U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: OLEIWI, AMMAR ALAA

A 201-005-985

Date of this notice: 11/28/2018

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.
Donovan, Teresa L.

Userteam: Docket

File: A201-005-985 – Seattle, WA Date: NOV 28 2018

In re: Ammar Alaa OLEIWI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin C. Byers, Esquire

ON BEHALF OF DHS: Anne McElearney
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Iraq, appeals from the Immigration Judge's April 12, 2018, decision denying his motion to rescind an in absentia removal order and reopen his removal proceedings. *See* section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). The respondent's appeal, which is opposed by the Department of Homeland Security (DHS), will be sustained and the record will be remanded for further proceedings.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was ordered deported in absentia on February 1, 2018, when he failed to appear at the initial master calendar hearing in these proceedings (IJ at 1). On April 2, 2018, the respondent filed a motion to reopen with the Immigration Judge. In the motion, the respondent claims that proceedings should be reopened because he did not receive notice of the hearing, that exceptional circumstances prevented him from attending the hearing, and that sua sponte reopening is warranted. The Immigration Judge concluded that the respondent did not establish a basis upon which to reopen these proceedings.

We conclude that the respondent met his burden to establish that proceedings should be reopened based on lack of notice. *See* section 240(b)(5)(C)(ii) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii). The respondent filed an affirmative asylum application on November 15, 2011. The respondent was interviewed in relation to his application on April 18, 2016. A Notice to Appear (NTA) was served on the respondent via regular mail at the mailing address listed on his asylum application on November 14, 2017.[1] The NTA indicated that the respondent should appear on a date to be determined. The NTA was filed with the Immigration Court on December 8, 2017. On January 4, 2018, the Immigration Court sent the respondent notice of a February 1, 2018,

[1] The asylum application indicates that the respondent's residence and mailing address are different.

hearing. The respondent did not appear for the hearing and was ordered removed in absentia. The respondent claims that he first learned that he had been ordered removed when he was arrested and detained by United States immigration authorities in early March 2018 (Respondent's Motion, Exh. B at 11).

There is a presumption of delivery where an NTA or hearing notice is sent by regular mail, but an alien may seek to overcome this presumption through circumstantial and corroborative evidence. *See Sembiring v. Gonzales*, 499 F.3d 981, 988-89 (9th Cir. 2007) (finding that sufficient evidence may be presented to overcome the presumption of delivery without a sworn affidavit where notice is sent by regular mail); *Matter of M-R-A-*, 24 I&N Dec. 665, 673-74 (BIA 2008) (discussing factors to consider in assessing whether the presumption of delivery has been rebutted).

We conclude that the respondent's declaration and the circumstantial evidence present in this matter is sufficient to rebut the presumption of delivery. The respondent presented himself to the United States government when he filed an affirmative asylum application in 2011. Nearly 5 years later he appeared for an interview in relation to that application. His affidavit indicates that he did not have secure housing throughout much of his time in the United States due to mental health issues and poverty, and that his mail was being sent to the address of an acquaintance. The asylum application generally supports the respondent's claim in that it indicates the respondent's mailing address is different than his residence. The affidavit also indicates that his acquaintance told him in December 2017 that he could no longer receive the respondent's mail because he was moving. It also indicates that the respondent did not receive the NTA or hearing notice when he met with his acquaintance in December 2017.

The fact that the respondent diligently sought asylum for over 5 years, filing the application affirmatively and sitting for an interview, as well his diligence in filing a motion to reopen as soon as reasonably practicable after learning of the in absentia order of removal, persuades us that the respondent met his burden to rebut the presumption that the NTA and hearing notice were delivered. We perceive no basis to conclude that respondent would appear for an asylum interview on April 18, 2016, but would refuse to attend a hearing before the Immigration Judge regarding that application on February 1, 2018, and thereby waive his chance to lawfully reside in the United States based on an application he filed affirmatively in 2011.

We therefore find that under the standards we have set forth for reopening in absentia proceedings, the respondent has overcome the weaker presumption of delivery sent by regular mail. After consideration of the foregoing, we conclude that the respondent met his burden of proof to show that proceedings should be reopened under section 240(b)(5)(C)(ii) of the Act. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained and the record is remanded for further proceedings and the entry of a new decision.

FOR THE BOARD