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

Barcena, Gustavo A., Esq
Attorney at Law
6334 Whittier Boulevard
Los Angeles, CA 90022-0000

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

Name: GOMEZ-GOMEZ, VICTOR MANUEL **A099-669-457**

Date of this notice: 2/10/2012

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:
Adkins-Blanch, Charles K.
Hoffman, Sharon
Miller, Neil P.

File: A099 669 457 - Los Angeles, CA Date: FEB 10 2012

In re: VICTOR MANUEL GOMEZ-GOMEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gustavo A. Barcena, Esquire

ON BEHALF OF DHS: Sandra J. Santos
Senior Attorney

APPLICATION: Reopening

This case was last before us on September 16, 2011, when we remanded proceedings in order to provide the Immigration Judge an opportunity to adjudicate the respondent's motions seeking the ability to review the file and an extension of time to supplement the record after his review. The respondent, a native and citizen of El Salvador, has now filed a timely appeal of the Immigration Judge's decision dated October 18, 2011, again denying his motion to reopen. The Department of Homeland Security ("DHS") filed a brief opposing the appeal. We will sustain the appeal and remand the case for further proceedings consistent with this order.

The factual findings of the Immigration Judge are reviewed to determine whether they are "clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i). All other issues in appeals from decisions of Immigration Judges, including whether the parties have met the relevant burden of proof and issues of discretion, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

In the instant case, the Notice to Appear ("NTA") was initially issued on May 19, 2006, and contained an order for the respondent to appear at the immigration court on July 6, 2006 (Exh. 1). The NTA was not filed with the Immigration Court until nearly 2 years later, on February 28, 2008 (I.J. Oct. 18, 2011, at 1; Exh. 1). The respondent contends on appeal that he appeared at the immigration court on July 6, 2006; that he was informed that DHS had not yet filed the NTA; and that he filed with the court a change of address and was told it would be placed in his file (Respondent's Appeal Brief and sworn statement; *see also* I.J. Oct. 18, 2011, at 3). The court mailed the March 3, 2008, Notice of Hearing to the original address contained on the NTA (I.J. Oct. 18, 2011 at 1; Exh. 2). When the respondent did not appear at an April 24, 2008, hearing, the Immigration Judge ordered him removed. The respondent filed his motion to reopen with the Immigration Judge on May 17, 2011, as statutorily permitted when seeking to rescind an in absentia order of removal on the basis of lack of notice. Section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C).

Under the particular circumstances of this case, we agree with the respondent that the motion to reopen should have been granted. The respondent argues that he submitted a change of address on

the date of his originally scheduled hearing, nearly two years before proceedings commenced when DHS filed the NTA with the court; however, the Notice of Hearing was sent to the original address and not the updated address allegedly provided by the respondent. *See* section 239(c) of the Act, 8 U.S.C. § 1229(c) (finding notice by mail sufficient where there is proof of attempted delivery to the last address *provided by the alien* in accordance with section 239(a)(1)(F) of the Act) (emphasis added); *cf. Sembiring v. Gonzales*, 499 F.3d 981, 989-90 (9th Cir. 2007) (noting that a sworn affidavit is not necessarily required in order for an alien to demonstrate that he did not receive notice); *Singh v. INS*, 362 F.3d 1164, 1169 (9th Cir. 2004) ("Notice mailed to an address different from the one [the alien] provided could not have conceivably been reasonably calculated to reach him."); *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001) (entry of an in absentia order of removal is inappropriate where the record reflects that the alien did not receive, or could not be charged with receiving, the NTA that was served by mail at an address obtained from documents filed with DHS several years earlier).

