



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Chicago, IL 60603**

Name: PANTOJA-CABRERA, ELDEN MISAEL

A087-522-960

Date of this notice: 1/25/2011

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:

**Adkins-Blanch, Charles K.
Guendelsberger, John
King, Carol**

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Falls Church, Virginia 22041

File: A087 522 960 - Chicago, IL

Date:

JAN 25 2011

In re: ELDEN MISael PANTOJA-CABRERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ron Russell, Esquire

ON BEHALF OF DHS: Christine M. Young
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Honduras, was ordered removed in absentia on December 3, 2009. On December 11, 2009, the respondent filed a motion to reopen proceedings, which the Immigration Judge denied on February 17, 2010. The respondent filed a timely appeal of that decision. The appeal will be sustained, proceedings will be reopened and the record will be remanded.

The Immigration Judge denied the respondent's motion to reopen finding that notice for his December 3, 2009, hearing was properly sent to his last known address of record. However, upon review, we find that in light of the totality of circumstances presented in this case including the respondent's sworn affidavit in which he explained his efforts to provide the Court with his new address, although he sent the change of address form to the Memphis Immigration Court; his diligence in seeking to reopen proceedings as well as his potential eligibility for voluntary departure, we will allow the respondent another opportunity to appear for a hearing. *See Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008).

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



FOR THE BOARD

Immigrant & Refugee Appellate Center | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File No.: **A087-522-960**

Date: **February 17, 2010**

In the Matter of:)

Elden PANTOJA-Cabrera)

IN REMOVAL PROCEEDINGS)

CHARGE: **Section 212 (a)(6)(i)** of the Immigration and Nationality Act ("INA"), Entry without inspection

APPLICATIONS: Motion to Reopen

ON BEHALF OF THE RESPONDENT:

Ron Russell, Esq.

1012 South Fourth Street
Louisville, KY 40203

ON BEHALF OF THE DHS:

Christine Young

Assistant Chief Counsel
55 East Monroe Street, Suite 1700
Chicago, Illinois 60603

DECISION OF THE IMMIGRATION JUDGE

In a Motion filed on December 11, 2009, the respondent moved to reopen and rescind an order directing his removal to Honduras. Mr. Pantoja claims that he never received a hearing notice informing him of a removal hearing scheduled for December 3, 2009. The DHS has responded expressing its opposition to reopening.

A number of important facts are uncontroverted. First, the DHS did personally serve the respondent with a Notice to Appear (NTA) on August 11, 2009. Second, the Immigration Court (IC) mailed a hearing notice to him on October 29, 2009 informing him that his removal hearing would take place on December 3, 2009 in Chicago. Third, when the respondent failed to show up for his hearing, the DHS asked the Court to proceed with an *absentia* hearing, and as a result, the Court ordered the respondent removed to Honduras based on the information contained in his I-213 (Record of Deportable Alien). See *Exhibit 3*.

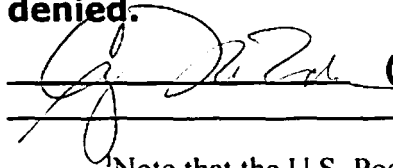
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The respondent interposed a defense of lack of notice, because the hearing notice never reached him.¹ However, the notice reflects that it was addressed to the respondent's last known address, namely **2012 East Market St., New Albany, IN 47150**. However, the respondent claims he tried to inform the IC in Memphis of his new address in Louisville, KY by sending a change of address form (AR-11) sometime after he was served with the NTA.

Although the respondent relies on *In re G-Y-R*, Interim Decision #3458 (BIA 10/19/2001) for the proposition that he could not be ordered removed if he did not receive actual notice of his hearing, his reliance is misplaced. The Board in *G-Y-R* addressed a situation where the alien did not receive the NTA, and therefore, was not aware that proceedings had been instituted. In contrast, Mr. Pantoja was personally served with the NTA, which contains warnings about informing the IC of any change of address on Form EOIR-33. Yet the respondent failed to follow the clear instructions contained in the NTA. The DHS served the NTA on the Immigration Court in Chicago because the respondent resided in Indiana which is within its jurisdiction. The respondent could easily have discovered that by calling the immigration Court in Chicago after it received the NTA in October 20, 2009. Instead the respondent sent correspondence to an IC in Memphis which had no jurisdiction over his case.²

In sum, the Court did perform its duty by notifying the respondent of his hearing by sending a notice to his last known address. Mr. Pantoja never informed the Chicago Immigration Court that he had moved, a duty which he had under *G-Y-R*. Furthermore, this is not a case where the presumption of delivery of the hearing notice was overcome by other evidence. See *Matter of C-R-C*, 24 I&N Dec. 677 (BIA 2008). First, because the respondent never exercised due diligence by informing the court, and second, because the circumstantial evidence does not suggest he had an incentive to appear for his hearing, such as a relief from deportation. Finally, there are no exceptional circumstances present in this case which would excuse the respondent's non-appearance. Accordingly, the following order is entered.

IT IS ORDERED THAT the Motion to Reopen be (and hereby is) denied.



(Craig M. Zerbe, Immigration Judge)

¹Note that the U.S. Post Office returned the hearing notice as undeliverable.

²It is also noteworthy that the respondent could easily have obtain the 800 number which provides information about the date, time and location of hearings throughout the United States.

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