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

Lazare, Shirley, Esq.
Frenkel, Hershkowitz & Shafran LLP
16 East 34th Street, 16th Floor
New York, NY 10016

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: ROSS, CAROLINE REBECCA

A 087-202-743

Date of this notice: 6/20/2013

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.
Grant, Edward R.
Hoffman, Sharon

TranC
Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A087 202 743 – Dallas, TX Date: JUN 20 2013

In re: CAROLINE REBECCA ROSS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Shirley Lazare, Esquire

APPLICATION: Reopening

The Immigration Judge denied the respondent's motion to reopen because she failed to establish exceptional circumstances for her failure to appear at the February 17, 2010, hearing. However, upon review, we will sustain the appeal and reopen proceedings.

The respondent did not receive the oral warnings when she was served with the Notice to Appear by certified mail. Accordingly, the bar to discretionary relief set forth in section 240(b)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(7), does not apply and the rescission standards do not need to be met to reopen proceedings in order to pursue one of the specified forms of relief. *See Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998). Moreover, any issue of untimeliness is cured because the motion to reopen proceedings was agreed upon by the parties and jointly filed (MTR, Exh. H). 8 C.F.R. § 1003.23(b)(4)(iv). In view of the parties' agreement, reopening of the proceedings is warranted. *See Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) (discussing the important role the parties play in the proceedings and noting that "their agreement on an issue or proper course of action should, in most instances, be determinative"). Accordingly, we will change venue and allow the respondent another opportunity to appear for a hearing in order to pursue adjustment of status.

ORDER: The appeal is sustained, the in absentia order is rescinded, the proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings.

FURTHER ORDER: Venue is changed to New York, New York.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., ROOM 404
DALLAS, TX 75242

FRENKEL, HERSHKOWITZ & SHAFRAN, LLP
LAZARE, SHIRLEY
16 EAST 34TH STREET, 16TH FLOOR
NEW YORK, NY 10016

IN THE MATTER OF FILE A 087-202-743 DATE: Feb 15, 2012
ROSS, CAROLINE REBECCA

__ 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
1100 COMMERCE ST., ROOM 404
DALLAS, TX 75242

__ OTHER: _____

_____

TO

COURT CLERK
IMMIGRATION COURT FF

CC: HUNKER, PAUL
125 E. HWY 114, STE 500
IRVING, TX, 75062

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DALLAS, TEXAS

IN THE MATTER OF:	)	IN REMOVAL PROCEEDINGS
	)	
	)	
ROSS, Caroline Rebecca	)	
	)	A087-202-743
	)	
	)	
RESPONDENT	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act, as amended, in that after admission as a nonimmigrant under 101(a)(15) of the Act, you have remained in the United States longer than permitted, in violation of this Act or any other law of the United States

APPLICATION: Motion to Reopen *In Absentia* Order and Reopen Proceedings

ON BEHALF OF THE RESPONDENT

Shirley Lazare, Esq.
Frenkel, Herskkowitz & Shafran, LLP
16 East 34th Street
New York, NY 10016

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY

Paul B. Hunker III, Esq.
Chief Counsel – ICE
125 E. John Carpenter Fwy., Ste. 500
Irving, TX 75062

ORDER OF THE COURT

The Respondent has filed a Motion to Reopen in the above-captioned case. For the following reasons, the Motion will be **DENIED**.

