



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: ALCARAZ, LUIS ALBERTO

A 089-775-377

Date of this notice: 2/27/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Mann, Ana
KELLY, EDWARD F.

YungD
Userteam: Docket

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Los Angeles, CA 90014**

Name: ALCARAZ, LUIS ALBERTO

A 089-775-377

Date of this notice: 2/27/2017

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Mann, Ana
KELLY, EDWARD F.

YungD
User team: Docket

Falls Church, Virginia 22041

File: A089 775 377 – Los Angeles, CA

Date:

FEB 27 2017

In re: LUIS ALBERTO ALCARAZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hugo Rojas, Esquire

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated September 16, 2016, denying his motion to reopen. The respondent had previously been ordered removed in absentia for his failure to appear for the hearing on April 25, 2016. The appeal will be sustained, proceedings will be reopened, and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including findings as to credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Board possesses discretion to reopen or reconsider cases sua sponte. See 8 C.F.R. § 1003.2(a); see also *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Based on the totality of the circumstances in this case, we will grant the respondent's motion to reopen, and we will rescind his in absentia order pursuant to our sua sponte authority. See 8 C.F.R. § 1003.2(a); see also *Matter of J-J-*, *supra*. Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No.: A 089 775 377

In the Matter of:

ALCARAZ,
Luis,

Respondents

IN REMOVAL PROCEEDINGS

CHARGE: Immigration and Nationality Act (INA) Section 212(a)(6)(A)(i)—*alien present without admission or parole*
APPLICATION: The Respondent's Motion to Reopen

ON BEHALF OF THE RESPONDENT:

Hugo Rojas, Esquire
704 West Arbor Vitae Street
Inglewood, California 90301

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Luis Alcaraz (the respondent) is a native and citizen of Mexico. Exh. 1. On February 17, 2009, the U.S. Department of Homeland Security (the Department) personally served the respondent with a Notice to Appear (NTA). *Id.* In the NTA, the Department alleged that the respondent entered the United States at or near San Ysidro, California, on an unknown date and at an unknown time, and was not then admitted or paroled. *Id.* Accordingly, the Department charged the respondent with inadmissibility pursuant to INA § 212(a)(6)(A)(i). *Id.* Jurisdiction vested and removal proceedings commenced when the Department filed the NTA with the Court on February 25, 2009. *See* 8 C.F.R. § 1003.14.

On January 7, 2016, the respondent was personally served with a Notice of Hearing indicating that his next court date was April 25, 2016. The respondent failed to appear for his April 25, 2016, hearing. Accordingly, the Court, proceeding *in absentia*, found that the Department established the respondent's inadmissibility through clear and convincing evidence and ordered the respondent removed to Mexico.

On June 14, 2016, the respondent filed the pending motion to reopen his proceedings and to rescind the *in absentia* order of removal. The respondent argues that he missed his hearing because his attorney was confused as to the date of the hearing.

For the following reasons, the Court DENIES the respondent's motion to reopen.

II. Law and Analysis

A. Exceptional Circumstances

An Immigration Judge may rescind an *in absentia* removal order upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in INA § 240(e)(1). *See* INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). Exceptional circumstances refer to situations beyond the alien's control, such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances. INA § 240(e)(1). In determining whether the respondent's absence was due to exceptional circumstances, the Court must look at the "totality of the circumstances." *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996); *see also Matter of J-P-*, 22 I&N Dec. 33, 36 (BIA 1998).

Here, the respondent avers that his attorney was confused as to the date of the hearing, and that the attorney believed it to be April 26, 2016, not April 25. Resp't's Dec. at 5. The respondent further avers that the attorney told him that he had a scheduling conflict on April 25, 2016. *Id.* The respondent's attorney, Hugo Rojas, similarly avers that he met with the respondent on April 18, 2016, that he had the wrong date in his calendar, and that he called the Court on April 18 and was informed of the correct date and time. Rojas Dec. at 1. He further avers that he had a scheduling conflict on April 25, 2016. *Id.* at 1–2.

The respondent has advanced no support for the proposition that an attorney's scheduling conflict is an exceptional circumstance. According to the respondent and his attorney, the respondent knew of the correct hearing date a week in advance. Resp't's Dec. at 5, Rojas Dec. at 1. There is no indication that the respondent was physically unable to be present at the hearing unless Mr. Rojas was present. The respondent was aware of his obligation to attend the hearing; he was personally served with the NOH and warned by the Court of the consequences of failing to appear. He apparently chose not to do so because his attorney would not be able to attend. Indeed, both he and his attorney concede that the respondent had "no reason" not to attend the April 25, 2016 hearing. Resp't's Dec. at 5, Rojas Dec. at 2.

Accordingly, the Court shall enter the following order:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reopen is **DENIED**.

DATE: 9-16-16

Lori R. Bass
Lori R. Bass
Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
☒ MAIL (M) ☐ PERSONAL SERVICE (P)
TO: ☒ ALIEN ☐ ALIEN c/o Custodial Officer
☒ ALIEN'S ATT/REP ☐ DHS
DATE: 9/16/16 BY: COURT STAFF V. Gordon
Attachments: ☐ EOIR-33 ☐ EOIR-28
☐ Legal Services List ☐ Other