U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

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DHS/ICE Office of Chief Counsel - OMA
1717 Avenue H
Omaha, NE 68110

Name: RAMIREZ-PABLO, CATALINA

A 202-067-149

Date of this notice: 4/11/2016

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:
Mann, Ana
O'Leary, Brian M.
Grant, Edward R.

Userteam: Docket

File: A202 067 149 – Omaha, NE

Date: APR 11 2016

In re: CATALINA RAMIREZ-PABLO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas L. Niklitschek, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Guatemala, was ordered removed in absentia on October 20, 2015. On November 9, 2015, the respondent filed a motion to reopen proceedings, which an Immigration Judge denied on December 7, 2015. 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 Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(I). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo.

Upon de novo review of the record and in light of the totality of circumstances presented in this case, we conclude that the respondent demonstrated that reopening is warranted.[1] *See* sections 240(b)(5)(C)(i), (e)(1) of the Immigration and Nationality Act, 8 U.S.C.A. §§ 1229a(b)(5)(C)(i), (e)(1). We will therefore sustain the respondent's appeal and remand the record for further proceedings.

ORDER: The respondent's appeal is sustained, the in absentia order is vacated, proceedings are reopened and the record is remanded to the Immigration Judge for further proceedings and for the entry of a new decision.

FOR THE BOARD

[1] Among other factors, we have considered that notice for the October 20, 2015, hearing was sent by regular mail with the Immigration Judge's September 28, 2015, order to the respondent's counsel who has stated that he only received a copy of the Immigration Judge's September 28, 2015, order.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
525 W. VAN BUREN, SUITE 500
CHICAGO, IL 60607

THOMAS NIKLITSCHEK, ESQ.
5114 S. 24TH ST.
OMAHA, NE 68107

IN THE MATTER OF
RAMIREZ-PABLO, CATALINA

FILE A 202-067-149 DATE: Dec 7, 2015

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
525 W. VAN BUREN, SUITE 500
CHICAGO, IL 60607

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: CLETE P. SAMSON, ASST. CHIEF COUNSEL
1717 AVENUE H
OMAHA, NE 68110

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Immigration Court
Omaha, Nebraska

File: A202 067 149

Date: December 7, 2015

In the Matter of

Catalina RAMIREZ-PABLO,

Respondent

IN REMOVAL PROCEEDINGS

APPLICATION: Motion to Reopen

ON BEHALF OF THE RESPONDENT:
Thomas Niklitschek, Esq.
5114 S. 24th St.
Omaha, NE 68107

ON BEHALF OF THE GOVERNMENT:
Clete P. Samson, Ass't Chief Counsel
Department of Homeland Security
U.S. Immigration & Customs Enforcement
Omaha NE

DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Guatemala who failed to appear at her removal hearing on August 18, 2015 and was ordered removed *in absentia*. On August 19, 2015, she filed a motion to reopen to rescind this order which was subsequently granted by the Court on September 28, 2015. However, the respondent again failed to appear at the recalendared hearing on October 20, 2015, as a consequence of which she was ordered removed *in absentia* again. The respondent has filed another motion to reopen to rescind this order which is opposed by the government and will be denied.

Section 240(b)(5) of the Immigration and Nationality Act states that an alien who does not attend his removal hearing shall be ordered removed *in absentia* if the government establishes by clear, convincing and unequivocal evidence that the requisite written notice was provided and the alien is removable. The order may be rescinded under either of the following conditions:

> (1) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of "exceptional circumstances"; or
>
> (2) upon a motion to reopen filed at any time if the alien demonstrates

that he did not receive notice in accordance with subsection (a)(2) or was in Federal or State custody and was not at fault in failing to appear.

Here, the record reflects that the respondent was ordered removed *in absentia* on August 18, 2015 when she and her attorney were not present when the case was called. Her first motion to reopen maintained that she had been in fact present outside the hearing room since 9:00 a.m. waiting for her attorney arrive. Accordingly, she was given the benefit of the doubt and her motion was granted on September 28, 2015. The Record of Proceeding indicates that a copy of the Order was mailed to the respondent's attorney on the same day along with the notice of the re-opened hearing on October 20, 2015. The address to which these documents were mailed is the same address to which the August 18, 2015 hearing notice was sent. It is well-settled that notice to an attorney is imputed to his or her client. *See Matter of Barocio*, 19 I & N Dec. 255 (BIA 1985); *see also* 8 C.F.R.§1292.5(a).

The issue is then whether the evidence supports the conclusion that the respondent's attorney should be charged with receipt of the notice. *See Matter of M-D-*, 23 I&N Dec. 540, 544 (BIA 2002); *Matter of G-Y-R-*, 23 I&N Dec. 181, 189-90 (BIA 2001). According to INA § 239(c), service by regular mail raises a rebuttable presumption of effective service if there is proof of attempted delivery to the last address provided. *See Ghounem v. Ashcroft*, 378 F.3d 740 (8th Cir. 2004); *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002); *see also M-D-*, 23 I&N Dec.540 (BIA 2002). Although the presumption of effective service of notice by regular mail may not be as strong as the presumption created by delivery via certified mail,[1] there must still be some evidence that she (or in this case her attorney) did not receive, or cannot be charged with receiving, proper notice to rebut the presumption.

In *Matter of C-R-C-*, 24 I & N Dec. 677 (BIA 2008), the Board held that the respondent had overcome the presumption of delivery of a Notice to Appear that was sent by regular mail by submitting an affidavit stating that he did not receive the notice and that he had continued to reside at the address to which it was sent, as well as other circumstantial evidence indicating that he had an incentive to appear, and by exercising due diligence in promptly seeking to redress the situation by obtaining counsel and requesting reopening of the proceedings. *Dominguez v. United States Attorney General*, 284 F.3d 1258 (11th Cir. 2002), *distinguished.*

The Board has also held that a respondent's motion to reopen to rescind an *in absentia* order of removal based on a claim that a notice sent by regular mail to the most recent address provided was not received requires consideration of all relevant evidence, including, but not limited to, factors such as affidavits from the respondent and others who are knowledgeable about whether notice was received, whether due diligence was exercised in seeking to redress the situation, any prior applications for relief that would indicate an incentive to appear, and the

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, changed the requirements with regard to notification of removal proceedings. Prior to the enactment of IIRIRA, notice was required to be sent by certified mail when personal service was not practicable. *See* INA § 242B(1)(1995). The Act now allows notice to be sent via regular mail no longer requiring service by certified mail. *See* INA § 239(a)(1).

respondent's prior appearance at immigration proceedings, if applicable. *Matter of M-R-A-*, 24 I & N Dec. 665 (BIA 2008).

Here, there is no evidence (for example, an affidavit of counsel) other than the conclusory statement in the motion (which is repeated verbatim in the respondent's Affidavit) that her attorney did not receive notice of the October 20, 2015 hearing. These uncorroborated assertions are given little weight, however, in light of the fact that both notices of hearing as well as both *in absentia* removal orders were mailed to the same address *(above)*.

Accordingly, the following order will be entered:

IT IS ORDERED that the respondent's motion to reopen be denied.

JAMES R. FUJIMOTO
IMMIGRATION JUDGE