U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 20530

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Irving, TX 75062-2324

Name: ALFARO-MARTINEZ, KARLA DE... **A 202-076-417**

Date of this notice: 5/6/2015

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:
O'Herron, Margaret M
Neal, David L
Adkins-Blanch, Charles K.

Userteam: Docket

File: A202 076 417 – Dallas, TX

Date: MAY - 6 2015

In re: KARLA DE JESUS ALFARO-MARTINEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Laura P. Fernandez, Esquire

We have considered the totality of the circumstances presented in this case, and find that the evidence is sufficient to establish that the respondent did not receive proper notice of the hearing below, and that reopening and rescission of the in absentia removal order is therefore warranted. *See* section 239(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a)(2); *see also Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). Accordingly, the respondent's appeal will be sustained, the in absentia order will be rescinded, the proceedings will be reopened, and the record will be remanded to allow the respondent another opportunity to appear for her hearing.

ORDER: The appeal is sustained.

FURTHER ORDER: These proceedings are reopened, the in absentia order of removal is vacated, and the record is remanded to the Immigration Court for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

Puente, Hindieh & Fernandez, PLLC
Fernandez, Laura Patricia
3300 Oak Lawn Ave.
Suite 401
Dallas, TX 75219

IN THE MATTER OF FILE A 202-076-417 DATE: Jan 13, 2015
ALFARO-MARTINEZ, KARLA DE JESUS

__ 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
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

__ 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
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: SADRI, YAS
125 E. HWY 114, STE 500
IRVING, TX, 75062

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
DALLAS IMMIGRATION COURT

Date: January 13, 2015

File: A 202-076-417

Charge: Section 212(a)(6)(A)(i), INA

Immigration Removal Proceedings in the Matter of: Carla de Jesus Alfaro-Martinez, Respondent

Application: Motion to Reopen

On Behalf of the Respondent: Laura Patricia Fernandez, Esq., Puente, Hindieh & Fernandez, PLLC, 3300 Oak Lawn Ave., Suite 401, Dallas, Texas 75219

On Behalf of Department of Homeland Security/Immigration and Customs Enforcement: Yas Sadri, Esq., Ass't Chief Counsel, 125 E. John Carpenter Freeway, Suite 500, Irving, Texas 75062

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a female native and citizen of El Salvador. Exhibit 1. On June 2, 2014, the Government charged her with being subject to removal from the United States. *Id.* The Respondent failed to appear for her removal hearing on December 8, 2014 and was ordered removed *in absentia* based on the following allegations and charge.

Allegations:

(1) She is not a citizen or national of the United States;
(2) She is a native and citizen of El Salvador;
(3) She entered the United States at or near Roma, Texas on or about August 8, 2014; and
(4) She was not then admitted or paroled after inspection by an Immigration Officer.

Charge: The Government charged the Respondent as subject to removal from the United States pursuant to Section 212(a)(6)(A)(i), INA, as amended, in that she is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

Sustaining of the Charge: At a hearing on December 8, 2014, the Government submitted Form I-213, Record of Deportable/Inadmissible Alien in support of its removal charge. *See* Exhibit 2. Based upon the clear, unequivocal, and convincing evidence presented by the

Government, the Court sustained the allegations and charge of removal, specifically finding the Respondent subject to removal from the United States to her native country of El Salvador.

Application: Motion to Reopen.

II. MOTION

On December 30, 2014, the Respondent filed a Motion to Reopen. The basis of the Respondent's motion is not entirely clear. The Respondent's affidavit indicates that though the Notice of Hearing (NOH) was properly delivered, the Respondent did not have notice of the time and date of her hearing because her grandmother misplaced the NOH and did not find it until after her hearing. *See* Motion to Reopen, pg. 8. The Respondent's motion indicates that she concedes proper notice and states that the basis of her motion is "exceptional circumstances" arising from the fact that the Respondent misunderstood the time of the hearing and did not believe that her error could be corrected. *See id.* at 4. The Government has not filed a brief in response.

III. STATEMENT OF THE LAW AND ANALYSIS

A party is limited to one motion to reopen and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceedings sought to be reopened. 8 C.F.R. § 1003.23(b)(1). A motion to reopen does not have to conform to the above time and numerical limitations where it is (1) filed to apply or reapply for asylum based on changed circumstances in the respondent's home country; (2) filed on the basis of a removal order issued *in absentia*, when the motion to reopen is based on lack of notice or exceptional circumstances; or (3) agreed upon by all parties and jointly filed. *See* 8 C.F.R. § 1003.23(b)(4). An *in absentia* order may be rescinded upon a motion to reopen filed at any time if the alien has not received adequate notice of the hearing. INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii). An *in absentia* order may also be rescinded upon a motion to reopen filed 180 days after an administratively final order of removal is entered if the Respondent shows "exceptional circumstances" leading to her absence from the hearing. INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(iii). "Exceptional circumstances" include circumstances beyond the control of the alien, including "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." INA § 240(e)(1).

If an alien does not attend a removal hearing after written notice has been provided to the alien or the alien's counsel of record, the alien will be ordered removed *in absentia* if the Government establishes by clear, unequivocal, and convincing evidence that written notice of the hearing was provided and that the alien is removable. INA § 240(b)(5)(A). Adequate notice can be accomplished through personal service, or if personal service is not practicable, through service by mail to the alien. INA § 239(a)(1). Service by mail is proper upon proof of attempted delivery to the alien's most recently provided address. INA § 239(c). The Notice to Appear (NTA) includes the alien's obligation to immediately provide a written record of any change in address or telephone number and the consequences of failing to do so, and also includes the consequences of failing to appear. *See* INA § 239(a)(1)(F), (G). Thus, if the alien receives actual

notice of the hearing or can be charged with receiving constructive notice, through receipt of a NTA, then *in absentia* proceedings are authorized. *Matter of G-Y-R-*, 23 I&N Dec. 181, 186 (BIA 2001).

