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

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: SOLIS, JORGE LUIS **A 088-590-199**

Date of this notice: 8/8/2016

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:
Mann, Ana
Grant, Edward R.
O'Leary, Brian M.

Userteam: Docket

File: A088 590 199 – Los Angeles, CA

Date: AUG - 8 2016

In re: JORGE LUIS SOLIS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening; reconsideration

The respondent, a native and citizen of Mexico, has appealed the Immigration Judge's decision of June 17, 2015. In that decision, the Immigration Judge denied the respondent's motion to reconsider the denial of the motion to reopen proceedings in which the respondent was ordered removed in absentia on August 28, 2014. The Department of Homeland Security (DHS) has not replied to the appeal. The appeal will be sustained.

We have considered the totality of the circumstances presented in this case, including the evidence that the respondent saw a doctor on the day of his hearing, was advised to rest and was given a prescription, and the fact that the respondent previously appeared in Immigration Court, and exercised diligence in seeking reopening. We thus find that reopening is warranted. Accordingly, the respondent's appeal will be sustained, the in absentia order will be rescinded, the proceedings will be reopened, and the record will be remanded to allow the respondent another opportunity to appear for his hearing.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order is vacated, proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File Number: **A 088 590 199**	)	
	)	
In the Matter of:	)	
	)	
SOLIS,	)	**IN REMOVAL PROCEEDINGS**
Jorge Luis,	)	
	)	
Respondent	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) (2013) – *present in the United States without admission or parole*

APPLICATION: Motion to Reconsider

ON BEHALF OF RESPONDENT:
Vital D'Caprio, Esquire
Law Office of Vital D'Caprio
611 West Civic Center Drive, Suite 300
Santa Ana, California 92701

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Jorge Luis Solis (Respondent) is a native and citizen of Mexico. See Exh. 1. On August 26, 2013, the U.S. Department of Homeland Security (the Department) personally served Respondent with a Notice to Appear (NTA). Id. In the NTA, the Department alleged that Respondent entered the United States at an unknown place, on an unknown date, and was not then admitted or paroled after inspection by an immigration officer. Id. Based on these factual allegations, the Department charged Respondent with inadmissibility pursuant to section 212(a)(6)(A)(i) of the INA. Id. Jurisdiction vested and removal proceedings commenced when the Department filed the NTA with the Court on September 3, 2013. See 8 C.F.R. § 1003.14(a) (2013).

On November 7, 2014, Respondent appeared in Court *pro se*, and the Court continued his proceedings to provide him the opportunity to seek counsel. On May 27, 2014, Respondent again appeared in Court *pro se*. The Court again continued Respondent's case to provide him additional time to seek counsel and informed him that this would be the last continuance. The Court also notified Respondent that, at his next hearing, he would be expected to comply with biometrics, submit any applications for relief, and plead to the charges contained in the NTA. The Court explained to Respondent that, should he fail to meet these requirements, he would be

ordered removed. In addition, the Court informed Respondent that, should he fail to appear for his next hearing, the Court would order him remove in his absence. Respondent acknowledged that he understood the Court's requirements and the consequences of failing to attend his hearing.

On August 28, 2014, Respondent failed to appear for his scheduled removal hearing. Proceeding *in absentia*, the Court found that inadmissibility had been established by clear, convincing, and unequivocal evidence based on documentary evidence submitted by the Department. Accordingly, the Court ordered Respondent removed to Mexico.

On December 17, 2014, Respondent filed a motion to reopen, alleging therein that he failed to appear for his removal hearing because he fell ill and went to the hospital. Resp't's Mot. to Reopen, at 7. In the alternative, Respondent requests that the Court exercise its *sua sponte* authority and reopen his proceedings. Id. at 9.

On April 3, 2015, the Court denied Respondent's motion to reopen. In denying Respondent's motion, the Court found that he failed to show that exceptional circumstances prevented him from attending his removal hearing. In addition, the Court declined to exercise its *sua sponte* authority to reopen Respondent's case because he failed to make a *prima facie* showing of eligibility for any form of relief.

On May 5, 2015, Respondent filed a motion to reconsider his motion to reopen. Therein, Respondent requests that the Court examine new evidence supporting his claim that he failed to appear at his removal hearing because of serious illness.

For the following reasons, the Court will deny Respondent's motion.

II. Law and Analysis

A. Motion to Reconsider

A motion to reconsider requests that the Court reexamine its original decision in light of additional legal arguments, an argument or aspect of the case that was overlooked, or a change in the law. See Matter of Ramos, 23 I&N Dec. 336, 338 (BIA 2002) (quoting Matter of Cerna, 20 I&N Dec. 399, 402 n.2 (BIA 1991)). In deciding a motion to reconsider, the Court reviews the same factual record used in making its prior decision. See Doissaint v. Mukasey, 538 F.3d 1167, 1170 (9th Cir. 2008); Iturribarria v. INS, 321 F.3d 889, 895 (9th Cir. 2003). In contrast, a motion to reopen seeks to present new facts that would entitle the alien to relief from deportation." Mohammed v. Gonzales, 400 F.3d 785, 792 n. 8 (9th Cir. 2005).

