Files: (b) (6)

Date: OCT 15 2009

In re: (b) (6)

IN ASYLUM PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANTS: Douglas Grannan, Esquire

This case was last before the Board on May 30, 2007, when we dismissed the applicants' appeal of the Immigration Judge's November 22, 2005, decision denying the lead applicant's application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3). This case is now before the Board pursuant to a remand from the United States Court of Appeals for the (b) (6) dated (b) (6) The appeal will be dismissed.

The (b) (6) has remanded this case to the Board for consideration of the applicant's appellate contention that the Immigration Judge erred in not granting his request for a continuance.[1] Specifically, the applicant raised this argument in his Notice of Appeal but did not address the argument further in his appellate brief and the Board did not address the argument in our May 30, 2007, decision. Through his Notice of Appeal, the applicant contends that the Immigration Judge erred in not granting his request for a continuance where his previous attorney withdrew prior to his individual hearing because his new counsel was "not able to assist him in preparing his claim." *See* Applicant's Notice of Appeal. The applicant does not elaborate further on his contention.

An Immigration Judge, in his discretion, may grant a motion for continuance for good cause shown. 8 C.F.R. § 1003.29 (2009); *Matter of Silva-Rodriguez*, 20 I&N Dec. 448, 450 (BIA 1992). In determining whether an alien has demonstrated "good cause," an Immigration Judge has broad discretionary authority. *See Matter of Perez-Andrade*, 19 I&N Dec. 433, 434 (BIA 1987). Indeed, we have held that "an Immigration Judge's decision denying [a] motion for continuance will not be reversed unless the alien establishes that [the] denial caused him actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*,18 I&N Dec. 354, 356 (BIA 1983); *see also Hashimi v. Attorney General*, 531 F.3d 256 (3d Cir. 2008) (prejudice found when continuance denied solely based on case-completion goals where alien established potential eligibility for relief in future and the denial of opportunity to seek the relief during proceedings).

[1] All references to the applicant refer solely to the lead applicant unless otherwise specified.

Here, the applicant has failed to articulate how the denial of his request for a continuance caused him actual prejudice and harm and/or materially affected the outcome of his application and we cannot speculate as to the meaning of the applicant's broad statement that new counsel was "not able to assist him in preparing his claim." *See* Applicant's Notice of Appeal. The record reflects that the applicant's prior counsel was granted his request to withdraw, filed several days earlier, during the November 2005 merits hearing based upon "ethical" issues and that new counsel, who had already been retained, was present in the courtroom at that time (Tr. at 10-17). According to the record, the applicant's new counsel expressed concerns regarding the potential consequences to the applicant in moving forward with the asylum application and was granted time to consult with the applicant in this regard (Tr. at 26-32). The applicant's new counsel did not raise any issues as to his preparedness to proceed at that time.

In denying the request for a continuance, the Immigration Judge primarily based his decision on the fact that the applicant's application was filed in 2002 and his proceedings were previously continued for over 3 years, from September 2002 until November 2005 (Tr. at 10-17). *Cf. Hashimi v. Attorney General, supra* (denial of a continuance based solely on case-completion goals rather than the facts and circumstances of the particular case is an abuse of discretion). Further, the record establishes that the applicant was given ample opportunity to present his claim for relief during his 2005 merits hearing (Tr. at 32-96). *See id.* (prejudice shown where alien denied opportunity to pursue relief). Ultimately, the Immigration Judge denied the application based upon his adverse credibility determination and the applicant has failed to establish how the outcome would have been different had he been granted a continuance. Under these circumstances, we cannot find that the Immigration Judge erred in denying the continuance.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

Files: (b) (6)

Date: APR 30 2010

In re: (b) (6)

IN ASYLUM PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF APPLICANTS: Douglas Grannan, Esquire

This case was last before the Board on October 15, 2009, when we dismissed the applicants' appeal of the denial of their request for a continuance in accordance with the (b) (6) remand from the United States Court of Appeals for the (b) (6) where this case arises.[1] The applicant has now filed a motion to reopen. The motion will be granted *sua sponte*. The appeal will be dismissed.

