U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Claffey, Danielle M
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365 Northridge Road
Suite 300
Atlanta, GA 30350

DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr., SW,
Ste 332
Atlanta, GA 30303

Name: GODOY-ARREDONDO, JUAN

A 205-131-326

Date of this notice: 11/21/2017

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.
Kelly, Edward F.
Mann, Ana

Userteam: Docket

File: A205 131 326 – Atlanta, GA

Date: NOV 21 2017

In re: Juan GODOY-ARREDONDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Danielle M. Claffey, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, was ordered removed from the United States in absentia on May 26, 2016, after not appearing at a hearing. He filed a motion to reopen on August 24, 2016, and appeals from the Immigration Judge's decision dated February 24, 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).

The respondent has established that "exceptional circumstances" prevented his appearance at the hearing. *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). The Immigration Court mailed the Notice of Hearing to the respondent's counsel at a former address, and the post office returned it as undeliverable. Hence, the respondent did not receive actual notice of the hearing. In addition, the respondent appeared at prior hearings and filed his motion to reopen with due diligence. Moreover, it appears that the respondent's counsel was confused regarding the obligation to notify the Immigration Court that counsel had changed the law firm's mailing address. In light of the foregoing, we will reopen these proceedings based on "exceptional circumstances."

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

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
180 TED TURNER DR SW, STE. 241
ATLANTA, GA 30303

Kuck Immigration Partners LLC
Claffey, Danielle Maria
365 Northridge Road
Suite 300
Atlanta, GA 30350

Date: Feb 27, 2017

File A205-131-326

In the Matter of:
GODOY-ARREDONDO, JUAN

_____ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

__X__ **Enclosed is a copy of the order/decision of the Immigration Judge.**

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

CJC
Immigration Court Clerk UL

cc: **OCC/DHS**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

IN THE MATTER OF:	)	**In Removal Proceedings**
	)	
GODOY-ARREDONDO, Juan	)	**File No. A# 205-131-326**
	)	
Respondent	)	
	)	

CHARGE: Section 212(a)(6)(A)(i) of the Act, in that Respondent was present in the United States without being admitted or paroled, or arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Motion to Reopen Removal Proceedings Subsequent to an *In Absentia* Ruling

APPEARANCES

ON BEHALF OF THE RESPONDENT:
Danielle M. Claffey, Esq.
Kuck Immigration Partners, LLC
365 Northridge Road, Suite 300
Atlanta, Georgia 30350

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
Department of Homeland Security
180 Ted Turner Dr. SW, Suite 332
Atlanta, Georgia 30303

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Juan Godoy-Arredondo ("Respondent") is an adult male native and citizen of Mexico. He attempted to enter the United States at or near an unknown place on or about an unknown time without being admitted or paroled after inspection by an Immigration Officer.

On January 9, 2012, the Department of Homeland Security ("Department") issued Respondent a Notice to Appear ("NTA") charging Respondent as removable under section 237(a)(1)(B) of the Act, as amended, in that after admission as a nonimmigrant under section 101(a)(15) of the Act, Respondent remained in the United States for a time longer than permitted, in violation of the Act or any other law of the United States. See NTA.

On October 13, 2015, the Court sent a Notice of Hearing in Removal Proceedings ("Notice of Hearing") to the address of his attorney at the time. Respondent was set for a hearing on May 26, 2016.

On May 26, 2016, Respondent failed to appear before the Court and was ordered removed to Mexico *in absentia* on that date.

On August 24, 2016, Respondent filed a Motion to Reopen Removal Proceedings Subsequent to an *In Absentia* Ruling ("Motion to Reopen") with the Court.

The Court has carefully reviewed the entire record before it. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny Respondent's Motion to Reopen.

II. STATEMENT OF LAW

Only one motion to reopen may be filed by the alien. 8 C.F.R. § 1003.23(b)(4)(ii). Generally, motions to reopen for the purpose of rescinding an *in absentia* removal order must be filed within 180 days after the date of the removal order, and the respondent must demonstrate that the failure to appear was due to exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). However, motions to reopen for the purpose of rescinding an *in absentia* removal order may be filed at any time, including after the 180-day deadline, if the alien argues that she did not receive notice of the hearing or asserts that she was in Federal or State custody and the failure to appear was through no fault of her own. See INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii). All motions to reopen must "be supported by affidavits and other evidentiary material." 8 C.F.R. § 1003.23(b)(3).

