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 - LVG
3373 Pepper Lane
Las Vegas, NV 89120

Name: VILLATUYA, GLOROFER ANGE... **A 089-445-773**

Date of this notice: 1/23/2014

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:
Adkins-Blanch, Charles K.
Hoffman, Sharon
Manuel, Elise

yungc
Userteam: Docket

File: A089 445 773 – Las Vegas, NV Date: JAN 23 2014

In re: GLOROFER ANGELICA NUFABLE VILLATUYA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert West, Esquire

ON BEHALF OF DHS: Christian Parke
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of the Philippines who was ordered removed from the United States in absentia on January 6, 2012, appeals the decision of the Immigration Judge, dated May 11, 2012, denying her motion to reopen. The Department of Homeland Security is opposed to the respondent's appeal.

The Immigration Judge properly denied the respondent's motion to reopen. As recognized by the respondent on appeal, the motion, which was prepared by her former counsel, lacked merit. Nonetheless, as the respondent has sought new counsel in a diligent manner, filed a complaint against her former counsel, and established that her former counsel's ineffective assistance of counsel contributed to her failure to appear at her removal hearing, we are satisfied that the respondent has now presented sufficient evidence to establish that the order of removal entered against her should be rescinded. *See* section 240(b)(5)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C)(i); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Accordingly, we will reopen these proceedings in order to provide the respondent with an additional opportunity to appear for a removal hearing. The following order is entered.

ORDER: The in absentia order of removal entered on January 6, 2012, is rescinded, these removal proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3365 PEPPER LANE, SUITE 200
LAS VEGAS, NV 89120

MONTOYA, VICENTA, ESQ.
330 E. CHARLESTON, STE. 200
LAS VEGAS, NV 89104

Date: May 11, 2012

File A089-445-773

In the Matter of:
VILLATUYA, GLOROFER ANGELICA NUFABLE

X Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

_____ Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

S. Overton
Immigration Court Clerk UL

cc: CHRISTIAN PARKE, ESQUIRE
3373 PEPPER LANE, STE. 200
LAS VEGAS, NV 89120

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**
VILLATUYA, Glorofer Angelica	**File No.:** A089-445-773
Respondent	**Date:** May 11, 2012
On Behalf of the Respondent Vicenta E. Montoya, Esq. 330 East Charleston Boulevard Suite 200 Las Vegas, NV 89104	**On Behalf of DHS** Christian Parke Immigration and Customs Enforcement Department of Homeland Security 3373 Pepper Lane Las Vegas, Nevada 89120

DECISION OF THE IMMIGRATION COURT

I. BACKGROUND

The respondent is a 44-year-old female, native and citizen of the Phillippines. She was admitted to the United States at Las Vegas, Nevada on September 16, 2006 pursuant to a nonimmigrant B-1 visitor for business visa with authorization to remain until November 3, 2006. (Ex. 1.) On September 20, 2007 the respondent was granted conditional permanent resident status for two years. (Exs. 1, 5.) On August 20, 2010 the Department of Homeland Security (DHS) issued a Notice to Appear (NTA) charging the respondent with removability pursuant to section 237(a)(1)(D)(i) of the Immigration and Nationality Act (INA), as amended, as an alien whose lawful admission as a conditional resident had been terminated under INA § 216. (Ex. 1.)

At a master hearing convened on November 4, 2010 the respondent admitted NTA factual allegations 1, 2, 3, and 4; denied factual allegation 5; and denied the charge of removability. The Immigration Court then scheduled an individual hearing for January 6, 2012 to resolve the contested charge of removability. The respondent and her attorney of record, Vicenta Montoya, personally were served with the written notice of this hearing in Immigration Court the same day. (Ex. 4)

On January 6, 2012 the scheduled master hearing was convened. The respondent was not present at the hearing. Ms. Montoya appeared, but was unable to offer an explanation for the respondent's absence. Ms. Montoya then moved to continue this hearing. The Immigration Court determined good cause had not been presented to justify a continuance and denied the motion. DHS then moved to conduct the removal hearing *in absentia,* which motion was granted for good cause shown. DHS next sought to amend NTA factual allegation 5, without objection by the respondent's counsel.[1] Therefore, the Immigration Court granted the motion to amend. Based on the evidence presented the Immigration Court next sustained all factual allegations as well as the charge of removability. On this basis the respondent was ordered removed *in absentia* from the United States to the Philippines.

More recently on February 6, 2012, the respondent filed a motion to reopen. In this motion the respondent seeks reopening of her removal proceeding because of a claim she failed to attend the January 6, 2012 hearing when mistakenly anticipating this hearing was scheduled for January 12, 2012. In support of the motion to reopen, the respondent has filed her declaration explaining the mistake. The respondent also has filed an employee written request for excused absence from employment for January 12, 2012.

