U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: DJABENG, EINSTEIN OFOTSU **A 205-492-530**

Date of this notice: 2/16/2017

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:
Mann, Ana
Adkins-Blanch, Charles K.
Neal, David L

Userteam: Docket

File: A205 492 530 – Buffalo, NY

Date: FEB 16 2017

In re: EINSTEIN OFOTSU DJABENG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jose E. Perez, Esquire

APPLICATION: Continuance

The respondent, a native and citizen of Ghana, appeals from the Immigration Judge's decision dated May 10, 2016, denying his request for a continuance. The Department of Homeland Security has not filed a brief in opposition. The appeal will be sustained and the record will be remanded for further proceedings consistent with this opinion.

We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

A party seeking a continuance has the burden of demonstrating good cause for the delay. 8 C.F.R. §§ 1003.29, 1240.6. In *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), we identified several factors for an Immigration Judge to consider in determining whether good cause exists to continue proceedings pending the adjudication of a family-based visa petition. Factors to consider include, but are not limited to: (1) the Department of Homeland Security's position regarding the continuance request; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment of status merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors. *See Matter of Hashmi*, *supra*, at 791.

We conclude that the respondent established good cause for a continuance. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); *see also Matter of Hashmi*, *supra*. The respondent is the beneficiary of a pending Alien Relative Petition (Form I-130) filed on his behalf by his United States citizen spouse, who is the mother of his child (I.J. at 2, 4; Tr. at 51-52, 57-59; Exh. 9). The Department of Homeland Security (DHS) did not indicate any opposition to the respondent's motion to continue (Tr. at 53, 62-63). In light of the foregoing, we conclude that a continuance was warranted.

Furthermore, we conclude that the respondent established good cause for a change of venue. We note that at the November 30, 2015, hearing the DHS affirmatively indicated that it was not opposed to the respondent's request for a change of venue. Upon balancing the relevant factors, we conclude that the respondent's request for a change of venue should have been granted. *See Monter v. Gonzales*, 430 F.3d 546 (2d Cir. 2005) (denial of alien's motion for change of venue of removal proceedings to a location significantly closer both to his and his principal

witness' residence, that was also significantly closer to evidence bearing on only contested issue in case, the bona fide nature of alien's marriage to United States citizen, was abuse of discretion that prejudiced alien's rights, and that necessitated vacation of the Board order and remand for further proceedings). Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: Venue is changed from Buffalo, New York, to Newark, New Jersey.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BUFFALO, NEW YORK

In the Matter of:	
DJABENG, Einstein Ofotsu	
A# 205-492-530	**IN REMOVAL PROCEEDINGS**
Respondent	

CHARGES: INA § 237(a)(1)(C)(i) Nonimmigrant Status Violators

ON BEHALF OF RESPONDENT
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ON BEHALF OF THE DHS
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

The charge that Respondent is subject to removal pursuant to INA § 237(a)(1)(C)(i) is **SUSTAINED**. Respondent is ordered **REMOVED** to Ghana.

I. FACTS AND PROCEDURAL HISTORY

On September 14, 2012, the Department of Homeland Security ("DHS") issued Einstein Ofotsu Djabeng ("Respondent") a Notice to Appear ("NTA") (Exh. 1), alleging that:

[1] Respondent is not a citizen or national of the United States;

[2] Respondent is a native and citizen of Ghana;

[3] Respondent was admitted to the United States at JFK International Airport on August 19, 2006 as a nonimmigrant student to attend Indiana University of Pennsylvania in Indiana, Pennsylvania.

[4] Respondent's status was terminated July 1, 2011.

Based on these factual allegations, Respondent was charged as removable from the United States pursuant to INA § 237(a)(1)(C)(i), in that after admission as a nonimmigrant under Section

101(a)(15) of the Immigration and Nationality Act, he failed to maintain or comply with the conditions of the nonimmigrant status under which he was admitted.

Respondent first appeared *pro se* before the U.S. Immigration Court at the Buffalo Federal Detention Facility in Batavia, New York on October 4, 2012. The matter was then continued to give Respondent an opportunity to retain counsel.

