U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: CHOI, YUN HO

A 099-870-596

Date of this notice: 2/18/2014

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:
Adkins-Blanch, Charles K.

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Userteam: Docket

File: A099 870 596 - Los Angeles, CA

Date: FEB 18 2014

In re: YUN HO CHOI

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Steve S. Chang, Esquire

APPLICATION: Continuance; remand

The respondent, a native and citizen of South Korea, appeals the decision of the Immigration Judge, dated December 10, 2012, denying his motion for a continuance and ordering his removal from the United States. The respondent has also filed a motion to remand.

Considering the totality of the circumstances, we will grant the respondent's motion to remand. *See generally Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002). The respondent has moved for remand in order to seek adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). He has presented evidence that he is the beneficiary of a pending immigrant visa petition filed by his United States citizen daughter and an Application to Register Permanent Residence or Adjust Status (Form I-485). The Department of Homeland Security has not replied to the respondent's motion. Accordingly, the following order is entered.

ORDER: The respondent's motion to remand is granted and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing 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
LOS ANGELES, CALIFORNIA

File: A099-870-596 December 10, 2012

In the Matter of

YUN HO CHOI	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: INA Section 237(a)(1)(B).

APPLICATIONS: Motion to continue.

ON BEHALF OF RESPONDENT: STEVE S. CHANG

ON BEHALF OF DHS: ADAM PERL

ORAL DECISION OF THE IMMIGRATION JUDGE

Removal proceedings were commenced in this case by the filing, on July 7, 2008, of a Notice to Appear, dated June 27, 2008. See Exhibit 1. At a master calendar hearing on May 4, 2009, the respondent denied all the factual allegations set forth in the Notice to Appear and denied deportability.

Factual allegation 2 in the Notice to Appear initially alleged that the respondent is a native of Korea and a citizen

of Korea. At a hearing on December 10, 2012, the Department of Homeland Security orally amended that factual allegation to read that the respondent is a native of South Korea and a citizen of South Korea. The respondent continued to deny factual allegation number 2 as amended, continued to deny all the factual allegations set forth in the Notice to Appear, and continued to deny deportability as charged.

At a hearing on November 23, 2009, the prior Immigration Judge sustained the factual allegations and sustained the charge of deportability.

Separate and apart from the finding of the prior Immigration Judge, the Court concludes that the Department of Homeland Security has satisfied its burden of proving deportability by clear and convincing evidence that is unequivocal. Exhibit 2 is an application for adjustment of status. It establishes the respondent's alienage. It establishes that the respondent was admitted to the United States in or about September 1994 with a temporary non-immigrant status. The Court finds that a review of Exhibit 2 discloses that the respondent is an alien, ~~and~~ admitted to the United States, who is present in violation of law. The charge of deportability is sustained.

The respondent in this case has submitted no applications for relief. Proceedings have been pending since the filing of the Notice to Appear in July 2008. At a hearing

on December 10, 2012, the respondent explicitly advised the Court that he does not wish to seek voluntary departure as a remedy. As such, the Court is left with a deportable respondent who has made no applications for relief from removal.

At a hearing on December 10, 2012, the respondent moved to continue proceedings. Consistent with its obligation to properly evaluate the motion to continue, the Court asked the respondent's counsel to articulate the basis for the motion to continue. In response, among other things, respondent, through his attorney, explained that he has been in the United States for 18 years. He explained that he has two lawful permanent resident children. He indicated that one of these children may be eligible to naturalize beginning in or about May 2013, and speculates that this may provide him with a basis to regularize his status at some uncertain point in the future.

An Immigration Judge may grant a motion for a continuance for good cause shown. See 8 C.F.R. Section 1003.29. Immigration Judges have broad discretionary authority over continuances. However, this discretion is not without limits.

This case arises under the jurisdiction of the Ninth Circuit Court of Appeals. In evaluating whether a denial of a continuance constitutes an abuse of discretion, the Ninth Circuit considers, among other things, the following factors: (1) the nature of any evidence excluded as a result of the denial of the continuance; (2) the reasonableness of the alien's

conduct; (3) the inconvenience to the Court; and (4) the number of continuances previously granted. See Ahmed v. Holder, 569 F.3d 1009 (9th Cir. 2009). Administrative efficiency alone cannot justify the denial of a continuance. Id. at 1014.

In this case, the respondent speculates that one day he may be eligible to regularize his status based upon the possibility that a child may one day naturalize. As explained by the respondent's attorney at a hearing on November 9, 2012, and as reconfirmed at the hearing on December 10, 2012, a naturalization application filed by this same child already has been denied. Still, the respondent's attorney advises that he believes the child may become eligible for naturalization, notwithstanding the prior denial, sometime in or about May 2013.

