# Matter of H. N. FERREIRA, Respondent

*Decided December 19, 2023*

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

Given the significance of a respondent's interest in securing review of a denial of a petition to remove the conditions on permanent residence, an Immigration Judge should ordinarily review the denial of a Form I-751 upon the request of the respondent.

FOR THE RESPONDENT: Jan J. Bejar, Esquire, San Diego, California

BEFORE: Board Panel: HUNSUCKER, PETTY, and CLARK, Appellate Immigration Judges.

PETTY, Appellate Immigration Judge:

The respondent, formerly a conditional permanent resident of the United States, petitioned to remove the conditions on his residence. United States Citizenship and Immigration Services ("USCIS") concluded that he failed to prove his qualifying marriage was bona fide and denied his Form I-751, Petition to Remove Conditions on Residence, terminating his status as a conditional permanent resident. The respondent was then placed in removal proceedings, where he sought review of that decision before the Immigration Judge, as provided for by statute. The Immigration Judge, however, granted the Department of Homeland Security's ("DHS") motion to terminate the respondent's removal proceedings before conducting that review. Because the Immigration Judge did not consider the respondent's objection to termination, we will remand for further proceedings.

## I. BACKGROUND

After admission to the United States, the respondent married a United States citizen and was granted conditional permanent resident status based on that marriage. In 2010, following his divorce, the respondent filed a Form I-751 petition with USCIS to remove the conditions on his permanent residence. USCIS, however, concluded that the respondent married for the sole purpose of evading the immigration laws and, in 2011, terminated the respondent's conditional permanent resident status. DHS initiated removal proceedings against him, charging him with removability under section 237(a)(1)(D)(i) of the Immigration and Nationality Act ("INA"),

8 U.S.C. § 1227(a)(1)(D)(i) (2006), as a noncitizen whose conditional permanent residence status was terminated.

In Immigration Court, the respondent sought review of USCIS' termination of his conditional permanent resident status. An Immigration Judge concluded that DHS did not establish the respondent's removability and terminated the removal proceedings. In the absence of further review, USCIS' termination of the respondent's conditional permanent residence remained in effect.

The respondent then filed another Form I-751 petition with USCIS, alleging that he entered into his marriage in good faith, that it ended, that he was not at fault for failing to file a joint petition, and that he would suffer extreme hardship if he were removed. USCIS denied this Form I-751 petition, and DHS again initiated removal proceedings under section 237(a)(1)(D)(i) of the INA, 8 U.S.C. § 1227(a)(1)(D)(i). The Notice to Appear alleges that the respondent's conditional permanent resident status was terminated because he failed to establish that his qualifying marriage was entered into in good faith and that he did not qualify for an extreme hardship waiver.

At a 2019 hearing before the Immigration Judge, DHS indicated that it did not have the respondent's file and sought a continuance to locate it. The respondent did not object but asked that the proceedings move forward as quickly as possible to obtain review of USCIS' decision denying his most recent petition to remove the conditions on his residence. The Immigration Judge continued the case for one month.

At the next hearing, DHS still had not located the respondent's file. The Immigration Judge asked the DHS attorney if she was moving to terminate for failure to prosecute the case, and the DHS attorney indicated that she was. The respondent objected on the grounds that the government "can only move for dismissal on enumerated grounds . . . [a]nd failure to find its file is not one of them." The respondent also contended that terminating removal proceedings would leave him without an avenue for review of USCIS' denial of his Form I-751, which at that point he had been seeking for nearly a decade. The Immigration Judge granted DHS' motion to terminate the removal proceedings on the ground that the court lacked jurisdiction to interfere with DHS' prosecutorial discretion. The respondent timely appealed.

## II. DISCUSSION

This case requires us to reconcile an Immigration Judge's regulatory authority to terminate removal proceedings with a respondent's interest in having the Immigration Judge review USCIS' denial of a Form I-751.

