U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

DHS/ICE Office of Chief Counsel - EAZ
P.O. Box 25158
Phoenix, AZ 85002

Name: HERNANDEZ-PACHECO, CIRILO **A 200-280-956**

Date of this notice: 11/26/2014

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:
Adkins-Blanch, Charles K.
Hoffman, Sharon
Manuel, Elise

Userteam: Docket

File: A200 280 956 – Eloy, AZ

Date: NOV 26 2014

In re: CIRILO HERNANDEZ-PACHECO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, was ordered removed in absentia by an Immigration Judge on December 3, 2012.[2] He filed a motion to reopen on May 31, 2013. The Immigration Judge denied the motion on June 28, 2013, and the respondent timely appeals. The Department of Homeland Security (DHS) has not replied to the appeal. We will sustain the respondent's appeal.

We have considered the totality of the circumstances presented in this case, and find that exceptional circumstances for the respondent's failure to appear have been shown. Sections 240(b)(5)(C) and (e)(1) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(b)(5)(C), (e)(1); 8 C.F.R. § 1003.23(b)(4)(ii). Accordingly, the respondent's appeal will be sustained, the in absentia order will be rescinded, the proceedings will be reopened, and the record will be remanded to allow the respondent another opportunity to appear for his hearing.

ORDER: The appeal is sustained.

FURTHER ORDER: These proceedings are reopened, the in absentia order of removal is vacated, and the record is remanded to the Immigration Court for further proceedings.

FOR THE BOARD

[1] We note that effective May 13, 2014, attorney Roberto Salazar, who filed the appeal, has been suspended from practice before the Board. As this attorney is not permitted to practice law before the Board at this time, this order is being sent directly to the respondent. Please also see the attached copy of the order suspending attorney Salazar from practice.

[2] The respondent's previous counsel, Roberto Salazar, first filed a direct appeal of the in absentia order to the Board, which the Board dismissed for lack of jurisdiction, by order dated March 27, 2013. Mr. Salazar then filed the motion to reopen on the last day and did not include an affidavit from the respondent.

B ✓

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

Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Roberto Salazar
Salazar Law Firm, PLLC
3003 N Central Avenue, Suite 690
Phoenix, AZ 85012-2924

Jennifer J. Barnes
Disciplinary Counsel
Executive Office for Immigration Review
Office of the General Counsel
5107 Leesburg Pike, Suite 2600
Falls Church, VA 20530

Re: Roberto Salazar
D2013-341

Date of this notice: May 13, 2014

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

Donna Carr

Donna Carr
Chief Clerk

Enclosure

If you wish to be represented by counsel, a Notice of Appearance as Attorney or Representative before the Board of Immigration Appeals (Form EOIR-27) must be filed with the Board. Your Form EOIR-27 must include your EOIR ID. Unless a Form EOIR-27 is received from your representative, all future notices will be sent directly to you at your address above and not your representative.

Proof of service on all parties is required for ALL submissions to the Board of Immigration Appeals. Any submission filed with the Board without a certificate of service on the Office of General Counsel and the Department of Homeland Security will be rejected.

Panel Members:
JOHN GUENDELSBERGER
DAVID B. HOLMES
NEIL P. MILLER

CC: Kuyomars "Q" Golparvar
Chief, Field Legal Operations
Department of Homeland Security

CC: Catherine M. O'Connell
Disciplinary Counsel
Department of Homeland Security

File: D2013-341

Date: MAY 13 2014

In re: ROBERTO SALAZAR, ATTORNEY

IN PRACTITIONER DISCIPLINARY PROCEEDINGS

PETITION FOR IMMEDIATE SUSPENSION

ON BEHALF OF EOIR: Jennifer J. Barnes, Disciplinary Counsel

ON BEHALF OF DHS: Diane H. Kier
Associate Legal Advisor

On January 16, 2014, the Supreme Court of Arizona suspended the respondent for five years, after the parties signed an "Agreement for Discipline By Consent". Consequently, on April 23, 2014, the Disciplinary Counsel for the Executive Office for Immigration Review petitioned for the respondent's immediate suspension from practice before the Board of Immigration Appeals and the Immigration Courts. The Department of Homeland Security (the "DHS") then asked that the respondent be similarly suspended from practice before that agency. The petition will be granted.