The Court first considers the nature of any evidence excluded as a result of the denial of a continuance. See Ahmed, supra. There does not appear to be any currently available evidence that would be excluded as a result of a denial of a continuance. The respondent has not submitted any evidence in this case concerning the basis for the proposed continuance. The respondent has not submitted any evidence in this case concerning the prospects of naturalization relating to the lawful permanent resident child. To the extent that any evidence ultimately would be excluded, it would appear to be related to the speculative future possibility that the respondent one day may be eligible to regularize his status.

The Court next considers the reasonableness of the respondent's conduct, see Ahmed, supra. The Court does not believe that the respondent has behaved unreasonably in this case. Nonetheless, the Court also considers that the respondent has not submitted any application for relief to the Court over which the Court has jurisdiction. Nor is there any evidence that the respondent has any application currently pending before any other agency that might lead to his eligibility to regularize his status. Again, in seeking a continuance, the respondent cites merely the speculative possibility that his child one day may pursue naturalization, may succeed on that naturalization application, and may serve as a predicate for the respondent to regularize his status.

The Court next considers the inconvenience to the Court caused by a continuance, see Ahmed, supra. The Court is not particularly concerned with any inconvenience to the Court. The Court does not find that it would be inconvenienced in any significant manner by a continuance. This is not a factor that militates against a continuance. The Court recognizes, nonetheless, that the Department of Homeland Security has a legitimate interest in prosecuting immigration cases of aliens who are illegally in the United States.

The Court next considers the number of continuances previously granted, see Ahmed, supra. As noted, this case has been pending before the Immigration Court since the Notice to

Appear was filed on July 7, 2008. It has been pending in the neighborhood of four and one half years. A hearing was conducted on May 4, 2009. A hearing was conducted on November 23, 2009. A hearing was conducted on September 27, 2010. A hearing was conducted on September 2, 2011. A hearing was conducted on November 9, 2012. All of these hearings predated the hearing at which the Immigration Court has considered the motion to continue filed by the respondent on December 10, 2012. To be sure, not every continuance is chargeable to the respondent in this case. Nonetheless, thea number of hearings that have occurred since the inception of the case under circumstances in which the respondent has never submitted an application for relief or protection before this Court is a factor that the Court considers in assessing the motion to continue.

Having considered all the factors articulated by the Ninth Circuit in the Ahmed case, the Court concludes that these factors overwhelmingly militate against granting the motion to continue in this case. The respondent has not demonstrated good cause for a continuance. His motion to continue is predicated entirely upon the speculative hope that he one day may be able to regularize his status as a consequence of events that are not fully under his control. The motion to continue does not present good cause for a continuance. The motion is denied.

The Court notes that on November 9, 2012, the

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Department of Homeland Security indicated that it was not exercising prosecutorial discretion in this applicant's favor. The Court has no jurisdiction over prosecutorial discretion determinations made by the Department of Homeland Security. It has long been recognized that the executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case. See, e.g., Heckler v. Chaney, 470 U.S. 821, 831 (1985). Judicial supervision ~~exception~~ of such decisions is sharply limited by the separation of powers and is guided by the recognition that the decision to prosecute is particularly ill suited to judicial review. See Wayte v. United States, 470 U.S. 598, 607 (1985). As applied to administrative removal proceedings, the Department of Homeland Security has discretion concerning whether to place an alien into proceedings and what charges to file. See Matter of E-R-M- and L-R-M-, 25 I&N Dec. 520, 521~~-through~~-23 (BIA 2011).

Insofar as prosecutorial discretion determinations in a removal context fall within the exclusive authority of the Department of Homeland Security, the Court expresses no position concerning the Department's determination in this case and finds that it has no authority to review the determination of the Department of Homeland Security. Inasmuch as the Department already had declined to exercise prosecutorial discretion on this applicant's behalf, such a determination does not present a basis that militates in favor of the continuance request in this

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case.

Insofar as the motion to continue is denied, and insofar as the respondent has not submitted any applications for relief or protection to ~~in~~ this court, and insofar as the respondent has expressly disclaimed any application for voluntary departure, the Court is left with no choice, regrettably, but to order the respondent's removal from the United States to South Korea on the charge contained in the Notice to Appear. The Court notes that at a hearing on December 10, 2012, the respondent designated South Korea as the country for removal in the event that removal became necessary. The Court recognizes this designation in its order.

ORDER

For all the foregoing reasons, IT IS HEREBY ORDERED that the respondent's motion to continue is denied.

IT IS HEREBY FURTHER ORDERED that the respondent shall be removed from the United States to South Korea on the charge contained in the Notice to Appear.

Dated: December 10, 2012.

Please see the next page for electronic signature
PHILIP J. COSTA
Immigration Judge

//s//

Immigration Judge PHILIP J. COSTA

costap on March 4, 2013 at 6:38 PM GMT