**U.S. Department of Justice**

Executive Office for Immigration Review

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*Office of the Clerk*

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**Name: S[redacted] Z[redacted], M[redacted]** **A [redacted]-385**

**Date of this notice: 4/10/2020**

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:
Morris, Daniel
Creppy, Michael J.
Liebowitz, Ellen C

Userteam: Docket

File: A[redacted]-385 – San Diego, CA

Date: APR 10 2020

In re: M[redacted] S[redacted] Z[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Iman Ghasri, Esquire

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, has appealed from the decision of the Immigration Judge dated March 20, 2018, denying her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The appeal will be sustained, and the record will be remanded.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

In order to be eligible for cancellation of removal, an alien must first have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application." Section 240A(b)(1)(A) of the Act; *Gutierrez v. Mukasey*, 521 F.3d 1114, 1116-17 (9th Cir. 2008). The Immigration Judge found that the respondent, who claims an initial entry date of January 25, 2003, had not shown the necessary continuous physical presence because she had at least one voluntary departure sometime between July and September 2010 (Exh. 4, Form EOIR-42B, at 1). The respondent challenges this finding on appeal.

"[A] period of continuous physical presence is terminated whenever . . . the alien has voluntarily departed under the threat of deportation." 8 C.F.R. § 240.64(b)(3); *see Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 973 (9th Cir. 2003); *Matter of Romalez-Alcaide*, 23 I&N Dec. 423, 429 (BIA 2002). However, a voluntary departure will not break an alien's continuous physical presence unless there is evidence that she knowingly accepted its terms. *Gutierrez v. Mukasey*, 521 F.3d at 1117; *Matter of Castrejon-Colino*, 26 I&N Dec. 667, 670 (BIA 2015); *Matter of Avilez*, 23 I&N Dec. 799, 805 (BIA 2005). "Simply put, there must be evidence that the alien was made aware of the possibility of appearing at a hearing before an Immigration Judge and affirmatively agreed to depart in lieu of being subjected to removal proceedings." *Matter of Castrejon-Colino*, 26 I&N Dec. at 670.

In addressing the presence-breaking character of a voluntary departure or return, the Board and the courts have considered whether the evidence shows a process of sufficient formality that the alien was made aware of the choice between returning voluntarily or being subjected to more formal procedures to expel her from the United States. This will depend on the circumstances of each case, although evidence that an alien was fingerprinted and/or photographed before being

allowed to voluntarily depart is not enough, in itself, to show a process of sufficient formality to break continuous physical presence. *Valadez-Munoz v. Holder*, 623 F.3d 1304, 1311 (9th Cir. 2010). In making this determination, the record should be fully developed regarding 1) the date and place of the encounter underlying the purported presence-breaking departure; 2) the possibility that the alien was alternatively subject to exclusion, deportation, or removal in which there a right to a hearing before an Immigration Judge; and 3) the formality of the process used, including how the threat of proceedings was communicated to the alien, what advisals were given, and whether the alien had knowledge that the agreement to depart was in lieu of being placed in proceedings. *Matter of Castrejon-Colino*, 26 I&N Dec. at 672.

Although the respondent had several voluntary returns to Mexico within a 2-month period in 2010, the evidence is insufficient to show that in any of these encounters, she was informed that she had a right to a hearing before an Immigration Judge and understood that her departure was in lieu of being placed in removal proceedings. The fact that she was fingerprinted and photographed and testified that she had signed papers prior to her voluntary departures or returns does not show that she was aware of the possibility of appearing at a hearing before an Immigration Judge and affirmatively agreed to depart in lieu of being subject to removal proceedings. The record does not contain any copies of the papers the respondent had signed, nor did she testify that she understood she was agreeing to depart in lieu of being placed in removal proceedings and appearing before an Immigration Judge. *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619 (9th Cir. 2006) (finding insufficient evidence alien knowingly and voluntarily accepted voluntary departure where record did not contain the signed Form I-826, Notice of Rights and Request for Disposition, and alien claimed lack of notice by authorities); *cf. Gutierrez v. Mukasey*, 521 F.3d at 1117 (finding alien's voluntary departure interrupted accrual of his physical presence where he "crucially, admitted twice that he had been given the opportunity to go before an immigration court and had explicitly rejected it and signed a voluntary departure document instead").

The Immigration Judge's adverse credibility determination is insufficient, without more, to show that any of the respondent's voluntary departures broke her continuous physical presence in this country. The evidence does not show a process of sufficient formality to break the respondent's continuous physical presence. Accordingly, the respondent's appeal will be sustained, and we will remand the proceedings to the Immigration Court for further proceedings to determine if the respondent is eligible for cancellation of removal under section 240A(b)(1) of the Act.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD