06-1537-ag

To be Argued By:
DOUGLAS P. MORABITO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-1537-ag

ILIAS DOAS,
Petitioner,

-vs-

ALBERTO R. GONZALES, ATTORNEY GENERAL
Respondent.

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

==

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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2004), to review Petitioner's challenge to the Board of Immigration Appeals' January 27, 2006, final order upholding the Immigration Judge's decision finding him removable from the United States. Petitioner filed a timely petition for review on February 27, 2006 in the United States Court of Appeals for the First Circuit. On March 31, 2006, that court transferred the petition to this Court under 28 U.S.C. § 1631.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Immigration Judge acted within his discretion in denying Petitioner's motion for an indefinite continuance where Petitioner had conceded that he was removable, where Petitioner was not eligible for any form of relief from removal, and where Petitioner's eligibility for adjustment of status was merely speculative.

2. Whether the Immigration Judge acted within his discretion in denying Petitioner's motion for change of venue where Petitioner was not eligible for any form of relief from removal and where Petitioner was not prejudiced by the denial.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-1537-ag

ILIAS DOAS,

Petitioner,

-vs-

ALBERTO R. GONZALES, Attorney General,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO R. GONZALES
Attorney General of the United States

Preliminary Statement

Ilias Doas ("Petitioner"), a native and citizen of Greece, petitions this Court for review of a Board of Immigration Appeals ("BIA") decision dated January 27, 2006. The BIA adopted and affirmed an Immigration Judge's ("IJ") decision ordering Petitioner removed from the United States and denying his motion for a continuance and his motion for a change of venue. The IJ denied Petitioner's motions because without an approved labor certification,

he was not eligible for an I-140 petition or adjustment of status under 8 U.S.C. § 1255(i), the only form of relief from removal he was requesting.

In this Court, Petitioner seeks a remand to the Immigration Court so that at some point in the future he may apply for adjustment of status. The petition should be denied because the IJ acted well within his discretion to deny Petitioner's motion for an indefinite continuance and his motion for a change of venue.

Statement of the Case

Petitioner was placed into removal proceedings through the issuance of a Notice to Appear on August 11, 2004. On October 14, 2004, an IJ found Petitioner removable to Greece because he entered the United States without being admitted or paroled. The IJ denied Petitioner's motion for an indefinite continuance and for a change of venue because he was not eligible for an I-140 petition or adjustment of status under 8 U.S.C. § 1255(i). Certified Administrative Record ("CAR") 55-60.

On January 27, 2006, the BIA dismissed Petitioner's appeal from the IJ's decision. The BIA adopted and affirmed the IJ's decision, concluding that the IJ had properly denied Petitioner's motion for a continuance and his motion for a change of venue.

On February 27, 2006, Petitioner filed a petition for review of the BIA's decision in the United States Court of Appeals for the First Circuit. On March 31, 2006, that

court transferred the petition for review to this Court under 28 U.S.C. § 1631.

STATEMENT OF FACTS

A. Petitioner's Entry into the United States

Petitioner is a native and citizen of Greece. At a time and place unknown to the government, he entered the United States without inspection. CAR 94.

B. Removal Proceedings

On August 11, 2004, Petitioner was served with a Notice to Appear ("NTA") which charged him with not being a citizen or national of the United States but a native and citizen of Greece, and for being subject to removal from the United States. According to the NTA, Petitioner was removable under § 212(a)(6)(A)(i) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. The NTA directed him to appear before an IJ in Hartford, Connecticut, on September 23, 2004. CAR 94.

Prior to Petitioner's appearance before the IJ, he filed a motion for change of venue. The IJ denied that motion on September 20, 2004, but provided that Petitioner's counsel could appear telephonically. CAR 84. Because Petitioner's counsel was unavailable at the scheduled time, the case was rescheduled for October 14, 2004. CAR 73-74.

