U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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8205 E. Colfax Ave.
Denver, CO 80220

DHS/ICE Office of Chief Counsel - DEN
12445 East Caley Avenue
Centennial, CO 80111-5663

Name: DUARTE-MENDEZ, DANIEL

A 205-208-430

Date of this notice: 8/5/2015

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:
Grant, Edward R.
Guendelsberger, John
Holiona, Hope Malia

Userteam: Docket

File: A205 208 430 – Denver, CO Date: AUG 5 2015

In re: DANIEL DUARTE-MENDEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bryce Erick Downer, Esquire

ON BEHALF OF DHS: Michelle Smith
Senior Attorney

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated July 25, 2014, denying his motion to reopen. The Immigration Judge had previously ordered the respondent's removal from the United States, following the respondent's failure to appear for a hearing on March 5, 2014. The appeal will be sustained, proceedings will be reopened, and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal the respondent contends that he did not receive notice of the March 5, 2014, hearing and he has presented sufficient evidence to overcome the presumption of receipt. The respondent asserts that he received all prior hearing notices, and he had attended all prior hearings.

The Immigration Judge determined that the respondent received the notice of hearing dated October 23, 2013, providing a rescheduled hearing date of March 5, 2014. The Immigration Judge found that the notice of hearing was proper as it was sent to the respondent's last known address, and the respondent failed to rebut the presumption of delivery.

The record reflects that after the respondent was released from custody, a notice of hearing was mailed to him on October 29, 2012, and he appeared for the scheduled hearing on December 12, 2012. Pursuant to a hearing notice served on the respondent in court on December 12, 2012, he appeared for the scheduled hearing on July 31, 2013, but he was informed that the hearing had been rescheduled to October 30, 2013. The respondent asserts on appeal that he appeared for his hearing on that day, but he was informed that he would be receiving a new notice of hearing. The respondent claims that he did not receive a subsequent hearing notice for the March 5, 2014, hearing, and he did not appear for the hearing on that day due to lack of

notice. The notice of hearing was not returned to the Immigration Court as undeliverable. The respondent did not appear for his hearing on March 5, 2014, and he was ordered removed in absentia on that date.

Based on the evidence of record which reflects that the respondent attended all of his prior hearings, and that he continues to reside at the same address to which the hearing notice was sent, we find that the respondent has presented sufficient evidence to overcome the presumption of delivery of the notice of hearing. *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). Furthermore, it appears that when the respondent learned of his order of removal, he exercised due diligence in obtaining counsel and requesting reopening of the proceedings.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294

Levesque Law PLLC
Downer, Bryce Erick
176 E. Calderwood Dr. Ste 150
Meridian, ID 83642

IN THE MATTER OF
DUARTE-MENDEZ, DANIEL

FILE A 205-208-430 DATE: Jul 25, 2014

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294

__ OTHER: _____

_____

COURT CLERK
IMMIGRATION COURT

FF

CC: KATZ, MINDY
12445 E. Caley Avenue
Centennial, CO, 80111

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 SOUT STREET, SUITE 3101
DENVER, CO 80294

In The Matter Of:	)	**Date: 25 July, 2014**
	)	
DUARTE-MENDEZ, Daniel	)	IN REMOVAL
	)	PROCEEDINGS
Respondent.	)	
	)	
File No.: A 205 208 430	)	

MOTION: Motion to Reopen under INA § 240(b)(5)(C).

ON BEHALF OF RESPONDENT:
Bryce E. Downer, Esq.
MyRights Immigration Law Firm
8205 E. Colfax Avenue
Denver, CO 80220

ON BEHALF OF SERVICE:
Aminda B. Katz, Esq.
Assistant Chief Counsel
U.S. Department of Homeland Security
12445 East Caley Avenue
Centennial, CO 80111

WRITTEN DECISION

I. Facts and Procedural History

Daniel Duarte Mendez ("Respondent") is a 21-year-old male, native and citizen Mexico, who entered the United States at or near Douglas, Arizona, on or about June 15, 2009, without inspection. The Department of Homeland Security ("DHS") served Respondent with a Notice to Appear ("NTA") on October 12, 2012, charging Respondent as removable from the United States pursuant to section 212(a)(6)(A)(i) of the Act, as an alien present in the United States without being admitted or paroled. The NTA was filed on October 16, 2012, thereby vesting jurisdiction with this Court.

On December 12, 2012, Respondent requested a continuance in order to obtain counsel. The Court granted Respondent's request, and provided Respondent with a Notice of Hearing, advising him that he was scheduled to appear at the Denver Immigration Court on July 31, 2013.

A Notice of Hearing, dated June 21, 2013, was sent to Respondent's last known address, informing him that his hearing date was rescheduled to October 30, 2013. On October 23, 2013, the Court mailed a new Notice of Hearing to Respondent's last known address, informing him that his hearing date was rescheduled to March 5, 2014. Respondent failed to appear at his master calendar hearing on March 5, 2014.

DHS filed a Form I-213, Record of Deportable/Inadmissible Alien on March 5, 2014.

The Court found that the I-213 established the truth of the factual allegations contained in the NTA. As such, the Court found Respondent removable as charged, and ordered him removed *in absentia* to Mexico. The Court mailed the *in absentia* order of removal to Respondent's last known address on March 5, 2014.

On May 23, 2014, Respondent, through counsel, filed Motion to Reopen ("Motion") alleging that he did not receive notice of his hearing on March 5, 2014. DHS did not file a response to the Motion.

