U.S. Department of Justice

Executive Office for Immigration Review

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Name: VALENCIA-BARRAGAN, ROCIO ... **A 209-138-515**
Riders: [redacted]

Date of this notice: 2/5/2018

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.
Adkins-Blanch, Charles K.
Mann, Ana

Userteam: Docket

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Files: A209 138 515 – Seattle, WA
[redacted]

Date:
FEB – 5 2018

In re: Rocio Alida VALENCIA BARRAGAN
[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Sharon Arlene Healey, Esquire

APPLICATION: Reopening

The respondents, natives and citizens of Mexico, were ordered removed from the United States in absentia on January 3, 2017, after not appearing at a hearing. They filed a motion to reopen on February 8, 2017, and appeal from the Immigration Judge's decision dated June 5, 2017, denying the motion. The appeal will be sustained.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In the Notice of Appeal (Form EOIR-26), the lead respondent, hereafter the respondent, argues that she did not receive the Notice of Hearing. *See Sembiring v. Gonzales*, 499 F.3d 981, 988–90 (9th Cir. 2007) (describing evidence sufficient to overcome presumption of effective service of regular mail); *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). She states that she diligently kept her appointments with the Department of Homeland Security and timely filed an application for asylum (Form I-589). The respondent also filed her motion to reopen with due diligence. Moreover, it appears that the respondent had an incentive to appear at her hearing to pursue her claim for asylum in the United States. In light of the foregoing, the respondents have rebutted the presumption that the post office served them with the Notice of Hearing.

In addition, notwithstanding the above, the respondent established that her non-appearance at the hearing was caused by an "exceptional circumstance." *See* section 240(e)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(e)(1) (stating that the 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). According to the respondent's declaration, she gave birth to her child via caesarian section on December 24, 2016, and remained in the hospital until December 26, 2016.

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Hence, the respondent's medical condition appears to have rendered her unable to attend her January 3, 2017, hearing. We will therefore reopen these proceedings.

Accordingly, the following order will be entered.

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

FOR THE BOARD

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
SEATTLE IMMIGRATION COURT
SEATTLE, WASHINGTON

In the Matter of:

Rocio VALENCIA BARRAGAN
[redacted],

Respondents

File Number: **A209-138-515**
[redacted]

IN REMOVAL PROCEEDINGS

CHARGE: INA § 212(a)(7)(A)(i)(I) – Intending Immigrant Not in Possession of Valid Entry Documents

APPLICATION: Motion to Reopen and Rescind *In Absentia* Order of Removal

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ON BEHALF OF ICE
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DECISION OF THE IMMIGRATION JUDGE

I. Introduction and Procedural History

On October 7, 2016, the Department of Homeland Security ("DHS") initiated removal proceedings against the Lead Respondent, Rocio Valencia Barragan, and her two minor children by filing three Notices to Appear ("NTAs") with the Seattle Immigration Court. Exh. 1. The NTAs allege that the respondents are natives and citizens of Mexico, who applied for admission to the United States at the San Luis Port of Entry on October 6, 2016, but did not then possess or present a valid immigrant visa or entry document. *Id.* On the basis of these allegations, the DHS charged the respondents as inadmissible under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA"), as an intending immigrant without valid immigrant visas or entry documents. *Id.* at 3.

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Respondent and her children failed to appear at their initial master calendar hearing on January 3, 2017. The Court granted DHS's motion to proceed *in absentia*. On the basis of the facts asserted in the Form I-213, the Court found DHS had demonstrated by clear and convincing evidence that the respondents were removable as charged in the NTAs and ordered them removed to Mexico. Decision of the Immigration Court (Jan. 3, 2017). On February 8, 2017, Respondent, through counsel, filed a motion to reopen and rescind the *in absentia* removal orders. Respondent's Motion to Reopen and Rescind *In Absentia* Removal Order (Feb. 8, 2017) [hereinafter "MTR"]. DHS did not file an opposition brief. For the following reasons, the Court denies Respondent's motion to reopen.

II. Motion to Reopen

A. Notice

An *in absentia* removal order may be rescinded at any time if the alien demonstrates that he did not receive notice. INA §240(b)(5)(C); 8 C.F.R. §1003.23(b)(4)(ii). An alien is placed on notice of proceedings if he receives the NTA. *See Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1005 (9th Cir. 2014) ("[T]he NTA warns aliens that they will be removed in absentia if they fail to appear. . . ."); *Matter of G-Y-R-*, 23 I&N Dec. 181, 188-89 (BIA 2001). Following proper service of the NTA, a hearing notice, including a notice of change in time or place of proceedings, may be served, in person or by mail, on the alien. *See* INA § 239(a)(2)(A). However, no written notice is required "if the alien has failed to provide [his] address," as he is required to do by the Act. INA §§ 239(a)(2)(B); 240(b)(5)(B); *see also Velasquez-Escovar*, *supra*, at 1003-04. Specifically, an alien "must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number." INA § 239(a)(1)(F)(ii).

