U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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5701 Executive Ctr Dr., Ste 300
Charlotte, NC 28212

Name: DOUMBIA, ASSETOU **A089-952-722**

Date of this notice: 6/28/2012

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

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A089 952 722 - Charlotte, NC **Date:** JUN 28 2012

In re: ASSETOU DOUMBIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: U. Wilfred Nwauwa, Esquire

ON BEHALF OF DHS: Melissa K. Metz
Assistant Chief Counsel

The respondent, a native and citizen of Mali, was ordered removed in absentia on September 9, 2009. On January 11, 2010, the respondent filed a motion to reopen proceedings, which the Immigration Judge denied on January 19, 2010. The respondent filed an appeal of that decision and on February 8, 2011, the Board remanded the case to the Immigration Judge for further consideration. On March 9, 2011, the Immigration Judge denied the respondent's motion. The respondent filed an appeal of that decision.[1] The appeal will be sustained, proceedings will be reopened and the record will be remanded.

Upon review, we find that based upon the totality of circumstances presented in this case, including the respondent's affidavit in which she states that she did not receive notice for the September 9, 2009, hearing, the error in the street address on the notice for the September 9, 2009, hearing–the street name is listed as "Idlewild Roas" as opposed to "Idlewild Road," as well as the fact that the respondent has two citizen children and is married to a lawful permanent resident who intends to file an immigrant visa petition on her behalf, we will reopen proceedings, sustaining the respondent's appeal of the Immigration Judge's denial of the motion under our de novo review authority. Accordingly, the respondent will be provided the opportunity to attend another hearing.

[1]The respondent's appeal was untimely; however, we accept the appeal by certification.

ORDER: The appeal is sustained, proceedings are reopened, 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
United States Immigration Court
5701 Executive Center Drive, Suite 400
Charlotte, NC 28212

IN THE MATTER OF	)	IN REMOVAL PROCEEDINGS
	)	
DOUMBIA, Assetou	)	File No. A 089-952-722
	)	
Respondent.	)	DATE: February 28, 2011
	)	

MOTION: Motion to Reopen Removal Proceedings and Rescind *In Absentia* Order of Removal.

ON BEHALF OF RESPONDENT:
Wilfred U. Nwauwa, Esq.
P.O. Box 34691
Charlotte, NC 28234

ON BEHALF OF THE GOVERNMENT:
Melissa Metz, Assistant Chief Counsel
5701 Executive Center Drive, Suite 300
Charlotte, NC 28212

DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On July 7, 2009, the Department of Homeland Security ("DHS" or "Department") placed Respondent in removal proceedings with the issuance of the Notice to Appear ("NTA"). The DHS charged Respondent with removability pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act ("INA" or "Act"), in that after admission as a nonimmigrant, Respondent remained in the United States for a time longer than permitted. The NTA was personally served on Respondent and informed Respondent that she was ordered to appear before the Immigration Court on a date to be set. Respondent's signature appears on the NTA acknowledging proper service. The charging document was filed with the Charlotte Immigration Court on July 10, 2009, thereby vesting this Court with jurisdiction. *See* 8 C.F.R. § 1003.14(a).

On May 8, 2009, a Notice of Hearing was sent to Respondent via regular mail. The Notice of Hearing informed Respondent that her case had been scheduled for a hearing on September 9, 2009, and indicated the time and place of the hearing.

On September 9, 2009, the date of the scheduled hearing, Respondent was not present in Court. The DHS motioned the Court to proceed in Respondent's absence as there was no apparent reason why Respondent was not in court. The Court granted the motion and held an *in absentia*

hearing under section 240(b)(5)(A) of the Act, which states that any alien who, after written notice required under paragraph (1) and (2) of section 239(a) has been provided to the alien, does not attend a proceeding under this section, shall be ordered removed *in absentia* if the DHS establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable. The Court found that the DHS had met its burden of showing that Respondent was removable by clear, unequivocal, and convincing evidence pursuant to section 240(b)(5)(A) of the Act; and ordered Respondent removed from the United States to Mali. *See* 8 C.F.R. § 3.26(c).

On January 11, 2010, Respondent, through counsel, filed a motion to reopen removal proceedings. Respondent requests that the court reopen removal proceedings and rescind the *in absentia* order because she did not receive the Notice of Hearing. The Court denied Respondent's motion. Respondent appealed to the Board of Immigration Appeals ("Board" or "BIA"). On February 8, 2011, the Board issued a decision remanding Respondent's case to the Court for consideration of Respondent's motion to reopen. Specifically, the Board directed the Court to consider whether Respondent's evidence was sufficient to overcome the presumption of receipt that attaches to notices sent by regular mail.

For the reasons set forth below, the Court will deny Respondent's motion.

