U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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80 Monroe Ave., Ste 502
Memphis, TN 38102

Name: GARCIA-HERNANDEZ, FRANCI... **A 205-152-120**

Date of this notice: 12/17/2015

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:
Cole, Patricia A.

Userteam: Docket

File: A205 152 120 - Memphis, TN

Date: DEC 17 2015

In re: FRANCISCO GARCIA-HERNANDEZ a.k.a. Fransisco G. Hernandez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sally M. Joyner, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (found)

APPLICATION: Continuance; administrative closure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's September 2, 2014, decision denying his request for administrative closure or for a continuance and ordering his removal. The respondent sought a continuance and administrative closure to seek adjustment of status pursuant to section 245(m)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1255(m)(3). The Department of Homeland Security ("DHS") has not filed a brief on appeal. The record will be remanded.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent contends that the Immigration Judge erred in denying his request for administrative closure and misapplied the Board's precedent in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (Respondent's Brief at 6-12). Specifically, he argues that the Immigration Judge did not properly consider the basis for the DHS's opposition to administrative closure and the likelihood of the respondent's success in his prospective adjustment application (Respondent's Brief at 9-10). *See Matter of Avetisyan*, *supra*, at 696. In the alternative, the respondent requests that we exercise our independent authority to administratively close proceedings (Respondent's Brief at 12). The respondent contends that once his wife files for adjustment of status in March 2016, under section 245(m)(1) of the Act, he will be able to pursue adjustment of status under section 245(m)(3) of the Act (Respondent's Brief at 5, 7-8). *See* 8 C.F.R. § 245.24(a)(2), (h), (i).

Upon de novo review, we agree with the Immigration Judge that administrative closure is not an appropriate disposition in this case (I.J. at 3-4). Pursuant to *Matter of Avetisyan*, *supra*, an Immigration Judge or the Board, in the exercise of independent judgment and discretion may administratively close a matter over the objection of one party, so long as administrative closure is an appropriate disposition when considering the totality of the circumstances in a case.

See Matter of Avetisyan, *supra*, at 690-95. Evaluating the propriety of administrative closure requires the consideration of, among other things, the basis for any opposition to administrative closure and the likelihood that the respondent will succeed on the action he or she is pursuing outside of removal proceedings. *See id.* Administrative closure is inappropriate for a purely speculative event or action. *See id.* at 696.

The Immigration Judge noted that the DHS opposes the respondent's request because his criminal history makes him an enforcement priority, he has no pending petition, and he bases his request on speculative events (I.J. at. 2-3; Exh. 6 at 3-4). It is undisputed that the respondent currently is not prima facie eligible to apply for adjustment of status under section 245(m)(3) of the Act and that any prospective application is conditioned on the respondent's wife filing for adjustment of status in March 2016 (Respondent's Brief at 2; I.J. at 4, Exh. 6 at 4). Consequently, we find that the Immigration Judge properly determined that the circumstances of this case do not support administrative closure, and the respondent's request was properly denied. *See Matter of Avetisyan*, *supra*, at 690-96. Because we agree with the Immigration Judge's conclusion that administrative closure is not an appropriate disposition for this matter, we likewise decline to exercise our independent authority to administratively close these proceedings.

The respondent also appeals the denial of his request for a continuance and argues that the Immigration Judge failed to consider whether he established good cause for a continuance (Respondent's Brief at 12-15). On February 25, 2014, the Immigration Judge provided the DHS the opportunity to file a response to the respondent's oral motion to continue (Tr. 7-8, 11). However, at the next hearing held on September 2, 2014, the Immigration Judge ordered the respondent removed without addressing the motion to continue (I.J. at 2-3; Tr. at 11).

