U.S. Department Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

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125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: SINGH, VARINDER

A 201-156-040

Date of this notice: 7/23/2013

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:
Manuel, Elise
Adkins-Blanch, Charles K.
Hoffman, Sharon

TranC
Userteam: Docket

File: A201 156 040 – Dallas, TX

Date: JUL 23 2013

In re: VARINDER SINGH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jaspreet Singh, Esquire

ON BEHALF OF DHS: Dan Gividen
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated June 20, 2012, denying his motion to reopen. The Immigration Judge had previously ordered the respondent removed in absentia for his failure to appear at the hearing on October 17, 2011. The appeal will be sustained and the record will be remanded.

We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

An order of removal that is issued following proceedings conducted in absentia pursuant to section 240(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5), may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal if the respondent demonstrates that he failed to appear because of exceptional circumstances, or upon a motion to reopen filed at any time if the respondent demonstrates that he did not receive proper notice of the time and place of the hearing, or that he was in federal or state custody and failed to appear through no fault of his own. "The term 'exceptional circumstances' refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." Section 240(e)(1) of the Act.

The respondent contends that he established exceptional circumstances for his failure to attend the hearing scheduled for October 17, 2011. In support of his claim, he has submitted a detailed affidavit and corroborating evidence. *See* Resp. Motion, Tabs A-C. The respondent contacted the Immigration Judge the day of his hearing regarding his inability to appear. Moreover, his motion to reopen proceedings was filed shortly after the issuance of the in absentia order and was timely filed pursuant to Section 240(b)(5)(C) of the Act. Upon our de novo review, based upon the particular facts presented in this case, we find that the respondent demonstrated exceptional circumstances for his failure to appear. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) ("We note that one must look to the "totality of circumstances" to resolve this issue of exceptional circumstances."). Therefore, we will sustain the appeal and

reopen the proceedings to allow the respondent another opportunity to appear for a hearing. Accordingly, the following order will be entered.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., ROOM 404
DALLAS, TX 75242

LAW OFFICES OF JASPREET SINGH
SINGH, JASPREEET
37-18 73RD STREET, SUITE 401
JACKSON HEIGHTS, NY 11372

IN THE MATTER OF
SINGH, VARINDER

FILE A 201-156-040 DATE: Jun 26, 2012

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X 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

__ 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., ROOM 404
DALLAS, TX 75242

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT

FF

CC: GIVIDEN, DANIAL
125 E. HWY 114, STE 500
IRVING, TX, 75062

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DALLAS, TEXAS

IN THE MATTER OF:	)	IN REMOVAL PROCEEDINGS
	)	
	)	
SINGH, Varinder	)	A201-156-040
	)	
	)	
	)	
RESPONDENT	)	

CHARGE: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, as amended, in that you are an alien at the time of application for admission, who was not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General.

APPLICATION: Motion to Rescind *In Absentia* Removal Order and Reopen Proceedings

ON BEHALF OF THE RESPONDENT

Jaspreet Singh, Esq.
Law Office of Jaspreet Singh
37-18 73 Street, Ste. 401
Jackson Heights, NY 11372

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY

Dan Gividen
Assistant Chief Counsel, ICE
U.S. Dept. of Homeland Security
125 E. John Carpenter Fwy., Ste. 500
Irving, TX 75062

ORDER OF THE COURT

The Respondent has filed a Motion to Reopen in the above-captioned case. For the following reasons, the Motion will be **DENIED**.

FACTUAL AND PROCEDURAL HISTORY

The Respondent is a male, native and citizen of India. Exhibit 1. He entered the United States at or near Lukeville, Airzona, on or about February 17, 2011, without being then admitted or paroled after inspection by an immigration officer. *Id.* Later that day, Respondent was encountered by Customs and Border Protection, and he was subsequently arrested and transported for detention on the grounds that he was an alien who illegally entered the United States. Exhibit 6. Respondent wished to apply for asylum and was scheduled for a Credible Fear Interview, which occurred on March 7, 2011.