DHS filed a written opposition to reopening on February 7, 2012. Therein DHS argues the respondent has failed to demonstrate exceptional circumstances that justify the reopening of her removal proceeding.

II. ANALYSIS

Notably, the respondent does not dispute that she received proper notice of her January 6, 2012 hearing in Immigration Court. *See* INA § 240(b)(5)(C)(ii) (an *in absentia* removal order may be rescinded "based upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice. . ."); *see also Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004) ("Actual notice is . . . sufficient to meet due process requirements."). Where notice of the hearing at issue was proper, an *in absentia* removal order may be rescinded based on "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))." INA § 240(b)(5)(C)(i). "Exceptional circumstances," for purposes of rescinding an *in absentia* removal order, refers to events "beyond the control of the alien" such as "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but *not including less compelling circumstances*." INA § 240(e)(1) (emphasis added). The standard for exceptional circumstances is stringent, both in terms of the degree of

[1] NTA factual allegation 5 originally alleged: "Your status was terminated on September 20, 2000 because you failed to establish your marriage to Eusebio Villatuya was entered into in good faith." (Ex. 1.) This allegation was amended to read: "Your status was terminated on April 29, 2010." (See Immigration Judge's handwritten alterations to Ex. 1.).

severity required and also the proof required to establish the contention. *See, e.g., Matter of B-A-S-*, 22 I& N Dec. 57, 58-59 (BIA 1998); *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996) (finding vehicle traffic difficulties did not qualify as an exceptional circumstance justifying reopening).

The respondent's motion to reopen was filed timely with the Immigration Court. Still, she has failed to demonstrate a circumstance sufficient to justify her failure to appear at the January 6, 2012. Though the respondent has explained that she believed her January 6, 2012 hearing was scheduled for January 12, 2012, this personal confusion apparently existed despite the fact that she and her attorney were provided verbal and written notice of the January 6, 2012 hearing date. Such an explanation does not rise to the level of a compelling circumstance beyond the control of the respondent as required by INA § 240(e)(1). *See Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205 (9th Cir. 2003) (alien's failure to appear based on alleged misunderstanding of time of hearing did not constitute exceptional circumstance justifying reopening). Consequently, the Immigration Court concludes the respondent has failed to establish her failure to appear on January 6, 2012 was the result of an exceptional circumstance that warrants rescinding the *in absentia* order of removal to reopen this removal proceeding.

Another relevant consideration concerns the respondent's claim in the motion to reopen of eligibility to obtain removal of the condition on her resident status by means of a Form I-751. But, the respondent's previous Form I-751 was denied by the United States Citizenship and Immigration Services (USCIS) based on a failure to establish her marriage to Eusebio Villatuya was bona fide. (Ex. 5.) The record of proceedings further indicates that the respondent previously provided the Immigration Court minimal documentation when attempting to demonstrate the bona fides of her marriage of nearly four years to Eusebio Villatuya. In connection with the motion to reopen the Immigration Court has not received additional documentation demonstrating either the bona fides of her ongoing marriage or eligibility for any other relief from removal. Thus, the respondent has not persuaded that denial of her motion to reopen would produce the "unconscionable result" of removal despite a valid claim for relief. *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) (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").

Finally, the Immigration Court recognizes that the respondent has not presented "truly exceptional circumstances" justifying the "extraordinary remedy" represented by the Immigration Court's discretionary authority to reopen a deportation proceeding *sua sponte* under 8 C.F.R. § 1003.23(b). *See Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999) (denying *sua sponte* reopening without considering the alien's eligibility to receive relief from removal); *Matter of J-J-*, I&N Dec. 976, 984 (BIA 1997) (the power to reopen *sua sponte* is not meant to cure filing defects or circumvent regulations simply because hardship might otherwise occur); *but see Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998) (*sua sponte* reopening was warranted where there was a fundamental change in the principles of asylum law).

III. CONCLUSION

Based on the foregoing, the Immigration Court concludes the respondent has failed to demonstrate that her failure to appear at the hearing on January 6, 2012 was caused by exceptional circumstances. INA § 240(e)(1). The Immigration Court likewise concludes that the respondent has failed to demonstrate the truly exceptional circumstances necessary to warrant the Immigration Court reopening proceedings *sua sponte*.

Accordingly, the following order shall be entered:

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

Ronald L. Mullins
Immigration Judge

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) Personal Service (P)
TO: [ ] DHS [ ] Alien [M] Alien's Attorney
DATE: May 11, 2012
BY: Court Staff