U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: QATANANI, MOHAMMAD M. **A076-133-969**
Riders: 076-123-694 076-123-695 076-123-696 076-123-697

Date of this notice: 10/28/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Malphrus, Garry D.
Mullane, Hugh G.

U.S. Department of Justice

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Riders: 076-123-694 076-123-695 076-123-696 076-123-697

Date of this notice: 10/28/2009

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Malphrus, Garry D.
Mullane, Hugh G.

Files: A076 133 969 - Newark, NJ
A076 123 694
A076 123 695
A076 123 696
A076 123 697

Date: OCT 28 2009

In re: MOHAMMAD M. QATANANI
SUMAIA M. ABUHNOUD
OMAR M. QATANANI
AHMAD M. QATANANI
ISRA M. QATANANI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Claudia Slovinsky, Esquire

ON BEHALF OF DHS: Alan Wolf, Senior Attorney
Christopher Brundage, Deputy Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Adjustment of status

The Department of Homeland Security (the "DHS") appeals from an Immigration Judge's September 4, 2008, decision granting the respondents' application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). The appeal will be sustained in part and dismissed in part; the record will be remanded.

I. FACTUAL AND PROCEDURAL BACKGROUND

The respondents,[1] natives and citizens of Jordan, entered the United States on November 19,1996, with H-1B and H-4 visas. The lead respondent's employer, the Islamic Center of Passaic County ("ICPC"), filed an I-360 Petition on his behalf, which was approved by the DHS on October 13, 1998 (DHS Exh. 4). On April 1, 1999, the respondents' non-immigrant stays expired and they filed a Form I-485, Application to Register Permanent Residence or to Adjust Status. On

[1] The respondent in this case are a husband, wife, and three children. The husband (A076 133 969) is the lead respondent and will be referred to as the "lead respondent" or "Mr. Qatanani."

July 10, 2006, the DHS denied the respondents' I-485 (DHS Exh. 6), and served them with Notices to Appear, placing them into these removal proceedings (DHS Exhs. 1, 1A, 1B, 1C, 1D). The respondents have admitted the factual allegations contained in the Notices to Appear, and have conceded that they are removable as charged (Tr. at 2-3). Following the respondents' merits hearing, the Immigration Judge issued a written decision dated September 4, 2008, granting their renewed I-485 after finding that they were eligible for adjustment of status under section 245(a), and deserving of such relief as a matter of discretion. The DHS has appealed from such decision.

II. LEGAL BACKGROUND

In order to qualify for adjustment of status, the lead respondent must satisfy three prerequisite conditions: (1) he must have applied for adjustment of status; (2) he must be eligible to receive an immigrant visa and be admissible to the United States for permanent residence; and (3) an immigrant visa must be immediately available to him at the time he files his adjustment application. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a). It is the lead respondent's burden to prove that he has met each of these requirements and that he merits a grant of relief in the exercise of discretion. *See* section 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d); *see also Matter of Rainford*, 20 I&N Dec. 598, 599 (BIA 1992).

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008); *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008).

III. DISCUSSION

A. Unauthorized Employment

The DHS argues that the lead respondent is ineligible to adjust because he was employed without authorization (DHS Brief at 7-10). *See* sections 245(c)(8), 274A(h)(3) of the Act, 8 U.S.C. §§ 1255(c)(8), 1324a(h)(3); 8 C.F.R. § 274a.12(c)(9). The Immigration Judge found that the respondent was not rendered ineligible for relief on this basis and that any lack of work authorization was attributable to DHS delays and violated "the basic principles of due process." Under the circumstances presented here, we will not disturb the Immigration Judge's conclusion that the respondent's work history is not a basis for denial of relief.[2]

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[2] On appeal, the lead respondent also argues that he would be eligible for adjustment of status under section 245(i) of the Act. Such section permits the adjustment of certain aliens who were otherwise ineligible, including those who accepted unauthorized employment under section 245(c). The lead respondent is a special religious worker under section 101(a)(27)(C) of the Act, and is a beneficiary of an approved I-360 petition under section 204(a)(1)(G) of the Act (DHS Exh. 20). *See* section

(continued...)

