U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Jones, Danielle Alyse Nicole
Nexus Caridades
113 Mill Place Parkway, Suite 103
Verona, VA 24482

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: IRACHETA GONZALES, JOSE M... **A 208-279-037**

Date of this notice: 4/18/2016

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

Userteam: Docket

File: A208 279 037 – Dallas, TX

Date: APR 18 2016

In re: JOSE MIGUEL IRACHETA GONZALES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Danielle Jones, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of El Salvador, appeals the decision of the Immigration Judge, dated December 8, 2015, denying his motion to reopen. The Department of Homeland Security has not replied to the respondent's appeal.

We review Immigration Judges' findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Considering the totality of the circumstances presented in this case, we conclude that reopened removal proceedings are warranted in order to provide the respondent with a renewed opportunity to appear before an Immigration Judge to show why he should not be removed from the United States. *See* 8 C.F.R. § 1003.23(b)(1). Upon remand, the Immigration Judge should set a new deadline for the filing of applications for relief. At the present time, we express no opinion regarding the ultimate outcome of these proceedings. Accordingly, the following order is entered.

ORDER: The respondent's appeal is sustained, the order of removal, entered in absentia on September 23, 2015, is vacated, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings and the entry of a new decision.

FOR THE BOARD

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

Nexus Caridades
Jones, Danielle Alyse Nicole
113 Mill Place Parkway
Suite 103
Verona, VA 24482

IN THE MATTER OF FILE A 208-279-037 DATE: Dec 8, 2015
IRACHETA GONZALES, JOSE MIGUEL

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ 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 22041

__ 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

X OTHER: Motion to Reopen denied

DLT

COURT CLERK
IMMIGRATION COURT FF

CC: PEGGY PRICE
125 E. HWY 114, STE 500
IRVING, TX, 75062

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

IN THE MATTER OF:	)	
	)	IN REMOVAL PROCEEDINGS
IRACHETA GONZALES, Jose	)	
	)	A 208-279-037
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:

Danielle Jones, Esq.
Nexus Caridades
113 Mill Place Parkway, Suite 103
Verona, VA 24482

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Paul B. Hunker III, Esq.
Chief Counsel - DHS/ICE
125 E. John Carpenter Freeway, Suite 500
Irving, TX 75062

WRITTEN DECISION OF THE IMMIGRATION JUDGE

This matter is before the Court pursuant to the Respondent's November 18, 2015 Motion to Reopen. For the reasons set forth below, the motion will be DENIED.

The Respondent is a native and a citizen of El Salvador. Exhibit 1. He entered the United States on June 25, 2015. *Id.* At the time of his arrival, he did not possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document, nor was he admitted or paroled by an immigration officer. *Id.* Consequently, on August 3, 2015, the Respondent was personally served with a Notice to Appear (NTA) charging him with removability pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (INA or Act). *Id.* The Respondent was also placed in detention at the Rolling Plains Detention Facility pending removal proceedings. *See id.*

The initial master calendar hearing was held on September 1, 2015. At the hearing, the Respondent appeared via video and his former attorney, Ms. Miriam Ayala, appeared

telephonically. Ms. Ayala requested additional time for preparation. The Court granted her request and continued the proceedings until September 9, 2015.

On September 9, on behalf of the Respondent, Ms. Ayala admitted allegations one through five and conceded the charge of removability contained in the Notice to Appear. Based on the admissions and concessions, the Court found removability established as charged. Ms. Ayala indicated that the Respondent would be seeking asylum, withholding of removal, and relief under the Convention Against Torture. The hearing was continued until September 23, 2015 at 9 a.m. for the Respondent to submit his application for relief. The Court advised both the Respondent and Ms. Ayala that "any application [sic] not received by 9:00 a.m. on September 23rd will be deemed abandoned pursuant to 8 C.F.R. 100.31(c)." The next day, on September 10, 2015, the Respondent was released from Government custody on $20,000 bond.

At the hearing on September 23, 2015, the Respondent was not present. Ms. Ayala, however, was contacted by telephone. Ms. Ayala stated that she did not have any information on her client's whereabouts. She also claimed that she did not have any notice of the hearing because "usually" cases on the detained docket are moved to another docket once the alien is released from Government custody. The Court explained that her belief was mistaken; the Respondent was required to appear on September 23rd in Dallas and submit his application even if he bonded out. Ms. Ayala then requested a continuance. The Court denied her request and issued a decision finding that the Respondent's application for relief was abandoned for failure to file the application within the set deadline. Finally, given his failure to appear and the lack of any other viable relief, the Court ordered that the Respondent be removed to El Salvador based on the charge contained in the notice to appear.

The Respondent, through his new attorney, has now filed a motion to reopen seeking rescission of his *in absentia* order. However, the Respondent has not included the appropriate filing fee and fee receipt. Thus, his motion must be denied because it does not comply with the regulations at 8 C.F.R. § 1003.24. In any event, even if the Respondent had properly filed his motion with a fee receipt, the Court would deny his request for the following reasons.

The Respondent asserts that his absence from the September 23, 2015, hearing was attributable to the erroneous advice his former attorney, Ms. Ayala, provided him. He claims that he contacted Ms. Ayala's office ten days prior to his hearing date and during the phone call, "Ms. Ayala's legal assistant confirmed that the court date would be automatically moved and [the Respondent] would not need to appear in Texas on September 23, 2015." Motion to Reopen at 2. The Respondent contends that if he had "not been informed by his attorney, whom he trusted, that he would soon receive a new court date, [he] would have appeared in court on September 23rd." *Id.* at 4. Thus, he argues that his former counsel's ill-advice constitutes an "exceptional circumstance" warranting reopening of his removal proceeding. *See id.*

Section 240(b)(5)(C)(i) of the Act provides that the Court may rescind an *in absentia* order filed 180 days after an administratively final order of removal is entered if the alien 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).

Here, it is undisputed that the Respondent had notice of his hearing scheduled on September 23, 2015. He was also advised that if he failed to submit his application for relief on that date, the application would be deemed abandoned. The record further indicates that the Respondent was provided with a hearing notice which warned him of the consequences for his failure to appear. The fact that his former attorney misinformed him that he did not need to attend the hearing does not amount to "exceptional circumstance" beyond his control, regardless of the attorney's allegations that her assistant spoke to a "gentleman" from the court that told her the hearing would be rescheduled. *See* Motion to Reopen at Exh. 1. The assistant's statement merely states, in part, that she "[s]oke to a gentlemen who said Yes its going to be rescheduled because it was set when he was detain (sic)." *Id.* Such a bare assertion, without more, does not carry the Respondent's burden to show that his failure to appear was due to an exceptional circumstance beyond his control. *See* INA § 240(b)(5)(C)(i). Thus, the Court concludes that the Respondent is not entitled to rescission of his *in absentia* order based on "exceptional circumstances."

Furthermore, to the extent the Respondent maintains that his counsel failed to properly advise him, he has not complied with the requirements to state a claim for ineffective assistance of counsel as articulated in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

Finally, the Court will decline to exercise its power to reopen the Respondent's case *sua sponte* as the Court does not find that this case presents a "truly exceptional situation." *See Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999) (citing examples of when it is appropriate for the Court to exercise its *sua sponte* authority).

Accordingly, the following order shall be entered:

ORDER

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

On this 8th day of December 2015.

James A. Nugent
United States Immigration Judge

Copy to:
Chief Counsel, DHS/ICE