During the October 14, 2004, hearing, Petitioner conceded removability and renewed his request for a change of venue. In addition, Petitioner asked for a continuance to allow him time to obtain approval of his labor certification. CAR 63-65. Through counsel, Petitioner confirmed that the only relief he was seeking was an adjustment of status under 8 U.S.C. § 1255(i). CAR 63-64.

At the conclusion of the hearing, the IJ denied Petitioner's motions and ordered him removed to Greece. The IJ refused to continue proceedings because Petitioner was ineligible for any relief from removal, and the potential for an adjustment of status under 8 U.S.C. § 1255(i) was "far too tenuous" to justify a continuance. CAR 58. The IJ denied Petitioner's motion to change venue because Petitioner "is not eligible for any relief[] and seeks essentially no relief." CAR 59. With no relief available to Petitioner, the IJ ordered him removed to Greece. CAR 59.

Petitioner appealed to the BIA, and on January 27, 2006, the BIA dismissed his appeal in an order adopting and affirming the IJ's decision. CAR 2. According to the BIA, the IJ properly denied the motion for continuance because the IJ "and this Board are not imbued with authority to grant open-ended, indefinite continuances in such circumstances." Similarly with respect to the motion for a change of venue, the BIA found no error in the denial of the motion. CAR 2.

Petitioner filed a timely petition for review challenging the BIA's decision in the United States Court of Appeals

for the First Circuit on February 27, 2006. The First Circuit transferred the petition for review to this Court under 28 U.S.C. § 1631 on March 31, 2006.

SUMMARY OF ARGUMENT

This Court should deny Petitioner's petition for review because the IJ acted well within his broad discretion in denying Petitioner's request for an indefinite continuance. An immigration judge *may* grant a continuance only for "good cause" shown. Here, Petitioner had conceded that he was removable and requested an indefinite continuance in the hope that he *might* in the future become eligible for an employment-based adjustment of status. As the IJ reasonably found, Petitioner's future eligibility for adjustment was merely speculative. Thus, the IJ's refusal to continue the case to allow Petitioner additional time to apply for relief that he was not eligible for was not an abuse of discretion. Under these circumstances, the IJ reasonably denied Petitioner's request for an indefinite continuance, and the petition for review should be denied.

The IJ also properly denied Petitioner's motion for a change of venue. Because Petitioner was ineligible for any relief from removal, there was no need to transfer the case to another immigration court. In any event, Petitioner has shown no prejudice from the denial of his motion for change of venue.

ARGUMENT

I. THE IJ ACTED WELL WITHIN HIS DISCRETION IN DENYING PETITIONER'S REQUEST FOR AN INDEFINITE CONTINUANCE

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. Motion for Continuance

The regulations governing the procedures in immigration court provide that "[t]he Immigration Judge *may* grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29 (emphasis added). *See also* 8 C.F.R. § 1240.6 ("After the commencement of the hearing, the immigration judge *may* grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.") (emphasis added). In reviewing discretionary decisions under this regulation, this Court affords substantial deference to the IJ to manage his calendar. *See Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir. 2006) ("IJs are accorded wide latitude in calendar management, and we will not micromanage their scheduling decisions any more than when we review such decisions by district judges."); *Zafar v. U.S. Attorney General*, 461 F.3d 1357,

1362 (11th Cir. 2006) ("The grant of a continuance is within the IJs' broad discretion.").

In reviewing decisions applying this "good cause" standard, courts have repeatedly held that an IJ does not abuse his discretion to deny a motion for continuance based on the speculative claim that at some point in the future the applicant *might* become eligible for adjustment of status. *See Morgan*, 445 F.3d at 552 (upholding denial of motion for continuance where "[a]t the time of the hearing, [the petitioner] was not eligible for adjustment of status, and he had no right to yet another delay in the proceedings so that he could attempt to become eligible"); *Zafar*, 461 F.3d at 1362-67 (upholding denial of motions for continuance where, at time of denials, petitioners had labor certifications pending but had not filed I-140 petitions or I-485 applications for adjustment of status); *Khan v. Attorney General of the United States*, 448 F.3d 226, 233-35 (3rd Cir. 2006) (same); *Ahmed v. Gonzales*, 447 F.3d 433, 437-39 (5th Cir. 2006) (same); *but see Subhan v. Ashcroft*, 383 F.3d 591, 593-94 (7th Cir. 2004) (reversing denial of continuance for alien with merely labor certification pending because IJ failed to offer any reason for the denial).