On April 19, 2013, Respondent appeared *pro se* before the U.S. Immigration Court in Buffalo, New York ("the Court"). At this time, Respondent acknowledged service of process of the charging document. The matter was then continued to give Respondent an additional opportunity to retain counsel.

On June 3, 2014, Respondent filed a motion to change venue, citing that he resides in New Jersey. On June 10, 2014, the Court sustained the government's objection to the motion to change venue. On June 11, 2014, Respondent appeared before the Court with counsel present. Through counsel, Respondent again conceded service of the NTA and admitted to all factual allegations contained therein. Respondent also conceded the charge of removability. Respondent designated Ghana as the country for removal should removal become necessary.

Respondent explained he has a seven-month-old U.S. citizen child and the mother of the child is a permanent resident who will be applying for citizenship. Respondent indicated he and the mother of his child plan to get married. The Court noted that it appeared Respondent did not have any current statutory eligibility for relief from removal. DHS stated the only available relief at this time would be voluntary departure. Respondent agreed to pursue voluntary departure in the alternative to adjusting status.[1] DHS noted that Respondent entered the U.S. legally and has no criminal history; DHS stated it would not oppose a grant of voluntary departure and would not oppose a continuance.

On November 3, 2015, Respondent's counsel filed a motion to withdraw. Respondent appeared *pro se* before the Court on November 16, 2015. The Court noted that the motion to withdraw was denied because of the untimeliness of the motion. The Court phoned the attorney of record to inquire about his failure to appear but was unsuccessful in reaching him. The Court then asked Respondent whether he wishes to discharge his attorney of record. Respondent indicated he would like to discharge his attorney. The Court granted this request.

On November 30, 2015, Respondent appeared before the Court with counsel present. The Court indicated that there is still no approved Form I-130 Petition for Alien Relative. Respondent indicated he submitted evidence of the *bona fides* of the marriage, including the birth certificate of his child. Respondent requested another continuance in order to await the adjudication of the I-130. The Court found that the evidence was insufficient. DHS indicated it agreed with the Court in that documentation submitted by Respondent was insufficient. The Court indicated the hearing would move forward.

Respondent testified in support of his case. He testified he is 35 years old. Respondent testified that the letter he submitted to the Court indicating he would represent himself was in response to the fact that his attorney of record was unresponsive and even failed to appear at

[1] Respondent abandoned this form of relief at the final hearing. *See* Digital Audio Recording (Nov. 30, 2015).

hearings. Respondent testified he was not happy with his legal situation, and because he was unsure whether he could retain alternate counsel in time for his upcoming hearing, he indicated in the letter that he would either hire another attorney or represent himself.

Respondent testified he traveled from New Jersey with his wife and his son for this hearing. Respondent explained he was detained in Batavia and when he bonded out his case was transferred to the court in Buffalo.

Respondent testified he was married to his wife two years after his son was born. He explained he wanted to have a large wedding, so they postponed due to financial reasons. Respondent testified his wife is a home health aide.

DHS indicated that it was not opposed to transferring this matter to New Jersey since Respondent has been traveling to Buffalo, New York for all his scheduled hearings. The Court indicated it was opposed to "11th hour" motions and denied the oral motion. The Court concluded that there has been an intentional delay on the part of Respondent because the Court had not been apprised of the *bona fides* of the marriage until the present hearing. Respondent's counsel noted that Respondent was in a *pro se* capacity and might have had the filing receipt for the I-130 at the last hearing.

Respondent then indicated he would not be seeking voluntary departure. The Court then reserved its decision for a written opinion.

II. DOCUMENTARY EVIDENCE

The following documents are included in the record of proceedings and are herein renumbered for clarity:

Exhibit 1: Notice to Appear, dated September 14, 2012

Exhibit 2: Respondent's Motion to Change Venue (Jun. 3, 2014)

Exhibit 3: DHS Memorandum in Response to Motion (Jun. 9, 2014)

Exhibit 4: Order of the IJ (denying motion to change venue) (Jun. 10, 2014)

Exhibit 5: Respondent's Sworn Statement (Nov. 4, 2015)

Exhibit 6: Respondent's Motion to Withdraw Attorney of Record (Nov. 4, 2014)

Exhibit 7: Order of the IJ (denying motion to withdraw) (Nov. 13, 2015)

