



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 20530

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Newtown, PA 18940**

**DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402**

Name: CHAU, PAU SOC

A 028-009-220

Date of this notice: 5/8/2015

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:
Guendelsberger, John

Userteam: Docket

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Falls Church, Virginia 20530

File: A028 009 220 – York, PA

Date:

MAY - 8 2015

In re: PAU SOC CHAU

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Johanna K. Dennis, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

APPLICATION: Remand

The respondent, who was previously granted lawful permanent resident status in the United States, has appealed from the Immigration Judge's decision dated January 14, 2015. The Immigration Judge found the respondent removable and found him ineligible for relief from removal based on his criminal conviction. The record will be remanded.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The Notice to Appear alleges that, on October 31, 2013, the respondent was convicted of Robbery – Threat of Immediate Physical Injury, in violation of Pennsylvania law, and sentenced to 11.5 months to 23 months in prison. A record of this conviction was entered into the record of proceedings (Exh. 2(C)). *See* section 240(c)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3)(B); 8 C.F.R. § 1003.41(a). In addition, the respondent admitted the conviction (Tr. at 6). *See* 8 C.F.R. §§ 1003.41(d), 1240.10(c). Based on this evidence, the Immigration Judge found the conviction proved (I.J. at 2; Tr. at 6-7). The respondent does not expressly challenge this finding on appeal.

The respondent was charged with being removable for having been convicted of an aggravated felony involving theft (Exh. 1). The Immigration Judge found the respondent removable as charged (I.J. at 2; Tr. at 7).¹ The respondent does not expressly challenge this finding on appeal.

¹ However, rather than finding it to be an aggravated felony involving theft, the Immigration Judge refers to the aggravated felony as a crime of violence. On remand, the Immigration Judge should clarify his finding of removal.

On appeal, the respondent indicates he was denied his right to counsel and received insufficient time to hire an attorney to represent him in removal proceedings.

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), 292 of the Act; 8 U.S.C. § 1229a(b)(4)(A), 1362. *See also* 8 C.F.R. §§ 1003.16(b), 1240.3, 1240.11(c)(1)(iii). Where the statutory and regulatory privilege of legal representation is not expressly waived, in order to meaningfully effectuate the privilege, the Immigration Judge must grant a reasonable and realistic amount of time and provide a fair opportunity for a respondent to seek, speak with, and retain counsel. *See Matter of C-B-*, 25 I&N Dec. 888, 889-890 (BIA 2012). *See also* sections 239(a)(1)(E) and 239(b)(1) of the Act, 8 U.S.C. §§ 1229(a)(1)(E), (b)(1).

We note that, on November 12, 2014, the Immigration Judge did advise the respondent of his rights concerning representation, provided him a list of free and low cost attorneys, and granted him two months to hire an attorney (Tr. at 2). Moreover, at the final hearing, the respondent said he wished to represent himself (Tr. at 4; I.J. at 1). Because (1) the respondent did not request additional time to seek, speak with, and retain counsel, and (2) the respondent advised the Immigration Judge that he wished to represent himself, the Immigration Judge concluded that the respondent waived his statutory and regulatory privilege of legal representation. *See Matter of C-B-*, *supra*. We agree that the statutory and regulatory privilege of legal representation was waived.

On appeal, the respondent also alleges that he was not advised of the immigration consequences of his conviction. While he is free to file a motion to vacate his criminal conviction before the criminal court pursuant to *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010),² such a motion does not justify a stay of the removal proceedings against the respondent. *See Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996). The post-conviction motion to vacate the conviction does not render the conviction non-final. *See Matter of Abreu*, 24 I&N Dec. 795, 802 n. 8 (BIA 2009); *Matter of Madrigal*, *supra*; *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992).

Finally on appeal, the respondent says the Immigration Judge erred in ordering him removed to Vietnam. At the hearing on January 15, 2015, the respondent admitted the allegation in the Notice to Appear that he is a native and citizen of Vietnam (Tr. at 6, 11). However, the Memorandum of Creation of Record of Lawful Permanent Residence in the record indicates that he was born in Thailand and is a citizen of Cambodia (Exh. 2(E) at 54). In light of that, we find it appropriate to remand the record to have the Department of Homeland Security make the

² In *Padilla v. Kentucky*, the Supreme Court held that the failure to advise a non-citizen criminal defendant that a plea could result in deportation constitutes ineffective assistance of counsel and violates the right to counsel. *See also Chaidez v. United States*, 568 U.S. ___, 133 S.Ct. 1103 (2013) (holding that *Padilla v. Kentucky*, *supra*, which requires defense counsel to advise a defendant about the risk of deportation arising from a guilty plea, does not apply retroactively).

appropriate amendment to the Notice to Appear, to have the Immigration Judge reconsider his factual findings concerning the respondent's country of nativity and country of citizenship, and to reconsider the country of removal.

Accordingly, the following order will be entered.

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



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File: A028-009-220

January 14, 2015

In the Matter of

PAU SOC CHAU

RESPONDENT

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)

IN REMOVAL PROCEEDINGS

CHARGES: Aggravated felony; crime of violence.

APPLICATIONS: None.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: JEFFREY T. BUBIER, SENIOR ATTORNEY

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 28-year-old single male alien, a native and citizen of Vietnam who was placed into removal proceedings by service of a Notice to Appear, form I-862, served in person on October 3, 2014, per the certificate of service. The respondent appeared before a prior Judge approximately two months ago. He postponed the case to seek an attorney. He was unable to do that. He was duly served with a pro bono list. He was given the correct list; the only list the Court maintains. The Court will note anecdotally that anyone serving prison terms, the pro bono organization on the list never, repeat, never provide assistance or respond favorably to inquiries from

indigent aliens. We proceeded today.

Respondent conceded the allegations on the Notice to Appear, allegations 1 through 5. Based thereon in the evidence of record, particularly tab C in Exhibit 2, which contains his conviction record for robbery, the Court deems this, per the elements of the offense, as a crime of violence as defined in INA Section 101(a)(43)(F).

Accordingly, based upon the foregoing, the following order is hereby entered:

ORDER

Respondent is hereby ordered removed from the United States to Vietnam.

WALTER A. DURLING
Immigration Judge

CERTIFICATE PAGE

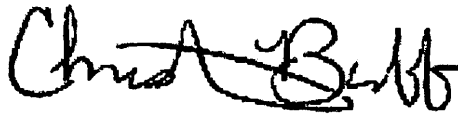
I hereby certify that the attached proceeding before JUDGE WALTER A.
DURLING, in the matter of:

PAU SOC CHAU

A028-009-220

YORK, PENNSYLVANIA

was held as herein appears, and that this is the original transcript thereof for the file of
the Executive Office for Immigration Review.



CHRISTINE BUBB (Transcriber)

DEPOSITION SERVICES, Inc.-2

February 24, 2015

(Completion Date)