II. Findings

Generally, only one motion to reopen may be filed before the Immigration Court and such motion must be filed within ninety days of the final administrative order of removal. 8 C.F.R. § 1003.23(b). The applicant must make a *prima facie* case for the underlying substantive relief by stating new facts that will be proven at a hearing if the motion is granted, and it must be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3); *see also INS v. Abudu*, 485 U.S. 94 (1988). A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen to apply for a form of discretionary relief will not be granted if the respondent's right to apply for such relief was fully explained by the Immigration Judge at the previous hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. 8 C.F.R. § 1003.23(b)(3). Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and supporting documentation. *Id.* Finally, if the ultimate relief is discretionary, the Immigration Judge may deny a motion to reopen even if the moving party demonstrates *prima facie* eligibility for relief. *Id.*; *see Abudu*, 485 U.S. 94.

A motion to reopen for purposes of rescinding an *in absentia* removal order may be filed at any time where the alien demonstrates that he did not receive notice of the hearing and the failure to appear was through no fault of his own. *See* INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii). Due process is satisfied so long as the method of notice is conducted "in a manner 'reasonably calculated' to ensure that notice reaches the alien." *United States v. Dominguez*, 284 F.3d 1258, 1259 (11th Cir. 2002). Notice to the alien at the most recent address provided by the alien to the

court is sufficient notice. *Id.* The last address provided to DHS qualifies as a proper address, and notice given to that address is deemed sufficient for purposes of *in absentia* hearings if the alien has not notified the court of a change of address. INA § 240(b)(5)(A); *Matter of G-Y-R-*, 23 I. & N. Dec. 181 (BIA 2001). Furthermore, it is the affirmative duty of an alien to provide the DHS with a correct address in writing within 10 days from the date of a change of address. *See* INA §§ 262, 265; *Dominguez*, 284 F.3d at 1260.

In this case, Respondent claims she never received the Notice of Hearing and, thus, her failure to appear should be excused. On May 8, 2009, the Notice of Hearing was sent via regular mail to "6630 Idlewild Road, Apt A, Charlotte, North Carolina 28212." The Certificate of Service on the Notice of Hearing provides that Respondent was served, by regular mail to the alien, in accordance with Section 239(a)(1)(F) of the Act. Respondent acknowledges that the 6630 Idlewild Road, Apt A, address was, and currently is, her correct address. However, Respondent alleges that she never received the Notice of Hearing.

Service of notice by mail is sufficient under Section 239(c) of the Act if there is proof of attempted delivery to the last address provided by the alien. The record indicates that Respondent provided the 6630 Idlewild Road, Apt A, address to the DHS after receiving personal service of the NTA. Furthermore, Respondent agrees that this address was correct and concedes receipt of Order of Supervision by the Immigration and Customs Enforcement ("ICE") at this same address. Therefore, notice of the hearing was conducted in a manner reasonably calculated to reach Respondent. *Dominguez*, 284 F.3d 1258.

However, an alien may overcome the presumption of delivery that applies to regular mail. *Matter of M-R-A*, 24 I. & N. Dec. 665 (BIA 2008) (holding that the presumption of delivery for documents sent by regular mail is weaker than the presumption that applies to documents sent by certified mail); *see also Matter of G-Y-R-*, 23 I. & N. Dec. 181 (holding that application of a strong presumption to the use of regular mail is unwarranted). In determining whether an alien has submitted sufficient evidence to overcome the weaker presumption of delivery that applies to regular mail, the court should consider the following nonexclusive factors: the alien's affidavit of nonreceipt of notice; affidavits from other family members or individuals with knowledge as to whether notice was received; the alien's due diligence in seeking to redress the *in absentia* removal order; any affirmative prior application for relief or any other prior application for relief indicating an incentive to appear; the alien's previous attendance at Immigration Court proceedings; and, any other circumstances or evidence indicating possible lack of notice. *Matter of M-R-A*, 24 I. & N. Dec. at 674; *see also Matter of C-R-C-*, 24 I. & N. Dec. 677 (BIA 2008).

The Court finds that Respondent's evidence is insufficient to overcome the presumption of delivery that applies to regular mail. Respondent submitted an affidavit attesting that she did not receive the notice of hearing. She further attests that she did not become aware of the removal order until she was served an Order of Supervision by ICE on September 14, 2009. Respondent did not, however, submit any affidavits from other household members attesting to her nonreceipt of the notice. Furthermore, Respondent filed her motion to reopen in January 2010, over four months after

she learned that she had been ordered removed. The Court finds that waiting four months to redress an *in absentia* removal order is not an exercise of due diligence. Respondent's attorney argues that Respondent acted as soon as she had sufficient money to hire an attorney. Respondent's affidavit, however, does not explain why she waited four months before filing her motion to reopen. The Notice of Hearing was not returned to the Court nor has Respondent offered any evidence, other than her affidavit, to indicate that it was not properly delivered. Respondent has also not indicated any eligibility for relief that would have served as a motivation for her to appear.

III. Conclusion

For the reasons set forth above, the Court will deny Respondent's motion to reopen.

Accordingly, the following orders shall be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's motion to reopen is DENIED.

3/9/11
Date

Theresa Holmes Simmons
United States Immigration Judge
Charlotte, NC