U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: CHEN, ZAO

A 200-185-351

Date of this notice: 10/1/2018

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:
Snow, Thomas G
Adkins-Blanch, Charles K.
Mann, Ana

Userteam: Docket

File: A200-185-351 – New York, NY

Date: OCT 0 1 2018

In re: Zao CHEN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David G. Sullivan, Esquire

APPLICATION: Reconsideration; reopening

The respondent has appealed from the Immigration Judge's June 12, 2018, decision denying his June 4, 2018, motion to reconsider the May 18, 2018, denial of his May 17, 2018, motion to reopen and rescind the Immigration Judge's in absentia order of removal issued on March 7, 2018. The appeal will be sustained, and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

A motion to reconsider will only succeed if it identifies an error of fact or law in the Immigration Judge's prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); 8 C.F.R. § 1003.23(b).

Pursuant to section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C), an in absentia removal order may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing in accordance with sections 239(a)(1) or (2) of the Act, 8 U.S.C. § 1229(a)(1) or (2). Section 240(b)(5)(C)(ii) of the Act; *Matter of Guzman*, 22 I&N Dec. 722, 722-23 (BIA 1999).

Notices to appear that are served via regular mail, as was the case here, "call for a less stringent, rebuttable presumption of receipt," than notices sent by certified mail. *Silva-Carvalho Lopes v. Mukasey*, 517 F.3d 156, 159 (2d Cir. 2008). In *Matter of M-R-A-*, 24 I&N Dec. 665, 674 (BIA 2008), we provided the following framework for evaluating motions to reopen following an in absentia order where the notice of hearing was sent by regular mail:

> In determining whether a respondent has rebutted the weaker presumption of delivery applicable in these circumstances, an Immigration Judge may consider a variety of factors including, but not limited to, the following: (1) the 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 nonreceipt of notice. We emphasize that these are just examples of the types of evidence that can support a motion to reopen. Immigration Judges are neither required to deny reopening if exactly such evidence is not provided nor obliged to grant a motion, even if every type of evidence is submitted. Each case must be evaluated based on its own particular circumstances and evidence.

In this case, the respondent submitted affidavits from himself and his wife claiming non-receipt of the notice for his March 7, 2018, hearing. But more importantly, the respondent – a lawful permanent resident who had applied for naturalization – had a powerful incentive to appear in any immigration proceedings where his lawful status was under threat. We also note that the respondent demonstrated due diligence by filing his May 17, 2018, motion to reopen just 2 months after the issuance of the in absentia order in his case. Finally, the notice of the respondent's final hearing on March 7, 2018, was sent to an address provided on an application for adjustment of status (Form I-485) submitted on September 17, 2012, more than 6 years prior (Exh. 3), yet the respondent's motion to reopen included evidence that he had provided a different address to the Department of Homeland Security (DHS) on his application for naturalization (Form N-400) in October 2016.

Given all of this evidence, we conclude that the respondent has succeeded in rebutting the slight presumption of delivery of the hearing notice in his case. *See Silva-Carvalho Lopes v. Mukasey*, 517 F.3d at 159; *Matter of M-R-A-*, 24 I&N Dec. at 674.

We therefore further conclude that the respondent's June 4, 2018, motion to reconsider succeeded in identifying an error of fact or law in the Immigration Judge's May 18, 2018, decision denying his motion to rescind his in absentia removal order. *See Matter of O-S-G-*, 24 I&N Dec. at 56; 8 C.F.R. § 1003.23(b).

Accordingly, the following order will be issued.

ORDER: The appeal is sustained, the March 7, 2018, in absentia removal order is rescinded, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings.

FOR THE BOARD