Through his motion to reopen, the applicant has presented evidence indicating that he filed a brief with the Board on March 25, 2009, shortly after the (b) (6) remanded the case. The brief was not contained in the record at the time we adjudicated the (b) (6) remand and was therefore not considered. In our decision, we specifically noted the applicant's failure to expand on his appellate argument regarding the denial of his request for a continuance which was raised only in his Notice of Appeal. As a result, we find it necessary to grant the applicant's motion to reopen *sua sponte* to consider his arguments. *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (Board's discretion to reopen *sua sponte* is an extraordinary remedy used in exceptional circumstances).

Through his brief, the applicant contends that the Immigration Judge's denial of his request for a continuance after withdrawal of prior counsel caused him prejudice. *See* Applicant's Brief at 1-6. Specifically, the applicant contends that the record establishes failure to properly prepare his case by all 3 of his former attorneys such that he was deprived of a fair hearing. *See id.* at 1-2. The applicant further alleges that the "quality" of his testimony, which resulted in an adverse credibility determination, was the result of his counsels' lack of preparation. *See id.* at 2 and 5-6. In addition, the applicant asserts that the Immigration Judge failed to provide any legal or factual bases in his denial and further contends that the Immigration Judge was pressured into denying the continuance due to the retirement of another Immigration Judge which caused a backlog in the docket. *See id.* at 4.

[1] Any further references to the applicant refer solely to the lead applicant unless otherwise specified.

Despite the applicant's contentions, we find that the Immigration Judge's decision denying his request for a continuance is supported by the record (Tr. at 10-17). *See* 8 C.F.R. § 1003.1(d) (2009) (*de novo* review); *see also Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983) ("an Immigration Judge's decision denying [a] motion for continuance will not be reversed unless the alien establishes that [the] denial caused him actual prejudice and harm and materially affected the outcome of his case"). In this regard, we find the applicant's assertion that the Immigration Judge was influenced by the retirement of another Immigration Judge, and the effect this may have had on the docket, to be purely speculative with no basis in fact. *See* Applicant's Brief at 4. Moreover, the Immigration Judge provided his factual and/or legal bases in denying the motion for a continuance by citing to the fact that the applicant had been granted several prior continuances to prepare (Tr. at 10-17).

In addition, as noted in our prior decision, the record establishes that the applicant was given ample opportunity to present his claim for relief during his 2005 merits hearing (Tr. at 32-96). *See Ponce-Levia v. Ashcroft*, 331 F.3d 369 (3d Cir. 2003) (finding no prejudice where Immigration Judge denied continuance and proceeded without counsel present where alien failed to show that Immigration Judge did not give him opportunity to fully present his case). The applicant has not cited to any specific evidence in the record supporting his assertion that all 3 of his former attorneys failed to properly prepare his case resulting in the denial of a fair hearing nor has he made a claim of ineffective assistance of counsel against any former attorney. *See* Applicant's Brief at 1-2; *see also Matter of Sibrun*, *supra* (motion for a continuance for additional preparation must be supported by reasonable showing that lack of preparation occurred despite diligent good faith effort to proceed and alien must establish prejudice to prevail on appeal). In this regard, we note that the November 22, 2005, hearing was the first individual hearing and the only hearing in which the applicant provided testimony and evidence. Under these circumstances, the applicant's contention that the discrepancies in his testimony resulting in the adverse credibility determination were the result of his prior attorneys' failure to prepare is without merit nor has he cited to any specific portions of his testimony that would have been different had he been granted a continuance. Therefore, the applicant has failed to establish that the denial of his request for a continuance resulted in prejudice. *See id.*

Accordingly, the motion to reopen will be granted and the appeal will be dismissed.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The appeal is dismissed.

FOR THE BOARD