



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 22041

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5701 Executive Ctr Dr., Ste 300
Charlotte, NC 28212

Name: P [REDACTED]-J [REDACTED] B [REDACTED] A [REDACTED] A [REDACTED] 863

Date of this notice: 8/31/2016

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

Userteam: Docket

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5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

P [REDACTED] J [REDACTED] B [REDACTED] A [REDACTED]
A [REDACTED]-863
STEWART DETENTION CENTER
146 CCA ROAD, P.O. BOX 248
LUMPKIN, GA 31815

DHS/ICE Office of Chief Counsel - CHL
5701 Executive Ctr Dr., Ste 300
Charlotte, NC 28212

Name: P [REDACTED] J [REDACTED] B [REDACTED] A [REDACTED] A [REDACTED]-863

Date of this notice: 8/31/2016

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

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

Userteam: [REDACTED]

Falls Church, Virginia 22041

File: A-863 – Charlotte, NC

Date:

AUG 31 2016

In re: B-A-P-J

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Lamb, Esquire

ON BEHALF OF DHS: Hilary Rainone
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, a native and citizen of Guatemala, appeals the Immigration Judge's April 18, 2016, decision denying the respondent's motion to reopen to rescind an in absentia removal order. See section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). The Department of Homeland Security ("DHS") opposes the appeal, which will be sustained.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

Considering the totality of the circumstances presented in this case, we conclude that the respondent has presented an exceptional situation sufficient to warrant sua sponte reopening of his removal proceedings. See 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). In his motion, the respondent, who has been designated as an Unaccompanied Alien Child ("UAC"), and who was an 18-year-old high school student when the in absentia order of removal was issued, presented a copy of an application for asylum and related relief (Form I-589) along with evidence supporting his claim. The respondent further presented a receipt notice demonstrating that he filed his I-589 with the United States Citizenship and Immigration Services ("USCIS") on April 18, 2016.

Under the circumstances presented in this case, particularly in light of the evidence that the respondent now has an asylum application pending before USCIS, we will grant reopening of the respondent's removal proceedings, and the proceedings will be administratively closed while the respondent's asylum application is pending before USCIS. If either party to this case wishes to reinstate the proceedings, a written request to reinstate the proceedings may be made to the

Board of Immigration Appeals ("Board"). The Board will take no further action in the case unless a request is received from one of the parties. The request must be submitted directly to the Clerk's Office, without fee, but with certification of service on the opposing party.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The in absentia order is rescinded and the respondent's motion to reopen is granted.

FURTHER ORDER: The proceedings before the Board of Immigration Appeals in this case are administratively closed.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
5701 Executive Center Drive, Suite 400
Charlotte, North Carolina 28212

IN THE MATTER OF: [REDACTED]

CASE NO. [REDACTED]-863

ALIEN ATTORNEY: *LAMB, ROBERT WILLIAM, ESQ.*

DECISION ON A MOTION TO REOPEN.

IN

[] DEPORTATION [] EXCLUSION [X] REMOVAL PROCEEDINGS [] AOC ASYLUM ONLY


A **MOTION TO REOPEN** has been filed in the above captioned case. The Motion has been duly considered and it appears to the Court that:

[] The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be GRANTED.

[X] The Motion has been duly considered and it appears to the Court that no substantial grounds have been advanced to warrant its grant. Therefore, IT IS HEREBY ORDERED that the Motion be and the same is hereby DENIED.

[] Adjourn to individual / master calendar hearing on _____ at _____ am/pm.

Dated this 18 day of April, 2016



Hon. THERESA HOLMES-SIMMONS
U.S. Immigration Judge

This document was served to:

[X] District Counsel
[X] Counsel for Respondent / Applicant
[] Respondent / Applicant

Mailed out: 4/18/16 By: TR

Immigrant & Refugee Appellate Center, LLC | www.irc.net

) IN REMOVAL PROCEEDINGS

) A [REDACTED] 863

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ON BEHALF OF THE GOVERNMENT:

Cori White, Esq.