It appears likely that the address to which the Notice of Hearing was mailed was not the "last address provided by" the respondent, as required by statute. *See* section 239(c) if the Act. In such a case, the address used by the court cannot qualify as a section 239(a)(1)(F) address and the entry of an in absentia order is precluded. *Matter of G-Y-R-*, *supra*, at 190-92; *see also Sembiring v. Gonzales*, *supra*, at 988 ("The test for whether an alien has produced sufficient evidence to overcome the presumption of effective service by regular mail is practical and commonsensical rather than rigidly formulaic."); *Matter of M–R–A–*, 24 I & N Dec. 665, 674 (BIA 2008) (listing factors for consideration in determining whether an alien has rebutted the weaker presumption of delivery for notices sent by regular mail, and stating that "the Immigration Judge must conduct a practical evaluation of all the evidence, both circumstantial and corroborating evidence").

Considering the totality of the unique circumstances in this case, proceedings are reopened under the provision of 8 C.F.R. § 1003.23(b)(4)(ii). *See* Section 240(b)(5)(C)(ii) of the Act, 8 U.S.C. § 1229a(b)(5)(C)(ii).

Accordingly, the appeal is sustained, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

ORDER: The appeal is sustained.

FURTHER ORDER: The in absentia order of removal is vacated, the removal proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
606 SOUTH OLIVE ST.
LOS ANGELES, CA 90014

GUSTAVO A. BARCENA, ESQ.
6334 WHITTIER BLVD.
LOS ANGELES, CA 90022

IN THE MATTER OF FILE A 099-669-457 DATE: Oct 19, 2011
GOMEZ-GOMEZ, VICTOR MANUEL

__ 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
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ 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
606 SOUTH OLIVE ST.
LOS ANGELES, CA 90014

X OTHER: See attached IJ ORDER.

V.G. ORDONEZ
COURT CLERK
IMMIGRATION COURT FF

CC:

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

File Number: **A 099 669 457**	)	**DETAINED**
	)	
In the Matter of:	)	
	)	
GOMEZ-GOMEZ, Victor Manuel	)	**IN REMOVAL PROCEEDINGS**
	)	
Respondent.	)	
	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) - *present in the United States without being admitted or paroled.*

APPLICATION: Motion to Reopen.

ON BEHALF OF RESPONDENT:
Gustavo A. Barcena, Esquire
6334 Whittier Boulevard
Los Angeles, California 90022

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
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 May 19, 2006, the Government personally served Victor Manuel Gomez-Gomez (Respondent) with a Notice to Appear (NTA). Exh. 1. In the NTA, the Government alleged that Respondent is a native and citizen of El Salvador, who entered the United States at or near Brownsville, Texas, on or about May 14, 2006, and was not then admitted or paroled after inspection by an immigration officer. Id. Accordingly, the Government charged Respondent with removability pursuant to section 212(a)(6)(A)(i) of the INA. Id. The NTA ordered Respondent to appear in Court on July 6, 2006. Id. The Government filed the NTA with the Court on February 28, 2008, thereby vesting jurisdiction over Respondent's proceedings with this Court. See 8 C.F.R. § 1003.14(a).

On March 3, 2008, the Court mailed Respondent a notice of hearing to the address listed in the NTA, ordering him to appear in Court on April 24, 2008. Exh. 2. The notice of hearing was returned to the Court, reflecting "Return to Sender Attempted – Not Known Unable to Forward."

On April 24, 2008, Respondent failed to appear for his scheduled hearing and the Court

proceeded *in absentia*. Based on evidence presented by the Government, the Court found that removability had been established by clear, convincing, and unequivocal evidence. Accordingly, the Court ordered Respondent removed to El Salvador.

On May 17, 2011, Respondent filed a motion to reopen, arguing lack of notice. Respondent also requested an opportunity to supplement the motion to reopen, which the Court granted on May 26, 2011, providing Respondent with fifteen days to supplement the record. However, as the Court was not provided with further evidence from Respondent, the Court denied Respondent's motion to reopen on June 23, 2011.

On July 1, 2011, Respondent appealed the Court's decision to the Board of Immigration Appeals (Board), indicating therein that counsel for Respondent had requested an appointment with the Court to review Respondent's file, but an appointment was not scheduled by the Court. In a decision dated September 16, 2011, the Board noted that the record did not contain evidence that the Court had considered Respondent's counsel's attempts to review the file.[1] Accordingly, the Board remanded proceedings.