## A. Legal Framework

The Attorney General has statutory authority to promulgate regulations governing Immigration Court proceedings. INA § 103(g)(2), 8 U.S.C. § 1103(g)(2) (2018). Pursuant to this statutory authority, the Attorney General has, by regulation, given Immigration Judges significant latitude in controlling the cases before them. *See, e.g.*, 8 C.F.R. §§ 1240.1(a)(1)(iv), (c), 1240.7(a), (c), 1240.46(b), (d) (2023); 8 C.F.R. § 1240.6 (2020). Immigration Judges also have substantial authority to independently adjudicate those cases. *See, e.g.*, 8 C.F.R. §§ 1240.1(a)(1)(i)–(iii), 1240.12; 1240.41, 1240.50 (2023). This includes authority to dismiss or terminate proceedings. *See* 8 C.F.R. § 1239.2(c) (2023); *see also Matter of Coronado Acevedo*, 28 I&N Dec. 648, 651–52 (A.G. 2022). However, we have also explained that an order terminating or dismissing proceedings must be consistent with law. *See Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 (BIA 2017); *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012).

Certain noncitizens who obtain lawful permanent resident status based on marriage are initially deemed conditional permanent residents. INA § 216(a)(1), (h)(1), 8 U.S.C. § 1186a(a)(1), (h)(1) (2018). As we explained in *Matter of Bador*, 28 I&N Dec. 638, 641 (BIA 2022), this conditional status provides "immigration authorities time to examine the bona fides of a marriage more fully." Subject to certain exceptions, the conditional permanent resident and the United States citizen spouse must jointly file a Form I-751 petition attesting to certain facts regarding the bona fides of the marriage within the 90 days preceding the second anniversary of the date on which the conditional permanent resident obtained the status and must appear for a personal interview.[1] *See* INA § 216(c)(1), (d), 8 U.S.C. § 1186a(c)(1), (d); *Matter of Mensah*, 28 I&N Dec. 288, 290 (BIA 2021). If they establish the bona fides of the marriage, and there are no other disqualifying factors, the conditions on residence are lifted. *Matter of Bador*, 28 I&N Dec. at 641. If, however, USCIS determines that the qualifying marriage was entered into for the purpose of procuring admission as an immigrant, has been judicially annulled or terminated other than through death, or a payment was made for

[1] Recognizing that some marriages may be entered into in good faith yet still fail, a conditional permanent resident who is unable to file jointly with a spouse or former spouse may be eligible for a discretionary waiver. *See* INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4); 8 C.F.R. § 1216.5(a)(1) (2023). The conditional permanent resident must establish that their removal would result in extreme hardship, that they entered into the marriage in good faith despite it having ended, or that they have been subjected to battery or extreme cruelty by the United States citizen. *See* INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4); *Matter of Bador*, 28 I&N Dec. at 642.

the filing of the petition (other than attorney preparation), USCIS "shall terminate the permanent resident status." INA § 216(b)(1)(A), 8 U.S.C. § 1186a(b)(1)(A). After terminating the conditional permanent resident status, DHS "shall issue a notice to appear." 8 C.F.R. § 1216.3(a) (2023).

Congress has provided that a decision by USCIS to terminate a noncitizen's conditional permanent resident status is reviewable in removal proceedings by the Immigration Judge. *See* INA § 216(b)(2), (c)(3)(D), 8 U.S.C. § 1186a(b)(2), (c)(3)(D). Under current regulations, this is the only permitted avenue for review. *See* 8 C.F.R. § 1216.3(a); *cf.* 8 C.F.R. § 1216.5(f) (2023) ("No appeal shall lie from the decision of the director [to deny a waiver of the joint filing requirement]; however, the alien may seek review of such decision in removal proceedings."). Where the basis for USCIS' denial of a Form I-751 petition is the denial of a waiver of the joint filing requirement, the Immigration Judge reviews the denial of the waiver as well. *See* 8 C.F.R. § 1216.5(f); *Matter of Bador*, 28 I&N Dec. at 642 (collecting authority); *see also Matter of Herrera Del Orden*, 25 I&N Dec. 589, 593–95 (BIA 2011) (discussing the scope of the Immigration Judge's review of the denial of an applicant's request for a waiver of the joint filing requirement).

