U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: KERINA, FREDRICK MONYONCHO **A093-442-983**

Date of this notice: 4/24/2012

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:
Kendall-Clark, Molly
Manuel, Elise L.
Miller, Neil P.

File: A093 442 983 - Dallas, TX

Date: APR 24 2012

In re: FREDRICK MONYONCHO KERINA

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Gabriel Ogueri, Esquire

ON BEHALF OF DHS: Margaret M. Price
Assistant Chief Counsel

APPLICATION: Reconsideration, reopening

The respondent has appealed from the Immigration Judge's March 16, 2011, decision denying his motion to reconsider.[1] To avoid any issue regarding the timeliness of the respondent's appeal, the Board will take jurisdiction over this appeal by certification. *See* 8 C.F.R. § 1003.2(a). The Immigration Judge's decision will be reversed, the proceedings will be reopened, and the record will be remanded.

On October 25, 2010, two days before the next scheduled hearing in this case, the Immigration Judge issued a written decision finding that the respondent had abandoned his applications for lack of prosecution under 8 C.F.R. § 1003.31(c), because he failed to submit his applications by the October 13, 2010, deadline set by the Immigration Judge. On reviewing the record, we are persuaded that the Immigration Judge improperly entered a written order finding that all relief had been abandoned, and will therefore reverse the Immigration Judge's decision denying the motion to reconsider and will reopen these proceedings. A review of the recording of the hearing at which the Immigration Judge imposed a deadline for the submission of applications reveals no discussion of voluntary departure. The respondent had, however, in a prior written motion for continuance, expressed a desire to pursue voluntary departure if he could not pursue adjustment. Under the circumstances, where there is no form to submit to apply for voluntary departure, the Immigration Judge should not have issued a written decision finding all applications abandoned without providing the respondent the opportunity to pursue his application for voluntary departure. Thus, we are convinced that the October 25, 2010, written decision was in error, and that reconsideration and reopening are warranted.

In addition, the Immigration Judge's October 25, 2010, order states that 8 C.F.R. § 1003.31(c) is "mandatory, not discretionary" and that the Immigration Judge had "no choice" but

[1] The Immigration Judge construed the respondent's motion as both for reconsideration and to reopen proceedings.

to find the applications abandoned, and the Immigration Judge reiterated this understanding in the decision denying the respondent's motion (I.J. at 5-6 & n.3). The Board has held that the Immigration Judges have broad discretion to conduct and control immigration proceedings, including the authority to set filing deadlines for applications and related documents. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010). The applicable regulation also allows the Immigration Judge the discretion to extend deadlines. *See* 8 C.F.R. § 1003.31(c); *see also, e.g., Dedji v. Mukasey*, 525 F.3d 187 (2d Cir. 2008) (holding in part that the Immigration Judge had discretion to deviate from filing deadlines in local rules). Whether a filing deadline should be extended is a question of judgment and discretion that the Board reviews de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii). In this case, the Immigration Judge appears to have declined to consider whether a reasonable explanation had been provided, or good cause had been shown, for the failure to file the adjustment application by the deadline because he was under the misapprehension that it was mandatory for him to find that the failure to meet the deadline required him to deem the opportunity to file the application waived. On de novo review, and considering the totality of the circumstances presented in the motion and on appeal, we find it appropriate to allow the respondent another opportunity to submit his application for adjustment of status on remand.

In view of the foregoing, we will reverse the Immigration Judge's decision, reopen these proceedings, and remand to allow the respondent an opportunity to pursue both voluntary departure and adjustment of status. Accordingly, the following order will be entered.

