U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Mikula, Carolyn McIntosh, Esq.
Carolyn Mikula Law, P.C.
449 Broadway
Suite 9
Everett, MA 02149

DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: CARNEIRO, CLEBSON SOUSA **A 078-254-701**

Date of this notice: 1/6/2017

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.
Mann, Ana
O'Connor, Blair

Userteam: Docket

File: A078 254 701 – Boston, MA Date: JAN - 6 2017

In re: CLEBSON SOUSA CARNEIRO a.k.a. Clebson Carneiro-De Sousa

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carolyn Mikula McIntosh, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Brazil, appeals from an Immigration Judge's decision dated July 13, 2015, denying the respondent's March 5, 2015, motion to reopen his January 21, 2015, removal proceedings, which had been conducted in absentia under section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A). The Department of Homeland Security (DHS) has not filed a response to the appeal. The appeal will be sustained.

We have considered the totality of the circumstances presented in this case and find that reopening and rescission of the in absentia removal order is warranted. We have specifically considered the respondent's affidavit in which the respondent states that, after he was released on his own recognizance by the Immigration and Customs Enforcement (ICE), he reported to ICE on three separate occasions, and once again following the entry of the in absentia order; that the respondent attempted to inform ICE in person and by telephone of his correct address; that the respondent was diligent in seeking reopening; and that the respondent was not given the oral warnings for failing to appear at his hearing in his native language of Portuguese. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). Accordingly, the appeal will be sustained, the in absentia order will be rescinded, the proceedings will be reopened, and the record will be remanded to allow the respondent another opportunity to appear for his hearing.

ORDER: The appeal is sustained, the in absentia order is vacated, proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

IN THE MATTER OF:

CARNEIRO, Clebson Sousa	)	**IN REMOVAL PROCEEDINGS**
a.k.a. CARNEIRO-DE SOUSA, Clebson	)	13 JULY 2015
A 078-254-701	)	
	)	
Respondent	)	

CHARGE: Immigration and Nationality Act (INA or Act) § 212(a)(6)(A)(i): 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.

APPLICATION: Motion for Custody Redetermination

ON BEHALF OF THE RESPONDENT
Thomas P. Glynn, Esq.
537 Broadway
Everett, MA 02149

ON BEHALF OF DHS
Assistant Chief Counsel
Office of the Chief Counsel
15 New Sudbury Street, Room 425
Boston, MA 02203

ORDER OF THE IMMIGRATION COURT

The Respondent's motion for a custody redetermination is denied for lack of jurisdiction.

On January 21, 2015, the Boston Immigration Court (Court) entered an *in absentia* order of removal against the Respondent. On July 13, 2015, the Court denied the Respondent's motion to reopen, at which time his removal order became final. *See* 8 C.F.R. § 1241.1(e); *see also* 8 C.F.R. § 241.4(b)(1) ("An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal . . . shall remain subject to the provisions of this section unless the motion to reopen is granted.").

On March 5, 2015, the Respondent filed with the Court a motion to request a bond hearing. Essentially, the Respondent seeks a modification of the conditions of his release imposed by the Department of Homeland Security—namely, the use of a GPS monitoring device. However, this Court has no authority to redetermine the conditions of an alien's release once an order of removal becomes final.[1] *See* 8 C.F.R. § 1236.1(d)(1). Consequently, the Respondent's motion to request a bond hearing is denied.

[1] If the DHS determines that the Respondent is a class member such that this rule does not apply, the DHS shall inform this court and Respondent's counsel.

ORDER

IT IS HEREBY ORDERED that the Respondent's motion for custody redetermination be **DENIED**.

13 JULY 2015
Date

MATTHEW D'ANGELO
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

IN THE MATTER OF:

CARNEIRO, Clebson Sousa	)	**IN REMOVAL PROCEEDINGS**
a.k.a. CARNEIRO-DE SOUSA, Clebson	)	13 July 2015
A 078-254-701	)	
	)	
Respondent	)	

CHARGE: Immigration and Nationality Act (INA or Act) § 212(a)(6)(A)(i): 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.

APPLICATION: Motion to Reopen

ON BEHALF OF THE RESPONDENT
Thomas P. Glynn, Esq.
537 Broadway
Everett, MA 02149

ON BEHALF OF DHS
Assistant Chief Counsel
Office of the Chief Counsel
15 New Sudbury Street, Room 425
Boston, MA 02203

ON RESPONDENT'S MOTION TO REOPEN

I. Procedural History

On September 5, 2013, the Department of Homeland Security (DHS) apprehended the Respondent, Clebson Sousa Carneiro, and his family at the Santa Rite area at or near Laredo, Texas. Exh. 2, Form I-213 (Jan. 21, 2015). The Respondent and his family were arrested and transported to the Laredo South Border Patrol Station in Laredo, Texas, for processing. *Id.* Shortly thereafter, DHS initiated removal proceedings against the Respondent through personal service of a Notice to Appear (NTA) alleging that the Respondent is not a citizen or national of the United States and is a native and citizen of Brazil who arrived in the United States at or near Laredo, Texas, on or about September 4, 2013, without being admitted or paroled after inspection by an immigration officer. Exh. 1, NTA (Jan. 21, 2015). Based on these allegations, DHS charged the Respondent as removable pursuant to section 212(a)(6)(A)(i) of the Act. *Id.* The Respondent was then released on his own recognizance. *See* Exh. 2; *see also* Resp't Mot. to Reopen at Tab A (Mar. 5, 2015).