FACTUAL AND PROCEDURAL HISTORY

The Respondent is a female, native and citizen of Liberia. Notice to Appear. She entered the United States on or about June 20, 2006 as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed December 7, 2006.[1] *Id.* She remained in the United States beyond December 7, 2006 without authorization from the Immigration the Department of Homeland Security (DHS or Government). *Id.*

On August 25, 2006 the DHS served the Respondent with a Notice to Appear (NTA) via certified mail, return receipt requested, charging her with removability under Section 237(a)(1)(B) of the Immigration and Nationality Act (INA or the Act). Notice to Appear. The NTA was mailed to the Respondent's address in Marshall, Texas. *Id.*

On December 29, 2009 the Respondent filed a Notice to EOIR: Alien Address (Form I-830) listing her new address as: 121-47 238th Street, Rosedale, NY 11422. Form I-830. That same day she also filed a Motion to Change Venue from the Dallas Immigration Court to the New York Immigration Court, and a Motion for Telephonic Master Hearing in the alternative. Respondent's Motion to Change Venue, dated December 23, 2009. In the Respondent's Motion to Change Venue, her counsel admitted all of the allegations in the NTA and conceded the charge of removability. *Id.* Immigration Judge Rogers denied the Motion to Change Venue on January 4, 2010, but did hold that the Respondent's attorney would be able to appear telephonically. Order of the Immigration Judge, January 4, 2010.

[1] On June 15, 2007 the Respondent was granted an extension of her nonimmigrant visa by USCIS until December 7, 2007. Respondent's Motion to Change Venue, dated December 23, 2009, Tab A (Form I-797).

Both the Respondent and her counsel conceded that the Respondent's Master Calendar Hearing was scheduled for February 17, 2010. Respondent's Motion to Change Venue, dated December 23, 2009; Respondent's Motion to Reopen an *In Absentia* Order and Motion to Change Venue, dated May 23, 2011.

On February 17, 2010 the Respondent failed to appear at her hearing thus the proceedings were conducted *in absentia.* At the hearing, the Government submitted documentary evidence establishing the truth of the factual allegations contained in the NTA. Order of the Immigration Judge, dated February 17, 2010. The Court found the Respondent removable as charged by clear, unequivocal, and convincing evidence. *See* 8 C.F.R. § 1003.26(c). Accordingly, the Court designated the Respondent's country of removal as Liberia, and ordered her removed to Liberia *in absentia. Id.*

At some point after the *in absentia* order was entered, the Respondent filed an I-485 based upon an approved I-130 petition filed on her behalf by her USC mother. Respondent's Motion to Reopen, Tab G.

On March 10, 2011, the DHS agreed to and signed a Stipulation to Reopen Removal Proceedings drafted by the Respondent. Respondent's Motion to Reopen, Tab H. Respondent's counsel signed the agreement on March 17, 2011. *Id.* The Government, pursuant to 8 C.F.R. § 3.2(c)(3)(iii), agreed to the case being reopened so that the Respondent might avail herself of Adjustment of Status pursuant to the approved I-130 petition filed on her behalf. *Id.*

On March 10, 2011, the DHS filed a Non-Opposition Motion for Change of Venue. *Id.*, Tab I. The DHS stated that it did not oppose the Respondent's Motion to

Change Venue because of the Respondent's medical condition and financial resources. *Id.*

On May 23, 2011, the Respondent, through counsel, filed a Motion to Reopen. In the Motion, the Respondent states that she moved to New York to live with her sister and await further surgeries for a craniofacial disorder from which she suffers. Motion to Reopen, Respondent's Affidavit. She also stated that when she learned of the denial of her Motion to Change Venue, she was unable to travel back to Texas for her hearing due to financial inability and her dependence upon others for her care. *Id.*

LEGAL STANDARDS

An *in absentia* removal order pursuant to section 240(b)(5) of the Act may be rescinded upon a Motion to Reopen if there is a violation of the respondent's constitutional right to adequate notice. In such a case, the alien may file a motion to reopen at any time and the court may rescind an *in absentia* removal order if the "alien demonstrates that the alien did not receive adequate notice in accordance with the [notice requirements of the INA]." INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(iii).