When a Notice of Hearing is sent to an alien by regular mail, properly addressed, and mailed according to normal office procedures, there is a presumption that the alien received proper notice. Matter of M-R-A-, 24 I&N Dec. 665, 673 (BIA 2008). However, the presumption of notice is weaker when the notice is sent by regular mail, as opposed to certified mail. Id.; Qi Hu Sun v. U.S. Atty. Gen., 543 Fed.Appx. 987, 989 (11th Cir. 2013) (unpublished and cited for persuasiveness).

The Code of Federal Regulations also grants an Immigration Judge *sua sponte* authority to reopen, at any time, any case in which he has made a decision. See 8 C.F.R. § 1003.23(b). The Board has explained that exercising *sua sponte* authority is an "extraordinary remedy reserved for truly exceptional situations." Matter of G-D-, 22 I&N Dec. 1132, 1134 (BIA 1999) (citing Matter of J-J-, 21 I&N Dec. 976 (BIA 1997)).

Finally, the Supreme Court has held that "motions to reopen are disfavored" and "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." See INS v. Abudu, 485 U.S. 94, 107 (1988). "This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." INS v. Doherty, 502 U.S. 314, 323 (1992) (internal citations omitted).

III. DISCUSSION

An Immigration Judge may consider various factors to determine whether a respondent has rebutted the weaker presumption of delivery when notice is sent via regular mail, including, but not limited to, the following: (1) affidavits from the alien and other individuals with knowledge of facts relevant to receipt of notice; (2) whether the alien exercised due diligence upon learning of the *in absentia* removal order; (3) any prior applications for immigration relief that would indicate an incentive to appear at the removal hearing; (4) the alien's attendance at earlier

immigration hearings; and (5) any other circumstances indicating possible nonreceipt of notice. Markova v. U.S. Atty. Gen., 537 Fed.Appx. 871, 874 (11th Cir. 2013) (unpublished and cited for persuasiveness); Matter of M-R-A-, 24 I&N Dec. at 674. After considering the evidence presented by Respondent and the factors described above, the Court finds Respondent has failed to overcome the presumption of proper notice.

In the present case, copies of e-mails state that Respondent's previous attorney, Ms. Rojas, claims that after speaking with the Court Administrator, she electronically updated her address with the Court. See Motion to Reopen, B at 3; Tab C at 4. However, the Notice of Hearing was still sent to the firm's old address. Although Respondent's previous attorney did electronically update her address in the Court's system, it is still required to file a new EOIR-28 with *each respondent after* the update either electronically or in person.

After this update was completed by Ms. Rojas, there is no record of her filing a new EOIR-28 in this case. Respondent provides no affidavit of Ms. Rojas explaining to the contrary. No other attorney properly submitted an EOIR-28 for this case. Because previous counsel failed to follow proper procedure for these types of circumstances, the Notice of Hearing was sent to the address of record in Respondent's case which was the firm's previous location. Therefore, Respondent has not overcome the presumption of proper notice.

The Court may *sua sponte* reopen a case over which it has jurisdiction at any time. 8 C.F.R. § 1003.23(b)(1); see also Matter of J-J-, 21 I&N Dec. 976. However, such power should only be exercised in cases of "exceptional situations." Id. at 984. The respondent has the burden to show that an exceptional situation exists. Matter of Beckford, 22 I&N Dec. 1216, 1218-19 (BIA 2000). Moreover, the power to reopen a case *sua sponte* "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing may result in hardship." Matter of J-J-, 21 I&N Dec. at 984. As a general matter, the Court "invokes [its] *sua sponte* authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." Matter of G-D-, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (citing Matter of J-J-, supra). Finally, the Eleventh Circuit has held that the Board's discretion to reopen proceedings *sua sponte* is exceptionally broad and not subject to judicial review. Lenis v. U.S. Atty. Gen., 525 F.3d 1291, 1293 (11th Cir. 2008).

The Court is not convinced that exceptional circumstances have been established in the present case. As mentioned above, Respondent's previous attorney failed to follow proper procedure when updating her address and filing an EOIR-28 with the Court. For the foregoing reasons, the Court denies Respondent's Motion to Reopen.

In light of the foregoing, the Court will enter the following order:

ORDER OF THE IMMIGRATION JUDGE

It is ordered that:

Respondent's Motion to Reopen is hereby **DENIED**.

2-24-2017
Date

J. Dan Pelletier
United States Immigration Judge
Atlanta, Georgia