ORDER: The petition is granted, and the respondent is hereby suspended, absent a showing of good cause, from the practice of law before the Board, the Immigration Courts, and the DHS pending final disposition of this proceeding. 8 C.F.R. § 1003.103(a)(2013).

FURTHER ORDER: The respondent is directed to promptly notify, in writing, any clients with cases currently pending before the Board, the Immigration Courts, or the DHS that the respondent has been suspended from practicing before these bodies.

FURTHER ORDER: The respondent shall maintain records to evidence compliance with this order.

FURTHER ORDER: The Board directs that the contents of this notice be made available to the public, including at Immigration Courts and appropriate offices of the DHS.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1705 E. HANNA RD.
ELOY, AZ 85131

SALAZAR, ROBERTO
ONE E. CONGRESS, SUITE 165
TUCSON, AZ 85701

IN THE MATTER OF
HERNANDEZ-PACHECO, CIRILO

FILE A 200-280-956 DATE: Jun 28, 2013

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

✓ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1705 E. HANNA RD.
ELOY, AZ 85131

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC:

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1705 EAST HANNA ROAD, SUITE 366
ELOY, AZ 85131

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
HERNANDEZ-PACHECO, Cirilo	)	**FILE NO.** A200-280-956
RESPONDENT	)	**DATE:** June 28, 2013

MOTION: Respondent's Motion to Reopen Removal Proceedings

ON BEHALF OF THE RESPONDENT:
Roberto Salazar, Esq.
One East Congress, Ste. 165
Tucson, Arizona 85701

ON BEHALF OF THE DEPARTMENT:
Elly Laff, Assistant Chief Counsel
Department of Homeland Security
1705 East Hanna Road
Eloy, Arizona 85131

MEMORANDUM DECISION AND ORDER OF THE IMMIGRATION COURT

I. PROCEDURAL BACKGROUND

The above-named respondent is a thirty-four year old male native and citizen of Mexico. On July 5, 2012, the Department of Homeland Security ("DHS" or "The Department") issued a Notice to Appear ("NTA") against the respondent. (Exh. 1, Form I-862, 1.) This charging document alleged that the respondent was a native and citizen of Mexico who entered the United States at or near an unknown place on or about an unknown date without being admitted or paroled after inspection by an immigration officer. (*Id.*)

Based on these allegations, the DHS charged the respondent with being removable pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act, "in that [he is] 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." (*Id.*) In written pleadings, the respondent admitted all of the allegations and conceded his removability as charged; based on these admissions and concessions, the Court sustained the allegations and the charge by clear and convincing evidence. (Exh. 2; Tr. (Aug. 13, 2012), 9:9-13.) Mexico was designated as the country of removal. (Tr. at 9:20-21.) The respondent averred that he wished to apply for cancellation of removal for certain nonpermanent residents and voluntary departure, in the alternative, pursuant to sections 240A(b)(1), 240B of the Act. (*Id.* at 9:13-18).

The Court orally notified the respondent that the case was reset to December 3, 2012, at 8:30 a.m., and the respondent's counsel acknowledged that this hearing date was acceptable:

THE COURT:	My first available three hour hearing is December 3rd at 8:30, are you available, sir?
COUNSEL:	Yes, Your Honor.
THE COURT:	So December 3rd, 2012 will be the date for the individual hearing at 8:30 in the morning. . . .
. . .	
THE COURT:	December 3rd at 8:30, Mr. Salazar?
COUNSEL:	Yes, Your Honor.

(Tr. at 10:21-23, 13:15-16.)

The same day as the hearing, the Court mailed a Notice of Hearing to the respondent's counsel, stating that the respondent was scheduled to appear at an individual hearing before this Court on December 3, 2012. (Exh. 3.)

