U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: PELI, MARIE N

A 099-273-416

Date of this notice: 5/31/2013

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:
Guendelsberger, John
Hoffman, Sharon
Manuel, Elise

schuckec
Userteam: Docket

File: A099 273 416 – Atlanta, GA

Date: MAY 31 2013

In re: MARIE N. PELI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kell Enow, Esquire

ON BEHALF OF DHS: Jill K. Krishnan
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Cameroon, has appealed the Immigration Judge's decision of August 2, 2012. In that decision, the Immigration Judge denied the respondent's motion to reopen and rescind the in absentia order of removal entered on April 18, 2012. The Department of Homeland Security (DHS) has filed a brief in opposition to the appeal. The appeal will be sustained and the record will be remanded.

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).

Under the totality of the circumstances, upon de novo review, we conclude that the respondent established exceptional circumstances for her failure to appear in a timely fashion for the rescheduled hearing on April 18, 2012.[1] Sections 240(b)(5)(C) and (e)(1) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(b)(5)(C), (e)(1); 8 C.F.R. § 1003.23(b)(4)(ii). The respondent had appeared at two prior hearings, was potentially eligible for adjustment of status based on her marriage to a United States citizen, and apparently had no motive to avoid the rescheduled April 18, 2012, hearing. She filed her motion in a timely manner, which explained the unique circumstances that resulted in her failure to appear. The following order will be entered.

ORDER: The appeal is sustained, the in absentia order is vacated, proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

[1] We also note that it is impossible for the Board to determine if notice that the hearing was rescheduled from April 19, 2012, to April 18, 2012, was properly served on attorney Echols, as the Immigration Judge found, where the record forwarded to the Board does not contain a Form EOIR-28 (Notice of Appearance) filed by attorney Echols.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
180 Spring Street Suite 241
Atlanta, Georgia 30303

IN THE MATTER OF:	CASE NO.
PELI, Marie	**A 099-273-416**
RESPONDENT	IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT: **Kell Enow, Esq**
ON BEHALF OF DHS: **Jill Jensen, Assistant Chief Counsel**

DECISION ON A MOTION

A **Motion to Reopen/Rescind** has been filed by the Respondent in the above-referenced case. DHS opposes the motion. The motion has been duly considered and, for reasons explained more fully below, the motion will be denied.

BACKGROUND

By a hearing notice dated December 13, 2011, which was mailed to Respondent's attorney of record, the Court scheduled a hearing in this case for April 18, 2012. On April 18, 2012, Respondent's attorney of record, Eli Echols, appeared in Court. Respondent failed to appear at the scheduled hearing on April 18, 2012, and she was ordered removed *in absentia*.

Approximately three months later, on July 17, 2012, Respondent filed the instant motion to reopen. DHS has filed an opposition.

DISCUSSION

The Immigration and Nationality Act ("INA") provides that an order of removal entered *in absentia* in removal proceedings may be rescinded at any time, upon a motion to reopen, if the alien demonstrates that he or she did not receive notice in accordance with section 239(a) of the Act. INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii) (2007). However, if an alien received notice of the hearing, he or she must (1) file a motion to reopen within 180 days of the date of the order of removal and (2) demonstrate that the failure to appear was due to "exceptional circumstances." INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii) (2007). The term "exceptional circumstances" is defined as "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 [even if] beyond the control of the alien." INA § 240(e)(1).

Pursuant to applicable regulations, notice to counsel constitutes notice to Respondent. 8 C.F.R. § 1003.26(c)(2); see also Matter of Barocio, 19 I&N Dec. 255 (BIA 1985) (holding that notice to an alien's counsel constitutes notice to the alien). In this case, the record reflects that the hearing notice was mailed to Respondent's counsel, who appeared in Court on April 18, 2012. Respondent's motion indicates that her then-attorney, Eli Echols, contacted her and advised her of the hearing on April 18, 2012. The Court finds that notice of the hearing was

properly provided to the Respondent.

Respondent contends that she failed to appear due to exceptional circumstances. Respondent's contentions are without merit.

Respondent says that sometime after the death of attorney Akuoko on February 11, 2012 and before the scheduled hearing on April 18, 2012, she hired her present attorney, Kell Enow, to represent her in these proceedings.[1] In the motion, Respondent's present attorney, Mr. Enow, has not explained why he did not file an entry of appearance upon allegedly being retained by Respondent.[2]

Moreover, although Mr. Enow claims he was aware of the April 18th hearing, he has not explained why he did not seek a continuance, call the Court on April 18th, call Mr. Echols (the attorney of record) or appear in Court on the hearing date.[3] Moreover, as discussed above, there is no evidence that Mr. Enow contacted the prior attorney to inquire regarding the status of the case or about the April 18th hearing.

