U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: HERRERA HUERTA, JUAN ALEJ... **A 200-709-587**

Date of this notice: 9/26/2016

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:
Adkins-Blanch, Charles K.
Mann, Ana
O'Connor, Blair

Userteam: Docket

File: A200 709 587 – Los Angeles, CA Date: SEP 2 6 2016

In re: JUAN ALEJANDRO HERRERA HUERTA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated March 3, 2015, denying his motion to reopen. The Immigration Judge had previously ordered the respondent removed in absentia for his failure to appear at the hearing on September 2, 2014. We review an Immigration Judge's 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)(i), (ii). We have considered the totality of the circumstances presented in this case, and find that exceptional circumstances for the respondent's failure to appear have been shown. *See* section 240(b)(5)(C)(i) of the Immigration and Nationality Act; 8 C.F.R. § 1003.23(b)(4)(ii). Accordingly, the respondent's appeal will be sustained, the in absentia order will be rescinded, the proceedings will be reopened, and the record will be remanded to allow the respondent another opportunity to appear for his hearing.

ORDER: The appeal is sustained.

FURTHER ORDER: These proceedings are reopened, the in absentia order of removal is vacated, and the record is remanded to the Immigration Court for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File Number:	**A 200 709 587**	)
		)
In the Matter of:		)
		)
	HERRERA HUERTA, Juan Alejandro	) **IN REMOVAL PROCEEDINGS**
		)
		)
Respondent		)

CHARGE: Section 237(a)(1)(C)(i) of the Immigration and Nationality Act (INA) (2010) – *failure to comply with conditions of nonimmigrant status*

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT:
Joan Del Valle, Esquire
6457 Whittier Boulevard
Los Angeles, California 90022

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

On September 22, 2010, the Department of Homeland Security (Department) personally served Juan Alejandro Herrera Huerta (Respondent) with a Notice to Appear (NTA). See Ex. 1. Therein, the Department charged Respondent as removable pursuant to section 237(a)(1)(C)(i), as an alien who failed to comply with the conditions of the nonimmigrant status under which he was admitted. See id. Jurisdiction vested and removal proceedings commenced when the Department filed the NTA with the Court on October 6, 2010. See 8 C.F.R. § 1003.14(a) (2010).

At a hearing on June 15, 2011, Respondent, through original counsel,[1] conceded proper service of the NTA, admitted the allegations, and conceded the charge of removability. See Exh. 1. On November 30, 2011, Respondent's counsel informed the Court that Respondent was detained by Immigration and Customs Enforcement (ICE). On December 15, 2011, Respondent's original counsel made a motion to withdraw. Respondent was granted a bond of $3,000 but was detained by ICE again on May 25, 2012. On July 3, 2012, Respondent submitted evidence that his wife had submitted a Form I-130, Petition for Alien Relative, on his behalf.

[1] Respondent was originally represented by Marta Canossa and Hector Ortega of Ortega, Canossa and Associates, PLC.

Respondent's hearings were continued on June 14, 2012; June 5, 2012; July 3, 2012; August 2, 2012; and August 7, 2012. On August 17, 2012, the motion to withdraw as counsel was granted.

On August 17, 2012; September 7, 2012; September 28, 2012; and October 28, 2012, Respondent's hearings were continued to allow him time to find an attorney. On November 8, 2012, Respondent appeared with new counsel, Joan Del Valle. On November 19, 2012; December 14, 2012; January 15, 2013; February 15, 2013; March 5, 2013; March 21, 2013; April 4, 2013; April 18, 2013; April 30, 2013; and May 17, 2013, the Court continued Respondent's hearings so that he could file the requisite documents for adjustment of status, including a medical report, proof of filing fee, and an adequate affidavit of support. On June 14, 2013, Respondent was released from ICE custody.

On September 30, 2013, Ms. Del Valle filed a motion to withdraw. On November 14, 2013, Ms. Del Valle filed a second motion to withdraw. On November 18, 2013, Ms. Del Valle filed a motion for a continuance. On the same day, the Court granted the motion to continue, and reset the hearing for December 3, 2013. On March 11, 2014, the Court served Ms. Del Valle with an NOH via mail, indicating that Respondent's hearing was rescheduled for September 2, 2014.

