U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: BANUELOS-BARRAZA, ADAN R... **A 206-279-823**

Date of this notice: 12/4/2017

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:
Guendelsberger, John
Kendall Clark, Molly
Grant, Edward R.

Userteam:

U.S. Department of Justice

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5107 Leesburg Pike, Suite 2000
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BANUELOS-BARRAZA, ADAN RICARDO
A206-279-823
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125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: BANUELOS-BARRAZA, ADAN R... **A 206-279-823**

Date of this notice: 12/4/2017

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

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Kendall Clark, Molly
Grant, Edward R.

Userteam: Docket

File: A206 279 823 – Dallas, TX

Date: DEC - 4 2017

In re: Adan Ricardo BANUELOS-BARRAZA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arthur Campbell Cooke, Esquire

APPLICATION: Motion to reopen and terminate

ORDER:

The respondent appealed from the Immigration Judge's July 27, 2017, decision denying his motion to reopen and terminate his removal proceedings based on his acquisition of U nonimmigrant status. *See* 8 C.F.R. § 214.14(c)(5)(i) (2017). In view of the respondent's present status and the circumstances presented, the appeal is sustained, and the proceedings are reopened and terminated without prejudice. *See* 8 C.F.R. § 1003.2(a). The respondent's stay request is denied as moot, as we have adjudicated this appeal. The record is returned to the Immigration Court without further action.

FOR THE BOARD

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

IN THE MATTER OF:	)	IN REMOVAL PROCEEDINGS
	)	
BANUELOS BARRAZA, Adan Ricardo	)	A 206-279-823
	)	
RESPONDENT	)	**(DETAINED)**

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or Act), as amended, in that you are 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.

APPLICATIONS: Motion to Reopen and Terminate

ON BEHALF OF RESPONDENT:	**ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:**
Arthur Campbell Cooke, Esq.	Joshua Levy, Esq.

Order Denying Motion to Reopen and Terminate

Respondent was ordered removed at his own request on Feb. 20, 2014. He now seeks reopening and termination based on the approval of a non-immigrant visa. DHS opposes the motion.

Respondent is a twenty-three-year-old male native and citizen of Mexico. Ex. 1. On December 12, 2013, the Department of Homeland Security (the Government) served Respondent with a Notice to Appear (NTA), charging him with removability pursuant to INA § 212(a)(6)(A)(i). Id. Following a finding of removability, Respondent requested a continuance for the adjudication of a U visa application. Respondent was detained at this time. The undersigned IJ then scheduled Respondent for an evidentiary hearing pursuant to *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012), in order to determine whether the application was prima facie approvable.[1] A deadline was set by the court for the submission of witness lists and supporting documentation, and Respondent was directed by the Court to submit a complete copy of the U visa application.

Respondent did not comply with that directive and did not offer himself for examination by the Court as contemplated by *Sanchez-Sosa*. Instead, he jointly requested a removal order

[1] The MTR, at 4, implies erroneously that the purpose of the continuance on Feb. 10, 2014 was to allow time for the government to adjudicate the U visa. The audio transcript shows otherwise.

five days before the scheduled examination by the Court. At that time, Respondent did not inform the Court that he intended to try to remain in the United States pending adjudication of the U visa, and then seek to reopen his case. On February 20, 2014, the Immigration Court ordered Respondent removed to Mexico at his own request. The government then released Respondent from detention and allowed him to proceed to an adjudication of the U visa without interview or court examination.

On Feb. 12, 2015 Respondent was provisionally approved for a U visa, and placed in deferred action pending numbers becoming current. On Dec. 1, 2016 the numbers became current and Respondent was automatically granted a U non-immigrant visa.

In the meantime, Respondent incurred negative discretionary factors, the government re-detained Respondent, and has declined to release him notwithstanding the approval of the U visa. Thus far, Respondent has not sought bond redetermination.

A hearing was conducted on the motion July 25, 2017. The government opposes the motion, and declines to waive the time limitation on the filing of motions to reopen.

I. APPLICATION LAW & ANALYSIS

A motion to reopen shall state new facts and evidence to be presented at a re-opened hearing, the evidence must be material, and the respondent must also show that it was unavailable and could not have been discovered or presented at the previous hearing. 8 C.F.R. § 1003.23(b)(3); *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007). Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. *Id.* The motion must be filed within 90 days of the date of entry of a final administrative order of removal. 8 C.F.R. § 1003.23(b)(1).

