U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: BONILLA-MOLINA, ORLANDO A... **A 094-246-276**

Date of this notice: 9/2/2015

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.
Holiona, Hope Malia
O'Leary, Brian M.

Userteam: Docket

File: A094 246 276 – Los Angeles, CA Date: SEP - 2 2015

In re: ORLANDO ANTONIO BONILLA-MOLINA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

The respondent appeals from the Immigration Judge's October 28, 2014, decision denying his motion to reopen. The respondent was ordered removed in absentia on September 10, 2014. The appeal will be sustained.

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, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(i), (ii) (2015).

An order of removal issued following proceedings conducted in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A), may only be rescinded upon a motion to reopen filed by an alien (1) within 180 days after the date of the order establishing that exceptional circumstances excuse his failure to appear; or (2) at any time establishing that he did not have proper notice of the hearing or that he was in Federal or State custody and failed to appear through no fault of his own. Section 240(b)(5)(C) of the Act. The term "exceptional circumstances" refers to circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but does not include less compelling circumstances. Section 240(e)(1) of the Act, 8 U.S.C. § 1229a(e)(1). We consider the "totality of circumstances" when addressing whether exceptional circumstances exist to excuse an alien's absence from a hearing. *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that exceptional circumstances will warrant rescinding an in absentia order of removal where an alien's absence is the result of reasonable confusion about the date or time of the hearing provided that the alien has demonstrated a strong desire and incentive to appear and defend against removal, as reflected by appearances at past hearings and potential eligibility for relief from removal that would have allowed the alien to remain in the United States. *See Singh v. INS*, 295 F.3d 1037, 1039-40 (9th Cir. 2002); *cf. Valencia-Fragoso v. INS*, 321 F.3d 1204, 1206 (9th Cir. 2003) (per curiam) (finding no exceptional circumstances based on an alien's confusion about the time of a hearing where the only form of relief the alien "might hope for [is] a discretionary grant of voluntary departure").

The record reflects that the respondent attended all five of the hearings held in his case prior to the entry of the in absentia order, spanning from 2010 through 2014. The record further reflects that the respondent reasonably confused the date of the final hearing but took immediate efforts to remedy his mistake through the present motion to reopen, filed only 2 weeks after the

in absentia order was entered. Further, the respondent appears to be the beneficiary of an approved immigrant visa with a priority date of April 24, 2001, which was at the time of the hearing, and continues to be, current (Exh. 3). *See* Department of State Visa Bulletin, Vol. IX, No. 84 (Sept. 2015) (reflecting that visas chargeable to El Salvador under the respondent's preference category are current through May 8, 2004); Department of State Visa Bulletin, Vol. IX, No. 72 (Sept. 2014) (reflecting that the relevant current date at the time the in absentia order was entered was November 15, 2003). The respondent's potential eligibility for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i), reflects the strong incentive he had to appear at the September 10, 2014, hearing. Considering the totality of the circumstances, we conclude that, under the law of the Ninth Circuit, exceptional circumstances warrant rescinding the in absentia order entered in this case. *See Singh v. INS*, *supra*, at 1039-40 (finding exceptional circumstances where an alien reasonably misunderstood the time of the hearing, noting that the alien attended all of the prior hearings in his case and was the beneficiary an approved immediate relative visa petition).

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

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

File Number: **A 094 246 276**	)	
	)	
In the Matter of:	)	
	)	
BONILLA-MOLINA,	)	**IN REMOVAL PROCEEDINGS**
Orlando Antonio,	)	
Respondent	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) – *present without admission or parole*

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT:
Pro Se
39560 166th Street East
Lake Los Angeles, California 93591

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

Orlando Antonio Bonilla-Molina (Respondent) is a native and citizen of El Salvador. *See* Exh. 1. On October 22, 2009, the U.S. Department of Homeland Security (Department) personally served Respondent with a Notice to Appear (NTA). *See id.* In the NTA, the Department alleged that Respondent entered the United States at or near San Ysidro, California, on or about 1984, and was not then admitted or paroled after inspection by an immigration officer. *Id.* Based on these factual allegations, the Department charged Respondent with inadmissibility pursuant to section 212(a)(6)(A)(i) of the INA. *Id.* Jurisdiction vested and removal proceedings commenced when the Department filed the NTA with the Court on November 3, 2009. *See* 8 C.F.R. § 1003.14(a).

