U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Wiesinger, Benjamin T., Esq.
Pope & Associates, PC
333 E. Virginia Avenue, Suite 216
Phoenix, AZ 85004-1210

DHS/ICE Office of Chief Counsel - PHO
P.O.Box 25158
Phoenix, AZ 85002

Name: CUEVAS, JOSE ROSARIO **A095-282-946**

Date of this notice: 5/7/2012

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:
Creppy, Michael J.
Malphrus, Garry D.
Mullane, Hugh G.

File: A095 282 946 - Phoenix, AZ

Date: MAY -7 2012

In re: JOSE ROSARIO CUEVAS a.k.a. Jesse Prieto Quijada

IN REMOVAL PROCEEDINGS

INTERLOCUTORY APPEAL

ON BEHALF OF RESPONDENT: Benjamin T. Wiesinger, Esquire

ON BEHALF OF DHS: Ryan J. Goldstein
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(I), I&N Act [8 U.S.C. § 1182(a)(6)(A)(I)] - Present without being admitted or paroled

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Reconsideration

The Department of Homeland ("DHS") has filed an interlocutory appeal from the Immigration Judge's July 14, 2011, decision denying its motion to reconsider the Immigration Judge's May 24, 2011, oral order compelling DHS to produce a copy of the respondent's entire Alien file ("A-file"), including his entry document, and any other records or documents that have not been classified as confidential by the Attorney General, pertaining to the respondent's admission or presence in the United States. The respondent has not filed a response to the appeal.

Although this Board does not ordinarily entertain interlocutory appeals, we have on occasion ruled on the merits of interlocutory appeals where we deemed it necessary to address important jurisdictional questions regarding the administration of the immigration laws, or to correct recurring problems in the handling of cases by Immigration Judges. *See, e.g., Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); *Matter of Dobere*, 20 I&N Dec. 188 (BIA 1990). Since this matter involves a recurring problem in the handling of cases by Immigration Judges, we will accept this case by certification and address the merits of this interlocutory appeal. *Matter of Ruiz-Campuzano*, 17 I&N Dec. 108 (BIA 1979); *Matter of Ku*, 15 I&N Dec. 712 (BIA 1976); *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); *Matter of Dobere*, *supra*. The appeal will be sustained.

The Immigration Judge denied the DHS's motion, stating that he is merely implementing the mandate of *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010). The DHS argues, inter alia, that *Dent* does not alter the statutory and regulatory limitations set forth in section 240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(1) regarding the authority of Immigration Judges to order discovery. We agree.

Although the Ninth Circuit held that the alien in *Dent* was entitled to a copy of his A-file, the ruling was rendered in the context of the alien having been denied "access to his entry documents and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States" as mandated by section 240(c)(2)(B) of the Act, 8 U.S.C. § 1229a(c)(2)(B). The court did not reach the issue of whether the A-file should be produced in other scenarios. *See Dent v. Holder, supra* at 374-75. Thus, notwithstanding the DHS's obligation to grant the respondent access to his entry documents and other records pertaining to his admission or presence, the Immigration Judge's order exceeds the scope of section 240(c)(2)(B) of the Act and the mandate of *Dent*.

Furthermore, we conclude that *Dent* does not require Immigration Judges to order discovery beyond the scope contemplated by the Act and regulations. *See* section 240(b)(1) of the Act; 8 C.F.R. §§ 1003.35, 1208.12(b), 1240.1(a)(1)(iv) and (c); *Matter of Henriquez Rivera*, 25 I&N Dec. 575, 579 (BIA 2011) (Immigration Judge erred in ordering the DHS to provide the Immigration Court with an applicant's complete administrative record from the USCIS); *Matter of Khalifah*, 21 I&N Dec. 107, 112 (BIA 1995) (observing that there is no right to discovery in deportation proceedings); *Cunanan v. INS*, 856 F.2d 1373, 1374 (9th Cir. 1988) (there is no right to discovery in immigration proceedings as they are not controlled by strict rules of evidence). Even if construed as an application for subpoena pursuant to 8 C.F.R. § 1003.35(a)(2), the respondent did not meet his burden to establish what he expects to prove by the evidence he demands, and that he has made diligent effort, without success, to produce the same. Also, the respondent should obtain copies of any criminal records from the relevant law enforcement authorities.

DHS represented that on February 7, 2011, the respondent, through counsel John M. Pope, made a request to USCIS for a copy of his entire A-file pursuant to the FOIA/Privacy Act, and on April 27, 2011, USCIS released all information responsive to that request except portions that are exempt pursuant to 5 U.S.C. §§ 552(b)(5) - (6), (b)(7)(C), and (b)(7)(E). USCIS identified 679 pages in the respondent's A-file; it released 585 entire pages, 78 pages in part, and withheld 16 pages in full which it determined "contained no reasonable segregable portion(s) of non-exempt information" (Exh. 4 at 4-5). Insofar as the respondent has not challenged the DHS's assertion that USCIS released the non-confidential contents of his A-file, his request for production of evidence is moot.

Based on the foregoing, we will sustain the DHS's appeal. On remand, the Immigration Judge should proceed with the removal proceedings. Therefore, the following orders will be entered.

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The Immigration Judge's May 24, 2011, and July 14, 2011, orders are vacated and the record is returned to the Immigration Court without further action.

Carol Mackey

FOR THE BOARD