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

FARAFONOV, ANDREY M.
(A077 690 710)
P.O. BOX 560 HA-44
TROUT, LA 71371

DHS/ICE Office of Chief Counsel - CHI
55 East Monroe Street, Suite 1700
Chicago, IL 60603

Name: FARAFONOV, ANDREY M * T** **A077-690-710**

Date of this notice: 12/5/2011

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.
Donovan, Teresa L.
Guendelsberger, John

File: A077 690 710 - Chicago, IL

Date: DEC -5 2011

In re: ANDREY M. FARAFONOV

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Anastasie M. Senat
Assistant Chief Counsel

APPLICATION: Continuance

The respondent, a native and citizen of Russia, who was previously granted lawful permanent resident status in the United States, has appealed from the Immigration Judge's decision dated May 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 October 13, 2010. Because he was detained, the respondent apparently did not have access to the Notice to Appear, which contains the factual allegations and bases for removability, until the April 11, 2011, hearing. *See* Exh. 1; Tr. at 3-4. He also did not have access to the list of free/reduced-fee attorneys until the March 24, 2011, hearing. *See* Tr. at 1-2. At the April 20, 2011, hearing, the respondent agreed to proceed with the hearing, and the Immigration Judge took pleadings. When the Immigration Judge turned his focus to relief from removal, he told the respondent that he would continue his case to enable the respondent to hire an attorney, and the respondent said he wanted to do that. The respondent was given two weeks. *See* Tr. at 12. At the May 3, 2011, hearing, the respondent said that the facility where he was being detained did not allow him to make phone calls, so he had been contacting attorneys by mail, but had not yet retained one. *See* Tr. at 14. The respondent requested another continuance to find an attorney to represent him. However, the Immigration Judge required the respondent to proceed without an attorney. *See* Tr. at 15.

On appeal, the respondent argues that he has been denied his right to due process. 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).

We do not find that the respondent should be held accountable for failing to make efforts to hire an attorney prior to the date he was given copies of the Notice to Appear and the list of free/reduced-fee attorneys. Moreover, while the respondent was given multiple continuances from the date of his first hearing, the continuances were relatively brief and only amounted to a total of five weeks. It is of significant concern to this Board that, during part of that time -- at least the final two-week period -- the respondent did not have access to a telephone, severely hindering his efforts to hire an attorney. So the Immigration Judge could not find, based on the continuances alone, that the respondent had waived his right to counsel.

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 should have been granted to enable the respondent to hire counsel to determine whether he is eligible for any relief. 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). Moreover, we conclude that denial of the continuance to hire an attorney deprived the respondent of a full and fair hearing. *See Matter of Luviano-Rodriguez*, 21 I&N Dec. 235,237 (BIA 1996); *Matter of Perez-Andrade*, 19 I&N Dec. 433, 434 (BIA 1987); *Matter of Namio*, 14 I&N Dec. 412, 415-416 (BIA 1973).[1]

Accordingly, the following orders will be entered.

ORDER: The decision of the Immigration Judge is vacated.

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

[1] An alien who faces removal is entitled under the constitution to a full and fair removal hearing. *See Matter of D-*, 20 I&N Dec. 827, 831-32 (BIA 1994); *Matter of Santos*, 19 I&N Dec. 105, 107-110 (BIA 1984); *Matter of Exilus*, 18 I&N Dec. 276, 280-81 (BIA 1982). In order to establish that his due process rights were violated, the respondent must prove (1) that there was an error and (2) that he was prejudiced by the error. *See Matter of Santos*, *supra*; *Matter of Exilus*, *supra*.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No.: A 077 690 710 May 3, 2011

In the Matter of	)	
	)	
AUDREY M. FARAFONOV	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: 237(a)(2)(A)(iii) of the Immigration and Nationality Act.

APPLICATIONS: Motion to continue.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Pro se	Patrick McKenna, Esquire

ORAL DECISION

The respondent is an adult male, native and citizen of Russia, who was issued a Notice to Appear on August 24, 2010. The respondent was served in person on October 13, 2010.

The respondent appeared in the Immigration Court at a Master Calendar hearing on March 24, 2011. The matter was continued to April 11, 2011 to allow the respondent additional time to attempt to retain counsel. The matter was continued again to April 20, 2011 to allow additional time for the respondent to retain counsel. The matter was then continued to May 3, 2011 to allow the respondent additional time to retain counsel.

On May 3, 2011, the respondent appeared in Immigration Court in person. He was still unrepresented. The respondent requested additional time to attempt to retain counsel. The Court noted that the respondent had been served with a Notice to Appear on October 13, 2010, and that the matter had been continued since March 24 to allow the respondent additional time to retain counsel. The respondent indicated that he wanted more time to call more agencies in an attempt to retain counsel. It appeared to the Court that a continuance would not be fruitful and that the respondent had had ample time to retain counsel. The Court, in the exercise of its discretion, denied the respondent's request for a continuance.

Pleadings had earlier been taken on April 20, 2011. Allegations 1 through 5 were admitted. The Court found that the charge under Section 237(a)(2)(A)(iii) was sustained based upon conviction records submitted by the Department of Homeland Security that were marked as Exhibit 2. They showed the respondent's conviction for theft and his original sentence. The record showed that his probation was subsequently revoked and that he was then re-sentenced on October 6, 2010 to 300 days in the Department of Corrections.

The respondent informed the Court, while under oath, that he is single; that he has one child who was born in the United States; neither of his parents nor any of his siblings have any legal status in the United States. The respondent indicated that

he has worked as an internet salesperson and has done body shop work.

The respondent informed the Court that he fears returning to the Soviet Union because his father, in the past, has been abusive toward him. The respondent indicated that his father struck him in the head, causing injury that caused his hospitalization when the respondent was between the ages of 15 and 16. The Court inquired as to whether the respondent had ever sought the help of the police or had ever contacted the police. The respondent indicated that he had not, but, rather, that he left home and that he later came to the United States.

There is no indication that the abuse by the respondent's father was based upon any of the protected grounds recognized in asylum or withholding, nor is there any indication that the respondent could qualify for relief under the Convention against Torture. There is no indication that the Soviet government condones such abuse, and the respondent did not seek the protection of the police. I find, therefore, that there is no potential relief here for asylum, withholding, or relief under the Convention against Torture.

I further find that the respondent is disqualified from cancellation of removal based upon his criminal record, including his felony theft and a sentence as reflected in Exhibit 2.

The Court has considered the possibility of voluntary departure, although the respondent did not specifically request

it. The Court concludes that, in its discretion, it should not grant voluntary departure. The Court has taken into account the length of the respondent's time in the United States, since 2001, and the fact that he does have a child who was born in the United States. The Court has taken into account his length of residence, his family ties to the United States in the form of his child, and the fact that he has steadily worked while in the United States, but the Court has also taken into account the nature of the respondent's criminal history, which includes the felony theft as set forth in Exhibit 2 and also includes two operating while under the influence convictions on the part of the respondent. Weighing the gravity of these offenses and their nature, and considering that the respondent has only been in the United States for approximately ten years, the Court concludes that voluntary departure would not be in the sound exercise of its discretion and would not grant voluntary departure even if the respondent were to request it.

The Court finds, therefore, that there is no Immigration relief available to the respondent.

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States to Russia on the charge contained in his Notice to Appear.

PHILIP L. DIMARZIO
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE PHILIP L. DIMARZIO, in the matter of:

ANDREY M. FARAFONOV

A 077 690 710

Chicago, Illinois

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Linda Dock, Transcriber
Free State Reporting, Inc.

September 8, 2011
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, and/or CD, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.