In light of the Immigration Judge's decision, we cannot make a clear determination as to the basis for denying the respondent's motion to continue, nor can we assess whether the denial was within the Immigration Judge's sound discretion. *See* 8 C.F.R. § 1003.29 (permitting continuances for good cause); *Matter of Perez-Andrade*, 19 I&N Dec. 433, 434 (BIA 1987); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983) (vesting continuance power in the sound discretion of the Immigration Judge). Accordingly, we find that remand is appropriate. *See Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (concluding that the Immigration Judge should articulate, balance, and explain all relevant and applicable factors in deciding whether to continue proceedings for the adjudication of a benefit); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (requiring explicit findings on all issues). On remand, the Immigration Judge should issue a new decision that articulates his reasons for denying the respondent's motion to continue.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MEMPHIS, TENNESSEE

File: A205-152-120 September 2, 2014

In the Matter of

FRANCISCO GARCIA-HERNANDEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(6)(A)(i), alien present without being admitted or paroled.

APPLICATIONS: Administrative closure.

ON BEHALF OF RESPONDENT: SALLY JOYNER

ON BEHALF OF DHS: JONATHAN LARCOMB

ORAL DECISION AND ORDER

The respondent is a married male, native and citizen of Mexico, and based upon admissions that were made before the Immigration Court in Oakdale, the Court in that city sustained the charge and venue was changed to the Memphis Immigration Court. The Court will mark as Exhibit 3 the written plea before the Court in Oakdale.

Before the Memphis Court, respondent appeared and asked for

administrative closure. The Court has before it a petition for a U visa filed by respondent's wife which has subsequently been approved by CIS. The documents relating to that petition are hereby sua sponte marked as Exhibit 4. The parties are in agreement that respondent himself is not eligible for a U visa at this time because he was not married to his wife at the time that she filed the petition a U visa. She will be eligible for adjustment of status in 2016. The respondent's motion for administrative closure with attachments is sua sponte marked as Exhibit 5 and the Department's opposition thereto is sua sponte marked as Exhibit 6.

The gist of respondent's motion is that he has been a good husband and has supported his wife through difficult times and should not be separated from her as she rebuilds her life.

This may be so, but respondent also has been convicted twice for driving under the influence. His most recent conviction is in the state of Mississippi in 2009. The respondent's attorney argues that this was an indiscretion, but it is more than an indiscretion. It is an action on the respondent's part that puts other people at risk and ironically, respondent is seeking protection in the United States based upon his wife having been put at risk, such that she was able to become the beneficiary of a petition for a U visa.

The Department opposes administrative closure. See Exhibit 6. The Department counsel argues that the respondent is in no different situation than any other respondent in removal proceedings who is awaiting the approval of a petition and that the decision of the Board of Immigration Appeals in Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012), is unavailing as to the respondent. The respondent counters by saying that this is not a situation where a respondent has a lengthy and unpredictable wait for eligibility but is a situation where the respondent knows when he will be eligible

to adjust status, namely as soon as his wife adjusts status in 2016.

ANALYSIS

This matter is largely governed by Matter of Avetisyan, supra. In that decision, the Board of Immigration Appeals set out six factors that the Immigration Judge is to consider, including the reason for administrative closure, which the Court has elucidated earlier; the basis for any opposition to administrative closure, which is set out in Exhibit 6 and which is articulated also by the Immigration Judge as the respondent being ineligible for administrative closure as a matter of discretion. The respondent has been convicted of two DUI. The third factor is the likelihood that respondent will succeed on any petition and while the respondent's attorney is optimistic that the respondent will become the beneficiary of a spousal U visa, the Court is not quite as optimistic as Ms. Joyner. The anticipated duration of the closure is the fourth factor and that is well over a year; the fifth, the responsibility of either party in contributing to any current or anticipated delay. The Court sees no delay on either side but does note that the respondent wishes to have the convenience of remaining in the United States while his wife becomes eligible for adjustment of status. Finally, the ultimate outcome of removal proceedings has to be considered and the Immigration Judge did give the respondent the opportunity to accept voluntary departure and he does not wish to accept voluntary departure. That is his prerogative and he simply wishes to appeal an order of removal.

Weighing these factors, and especially noting respondent's criminal history inside the United States, the Immigration Judge denies the administrative closure. The respondent has not asked for any other relief and so the Court enters this order:

ORDER

The respondent's request for administrative closure is denied;

The respondent is hereby ordered removed to Mexico.

Please see the next page for electronic signature

CHARLES E. PAZAR
Immigration Judge

//s//

Immigration Judge CHARLES E. PAZAR

pazarc on December 18, 2014 at 2:56 PM GMT