U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: PAJARES-ARCAYA, GABRIELA ... **A 078-508-085**

Date of this notice: 9/18/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Adkins-Blanch, Charles K.
Kelly, Edward F.

Userteam: Docket

File: A078 508 085 – San Antonio, TX Date: SEP 18 2017

In re: Gabriela Alesandra PAJARES-ARCAYA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Cesar Martin Estela, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Peru, appeals from the Immigration Judge's January 27, 2017, decision denying the respondent's motion to reopen an order of removal entered in absentia. The Department of Homeland Security (DHS) did not file an opposition to the appeal. The appeal will be sustained.

Upon de novo review, in light of the totality of circumstances presented in this case, including the fact that the respondent was a 7 year old minor in the custody of her mother at the time of proceedings, she appears prima facie eligible to adjust her status,[1] and DHS filed no opposition to the motion or appeal, we will sustain the appeal and allow the respondent another opportunity to appear for a hearing.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[1] *See* section 245(i)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i)(1)(A) (providing that aliens physically present in the United States who, *inter alia*, overstayed their lawful period of nonimmigrant status, may nevertheless be eligible for adjustment of status provided that they are beneficiaries of a visa petition filed with the Attorney General); *Matter of Alania-Martin*, 25 I&N Dec. 231 (BIA 2010) (alien, who is an overstay and who is otherwise eligible, may adjust status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i)).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA STREET, SUITE 300
SAN ANTONIO, TEXAS 78207

In the Matter of	)	
	)	
PAJARES-ARCAYA,	)	
GABRIELA ALESANDRA	)	**Case No. A078-508-085**
	)	
RESPONDENT	)	
	)	
In Removal Proceedings	)	
	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act (the Act), as amended: Alien present in the United States in violation of the Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i).

APPLICATION: 8 C.F.R. § 1003.23(b): Motion to Reopen.

ON BEHALF OF THE RESPONDENT
Cesar Martin Estela, Esq.
Law Offices of Cesar Martin Estela
24 Commerce Street, Suite 1729
Newark, NJ 07102

ON BEHALF OF THE GOVERNMENT
U.S. Immigration & Customs Enforcement
Office of the Chief Counsel
8940 Fourwinds Drive, 5th Floor
San Antonio, TX 78297

WRITTEN DECISION & ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is a twenty-three-year-old female, native and citizen of Peru, who arrived and was admitted into the United States at or near Newark, New Jersey, on or about October 12, 1998, as a nonimmigrant B-2 visitor with authorization to remain in the United States for a temporary period not to exceed six months. Exhibits 1 and 3. On March 12, 2001, the Immigration and Naturalization Service (INS), now the Department of Homeland Security (DHS), personally served the respondent's mother with the respondent's Notice to Appear (NTA) charging the respondent as removable pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act (the Act), as amended, as an alien who remained in the United States for a time longer than permitted after admission as a nonimmigrant under Section

101(a)(15) in violation of the Act or any other law of the United States. Exhibits 1 and 3. The NTA contains a section titled "**Failure to appear**" that specifies, *inter alia*, the consequences of failing to appear for any scheduled hearings and of failing to apprise the Court of the respondent's full and current mailing address. Exhibit 1. The NTA reflects that the respondent's mother was advised of the consequences of non-appearance in the Spanish language. *Id.*

At a master calendar hearing on October 15, 2002, the respondent was not present for her hearing before this Court and was unavailable for examination under oath. Pursuant to the authority provided in section 240(b)(5)(A) of the Act, the Court proceeded *in absentia* and ordered the respondent's removal to Peru on the charge contained in her NTA.

On December 30, 2016, the respondent, through counsel, filed a motion to reopen her removal proceedings and a request for an automatic stay of her removal. The DHS did not file a brief in opposition to the respondent's motion and request for a stay of removal.

II. Motion to Reopen

An *in absentia* order of removal may be rescinded only (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances, or (ii) upon a motion to reopen filed at any time if the alien demonstrates that she did not receive notice in accordance with paragraph (1) or (2) of section 239(a) of the Act or the alien demonstrates that she was in Federal or State custody and the failure to appear was through no fault of her own. Section 240(b)(5)(C) of the Immigration and Nationality Act (2016); 8 C.F.R. § 1003.23(b)(4)(iii) (2017).

A. Exceptional Circumstances

Over fourteen years passed between the date the Court ordered the respondent removed *in absentia* and the date the respondent filed her motion to reopen. Accordingly, any motion to reopen based on exceptional circumstances is time-barred. *See id.*; *see also* INA § 240(b)(5)(C).