ORDER: The Immigration Judge's decision is reversed, these removal proceedings are reopened, 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
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
KERINA, FREDERICK MONYOMCHO	)	
	)	IN REMOVAL PROCEEDINGS
	)	
RESPONDENT	)	A 093-442-983

CHARGES: Section 237 (a)(1)(B) of the Immigration and Nationality Act, as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, you have remained in the United States for a time longer than permitted, in violation of this Act or any other law in the United States

APPLICATION: Motion to Reconsider & to Reopen[1]

ON BEHALF OF THE RESPONDENT:

Gabriel Ogueri, Esq.,
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Dallas, TX 75206

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Margaret Price, Esq.
Asst. Chief Counsel- ICE
125 E. John Carpenter Fwy., Ste. 500
Irving, TX 75062-2324

ORDER OF THE COURT

The Respondent has filed a Motion to Reconsider and to Reopen the above-captioned case. For the following reasons, the Motion will be **DENIED.**

[1] *See* "Legal Standards," *infra.* While the Motion is titled "Motion to Reconsider," it also has characteristics common to Motions to Reopen.

WRITTEN DECISION OF THE IMMIGRATION JUDGE

FACTUAL AND PROCEDURAL HISTORY

The Respondent is a male, native and citizen of Kenya. Exhibit 1. On or about June 14, 2003 the Respondent was admitted into the United States as a nonimmigrant visitor, with authorization to remain in the United States for a temporary period not to exceed December 13, 2003. *Id.* The Respondent remained in the United States beyond December 13, 2003 without authorization from the Government. *Id.*

On October 7, 2009 the Department of Homeland Security (DHS or the Government) sent to the Respondent, by certified mail, a Notice to Appear (NTA), charging him with removability under Section 237(a)(1)(B) of the Act, in that after admission as a nonimmigrant, he remained in the United States for a time longer than permitted. *Id.*

At a hearing on July 28, 2010, the Respondent appeared before the Court, with counsel, and admitted the Government's allegations and conceded the charge of removability. Thus, the Court found the Respondent removable by clear, unequivocal, and convincing evidence. *See* INA § 240(c)(3)(A). The Respondent declined to designate a country of removal, and the Court designated his country of removal as Kenya. At the hearing, the Court set the Respondent's deadline for submitting any applications for relief as October 13, 2010, pursuant to 8 C.F.R. § 1003.31(c).

The Respondent did not submit any applications for relief by the October 13th deadline. Accordingly, on October 25, 2010 the Court deemed that the Respondent had waived the opportunity to submit any application for relief. *See* 8 C.F.R. § 1003.31(c) ("The Immigration Judge may set and extend time limits for the filing of applications and

related documents and responses thereto, if any. If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document *shall* be deemed waived.") (emphasis added).

On October 25, 2010 the Court ordered that the Respondent's applications for relief be deemed abandoned pursuant to 8 C.F.R. § 1003.31(c), and ordered the Respondent removed to Kenya.

On November 17, 2010 the Respondent submitted the present Motion to Reconsider and to Reopen. In his Motion, he argues that his case should be reopened because his attorney mistakenly thought the application was due on October 27, 2010, the date of his next hearing. Also in his Motion he requested that the Court reopen his proceedings so he can apply for adjustment of status based upon a pending Petition for Alien Relative (Form I-130) filed by the Respondent's United States citizen (USC) wife. Respondent's Motion to Reconsider and to Reopen, dated November 17, 2010.

On November 24, 2010 the Respondent submitted an Amendment to his Motion to Reconsider and to Reopen, requesting that the Court reopen his case so he can apply for adjustment of status based upon the newly-approved I-130 Petition filed by his USC spouse. Respondent's Motion to Reconsider, dated November 17, 2010.

The DHS did not submit a response.

LEGAL STANDARDS

Motions submitted to the Immigration Court are construed according to content, rather than title. Immigration Court Practice Manual, Ch. 5, pg. 86. The present Motion, while titled "Motion to Reconsider," has characteristics common to motions to reopen. Thus, the Court treats this Motion as both in its analysis.