On March 14, 2011, the DHS served the Respondent with a Notice to Appear ("NTA") via personal service charging him with removability under Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA" or "the Act"). Exhibit 1. The alien was provided oral notice in the Punjabi language of the consequences of failure to appear as provided in section 240(b)(7) of the Act. *Id.* Further, the Respondent signed the Certificate of Service indicating its receipt. *Id.*

On April 8, 2011, the Respondent filed a Motion for Change of Venue from the Florence Immigration Court to the Dallas Immigration Court. That motion was granted on May 5, 2011, and proceedings were transferred to this Court. On May 3, 2011, upon paying a bond of $5,000, Respondent was released from custody and scheduled for a Master hearing to take place on October 17, 2011, at 9:00 A.M. Exhibit 2; Notice to EOIR: Alien Address (Form I-830). The Respondent does not dispute receipt of the hearing notice.

On September 23, 2011, Respondent, through Counsel, attempted to file a Motion to Change Venue to the New Jersey Immigration Court, with motions in the alternative to waive appearance of the Respondent and to permit telephonic appearance of counsel. These motions were rejected by the clerk due to noncompliance with the EOIR Practice Manual. They were subsequently filed on October 12, 2011. *See* Exhibits 3-5.

On the morning of October 17, 2011, Counsel called the Court to inform it that Respondent had tried to board his flight from New Jersey to Dallas on October 16, 2011, and was denied entry because he had no photo identification. Respondent's Motion to Reopen, Exhibit A. The Respondent thus failed to appear at his October 17, 2011, hearing and the proceedings were conducted *in absentia*. At the hearing, the Government submitted documentary evidence establishing the truth of the factual allegations contained in the NTA. Order of the Immigration Judge, dated October 17, 2011. The Court found the Respondent removable as charged by clear, unequivocal, and convincing evidence. *See* 8 C.F.R. § 1003.26(c). Accordingly, the Court designated the Respondent's country of removal as India, and ordered him removed to India *in absentia*. *Id.*

On November 21, 2011, the Respondent, through counsel, filed a Motion to Rescind the *In Absentia* Order of Removal and Reopen Proceedings. The Respondent asks the Court to reopen proceedings based on exceptional circumstances pursuant to INA § 240(b)(5)(C)(i). In the Motion, the Respondent states he bought a plane ticket for October 16, 2011, in order to attend his hearing. Motion to Reopen, Respondent's Statement. However, Respondent explains that he was not allowed through security because he did not have a government issued identification document. Exhibit A. Thus,

Respondent argues that he was unable to travel to Dallas for his hearing because he did not have the identification necessary for air travel within the United States. In support of his motion, Respondent provides a copy of his American Airlines boarding pass and his sworn affidavit. Exhibits A-C.

On January 6, 2012, DHS filed DHS's Response to the Respondent's Motion to Reopen. The Department opposes the motion on the grounds that "the need to have an ID to pass through airport security is not an exceptional circumstance—it is a foreseeable and known circumstance." DHS's Response to the Respondent's Motion to Reopen. The Department also argues that the motion should be denied for the same reasons articulated by the IJ on the record of hearing on October 17, 2011. *Id.*

LEGAL STANDARDS

An *in absentia* removal order pursuant to section 240(b)(5) of the Act may be rescinded upon a Motion to Reopen if there is either a showing that the alien's failure to appear was because of exceptional circumstances, or a violation of the respondent's constitutional right to adequate notice. INA § 240(b)(5)(C)(i)-(ii). A motion to reopen alleging exceptional circumstances must be filed within 180 days after the date of the order of removal. § 240(b)(5)(C)(i). In cases alleging non-receipt of notice, the alien may file a motion to reopen at any time and the court may rescind an *in absentia* removal order if the "alien demonstrates that the alien did not receive adequate notice in accordance with the [notice requirements of the INA]." INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(iii).

