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

Marchi, Nicholas Wright
Carney & Marchi
108 South Washington Street
Suite 406
Seattle, WA 98104

DHS/ICE Office of Chief Counsel - SEA
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Name: R[redacted]-H[redacted], R[redacted]... **A[redacted]-423**

Date of this notice: 8/12/2019

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:
O'Connor, Blair
Wendtland, Linda S.
Donovan, Teresa L.

MalikAr
Userteam: Docket

File: [redacted]-423 – Seattle, WA

Date: AUG 12 2019

In re: R[redacted] R[redacted]-H[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nicholas W. Marchi, Esquire

ON BEHALF OF DHS: Xiao Yan Huang
Assistant Chief Counsel

APPLICATION: Asylum, withholding of removal, Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's October 23, 2017, decision denying his applications for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and pursuant to the Convention Against Torture. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed in part and the record will be remanded for further proceedings consistent with this order.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews de novo questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's credibility is not at issue on appeal (IJ at 3).

We first address the respondent's challenge to the Immigration Judge's denial of his applications for asylum (including humanitarian asylum) and withholding of removal under the Act. The respondent's claims to relief relate to his fear of harm from two sources: (1) a man who kidnapped his mother from Mexico when he was around 1 year of age, in or around 1995; and (2) his father, who neglected him while his mother was away and then physically abused him and his mother (IJ at 4-9). The respondent claimed that he experienced past harm and feared future harm on account of his membership in the particular social groups of (1) members of his mother's family, and (2) victims of domestic violence who are members of the same family (IJ at 6).

The Immigration Judge denied the respondent's claims to asylum and withholding of removal because, even if the man who kidnapped his mother threatened the respondent due to his family relationship to her, the record did not contain adequate evidence to reflect that this man still sought to harm the respondent on this or any basis (IJ at 7). We affirm this finding, i.e., that the record does not reflect the requisite evidence to support a well-founded fear of future persecution, as lacking clear error. *See* IJ at 7-8 (noting the passage of time, the lack of evidence reflecting the kidnapper's whereabouts, and the lack of evidence reflecting that the kidnapper had any further

contact with the respondent or his relatives).[1] Furthermore, while the respondent claims to have suffered domestic violence in the United States at the hands of his father (who is now dead), we affirm the finding that the record does not contain evidence to show that Mexican society would recognize as a particular social group those members of the respondent's family who were subject to domestic abuse in the United States (IJ at 8-9).

We turn next to the respondent's appeal from the denial of humanitarian asylum. This relief was denied by the Immigration Judge because, first, the respondent did not show that his domestic abuse by his father was on account of a protected ground, *cf. Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), and second, he did not suffer egregious harm at the hands of the kidnapper, even assuming that he was threatened by that man due to his family relationship to his mother. *See* IJ at 9. On appeal, the respondent argues that the Immigration Judge's denial of humanitarian asylum was in error because the Immigration Judge found that he had experienced past persecution based on the threats from the kidnapper, but then failed to determine whether humanitarian asylum was proper due to "other serious harm" that the respondent would encounter in Mexico. *Cf.* Respondent's Br. at 19-21. We note that insofar as the Immigration Judge stated that the respondent experienced past persecution (IJ at 9), further analysis of the record should have been conducted to determine whether a grant of humanitarian asylum is appropriate under the "other serious harm" prong of 8 C.F.R. § 1208.13(b)(1)(iii). On remand, the Immigration Judge should undertake this analysis, if appropriate and if the Immigration Judge determines that the threat that rose to the level of persecution was on account of a protected ground.[2]

We affirm the Immigration Judge's decision that the respondent has not established that anyone in Mexico would, more likely than not, torture him with the consent or acquiescence of the government (including the concept of willful blindness) (IJ at 9). The Immigration Judge found without clear error that the respondent's father was dead and that he had no objective evidence that the man who kidnapped his mother sought to harm him (IJ at 3-9). As such, the record lacks sufficient evidence to support a claim that he faces a clear probability of torture. *See Ridore v. Holder*, 696 F.3d 907, 922 (9th Cir. 2012).

