U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Rudolph, James B., Esq.
Rudolph, Baker & Associates
419 19th Street
San Diego, CA 92102

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

Name: VALVERDE-MARTINEZ, ADRIAN **A 200-569-794**

Date of this notice: 8/11/2015

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.
Guendelsberger, John
Holiona, Hope Malia

Userteam: Docket

File: A200 569 794 – San Diego, CA Date: AUG 11 2015

In re: ADRIAN VALVERDE-MARTINEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Rudolph, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, was ordered removed in absentia on October 31, 2013. On November 25, 2013, the respondent filed a motion to reopen proceedings. The Immigration Judge denied that motion on January 10, 2014, and the respondent filed the instant appeal. The in absentia order will be vacated, proceedings will be reopened, and the record will be remanded..

Upon de novo review of the record and in light of the totality of circumstances presented in this case including the evidence supporting the fact that the respondent was abusing drugs at the time of his hearing and sought treatment at a drug rehabilitation facility, as well as his attendance at five prior hearings and the absence of evidence to establish that he was seeking to elude proceedings, we find it appropriate to reopen these proceedings and allow the respondent another opportunity to appear for a hearing before an Immigration Judge.

ORDER: The appeal is sustained, the in absentia order is vacated, proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
401 WEST A STREET, SUITE #800
SAN DIEGO, CA 92101

VALVERDE-MARTINEZ, ADRIAN
3939 T. ST
SAN DIEGO, CA 92113

Date: Jan 10, 2014

File A200-569-794

In the Matter of:
VALVERDE-MARTINEZ, ADRIAN

X Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before February 10, 2014. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

X Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

Immigration Court Clerk UL

cc: PARTIDA, ANA, ASSISTANT CHIEF COUNSEL
880 FRONT ST.SUITE # 2246
SAN DIEGO, CA 92101

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
401 West A Street, Suite 800
San Diego, California 92101

File No.: A200 569 794	)	Date: January 10, 2014
	)	
In the Matter of	)	
	)	**IN REMOVAL PROCEEDINGS**
Adrian VALVERDE-MARTINEZ,	)	
	)	
Respondent	)	

ON BEHALF OF RESPONDENT:	**ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:**
Pro se[1]	Ana L. Partida, Esquire 880 Front Street, Suite 2246 San Diego, California 92101

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (Present Without Being Admitted or Paroled).

MOTIONS: Motion to Reopen and Rescind In Absentia Order;
Motion to Request to File without Fee.

DECISION AND ORDER OF THE IMMIGRATION JUDGE

On June 20, 2011, the Department of Homeland Security ("DHS") personally served the respondent with a Notice to Appear ("NTA"), charging him with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act") as an alien who is present in the United Sates without being admitted or paroled. (Exh. 1.) The DHS alleged that the respondent is a native and citizen of Mexico who entered the United States at or near the San Ysidro Port of Entry on or about January 1, 1989 without being admitted or paroled. (*Id.*) On June 21, 2011, the DHS filed the NTA with the San Diego Immigration Court thereby vesting it with jurisdiction over these proceedings. *See* 8 C.F.R. § 1003.14(a) (2011).

On July 6, 2011, the respondent, represented by counsel, appeared for an initial master calendar hearing on the detainee docket. (Exh. 5.) At the hearing, the respondent indicated his intention to object to the admission of the Record of Deportable/Inadmissible Alien (Form I-213), and to apply for cancellation of removal for certain nonpermanent residents and voluntary

[1] During removal proceedings, the respondent was represented by attorney K. Kerry Yianilos. As discussed below, neither the respondent nor his counsel appeared for the scheduled October 31, 2013 hearing and attorney Yianilos subsequently sought to withdraw as counsel for the respondent. Attorney Yianilos' motion to withdraw was rejected by the Court for her failure to comply with the Court's filing requirements. The present motions are filed by the respondent *pro se*.

departure. (*Id.*) As the respondent had been released from custody, his case was transferred to the non-detained docket. October 11, 2011, the respondent, represented by counsel, appeared for a master calendar hearing. Because his attorney was not feeling well, the Court granted the respondent's request to postpone the matter. (Exh. 9.) The Court continued the case to February 16, 2012. (*Id.*) On February 16, 2012, the respondent, represented by counsel, informed the Court that he had not requested prosecutorial discretion with the DHS and was not ready to apply for any forms of relief. (Exh. 11.) The Court continued the case once again in order to give the respondent time to prepare his evidentiary objections and applications for relief, and ordered the respondent to provide the Court with a copy of his prosecutorial discretion request to the DHS by June 15, 2012. (*Id.*) On June 21, 2012, the respondent filed a copy of his Request for Prosecutorial Discretion with the Court. (Exh. 13.) The DHS declined to exercise its prosecutorial discretion. (Exh. 14.)

