U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: (b) (6)

Date:

OCT 19 2004

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Susan E. Hill Esquire

APPLICATION: Reopening

ORDER:

PER CURIAM. This case was previously before us on March 6, 2002, when we dismissed the respondents' appeal from the Immigration Judge's decision denying their motion to reopen to rescind the in absentia deportation hearing. On September 24, 2002, we denied the respondents' motion to reconsider. The matter is now before us pursuant to the (b) (6) decision of the United States Court of Appeals for the (b) (6) The court found that the Board and the Immigration Judge erred in considering the respondents' 7-month delay in filing their motion to reopen to rescind after they learned of the in absentia order. It held that as there is no time limit for motions to reopen in absentia orders based on lack of notice of the hearing, "the Immigration Judge could not create one as a matter of discretion." The court remanded for the Board to consider whether the notice of the hearing was in fact proper.

Following the court's decision, we solicited further briefs from the parties. The respondent filed a further brief, but the Department of Homeland Security did not. Upon further consideration, we find that the proceedings should be reopened. In *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001), we held that, "the notice requirement leading to an in absentia order cannot be satisfied by mailing the Notice to Appear to the last known address of the alien when the alien does not receive the mailing." *Id.* at 189. Thus, an in absentia hearing is not appropriate where the alien does not receive, and cannot be charged with receiving, notice of removal proceedings,

The record in this case reflects that the notice of hearing was returned to the government as undeliverable. The government claims that the notice was sent to the last known address of the

respondents. The respondents have claimed that the letters were sent to the immigration consultant (not attorney) they had hired, and that they did not know the consultant had provided that address. *See Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002). They have consistently alleged that they did not receive the Order to Show Cause or Notice to Appear. It also appears that the respondents were not informed of the requirement that they inform the government of any change of address. *See generally Urbina-Osejo v. INS*, 124 F.3d 1314 (9th Cir. 1997), and *Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998). Finally, there is no indication that the respondents received oral warnings of the consequences of their failure to appear for their deportation hearing, and the court in this case has held that the respondents' delay in filing their motion should not be considered. *See Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998).

In view of all these circumstances, we find that reopening is appropriate. Accordingly, the decisions of the Board dated March 6, 2002, and September 24, 2002, are vacated, the proceedings are reopened, and the record is remanded to the Immigration Judge for a further hearing.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
(b) (6)

In the Matter of:
(b) (6)

Case No.: (b) (6)

RESPONDENT

IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Nov 18, 2005.. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

( ) The respondent was ordered deported to
the alternative to

( ) Respondent's application for voluntary departure was denied and respondent was ordered deported to
or in the alternative to

( ) Respondent's application for voluntary departure was granted until , with an alternate order of deportation
to or

( ) Respondent's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.

( ) Respondent's application for withholding of deportation was ( )granted ( )denied ( )withdrawn ( )other.

( ) Respondent's application for suspension of deportation was ( ) granted under section 244(a)(1) or (2) ( ) granted under section 244(a)(3) ( ) denied ( ) withdrawn ( ) other.

( ) Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( )granted ( )denied ( )withdrawn ( )other.

( ) Respondent's application for _____ was ( )granted ( )denied ( )withdrawn ( )other.

( ) Proceedings were terminated.

(✓) The application for adjustment of status under Section (216)(216A) (245)(249) was (✓)granted ( )denied ( )withdrawn ( )other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

( ) Respondent's status was rescinded under Section 246.

( ) Other _____.

( ) Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Date: Nov 18, 2005

JAN D. LATIMORE
Immigration Judge

Appeal: WAIVED (Alien/INS/Both)
Appeal Due by:

CJO

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

[redacted]

In the Matter of:
[redacted]

Case No.: [redacted]

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