Office of Chief Counsel

Department of Homeland Security

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The Court reviewed and considered all evidence submitted by the parties, whether or not it is expressly referenced in this decision.

A. Documentary Evidence

- Exhibit 1: Notice to Appear, filed October 11, 2014¹
- Exhibit 2: Respondent's Hearing Notice for August 5, 2015, served February 20, 2015
- Exhibit 3: Respondent's Inabsentia Order dated August 5, 2015²
- Exhibit 4: Respondent's Motion to Re-Open, filed February 16, 2016³ and attached Form I-589
- Exhibit 5: Government's Response to Motion to Re-Open dated March 1, 2016

III. Motion to Reopen

A. Law

"Motions for reopening immigration proceedings are disfavored for the same reasons as are petitions for rehearing, and motions for a new trial on the basis of newly discovered evidence. This is especially true in a deportation proceeding where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Matter of Coleho*, 20 I&N Dec. 464, 472 (BIA 1992) (quoting *INS v. Doherty*, 502 U.S. 314, 315-16 (1992)). A respondent who seeks to reopen his case must establish that the ultimate relief he seeks would be merited as a matter of discretion. *Id.*

An *in absentia* order of removal may be rescinded only if: (i) a motion to reopen is filed within 180 days of the order and the person demonstrates there were exceptional circumstances or (ii) a motion to reopen is filed at any time and the person can demonstrate that failure to appear was due to a lack of proper notice in accordance with INA § 239(a)(1) or (2) of the Act. INA § 240(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(ii).

B. Analysis

In this case, Respondent seeks to reopen his August 5, 2015, *in absentia* order of removal. To prevail, Respondent must show that his failure to appear was due to exceptional circumstances or that he failed to receive proper notice of their hearing. INA § 240(b)(5)(C); 8 C.F.R. §1003.23(b)(4)(ii). In his motion, Respondent argues that his failure to appear was due to the Respondents inability to hire an attorney. Mot. to Reopen *In Absentia* at ¶II. Specifically, Respondents cites in paragraph 2 of his father's affidavit "... He was caught at the border when he entered the country and I believe he was given a court date but we did not have the funds to hire an attorney. Before we knew it, his court date had passed and I figured there was nothing we could do about the situation." This was the reason why Respondents failed to appear. This is not an exceptional circumstance.

The Respondent was aware and on notice of his hearing date, scheduled for the August 5, 2015. INA §239(a)(1), INA § 240(b)(5)(A). This is evident from the affidavit.

The Court further notes that Respondent made no effort to re-open this matter until February 1016. This was more than six months after he was ordered in absentia. Therefore his motion is untimely. 8 C.F.R. Section 1003.23 (b) (1).

In addition, the filing of the application for asylum does not warrant re-opening, C.F.R. Section 1003.23 (b) (3) provides, in pertinent part that motions to reopen:

Shall be supported by affidavits and other evidentiary material... A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence is material and could not have been discovered or presented at the former hearing.

The affidavit or statement of the Respondent's father states he came to the United States because of an incident that occurred in September 2014. (See statement of Emilio Pujoy de Leon). Therefore, this evidence was available and could have been presented if the Respondent had appeared in Court.

The Court finds that the Respondent has not articulated any exceptional circumstances that excuse his absence, nor has he shown that he failed to receive notice of his hearing. For the foregoing reasons, the Court denies the Respondents' motion to reopen.

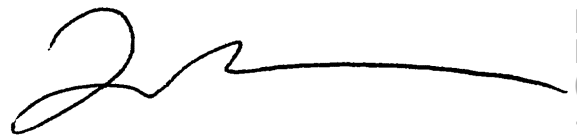
Accordingly, the Court enters the following:

ORDER

IT IS HEREBY ORDERD that Respondents' February 16, 2016, motion to reopen is DENIED.

4/18/16

Date



Theresa Holmes-Simmons
U.S. Immigration Judge
Charlotte, North Carolina