For the reasons set forth below, the Court will deny Respondent's Motion.

II. Motion to Reopen Respondent's *In Absentia* Order

A. Lack of Notice

The respondent bears a heavy burden to demonstrate that the reopening of his case is warranted. *See INS v. Abudu*, 485 U.S. 94, 107 (1988); *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). An Immigration Judge ("IJ") may reopen a case and rescind an *in absentia* order upon a motion to reopen filed at any time if the respondent did not appear because she was not given proper notice or if the respondent was in Federal or State custody through no fault of her own. 8 C.F.R. 1003.23(b)(4)(ii); INA § 240(b)(5)(C)(ii). Notice is deemed proper if it is mailed to a respondent's last known address. INA § 240(b)(5)(A). Where notice is sent to the last known address, a presumption of receipt exists. *Lopes v. Gonzales*, 468 F.3d 81, 84-85 (2d. Cir. 2006).

When notice is sent by regular mail according to normal office procedures, there is a presumption of receipt that respondent must overcome to show a lack of proper notice. *Gurung v. Ashcroft*, 371 F.3d 718, 721 (10th Cir. 2004); *Matter of M-R-A-*, 24 I&N Dec. 665, 671-72 (BIA 2008). However, this is a weaker presumption than that which accompanies mail sent by certified mail. *Matter of M-R-A*, 24 I&N Dec. at 671-72. Therefore, when a respondent claims that he did not receive the notice sent via regular mail, "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." *Id.* at 673.

Moreover, notice is sufficient if the respondent can be "charged" with having received the notice, even when he did not receive actual notice. *See Matter of Grijalva*, 21 I&N Dec. 27, 32 (BIA 1995) (superseded by amendments to the INA with regards to methods of service). The Board has found that a respondent need not personally receive, read, and understand the notice in order for the notice requirement to be satisfied. *Matter of G-Y-R-*, 23 I&N Dec. 181, 187 (BIA 2001). Constructive notice is appropriate when, for example, the notice reaches the respondent's correct address but due to some breakdown in the internal workings of the home, the respondent does not receive actual notice. *Id.*

In his Affidavit, Respondent alleges that he came to the Immigration Court on July 31,

2012,[1] and on that date, he was "given papers" providing the rescheduled court date of October 30, 2013. Motion, Exhibit A at 3. "Then I got a letter indicating my court was changed. But never received another court date." *Id.*[2] Respondent's Notice of Hearing dated June 21, 2013, however, provides a new hearing date of October 30, 2013. Furthermore, the Notice of Hearing dated October 23, 2013, provides a new hearing date of March 5, 2014. Accordingly, Respondent received notice that his hearing was changed and each Notice of Hearing contained the reschedule hearing date.

Respondent does not allege that the Court mailed the notice to the incorrect address, and Respondent's affidavit establishes that he received correspondence from the Court at his address of record. The Court finds that the notice of hearing was proper as it was sent to Respondent's last known address, and Respondent failed to rebut the presumption of receipt. *Gurung v. Ashcroft*, 371 F.3d at 721; *Matter of M-R-A-*, 24 I&N Dec. at 671-72

B. *Sua Sponte*

An IJ may also reopen any case "upon his or her own motion at any time." 8 C.F.R. § 1003.23(b). The "power to reopen [*sua sponte*] is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). *Sua sponte* reopening, therefore, is "an extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999). The respondent has the burden to show that an exceptional situation exists. *Matter of Beckford*, 22 I&N Dec. 1216, 1219 (BIA 2000).

Respondent argues that his case merits *sua sponte* reopening because of his continuous presence in the United States since 2009, and because he "may qualify for the Provisional Waiver to obtain Lawful Permanent Resident status." Motion at 4. Respondent also argues that he may be eligible for asylum, withholding of removal, or voluntary departure. *Id.* at 4-5. Finally, Respondent alleges that he will lose the $15,000.00 bond. *Id.* at 5.

The Court first notes that reopening a case to apply for relief is not a basis for reopening an *in absentia* order, and as such, the Court declines to analyze this argument. *See* 8 C.F.R. 1003.23(b)(4)(iii). The Court finds that Respondent does not merit *sua sponte* reopening of his case. The Court cannot use its power of *sua sponte* reopening "as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations." *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). It is Respondent's burden to show that

[1] Because Respondent was originally scheduled for Court on July 31, 2013, the Court assumes that the date of July 31, 2012, was a typographical error.

[2] In the Motion, Respondent's counsel alleges that Respondent received the hearing notice dated June 21, 2013, rescheduling his hearing from July 31, 2013, to October 30, 2013. Motion at 2. Further, he argues that Respondent appeared in Court for the October 30, 2013, where he was informed that his hearing had been rescheduled and that he would receive a hearing notice, which he never received. *Id.* The Court will assume Respondent's version of the events as presented in his Affidavit. The allegations and arguments made by Respondent's counsel "do not constitute evidence, nor do they establish material facts." *Beltre-Veloz v. Mukasey*, 533 F.3d 7, 10 (1st Cir. 2008); *see also Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980).

an exceptional circumstance exists and he has failed to do so. *Matter of Beckford*, 22 I&N Dec. at 1219.

As such, Respondent has not met his burden to establish that he warrants reopening of his case. Accordingly, the Court enters the following order:

ORDER

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

25 July, 2014

John W. Davis
Immigration Judge