[1] Contrary to the respondent's argument on appeal, Respondent's Br. at 12-19, we read the Immigration Judge's determination in this regard to find that any presumption in favor of future persecution that arose due to the threats against the respondent from the kidnapper (assuming the requisite nexus) has been rebutted by evidence of record, including evidence elicited by the DHS on cross-examination of the respondent, reflecting no further contact from this man, including in the years immediately after this man allegedly returned to Mexico (IJ at 7-9; Tr. at 52-58).

[2] We note that the record is unclear on this point, as the Immigration Judge stated (in reference to the threats by the kidnapper) that the respondent was "persecuted in the past" but also stated that this harm was not "on account of any particular basis." *See* IJ at 9. Moreover, we note that the Attorney General's recent decision in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), calls into question the cognizability of the respondent's proposed particular social groups based on family membership. On remand, the Immigration Judge should reconsider this issue to the extent necessary.

We are unpersuaded by the respondent's appellate arguments that the Immigration Judge erred in denying his request to present the telephonic testimony of an expert witness and his mother. Respondent's Br. at 6-8. Since the Immigration Judge ultimately allowed the statements of these witnesses into the record, and because the respondent does not specifically identify any evidence that was excluded as a result of the Immigration Judge's decision, we reject the argument that the ruling as to witnesses constituted a prejudicial due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986) (an alien must demonstrate prejudice in order to establish a due process violation); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979) ("The alien has been denied the full and fair hearing which due process provides only if the thing complained of causes the alien to suffer some prejudice.").

In addition to challenging the denial of his applications for relief, the respondent argues on appeal that he should have been granted a continuance to allow for adjudication of his pending U visa petition pursuant to *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012). *See* Respondent's Brief at 9-10. During the hearing, the Immigration Judge stated that he would deny the continuance because the respondent had recently been released from detention on bond and his case was therefore a priority (Tr. at 10-18), and his written decision indicates that the continuance was denied solely for this reason (IJ at 2).

The respondent's application for a U visa was filed in January 2017 (Exh. 9). The record reflects that he has secured a law enforcement certification which is a necessary prerequisite to approval of that visa (*Id.*). Although U.S. Citizenship and Immigration Services has exclusive jurisdiction over the respondent's U visa application, a continuance to await the adjudication of a pending U visa application may still be appropriate under certain circumstances. *See Matter of Sanchez Sosa*, 25 I&N Dec. at 812-15 (outlining when and under what circumstances a continuance may be supported by good cause to await the adjudication of a pending U visa application); 8 C.F.R. §§ 1003.29 and 1240.6.

Recently, in *Matter of L-A-B-R-, et al.*, 27 I&N Dec. 405, 406 (A.G. 2018), the Attorney General discussed "the proper application of the good-cause standard to a motion for continuance to accommodate collateral proceedings." The Attorney General stated that an Immigration Judge is to "consider[] primarily the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings, and any other relevant secondary factors." *Id.* at 419; *see also id.* at 416-17 (discussing previous precedent disapproving denial of continuances where administrative "case-completion goals" are the sole basis for such decision).

Matter of L-A-B-R- does not alter the fundamental considerations outlined in *Matter of Sanchez Sosa* that bear on whether proceedings should be continued where an alien presents evidence that an application for relief is pending in a collateral proceeding or with another agency. The record reflects that the Immigration Judge did not consider the likelihood that the respondent's application for a U visa would be successful, assess whether it would materially affect the outcome of these proceedings, or inquire as to whether the Department of Homeland Security opposed any continuance. Given these circumstances, we will remand this record for the Immigration Judge to make these determinations and to reconsider whether proceedings should be continued pending the adjudication of the respondent's U visa application.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal from the denial of his applications for withholding of removal, and protection under the Convention Against Torture is dismissed.

FURTHER ORDER: The Immigration Judge should address whether the respondent is entitled to humanitarian asylum under 8 C.F.R. § 1208.13(b)(1)(iii) because he will suffer "other serious harm" upon return to Mexico.

FURTHER ORDER: The record is remanded for additional further proceedings consistent with this order.

FOR THE BOARD