U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MENJIVAR-LOPEZ, JOSE ROBE... **A 208-181-983**

Date of this notice: 9/13/2018

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.
Snow, Thomas G
Kelly, Edward F.

Userteam: Docket

File: A208-181-983 – San Francisco, CA

Date: SEP 13 2018

In re: Jose Roberto MENJIVAR-LOPEZ

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Jonathan Kaufman, Esquire

ON BEHALF OF DHS: Richard C. Burson
Assistant Chief Counsel

The respondent appeals from the Immigration Judge's decision dated October 4, 2017, which ordered him removed from the United States. The parties have provided arguments on appeal. While the appeal was pending, the respondent filed a motion to terminate removal proceedings. The Department of Homeland Security (DHS) has not responded to the motion. The motion to terminate will be denied, and the record will be remanded.

The record shows that on June 14, 2015, the DHS personally served the respondent with a Notice to Appear (NTA) alleging that he was a native and citizen of El Salvador and charging him as inadmissible under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i) (present without being admitted or paroled) (Exh. 1). At the initial master calendar hearing on March 22, 2016, where the respondent appeared pro se, the Immigration Judge marked and admitted the NTA, and marked the Form I-213, Record of Deportable/Inadmissible Alien (Tr. at 2).

After a change of venue, the respondent, now represented by counsel, filed pleadings denying all the factual allegations and the charge in the NTA and moved to strike the Form I-213 as improperly served. Thereafter, the DHS re-served the Form I-213 on the respondent, through counsel. During the next master calendar hearing on July 26, 2017, counsel conceded service, and the Immigration Judge admitted the Form I-213 (Tr. at 8, 18; Exh. 2). At that time, the respondent asked that the Immigration Judge hear evidentiary objections to the Form I-213 (Tr. at 18-20). The Immigration Judge then questioned the respondent on the allegations in the NTA, and the respondent did not answer (Tr. at 20-24). Based on the respondent's silence, the Immigration Judge found that he was admitting the allegations from the NTA, including the allegation of alienage, and sustained the charge of inadmissibility independent of the information in the Form I-213 (Tr. at 24-25). The Immigration Judge set the case over for another master calendar hearing to receive any application for relief (Tr. at 25-26).

At the following hearing on October 4, 2017, the Immigration Judge stated that there had been a sustained charge of removability based on the Form I-213 (Tr. at 32, 34). The respondent did not apply for relief from removal (Tr. at 30-32). The Immigration Judge issued a summary order on October 4, 2017, which included hand-written notes indicating, among other things, that the respondent was advised that removability findings were made orally and that removability was

established by clear and convincing evidence based on the record evidence, including the Form I-213.

Initially, we will address the respondent's motion to terminate removal proceedings. In the motion, the respondent argues that termination of proceedings is warranted because the underlying NTA served on or about June 14, 2015, is defective under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and that because no proper NTA was filed, jurisdiction never vested with the Immigration Court. Respondent's Motion to Terminate at 2-3. These arguments are not persuasive. The specific, limited question addressed in *Pereira* was: "Does a "notice to appear" that does not specify the "time and place at which the proceedings will be held," as required by [8 U.S.C. § 1229(a)(1)(G)(i)], trigger the stop-time rule?" *Id.* at 2113. The Supreme Court did not hold that the NTA in that case was invalid and terminate the underlying removal proceedings, and, notwithstanding the respondent's assertion to the contrary, there is no suggestion that the Court intended its holding to be extrapolated to support such an action. Respondent's Motion to Terminate at 2. Accordingly, the motion to terminate is denied.

We will now turn to the matter on appeal. Where, as here, a respondent is charged as being present in the United States without being admitted or paroled, the DHS must first establish the alienage of the respondent; then the burden shifts to the respondent to show that he is lawfully in the United States or is entitled to be admitted and is not inadmissible as charged. 8 C.F.R. § 1240.8(c).

On appeal, the respondent argues that the DHS did not meet its burden to prove alienage. Respondent's Br. at 7. As discussed above, the Immigration Judge initially indicated that, independent of the Form I-213, the respondent's silence constituted an admission that he was a native and citizen of El Salvador. However, a respondent's silence alone, in the absence of other evidence of record, is not sufficient to satisfy the DHS's burden. *Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1990). The Immigration Judge later indicated that the charge (and necessarily the allegation of alienage) was sustained based on the Form I-213 or on evidence including the Form I-213. The respondent argues on appeal that he was not provided a fair opportunity to challenge the contents of the I-213. Respondent's Br. at 9-11. In its response, the DHS contends that the respondent could have, but did not, challenge the Form I-213 in the time between the July 26, 2017, hearing and the hearing on October 4, 2017. DHS's Br. at 9-10. However, inasmuch as the Immigration Judge explicitly stated during the July 26, 2017, hearing that the allegations and charge were sustained independent of the information Form I-213, we are not persuaded that the failure to attempt further challenge to the Form I-213 at the time is dispositive. We are similarly unpersuaded by the argument that the respondent does not assert on appeal that the statements in the Form I-213 were inaccurate given that the respondent's pleadings denied all factual allegations, including alienage and date and manner of entry. DHS's Br. at 7-8.

Considering all the circumstances, and the dearth of specific explanation offered in the Immigration Judge's October 4, 2017, order, it is unclear what finding of fact the Immigration Judge made to support the legal conclusion that the DHS met its burden to prove alienage. Thus, a remand is required. *See* 8 C.F.R. § 1003.1(d)(3)(iv). On remand, the Immigration Judge should allow the parties to present additional evidence and testimony, as appropriate. Accordingly, the following orders will be entered.

ORDER: The motion to terminate removal proceedings is denied.

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

FOR THE BOARD