U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Sarian, Artem M., Esq.
Sarian Law Group, APLC
P.O. Box 1332
Glendale, CA 91209-1332

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

Name: BASAMBEKYAN, JASMEN

A 075-665-907

Date of this notice: 11/28/2017

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:
O'Connor, Blair
Pauley, Roger
Adkins-Blanch, Charles K.

LulsegeS
Userteam: Docket

File: A075 665 907 – Los Angeles, CA Date: NOV 28 2017

In re: Jasmen BASAMBEKYAN a.k.a. Zhozefina Jnsyan

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Artem M. Sarian, Esquire

APPLICATION: Motion to reopen

The respondent appeals the Immigration Judge's March 21, 2016, decision denying her motion to rescind the September 13, 2000, *in absentia* removal order entered against her and to reopen her proceedings. The appeal will be sustained, the *in absentia* order of removal will be rescinded, the proceedings will be reopened, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

On appeal, the respondent contends that she did not attend her September 13, 2000, hearing before the Immigration Judge because she did not receive the Notice of Hearing ("NOH"). *See* Respondent's Motion to Reopen. According to the respondent, the attorney to whom the NOH was sent was either not representing her or did not provide her with notice of the hearing. *See id.* As such, the respondent claims she was the victim of ineffective assistance of counsel. *See id.* Although the NOH was also mailed to her personally, the respondent claims she never lived at the address to which it was mailed. *See id.* To substantiate her claim in this regard, the respondent has filed her own affidavit along with two affidavits from her daughter and son-in-law, respectively, stating she never lived at that address. *See id.*

Initially, we disagree with the Immigration Judge's finding that the presumption of proper delivery of the NOH applies in this case (IJ at 3-4). *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003) ("[I]t is presumed that a *properly-addressed* piece of mail placed in the care of the Postal Service has been delivered.") (emphasis added) (internal quotation marks and citation omitted). Specifically, the respondent asserts in her affidavit that she never resided at the address to which the NOH was sent. *See Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (alien's affidavit in support of a motion to reopen must be accepted unless inherently unbelievable). In this regard, the respondent alleges that an individual holding herself out as an attorney wrote the wrong address on her application for asylum-related relief (Form I-589) and took all of the subsequent notices the respondent received, preventing her from realizing that the wrong address was being used. This claim is corroborated by the fact that the Form I-589 shows the address provided as being the preparer's own address.

Further, because all of the notices sent to the respondent were taken by the individual holding herself out to be an attorney (who was also the person who provided the address in the first place), the respondent was prevented from becoming aware that an incorrect address was being used, and thus could not have corrected the mistake. *See Velaszquez-Escovar v. Holder*, 768 F.3d 1000, 1004-05 (9th Cir. 2014) ("Th[e] advisal [set forth in section 239(a)(1)(F)(ii) of the Immigration

and Nationality Act, 8 U.S.C. § 1229(a)(1)(F)(ii) (2012)] says only that 'You are required to provide the [Department of Homeland Security], in writing, with your full mailing address and telephone number.' Nothing in the advisal mentions or fairly implies any continuing duty, much less a continuing duty to correct the government."). While the respondent was served with subsequent hearing notices in court that did provide written notice of her obligation to correct any incorrect address listed on the Notice to Appear, the transcript of the hearing fails to indicate that the Immigration Judge provided oral notice of this requirement to the respondent in her native language. Therefore, we are unable to conclude that it was necessarily the respondent's fault that her hearing notice was sent to an incorrect address. Furthermore, we note that the respondent has complied with the requirements for an ineffective assistance of counsel claim set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), as it pertains to the attorney who did appear in court with her and who, on more than one occasion, failed to appear.

Under the circumstances of this case, we cannot agree that there is a presumption that the relevant NOH was received by the respondent. *See Busquets-Ivars v. Ashcroft*, 333 F.3d at 1009. The respondent's inherently reliable statement (along with those by her relatives) that she never lived at the address provided to the government, and that the address was provided by someone holding herself out to be an attorney, mitigates the respondent's responsibility in correcting the address with the government. *See Velaszquez-Escovar v. Holder*, 768 F.3d at 1004-05. Therefore, we find the respondent's motion should be granted, and the *in absentia* order of removal rescinded. During the reopened proceedings, the Immigration Judge should consider the respondent's current application for adjustment of status.[1]

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 to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents. The respondent was adequately informed of the need to correct any erroneous address. No oral notice of this requirement is necessary where, as here, written notice is provided.

[1] The record indicates that the respondent used a false name both in her application for asylum and in court, which raises legitimate concerns that should be specifically addressed on remand. We express no opinion on the ultimate outcome of these proceedings.