On September 2, 2014, Respondent failed to appear for his scheduled hearing, although Ms. Del Valle was present. She did not know where Respondent was and stated that she had advised him of the September 2, 2014 hearing via mail, but had not heard from him for four months. The Court, proceeding *in absentia*, found that removability had been established by clear, convincing, and unequivocal evidence based on Respondent's prior admissions and concession. Accordingly, the Court ordered Respondent removed to Mexico.

On December 3, 2014, Respondent, through Ms. Del Valle, filed the pending motion to reopen, alleging therein that Respondent did not appear for his September 2, 2014 hearing because his wife had health problems, he had lost his job, and their home was in foreclosure. Resp't's Mot. to Reopen at 3-5. Respondent also asks this Court to reopen Respondent's proceedings based on the likelihood that his adjustment of status application will be granted. See id. at 6.

For the following reasons, this Court will deny Respondent's motion to reopen.

II. Law and Analysis

A. Exceptional Circumstances

The Court may rescind an *in absentia* order of removal upon a motion filed within 180 days of the date of the order if the alien demonstrates that he failed to appear because of exceptional circumstances beyond his control. 8 C.F.R. § 1003.23(b)(4)(ii). Exceptional circumstances include the serious illness of the respondent or the serious illness or death of the respondent's spouse, child, or parent. INA § 240(e)(1). Exceptional circumstances do not include less compelling circumstances. Id. In determining whether a respondent's motion raises exceptional circumstances, the Court must examine the "totality of the circumstances." Matter

of W-F-, 21 I&N Dec. 503, 509 (BIA 1996). However, the respondent bears the burden of supporting the motion with specific, detailed evidence to corroborate the claim of exceptional circumstances. Celis-Castellano v. Ashcroft, 298 F.3d 888, 890 (9th Cir. 2002); Matter of Beckford, 22 I&N Dec. 1216, 1218 (BIA 2000) (citing Matter of J-J-, 21 I&N Dec. 976, 984-85 (BIA 1997)).

As a preliminary matter, the Court notes that Respondent has not submitted a declaration or affidavit with this motion. See Resp't's Mot. to Reopen. The Court may not rely on the bare statements of counsel as evidence. See INS v. Phinpathya, 464 U.S. 183, 188 n. 6 (1984) (stating that counsel's unsupported assertions in a brief are not entitled to evidentiary weight); see also Sembiring v. Gonzales, 499 F.3d 981, 984 (9th Cir. 2007) ("Statements in motions are not evidence and are, therefore, not entitled to evidentiary weight."). Therefore, Respondent has failed to meet his burden of supporting his motion to reopen with specific, detailed evidence to corroborate the claim of exceptional circumstances. See Celis-Castellano, 298 F.3d at 890. Nevertheless, the Court proceeds to examine Ms. Del Valle's arguments and consider the medical documents submitted with the pending motion. See Resp't's Mot. to Reopen, Tab A.

Here, Ms. Del Valle contends that Respondent missed his September 2, 2014 hearing because he "had some family problems and lost his job which made him been [sic] unable to communicate with counsel since he did not had [sic] a phone and had to stay with his wife in the hospital, reason [sic] that he did not received [sic] the letter sent by counsel." See Resp't's Mot. to Reopen, at 2. The Court finds that Respondent's reason for not attending his scheduled hearing does not constitute an exceptional circumstance.

To begin, Respondent's failure to receive the letter sent to him by his counsel was firmly within his own control. See 8 C.F.R. § 1003.23(b)(4)(ii). Although Ms. Del Valle contends that Respondent was busy with personal crises, this does not excuse him from ensuring that he appears for his removal proceedings. Respondent has been in removal proceedings since 2010, and conceded receipt of his NTA on June 15, 2011. Since his removal proceedings commenced, Respondent has attended over twenty hearings, most of which occurred while he was in ICE detention. He was informed of the consequences of his failure to appear on every NOH issued for his hearings. Even if he did not own a phone, Respondent could have called Ms. Del Valle's office from any phone, such as a pay phone or a phone in the hospital. Respondent could also have called the Court's automated system at any time to ensure he knew what his next scheduled hearing date was. While the Court is sympathetic to Respondent's personal crises, they do not absolve him of his responsibility to ensure that he communicates with his attorney or appears for his hearings.

