U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: PEREZ-HERNANDEZ, MARTHA ... **A 092-773-151**

Date of this notice: 6/15/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
O'Connor, Blair
Pauley, Roger

Userteam: Docket

File: A092 773 151 – Los Angeles, CA

Date: JUN 15 2017

In re: Martha Alicia PEREZ-HERNANDEZ

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Christopher John Stender, Esquire

APPLICATION: Reopening

The applicant, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated December 10, 2015,[1] denying her motion to reopen and rescind the in absentia order of exclusion entered on May 5, 1992. The Department of Homeland Security (DHS) has not filed a response to the appeal, which will be sustained.

In her motion, the applicant first contended that she should not have been placed in exclusion proceedings when she attempted to reenter the United States in March 1992 without having obtained advanced parole prior to her departure (I.J. at 2-3; App'l Br. at 3-7). Specifically, she argues that because she was an applicant for temporary residence under section 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a, and was a member of the class certified in *Catholic Soc. Servs. v. Meese*, 685 F. Supp. 1149 (E.D. Cal. 1988), under the Ninth Circuit's decision in *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270 (9th Cir. 1996) (invalidating the advance parole requirement at 8 C.F.R. §§ 245a.2(l)(2) and (m)(1) in light of *Rosenberg v. Fleuti*, 374 U.S. 449 (1963)), her brief, casual, and innocent departure without advance parole did not meaningfully disrupt her residence in the United States and could not have subjected her to exclusion proceedings. She further argues that, even if the Immigration Judge had jurisdiction to conduct the proceedings, rescission is appropriate because she never received a determination as to whether her absence was "brief, casual, and innocent."

The Immigration Judge held that the applicant's argument was misplaced (I.J. at 2-3). First, citing *Landon v. Plasencia*, 459 U.S. 21 (1982), the Immigration Judge held that he had the authority to conduct an exclusion proceeding to determine whether the applicant was attempting to enter the United States, including whether the departure was "brief, casual, and innocent." Second, citing section 291 of the Act, 8 U.S.C. § 1361, and *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994), the Immigration Judge held that the burden of proof to demonstrate that the applicant was in fact improperly placed in exclusion proceedings was on her, and that she could not carry her burden of proof by failing to appear.

[1] Following the original Immigration Judge's retirement, the applicant's motion to reissue the decision was reassigned to a new Immigration Judge. The new Immigration Judge granted the motion to reissue on February 3, 2016.

On review, we disagree with the Immigration Judge that the burden of proof was on the applicant. The provision the Immigration Judge relied on, section 291 of the Act, applies, inter alia, to aliens making an application for admission or otherwise making attempts to enter the United States. However, the Ninth Circuit's decision in *Espinoza-Gutierrez* applied *Fleuti* to returning applicants for temporary residence. *See Fleuti*, *supra*, at 462 ("[A]n innocent, casual, and brief excursion by a resident alien outside this country's borders . . . may not subject him to the consequences of an 'entry' into the country on his return."). In this context, we have long held "that the [government] bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission." *See Matter of Rivens*, 25 I&N Dec. 623, 625-26 (BIA 2011) (citing *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988); *Matter of Kane*, 15 I&N Dec. 258 (BIA 1975), and *Plasencia*, *supra*). Thus, the Immigration Judge should have placed the burden of proof on the DHS to demonstrate that the applicant was properly subject to the consequences of an "entry" into the country on her return. As there is no indication in the record that the DHS made this showing, we will sustain the applicant's appeal, and grant the motion to reopen the instant exclusion proceedings.

We find it unnecessary to reach the applicant's additional contentions on appeal, including whether she had reasonable cause for failing to appear because she did not receive the mailed notice of the May 5, 1992, hearing (I.J. at 3-4; App'l Br. at 2, 7-8) or that we should reopen and remand the record to the Immigration Judge for termination or administrative closure so that she may pursue adjustment of status before United States Citizenship and Immigration Services (App'l Br. at 8-9).[2] Accordingly, the appeal will be sustained, the proceedings will be reopened, and the record will be remanded for further proceedings. The following order will be entered.

ORDER: The applicant's appeal is sustained, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing discussion and the entry of a new decision.

FOR THE BOARD

[2] We observe that this issue is raised for the first time on appeal.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File Nos.:	**A 092 773 151**	)	
		)	
In the Matter of:		)	
		)	
	PEREZ-HERNANDEZ,	)	**EXCLUSION PROCEEDINGS**
	Martha Alicia	)	
		)	
Respondent		)	

CHARGE: Section 212(a)(7)(A)(i)(1) of the Immigration and Nationality Act (INA) *—alien not in possession of a valid entry document*

APPLICATION: Motion to Reissue

ON BEHALF OF RESPONDENT:
Christopher J. Stender, Esquire
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141 East Palm Lane, Suite 112
Phoenix, AZ 85004

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

ORDER OF THE IMMIGRATION JUDGE

The Respondent's motion to reissue is granted for good cause—to wit, Court error.