A Motion to Reopen will not be granted unless the Respondent establishes a *prima facie* case of eligibility for the underlying relief. A motion to reopen must be accompanied by applications for relief and all supporting documents. *See INS v. Abudu*, 485 U.S. 94, 104 (1988); s*ee also INS v. Doherty*, 502 U.S. 314 (1992); *but see Matter of Ruiz*, 20 I&N Dec. 91, 92 (BIA 1989).[2] In general, an immigration judge has broad

[2] "A motion to reopen may be denied on the basis that the applicant has not established a prima facie case for the underlying substantive relief sought. *See* INS v. Abudu, 485 U.S. 94, 108 S.Ct. 904 (1988). But in the context of a prior in absentia hearing, the underlying relief being sought by way of the motion to reopen is the opportunity to present the applications for relief at a full evidentiary hearing .... When the basis for a motion to reopen is that the immigration judge held an in absentia hearing, the alien must establish that he has reasonable cause for his absence from the proceedings. Section 242(b) of the Act, 8 U.S.C. § 1252(b) (1982) (deportation proceedings); Matter of Haim, supra; Matter of Nafi, supra; Matter of Patel, Interim

authority to grant or deny a motion to reopen. *INS v. Doherty*, 502 US 314, 322 (1992). An immigration judge may deny a motion even where there is prima facie eligibility if the relief sought would be denied as a matter of discretion. *INS v. Rios-Pineda*, 471 US 444, 449 (1985).

Finally, the Court may exercise its *sua sponte* authority to reopen in "truly exceptional situations," where the interests of justice would be served. *Matter of G-D-*, 22 I. & N. Dec. 1132, 1133 (B.I.A. 1999); *Matter of J-J-*, 21 I. & N. Dec. 976 (B.I.A. 1997); *see also Matter of X-G-W-*, 22 I. & N. Dec. 71, 74 (B.I.A. 1998) (finding exceptional circumstances met where a fundamental change in asylum law).

Proper service of a written notice under the Act may be accomplished by personal service, or if personal service is not practicable, service by regular mail to the alien or to his attorney of record. INA § 239(a)(1). Proper notice can be accomplished through personal service of the document (the NTA or the NOH), or if personal service is not practicable, through service by mail to the Respondent. INA § 239(a)(1). Additionally, service by mail of the document is sufficient if there is proof of attempted delivery to the alien's most recently provided address. INA § 239(c).

When the written notice is properly addressed and sent to the alien by regular mail according to normal office procedures there is also a presumption of delivery. *Matter of M-R-A-*, 24 I. & N. Dec. 665, 673 (B.I.A. 2008). However, the regular mail presumption is weaker than the presumption applying to documents sent by certified mail. *Id.*; *See*

Decision 2993 (BIA 1985), aff'd, Patel v. INS, 803 F.2d 804 (5th Cir. 1986); Matter of Marallag, 13 I & N Dec. 775 (BIA 1971). Once reasonable cause has been established, the applicant retains his statutory right to an opportunity to present his asylum claim at a hearing. To require him to establish prima facie eligibility for asylum in conjunction with his motion to reopen, before he is given the opportunity to a hearing on his asylum claim, would violate his statutory right to such a hearing." Matter of Ruiz 20 I. & N. Dec. 91, 92-93 (BIA 1989).

Matter of Grijalva, 21 I. & N. Dec. 27, 37 (B.I.A. 1995). When alleging non-receipt of a written notice, the burden is on the alien to provide proof that the document was not received. *Matter of M-R-A*, 24 I. & N. Dec. at 673–74; *see also Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503 (B.I.A. 1980) (when alleging non-receipt of an NTA, the alien must provide some evidence to the court that the NTA was not in fact received). In adjudicating an alien's motion to rescind an *in absentia* order of removal based on a claim that a NTA or NOH sent by regular mail to the most recent address was not received, all relevant evidence submitted to rebut the weaker presumption of delivery must be considered by the Immigration Judge. *Matter of M-R-A*, 24 I. & N. Dec. at 673–74.