Exhibit 8: Order of the IJ (granting amended motion to withdraw) (Nov. 16, 2015)

Exhibit 9: Respondent's Proposed Evidence (Nov. 30, 2015)
- **9A:** USCIS Form I-797 Notice of Action (I-130 transfer notice)
- **9B:** USCIS Form I-797 Notice of Action (I-130 receipt notice)
- **9C:** Certificate of Marriage

9D: Certificate of Naturalization of Respondent's wife
9E: Certificate of Birth of Respondent's U.S. citizen child
9F: Copy of Form I-130 Petition for Alien Relative

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has considered the entire record carefully. All evidence has been considered, even if not specifically addressed in the decision below.

A. Respondent is Removable Pursuant to INA § 237(a)(1)(C)(i)

Respondent admitted to all factual allegations contained in the NTA. *See* (Exh. 1); *see also* Digital Audio Recording (Nov. 30, 2015). Additionally, Respondent conceded the charge of removability. *Id.* While Respondent did not elaborate as to the circumstances of why he fell out of student status, he appeared to imply that he remained in the U.S. because he is recently the biological father of a U.S. citizenship child. *See* Digital Audio Recording (Nov. 30, 2015). Respondent's testimony was sparse and he did not provide sufficient documentation that would show he is currently statutorily eligible for any relief from removal. DHS likewise did not cross-examine Respondent and did not submit any evidence to the Court. However, based on Respondent's own admissions, the Court finds Respondent removable based on the factual allegations and charge in the Notice to Appear.

B. Respondent Failed to Demonstrate Good Cause for Further Continuing His Removal Proceedings

According to 8 C.F.R. § 1003.29, the Court "may grant a motion for continuance for good cause shown." This regulation grants the Court "broad discretionary authority over continuances." *Matter of Sosa*, 25 I&N Dec. 807, 812 (BIA 2012) (citing *Matter of Rajah*, 25 I&N Dec. 127, 129-30 (BIA 2009)). "The regulations do not contain a definition of what constitutes good cause." *Matter of Hashmi*, 24 I&N Dec. 785, 788 (BIA 2009). Instead, the Board of Immigration Appeals has "defined the parameters of 'good cause' in different ways depending on the facts and circumstances presented." *Id.*

Further, Respondent entered into a marriage after being place into removal proceedings and may not have his status adjusted under INA § 245(a) based on a marriage that was entered into during the pendency of such proceedings unless the he "establishes by clear and convincing evidence . . . that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no [inappropriate] fee or other consideration was given . . . for the filing of [the immigrant petition]." INA § 245(e).

Respondent was granted a total of *seven* continuances since his initial master calendar hearing. *See* Digital Audio Recording (Nov. 30, 2015). The Court would note that Respondent has not appeared to make a diligent effort to advance his claim to adjust status through an approved I-130 petition. The Court was only made aware of a *pending* Form I-130 at the final hearing on November 30, 2015. *Id.* Furthermore, the Court does not find the evidence

Respondent submitted at the 11th hour to be sufficient evidence of the *bona fides* of his marriage to overcome his burden to show it was not entered into to evade the immigration laws of the United States. *See* (Exh. 9). Consequently, the Court finds that Respondent has failed to establish by clear and convincing evidence that his marriage was entered into in good faith. At this juncture, he is therefore ineligible to have his status adjusted to that of a lawful permanent resident pursuant to INA § 245(a).

Additionally, the Court finds that Respondent has not established good cause for continuing his removal proceedings to await the adjudication of a visa petition that was only filed a month prior to his final hearing. The Court will enter the following order:

ORDER

THE COURT FINDS the charge that Respondent is subject to removal pursuant to INA § 237(a)(1)(C)(i) is **SUSTAINED**.

IT IS ORDERED that Respondent be **REMOVED** from the United States to Ghana based on the charge stated in the Notice to Appear.

5-10-2016
Date

Philip J. Montante, Jr.
U.S. Immigration Judge

Certificate of Service
This document was served by: ☒ Mail ☐ Personal Service
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Date: 5/11/16 By Court Staff:
Attachments: ☐ EOIR-33 ☐ EOIR-28 ☐ Legal Services List ☐ Other