In other words, an alien's attempt extend his unlawful presence in the United States, in the hope of later becoming eligible for adjustment of status, does not generally constitute "good cause" for a continuance. *See Sanusi v. Gonzales*, 445 F.3d 193, 200 (2d Cir. 2006) (dismissing petition for review where "IJ granted two continuances, and nothing in the record suggests that his

decision to deny a third request after months of delay was an abuse of discretion"); *In re Quintero*, 18 I.&N. Dec. 348, 350 (BIA 1982) ("[T]he [IJ's] refusal to continue the hearing until a visa number was available was proper because he may neither terminate nor indefinitely adjourn the proceedings in order to delay an alien's deportation."); *Bowes v. District Director*, 443 F.2d 30 (9th Cir. 1971) ("The pendency of an application for immigration status . . . does not entitle an alien to a delay in deportation proceedings.").[1]

2. Standard of Review

This Court reviews the IJ's discretionary denial of a motion for continuance "under a highly deferential standard of abuse of discretion." *Morgan*, 445 F.3d at 551; *Sanusi*, 445 F.3d at 199 (review of denial of motion for continuance under abuse of discretion); *Khan*, 448 F.3d at 233 (same). "Just as United States District Judges have broad discretion to schedule hearings and to grant or to deny continuances in matters before them, IJs have similarly broad discretion with respect to calendaring matters." *Sanusi*, 445 F.3d at 199.

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[1] While agency prosecutors may terminate proceedings in their discretion, an IJ has no authority to do so. *See, e.g., Quintero*, 18 I.&N. Dec. at 350 ("Once deportation proceedings have been initiated by the District Director, the [IJ] may not review the wisdom of the District Director's action, but must execute his duty to determine whether the deportation charge is sustained by the requisite evidence in an expeditious manner.").

The abuse of discretion standard is a difficult one to satisfy. *Id.* "An abuse of discretion may be found . . . where the [challenged] decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the [agency] has acted in an arbitrary or capricious manner." *Zhao v. U.S. Department of Justice*, 265 F.3d 83, 93 (2d Cir. 2001) (citations omitted). *See also Morgan*, 445 F.3d at 51-52 (IJ abuses discretion if decision rests on legal error or clearly erroneous factual finding, or if decision "cannot be located within the range of permissible decisions") (internal quotations omitted).

C. Discussion

The IJ acted well within his broad discretion in denying Petitioner's motion for an indefinite continuance. As the IJ held, and as explained further below, Petitioner's hope that he might later become eligible for adjustment of status was merely speculative, and therefore the IJ reasonably determined that Petitioner had not demonstrated good cause for an indefinite continuance. *See* CAR 57-60.

1. The Adjustment of Status Process

"Adjustment of status" is a discretionary immigration benefit that affords qualifying aliens the procedural opportunity to obtain lawful permanent resident status from within the United States. *See* 8 U.S.C. § 1255. Specifically, 8 U.S.C. § 1255(a) provides that the Attorney General "may" adjust the status of an alien already present

in the United States if, *inter alia*, the alien is in possession of an "immediately available" visa. 8 U.S.C. § 1255(a); *see also id.* § 1255(i)(2). An alien may obtain a visa through a qualifying family member's sponsorship, or, as in Petitioner's case, through a qualifying employer's sponsorship. *See* 8 U.S.C. § 1151; *see also id.* §§ 1153-54; *Drax v. Reno*, 338 F.3d 98, 113-15 (2d Cir. 2003) (describing the "adjustment of status regime" as a multi-step process requiring: (1) an approved immigrant visa that is immediately available; (2) a determination that the alien meets all of the other statutory requirements for adjustment; and (3) a determination that he warrants the favorable exercise of discretion).

