U.S. Department of Justice

Executive Office for Immigration Review

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Name: GASPAR-TOMAS, EULALIA
Riders:206-462-893

A 206-462-892

Date of this notice: 6/22/2017

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:
Kendall Clark, Molly
Guendelsberger, John
Malphrus, Garry D.

Userteam: Docket

Files: A206 462 892 – Seattle, WA
A206 462 893

Date: JUN 22 2017

In re: EULALIA GASPAR-TOMAS
JUAN MANUEL MONTEJO-GASPAR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Cornell Kirby, Esquire

APPLICATION: Reopening

This case is presently before the Board pursuant to a remand from the United States Court of Appeals for the Ninth Circuit for reconsideration of our September 23, 2015, dismissal of the respondents' appeal. The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings.

In reviewing the evidence of record and applicable circuit court case law, we conclude that the appeal should be sustained and the record remanded pursuant to *Sembiring v. Gonzales*, 499 F.3d 981 (9th Cir. 2007) and *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002). In *Sembiring*, the Ninth Circuit Court of Appeals determined that the alien who had brought herself to the government's attention did not have a motive to avoid immigration proceedings. In *Salta,* the Ninth Circuit Court of Appeals determined that a sworn affidavit from the alien that neither she nor a responsible party residing at her address received the notice should ordinarily be sufficient to rebut the presumption of delivery and entitle an alien to an evidentiary hearing to consider the veracity of her allegations.[1] *Id.* at 1079.

The record reflects that the Notice to Appear (NTA) was personally served on the respondents on August 24, 2014, ordering them to appear before an Immigration Judge at a date and time to be set. On October 16, 2014, the Seattle Immigration Court sent a notice of hearing by regular mail to the address listed on the NTA. The respondents failed to appear at their hearing and on November 6, 2014, the in absentia order was mailed to the respondents. The respondents state in their motion to reopen and attached declaration that they have not moved since coming to the United States and continue to reside at the address listed on the NTA, but never received a hearing notice.

The circumstantial evidence present in the instant matter supports sustaining the respondents' appeal and remanding for further proceedings. As in *Salta,* there is no indication that the

[1] The Ninth Circuit Court of Appeals also noted that "the use of regular mail is now permitted by the governing statute, and that some of the *Grijalva-Arrieta* proof requirements (e.g. documentary evidence from the Postal Service, third party affidavits indicating improper delivery, etc.), which made perfect sense in connection with certified mail, clearly have no application under a regular mail regime." *Id.* at 1080.

respondents had any motive to avoid appearing at the hearing. The respondents in this case willingly presented themselves at an Immigration and Customs Enforcement Office before and after their in absentia removal orders. There is no indication that the respondents moved from the address to which the notice of hearing was sent. Furthermore, they exercised due diligence in promptly retaining counsel and requesting reopening of proceedings once they learned of the in absentia order of removal. *See Matter of M-R-A-*, 24 I&N Dec. 665, 674-76 (BIA 2008) (setting forth the standards for determining if a respondent has presented sufficient evidence to overcome the weaker presumption of delivery that attaches to notices sent by regular mail) and *Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008) (Board held the respondent overcame the presumption of delivery of a Notice to Appear sent by regular mail where he submitted an affidavit stating that he did not receive the notice and additional evidence indicating he had an incentive to appear, and by exercising due diligence in promptly obtaining counsel and requesting reopening of the proceedings). Consequently, we conclude that the respondents have sufficiently rebutted the presumption of delivery. Based on the evidence of the record, the proceedings will be remanded to the Immigration Judge to provide the respondents a hearing and to pursue any applications for relief.

ORDER: The Board's decision of September 23, 2015, is vacated.

FURTHER ORDER: The appeal is sustained, and the record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD