U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: S[redacted] E[redacted], S[redacted]

A [redacted]-896

Date of this notice: 4/3/2018

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:
Snow, Thomas G
Kelly, Edward F.
Mann, Ana

Userteam: Docket

File: [redacted] 896 – San Diego, CA

Date: APR - 3 2018

In re: S[redacted] S[redacted] E[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Yunuen Berenice Mora, Esquire

APPLICATION: Cancellation of removal under section 240A(b)(1) of the Act

This case was last before the Board on December 30, 2016, when we dismissed the respondent's appeal from an Immigration Judge's decision dated April 14, 2016, denying the respondent's application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2012). The Immigration Judge denied the application on the basis of the respondent's failure to establish the requisite minimum period of 10 years of continuous physical presence in the United States. In our decision, we also declined to reinstate the Immigration Judge's grant of voluntary departure and ordered the respondent's removal from the United States pursuant to the Immigration Judge's alternative order. On October 30, 2017, the United States Court of Appeals for the Ninth Circuit granted the government's unopposed motion to remand. The case will be remanded to the Immigration Judge for further proceedings.

In its unopposed motion, the government requested a remand for consideration of arguments the respondent raised before the Board regarding purported misleading practices of immigration enforcement agents in Southern California when granting voluntary departure to individuals apprehended in that area, as set forth in a complaint filed in *Lopez-Venegas v. Johnson*, C.D. Cal. 13-cv-03972 (Mar. 11, 2015). Specifically, the respondent had argued in his brief before the Board that, consistent with the practices described in *Lopez-Venegas*, the Immigration and Customs Enforcement (ICE) officers he encountered on July 14, 2008, did not inform him of his rights and presented him with a pre-checked Form I-826 already indicating his request for voluntary departure. He argued that because the form was pre-checked, and given the lack of any advisals, his acceptance of voluntary departure was not knowing and voluntary and, as such, did not break his period of continuous physical presence in the United States. The respondent further argued that the Immigration Judge failed to consider these arguments in the first instance, which we note he had already made in the brief he filed in support of his cancellation of removal application, dated November 10, 2015, and in a brief he subsequently filed in response to a DHS filing, dated January 8, 2016 (Respondent's Br. dated August 25, 2016, at 4-6, 9-15; Exhs. 6, 10).

In his current brief before the Board, the respondent reiterates the above-referenced arguments. He also asks that, in determining whether his July 14, 2008, departure severed his physical presence in the United States for purposes of cancellation of removal, we consider the settlement agreement ultimately reached in *Lopez-Venegas*, in addition to the information in the amended complaint itself, photocopies of which he has submitted with his brief (Respondent's Br. dated January 10, 2018, at 3-5, and Tabs A and B).

The 28-page settlement agreement in *Lopez-Venegas* identifies on its page 16 specific oral advisals that the government should give to aliens afforded the opportunity to elect voluntary departure. The advisals, which explain the rights and options of every alien in these situations, and the potential consequences of choosing each option, are to be given in a language the alien understands before the alien is allowed to request a disposition on a Form I-826 (Respondent's Br. dated August 25, 2016, Attachment at 82).

The Immigration Judge's April 14, 2016, decision does not reflect consideration of the respondent's arguments pertaining to the *Lopez-Venegas* complaint and settlement agreement. Such consideration and subsequent analysis will likely require additional fact finding, which is an action solely within the purview of the Immigration Judge. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (stating that the Board may not engage in fact-finding in the course of deciding appeals except for taking administrative notice of commonly known facts); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). Thus, based on our further review of the record, and upon consideration of the Ninth Circuit's order granting the government's unopposed motion to remand, we will remand the record to the Immigration Judge for further proceedings consistent with the foregoing, and for the issuance of a new decision reflecting re-adjudication of the respondent's application for cancellation of removal.

On remand, the Immigration Judge should consider the respondent's arguments pertaining to the amended complaint and settlement agreement in *Lopez-Venegas* and give both parties another opportunity to submit additional arguments and evidence in support of their respective positions. In remanding, we express no opinion as to the ultimate outcome of this case. Accordingly, the following order shall be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing and for the issuance of a new decision.

FOR THE BOARD