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

File No.:	**A 075-665-907**	)
		)
In the Matter of:		)
		)
	BASAMBEKYAN, Jasmen	) **IN REMOVAL PROCEEDINGS**
		)
Respondent		)

CHARGE: Section 237(a)(1)(A) of the Immigration and Nationality Act (INA) (2000) *— at the time of entry or adjustment of status, alien not in possession of a valid entry document*

APPLICATIONS: Motion to Reopen and Motion to Stay Removal

ON BEHALF OF RESPONDENT:
Arman S. Mkryan, Esquire
Sarian Law Group
P.O. Box 1332
Glendale, California 91209

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

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent is a native and citizen of Azerbaijan. On October 1, 1999, Respondent filed a Form I-589, Application for Asylum and for Withholding of Removal (Form I-589) with the former Immigration and Naturalization Service (INS).[1] Proceedings commenced and jurisdiction vested upon the filing of a Notice to Appear (NTA) with the Court on January 21, 2000. See Exh. 1.

On February 1, 2000, Respondent appeared before an Immigration Judge and through former counsel, Mr. David Beitchman, admitted the factual allegations contained in the NTA and conceded the charge of removability. As relief from removal, Respondent renewed her previously filed applications for asylum and withholding of removal and protection under the Convention Against Torture (CAT).

On September 13, 2000, Respondent failed to appear for her scheduled hearing. The Immigration Judge, proceeding *in absentia*, found Respondent removable as charged based on

[1] The Homeland Security Act of 2002, as amended, transferred the enforcement, services, and administrative functions of the (former) INS to the U.S. Department of Homeland Security.

her prior admissions and concession, and ordered her removed to Azerbaijan. See Decision of the Immigration Judge, Sept. 13, 2000.

On August 21, 2015, almost fifteen years later, Respondent, through present counsel, filed the instant motion to reopen and request for a stay of removal, therein claiming lack of notice. Resp't's Mot. to Reopen, Aug. 21, 2015.

For the following reasons, the Court will DENY Respondent's motion to reopen and thus, her motion to stay removal.

II. Law and Analysis

A. Notice

The Court may rescind an *in absentia* removal order upon a motion to reopen filed at any time if the respondent demonstrates that she did not receive proper notice of the hearing (NOH). INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii). Pursuant to section 239(a)(1) of the INA, written notice of the hearing shall be given in person to the respondent or, if personal service is not practicable, through service by mail to the respondent or to the respondent's counsel of record. INA § 239(a)(1); 8 C.F.R. § 1003.13.

Once the NTA has been properly served, the respondent is required to provide an address at which she can be contacted, and she has an affirmative obligation to update the Court if that address changes. See INA § 239(a)(1)(F). Additionally, the NOH is deemed sufficient if mailed to the most recent address provided by the respondent. See INA § 240(b)(5)(A); Matter of G-Y-R-, 23 I&N Dec. 181, 185 (BIA 2001). The respondent can be properly charged with receiving constructive notice, even though she did not personally see the mailed document. Id. at 189.

In cases where a NOH is sent through regular mail, a presumption of delivery exists; however, it is a weaker presumption than applied to notice by certified mail, Sembiring v. Gonzales, 499 F.3d 981, 987 (9th Cir. 2007); Salta v. INS, 314 F.3d 1076, 1079 (9th Cir. 2002). To overcome this presumption, the respondent must present sufficient evidence that she did not receive the notice. Matter of M-R-A-, 24 I&N Dec. 665, 673-74 (BIA 2008). In determining whether 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 application for relief 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; (5) the respondent's previous attendance at Immigration Court hearings, if applicable; and (6) any other circumstances or evidence indicating possible non-receipt of notice. Id. 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.

In the instant matter, Respondent alleges that she did not appear at her September 13, 2000 hearing because she never received notice. See Resp't's Mot. at 8-9. Respondent appears to fault a former purported legal representative, whose name she cannot remember, for her failure to receive proper notice. Id., Tab A at 2-3. Namely, she suggests that this individual, identified as "Khatum" in her Form I-589, prevented her from receiving notice of the September 13, 2000 hearing by listing her address incorrectly. Id. at 2-5, 8-9. Nevertheless, the Court finds that Respondent received legally sufficient notice of her scheduled hearing.

To begin, there is a presumption of delivery. On August 29, 2000, the Court mailed to Mr. Beitchman a NOH, scheduling Respondent's hearing for September 13, 2000. Exh. 2. Mr. Beitchman entered an appearance as Respondent's counsel of record on February 1, 2000. Although the Court acknowledges that Mr. Beitchman failed to appear for Respondent's hearings after his initial appearance, Respondent repeatedly acknowledged him as her counsel of record for removal proceedings.[2] As the record contains no motion to withdraw as counsel, the mailing of the NOH to Mr. Beitchman as Respondent's then-counsel of record constitutes notice to Respondent. See Al Mutarreb v. Holder, 561 F.3d 1023, 1028 n. 6 (9th Cir. 2009) (citing Garcia v. INS, 222 F.3d 1208 (9th Cir. 2000) (per curiam) for the proposition that notice on a respondent's counsel may be sufficient to meet notice requirements).

