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

Holguin, Alex, Esq.
Dream Act Lawyers
714 W. Olympic Blvd.
Suite 450
Los Angeles, CA 90015

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: GALVEZ, ENNIO EDGARDO

A 095-006-115

Date of this notice: 7/5/2016

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.

Userteam: Docket

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

GALVEZ, ENNIO EDGARDO
A095-006-115
SANTA ANA CITY JAIL
62 CIVIC CENTER PLAZA
SANTA ANA, CA 92701

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: GALVEZ, ENNIO EDGARDO **A 095-006-115**

Date of this notice: 7/5/2016

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.

Userteam:

File: A095 006 115 – Los Angeles, CA

Date: JUL – 5 2016

In re: ENNIO EDGARDO GALVEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alex Holguin, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's decision dated March 14, 2016. We review questions of law, discretion, and judgment arising in appeals from decisions of Immigration Judges de novo, whereas we review findings of fact in such appeals under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3). The record will be remanded.

The Immigration Judge denied the respondent's March 4, 2016, motion to reopen his removal proceedings after the issuance of an in absentia order of removal on August 24, 2010. Pursuant to section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C), an in absentia removal order may be rescinded only (1) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances, or (2) upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing in accordance with sections 239(a)(1) or (2) of the Act, or that the alien was in Federal or State custody and did not appear through no fault of the alien. Sections 240(b)(5)(C)(i) and (ii) of the Act; *see also Matter of Guzman*, 22 I&N Dec. 722, 722-23 (BIA 1999). The respondent's motion did not establish any of these circumstances. The motion acknowledged that it was too late to establish extraordinary circumstances and included no affidavit by the respondent or other evidence to establish that he did not receive notice of his missed hearing. We therefore agree with the Immigration Judge that the respondent's motion did not meet the statutory grounds for rescission of his order of removal under section 240(b)(5)(C) of the Act.

However, on appeal the respondent has submitted evidence that tends to show that he no longer lived at the address to which his Notice to Appear (Exh. 1) and Notice of Hearing were sent. Given this evidence, we find it appropriate to remand the record to allow the Immigration Judge to conduct fact-finding, by holding a hearing if necessary, to determine whether the respondent received notice of the August 24, 2010, hearing in accordance with sections 239(a)(1) or (2) of the Act. *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001).

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings.

FOR THE BOARD

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

File Nos.: **A 095 006 115**	)	**DETAINED**
	)	
In the Matter of:	)	
	)	
GALVEZ,	)	**IN REMOVAL PROCEEDINGS**
Ennio Edgardo,	)	
	)	
Respondent	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act (INA) (2010) – *remained in the United States longer than permitted*

APPLICATION: Respondent's Motion to Reopen

ON BEHALF OF RESPONDENT:
Michael Bhotiwihok, Esquire
Los Angeles Immigration Attorneys
700 South Flower Street, Suite 2925
Los Angeles, California 90017

ON BEHALF OF THE DEPARTMENT:
Lily C. Hsu, 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

Ennio Edgardo Galves (Respondent) is a native and citizen of El Salvador. Exh. 1. On May 12, 2010, the U.S. Department of Homeland Security (the Department) served Respondent with a Notice to Appear (NTA) by mail. *Id.* In the NTA, the Department alleged that Respondent was admitted to the United States on July 20, 2000, as a nonimmigrant B2 visitor with authorization to remain the United States for a limited period of stay, and has remained in the United States since without authorization. *Id.* Accordingly, the Department charged Respondent with removability pursuant to section 237(a)(1)(B) of the INA. *Id.* Jurisdiction vested and removal proceedings commenced when the Department filed the NTA with the Court on May 24, 2010. *See* 8 C.F.R. § 1003.14 (2010).

On June 10, 2010, the Court mailed Respondent a notice of hearing (NOH) for his August 24, 2010 hearing to the address provide3d on the NTA. Respondent failed to appear for his August 24, 2010 hearing. Accordingly, the Court, proceeding *in absentia*, found that the Department established removability through clear and convincing evidence and ordered Respondent removed to El Salvador.

On March 4, 2016, Respondent filed the pending motion to reopen his proceedings and to rescind the order of removal entered against him *in absentia* on August 24, 2010. On March 10, 2016, the Department filed an opposition to Respondent's motion.

For the following reasons, the Court denies Respondent's motion to reopen.

II. Law, Analysis, and Findings of the Court

A. Timeliness

An *in absentia* order of removal may be rescinded if a motion to reopen is filed within 180 days after the final order of removal if the respondent can show that the failure to appear was due to exceptional circumstances or at any time if the respondent demonstrates that he did not receive proper notice. *See* INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). For the purposes of calculating motion deadlines, the date that an immigration judge's order is entered fixes the deadline for filing a motion to reopen. *Matter of Goolcharan*, 23 I&N Dec. 5, 6 (BIA 2001).

In the present case, the Court issued an *in absentia* order removing Respondent and concluding his proceedings on August 24, 2010. Respondent did not file the pending Motion until March 6, 2016, over five years after his hearing. Therefore, Respondent's Motion is untimely.

