U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted] - Pompano Beach, FL Date: OCT 27 2011

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Magdalena E. Cuprys, Esquire

ON BEHALF OF DHS: Robert D'Adamo
Assistant Chief Counsel

APPLICATION: Continuance

The respondent, a native and citizen of Brazil, has appealed from the Immigration Judge's decision dated June 3, 2011. The Immigration Judge found the respondent removable and found him ineligible for relief from removal.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The respondent was placed in removal proceedings on March 9, 2011. His first hearing was on March 31, 2011, and his final hearing was on June 3, 2011. At his April 21, 2011, hearing, the detained respondent indicated that he had spoken to an attorney (Diana Pinto) the night before and expected her to appear at the hearing, but no attorney appeared on his behalf. *See* Tr. at 7-9. The Immigration Judge gave him another week to hire an attorney, but told the respondent he would have to proceed without an attorney if he did not have one at that time. *See* Tr. at 9. However, because two hearing notices were sent, the attorney the respondent contacted (Vanessa Paz) told the respondent that the hearing had been put over to May 10, 2011, and did not appear on April 28, 2011. *See* Tr. at 11-12. No attorney appeared on the respondent's behalf on May 1, 2011, either, so the Immigration Judge proceeded with the hearing and took pleadings. *See* Tr. at 15-16. The Immigration Judge then continued the hearing to allow the respondent to submit an application for asylum. *See* Tr. at 18-19. The respondent completed the application and submitted it at the May 24, 2011, hearing. Proceedings were then put over for one week for the merits hearing on the application. *See* Tr. at 21-22.

At the June 3, 2011, hearing, the respondent's present attorney appeared, but the Immigration Judge denied the respondent a continuance to allow counsel to prepare for the hearing on the respondent's applications for asylum and withholding of removal, under sections 208 and 241(b)(3)

of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and protection under the Convention Against Torture, under 8 C.F.R. §§ 1208.16 through 1208.18. *See* I.J. at 1.

On appeal, the respondent argues that he has been denied his right to counsel. We agree. The law provides an alien the right to have legal representation at his removal hearing. *See* 8 U.S.C. § 1229(b)(4)(A); 8 C.F.R. §§ 1003.16; 1240.3, 1240.10(a). An alien can waive the right to counsel by indicating to the immigration judge that he wants to proceed without counsel. *Cf. Michel v. INS*, 206 F.3d 253, 258-59 (2d Cir. 2000). The right to counsel can also be considered waived where, despite the absence of an express waiver of representation by the alien, the Immigration Judge granted multiple continuances and had warned the alien that he should be prepared to proceed on the next hearing date with or without a representative. *Cf. Hidalgo-Disla v. INS*, 52 F.3d 444, 447 (2d Cir. 1995). No waiver of the right to counsel will be found where the alien was asked whether he wanted to be represented at the hearing and the alien's answer was nonresponsive. *Cf. Montilla v. INS*, 926 F.2d 162, 169 (2d Cir. 1991).

While the respondent was given multiple continuances, the continuances were quite brief. Moreover, only three months had transpired between the date the respondent was placed in proceedings and the date he was ordered removed, so the Immigration Judge could not find, based on the continuances alone, that the respondent had waived his right to counsel. It is also clear that the respondent was intent on hiring an attorney throughout the course of proceedings. Continuances were not used as a dilatory tactic. Consequently, we find that the respondent was denied the right to have legal representation at his removal hearing. *See* 8 U.S.C. § 1229(b)(4)(A); 8 C.F.R. §§ 1003.16; 1240.3, 1240.10(a).

On appeal, the respondent also argues that the Immigration Judge erred in denying him a continuance on June 3, 2011. We agree. An Immigration Judge may grant a continuance where good cause is shown. *See* 8 C.F.R. §§ 1003.29, 1240.6. We find that good cause was shown here. A continuance to enable an alien to meet with counsel to enable counsel to prepare for the merits hearing on the alien's applications does constitute good cause, and the request should have been granted.

Moreover, we conclude that denial of the continuance to hire and meet with an attorney deprived the respondent of a full and fair hearing. *See Matter of Luviano-Rodriguez*, 21 I&N Dec. 235 (BIA 1996); *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973). Denial of the continuance prevented the respondent from properly preparing for the hearing on his claims for asylum, withholding of removal, and protection under the Convention Against Torture. *See Matter of Luviano-Rodriguez*, 21 I&N Dec. 235 (BIA 1996); *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973). Consequently, a new hearing will be granted.

Accordingly, the following orders will be entered.

ORDER: The decision of the Immigration Judge is vacated.

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

FOR THE BOARD