B. Notice

The record reflects that immigration officials personally served the respondent's mother with the respondent's NTA on March 12, 2001. Exhibits 1 and 3. As required by section 239(a)(1) of the Act, the NTA advised the respondent's mother of the respondent's obligation to maintain a current mailing address with the Court and of the consequences of failing to appear for any scheduled hearings. *Id.* The NTA also reflects that the respondent's mother was advised of the consequences of non-appearance in the Spanish language. *Id.*

The respondent, through counsel, argues that she "did not receive the Notice to Appear, Notice of Hearing, or Notice to Change Address" and therefore "was improperly served notice." Respondent's Motion to Reopen *In Absentia* Removal Order Based on Lack of Notice with Automatic Stay & Request for *Sua Sponte* Reopening in the Interest of Justice at 11. Specifically, the respondent's counsel claims that the respondent "was only six years of age upon service of the original NTA to her mother" and she "should not be imputed the negligence of her mother for failing to advise the law enforcement agency" that the respondent and her mother "did not have a place of residence to accept mail." *Id.* The respondent, through counsel, emphasizes that "the court may find the government's failure to comply with requirements as grounds to terminate removal proceedings." *Id.* at 12.

The version of the Act applicable in 2001 required that the NTA be given "in person to the alien" or through the mail or the alien's counsel of record. INA § 239(a)(1) (1996); 8 U.S.C. § 1229(a)(1) (1996). The regulations in place at the time immigration officials apprehended the respondent provided that if an alien is a minor under fourteen years of age, the NTA must be served upon the person with whom the minor resides and, whenever possible, service shall also be made on a near relative, guardian, committee, or friend. 8 C.F.R. §§ 103.5a(c)(2)(ii), 236.2(a) (1999). A review of the record evinces that, although the respondent was seven-years-old when immigration officials apprehended her, immigration officials personally served her mother with her NTA. Exhibits 1 and 3. As such, the Court finds that the respondent's NTA was properly served upon her via service to her nearest relative, namely her mother. 8 C.F.R. §§ 103.5a(c)(2)(ii), 236.2(a).

C. *Sua Sponte*

An Immigration Judge may, upon his own motion, reopen any case in which he previously made a decision. 8 C.F.R. § 1003.23(b)(1) (2017). *Sua sponte* reopening, however, is an "extraordinary remedy reserved for truly exceptional situations" and is not "a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations." *Matter of Yauri*, 25 I&N Dec. 103, 110-12 (BIA 2009); *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999); *see also Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

The respondent, through counsel, appears to argue that she is eligible for relief not previously available at the time of her removal hearing in 2002. Respondent's Motion to Reopen *In Absentia* Removal Order Based on Lack of Notice with Automatic Stay & Request for *Sua*

Sponte Reopening in the Interest of Justice at 5-6. Specifically, the respondent claims she "is 245(i) eligible based on a petition filed by her paternal aunt on February 26, 2001." *Id.* at 3. The respondent, through counsel, accepts that her "eligibility for adjustment of status (lawful permanent residence) is contingent on establishing grandfathering under INA § 245(i)." *Id.*

Section 245(i) states that an alien physically present in the United States who entered the United States without inspection, is the beneficiary of a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001, and was physically present in the United States on the enactment date of the LIFE Act Amendments of 2000 may apply to the Attorney General to adjust her status to that of an alien lawfully admitted for permanent residence; the Attorney General may accept the alien's application only if the alien remits payment of $1,000 with the filing of her application. INA § 245(i)(1). The Act further provides that the Attorney General may, upon receipt of such application and fee payment, adjust the status of the alien to that of an alien lawfully admitted for permanent residence if (1) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence and (2) an immigrant visa is immediately available to the alien at the time she filed her application. INA § 245(i)(2).