Obtaining an employment-based visa is a three-step and time consuming process, involving several federal and state agencies. *See Khan*, 448 F.3d at 228 n.2 (describing process in detail). First, an applicant's prospective employer must file an application for a labor certification with the Department of Labor ("DOL"), which refers the petition to the appropriate state-level authority. If the application satisfies certain requirements (for example, that sufficient United States workers are unwilling or unable to perform the job in question and that petitioner has the requisite experience), the state labor office, and thereafter the DOL, will "certify" the labor request. *See* 8 U.S.C. § 1182(a)(5)(A); *see also* 20 C.F.R. §§ 656.1 *et seq.* (DOL regulations governing labor certification).

After the DOL approves the labor certification, the alien's prospective employer must file an I-140 Visa Petition for Prospective Immigrant Employee with the

Department of Homeland Security ("DHS") on the alien's behalf. *Khan*, 448 F.3d at 228 n.2. This visa petition "constitutes a request to [DHS] that the alien named in the Labor Certification be classified as eligible to apply for designation within a specified visa preference employment category. If [DHS] approves the Visa Petition and classifies the certified alien as so eligible, the alien is assigned an immigrant visa number by the Department of State." *Id.* (quoting *United States v. Ryan-Webster*, 353 F.3d 353, 356 (4th Cir. 2003) (citing 8 U.S.C. § 1153(b)). *See also Zafar*, 461 F.3d at 1363 ("An employment-based immigrant visa cannot be applied for until the alien has an approved labor certification from the DOL."); 8 C.F.R. § 204.5(a) (requiring that visa petition be "[a]ccompanied by any required individual labor certification"). Pursuant to Department of State regulations, the alien must also separately file an application for an immigrant visa with the consular office having jurisdiction over the alien's place of residence. *See* 22 C.F.R. § 42.61; *see also Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 109 (D.D.C. 2005). The number of visa allotments is limited for each employment category pursuant to 8 U.S.C. § 1153(b) and Department of State regulations, and it is the Department of State that actually assigns the visa number. *Liberty Fund*, 394 F. Supp. 2d at 109.

Finally, "after the alien receives a visa number under Form I-140, and if the alien presently resides in the United States . . ., then the alien must file with DHS an Application to Adjust Status (Form I-485). DHS then considers Forms I-140 and I-485 to determine whether to adjust the alien's status to lawful permanent resident." *Khan*, 448 F.3d at 228 n.2. If DHS grants the adjustment

of status, the alien is permitted to live and work in the United States. *Id.*

2. The IJ Properly Denied Petitioner's Request for an Indefinite Continuance Because He Was Not Eligible for Adjustment of Status During His Removal Proceedings, and His Potential Eligibility for Adjustment of Status Was Entirely Speculative

Petitioner was two steps removed from eligibility for adjustment of status at the time he sought an indefinite continuance. Specifically, at the time Petitioner asked for the continuance, his labor certification was still pending with the DOL. CAR 64-65. Even after obtaining approval from the DOL, Petitioner's sponsoring employer would need to file an I-140 petition with DHS, and Petitioner would need to obtain a visa number from the Department of State. After obtaining the visa number, Petitioner would then need to submit the I-140 and I-485 to DHS for the agency to determine whether to adjust his status to lawful permanent resident. Thus, at the time Petitioner asked for a continuance, he had not completed the procedure for obtaining an adjustment of status and he was ineligible for any relief.

