U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: SORTO-ORELLANA, RIGOBERT...

A 078-971-293

Date of this notice: 11/16/2017

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:
Kelly, Edward F.
Grant, Edward R.
Adkins-Blanch, Charles K.

Userteam: Docket

File: A078 971 293 – Los Angeles, CA

Date: NOV 16 2017

In re: Rigoberto Osiris SORTO-ORELLANA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brian P. Casson, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of El Salvador, appealed from the Immigration Judge's decision dated March 7, 2017, denying his February 27, 2017, motion to reopen and rescind the Immigration Judge's in absentia order of removal entered on June 13, 2002. The Department of Homeland Security (DHS) did not file a response to the appeal. 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).

Pursuant to section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C), an in absentia removal order may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing in accordance with sections 239(a)(1) or (2) of the Act, 8 U.S.C. § 1229(a)(1) or (2). Section 240(b)(5)(C)(ii) of the Act; *Matter of Guzman*, 22 I&N Dec. 722, 722-23 (BIA 1999). In determining whether the respondent received notice, all circumstances and evidence indicating possible non-receipt of notice should be considered. *Matter of M-R-A-*, 24 I&N Dec. 665, 674 (BIA 2008).

The Immigration Judge concluded that the respondent had received proper notice of his hearing. She found the hearing notice was sent to the last known address the respondent had provided in 2001, after personal service of the Notice to Appear (NTA), yet the respondent did not appear for his hearing. The Immigration Judge also noted that the respondent did not contact the court in the intervening years (IJ at 2). On appeal, the respondent argues that he did not receive notice of the hearing held on June 13, 2002 and should not be charged with receiving it (Resp. Br. at 6). The respondent was a minor when he was released from DHS custody and he argues that the address he provided contained "c/o Marta F. Orellana," that the notice of hearing did not reflect this part of his address, and that he did not receive the notice of hearing held in 2002 (Respondent Br. at 8-10). The respondent argues further that he actually received mail that was properly addressed c/o his mother, within the relevant time frame (Respondent's Br. at 9).

The record reflects that the respondent's contentions about the address on his notice of hearing are correct. In addition, the respondent's motion included signed affidavits in which he and his mother attest that they never received notice of the June 13, 2002, hearing (Respondent's Motion to Reopen at Exhibits A-B). Additionally, the evidence does not reflect that the respondent

deliberately absconded or made himself unreachable. Rather, he contacted the DHS repeatedly subsequent to the hearing in absentia to obtain employment authorization between 2004 and 2010, and thereafter he also applied for Temporary Protected Status (Respondent's Motion to Reopen at Exhibits C-F). Finally, upon learning of the in absentia order, the respondent promptly consulted counsel and filed a motion to reopen the in absentia order of removal. In these circumstances, on balance, we conclude that the respondent's motion succeeded in rebutting the presumption of delivery of the hearing notice in his case. *Matter of M-R-A-*, 24 I&N Dec. at 675-76; 8 C.F.R. 1003.23(b)(4)(ii).

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained, and the Immigration Judge's decision is vacated. The order of removal entered in absentia, on June 13, 2002, is rescinded.

FURTHER ORDER: The record is remanded for to the Immigration Judge for further proceedings and the entry of a new decision consistent with the foregoing opinion.

FOR THE BOARD

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

SORTO-ORELLANA, RIGOBERTO OSIRIS
[redacted]

IN THE MATTER OF FILE A 078-971-293 DATE: Mar 8, 2017
SORTO-ORELLANA, RIGOBERTO OSIRIS

__ 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 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
606 SOUTH OLIVE ST.
LOS ANGELES, CA 90014

✓ OTHER:

COURT CLERK
IMMIGRATION COURT

CC: FF

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

File No.:	**A 078-971-293**	)
		)
In the Matter of:		)
		)
SORTO-ORELLANA,		) **IN REMOVAL PROCEEDINGS**
Rigoberto Osiris,		)
		)
		)
Respondent		)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) — *Alien present in the United States without being admitted or paroled.*

APPLICATION: Respondent's Motion to Reopen

ON BEHALF OF RESPONDENT:
Ellennita Muetze Hellmer, Esquire
The Law Offices of Hale Hawbecker
14416 Jefferson Davis Highway, Suite 10
Woodbridge, Virginia 22191

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

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Rigoberto Osiris Sorto-Orellana (Respondent) is a native and citizen of El Salvador. Exh. 1. On November 7, 2001, the former Immigration and Naturalization Service (INS) personally served Respondent with a Notice to Appear (NTA). *Id.* Therein, the INS alleged that Respondent is not a citizen or national of the United States; is a citizen and native of El Salvador; arrived in the United States at or near Falcon Heights, Texas, on or about November 7, 2001; and was not then admitted or paroled after inspection by an Immigration Officer. *Id.* Accordingly, the INS charged Respondent as an alien present in the United States without being admitted or paroled under INA § 212(a)(6)(A)(i). *Id.* Jurisdiction vested and removal proceedings commenced when the INS filed the NTA with the Court on November 19, 2001. *See* 8 C.F.R. § 3.14(a) (2001).

