U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Irving, TX 75062-2324

Name: CONGANIGE, SUMITHRA KEER... **A 088-035-796**

Date of this notice: 5/28/2013

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:
Grant, Edward R.

TranC
Userteam: Docket

File: A088 035 796 – Dallas, TX Date: MAY 28 2013

In re: SUMITHRA KEERTHI PRASANNA FERNANDO CONGANIGE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Matthew M. Hanley, Esquire

ON BHEALF OF DHS: Michelle Allen-McCoy
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of the Sri Lanka, was ordered removed in absentia on March 7, 2011. On December 20, 2011, the respondent filed a motion to reopen proceedings which was denied by the Immigration Judge on February 14, 2012. The respondent filed a timely appeal of that decision. The record will be remanded.

The Immigration Judge, in reaching his February 14, 2012, decision, indicated that the respondent did not present any evidence other than his own affidavit to establish lack of notice with respect to his Notice to Appear or notice for the March 7, 2011, hearing. *See* I.J. at 6. However, the record reflects that with his current motion to reopen proceedings, the respondent submitted his original motion to reopen which was rejected because there was no proof of service and the filing fee had been incorrectly paid to the Court. This first motion included two additional affidavits supporting the respondent's claim regarding lack of notice. In view of these circumstances, we will return the case to the Immigration Judge in order to allow the Immigration Judge to consider this additional evidence in the first instance and for the respondent to further address his claim of non-receipt of the Notice to Appear and notice for his hearing as well as to pursue any other potentially available relief.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the above order.

FOR THE BOARD

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

HANLEY, MATTHEW M
212 S. MESQUITE ST STE 2-F
ARLINGTON, TX 76061

IN THE MATTER OF FILE A 088-035-796 DATE: Feb 15, 2012
CONGANIGE, SUMITHRA KEERTHI PRASANNA FERNANDO

__ 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

X OTHER: MOTION TO REOPEN (DENIED)

COURT CLERK
IMMIGRATION COURT FF

CC: ALLEN-MCCOY, MICHELLE
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:	)	
	)	
CONGANIGE, SUMITHRA	)	
	)	IN REMOVAL
	)	PROCEEDINGS
	)	
RESPONDENT	)	A 088-035-796

CHARGES: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations by the Attorney General under Section 211(a) of the Act

APPLICATION(S): Motion to Reopen

ON BEHALF OF THE RESPONDENT:

Matthew M. Hanley, Esq.
212 S. Mesquites St., Ste. 2F
Arlington, TX 76010

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Heidi Graham, Esq.
Assistant 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.**

WRITTEN DECISION OF THE IMMIGRATION JUDGE

FACTUAL AND PROCEDURAL HISTORY

The Respondent is a male, native and citizen of Sri Lanka. Record of Deportable/Inadmissible Alien (Form I-213). On or about August 7, 2000 he was paroled into the United States at New York, New York in order to pursue a pending Application to Register Permanent Residence or Adjust Status (Form I-485). *Id.*

On February 1, 2010, the Respondent's I-485 application was denied due to eligibility issues. *Id.*

On July 22, 2010 the Department of Homeland Security (DHS or the Government) served the Respondent by regular mail at 5133 Meandering Creek Court, Fort Worth, Texas 76179 with a Notice to Appear (NTA), charging him with removability under Section 212(a)(7)(A)(i)(I). Notice to Appear, dated Jul. 22, 2010.

On August 14, 2010 the Dallas Immigration Court served to the Respondent by regular mail at 5133 Meandering Creek Court, Fort Worth, Texas 76179 a Notice of Hearing, setting the Respondent's removal hearing for March 7, 2011. Notice of Hearing. The Notice of Hearing was not returned by the Postal Service.

The Respondent did not appear for his hearing on March 7, 2011 and thus the proceedings were conducted *in absentia*. Order of the Immigration Judge. On March 7, 2011 the Court ordered the Respondent removed to Sri Lanka after the Government submitted a Form I-213, Record of Deportable Alien, that established the truth of the allegations contained in the NTA. *Id.*

On December 20, 2011 the Respondent, through counsel, submitted the present Motion to Reopen arguing that he did not receive his Notice to Appear or Notice of

Hearing, and that exceptional circumstances resulted in his failure to appear to his March 7, 2011 hearing.

LEGAL STANDARDS

An Order of Removal entered *in absentia* may be rescinded upon a Motion to Reopen if the alien demonstrates that he did not receive proper notice of the scheduled hearing. INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(iii). 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), (c). 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).

If notice of deportation proceedings is properly addressed and sent to the alien by regular mail according to normal office procedures, there is a presumption of delivery, albeit weaker than for certified mail. *Matter of M-R-A*, 24 I. & N. Dec. 665 (BIA 2008). Thus, when a respondent bases his motion to reopen on a claim that he or she lacked notice, the question to be determined is whether the respondent has presented sufficient evidence to overcome the weaker presumption of delivery. *Id.* at 673.