A. Motion to Reconsider

A motion to reconsider is a request that the Court reexamine its decision in light of additional legal arguments, a change of law, or an argument or aspect of the case which was overlooked. *Matter of Ramos*, 23 I. & N. Dec. 336, 338 (B.I.A. 2002) (quoting *Matter of Cerna*, 20 I. & N. Dec. 399, 402 n.2 (B.I.A. 1991)). A motion to reconsider alleges that at the time of the Court's previous decision an error was made; it questions the Court's decision for alleged errors in appraising the facts and the law. *Matter of Cerna*, 20 I. & N. Dec. at 402. When the Court reconsiders a decision it is, in effect, placing itself back in time and considering the case as though a decision on the record had never been entered. *Id.* The very nature of a motion to reconsider is that the original decision was defective in some regard. *Id.*

Thus, a motion to reconsider must state the reasons for the motion by specifying the errors of fact or law in the Court's prior decision, and must be supported by pertinent authority. 8 C.F.R. § 1003.23(b)(2). A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion. 8 C.F.R. § 1003.23(b)(1). A respondent may only file one motion to reconsider. *Id.*

B. Motion to Reopen

A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply such relief was fully explained to him by the Immigration Judge and an opportunity therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. 8 C.F.R. § 1003.23(b)(3). A motion to reopen will not be granted unless the Immigration Judge is satisfied that the

evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. *Id.*

An immigration judge has broad authority to grant or deny a motion to reopen. *INS v. Doherty*, 502 U.S. 314, 322 (1992). An immigration judge may deny a motion even where there is *prima facie* eligibility for relief, if the relief sought would be denied as a matter of discretion. *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985). A respondent must therefore establish a *prima facie* case for the underlying substantive relief sought and must show that he warrants relief in the exercise of discretion, or his motion to reopen will be denied. *See e.g., INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Doherty*, 502 U.S. 314, 315–16 (1992). A respondent requesting a motion to reopen bears a "heavy burden." *See Matter of Coelho*, 20 I. & N. Dec. 464, 472 (B.I.A. 1992); *Matter of Pena-Diaz*, 20 I. & N. Dec. 841, 844 (B.I.A. 1994).

The Court may exercise its *sua sponte* authority to reopen in "truly exceptional situations," where the interests of justice would be served. *Matter of G-D-*, 22 I.& N. Dec. 1132 (B.I.A. 1999); *see also Matter of J-J-*, 21 I. & N. Dec. 976 (B.I.A. 1997) (holding that the Court has discretion to reopen a case *sua sponte*; however, that discretion is limited to cases where exceptional circumstances are demonstrated).

ANALYSIS

A. Motion to Reconsider

To the extent that the present Motion is a Motion to Reconsider, the Respondent has not met his burden. The Respondent does not specify any errors of fact or law in the Court's prior decision. Rather, the Respondent states that his attorney made a mistake—that his attorney allegedly thought the application was due on October 27, 2010, the

Respondent's next hearing date, instead of October 13, 2010, the date set on the record by the Court.[2] While the Court is sympathetic to the Respondent he has not shown, or even suggested, that the Court's decision was defective.[3]

B. Motion to Reopen

To the extent that the present Motion is a motion to reopen, 8 C.F.R. § 1003.23(b)(3) precludes the Court from reopening the proceedings. The Court fully afforded the Respondent an opportunity to apply for adjustment of status. *See id.* While the I-130 Petition was approved after the Court's order, the Court had permitted the Respondent to apply for Adjustment of Status as he awaited the I-130 Petition's approval. That the I-130 was approved after the Court's order does not affect whether the Respondent had the opportunity to apply for adjustment of status before the Court.

In addition, while the Respondent argues that his attorney's mistake precluded him from submitting his application in a timely manner, the Respondent has not alleged ineffective assistance of counsel.

Finally, the Court finds that this case does not present a truly exceptional situation, where the interests of justice would demand a reopening of the proceedings.

CONCLUSION

Accordingly, the following order will be entered.

[2] Notably, the Respondent has not alleged ineffective assistance of counsel.

[3] While the Court is not obligated to defend its prior decision, as noted in its decision dated October 25, 2010, 8 C.F.R. § 1003.31(c) is a mandatory regulation, and provides that a Court *shall* deem an application abandoned if the Court's filing date for that application is not met.

ORDER

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

This 16th day of March, 2011

James A. Nugent
United States Immigration Judge