U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: J[redacted]-C[redacted], L[redacted] L[redacted] **A [redacted]-378**
Riders:[redacted]

Date of this notice: 7/19/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Mann, Ana
Adkins-Blanch, Charles K.
Kelly, Edward F.

Userteam: Docket

File: [redacted] 378 – Atlanta, GA

Date: JUL 19 2017

In re: L[redacted] L[redacted] J[redacted]-C[redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Marshall L. Cohen, Esquire

APPLICATION: Reopening

The applicants, natives and citizens of Guatemala, who were ordered removed from the United States in absentia on August 23, 2016, have filed an appeal from the Immigration Judge's decision dated January 3, 2017, denying their motion to reopen.[1] The applicant has filed an appeal brief. The Department of Homeland Security ("DHS") has not filed a brief in opposition to the appeal. The appeal will be sustained.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (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240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C), an in absentia removal order may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing in accordance with sections 239(a)(1)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 *Matter of M-R-A-*, 24 I&N Dec. 665, 674 (BIA 2008), we provided the following framework for evaluating motions to reopen following an in absentia order where the notice of hearing was sent by regular mail:

> In determining whether a applicant has rebutted the weaker presumption of delivery applicable in these circumstances, an Immigration Judge may consider a variety of factors including, but not limited to, the following: (1) the applicant's affidavit; (2) affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received; (3) the applicant'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 applicant had an incentive to

[1] The lead applicant ([redacted] 378) is the mother of the co-applicant, [redacted]). References to the singular applicant will be to the lead applicant.

appear; (5) any prior application for relief filed with the Immigration Court or any prima facie evidence in the record or the applicant's motion of statutory eligibility for relief, indicating that the applicant had an incentive to appear; (6) the applicant's previous attendance at Immigration Court hearings, if applicable; and (7) any other circumstances or evidence indicating possible nonreceipt of notice. We emphasize that these are just examples of the types of evidence that can support a motion to reopen. Immigration Judges are 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. Each case must be evaluated based on its own particular circumstances and evidence.

We conclude that the applicant's motion succeeded in rebutting the presumption of delivery of the hearing notice in her case. The applicant's motion included signed statements by the applicant and her spouse in which they claimed that they had not received any communication from the Immigration Court and that they would have attended any hearing if notice had been received. The applicant's letter states that she and her daughter were held in custody until they were released on July 9, 2016, and they later joined her husband in Atlanta, Georgia. The applicant stated that she did not know her husband's address and that he provided it to the Immigration Officer. The address recorded by the officer was "751 Holmes Apt. B Atlanta, Georgia 30318." The applicant's actual address is "751 Holmes Apt. D Atlanta, Georgia 30318." The applicant signed the Immigration and Customs Enforcement Form 830E, Notice to EOIR: Alien Address, which contained the address 751 Holmes Apt. B Atlanta, Georgia 30318. The applicant and her husband explain that she was not familiar with the address (Applicant's Br. at 6-7). The applicant asserts that she exercised due diligence by promptly filing a motion to reopen on November 14, 2016, soon after she learned that an in absentia order of removal was entered (Applicant's Br. at 7-8). The Notice of Hearing (NOH) was sent to 751 Holmes Apt. B Atlanta, Georgia 30318. The NOH was not returned to the sender as undeliverable. On August 12, 2016, the applicant states she informed an immigration officer of the correct apartment designation when she came to the address and knocked on the wrong apartment door (*Id.* at 3-4). In these circumstances, the evidence of record does not support a finding that the applicant can be charged with receiving notice of the hearing and failing to appear. Accordingly, the following order will be entered.

ORDER: The appeal is sustained, and the Immigration Judge's decision is vacated. The order of removal entered in absentia, on August 23, 2016, 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
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

IN THE MATTER OF:	)	**In Withholding Only Proceedings**
	)	
JI[redacted]-C[redacted], L[redacted] L[redacted]	)	**File No. A# [redacted]-378**
[redacted]	)	**File No. A# [redacted]**
	)	
Respondent	)	
	)	

APPLICATION: Respondent's Motion to Reopen

APPEARANCES

ON BEHALF OF THE RESPONDENT:
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ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

L[redacted] L[redacted] J[redacted]-C[redacted] ("Respondent") is an adult female native and citizen of Guatemala who came to the Court by way of the issuance of an I-863, Notice of Referral to the Immigration Judge, dated June 27, 2016.[1]

On August 2, 2016, the Court sent a Notice of Hearing in Removal Proceedings ("Notice of Hearing") to the address provided on Respondent's I-830E, Notice to EOIR: Alien Address form. She was scheduled to appear before an Immigration Judge at the Atlanta Immigration Court on August 23, 2016.

On August 23, 2016, Respondent failed to appear before the Court and was ordered removed to Guatemala *in absentia*.

On November 14, 2016, Respondent filed a Motion to Rescind In Absentia Order and Reopen Proceedings Based on Lack of Notice ("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.

[1] The lead respondent (A# [redacted]-378 is the mother of co-respondent (A# [redacted]).

II. STATEMENT OF LAW

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 he did not receive notice of the hearing or asserts that he was in Federal or State custody and the failure to appear was through no fault of his 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 F.Appx. 987, 989 (11th Cir. 2013) (unpublished and cited for persuasiveness).

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 citing 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

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. at 673. 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 F.Appx. 871, 874 (11th Cir. 2013) (unpublished and cited for persuasiveness); Matter of M-R-A-, 24 I&N Dec. at 674.

In the present case, Respondent was served with the NTA in person. See NTA. The Notice of Hearing was sent by regular mail to the address reflected on Respondent's I-830E, Notice to EOIR: Alien Address. See I-830E. This form was signed by Respondent which lists her address as "751 Hollmes Apt. B Atlanta, Georgia 30318." Furthermore, Respondent's report from her order of supervision which she signed also lists the same address. See Motion to Reopen, Tab C. The Notice of Hearing was not returned to sender.

Respondent claims that when she was required to give her address to which she would be released from detention, she did not know it and her husband was able to supply it. Respondent

claims that the officer wrote down the wrong address, misspelling the street name and writing "apt. B," instead of "apt. D."

Respondent asserts that she informed the ISAP representative of her correct of address when she had her home interview, however the NTA makes clear that Respondent must also inform the Court of a change in address. When representative allegedly claimed that the address mistake would "not be a problem," Respondent should not have taken it to have a meaning toward proceedings with the Court. The Court operates separate from ISAP, USCIS, and the Department.[2]

Respondent has an obligation to keep her address updated and correct with the Court. The NTA, which Respondent received in person, clearly states, "[y]ou are required to provide [the Department], in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this preceeding." See NTA. It further informs Respondent that notices of hearings will be sent to the address in the NTA and the consequences of failing to file an EOIR-33. See id. It is Respondent's responsibility to keep an updated address with the Court. Respondent failed to update the Court with her correct address even when she was informed the wrong address was on file. Therefore, Respondent has not overcome the presumption of proper notice.

Further, the Motion to Reopen indicates that Respondent would apply for asylum and withholding of removal upon the reopening of her case. However, Respondent has failed to include an application for such relief, as required by regulation. See 8 C.F.R. 1003.23(b)(3) (stating that a motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application and all supporting documents).

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

ORDER

It is ordered that: Respondents' Motion to Reopen is hereby **DENIED**.

1-3-2017
Date

J. Dan Pelletier
United States Immigration Judge
Atlanta, Georgia

[2] The Court notes that in Respondent's current motion, after she had admitted in her affidavit that she has once again moved, she has failed to provide the Court with a change of address form along with her Motion to Reopen.