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's motion be **GRANTED**.

Date: 2/3/16

Christine E. Stancill
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

DEC 10 2015

File No.:	**A 092 773 151**	)
In the Matter of:		)
	PEREZ-HERNANDEZ, Martha Alicia,	) **IN EXCLUSION PROCEEDINGS**
Applicant		)

CHARGE: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (INA) (1992) *–immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document*

APPLICATION: Motion to Reopen

ON BEHALF OF APPLICANT:
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Federal Immigration Counselors
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Oakland, California 94612

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

On March 27, 1992, the Government personally served Martha Alicia Perez-Hernandez (Applicant) with a Notice to Applicant for Admission Detained for Hearing before Immigration Judge (Form I-122), charging her with excludability under former INA § 212(a)(7)(A)(i)(I), as an immigrant not in possession of a valid entry document at the time of application for admission. Jurisdiction vested and exclusion proceedings commenced when the Government filed the Form I-122 with the Court on April 20, 1992. *See* 8 C.F.R. § 3.14(a) (1992).

On April 20, 1992, the Court sent written notice to the most recent address provided by Applicant, informing her that her case was scheduled for a hearing on May 5, 1992. On that date, she failed to appear for her hearing. The Court, proceeding *in absentia*, found that she had not established her eligibility for admission or any discretionary relief, and ordered her excluded and deported from the United States based on the charge in the Form I-122.

On July 29, 2015, Applicant, through counsel, filed the pending motion requesting that the Court reopen proceedings because, based on a change in law, the Court lacked jurisdiction to

conduct exclusion proceedings when it issued the *in absentia* order. In the alternative, she argues she did not receive proper notice. For the following reasons, the Court will deny Applicant's motion to reopen.

II. Law and Analysis

A. Jurisdiction

Congress passed former INA § 245A as part of the Immigration Reform and Control Act of 1986, Pub.L. No. 99–603, reprinted in 1986 U.S.C.C.A.N. 5649 (100 Stat. 3359). INA § 245A allowed aliens residing in the United States unlawfully since 1981 to obtain legal status. INA § 245A (1992); *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1272 (9th Cir. 1996). Those who met the statutory requirements and filed timely applications were granted temporary resident status. INA § 245A(a); *Espinoza-Gutierrez*, 94 F.3d at 1272. After one year residing as a temporary resident in the United States, the alien was permitted to adjust status to that of lawful permanent resident. INA § 245A(b).

The regulations implementing this statutory scheme required those with pending applications for temporary resident status under INA § 245A(a) to obtain advance parole prior to departing the country in order to be readmitted. 8 C.F.R. § 245a.2(*l*)(2), (m)(1); *see also Espinoza-Gutierrez*, 94 F.3d at 1272. However, in *Espinoza-Gutierrez*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) invalidated those regulations, finding instead that Congressional intent mandated the application of the test for readmission announced in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). *Espinoza-Gutierrez*, 94 F.3d at 1277. Applying *Fleuti*, the Ninth Circuit found that an applicant for temporary resident status could not be required to obtain advance parole prior to departing the country. *Id.* Instead, as long as the applicant's departure had been "brief, casual, and innocent," the applicant was readmitted and permitted to resume the temporary resident application process. *Id.*

Here, Applicant attempted to reenter the United States and was served with a Form I-122 in March 1992, while the adjudication of her application for temporary resident status was pending. Applicant argues in her motion that she was placed in exclusion proceedings because she did not obtain advance parole prior to her departure. She further asserts that because *Espinoza-Gutierrez* later invalidated the regulations requiring advance parole in such circumstances, and because her departure was "brief, casual, and innocent," she was not attempting to make an "entry." She concludes that therefore exclusion proceedings were inappropriately initiated and the Court lacked jurisdiction to order her excluded.

Applicant's argument is misplaced. Even if she had been improperly placed in exclusion proceedings for failing to acquire advance parole, the Court would not be deprived of jurisdiction to conduct an exclusion proceeding or to order her excluded upon her failure to appear. The Court has authority to conduct an exclusion hearing to determine whether an applicant was attempting to enter the United States. *See Landon v. Plasencia*, 459 U.S. 21, 28 (1982) (concluding that the "question of entry," including whether a departure was "brief, casual, and innocent," is properly determined in an exclusion proceeding); *Matter of Leal*, 15 I&N Dec. 477, 478-479 (BIA 1975). Furthermore, in exclusion proceedings, the burden is on an applicant to demonstrate that she was improperly placed in such proceedings. *See* INA § 291; *Matter of Y-G*,

20 I&N Dec. 794, 797 (BIA 1994). Thus, whether Applicant was properly placed in exclusion proceedings was an appropriate question for the Court to determine at her May 5, 1992 exclusion hearing. When she failed to appear, she was properly ordered excluded because she did not meet her burden of proof.

In sum, the Court had jurisdiction to conduct the exclusion hearing and properly ordered Applicant excluded *in absentia* when she failed to appear, regardless of the change in law presented here.

