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 22041

Urizar, Mario Rene
Eduardo Soto PA
999 Ponce de Leon Blvd., Ste. 1040
Coral Gables, FL 33134

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: DOMINGUEZ-TRILLO, PEDRO **A 200-760-650**

Date of this notice: 2/18/2016

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:
Pauley, Roger
Greer, Anne J.
Wendtland, Linda S.

Userteam: Docket

File: A200 760 650 - Dallas, TX

Date: FEB 18 2016

In re: PEDRO DOMINGUEZ-TRILLO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mario Rene Urizar, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law (conceded)

APPLICATION: Reopening

On January 29, 2015, the Immigration Judge denied the respondent's motion to reopen filed December 16, 2014. The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings consistent with this decision.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The following procedural history is relevant with respect to the respondent's statutory eligibility for relief. The respondent, a native and citizen of Mexico, entered the United States as a nonimmigrant visitor but stayed longer than authorized (I.J. at 1; Exh. 1). On September 4, 2014, the respondent filed a motion with the Immigration Court withdrawing all applications for relief except for post-conclusion voluntary departure pursuant to section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b) (I.J. at 1-2; Respondent's Sept. 4, 2014, Request for Voluntary Departure). In a decision dated October 16, 2014, and mailed to the parties on October 30, 2014, the Immigration Judge granted the respondent 60 days to voluntarily depart (I.J. at 2; Order Granting Voluntary Departure).[1] On November 14, 2014, the respondent married a United States citizen (Respondent Dec. 16, 2014, Motion to Reopen at 2, Tab B).

[1] The Immigration Judge's order contains conflicting language: it states that the respondent may depart within "sixty days of *receipt* of this Order" but "not later than December 16, 2014" (Order Granting Voluntary Departure (emphasis added)). Assuming the respondent received the order on the day it was mailed, that would potentially extend a 60-day voluntary departure grant until December 29, 2014 (Resp. Brief at 4). However, we need not decide the exact date that voluntary departure expired, as the respondent's motion to reopen was filed on December 16, 2014, before the earliest possible date on which voluntary departure could have expired.

On December 16, 2014, the respondent filed a motion to reopen, requesting an opportunity to file for adjustment of status pursuant to section 245(a) of the Act, 8 U.S.C. § 1255(a), and providing evidence that his wife is pursuing an Alien Relative Petition (Form I-130) on his behalf (Respondent, Dec. 16, 2014, Motion to Reopen at Tabs B, H). The Immigration Judge denied the motion to reopen, finding the respondent was not statutorily eligible for any relief, including adjustment of status, because he had overstayed the voluntary departure period (I.J. at 3).

The respondent appeals the Immigration Judge decision, arguing the motion was filed within the voluntary departure period, and thus, under 8 C.F.R § 1240.26(e)(1), he is not subject to the penalties for overstaying voluntary departure found at section 240B(d)(1)(B) of the Act (Resp. Brief at 4). We agree.

Generally, a bar is imposed on a respondent who is granted voluntary departure by a date definite but remains past that deadline. Section 240B(d)(1)(B) of the Act (an alien who does not voluntarily depart within the time specified "shall be ineligible, for a period of 10 years" for various forms of discretionary relief). However, if a motion to reopen or reconsider is filed within the departure period, the grant of voluntary departure automatically terminates such that the penalties for failure to depart do not apply. 8 C.F.R. § 1240.26(e)(1) ("If the alien files a post-order motion to reopen . . . during the period allowed for voluntary departure, the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply."); *see also Dada v. Mukasey*, 554 U.S. 1 (2008).

