



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: CISNEROS-RAMIREZ, J. MARCOS A 090-442-154

Date of this notice: 8/9/2016

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:
Grant, Edward R.
Mann, Ana
Adkins-Blanch, Charles K.

Userteam: Docket

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Falls Church, Virginia 22041

File: A090 442 154 – Houston, TX

Date: AUG - 9 2016

In re: J. MARCOS CISNEROS-RAMIREZ a.k.a. Fernando Sifuentes

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alex M. Torres, Esquire

ON BEHALF OF DHS: Rory H. Potter
Assistant Chief Counsel

APPLICATION: Reopening

The respondent appealed the Immigration Judge's decision dated January 28, 2015, denying his motion to reopen proceedings. An Immigration Judge previously ordered the respondent removed on December 13, 2000. We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). Since the respondent's final hearing, intervening changes in the law have affected his removability as charged. Upon our de novo review, in light of the totality of circumstances presented in this matter, including intervening case law by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, we conclude that reopening and termination of these removal proceedings is warranted. *See Lopez v. Gonzalez*, 549 U.S. 47 (2006), *Chapa-Garza v. Ashcroft*, 262 F.3d 479 (5th Cir. 2001), *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012). Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, and these proceedings are reopened and terminated.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
5520 GREENS ROAD
HOUSTON, TX 77032

Law Office of Alex M. Torres
Torres, Alex
P.O. Box 3268
Bellaire, TX 77402

IN THE MATTER OF
CISNEROS-RAMIREZ, J. MARCOS

FILE A 090-442-154

DATE: Jan 28, 2015

___ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:
BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
5520 GREENS ROAD
HOUSTON, TX 77032

___ OTHER: _____

Brandi Henderson
COURT CLERK
IMMIGRATION COURT

CC: DHS

FF

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON SERVICE PROCESSING CENTER
HOUSTON, TEXAS

IN THE MATTER OF)	IN REMOVAL PROCEEDINGS
)	
J. Marcos Cisneros Ramirez)	File No. A090-442-154
)	
Respondent.)	
_____)	

ON BEHALF OF THE RESPONDENT:
Alex M. Torres
Law Office of Alex M. Torres
P.O. Box 3268
Bellaire, TX 77402

ON BEHALF OF THE GOVERNMENT:
Dean Emmons, Deputy Chief Counsel
Department of Homeland Security

MEMORANDUM AND DECISION OF THE IMMIGRATION JUDGE

Respondent is a native and citizen of Mexico whose status was adjusted to that of a lawful permanent resident on October 18, 1989. Exh. 1. On October 9, 2000, Respondent was convicted in Texas for driving while intoxicated and sentenced to a five-year term of incarceration. Exh. 2. On October 17, 2000, the former Immigration and Naturalization Service served Respondent with a Notice to Appear (NTA), charging him with removability pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), as an alien who, at any time after admission, was convicted of an aggravated felony, as defined in INA § 101(a)(43)(F), to wit: a crime of violence for which the term of imprisonment is at least one year. Exh. 1.

At the master calendar hearing on December 13, 2000, Respondent, through counsel, admitted factual allegations contained in the NTA and conceded the charge of removability. Based on Respondent's admissions and concessions, the prior Immigration Judge sustained the charge and ordered Respondent removed from the United States to Mexico. Respondent waived appeal of the Court's decision and was thereafter physically removed from the United States. *See* Respondent's Motion to Reopen at 7 (Jan. 8, 2015).

On January 8, 2015, Respondent filed the present Motion to Reopen in which he requests that the Court reopen his case, rescind the 2000 order of removal, and terminate removal proceedings, based on subsequent changes in the law. Respondent's Motion to Reopen at 8-13.

Motions to reopen are governed by INA § 240(c)(7) and 8 C.F.R. § 1003.23(b). Only one motion to reopen is allowed, and it must be filed within ninety days of a final administrative order. INA § 240(c)(7)(A), (c)(7)(C)(i). Respondent's motion to reopen was filed on January 8, 2015, more than fourteen years after the final administrative order in his case. Therefore, it was untimely filed. Respondent's motion to reopen does not fall within any of the exceptions to

timeliness set forth in INA § 240(c)(7)(C) and 8 C.F.R. § 1003.23(b). Consequently, the untimeliness of his motion to reopen is not excused and reopening is not statutorily authorized.

Respondent argues that the untimeliness of his motion to reopen should be excused because he is no longer removable following the Fifth Circuit Court of Appeals' decision in *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001) (holding that a Texas felony conviction for driving while intoxicated does not constitute an aggravated felony under INA § 101(a)(43)(F)). He further contends that he was prevented by the departure bar set forth in 8 C.F.R. § 1003.23(b)(1) from timely filing the instant motion to reopen until the issuance of the Fifth Circuit's decision in *Garcia-Carias v. Holder*, 697 F.3d 257, 264 (5th Cir. 2012), and that the ninety day deadline should be tolled. Respondent's Motion to Reopen at 8-13. However, the Court observes that the Fifth Circuit has not adopted the doctrine of equitable tolling in the context of a motion to reopen. See *Joseph v. Holder*, 720 F.3d 228, 231 (5th Cir. 2013); *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). Instead, the Fifth Circuit construes such an argument as a request for the Court to reopen proceedings *sua sponte*. *Id.*

The Court finds that it lacks jurisdiction to reopen *sua sponte* because Respondent departed from the United States under a final order of removal. Pursuant to 8 C.F.R. § 1003.23(b)(1), a "motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his departure from the United States." The Fifth Circuit has held that this regulation, known as the "departure bar," does not apply within the context of statutory motions to reopen made in removal proceedings. *Garcia-Carias*, 697 F.3d at 263. ("[I.N.A. § 240(c)(7)] unambiguously gives aliens a right to file a motion to reopen regardless of whether they have left the United States"). Thus, an Immigration Judge has jurisdiction to entertain a motion to reopen in removal proceedings made pursuant to INA § 240(c)(7) even if the alien has been removed from the United States. However, this authority does not extend to *sua sponte* motions to reopen, which are regulatory in nature and subject to the departure bar. *Garcia-Carias*, 697 F.3d at 263; *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003). Consequently, the Court lacks jurisdiction to *sua sponte* reopen proceedings, and must deny Respondent's motion.

Accordingly, the following order is issued:

ORDER

IT IS HEREBY ORDERED that Respondent's motion to reopen is denied.

1/29/15

Date



Saul Greenstein
Immigration Judge