The lead respondent's I-360 Petition was approved by the DHS on October 18, 1998 (DHS Exh. 4), and he applied for employment authorization when he filed his application for adjustment of status on April 1, 1999. The record indicates that he was granted employment authorization, which was renewed by the DHS until June 26, 2000, and subsequently renewed again until July 30, 2001, (DHS Exh. 20). The lead respondent's 2001 renewal was denied for "failure to prosecute." However, the basis for such failure to prosecute is unclear, and the lead respondent attempted to remedy the situation on numerous occasions, including by contacting DHS *via* counsel, by the filing of further renewal applications (*e.g.*, a renewal application was filed August 2, 2002), and before the DHS during his adjustment interview. *See, e.g.*, DHS Exh. 20; DHS Exh. 13, at 202-03, 209-10; Respondents' Exh. 15; Tr. at 803-04, 842-43.

The regulations provide that "[t]he district director shall adjudicate the application [for employment authorization] within 90 days from the date of receipt of the application by the INS" and that the "[f]ailure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days." 8 C.F.R. § 274a.13(d). In addition, the denial of an application for employment authorization must be in writing and include the reasons for such denial. *See* 8 C.F.R. § 274a.13(c). The DHS failed to comply with both of the above regulations. The Immigration Judge did not err in concluding that it would be inappropriate under these circumstances to use the DHS' delays in adjudicating the lead respondent's employment authorizations as a basis for finding him ineligible for adjustment of status (I.J. at 65-66). Thus, the Immigration Judge correctly concluded that the lead respondent's employment history in this country does not render him ineligible for adjustment of status under section 245(c)(8) of the Act. *See* 8 C.F.R. §§ 1003.1(d)(3), 1240.8(d).

B. Inadmissibility under section 212(a)(3)(B)(i) of the Act

The Immigration Judge found that the lead respondent was eligible for adjustment of status because he was not inadmissible under section 212(a)(3)(B)(i) of the Act, for engaging in terrorist activities (I.J. at 20-53). In reaching his conclusion that the lead respondent was not inadmissible under section 212(a)(3)(B)(i), the Immigration Judge identified the relevant issue as "whether, based on the evidence of record and the testimonies offered at the merits hearing, Mr. Qatanani has afforded material support to HAMAS." (I.J. at 22). The lead respondent did not challenge that HAMAS is a terrorist organization under 212(a)(3)(B)(vi) of the Act, and did not assert that he should not have reasonably known that HAMAS was a terrorist organization (I.J. at 21-22).

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[2] (...continued)
203(b)(4) of the Act, 8 U.S.C. §§ 1153(b)(4). As the lead respondent's I-360 was filed prior to April 30, 2001, and he has been physically present in the United States since November 19, 1996, he appears to be eligible to adjust pursuant to section 245(i)(1) of the Act, 8 U.S.C. § 1255(i)(1), despite any unauthorized employment. Nevertheless, the lead respondent is currently not eligible to adjust under section 245(i) of the Act as there is no indication that he has remitted the statutorily required fee imposed by section 245(i). *See Matter of Fesale*, 21 I&N Dec. 114, 119-20 (BIA 1995) (the fee required under section 245(i) may not be waived).

Whether the lead respondent did not afford material support to HAMAS is a factual issue on which he bears the burden of proof. We emphasize that the DHS does not bear the burden of proof on the respondent's application for adjustment of status and does not have to establish that the lead respondent is ineligible for adjustment of status. Rather, the lead respondent bears the burden of establishing that he is eligible for adjustment of status, which includes proving that he "is admissible to the United States within the meaning of section 212(a) of the Act or, if inadmissible, is eligible for a waiver of inadmissibility." *Matter of Hashmi*, 24 I&N Dec. 785, 789 (BIA 2009); section 245(a) of the Act, 8 U.S.C. § 1255(a).

As the DHS has presented evidence suggesting that the lead respondent is inadmissible under section 212(a)(3)(B)(i) of the Act for engaging in terrorist activities, the lead respondent has the burden of showing that such ground of inadmissibility does not apply to him. Thus, if the respondent can establish that he did not provide material support to HAMAS, he will not be ineligible for adjustment of status under section 212(a)(3)(B)(i). *See* section 245(a) of the Act, 8 U.S.C. § 1255(a); *see also* 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4), and 8 C.F.R. § 1240.8(d) (providing that in removal proceedings, the alien bears the burden of establishing eligibility for the requested relief).

