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

Garza, Felice M.
Law Office of Garcia & Ramirez
800 Dolorosa St.
Ste. 202
San Antonio, TX 78207

DHS/ICE Office of Chief Counsel - HLG
1717 Zoy Street
Harlingen, TX 78552

Name: ROJAS-CARVAJAL, OSCAR IVAN **A 209-418-857**

Date of this notice: 6/16/2020

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:
Adkins-Blanch, Charles K.
Couch, Stuart V.
Kelly, Edward F.

Userteam: Docket

File: A209-418-857 – Harlingen. TX Date: JUN 16 2020

In re: Oscar Ivan ROJAS-CARVAJAL a.k.a. Oscar Ivan Rojas-Caruaval

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Felice M. Garza, Esquire

ON BEHALF OF DHS: Christine H. Kim
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(b) of the Act

The respondent, a native and citizen of Mexico, appeals from the April 5, 2018, decision of the Immigration Judge denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The Department of Homeland Security (DHS) filed a response to the appeal. 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).

On appeal, he respondent argues that the removal proceedings should be remanded to consider whether the proceedings were properly initiated pursuant to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)[1] (Respondent's Br. at 7-9). Assuming that jurisdiction properly vested in the Immigration Court, the respondent asserts that he is statutorily eligible for cancellation of removal for certain nonpermanent residents (*Id.* at 8-9). The respondent also asserts that the Immigration Judge erred by finding that he voluntarily and knowingly waived his right to a hearing before an Immigration Judge, and by finding that his voluntary return to Mexico in April 2007 was sufficient to break his continuous physical presence for purposes of cancellation of removal (*Id.* at 9-10).

The DHS argues that the Immigration Judge's decision should be affirmed (DHS's Br. at 2-3). The DHS also argues that the record should be remanded to the Immigration Judge for a decision on the respondent's application for voluntary departure (*Id.*)

[1] The Immigration Judge had proper jurisdiction over the respondent's removal proceedings because he was served with a Notice to Appear which did not specify the time and place of his hearing, but he was later served with a Notice of Hearing which did specify the pertinent information. *Matter of Bermudez-Cota*, 27 I&N Dec. 441, 447 (BIA 2018); *see also Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019) (agreeing with *Matter of Bermudez-Cota*).

The Immigration Judge found that the respondent failed to establish 10 years of continuous presence in the United States prior to the issuance of the Notice to Appear, as required under section 240A(d)(1) of the Act (IJ at 3-4). The respondent testified that on or about April 6, 2007, he chose to voluntarily return to Mexico instead of seeing an Immigration Judge, and he later returned to the United States on May 3, 2007 (IJ at 3; Tr. at 51-56, 61-64). The Immigration Judge considered the respondent's argument that under *Matter of Garcia-Ramirez*, 26 I&N Dec. 674 (BIA 2015), his voluntary return to Mexico was insufficient to break his continuous physical presence under section 240A(d)(1) of the Act (IJ at 3-4; Respondent's Br. at 7-9).

In *Garcia-Ramirez* we held that "[e]vidence that an alien who had the right to a hearing before an Immigration Judge was fingerprinted and/or photographed before being allowed to voluntarily depart is not enough, in itself, to demonstrate a waiver of the right to a hearing or to show a process of sufficient formality to break continuous physical presence." The Immigration Judge distinguished the respondent's case, where he testified that he chose to voluntary return to Mexico in lieu of appearing before an Immigration Judge, from the case of *Garcia-Ramirez* where "no testimony on his application was taken" (IJ at 4). However, the respondent argues that the Immigration Judge erred by finding that he was adequately informed of his right to a hearing and waived his right to a hearing before an Immigration Judge (Respondent's Br. 9-10). The respondent also argues that under *Pereira*, the "stop-time rule" no longer prevents him from establishing 10 years of continuous physical presence in the United States and he is prima facie eligible for cancellation of removal (*Id.* at 7-8).[2] *Pereira v. Sessions*, 138 S. Ct. at 2114-20.

In view of the foregoing, the record will be remanded for the Immigration Judge to determine, in the first instance, whether the respondent knowingly and voluntarily waived his right to a hearing before an Immigration Judge, and whether he accepted voluntary return. If the Immigration Judge finds the respondent's April 2007 departure is not adequate to constitute a break in his continuous physical presence, the Immigration Judge should assess the other criteria for cancellation of removal. Section 240A(b)(1) of the Act. On remand, the Immigration Judge should also make any necessary fact-findings regarding whether the voluntary return was of sufficient formality and then reconsider and reassess this case pursuant to *Matter of Garcia-Ramirez*, 26 I&N Dec. 674, 677-78 and *Matter of Castrejon-Colino*, 26 I&N Dec. 667, 670-73 (BIA 2015).

In the remanded proceedings, both parties should be given another opportunity to submit evidence, including testimony, regarding the respondent's applications for cancellation of removal and voluntary departure. We express no opinion about the ultimate outcome of this matter. Accordingly, the following orders shall be entered.

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[2] The respondent argues the record evidence adequately establishes that he has 10 years of continuous physical presence in the United States. We note that the Immigration Judge's calculation concerning an entry date of May 3, 2007, may not be consistent with the stipulations and findings at the hearing (Tr. at 61, 63, 72). However, in light of our disposition of this matter, we need not reach this issue at this time.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's April 5, 2018, decision is vacated.

FURTHER 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