



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

**Gannon, Brian V., Esq.
Abod & Caruso, LLC
2200-A University Boulevard West
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**DHS/ICE Office of Chief Counsel - HLG
1717 Zoy Street
Harlingen, TX 78552**

Name: NIETO-MONTENEGRO, JOSE AL... A 097-315-872

Date of this notice: 3/18/2016

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:
Adkins-Blanch, Charles K.

Userteam: Docket

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Falls Church, Virginia 22041

File: A097 315 872 – Harlingen, Texas

Date: **MAR 18 2016**

In re: JOSE ALEXANDER NIETO-MONTENEGRO a.k.a. Hector David Garcia Rivera

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Brian V. Gannon, Esquire

ON BEHALF OF DHS: Delia Irene Gonzalez
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before the Board on March 9, 2015, when we remanded to the Immigration Judge for further proceedings and the entry of a new decision. The Immigration Judge has certified the matter to the Board. Neither party has filed a response with the Board after certification. The record will be remanded.

We review an Immigration Judge's findings of fact, including the credibility determination, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues involving questions of law, judgment and discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was ordered removed in absentia on May 17, 2004. The Immigration Judge denied the respondent's motion to reopen on January 20, 2014. On March 9, 2015, we sustained the respondent's appeal, reopened the proceedings sua sponte on the merits, and remanded the record to the Immigration Judge to consider whether the respondent was eligible for any relief from removal.

On March 24, 2015, instead of resolving the case on the merits, the Immigration Judge certified the record to the Board because he determined that we were without jurisdiction to reopen these proceedings on our own motion. He requested that we review our March 9, 2015, decision to reopen the proceedings.

We decline to accept the Immigration Judge's request for certification. We previously sustained the respondent's appeal and remanded for further proceedings, not under our reopening authority, rather pursuant to our de novo review of the Immigration Judge's denial of the motion to reopen. See 8 C.F.R. § 1003.1(b)(3). The Immigration Judge did not comply with our 2015 order to provide the respondent with an opportunity to establish his eligibility for relief from removal and to enter a new decision.

Upon remand, the Immigration Judge should conduct further proceedings to determine if the respondent is eligible for any relief from removal and enter a new decision.

Our decision in this matter does not reflect any assessment about the underlying merits of the respondent's case. Accordingly, the following order will be entered.

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



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2009 W. JEFFERSON AVE, STE 300
HARLINGEN, TX 78550

Abod & Caruso, LLC
Gannon, Brian Vincent
2200-A University Boulevard West
Wheaton, MD 20902

IN THE MATTER OF FILE A 097-315-872 DATE: Mar 24, 2015
NIETO-MONTENEGRO, JOSE ALEXANDER

___ 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 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
2009 W. JEFFERSON AVE, STE 300
HARLINGEN, TX 78550

✓ OTHER: _____

Lu
COURT CLERK
IMMIGRATION COURT

FF

CC: ASSISTANT CHIEF COUNSEL
1717 ZOY ST.
HARLINGEN, TX, 785520000

Immigrant & Refugee Appellate Center, LLC | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF)

March 24 2015

JOSE ALEXANDER NIETO-
MONTENEGRO AKA)

Case Number: A 097 315 872

HECTOR DAVID GARCIA RIVERA)

RESPONDENT)

In Removal Proceedings

IMMIGRATION JUDGE'S CERTIFICATION OF DECISION
PURSUANT TO 8 C.F.R. § 1003.1(c)

On May 17, 2004, this Court ordered the respondent removed to El Salvador *in absentia* pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act (INA or Act). This Court denied the respondent's motion to reopen in a written decision dated January 10, 2014. In its decision, this Court determined that the respondent received proper notice of his hearing, failed to timely file for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act of 1997 ("NACARA") and under section 245(a) of the Act, and declined to reopen the proceedings sua sponte. The respondent timely appealed this Court's decision to the Board of Immigration Appeals. The Board concluded that proceedings should be reopened sua sponte and sustained the appeal, thereby reopening the respondent's removal proceedings and remanding the record to this Court for entry of a new decision. Jose Alexander Nieto-Montenegro, A97 315 872 (Mar. 9, 2015).

An Immigration Judge "may in any case arising under paragraph (b) of this section certify such case to the Board." 8 C.F.R. § 1003.1(c). The instant matter falls under 8 C.F.R. § 1003.1(b)(3), as an appeal of a decision of an Immigration Judge in removal proceedings under 8 C.F.R. § 1240.

