UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40750
Summary Calendar

JOSE NICOLAS THOMPSON,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
INS #A 70 526 151

(March 29, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Jose Nicolas Thompson ("Thompson") appeals an order of deportation entered against him by the Board of Immigration Appeals ("BIA"). Finding that the BIA failed to consider the affidavit or

---

[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

sworn statement of Thompson as evidence, we vacate the decision of the BIA and remand for necessary proceedings.

FACTS AND PROCEDURAL HISTORY

Thompson is a native and citizen of the Philippines who has resided in the United States for almost 12 years. He entered this country legally with a non-immigrant student visa in November, 1982. This visa expired in August, 1985. Thompson is married to a lawful permanent resident of the United States, and they have two United States citizen children. Because he has no criminal record and because of his family and long residence, it would appear that, upon proper application, Thompson is eligible to be considered for a suspension of deportation under § 244(a)(1) of the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1254(a)(1).[1]

On July 25, 1991, Thompson voluntarily surrendered himself to the Immigration and Naturalization Service ("INS"). On August 6, 1991, an Order to Show Cause ("OSC") charging Thompson with deportability was prepared and mailed to him certified mail, return receipt requested, at the address he provided to the INS: 9319 Lynchester Drive, Houston, Texas, 77083. On August 8, 1991, Thompson received the OSC. The OSC of August 6, 1991 did not set a hearing date but indicated that the hearing would be set and notice given at a later date.

[1]Indeed, Thompson asserts in his motion to reopen and in his brief on appeal that he turned himself in believing he could get a favorable ruling on a request for suspension.

It would appear from a file copy in the Office of the Immigration Judge that, on August 7, 1991, a notice that the hearing would take place on August 29, 1991 was mailed to Thompson. According to such copy, the information was sent to the same address as the one the OSC was sent to, but was not mailed certified mail, return receipt requested. Thompson never appeared at the hearing, and the Immigration Judge ("IJ") ordered him deported *in absentia*. The written decision of the IJ was sent to Thompson at the same address, and he received it.

On September 11, 1991, Thompson filed a motion with the IJ to reopen the deportation proceedings. In this motion, Thompson argued that he never received notice of the hearing. The motion was accompanied by a "Verification," in which Thompson stated under oath that "every statement of fact contained [in the motion], not attributed to others, is within affiant's knowledge, true and correct." On September 16, 1991, the INS advised the IJ that it did not oppose the motion.

On October 4, 1991, the IJ denied the motion, stating:

> On August 7, 1991, the Order to Show Cause was filed with the court, and on that same day, the court sent notice to respondent that a master calendar hearing would be held on his case on August 29, 1991. The notice was sent to 9310 Lynchester Drive, Houston, TX 77083, and was never returned to the court by the postal service, thus justifying an inference that it had been duly received by respondent. On August 8, 1991, respondent signed a certified mail receipt acknowledging receipt of the Order to Show Cause, which had also been mailed to the Lynchester Drive address.

Thompson appealed the IJ's decision to the BIA. Among other issues, Thompson argued that the mailing address alleged in the decision of the IJ was incorrect, as Thompson lived at 931<u>9</u>

Lynchester, not 931<u>0</u> Lynchester. On May 5, 1994, the BIA dismissed the appeal, stating:

> Notice of the hearing in question, dated August 7, 1991, was mailed to the respondent at his last known address in Houston, Texas. It was the same address listed in the Order to Show Cause, and the Record of Deportable Alien, and the same address at which the respondent signed the certified mail receipt for his Order to Show Cause on August 8, 1991. The notice was not returned by the postal authorities as undeliverable. We also note that the immigration judge's decision was mailed to the same address, and in response the respondent filed his motion to reopen soon after. From these facts, it may be presumed that the hearing notice was delivered. In response, we have only a vague assertion that the respondent had no notice of the hearing, with no explanation from the respondent why he would not have received the notice if provided to his correct address.

The BIA also stated:

> In fact, neither the motion to reopen nor the appeal includes any affidavit or other statement from the respondent stating that he in fact did not receive any hearing notice and was unaware of the hearing date. We only have before us counsel's statements in the motion and on appeal to this effect. Counsel's statements in a brief, motion, or Notice of Appeal do not constitute evidence and carry no evidentiary weight.

Thompson appeals.

ANALYSIS

Although the standard of review applicable to the issue of notice has never been examined by this Circuit, we defer to the factual findings of the BIA and reverse only if the BIA's factual conclusion is not supported by substantial evidence. <u>Cf</u>. <u>Castillo-Rodriguez v. I.N.S.</u>, 929 F.2d 181, 184 (5th Cir. 1991) ("We review the Board's factual finding that an alien is not eligible for consideration for asylum only to determine whether it is supported

by substantial evidence."). However, "[w]e accord deference to the Board's interpretation unless there are compelling indications that it is wrong." Id.

A significant factor the BIA relied on in finding that Thompson had received notice was that Thompson never presented an affidavit stating that he did not receive the notice and was unaware of the hearing date. Thompson, however, did present such an affidavit when he verified under oath that "every statement of fact contained [in the motion], not attributed to others, is within affiant's knowledge, true and correct." Although the cases which the BIA cites in its decision hold that an attorney's statements in a brief or motion do not constitute evidence, I.N.S. v. Phinpathya, 464 U.S. 183, 188-89 n.6 (1984); Ghosh v. Attorney General, 629 F.2d 987, 989 (4th Cir. 1980); Matter of Ramirez-Sanchez, 17 I.& N. Dec. 503, *505-06 (BIA 1980), none of the cases concern a situation in which the respondent made a statement under oath verifying the factual contents of the attorney's brief or motion. Thus, we hold that the BIA erred in concluding that Thompson had not made a statement or affidavit.

Because the BIA, if it had considered Thompson's sworn testimony, may have arrived at a different factual conclusion and may not have found that Thompson made only a "vague assertion" of not receiving notice in failing to rebut the presumption that notice was received, we **VACATE** the decision of the BIA and **REMAND** this matter to the BIA for a reconsideration of Thompson's appeal from the decision of the IJ denying his motion to reopen, such

reconsideration to take into account the sworn testimony of Thompson set out in his motion to reopen.