Here, Respondent does not contend that the Court made any errors of fact or law in its decision to deny his motion to reopen. See Resp't's Mot. to Reconsider. Instead, Respondent requests the Court to consider new evidence in support of his exceptional circumstances claim.

See id. Therefore, the Court construes the instant motion as a new motion to reopen.[1] See 8 C.F.R. § 1003.23(b)(3); Mohammed v. Gonzales, 400 F.3d 785, 792-93 (9th Cir. 2005) (finding that an improperly-titled motion should be construed according to its underlying purpose).

B. Motion to Reopen

1. Numerical Bar

A respondent may only file one motion to reopen an *in absentia* order of removal. 8 C.F.R. § 1003.23(b)(4)(2). Respondent previously filed a motion to reopen with the Court on December 17, 2014, which the Court denied on April 3, 2015. See Resp't's Mot. to Reopen. Therefore, the present motion is numerically barred. See Shin v. Mukasey, 547 F.3d 1019, 1025 (9th Cir. 2008).

2. Exceptional Circumstances

Even if Respondent could file a motion to reopen, the Court would still deny his motion because he failed to show that exceptional circumstances prevented him from attending his removal hearing. The Court may rescind an *in absentia* removal order upon a motion to reopen filed within 180 days after the date of the removal order if the respondent demonstrates that the failure to appear was because of exceptional circumstances, as defined in section 240(e)(1) of the INA. 8 C.F.R. § 1003.23(b)(4)(ii). Exceptional circumstances refer to situations beyond the respondent's control, such as 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). To establish exceptional circumstances, the respondent should provide specific and detailed evidence to corroborate his claim. See Celis-Castellano v. Ashcroft, 298 F.3d 888, 890 (9th Cir. 2002). In determining whether a respondent's absence was due to exceptional circumstances, the Court must look at the "totality of the circumstances." Matter of W-F-, 21 I&N Dec. 503, 509 (BIA 1996).

Respondent's recently submitted documentary evidence does not demonstrate that Respondent failed to appear at his removal proceedings due to exceptional circumstances. Respondent claims that, on the day of his hearing, he was suffering from nausea, vomiting, and stomach pains. Resp't's Mot. to Reconsider, Tab B at 1-2. In support of this contention, Respondent submitted a patient intake note from the clinic of David P. Quintero, M.D., stating that Respondent was seen on August 28, 2014, at 11:00 a.m., for "vomiting, nausea since last night." Id., Tab A. Additionally, Respondent presented a doctor's note advising him to rest on August 28 and August 29, 2014. Id. Respondent also submitted his own declaration, as well as affidavits by his mother and father, indicating that Respondent was ill with a stomach virus on the day of his hearing. Id., Tabs B-D. The Court finds that this evidence is insufficient to establish that Respondent failed to appear due to exceptional circumstances.

To begin, the evidence fails to establish that Respondent had a "serious illness." The

[1] For the sake of clarity, the Court will continue to cite the present motion as "Resp't's Mot. to Reconsider" and Respondent's first motion to reopen, filed on December 17, 2014, as "Resp't's Mot. to Reopen."

doctor's notes provide no details as to the severity of the alleged illness or what the illness entailed. See id.; see also Celis-Castellano, 298 F.3d at 890-92 (holding that a respondent's general evidence of illness without any documentation of the severity of the condition did not establish exceptional circumstances). Respondent was simply advised to rest. Id., Tab A. Similarly, Respondent's declaration stating that he had a stomach virus is insufficient to establish that his condition was severe within the meaning of the statute. See Resp't's Mot. to Reconsider, Tab B; see also Celis-Castellano, 298 F.3d at 890-92, (finding that a medical form and affidavit showing that the respondent had an asthma attack did not establish "exceptional circumstances."); Soriano-Arellano v. Gonzales, 229 F. App'x 503, 504 (9th Cir. 2007) ("[Respondent's] prescription for medicine for stomach pain and his own declaration that he had a stomach virus and diarrhea do not establish that his illness was "serious" within the meaning of the statute.").

Furthermore, while it is not a requirement that Respondent contact the Court on the day of his hearing to explain his absence, his failure to do so further undermines his claim. See Matter of J-P-, 22 I&N Dec. 33, 35 (BIA 1998). Respondent was notified that failure to appear would result in his removal. Even if he were ill on the date of his hearing, Respondent should have been able to notify the Court of his absence the morning of his hearing.

Finally, the Court notes that Respondent was required to submit his application for relief and comply with biometrics by the date of his removal hearing on August 28, 2014. Respondent knew that, if he failed to meet these requirements, the Court would order him removed. However, Respondent has submitted no evidence that he met these requirements prior to his removal hearing, which further undermines his contention that he planned to attend his removal hearing.

Given the foregoing, the Court finds that Respondent has not established exceptional circumstances to warrant reopening of his proceedings.