Moreover, given the lengthy and multi-step process for securing adjustment of status, there was no guarantee that

Petitioner would *ever* be eligible for relief.[2] There was no guarantee, for example, that the DOL would approve his labor certification, or assuming approval of the labor certification, that DHS would approve an I-140 and I-485 application. Indeed, DHS may deny an I-140 application for numerous reasons. For example, DHS may deny an I-140 visa petition where the job opportunity is no longer available or where the prospective employer no longer has the means to pay the alien. *See* 8 C.F.R. § 204.5(g). DHS may also deny an I-140 visa petition if the alien fails to submit evidence that he "meets the educational, training, or experience and any other requirements of the labor certification." *See* I-140 Immigrant Petition for Alien Worker, Form Instructions, *available at* http://www.uscis.gov/graphics/formsfee/forms/files/i-140.pdf.; *see also* 8 U.S.C. § 1361 (burden of proof on alien to establish eligibility for visa); 8 C.F.R. § 103.2(b)(2)(i) ("The non-existence or other unavailability of required evidence creates a presumption of ineligibility."). Finally, because there are numerical limits on the availability of visas, even if DHS approved an I-140 application, a visa would be "immediately available" to the alien, as required for an adjustment of status, only if the number of visa allotments had not been exceeded for the alien's employment category, pursuant to 8 U.S.C. § 1153(b) and the relevant Department of State regulations. *Cf. Zafar*, 461 F.3d at 1363-64 ("All petitioners offered the IJs was the speculative possibility that at some point in the future

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[2] Indeed, if the IJ *had* granted a continuance to await the approval of a labor certification, this case would *still* be pending because today, more than two years after the IJ denied the continuance, Petitioner still does not have an approved labor certification. *See* Pet. Br. at 31.

they might have received . . . approved labor certifications from the DOL, and only then could the required I-140 visa petitions be filed, and only then would petitioners be able to file the I-485 applications for adjustment of status relief.").

Accordingly, Petitioner was ineligible for adjustment of status at the time he applied for an indefinite continuance, and his potential eligibility for this relief, was, at best, speculative. Petitioner concedes as much. *See* Pet. Br. at 19. Thus, the IJ reasonably concluded that there was no need for a continuance because Petitioner was not eligible for any concrete relief. CAR 57-60. Under these circumstances, the IJ acted well within his considerable discretion in denying Petitioner's motion. *See Morgan*, 445 F.3d at 552 ("At the time of the hearing, [petitioner] was not eligible for adjustment of status" because he did not have an approved I-130 application or visa number and "he had no right to yet another delay in the proceedings so that he could attempt to become eligible for such relief."); *Sanusi*, 445 F.3d at 200 (upholding IJ's denial of third request for continuance despite petitioner's claim that he needed additional time to gather and submit evidence to establish his eligibility for relief under the Convention Against Torture).

On similar facts, several courts have upheld decisions by IJs denying motions for continuance by petitioners who wanted to apply for adjustment of status and asked for additional time to obtain an approved labor certification. For example, in *Zafar*, the petitioners had labor certification applications pending, but because they had

not yet received approved certifications from the DOL, they had not submitted I-140 applications, and there was no evidence that a visa was "immediately available" to them. 461 F.3d at 1363-64. Under these circumstances, the Eleventh Circuit held that because the petitioners were not statutorily eligible for adjustment of status, "it clearly was not an abuse of discretion for the IJs to deny the motions for continuances of the removal proceedings." *Id.* at 1364. Similarly, the Fifth Circuit upheld the denial of a motion for continuance by a petitioner seeking additional time to obtain an approved labor certification:

> [The petitioner's] pending labor certification would not have made him any less removable even if it had been processed at the time of his hearing before the immigration judge. In order to receive relief from removal on the undisputed facts, [the petitioner] needed to receive an adjustment of status, and the receipt of his pending labor certification was only the first step in this long and discretionary process. . . . Various immigration officials could have properly exercised their discretion, denied [the petitioner's] application for adjustment of status, and ensured his removal at any of these subsequent discretionary points. In this matter, the immigration judge simply exercised his discretion at the first stage of this lengthy and discretionary process when he refused to grant [the petitioner] a continuance for lack of good cause. The immigration judge's reasons for this refusal were correct; *[the petitioner] lacked good cause for a continuance because he was ineligible for removal relief under the relevant statutes.*