Respondent concedes receipt of the NTAs, but claims she never received a notice of her January 3, 2016 hearing. MTR at 2, 5. Additionally, the NTAs she was given did not specify a time or date. *See* Exhs. 1, 1A, 1B. The respondent further claims that had she known about her hearing she would have likely requested a continuance because she gave birth to her third child on December 24, 2016. *Id.* at 5.

The Court applies a presumption of receipt to a hearing notice "sent by regular mail when the notice was properly addressed and mailed according to normal office procedures," but this presumption is weaker than that accorded to notices sent by certified mail. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). In determining whether the respondent has rebutted this presumption of delivery, the Court must examine "all relevant evidence submitted," and "may consider a variety of factors including, but not limited to:" supporting affidavits, the alien's prior attendance at hearings, whether the alien exercised due diligence upon learning of the *in absentia* order, any prior affirmative applications for relief indicating an incentive to appear, and any other evidence of nonreceipt. *Id.* at 674.

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For the following reasons, the Court finds notice was proper. DHS personally served Respondent with the NTA after she presented herself at the border. The NTA expressly warned Respondent that she "must notify the Immigration Court immediately by using Form EOIR-33 whenever [she] change[s] [her] address." Exh. 1 at 2. During her initial interview with U.S. Border Patrol agents, Respondent gave her aunt's home address at 1408 Ledwich Ave, Yakima, Washington 98902 as her intended destination and residence. Exh. 3 at 2. On December 7, 2016, the Seattle Immigration Court sent the January 3, 2017 hearing notice to the Yakima address Respondent provided pursuant to normal office procedures. Exh. 2; INA § 239(c). The hearing notice was not returned to the Court as undeliverable. Respondent did not provide any explanation for why she did not receive the hearing notice. Rather, Respondent confirmed she lived at the same address on record at the time the Court sent the hearing notice, but just did not receive it. MTR at 5. The Court finds that Respondent has not rebutted the presumption of delivery, given that her hearing notice was not returned as undeliverable and she did not proffer any explanation for why she did not receive the hearing notice. *See Matter of M-R-A-*, *supra*, at 673. Thus, the Court denies Respondent's motion on this basis.

B. *Sua Sponte* Reopening to Apply for Asylum

Respondent did not clearly request the Court invoke its sua sponte authority. However, "[a]n Immigration Judge may upon his or her own motion at any time . . . reopen or reconsider any case in which he or she has made a decision. . . ." 8 C.F.R. § 1003.23(b)(1). The decision to grant or deny a motion to reopen ultimately lies within the discretion of the immigration judge. *Id.* The power to reopen proceedings *sua sponte* is reserved for exceptional situations and "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). The Court has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief. 8 C.F.R. § 1003.23(b)(3). Again, the Court finds that Respondent has not presented exceptional circumstances that would warrant *sua sponte* reopening.

The Court acknowledges Respondent alleges she came to the United States after fleeing cartel violence and has three minor children, including one United States citizen child. *See generally* MTR. Although Respondent claims she is eligible for relief from removal, the Court finds that she is applying for discretionary relief in the form of asylum and the likelihood of success remains speculative at best. *See Sharma v. INS*, 89 F.3d 545, (9th Cir. 1996) (finding no exceptional circumstances where respondents arrived late for their hearing due to traffic congestion and parking difficulties and their only possibility of relief from deportation was a discretionary grant of asylum). Moreover, even accepting Respondent's affidavit as true, the Court finds that she has not established prima facie eligibility for asylum. The Court agrees that one's family constitutes a legally cognizable social group under Ninth Circuit precedent, but

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Respondent has not established her membership in that particular social group is one central reason for any harm suffered in the past or feared in the future. *See* INA § 208(b)(1)(B)(i); *Flores-Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (recognizing "family" as "the quintessential particular social group"). Rather, it appears the Knights Templar cartel targeted her partner, not her, because he fought against the cartel as a member of a community militia group. MTR at 24. While regrettable, the Court finds any risk of harm by the cartel against her partner on account of his participation in the community militia would not qualify as harm on account of a protected ground. *See Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) ("[M]istreatment motivated purely by personal retribution will not give rise to a valid asylum claim."); *see also Ayala v. Holder*, 640 F.3d 1095, 1097-98 (9th Cir. 2011); *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (holding that harm as a result of a personal vendetta is not persecution on account of a protected ground).

Accordingly, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that Respondents' motion to reopen is **DENIED.**

June 5, 2017
Date

Paul A. DeFonzo
Immigration Judge

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