3. *Sua Sponte*

An immigration judge may, upon her own motion at any time, or upon motion of the Department or the alien, reopen any case in which she has made a decision. 8 C.F.R. § 1003.23(b)(1). The decision to grant or deny a motion to reopen is within the discretion of the immigration judge. 8 C.F.R. § 1003.23(b)(1)(iv). "[T]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." Matter of J-J-, 21 I&N Dec. 976, 984 (BIA 1997). Proceedings should be reopened *sua sponte* only in "exceptional" situations. Id. Moreover, where finality is a key objective, the threshold for *sua sponte* reopening is extremely high. See Matter of O-, 19 I&N Dec. 871, 871 (BIA 1989).

A motion to reopen must state the new facts that will be proven at a hearing to be held if the motion is granted. INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(3). Additionally, where the alien seeks to reopen proceedings to act on an application for relief, he must establish *prima facie* eligibility for the relief sought by showing that there is a reasonable likelihood of success on the merits so as to make it worthwhile to develop the issues further at an individual hearing.

See INS v. Rios-Pineda, 471 U.S. 444, 449 (1985); Delgado-Ortiz v. Holder, 600 F.3d 1148, 1151 (9th Cir. 2010); Matter of L-O-G-, 21 I&N Dec. 413, 419 (BIA 1996).

Here, upon consideration of all the facts and circumstances of this case, the Court finds that *sua sponte* reopening is unwarranted. Respondent has not established that he is *prima facie* eligible for any form of relief. Respondent alleges that he may be eligible for (a) cancellation of removal for certain nonpermanent residents, (b) relief as a victim of domestic violence, and (c) Deferred Action for Childhood Arrivals (DACA). See Resp't's Mot. to Reconsider, at 6-7. However, the evidence submitted is insufficient to establish *prima facie* eligibility for any of these forms of relief.

First, regarding cancellation of removal, Respondent submitted documentation establishing that his parents are legal permanent residents, as well as two letters from Dr. Mayela Saenz indicating that Respondent's parents have medical conditions that require "continuous medical care." Resp't's Mot. to Reconsider, Tab F. However, that Respondent's parents require continuous medical care is insufficient to show that the parents would suffer "exceptional and extremely unusual hardship" if Respondent were removed to Mexico. See INA § 240A(b)(1); Matter of Monreal-Aguinaga, 23 I&N Dec. 56, 59 (BIA 2001) (*en banc*) (declaring that to establish "exceptional and extremely unusual hardship," the alien must show that his qualifying relatives would suffer hardship substantially beyond that which would ordinarily result from an alien's removal). In addition, Respondent has not submitted evidence that he meets any of the other statutory criteria for this form of relief. See id.

Second, Respondent submitted a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, claiming that he is eligible for cancellation of removal as a battered spouse. Resp't's Mot. to Reconsider, at 5-6; id., Tab G; see INA § 240A(b)(2). In support, Respondent submitted a declaration claiming that he is a victim of domestic violence, as his U.S.-citizen wife disrespected him verbally and "came close to getting physical." Resp't's Mot. to Reconsider, Tab G. However, this evidence is insufficient to demonstrate that Respondent was "battered or subjected to extreme cruelty" by his spouse, as required under the INA. See INA § 240A(b)(2)(A)(i)(I). In addition, Respondent has not submitted evidence that he meets any of the other statutory criteria for this form of relief. See INA § 240A(b)(2)(A).

Third, the Department has already determined that Respondent is not eligible for DACA based on his crimes and educational level, but even if he was eligible, the Court lacks the jurisdiction to grant DACA applications. See Matter of Bahta, 22 I&N. Dec. 1381, 1391 (BIA 2000) (explaining that requests for prosecutorial discretion fall solely within the jurisdiction of the Department); see Deferred Action for Childhood Arrivals, Homeland Security, http://www.dhs.gov/deferred-action-childhood-arrivals (last visited Apr. 1, 2015) (explaining that DACA is a form of prosecutorial discretion exercised by the Department). As such, Respondent has not demonstrated that he is eligible for any form of relief.

Moreover, even if the Court were to find that Respondent demonstrated *prima facie* eligibility for any relief, this would not ensure a favorable exercise of the Court's discretion. See Sequeira-Solano v. INS, 104 F.3d 278, 279 (9th Cir. 1997) (citing INS v. Abudu, 485 U.S. 94 (1988)). The Court still possesses the responsibility to weigh the equities of the case, which in

this instance do not merit granting Respondent's motion. See 8 C.F.R. § 1003.23(b)(3) ("The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a *prima facie* case for relief."). Respondent has multiple criminal convictions and failed to attend his hearing despite being given two continuances by the Court. See Form I-813, Record of Deportable/Inadmissible Alien.

The Court also considered the positive factors in Respondent's case. The Court recognizes that both of Respondent's parents are legal permanent residents, and they may be inconvenienced by Respondent's removal. See Resp't's Mot. to Reopen, Tab A, Exh. D at 21-22. However, the Court finds the equities insufficient to outweigh the negative factors in Respondent's case. Based on the foregoing, and in the interest of finality, the Court will not reopen Respondent's case *sua sponte*.

Accordingly, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's motion to reconsider is **DENIED**.

DATE: June 17, 2015

Anna Ho
Immigration Judge