Ahmed, 447 F.3d at 439-39 (emphasis added). *See also Khan*, 448 F.3d at 234-35 (upholding denial of motion for continuance when application for labor certification was pending with the DOL, noting that the petitioner has not filed a visa petition and "is presently ineligible for adjustment of status"); *cf. United States v. Gonzalez-Roque*, 301 F.3d 39, 45-46 (2d Cir. 2002) (holding that "[i]t was well within the IJ's discretion" to deny a continuance pending the alien's proffer of an allegedly approved I-130 visa petition, where case had already been adjourned three times over the course of five months); *Onyeme v. U.S. INS*, 146 F.3d 227, 232 (4th Cir. 1998) (upholding IJ's denial of continuance "given [petitioner's] statutory ineligibility . . . and the numerous contingencies that had to occur before [he] would obtain" adjustment of status); *Oluyemi v. INS*, 902 F.2d 1032, 1034 (1st Cir. 1990) (holding that IJ did not abuse discretion in denying continuance where alien had no immediately available visa and it was unlikely that Attorney General would exercise discretion to waive alien's inadmissibility).

In the face of this authority, Petitioner relies heavily on the Seventh Circuit's decision in *Subhan*. In that case, the court granted a petition for review when the IJ had denied a motion for continuance. The petitioner there had requested a continuance to obtain an approved labor certification, and the Seventh Circuit found the IJ's denial of the requested continuance improper because the IJ had failed to give *any reason* for the denial. 383 F.3d at 593-94. That decision is distinguishable because the IJ here explained the reason for his decision: Petitioner was not eligible for any relief and the potential for future relief was too tenuous to allow a continuation of the proceedings.

See Khan, 448 F.3d at 234-36 (discussing *Subhan*, but declining to follow it); *Ahmed*, 447 F.3d at 437-39 (same); *Zafar*, 461 F.3d at 1366-67 (same).

Finally, this Court's decision in *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006) does not require a different result. In *Thapa*, this Court considered whether it should enter a stay of voluntary departure and held that this decision should be made on the basis of "the usual criteria for obtaining injunctive relief," namely, a balancing of the likelihood of success on the merits, the potential injuries involved, and the public interest. *Id.* at 334. In evaluating the petitioner's likelihood of success on the merits, this Court noted that the petitioner had an argument, based on *Subhan*, that the BIA should have granted him a continuance based on his pending labor certification. *Id.* at 335-36. This Court emphasized, however, that its "preliminary assessment" of the merits was "not exhaustive," and made "without the benefit of full briefing and oral argument." *Id.* at 335 n.4. In other words, this Court merely suggested that the argument had *some* potential for success and that in light of the potential for irreparable harm to the petitioner, a stay of voluntary departure should issue. *Id.* at 336.

In sum, the IJ here properly exercised his discretion to deny Petitioner's motion for an open-ended continuance. Petitioner was not eligible for any relief from removal, and although he had begun the process to apply for relief, his ultimate eligibility for that relief was too speculative and tenuous to justify a continuance of the removal proceedings.

II. THE IJ ACTED WELL WITHIN HIS DISCRETION IN DENYING PETITIONER'S REQUEST FOR A CHANGE OF VENUE

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

"The immigration judge, for good cause, *may* change venue" upon application by one of the parties. 8 C.F.R. § 1003.20(b) (emphasis added); *see also Monter v. Gonzales*, 430 F.3d 546, 559 (2d Cir. 2005) (decision to change venue is governed by good cause standard); *In re Rahman*, 20 I.&N. Dec. 480 (BIA 1992) (same). Because this standard gives discretion to the IJ, this Court reviews an IJ's decision on a motion to change venue for abuse of discretion. *Lovell v. INS*, 52 F.3d 458, 460 (2d Cir. 1995). Even if an IJ abuses his discretion in denying a motion for change of venue, the petitioner is not entitled to a remand unless he can demonstrate that the incorrect decision caused him prejudice. *Monter*, 430 F.3d at 559 (quoting *Lovell*, 52 F.3d at 461).

