



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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26 Federal Plaza, 11th Floor
New York, NY 10278**

Name: MENDEZ PEREZ, AMINADAD N... A 099-623-872

Date of this notice: 10/30/2013

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:
Hoffman, Sharon
Manuel, Elise
Guendelsberger, John

lulsegas
Userteam: Docket

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Falls Church, Virginia 22041

File: A099 623 872 – New York, NY

Date: OCT 30 2013

In re: AMINADAD NATANAEL MENDEZ-PEREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lymari Casta, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of the Dominican Republic, appeals the Immigration Judge's decision dated May 29, 2012, denying the respondent's motion to reopen an order of removal entered in absentia on February 14, 2012. The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 8 C.F.R. § 1003.1(d)(3). Under the totality of the circumstances, we are persuaded by the respondent's argument that he established "exceptional circumstances" for his failure to appear, and that the in absentia order should therefore be rescinded. See section 240(b)(5)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C)(i); *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, these proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

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

File No. A# 099 623 872

In the Matter of:)
)
MENDEZ-Perez, Aminadad Natanael)
)
Respondent)
)

IN REMOVAL PROCEEDINGS

CHARGE: INA § 237(a)(1)(B)
APPLICATION: Motion to Reopen

ON BEHALF OF THE RESPONDENT:

H. Benjamin Perez, Esq.
350 Broadway, Suite 400
New York, NY 10013

ON BEHALF OF THE SERVICE:

Renata Parras
Assistant Chief Counsel, New York OCC
New York, NY 10278

DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent, Aminadad MENDEZ, is a native and citizen of Dominican Republic who was admitted to the United States at New York, NY as nonimmigrant B-2 on August 27, 2007 as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed 6 months. The Respondent remained in the United States beyond the allowable amount of time without authorization from the Department of Homeland Security (DHS). On April 4, 2011, DHS issued and personally served a Notice to Appear (NTA) (Form I-862), alleging that the respondent entered the United States ("US") on or about August 27, 2007, as a nonimmigrant B-2 with authorization to remain in the US for a temporary period not to exceed six months. The NTA charges Respondent with removability pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act (the "Act") in that after his admission as a nonimmigrant B-1, the alien remained in the United States beyond November 15, 2008 without authorization.

On November 15, 2011, Respondent appeared with his attorney and requested an adjournment in order for the Respondent criminal matter to be resolved as well as to give the Respondent an opportunity to address what forms of relief he will be seeking with the Court. The Court adjourned the matter to February 14, 2012 at 9:30 am. The original notice clearly states the correct date and time of the hearing. Both parties were personally served with a copy of the notice. Further, the Court also announced orally the accurate date of the incoming hearing. On November 15, 2011, the Respondent was provided written notice of his incoming hearing scheduled for February 14, 2012 at 9:30am.

On February 14, 2012, the Respondent failed to appear at his scheduled hearing and the Court conducted an *in absentia* hearing and ordered Respondent removed to the Dominican republic pursuant to the charge contained in the NTA.

On March 29, 2012, Respondent, through his counsel, filed a motion to reopen. Respondent requests that proceedings be reopened because he claims that he missed his scheduled hearing due to clerical mistake on the Court's part. More specifically, the Respondent alleges that he received a hearing notice from the Court, which indicated that he was scheduled for a hearing on February 15, 2012. On April 5, 2012, DHS filed a reply in opposition to the respondent's motion to reopen.

II. Legal Standard & Analysis

An order entered *in absentia* in removal proceedings may only be rescinded upon a motion to reopen filed: (1) 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 beyond their control; or (2) at any time if the alien demonstrates that they did not receive notice or that they were in federal or state custody and their failure to appear was through no fault of their own. See 8 CFR § 3.23(b)(4)(iii)(A).

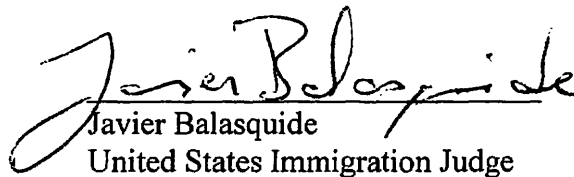
The Court finds that the Respondent received proper notice. The record of proceedings reflects that the proper notice of hearing was served on the Respondent on November 15, 2011 when he attended to his last master calendar hearing with his counsel and he was aware of his February 14, 2012 master calendar hearing date. The original notice of the hearing clearly states the date of February 14, 2012. The original notice of the hearing fails to contain the allege correction or amendment. The Court reviewed its original hearing notice in the record of proceedings and concluded that this alteration is not in the original document. Although it is unclear who made this change to the Notice of the hearing, based on the totality of the evidence, it appears that this Court was not responsible for this alteration. Based on my review of the evidence provided in the motion to reopen, it also appears that the number "5" has been handwritten over the number that originally was below. Based on the totality of the evidence, the Respondent was properly served with a notice of the hearing as he was present in Court and received oral notice in person. Therefore, the Respondent has not sufficiently demonstrated that the notice was defective or improper or that an exceptional circumstances prevented him from

appearing in Court on February 14, 2012.

ORDER

IT IS HEREBY ORDERED that Respondents motion to reopen proceedings be DENIED.

Date 5-29-12


Javier Balasquide
United States Immigration Judge

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