An Immigration Judge may also reopen any case in which he has made a decision at any time upon his own motion. 8 C.F.R. § 1003.23(b)(1). An Immigration Judge may exercise his discretion to reopen a respondent's case despite the statutorily mandated time and numerical restrictions on motions to reopen only in "exceptional situations." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); see 8 C.F.R. § 1003.23(b)(1), (3). "[I]t is the respondent's burden to demonstrate that such a situation exists." *Matter of Beckford*, 22 I&N Dec. 1216, 1218 (BIA 2000). When jurisdiction over a respondent's application for relief rests solely with USCIS *sua sponte* reopening is not appropriate. *See Matter of Yauri*, 25 I&N Dec. 103, 112 (BIA 2009) (declining to reopen for an arriving alien seeking adjustment to LPR status). Finally, under the regulations, a respondent who has an approved U visa and

> who is subject to an order of exclusion, deportation, or removal issued by an immigration judge or the Board may seek cancellation of such order by filing, with the immigration judge or the Board, a motion to reopen and terminate removal proceedings. ICE counsel may agree, as a matter of discretion, to join such a motion to overcome any applicable time and numerical limitations of 8 CFR 1003.2 and 1003.23.

8 C.F.R. § 214.14(c)(5)(i)

First, the Court notes that Respondent's motion to reopen is time barred. *See* 8 C.F.R. § 1003.23(b)(1). Respondent was ordered removed on February 20, 2014, and filed his motion on July 7, 2017, more than three years later. Although 8 C.F.R. § 214.14(c)(5)(i) contemplates a respondent who has been granted a U visa being able to file a motion to reopen and terminate, the regulation contemplates that the respondent's motion is still subject to the time limitations in 8 C.F.R. § 1003.23(b)(1). *See* § 214.14(c)(5)(i) (noting DHS may join in the motion "to *overcome* any applicable time and numerical limitations"). An alien who chooses to request a removal order even while still seeking a U visa runs the risk under the regulation that he will incur additional negative factors and that the government may not agree to waive the time limitations. Here, DHS, in its discretion, has not joined in the motion to reopen and terminate; rather, DHS has stated on the record that they oppose Respondent's motion to reopen and terminate. Thus, the MTR cannot be granted except on a *sua sponte* basis.

Respondent requested an order of removal in February 2014. He is seeking to reopen and terminate only now that he has obtained an approved U visa. If permitted, this machination would effectively allow aliens to avoid examination under *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012). The order of removal started the motion to reopen time limitation. Now, three years later and after Respondent has obtained a U visa, he seeks to take advantage of the Immigration Court's jurisdiction again so that he may eventually adjust his status. If Respondent intended to adjust status rather than be removed, he should not have sought to end this court's jurisdiction by requesting a removal order. It was always inevitable that Respondent would have to seek reopening if he expected to adjust to LPR status through the U visa process. It was never contemplated by either the Board or CIS that requesting a removal order was an appropriate way to await the adjudication of a U visa. The Court will not grant a motion that would have the effect of circumventing orderly procedures. *See generally Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (holding the Board will not reopen *sua sponte* to cure filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship).

In any event, if Respondent is correct that the grant of the U visa operates to preclude the government from executing the removal order, it is unnecessary to burden the court with reopening motions that would have no practical effect. *See Matter of Yauri*, 25 I&N Dec. 103, 112 (BIA 2009) (" . . . it is not necessary to reopen or terminate proceedings in order to allow an alien to pursue an application for adjustment of status before USCIS. The fact that USCIS has, in fact, completed its adjudication . . . and granted the respondent lawful permanent resident status while her motion [to reopen] was pending with the Board merely reinforces our determination that sua sponte reopening is not generally warranted."). The Board in *Yauri* specifically alludes to the "already-crowded dockets [of the Immigration Courts." Similar to *Yauri,* where the Court lacked jurisdiction over adjustment for an arriving alien, so here the Court lacks jurisdiction over U visa approvals. The Court lacks jurisdiction over any relief to which Respondent may be entitled.[2]

According, the following order will be entered:

[2] Respondent is not currently eligible for adjustment of status because he has not been physically present in the U.S. for a continuous period of at least three years after the date he was admitted as a U nonimmigrant. *See* 8 C.F.R. § 245.24(b). It would of course be speculative as to whether Respondent might become eligible for adjustment in the future. At present he is not eligible for any relief over which the Court has jurisdiction, and thus *Yauri* applies.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Reopen and Terminate is **DENIED.**

Date: 1-27-17
Dallas, Texas

R. Wayne Kimball
United States Immigration Judge