On January 31, 2002, the Court granted Respondent's motion to change venue from Harlingen, Texas to Los Angeles, California. IJ Decision (Jan. 31, 2002). On April 1, 2002, Court staff served a Notice of Hearing (NOH) by mail to Respondent's address of record. *See* NOH (Apr. 1, 2002); Form EOIR-33. Respondent failed to appear at his June 13, 2002 hearing.

See IJ Decision (June 13, 2002). Based on evidence that is clear, convincing and unequivocal, the Court ordered Respondent removed, *in absentia*, to El Salvador on June 13, 2002. *Id.*

Respondent submitted the pending motion to reopen on February 27, 2017, requesting that the Court reopen his proceeding based on lack of notice. *See* Respondent's Motion to Reopen. In addition, Respondent requested a stay of removal in connection with his motion to reopen. *Id.*

For the following reasons, the Court denies Respondent's motion to reopen and stay of removal.

I. Law and Analysis

A. Notice

The Court may rescind an *in absentia* removal order upon a motion to reopen if the applicant demonstrates that he did not receive proper notice of the proceedings. INA § 240(b)(5)(C)(ii); *see also* 8 C.F.R. § 1003.23(b)(4)(ii). Written notice of scheduled proceedings must be given to the applicant in person or, if personal service is not practical, sent by mail to counsel of record or the applicant at the most recent address provided to the Attorney General. *See* INA § 239(a)(1), (2). Notice to counsel of record constitutes notice to the applicant. *See* 8 C.F.R. § 1003.26(c)(2); *see also Matter of Barocio*, 19 I&N Dec. 255, 259 (BIA 1985).

In cases where the NOH is sent through regular mail, a presumption of delivery exists, but it is a lesser presumption than the presumption applied to correspondence sent by certified mail. *See Sembiring v. Gonzales*, 499 F.3d 981, 983 (9th Cir. 2007); *see also Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2003). In order to rebut this presumption, a respondent must submit sufficient evidence to support his claim that he did not receive notice. *See Matter of M-R-A-*, 24 I&N Dec. 665, 674 (BIA 2008) (holding that all relevant evidence submitted to overcome the weaker presumption of delivery must be considered); *Salta*, 314 F.3d at 1079 (noting that a sworn affidavit may be sufficient evidence where a respondent initiated a proceeding to obtain a benefit, appeared at an earlier hearing, and had no motive to avoid the hearing).

When determining if a respondent has rebutted the lesser presumption of delivery, the 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 non-receipt of notice. *M-R-A-*, 24 I&N Dec. at 674. Additionally, "[e]ach 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.*

In the pending motion, Respondent asserts that he was only recently made aware of the Court's removal order dated June 13, 2002. Respondent's Motion to Reopen at 1. Respondent submitted an affidavit from his mother Marta Orellana, in addition to his own affidavit, stating neither had received notice of a hearing. *Id.* at Tabs A–B. The Court notes that Marta Orellana stated in her affidavit that, "authorities told me to watch the mail for a hearing notice advising me of when Rigoberto would have to return to immigration court." Yet, Respondent, nor his mother, ever inquired as to this hearing until sixteen years later when Respondent was detained by immigration authorities. Furthermore, the NTA, personally served on the Respondent, notified Respondent of his requirement to change his address after moving. *See* Exh. 1. Respondent sent in an Form EOIR-33 with the California address. *See* Form EOIR-33. The Court notes that Respondent's current motion to reopen has an updated Form EOIR-33 with a Manassas, Virginia Address. *See* Respondent's Motion. At no time in the last sixteen years did Respondent ever submit an address change to Virginia, as requires under the NTA.

The Court served Respondent with the NOH at the most recent address provided to the Court on April 1, 2002. *See* Notice of Hearing (Apr. 1, 2002). In fact, Respondent provided the same Lynwood, California address in all correspondences with the Court since his release, including Respondent's Notice to EOIR, Form I-830; Order of Release on Recognizance, Form I-220A; and Change of Address, Form EOIR-33. Written notice of scheduled proceedings to Respondent's most recent address satisfies the INA's notice requirements. *See* INA § 239(a)(1), (2). Furthermore, Respondent has not submitted sufficient evidence to rebut the presumption of delivery. *See Salta*, 314 F.3d at 1079; *M-R-A-*, 24 I&N Dec. at 674. Thus, the Court finds that Respondent received legally sufficient notice of his June 13, 2002 hearing. *Id.*

The Court also provided notice of Respondent's removal order by regular mail on June 13, 2002. *See* IJ Decision (June 13, 2002). That order was sent to Respondent's most recent address on file with the Court. Thus, the Court finds that Respondent received legally sufficient notice of the Court's order. *See* INA § 239(c).

Given the foregoing, the Court denies Respondent's motion to reopen based on lack of notice. Accordingly, the Court enters the following order:

ORDER

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

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

DATE: 3/7/17

D.D. Sitgraves

D.D. Sitgraves
Immigration Judge

Certificate of Service

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