

FILED

NOV 18 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO JAVIER VARELA SILVA,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 21-70575

Agency No. A215-649-011

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted November 14, 2022**
Phoenix, Arizona

Before: BYBEE and OWENS, Circuit Judges, and RAKOFF, *** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Francisco Javier Varela Silva appeals the decision of the Board of Immigration Appeals (“BIA”) which upheld the denial of a continuance by the Immigration Judge (“IJ”). We have jurisdiction pursuant to 8 U.S.C. § 1252, and we grant the petition and remand for further proceedings.

The parties are familiar with the facts in this case, and we repeat them only as necessary to our analysis. Varela Silva is a citizen of Mexico who is married to a U.S. citizen. He came to the United States on a B-2 Visa and then remained in the country. Varela Silva has been arrested once for solicitation of prostitution and at least once for driving under the influence (“DUI”), including for extreme DUI. Varela Silva challenges the IJ and BIA’s denial of his motion to continue and the due process of his hearing before the IJ.

We review the BIA’s decision regarding the continuance for abuse of discretion. *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009) (describing the standard of review on continuance decisions). Under 8 C.F.R. § 1003.29, a motion for continuance requires the petitioner to show “good cause.” The “decision to grant or deny the continuance is within the sound discretion of the judge.” *Singh v. Holder*, 638 F.3d 1264, 1274 (9th Cir. 2011) (internal citations and quotations omitted). When determining whether a continuance is warranted, the IJ should focus the inquiry on “the apparent ultimate likelihood of success on the adjustment

application.” *In re Hashmi*, 24 I. & N. Dec. 785, 790 (BIA 2009). And, in this case, adjustment of status is left to the discretion of the IJ. 8 U.S.C. § 1255(a).

Varela Silva’s claims stem from confusion about his criminal history. The BIA concluded that Varela Silva “would be denied adjustment of status as a matter of discretion based on his extensive criminal history, including convictions for solicitation of prostitution and driving under the influence (DUI), and his recent arrest for extreme DUI.” The IJ also noted that Varela Silva was “arrested and convicted” of solicitation of prostitution and DUI, and that “the Court would deny adjustment of status in the exercise of discretion” based on his criminal history.

Convictions are relevant to an adjustment of status because “any decision to grant or deny adjustment of status . . . should include a careful analysis of whether an applicant with multiple DUI convictions merits such relief as a matter of discretion.” *In re Castillo-Perez*, 27 I. & N. Dec. 664, 673 n.3 (A.G. 2019) (emphasis in original). If Varela Silva has indeed been convicted of driving under the influence, then the IJ and BIA reasonably found that he would not merit a discretionary grant of adjustment of status. *Id.*

However, the administrative record does not show any documented convictions. At the IJ hearing, Varela Silva denied that he had ever been convicted of solicitation of prostitution, and his counsel said that the 2018 DUI arrest

“resulted . . . in a simple DUI.” Taken together, these documents and Varela Silva’s oral testimony do not conclusively show prior convictions. Because the IJ and the BIA relied on prior criminal convictions, the lack of documentation in the record undermines their conclusion that Varela Silva would ultimately be unsuccessful in his application to adjust his status, and therefore did not deserve a continuance. And without evidence of a conviction, it is unclear if the remaining adverse factors are sufficient to uphold the BIA and IJ’s decision.

Accordingly, we **GRANT the petition and REMAND** to the BIA with instructions to remand to the IJ for further proceedings consistent with this opinion. The IJ should determine whether Varela Silva has any prior convictions and then weigh the factors enumerated in *In re Hashmi*, 24 I. & N. Dec. 785 (2009).

The petition is **GRANTED and REMANDED**.