U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: DIFEO, KAREN LOUISE

A 074-093-925

Date of this notice: 6/14/2013

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:
Adkins-Blanch, Charles K.
Hoffman, Sharon
Guendelsberger, John

schuckec
Userteam: Docket

File: A074 093 925 – Miami, FL Date: JUN 14 2013

In re: KAREN LOUISE DIFEO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marcela Gyires, Esquire

ON BEHALF OF DHS: Patricia B. Kelly Le Bienvenu
Assistant Chief Counsel

APPLICATION: Continuance; termination of proceedings

The respondent, a native and citizen of Canada, who was previously granted lawful permanent resident status in the United States, has appealed from the Immigration Judge's decision dated January 26, 2012. The Immigration Judge found the respondent removable as charged and found her ineligible for relief from removal based on her criminal convictions.[1] On appeal, the respondent challenges the denial of a continuance and denial of a request to terminate removal proceedings. 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).

Before the Immigration Judge, the respondent requested continuances to enable her to challenge her criminal convictions before the criminal court pursuant to *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010)[2] and to pursue termination of proceedings through prosecutorial discretion by the Department of Homeland Security (DHS). The Immigration Judge granted continuances from May 19, 2011, until January 26, 2012, but declined to grant a further continuance. The respondent argues on appeal that the Immigration Judge erred in denying a further continuance. However, the respondent does not indicate whether the convictions have been vacated.

[1] Removability and relief from removal are not at issue on appeal.

[2] In *Padilla v. Kentucky*, the Supreme Court held that the failure to advise a non-citizen criminal defendant that a plea could result in deportation constitutes ineffective assistance of counsel and violates the right to counsel. *See also Chaidez v. United States*, 568 U.S. ___, 133 S.Ct. 1103 (2013) (holding that *Padilla v. Kentucky*, *supra*, which requires defense counsel to advise a defendant about the risk of deportation arising from a guilty plea, does not apply retroactively).

An Immigration Judge may grant a continuance where good cause is shown. *See* 8 C.F.R. §§ 1003.29, 1240.6. *See also Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).[3] We find that the Immigration Judge appropriately considered the relevant factors to determine whether good cause for a continuance was shown. We conclude that good cause was not shown. While the respondent is free to pursue a collateral attack on the convictions, such a motion does not justify a stay of the removal proceedings against the respondent. *See Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996). A post-conviction motion to vacate convictions does not render the convictions non-final. *See Matter of Abreu*, 24 I&N Dec. 795, 802 n. 8 (BIA 2009); *Matter of Madrigal*, *supra*; *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992).

Also at the January 26, 2012, hearing, the respondent requested termination of proceedings to pursue naturalization. The Immigration Judge denied that request. The respondent argues on appeal that the Immigration Judge erred in denying the motion to terminate proceedings to allow the respondent to naturalize. She argues that she is in a regulatory catch-22, because the United States Citizenship and Immigration Services (USCIS), a part of the DHS, will not adjudicate her naturalization application while she is in removal proceedings, and the Immigration Judge will not terminate proceedings without an acknowledgment of facie eligibility for naturalization from the USCIS. The DHS responds that the Immigration Judge cannot terminate proceedings without an affirmative communication of prima facie eligibility from the USCIS and that neither the Immigration Judge nor this Board can compel the USCIS to respond to a request for such an affirmative communication. The DHS also points out that the respondent submitted the request for acknowledgment of prima facie eligibility for naturalization to the Immigration and Customs Enforcement (ICE), also a part of DHS, instead of USCIS, and the request was made only a few days before the scheduled hearing.

The Board of Immigration Appeals and Immigration Judges lack jurisdiction to adjudicate applications for naturalization. In order to pursue naturalization, the respondent must file a Form N-400, along with all relevant evidence, with the USCIS. Generally, an Immigration Judge cannot terminate proceedings to allow an alien to pursue that process. An Immigration Judge can only terminate proceedings when an alien has "established prima facie eligibility for naturalization" and the matter "involves exceptionally appealing or humanitarian factors." *See* 8 C.F.R. § 1239.2(f). We decline to reach the respondent's argument that we should revisit our holding in *Matter of Acosta-Hidalgo*, 24 I&N Dec. 103 (BIA 2007), in this case where the Immigration Judge has not addressed whether the respondent's case "involves exceptionally appealing or humanitarian factors." We find it appropriate to remand the record to the Immigration Judge to address, in the first instance, whether the "exceptionally appealing or humanitarian factors" prong of § 1239.2(f) is satisfied.

[3] In determining whether good cause exists to continue removal proceedings, a variety of factors may be considered, including, but not limited to: the Department of Homeland Security's response to the motion to continue and the reason for the continuance and any other relevant procedural factors. *See Matter of Hashmi*, *supra*.

Accordingly, the following order will be entered.

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