A Motion to Reopen will not be granted unless the Respondent establishes a *prima facie* case of eligibility for the underlying relief. A motion to reopen must be

accompanied by applications for relief and all supporting documents. *See INS v. Abudu*, 485 U.S. 94, 104 (1988); s*ee also INS v. Doherty*, 502 U.S. 314 (1992); *but see Matter of Ruiz*, 20 I&N Dec. 91, 92 (BIA 1989).[1] In general, an immigration judge has broad authority to grant or deny a motion to reopen. *INS v. Doherty*, 502 US 314, 322 (1992). An immigration judge may deny a motion even where there is prima facie eligibility if the relief sought would be denied as a matter of discretion. *INS v. Rios-Pineda*, 471 US 444, 449 (1985).

Proper service of a written notice under the Act may be accomplished by personal service, or if personal service is not practicable, service by regular mail to the alien or to his attorney of record. INA § 239(a)(1). Proper notice can be accomplished through personal service of the document (the NTA or the NOH), or if personal service is not practicable, through service by mail to the Respondent. INA § 239(a)(1). Additionally, service by mail of the document is sufficient if there is proof of attempted delivery to the alien's most recently provided address. INA § 239(c).

When the written notice is properly addressed and sent to the alien by regular mail according to normal office procedures there is also a presumption of delivery. *Matter of M-R-A-*, 24 I. & N. Dec. 665, 673 (B.I.A. 2008). However, the regular mail presumption is weaker than the presumption applying to documents sent by certified mail. *Id.*; *See*

[1] "A motion to reopen may be denied on the basis that the applicant has not established a prima facie case for the underlying substantive relief sought. *See* INS v. Abudu, 485 U.S. 94, 108 S.Ct. 904 (1988). But in the context of a prior in absentia hearing, the underlying relief being sought by way of the motion to reopen is the opportunity to present the applications for relief at a full evidentiary hearing .... When the basis for a motion to reopen is that the immigration judge held an in absentia hearing, the alien must establish that he has reasonable cause for his absence from the proceedings. Section 242(b) of the Act, 8 U.S.C. § 1252(b) (1982) (deportation proceedings); Matter of Haim, supra; Matter of Nafi, supra; Matter of Patel, Interim Decision 2993 (BIA 1985), aff'd, Patel v. INS, 803 F.2d 804 (5th Cir.1986); Matter of Marallag, 13 I & N Dec. 775 (BIA 1971). Once reasonable cause has been established, the applicant retains his statutory right to an opportunity to present his asylum claim at a hearing. To require him to establish prima facie eligibility for asylum in conjunction with his motion to reopen, before he is given the opportunity to a hearing on his asylum claim, would violate his statutory right to such a hearing." Matter of Ruiz 20 I. & N. Dec. 91, 92-93 (BIA 1989).

Matter of Grijalva, 21 I. & N. Dec. 27, 37 (B.I.A. 1995). When alleging non-receipt of a written notice, the burden is on the alien to provide proof that the document was not received. *Matter of M-R-A*, 24 I. & N. Dec. at 673–74; *see also Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503 (B.I.A. 1980) (when alleging non-receipt of an NTA, the alien must provide some evidence to the court that the NTA was not in fact received). In adjudicating an alien's motion to rescind an *in absentia* order of removal based on a claim that a NTA or NOH sent by regular mail to the most recent address was not received, all relevant evidence submitted to rebut the weaker presumption of delivery must be considered by the Immigration Judge. *Matter of M-R-A*, 24 I. & N. Dec. at 673–74.

If the alien's address is not provided, or is incorrectly provided in the NTA, the alien must provide to the Court a written notice of an address and telephone number at which the alien can be contacted within five days of service of the NTA. 8 C.F.R. § 1003.15(d)(1). This requirement is satisfied by completing and filing a Change of Address Form (EOIR-33). *Id.* In addition, within five days of any change of address, the alien must complete and file with the Court a Change of Address Form. 8 C.F.R. § 1003.15(d)(2). Thus, if the alien fails to file a Change of Address Form when required, and this is the reason he has not received proper notice of a scheduled hearing, then lack of notice cannot be the basis for granting a motion to reopen. *Matter of M-R-A-*, 24 I. & N. Dec. at 675.

