U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: MARTINEZ HERNANDEZ, JUAN **A 200-778-895**

Date of this notice: 1/12/2015

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:
Creppy, Michael J.
Malphrus, Garry D.
Mullane, Hugh G.

Userteam: Docket

File: A200 778 895 – Chicago, Illinois

Date: JAN 12 2015

In re: JUAN MARTINEZ- HERNANDEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: George P. Katsivalis, Esquire

ON BEHALF OF DHS: Michelle M. Venci
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 (conceded)

APPLICATION: Continuance; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's June 18, 2013, decision denying his requests for: (1) a continuance to pursue a pending visa petition filed on his behalf by his United States citizen wife; and (2) his request for post-conclusion voluntary departure pursuant to section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b). The appeal will be sustained, and the record, remanded to the Immigration Judge for further proceedings.

We review findings of fact for clear error. *See* 8 C.F.R. § 1003.1(d)(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)(ii).

We agree with the respondent that the Immigration Judge erred in denying his request for voluntary departure pursuant to section 240B(b) of the Act because he declined to waive his appellate rights (I.J. at 3). While the Immigration Judge correctly observed that an alien must waive his right to appeal to seek pre-conclusion voluntary departure, there is no such requirement for post-conclusion voluntary departure. *See Matter of Ocampo-Ugalde,* 22 I&N Dec. 1301, 1302-04 (BIA 2000) (discussing the two forms of voluntary departure—pre-conclusion under section 240B(a) of the Act and post-conclusion under section 240B(b) of the Act); *see also* 8 C.F.R. §§ 240.26(b)(1)(i)(D), 1240.26(c), (g). Accordingly, we will remand these proceedings to the Immigration Judge to consider the respondent's eligibility for post-conclusion voluntary departure. The Immigration Judge may also consider any other issue on remand that he deems appropriate.

ORDER: The appeal is sustained.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CHICAGO, ILLINOIS

File: A200-778-895 June 18, 2013

In the Matter of

JUAN MARTINEZ HERNANDEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 212(a)(6)(A)(i), entry without inspection.

APPLICATIONS: For a continuance, administrative closure.

ON BEHALF OF RESPONDENT: GEORGE P. KATSIVALIS

ON BEHALF OF DHS: MICHELLE M. VENCI

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a married male, he is a native and citizen of Mexico. He was placed under proceedings when a Notice to Appear was personally served on him on August 5, 2011. At that time, he was placed in custody and he had a bond hearing. The Judge noted the charge against him, the Notice to Appear was served on the Immigration Court in Chicago on August 15, 2011.

Subsequently, the respondent appeared before the Court on December 4, 2012 with his lawyer. At that time, he pled to the allegations, admitting the allegations and charge. Based on the charge, the Court finds that there is clear, convincing and

unequivocal evidence the charge has been established by those admissions.

PROCEDURAL AND FACTUAL HISTORY

At the hearing on December 4, 2012, the respondent requested a continuance stating that he had been married recently, October 21, 2011, after the issuance of the Notice to Appear to a woman by the name of Carina Garcia-Mendoza. He claimed that she was a United States citizen and that he intended to file a visa petition, that is Ms. Garcia-Mendoza intended to file a visa petition in his behalf. The Court noted that since the respondent entered without inspection that he would not be eligible for adjustment even if a visa petition had been filed and approved. But the respondent insisted on a continuance and the Court agreed to one continuance of six months with the respondent's attorney stating that he would be seeking voluntary departure if he were not eligible for adjustment at the next hearing.

At this hearing, the respondent is again seeking a continuance. He claims that he needs the time to adjudicate a waiver request. The Court has stated that its not willing to agree to continue the case applying the criteria set forth in Matter of Hashmi, which is one that the relief to be considered, adjustment of status, is not a relief for which the respondent is eligible even if the case is continued for adjudication of the visa petition filed by his spouse because he did not enter the United States with inspection and consequently is not eligible for 245(a) adjustment nor is he eligible for 245(i) adjustment because the visa petition was only filed in 2013.

The DHS is not willing to agree to administratively close the case. The Court is not willing to apply its authority under Matter of Avetisyan, 2011 BIA decision, to administratively close the case on its own motion given its context which is that it has already been continued multiple times, that there has been pending proceedings against the respondent for approximately two years and given the recent date of the

marriage.

The respondent was offered the option of voluntary departure. This has been a first stage voluntary departure, he is not willing to waive appeal, so he is not requesting it. Accordingly, the only other relief to be considered in this case is that of an order of removal. Accordingly, the following order is entered.

ORDER

The respondent is ordered removed to Mexico on the charge contained in the Order to Show Cause.

CRAIG M. ZERBE
Immigration Judge