



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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**DHS/ICE Office of Chief Counsel - MIA  
333 South Miami Ave., Suite 200  
Miami, FL 33130**

**Name: ABELLA, ELENA**

**A 087-184-034**

**Date of this notice: 6/2/2014**

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:  
Manuel, Elise

TranC  
Userteam: Docket

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Falls Church, Virginia 20530

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File: A087 184 034 – Miami, FL

Date: JUN - 2 2014

In re: ELENA ABELLA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Emilio C. Pastor, Esquire

APPLICATION: Continuance

The respondent, a native and citizen of Moldova, appeals from the Immigration Judge's decision dated September 27, 2012, denying her motion for a continuance to await the Board's adjudication of her visa petition (Form I-130) denial appeal that was filed by her citizen spouse.<sup>1</sup> The record will be remanded.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 8 C.F.R. § 1003.1(d)(3).

A further evaluation of the respondent's motion for a continuance is warranted. *See* 8 C.F.R. § 1003.29; *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987) (the decision to grant or deny a continuance is within the discretion of the Immigration Judge, if good cause is shown, and that decision will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing). *See also Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (setting forth factors for when deciding whether to grant a motion for a continuance based on a pending visa petition). The Immigration Judge found that the respondent was ineligible to adjust her status to a lawful permanent resident pursuant to section 204(c) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c), inasmuch as the United States Citizenship and Immigration Services (CIS) had determined that her prior marriage was a sham (I.J. at 3). However, section 204(c) of the Act does not directly bar the respondent from establishing eligibility for adjustment of status, and it only bars the CIS from approving a visa petition filed on behalf of an alien who has engaged in a prior sham marriage. In addition, the CIS is required to independently decide whether a prior sham marriage exists, and it may not rely exclusively on the existence of a prior finding of a sham marriage. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In light of the foregoing, the record will be remanded to reevaluate the respondent's motion for a continuance. On remand, the parties shall be given an opportunity to submit additional evidence such as the status of the visa petition or the outcome of an appeal.

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<sup>1</sup> In her appellate brief, the respondent indicates that she filed her appeal with the CIS on September 24, 2012, and the CIS has not yet forwarded her appeal to the Board.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

  
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FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
MIAMI, FLORIDA

File: A087-184-034

September 27, 2012

In the Matter of

ELENA ABELLA	)	
	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES:           237(a)(1)(B), an alien who after admission as a  
non-immigrant has remained in the United States  
for a longer time than permitted;  
237(a)(1)(C)(i), an alien who after admission as  
a non-immigrant has failed to maintain or comply  
with the conditions of the non-immigrant status  
under which she was admitted.

APPLICATIONS:

ON BEHALF OF RESPONDENT: EMELIO PASTOR

ON BEHALF OF DHS: JOHN T. THOMPSON

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a married, female, native and  
citizen of Moldova who was issued a Notice to Appear on May 28,  
2009. See Exhibit 1. The respondent appeared with counsel  
today in court in a master calendar hearing, admitted factual

allegations 1 through 5. Based on the respondent's admissions, the Court sustained both charges of removability by clear and convincing evidence, finding that the respondent, after admission as a non-immigrant, has remained in the United States for a longer time than permitted in violation of Section 237(a)(1)(B). The Court also found the respondent was subject to removal under Section 237(a)(2)(C)(i) as an alien who after admission as a J-1 visa failed to maintain or comply with conditions under the non-immigrant status under which she was admitted based on counsel's admissions. The Court sustained the charges of removability by clear and convincing evidence. See Section 240(c)(1)(A) of the INA.

The respondent today asked for a continuance. Respondent was previously married to a U.S. citizen, and that I-130 petition was denied. Respondent subsequently married another U.S. citizen and a I-130 petition was filed and was again denied by USCIS. She has that case on appeal before the administrative appeals unit. Respondent wishes to adjust status based on her current marriage to a U.S. citizen, and her attorney seeks a continuance based on Matter of Hashmi, 24 I&N Dec. 785 (BIA 2009), and also requests a Bull v. INS continuance, 790 F.2d 869 (11th Cir. 1986).

Based on the documentary evidence, the Court finds the respondent is not entitled to a continuance in this matter. In order to establish eligibility for a continuance, the respondent

would need to establish that she is prima facie eligible for relief. In the instant case, the evidence we have seems to indicate the respondent has a bar to adjustment of status based on her prior marriage. USCIS made a finding that she has a 204(c) bar. The Court realizes that the case is now on appeal before the administrative appeals unit, but the Court is not inclined to continue the case when the Court finds the respondent has not established prima facie eligibility for adjustment of status. There is no pending petition before CIS. It is on appeal at the AAU, and the Court has reviewed her appeal and the decision from March 2009, or the pertinent pages that I have, and it appears to be a finding of a sham marriage, and therefore barring her from eligibility.

An Immigration Judge "may grant a continuance for good cause shown." 8 C.F.R. Section 1003.29. The decision to grant or deny a motion for continuance is within the sound discretion of an Immigration Judge, and the Immigration Judge's decision will not be reversed unless the alien demonstrate the denials cause "actual prejudice and harm that materially affected the outcome of the case." Matter of Sibrun, 18 I&N Dec. 354, 356-57 (BIA 1983). The Court finds a request for a continuance shall be denied this time as the respondent has not established eligibility for relief.

The respondent, through counsel, says that the only relief she wishes to seek is the adjustment of status, and no

other relief before the Court. There being no other relief pending and no other petitions than the one in AAU, the Court is denying the continuance and entering the following order.

ORDER

IT IS HEREBY ORDERED the respondent is ordered removed from the United States to Moldova on the charges contained in the Notice to Appear.

*see signature on next page*  
\_\_\_\_\_  
LOURDES MARTINEZ-ESQUIVEL  
Immigration Judge

//s//

Immigration Judge LOURDES MARTINEZ-ESQUIVEL

martinlo on December 18, 2012 at 3:56 PM GMT

Immigrant & Refugee Appellate Center | [www.irac.net](http://www.irac.net)



CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE  
LOURDES MARTINEZ-ESQUIVEL, in the matter of:

ELENA ABELLA

A087-184-034

MIAMI, FLORIDA

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.



DANIEL CHARLTON (Transcriber)

DEPOSITION SERVICES, Inc.

NOVEMBER 29, 2012

(Completion Date)