Additionally, the Court cannot determine from the documents submitted with the pending motion that he missed his September 2, 2014 hearing because of the serious illness of his wife. A photocopy of Respondent's wife's hospital bracelets shows that Respondent's wife was admitted for emergency care on January 29, 2014; February 3, 2014; February 23, 2014; March 18, 2014; April 4, 2014; June 9, 2014; June 22, 2014; July 10, 2014; August 12, 2014; and October 6, 2014. Resp't's Mot. to Reopen, Tab A at 5-7. The only discharge dates that the Court can ascertain from the medical documents are April 24, 2014; July 27, 2014; and August 12, 2014. See id., Tab A at 1-2, 8. None of the documents submitted with the motion to reopen

indicate that Respondent's wife was admitted for emergency hospital care on September 2, 2014. See id. As such, Respondent has not established that the serious illness of his wife caused him to specifically miss this hearing.

Respondent did, however, submit an appointment notice with "Daniel Franco M.D. Inc." on September 2, 2014 at 9:00 a.m. Id., Tab A at 10. The Court first notes that the appointment notice does not indicate who the appointment is for. As noted above, Respondent did not submit his own statement regarding where he was on September 2, 2014. See supra Part II. There is also no affidavit from Dr. Franco indicating that Respondent was actually present for this appointment. Furthermore, even if the appointment was for Respondent's wife and Respondent actually accompanied her to see Dr. Franco, prescheduled appointments, by their nature, can be rescheduled. Respondent could have asked for a different appointment date and time other than the exact date and time of his missed hearing. Therefore, this allegedly conflicting appointment was firmly within Respondent's control and does not constitute an exceptional circumstance. See 8 C.F.R § 1003.23(b)(4)(ii).

Accordingly, the Court finds that Respondent's reason for his failure to appear at his scheduled hearing does not constitute an exceptional circumstance sufficient to excuse his absence and warrant reopening his proceedings. See id.

B. *Sua Sponte*

An immigration judge may, upon her own motion at any time, or upon motion of the Department or the respondent, reopen any case in which she has made a decision. 8 C.F.R. § 1003.23(b)(1). The decision to grant or deny a motion to reopen is within the discretion of the immigration judge. 8 C.F.R. § 1003.23(b)(1)(iv). The Board of Immigration Appeals (Board) has stated that "the power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." J-J-, 21 I&N Dec. at 984. Proceedings should be reopened *sua sponte* only under "exceptional" circumstances. Id. Moreover, the Board has indicated that where finality is a key objective, the threshold for *sua sponte* reopening is extremely high. See Matter of O-, 19 I&N Dec. 871, 871 (BIA 1989).

Ms. Del Valle posits that Respondent is the sole caretaker of his wife, who "needs him to care for her not only the day to day life [sic] but mostly emotionally since being so sick and alone is something no one should endure." Resp't's Mot. to Reopen at 4. She also stated that "there was no reason for [Respondent] not to be present in court when he wanted his case be [sic] heard by an immigration judge and has a source of relief with adjustment of status through his wife." Id. However, even if the Court were to find that Respondent makes out a *prima facie* case for relief, this would not ensure a favorable exercise of the Court's discretion. See Sequeira-Solano v. INS, 104 F.3d 278, 279 (9th Cir. 1997) (citing INS v. Abudu, 485 U.S. 94 (1988)); 8 C.F.R. § 1003.23(b)(3) ("The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a *prima facie* case for relief.").

The equities in this instance do not merit granting Respondent's motion to reopen *sua sponte*. As previously stated, Respondent did not attend his hearing and has not presented

sufficient evidence to show that he missed his hearing because of exceptional circumstances. Ms. Del Valle stated on September 2, 2004, that despite her dedicated efforts, Respondent refused to cooperate with her in order to work on obtaining immigration relief. See also Mot. to Withdraw at 3 (Sept. 30, 2013) (stating that Respondent stopped communicating with Ms. Del Valle when he was released from ICE detention in June 2013, failed to provide the documents necessary for his applications for relief, and failed to pay the application fees despite repeated calls from her office). Ms. Del Valle also wrote that Respondent "was afraid of contacting [her] office since he was aware that he had not complied with the requested documentation." Resp't's Mot. to Reopen at 3. The Court finds that reopening *sua sponte* on this basis would credit Respondent for failing to exercise due diligence in seeking immigration relief, despite the many continuances he was granted by the Court to do so.

Accordingly, the following order shall be entered:

ORDER

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

DATE: March 3, 2015

Rose C. Peters
IMMIGRATION JUDGE