U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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CASTILLO, LUIS ALONSO
A094-305-773
C/O CUSTODIAL OFFICER
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DHS/ICE
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LOS ANGELES, CA 90014

Name: CASTILLO, LUIS ALONSO **A 094-305-773**

Date of this notice: 4/9/2014

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:
Guendelsberger, John
Manuel, Elise
Hoffman, Sharon

williame
Userteam: Docket

File: A094 305 773 – Los Angeles, CA Date: APR - 9 2014

In re: LUIS ALONSO CASTILLO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Continuance

The respondent, a native and citizen of El Salvador, has appealed from the Immigration Judge's decision dated January 2, 2014. The Immigration Judge found the respondent removable and found him ineligible for relief from removal. On appeal, the respondent argues that he was improperly denied a continuance and was denied his right to counsel. The appeal will be sustained and the record will be remanded.

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).

The detained respondent was placed in removal proceedings on November 27, 2013 (Exh. 1). His first hearing was on December 24, 2013 (Tr. at 1). At that hearing, the respondent said he wished to apply for a U nonimmigrant visa and asked for a continuance of 20 days (I.J. at 2; Tr. at 2). The Immigration Judge granted him 9 days (Tr. at 3). At the January 2, 2014, hearing, the respondent asked for more time to hire an attorney and to prepare the necessary documents for his U nonimmigrant visa petition. He specifically asked for 1 month's time (Tr. at 4). The Immigration Judge said he had already had sufficient time to hire an attorney because he had been in proceedings and had the list of low-cost attorneys for more than a month. The Immigration Judge doubted the respondent's family could get the money to hire an attorney, so he did not find good cause for a continuance. The Immigration Judge required the respondent to represent himself (I.J. at 2; Tr. at 5-6). Pleadings were taken, and the respondent was found removable as charged (I.J. at 2; Tr. at 7-8). The Immigration Judge asked the respondent questions to determine eligibility for relief, but concluded that he was not eligible for relief, and ordered him removed (I.J. at 3; Tr. at 9-14). This appeal followed.

Respondents in immigration proceedings have the statutory and regulatory "privilege of being represented," at no expense to the Government, by counsel of their choosing. *See* sections 240(b)(4)(A), 292 of the Act; 8 U.S.C. §§ 1229a(b)(4)(A), 1362. *See also* 8 C.F.R. §§ 1003.16(b), 1240.3, 1240.10(a), 1240.11(c)(1)(iii); *Matter of C-B-*, 25 I&N Dec. 888, 889-890 (BIA 2012). Where the statutory and regulatory privilege of legal representation is not

expressly waived,[1] as is the case here, in order to meaningfully effectuate the privilege, the Immigration Judge must grant a reasonable and realistic amount of time and provide a fair opportunity for a respondent to seek, speak with, and retain counsel. *See Matter of C-B-*, *supra*. *See* also sections 239(a)(1)(E) and 239(b)(1) of the Act, 8 U.S.C. §§ 1229(a)(1)(E); (b)(1). A desire to seek counsel constitutes good cause for a continuance. *See* 8 C.F.R. §§ 1003.29, 1240.6; *Matter of C-B-*, *supra*. *See also Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005); *Tawadrus v. Ashcroft*, *supra*; *Velasquez Espinosa v. INS*, 404 F.2d 544, 546 (9th Cir. 1968). Consistent with the responsibility to grant a reasonable and realistic amount of time, an Immigration Judge must consider the facts and circumstances of each individual case to determine the appropriate amount of time to be granted.[2] *See Matter of C-B-*, *supra*.

We conclude that it was not consistent with *Matter of C-B-*, *supra*, for the Immigration Judge to have granted the respondent only a 9-day continuance at the December 24, 2013, hearing, and to have denied an additional continuance at the January 2, 2014, hearing (Tr. at 11-12). The 9-day continuance fell during a holiday period when it would be unrealistic to expect the respondent's family to have been able to speak with and retain counsel. In light of the short duration of the continuance and that it fell during a holiday period, and in light of the fact that the respondent was detained, was not an English speaker, and was reliant on family to hire an attorney, we conclude that he was not granted a reasonable and realistic amount of time and provided a fair opportunity to seek, speak with, and retain counsel. *See Biwot v. Gonzales*, *supra* (Immigration Judge denied alien's statutory right to counsel in denying continuance when detained respondent had diligently sought counsel when previously granted 2 continuances

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[1] In order for a waiver to be valid, an Immigration Judge must generally: (1) inquire specifically as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response. *See Matter of C-B-*, *supra*. *See also Ram v. Mukasey*, 529 F.3d 1238, 1242 (9th Cir. 2008); *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 945 (9th Cir. 2004); *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1313 (9th Cir. 1988); *Reyes-Palacios v. INS*, 836 F.2d 1154, 1155-56 (9th Cir. 1988); *Colindres-Aguilar v. INS*, 819 F.2d 259, 261 (9th Cir. 1987); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985); *Castro-Nuno v. INS*, 577 F.2d 577, 579 (9th Cir. 1978). Failure to obtain such a waiver is an effective denial of the right to counsel. *See Matter of C-B-*, *supra*. *See also Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). A respondent who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney. *See Montes Lopez v. Holder*, 694 F.3d 1085, 1090-1094 (9th Cir. 2012).

