U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted], R[redacted]

A [redacted]-582

Date of this notice: 3/6/2020

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:
Grant, Edward R.
Mullane, Hugh G.
Mann, Ana

M[illegible]
Userteam: Docket

File: A[redacted]-582[1] – Orlando, FL

Date: MAR - 6 2020

In re: R[redacted] C[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John R. Gihon, Esquire

ON BEHALF OF DHS: David L. Meek
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, who maintains that he is a native of Brazil and a dual citizen of Brazil and Italy, appeals from the June 18, 2018, decision of the Immigration Judge denying his motion to reopen and rescind the in absentia order of removal entered in this case on November 6, 2008. Section 240(b)(5)(C)(ii) of the Act, 8 U.S.C. § 1229a(b)(5)(C)(ii). The appeal will be sustained, the order of removal rescinded, the proceedings reopened, and the record remanded.

We review the 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).

The DHS mailed the Notice to Appear (NTA) to the last known address for the respondent on April 4, 2008 (Exh. 1). The DHS obtained this address from a Petition for Special Immigrant (Form I-360) previously filed by the respondent with U.S. Citizenship and Immigration Services (USCIS) (IJ at 2; Exh. 2). The notice of hearing dated October 2, 2008, was mailed to the same address, scheduling the respondent's first hearing before the Immigration Court on November 6, 2008, and the notice was returned to the Immigration Court as unable to be forwarded (IJ at 3).

The respondent stated in an affidavit filed with his motion to reopen that he (1) never lived at the address provided to USCIS in his visa petition and (2) believed it is the address where he met the person who filed the visa petition for him (Respondent's Motion to Reopen at Tab A). The DHS provided public records indicating that the address listed on the visa petition was also provided by the respondent for a 2006 vehicle registration (DHS Opp'n to Motion at Tab E). However, the records also corroborated the respondent's assertion that he never lived at that address (DHS Opp'n to Motion at Tab E). Moreover, the respondent asserted, and public records provided by the DHS confirmed, that the respondent was not using the address listed on the NTA

[1] Both the respondent and the Department of H[redacted]curity (DHS) identify a second alien number (A#) attributable to the respondent – A[redacted] (Respondent's Motion to Reopen at Tab D; DHS Opp'n to Motion at 3).

or the Notice of Hearing in 2008 when these documents were sent (Respondent's Motion to Reopen at Tab A; DHS Opp'n to Motion to Tab E).

"[A]n Immigration Judge may not order an alien removed in absentia when the Service mails the Notice to Appear to the last address it has on file for an alien, but the record reflects that the alien did not receive the Notice to Appear . . . and therefore has never been notified of the initiation of removal proceedings or the alien's address obligations under section 239(a)(1) of the Act [8 U.S.C. § 1229(a)(1)]." *Matter of G-Y-R*, 23 I&N Dec. 181, 192 (BIA 2001); *see also Matter of Anyelo*, 25 I&N Dec. 337, 339 (BIA 2010) (reaffirming our holding in *Matter of G-Y-R-* and confirming its applicability within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, wherein this matter arises). It does not appear from the record that the respondent received actual notice of his removal proceedings or his address obligations under section 239(a)(1)(F) of the Act. Under these circumstances, "the entry of an in absentia order is precluded." *Matter of G-Y-R-*, 23 I&N Dec. at 190.

We acknowledge the respondent's argument, based on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), that the Immigration Judge lacked jurisdiction over these proceedings because the NTA did not list the time of his initial hearing (Notice of Appeal). This argument, however, is squarely foreclosed by *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1152-57 (11th Cir. 2019), and termination of the proceedings on this basis is therefore unwarranted. *See Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 463 (A.G. 2017) (explaining that the Immigration Judges and this Board only have authority to terminate proceedings under specified circumstances inapplicable here). Finally, given our disposition of this matter, we need not address the respondent's arguments regarding sua sponte reopening or his prima facie eligibility for relief (Respondent's Br. at 14).

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The proceedings are reopened, the order of removal is rescinded, and the record is remanded for further proceedings.

FOR THE BOARD