U.S. Department of Justice

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Name: SAPAREVSKI, VESELIN

A 096-540-058

Date of this notice: 8/21/2020

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:
Malphrus, Garry D.
Creppy, Michael J.
Liebowitz, Ellen C

Userteam: Docket

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File: A096-540-058 – Chicago, IL

Date: AUG 21 2020

In re: Veselin SAPAREVSKI

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Anne G. Relias, Esquire

ON BEHALF OF DHS: Alexandra Kostich
Assistant Chief Counsel

APPLICATION: Administrative closure; remand

The respondent appeals from the Immigration Judge's April 3, 2018, decision denying his motion for administrative closure. During the pendency of his appeal, the respondent also moved the Board to remand to allow him to pursue an application for cancellation of removal for non-permanent residents. Section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). We will dismiss the appeal, and grant the motion to remand.

We review 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 respondent's appellate filings offer no substantive argument contesting the Immigration Judge's denial of his motion for administrative closure, and the issue is therefore waived on appeal. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (failure to substantively address on appeal an issue addressed in the Immigration Judge's decision results in waiver of the issue).

We will grant the respondent's motion to remand, however, for the Immigration Judge to consider his application for cancellation of removal for non-permanent residents. Section 240A(b)(1) of the Act. The respondent moved to remand on the grounds that under the United States Supreme Court opinion issued in *Pereira v. Sessions*, he is able to establish the requisite 10 years of continuous physical presence to qualify for relief because the Notice to Appear ("NTA") that was served on him on October 9, 2012, did not include the time or place of his initial removal hearing, and therefore did not act to terminate the accrual of his continuous physical presence under the stop-time rule. Section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1).[1] *See Pereira v. Sessions*, ___ U.S. ___, 138 S. Ct. 2105, 2110, 2113 (2018).

[1] At a September 19, 2017, master calendar hearing, the respondent conceded that he was "just shy of non-LPR cancellation for removal by a few months" (Tr. at 14). The NTA alleges that the respondent was admitted to the United States on or about May 19, 2003, and the respondent admitted this factual allegation (Exh. 1; Tr. at 13).

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The Department of Homeland Security ("DHS") opposes the remand on the grounds that while the NTA did not contain the date and time information, the Immigration Court issued a Notice of Hearing on February 13, 2013, scheduling the respondent's initial removal hearing for August 6, 2013, which cured the defect in the NTA, and, in combination with the NTA, operated to terminate the accrual of his continuous physical presence before the respondent reached the 10-year mark (DHS's Opp. at 3, 8 (citing federal circuit court cases that precede *Pereira v. Sessions*, and which hold that the "stop-time" rule is triggered by a two-part process where an alien is served with a notice to appear in combination with a subsequent notice of hearing that provides the information required by section 239(a)(1) of the Act)). *See also Matters of Mendoza-Hernandez & Capula-Cortes*, 27 I. & N. Dec. 520, 529 (BIA 2019) (where a notice to appear does not specify the time or place of an alien's initial removal hearing, the subsequent service of a notice of hearing containing that information perfects the deficient notice to appear, triggers the "stop-time" rule, and ends the alien's period of continuous residence or physical presence in the United States).[2]

The flaw with the DHS's argument, however, is that the record reveals that the respondent did not receive the February 13, 2013, Notice of Hearing, and that it was returned to the Immigration Court as undeliverable. The respondent did not appear at the scheduled August 6, 2013, hearing, and the Immigration Court ordered him removed in absentia (Tr. at 3). The in absentia removal order was also returned to the Immigration Court as undeliverable.[3]

[2] The United States Court of Appeals for the Seventh Circuit recently declined to decide whether it agrees with the merits of *Matters of Mendoza-Hernandez & Capula-Cortes* because the alien in that case did not overcome an antecedent procedural obstacle – the untimeliness of her motion to reopen. *See Chen v. Barr*, 960 F.3d 448 (7th Cir. May 29, 2020). After the conclusion of her removal proceedings and the Seventh Circuit's denial of her petition for review, Chen filed a motion to reopen with the Board seeking cancellation of removal on the grounds that under the recently-issued decision in *Pereira v. Sessions*, the NTA issued to her was defective and did not terminate the accrual of her continuous physical presence. The Board denied the motion to reopen on its merits, and Chen appealed to the Seventh Circuit. The Seventh Circuit declined to address whether a Notice of Hearing that was issued approximately 3 months later (and which, unlike Pereira and the respondent here, Chen received) perfected the deficient NTA and terminated accrual of continuous physical presence. Instead, the court held that the motion to reopen was untimely and not subject to equitable tolling because the alien did not make a *Pereira*-like argument or seek cancellation of removal during the original removal proceedings, even though the proceedings continued past the tenth anniversary of her arrival. *Chen v. Barr*, 960 F.3d at 449. Chen also could not show prejudice as she received the Notice of Hearing and attended the initial removal hearing. *Id.* at 451. Thus, the Seventh Circuit denied the petition for review without addressing the merits of *Matters of Mendoza-Hernandez & Capula-Cortes*.

[3] The respondent's affidavit attached to his motion to reopen and rescind indicates that he did not learn that he had had been ordered removed in absentia until he called the Chicago Immigration Court in March of 2014 to confirm a removal hearing that, according to an attorney he had consulted with in November of 2012, had been scheduled for April 10, 2014, a date the attorney apparently learned by a phone call (Respondent's Affidavit in support of Motion to Reopen and Rescind at ¶8; *see also* Respondent's Motion at 4).

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On June 24, 2014, the respondent filed a motion with the Immigration Court to reopen and rescind the in absentia removal order based on a lack of notice of the August 6, 2013, hearing, and the DHS filed an opposition brief. On July 31, 2014, the Immigration Judge granted the motion to reopen and rescind the in absentia removal order, and, that same day, also issued a Notice of Hearing, which scheduled a removal hearing for May 7, 2015. The respondent appeared at the May 7, 2015, hearing, and all subsequently-scheduled hearings (Tr. at 4).

The July 31, 2014, Notice of Hearing advising the respondent of the time and place of his May 7, 2015, hearing was received more than 10 years after his May 19, 2003, admission, and thus, after he had accrued 10 years of continuous physical presence. That the first Notice of Hearing advising the respondent of the time and place of his removal hearing was received more than 10 years after his admission to the United States renders this case factually analogous to the one presented in *Pereira v. Sessions*, 138 S. Ct. at 2112-20 (case remanded for alien to apply for non-LPR cancellation of removal when the alien received an NTA that did not identify the time and place of his initial removal hearing, and a subsequently-issued notice of hearing containing that information was sent to the wrong address, and returned as undeliverable).

As we have limited fact-finding ability on appeal, we cannot review the respondent's application for cancellation of removal in the first instance, and we will remand the record for the Immigration Judge to make the necessary findings of fact and conclusions of law regarding the respondent's eligibility for cancellation of removal for non-lawful permanent residents. Section 240A(b)(1) of the Act. Accordingly, the following orders will be issued.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent's motion to remand is granted.

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

Ellen Rubowitz
FOR THE BOARD

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