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 22041

Carbide, Sakina
Law Office of Sakina Carbide
2315 W Devon Avenue
Second Floor
Chicago, IL 60659

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

Name: SINGH, GURWINDER

A 208-751-159

Date of this notice: 9/25/2017

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

Userteam: Docket

File: A208 751 159 – Harlingen, TX

Date: SEP 25 2017

In re: Gurwinder SINGH a.k.a. Bobby Thapa

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sakina Carbide, Esquire

ON BEHALF OF DHS: Daniel J. Wright
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of India, has filed a timely appeal of the Immigration Judge's February 28, 2017, denial of the respondent's motion to reopen and rescind the order of removal entered in absentia on May 4, 2016. The Department of Homeland Security opposes the appeal. The appeal will be sustained.

Upon de novo review, we will sustain the appeal and reopen these removal proceedings based on a determination that proper notice of the scheduled removal hearing was not provided in this case, and the in absentia removal order should therefore be rescinded. Section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C).

While not raised in his motion to reopen, on appeal, the respondent contends that the notice of hearing (NOH) should have been served upon his counsel of record, rather than upon the respondent.

Section 239(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a)(1), provides that written notice of the proceedings shall be provided to the alien "or to the alien's counsel of record, if any." Applicable regulations further provide that "whenever a person is required … to give or be given notice … such notice … shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented." 8 C.F.R. § 1292.5(a).

In this case, Arnoldo Hinojosa, Esquire, filed a Notice of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28) on March 28, 2016, at the time he moved for re-determination of custody status on the respondent's behalf. The record reveals, however, that hearing notices were served only on the respondent, not on his counsel of record. Relevant statutes and regulations require that, if an alien is represented, notice must be provided to the alien's representative of record. That was not done in this case, and the notice was therefore improper.

The Immigration Judge noted that Mr. Hinojosa represented the respondent in "custody and bond proceedings only" (IJ at 1). However, there is no "limited" appearance of counsel in

bond. The record does not reflect that Mr. Hinojosa filed a motion to withdraw representation as required by 8 C.F.R § 1003.17(b), and therefore notices should have been served upon him.

Given the unique circumstances of this case, we therefore will sustain the respondent's appeal and reopen these proceedings and rescind the in absentia order of removal based on a lack of proper notice. In view of this decision, we need not address the numerous other issues raised in the respondent's appeal. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The order of removal entered in absentia is vacated, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2009 WEST JEFFERSON AVENUE, SUITE 300
HARLINGEN, TEXAS 78550

IN THE MATTER OF:	)	
	)	
GURWINDER SINGH	)	CASE NO. **A208 751 159**
	)	
	)	
RESPONDENT	)	
IN REMOVAL PROCEEDINGS	)	

MEMORANDUM AND ORDER

On September 6, 2016, Respondent through his counsel of record, filed a motion to reopen this removal proceeding. The removal order was issued in this case on May 4, 2016 based upon a removal hearing held in absentia on that same date pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act (the Act). The Department of Homeland Security (DHS) has not filed a response to the motion to reopen.

On February 24, 2016, Respondent was personally served with his Notice to Appear in accordance with section 239(a)(1) of the Act (Exh. #1). Respondent was released from detention by DHS on April 6, 2016 (Exh. #3). On April 8, 2016 the Court mailed a hearing notice to Respondent for his May 4, 2016 removal hearing (Exh. #4). That hearing notice was mailed to Respondent at the address he provided for himself to DHS upon his release from detention on bond, which is stated in the Notice to EOIR: Alien Address (Form I-830) (Exh. #3). The address provided by Respondent for himself to DHS was 5173 Emerson Village PL, Apt. 208, Indianapolis, Indiana 46237. The hearing notice mailed to Respondent by the Court for his May 4, 2016 removal hearing was not returned to the Court by the United States Postal Service as undeliverable. This was proper notice to Respondent of his May 4, 2016 removal hearing pursuant to section 239(a)(2)(A) of the Act. *See also* 8 C.F.R. 1003.18(b); 8 C.F.R. 1003.26(c) and (d). It is noted that, although Respondent states in his affidavit submitted with his motion to reopen that he hired an attorney in Tampa and California, the only Form EOIR-28 filed in this case prior to this motion to reopen, was from Arnold Hinojosa, whose office is in Brownsville, Texas and who filed to represent Respondent in "custody and bond proceedings only". Therefore, it was proper for the Court to mail the hearing notice for Respondent's May 4, 2016 removal hearing directly to Respondent at his address in Indianapolis, Indiana. It is also noted that, on