C. Inadmissibility under section 212(a)(6)(C)(i) of the Act

The Immigration Judge found that the lead respondent was eligible for adjustment of status because he was not inadmissible under section 212(a)(6)(C)(i) of the Act. Section 212(a)(6)(C)(i) of the Act renders inadmissible "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure ... a visa, other documentation, or admission into the United States or other benefit provided under this Act." Similar to the discussion above, the lead respondent has the burden of establishing that he is not inadmissible under section 212(a)(6)(C)(i) of the Act. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a); *see also* 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4), and 8 C.F.R. § 1240.8(d).

We have held that a misrepresentation is material "if it tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980); *see also Kungys v. United States*, 485 U.S. 759, 771-72 (1988) (stating that the record must demonstrate that the misrepresentation either did result in the erroneous grant of a benefit, or that it had a "natural tendency" to affect the decision to grant the benefit); *Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999) (an alien's understatement of time he had spent in United States, made in applying for business visitor visa, was a material fraudulent misrepresentation).

The DHS argues that the lead respondent is inadmissible because he made "at least two material fraudulent misrepresentations on his application for adjustment of status (Form I-485), which he signed on March 25, 1999." DHS Brief, at 24-25. In particular, the DHS explains that the lead respondent's answer's "no" to questions 1b and 4 of Part 3 of the I-485 were material fraudulent misrepresentations. The relevant part of the first question asks:

1. Have you ever, in or outside of the U.S.:

> (b) been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations? DHS Exh. 3

The Immigration Judge concluded that "there is sufficient evidence that Mr. Qatanani and his then attorney in the United States answered truthfully in his I-485 application for adjustment of status when he marked the box indicating that he was never arrested or convicted in any country." (I.J. at 64). The lead respondent characterizes his interaction with the Israeli military as a "detention." (Tr. at 812-13), and the Immigration Judge found it important that the lead respondent had a reasonable belief that he had been detained rather than arrested (I.J. at 57-65). However, the question in the I-485 is drafted quite broadly. Even if the Immigration Judge were to accept the lead respondent's assertion that he had not been arrested and convicted and even if it were reasonable for the Immigration Judge to do so – a finding which should be revisited on remand due to evidentiary issues as discussed below – but instead was merely detained by the Israeli military, the Immigration Judge's decision does not address whether such a detention should have been disclosed in light of the remainder of the question (*i.e.*, whether the lead respondent had ever been cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?). *See, e.g., Ali v. U.S. Att'y Gen.*, 443 F.3d 804, 812 n.9 (11th Cir. 2006) (questioning how an alien, who failed to disclose an arrest on an I-485, "could reasonably have believed that he had not been 'cited, charged, [or] indicted' for violating the law").

Furthermore, the lead respondent answered "no" to question number 4, which asks:

> Have you ever engaged in, conspired to engage in, or do you intend to engage in, or have you ever solicited membership or funds for, or have you through any means ever assisted or provided any type of material support to, any person or organization that has been engaged or conspired to engage, in sabotage, kidnaping, political assassination, hijacking, or any other form of terrorist activity? DHS Exh. 3

This question is broadly related to terrorist activities. Given the DHS's position, this question is partially subsumed by the first question because it alleges that the lead respondent was arrested and convicted in 1993 for performing service for and being a member of HAMAS. However, the question also inquires into the applicant's personal and financial ties to terrorist organizations and associated individuals. As further discussed below, the respondent's personal ties and financial transactions are relevant to this issue, and the Immigration Judge erred in precluding evidence on the matter.

On remand, the Immigration Judge should again address whether the lead respondent's answers to the I-485 were material fraudulent misrepresentations. More specifically, he should address again whether the lead respondent was arrested and/or convicted by the Israeli military, and whether his failure to disclose such incident, however it may be characterized, tended to shut off a line of inquiry relevant to his eligibility for adjustment.

D. Evidentiary Issues

On appeal, the DHS argues that the Immigration Judge "erred in failing to give credence to DHS evidence that was properly authenticated, reliable, and showed the [lead] respondent's connections

to terrorist activities." (DHS Brief, at 10). In particular, the DHS argues that the Immigration Judge erred in: (1) assigning little weight to records of conviction from an Israeli military court; (2) finding two of the DHS' witnesses not credible, and the lead respondent credible; (3) excluding testimony regarding the lead respondent's overseas financial transactions; and (4) relying on an affidavit from Ronald Fava without permitting DHS to cross-examine the witness or offer rebuttal evidence (DHS Brief, at 6-7, 10-18, 21-27, 30-39).