B. Notice

An applicant seeking to rescind an *in absentia* exclusion order must show "reasonable cause" for her absence from proceedings. *See* INA § 242(b); *Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988). Lack of proper notice of a hearing constitutes reasonable cause for failure to appear. *See Lahmidi v. INS*, 149 F.3d 1011, 1017 (9th Cir. 1998). However, no particular form of service is required when notice of the time, place, and date of the exclusion hearing is sent by the Court, rather than by the Government. *See Matter of Munoz-Santos*, 20 I&N Dec. 205, 207 (BIA 1990) (citing to 8 C.F.R. § 3.17 (1990)).

When notice is sent by regular mail to an applicant's most recent address, there is a presumption of effective service; however, the presumption is weaker than when notice is sent by certified mail. *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002). An applicant may overcome the presumption by presenting sufficient evidence that she did not receive the notice. *Sembiring v. Gonzales*, 499 F.3d 981, 987 (9th Cir. 2007); *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). In determining whether an applicant has rebutted the presumption of delivery, the Court considers any circumstances or evidence indicating possible nonreceipt of notice, including: (1) the applicant's affidavit; (2) affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received; (3) the applicant's actions upon learning of the *in absentia* order, and whether due diligence was exercised in seeking to redress the situation; (4) the applicant's eligibility for relief, indicating that the applicant had an incentive to appear; and (5) the applicant's previous attendance at Court hearings, if applicable. *M-R-A-*, 24 I&N Dec. at 674; *see also Salta*, 314 F.3d at 1079 ("Where a petitioner actually initiates a proceeding to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing, a sworn affidavit . . . that neither she nor a responsible party residing at her address received the notice should ordinarily be sufficient to rebut the presumption of delivery.").

Here, Applicant states in her declaration that she did not receive the mailed notice of the May 5, 1992 hearing at which she was ordered excluded *in absentia*. Although she does not contest that the notice was mailed to her current address, she asserts that mail theft was a common occurrence at her residence during that period and that the notice was likely stolen. Respondent's Motion, Tab A. She further states that had she been aware of the hearing, she "would not have missed [her] opportunity to continue with [her] process for amnesty." *Id.* Finally, she alleges that she only recently learned that she had an *in absentia* order of exclusion issued against her, implying that her actions to redress the situation were diligent. *Id.*

The Court finds that the evidence Applicant has presented is insufficient to demonstrate that she did not receive proper notice of her May 5, 1992 hearing. First, it is unclear whether Applicant had any relief available at the time. The regulations requiring her to obtain advance parole prior to departing the country had not yet been invalidated. *See Espinoza-Gutierrez*, 94 F.3d at 1277. Moreover, notwithstanding the regulations, she has not demonstrated that her departure in 1992 was in fact "brief, casual, and innocent" under the factors provided in *Fleuti*, 374 U.S. at 462. For instance, she has not stated the purpose of her trip abroad or provided any evidence of its duration.[1] Accordingly, although Applicant states that she desired to continue with her application for temporary resident status, she has not demonstrated that she had the ability to do so or that she had any other incentive to appear for her May 5, 1992 hearing.

Second, it is implausible that Applicant failed to inquire as to the status of her pending application for temporary resident status for over twenty years. Had she done so, she would have likely discovered the *in absentia* order of exclusion issued against her. Accordingly, the Court does not find Applicant has demonstrated diligence in these proceedings, in spite of her assertion that she only recently discovered the order of exclusion.

For these reasons, Applicant's statement that notice of her hearing may have been stolen from her mailbox is insufficient to overcome the presumption of effective service in this case. *See M-R-A-*, 24 I&N Dec. at 674. The Court therefore finds that Applicant received proper notice of her May 5, 1992 hearing.

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that Applicant's motion to reopen be **DENIED**.

DATE: DEC 10 2015

Thomas Y.K. Fong
Assistant Chief 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 (30) calendar days from the date of service of this written decision. 8 C.F.R. § 1003.38.

[1] Although counsel states in his motion that Applicant's departure was fifteen days in length; the assertions of counsel are not evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (stating that counsel's unsupported assertions in a brief are not entitled to evidentiary weight).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File Nos.:	**A 092 773 151**	)	
		)	
In the Matter of:		)	
		)	
	PEREZ-HERNANDEZ, Martha Alicia	)	**EXCLUSION PROCEEDINGS**
		)	
		)	
Respondent		)	

CHARGE: Section 212(a)(7)(A)(i)(1) of the Immigration and Nationality Act (INA) *—alien not in possession of a valid entry document*

APPLICATION: Motion to Reissue

ON BEHALF OF RESPONDENT:
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141 East Palm Lane, Suite 112
Phoenix, AZ 85004

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

ORDER OF THE IMMIGRATION JUDGE

The Respondent's motion to reissue is granted for good cause—to wit, Court error.

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's motion be **GRANTED**.

Date: 2/3/16

Christine E. Stancill
Immigration Judge