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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DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr., SW, Ste 332
Atlanta, GA 30303

Name: ELLISON, OPHELIA SALAZAR

A 200-185-139

Date of this notice: 11/21/2017

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:
Kelly, Edward F.
Adkins-Blanch, Charles K.
Mann, Ana

Userteam: Docket

File: A200 185 139 – Atlanta, GA

Date: NOV 21 2017

In re: Ophelia Salazar ELLISON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Neil S. Rambana, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of the Philippines, was ordered removed from the United States in absentia on June 2, 2016, after not appearing at the hearing. She filed a motion to reopen on August 31, 2016, and appeals from the Immigration Judge's decision dated March 14, 2017, denying the motion. The appeal will be sustained.

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).

On appeal, the respondent argues that "exceptional circumstances" prevented her appearance at the hearing. *See* section 240(e)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(e)(1) (stating that the term "exceptional circumstances" refers to exceptional circumstances (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) beyond the control of the alien). The respondent states that she departed the United States prior to the hearing because of a family emergency. According to the respondent, she was not permitted to board her return flight because her lawful permanent resident card had expired, and she did not have her Form I-751 receipt. She further states that she subsequently obtained the receipt, and, on June 12, 2016, reentered the United States. In addition, the Department of Homeland Security filed a non-opposition to her motion to reopen. In light of the foregoing, we will sustain the respondent's appeal.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is vacated, and these proceedings are reopened and remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
180 TED TURNER DR SW, STE. 241
ATLANTA, GA 30303

RAMBANA & RICCI P.L.L.C
RAMBANA, NEIL SAINT JOHN
2915 Kerry Forest PKY
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Tallahassee, FL 32309

IN THE MATTER OF
ELLISON, OPHELIA SALAZAR

FILE A 200-185-139 DATE: Mar 15, 2017

__ 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 22041

__ 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
180 TED TURNER DR SW, STE. 241
ATLANTA, GA 30303

__ OTHER: _____

_SB_____
COURT CLERK
IMMIGRATION COURT

FF

CC: OFFICE OF THE CHIEF COUNSEL
180 TED TURNER DR SW, STE 332
ATLANTA, GA, 30303

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Atlanta, Georgia

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
	)	
ELLISON, Ophelia Salazar	)	**File No. A# 200-185-139**
	)	
Respondent	)	
	)	

CHARGES: Section 237(a)(1)(D)(i) of the Act, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under Section 216 or 216A of the Act Respondent's status was terminated under such respective section.

APPLICATION: Respondent's Motion to Reopen *In Absentia* Order

APPEARANCES

ON BEHALF OF RESPONDENT:

Neil S. Rambana, Esq.
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Tallahassee, Florida 32309

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel
Department of Homeland Security
180 Ted Turner Dr. SW, Suite 332
Atlanta, Georgia 30303

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Ophelia Salazar Ellison ("Respondent") is an adult female native and citizen of the Philippines. She was admitted to the United States at or near Atlanta, Georgia, on or about February 18, 2012, on a K1 fiancée visa. See Exh. 1.

On September 20, 2012, Respondent's status was adjusted to that of a conditional permanent resident. See Exhs. 1, 3.

On September 2, 2014, Respondent submitted a Form I-751, Petition to Remove Conditions on Residence ("I-751"), with United States Citizenship and Immigration Services ("USCIS"). See Exhs. 1, 3.

On September 13, 2015, Respondent's I-751 was denied by USCIS. See Exhs. 1, 3.

On March 17, 2016, the Department of Homeland Security ("Department") issued Respondent a Form I-862, Notice to Appear ("NTA") charging her as removable under section 237(a)(1)(D)(i) of the Immigration and Nationality Act, as amended ("INA" or "Act"), in that after admission or adjustment as an alien lawfully admitted for permanent residence on a

conditional basis under Section 216 or 216A of the Act, Respondent's status was terminated under such respective section. See Exh. 1.

On June 2, 2016, Respondent had a master calendar hearing before the Atlanta Immigration Court. Although an attorney appeared on Respondent's behalf, Respondent failed to appear before the Court and was ordered removed to the Philippines *in absentia* on that date.

On August 31, 2016, Respondent filed Motion to Reopen and Dismiss Proceedings Without Prejudice ("Motion to Reopen") with the Court. The Department has not filed a response.

The Court has carefully reviewed the entire record before it. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny Respondent's Motion to Reopen.

II. STATEMENT OF LAW

Only one motion to reopen may be filed by an alien. 8 C.F.R. § 1003.23(b)(4)(ii). Generally, motions to reopen for the purpose of rescinding an *in absentia* removal order must be filed within 180 days of the date of the removal order, and the respondent must demonstrate that his failure to appear was due to exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii).

All motions to reopen must also state new facts that will be proven at a hearing if the motion is granted and must "be supported by affidavits and other evidentiary material." 8 C.F.R. § 1003.23(b)(3); see also INS v. Abudu, 485 U.S. 94, 97 (1988). Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and supporting documentation. 8 C.F.R. § 1003.23(b)(3). In addition, a motion to reopen will be denied unless the respondent establishes a *prima facie* case of eligibility for the underlying relief sought. INS v. Doherty, 502 U.S. 314, 315 (1992); Matter of S-V-, 22 I&N Dec. 1306, 1307 (BIA 2000) (citing Abudu, 485 U.S. at 105); 8 C.F.R. § 1003.23(b)(3). Moreover, if the ultimate relief is discretionary, the Immigration Judge may deny a motion to reopen even if the respondent demonstrates *prima facie* eligibility for relief. See Abudu, 485 U.S. at 105; 8 C.F.R. § 1003.23(b)(3).