The respondent was released on bond on November 30, 2012. (DHS Opposition (June 7, 2013), Attach. A.) Prior to his release, the respondent certified that he had been informed by the Court to appear for a further hearing and that a removal hearing could be conducted in his absence if he failed to appear for that hearing. (*Id.*)

On December 3, 2012, neither the respondent, nor his counsel appeared before this Court. (Tr. (Dec. 3, 2012), 15:6-7.) No motion to change venue had been received by the Court as of December 3, 2012.[1] The DHS requested the respondent be ordered removed *in absentia*. (*Id.* at 18:11-14.) In a written order, the Court determined that the respondent was amenable to the entry of an *in absentia* removal order because he failed to attend removal proceedings in this matter despite being personally served with the NTA, and in spite of the fact that his attorney was served with sufficient notice of the time and place of the removal hearing, (IJ Order (Dec. 3, 2012), 3-6). *See* sections 239(a)(2), (c), 240(b)(5) of the Act; 8 C.F.R. § 1292.5 (2013). Accordingly, the respondent was ordered removed to Mexico on December 3, 2012. (IJ Order at 6.)

On May 31, 2013, the respondent requested that this Court reopen his removal proceedings. (Resp't Mot. (May 31, 2013).)[2] The DHS filed its opposition to this request on June 7, 2013. (DHS Opposition (June 7, 2013).)

[1] The Court's records indicate that a motion to change venue was received by the Court on December 10, 2012, and was rejected due to the fact that the respondent had been ordered removed a week prior.

[2] Prior to filing his motion to reopen, the respondent appealed the Court's *in absentia* removal order to the Board of Immigration Appeals. On March 27, 2013, the Board dismissed the respondent's appeal for lack of jurisdiction and returned the record in this matter to this Court. In its Order, the Board suggested that the respondent file a motion to reopen before this Court pursuant to section 240(b)(5)(C) of the Act.

II. STATEMENT OF LAW

An Immigration Judge upon his or her motion, or upon motion of the DHS or an alien, may reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. 8 C.F.R. § 1003.23(b)(1). Generally, an alien is limited to only one motion to reopen, which must be filed within ninety days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 20, 1996, whichever is later. Section 240(c)(7)(C)(i) of the Act; 8 C.F.R. § 1003.23(b)(1). Under certain circumstances, however, a motion to rescind an *in absentia* removal order entered pursuant to section 240(b)(5) of the Act may be filed outside the ninety-day filing period. Sections 240(b)(5), (c)(7)(C)(iii) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

Specifically, a motion to rescind an *in absentia* removal order may be 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 by section 240(e)(1) of the Act. *Id.* "Exceptional circumstances" include "circumstances beyond the control of the alien . . . such as battery or extreme cruelty, serious illness by the alien, or serious illness or death of the spouse, child, or parent of the alien, *but not including less compelling circumstances* . . . ." *Id.* (emphasis added). Alternatively, a motion to rescind an *in absentia* removal order may be filed "at any time" if he or she demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act, or the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien. *Id.*

Ultimately, the decision to grant or deny a motion to reopen is within an Immigration Judge's "broad discretion" under the Act and the regulations. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citations omitted).

III. FINDINGS AND ANALYSIS

The respondent argues that his removal proceedings should be reopened because "it was incorrect for the Eloy Immigration Judge to have an [i]ndividual hearing in absentia . . . ." (Resp't Mot. at 1.) The respondent concedes that this Court applied the correct legal standard; considered the appropriate evidence; and properly allocated the burden of proof when it ordered him removed *in absentia*. (*Id.*) He merely objects to the fact that an individual hearing was held on a Monday (December 3, 2012) after he was released from DHS custody on the Friday (November 30, 2012). (*Id.* at 2) ("Why the Eloy Immigration Judge had an individual hearing in absentia in a situation where the respondent paid the bond amount and was released 48 hours approximately before the hearing?"). The respondent's motion is untimely and his argument lacks merit. Accordingly, the respondent's motion to reopen shall be denied.

