U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: CHATTUAIS, JACKS-GUY

A 098-063-263

Date of this notice: 5/15/2013

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:
Adkins-Blanch, Charles K.
Guendelsberger, John
Hoffman, Sharon

Userteam: Docket

File: A098 063 263 – Atlanta, GA

Date: MAY 15 2013

In re: JACKS-GUY NKOUNGA CHATTUAIS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: H. Glenn Fogle, Jr., Esquire

ON BEHALF OF DHS: Wylly Jordan
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated March 15, 2012, denying his timely filed motion to reopen. The Immigration Judge had previously ordered the respondent removed in absentia for his failure to appear at the hearing on November 7, 2011. The Department of Homeland Security (DHS) has filed a brief in opposition. The record will be remanded.

We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

Upon our de novo review, in light of the totality of the circumstances presented in this matter, we conclude that the respondent has established that his failure to appear was because of exceptional circumstances. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) ("We note that one must look to the "totality of circumstances" to resolve this issue of exceptional circumstances."). The respondent provided detailed affidavits regarding the efforts he took to timely arrive at his hearing and the reason for his delay. We find that the facts of the instant matter are distinguishable from those at issue in *Matter of S-A-*, 21 I&N Dec. 1050 (BIA 1997). Therefore, we will sustain the appeal and reopen the proceedings to allow the respondent another opportunity to appear for a hearing. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, the in absentia order is rescinded, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
180 SPRING ST., SW, SUITE 241
ATLANTA, GA 30303

THE GRANT BUILDING
FOGLE, JR., ESQ., H. GLENN
44 BROAD ST., N.W.,SUITE 700
ATLANTA, GA 30303

IN THE MATTER OF
CHATTUAIS, JACKS-GUY

FILE A 098-063-263 DATE: Mar 19, 2012

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
180 SPRING ST., SW, SUITE 241
ATLANTA, GA 30303

__ OTHER: _____

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COURT CLERK
IMMIGRATION COURT FF

CC:
OAA

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

IN THE MATTER OF:	)	**In Removal Proceedings**
	)	
CHATTUAIS, Jacks-Guy[1]	)	**File No. A# 098-063-263**
	)	
Respondent	)	
	)	

APPLICATION: Respondent's Motion to Reopen *In Absentia* Removal Proceedings and Stay Removal

APPEARANCES

ON BEHALF OF THE RESPONDENT:

H. Glenn Fogle, Jr.
The Fogle Law Firm, LLC
44 Broad Street, NW, Suite 700
Atlanta, Georgia 30303

ON BEHALF OF THE GOVERNMENT:

Assistant Chief Counsel
Department of Homeland Security
180 Spring Street, SW, Suite 332
Atlanta, Georgia 30303

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a male native and citizen of Cameroon who was admitted to the United States at Atlanta, Georgia on or about April 4, 2003 as a nonimmigrant B-1 visitor. The Respondent was authorized to remain in the United States for a temporary period not to exceed May 3, 2003.

The Department of Homeland Security ("Department") placed the Respondent into removal proceedings through the issuance of a Notice to Appear ("NTA") on September 24, 2009. The Department charged the Respondent under section 237(a)(1)(B) of the Immigration and Nationality Act ("INA" or "Act") in that after admission as a nonimmigrant under section 101(a)(15) of the Act, the Respondent has remained in the United States for a time longer than permitted, in violation of the Act or any other law of the United States.

At a master calendar hearing in October 2009, the Respondent admitted the factual allegations contained in the NTA and the Court sustained the charge of removability by clear and convincing evidence. See 8 C.F.R. § 1240.8(a).

[1] The Respondent's name is also included in the record as Jacks-Guy Nkounga Chattuais.

On November 7, 2011, the Respondent failed to appear at his individual hearing and was ordered removed from the United States to Cameroon *in absentia*.

On November 28, 2011, the Respondent filed the instant Motion to Reopen and Motion to Stay Removal with the Court. The Respondent argues that his case should be reopened because he arrived late for his hearing due to a traffic accident that caused him to be stuck in traffic while on his way to court.

On November 30, 2011, the Department filed its opposition to the Respondent's motion arguing that notice to the Respondent of his hearing date was proper, the Respondent has not shown any exceptional circumstances that excuse his failure to appear, and pursuant to Matter of S-A-, the failure to attend a hearing due to traffic conditions does not warrant the reopening of an *in absentia* order of removal. See 21 I&N Dec. 1050 (BIA 1997).

The Court has carefully reviewed the arguments of both parties and the entire record before it. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny the Respondent's Motion to Reopen and Motion to Stay Removal.

II. APPLICABLE LAW

Generally, motions to reopen for purposes of rescinding an *in absentia* removal order must be filed within 180 days after the date of the removal order if the alien demonstrates that the failure to appear was because of exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). However, if the alien argues that he did not receive notice of the hearing or asserts that he was in Federal or state custody and the failure to appear was through no fault of his own, an order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time. 8 C.F.R. § 1003.23(b)(4)(ii). Only one such motion may be filed by the alien. Id.

In Matter of G-D-, the Board explained that "motions rules respond directly to the legislative interest in setting meaningful and effective limits on motions and ultimately in achieving finality in immigration case adjudications." 22 I&N Dec. 1132, 1134 (BIA 1999). However, the time and numerical limitations do not apply when the basis of the motion is either a request for asylum under INA § 208, a request for withholding of removal under INA § 241(b)(3), or a claim under the Convention Against Torture. See INA § 240(c)(7)(C)(ii); 8 C.F.R. §§ 1003.2(c)(3)(ii), 1003.23(b)(4)(i).

