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

BENITEZ RECINO, JUAN JOSE
A201-176-938
ADELANTO DETENTION CENTER
10250 RANCHO ROAD
ADELANTO, CA 92301

DHS/ICE - Office of Chief Counsel
10400 Rancho Road
Adelanto, CA 92301

Name: BENITEZ RECINO, JUAN JOSE **A 201-176-938**

Date of this notice: 9/10/2013

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:
Kendall-Clark, Molly

schuckec
Userteam: Docket

File: A201 176 938 - Adelanto, CA Date: SEP 10 2013

In re: JUAN JOSE BENITEZ RECINO a.k.a. Juan Jose Benitez
a.k.a. Alejandro Servantes Aguilar a.k.a. Victor Antonio Montero Venitez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Franklin Yu
Assistant Chief Counsel

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 (sustained)

APPLICATION: Continuance

The respondent appeals from the Immigration Judge's April 8, 2013, decision holding him removable as charged and ordering him removed to El Salvador. Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1186(a)(6)(A)(i). We will dismiss the appeal.

We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge correctly held that the respondent is removable as charged based on his admission to the factual allegations in the Notice to Appear and his concession of removability as charged (I.J. at 2; Tr. at 17; Exh. 1). 8 C.F.R. § 1240.10(c). The respondent contends for the first time on appeal that he suffers from a mental disorder that *may have* rendered him mentally incompetent when he appeared before the Immigration Judge (Respondent's Brief at 3, 5 and Exh. A). 8 C.F.R. § 1240.10(c) (Immigration Judge may not accept admission of removability from mentally incompetent respondent).

The respondent's contention is without merit as he exhibited no indicia of mental incompetency at his April 8, 2013, hearing. *Matter of M-A-M-*, 25 I&N Dec. 474, 477 (BIA 2011) ("Absent indicia of mental incompetency, an Immigration Judge is under no obligation to analyze an alien's competency."). The record of the hearing reflects that the respondent fully understood the proceedings, actively inquired of the Immigration Judge as to his right to an attorney, and knowingly and intelligently decided to proceed without an attorney and plead to the allegations and charge in the NTA (Tr. at 6-17). The respondent was also able to designate the country of removal, and succinctly respond to the Immigration Judge's questions

regarding his eligibility for any relief from removal, including questions regarding his criminal record, without any apparent difficulty or confusion (Tr. at 18-21; I.J. at 2). The respondent was also able to decide, without any apparent difficulty or confusion, to reserve his right to appeal and to contact an attorney, and he acknowledged that he understood the process for filing his appeal and requested an additional copy of the appeal rights notice (Tr. at 16, 21-23). On this record, there is no indicia that the respondent was mentally incompetent at the April 8, 2013, hearing. *Matter of M-A-M-*, *supra*, at 479 (indicia of a respondent's mental incompetency may include the inability to understand and respond to questions or to stay on topic, or evidence of a "high level of distraction").

Furthermore, although not dispositive on the issue of mental incompetency, there is also no record evidence that the respondent has a mental disorder. *Matter of M-A-M-*, *supra*, at 480 ("a diagnosis of mental illness does not automatically equate to a lack of competency"). Although he contends in his appeal brief that he suffers from "great depression" due to a November 2012 assault, there is no record evidence to support his claimed depression (Respondent's Brief at 2 and Exhs. B, C). *Matter of M-A-M-*, *supra*, at 479-80 (indicia of a respondent's mental incompetency may include medical reports or assessments from medical health professionals, evidence of participation in programs for persons with mental illness, or affidavits or testimony from friends, family, or social workers and counselors).

Furthermore, the respondent did not raise this claimed medical condition to the attention of the Immigration Judge, and, as discussed above, the respondent exhibited no signs of mental incompetency at his April 8, 2013, hearing. Thus, even assuming for purposes of the argument that the respondent is depressed, there is no evidence that the depression rendered him mentally incompetent at his April 8, 2013, hearing. *Matter of M-A-M-*, *supra*, at 480 ("Mental competency is not a static condition. It varies in degree [ ] and over time").