B. Notice

The Court may rescind an *in absentia* removal order upon a motion to reopen filed at any time if the respondent demonstrates that he did not receive proper notice. INA § 240(b)(5)(C)(ii); *see also* 8 C.F.R. § 1003.23(b)(4)(ii). A respondent receives proper notice of a proceeding if written notice is given to him in person or sent by mail at the most recent address the respondent provided. *See* INA § 239(a)(1), (2); *Matter of G-Y-R,* 23 I&N Dec. 181, 185 (BIA 2001). It is not always necessary that a respondent receive actual notice of the proceeding. *See G-Y-R-*, 23 I&N Dec. at 189. Service by mail is sufficient if there is proof of attempted delivery to the last address provided by the respondent as required under section 239(a)(1)(F) of the INA. INA § 239(c). A respondent can be properly charged with receiving constructive notice, even though he did not personally see the mailed document, if he was informed of his obligation to keep the Court apprised of his address and the NOH is mailed to the last known address of record. *G-Y-R-*, 23 I&N Dec. at 189. The respondent bears the burden of supporting the motion with specific, detailed evidence to corroborate his claim. *See Celis-Castellano v. Ashcroft*, 298 F.3d 888, 890 (9th Cir. 2002).

In the present matter, Respondent does not allege that he missed his hearing due to lack of notice. Specifically, counsel for Respondent stated that he was "unable to ascertain whether Responded failed to receive notice of his last scheduled hearing." Resp't's Mot. at 3. Additionally, both the NTA and the NOH were sent to Respondent's address of record, and there was no evidence provided to show ineffective delivery. *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2003) (To overcome the presumption of delivery, a respondent must submit sufficient evidence to support her claim that she did not receive notice.)

Overall, Respondent failed to meet his evidentiary burden. *See Celis-Castellano*, 298 F.3d at 890, *M-R-A-*, 24 I&N Dec. at 674. As a result, the Court finds that Respondent received notice of his scheduled hearing and denies his motion on that basis. INA § 240(b)(5)(C)(ii); *G-Y-R-*, 23 I&N Dec. at 189; 8 C.F.R. § 1003.23(b)(4)(ii).

C. Changed Country Conditions

A respondent may request the Court reopen proceedings at any time to apply or reapply for asylum, withholding of removal, or protection under the CAT, if such claim is based on changed country conditions arising in the country of nationality, and if such evidence is material and was not available and could not have been discovered or presented at the previous hearing. 8 C.F.R. § 1003.23(b)(4)(i); *see also Malty v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013, 1021-1022 (9th Cir. 2004). In determining the sufficiency of changed country conditions, the "critical question" is "whether circumstances have changed sufficiently that a [respondent] who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution." *Malty*, 381 F.3d at 945. In making this assessment, the Court will compare the evidence of country conditions submitted with the motion, to those that existed at the time of the last merits hearing. *Matter of S-Y-G-*, 24 I&N Dec. 247, 253 (BIA 2007).

Respondent claims that he fears return to El Salvador because of his sexuality and his diagnosis of Human Immunodeficiency Virus (HIV). While the Court is sympathetic to the issues Respondent may face, he made no mention of a change of conditions in El Salvador since his last hearing. Additionally, he failed to produce any evidence that was undiscoverable or unavailable at the time of his last hearing. As a result, the Court concludes that Respondent has failed to demonstrate changed country conditions in El Salvador sufficient to warrant the reopening of his proceedings.

D. *Sua Sponte*

Respondent also requests the Court reopen under its *sua sponte* authority. An immigration judge may, upon her own motion at any time, or upon motion of the Department or the alien, reopen any case in which she has made a decision. 8 C.F.R. § 1003.23(b)(1). The decision to grant or deny a motion to reopen is within the discretion of the immigration judge. 8 C.F.R. § 1003.23(b)(1)(iv). The Board of Immigration Appeals (Board) has stated that "the power to reopen on our own motion 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). Proceedings should be reopened *sua sponte* only in "exceptional" situations. *Id.* Moreover, the Board has indicated that where finality is a key objective, the threshold for *sua sponte* reopening is extremely high. *See Matter of O-*, 19 I&N Dec. 871, 871 (BIA 1989).

A motion to reopen must state the new facts that will be proven at a hearing to be held if the motion is granted. INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(3). Additionally, where the alien seeks to reopen proceedings to act on an application for relief, he must establish *prima facie* eligibility for the relief sought by showing that there is a reasonable likelihood of success on the merits so as to make it worthwhile to develop the issues further at an individual hearing.

See INS v. Rios-Pineda, 471 U.S. 444, 449 (1985); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151 (9th Cir. 2010); *Matter of L-O-G-*, 21 I&N Dec. 413, 419 (BIA 1996).

In the present matter, Respondent argues that he is eligible for relief in the form of adjustment of status and asylum. Yet, he did not submit a Form-I 589, Application for Asylum and Withholding of Removal, with his motion. Even assuming Respondent can demonstrate *prima facie* eligibility for such relief, the Court may still deny the motion to reopen in the exercise of discretion. *Rios-Pineda*, 471 U.S. at 449; *Matter of Reyes*, 18 I&N Dec. 249, 252 (BIA 1982). Overall, the equities in Respondent's case do not merit granting his motion *sua sponte*. Respondent has not demonstrated due diligence in filing the present motion to reopen. The Court order Respondent removed to El Salvador in August 2010, yet he waited over five years to file this motion. Further, he missed his only hearing with the Court, and thus, he has not demonstrated that he is committed to pursuing his case with this Court. The Court acknowledges that Respondent married a United States citizen in 2013; however, reopening *sua sponte* based on equities acquired after the entry of a final removal order would undermine the INA and circumvent the regulations. *See INS v. Rios-Pineda*, 471 U.S. 444, 450-51 (1985). Based on the foregoing, and in the interest of finality, the Court will not reopen Respondent's case *sua sponte*.

Accordingly, the Court shall enter the following order:

ORDER

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

DATE: March 14, 2016

TARA NASELOW-NAMAS
Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
[M] MAIL (M) [ ] PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[M] ALIEN'S ATT/REP [ ] DHS
DATE: 3/17/16 BY: COURT STAFF Ramos
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [M] Other EOIO