May 4, 2016, the Court mailed the Court's Decision containing the removal order to Respondent at that same address, and it was not returned to the Court by the United States Postal Service as undeliverable.

In Respondent's affidavit submitted with his motion to reopen, Respondent states that he was placed in removal proceedings and hired "an attorney in Tampa and in California." Respondent states that he was granted bond and moved to Indianapolis and that he provided his lawyer with his new and proper address. Respondent further states that his attorney in California, Samuel Ouya Maina, told Respondent that he would "file my asylum case and . . . file a motion to change the case to Chicago". Respondent states that he hired Mr. Maina in May of 2016. Respondent asserts that he lost the notice of hearing and thought that his removal hearing was on June 16. Respondent states that he traveled to Harlingen, Texas and arrived at the immigration court on June 16 but was told that he did not have a court date.

Respondent was ordered removed in absentia on May 4, 2016. On April 5, 2016, prior to Respondent being released from detention, Respondent was personally served with a hearing notice for his June 17, 2016 removal hearing in Los Fresnos, Texas. After Respondent was released from detention, his removal hearing was rescheduled to May 4, 2016 in Harlingen, Texas. The Court finds that the removal hearing Respondent is referring to in his affidavit is the removal hearing scheduled for June 17, 2016 in Los Fresnos, Texas. Nevertheless, the Court finds that Respondent had proper notice of his May 4, 2016 removal hearing in Harlingen, Texas. On April 8, 2016, the Court mailed a hearing notice to Respondent for his May 4, 2016 removal hearing in Harlingen, Texas to the address stated in the Notice to EOIR: Alien Address (Form I-830) (Exh. #3) in accordance with section 239(a)(2)(A) of the Act.

In *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008), the Board of Immigration Appeals held that where a hearing notice is properly addressed and sent by regular mail according to normal office procedures, there is a presumption of delivery, but it is weaker than the presumption applied to delivery by certified mail. The Court must consider all relevant evidence in determining whether this weaker presumption of delivery has been rebutted, which includes both circumstantial and corroborating evidence. In *Matter of M-R-A-*, *supra* at 674, the Board set forth some examples of factors that can be considered in making this determination, but emphasized that these are just examples of the types of evidence that can support a motion to reopen. *See also Matter of C-R-C*, 24 I&N Dec. 677 (BIA 2008).

The Court concludes that the affidavit submitted by Respondent with his motion to reopen is insufficient to overcome the weaker presumption of delivery of the hearing notice for Respondent's May 4, 2016 removal hearing for the following reasons. In his affidavit submitted with his motion to reopen,

Respondent does not state the address where he resided upon his release from detention by DHS. Respondent has not demonstrated that he is personally knowledgeable about whether the hearing notice for his May 4, 2016 removal hearing was delivered to the address he provided for himself to DHS because he does not state that he ever lived at that address. In addition, Respondent has not provided a statement or affidavit from anyone else who may be knowledgeable about whether that hearing notice was delivered to that address. Respondent does not state that the hearing notice mailed to him by the Court for his May 4, 2016 removal hearing was not delivered at the address 5173 Emerson Village PL, Apt. 208, Indianapolis, Indiana 46237. In fact, Respondent does not state in his affidavit that he did not receive the hearing notice for his May 4, 2016 removal hearing. Accordingly, the Court concludes that Respondent has not rebutted the weaker presumption of delivery of the hearing notice for his May 4, 2016 removal hearing. The Court concludes that Respondent has not demonstrated that he did not receive notice of his May 4, 2016 removal hearing in accordance with section 239(a)(2) of the Act. Therefore, the Court concludes that Respondent's removal order should not be rescinded under section 240(b)(5)(C)(ii) of the Act. *See also* 8 C.F.R. 1003.23(b)(4)(ii).