At a hearing on October 25, 2012, the respondent, represented by counsel, informed the Court that he was not ready to apply for any forms of relief, but reiterated his intention to file formal evidentiary objections and apply for cancellation of removal and voluntary departure. (*Id.*) The Court suggested that the respondent apply for Deferred Action for Childhood Arrivals ("DACA"), but the respondent, through counsel, stated that he did not believe he met the educational requirement. The Court continued the case to May 23, 2013 so that the respondent could review his DACA eligibility and prepare his applications for relief. At a hearing on May 23, 2013, the respondent, through counsel, stated that he had been unable to register for educational classes but that he would try to register next semester. (Exh. 17.) Although the respondent was present at the hearing, his counsel indicated that she had been unable to contact the respondent and requested a continuance to prepare his relief applications and evidentiary objections. (*Id.*) The Court continued the case to a master calendar hearing on October 31, 2013 and provided the respondent and the respondent's counsel with a copy of the hearing notice, which included a warning of the consequences should the respondent fail to appear. (*Id.*)

On October 31, 2013, neither the respondent nor his counsel appeared for his scheduled master calendar hearing.[2] (Decision of the Immigration Judge, Oct. 31, 2013.) The Court was not informed of any reason for the respondent's failure to appear at the hearing.[3] (*Id.*) Upon the motion of the DHS, the Court proceeded *in absentia* under section 240(b)(5)(A) of the Act, and found that the respondent had received proper notice of the hearing. The DHS then moved for the admission of the Form I-213. (Exh. 3.) Since the respondent was not present and had filed no written objections, the Court deemed them waived and received the exhibit. Based upon that document, the Court found the respondent removable as charged. Based upon his failure to be present the Court denied any and all relief, and ordered the respondent removed to Mexico. (Decision of the Immigration Judge, Oct. 31, 2013.)

On November 25, 2013, the respondent, *pro se*, timely filed a Motion to Reopen removal proceedings and Request to File without Fee.[4] (Resp. Mot. to Reopen.) The respondent included in

[2] As neither party appealed the Court's decision, no transcript has been produced; however, this information is gleaned from the Record of Proceedings and the audio recording of the hearings, which the Court reviewed in preparation of this decision.

[3] The respondent's counsel had appeared at the Court window to file certain documents earlier in the day but did not appear at the respondent's scheduled master calendar hearing.

[4] The respondent's wife completed, signed, and filed the Request to File without Fee for the respondent.

his motion a declaration from his wife Amy Joy Flores. (*Id.*, Flores Declaration.) In his motion, the respondent concedes that there was "no specific reason why [he] missed [his] hearing," but that a "significant hardship [was the] cause." (Resp. Mot. to Reopen.) The respondent claims that he was "depressed, mentally unstable, [and] wasn't fit to make right decisions." (*Id.*) The respondent's motion indicates that he has anger and drug abuse issues, and that he voluntarily entered a rehabilitation clinic twice at some point in mid-October and early November. (*Id.*) The respondent has not provided the Court with any documentary evidence of this rehabilitation clinic, and does not claim that his attendance at the clinic prevented him from attending his court hearing. In his Request to File without Fee application, the respondent states that he is recently unemployed and has been on welfare since August 2013. On December 6, 2013, the DHS filed a motion opposing the respondent's motion to reopen. (DHS Opp.) The DHS argues that the Court should deny the motion because the respondent has not established any statutory grounds to warrant reopening.