The NTA informed the Respondent that he was ordered to appear before an immigration judge for a hearing regarding his removal proceedings on a date and at a time to be determined.

Exh. 1. The Respondent was given oral notice in the Spanish language of the contents of the NTA as well as the consequences of failing to appear as ordered. *Id.* In addition, the Respondent was reminded of his duty to keep the Immigration Court informed of his current address by using Form EOIR-33 whenever his address or telephone number changed during the course of his removal proceedings. *Id.* Upon release from DHS custody, the Respondent reported his address as 12 Cutter Street, Somerville, Massachusetts 02145. Form I-830 (Aug. 22, 2014); *see also* Exh. 1.

On September 22, 2014, the Boston Immigration Court (Court) sent a Notice of Hearing, along with Form EOIR-33, by mail to the Respondent at his reported address—12 Cutter Street, Somerville, Massachusetts 02145. Exh. 1A, Notice of Hearing (Sept. 22, 2014). Nothing in the record suggests that the notice was returned as undeliverable. On January 21, 2015, the Respondent did not appear for his scheduled hearing, and the Court proceeded *in absentia.* Removal Order of the IJ (Jan. 21, 2015). The issue of removability having been established, the Court ordered the Respondent removed to Brazil. *Id.*

II. Motion to Reopen

On March 5, 2015, the Respondent, through counsel, filed a motion to reopen alleging that he never received notice of his January 21, 2015 hearing. Resp't Mot. to Reopen at 2. According to the Respondent, he "had advised ICE both in person and telephonically from the beginning that his address was in Everett, Massachusetts." *Id.* at 3. Specifically, the Respondent asserts that he "did not provide the address to which the final notice of hearing was mailed" and further, that he "advised ICE that this address was incorrect and gave them [his] address at: 3 Elmwood Street, Apartment # 2, Everett, Massachusetts." *Id.* at 5, 17 ¶ 6. Accordingly, because the NTA "did not contain the date and time of his hearing," the Respondent argues that the notice requirements of INA § 239(a)(G)(i) were never fulfilled "because he never received written notice of the time and date of his hearing at an address he provided." *Id.* at 5. Alternatively, the Respondent requests *sua sponte* reopening, contending that his circumstances rise to the level of exceptional circumstances because he "has complied with ICE's entire request for reporting" and "made known to ICE his appropriate address." *Id.* at 7.

The Respondent seeks to reopen his proceedings so that he may seek relief in the form of asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 2. In support of his motion, the Respondent submitted, *inter alia*, two sworn affidavits[1] and a Form I-589. *Id.* at Tabs C-D.

III. Standards of Law

In general, motions to reopen are "disfavored as contrary to 'the compelling public interests in finality and the expeditious processing of proceedings.'" *Raza v. Gonzalez*, 484 F.3d 125, 127 (1st Cir. 2007) (quoting *Roberts v. Gonzales*, 422 F.3d 33, 35 (1st Cir. 2005)). Accordingly, there are procedural and substantive bars to reopening removal proceedings. *See*

[1] The Respondent's first affidavit addresses his failure to appear at his January 21, 2015 hearing. *See id.* at Tab C. The Respondent's second affidavit addresses his I-589 application. *See id.* at Tab D, 32-34.

Smith v. Holder, 627 F.3d 427, 433 (1st Cir. 2010); *see also* 8 C.F.R. §§ 1003.23(b)(1), (b)(3)–(4) (2014).

The Court may upon its own motion at any time, or upon motion by DHS or the Respondent, reopen or reconsider any case in which it has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals (BIA or Board). 8 C.F.R. § 1003.23(b)(1). Subject to limited exceptions, a party may only file one motion to reopen, which must generally be filed within ninety days of the entry of a final order of removal. *Id.* With respect to orders of removal entered *in absentia*, such orders may be rescinded only upon (1) a motion to reopen filed within 180 days after the date of the order of removal only if the alien demonstrates that the failure to appear resulted from exceptional circumstances (as defined in section 240(e)(1) of the Act) or (2) a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). Notice shall be served either in person or, where personal service is impractical, by regular mail to the Respondent's last known address. INA § 239(a)(1); 8 C.F.R. § 1003.13.

