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

Reyes, Miriam Zavodnick
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4914 Kennedy Blvd., Suite 203
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DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: PEREZ, DANIEL ANTONIO

A 206-719-389

Date of this notice: 7/14/2016

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:
Mann, Ana
Grant, Edward R.
O'Leary, Brian M.

Userteam: Docket

File: A206 719 389 – Dallas, TX

Date: JUL 14 2016

In re: DANIEL ANTONIO PEREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Miriam Z. Reyes, Esquire

APPLICATION: Reopening

The respondent appeals from an Immigration Judge's decision dated April 2, 2015, denying the respondent's December 2, 2014, motion to reopen his November 3, 2014, removal proceedings, which had been conducted in absentia under section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A). The Department of Homeland Security (DHS) has not filed a brief in response to the appeal. The appeal will be sustained.

Upon de novo review, in light of the totality of circumstances presented in this case, including the respondent's diligence in filing a motion to reopen, and the absence of any DHS opposition to the respondent's motion to appear telephonically and motion to change venue and the absence of any DHS opposition to reopening, we will sustain the appeal and allow the respondent another opportunity to appear for a hearing. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) (stating that 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).

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order is vacated, proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

Miriam Z. Reyes, Attorney at Law
Reyes, Miriam Zavodnick
c/o Law Offices of Benjamin I. Zavodnick
4914 Kennedy Blvd., Suite 203
West New York, NJ 07093

IN THE MATTER OF
PEREZ, DANIEL ANTONIO

FILE A 206-719-389 DATE: Apr 7, 2015

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

Y ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

__ OTHER: _____

COURT CLERK
IMMIGRATION COURT

FF

CC:
Dallas DCA

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	IN REMOVAL PROCEEDINGS
PEREZ, Daniel Antonio	)	
	)	A 206-719-389
RESPONDENT	)	

CHARGE: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under Section 211(a) of the Act.

APPLICATION: Motion to Reopen

ON BEHALF OF THE RESPONDENT:

Miriam Z. Reyes, Esq.
Law Offices of Benjamin I. Zavodnick
4914 Kennedy Blvd., Suite 203
West New York, New Jersey 07093

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Paul B. Hunker III, Esq.
Chief Counsel- DHS/ICE
125 E. John Carpenter Freeway, Ste. 500
Dallas, Texas 75242

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Factual & procedural history

The Respondent is a native and citizen of El Salvador who entered the United States at or near Hidalgo, Texas on May 19, 2014.[1] Exhibit 1. He did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document and was not then admitted or paroled after inspection by an immigration officer. *Id.* Soon thereafter, the Respondent was apprehended and detained. On July 3, 2014, the Department of Homeland Security (DHS or Government) personally served the Respondent with a Notice to

[1] The Respondent claims that this date is an error and that he actually entered on April 19, 2014. *See* Motion to Reopen at 6.

Appear charging him with removability under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (INA or Act). Exhibit 1.

On July 14, 2014, the Respondent was released from Government custody on $15,000 bond. Exhibit 2. On July 18, 2014, a Notice of Hearing was sent to the Respondent indicating that he was scheduled for a master hearing on November 3, 2014 at 9 a.m. Exhibit 3. Three months later, on October 21, 2014,[2] the Court received a motion requesting a change venue from Dallas to New York from the Respondent. Then on October 29, 2014, the Respondent submitted motions for telephonic appearance and motions for waiver of appearance for both the Respondent and his attorney.

At the November 3, 2014 hearing, the Respondent did not appear. His attorney was also not present. The Court acknowledged receipt of the previously filed motions. However, each motion was denied as untimely and for failure to establish good cause. The Court then noted that the Respondent had adequate notice of the hearing and thus, proceeded *in absentia* pursuant to section 240(b)(5)(A) of the Act. During the hearing, the Government submitted documentary evidence establishing the truth of the factual allegations contained in the NTA. Thus, the Court found removability established as charged and ordered the Respondent removed to Honduras.

On December 2, 2014, the Respondent filed a motion to reopen arguing that his *in absentia* order should be rescinded. The Government has not filed a response.

II. Applicable Law

Unless excused by the Immigration Judge, an alien must attend all scheduled hearings before the court. *Matter of G-Y-R-*, 23 I&N Dec. 181, 188 (BIA 2001). If an alien does not

[2] Although the Respondent claims that the Court received this motion on October 17, 2014, the date stamped is October 21, 2014. *See* Immigration Practice Manual Ch. 3.1(a)(iii) ("An application or document is not deemed filed until it is received by the Immigration Court. All submissions received by the Immigration Court are date-stamped on the date of receipt.").

attend a removal hearing after written notice has been provided to the alien or the alien's counsel of record, the alien will be ordered removed *in absentia* if the Government establishes by clear, unequivocal, and convincing evidence that the written notice was provided and that the alien is removable. INA § 240(b)(5). Adequate notice can be accomplished through personal service, or if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record. INA § 239(a)(1).

