U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: EUSTATE, JOSE

A 047-128-564

Date of this notice: 12/20/2013

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.

Lulseges
Userteam: Docket

U.S. Department of Justice

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Board of Immigration Appeals
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5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

EUSTATE, JOSE
A047-128-564
LASALLE PARISH DETENTION CTR
830 PINEHILL ROAD
JENA, LA 71342

DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: EUSTATE, JOSE

A 047-128-564

Date of this notice: 12/20/2013

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:
Grant, Edward R.

Lulseges
Userteam: Docket

File: A047 128 564 – Boston, MA

Date: DEC 20 2013

In re: JOSE EUSTATE

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Stephen A. Lagana, Esquire

APPLICATION: Reopening; remand

The respondent has appealed from the Immigration Judge's decision dated July 16, 2013. The Immigration Judge denied the respondent's motion to reopen proceedings in which he was ordered removed in absentia. On October 28, 2013, the respondent filed a motion to remand. The respondent's motion to remand will be granted.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

In support of his motion to remand, the respondent has presented evidence that his 2005 conviction for the offense of Unlawful Distribution of a Controlled Substance in violation of Mass. Gen. Laws ch. 94C, § 32A(a) was vacated and a "guilty-filed" judgment was entered. Under these circumstances, we find it appropriate to remand the record to the Immigration Judge for consideration of the respondent's evidence relating to the vacation of his conviction and the legal effect of that action. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2001) (finding significant the distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and convictions vacated because of post-conviction events such as rehabilitation or immigration hardships). Accordingly, the following order will be entered.

ORDER: The motion to remand is granted and proceedings are remanded to the Immigration Judge for further proceedings consistent with the foregoing decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

IN THE MATTER OF:	)	
	)	
EUSTATE, Jose	)	**In Removal Proceedings**
A 047-128-564	)	**DETAINED**
	)	
Respondent	)	

CHARGES: Immigration and Nationality Act (INA or Act) § 212(a)(2)(A)(i)(II): Alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802).

INA § 212(a)(6)(A)(i): Alien present in the United States without being admitted or paroled, or who has arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT
Stephen A. Lagana, Esq.
Law Offices of Stephen A. Lagana
145 Essex Street
Lawrence, Massachusetts 01840

ON BEHALF OF DHS
Assistant Chief Counsel
Office of the Chief Counsel
JFK Federal Building, Room 425
Boston, Massachusetts 02203

ON RESPONDENT'S MOTION TO REOPEN

I. Procedural History

On July 17, 2007, the Department of Homeland Security (DHS) served the Respondent, Jose Eustate, with a Notice to Appear (NTA), which alleged that he: (1) is not a citizen or national of the United States; (2) is a native and citizen of the Dominican Republic; (3) was granted lawful permanent residence in the United States on June 4, 1999; (4) was convicted on April 19, 2005, of the offense of Unlawful Distribute Controlled Substance Class B (cocaine), in violation of Mass. Gen. Laws ch. 94C § 32A(a); (5) applied for admission to the United States as a lawful permanent resident on May 22, 2007, at Luis Munoz Marin International Airport in San Juan, Puerto Rico; (6) was paroled into the United States at Boston, Massachusetts, on May 22, 2007, for a deferred inspection; (7) did not appear for his scheduled and required deferred inspection on June 21, 2007; (8) and has been present in the United States without admission or

parole after inspection and authorization by an immigration officer. Based on these factual allegations, DHS charged the Respondent as removable pursuant to INA § 212(a)(2)(A)(i)(II), for a controlled substance offense, and INA § 212(a)(6)(A)(i), as an alien present in the United States without admission or parole.

On November 7, 2007, a notice was mailed to the Respondent advising him to appear at the Boston Immigration Court (Court) for a hearing scheduled for December 4, 2007, at 9:30 a.m. Because the Respondent failed to appear for the December 4, 2007, hearing, the Court proceeded with his case *in absentia*. DHS filed an I-213 as evidence of the Respondent's removability, and the Court sustained both charges in the NTA. As the Respondent failed to establish good cause for his failure to appear, the Court found that he had abandoned any and all claims for relief from removal. Order of the IJ (Dec. 10, 2007). Consequently, the Court ordered the Respondent removed from the United States to the Dominican Republic. *Id.*

II. Respondent's Motion to Reopen

On June 14, 2013, the Respondent, through counsel, filed a motion to reopen his removal proceedings. In his motion, the Respondent contends that DHS improperly charged the Respondent under INA § 212(a)(6)(A)(i) when he was actually paroled into the United States on May 22, 2007. *See* Resp't Memo. of Law in Support of Mot. to Reopen to Terminate Removal Proceedings (Jul. 8, 2013) (hereinafter Resp't Mot. to Reopen Memo). Based on the Respondent's assertion that he was paroled into the United States, he argues that there was insufficient evidence to sustain the removal charge on that ground. *Id.* Accordingly, the Respondent requests that his case be reopened and terminated with prejudice. *Id.*

III. Standards of Law

The Immigration Judge may upon his or her own motion at any time, or upon motion by DHS or the Respondent, reopen any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals (BIA or Board). 8 C.F.R. § 1003.23(b)(1) (2013). A motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3).

