U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: MADRID-GOMEZ, MARICELA JA... **A 206-254-226**

Date of this notice: 8/11/2016

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:
Adkins-Blanch, Charles K.
O'Connor, Blair
O'Leary, Brian M.

Userteam: Docket

File: A206 254 226 – Los Angeles, CA Date:

AUG 11 2016

In re: MARICELA JACQUELIN MADRID-GOMEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rosana Kit Wai Cheung, Esquire

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated December 16, 2014, denying her motion to reopen. The respondent had previously been ordered removed in absentia for her failure to appear for the hearing on April 16, 2014. The appeal will be sustained, proceedings will be reopened, and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including findings as to credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Board possesses discretion to reopen or reconsider cases sua sponte. *See* 8 C.F.R. § 1003.2(a); *see also Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Based on the totality of the circumstances in this case, we will grant the respondent's motion to reopen, and we will rescind her in absentia order pursuant to our sua sponte authority. *See* 8 C.F.R. § 1003.2(a); *see also Matter of J-J-*, *supra*. Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

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

LAW OFFICES OF ROSANA KIT WAI CHEUNG
ROSANA KIT WAI CHEUNG, ESQ.
617 S. OLIVE ST. #915
LOS ANGELES, CA 90014

IN THE MATTER OF FILE A 206-254-226 DATE: Dec 17, 2014
MADRID-GOMEZ, MARICELA JACQUELIN

__ 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
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
606 SOUTH OLIVE ST.
LOS ANGELES, CA 90014

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC:

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

File Number: **A206 254 226**	)	
	)	
In the Matter of:	)	
	)	
MADRID-GOMEZ,	)	**IN REMOVAL PROCEEDINGS**
Maricela Jacquelin,	)	
	)	
Respondent	)	

APPLICATION: Motion to Reopen; Request for Stay of Removal

ON BEHALF OF RESPONDENT:
Rosana Kit Wai Cheung, Esquire
Law Offices of Rosana Kit Wai Cheung
617 South Olive Street, Suite 915
Los Angeles, California 90014

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. Procedural History

Maricela Jacquelin Madrid-Gomez (Respondent) is a native and citizen of El Salvador. *See* Exh. 1. The Department of Homeland Security (Department) personally served Respondent with a Notice to Appear (NTA) on November 24, 2013. The NTA alleged that Respondent was not a citizen or national of the United States and entered the United States near Laredo, Texas on or about November 22, 2013, and was not then admitted or paroled. Exh. 1. Accordingly, the NTA charged her with inadmissibility pursuant to INA § 212(a)(6)(A)(i). *Id.* Jurisdiction vested and removal proceedings commenced when the Department filed the NTA with the Court on December 12, 2013. 8 C.F.R. § 1003.14(a) (2013).

Upon release from custody, Respondent reported her address would be: 10826 South Central Avenue, Los Angeles, California 90059. *See* Respondent's Motion to Reopen, Tab B. Accordingly, the Department notified Respondent that she must report to the Department on the thirtieth day of each month, and reminded her that she must not change residences without first securing written permission. *See id.*

On March 26, 2014, the Court served Respondent with a Notice of Hearing (NOH), sent via regular mail to her Los Angeles address, informing Respondent that her next hearing was scheduled for April 16, 2014. The NOH was not returned to the Court as undeliverable. On April 16, 2014, Respondent failed to appear for her hearing. The Court, proceeding *in absentia*,

found that removability had been established by clear, convincing and unequivocal evidence. Accordingly, the Court ordered Respondent removed to El Salvador.

On October 14, 2014, Respondent filed the pending motion to reopen on the basis of improper notice, alleging that she did not receive the NOH informing her of her April 16, 2014 hearing. For the following reasons, this Court will deny Respondent's motion to reopen.

II. Law and Analysis

A. Motion to Reopen

1. Notice

The Court may rescind an *in absentia* removal order upon a motion to reopen if the respondent demonstrates that she did not receive proper notice of the proceeding. INA § 240(b)(5)(C)(ii); *see also* 8 C.F.R. § 1003.23(b)(4)(ii). Written notice of a scheduled proceeding must be given to the alien in person or, if personal service is not practical, sent by mail to counsel of record or the respondent at the most recent address provided to the Attorney General. *See* INA § 239(a)(1), (2); *Matter of G-Y-R-*, 23 I&N Dec. 181, 185 (BIA 2001).

Once the Department demonstrates that an NOH was sent by regular mail to an alien's most recent address, there is a presumption of effective service. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). This is a weaker presumption than the Court applies to notice by certified mail; however, an alien must present sufficient evidence that she did not receive the notice in order to overcome this presumption. *Sembiring v. Gonzales*, 499 F.3d 981, 987 (9th Cir. 2007); *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002); *M-R-A-*, 24 I&N Dec. at 673.

