U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Antonio Bugge, Esquire
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Miami, FL 33133

DHS/ICE Office of Chief Counsel - MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: RIVERO-GODOY, SUSANA

A 024-718-991

Date of this notice: 11/18/2013

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:
Holmes, David B.

lucasd
Userteam: Docket

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File: A024 718 991 – Miami, FL

Date: NOV 18 2013

In re: SUSANA RIVERO-GODOY

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Antonio Bugge, Esquire

APPLICATION: Reconsideration

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2(b) to reconsider its August 8, 2013, decision dismissing her appeal of the Immigration Judge's denial of her motion to reopen and rescind the in absentia order of removal. The Immigration Judge and the Board found that respondent's motion to reopen based on exceptional circumstances was untimely. The Department of Homeland Security has not responded to the motion. The motion to reconsider will be granted and the record will be remanded.

The respondent argues that neither we nor the Immigration Judge considered the additional argument raised in her motion below and again on appeal that she is not deportable from the United States based on the charge alleged in the Notice to Appear ("NTA") (Exh. 1). We will grant the respondent's motion and reconsider our decision dismissing her appeal in order to address whether the Immigration Judge properly sustained the charge of deportability.

The Board reviews findings of fact, including credibility determinations, under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, including whether the parties have met the relevant burden of proof, and issues of discretion under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

Upon reconsideration, we deem remand appropriate for the Immigration Judge to determine the threshold issue of the respondent's deportability based on the allegations and charge listed on the NTA, specifically, whether the respondent's 1996 Florida Grand Theft conviction and 1993 Florida Assault conviction constitute crimes involving moral turpitude. Accordingly, the following orders will be entered.

ORDER: The motion to reconsider is granted, and our August 8, 2013, decision is reconsidered for the purposes of addressing that aspect of the respondent's appeal alleging that the Immigration Judge improperly sustained the charge of deportability.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

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DHS/ICE Office of Chief Counsel - MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: RIVERO-GODOY, SUSANA

A 024-718-991

Date of this notice: 8/8/2013

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:
Malphrus, Garry D.

schwarzA
Userteam: Docket

Immigrant & Refugee Appellate Center | www.irac.net

File: A024 718 991 – Miami, Florida Date: AUG 08 2013

In re: SUSANA RIVERO-GODOY a.k.a. Susana Tomasa Guieb a.k.a. Suzanne Revero a.k.a. Suzanne Rivero

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Antonio Bugge, Esquire

ON BEHALF OF DHS: Adam Weisholtz
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Cuba and a lawful permanent resident, has appealed from an Immigration Judge's decision dated August 31, 2012, which denied her motion to rescind her in absentia removal order. The Department of Homeland Security (DHS) has filed a brief in opposition. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

An order of removal issued following proceedings conducted in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A), may be rescinded only upon a motion to reopen which demonstrates that the alien failed to appear because of exceptional circumstances, because he did not receive proper notice of the hearing, or because he was in Federal or State custody and failed to appear through no fault of his own. Section 240(b)(5)(C) of the Act, 8 U.S.C. § 1229a(b)(5)(C). *See Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995); *Matter of Gonzalez-Lopez*, 20 I&N Dec. 644 (BIA 1993). The term "exceptional circumstances" refers to exceptional circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. Section 240(e)(1) of the Act, 8 U.S.C. § 1229a(e)(1). In determining whether exceptional circumstances exist to excuse an alien's failure to appear, the "totality of circumstances" pertaining to the alien's case must be considered. *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

Following a hearing conducted in absentia on February 6, 2012, at which DHS presented evidence and the respondent failed to appear, an Immigration Judge found the respondent subject to removal as charged, determined that she had abandoned all potential applications for relief, and ordered her removed from the United States. *See generally* section 240 of the Act, 8 U.S.C. § 1229a.