This Court's request for certification is based upon the Board's lack of jurisdiction to reopen these proceedings on its own motion. The Board, like Immigration Judges, has authority to reopen or reconsider sua sponte. See 8 C.F.R. § 1003.2(a) (Board); 8 C.F.R. § 1003.23(b)(1) (Immigration Judge). The specific regulatory language granting the Board its authority to reopen or reconsider sua sponte, however, limits the jurisdiction to do so to "any case in which it has rendered a decision." 8 C.F.R. § 1003.2(a).

Here, the respondent was ordered removed *in absentia* on May 17, 2004. The respondent sought to reopen his removal proceedings by filing a motion to reopen with this Court on December 16, 2013, which was subsequently denied on January 10, 2014. The respondent's appeal of this Court's decision denying his motion to reopen was the first instance in which the Board was

presented with this case. As such, the Board cannot be said to have rendered a decision in this case. In accordance with the plain meaning of the regulation at 8 C.F.R. § 1003.2(a), the Board does not have jurisdiction to exercise its own sua sponte reopening authority. Therefore, the Board's March 9, 2015 decision, in which it "conclude[d] that these removal proceedings should be reopened sua sponte," is improper.

Moreover, the respondent's appeal only challenged this Court's determination that the respondent received proper notice of his hearing. He did not challenge any other aspect of this Court's decision denying the motion to reopen, which also sought reopening in order to apply for relief from removal. See Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26); Respondent's Brief in Support of Appeal. He also did not challenge this Court's decision not to favorably exercise its sua sponte authority and reopen the proceedings. *Id.* Therefore, he has waived any such a challenge. See *Matter of R-S-H-*, 23 I&N Dec. 629, 638 (BIA 2003). Even if the Board's decision sustaining the respondent's appeal and reopening these proceedings sua sponte can be interpreted as determining that this Court should have exercised its own authority set forth at 8 C.F.R. § 1003.23(b)(1), the respondent did not challenge the issue on appeal. Therefore, it was improper for the Board to review this Court's decision not to use reopen proceedings sua sponte.

In any event, this Court submits that the Board does not have the authority to compel an Immigration Judge to exercise his or her own sua sponte authority. The Board, in *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999), and *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997), indicated that the regulatory sua sponte authority is "an extraordinary remedy reserved for truly exceptional situations" and that it is "limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations." These cases provide helpful guidance in determining what types of situations warrant the exercise of the limited discretion to reopen or reconsider sua sponte, yet the very nature of sua sponte discretion prohibits another court from requiring that such authority be exercised. The United States Court of Appeals for the Fifth Circuit, as well as many other sister circuits, ultimately determined it lacked the jurisdiction to answer the question of whether the Board should have compelled the Immigration Judge to reopen a case based on the Immigration Judge's sua sponte authority for lack of jurisdiction, but its reason for doing so is exceedingly relevant and instructive. See *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246 (5th Cir. 2004). The Fifth Circuit opined that the lack of meaningful standards by which sua sponte authority is governed, and permissive "may" included in the text of the regulation, "implies that the IJ is under no obligation to reopen a case." *Id.* at 249.

Therefore, in light of the arguments set forth above, the Court requests that the Board grant this certification of decision pursuant to 8 C.F.R. § 1003.1(c), and review its March 9, 2015 decision reopening the respondent's removal proceedings sua sponte.



David Ayala
United States Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL ☒ PERSONAL SERVICE ☒
TO: () ALIEN () ALIEN C/O CUSTODIAN ☒ ALIEN'S ATTY/REP ☒ DHS
DATE: 3-24-2015 BY: COURT STAFF +

ATTACHMENTS: () EOIR-33 () EOIR-28 () LEGAL SERVICES LIST () OTHER



U.S. Department of Justice

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Name: NIETO-MONTENEGRO, JOSE AL... A 097-315-872

Date of this notice: 3/9/2015

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
Adkins-Blanch, Charles K
Guendelsberger, John

User team: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A097 315 872 - Harlingen, TX

Date:

MAR - 9 2015

In re: JOSE ALEXANDER NIETO-MONTENEGRO a.k.a. Hector David Garcia Rivera

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brian V. Gannon, Esquire

ON BEHALF OF DHS: Delia Irene Gonzalez
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of El Salvador, appeals the decision of the Immigration Judge, dated January 10, 2014, denying his motion to reopen. The Department of Homeland Security is opposed to the respondent's appeal.

Considering the totality of the circumstances presented, we conclude that these removal proceedings should be reopened *sua sponte* in order to provide the respondent with a renewed opportunity to appear before an Immigration Judge and show why he should not be removed from the United States. See *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

While we conclude that reopening is warranted, we express no opinion regarding the ultimate outcome of these proceedings at the present time. See *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). Accordingly, the following order is entered.

ORDER: The respondent's appeal is sustained, the order of removal, entered in absentia on May 17, 2004, is vacated, these removal proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.


FOR THE BOARD