U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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8940 Fourwinds Drive, 5th Floor
San Antonio, TX 78239

Name: TURCIOS-CASTELLANOS, JESU... **A 200-005-691**

Date of this notice: 3/17/2017

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

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Grant, Edward R.
KELLY, EDWARD F.

Userteam: Docket

File: A200 005 691 – San Antonio, TX Date: MAR 17 2017

In re: JESUS OMAR TURCIOS-CASTELLANOS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Caroline Babakhanloo, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled

APPLICATION: Reopening

The respondent has appealed from the October 19, 2016, decision of the Immigration Judge denying his motion to rescind the October 31, 2005, in absentia order of removal and reopen proceedings. The respondent has filed a brief on appeal; the Department of Homeland Security has not. The appeal will be sustained.

Section 240(b)(5)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C)(ii), states that an in absentia order of removal may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he did not receive notice of the hearing. Where, as here, notice was served by regular mail, there is a weaker presumption of delivery than where documents were sent by certified mail. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). The United States Court of Appeal for the Fifth Circuit (under whose jurisdiction the present claim arises) has held that where notice was sent by regular mail, the respondent's own affidavit stating that he or she did not receive notice is sufficient to rebut the presumption of delivery in the absence of evidence that the respondent sought to evade the removal proceedings. *Maknojiya v. Gonzales*, 435 F.3d 588, 589-90 (5th Cir. 2005). The respondent's complete explanation as to how and when the respondent learned of the in absentia order, and the actions he or she took in response (such as the hiring of an attorney to file a FOIA request to learn of his immigration status), should also be evaluated as circumstantial evidence. *Hernandez v. Lynch*, 825 F.3d 266, 270-71 (5th Cir. 2016).

In the present case, the respondent submitted evidence to support his claim that he visited the Immigration Court 18 days after his release from detention to inquire about the status of his case, and was informed that DHS had not yet filed the documents required to initiate proceedings.

Although the Immigration Judge determined that the address provided by the respondent was incomplete, the respondent's concession that he did receive the in absentia order mailed to him at the same address undermines such conclusion. Furthermore, the respondent offered evidence in support of his claim to have hired a legal office in Los Angeles to seek reopening of his proceedings shortly after receiving the in absentia order.

We conclude that the evidence of record is sufficient to rebut the weaker presumption of notice pursuant to the applicable case law. Accordingly, the following order will be entered.

ORDER: The decision of the Immigration Judge is vacated, the motion is granted, and the record is remanded for further proceedings consistent with the above opinion.

FOR THE BOARD

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

IN THE MATTER OF	)	
	)	
Jesus Omar Turcios-Castellanos	)	Case No. **A200 005 691**
	)	
RESPONDENT	)	
	)	
IN REMOVAL PROCEEDINGS	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended: Alien present in the United States without admission or parole.

APPLICATION: 8 C.F.R. § 1003.23(b): Motion to Reopen.

ON BEHALF OF THE RESPONDENT
Caroline Babakhanloo, Esq.
6507 Pacific Blvd.
Suite 204
Huntington Park, CA 90255

ON BEHALF OF THE GOVERNMENT
U.S. Immigration & Customs Enforcement
Office of the Chief Counsel
8940 Fourwinds Dr., 5th Fl.
San Antonio, TX 78239

WRITTEN DECISION & ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is a thirty-eight-year-old male, native and citizen of Honduras, who entered the United States at or near Eagle Pass, Texas, on or about June 30, 2005. Exhibit #3; Exhibit #1. On July 2, 2005, the Department of Homeland Security (DHS), personally served the respondent with a Notice to Appear (NTA), charging him as removable pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), as amended, as an alien present in the United States without admission or parole. Exhibit #1.

On September 14, 2005, the Court mailed a notice of hearing to the respondent at the following address: 5144 Clara Street, Cudahy, CA 90201. Exhibit #2. On October 31, 2005, the respondent was not present for his hearing and was unavailable for examination under oath. Pursuant to the authority provided in section 240(b)(5)(a) of the Act, the Court proceeded *in*

absentia and ordered the respondent removed from the United States to Honduras on the charge contained in the NTA.