Here, the respondent filed his motion to reopen on December 16, 2014, within the 60-day voluntary departure period granted by the Immigration Judge (Order Granting Voluntary Departure). Thus, the penalties for failing to depart do not apply. 8 C.F.R. § 1240.26(e)(1). We therefore remand for consideration by the Immigration Judge of whether the respondent has met his burden for reopening. *See* section 240(c)(7) of the Act, 8 U.S.C. § 1229a(c)(7) (governing motions to reopen); 8 C.F.R. § 1003.23 (outlining the requirements for motions to reopen before the Immigration Judge). Although we are not resolving in this appeal whether reopening is warranted, we agree with the respondent that his motion was timely filed within 90 days of the Immigration Judge's administratively final decision, such that the Immigration Judge improperly applied the more stringent requirements applicable to sua sponte requests for reopening (I.J. at 3; Resp. Brief at 2-3). *See* 8 C.F.R. § 1003.23(b) (generally setting a 90 day deadline for filing motions to reopen); *Matter of Coehlo*, 20 I&N Dec. 464 (BIA 1992) (outlining the requirements generally applicable to timely motions to reopen); *compare Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (requiring a motion for sua sponte reopening be supported by exceptional circumstances).

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
DOMINGUEZ TRILLO, Pedro	)	A 200-760-650
	)	
RESPONDENT	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, you have remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States.

APPLICATION(S): Motion to Reopen

ON BEHALF OF THE RESPONDENT:	**ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:**
Eduardo R. Soto, Esq.	Office of the Chief Counsel, Dallas

WRITTEN DECISION OF THE IMMIGRATION JUDGE

Respondent has filed the present Motion to Reopen to apply for adjustment of status. The Department of Homeland Security has not filed a response. The motion will be denied due to statutory ineligibility.

On November 19, 2013, the Respondent appeared before the Court with counsel, admitted the allegations, conceded the charge, declined to designate a country of removal, and requested relief in the form of Adjustment of Status and Post-conclusion voluntary departure. Based on the admissions and concessions, removability was established by clear and convincing evidence. The Court designated Mexico as the country of removal, that being the country of nativity and citizenship. The deadline to file the application was set for September 2, 2014.

On September 4, 2014, the Respondent filed a motion to withdraw the request for Adjustment and proceed on the request for voluntary departure. Accordingly, in lieu of an order of removal, the Court granted the Respondent voluntary departure pursuant to Section 240B(b), to be effected by December 16, 2014. *See* Order Granting Voluntary Departure, dated October 10, 2014.

The granting of a motion to reopen lies within the discretion of the Immigration Judge. *See INS v. Doherty*, 502 US 314, 322 (1992). In order for a motion to reopen to be granted, an alien must state new facts that he or she intends to establish, supported by affidavits or other evidentiary materials, and why the new material was not available during other hearings. *See* 8 C.F.R. § 1003.23(b)(3). In addition, a Motion to Reopen will not be granted unless the Respondent establishes a *prima facie* case of eligibility for the underlying relief. *See INS v. Abudu*, 485 U.S. 94, 104 (1988); s*ee also INS v. Doherty*, 502 U.S. 314 (1992). A motion to reopen must be accompanied by applications for relief and all supporting documents. *INS v. Doherty*, 502 U.S. 314 (1992).

Additionally, the Court may exercise its *sua sponte* authority to reopen in "truly exceptional situations" and where the interests of justice would be served. *In Re G-D-*, 22 I&N Dec. 1132 (BIA 1999); *see also Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (holding that the Court has discretion to reopen a case *sua sponte*; however, that discretion is limited to cases where exceptional circumstances are demonstrated).

Here, the Court granted the Respondent's request for voluntary departure pursuant to Section 240B(b) of the Act on October 10, 2014 and required the Respondent to depart within sixty days of receipt of the written order but no later than December 16, 2014. *See* Order Granting Voluntary Departure, dated Oct. 10, 2014; *see also* INA § 240B(b)(2) ("Permission to

depart voluntarily under this subsection shall not be valid for a period exceeding 60 days."). However, he failed to depart by that date. *See* Respondent's Motion to Reopen & Motion for Extension of Voluntary Departure. Due to his failure to depart in compliance with his voluntary departure order, under Section 240B(d)(1)(B), he is ineligible, for a period of 10 years, to receive any further relief under Section 240B and Sections 240A, 245, 248, and 249 of the Act. Respondent's request for an extension of voluntary departure is denied as he has already been granted the maximum time allowed, and he is no longer within the time permitted, but is now under a final order of removal.

Finally, the Court finds that this case does not present the exceptional circumstances warranting a *sua sponte* reopening of the proceedings.

Date: 29 January 2015
Dallas, Texas

R. Wayne Kimball
Immigration Judge