[2] In determining whether good cause exists to continue proceedings for a detained respondent to seek, retain, speak with or meet with counsel, prior to counsel's entry of appearance before the Immigration Court, the Immigration Judge should consider a variety of factors, including, but not limited to: (1) the specific actions taken by the respondent to seek and retain counsel and the specific reasons for the respondent's inability to speak with, meet with, and/or retain counsel; (2) the number and length of continuances requested by, and granted to, the respondent to seek and retain counsel and/or to speak with and meet with counsel; and (3) whether the case involves complex legal, factual, or evidentiary issues. These factors are illustrative, not exhaustive.

amounting to 5 working days following a national holiday); *Rios-Berrios v. INS*, *supra* (Immigration Judge denied alien's statutory right to counsel in denying continuance when respondent had previously been granted 2 continuances amounting to 2 working days and his attempts to secure a lawyer were hampered by his detention far from the only person he knew in this country, lack of English skills, and unfamiliarity with this country).

Consequently, we conclude that, in the absence of a knowing and voluntary waiver of the privilege of legal representation by the respondent, the failure of the Immigration Judge to grant a continuance to enable the respondent to retain counsel resulted in the denial of the respondent's statutory and regulatory privilege of legal representation. *See* sections 240(b)(4)(A), 292 of the Act; 8 C.F.R. §§ 1003.16(b), 1240.3, 1240.10(a), 1240.11(c)(1)(iii).

Consequently, the appeal will be sustained, and the record will be remanded to the Immigration Judge for a new hearing.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File: A094-305-773 January 2, 2014

In the Matter of

LUIS ALONSO CASTILLO	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended - alien present in the United States without being admitted or paroled.

APPLICATIONS: None.

ON BEHALF OF RESPONDENT: PRO SE
C/O DHS Custody
501 City Drive South
Orange, California 92868

ON BEHALF OF DHS: M. KRISTINA DEGUZMAN
Assistant Chief Counsel
Department of Homeland Security
606 South Olive Street, 8th Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of El Salvador. The Department of Homeland Security (DHS) commenced these removal proceedings against the respondent pursuant to its authority under Section 240 of the Immigration and

Nationality Act (INA). DHS commenced these proceedings by issuing the respondent a Notice to Appear (NTA) and filing it with the Immigration Court on December 5, 2013. See Exhibit 1. In the NTA, DHS charged the respondent with being removable from the United States pursuant to INA Section 212(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled.

The respondent appeared for a hearing on December 24, 2013. He requested additional time to prepare as he was attempting to prepare to file a petition for a U visa with DHS. The case was continued to January 2, 2014. On that date, the respondent requested additional time to prepare. The respondent also requested additional time to look for an attorney. The Court denied the respondent's request, as the respondent had been served with the Notice to Appear on November 27, 2013 and has been detained since that time. Thus, the respondent has had over a month to seek representation.

Additionally, the respondent, despite being aware of the legal aid list, has not attempted to use that list. The respondent indicated he was the primary source of income for his family, and with his detention they do not have finances to find an attorney. Given the fact the respondent remains detained, the Court did not find that good cause existed to continue the matter, as there is nothing to indicate that the financial situation would change and that the respondent would be able to afford to hire an attorney if granted a continuance. Further, the respondent has had over a month to use the legal aid list and has elected not to do so. As good cause was not established to continue the matter to look for an attorney, the Court proceeded with the case.

The respondent acknowledged proper service of the Notice to Appear. The respondent admitted all four factual allegations contained in the Notice to Appear. Based upon the respondent's admissions, the Court finds that removability has been established by clear and convincing evidence. See INA Section 240(c)(3)(A).

The respondent designated El Salvador as the country of removal.

In examining what applications for relief the respondent may be eligible to pursue in these proceedings, the respondent provided information. The respondent indicated he did not fear being harmed or tortured if he went back to El Salvador; thus, the Court concluded the respondent did not have a basis for applying for asylum, withholding or Convention against Torture protection. The respondent indicated no visa petition has been filed on his behalf; thus, the respondent is not eligible for adjustment of status. The respondent has also been convicted of possession of a controlled substance in November of 2013, taking a vehicle without an owner's consent in 2006, and also has a conviction for receiving stolen property.

The respondent initially indicated that he entered the United States in 1990 and had not departed the country since that time. Later upon questioning from the Department, the respondent admitted he was deported or removed from the United States in 2006 and was physically removed to El Salvador. Thus, although the respondent has qualifying relatives and initially came to the U.S. in 1990, the removal in 2006 would cut off his physical presence and the respondent could not establish the requisite physical presence for cancellation of removal for certain non-permanent residents. See INA Section 240A(b)(1).

The respondent was advised he could pursue voluntary departure. The respondent declined to make that application. As the respondent declined to apply for the only relief he is eligible to seek in these proceedings, the Court ordered the respondent removed to El Salvador.

Accordingly, the Court enters the following orders.

ORDER

IT IS HEREBY ORDERED that the respondent be removed to El Salvador on the

charge contained in the Notice to Appear.

Date: January 2, 2014.

Please see the next page for electronic

signature

KEVIN W. RILEY
Immigration Judge

//s//

Immigration Judge KEVIN W. RILEY

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