U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: BENITEZ-SOSA, ELCY LETICIA **A 078-964-763**

Date of this notice: 3/15/2016

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:
O'Leary, Brian M.

Userteam: Docket

File: A078 964 763 – New York, NY

Date: MAR 15 2016

In re: ELCY LETICIA BENITEZ-SOSA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: George A. Terezakis, Esquire

APPLICATION: Reopening

The respondent is a native and citizen of El Salvador. She appeals from the January 14, 2015, decision of an Immigration Judge which denied the respondent's motion to reopen her removal proceedings, which had been conducted in absentia under section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A). The respondent filed a timely appeal from that decision. The Department of Homeland Security (DHS) has not filed a response to the appeal. The record will be remanded to the Immigration Judge for further proceedings.

The Board reviews findings of fact by an Immigration Judge only to determine whether they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002). The Board reviews 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).

Upon review of the record, we find that the Immigration Judge failed to address the respondent's request for sua sponte reopening (I.J. at 2). *See* Motion at 5-6. The Immigration Judge, in effect, only decided the respondent's motion based on whether the respondent could establish that rescission of her in absentia order of removal was proper because she did not receive notice of her hearing. The Immigration Judge did not, however, address or enter any findings of fact with regard to the merits of the respondent's additional request for sua sponte reopening. On appeal, the government has not filed a response to the respondent's request for a remand based on the Immigration Judge's error. The request for a remand is, therefore, deemed unopposed. *See* 8 C.F.R. § 1003.2(g)(3) (a motion is deemed unopposed when the opposing party fails to file a timely response 13 days after service of the motion).

Accordingly, the record is remanded for the Immigration Judge to consider the respondent's request for sua sponte reopening in the first instance and to make findings of fact consistent with *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (exceptional circumstances must be shown to warrant sua sponte reopening as a matter of discretion).

Accordingly, the following orders will be entered.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

File: A: 078 964 763 Date: January 14th, 2015

In the Matter of

Benitez-Sosa, Elcy Leticia

Respondent.

ORDER ON MOTION TO REOPEN

REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
Sylvia Cabana, Esq.
222 Stewart Ave.
Garden City, NY, 11530

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Veronica Cardenas, Esq.
Assistant District Counsel
New York District

WRITTEN DECISION OF THE IMMIGRATION JUDGE

OnMay 9th 2003 , the Respondent failed to appear for her scheduled removal hearing. At that time, the Department of Homeland Security established by clear and convincing, evidence that written notice, pursuant to INA § 239(a)(1) or (2), was provided to the Respondent informing him of his obligation to appear at that time, and that the Respondent was removable from this country pursuant to INA § 240(e)(2). *See* INA § 240(b)(5)(A). Accordingly, the hearing was held *in absentia* and the Respondent was ordered removed to El Salvidor pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("the Act"). *Id.*; 8 C.F.R § 3.26(c).

On December 16th, 2014 , the Respondent filed this motion to reopen removal proceedings. On January 5th, 2015 the Department filed a memorandum in opposition to the Respondent's motion. For the reasons set forth below, the motion will be denied.

Section 240(b)(5)(C) of the Act provides that an *in absentia* removal order may be rescinded by the Immigration Judge only:

(i) upon 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 [as defined in INA § 240(e)(1)], or

(ii) upon a motion 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) or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

INA § 240(b)(5)(C). Section 240(e)(1) of the Act defines "exceptional circumstances" as circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

This Court is satisfied the Respondent received proper notice of his hearing.

Respondent's attorney's assertion that the respondent did not receive notice of the hearing is contrary to the facts. The Notice to Appear clearly shows the respondent was personally served with the Notice. The Notice contained the date and time to appear at the hearing. Additionally, as the government points out, the motion itself is time barred.

Accordingly, after a careful review of the record, the following order will be entered:

ORDER: IT IS ORDERED that the Respondent's motion to reopen removal proceedings be hereby DENIED.

Robert D. Weisel
U.S. Immigration Judge