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 20530

McLin, Jaesa W
Riguer Silva, LLC
3213 Florida Avenue
Suite C
Kenner, LA 70065

DHS/ICE Office of Chief Counsel - HLG
1717 Zoy Street
Harlingen, TX 78552

Name: VELASQUEZ-MEJIA, DANIEL AL... **A 078-972-091**

Date of this notice: 7/15/2015

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.
Guendelsberger, John
Holiona, Hope Malia

Userteam: Docket

File: A078 972 091 – Harlingen, TX

Date: JUL 15 2015

In re: DANIEL ALBERTO VELASQUEZ-MEJIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jaesa McLin, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Honduras, was ordered removed from the United States in absentia on January 22, 2004, after not appearing at a hearing. He filed a motion to reopen on February 13, 2014, and he appeals from the Immigration Judge's decision dated March 6, 2014, denying his motion. The appeal will be sustained.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding questions of law and the application of a particular standard of law to those facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

In his appellate brief, the respondent argues that these proceedings should be reopened based on lack of notice. The respondent states that he was only 15 years old when the Notice of Hearing was sent, did not understand the consequences for not appearing, and he was dependent on his mother to take him to the hearing. *See Matter of Cubor*, 25 I&N Dec. 470 (BIA 2011) (holding that service of a Notice to Appear (Form I-862) on a minor who is 14 years of age or older at the time of service is effective). We agree with the Immigration Judge that the respondent was properly served with the required notices, inasmuch as he was older than 14 years old at the time of service. The respondent's motion was also filed untimely to the extent that he argues on appeal that an exceptional circumstance caused his non-appearance. *See* section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C) (requiring that a motion to reopen an in absentia order of removal based on exceptional circumstances be filed within 180 days after the issuance date of the order).

Notwithstanding, under the totality of the circumstances, we are persuaded by the respondent's argument that the Immigration Judge should have exercised his sua sponte authority to reopen these proceedings. *See* 8 C.F.R. § 1003.23(b)(1). *See also Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

Accordingly, the following order will be entered.

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

FOR THE BOARD[1]

[1] We note that on June 15, 2012, the Secretary of the Department of Homeland Security (DHS) announced that certain young people, who are low law enforcement priorities, will be eligible for deferred action. The respondent may be eligible to seek deferred action. Information regarding DHS' Consideration of Deferred Action for Childhood Arrivals may be obtained on-line (www.uscis.gov or www.ice.gov) or by phone on USCIS hotline at 1-800-375-5283 or ICE hotline at 1-888-351-4024.

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

IN THE MATTER OF	)	March 6, 2014
	)	
DANIEL ALBERTO VELASQUEZ-MEJIA,	)	File Number: A 078 972 091
	)	
Respondent.	)	In Removal Proceedings

APPLICATIONS: Motion to Reopen

ON BEHALF OF THE RESPONDENT
Jaesa W. McLin, Esq.
3213 Florida Avenue, Suite C
Kenner, LA 70065

ON BEHALF OF THE GOVERNMENT
Abe Burgess, Esq.
U.S. Department of Homeland Security
1717 Zoy St.
Harlingen, TX 78552

DECISION OF THE IMMIGRATION JUDGE

On January 22, 2004, the Court ordered Respondent removed to Honduras *in absentia* pursuant to section 240(b)(5) of the Immigration and Nationality Act (INA or Act) because he failed to appear for his hearing on that date. On February 13, 2014, Respondent filed a motion to reopen his removal proceeding, arguing that he did not receive notice of his January 22 hearing. He further argues that he was a minor at the time of the hearing that depended on his parents to provide transportation, and that his failure to appear was because his parents did not take him to his hearing. The government has since responded that it opposes reopening this proceeding. The motion is denied.

First, notice was proper. On April 13, 2002, Respondent was personally served with a Notice to Appear (NTA) in accordance with section 239(a)(1) of the Act. It is of no consequence that Respondent was only fifteen at the time, because notice is proper on any alien fourteen years of age or older. *See* 8 C.F.R. § 103.8(c)(2)(ii); *Lopez-Dubon v. Holder*, 609 F.3d 642, 646 (5th Cir. 2010). The NTA contained everything required under section 239(a)(1) except for the time and place of the hearing; the time and place of the hearing need not be included in the NTA if that information is later sent in a hearing notice. *See Gomez-Palacios*, 560 F.3d 354, 359 (5th Cir. 2009). On September 10, 2003, the Court sent Respondent a hearing notice regarding his January 22 hearing to his last known address. Respondent does not contend that he did not receive this notice. In fact, Respondent has provided with his motion to reopen a letter from the Court regarding a change of venue request that was sent with that hearing notice. Thus, Respondent can clearly be charged with having received the hearing notice.

As for the change of venue request, Respondent contends that the Court erred by not changing venue. The Court acknowledges that Respondent did submit a change of venue

request, and that his request was rejected by the Court. This is evidenced by the form letter sent by the Court notifying Respondent that the motion was returned because it did not have a certificate of service, and by the letter from the Court Administrator stating that the hearing was rescheduled and that Respondent may file a new request with a proper certificate of service.[1] However, Respondent never submitted a properly filed motion with the Court despite being advised to do so. Instead, as his motion provides, he "simply gave up."

Inasmuch as Respondent claims that exceptional circumstances prevented him from attending his hearing (e.g. his parents would not take him), the Court finds that the presentation of this defense is clearly untimely. *See* 8 C.F.R. § 1003.23(b)(4)(ii) (setting a 180 day time limit on such a motion). Finally, the Court will not reopen this proceeding *sua sponte*. The Court's *sua sponte* authority to reopen a removal proceeding is an "extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). Further, "[t]he power to reopen on [the Court's] own motion is not meant to be used ... to circumvent the regulations, where enforcing them might result in hardship." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). Respondent has not presented such a case.

Accordingly, the following orders shall be entered:

ORDER: Respondent's motion to reopen is DENIED.

David Ayala
United States Immigration Judge

1 Contrary to Respondent's assertions, it was his mother's motion to change venue that was improperly returned by the Court, as evidenced by the letter from the Court Administrator. His motion, however, was properly rejected for not having a certificate of service as required.