The motion to reopen shall state the new facts that the party will prove at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3). Further, a motion to reopen for the purpose of applying for a form of relief must be accompanied by the appropriate application for relief and all supporting documents. *Id.*; *Palma-Mazariegos v. Keisler*, 504 F.3d 144, 147 (1st Cir. 2007). To reopen his case, the Respondent must establish a *prima facie* case of eligibility for the underlying relief sought. 8 C.F.R. § 1003.23(b)(3); *see also INS v. Abudu,* 485 U.S. 94 (1988). Although the Court has broad discretion to grant or deny motions to reopen, an applicant must meet the "heavy burden" of showing that the new evidence offered would likely change the outcome of the case if the proceedings were reopened. *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992).

While the Court may reopen a case under its *sua sponte* power, as a general rule such authority is used sparingly; it is not meant to be a "general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but rather as an extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1133 (BIA 1999); *see also Matter of Jean*, 23 I&N Dec. 373, 380 n.9 (A.G. 2002).

IV. Findings of Fact and Conclusions of Law

As a preliminary matter, the Court finds that the Respondent's motion to reopen is timely as it has been filed within ninety days of the entry of the final order of removal. *See* 8 C.F.R. § 1003.23(b)(1); Removal Order of the IJ; Resp't Mot. to Reopen. Nevertheless, the Court finds that the Respondent has not demonstrated that he did not receive sufficient notice of the January 21, 2015 hearing. *See* INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii).

To begin with, notwithstanding the Respondent's contention that he never received notice of his hearing, the Court finds that the notice of hearing was sent to the Respondent, by regular mail and according to normal office procedures, at the only address he provided to the Court—12 Cutter Street, Somerville, Massachusetts 02145. *See* Exhs. 1-1A; Form I-830. Accordingly, delivery of the notice of hearing to the Respondent is presumed. *See Matter of M-R-A-*, 24 I&N

Dec. 665, 673 (BIA 2008) ("We find it is proper to apply some presumption of receipt to a Notice to Appear or Notice of Hearing sent by regular mail when the notice is properly addressed and mailed according to normal office procedures."). Moreover, this was the same address listed on the NTA, which was personally served upon the Respondent. *See* Exh. 1. Thus, in order for the Respondent to prevail on his motion to reopen, he must present sufficient evidence to overcome this presumption of delivery. *See Matter of M-R-A-*, 24 I&N Dec. at 673 ("[W]hen a respondent seeks to reopen proceedings based on a claim of lack of receipt of notice, the question to be determined is whether the respondent has presented sufficient evidence to overcome the weaker presumption of delivery attached to notices delivered by regular mail.").

In determining whether sufficient evidence has been presented to rebut the presumption of delivery that is associated with the use of regular mail, the Court may consider a variety of factors that can support a motion to reopen. *See id.* at 674 (identifying several of the relevant factors and emphasizing that "[e]ach case must be evaluated based on its own particular circumstances and evidence."). With respect to the Respondent's motion to reopen, there is little to no evidence in the record that rebuts the presumption of delivery. First, the Respondent has not initiated the proceedings himself, such as by affirmatively applying for a particular form of relief, which would serve to bolster the Respondent's incentive to appear. *Cf. id.* (finding that the respondent's affirmative application for asylum established his incentive to appear and negated any motive to miss subsequent hearings thereby rebutting the presumption of delivery). Moreover, it does not appear that the Respondent's notice of hearing was returned to the Court as undeliverable. Rather, the only evidence offered by the Respondent in support of his motion to reopen are his own assertions that he did not receive notice of the hearing, that the address to which the notice of hearing was sent was not the address he provided, and that the address he reported to DHS is 3 Elmwood Street, Apartment # 2, Everett, Massachusetts. *See* Resp't Mot. to Reopen at 5, 17 ¶ 6. However, while the First Circuit has declined to presume that every notice sent by regular mail has been received by the recipient absent an extraordinary evidentiary showing, it has expressed that "a bare, uncorroborated, self-serving denial of receipt, even if sworn, is weak evidence." *Kozak v. Gonzales*, 502 F.3d 34, 37 (1st Cir. 2007).