A. Timeliness

The respondent's motion is untimely. The record reflects that the respondent was ordered removed *in absentia* on December 3, 2012. (IJ Order at 6.) The respondent filed his motion to reopen with this Court on May 31, 2013—179 days after the entry of the Court's removal order. (Resp't Mot at 1.) The respondent's motion requests that this Court rescind its *in absentia* order

in this matter. (*Id.*) Under the regulations, therefore, the respondent's filing of his motion outside the ninety-day period is excusable if he can demonstrate: (1) exceptional circumstances; (2) lack of sufficient notice; or (3) he was in federal or state custody and his failure to appear was through no fault of his own. 8 C.F.R. §§ 1003.23(b)(4)(ii). Based on the evidence of record and the below analysis, the Court finds that the respondent has failed to demonstrate a sufficient excuse under the regulations.

i. Exceptional Circumstances

The respondent has failed to establish that he was prevented from filing his motion to reopen within the ninety-day filing period by exceptional circumstances as defined by section 240(e)(1) of the Act. In his motion, the respondent notes that he *mailed* a motion to change venue on December 3, 2012—the date of his removal hearing.[3] However, the mere filing, let alone mailing, of a motion for a change of venue does not constitute "exceptional circumstances" so as to relieve the respondent of his responsibility to appear for his scheduled removal hearing, and unless the Immigration Judge grants the motion, he remains obligated to appear at the appointed place, date, and time. *See Matter of Rivera*, 19 I&N Dec. 688 (BIA 1988); *Matter of Patel*, 19 I&N Dec. 260 (BIA 1985), *aff'd, Patel v. INS*, 803 F.2d 804 (5th Cir. 1986); *cf. Hernandez-Vivas v. INS*, 23 F.3d 1560 (9th Cir. 1994) (holding under lower "reasonable cause" standard that filing a motion for a change of venue did not excuse failure to appear).

The Court takes notice, furthermore, that the respondent was released to Tucson, Arizona, between one and two hours away from this Court by automobile. *See Matter of R-R-*, 20 I&N Dec. 547, 551 n.3 (BIA 1992) (holding that it is well established that Immigration Judges may take administrative notice of commonly known or readily verifiable facts). Nothing in the respondent's motion indicates that he was unable to appear before this Court on December 3, 2012, due to battery; extreme cruelty; a serious illness; or the serious illness or death of an immediate relative. Section 240(e)(1) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii). Therefore, the Court finds that the respondent has not demonstrated that exceptional circumstances excuse the late-filing of his motion to reopen.

ii. Notice

The record also reflects that the respondent and his counsel received sufficient notice of the December 3, 2012, hearing under sections 239(a)(1) or (2) of Act. Under these provisions it is sufficient to serve the NTA or a Notice of Hearing on the alien in person. Sections 239(a)(1), (2) of the Act. Notice of a removal hearing is also sufficient under these provisions if written notice of the hearing is serviced by mail on the alien's counsel of record. Section 239(a)(2)(A) of the Act.

Here, the record reflects that the respondent acknowledged that was personally served with the NTA in this matter. (Exh. 1 at 2.) The record additionally indicates that this Court notified the respondent and the respondent's counsel orally that a removal hearing was scheduled December 3, 2012, at 8:30 a.m., and the respondent's counsel acknowledged that this hearing date was acceptable:

[3] The Court did not receive this motion until December 10, 2012.

THE COURT:	My first available three hour hearing is December 3rd at 8:30, are you available, sir?
COUNSEL:	Yes, Your Honor.
THE COURT:	So December 3rd, 2012 will be the date for the individual hearing at 8:30 in the morning. . . .
. . .	
THE COURT:	December 3rd at 8:30, Mr. Salazar?
COUNSEL:	Yes, Your Honor.

(Tr. (Aug. 13, 2012), 10:21-23, 13:15-16.)