If an alien did not receive adequate notice of the hearing, an *in absentia* order may be rescinded at any time upon the filing of a motion to reopen. INA § 240(b)(5)(C)(ii); 8 C.F.R. §§ 1003.23(b)(4)(ii). An *in absentia* order may also be rescinded upon a motion to reopen filed 180 days after an administratively final order of removal is entered if the Respondent shows "exceptional circumstances" leading to his absence from the hearing. INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(iii). "Exceptional circumstances" are circumstances beyond the control of the alien, including "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." INA § 240(e)(1). This "is a difficult burden to meet." *Magdaleno de Morales v. INS*, 116 F.3d 145, 148 (5th Cir. 1997). The Court must look to the "totality of the circumstances" in deciding whether exceptional circumstances exist. *In re W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

III. Analysis

The Respondent, through counsel, argues that the Court committed "reversible order" when it ordered the Respondent removed *in absentia*. *See* Motion to Reopen at 9. In her affidavit, the Respondent's counsel states that the Respondent "actually did appear virtually as he was present in [her] office that entire day and [they] had filed motions requesting a change of

venue, waivers of appearance and requesting to be permitted to appear telephonically." *Id.* at 24. However, "actually did appear virtually" is not the standard. The Act allows a hearing to be conducted *in absentia* once the alien can be charged with receiving written notice and fails to appear. *See* INA § 240(b)(5)(A). As the Respondent did receive written notice of his hearing, he was required to attend his scheduled hearing unless excused by the Court.

Next, the Respondent argues that his failure to appear was due to "exceptional circumstances." The crux of the Respondent's argument is that since he submitted several motions, called the court to check the status of the motions, and was present at his attorney's office the day of the hearing, the Court should find that "exceptional circumstances" exist that warrant reopening of his proceedings.[3]

The Court, however, is not persuaded by the Respondent's argument. A hearing notice was sent to the Respondent on July 18, 2014, indicating that he had a hearing scheduled for November 3, 2014. Thus, he had ample time to file any timely requests with the Court. Yet, the Respondent waited until two weeks before the hearing to request a change of venue and mere days to file his motions requesting telephonic appearance and waiver of appearance. The Court does not find that the Respondent's lack of diligence in filing timely requests were circumstances beyond his control. INA § 240(e)(1). Moreover, it is well established that the mere submission of a motion does not relieve an alien or his counsel of the obligation to attend a scheduled hearing, "and unless the Immigration Judge grants the motion, the respondent remains obligated to appear at the appointed date and time." *Patel v. INS*, 803 F.2d 804, 806 (5th Cir. 1986); *see also Tang v. Ashcroft*, 354 F.3d 1192, 1195 (10th Cir. 2003). Consequently, unless and until the

[3] In support of his argument, the Respondent extensively cites the Second Circuit court case *Romero-Morales v. INS*, 25 F.3d 125 (2d Cir. 1994). *See* Motion to Reopen at 9-19. However, this Court is within the jurisdiction of the Fifth Circuit. Thus, although *Romero-Morales v. INS* may be persuasive authority, it is not binding upon the Court.

Court granted any of the motions, the Respondent had an obligation to physically attend his hearing in Dallas, Texas, on November 3, 2014.

The Respondent also claims that other circumstances led to his absence from the hearing. The Respondent claims that his sister's health problems, his own "coughing spasms" on the day of the hearing, and his mother's inability to travel with the Respondent on "such short notice," amount to "exceptional circumstances." *See* Motion to Reopen at 4-5. However, the Court does not find that these circumstances are "exceptional" as contemplated by the statute and regulations. Since July, the Respondent should have made arrangements to travel to Texas. Yet, he did not, and the Court does not find that three months is short notice. Nor does the Court find that his sister's "emotional problems" and the Respondent's alleged illness on the date of hearing caused him to miss his hearing.

Contrary to the Respondent's assertions, the evidence indicates that the reason the Respondent did not attend his hearing was because he expected that his motions would be granted and his appearance would be excused. For example, the motion states, "although had we anticipated that change of venue would have been denied, we would have requested a continuance." Motion to Reopen at 8. However, it was unreasonable to assume that by simply filing a motion that motion would be granted, thus excusing the Respondent's appearance. *See Matter of Patel*, 19 I&N Dec. 260 (BIA 1985) (explaining that the request for a continuance does not relieve the respondent of her obligation to appear at her scheduled hearing unless the motion is granted), *aff'd, Patel v. INS*, 803 F.2d 804 (5th Cir. 1986); s*ee also Hernandez-Vivas v. INS*, 23 F.3d 1557, 1560-61 (9th Cir. 1994). In her affidavit, the Respondent's counsel also states that when she called the Respondent's mother on the evening of October 31, 2014, to ask if she would be able to get the Respondent to Dallas, "Ms. Perez explained that she had been under the

impression that they would not have to go to Texas; that I had implied that the case was going to be transferred to the immigration court in Newark, New Jersey." Motion to Reopen at 27; 35; 39. However, relying on ill-advice from counsel does not amount to "exceptional circumstances."[4]

In sum, the Court finds that in considering the totality of the circumstances, the Respondent's failure to appear at his hearing was not due to "exceptional circumstances."

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion to Reopen is **DENIED**.

Date: 4/2/15
Dallas, Texas

Deitrich H. Sims
Immigration Judge

[4] If it is the Respondent's intention to make an ineffective assistance of counsel claim, the Respondent has failed to meet the requirements for such a claim as articulated in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).