U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: R[redacted]-R[redacted], A[redacted] [redacted] C[redacted] **A [redacted]-876**
Riders:[redacted]

Date of this notice: 7/10/2020

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:
Cassidy, William A.
Adkins-Blanch, Charles K.
Kelly, Edward F.

Userteam: Docket

Files: A[redacted]876 – Los Angeles, CA
A[redacted]

Date: JUL 10 2020

In re: A[redacted] C[redacted] R[redacted]-R[redacted]
[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Rosana K. Cheung, Esquire

APPLICATION: Reopening

The respondents have appealed from the Immigration Judge's October 8, 2019, decision denying their October 1, 2019, motion to reopen and rescind the Immigration Judge's in absentia orders of removal issued on July 9, 2019. The appeal will be sustained, and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

Pursuant to section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C), an in absentia removal order may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing in accordance with sections 239(a)(1) or (2) of the Act, 8 U.S.C. § 1229(a)(1) or (2). Section 240(b)(5)(C)(ii) of the Act; *Matter of Guzman*, 22 I&N Dec. 722, 722-23 (BIA 1999).

"[T]he presumption of effective service of notices to appear by regular mail is weaker than the presumption when applied to delivery by certified mail." *Sembiring v. Gonzales*, 499 F.3d 981, 987 (9th Cir. 2007). In *Matter of M-R-A-*, 24 I&N Dec. 665, 674 (BIA 2008), we provided the following framework for evaluating motions to reopen following an in absentia order where the notice of hearing was sent by regular mail:

> In determining whether a respondent has rebutted the weaker presumption of delivery applicable in these circumstances, an Immigration Judge may consider a variety of factors including, but not limited to, the following: (1) the respondent's affidavit; (2) affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received; (3) the respondent's actions upon learning of the in absentia order, and whether due diligence was exercised in seeking to redress the situation; (4) any prior affirmative application for relief, indicating that the respondent had an incentive to appear; (5) any prior application for relief filed with the Immigration Court or

any prima facie evidence in the record or the respondent's motion of statutory eligibility for relief, indicating that the respondent had an incentive to appear; (6) the respondent's previous attendance at Immigration Court hearings, if applicable; and (7) any other circumstances or evidence indicating possible nonreceipt of notice. We emphasize that these are just examples of the types of evidence that can support a motion to reopen. Immigration Judges are neither required to deny reopening if exactly such evidence is not provided nor obliged to grant a motion, even if every type of evidence is submitted. Each case must be evaluated based on its own particular circumstances and evidence.

In this case, the lead respondent submitted a sworn declaration stating that she had not received the notice of her July 9, 2019, hearing. She further stated that she had "been reporting to the ICE" since her release from custody and that her last appearance had been on June 4, 2019, when she had been informed that her next appearance would be on October 2, 2019. The Department of Homeland Security (DHS) has not disputed this assertion. We further note that the lead respondent demonstrated due diligence by filing her motion less than 3 months after the issuance of the in absentia order in her case. Finally, the respondent's motion includes an application for asylum (Form I-589), in which she expresses a fear of return to Honduras for herself and her child. This case thus "involves a removal order entered against an alien who contends that she will be persecuted if she is removed pursuant to an order that was entered at a hearing of which she plausibly contends she did not have notice," which was observed to be a relevant factor by the United States Court of Appeals for the Ninth Circuit in *Sembiring v. Gonzales*, 499 F.3d at 990.

Given this evidence, we conclude that the respondents have succeeded in rebutting the slight presumption of delivery of the hearing notices in their case. *See Sembiring v. Gonzales*, 499 F.3d at 990; *Matter of M-R-A-*, 24 I&N Dec. at 674.

Accordingly, the following order will be issued.

ORDER: The appeal is sustained, the July 9, 2019, in absentia removal order is rescinded, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings.

FOR THE BOARD