When written notice is properly addressed and sent to the alien by regular mail according to normal office procedures, a presumption of delivery arises. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). Once the presumption of delivery arises, the burden is on the alien to provide proof that the document was not received. *Id.* at 674. The Court may consider all relevant evidence of record to overcome the presumption of delivery. *Id.* at 673-74. Evidence may include, but is not limited to:

> (1) [T]he 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 non-receipt of notice.

Id. at 674. The granting of a motion to reopen lies within the "broad discretion" of the Immigration Judge. *See INS v. Doherty*, 502 U.S. 314, 323 (1992).

The Court may exercise its *sua sponte* authority to reopen in "truly exceptional situations," where the interests of justice would be served. *Matter of G-D-*, 22 I&N Dec. 1132, 1133 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

Court's Finding: Out of an abundance of caution, the Court will address both presumed claims as to lack of notice and exceptional circumstances. As to the Respondent's assertion of lack of proper notice, the Respondent's NTA reflects that she was personally served, as evidenced by her signature and fingerprint thereon. *See* Exhibit 1. Thus, the Respondent was on notice of the initiation of removal proceedings, her obligation to update the Immigration Court with any change of address, and the consequences of failing to appear as required by Section 239(a)(1), INA. *See Matter of G-Y-R-*, 23 I&N Dec. at 186. In addition, the NTA indicates that the Respondent was advised in her native Spanish language of the consequences of her failure to appear. *See* Exhibits 1, 2.

The Respondent alleges that she did not receive her NOH until after her removal hearing, and thus did not have actual notice of the time and date of the hearing. Motion to Reopen, pg. 8. The last address the Respondent provided in accordance with Section 239(a)(1)(F), INA was the address provided upon her release from the Office of Refugee Resettlement (ORR) custody.[1] The NOH was mailed to the Respondent at this address. *See* Exhibit 3. Service by mail of the NOH to

[1] The Respondent's address was represented as 1544 Bradford St., Irvin[g], TX 75071.

the last address provided by the Respondent in accordance with Section 239(a)(1)(F), INA is sufficient due to the presence of proof of attempted delivery to such address. INA § 239(c). Thus, *in absentia* proceedings were properly authorized. *See* INA § 240(b)(5)(B); *Matter of G-Y-R-*, 23 I&N Dec. at 187.

As to the Respondent's assumed claim for rescission based on lack of notice, the Court must determine whether the Respondent received actual notice of the hearing. *See Gomez-Palacios v. Holder*, 560 F.3d 354, 359-60 (5th Cir. 2009). Her NOH was mailed to the most recent address of record according to normal office procedures. Thus, a presumption of delivery arises. *See Matter of M-R-A-*, 24 I&N Dec. at 673. The Court must consider all evidence submitted by the Respondent to overcome the presumption of delivery. *Id.* at 674-75.

The Respondent has submitted an affidavit to rebut the presumption of delivery. In this statement, the Respondent indicates that she did not receive the notice because her grandmother, with whom she lives, misplaced the notice until after the hearing. *See* Motion to Reopen, pg. 8. The Respondent does not allege that the NOH was delivered improperly. This affidavit does not provide any details surrounding the circumstances of her discovery of the NOH. The Court also notes that the Respondent's grandmother has not submitted an affidavit in support of the Respondent's motion. If the Respondent fails to receive actual notice of her removal hearing "through some failure in the internal workings of the household" the alien may still be charged with receiving proper notice. *See Ojeda-Calderon v. Holder*, 726 F.3d 669, 673 (5th Cir. 2013); *Matter of G-Y-R-*, 23 I&N Dec. at 189. Such is the case in this instance. Thus, the Court finds that the Respondent may be charged with receiving proper notice and the Court will not reopen the proceedings based on lack of notice.

As to the Respondent's request for reopening based on exceptional circumstances, the Court finds the circumstances described by the Respondent do not rise to the level of "exceptional circumstances" as defined by the Act. The Respondent's motion indicates that the NOH was "misplaced" causing the Respondent to be unaware of the correct time of the hearing. *See* Motion to Reopen, pgs. 1, 4. "Exceptional circumstances" include circumstances beyond the control of the alien, such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, *but not including less compelling circumstances*. INA § 240(e)(1) (emphasis added); 8 C.F.R. § 1003.23(b)(4)(iii)(1). Given this relatively high standard, the Court finds that the circumstances described in the Respondent's motion are indeed less compelling than those described in the statute. *See, e.g.*, *Matter of G-Y-R-*, 23 I&N Dec. 181 (where the NTA reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving the NTA and proper service will have been effectuated). The Court also notes that the Respondent has failed to submit any corroborating evidence to support her claim, including an affidavit from her grandmother regarding the circumstances surrounding the "misplaced" NOH. In consideration of the foregoing, the Court will not reopen the Respondent's case on the basis of "exceptional circumstances."

Finally, the Respondent has not demonstrated the requisite "exceptional situation" to warrant *sua sponte* reopening. *See Matter of G-D-*, 22 I&N Dec. at 1133; *Matter of J-J-*, 21 I&N Dec. 976.

Accordingly, the following Order shall be entered:

IV. ORDER

IT IS HEREBY ORDERED THAT the Respondent's Motion to Reopen be and is **DENIED.**

Date: January 13, 2015

Richard Randall Ozmun
Immigration Judge
USDOJ/EOIR

Copy to:
Chief Counsel, DHS/ICE