(i) Testimony of FBI Special Agent Angel Alicea

The Immigration Judge found two of the DHS' witnesses not credible (I.J. at 40-48). The witnesses were federal law enforcement agents, FBI Special Agent Angel Alicea and ICE Special Agent Heather Philpott, who were present at an interview with the lead respondent on February 7, 2005. The Immigration Judge indicated that "although the Court appears to have two federal officials testifying that Mr. Qatanani, at the February 7, 2005, interview, admitted that he knew he was arrested for his relationship with HAMAS, their testimony is tainted by the lack of an accurate record and their inconsistent and contradictory testimony." (I.J. at 48). On appeal, the DHS argues that the Immigration Judge's adverse credibility determination is inadequate and not supported by a fair review of the record. We agree, and conclude that the Immigration Judge's adverse credibility findings are clearly erroneous. *See, e.g., Gabuniya v. Att'y Gen.*, 463 F.3d 316 (3d Cir. 2006); *Caushi v. Att'y Gen.*, 436 F.3d 220, 227-28 (3d Cir. 2006); *Berishaj v. Ashcroft*, 378 F.3d 314, 323-24 (3d Cir. 2004).

The Immigration Judge disregarded Agent Alicea's testimony as not credible and unreliable primarily based on his level of involvement and knowledge of investigations and issues related to Mr. Qatanani prior to the February 7, 2005, interview, lack of records related to the interview, and the agent's demeanor during the hearing.

The Immigration Judge's identified bases for finding that Agent Alicea provided inconsistent testimony regarding his knowledge of immigration matters and the timing of his investigations of the lead respondent are not supported by the record. Such finding is based on minor inconsistencies or inferences and presumptions that are not reasonably grounded in the record. *See Dia v. Ashcroft,* 353 F.3d 228, 249 (3d Cir. 2003). For example, the Immigration Judge found that Agent Alicea provided inconsistent testimony regarding "whether he knew in advance of any information about Mr. Qatanani," and that Agent Alicea first testified that he had "no prior knowledge," but that he "later admitted that he knew of Mr. Qatanani as a 'subject of interest' regarding the ICPC activities." (I.J. at 40-41). The portion of the transcript cited for the proposition that Agent Alicea did not have prior knowledge of Mr. Qatanani's activities relates only to when Agent Alicea became aware of Mr. Qatanani's alleged arrest in Israel in 1993 (Tr. at 148), and does not conflict with his subsequent testimony, including the testimony regarding when and how he became aware of Mr. Qatanani's identity (Tr. at 214-15). Nor does the record support the Immigration Judge's statement that Agent Alicea "testified that his only interest in talking to Mr. Qatanani was because he had been designated as a person of interest due to his activities with ICPC" (I.J. at 40, citing Tr. at 214). The identified portion of the transcript merely indicates that the witness was aware of Mr. Qatanani's name before the February 7, 2005, interview because Mr. Qatanani was working at ICPC (Tr. at 214). Agent Alicea repeatedly testified that he first became involved in Mr. Qatanani's immigration case only when Mr. Qatanani requested a meeting with the FBI, which resulted in the February 7, 2005, interview (Tr. at 135, 186-87, 189-90, 200-03, 214, 220-21).

The Immigration Judge found it "unacceptable" that Agent Alicea "was not aware of what an IBIS hit was," and that it was not plausible "that as of 2005, when he conducted Mr. Qatanani's interview, [Agent Alicea] was not aware of the 2002 hit and what it related [to]." (I.J. at 41-42). As an initial matter, it is plausible that a special agent in the FBI may not be familiar with the DHS Interagency Border Inspection System ("IBIS"). The evidence of record is insufficient to evaluate the appropriate level of knowledge a special agent in Agent Alicea's position should have concerning such a database. The Immigration Judge appears to base his finding on the fact that another federal law enforcement officer, ICE Special Agent Heather Philpott, testified that she had notified the FBI of an IBIS hit in the lead respondent's case in 2002. *See* Tr. at 384. However, she also clearly testified that she did not convey the IBIS hit information directly to Agent Alicea, as she was not working with him in 2002 (Tr. at 383-85). Although Agent Philpott and Agent Alicea eventually began working together, there is nothing in the record to indicate that the two discussed the IBIS database or specifically discussed the status of Mr. Qatanani's immigration applications or that there was an IBIS hit on Mr. Qatanani's adjustment application. It is certainly possible if not likely that an FBI special agent who may be involved in numerous investigations may not be aware of immigration matters or the details of each IBIS hit that is transmitted to the FBI.

