U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: Z[redacted]-M[redacted], S[redacted] F[redacted]... **A [redacted]-301**
Riders:[redacted]

Date of this notice: 7/19/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Kelly, Edward F.
Mann, Ana

Russell
Userteam: Docket

Files: [redacted] 301 – Houston, TX

Date:

JUL 19 2017

In re: S[redacted] F[redacted] Z[redacted]-M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michelle N. Mendez, Esquire

APPLICATION: Reopening

The respondents[1], natives and citizens of Honduras, were ordered removed in absentia on October 14, 2015. On July 29, 2016, the respondents filed a motion to reopen proceedings, which an Immigration Judge denied on November 18, 2016. The respondents filed a timely appeal of that decision. The appeal will be sustained, proceedings will be reopened, and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1 (d)(3)(ii).

Upon de novo review of the record and in light of the totality of circumstances presented in this case, we conclude that the respondent demonstrated that reopening is warranted.[2] *See* sections 240(b)(5)(C)(i), (e)(1) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(b)(5)(C)(i), (e)(1). We will therefore sustain the respondent's appeal and remand the record for further proceedings.

ORDER: The respondent's appeal is sustained, the in absentia order is vacated, proceedings are reopened and the record is remanded to the Immigration Judge for further proceedings and for the entry of a new decision.

FOR THE BOARD

[1] The respondents are a mother ([redacted] 301) and her minor daughter ([redacted]).

[2] Among other factors, we have considered that the respondent was under the virtual control of others at the time she was provided notice for her hearing, she diligently filed her motion to reopen proceedings, including her declaration and application for asylum, has consistently reported to ICE and appears to have a substantial claim for asylum.

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

In the Matter of:

Z[redacted]-M[redacted], S[redacted] F[redacted]

[redacted]

Respondents.

File Number: **A** [redacted]**-301**

File Number: **A** [redacted]

APPLICATION: Respondent's Motion to Reopen

ON BEHALF OF RESPONDENT:
Michelle N. Mendez
CARA Pro Bono Project
8757 Georgia Avenue, Suite 850
Silver Spring, MD 20910

ON BEHALF OF DHS:
Office of Chief Counsel
Department of Homeland Security
126 Northpoint Drive, Suite 2020
Houston, Texas 77060

ORDER ON MOTION

Pending before the Court is Respondent's Motion to Reopen filed on July 29, 2016. The Department of Homeland Security (DHS or Department) has not filed a response. For the reasons stated below, the Court will deny Respondent's motion to reopen.

I. Factual and Procedural History

Respondent is a native and citizen of Honduras. *See* Notice to Appear (Aug. 17, 2015). Respondent entered the United States at or near Hidalgo, Texas, on or about August 1, 2015. *Id.* Respondent was not admitted or paroled after inspection by an Immigration Officer. *Id.*

On August 17, the Department of Homeland Security (DHS) personally served Respondent with a Notice to Appear, charging her as removable from the United States pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (INA or the Act). *Id.* On September 1, 2015, the Court served Respondent with a Notice of Hearing in Removal Proceedings, informing Respondent of her initial master hearing scheduled for

September 8, 2015. *See* Notice of Hearing in Removal Proceedings (Sept. 1, 2015). Respondent appeared on September 8, 2015 and received a continuance until September 10, 2016. *See* Notice of Hearing in Removal Proceedings (Sept. 8, 2015). Respondent was ordered released from custody on bond on September 10, 2015. *See* Order of the Immigration Judge with Respect to Custody (Sept. 10, 2015), and the Court granted a continuance until September 15, 2016. *See* Notice of Hearing in Removal Proceedings (Sept. 10, 2015). Respondent appeared on September 15, 2016, and as her family had recently paid the bond and she was awaiting release, the Court granted a continuance until September 22, 2015. *See* Notice of Hearing in Removal Proceedings (Sept. 15, 2015). As Respondent had been released prior to September 22, 2015, Respondent was not expected to appear at the hearing on September 22, 2015. The Court granted a Change of Venue to Houston, TX on September 23, 2016. *See* Order of the Immigration Judge (Sept. 23, 2016). Subsequently, the Court served Respondent with a Notice of Hearing in Removal Proceedings by mail on September 29, 2015, informing Respondent of her hearing scheduled for October 14, 2015. *See* Notice of Hearing in Removal Proceedings (Sept. 29, 2015). Respondent did not appear for that hearing and was ordered removed to Honduras *in absentia*. *See* Order of the Immigration Judge (Oct. 14, 2015).

Thereafter on July 29, 2016, Respondent filed this untimely motion to reopen. In it, Respondent, through her attorney, argues that Respondent failed to appear for her hearing due to lack of notice, and that in the alternative, the removal order should be rescinded based on exceptional circumstances or reopened *sua sponte*. *See* Respondent's Motion to Reopen (July 29, 2016). DHS has not filed an opposition.

II. Statement of the Law

An *in absentia* removal order may be rescinded only in the following circumstances: (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was due to exceptional circumstances; or (ii) upon a motion to reopen filed at any time if the alien demonstrates that he did not receive notice in accordance with paragraph (1) or (2) of section 239(a) of the INA, or the alien demonstrates that he was in Federal or State custody and the failure to appear was through no fault of his own. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii) (2011). Furthermore, the filing of this motion shall stay the removal of the alien until the Immigration Judge issues his decision. *See* 8 C.F.R. § 1003.23(b)(4)(ii). An alien may file one motion to reopen proceedings. *See* INA § 240(c)(7)(A).

