U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: BALCARCEL, SANDRA LORENA **A 074-263-332**

Date of this notice: 4/13/2018

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:
Crossett, John P.
Greer, Anne J.
Cole, Patricia A.

Userteam: Docket

File: A074 263 332 – Arlington, VA

Date: APR 13 2018

In re: Sandra Lorena BALCARCEL

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Margaret W. Wong, Esquire

APPLICATION: Reopening

The respondent appeals from an Immigration Judge's May 16, 2017, decision denying her motion to reopen an *in absentia* removal order. The appeal will be sustained and the record remanded.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent renews the arguments she made before the Immigration Judge (Respondent's Br. at 1-14)—specifically, that she did not receive proper notice of her hearing because her documents were forged and that the consequences for her failure to appear were not read back to her orally in her native Spanish language. The respondent also contends that she demonstrated exceptional circumstances warranting *sua sponte* reopening because the Department of Homeland Security (DHS) filed an affirmative non-opposition to the motion (Respondent's Br. at 1-14; IJ at 3).

Upon de novo review, we conclude that the DHS's affirmative non-opposition to the respondent's motion to reopen was highly significant and constitutes an exceptional situation warranting *sua sponte* reopening. *See Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) (stating that "[w]e believe the parties have an important role to play in these administrative proceedings, and that their agreement on an issue or proper course of action should, in most instances, be determinative"). In view of the totality of the circumstances presented here, including the fact that the respondent has now been in the United States for over 20 years, is married to a United States citizen, and has four United States citizen children, and in light of the exceptional situation presented, the proceedings will be reopened *sua sponte*. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). On remand, the respondent will have the opportunity to apply for any relief that may be available to her.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained and the Immigration Judge's decision denying reopening is vacated.

FURTHER ORDER: The removal proceedings are reopened and the record is remanded to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTER OF:	)	**IN DEPORTATION PROCEEDINGS**
	)	
BALCARCEL, Sandra Lorena,	)	**File No.:** A 074 – 263 – 332
	)	
Respondent.	)	
	)	

APPLICATION: Motion to Reopen.

APPEARANCES

ON BEHALF OF THE RESPONDENT:
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Cleveland, OH 44114

ON BEHALF OF THE GOVERNMENT:
Kathryn J.H. Boardman
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Arlington, VA 22202

DENIAL OF MOTION TO REOPEN

I. PROCEDURAL HISTORY

The Respondent is a native and citizen of Guatemala. See Exh. 1. She entered the U.S. without inspection at or near Nogalez, Arizona on or about January 10, 1992. See id. On June 1, 1995, the Respondent filed an Application for Asylum and for Withholding of Removal (Form I-589), seeking asylum and withholding of removal under the Act. See Exh. 4. On July 17, 1995, the legacy Immigration and Naturalization Services ("INS") issued an Order to Show Cause and Notice of Hearing (Form I-221). See Exh. 1. On the same day, INS personally served the Respondent a copy of the Form I-221. See id. On August 2, 1995, the Respondent was sent a Notice of Hearing set for August 21, 1995, via certified mail. See Exh. 2. The Respondent's signature appears on the signed receipt for this mailing. See Exh. 3. The Respondent failed to appear at the August 21, 1995, hearing. Consequently, a predecessor immigration judge to the Immigration Court entered a deportation order *in absentia*. On March 27, 2017, the Respondent filed a motion to rescind the *in absentia* deportation order and reopen her deportation proceedings, claiming she had not received notice of her August 21, 1995, hearing. See Mot. to Reopen at 1. For the following reasons, the Immigration Court denies the Respondent's motion to reopen.

II. DISCUSSION

A party seeking reopening bears a heavy burden because motions to reopen are disfavored. Matter of Coelho, 20 I&N Dec. 464, 472 (BIA 1992). If the Immigration Court enters a removal order *in absentia*, it may rescind the removal order if the Respondent files a motion to reopen within 180 days after the date of the order of removal and the Respondent demonstrates exceptional circumstances prevented her from appearing. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(iii)(1). If the Respondent demonstrates she did not receive notice in accordance with INA § 239(a)(1) or (2), a motion to reopen can be filed at any time. 8 C.F.R. § 1003.23(b)(4)(iii)(2). A motion to reopen "shall be supported by affidavits and other evidentiary material." Id. § 1003.23(b)(3). Alternatively, the Court may reopen a case *sua sponte*. Id. § 1003.23(b).