C. Discussion

The IJ acted well within his broad discretion in denying Petitioner's motion for a change of venue. Because Petitioner was removable and not entitled to any relief,

there was no point in transferring the case to another immigration court. Petitioner's hope that he might someday become eligible for relief was too speculative to justify a continuation of his case in another court. CAR 58-59. Because venue is ultimately a question about where future proceedings will be held, *see Rahman*, 20 I.&N. Dec. at 483, the BIA has concluded that it is proper for an IJ to deny a motion for change of venue where the petitioner is not eligible for any relief, *In re Chow*, 20 I.&N. Dec. 647, 652 (BIA 1993) (noting that after determining that the alien was deportable and not eligible for any relief "there was no need for a change of venue, as it was then appropriate to issue the order of deportation").

Moreover, even if the IJ abused his discretion by denying the motion for change of venue, Petitioner has not shown that he was prejudiced by the denial. For example, he identifies no witnesses or testimony that he would have presented in Newark but could not do so in Hartford. He argues only that if his case had been transferred to an immigration court in Newark, New Jersey, he would have obtained a continuance to obtain a labor certification. Even if this argument -- that another immigration court would have been more sympathetic to him -- were sufficient to establish prejudice, it is speculative at best. He presents no evidence that the immigration courts in Newark grant continuances in these circumstances, or that they would have granted him an indefinite and open-ended continuance sufficient to obtain an approved labor certification, an approval that he still lacks today. *See Khan*, 448 F.3d at 233-35 (upholding denial of motion for continuance).

Finally, Petitioner's reliance on this Court's decisions in *Lovell* and *Monter* is misplaced. In *Lovell*, this Court held that the IJ abused his discretion when he found that he lacked the power to consider a motion for change of venue. 52 F.3d at 460. Here, by contrast, there is no suggestion that the IJ thought he lacked the power to grant the motion; he denied the motion on the merits. CAR 58-59. In *Monter*, this Court found that the IJ had abused his discretion in denying a motion for change of venue to New York City *and* found that the petitioner was prejudiced by the denial. In that case, the central contested issue was whether the petitioner's marriage was bona fide, and the petitioner's wife -- the central witness on this point -- lived significantly closer to New York City than to the original venue of Buffalo and was unable to appear in Buffalo to testify. 430 F.3d at 559-60. In this case, by contrast, because Petitioner is not eligible for any relief, there are no contested issues to be resolved in a future proceeding. Under these circumstances, Petitioner, unlike the petitioner in *Monter*, cannot demonstrate that he was prejudiced by the denial of his motion for change of venue.

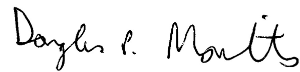
CONCLUSION

Because the IJ acted well within his discretion in denying Petitioner's motion for continuance and his motion for change of venue, the IJ's and BIA's decisions should be upheld. The petition for review should be denied.

Dated: October 18, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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ADDENDUM

8 U.S.C. § 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence

(i) Adjustment of status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--

(A) who--

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of--

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. . . .

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if--

> (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and
> (B) an immigrant visa is immediately available to the alien at the time the application is filed.

. . . .

8 C.F.R. § 1003.20 Change of venue

(b) The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, after the charging document has been filed with the Immigration Court. The Immigration Judge may grant a change of venue only after the other party has been given notice and an opportunity to respond to the motion to change venue.

8 C.F.R. § 1003.29 Continuances

The Immigration Judge may grant a motion for continuance for good cause shown.

8 C.F.R. § 1240.6 Postponement and adjournment of hearing

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.