Moreover, an *in absentia* order may only be entered where the alien has received, or can be charged with receiving, the charging document. *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). The alien must be properly served with the charging document in person, though service by mail will suffice if personal service is not practicable. INA § 239(a)(1). If the hearing notice was sent by certified mail, there is a presumption of effective service that may be overcome only by "substantial and probative evidence." *Maknojiya v. Gonzales,* 432 F.3d 588, 589 (5th Cir. 2005) (quoting *Matter of Grijalva,* 21 I&N Dec. 27, 37-38 (BIA 1995), *superseded by statute on other grounds,* 8 U.S.C. § 1229(a)(1)). This presumption of effective service is weaker when the document is served

by regular mail instead of certified mail. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). Factors weighing in favor of overcoming the weaker presumption of delivery include the alien's affidavit, affidavits from other individuals knowledgeable about the relevant facts, the alien's actions upon learning of the removal order and whether she exercised due diligence, any prior applications for relief indicating an incentive for the alien to appear, and any prior attendance at hearings. *Id.* at 674.

The Court also has discretion under its *sua sponte* authority to reopen any case in which the Court has made a decision, unless jurisdiction in the case is vested in the Board. 8 C.F.R. § 1003.23(b)(1). S*ua sponte* authority is to be invoked sparingly, not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations. *Matter of G-D-*, 22 I&N Dec. 1132, 1133–34 (BIA 1999). *Sua sponte* authority is to be used in unique situations where it would serve the interest of justice. *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998). It is Respondent's burden to persuade the Court that his circumstances are truly exceptional before it will intervene. *G-D-*, 22 I&N Dec. at 1134; *Matter of Beckford*, 22 I&N Dec. 1216, 1218 (BIA 2000).

III. Analysis

A. Lack of Notice

The Respondent argues in her motion and sworn statement that she did not receive notice of the hearing. *See* Respondent's Motion to Reopen at 2 (Aug. 31, 2016); *see also* Respondent's Motion to Reopen, Tab A. Respondent does not dispute that she was residing with her aunt at the address of record. However, she claims that she was not allowed to check the mail at her aunt's house, but that her aunt and other relatives did check the mail and never received notice of the hearing. *Id.* She also speculates that the Court may have mailed the notice of the hearing to the wrong address, or the postal service may have delivered it to the wrong address, due to a clerical error. S*ee* Respondent's Motion to Reopen at 6. But, this is merely speculation as Respondent provides no evidence to support this claim. She also claims that the only mail she received from the Court were the removal notices for her and her daughter. *See* Respondent's Motion to Reopen, Tab A. Respondent further claims that she did not understand the removal notices due to not understanding English, and that when she showed them to her sponsor, a United States citizen, he told her they meant she should hire an attorney and did not explain that she had missed her hearing and been ordered removed *in absentia*. *Id.*

Respondent submitted an affidavit in support of her motion, but did not submit any additional evidence, such as affidavits from relatives. She alleged without evidence that the supposed lack of notice was caused by a clerical error, but the letter was not returned to the Court as undeliverable and there is no reason, other than Respondent's speculation, to suppose that a clerical error occurred.

Respondent filed her motion well over nine months after receiving the *in absentia* removal order; although she claims that this was because her English-speaking sponsor did not tell her what the removal order said, she did not provide any evidence of this

other than her assertion. She also claims that her sponsor told her that the removal order meant that she should find an attorney, but she did not then exercise due diligence in seeking an attorney, instead claiming that her sponsor did not find one for her so she did not take action. Respondent's actions do not support a finding that she exercised due diligence upon receiving the removal order.

In this case, Respondent was personally served with the NTA, and the hearing notice was mailed to the address she provided and was not returned as undeliverable. *See* Notice of Hearing in Removal Proceedings. Therefore, the Court finds that an *in abstentia* order was appropriate as Respondent can be charged with receiving proper notice of her scheduled hearing. *See Matter of G-Y-R-* at 189.

B. Exceptional Circumstances

Respondent is barred from asserting exceptional circumstances to justify reopening due to the untimely submission of the Motion to Reopen. *See* 8 C.F.R. § 1003.23(b)(4)(ii). The Court issued its order on October 14, 2015, and Respondent filed her Motion to Reopen on July 29, 2016, well over 180 days later. *See* Respondent's Motion to Reopen (July 29, 2016); *see also* Order of the Immigration Judge (Oct. 14, 2016). Thus, this Motion to Reopen is untimely. *See* 8 C.F.R. § 1003.23(b)(4)(ii).

C. Sua Sponte Authority

Notwithstanding the statutory limitations on motions to reopen, the Court retains discretionary *sua sponte* authority to reopen or reconsider any case in which the Court has made a decision, unless jurisdiction in the case is vested in the Board. *See* 8 C.F.R. § 1003.2(a); 8 C.F.R. § 1003.23(b)(1). S*ua sponte* authority is reserved for exceptional situations. *G-D-*, 22 I&N Dec. at 1133–34; *Beckford*, 22 I&N Dec. at 1218.

Respondent has not met her burden of persuading the Court that her circumstances are truly exceptional, so the Court finds no basis for reopening Respondent's removal order *sua sponte*.

Based upon the foregoing, the following shall be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Reopen be **DENIED**.

11/18/2016
Date

Monique Harris
Immigration Judge