Finally, the Supreme Court has held that "motions to reopen are disfavored" and "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." Abudu, 485 U.S. at 107. "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." Doherty, 502 U.S. at 323.

III. DISCUSSION

Preliminarily, the Court notes that Respondent's Motion to Reopen is timely. Respondent was ordered removed on June 2, 2016. She filed her Motion to Reopen almost three (3) months later, on August 31, 2016. Therefore, Respondent filed her Motion to Reopen less than 180 days after the final administrative order of removal, and the Motion is timely.

However, even a timely filed motion to reopen must demonstrate that the respondent's failure to appear was due to exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). The term "exceptional circumstances" refers to "exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." INA § 240(e)(1). In determining whether an alien has established exceptional circumstances, the Court considers the "totality of the circumstances," including, among other things, supporting documentary evidence, the respondent's efforts in contacting the immigration court, and the respondent's promptness in filing the motion to reopen. See Matter of B-A-S-, 22 I&N Dec. 57, 59 (BIA 1998); Matter of W-F-, 21 I&N Dec. 503, 509 (BIA 1996).

In this case, Respondent concedes that she received notice of her June 2, 2016 hearing. See Exh. 2; Mot. to Reopen, at 2 (stating that Respondent attempted to return "for" the hearing). Instead, Respondent claims that she did not attend her June 2, 2016 hearing because she traveled to the Philippines on February 3, 2016 to be with her sick mother, and was unable to obtain a travel visa to return to the United States until June 12, 2016. See Mot. to Reopen, at 1–2 (Aug. 31, 2016). Respondent has provided a Korean Air receipt indicating that a flight was purchased in her name for travel from Cebu, Philippines, to Atlanta, Georgia on May 16, 2016. Id. Exh. D. She has also provided an affidavit, in which she states that she arrived at the airport in Cebu on May 16, 2016, but was denied entry because she did not have a travel visa and the United States Consulate in Cebu would not give her permission to travel. Id. Exh.A.

As Respondent concedes, she was unable to return to the United States because her conditional permanent residence status had expired, and although she had filed an I-751 to remove her conditional status, it was denied by USCIS on September 13, 2015, because Respondent failed to respond to a request for evidence. Id. at 2. Consequently, Respondent was fully aware of her lack of status when she left the United States on February 3, 2016. Her choice to return to the Philippines regardless of her expired legal permanent residence status and subsequent inability to return to the United States is therefore not an exceptional circumstance. Moreover, Respondent's voluntary departure from the United States is not, in general, an exceptional circumstance that justifies her failure to appear. To the contrary, an Immigration Judge is compelled to proceed *in absentia* and enter a final order of removal if a respondent leaves the United States and fails to appear at a scheduled hearing, provided the Department proves the allegations in the NTA. See Matter of Sanchez-Herbert, 26 I&N Dec. 43, 44–45 (BIA 2012). Therefore, the Court finds that Respondent has not established that exceptional circumstances justified her failure to appear at her June 2, 2016 hearing, and it denies her Motion to Reopen on these grounds.

Moreover, a motion to reopen will be denied unless the respondent establishes a *prima facie* case of eligibility for the underlying relief sought. Doherty, 502 U.S. at 315; Matter of S-V-, 22 I&N Dec. at 1307 (citing Abudu, 485 U.S. at 105); 8 C.F.R. § 1003.23(b)(3). *Prima facie* eligibility is established where "the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied." Matter of S-V-, 22 I&N Dec. at 1308. In addition, a motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application and all supporting documents. 8 C.F.R. § 1003.23(b)(3).

In her Motion to Reopen, Respondent states that she filed a new I-751 with USCIS on April 11, 2016, and the petition is still pending. See Mot. to Reopen, at 2. The USCIS receipt provided by Respondent indicates that an I-751 was filed on her behalf on June 1, 2016. Id. Exh. E. Regardless of the date on which it was filed, a pending I-751 does not demonstrate Respondent's *prima facie* eligibility for adjustment of status. Moreover, Respondent has not provided any evidence regarding her eligibility for the petition at issue. Especially in light of the fact that her previous petition was denied, evidence of eligibility is necessary for Respondent to establish that she is *prima facie* eligible for the I-751. All Respondent has currently demonstrated is that she might someday become eligible for adjustment of status, not that she is presently *prima facie* eligible, as required under 8 C.F.R. § 1003.23(b)(3). See Matter of Velarde–Pacheco, 23 I&N Dec. 253, 255–57 (BIA 2002), overruled on other grounds by Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012).

Therefore, the Court will deny Respondent's Motion to Reopen because although it is timely, Respondent has not established that exceptional circumstances justified her failure to appear and she has not demonstrated that she is *prima facie* eligible for the relief she seeks.

Accordingly, the Court will enter the following order:

ORDER OF THE IMMIGRATION JUDGE

It is ordered that: Respondent's Motion to Reopen is hereby **DENIED**.

3-14-2017
Date

J. Dan Pelletier
United States Immigration Judge
Atlanta, Georgia