On October 5, 2011, the Court ordered Respondent to supplement the motion to reopen with an affidavit and any other evidence necessary to support his claim of lack of notice within ten days of the Court's order to supplement. Respondent's counsel subsequently reviewed the record but failed to supplement the motion to reopen.

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

II. Law & Analysis

A. Notice

An *in absentia* removal order may be rescinded by the Court upon a motion to reopen filed at any time if the respondent demonstrates that he did not receive notice in accordance with section 239(a) of the INA. INA § 240(b)(5)(C)(ii). Pursuant to section 239(a)(1) of the INA, written notice must be provided in person to the respondent or, if personal service is not practicable, through service by mail to the respondent or to the respondent's counsel of record, if any. INA § 239(a)(1). Once the NTA has been properly served, the notice of hearing is deemed sufficient if mailed to the most recent address provided by the respondent. See INA § 240(b)(5)(A); Matter of G-Y-R-, 23 I&N Dec. 181, 185 (BIA 2001). Written notice of proceedings is not required if the respondent fails to provide the court with a written record of an address and telephone number at which he may be contacted. INA § 240(b)(5)(B).

As a preliminary matter, Respondent has failed to comply with 8 C.F.R. § 1003.23(b)(3), which requires that a motion to reopen be supported by affidavits and other evidentiary material. Respondent was provided with ample opportunity to supplement the record and failed to do so to

[1] At the time of the Court's initial decision denying the motion to reopen, the undersigned Immigration Judge was not aware of the counsel's request to review the file. Since the Board's decision remanding these proceedings, the Court ensured that counsel has reviewed the file prior to issuing the second order to supplement the record dated October 5, 2011.

support the arguments contained in the motion to reopen. The Court notes that while Respondent's counsel makes general, conclusory statements regarding lack of notice, unsworn statements by attorneys in briefs do not constitute evidence and are not entitled to any evidentiary weight. See Matter of S-M-, 22 I&N Dec. 49, 51 (BIA 1998). Nonetheless, the Court will consider whether Respondent received proper notice of his hearing.

According to counsel, Respondent concedes being personally served with the NTA, which ordered him to appear in Court on July 6, 2006. Counsel asserts that Respondent appeared in Court on that date, only to learn that his case had not been filed with the Court. Counsel further asserts that Respondent diligently checked the status of his case for the next year and a half and notified the Court of his change of address in the interim. Counsel contends that Respondent never received the notice of hearing ordering Respondent to appear in Court on April 24, 2008, despite having complied with the change of address requirements.

The Court finds that Respondent received legally sufficient notice of the hearing scheduled on April 24, 2008. To begin, Respondent does not contest being personally served with the NTA. Once he was served with the NTA, Respondent was on notice of his obligations to the Court, including his obligation to update his address. See INA § 239(a)(1)(F); see also Matter of G-Y-R-, 23 I&N Dec. at 187. Despite counsel's argument in the motion to reopen, the record does not contain evidence of Respondent's attempt to change his address with the Court. Counsel has also not supplemented the record, despite the Court's order to do so, with information to the contrary that would reflect Respondent's diligence in pursuing his case and his attempt to update his address. Consequently, absent any evidence that Respondent updated his address with the Court after being personally served with the NTA, the Court finds that Respondent received constructive notice of his hearing as the Court mailed the notice of hearing to the most recent address provided by Respondent. See INA § 240(b)(5)(A). Further, because Respondent failed to meet his obligation under section 239(a)(1)(F) of the INA to update his address with the Court, he was not entitled to written notice of proceedings. See id. Accordingly, the Court finds that Respondent received legally sufficient notice of his hearing and denies his motion to reopen.

Based on the foregoing, the following order will be entered:

ORDER

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

DATE: 12/18/2011

A. Ashley Tabaddor
IMMIGRATION JUDGE

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
[X] MAIL (M) [ ] PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN'S ATT/REP [X] DHS
DATE: 12/19/11 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other