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

Taylor, Stephanie Rodriguez
Hansen & Taylor, PLLC
6901 N. Lamar Blvd.
Suite 107
Austin, TX 78752

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

Name: AMAYA-BANEGAS, SANDRA LI... **A 206-886-601**
Riders:206-886-602

Date of this notice: 3/3/2016

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:
Mann, Ana
Mullane, Hugh G.
Malphrus, Garry D.

SCHWARZA
Userteam: Docket

Files: A206 886 601 – San Antonio, TX
A206 886 602

Date: MAR - 3 2016

In re: SANDRA LISSETH AMAYA-BANEGAS
CARMEN GISSELLE AMAYA-BANEGAS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Stephanie Rodriguez Taylor, Esquire

APPLICATION: Reopening

The respondents, mother and minor child, are natives and citizens of Honduras. They were ordered removed from the United States in absentia on March 25, 2015. *See* section 240(b)(5)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(a). They appeal the decision of the Immigration Judge, dated September 3, 2015, denying their motion to reopen. We will sustain the respondents' appeal and remand for further proceedings.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

A motion to reopen a removal order entered in absentia may be rescinded if the alien files a motion to reopen within 180 days and demonstrates that the failure to appear was because of exceptional circumstances beyond his control. 8 C.F.R. § 100.23(b)(4)(iii)(A)(1). The removal order may also be rescinded at any time if the alien demonstrates that he did not receive notice of the hearing. 8 C.F.R. § 100.23(b)(4)(iii)(A)(2).

There is no dispute that the respondents did not appear at the scheduled hearing on March 25, 2015. The record reflects the respondents were personally served with the Notice to Appear on December 23, 2014. The Notice indicated that the time, date, and place of the hearing would be set at a later time (I.J. at 1; Exh. 1). The adult respondent asserts that, before she was released from detention, she informed the Immigrations and Customs Enforcement ("ICE") officer of the address of her friend's residence, where she would be staying. 8 C.F.R. § 1003.15(d)(1). A Notice of Hearing was sent to the respondent at this address on March 10, 2015, reflecting the March 25, 2015 hearing date; however the Notice was returned for insufficient address because there was no apartment number.

The Immigration Judge found that the respondents had not given the ICE officer the correct address; however, he did not take into account their explanation that the adult respondent related the entire address, including the apartment number, to the ICE officer, and that the failure to include the apartment number on the notice of hearing may have been a clerical error. Moreover, the respondents demonstrated their good faith by reporting to their scheduled "check-in" with

ICE in July 2015 (where they learned that they had missed the hearing). In these circumstances, the evidence of record does not support a finding that the respondents can be charged with receiving notice of the hearing and failing to appear. Accordingly, the following order will be entered.

ORDER: The respondents' appeal is sustained, and the Immigration Judge's decision is vacated.

FURTHER ORDER: The record is remanded for further proceedings and the entry of a new decision consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Immigration Court

File A206 886 601 & 602

In the Matter of	)	In Removal Proceedings
Sandra Lisseth Amaya-Banegas Carmen Gisselle Amaya-Banegas	)	Order of the Immigration Judge

The respondents in the above captioned case were scheduled for a Master Docket hearing before the Immigration Court on March 25, 2015 and did not appear. At the request of counsel for the Department of Homeland Security, a hearing was conducted in the respondents' absence and they were ordered removed. The respondents, through counsel, have subsequently filed a motion to reopen the proceeding, alleging that they had not received notice of their hearing, thereby meeting the requirement for reopening under §240(b)(5)(C)(ii) of the Act. The motion will be denied.

With respect to the issue of notice to the respondent, notice was sent to the address specified for that purpose by the respondent at the time of the release of her and her child from custody. The Notice to Appear for each respondent was served on the adult respondent on December 23, 2014. The Notice to Appear served on the respondent on December 23, 2014 contained the address of the court in San Antonio, Texas and specific instructions for notifying the court at that address with Form EOIR - 33 (provided to the respondent) should any change or correction of address occur and giving the respondent the consequences of failure to do so. Oral notice was given to the respondent in Spanish of the consequences of failure to appear. It is the respondent's responsibility to provide any new or corrected address to the court within 5 days. Title 8 CFR §1003.15(d)(1) & (2). The motion to reopen filed August 31, 2015 makes clear that the respondent provided an incomplete and undeliverable address at the time of her release from custody and did not correct it until filing her motion to reopen. The address given by the respondent on release from custody did not provide an apartment identifier. The United States Postal Service reference internet site shows the address to be a multi-unit address with over 200 units. While the respondent's application (Form I - 589) and counsel's appearance (Form E - 28) now provides an apartment designator, it had not been properly reported to the court in writing as required by law and regulation prior to filing the motion. The Board of Immigration Appeals in *Matter of M - R - A -*, 24 I&N Dec. 665 (BIA 2008) dealt with the question of adjudicating motions to reopen involving the presumption of delivery of documents sent by regular mail. The orders sent to respondents on March 25, 2015 were returned as undeliverable by the United States Postal Service and it appears that the hearing notices would also be undeliverable. Where the respondent has not provided a valid address for notice purposes, no notice is required. See *Gomez-Palacios v. Holder*, 560 F. 3rd 354 (5th Cir. 2009). With respect

to the respondent's lack of knowledge of the significance of the Notice to Appear, the immigration law and regulations and the English language, these would not be exceptional circumstances for recent entrants but rather the normal circumstance. See §240(b)(5)(C)(i) of the Act and Title 8 CFR §1003.23(b)(4)(ii). There is no requirement that a Notice to Appear and the advisals thereon be in any language other than English. *See Cruz-Diaz v. Holder*, 388 F. App'x. 429 (5th Cir. 2010; *Chavez v. Holder*, 343 F. App'x. 955 (5th Cir 2009), *Ojeda Calderon v Holder*, 726 F3 669 (5th Cir. 2013). The respondent's responsibilities are not obviated by her ignorance of them or by her willfully ignoring them. Under the applicable circuit law respondent is not entitled to notice and therefore reopening for lack of notice would not be available. I also note that the respondent's motion contains a draft application for asylum making clear that the application is not based on any material change in country conditions.

This would not be an appropriate case for the utilization of any device to circumvent the regulations or avoid hardship under the standards set in *Matter of G - D -*, 22 I&N Dec. 1132 (BIA1999) and *Matter of J- J-*, 21 I&N Dec. 976 (BIA 1997). The motion shall therefore be, and is hereby, DENIED. SO ORDERED.

Date: September 3, 2015
Place: San Antonio, Texas

Gary Burkholder
Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
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DATE: 9-8-15 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other