Subject to limited exceptions, a party may file only one motion to reopen within ninety days of the date of entry of a final administrative order of removal. However, an order of removal entered *in absentia* may be rescinded upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear resulted from exceptional circumstances as defined in section 240(e)(1) of the Act. INA § 240(b)(5)(C) (2013); 8 C.F.R. § 1003.23(b)(4)(ii). Alternatively, an order of removal entered *in absentia* may also be rescinded at any time if the alien demonstrates that he or she did not receive notice of the hearing. *Id.*

While the Court may reopen a case under its *sua sponte* power, such authority is used sparingly as a general rule; it is not meant to be a "general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but rather as an

extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1133 (BIA 1999); *see also Matter of Jean*, 23 I&N Dec. 373, 380 n.9 (A.G. 2002).

IV. Findings of Fact and Conclusions of Law

As a general matter, motions to reopen are "disfavored as contrary to 'the compelling public interests in finality and the expeditious processing of proceedings.'" *Raza v. Gonzalez*, 484 F.3d 125, 127 (1st Cir. 2007) (quoting *Roberts v. Gonzales*, 422 F.3d 33, 35 (1st Cir. 2005)). Accordingly, there are procedural and substantive bars to reopening removal proceedings. *See Smith v. Holder*, 627 F.3d 427, 433 (1st Cir. 2010).

Procedurally, the Respondent's motion to reopen is untimely and not subject to an exception. *See* 8 C.F.R. § 1003.23(b)(1), (4). The Respondent filed the present motion to reopen on June 14, 2013—nearly six years after he was ordered removed and well beyond 180-day deadline specified in the regulations. *See* 8 C.F.R. § 1003.23(b)(4). The Respondent did not allege that the time limitations are inapplicable due to lack of notice or to changed country conditions giving rise to a claim for asylum or withholding of removal. Consequently, the Court finds that the Respondent's motion to reopen is time-barred. *See* 8 C.F.R. § 1003.23(b)(1), (4).

Furthermore, the Respondent's claim also fails substantively, as he has not established a *prima facie* case for the relief sought or introduced previously unavailable, material evidence. *See id.* at 433 (citing *Fesseha v. Ashcroft*, 333 F.3d 13, 20 (1st Cir.2003)). The Respondent contends that his proceedings should be reopened and terminated because there was insufficient evidence to find him removable pursuant to section 212(a)(6)(A)(i) of the Act. *See* Resp't Mot. to Reopen Memo. As an initial matter, he did not provide an affidavit or any other evidence to corroborate this assertion. *See Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1st Cir. 2005) (Counsel's factual assertions in pleadings or legal memoranda are not evidence and do not establish material facts). Contrary to the Respondent's claims, the record evidence supports the charge of removability. The I-213 indicates that on May 22, 2007, he was paroled into the United States until the date of his deferred inspection on June 21, 2007. The Respondent never appeared for his deferred inspection and his status was automatically terminated on that date. *See* 8 C.F.R. § 212.5(e). No written notice terminating his parole status was required. *Id.*

The Court finds no basis to conclude that the charge under INA § 212(a)(6)(A)(i) was erroneously sustained. Moreover, in its initial decision, the Court also found the Respondent removable pursuant to INA § 212(a)(2)(A)(i)(II). Thus, even if one of the removal charges should not have been sustained, the Respondent remained removable on other grounds. Accordingly, the Court finds that the Respondent has not established that his proceedings should be reopened and terminated.

Due to the Respondent's lack of diligence and failure to demonstrate a *prima facie* case for any relief from removal, the Court also finds that reopening his removal proceedings *sua sponte* is not warranted. *See Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). When the Respondent was paroled into the United States, he had notice of his deferred inspection date but failed to appear. He offered no explanation for his absence or his failure to reschedule his inspection. Nor did he provide reasons why he failed to

attend his removal hearing. Further, the Respondent did not request any viable form of relief from removal, no affidavit or applications were submitted, and there is no evidence that he is eligible for any relief. Before exercising *sua sponte* authority, the Court must be persuaded that the Respondent's situation is "truly exceptional." *Matter of G-D-*, 22 I&N Dec. at 1135. Because the Respondent has not established such a situation in this case, his motion to reopen is denied and the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion to Reopen be **DENIED.**

7/16/13
Date

PAUL M. GAGNON
United States Immigration Judge