U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: HARO PENA, JORGE ANTONIO **A 095-727-770**

Date of this notice: 12/17/2013

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:
Grant, Edward R.

williame
Userteam: Docket

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File: A095 727 770 – Los Angeles, CA

Date: DEC 17 2013

In re: JORGE ANTONIO HARO PENA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Emilio Amaya, Accredited Representative

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's written decision mailed on January 8, 2013, denying his motion to reopen proceedings in which he was ordered removed in absentia. We will remand the record to the Immigration Judge as discussed below.

We review the findings of fact made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was ordered removed in absentia on October 25, 2012, after he failed to appear at the scheduled hearing. On December 17, 2012, the respondent filed a motion to reopen with the Immigration Judge, asserting that he failed to appear at the hearing because his automobile overheated and broke down on his way to the Immigration Court. He argued that his failure to appear at his hearing was due to "exceptional circumstances." *See* section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C). In support of the motion, the respondent submitted his statement and copies of the invoices for towing service and automobile repair, dated October 25 and 26, 2012, respectively. The Immigration Judge found that the respondent's motion to reopen was timely, but found that the reason given for the respondent's failure to appear (i.e., "automobile overheated and broke down while en route to the [I]mmigration [C]ourt") did not rise to the level of an exceptional circumstance (I.J. at 2).

The respondent argues on appeal that the Immigration Judge erred by applying a "per se" rule that automobile problems do not constitute "exceptional circumstances" for an alien's failure to appear, and by failing to consider all of the evidence presented. As the respondent admits, heavy traffic or car failure does not generally constitute exceptional circumstances. *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996); *Matter of S-A-*, 21 I&N Dec. 1050 (BIA 1997). However, we have not held that this is an absolute, or a "per se," rule.

Rather, the United States Court of Appeals for the Ninth Circuit has stated that it is necessary to look at the "particularized facts presented in each case" in determining whether an alien has established exceptional circumstances for failing to appear for a scheduled removal hearing. *See Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002). In the present case, it is not clear from the

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Immigration Judge's decision whether the decision was based on any "per se" legal principle or based on the particularized facts presented in the respondent's case, making it difficult for us to perform a meaningful appellate review. Therefore, we find it necessary to remand the record to the Immigration Judge to clarify whether the particularized facts presented in the respondent's case were considered and whether, upon consideration of such facts, the respondent has established that his failure to appear at the scheduled hearing was due to "exceptional circumstances." Accordingly, the following order will be issued.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with this order, and for the entry of a new decision.

FOR THE BOARD

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
606 SOUTH OLIVE ST.
LOS ANGELES, CA 90014

HARO PENA, JORGE ANTONIO
378 N MACY STREET
SAN BERNADINO, CA 92410

IN THE MATTER OF FILE A 095-727-770 DATE: Jan 8, 2013
HARO PENA, JORGE ANTONIO

__ 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
P.O. BOX 8530
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
606 SOUTH OLIVE ST.
LOS ANGELES, CA 90014

X__ OTHER: SEE ATTACHED IJ ORDER

COURT CLERK
IMMIGRATION COURT FF

CC: GAILYS, TASHA
606 SOUTH OLIVE, 8TH FLOOR
LOS ANGELES, CA, 90014

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

File No.:	**A 095 727 770**	)	**NON-DETAINED**
		)	
		)	
In the Matter of:		)	
		)	**IN REMOVAL PROCEEDINGS**
HARO PENA, Jorge Antonio		)	
		)	
		)	
		)	
Respondent.		)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act")
—alien present without being admitted or paroled

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT:
Jorge Antonio Haro Pena, *pro se*
378 N. Macy Street
San Bernardino, California 92410

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
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 Antonio Haro Pena ("Respondent") is a native and citizen of Mexico. On September 28, 2011, the Government personally served upon him a Notice to Appear ("NTA") alleging that Respondent entered the United States at an unknown place, date and time, and that he was not then admitted or paroled after inspection. See Exhibit 1. Accordingly, the Government charged Respondent as subject to removal under section 212(a)(6)(A)(i) of the Act. On October 25, 2012, the Government submitted documentary evidence relating to the respondent which established the truth of the factual allegations contained in the Notice to Appear. See Exhibit 3. Removability was established as charged.

On September 18, 2012, Respondent was orally informed and provided written notice of his October 25, 2012 hearing. See Exhibit 2. Respondent failed to appear for a scheduled

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hearing on October 25, 2012. The Court proceeded *in absentia* and ordered Respondent removed.

On December 17, 2012, Respondent filed the present motion to reopen alleging that exceptional circumstances, namely that his automobile overheated and broke down, caused him to miss his hearing. The Government has not filed a response.

For the following reasons, the Court denies Respondent's motion to reopen.

II. Law and Analysis

An *in absentia* removal order may be rescinded by the Immigration Judge upon motion to reopen filed within 180 days after the date of the order of removal if the respondent demonstrates that the failure to appear was because of exceptional circumstances. INA § 240(b)(5)(C); see also 8 C.F.R. § 1003.23(b)(4)(ii). For the purposes of calculating motion deadlines, the date that an Immigration Judge's order is entered fixes the deadline for filing a motion to reopen. Matter of Goolcharan, 23 I&N Dec. 5 (BIA 2001).

In the present matter, Respondent was ordered removed on October 25, 2012. He filed the present motion on December 17, 2012. Thus, Respondent's motion is timely. The reason given for failing to appear, "automobile overheated and broke down while en route to the immigration court," does not rise to the level of an exceptional circumstance.

Accordingly, the following order shall be entered:

ORDER

IT IS ORDERED that Respondent's Motion to Reopen is **DENIED**.

DATE: January 4, 2013

Arlene E. Dorfman
Arlene E. Dorfman
IMMIGRATION JUDGE

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
[ ] MAIL (M) [ ] PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[ ] ALIEN'S ATTY/REP [ ] DHS
DATE: 1/8/13 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] [illegible] [ ] Other

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