Furthermore, while the Respondent does not expressly assert that ICE made an error in recording his address when he was personally served with the NTA, such an argument—even if inferred from the Respondent's motion to reopen—would not be sufficient to rebut the presumption of delivery. First, the blatant discrepancy between the two addresses suggests that any potential error in the recording of the address was not due to a mere omission or oversight on the part of DHS. In other words, there is no evidence suggesting that DHS did not accurately record the Respondent's address as given in the ordinary course. Second, the failure to cure any potential defect in the Respondent's reported address cannot be attributed to DHS or the Court in the first place, as that responsibility rests entirely with the Respondent. *See* 8 C.F.R. § 1003.15(d)(1); *see also Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995) ("[The] presumption of effective service may be overcome by the affirmative defense of nondelivery or improper delivery . . . [if] the respondent [] present[s] substantial and probative evidence . . . demonstrating that there was improper delivery or that nondelivery was *not due to the respondent's failure* to provide an address where he could receive mail.") (emphasis added). Moreover, although the Respondent makes the bare assertion that he advised DHS that his address was incorrect and then provided them with the correct address, any effort to cure a

potential defect in the Respondent's reported address must be directed toward the Immigration Court through the use of Form EOIR-33. *See* 8 C.F.R. § 1003.15(d)(1) (providing that if an alien's address as listed on the NTA is incorrect, "the alien must provide to the *Immigration Court* . . . an address . . . at which the alien can be contacted) (emphasis added); *see also* Exh. 1 ("You must notify the *Immigration Court* immediately by using Form EOIR-33 whenever you change your address . . . during the course of this proceeding.") (emphasis added). Finally, and especially determinative, the address to which the notice of hearing was sent to is the same address listed on the NTA, which was signed by the Respondent. *See* Exhs. 1-1A.

Ultimately, the Respondent cannot now claim a lack of notice due to what amounts to his own negligence. The Respondent was personally served with a NTA on September 5, 2013. Exh. 1. The Respondent was thereby advised, both in writing and orally, that removal proceedings had been initiated against him and that he should soon expect a notice informing him of his hearing before the Court. In addition, the Respondent was also advised of his duty to keep the Court informed of any changes in his address. *See id.* Given the gravity of these advisements, this duty naturally encompassed any errors in the initial recording of the Respondent's address to which the Respondent should have reasonably been aware of. *See Matter of M-R-A-*, 24 I&N Dec. at 675 ("[A] respondent cannot evade delivery of a properly sent Notice of Hearing by relocating without providing the required change of address and then request reopening of in absentia proceedings on the basis of a claim that he did not receive notice."). Despite this, the Respondent offers no evidence demonstrating that he ever submitted or attempted to submit a Form EOIR-33 to the Court in order to indicate his correct address. Accordingly, the Court finds that the Respondent has failed to show the requisite lack of notice with respect to his January 21, 2015 hearing to warrant the reopening of his proceedings on that basis. *See* INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii).

Finally, in addition to the circumstances described above, the Respondent has failed to demonstrate *prima facie* eligibility for the relief he seeks, and thus, the Court declines to exercise its limited discretion to reopen *sua sponte*. *See* 8 C.F.R. § 1003.23(b)(3); *see also Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (holding the BIA and Immigration Judge's power to reopen or reconsider cases *sua sponte* is limited to exceptional circumstances and is not meant to cure filing defects or circumvent regulations, where enforcing them might result in hardship). Specifically, although the Respondent indicated in his Form I-589 that he is seeking asylum or withholding of removal on the basis of membership in a particular social group, he did not expressly articulate any particular social group to which he belongs or with which he identifies.[2] *See* Resp't Mot. to Reopen at Tab D; *see also Matter of A-T-*, 24 I&N Dec. 617, 623 n.7 (BIA 2008) (discussing the importance of establishing the "on account of" element in asylum and withholding claims and explaining that it is the applicant's burden to initially identify the particular social group or groups in which membership is claimed); *Rodriguez-Ramirez v. Ashcroft*, 398 F. 3d 120, 125 (1st Cir. 2005) ("[A] person who claims a fear of persecution on account of social group membership must at a bare minimum identify with particularity the social group with which he claims to be associated."). At most, the Respondent indicated in his second affidavit that he and his family's home in the city of Goiania were targeted by the local

[2] Although the Respondent also indicated that he is seeking asylum or withholding of removal on the basis of race, nationality, political opinion, and the Convention Against Torture, he has not provided any evidence nor made any assertions as to his eligibility on either of those grounds. *See* Resp't Mot. to Reopen at Tab D.

police because "these individuals targeted people who had returned from the United States after years away . . . . [because] these bandits thought that we had returned with a lot of money from the United States." Resp't Mot. to Reopen at Tab D, 34 ¶¶ 13-20. However, even if the Court infers from the Respondent's second affidavit that he identifies his social group as individuals having spent time in the United States prior to returning to their home country, such a group is not a viable particular social group for purposes of asylum and withholding of removal. *See Rojas-Perez v. Holder*, 699 F.3d 74, 78 (1st Cir. 2012) ("Both this court and the BIA have rejected calls to recognize individuals who might be perceived as being wealthy or as 'having money' and are returning to their country of origin after living in the Unites States as legally cognizable social groups.").

Accordingly, the following order shall be entered:

ORDER

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

13 July 2015
Date

MATTHEW D'ANGELO
Immigration Judge