B. Review of Denials of Petitions to Remove Conditions of Residence

The decision by DHS to commence removal proceedings is not reviewable by Immigration Judges or this Board.[2] *E.g.*, *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. at 170; *Matter of Bahta*, 22 I&N Dec. 1381, 1391 (BIA 2000); *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998). After a case is filed, however, the "[DHS] merely has the privilege to move for dismissal of proceedings." *Matter of G-N-C-*, 22 I&N Dec. at 284. The Immigration Judge must, consistent with the authority noted above, independently adjudicate the motion. *See id.* (noting the regulation does not contemplate an automatic grant).[3]

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[2] Additionally, a noncitizen has no right to be placed in removal proceedings by DHS for the purpose of seeking relief. *See Matter of Andrade Jaso and Carbajal Ayala*, 27 I&N Dec. 557, 558–59 (BIA 2019) (granting DHS' motion to dismiss removal proceedings under 8 C.F.R. § 239.2(a)(7) (2018) because the respondent filed a meritless asylum application with USCIS for the sole purpose of seeking cancellation of removal in removal proceedings).

[3] In some cases, the parties may agree to terminate proceedings. *See Matter of Coronado Acevedo*, 28 I&N Dec. at 650; *cf. Matter of A-C-A-A-*, 28 I&N Dec. 351, 352 (A.G. 2021) (permitting the Board to rely on stipulations and DHS' decision not to contest certain issues because this "approach helps ensure efficient adjudication by focusing the immigration courts' limited resources on the issues that the parties actually contest rather than those on which they agree"). Here, however, the parties are not in agreement on the appropriate

The respondent maintains that the inability of DHS to locate its file is not an enumerated ground upon which the regulations permit DHS to seek termination of proceedings. *See* 8 C.F.R. § 239.2(a), (c) (2023). However, the question before us is not on what grounds DHS may make a motion to terminate, but the scope of the Immigration Judge's authority to adjudicate such a motion and the order in which the Immigration Judge should address multiple potentially dispositive issues.

Because DHS does not have unilateral authority to cancel a Notice to Appear once removal proceedings have commenced, DHS' motion to terminate constituted a request that the Immigration Judge exercise his authority to terminate the proceedings. *See Matter of G-N-C-*, 22 I&N Dec. at 284. The Immigration Judge has authority to adjudicate this request "based on an evaluation of the factors underlying the [DHS'] motion." *Id*. The Immigration Judge erred in concluding that he was required to terminate proceedings simply because DHS had moved to do so. Instead, the Immigration Judge should have adjudicated the motion after considering the underlying facts and circumstances. Because the Immigration Judge mistakenly concluded that DHS' motion divested him of jurisdiction, he did not consider the respondent's interest in obtaining review of USCIS' denial of his Form I-751 petition.

The respondent's interest in having an Immigration Judge review USCIS' denial of a Form I-751 is significant. Regulations provide that when USCIS terminates conditional permanent resident status by denying a Form I-751, there is no appeal from that decision to any higher authority within USCIS, and the noncitizen must be placed in removal proceedings. 8 C.F.R. § 1216.3(a). At that point, the denial of the Form I-751, and any associated waivers, is reviewable only by the Immigration Judge. *See* INA § 216(b)(2), (c)(3)(D), 8 U.S.C. § 1186a(b)(2), (c)(3)(D); 8 C.F.R. §§ 1216.3(a), 1216.5(f); *Matter of Bador*, 28 I&N Dec. at 642.

We explained in *Matter of Mendes*, 20 I&N Dec. 833, 839 (BIA 1994), that when an Immigration Judge terminates removal proceedings without first reviewing the denial of a Form I-751, the respondent is left in "legal limbo" as he or she is "no longer a lawful permanent resident, yet [he or] she also has not been found deportable." That "legal limbo" is not simply being out of lawful immigration status, but the inability to access the sole form of review expressly provided for by law. Given the significance of a respondent's interest in securing review of a denial of a petition to remove the conditions on permanent residence, an Immigration Judge should ordinarily review the denial of a Form I-751 upon the request of the

disposition of this case, as the respondent objected to DHS' motion to terminate. Accordingly, this decision does not address joint or unopposed motions to terminate.

respondent. We will therefore remand this matter to the Immigration Judge to undertake that review.

**ORDER:** The appeal is sustained, the Immigration Judge's decision is vacated, and removal proceedings are reinstated.

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