If the alien's address is not provided, or is incorrectly provided in the NTA, the alien must provide to the Court a written notice of an address and telephone number at which the alien can be contacted within five days of service of the NTA. 8 C.F.R. § 1003.15(d)(1). This requirement is satisfied by completing and filing a Change of Address Form (EOIR-33). *Id.* In addition, within five days of any change of address, the alien must complete and file with the Court a Change of Address Form. 8 C.F.R. § 1003.15(d)(2). Thus, if the alien fails to file a Change of Address Form when required, and this is the reason he has not received proper notice of a scheduled hearing, then lack of notice cannot be the basis for granting a motion to reopen. *Matter of M-R-A-*, 24 I. & N. Dec. at 675.

The NTA includes the alien's obligation to immediately provide the Attorney General with written record of any change in address or telephone number and the consequences for failing to do so, and also includes the consequences for failing to

appear. *See* INA § 239(a)(1)(F), (a)(1)(G). The Notice of Hearing, whether contained in the charging document or as a separate notice, states the time and place of the scheduled hearing and informs the alien of the consequences for failing to update his address and for failing to appear. INA § 239(a)(1)(G), (a)(2)(A)(ii).

In addition to an alien's statutory obligation under INA § 239(a)(1)(F) to update his address after moving, an alien also has the general obligation to report address changes to the Attorney General under INA §265(a). All aliens residing in the United States must notify the Attorney General in writing of each change of address within ten days of the alien's move. INA § 265(a).

ANALYSIS

At the outset of the analysis, the Court recognizes the Joint Motion to Reopen signed by the DHS and the Respondent, via counsel. This Joint Motion removes both the time limit imposed on a proper motion to reopen and the fee requirement. 8 C.F.R. 1003.2(c)(3)(iii); 8 C.F.R. 1003.24(b)(1)(vii). As such, the Respondent's motion was timely and did not require a fee.

In the present case, the Respondent was served with an NTA via certified mail warning her of the consequences for failing to appear in Court. Under the Act, service via certified mail is a proper method sufficient for the Court to find that the Respondent was given adequate notice. *See* INA § 239(a)(1); *Matter of Grijalva*, 21 I. & N. Dec. at 37. Both the Respondent and her attorney conceded notice of the hearing date in February 2010. *See* Respondent's Motion to Change Venue, Lawyer's Affidavit; Respondent's Motion to Reopen, Respondent's Affidavit. While the Respondent filed an EOIR-33 with her New York address to the Court, merely showing the Court that she had

moved out of state did not guarantee her a change of venue or alter her obligation to appear in the Dallas Immigration Court for her hearing. The Immigration Judge explicitly denied her Motion to Change Venue and informed her of this decision therefore obligating her to appear at the Dallas Immigration Court on February 17, 2010. *See* Order of the Immigration Judge, dated January 4, 2010.

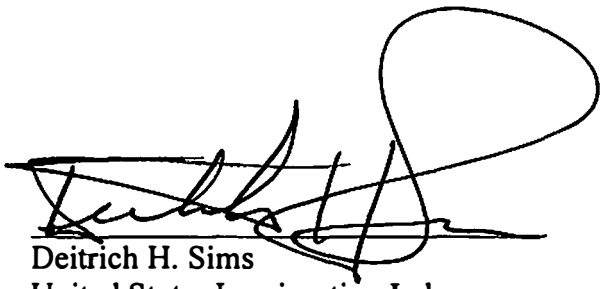
Further, the Respondent's failure to appear was not based upon exceptional circumstances. *See Matter of G-D-*, 22 I. & N. Dec. at 1133. While she did present evidence of her medical condition, she also explicitly stated that her failure to appear in Court was due to financial hardship—not her medical condition. *See* Respondent's Motion to Reopen, Respondent's Affidavit. Financial hardship does not warrant exceptional circumstances.

Accordingly, the following Order will be entered:

ORDER

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

This 30th day of January, 2012



Deitrich H. Sims
United States Immigration Judge