

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [REDACTED] - Baltimore, MD

Date:

JUL 21 2010

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Feroli, Esquire

ON BEHALF OF DHS: Roger K. Picker
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture; continuance

The respondent, a native and citizen of Indonesia, appeals from the decision of the Immigration Judge dated August 19, 2008, denying his motion to continue. The Immigration Judge granted voluntary departure. Section 240B of the Immigration and Nationality Act, 8 U.S.C. § 1229c. The Department of Homeland Security has filed a motion for summary affirmance, which is denied. The record will be remanded.

We review the findings of fact made by the Immigration Judge under a "clearly erroneous" standard and all other issues, including whether the parties have met the relevant burden of proof, under a de novo standard. 8 C.F.R. § 1003.1(d)(3); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The respondent challenges on appeal the Immigration Judge's denial of his request to reinstate his asylum application.¹ The Immigration Judge's decision does not address this issue, and the record of proceedings reflects only that the prior Immigration Judge indicated that she would not consider a previously-withdrawn asylum application and would consider a subsequently-filed asylum application only if it were based on "new and different facts" (Tr. at 15-16).

In the absence of any explanation in the record or in her decision, we cannot evaluate the current Immigration Judge's denial of the respondent's request to reinstate his asylum application.

¹ The respondent withdrew his timely-filed asylum application when it appeared he would be eligible for adjustment of status based on an approved immediate relative petition. Section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B). When the petitioner withdrew the petition, the respondent requested that the Immigration Judge permit him to reinstate his asylum application.

The record does not reflect that the Immigration Judge considered the reasons for or circumstances surrounding the respondent's request for reinstatement. Rather, it appears that the Immigration Judge concluded that an asylum application cannot be reinstated once it is withdrawn regardless of the circumstances.

We conclude that such a rule is overly rigid and that an Immigration Judge has discretion regarding whether to reinstate a previously-withdrawn asylum application. *See generally Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865 (9th Cir. 2003) (analogizing a motion to reinstate a previously-withdrawn asylum application to a motion to reopen and concluding that an asylum application may be reinstated under some circumstances if prima facie eligibility for asylum is established). We likewise conclude that a reinstated asylum application need not be based on new facts. *Cf.* section 208(a)(2)(D) of the Act, 8 U.S.C. § 1158(a)(2)(D) (providing that changed circumstances must be shown for consideration of an asylum application when a previous asylum application has been denied).

For these reasons, we will remand the record to the Immigration Judge for consideration of the respondent's request to reinstate his asylum application.

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



FOR THE BOARD

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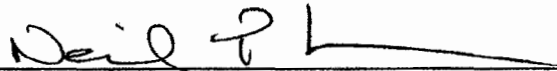
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CONCURRING OPINION: Neil P. Miller, Board Member

I respectfully concur in the majority's decision to remand this record for further proceedings but would at this point under the circumstances presented direct that the respondents asylum application be considered by the Immigration Judge on the merits.



Neil P. Miller
Board Member