In addition, the Court sent a separate NOH to Respondent. Exh. 3. The NOH addressed to Respondent was sent to "13556 Gault Street, Van Nuys, CA 91405." Id. At the time, this address was Respondent's address of record as reported in her Form I-589 filed on October 1, 1999, and her Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative (Form EOIR-28), dated February 1, 2000. See Resp't's Mot. to Reopen, Tabs D, F. The NOH was sent to this address and was not returned as undeliverable. Consequently, the NOH to Respondent also provided her constructive notice. See INA § 240(b)(5)(A); Busquets-Ivars v. Ashcroft, 333 F.3d 1008, 1010 (9th Cir. 2003) (holding that there is a presumption of effective delivery if the notice of hearing was properly addressed, had sufficient postage, and was properly deposited in the mail); G-Y-R-, 23 I&N Dec. at 189.

Furthermore, 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. Respondent merely argues that she never received the NOH because she never resided at the 13556 Gault Street address. See Resp't's Mot. to Reopen at 3, 8-9. To support her assertion, she submitted her own affidavit along with statements from her daughter and her son-in-law with whom she lived, stating that neither she, her daughter, nor her son-in-law received any notification from the Court. See id., Tabs A-C.

However, the 13556 Gault Street address was Respondent's reported address, and Respondent has not explained why she failed to provide the Court with her correct address. On January 11, 2000, Respondent was personally served with the NTA, bearing the 13556 Gault Street address and informing her of her legal obligation to keep the Court informed of her current address. See Exh. 1. On February 1, 2000, Respondent signed the Form EOIR-28, listing the

[2] Contrary to Respondent's present assertions that Mr. Beitchman was not her attorney of record at the time, see Resp't's Mot. to Reopen, Tab A at 3, the audio recordings indicate that she repeatedly acknowledged and named him as her attorney at the February 1, 2000, February 29, 2000, and May 31, 2000 hearings.

same address. See Resp't's Mot. to Reopen, Tab F. Yet, Respondent never attempted to correct the information despite having multiple opportunities to do so. On January 11, 2000, Respondent first received notice of her obligation to provide the Court with an address where she could be reached in the NTA by providing a Form EOIR-33, Change of Address Form (Form EOIR-33). See Exh. 1 at 2. Specifically, the NTA personally served on Respondent states:

> If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing.

Id.

At the conclusion of the February 1, 2000 hearing, she was personally served with a NOH providing her additional notice that if her address "is not correct," she must within five days of the notice provide a Form EOIR-33 with her correct address to the Court. See NOH at 1, Feb. 1, 2000. However, she still did not correct her address. Respondent continued receiving the same advisals in the NOHs she was personally served with at the February 29, 2000, May 31, 2000 and June 2, 2000 hearings without taking any action to comply with her legal obligations to provide a correct address. Therefore, there is no evidence to suggest that the Court failed to effect proper service of the NOH for the September 13, 2000 hearing by mailing it to the 13556 Gault Street address—the only address provided to the Court for Respondent.

Additionally, although Respondent appeared during all four previously scheduled hearings, the record reveals that she had little incentive to appear on September 13, 2000. Her contention that she would have attended the hearing had she received notice and known of the consequences for failing to appear are belied by the record. See Resp't's Mot. to Reopen, Tab A at 5. First, the audio recordings make clear that Respondent received multiple warnings concerning the consequences for non-attendance at her removal proceedings. At the conclusion of the four hearings she attended, the Immigration Judge expressly advised her that she would be ordered removed if she failed to appear at her next scheduled hearing.

Second, Respondent has not exercised due diligence in reopening her case. The record reflects that Respondent knew her proceedings were ongoing. She appeared for her first four scheduled hearings, and at the fourth hearing, was personally served with a NOH, listing a later hearing date. NOH at 1, Jun. 2, 2000. In addition, Respondent also received ample warning of the consequences of her failure to appear. At the conclusion of each hearing, the Court provided her with oral warnings that she would be removed *in absentia* if she failed to appear for any future hearings. The NOHs personally served on Respondent similarly advised her that her "[f]ailure to appear at [her] hearing . . . may result in . . . [a]n order of removal entered against her" in her absence. Id.; NOH (May 31, 2000), NOH (Feb. 29, 2000), NOH (Feb. 1, 2000).

