U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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3373 Pepper Lane
Las Vegas, NV 89120

Name: PEREZ-MOTE, FAUSTINO

A 205-934-720

Date of this notice: 3/9/2016

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:
Guendelsberger, John
O'Leary, Brian M.
Grant, Edward R.

Userteam: Docket

File: A205 934 720 – Las Vegas, NV

Date: MAR - 9 2016

In re: FAUSTINO PEREZ MOTE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jocelyn Cortez, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, was ordered removed in absentia on February 9, 2015. On February 26, 2015, the respondent filed a motion to reopen proceedings, which an Immigration Judge denied on April 27, 2015. The respondent filed a timely appeal of that decision. The appeal will be sustained, the in absentia order will be vacated, proceedings will be reopened, and the record will be remanded.

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).

Upon de novo review of the record and in light of the totality of circumstances presented in this case, we conclude that the respondent demonstrated that reopening is warranted.[1] *See* sections 240(b)(5)(C)(i), (e)(1) of the Immigration and Nationality Act, 8 U.S.C.A. §§ 1229a(b)(5)(C)(i), (e)(1). We will therefore sustain the respondent's appeal and remand the record for further proceedings.

ORDER: The respondent's appeal is sustained, the in absentia order is vacated, proceedings are reopened and the record is remanded to the Immigration Judge for further proceedings and for the entry of a new decision.

FOR THE BOARD

[1] Among other factors, we have considered that the respondent's failure to appear was inadvertent and the result of a good faith mistake rather than an attempt to avoid a hearing. Moreover, the respondent has been diligent in pursuing his status, has an I-130 pending and appears eligible to adjust his status.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3365 Pepper Lane, Suite 200
Las Vegas, Nevada 89120

IN THE MATTER OF:	**In Removal Proceedings**
PEREZ-MOTE, Faustino **Respondent**	**File No.:** A205-934-720
On Behalf of the Respondent: Jocelyn Cortez, Esq. 1149 South Maryland Parkway Las Vegas, Nevada 89104	**On Behalf of DHS:** Christian Parke Assistant Chief Counsel Immigration and Customs Enforcement

DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent's motion to reopen will be DENIED. The respondent was ordered removed from the United States to Mexico based on his failure to attend a removal hearing on February 9, 2015. During the hearing, the respondent was represented by counsel, Jocelyn Cortez, who filed a copy of a receipt notice for a Form I-130 petition for alien relative that had been filed on the respondent's behalf, and indicated to the Court that she had been unable to reach the respondent by phone that morning. On February 29, 2015, the respondent, through counsel, filed a motion to reopen this proceeding based on exceptional circumstances. The Department of Homeland Security (DHS) has not filed an opposition to the respondent's motion.

A motion to reopen based on exceptional circumstances must be filed within 180 days of the issuance of the *in absentia* order of removal. INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). The respondent's motion was timely filed, however he has not established that his failure to appear was based on an exceptional circumstance. After being released from DHS custody in 2013, the respondent retained his current counsel on December 20, 2013. On January 12, 2015, the respondent's United States citizen wife filed a Form I-130 petition that is pending approval by DHS. The respondent states that he mistakenly believed that he was not required to appear for the hearing on February 9, 2015 because of the pending Form I-130 petition. Therefore, from February 8th through February 13th, the respondent and his wife were out of state at a company retreat hosted by his wife's employer. For this reason, his attorney was unable to reach him on the morning of the hearing. When he returned on February 13, 2015, the respondent learned of his *in absentia* order of removal.

The respondent argues that he is entitled to reopening based on the precedent established in *Singh v. INS*, 295 F.3d 1037 (9th Cir. 2002). In that case, the Ninth Circuit Court of Appeals held that Singh "had no possible reason to try to delay the hearing [because it] was the culmination of years of efforts to obtain lawful permanent residence status," and noted that Singh had previously appeared for five of his previous hearings. *Singh v. INS*, 295 F.3d 1037, 1038-40 (9th Cir. 2002). Additionally, Singh misunderstood the time of his immigration hearing, and therefore appeared at his attorney's office one hour before he believed he needed to appear at the courthouse, but had already missed his hearing which took place that morning. *Id.* at 1040. The respondent's case is distinguishable from *Singh* because this would have been his first appearance in Immigration Court. Also, unlike the respondent in *Singh* who accidentally missed the scheduled hearing because he was mistaken about the scheduled time, the respondent knowingly and purposefully did not make any effort to attend the hearing in Immigration Court on February 9, 2015.

The respondent further argues that the Court should not deny his motion to reopen because he is eligible to receive relief from removal and denial would therefore lead to an "unreasonable, unfair and absurd" result. *See Chowdhury v. INS*, 241 F.3d 848 (7th Cir. 2001) (the BIA regulations "should not be so strictly interpreted as to provide unreasonable, unfair, and absurd results"); *Singh v. INS*, 295 F.3d at1040 (the agency "should not deny reopening of an in absentia deportation order where the denial leads to the unconscionable result of deporting an individual eligible for relief from deportation"). However, the respondent has not submitted any applications for relief with his motion to reopen. *See* 8 C.F.R. § 1003.23(b)(3) (a motion to reopen filed for the purpose of seeking relief from removal "must be accompanied by the appropriate application for relief and all supporting documents"). The respondent has submitted only a copy of the birth certificate of his United States citizen daughter, Miranda Valentina Perez, born on January 22, 2015, and a receipt notice from DHS confirming that a Form I-130 petition for alien relative was filed on his behalf by his United States citizen spouse. These documents alone are insufficient to establish his prima facie eligibility for adjustment of status to lawful permanent resident or for cancellation of removal for certain nonpermanent residents.

Additionally, the respondent is not entitled to reopening of this proceeding because he received notice in accordance with paragraphs (1) and (2) of section 239(a). *See* INA § 240(b)(5)(C)(ii). INA §§ 239(a)(1) and (2) provide that service to an alien of an NTA and subsequent written hearing notice "shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record. . .)." The NTA was personally served on the respondent on June 22, 2013, and notice of the February 9, 2015 hearing was mailed to the respondent's attorney, which constitutes service on the respondent. INA § 239(a)(1) and (2); *Matter of Peugnet*, 20 I&N Dec. 233, 237 (BIA 1991). Additionally, the respondent acknowledges receipt of the hearing notice during February 2014. Notably, the notice of hearing contains a written notice of the consequences of failing to appear, and thus the respondent's mistake was unreasonable.

Under the totality of the circumstances, where the respondent was provided with notice of the hearing date, was represented by counsel, and failed to establish prima facie eligibility for relief, the Court concludes the respondent has failed to establish that reopening of his removal proceeding is justified. Accordingly, the following order shall be entered:

IT IS HEREBY ORDERED that the respondent's motion to reopen be **DENIED**.

DATE: April 27, 2015

Jeffrey L. Romig
Immigration Judge

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) Personal Service (P)
TO: [P] DHS [ ] Alien [M] Alien's Attorney
DATE: 4/27/15
BY: Court Staff