U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted]-C[redacted], S[redacted]

A[redacted]-840

Date of this notice: 6/28/2019

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:
Morris, Daniel
Liebowitz, Ellen C
Mullane, Hugh G.

Userteam: Docket

File: A[redacted]-840 – Phoenix, AZ Date: JUN 28 2019

In re: S[redacted] C[redacted]-C[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Eric G. Bjotvedt, Esquire

ON BEHALF OF DHS: James T. Dehn
Associate Legal Advisor

APPLICATION: Asylum; withholding of removal; Convention Against Torture; continuance; remand

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's decision dated November 2, 2017, denying his motion for a continuance and his applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A), and for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c), 1208.18. The respondent also incorporates a request to remand the proceedings in his brief on appeal, and separately filed a motion to terminate the proceedings. The Department of Homeland Security did not file a response to the appeal, but filed an opposition to the respondent's motion to terminate. The motion to terminate will be denied, and the record will be remanded.

On March 5, 2019, the Board requested supplemental briefing from the parties addressing the Immigration Judge's denial of the respondent's motion for a continuance where the Immigration Judge granted respondent's counsel's request to withdraw, and the same attorney now represents the respondent on appeal. The respondent filed a supplemental brief, maintaining his view that the Immigration Judge did not determine whether he waived his right to counsel before denying his motion for a continuance. The DHS filed a supplemental brief arguing that the respondent was provided the right to have counsel represent him, that this case does not involve a waiver of the right to counsel, and that the respondent did not establish good cause for a continuance.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Respondents in immigration proceedings have the statutory and regulatory "privilege of being represented" by counsel of their choice at no expense to the Government. *See* sections 240(b)(4)(A) and 292 of the Act, 8 U.S.C. §§ 1229a(b)(4)(A) and 1362; *see also* 8 C.F.R. §§ 1003.16(b), 1240.3; 1240.11(c)(1)(iii); *Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012). To meet an alien's due process right to counsel, an Immigration Judge must (1) inquire whether the alien wishes counsel, (2) provide a reasonable period for obtaining counsel, and (3) assess whether any waiver

of counsel is knowing and voluntary. *Ram v. Mukasey*, 529 F.3d 1238 (9th Cir. 2008); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). The respondent need not show prejudice resulting from the denial of his right to counsel. *Montes-Lopez v. Holder*, 694 F.3d at 1093-94.

At his scheduled merits hearing, the respondent's counsel requested to withdraw representation, which the Immigration Judge granted (IJ at 1; Tr. at 26-29). However, the respondent's counsel also requested a continuance for additional preparation after hearing the respondent testify that he never received his letter (Tr. at 28-29). The Immigration Judge denied the respondent's request for a continuance (Tr. at 29). Although the Immigration Judge denied the motion for a continuance, the record does not show that the Immigration Judge expressly found that the respondent had waived[1] his right to counsel. *See Ram v. Mukasey*, 529 F.3d at 1242 (an Immigration Judge may "determine, in the absence of a showing of good cause for an additional continuance, that the right to counsel has been forfeited"); *Tawadrus v. Ashcroft*, 364 F.3d at 1103 ("In the present case, the IJ neither advised Mr. Tawadrus of the right to counsel at the time his original attorney withdrew, nor inquired whether Tawadrus wished to waive this right."). Based on the foregoing, it is not clear that the respondent waived his right to counsel.

Accordingly, we will remand the record to the Immigration Judge for a new hearing where the respondent can be represented on his claims for relief and protection from removal. While we conclude that a remand is appropriate, we express no opinion regarding the ultimate outcome of these proceedings at the present time. *See Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996).

During the pendency of the appeal, the respondent filed a motion to terminate based on *Pereira v. Sessions*, ___ U.S. ___, 138 S. Ct. 2105 (2018). In that case, the Supreme Court held that the stop-time rule was not triggered by a notice to appear that failed to identify the date and time for the hearing. This holding does not require or compel termination of proceedings. A notice to appear that does not specify the date and time of the alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings, and meets the requirements of section 239(a) of the Act, 8 U.S.C. §1229(a)(1) when a notice of hearing specifying this information is later sent to the alien. *Matter of Bermudez-Cota*, 27 I&N Dec. 441, 445-47 (BIA 2018); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). The respondent does not contest that he received this notice and appeared before the Immigration Judge. Moreover, the respondent did not object to the notice to appear before the Immigration Judge, thus waiving any claim with respect the notice to appear. Therefore, we will deny the motion to terminate.

Accordingly, the following orders will be entered.

[1] We will refer to the issue here as whether the respondent "waived" his right to counsel, in place of "forfeited" his right to counsel. *See Honcharov v. Barr*, ___ F.3d ___, 2019 WL 2285342, at *1 (noting that while the terms "forfeiture" and "waiver" are used interchangeably, "Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.") (internal citation and quotation omitted). The Ninth Circuit has also used these terms interchangeably in regard to the right to counsel in immigration proceedings. *See, e.g.*, *Ram v. Mukasey*, 529 F.3d 1238,

ORDER: The respondent's motion to terminate is denied.

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

FOR THE BOARD

Board Member Hugh G. Mullane dissents without opinion.