The Immigration Judge found that Agent Alicea "tried to cast doubts" about the lead respondent by discussing an incident where the respondents gave $5,000 in cash to the lead respondent's brother-in-law who failed to disclose the money while traveling, even though no charges were filed and he was allowed to continue on his trip (I.J. at 44) (Tr. at 162-64). Although the Immigration Judge questioned the witness' motives for providing such testimony, it is undisputed that the incident occurred, and the lead respondent's ties to his brother-in-law and his financial transactions are relevant to his application for relief from removal. We cannot conclude that Agent Alicea's testimony on this subject is sufficient to support an adverse credibility finding.

The Immigration Judge had previously stopped Agent Alicea from testifying regarding some of the lead respondent's financial transactions because (1) it was related to an ongoing criminal investigation and some supporting evidence could not be revealed, and (2) discussion of the issue without evidence "could affect Mr. Qatanani's presumption of innocence in the criminal investigation." (I.J. at 43; Tr. at 150-60, 866-73). The Immigration Judge erred by precluding DHS from presenting testimony related to the lead respondent's financial transactions on the above bases. The test for admissibility of evidence in removal proceedings is whether the evidence is probative and its use is fundamentally fair so as not to deprive the alien of due process. *See Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). Evidence of the lead respondent's financial transactions would certainly be relevant to his inadmissibility (*i.e.*, whether he made any material misrepresentations on his adjustment application, or engaged in terrorist activities), and the admission of such evidence would not be fundamentally unfair. Although the respondents objected that they were not made aware that Agent Alicea would testify on the issue of financial transactions (Tr. at 150-60), Agent Alicea's affidavit does reference the financial transaction involving lead respondent's brother-in-law (DHS Exh. 16), and should have put the respondents on notice that their financial transactions may be at issue. Moreover, the respondents would have had an opportunity to cross-examine the witnesses, and the absence of any documentary evidence related to financial transactions could certainly be considered in weighing the probative value of the agent's testimony. *See* section 240(b)(4)(B) of the Act, 8 U.S.C. § 1229a(b)(4)(B).

If the lead respondent is concerned about the future criminal implications of evidence that is admissible in these immigration proceedings, he may invoke his Fifth Amendment privilege against self-incrimination. *See, e.g., McAlister v. Henkel*, 201 U.S. 90 (1906) ("the immunity provided by the 5th Amendment against self-incrimination is personal to the witness himself"); *Matter of Guevara*, 20 I&N Dec. 238, 241-42 (BIA 1991) (an alien who remains silent when confronted with evidence may leave himself open to adverse inferences). Additionally, the fact that Agent Alicea may have been involved with investigations related to the lead respondent since 2001, and that no criminal charges have been brought against him is irrelevant to these removal proceedings (I.J. at 44).

We do acknowledge the Immigration Judge's concern that Agent Alicea's testimony on several issues may have been evasive or non-responsive. While we generally defer to an Immigration Judge's findings related to demeanor, the law enforcement agents in this case were testifying in their official capacity regarding their duties as they relate to these specific respondents. We recognize the need for law enforcement agents to avoid disclosing information that may impact or compromise ongoing investigations. *Cf. Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001). Such constraints may limit an officer's ability to provide responses to certain lines of questioning. Considering his likely involvement in numerous investigations and matters, there is no indication that Agent Alicea was unnecessarily evasive or non-responsive during testimony relevant to his involvement in this matter, in particular his testimony regarding the February 7, 2005, interview.

In light of the above, we conclude that the bases identified by the Immigration Judge are insufficient to support the adverse credibility determination with respect to the testimony of Agent Alicea. Accordingly, this factual finding is clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i).