As such, Respondent does not claim that she ever believed that her removal proceedings had concluded, nor does she indicate that she subsequently took any steps to verify her immigration status with the Court, despite knowing that she was scheduled to appear at further hearings. Instead, Respondent contends that for almost fifteen years, she simply decided to take

no action concerning her removal proceedings after joining the Jehovah's Witnesses made her wary of continuing to be dishonest with the Court and distrustful of attorneys. Resp't's Mot. to Reopen, Tab A at 4-5; Tab G at 1. Even after receiving confirmation in April, 2013 that the processing of the family-based immigrant petition filed by Respondent's daughter on her behalf had been delayed, id., Tab F at 3, she provided no evidence that she timely sought legal assistance prior to filing the instant motion more than two years later. Cf. id., Tab A at 5 (stating that after Respondent's initial immigrant visa interview was delayed in 2011, she "[e]ventually . . . decided to hire [an attorney] to see what was going on with [her] case").

Third, the record also suggests that her prospects for relief were low. As relief from removal, Respondent requested asylum and withholding of removal and protection under CAT. However, in her instant motion, Respondent asserts not only that she signed the Form I-589 and attended an asylum interview without any awareness of the basis for her claimed relief but also that her name is not "Jasmen Basambekyan" as stated on her Form I-589. Id. at 1-2. Relatedly, the audio recordings indicate that such facts would likely have come to light at the September 13, 2000 hearing. During her last appearance before the Court on June 2, 2000, Respondent was advised that the Government had concerns regarding her identity and that she was required to produce her original birth certificate at her next hearing. Thus, given these noted issues with Respondent's identity and credibility, the Court is unpersuaded that she had incentive to appear at her scheduled merits hearing on September 13, 2000.

Finally, to the extent that Respondent attributes her lack of notice to the ineffective assistance of an unidentified, former legal representative, Respondent has failed to substantially comply with the procedural requirements set forth in Matter of Lozada, 19 I&N Dec. 637, 639-40 (BIA 1988) or put forward a compelling reason as to why she has not done so. Respondent also failed to establish that this unnamed representative's performance had any prejudicial effect on her case, id. at 638, particularly in light of her failure to allege any plausible grounds for relief she had at the time. See Lin v. Ashcroft, 377 F.3d 1014, 1027 (9th Cir. 2004) (requiring a respondent to show that his counsel's sub-standard performance jeopardized plausible grounds for relief available to him).

Therefore, because Respondent failed to appear for her hearing despite receiving proper notice, the Court declines to reopen her proceedings on this basis.

B. Sua Sponte

In addition, Respondent requests that the Court reopen her removal proceedings under its *sua sponte* authority. Resp't's Mot. to Reopen at 13. An Immigration Judge may upon her own motion at any time, or upon motion of the Government or the 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 "the power to reopen on our own motion 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). Proceedings should be reopened *sua sponte* only under exceptional situations. Id.

In the present matter, Respondent requests that the Court reopen her proceedings in the interest of equity so that she can apply for adjustment of status. Resp't's Mot. to Reopen at 13. However, the Court does not find compelling reasons to reopen her proceedings under its *sua sponte* authority. The Court acknowledges that Respondent has resided in the United States for over fifteen years, suffers from poor health, and has a United States citizen daughter. See id., Tabs E, J. Nevertheless, the Court finds that reopening on these bases would improperly credit Respondent for after-acquired equities. See INS v. Rios-Pineda, 471 U.S. 444, 450-51 (1985) (finding that equities which are obtained after the entry of a final deportation order do not create substantial equities). Moreover, these equities are outweighed by Respondent's lack of due diligence in pursuing her immigration case and her apparent use of a false name and identity in filing her asylum claim. See supra Part II.A.

Respondent's claim that she did not receive the Court's removal order because it was sent to Mr. Beitchman and not forwarded to her is immaterial. See id., Tab A at 5-6. As discussed in Part II.A. supra, since receiving her NTA on January 11, 2000, Respondent was on notice of her obligation to provide the Court with an address where she could be contacted. See INA § 239(a)(1)(F). Moreover, this explanation does not account for her failure to undertake any measures to remain apprised of her immigration status over the last fifteen years.

Therefore, the Court finds that in light of proper notice, Respondent's failure to appear, and the long delay in filing the instant motion, this case does not merit *sua sponte* reopening. See J-J-, 21 I&N Dec. at 984.

C. Stay of Removal

Because the 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 Court will enter the following orders:

ORDERS

IT IS ORDERED that Respondent's Motion to Reopen be **DENIED.**

IT IS FURTHER ORDERED that Respondent's Motion to Stay Removal be **DENIED.**

DATE: March 21, 2016

Rodin Rooyani
Immigration Judge