When a Respondent's motion to rescind an *in absentia* order of removal is based on a claim that a Notice to Appear or Notice of Hearing sent by regular mail to the most recent address was not received, the burden is on the Respondent to provide proof that the document was not received. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA

1980). In determining whether a respondent has rebutted the weaker presumption of delivery, an Immigration Judge may consider a variety of factors including, but not limited to, the following: (1) the respondent's affidavit; (2) affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received; (3) the respondent's actions upon learning of the in absentia order, and whether due diligence was exercised in seeking to redress the situation; (4) any prior affirmative application for relief, indicating that the respondent had an incentive to appear; (5) any prior application for relief filed with the Immigration Court or any prima facie evidence in the record or the respondent's motion of statutory eligibility for relief, indicating that the respondent had an incentive to appear; (6) the respondent's previous attendance at Immigration Court hearings, if applicable; and (7) any other circumstances or evidence indicating possible nonreceipt of notice. However, Immigration Judges are neither required to deny reopening if such evidence is not provided nor obliged to grant a motion even if every type of evidence is submitted. Each case must be evaluated based on its own particular circumstances and evidence. *Matter of M-R-A*, 24 I. & N. Dec. at 674.

However, statements by the respondent's counsel contained in the motion to reopen are not evidence, and if unaccompanied by other evidence, do not carry respondent's burden of proof. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

A Motion to Reopen will not be granted unless the Respondent establishes a *prima facie* case of eligibility for the underlying relief. *See INS v. Abudu*, 485 U.S. 94, 104 (1988). A Motion to Reopen must also be accompanied by applications for relief and all supporting documents. *INS v. Doherty*, 502 U.S. 314 (1992).

Additionally, the Court may exercise its *sua sponte* authority to reopen in "truly exceptional situations" and where the interests of justice would be served. *In Re G-D-*, 22 I. & N. Dec. 1132 (BIA 1999).

Finally, an immigration judge has broad authority to grant or deny a motion to reopen. *INS v. Doherty*, 502 U.S. 314, 322 (1992).

ANALYSIS

A. Exceptional Circumstances

An order of removal entered *in absentia* may be rescinded upon a motion to reopen filed within 180 days of the date of the order of removal, if the alien demonstrates that his failure to appear was because of exceptional circumstances as defined in Section 240(e)(1) of the Act. 8 C.F.R. § 1003.23(b)(4). Section 240(e)(1) of the Act provides: "[t]he term 'exceptional circumstances' refers to exceptional circumstances (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) beyond the control of the alien."

Here, the Respondent's motion was not filed within 180 days of the date of the *in absentia* order of removal, and thus is time-barred. Accordingly, the Respondent cannot show that exceptional circumstances excused his failure to appear on March 7, 2011.

B. Lack of Notice

The Respondent argues that this Court should grant his Motion to Reopen because he did not receive the Notice to Appear or the Notice of Hearing. The Respondent states in his Motion that he did not receive the Notice to Appear because it was sent to his wife's attorney in New York City. However, the Notice to Appear indicates that it was

sent by regular mail to the Respondent's address in Fort Worth, Texas, and not to his wife's attorney in New York City. *See* Notice to Appear. Thus, contrary to the Respondent's assertion, the record shows that the Notice to Appear was sent to the correct address.

The Respondent states in his affidavit that, although the Notice of Hearing was sent to the correct address, he did not receive it because his wife failed to notify him of its arrival. The Respondent, however, presented no other evidence other than his own affidavit to establish lack of notice. Thus, the Court must determine whether the Respondent's affidavit alone is sufficient to rebut the presumption of proper delivery by regular mail.

The Court finds, for the following reasons, that the Respondent has not rebutted the weaker presumption of delivery by regular mail. First, the Respondent has failed to provide any corroborating evidence—in the form of a letter, declaration or affidavit—from someone with personal knowledge of the circumstances surrounding his alleged lack of notice. Although the Respondent's own affidavit is indeed evidence, as the Tenth Circuit has held, a mere conclusory statement of non-receipt is insufficient in light of the presumption of proper delivery by regular mail. *See Garung v. Ashcroft*, 371 F.3d 718, 722 (10th Cir. 2004).[1] *See also Joshi v. Ashcroft*, 389 F.3d 732, 735-36 (7th Cir. 2004) (holding that an alien's affidavit alleging non-receipt alone constitutes "weak evidence").

Second, the Respondent's I-485 application was denied on February 1, 2010, more than a year before his scheduled hearing date of March 7, 2011. Thus, at the time

[1] Although the Court recognizes that it is not bound by the Tenth Circuit, the Court nonetheless finds the Circuit Court's reasoning to be persuasive on this issue.

of his hearing, the Respondent did not have an incentive to appear as he was not prima facie eligible for relief.

The Court has considered all relevant facts and circumstances in the record and finds, for the reasons stated above, that the Respondent has not presented sufficient evidence to rebut the weaker presumption of delivery by regular mail.

C. Ineffective Assistance of Counsel

To the extent that the Respondent claims ineffective assistance of counsel, the Court finds that he has not complied with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

Under *Matter of Lozada*, a motion to reopen or reconsider based upon a claim of ineffective assistance of counsel requires:

> (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
>
> (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given the opportunity to respond, and
>
> (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. 19 I&N Dec. 637 (BIA 1988).

Here, the Respondent's claim of ineffective assistance of counsel must be denied as he has not attempted to comply with any of the three requirements under *Matter of Lozada*.

Finally, the Court finds that this case does not present the exceptional circumstances warranting a *sua sponte* reopening of the proceedings.

CONCLUSION

Accordingly, the following Order will be entered:

ORDER

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

Date: FEB 14, 2012
Dallas, Texas

James A. Nugent
Immigration Judge