Where notice of deportation proceedings is sent via certified mail through the U.S. Postal Service and there is proof of attempted delivery, a strong presumption of effective service arises. See Matter of Grijalva, 21 I&N Dec. 27, 37 (BIA 1995). An unsupported denial of receipt of certified mail notices is not sufficient to support a motion to reopen and rescind an *in absentia* order. Id. To rebut the presumption of effective service, a respondent must "present substantial and probative evidence such as documentary evidence from the Postal Service, third party affidavits, or other similar evidence" demonstrating improper delivery or non-delivery. See id.

The Respondent failed to demonstrate she lacked proper notice of her hearing. Although the Respondent claims she did not receive notice of her deportation proceedings, see Mot. to Reopen at 7, record evidence contradicts this claim. First, the Respondent's Form I-221 bears the Respondent's signature and states an immigration official personally served the Respondent on July 17, 1995. See Exh. 1. Similarly, the Respondent's signature appears on the signed certified mail receipt for the Respondent's notice of hearing sent to the Respondent's address of record. See Exh. 3. Although Respondent suggests these signatures are forgeries, she provided no "substantial or probative evidence" to support this claim. Respondent provided no third-party affidavits or other documentary evidence to support her claim of improper delivery. As such, the Respondent has failed to rebut the strong presumption of delivery that arises when notice is sent via certified mail.

Additionally, the Respondent's claim, that she lacked proper notice because she did not receive oral warning of the consequences for failing to appear, is a misreading of the Act's notice requirements. Respondent argues "[o]ral warnings of an alien's immigration consequences for failure to appear . . . must be provided." Mot. to Reopen at 7; however, the INA contains no such requirement. Rather, the Act provides that the Immigration Court may enter an *in absentia* removal order where, "after *written* notice . . . has been provided to the alien or alien's counsel of record, [the alien] does not attend [immigration proceedings]" and "the Service establishes by clear, unequivocal, and convincing evidence that the *written* notice was provided and that the alien

is removable." INA § 240(b)(5).[1] Accordingly, the Immigration Court finds the Respondent failed to establish she lacked proper notice of her deportation proceedings.

The Respondent also failed to provide sufficient evidence of exceptional circumstances that merit the Immigration Court reopening her case *sua sponte*. The Immigration Court's *sua sponte* authority is a discretionary remedy that is "reserved for truly exceptional situations." Matter of G-D-, 22 I&N Dec. 1132, 1133-34 (BIA 1999); see also Matter of Jean, 23 I&N Dec. 373, 380 n.9 (AG 2002). The Immigration Court's *sua sponte* power to reopen a case "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." Matter of J-J-, 21 I&N Dec. 976, 984 (BIA 1997); see Matter of G-D-, 22 I&N Dec. 1132, 1133-34 (BIA 1999). As discussed above, the Respondent failed to demonstrate she did not receive notice of her hearing. Moreover, the Respondent provided no evidence, other than her own affidavit, to support the claim that an individual by the name of Rosa, had forged the Respondent's signature on court filings. The Respondent did not provide evidence of any other exceptional circumstances that merit an exercise of the Immigration Court's *sua sponte* power. Therefore, the Immigration Court denies the Respondent's motion to reopen.

Accordingly, the Court enters the following order:

ORDERS

It Is Ordered that the Respondent's motion to reopen proceedings be **DENIED.**

MAY 16, 2017
Date

Rodger C. Harris
U.S. Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty calendar days after the date of service of this decision.

[1] The Immigration Court notes the section upon which the Respondent relies applies only to a respondent's eligibility for discretionary relief after a final order of removal has been entered. See INA § 240(b)(7); Matter of M-S-, 22 I&N Dec. 349, 355 (BIA 1998) (acknowledging the respondent's failure to appear at deportation proceedings after receiving oral notice, in a language the respondent understands, of the consequences of failing to appear, renders the respondent *ineligible for obtaining discretionary relief from deportation* for a statutorily mandated period).