U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: VALDOVINOS-LOPEZ, JUVENAL **A 200-684-816**

Date of this notice: 6/29/2016

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:
Kendall-Clark, Molly

Userteam: Docket

File: A200 684 816 – York, PA

Date: JUN 29 2016

In re: JUVENAL VALDOVINOS-LOPEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brian Nathan Wolf, Esquire

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 is a native and citizen of Mexico. This matter was last before us on November 24, 2014, when we dismissed the respondent's appeal of the Immigration Judge's August 22, 2014, decision denying his motion to reopen. The respondent subsequently filed a petition for review with the United States Court of Appeals for the Third Circuit, the controlling federal jurisdiction in this matter. On October 16, 2015, the Third Circuit granted the petition and remanded for further proceedings. *See Valdovinos-Lopez v. Att'y Gen.*, 2015 WL 6081101 (3d Cir., Oct. 16, 2015). For the following reasons, the appeal will be sustained and the record will be remanded to the Immigration Judge.

The following facts are undisputed. The respondent was ordered removed by an Immigration Judge on April 28, 2011, pursuant to a "quick docket" removal hearing. He was physically removed to Mexico on April 29, 2011, but illegally re-entered the United States in May 2011. In January 2014, he was detained by the Department of Homeland Security and placed in reinstatement proceedings after being arrested for possession of marijuana in violation of Washington law. As a result of his detention, the respondent retained counsel and requested a copy of the recording of the April 28, 2011, hearing (hereinafter referred to as the "DAR CD").

On July 8, 2014, the respondent, through counsel, moved to reopen these removal proceedings. Although the respondent had not yet received the DAR CD, he argued that the April 28, 2011, "quick docket" hearing violated due process. On August 22, 2014, the Immigration Judge denied the motion. The Immigration Judge determined that the respondent did not comply with the 90-day statutory deadline for filing a motion to reopen, and that he was ineligible for sua sponte reopening due to the post-departure bar. *See* section 240(c)(7)(C) of the Immigration and Nationality Act; 8 C.F.R. §§ 1003.2(a), (d); *Desai v. Att'y Gen.*, 695 F.3d 267, 268 (3d Cir. 2012).

On November 24, 2014, we affirmed the Immigration Judge's decision for the reasons stated therein. We also rejected the respondent's appellate argument that the filing deadline should have been equitably tolled from September 15, 2014, the date he received the DAR CD.[1] We noted that a statutory motion to reopen should have been filed on or before July 26, 2011, but was not. Hence, we reasoned, the motion to reopen was a sua sponte motion which was precluded by the post-departure bar and not subject to an equitable tolling analysis. Further, we reasoned that even if equitable tolling applied, the relevant inquiry was whether the respondent exercised due diligence in pursuing his immigration case between his removal order on April 28, 2011, and his motion to reopen in 2014.

On October 16, 2015, the Third Circuit granted the petition for review. The Third Circuit found that the motion to reopen should have been construed as a statutory motion to reopen rather than a sua sponte motion to reopen subject to the post-departure bar. As such, the Third Circuit determined that we must take into account whether equitable tolling would extend the 90-day deadline, making the motion to reopen a timely one.

Upon consideration of the facts in this case, we conclude that the respondent established that he is entitled to equitable tolling of the 90-day motion to reopen filing deadline. The record reflects that the respondent may have been misinformed of his rights and his possible eligibility for relief at and before the "quick docket" hearing. *See Valdovinos-Lopez v. Att'y Gen.*, *supra*, at *4. When the respondent discovered the potential errors, he retained counsel and requested the DAR/CD. We are satisfied that he acted with due diligence and that reopening is warranted on this record. We will therefore remand the record to the Immigration Judge for consideration of the merits of the respondent's case.

Accordingly, the following orders are entered.

ORDER: The respondent's appeal is sustained and these removal proceedings are reopened.

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

FOR THE BOARD

[1] We note that the respondent received the DAR CD after he filed his motion to reopen and the Immigration Judge rendered his decision.