U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: HERNANDEZ-RIVERA, CARMEN... **A 099-524-260**

Date of this notice: 7/8/2016

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:
Grant, Edward R.

Userteam: Docket

File: A099 524 260 – San Diego, CA

Date: JUL – 8 2016

In re: CARMEN ELENA HERNANDEZ-RIVERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rebecca A. Grose, Esquire

ON BEHALF OF DHS: Jonathan Grant
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of El Salvador, appeals the December 9, 2015, decision of the Immigration Judge denying her motion to reopen. The Department of Homeland Security ("DHS") opposes the appeal. We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. § 1003.1(d)(3). The record will be remanded.

In her motion to reopen filed with the Immigration Judge, the respondent claims that she failed to appear for her February 28, 2006, hearing because she did not know where or when to appear (I.J. at 2-3; Respondent's Motion to Reopen at 3-4). Specifically, the respondent's motion states that she was provided a court-related document, but due to a lack of sufficient knowledge of the English language and her husband's failure to advise her that the document related to a court hearing, she failed to appear (I.J. at 2-3; Respondent's Motion to Reopen at 3). The respondent argues in the alternative that she was unaware of the procedure and unsure what to do or when she was obligated to go to court (I.J. at 2-3; Respondent's Motion to Reopen at 3). The respondent alleges on appeal that the Immigration Judge improperly denied her motion to reopen and consequently violated her due process rights (Respondent's Brief at 1, 4).

The respondent argues for the first time on appeal that she did not personally receive the Notice to Appear (NTA) or otherwise receive notice of her February 28, 2006, hearing in accordance with section 239(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a) (Respondent's Brief at 2-3). As the respondent did not raise this claim below, it is not appropriate for us to consider it for the first time on appeal. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 266 n.1 (BIA 2007). We acknowledge that the respondent has submitted an affidavit on appeal in support of this new argument (Respondent's Brief at 8). To the extent that the respondent has proffered new evidence on appeal, we review only the record that was before the Immigration Judge. *See Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984).

Additionally, the record supports the Immigration Judge's finding that the NTA was personally served on the respondent on December 3, 2005, where it contains the date and time of her hearing, respondent's fingerprint and signature, and states it was served personally

(I.J. at 1; NTA[1]). The record also reflects that the respondent received oral notice in the Spanish language of the consequences of failing to appear for a hearing (Record of Deportable/Inadmissible Alien (Form I-213); NTA). The NTA informed the respondent that she had been placed in removal proceedings, and it provided information regarding the nature of the proceedings, including the opportunity to seek representation, the conduct of the hearing, the statutory address obligations associated with removal proceedings, and the consequences of a failure to appear (NTA). Current law does not require that the NTA be in any language other than English. *See* section 239 of the Act. Therefore, we will not disturb the Immigration Judge's finding that the DHS personally served the NTA on the respondent (I.J. at 1), and we reject the respondent's argument on appeal that she was not served with the NTA.

On January 24, 2006, pursuant to a motion by the DHS to calendar removal proceedings, the court sent a Notice of Hearing (NOH) to the address provided on the NTA, advising the respondent of her February 28, 2006, hearing (I.J. at 1; NTA; DHS Motion to Calendar). The respondent claims that, at the time of the hearing, she resided at the address which appears on the NOH, the NTA, and Form I-213 (Respondent's Brief; Respondent's Motion to Reopen at 2-3; Form I-213; NOH; NTA). However, the record reflects that the NOH for the respondent's February 28, 2006, hearing was returned on February 6, 2006, as undeliverable and marked "return to sender, not deliverable as addressed, unable to forward" and "she does not live here."

The Immigration Judge's decision does not indicate that the returned NOH was considered in finding that the respondent received proper notice of her February 28, 2006 hearing (I.J. at 1-2). Additionally, the record does not support the Immigration Judge's finding that the respondent conceded receipt of the NOH in her motion to reopen (I.J. at 2; Respondent's Motion to Reopen).

In light of the foregoing, we conclude that remand of the record is warranted for further fact-finding regarding service of the NOH and the entry of a new decision.[2] *See* 8 C.F.R. § 1003.1(d)(3)(iv) (stating that the Board may not engage in fact-finding in the course of deciding appeals except for taking administrative notice of commonly known facts); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (stating that the Board has limited fact-finding ability on appeal, which heightens the need for Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law). On remand, the parties are not precluded from submitting additional evidence or raising other issues. *See Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) (noting that with certain exceptions, the remand of a case by this Board is effective for not only the stated purpose of the remand, but also for consideration of any and all matters which the Immigration Judge

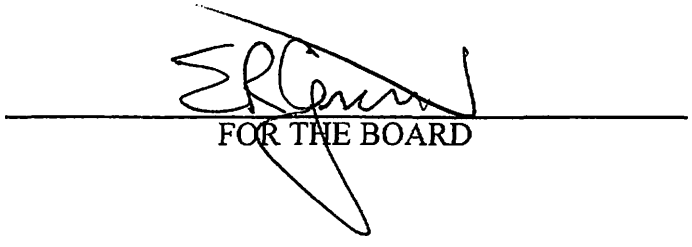
[1] The Immigration Judge's decision does not indicate that the evidence was marked in the proceedings below. For purposes of this decision, we will refer to the documents in the record by their respective titles.

[2] As the record is being remanded for the entry of a new decision, we need not address whether the Immigration Judge's decision violated the respondent's due process rights. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

deems appropriate). Our remand is solely for the purpose of allowing the Immigration Judge to enter new findings of fact and issue a new decision for the reasons stated above. We take no position at present regarding the outcome of the respondent's motion.

Accordingly, the following order is entered.

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