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

Vincent, Marie
Pangea Legal Services
350 Sansome Street
Suite 650
San Francisco, CA 94104

DHS/ICE Office of Chief Counsel - SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: H[redacted], J[redacted]

A [redacted]-980

Date of this notice: 2/28/2019

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:
Greer, Anne J.

Userteam: Docket

File: A[redacted]-980 – San Francisco, CA Date:

FEB 28 2019

In re: J[redacted] H[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Marie A. Vincent, Esquire

ON BEHALF OF DHS: Mark W. Payne
Assistant Chief Counsel

APPLICATION: Remand; cancellation of removal; voluntary departure

In a decision dated November 28, 2017, an Immigration Judge denied the respondent's applications for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2012), and voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b), and ordered her removed from the United States. The respondent has appealed from that decision, and has also moved to remand the record to the Immigration Judge. The Department of Homeland Security ("DHS") opposes the appeal and the motion to remand. The record will be remanded.

The respondent, a native and citizen of Mexico, concedes that she is removable by virtue of her unlawful presence in the United States (IJ at 1; Tr. at 11-12). Accordingly, the main issue on appeal is whether the Immigration Judge properly denied her applications for cancellation of removal and voluntary departure.

Section 240A(b)(1)(A) of the Act requires an applicant for cancellation of removal to prove that she "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [final adjudication of her] application." That means the respondent must establish her continuous physical presence in the United States since early 2009 at the latest.[1] The Immigration Judge found that the respondent did not carry her burden of proof in that regard because her period of continuous physical presence was terminated in December 2010, when she elected to voluntarily depart the United States after receiving written

[1] The Immigration Judge, relying on the "stop-time rule," *see* section 240A(d)(1)(A) of the Act, found that the respondent had to prove continuous physical presence throughout the 10-year period immediately preceding service of her notice to appear on November 7, 2011 (IJ at 5). In light of the Supreme Court's intervening opinion in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), however, we conclude that service of the notice to appear did not trigger the stop-time rule here because the notice to appear did not specify the place, date, and time of the respondent's initial removal hearing (Exh. 1).

notice of (and waiving) her right to a hearing before an Immigration Judge (IJ at 5-8).[2] The respondent now challenges that finding on several fronts.

In the "motion to remand" portion of her brief, the respondent argues that the record is incomplete because several significant parts of her individual hearing were not recorded by the Immigration Judge (Respondent's Br. at 9-13). Specifically, the respondent claims that the audio recording of her hearing—and, as a result, the transcript—omits the testimony of her children's pediatrician, Dr. Kanwal Merchant, as well as a discussion during which her attorney objected to the admission of two DHS documents—a Record of Deportable Alien (Form I-213) (Exh. 9) and a Spanish-language Notification of Rights and Request for Disposition (Form I-826) (Exh. 10)—which were admitted as evidence of her 2010 voluntary departure.

In removal cases arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, we are "required to credit evidence supporting a motion to reopen unless it is 'inherently unbelievable.'" *Salim v. Lynch*, 831 F.3d 1133, 1140–41 (9th Cir. 2016) (*quoting in part Tadevosyan v. Holder*, 743 F.3d 1250, 1256 (9th Cir. 2014) (citation omitted)).[3] The respondent's motion is supported by the sworn declaration of her attorney, who avers that the Immigration Judge did not record Dr. Merchant's testimony or some of her objections to the admission of the Forms I-213 and I-826 "on the grounds that they were hearsay and the maker of the document was unavailable for cross-examination, and on other grounds" (Respondent's Br., Exh. A, at 2). Counsel's declaration also represents that, in response to her objections, the Immigration Judge "said that she would give reduced weight to these documents," but then gave them full weight in her written decision (*Id.*). In opposition to the respondent's motion, counsel for the DHS argues that any gaps in the record are non-prejudicial to the respondent; however, the respondent's claim that portions of the individual hearing were unrecorded is not disputed (DHS's Opp. Br. at 1-3, Nov. 29, 2018).

The evidence offered in support of the respondent's motion to remand is not inherently unbelievable. The transcript shows that the Immigration Judge stopped recording the respondent's July 25, 2017, individual hearing a short time before Dr. Merchant's testimony was set to begin, but did not resume the recording until September 8, 2017, after Dr. Merchant had testified (Tr. at 99-100). During the September 8, 2017, hearing, moreover, the respondent's counsel referenced the fact that she had raised prior objections to the DHS's documents (Tr. at 101), but it appears the substance of those earlier objections—and the Immigration Judge's rulings on them—occurred during the unrecorded portion of the prior hearing. Although the Immigration Judge's written decision does address some of the respondent's evidentiary objections (IJ at 6 & n.1), it does not address the hearsay and other objections alluded to in counsel's sworn declaration.

---

[2] The Immigration Judge did not decide whether the respondent satisfied any of the other eligibility requirements for cancellation of removal, or merits relief in discretion.

[3] A motion to remand is simply a motion to reopen that is filed during the pendency of an appeal and is subject to the same rules that govern motions to reopen filed after dismissal of an appeal. *Matter of Oparah*, 23 I&N Dec. 1, 2 (BIA 2000).

The record will be remanded because the failure to record the respondent's entire individual hearing compromises our ability to conduct full appellate review of the issues argued on appeal. Dr. Merchant's testimony—bearing on the health of the respondent's United States citizen children—would have been relevant to our review of the merits of the respondent's voluntary departure claim, which the Immigration Judge denied in discretion.[4] Further, the respondent's eligibility for cancellation of removal turns heavily on the reliability of the Forms I-213 and I-826 to which the respondent objects; we are not prepared to give those documents conclusive weight on appeal in the face of evidentiary objections that were not adjudicated on the record by the fact finder.

On remand, the Immigration Judge shall take whatever steps may be necessary to reconstruct Dr. Merchant's testimony, and shall give the respondent a chance to renew her objections to the admission of the DHS's evidence. The Immigration Judge shall rule on those objections on the record after giving the DHS a fair opportunity to respond and, if appropriate, to remedy any technical deficiencies in the evidence. Finally, the Immigration Judge shall render a new decision adjudicating the respondent's applications for relief from removal. If, at the conclusion of the remanded proceedings, either party wishes to pursue further review, the Immigration Judge shall certify the record back to this Board. In light of this disposition, the respondent's appeal is not yet ripe for adjudication and will be dismissed accordingly.

ORDER: The respondent's motion to remand is granted and the record is remanded for further proceedings consistent with the foregoing opinion and for entry of a new decision.

FURTHER ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

[4] The DHS asserts in its opposition to the motion that the respondent initially declined to apply for voluntary departure, which is substantiated (DHS's Opp. Br. at 1, Nov. 29, 2018); (Tr. at 68). However, the Immigration Judge's decision—which expressly addresses voluntary departure (IJ at 8)—seems to suggest that the respondent may have changed her mind on that score, perhaps during the portion of the hearing that was not recorded. Under the circumstances, we cannot presume that the omission of Dr. Merchant's testimony is immaterial.