(ii) Testimony of ICE Special Agent Heather Philpott

The Immigration Judge indicated that he initially found Agent Philpott "sincere and honest," but the DHS's subsequent submission of a report she authored concerning the February 7, 2005, interview "casts doubts about her sincerity." (I.J. at 45; DHS Exh. 25). The Immigration Judge found the presentation of this report problematic because (1) given the existence of the report, it was "more probable" to conclude that Agent Philpott reviewed this report prior to her testimony in court, even though she did not reference her own report when she testified concerning what documents she reviewed in preparation for her testimony, and (2) Agent Philpott's report referenced another report that was not presented to the court. The Immigration Judge's findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record. *See Dia v. Ashcroft, supra.* In this regard, it does not appear that Agent Philpott was ever specifically asked if she had authored a report (Tr. at 376-82), and it is entirely possible that she did not review the report prior to testifying in immigration court. Moreover, the witness was not responsible for submitting DHS's evidence, and the DHS's failure to submit certain documents may have been attributable to any number of reasons, including a lack of access, a tactical decision, or some other reason unrelated to these proceedings.

Additionally, the Immigration Judge indicated that Agent Philpott testified inconsistently with Agent Alicea. The Immigration Judge found it surprising that although Agent Philpott was notified of an IBIS hit in the lead respondent's case in 2002, and claimed that she communicated such information to the FBI, she did not receive any feedback between 2002 and 2005 (I.J. at 46-47). The

Immigration Judge acknowledged that Agent Philpott did not convey the IBIS hit information directly to Agent Alicea, as she was not working with him in 2002 (Tr. at 384), but inexplicably concludes that Agent Philpott's testimony directly contradicts Agent Alicea's testimony. Such a claim does not conflict with Agent Alicea's testimony, as he testified that he became involved in Mr. Qatanani's immigration case only when Mr. Qatanani requested a meeting with the FBI, which resulted in the February 7, 2005, interview (Tr. at 135, 186-87, 189-90, 200-03, 214, 220-21). As discussed above, Agent Philpott testified that she was not working with Agent Alicea in 2002, and did not notify him of the IBIS hit in 2002. Thus, it would be inappropriate to find Agent Philpott not credible based upon Agent Alicea's knowledge, or lack of knowledge, of the IBIS hit in 2002. *See, e.g., Gabuniya v. Att'y Gen., supra.*

In light of the above, we conclude that the bases identified by the Immigration Judge are insufficient to support his adverse credibility determination with respect to the testimony of Agent Philpott. Accordingly, this factual finding is clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i).

(iii) Israeli Conviction Documents

In support of the proposition that the lead respondent was arrested and convicted in 1993 for performing service for and being a member of HAMAS, the DHS submitted the following documents: (1) a May 3, 2005, letter from Osnat Hershler, Superintendent Liaison Officer with the Israel Police Intelligence Department Special Operations Division (DHS Exh. 8); (2) a Verdict and Criminal Record from the Shechem Military Court, in the West Bank (DHS Exhs. 10, 14), and; (3) an Indictment and Protocol from the Shechem Military Court, in the West Bank (DHS Exhs. 10, 14) (collectively referred to as the "Israeli Conviction Documents").

The Immigration Judge questioned whether the Israeli Conviction Documents were properly authenticated under 8 C.F.R. § 1287.6(b), based on a number of factors, including; the absence of the request that the government sent under the Mutual Legal Assistance Treaty ("MLAT") to obtain the documents, the lack of attestation from the military court in Nablus, and the manner of their submission to the immigration court. *See, e.g.*, I.J. at 30. Despite his concerns, the Immigration Judge admitted the Israeli Conviction Documents and indicated that "the evidentiary value of these documents is highly questionable" and that he would accord them "very low evidentiary weight." (I.J. at 26). The Immigration Judge identified several reasons for questioning the reliability of the documents, including: "a questionable chain of custody, probable misidentification errors, missing attached documents, potential inconsistencies with the facts, and the military court that generated these documents is the subject of much debate for its impropriety in handling cases of arrested Palestinians circa 1993." (I.J. at 26). The DHS argues that because the Israeli Conviction Documents it submitted "have all been properly authenticated, are reliable, and all clearly pertain to the [lead] respondent, the [Immigration Judge] erred by holding that they were 'too unreliable' to prove that the [lead] respondent is inadmissible." (DHS Brief at 18). As discussed below, we conclude that the Israeli Conviction Documents were properly authenticated, and that there was no adequate basis for the Immigration Judge to give them "very low evidentiary weight."

While the Immigration Judge did admit the Israeli Conviction Documents into evidence (I.J. at 26), we cannot agree with his finding that the documents should be afforded little weight based on authentication grounds. The Third Circuit has held that "8 C.F.R. § 287.6 is not an absolute rule of exclusion, and is not the exclusive means of authenticating records before an immigration judge."