As with all motions to reopen, the applicant must state new facts that will be proven at a hearing if the motion is granted, and it must be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3); see also INS v. Abudu, 485 U.S. 94 (1988). Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and supporting documentation. Id. Finally, if the ultimate relief is discretionary, the Immigration Judge may deny a motion to reopen even if the moving party demonstrates *prima facie* eligibility for relief. Id.

The Code of Federal Regulations also grants an Immigration Judge *sua sponte* authority to reopen, at any time, any case in which he has made a decision. See 8 C.F.R. § 1003.23(b). The Board has the same *sua sponte* authority. See 8 C.F.R. §§ 1003.2(a), 1003.2(c)(3). The Board has explained that exercising *sua sponte* authority is an "extraordinary remedy reserved for truly exceptional situations." Matter of G-D-, 22 I&N Dec. at 1134 (citing Matter of J-J-, 21 I&N Dec. 976 (BIA 1997)). The movant has the burden of proving that an exceptional situation exists such that the Court may exercise its *sua sponte* authority. See Matter of Beckford, 22 I&N 1216, 1218 (BIA 2000). Ultimately, however, the Court's *sua sponte* authority gives it very broad discretion to reopen proceedings or to deny motions to reopen. See Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999) (explaining that the Board has "very broad discretion...to "reopen or reconsider" any motion it has rendered at any time").

III. DISCUSSION

i. The Respondent's Motion to Reopen is timely.

Generally, motions to reopen for purposes of rescinding an *in absentia* removal order must be filed within 180 days after the date of the removal order if the alien demonstrates that the failure to appear was because of exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii).

The Respondent was ordered removed *in absentia* on November 7, 2011. The Respondent filed his Motion to Reopen and Motion to Stay Removal on November 28, 2011. Therefore, the Respondent's Motion to Reopen was filed within 180 days after the date of the removal order and is timely. Id.

ii. The Respondent has not demonstrated that his failure to appear at his removal proceedings was because of exceptional circumstances.

While the Respondent's Motion to Reopen is timely, he must also demonstrate that his failure to appear was due to exceptional circumstances as defined in section 240(e)(1) of the Act. See 8 C.F.R. § 1003.23(b)(4)(ii).

Section 240(e)(1) of the Act states:

> The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any 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.

The Respondent has provided no evidence of such an exceptional circumstance in his instant Motion to Reopen. The Respondent states that he failed to appear at his individual hearing because there was a traffic accident which caused him to be stuck in traffic and delay his arrival to court. However, in Matter of S-A-, the Board of Immigration Appeals ("Board" or "BIA") held that a respondent's assertion "that he was prevented from reaching his hearing on

time [due to] heavy traffic does not constitute reasonable cause that would warrant reopening of his in absentia exclusion proceedings." 21 I&N Dec. at 1050.

The Respondent cites legal precedent in his Motion to Reopen from various Circuit Courts of Appeals, including the Second, Third, Fifth, and Ninth Circuits, on the issue of traffic problems causing a delay in a respondent's arrival to court. However, the Court is bound by the decisions of the Board unless there is a controlling decision issued by the Eleventh Circuit Court of Appeals. See Matter of U. Singh, 25 I&N Dec. 670 (BIA 2012) ("A decision by a Federal court of appeals reversing a precedent decision of the Board of Immigration Appeals is not binding authority outside the circuit in which the case arises."); see also Matter of Olivares-Martinez, 23 I&N Dec. 148, 149 (BIA 2001) ("The Board historically follows a court's precedent in eases arising in that circuit.") (citing Matter of Anselmo, 20 I&N Dec. 25, 31 (BIA 1989)).

Based on the above analysis, the Court finds that the Respondent has not provided evidence of any exceptional circumstances that would excuse his failure to appear. See 8 C.F.R. § 1003.23(b)(4)(ii). Further, the Respondent's assertion of traffic problems does not constitute reasonable cause that warrants a reopening of his removal proceedings. See Matter of S-A-, 21 I&N Dec. at 1050. Therefore, the Court will deny the Respondent's Motion to Reopen.

iii. The Respondent's Motion to Reopen does not merit an exercise of the Court's sua sponte authority.

The Court recognizes its *sua sponte* authority to reopen proceedings solely based on the equities in a given case. See 8 C.F.R. § 1003.23(b)(1). In order for the Court to reopen a case under its *sua sponte* authority there must be a "truly exceptional situatio[n]" before the Court. Matter of G-D-, 22 I&N Dec. at 1134 - 35. The Court's authority to reopen a case *sua sponte* "is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship." Matter of J-J-, 21 I&N Dec. at 976. Here, there is no evidence of a "truly exceptional situatio[n]." Matter of G-D-, 22 I&N Dec. at 1134. There is no compelling change in the law and no other evidence of an "exceptional situatio[n]." Id. at 1134 – 35. Therefore, the Court will not exercise its s*ua sponte* authority to reopen proceedings.

IV. CONCLUSION

Because the Court denies the Respondent's Motion to Reopen, the Court will also deny the Respondent's Motion to Stay Removal as moot. See 8 C.F.R. § 1003.23(b)(4)(i) ("The filing of a motion under this paragraph shall stay the removal of the alien pending disposition of the motion by the Immigration Judge.").

In light of the foregoing, the Court will enter the following order:

ORDER OF THE IMMIGRATION JUDGE

It is ordered that:

The Respondent's Motion to Reopen
Is Hereby **DENIED**.

3-15-2012
Date

J. Dan Pelletier
United States Immigration Judge
Atlanta, Georgia