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[1] In the motion, Respondent suggests that Mr. Akuoko was hired to represent her during removal proceedings and states that she is not sure if Mr. Akuoko entered an appearance in this case. The record shows that Mr. Akuoko was retained to represent Respondent in connection with the appeal of the denial of the I-130 visa petition, and that he filed the appeal on February 9, 2012. See Motion at page 72. Contrary to Respondent's suggestion, there is no evidence that Mr. Akuoko was hired to represent Respondent in these proceedings or that he filed an entry of appearance in this case.

[2] Pursuant to the Immigration Practice Manual, an attorney must file a Form EOIR 28. Mr. Enow filed an EOIR 28 on April 18, 2012 at 2:56 pm.

[3] Mr. Enow vaguely asserts that, on April 18, 2012, while he was preparing for the hearing, he checked the automated system and learned that the hearing was actually scheduled for April 18, 2012 at 9:30 am. Counsel fails to state the date on which he was allegedly hired to represent Respondent and why, upon being retained, he never either contacted Mr. Echols or checked the automated system.

The Court is also mindful that the motion states that Respondent contacted Mr. Echols and "he indicated that he forwarded the hearing notice to Respondent at her last known address." Motion at page 2. Since the hearing notice was mailed to Mr. Echols on December 13, 2011, it appears that Respondent must have known sometime in late December 2011 that a new hearing notice was issued.

Since Mr. Echols told Respondent that the new hearing notice was being sent to her, Respondent has not explained why (1) she did not follow up with Mr. Echols when she did not receive the hearing notice and (2) did not tell Mr. Enow, when she allegedly hired him, that she had been told by Mr. Echols that a new hearing notice was issued. Finally, it seems implausible that Mr. Echols would have told Respondent that a new hearing notice was issued, but did not also tell Respondent that the new hearing notice was issued because the date of the hearing was changed to April 18, 2012.

Respondent's affidavit and other parts of the record contain only vague allegations regarding Respondent's assertion that she hired Mr. Enow to represent her at the April 18th hearing. For example, Respondent's affidavit states "[a]fter Mr. Yaw Akuoko passed away, I hired Mr. Enow Kell and I gave him all of the documents." However, since a period of two months elapsed between Mr. Akuoko's passing and the April 18th hearing, the Court is left to speculate as to the date Mr. Enow was allegedly hired. Moreover, Respondent's affidavit fails to indicate that, when she hired Mr. Enow, she informed him that a new hearing notice had been issued and that Mr. Echols had mailed the new hearing notice to Respondent's last known address.[4] In view of the foregoing, Respondent has not shown that she did not know, or could not reasonably have known, of the April 18th hearing date.

Assuming that Mr. Enow represented Respondent at the time of the April 18th hearing, the record in this case fails to show diligence by Respondent. In this regard, there is no explanation as to why Respondent waited approximately three months to file a motion to reopen.

In sum, Respondent's affidavit contains assertions that seem contrary to the facts of this case. The Court finds that Respondent was made aware of the new hearing date. Respondent has not shown exceptional circumstances based on lack of notice, heavy traffic, or any circumstance beyond her control.

To the extent that Respondent, through counsel, implies that she received ineffective assistance of counsel, she has not complied with Matter of Lozada, 1988 WL 235454, 19 I. & N. Dec. 637, 639 (1988).[5]

[4] Also, Respondent's affidavit states that Mr. Enow called Mr. Echols' office. Interestingly, Mr. Enow makes no mention of such a telephone conversation.

[5] The Court acknowledges that, in a response to DHS's Opposition, Respondent states that Mr. Echols is "willing to submit any affidavit to support Respondent's contention that he had not been in contact with" Respondent. Any such affidavit will be contrary to evidence in this case. After all, as discussed above, the motion to reopen states that Respondent spoke to Mr. Echols and was told that the new hearing notice will be mailed to Respondent's last known address and Respondent's affidavit indicates that Respondent and Mr. Enow called Mr. Echols' office and discussed the need for a G-28 as a prerequisite for the release of Respondent's file.

In view of the foregoing, the Court finds that Respondent has failed to demonstrate that this matter should be reopened. Accordingly, the Court will issue the following order:

ORDER

WHEREFORE, IT IS HEREBY ORDERED that Respondent's motion to rescind the April 18, 2012 *in absentia* order be, and hereby is, DENIED.

August 2, 2012

Earle B. Wilson
U.S. Immigration Judge