On September 27, 2016, the respondent, through counsel, filed with the Court a motion to reopen his removal proceedings. DHS has filed a response in opposition to the motion.

II. Motion to Reopen

An *in absentia* order of removal may be rescinded only (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 because of 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 Act or the alien demonstrates that he was in Federal or State custody and the failure to appear was through no fault of his own. Section 240(b)(5)(C) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

A. Exceptional Circumstances

Over ten years passed between the date the Court ordered the respondent removed *in absentia* and the date the respondent filed his motion to reopen. Accordingly, any motion to reopen based on exceptional circumstances is time-barred. *See* Section 240(b)(5)(C) of the Act; *see also* 8 C.F.R. § 1003.23(b)(4)(ii).

B. Notice

When a notice of hearing is sent by regular mail and is properly stamped and addressed to an alien, there is a presumption of delivery. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). The presumption is weaker, however, than the presumption that applies to documents sent by certified mail. *Id.* To determine whether an alien has overcome the "weaker" presumption of delivery, the Court considers all of the submitted evidence, including the respondent's affidavit, affidavits from family members and other individuals, the respondent's actions upon learning of the *in absentia* order, prior affirmative applications for relief, the respondent's prior Court appearances, and any other evidence or circumstances indicating non-receipt. *Id.* at 674; *Matter of C-R-C-*, 24 I&N Dec. 677, 679 (BIA 2008).

The respondent, through counsel, filed an affidavit stating that he did not receive any notice of hearing at 5144 Clara Street, Cudahy, CA 90201, the address which he provided to immigration officials upon release from DHS custody. Respondent's Motion to Reopen at Tab A. The Court notes that the respondent states in his declaration that his correct address at the time of his release from DHS custody was 5144 Clara Street, #5, Cudahy, CA 90201. *Id.* The statement of Jose Luis

Zuniga also indicates that the respondent lived at 5144 Clara Street, #5, Cudahy, CA 90201 from July 2005 until December 2005. Respondent's Motion to Reopen at Tab E. It is clear to the Court that the respondent provided an incomplete address to immigration officers when he was released from DHS custody, in that he omitted the apartment number from the address at which he intended to stay.

It is incumbent upon a respondent to provide an address where he can receive mail. Section 239(a)(1)(F) of the Act. Entry of an *in absentia* order is proper where, as here, the respondent was personally served with a NTA, and he was put on actual notice of the proceedings, including notice of the obligation to keep the Court informed of any changes of address, and the consequences for failure to do so. When the address in the NTA is incorrect, the respondent has a duty to provide the Court within five days of service of the NTA, a written notice of an address where he can be contacted. *See* 8 C.F.R. § 1003.15(d)(1). As the respondent failed to provide the Court with a correct and complete address where he could receive correspondence, the Court concludes that the respondent was correctly ordered removed in his absence. *See Gomez-Palacios v. Holder*, 560 F.3d 354, 360 (5th Cir. 2009) (finding that an alien's failure to receive actual notice of his removal hearing due to his neglect of his obligation to keep the Immigration Court apprised of his current mailing address does not mean that the alien did not receive notice under section 240(b)(5)(C)(ii) of the Act).

C. *Sua Sponte*

An Immigration Judge may, upon his or her own motion, reopen any case in which he previously made a decision. *See* 8 C.F.R. § 1003.23(a). *Sua sponte* reopening, however, is an "extraordinary remedy reserved for truly exceptional situations" and is not "a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations." *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999).

The Court declines to *sua sponte* reopen the respondent's removal proceedings. The respondent did not contact the Court regarding his removal proceedings for over ten years. Moreover, the respondent offered no explanation for his failure to provide his address to the Court during this time. While the respondent has presented evidence that he is married to a United States citizen, and is the father of two United States citizen children, he has failed to establish that he is eligible for adjustment of status before the Court or that he is eligible for any other form of relief from removal.

Accordingly, the following order is hereby entered:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reopen is **DENIED**.

Date: 10-19, 2016

Craig A. Harlow
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE (P)
( )ALIEN( )ALIEN C/O CUSTODIAL OFFICIAL
(M)ALIEN'S ATTY REP (P)DHS
DATE: 10-20-16
COURT STAFF MW
ATTACHMENTS( ) E-33 E-28( )