U.S. Department of Justice

Executive Office for Immigration Review

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Name: CHILEL-RAMOS, DILIA
Riders:215-875-194

A 215-875-193

Date of this notice: 9/17/2020

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:
Cassidy, William A.
COUCH, V. STUART
Gorman, Stephanie

Userteam: Docket

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Files: A215-875-193 – Fort Snelling, MN
A215-875-194

Date: SEP 1 7 2020

In re: Dilia CHILEL-RAMOS
Jennifer Cecilia CHILEL-RAMOS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Joseph Lopez Wilson, Esquire

APPLICATION: Reopening

The respondents appeal from the Immigration Judge's decision, dated January 2, 2020, denying their motion to reopen proceedings. The respondents were ordered removed in absentia on May 14, 2019, after they did not appear for a scheduled hearing. The respondents assert that they did not receive notice of the hearing at which they were ordered removed and they argue that the Immigration Judge erred in denying their motion to reopen. The Department of Homeland Security has not replied to the appeal. The respondents' appeal will be sustained and the records will be remanded for further proceedings and for the entry of a new decision.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In their motion to reopen, the respondents asserted that they did not receive a hearing notice at their address of record. The record before us shows that the hearing notices and subsequent decision were returned to the Immigration Court as undeliverable because the address did not have a mail receptacle at the time of delivery. The Immigration Judge did not address whether service was sufficient, but denied the motion to reopen because the respondents did not submit an application for relief in support of their motion to reopen proceedings.

Section 240(b)(5)(C)(ii) of the Act, which addresses the rescission of an in absentia removal order, states that an alien may submit a motion to reopen at any time after being ordered removed in absentia if the alien did not receive proper notice of his or her removal proceedings. This section of the Act does not set forth content requirements for such a motion. The regulation contained at 8 C.F.R. § 1003.23(b)(3) addresses the contents of motions to reopen generally, while 8 C.F.R. § 1003.23(b)(4)(ii) specifically addresses motions to reopen where an alien is seeking the rescission of an in absentia order of removal. The latter does not mention applications for relief. 8 C.F.R. § 1003.23(b)(3), which addresses motions to reopen generally, provides that a motion may be denied as a matter of discretion even if the alien has established prima facie eligibility for the proposed form of relief.

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In the instant case, the respondents had not previously appeared before an Immigration Judge and thus had not received rights advisals or answered the charge of removability. While 8 C.F.R. § 1003.23(b)(3) contains a requirement that an alien submit an application for relief and all supporting documentation in support of a motion to reopen, we read this requirement as pertaining to cases where the alien has had the opportunity to answer the charge(s) of removability and apply for any available relief. This would include cases where an alien has failed to appear for a hearing after proper notice. The same regulation states that the alien must set forth the new facts that will be proven and provides that an Immigration Judge may deny a motion to reopen as a matter of discretion even if the alien submits an application and establishes prima facie eligibility for the proposed form of relief. We read these provisions to apply to those cases where an alien has appeared before an Immigration Judge, or had proper notice of his or hearing, and then seeks to file a new or amended application for relief after the entry of an administrative order.

In contrast, the record in this case indicates that the respondents did not receive notice of the hearing at which they were ordered removed. We conclude that the provisions of 8 C.F.R. § 1003.23(b)(3), which apply to motions to reopen generally, do not require the respondents to submit an application for relief where they are seeking rescission of an in absentia order because they did not receive notice of their hearing. In distinguishing between 8 C.F.R. § 1003.23(b)(3) and 1003.23(b)(4)(ii), we note that the former provides that an Immigration Judge may deny a motion to reopen as a matter of discretion even if the alien has submitted an application and established prima facie eligibility for the proposed form of relief. However, application of this discretionary authority would be inappropriate where an alien seeks rescission of an in absentia order due to lack of notice because it would allow for the denial of a non-discretionary form of relief, such as withholding of removal, solely because a hearing notice had not been properly delivered. We conclude that the Act does not provide for a limitation on the availability of relief solely because of faulty delivery of a hearing notice. For these reasons, we conclude that the Immigration Judge erred in requiring the respondents to submit an application for relief as a precondition for rescinding the in absentia removal order.

For the aforementioned reasons, the following order will be entered.

ORDER: The respondents' appeal is sustained, the Immigration Judge's decision dated January 2, 2020, is vacated, and the records are remanded for further proceedings and for the entry of a new decision.

FOR THE BOARD

Cite as: Dilia Chilel-Ramos, A215 875 193 (BIA Sept. 17, 2020)

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