The respondent's reliance on a May 22, 2013, letter from the American Civil Liberties Union ("ACLU") to the respondent does not advance his argument (Exhibit A to Respondent's Appeal Brief). The ACLU's conclusion that the respondent may be a member of the class in *Franco-Gonzales v. Holder*, CV 10-02211 DMG (C.D. Cal. 2011), is not supported by any record evidence, and instead refers to undefined "information" that the respondent apparently provided to the ACLU but did not submit for the record here (Exh. A to Respondent's Appeal Brief).

We have also reviewed the Department of Homeland Security's Notice of Possible Membership in *Franco-Gonzales* Class Action, which asserts that the respondent has been reported as suffering from post-traumatic stress disorder but further notes that he has not exhibited any indicia of incompetency. Nothing in the record before us reflects any evidence of post-traumatic stress disorder or mental incompetency on the part of the respondent.

In sum, there is no record evidence to support the respondent's claim, raised for the first time on appeal, that he was not mentally competent when he appeared at his April 8, 2013, hearing. The Immigration Judge correctly held that the respondent was removable as charged based on his factual admissions and legal concession (I.J. at 2; Tr. at 17; Exh. 1).

The respondent also contends that the Immigration Judge erred in failing to continue the case to allow the respondent time to consult with an attorney (Respondent's Brief at 4).

This argument is not supported by the record, which reflects that the Immigration Judge offered the respondent a continuance in order to allow him an opportunity to hire an attorney (Tr. at 12-13). The respondent asked the Immigration Judge several questions about his right to an attorney in an effort to measure the impact that proceeding without one would have on his case and any later effort to hire an attorney (*Id.*). The respondent then declined the offered continuance and unequivocally stated that he wanted to proceed with the April 8, 2013, hearing pro se (Tr. at 13, 16).

The respondent also requests, for the first time on appeal, a continuance to allow him to pursue a U nonimmigrant visa based on the circumstances of the November 2012 assault (Respondent's Brief at 2-4, 5 and Exhs. B, C). This argument was not raised below and is therefore waived on appeal. *Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007). Even if the argument were not waived, the respondent has not demonstrated prima facie eligibility for the U nonimmigrant visa, including any evidence that he statutorily qualifies for the visa or that he has submitted an application to the DHS (Respondent's Brief at 4 (noting that respondent is trying to contact the investigating authorities to provide information about the November 2012 assault)). Section 101(a)(15)(U)(i) of the Act, 8 U.S.C. § 1101(a)(15)(U)(i). Therefore, the respondent has not met the high standard necessary for a remand and he has not established good cause for a continuance. *Matter of Coelho*, 20 I&N Dec. 464, 471-72 (BIA 1992); *see also Matter of Sanchez Sosa*, 25 I&N Dec. 807, 812-16 (BIA 2012) (identifying factors relevant to determining 1) whether good cause exists to continue proceedings to await DHS adjudication of a pending U nonimmigrant visa; and 2) whether respondent has established prima facie eligibility for U nonimmigrant visa); 8 C.F.R. § 1003.29.

The respondent also argues on appeal that the Immigration Judge erred in failing to inquire about the respondent's family ties, which, according to the respondent, may help him establish legal residence (Respondent's Appeal Brief at 3). This argument is without merit. The hearing transcript reflects that the Immigration Judge considered all possible forms of relief available to the respondent, and correctly determined that the respondent's methamphetamine conviction renders him statutorily ineligible for either cancellation of removal or adjustment of status (Tr. at 18-21; I.J. at 2-3). Sections 240A(b)(1)(C), 245(i)(2)(A) of the Act, 8 U.S.C. §§ 1229b(b)(1)(C), 1255(i)(2)(A).

