U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: PACHECO-FIGUEROA, YESENI...

A 205-733-029

Date of this notice: 5/6/2016

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:
Kendall-Clark, Molly
Greer, Anne J.
O'Herron, Margaret M

Userteam: Docket

File: A205 733 029 – Buffalo, NY

Date: MAY - 6 2016

In re: YESENIA IVETH PACHECO-FIGUEROA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sarah L. Antos, Esquire

ON BEHALF OF DHS: Brandi M. Lohr
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Reopening

The respondent appeals from the Immigration Judge's November 4, 2015, decision denying her motion to reopen proceedings and rescind the *in absentia* order of removal entered on September 24, 2014. The appeal will be sustained, the proceedings will be reopened, and the record will be remanded.

We review findings of fact, including credibility findings, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The Board possesses discretion to reopen or reconsider cases *sua sponte*. *See* 8 C.F.R. § 1003.2(a); *see also Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Based on the totality of the circumstances in this case, including the respondent's young age at the time of the *in absentia* hearing, we will grant the respondent's motion to reopen and rescind the *in absentia* order pursuant to our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a); *see also Matter of J-J-*, *supra*. Accordingly, the following order will be entered.[1]

[1] The Digital Audio Recording for the May 30, 2014, hearing reflects that the Immigration Judge asked the respondent's father about his immigration status, as well as that of his wife, who was not present. The Immigration Judge also asked the respondent's father whether he assisted the respondent in entering the United States and advised him that both he and his wife should appear at the respondent's subsequent hearing. To the extent that the Immigration Judge's inquiry was irrelevant to the respondent's proceedings, we find that it was inappropriate.

ORDER: The appeal is sustained, the *in absentia* order of removal is rescinded, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BUFFALO, NEW YORK

In the Matter of:	
PACHECO-FIGUEROA, Yesenia Iveth **A# 205-733-029**	**IN REMOVAL PROCEEDINGS**
Respondent	

CHARGES: INA § 212(a)(6)(A)(i) Present without Permission or Parole

MOTIONS: Motion to Reopen and Rescind the *In Absentia* Order of Removal

ON BEHALF OF RESPONDENT
Sarah L. Antos, Esq.
Anne E. Doebler, P.C.
14 Lafayette Square, Suite 1800
Buffalo, New York 14203

ON BEHALF OF THE DHS
Brandi M. Lohr, Esq.
Assistant Chief Counsel
130 Delaware Avenue, Suite 203
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SUMMARY ORDER OF THE IMMIGRATION JUDGE

Respondent's motion to reopen and rescind the *in absentia* order or removal is **DENIED.**

The Court issued its removal decision on September 24, 2014. *See* Order of the IJ (Sept. 24, 2014). Because the Board of Immigration Appeals ("BIA") lacks jurisdiction to consider an appeal from an *in absentia* removal order, *see Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999), the Court's order became final upon its issuance. *See* Order of the IJ (Sept. 24, 2014). A motion to reopen must usually be filed within 90 days of the date of a final administrative order of removal. INA § 240(c)(7)(C)(i); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1). However, certain exceptions apply. *See, e.g.*, INA § 240(c)(7)(C)(ii). Relevant to these proceedings, the "filing of a motion to reopen an order entered [*in absentia*] is subject to [a separate deadline]." INA § 240(c)(7)(C)(iii) (rescission of *in absentia* orders of removal).

Respondent's motion to reopen was clearly not filed within 90 days of the date of the Court's final order of removal. *Compare* Respondent's Motion to Reopen and Rescind an In Absentia Order of Removal (Jul. 20, 2015) *with* Order of the IJ (Sept. 24, 2014). Therefore, she can only proceed under the rescission subsection. INA § 240(b)(5)(C). According to that statute, an order of removal entered *in absentia* may be rescinded only:

> (i) 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 was because of exceptional circumstances (as defined in subsection (e)(1)), or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 239(a) or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

Id. Respondent does not allege that there were any exceptional circumstances that would otherwise excuse her appearance at the September 24, 2014 hearing.

Additionally, Respondent's motion was not filed within 180 days of the Court's order of removal. *Compare* Respondent's Motion to Reopen and Rescind an In Absentia Order of Removal (Jul. 20, 2015) *with* Order of the IJ (Sept. 24, 2014). Respondent has not alleged that she was in Federal or State custody at the time of her original hearing. Therefore, Respondent must demonstrate that she did not receive notice in accordance with paragraph (1) or (2) of section 239(a) of the INA. (INA § 240(b)(5)(C)(ii)).

Respondent states that she did not receive notice of her September 24, 2015 hearing because "she and her family were in the process of moving . . . Respondent thought she told the Court her new address; however, she did not understand that she also had to complete a change of address form and she did not do so." *See* Respondent's Motion at ¶ 5.

As a threshold matter, the Court *always* informs the respondent, with or without counsel present, and in their best language, of their obligation to notify the Court within five days of their move of their new address by filing out an EOIR-33. Respondent, by her own admission, stated in her motion that she failed to provide the Court with a Change of Address form. *See* Respondent's Motion at ¶ 5; *see also* 8 C.F.R. § 1003.15(d)(2) (indicating that he respondent, whether represented or not, *must* notify the Immigration Court within five days of any change of address using the Alien Change of Address Form EOIR-33).

Furthermore, when the Notice of Hearing is served through the mail, there is "a presumption of receipt . . . so long as the record establishes that the notice was accurately addressed and mailed in accordance with normal office procedures." *Lopes v. Gonzales*, 468 F.3d 81, 85 (2d Cir. 2006). Again, by Respondent's own admission, she failed to inform the Court of her new address.

In any event, the statute makes clear that notice is proper when she is personally served with the NTA. Section 239(a)(1) requires the government to provide an alien in removal proceedings with a Notice to Appear—either in person "or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any." Respondent clearly received written notice of her removal proceedings. The NTA that was served on Respondent bares her signature. *See* (Exh. 1 at 3) (indicating that Respondent was personally

served). Respondent's NTA provided her with all of the advisals required by INA § 239(a)(1). *Id.*

Respondent cannot claim that she was not on notice of her removal proceedings, and should not have waited almost a year before attempting to remedy her immigration status. By law, the NTA is sufficient in forewarning Respondent that a hearing will be scheduled and that she is required to appear at all scheduled hearings. Respondent was aware that she was to be notified, through the mail, of her next scheduled hearing. The fact that she failed to provide the Court with her new address is not an adequate ground to reopen these proceedings. *See* INA § 239.

Relatedly, Respondent indicates, "upon information and belief" that her father was granted Temporary Protected Status. *See* Respondent's Motion at ¶ 7. Respondent provides no evidence of this and the Court cannot rely on the self-serving statement of Respondent. Accordingly, the Court hereby makes the following order:

ORDER

IT IS ORDERED that Respondent's motion to reopen and rescind the *in absentia* order or removal is **DENIED**.

Date

Philip J. Montante, Jr.
U.S. Immigration Judge