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On March 5, 2012, the respondent, through present counsel, filed a Notice of Appeal of the Immigration Judge's decision with the Board. On March 28, 2012, the Board issued an order which informed the respondent that we are precluded from considering a direct appeal of an Immigration Judge's in absentia order, and that the correct procedure was for the respondent to file a motion to reopen with the Immigration Judge. We returned the record to the Immigration Court without further action.

In the motion to reopen filed on August 17, 2012, through same counsel, the respondent asserted in part that she was late for her hearing in February 2012 because rain and a traffic accident delayed her trip from her home in Key West, Florida to the Immigration Court in Miami, Florida on the morning of her hearing.

On August 31, 2012, the Immigration Judge denied the motion to reopen, finding that the respondent's motion to reopen based on exceptional circumstances was untimely because it was filed more than 180 days after her in absentia removal order had been entered. In addition, he noted that the respondent's erroneous filing of the Notice of Appeal with the Board did not toll the 180-day filing deadline.

We affirm the Immigration Judge's decision that the respondent's motion to reopen based on exceptional circumstances was untimely. 8 C.F.R. § 1003.23(b)(4)(ii). In addition, the respondent has not established due diligence. She has not explained why she waited more than 6 months, until August 17, 2012, to file her motion to reopen with the Immigration Judge when the Board notified her in March 2012 that the proper procedure was to file a motion with the Immigration Judge. Furthermore, even if the motion were found to be timely, the respondent did not establish that her absence at the scheduled hearing was the result of exceptional circumstances, as required by section 240(b)(5)(C)(i) of the Act. *See* section 240(e)(1) of the Act; *Matter of S-A-*, 21 I&N Dec. 1050 (BIA 1997) ("heavy traffic" does not constitute exceptional circumstance).

Because we have decided the appeal on the preceding basis, it is not necessary to address the remaining contentions on appeal. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

IN THE MATTER OF:	)	
	)	
RIVERO-GODOY, Susana	)	
A# 024-718-991	)	**IN REMOVAL PROCEEDINGS**
	)	
RESPONDENT	)	
	)	

ON BEHALF OF RESPONDENT
Antonio Bugge, Esq.
2964 Aviation Avenue, Suite 300
Miami, Florida 33133

ON BEHALF OF DHS
Office of the Chief Counsel
Department of Homeland Security
333 South Miami Avenue, Suite 200
Miami, Florida 33130

DECISION OF THE IMMIGRATION COURT

I. Background

The respondent is a female, native, and citizen of Cuba. On February 6, 2012, the Immigration Court ordered the respondent removed in absentia. On August 17, 2012, the respondent filed a motion to reopen.

II. Discussion

The respondent's motion to reopen will be denied. The respondent does not dispute that she received proper notice of the February 6, 2012 hearing. *See Matter of G-Y-R-*, 23 I&N Dec. 181, 186 (BIA 2001) ("As a general matter, actual notice will always suffice."). The respondent's removal proceeding then qualifies for reopening only if her motion to reopen demonstrates her failure to appear "was because of exceptional circumstances." INA § 240(b)(5)(C)(i). However, because the respondent's motion to reopen was filed on August 17, 2012, more than 180 days after issuance of the February 6, 2012 in absentia order of removal, a claim that exceptional circumstances caused her failure to appear is time barred. *See* 8 C.F.R. § 1003.23(b)(4)(ii) (an alien seeking to reopen an *in absentia* removal order based on exceptional circumstances must file the motion within 180 days); *see also Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (noting that the 180-day time limitation for in absentia motions to reopen is "jurisdictional and mandatory").[1]

[1] The respondent's improperly filed appeal with the Board of Immigration Appeals did not toll the 180-day filing deadline. *See Matter of Goolcharan*, 23 I&N Dec. 5, 6 (BIA 2001) ("we find that the date that an Immigration Judge's order is entered fixes the deadline for filing a motion to reopen").

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Accordingly, the following order shall be entered:

IT IS HEREBY ORDERED that the respondent's motion to reopen be **DENIED**.

DATED this 31st day of August, 2012.

Charles J. Sanders
Immigration Judge

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