Liu v. Ashcroft, 372 F.3d 529, 533 (3d Cir. 2004). As other courts have recognized, authentication is a "flexible" doctrine. *See, e.g., Yongo v. INS,* 355 F.3d 27, 30-31 (1st Cir. 2004) ("[i]n substance, authentication requires nothing more than proof that a document or thing is what it purports to be."). Here, the DHS obtained the documents by a request under the MLAT to Israel. Although the DHS did not provide the MLAT request, FBI Special Agent Angel Alicea did testify regarding the steps taken in obtaining the documents under the MLAT (Tr. at 148-50).

Further, documents were accompanied by several certificates and attestations. The May 3, 2005, letter from Osnat Hershler, Superintendent Liaison Officer with the Israel Police Intelligence Department Special Operations Division (DHS Exh. 8), was certified by U.S. Department of State Foreign Service Officer, Thomas Rhodes (DHS Exhs. 7, 18). The Verdict and Criminal Record (DHS Exhs. 10, 14), were accompanied by a certification from Chief Inspector Liat Lev-Ary, who attested to her authority and that the records were true copies of original official records (DHS Exh. 10). Foreign Service Officer Rhodes certified the attestation (DHS Exhs. 18). The Indictment and Protocol were accompanied by attestations and certifications from a number of individuals (DHS Exh. 14). On October 5, 2006, Anat Agami submitted the documents to the U.S. Department of Justice. Judge Alon Gillon, with the Deputy Director of Courts in Israel, certified Anat Agami's signature and that she was a clerk of the Department for Legal Assistance to Foreign Countries at the Directorate of the Administration of Courts in Israel. Yitzchak Blum, the Deputy Director of the Department of International Affairs in Israel's Ministry of Justice, submitted and verified Judge Alon Gillon's declaration, and referenced the request from the United States authorities related to Mohd Mahdi Ahmad Qatanani. Foreign Service Officer Rhodes certified the declaration from Yitzchak Blum. There is no indication that the individuals involved in the authentication of these documents were not authorized to provide the documents, or that the documents are not actually official records from the Israeli court. *See, e.g.*, Tr. at 47-48. Based on the various attestations and declarations submitted by the DHS, we conclude that the Israeli Conviction Documents were properly authenticated under 8 C.F.R. § 1287.6(b). Even if the DHS had failed to comply with the technical requirements of 8 C.F.R. § 1287.6(b), given the flexible approach for authenticating documents, the DHS has clearly established that the documents are authentic (*i.e.*, they are what they purport to be). *See Yongo v. INS, supra.*

While the Immigration Judge expressed concern regarding whether the documents actually pertained to the lead respondent, it must be emphasized that the lead respondent does not deny that he came in contact with the Israeli military in the West Bank in 1993, that he was detained for approximately 3 months, and eventually released from the Israeli military's custody. These basic facts are supported by the lead respondent's own testimony in his interview before the USCIS and in immigration court. *See, e.g.*, DHS Exh. 13, at 64-109; Tr. at 755-90. Although the documents may have deficiencies, the Israeli Conviction Documents appear to relate to the lead respondent. For example, the dates on the Israeli Conviction Documents correspond with the date that the lead respondent admitted that he was detained by the Israeli military. *Compare* Tr. at 772, 789-90, *with* DHS Exh. 14. The Protocol indicates that the defendant's residence was the Askar Refugee Camp, and the Indictment indicates that he worked at the Abu Qurah mosque in Amman, which is consistent with the lead respondent's testimony. *Compare* Tr. at 893-94, *with* DHS Exh. 14. Although the Immigration Judge was concerned that the documents did not contain the respondent's confession (I.J. at 34-35), the respondents' expert witnesses acknowledged the informal nature of a guilty plea in the proceedings (Tr. at 566-67), and DHS' expert indicated that the "confession" referenced in the Protocol is likely just the lead respondent's guilty plea (Tr. at 43, 70). The

Immigration Judge found the documents unreliable in part because he considered the 3-month prison sentence too lenient for the crimes that the lead respondent was accused of, and because the lead respondent was able to renew his residency permit (I.J. at 35-36). Such finding is based on speculation. In fact, one of the respondents' expert witnesses apparently authored a report that included an individual who was charged with membership in an illegal organization, and was convicted and sentenced to only 2 months and 8 days in prison (Tr. at 685-88).