On June 29, 2010, Respondent, appearing *pro se*, admitted the factual allegations in the NTA and conceded the charge of inadmissibility under section 212(a)(6)(A)(i) of the INA. On January 22, 2014, the Court personally served Respondent with a Notice of Hearing, informing him of his hearing on September 10, 2014. Exh. 2. On September 10, 2014, Respondent failed to appear for his scheduled hearing. The Court, proceeding *in absentia*, found that inadmissibility had been established as charged based on Respondent's prior admissions and concession. Accordingly, the Court ordered Respondent removed to El Salvador.

On September 25, 2014, Respondent filed the pending motion to reopen, alleging that he failed to attend his scheduled hearing due to exceptional circumstances. *See* Resp't's Mot.

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

II. Law and Analysis

A. Exceptional Circumstances

An Immigration Judge may rescind an *in absentia* removal order upon a motion to reopen filed within 180 days after the date of the order of removal if the respondent demonstrates that his failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the INA. 8 C.F.R. § 1003.23(b)(4)(ii). Exceptional circumstances refer to situations beyond the alien's control, such as 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). In determining whether a respondent's absence was due to "exceptional circumstances," the Court must look at the "totality of the circumstances." *See Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996); *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996). A motion to reopen based on exceptional circumstances must be supported by specific, detailed evidence to corroborate the claim. *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 890 (9th Cir. 2002).

Here, the Court finds that Respondent's situation does not constitute an exceptional circumstance sufficient to excuse his absence and warrant reopening of his proceedings. On January 22, 2014, the Court personally notified Respondent of his September 10, 2014 hearing both orally and in writing. Respondent was personally served in court with a notice of hearing, which instructed him to appear before the Los Angeles Immigration Court on September 10, 2014 at 8:00 a.m. Exh. 2. Respondent does not contest service of the notice of hearing. Nevertheless, he claims that he missed his hearing because he made an "honest mistake" and believed the hearing was scheduled for September 16, 2014. *See* Resp't's Mot. Respondent explains that, "in the papers I received from court I read that [the courtroom] was on the 16th floor and in my mind so I would not forget I related it to the death of my father which he died on September 16 a year ago." *See id.*

Respondent's understanding of his hearing date was firmly within his control, as he could have carefully reviewed the hearing notice personally handed to him, or telephoned the Court's automated system at any time. His failure to take any action until his hearing date had passed is not an exceptional circumstance which merits reopening. *See* INA § 240(e)(1) (stating that exceptional circumstances refer to situations beyond the alien's control, such as 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); *Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205 (9th Cir. 2003) (per curiam) (concluding that typical daily occurrences that cause mishaps, delays, and oversight, such as losing the hearing notice or forgetting the scheduled time of the hearing, do not constitute exceptional circumstances). Therefore, the Court will not reopen Respondent's proceedings on this basis.

B. ***Sua Sponte***

An Immigration Judge may upon his or her own motion at any time, or upon motion of the Department or alien, reopen or reconsider any case in which he or 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." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Proceedings should be reopened *sua sponte* only under "exceptional" situations. *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 (BIA 1989).

Even assuming that Respondent has demonstrated *prima facie* eligibility for relief, Respondent's case does not warrant the exercise of the Court's discretion to reopen the proceedings *sua sponte*. The Court possesses the right to weigh the equities of the case, *see* 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."), and the equities in this instance do not merit granting Respondent's motion. The Court recognizes that there are some positive equities present in Respondent's case, including his prolonged residence in the United States and his three U.S.-citizen children. However, these positive equities are outweighed by the negative ones, particularly Respondent's criminal history. The record establishes that Respondent has five criminal convictions, the most recent of which occurred in 2010. *See* Resp't's Submission (May 15, 2013).

Consequently, the Court declines to exercise its *sua sponte* authority to reopen Respondent's proceedings.

Accordingly, the following order shall be entered:

ORDER

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

DATE: October 28, 2014

Monica M. Little
Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due in the hands of the Board of Immigration Appeals on or before 30 calendar days from the date of this written decision. *See* 8 C.F.R. § 1240.15.