The respondent's argument that he should somehow benefit from the absence of any documentary proof of his methamphetamine conviction overlooks the fact that the respondent has the burden of proving his eligibility for relief (Respondent's Brief at 3). 8 C.F.R. § 1240.8(d). The Immigration Judge correctly relied on the respondent's testimony regarding his methamphetamine conviction to determine that he was not eligible for cancellation of removal or adjustment of status (I.J. at 2-3; Tr. at 19-20).

The Immigration Judge correctly held that the respondent is removable as charged and that he is not eligible for any relief from removal (I.J. at 2-3). The respondent has offered no arguments on appeal demonstrating that the Immigration Judge erred in his rulings.

For these reasons, we will dismiss the respondent's appeal.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA
VIA TELEVIDEO TO ADELANTO, CALIFORNIA

File: A201-176-938 April 8, 2013

In the Matter of

JUAN JOSE BENITEZ RECINO	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 212(a)(6)(A)(i) of the INA, as amended - present without admission or parole.

APPLICATIONS: None. Voluntary departure will also be considered in this decision.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: JONATHAN P. FOERSTEL
Immigration and Customs Enforcement
606 S. Olive Street, Eighth Floor
Los Angeles, California 90014

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

On April 1, 2013, the U.S. Department of Homeland Security filed a Notice to Appear against the above-named respondent. The filing of the Notice to Appear vested the jurisdiction with this Court. In the Notice to Appear, the Department of Homeland Security alleges the respondent is a citizen of El Salvador who entered the United States at an unknown place and that he was not admitted or paroled after inspection by

an Immigration officer.

Respondent appeared in Court on or about April 8, 2013, and admitted allegations 1 through 4 and conceded the present without admission or parole charge of removability and, based on the pleadings, I do find that respondent is removable from the United States by clear and convincing evidence. El Salvador was directed as the country of removal.

Respondent was questioned as to relief eligibility. Initially he said he was fearful of criminals in his country and the Court gave a detailed explanation as to asylum, withholding and protection under the Convention against Torture. Respondent stated that he did not wish to apply for these.

Respondent stated that he had been in Court in March on a drug charge, a methamphetamine charge, and that he was placed in a drug ~~got into the~~ program. And under current prevailing case law, that would constitute a conviction for Immigration purposes. So as he has been convicted of a methamphetamine offense, he is not eligible for adjustment of status and would not be even if he were to have an approved visa petition.

The methamphetamine conviction also renders him ineligible for cancellation of removal for nonpermanent resident. He is also ineligible for cancellation of removal for certain permanent residents because he is not a permanent resident.

He is not eligible for registry because there is no evidence that he entered the United States prior to the cut-off date and in fact he was not even born by that date, so it is impossible that he could qualify for registry. Also independently, he has a drug conviction which would render him ineligible for registry.

With regard to voluntary departure, he does not have the passport or the money to pay his way back to El Salvador and he had a drug conviction and, of course, the

drug conviction renders him basically ineligible to return. A methamphetamine conviction is a ground of inadmissibility that can not be waived, at least for an immigrant visa and, thus, he is ineligible for the rest of his life to come back as an immigrant. Also he does not have a passport and the money to pay his way back to El Salvador. Now the respondent is in detention. We cannot really wait for him to get the passport and the money back. So based on that, voluntary departure was denied in the exercise of discretion.

There are really no other forms of relief for which he is eligible to apply, but he does wish to reserve appeal and get an attorney and see what can be done.

Respondent was not granted a continuance because respondent is currently not eligible for any form of relief. Even if respondent gets an attorney later, based on the facts of this case as was examined by the Court today, he still would not be eligible for any relief.

So based on the foregoing, the following order will enter:

ORDER

RESPONDENT IS HEREBY ORDERED removed from the United States to El Salvador.

Please see the next page for electronic signature

DAVID BURKE
Immigration Judge

//s//

Immigration Judge DAVID BURKE

burked on May 29, 2013 at 9:14 PM GMT