In the motion to reopen, Respondent does not contend that he was not provided with proper notice of his removal hearing. Respondent's counsel argues that Respondent's failure to appear at his June 17, 2016 removal hearing was the result of exceptional circumstances "due to a clear misdirection by his prior counsel" (Respondent's Motion to Reopen at p. 3). Motions to rescind based on exceptional circumstances must be filed within 180 days after the date of the order of removal. Section 240(b)(5)(C)(i) of the Act. The Court finds that the motion to rescind is timely. However, the Court finds that Respondent has not presented an exceptional circumstance within the meaning of section 240(e)(1) of the Act for his failure to appear at his May 4, 2016 removal hearing. Respondent's counsel argues that Respondent did not appear at his June 17, 2016 removal hearing because Respondent was instructed by Mr. Maina to leave Harlingen on June 16, 2016 (Respondent's Motion to Reopen at pp. 3 and 21). However, Respondent was not required to appear in Court on June 17, 2016 as he was ordered removed on May 4, 2016. Neither Respondent in his affidavit submitted with his motion to reopen nor Respondent's counsel in the motion to reopen states the reason Respondent did not appear at his May 4, 2016 removal hearing.

Inasmuch as the motion to rescind based on exceptional circumstances could be construed as a motion to reopen due to the failure of Respondent's counsel to file a motion to change venue, the Court finds that Respondent is not claiming that his understanding that Mr. Maina would file a motion to change venue on his behalf caused Respondent's failure to appear at his May 4, 2016 removal hearing. In any event, the mere filing of a motion to change venue would not have relieved Respondent of his obligation to appear for a

scheduled hearing. *See Matter of Rivera*, 19 I&N Dec. 688 (BIA 1988); *Matter of Patel*, 19 I&N Dec. 260 (BIA 1985), *aff'd, Patel v. INS*, 803 F.2d 804 (5th Cir. 1986). Because Respondent has not contended that his failure to appear at his May 4, 2016 removal hearing was the result of ineffective assistance of counsel, the Court need not determine whether Respondent has complied with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), in order to attempt to show that he received ineffective assistance of counsel. Based upon the above discussion, the Court concludes that Respondent's removal order should not be rescinded under section 240(b)(5)(C)(i) of the Act because he has not demonstrated, or even contended, that his failure to appear at his May 4, 2016 removal hearing was because of exceptional circumstances within the meaning of section 240(e)(1) of the Act.

In the motion to reopen, Respondent requests reopening in order to apply for asylum under section 208 of the Act, withholding of removal under section 241(b)(3) of the Act, and withholding of removal pursuant to the Convention Against Torture. The Court concludes that Respondent's motion to reopen to apply for these forms of relief and protection from removal is untimely because it was not filed within 90 days of the date of entry of the final administrative order of removal. Section 240(c)(7)(C)(i) of the Act; 8 C.F.R. 1003.23(b)(1). Respondent has not shown, or even contended, that this time limitation does not apply to his motion to reopen to apply for asylum and withholding of removal because it is based on changed country conditions arising in India since the date of his removal order.

WHEREFORE, it is hereby Ordered that Respondent's motion to reopen be denied.

DATED THIS 28th day of February, 2017.

Howard Achtsam

HOWARD ACHTSAM
IMMIGRATION JUDGE

HEA/bjr