First, the Court treats the respondent's motion as one to reopen and rescind the *in absentia* order. A removal order entered *in absentia* pursuant to section 240(b)(5) of the Act may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 239(a) of the Act or the alien demonstrates that the alien was in federal or state custody and the failure to appear was through no fault of the alien. INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2). A removal order entered *in absentia* pursuant to section 240(b)(5) of the Act may also be rescinded upon a motion to reopen filed within 180 days after the date of the order if the alien demonstrates that the failure to appear was caused by exceptional circumstances. INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(iii)(A)(1). "The term 'exceptional circumstances' refers to exceptional circumstances (such as battery or extreme cruelty to the alien, or serious illness or death of the spouse, child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." INA § 240(e)(1).

To the extent that the respondent is simply asking to reopen the matter, an Immigration Judge may, upon a motion by an alien, reopen any case in which he has made a decision, unless jurisdiction is vested in the Board of Immigration Appeals. 8 C.F.R. § 1003.23(b)(1). An Immigration Judge has discretion to waive the filing fee for a motion to reopen upon a showing that the filing party is unable to pay the fee. 8 C.F.R. § 1003.24. A party is permitted to file one motion to reopen proceedings within 90 days of the date of entry of a final administrative removal order. 8 C.F.R. § 1003.23(b)(1). Such a motion must also state the new facts that will be proven at a hearing to be held if the motion is granted and should be supported by affidavits or other evidentiary material. INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(3). Any motion to reopen for the purpose of action on an application for relief must be accompanied by all supporting documents. 8 C.F.R. § 1003.23(b)(3). A motion to reopen to allow for initial or further consideration of an application for relief under section 240A(b) of the Act may be granted only if the alien demonstrates *prima facie* eligibility for such relief. (*Id.*)

The Court finds that the respondent has sufficiently established his inability to pay the filing fee for a motion to reopen, and will grant the respondent's request to waive the filing fee. However, the Court finds that the respondent has failed to establish any statutory basis for reopening his case, and will thus deny his motion.

First, considering the respondent's request as a motion to reopen an *in absentia* order, the Court will deny the motion because the respondent has not established any of the statutory bases for an *in absentia* motion to reopen, and the Court finds that none apply. The respondent had notice of the hearing as shown by the May 23, 2013 Notice of Hearing, personally served on both the respondent and his counsel. (Exh. 18.) While the respondent has alluded to attending a voluntary rehabilitation clinic, he does not actually claim to have attended the clinic at the time of his hearing, nor does he claim that his attendance constituted a stay in federal or state custody or that his attendance prevented him from physically attending his hearing. In addition, the respondent has not shown that exceptional circumstances warrant the Court reopen his case. While the respondent claims that he was depressed, angry, and abusing drugs around the time of his hearing, he also claims that he had the mental and physical ability to voluntarily attend a drug rehabilitation clinic in mid-October and early November, indicating that he also had the ability to appear in court. Regardless, the Court does not find that the respondent has met his burden to establish exceptional circumstances beyond his control that justify his failure to attend his hearing. *See* INA § 240(e)(1).

Next, if the Court considers the respondent's request as a standard motion to reopen, the Court will deny the motion because the respondent has failed to file any application for relief as required by the regulations to support such a motion. *See* 8 C.F.R. § 1003.23(b)(3). Accordingly, the Court will also deny the respondent's motion to reopen because he has failed to establish *prima facie* eligibility for any type of relief that he would seek if proceedings were to be reopened. *See id.*

While the Court will deny the respondent's motion to reopen, the Court notes that the respondent might still be a candidate for DACA as this Court understands that DHS program. *See Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process. Despite the respondent's removal order, the DHS might consider the respondent to be a low priority for removal and the respondent had previsously indicated that he intended to further pursue his education, which would potentially make him DACA eligible. While the Court cannot adjudicate a DACA request, the respondent may wish to apply with USCIS if he believes himself eligible for this DHS program. Accordingly, the following orders will be entered:

ORDERS

IT IS ORDERED that the Request to File without Fee is **granted**;

IT IS FURTHER ORDERED that the motion to reopen treated either as one to reopen and rescind the *in absentia* order or to reopen the proceedings is **denied**.

RICO J. BARTOLOMEI
Immigration Judge

cc: The Respondent.
Ms. Partida for the DHS.