In determining whether a respondent has rebutted the lesser presumption of delivery, a Court may consider: (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. *M-R-A-*, 24 I&N Dec. at 674. "Each case must be evaluated based on its own particular circumstances and evidence," and the Court is "neither required to deny reopening if exactly such evidence is not provided nor obliged to grant a motion, even if every type of evidence is submitted." *Id.*

The Court finds that Respondent received legally sufficient notice of her scheduled hearing. A respondent can be properly charged with receiving constructive notice, even if she did not personally see the mailed document. *G-Y-R-*, 23 I&N Dec. at 189. The Court mailed the NOH on March 26, 2014 to Respondent's most recent address on file: 10826 South Central Avenue, Los Angeles, California 90059. Therefore, a presumption of delivery exists. *See Sembiring*, 499 F.3d at 983; *Salta*, 314 F.3d at 1079.

Respondent has not submitted sufficient evidence to overcome the presumption of delivery. *See Sembiring*, 499 F.3d at 987-88; *M-R-A-*, 24 I&N Dec. at 674. In support of her claim, Respondent submitted a declaration in which she states that she never received the NOH. *See* Respondent's Mot. to Reopen, Tab A. However, a declaration is only one factor this Court considers. *See M-R-A-*, 24 I&N Dec. at 674. Aside from this declaration, Respondent has not presented evidence that indicates nonreceipt of the NOH due to mail delivery issues or any other reason, and the Court notes that the NOH was not returned as undeliverable.

Although Respondent relies on *Salta*, 314 F.3d 1076, for the proposition that an affidavit, alone, may suffice to rebut a presumption of delivery, that case is distinguishable. In *Salta*, the respondent initiated removal proceedings herself so she could apply for relief. *Id.* at 1077. Although she had attended an earlier hearing, she failed to appear at a removal hearing and was ordered removed *in absentia*. *Id.* Under these circumstances, the Ninth Circuit Court of Appeals reasoned that an affidavit, alone, could rebut a presumption of delivery. *Id.* at 1079. In the instant case, Respondent did not approach the Department and ask them to serve an NTA. Rather, the Government caught and apprehended her as she was attempting to illegally cross the border. *See* Respondent's Mot. to Reopen, Tab A. Additionally, Respondent has submitted an unsworn declaration, which is not as persuasive as "a sworn affidavit." *Id.* Because she did not have as compelling an incentive to appear as the respondent had in *Salta*, her lone declaration is insufficient to overcome the presumption of delivery.

In weighing both the positive and negative factors presented, the Court finds that Respondent has failed to rebut the lesser presumption of delivery and has failed to demonstrate that she did not receive proper notice of her April 16, 2014 hearing. As the Court finds that Respondent received legally sufficient notice of her hearing, it declines to reopen her case on this basis.

2. Sua Sponte

An immigration judge may upon her own motion at any time, or upon motion of the Department or respondent, reopen or reconsider 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 has stated that proceedings should be reopened *sua sponte* only under "exceptional" circumstances and the Court's power to reopen "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). 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 (BIA 1989).

A motion to reopen for the purpose of acting on an application for relief must establish *prima facie* eligibility for the relief sought and must be accompanied by the appropriate application and supporting documents. *See* 8 C.F.R. § 1003.23(b)(3); *INS v. Abudu*, 485 U.S. 94 (1988). A *prima facie* showing of eligibility includes demonstrating that the respondent is both statutorily eligible and that the relief sought is warranted as a matter of discretion. *INS v. Wang*,

450 U.S. 139, 142-45 (1981). However, even if the respondent can demonstrate *prima facie* eligibility, the Court may deny the motion to reopen in the exercise of discretion. *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *Matter of Reyes*, 18 I&N Dec. 249, 252 (BIA 1982).

Although Respondent has attached a Form I-589, Application for Asylum and for Withholding of Removal, the application and declaration contain minimal information about Respondent's potential claim. Specifically, Respondent has not provided any information in her application or supporting documents about whether she was unable to leave her marriage, a requirement to establish membership in her purported social group of Salvadoran women who are in domestic violence relationships. *See Matter of A-R-C-G-*, 26 I&N Dec. 388, 392-93 (BIA 2014). Furthermore, although she has submitted country condition reports, she failed to include any information about whether she was persecuted by someone the government was unwilling or unable to control. *See id.* at 395. While her attorney did allege in the motion that she meets these criteria, Respondent's Mot. to Reopen at 10-13, the Court may not rely on the bare statements of counsel as evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (stating that counsel's unsupported assertions in a brief are not entitled to evidentiary weight).

Even assuming, *arguendo*, that Respondent provided enough information to make out a potential claim for relief, the Court would nonetheless deny her motion as a matter of discretion. *See Rios-Pineda*, 471 U.S. at 449. Although the Court is sympathetic to Respondent's situation, she failed to rebut the presumption of delivery, and therefore she had at least constructive notice of the hearing she failed to attend. Thus, in the interest of finality, the Court declines to reopen this case *sua sponte*. *See O-*, 19 I&N Dec. 871.

B. Stay of Removal

Because this Court will deny Respondent's motion to reopen, it finds no basis on which to grant her request for a stay of removal. *See Nken v. Holder*, 556 U.S. 418, 433 (2009) (stating that a stay under the regulatory criteria is not "a matter of right").

Accordingly, the following orders shall be entered:

ORDER

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

IT IS FURTHER ORDERED that Respondent's request for a stay of removal be **DENIED**.

DATE: Dec 16, 2014

Anna Ho
Immigration Judge