The NTA includes the alien's obligation to immediately provide the Attorney General with written record of any change in address or telephone number and the consequences for failing to do so, and also includes the consequences for failing to

appear. *See* INA § 239(a)(1)(F), (a)(1)(G). The Notice of Hearing, whether contained in the charging document or as a separate notice, states the time and place of the scheduled hearing and informs the alien of the consequences for failing to update his address and for failing to appear. INA § 239(a)(1)(G), (a)(2)(A)(ii).

In addition to an alien's statutory obligation under INA § 239(a)(1)(F) to update his address after moving, an alien also has the general obligation to report address changes to the Attorney General under INA §265(a). All aliens residing in the United States must notify the Attorney General in writing of each change of address within ten days of the alien's move. INA § 265(a).

Finally, the Court may rescind an in absentia order of removal and reopen proceedings in cases of "exceptional circumstances" pursuant to INA § 240(b)(5)(C)(i). As defined by the Act, the term "exceptional circumstances" refers to:

> [E]xceptional circumstances (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) beyond the control of the alien.

INA § 240(e)(1).

Generally, traffic, car trouble, and other such foreseeable travel circumstances do not qualify as exceptional circumstances. *De Morales v. INS*, 116 F.3d 145, 148 (5th Cir. 1997). In *De Morales*, the Fifth Circuit found that an alien did not meet the exceptional circumstances requirement for reopening when he cited mechanical car failure as the reason he missed his hearing. Not only did the alien miss his hearing, he also chose to not try and make his hearing even after getting a ride from the break-down site and did not correspond with the Court at all after failing to make his hearing. *Id.* at 149. The Court explained that the exceptional circumstances test is a "difficult burden to meet."

Id. at 148. Under the circumstances of this case, the Court found that the Board correctly concluded that the mechanical failure of the petitioners' car on the way to the hearing did not constitute exceptional circumstances within the meaning of the Act. *Id.* at 149; *see Matter of J-P-*, 22 I. & N. Dec. at 33-35 (the Board cited to *De Morales* in finding that the alien's headache was not sufficient to show exceptional circumstances and his claim was further undermined by his failure to notify the immigration court of his absence).

Likewise, failure to properly prepare for domestic air travel is generally not an exceptional circumstance beyond one's control. *See, e.g.*, *Lan Jin Zhou v. U.S. Atty. Gen.*, 303 F. App'x 725, 726 (11th Cir. 2008) (holding that the BIA did not abuse its discretion in determining that Respondent "should have been aware of the photo documentation required to travel by plane in the United States"); *Dong Yang v. Holder*, 384 F. App'x 340, 343 (5th Cir. 2010) (holding that the BIA did not abuse its discretion in finding no exceptional circumstances where alien did not have proper identification to board flight and thus was late for his hearing).

The Board has indicated that exceptional circumstances are determined using a "totality of the circumstances" test. *Matter of W-F-*, 21 I. & N. Dec. 503, 509 (B.I.A. 1996) (citing H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 132 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6797 ("[T]he conferees expect that in determining whether an alien's failure to appear was justifiable the Attorney General will look at the totality of the circumstances to determine whether the alien could not reasonably have been expected to appear.")). In applying the test, Courts are to keep in mind that circumstances that are within control of the alien are foreseeable and therefore not "exceptional circumstances." *Id.*

There are several factors that can be considered in assessing the "totality of the circumstances." *See Matter of J-P-*, 22 I. & N. Dec. 33, 35 (B.I.A. 1998); *De Morales v. INS*, 116 F.3d 145, 148 (5th Cir. 1995). These include whether 1) Respondent provided a detailed and plausible explanation for why he failed to appear; 2) whether Respondent provided adequate documentation in support of the motion to reopen; and 3) whether Respondent attempted to contact the Immigration Court on the date of the hearing. *Matter of J-P-*, 22 I. & N. Dec. at 35; *De Morales*, 116 F.3d at 149.