The record also reflects that, on August 13, 2012, the Court mailed a Notice of Hearing to the respondent's counsel of record, stating that the respondent was scheduled to appear at an individual hearing before this Court on December 3, 2012. (Exh. 3; *see also* Form EOIR-28.) Therefore, the respondent received adequate notice of the December 3, 2012, hearing nearly *four months* in advance. Sections 239(a)(1) or (2) of Act; 8 C.F.R. § 1003.23(b)(4)(ii).

Upon his release on November 30, 2012, the respondent acknowledged the consequences of failing to appear for any hearing scheduled in his proceedings. (DHS Opposition at Attach. A.) More precisely, he acknowledged that if he failed to appear his removal "hearing could be held in [his] absence," which is precisely what happened. (*Id.*) The respondent is thus incapable of demonstrating that he lacked notice of the December 3, 2012, hearing.

iii. Federal or State Custody

The record reflects that the respondent was released from DHS custody on November 30, 2012. (DHS Opposition at Attach. A.) There is no indication whatsoever that the respondent was prevented from appearing at his December 3, 2012, hearing because he was in federal or state custody.

iv. Conclusion

On this record, the respondent has failed to establish that he take advantage of the filing exception under 8 C.F.R. § 1003.23(b)(4)(ii). Consequently, his motion is untimely.

B. Discretion

The respondent's argument is without merit. Furthermore, the Court concludes that the respondent's motion does not warrant a favorable exercise of discretion. The respondent—and his counsel—were given sufficient notice of the December 3, 2012, hearing. *Supra* at 4-5. No cognizable excuse has been presented for their failure to appear. The respondent merely protests that his removal proceeding was held too soon after his release on bond. As noted, however, the December 3, 2012, hearing date was set approximately *four months* in advance. In fact, the respondent and his counsel were given written and oral notice of this hearing date on August 13, 2012. (Exh. 3; Tr. (Aug. 13, 2012), 10:21-23, 13:15-16.)

The respondent's position misconstrues his obligations in these proceedings. His release from DHS custody does not negate his responsibility to appear for a hearing for which he has received adequate notice. Mailing a motion to change venue to this Court the day of his hearing also does not relieve him of his responsibility to appear.

No other representations were made by either the respondent or his representative prior to (or on) December 3, 2012, that proceedings should be delayed. This Court permits window filing, which allows both parties to file motions—including motions to change venue—with the Court personally and directly. Therefore, the respondent's assertion that "it was impossible to file the change of venue" prior to the December 3, 2012, hearing is baseless. (Resp't Mot. at 3.) Regardless, the respondent would have been required to appear for the December 3, 2012, hearing, even if he had properly filed a motion to change venue prior to that date.

Jurisdiction in the respondent's case vested with this Court on July 5, 2012. (Exh. 1 at 1.) 8 C.F.R. § 1003.14(a). The Court was not divested of jurisdiction upon the respondent's release on bond. Accordingly, this Court was well within its authority to conduct a hearing in this case—a matter over which it retained jurisdiction. The Court was also well within its authority when it scheduled the December 3, 2012, hearing in this matter on August 13, 2012—approximately four months in advance—and provided both parties with adequate notice of the December 3, 2012, hearing. 8 C.F.R. § 1003.18. Nothing compels this Court to reschedule a hearing subsequent to an alien's release on bond. As a consequence, the Court declines to exercise its discretion with respect to the respondent's motion on account of its utter lack of merit.

IV. CONCLUSION

Accordingly, the Court shall enter the following Order:

ORDER: **IT IS HEREBY ORDERED THAT** the respondent's motion to reopen is **DENIED**.

Irene C. Feldman
United States Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision of the Immigration Judge in this case. Any appeal is due in the hands of the Board of Immigration Appeals on or before thirty calendar days from the date of service of this decision.

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer (M) ALIEN'S ATT/REP ( ) DHS
DATE: 6/28/13 BY COURT STAFF: _____
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other