U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: DE LA CRUZ, JUAN

A 216-021-003

Date of this notice: 3/25/2019

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:
Wendtland, Linda S.
Greer, Anne J.
Donovan, Teresa L.

Humphry
Userteam: Docket

File: A216-021-003 – Atlanta, GA Date: MAR 25 2019

In re: Juan DE LA CRUZ a.k.a. Juan Rodriguez-Gutierrez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Natasha V. Snow, Esquire

APPLICATION: Cancellation of removal; continuance

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's January 9, 2018, decision denying his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2012). The appeal will be dismissed, in part, and the record will be remanded as set forth below.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent conceded removability as charged (IJ at 1; Tr. at 6). The respondent sought cancellation of removal for non-permanent residents under section 240A(b) of the Act (IJ at 2). During his individual hearing, the respondent filed a motion to continue based on a pending U visa application (Tr. at 15; Motion to Continue at 2).[1] The Immigration Judge denied the respondent's motion to continue and his application for cancellation of removal (IJ at 10; Order Denying Motion to Continue at 4). The respondent now appeals.

We affirm the Immigration Judge's determination that the respondent did not demonstrate exceptional and extremely unusual hardship to his qualifying relatives (IJ at 7-9). *See* section 240A(b)(1)(D) of the Act; *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *cf. Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *see also* 8 C.F.R. § 1240.8(d). In support of his conclusion, the Immigration Judge noted that the respondent had testified that his two United States citizen children were both in good health and were performing well at school (IJ at 7; Tr. at 32-34). The Immigration Judge also found that the respondent's children would not incur "decreased educational or health opportunities" in the event of the respondent's removal to Guatemala because the respondent had testified that his children would remain in the United States with their mother (IJ at 3, 7-8; Tr. at 43-44). The Immigration Judge further noted that the children's living situation would remain stable because the house they

[1] The respondent's wife was the victim of a carjacking at gunpoint a few months prior to the commencement of this proceeding (Motion to Continue at 64). She subsequently filed an I-918 (Petition for U Nonimmigrant Status) on her own behalf and an I-918, Supplement A (Petition for Qualifying Family Member of U-1 Recipient) for the respondent (Motion to Continue at 12, 28).

lived in had been purchased by the respondent and was free from debt (IJ at 7-8; Tr. at 35-36). Although the Immigration Judge acknowledged that the respondent's removal would cause some emotional hardship, he concluded that it was the type of hardship "that would [normally] be expected any time a close family member" was removed from the United States, which was "insufficient to establish 'exceptional and extremely unusual hardship'" to the respondent's children (IJ at 8). *Matter of Recinas*, 23 I&N Dec. at 468.[2] We agree with the Immigration Judge's rulings, which are supported by the record and by pertinent case law.

Turning to the respondent's arguments on appeal, the respondent first claims that he was denied due process because he was not allowed to present the testimony of three individuals from his witness list (Respondent's Br. at 4-5). For the respondent to establish a due process violation, he must have been prejudiced by the procedural defect. *See Tang v U.S. Att'y Gen.*, 578 F.3d 1270, 1276 (11th Cir. 2009); *Matter of Santos*, 19 I&N Dec. 105, 107 (BIA 1984). Here, no such prejudice is apparent. The individuals named on the witness list correspond in part with the individuals who submitted letters on the respondent's behalf, attesting to his good character and the duration of his residence in the United States, with only brief references to potential hardship if he is removed (Respondent's Additional Supplemental Evidence, Exh 4, Tab K, Exh 2, Tab C at 6-7, 10). Although the Immigration Judge did not allow the witnesses to testify at the hearing, he admitted their letters into the record and – after stating that he considered all of the evidence and testimony presented – found that the respondent was of good moral character and had met the requisite continuous physical presence for cancellation of removal (IJ at 2, 6). As such, the testimony of the witnesses would not have likely changed the outcome of the Immigration Judge's decision. Therefore, the respondent has not established that he was prejudiced by the Immigration Judge's denial of his three witnesses.

Finally, with respect to the denial of the respondent's motion for a continuance due to a pending U visa, we conclude that remand of the record is warranted. As argued by the respondent on appeal, the Immigration Judge denied the respondent's application by asserting that a "U visa is not [a form of] relief before the Court" (IJ at 4; Tr. at 54). Although USCIS 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. 807, 810-12 (BIA 2012) (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.

In Matter of L-A-B-R- et al., 27 I&N Dec. 405, 406 (A.G. 2018), the Attorney General provided instruction as to "the proper application of the good-cause standard to a motion for [a] continuance

[2] On appeal, the respondent also asserts that the Immigration Judge erred in denying the respondent's application for cancellation as a matter of discretion (IJ at 9-10; Respondent's Br. at 5-7). In light of our affirmance of the Immigration Judge's determination that the respondent did not establish that he was eligible for cancellation of removal for failure to establish the requisite exceptional and extremely unusual hardship to a qualifying relative, we need not reach his alternative discretionary finding on appeal or address the respondent's corresponding appellate arguments (Respondent's Br. at 5-7).

to accommodate collateral proceedings." The Attorney General directed 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." *Matter of L-A-B-R- et al.*, 27 I&N Dec. at 419. Here, in making his decision, the Immigration Judge did not make sufficient findings of fact for us to address this issue in the first instance, as the Immigration Judge did not assess the likelihood that the collateral relief would be granted. *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002) (holding that the Board has limited fact-finding ability on appeal). We therefore conclude that remand is appropriate for the sole purpose of allowing the Immigration Judge to consider whether a further continuance is warranted in this case, under the guidance provided in *Matter of Sanchez Sosa* and *Matter of L-A-B-R- et al.*, including engaging in additional fact finding regarding the respondent's prima facie eligibility for a U visa.

Accordingly, the following orders will be entered.

ORDER: The appeal from the Immigration Judge's denial of cancellation of removal is dismissed.

FURTHER ORDER: The record is remanded to the Immigration Judge for the limited purpose of considering whether a continuance is warranted and for the entry of a new decision.

FOR THE BOARD