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

Francisco M. Maldonado, Esq
Maldonado Law Firm, PLLC
1614 West Avenue L, #109
Temple, TX 76504

DHS/ICE Office of Chief Counsel - SNA
8940 Fourwinds Drive, 5th Floor
San Antonio, TX 78239

Name: LOPEZ-OLVERA, RUVEN

A 075-244-372

Date of this notice: 6/4/2014

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:
Hoffman, Sharon
Manuel, Elise
Guendelsberger, John

lucasd
Userteam: Docket

File: A075 244 372 – San Antonio, TX

Date: JUN - 4 2014

In re: RUVEN LOPEZ OLVERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Francisco M. Maldonado, Esquire

ON BEHALF OF DHS: Eric C. Bales
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's February 1, 2013, decision denying his motion to reopen proceedings. The respondent was ordered removed in absentia on June 4, 2012, after he did not appear for a hearing. The Board reviews findings of fact under a clearly erroneous standard, while all other issues, including whether the parties have met the relevant burden of proof, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii). The respondent's appeal will be sustained.

An in absentia removal order may be rescinded only if the alien files a motion to reopen: (1) within 180 days after the date of the removal order in which he establishes that his failure to appear was because of "exceptional circumstances," as defined in section 240(e)(1) of the Act; or (2) at any time in which he establishes that he did not have proper notice of the hearing in which the removal order was entered. Section 240(b)(5)(C) of the Act. Where the record reflects that a hearing notice was sent by regular mail, a respondent asserting lacking of notice bears the burden to overcome the presumption of delivery. *See Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008).

The record reflects that the respondent was personally served with a Notice to Appear on July 22, 2010, indicating that a date and time would be set for a removal hearing. A subsequent hearing notice, dated September 1, 2010, notified the respondent that a hearing date had been set for August 15, 2011. In a hearing notice dated May 10, 2011, the respondent was informed that his hearing had been rescheduled for April 22, 2013. A third hearing notice, dated September 19, 2011, informed the respondent that his hearing had been rescheduled for June 4, 2012. The respondent was ordered removed in absentia after he did not appear for the June 4, 2012, hearing. A copy of this decision was mailed to the respondent at his address of record.

In a filing postmarked June 19, 2012, the respondent filed a motion to reopen in which he enclosed a copy of the Immigration Judge's June 4, 2012, decision and a copy of a prior hearing notice indicating a hearing date of April 22, 2013. In his motion to reopen, the respondent requested that proceedings be reopened and referenced the prior hearing notice reflecting the April 22, 2013, hearing date.

We will sustain the respondent's appeal and remand the record for further proceedings. While the respondent's pro se motion to reopen lacks a degree of clarity, we discern the respondent's assertion that he believed his hearing date to have been set for April 22, 2013, as previously scheduled. We note the respondent's diligence in promptly seeking to redress the situation upon learning of the Immigration Judge's in absentia order, which is a factor to be considered in evaluating whether the presumption of delivery has been overcome. *See Matter of M-R-A-*, *supra*, at 675-76. Upon consideration of the totality of the circumstances presented, we will sustain the respondent's appeal and remand the record for further proceedings. Accordingly, the following order will be entered.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA STREET-SUITE 300
SAN ANTONIO, TX 78207

LOPEZ-OLVERA, RUVEN
3233 EDMOND
WACO, TX 76707

IN THE MATTER OF
LOPEZ-OLVERA, RUVEN

FILE A 075-244-372 DATE: Jun 7, 2012

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

_X_ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
800 DOLOROSA STREET-SUITE 300
SAN ANTONIO, TX 78207

__ OTHER: _____

_____

COURT CLERK
IMMIGRATION COURT FF

CC: ERIC C. BALES
8940 FOURWINDS DR., 5TH FLOOR
SAN ANTONIO, TX, 78297

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Immigration Court

File A075 244 372

In the Matter of

Ruven Lopez-Olvera

In Removal proceedings

Order of the
Immigration Judge

CHARGE: §212(a)(6)(A)(i) of the Immigration & Nationality Act [8 USC §1182(a)(6)(A)(i)] Encountered in the United States without a valid admission or parole.

APPLICATION: None

ON BEHALF OF RESPONDENT:
No one

ON BEHALF OF USICE:
Eric Bales, Atty.

The Notice to Appear charged that the respondent is a native and citizen of Mexico who entered the United States on an unknown date in 2006 and is inadmissible under §212(a)(6)(A)(i) of the Act. Respondent (or counsel in accord with Title 8 C.F.R. §1003.26(c)(2) and §240(b)(5)(A) of the Act) was duly notified of the time, date and place of the hearing but failed to appear. Counsel appeared and stated on the record that the respondent could not be contacted recently by counsel. At the request of USICE the hearing proceeded *in absentia*.

§240(b)(5)(A) of the Act [8 USC §1249(b)(5)(A)] provides, *inter alia*, that the Immigration Judge shall have the power to conduct *in absentia* hearings: "Any alien who, after written notice required . . . has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia . . ." The Supreme Court in *INS V Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), stated: "The respondent must be given a reasonable opportunity to be present at the proceeding, but if the Respondent fails to avail himself of the opportunity, the hearing may proceed in his absence." See *Matter of Patel*, 19 I&N Dec 260 (B.I.A. 1985), *aff'd*, *Patel v. INS*, 803 F.2d 804 (5th Cir. 1986); See also *Maldonado-Perez v. INS*, 865 F.2d 328 (D.C. Cir. 1989); *Matter of Perez*, 19 I&N Dec 433 (B.I.A. 1987).

The United States Immigration and Customs Enforcement has presented for this record proof that the Notice to Appear was served upon the Respondent. Also submitted is a Record of Inadmissible Alien (Form I - 213) which establishes entry without inspection as alleged on the Notice to Appear. Also included in the record is the Court's confirmation of the mailed notice to the respondent informing him or her of the time, date and place of this hearing.

Based on the foregoing, I find that removability has been established by evidence that is clear, convincing and unequivocal and that a hearing *in absentia* is appropriate. See *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 484, 17 L.Ed.2d 362 (1966) and Title 8 CFR §100240.8(c).

Respondent has failed to appear for the hearing and has not established eligibility for any form of relief from removal. I will deny any relief for failure to establish eligibility and lack of prosecution. See *INS v. Abudu*, 485 U.S. 94 (1988); *Reyes-Arias v. INS*, 866 F.2d 500 (D.C. Cir. 1989); *Matter of Nafi*, 19 I&N Dec 430 (B.I.A. 1987). Accordingly, the following order shall be entered:

ORDER: It is ordered that the respondent be removed from the United States to Mexico, the country of nativity and citizenship, on the charge contained on the Notice to Appear.

Date: June 4, 2012
Place: San Antonio, Texas

Gary Burkholder
Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)
TO: [M] ALIEN [ ] ALIEN c/o Custodial Officer
[ ] ALIEN'S ATT/REP [P] DHS
DATE: 6-4-12 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other