In the present case, the respondent appears to qualify as a grandfathered alien for adjustment of status purposes under section 245(i). 8 C.F.R. § 245.10(a)(1); Respondent's Motion to Reopen *In Absentia* Removal Order Based on Lack of Notice with Automatic Stay & Request for *Sua Sponte* Reopening in the Interest of Justice, Tabs A and D at 2 and 13 (noting that the respondent's father is the named beneficiary of her aunt's petition for classification under section 204 that was filed on March 2, 2001); *Id.*, Tabs A and F at 2 and 24 (demonstrating that the respondent's parents married on September 22, 1984 and therefore the respondent was born in wedlock); *Id.*, Tab F at 18-20 (showing that the respondent is the beneficiary of an approved I-130, Immigrant Petition for Relative, filed by her legal permanent resident father); INA § 204(a)(1)(B)(i). However, the respondent did not enter the United States without inspection. Exhibit 1 (noting that the respondent was admitted as a nonimmigrant under section 101(a)(15) of the Act). Furthermore, the respondent was not physically present in the United States at the time the LIFE Act Amendments of 2000 were enacted. *Id.*; Legal Immigration Family Equity Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat 2763 (Dec. 21, 2000), Title XV, Div. B, of H.R. 5666, *enacted by ref. in* H.R. 4577. As such, the respondent does not

qualify to adjust her status to that of an alien lawfully admitted for permanent residence under section 245(i) of the Act. INA § 245(i)(1). Therefore, the Court will not reopen the respondent's removal proceedings to afford her the opportunity to seek adjustment of status.

The respondent, through counsel, also seeks reopening of her case because she "presents a unique factual scenario constituting exceptional circumstances." Respondent's Motion to Reopen *In Absentia* Removal Order Based on Lack of Notice with Automatic Stay & Request for *Sua Sponte* Reopening in the Interest of Justice at 13. Specifically, the respondent's counsel declares that the respondent (1) "was only 6-years-old when immigration proceedings began and the subsequent removal order was entered," of which she was unaware until adulthood; (2) "has no criminal inadmissibility bars, has not [sic] criminal convictions, and has U.S. citizen husband who is seeking to have his wife's status adjusted;" (3) will be "irreparably harm[ed]" if her proceedings are not reopened because "she will no longer be able to receive comparable medical care and supervision;" and (4) "obtained Deferred Action for Childhood Arrivals ('DACA') on or about September 12, 2012." *Id.* at 13-15. The respondent, through counsel, further asserts that she "has voluntarily appeared at all interview appointments." *Id.* at 15.

The term "exceptional circumstances" refers to exceptional circumstances beyond the alien's control such as battery or extreme cruelty to the alien or any child or parent, serious illness of the alien, or serious illness or death of the alien's spouse, child, or parent, but not including less compelling circumstances. INA § 240(e)(1). In any given case, the Court must look at the totality of circumstances to determine whether exceptional circumstances are present. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) (citing H.R. CONF. REP. NO. 955, 101st Cong., 2d Sess. 132 (1990)). The Court acknowledges that the respondent provided proof of her DACA status from January 2013 to January 2015. Respondent's Motion to Reopen *In Absentia* Removal Order Based on Lack of Notice with Automatic Stay & Request for *Sua Sponte* Reopening in the Interest of Justice, Tab K. The Court further recognizes that the respondent submitted medical records illustrating her diagnosis and treatment of supraventricular tachycardia. *Id.*, Tab M. However, the respondent failed to file any evidence regarding her criminal history or lack thereof. *See* Respondent's Motion to Reopen *In Absentia* Removal Order Based on Lack of Notice with Automatic Stay & Request for *Sua Sponte* Reopening in the Interest of Justice. Moreover, the respondent neglected to provide the Court with documentation demonstrating that she would be unable to obtain comparable treatment and medication for her

condition in Peru. *See id.* As such, the Court finds that the situation presented does not rise to the level of exceptional circumstances under 240(e)(1) of the Act. Thus, the Court declines to *sua sponte* reopen the respondent's removal proceedings.

III. Motion to Stay

The respondent, through counsel, "seeks acknowledgment of an automatic stay of removal in this case because it is a no-notice case, pursuant to INA 240(b)(5)(C)." Respondent's Motion to Reopen *In Absentia* Removal Order Based on Lack of Notice with Automatic Stay & Request for *Sua Sponte* Reopening in the Interest of Justice at 2. The Court is cognizant of the fact that it ordered the respondent's *in absentia* removal and therefore an automatic stay applies to the respondent's removal during the disposition of her pending motion to reopen. 8 C.F.R. § 1003.23(b)(1)(v); INA § 240(b)(5)(C). However, the Court found above that the respondent did not establish a valid basis upon which her case may be reopened. *See* Part II. Therefore, the automatic stay expires at the entry of this Court's decision.

Accordingly, the following order is hereby entered:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reopen be **DENIED**.

Date: 27 January, 2017

Thomas G. Crossan, Jr.
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[ ] ALIEN'S ATT/REP [ ] DHS
DATE: 1/30 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other