U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: HERRERA-MARTINEZ, MARCELO **A098-007-723**

Date of this notice: 2/11/2011

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.
Liebowitz, Ellen C
Malphrus, Garry D.

File: A 098 007 723 - Phoenix, AZ

Date: FEB 11 2011

In re: MARCELO HERRERA MARTINEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Maria V. Jones, Esquire

ON BEHALF OF DHS: Cara O. Knapp
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent has appealed the Immigration Judge's February 1, 2010, decision denying him cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The Immigration Judge also granted the respondent voluntary departure pursuant to section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The Department of Homeland Security has filed a brief opposing the respondent's appeal. The appeal will be sustained and the record will be remanded for further proceedings.

The Immigration Judge held that the respondent was ineligible for cancellation of removal because he did not establish the 10 years of continuous physical presence required under section 240A(b)(1)(A) of the Act. The respondent testified that he first entered the United States in 1994 and left the United States once in 1997 and twice in 1999 (Tr. at 6-7). The Immigration Judge held that the respondent's attempted re-entries into the United States in 1999 constituted a break in his continuous physical presence for purposes of cancellation of removal (I.J. at 5-6).

The main issue on appeal is whether the respondent departed the United States in 1999 pursuant to the formal processes of administrative voluntary departure (which would interrupt his accrual of physical presence) or border turnarounds by immigration authorities (which would not). *See Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2003) (per curiam); *Tapia v. Gonzales*, 430 F.3d 997 (9th Cir. 2005); *see also Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002) (en banc); *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005) (en banc).

The respondent testified that he was twice apprehended by border patrol officers and taken to an office where he was fingerprinted and signed papers (Tr. at 22-28). The respondent testified that the paperwork was for voluntary departure, but there are no voluntary departure forms in the record (Tr. at 26, 36). *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619 (9th Cir. 2006) (holding that the petitioner's testimony that he signed some sort of document was insufficient, by itself, to establish that he received administrative voluntary departure). The only documentary evidence in the record pertaining to the respondent's returns to Mexico in 1999 simply verifies his apprehensions (Exh. 5).

See Tapia, supra, at 1003-04 (finding that the acts of photographing or fingerprinting were not necessarily indicative of a formal documented process).

The record does not sufficiently establish under Ninth Circuit law that the respondent entered into a formal agreement whereby the terms and conditions of his departure were clearly specified or that the respondent was compelled to depart the United States under the threat of deportation. *See Tapia, supra*, at 1004; *Matter of Romalez, supra*, at 429. Thus, we cannot find based on the current record that the respondent knowingly and voluntarily accepted administrative voluntary departure in lieu of being placed in removal or deportation proceedings.

We conclude that the respondent's period of continuous physical presence was not broken as a result of his returns to Mexico in 1999. Accordingly, we will sustain the appeal and remand the record to the Immigration Court for further consideration of whether the respondent meets the 10-year physical presence requirement as well as the other statutory requirements for cancellation of removal.

ORDER: The appeal is sustained.

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

FOR THE BOARD