With these principles in mind, the Court will assess the totality of the circumstances of the case to determine whether exceptional circumstances beyond the control of the alien existed.

ANALYSIS

In this case, the facts indicate that there are no exceptional circumstances beyond Respondent's control. The Respondent attempted to appear for his hearing in Dallas, but was unable to pass through security because of his lack of a photo ID. The record indicates that Respondent had no valid foreign passport. Exhibit 6; Respondent's Motion to Reopen, Tab A. Thus, the record indicates that Respondent has no suitable government issued identity document for air travel within the United States. However, and for the following reasons, the Court agrees with the Department that the requirement of a government ID for air travel is a "foreseeable and known circumstance." DHS's Response to the Respondent's Motion to Reopen.

The failure to have an identification document to board a plane is insufficient to qualify as an exceptional circumstance. Rather, it is a foreseeable travel-related circumstance that does not rise to the level of exceptional circumstances as contemplated

by the Act. *See* INA § 240(e)(1); *see also De Morales*, 116 F.3d at 148; *Dong Yang*, 384 F. App'x. at 343. Considering that he had adequate notice of the charges against him and his hearing date, the Court finds that the Respondent did not adequately prepare to travel to Texas for his hearing. *See* Exhibit 1; Exhibit 2. The Respondent traveled from Texas to New Jersey when he moved there and he also could have come back to Texas for his hearing. Thus, Respondent's failure to appear at his hearing because of a lack of a valid photo identification document for air travel in the United States was not an exceptional circumstance beyond his control.

Furthermore, the totality of the circumstances indicates here that exceptional circumstances beyond control of the alien are not present. Although he exercised due diligence in attempting to avoid the entrance of an in absentia order of removal by notifying the Court prior to the hearing of his situation, this on its own is not sufficient in order to satisfy the "exceptional circumstances" standard.

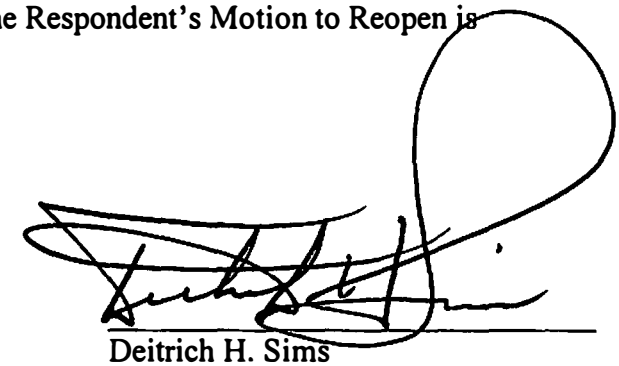
The Court notes that the Respondent provided it with some evidence showing his due diligence in letting the Court know of his absence. *Matter of J-P-*, 22 I. & N. Dec. at 33-35. His attorney called the Court on the day of his hearing to inform it that the Respondent was not going to be able to come. Respondent's Motion to Reopen, Tab A. The Respondent also provided evidence showing that he had a flight booked in order to reach his hearing. *Id.*, Tab B-C. Under the totality of the circumstances, however, these efforts do not establish that the Respondent missed his hearing due to exceptional circumstances. Thus, the Court finds that the Respondent did not do everything in his power to "avoid the entrance of an *in absentia* order of removal." *See De Morales v. INS*, 116 F.3d at 148.

In light of the foregoing, the Court finds that there are no exceptional circumstances beyond control of the alien. Accordingly, the following Order will be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion to Reopen is **DENIED.**

This 20th day of June, 2012



Deitrich H. Sims
United States Immigration Judge