U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

OGUERI, GABRIEL C.
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5646 MILTON ST, #745
DALLAS, TX 75206

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

Name: KEBE, ADAMA

A 206-705-958

Date of this notice: 1/29/2016

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:
O'Leary, Brian M.
Grant, Edward R.
Guendelsberger, John

Userteam: Docket

File: A206 705 958 – Dallas, TX

Date: JAN 29 2016

In re: ADAMA KEBE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gabriel Ogueri, Esquire

ORDER:

The respondent has appealed the Immigration Judge's denial of a motion to reopen proceedings in which the respondent was ordered removed in absentia. We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(i), (ii). On review, in light of the totality of the circumstances presented, we find that the respondent established exceptional circumstances for his failure to appear at the scheduled removal hearing. *See* section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C).

Accordingly, the appeal is sustained, the in absentia removal order is rescinded, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry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.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

OGUERI & ASSOCIATES,PC
OGUERI, GABRIEL C.
5646 MILTON ST #745
DALLAS, TX 75206

IN THE MATTER OF FILE A 206-705-958 DATE: Apr 20, 2015
KEBE, ADAMA

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ 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
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

X OTHER: Motion to Reopen denied.

DLT

COURT CLERK
IMMIGRATION COURT FF

CC: PEGGY PRICE
125 E. HWY 114, STE 500
IRVING, TX, 75062

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
DALLAS IMMIGRATION COURT

In Re: Adama Kebe Case No. 206-705-958

ORDER

This matter is before the Court pursuant to the Respondent's April 15, 2014, Motion to Reopen. For the reasons set forth below, it will be DENIED.

The Immigration Judge may rescind an *in absentia* removal order pursuant to a motion to reopen through two means. INA § 240(b)(5). First, if there is a violation of the respondent's Constitutional right to adequate notice, 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). Second, a motion to reopen may be rescinded if it is filed within 180 days of the order of removal and if the alien can prove exceptional circumstances existed to excuse his failure to appear. 8 C.F.R. § 1003.23(b)(4)(ii).

Proper notice can be accomplished through personal service of the written notice, or if personal service is not practicable, through service by mail to the Respondent. INA § 239(a)(1). A Notice of Hearing is properly served when it is personally delivered to the alien or his attorney, or when it is mailed to the attorney or to the last address provided by the alien in accordance with INA § 239(a)(1)(F). INA § 239(a)(1)(G)(i). Additionally, service by mail of a Notice of Hearing is sufficient if there is proof of attempted delivery to the alien's most recently provided address. INA § 239(c).

When a motion to reopen alleges exceptional circumstances existed to excuse the respondent's failure to appear, an Immigration Judge must examine the totality of the circumstances to determine whether exceptional circumstances exist. *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). Exceptional circumstances have been defined "as those [circumstances] beyond the control of the alien such as 'battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances.'" INA § 240(e)(1).

The court may also invoke its *sua sponte* authority to reopen proceedings in "truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). The Court's discretion to reopen *sua sponte* is limited to cases where exceptional circumstances are demonstrated. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

In the present case, the Department of Homeland Security (DHS or Government) personally served the Respondent with a Notice to Appear (NTA), charging the Respondent as removable under INA § 237(a)(1)(B). Exhibit 1.

The Respondent appeared with counsel for a hearing on February 11, 2014. At that time, the Respondent, via counsel, admitted the factual allegations and conceded the charge of removability contained in the NTA. The Court found the charge sustained by clear and convincing evidence. *See* 8 C.F.R. § 1240.8(a). The Respondent designated Senegal as the country of removal. Through his attorney, the Respondent indicated that he had no relief available to him and did not wish to seek voluntary departure. When the Immigration Judge asked the Respondent if he understood the consequences of choosing not to seek relief before the Court, the Respondent indicated that he would need the assistance of a Wolof interpreter to communicate with the Court. In an abundance of caution, the Immigration Judge reset the hearing to allow the Respondent additional time to submit an application for relief and to provide the Respondent with a Wolof interpreter at the next hearing.

On March 6, 2015, the Court mailed a Notice of Hearing to the Respondent's attorney of record setting his hearing for April 8, 2015. *See* NOH, dated March 6, 2015; *see* Form EOIR – 28, dated Dec. 4, 2014.

The Respondent failed to attend his hearing on April 8, 2015, and the hearing was conducted *in absentia*. Based upon the clear, unequivocal, and convincing evidence offered by the Government, the Court found the charge of removal against the Respondent established and ordered him removed to Senegal. 8 C.F.R. § 1003.26(c).

When asserting any groups for reopening, a respondent must provide some evidence to the Court that there are in fact grounds for reopening. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Such evidence can be in the form of an affidavit supporting that assertion. *Id.* In the case at hand, the Respondent has failed to submit a proper affidavit along with his Motion to Reopen. Additionally, statements of the Respondent's counsel contained in the Motion to Reopen are not evidence. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503. Therefore, the Motion to Reopen is insufficient on its face. However, even if the Court accepted the Respondent's motion as facially sufficient, the Respondent's motion would still be denied for the following reasons.

Here, the Respondent was personally served with his NTA and acknowledged proper service. *See* NTA, dated Mar. 6, 2015. His Notice of Hearing was then served upon his attorney of record to the address provided to the Court on the Form EOIR – 28. *See* NOH dated, Oct. 1, 2014; *See* NOH dated, Oct. 14, 2014. Consequently, service of the NOH in this case was proper. 8 C.F.R. § 1292.5(a) ("Whenever a person is required by any of the provisions of this chapter to give or be given notice [...] such notice [...] shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented."). Additionally, the recording from the hearing on April 8, 2015 makes clear that the Court attempted to

contact the Respondent and his attorney on the day of the hearing. Notably, the Respondent's attorney concedes that he received the Respondent's NOH but mistakenly "advised [the Respondent] not to appear for the hearing as set." Motion to Reopen at 3. The Supreme Court of the United States has held that "each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Link v. Wabash R. Co.*, 370 U.S. 626,633-634 (1962) (internal quotes omitted). Because the Respondent's attorney knew about the hearing, so too is the Respondent chargeable with knowledge of the date, time and location of the hearing. For the foregoing reasons, there is no claim to lack of notice.

The Respondent has also failed to establish that exceptional circumstances caused his failure to appear on April 8, 2015. It is the responsibility of the attorney and client to appear when the Court schedules a hearing. Therefore, the Court finds that the Respondent's attorney's purported confusion regarding the hearing date is not an exceptional circumstance which warrants reopening of the present proceedings under INA § 240(b)(5)(C)(i).

There are only two grounds for rescinding an *in absentia* order of removal, and the Respondent has not shown that he qualifies for reopening under either ground. INA § 240(b)(5)(C).

Additionally, the Court does not see any evidence in the record warranting a *sua sponte* reopening of this case. *Matter of G-D-*, 22 I&N Dec. 1132, 1133 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

On this 20th day of April, 2015.

James A. Nugent
United States Immigration Judge

Copy to:
Chief Counsel, DHS/ICE