U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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[redacted]

DHS/ICE Office of Chief Counsel - SND
880 Front St., Room 2246
San Diego, CA 92101-8834

Name: B[redacted]-V[redacted], S[redacted] ... **A [redacted]-486**
Riders: [redacted]

Date of this notice: 7/7/2020

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Pepper, S. Kathleen
Kelly, Edward F.

Userteam: Docket

Files: [redacted]-486 – San Diego, CA

Date: JUL - 7 2020

In re: S[redacted] M[redacted] B[redacted]-V[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Pro se

ON BEHALF OF DHS: Ted Y. Yamada
Deputy Chief Counsel

APPLICATION: Termination of removal proceedings

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's June 17, 2019, decision terminating removal proceedings. The respondents have not replied to DHS's appeal. 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).

On April 1, 2019, the DHS personally served the respondents with Notices to Appear ("NTAs") (Exh. 1). The NTAs advised them that they were required to appear before an Immigration Judge at the Immigration Court in San Diego, California, at 12:30 p.m. on May 8, 2019. The NTAs further warned them that, if they did not attend the hearing, a removal order may be issued by the Immigration Judge in their absence. The NTAs, which listed the respondents' address only as a "domicilio conocido" ("known domicile") in Mexico, warned them that they were required to provide their full mailing address in writing to the DHS and the Immigration Court, the latter by way of an Alien's Change of Address Form (Form EOIR-33), whenever they changed their address. The NTAs further warned them that, if they did not submit a Form EOIR-33 and did not otherwise provide an address at which they could be reached during removal proceedings, the Government would not be required to provide them with written notice of their hearing.

According to the I-213 (Record of Deportable/Inadmissible Alien) in each alien's file, the respondents were returned to Mexico to await removal proceedings pursuant to section 235(b)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(C), after being served with the NTAs and being provided a copy of document entitled "Migrant Protection Protocols

initial processing information" ("MPP Sheet"). However, the contents of the MPP Sheet are unclear, as a copy of the document was not in either respondent's record.

The respondents appeared at their hearing on May 8, 2019 (Tr. at 4-5, 21). They were provided personal notice of their next hearing on June 17, 2019. On that date, the Immigration Judge terminated removal proceedings after concluding that section 235(b)(2)(C) of the Act does not apply in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a.

We disagree with the Immigration Judge's decision to terminate the respondents' removal proceedings. "It is well settled that an Immigration Judge may only 'terminate removal proceedings under [specific] circumstances identified in the regulations' and where 'the charges of removability against a respondent have not been sustained.'" *Matter of J.J. Rodriguez Rodriguez*, 27 I&N Dec. 762, 763 (BIA 2020) (quoting *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 468 (A.G. 2018)).

In this case, the NTAs were personally served on the respondents. The NTAs placed them on notice of the "time and place at which [their] proceedings [would] be held," informed them of the charges against them, and warned them of the consequences of failing to appear for their hearing. Sections 239(a)(1)(D), (G) of the Act, 8 U.S.C. § 1229(a)(1)(D), (G). There is no indication that the NTAs were deficient. *See Matter of Bermudez-Cota*, 27 I&N Dec. 441, 445 (BIA 2018); 8 C.F.R. § 1003.15(c). Finally, the DHS's filing of the NTAs with the San Diego Immigration Court vested that court with adjudicatory authority over the respondent's removal proceedings. *See Matter of J.J. Rodriguez Rodriguez*, 27 I&N Dec. at 764. Since DHS has elected to commence removal proceedings against the respondents and to prosecute these proceedings to a conclusion, the Immigration Judge is obligated to order their removal if the evidence supports a finding of removability on the ground charged and they have not established eligibility for relief from removal. *See Matter of Roussis*, 18 I&N Dec. 256, 258 (BIA 1982).

We therefore will sustain the DHS's appeal and reinstate removal proceedings.

However, we disagree with the DHS's argument that the Immigration Judge erred by not issuing in absentia orders of removal at the respondents' June 17, 2019, hearing.

First, subsequent to the issuance of the Immigration Judge's decision, we have held that, where the DHS returns an alien to Mexico to await an immigration hearing pursuant to the Migrant Protection Protocols and provides the alien with sufficient notice of that hearing, an Immigration Judge should enter an in absentia order of removal if the alien fails to appear for the hearing. *Matter of J.J. Rodriguez Rodriguez*, 27 I&N Dec. at 762. "An alien does not need to be physically in the United States for the Immigration Judge to retain jurisdiction over pending [removal] proceedings and to conduct an in absentia hearing." *Matter of Herrera-Vasquez*, 27 I&N Dec. 825, 835 (BIA 2020) (quoting *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012)).

However, there is no evidence in the records before us that the respondents were provided the means and opportunity to attend their June 17, 2019, hearing. The DHS required the respondents to await their hearing in Mexico, pursuant to section 235(b)(2)(C) of the Act, but the record does not contain a copy of any instructions provided to the respondents as to how to reach the

Immigration Court in San Diego. Although the MPP Sheet may have contained such information, it is not in the record. Nor is a copy of any document the DHS may have provided at the May 8, 2019, hearing (Tr. at 30-31). We therefore disagree that, on the record before us, it would have been appropriate for the Immigration Judge to issue in absentia orders of removal at the respondents' June 17, 2019, hearing.

On remand, the Immigration Court should set a new hearing for the respondents. If the respondents do not appear at that hearing, in absentia orders would be appropriate if the DHS presents evidence that the respondents were provided the opportunity to attend through written notice of the hearing[1] and instructions as to how to reach the Immigration Court from a port of entry. The Immigration Judge should also conduct complete fact-finding and analysis as to whether the respondents are removable under the specific ground charged in the NTAs.

Accordingly, the following order will be entered.

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

FOR THE BOARD

[1] Written notice of any future hearing would be sufficient under section 240(b)(5)(B) of the Act if provided at the most recent address provided under section 239(a)(1)(F) of the Act, 8 U.S.C. § 1229(a)(1)(F). Section 240(b)(5)(B) of the Act. If the address contained on the respondents' NTAs is incorrect, it is the respondents' duty to file a written notice with the Immigration Court with an address at which they may be contacted. 8 C.F.R. § 1003.15(d)(1). There is no record that the respondents have updated their address with the Immigration Court or this Board since the issuance of the NTAs. It follows that the address listed on the NTAs remains valid for the purpose of the mailing of future hearing notices. The DHS is not required to show that written notice of a hearing was sent to a correct address prior to the issuance of in absentia orders of removal if the respondents have not provided the Immigration Court with an address at which they may be contacted. Section 240(b)(5)(B) of the Act; *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019).