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 - DEN
12445 East Caley Avenue
Centennial, CO 80111-5663

Name: MERAZ-PUENTES, MIGUEL AN... **A 201-220-260**

Date of this notice: 6/25/2015

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:
Holmes, David B.

Userteam: Docket

File: A201 220 260 – Denver, CO Date: JUN 25 2015

In re: MIGUEL ANGEL MERAZ-PUENTES a.k.a. Miguel Meraz a.k.a. Miguel Miras-Puentes

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Katharine S. Speer, Esquire

ON BEHALF OF DHS: Lynn M. Doble-Salicrup
Assistant Chief Counsel

The respondent is a 27-year-old native and citizen of Mexico. He has appealed a February 4, 2014, decision, in which an Immigration Judge denied his motion to reopen. The respondent, and the Department of Homeland Security (the "DHS"), have filed briefs concerning the decision of the Immigration Judge. The case will be remanded to the Immigration Judge for further proceedings.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. § 1003.1(d)(3). As the respondent is subject to removal from the United States, it is his burden to establish eligibility for relief from removal. *See* section 240(c)(4)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). The respondent's application for adjustment of status was filed after May 11, 2005, so it is subject to the provisions of the REAL ID Act of 2005.

The respondent on January 14, 2014, sought reopening so that he could pursue adjustment of status under section 245(m)(3) of the Act. That is, his wife's petition for U nonimmigrant status was granted on March 24, 2011. The respondent's wife was therefore eligible to apply for adjustment of status to lawful permanent resident, on March 24, 2014. Section 245(m)(1)(A) of the Act. As the spouse of a U nonimmigrant, the respondent is eligible to adjust his status under section 245(m)(3) of the Act.

The Immigration Judge in denying reopening correctly found that the motion was untimely filed. Section 240(c)(7)(C)(i) of the Act; 8 C.F.R. § 1003.23(b)(1). However, upon our de novo review, and considering the totality of circumstances presented in this case, we find that the proceedings should be reopened sua sponte for the respondent to pursue his claim to relief. Therefore, we will remand the case to the Immigration Judge for further proceedings.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294

Law Office of Jennifer M. Smith, P.C.
Richards, Erin Colleen
1607 Grand Ave. Ste. 22 P.O. Box 3005
Glenwood Springs, CO 81602

IN THE MATTER OF FILE A 201-220-260 DATE: Feb 4, 2014
MERAZ-PUENTES, MIGUEL ANGEL

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294

__ OTHER: _____

_____

COURT CLERK
IMMIGRATION COURT FF

CC: DOBLE-SALICRUP, LYNN
12445 E CALEY AVE
CENTENNIAL, CO, 80111

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 STOUT STREET, SUITE 3101
DENVER, CO 80294

In The Matter Of:	)	**Date:** February 4, **2014**
	)	
MERAZ-PUENTES, Miguel Angel	)	IN REMOVAL
	)	PROCEEDINGS
Respondent.	)	
	)	
File No.: A# 201 220 260	)	

MOTION: Motion to Reopen under INA § 240(b)(5)(C).

ON BEHALF OF RESPONDENT:

Erin C. Richards, Esq.
Law Office of Jennifer M. Smith, P.C.
P.O. Box 3005
Glenwood Springs, CO 81602

ON BEHALF OF SERVICE:

Lynn M. Doble-Salicrup, Assistant
Chief Counsel
U.S. Department of Homeland Security
12445 East Caley Avenue
Centennial, CO 80111

DECISION ON MOTION TO REOPEN

I. Facts and Procedural History

Miguel Angel Meraz-Puentes ("Respondent") is a male, native and citizen of Mexico. On July 7, 2011, the Department of Homeland Security ("DHS") served Respondent with a Notice to Appear ("NTA"). The NTA charges Respondent as removable from the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as an alien present in the United States without being admitted or paroled. The NTA was filed on July 19, 2011, thereby vesting jurisdiction in this Court.

On December 5, 2012, Respondent, through first prior counsel ("Mr. Hartman"), submitted written pleadings admitting the factual allegations and conceding the charge of removability alleged in the NTA. *See* Exh. 3. Respondent indicated he would be applying for voluntary departure, administrative closure, and prosecutorial discretion. On September 14, 2013, Mr. Hartman filed a motion for telephonic appearance for the hearing on September 19, 2013, which was granted. *See* Exhs. 4, 4a.

At Respondent's hearing on September 19, 2013, Respondent's second prior counsel ("Mr. Espinoza") filed a Motion for Substitution of Counsel, which was granted. *See* Exh. 5.

Mr. Espinoza requested a continuance pending the resolution of Respondent's pending traffic-related matter in state court. The Immigration Judge ("IJ") denied the request for a continuance, finding that DHS opposed the motion, its opposition was not unreasonable, and the matter had been pending since July 19, 2011. Digital Audio Recording ("DAR"), 09/19/2013; *see Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). DHS then indicated that it would not oppose pre-conclusion voluntary departure with the statutory maximum of 120 days for Respondent to depart the United States. After speaking with Mr. Espinoza, Respondent accepted DHS's offer.

The Court granted Respondent 120 days for voluntary departure. DAR, 09/19/2013. The Court warned Respondent that he needed to depart the United States by January 17, 2014, and that any failure to depart would result in an automatic order of removal to Mexico, as well as render him ineligible for voluntary departure, cancellation of removal, and adjustment or change of status for ten years. *Id.*; *see also* INA § 240B(d)(1)(B). He was further informed that if he filed a motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure would be terminated, and the alternative order of removal would take effect automatically, but that any penalties for failure to depart voluntarily would not apply. DAR, 09/19/2013; *see* 8 C.F.R. §§ 1240.11(b), 1240.26(b)(3)(iii), 1240.26(e)(1) (2013).

On January 14, 2014, Respondent filed a Motion to Reopen and Rescind Order for Voluntary Departure. Respondent argues that since his order of voluntary departure, he married a legal permanent resident ("LPR"), and that he will be eligible to receive lawful permanent residence through his spouse in March 2014. As such, Respondent urges the Court to reopen his proceedings due to these new circumstances. On January 16, 2014, DHS filed an Opposition to Respondent's motion.

II. Statement of Law - Motion to Reopen

An Immigration Judge may upon their own motion at any time, or upon the motion of the Service or the alien, reopen proceedings in any case in which they have made a decision. INA § 240(c)(7); 8 C.F.R. § 1003.23(b)(1). An alien may file one motion to reopen proceedings, wherein they must state new facts that will be proven at the hearing if the motion is granted and shall be supported by affidavits or other evidentiary materials. INA §§ 240(c)(7)(A), (B). The motion must be filed within ninety (90) days of the date the final administrative decision was rendered. 8 C.F.R. § 1003.23(b)(1).

A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence is material, was unavailable, and could not have been discovered or presented at the original hearing. 8 C.F.R. § 1003.23(b)(3). The Immigration Judge has discretion to deny a motion to reopen even if the respondent has made out a *prima facie* case for relief. *See INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); 8 C.F.R. § 1003.23(b)(3). The Supreme Court has noted that motions to reopen are generally disfavored stating, "[t]his 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." *See INS v. Doherty*, 502 U.S. 314, 323 (1992). Ultimately, the applicant seeking to reopen proceedings bears a "heavy burden." *See Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992).

III. Discussion

Respondent failed to file his motion to reopen within ninety days of the final administrative order as required by the Act. INA § 240(c)(7)(C)(i). Respondent was granted voluntary departure on September 19, 2013. His motion to reopen needed to be filed before December 18, 2013. Respondent, however, did not file his motion until January 14, 2014. As such, his motion is untimely. INA § 240(c)(7)(C)(iv)(III).

Respondent's counsel requested reinstatement of voluntary departure in the alternative. The Court finds, however, that Respondent is not eligible for reinstatement of voluntary departure. The Code of Federal Regulations specifically states that reinstatement is only available when a case is reopened for a purpose other than solely making an application for voluntary departure, and reopening was granted prior to the expiration of the original period of voluntary departure. 8 C.F.R. § 1240.26(h). The Court has declined to reopen Respondent's case, and the period of voluntary departure has since expired. Accordingly, reinstatement of voluntary departure is not available to Respondent.

IV. Conclusion

Respondent's untimely motion to reopen will be denied. The motion was filed during the voluntary departure period. During the hearing, Respondent received oral notice in his native language of all repercussions of a failure to voluntarily depart, including the consequences of filing a motion to reopen. Because Respondent's motion was filed during the voluntary departure period, Respondent's grant of voluntary departure automatically terminates and the converts to the alternate order of removal to Mexico. 8 C.F.R. § 1240.26(b)(3)(iii), (e)(1); *Dada v. Mukasey*, 554 U.S. 1 (2008). Respondent is not, however, subject to the 10-year bar imposed by 8 C.F.R. § 1229c(d)(1). 8 C.F.R. § 1240.26(b)(3)(iii), (e)(1); *Dada v. Mukasey*, 554 U.S. 1 (2008).

Accordingly, the Court enters the following orders:

ORDERS

IT IS HEREBY ORDERED that Respondent's Motion to Reopen be DENIED.

IT IS HEREBY FURTHER ORDERED that Respondent be REMOVED to MEXICO.

Feb. 4, 2014

Mimi E. Tsankov
Immigration Judge