Although the Immigration Judge questioned the documents based on their origination from an "unreliable court" (I.J. at 36-39), the evaluation of the legitimacy of the foreign court system is not an appropriate issue for resolution in the administrative immigration court system. As correctly noted by the DHS, this country's immigration laws do not require that a foreign conviction must conform with the constitutional guarantees of the United States. *See Matter of M-*, 9 I&N Dec. 132, 183 (BIA 1960); *Matter of Gutierrez*, 14 I&N Dec. 457, 458 (BIA 1973); *Matter of Awadh*, 15 I&N Dec. 775, 777 (BIA 1976); *see also Brice v. Pickett*, 515 F.2d 153, 154 (9th Cir. 1975) (holding that due process does not require that an alien being deported for a foreign conviction be permitted to challenge the conviction collaterally).[3] Moreover, several of the concerns identified by the Immigration Judge do not appear relevant to the lead respondent's case. For example, concerns over the prisoner's access to legal representation and likelihood of coerced confessions (I.J. at 38-39), are not applicable to the lead respondent's situation as he maintains that he was never convicted in the court system and claims that he was represented by counsel and does not claim that he was forced into making a confession (Tr. at 770-90).

Additionally, the regulations provide the types of documents that may be used to establish a criminal convictions. 8 C.F.R. § 1003.41(a) lists a series of judicial documents which "shall be admissible as evidence in proving a criminal conviction." 8 C.F.R. § 1003.41. Section 240(c)(2) of the Act, 8 U.S.C. § 1229a(c)(3)(B) generally utilizes the records listed in 8 C.F.R. § 1003.41(a), but amends and expands that list of specific documents, and provides that such records conclusively establish the existence of a criminal conviction. In addition to the list of judicial documents, the regulations provide that "[a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof." 8 C.F.R. § 1003.41(d); *see also, e.g., Park v. Att'y Gen.*, 316 Fed.Appx. 103, 107 (3d Cir. 2008) (holding that even if conviction records used to establish alien's removability were not certified in compliance with statutory and regulatory requirements, documents were admissible as evidence that reasonably indicated the existence of a criminal conviction); *Rosales-Pineda v. Gonzales*, 452 F.3d 627 (7th Cir. 2006) (holding that an FBI Identification Record reasonably indicated that the alien had been convicted of a drug related offense, and thus, was statutorily ineligible for the discretionary relief he sought). Thus, in addition to being admissible under 8 C.F.R. § 1287.6, the Israeli Conviction Documents are admissible as they reasonably indicate the existence of a criminal conviction.

As discussed above, it is the lead respondent's burden to establish that he is eligible for adjustment of status, and is admissible. *See Matter of Hashmi, supra;* section 245(a) of the Act, 8 U.S.C. § 1255(a); 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4), and 8 C.F.R. § 1240.8(d). The

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[3] The Immigration Judge's reliance on *Boumediene v. Bush*, --- U.S. ----, 128 S.Ct. 2229 (2008), is misplaced. The constitutional guarantees of the United States would be inapplicable to an Israeli military court system.

documents were properly authenticated and we cannot agree with the Immigration Judge's characterization of the documents as "highly questionable." Thus, on remand the Immigration Judge should further evaluate the Israeli Conviction Documents, consistent with the analysis set forth in this decision.

(iv) Other

On remand the parties should be provided with the opportunity to submit additional relevant evidence, and to explain how such evidence impacts the respondent's case.[4]

IV. MOTION

The respondents have filed a motion to strike the appendices attached to the DHS appellate brief. The appendices in question are summaries of witness testimony presented at trial. While the DHS appendices are lengthy, the transcript in this case is nearly 1,000 pages long, and factual summations are a common component of appellate briefs. Accordingly, such motion is denied.

V. CONCLUSION

In light of the above, we find that a remand is appropriate under the circumstances. Thus, we will remand the record to the Immigration Judge for further consideration of the evidence of record, for the submission of such additional relevant evidence as appropriate, and for entry of a new decision. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

Accordingly, the following orders will be entered.

ORDER: The DHS's appeal is sustained in part and dismissed in part.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

[4] The DHS has also asserted that the Immigration Judge erred by relying on an affidavit from Ronald Fava without permitting DHS to cross-examine the witness or offer rebuttal evidence (DHS Brief, at 6-7, 10-18, 21-27, 30-39). As the record will be remanded for further proceedings, we need not decide this issue.