U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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525 West Van Buren Street
Chicago, IL 60607

Name: HAMDAN, MAHMOUD NABEEL **A 087-240-107**

Date of this notice: 6/9/2014

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

TranC
Userteam: Docket

File: A087 240 107 – Chicago, IL

Date: JUN 0 9 2014

In re: MAHMOUD NABEEL HAMDAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Matthew S. Kriezelman, Esquire

ON BEHALF OF DHS: Elizabeth I. Treacy
Assistant Chief Counsel

APPLICATION: Reopening

The respondent appeals from the September 12, 2012, Immigration Judge's decision denying the respondent's motion to reopen removal proceedings which had been conducted in absentia on December 29, 2010. The Department of Homeland Security (DHS) has filed an opposition to the appeal. The record will be remanded.

The Board reviews findings of fact by an Immigration Judge under the clearly erroneous standard of review, and may review questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges de novo. *See* 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

In *Smykiene v. Holder*, 707 F.3d 785 (7th Cir. 2013), the U.S. Court of Appeals for the Seventh Circuit, in whose jurisdiction this case lies, held that once nonreceipt is attested in an affidavit and there is no conclusive evidence of evasion, the alien is entitled to an evidentiary hearing. Here, the respondent contended in his affidavit that he did not receive notice of the hearing, and the record reflects that it was returned to the Immigration Court as undeliverable. In light of this intervening precedent, we will remand for the Immigration Judge to evaluate whether the respondent is entitled to an evidentiary hearing to determine the factual basis for nonreceipt of the hearing notice. *Id. See also* 8 C.F.R. § 1003.1(d)(3)(iv) (limiting the Board's fact-finding ability on appeal).

On remand, the Immigration Judge shall also evaluate this case under *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). In that case we held that entry of an in absentia order of removal is inappropriate where the record reflects that the alien did not receive, and could not be charged with receiving, the notice to appear (NTA) that was served by mail at an address obtained from documents filed with the Service several years earlier. While the Immigration Judge found that address notification advisals provided in the Form I-485 were sufficient to find the respondent may be properly charged with notice, in *Matter of G-Y-R-*, we have found that section 239(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a)(1), authorizes the entry of an in

absentia order only after the respondent receives the warnings and advisals contained in the NTA.[1]

In remanding this case, we intimate no opinion as to the ultimate merits of the respondent's appeal. Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

[1] In his affidavit accompanying the motion to reopen, the respondent states that he was "served" with the NTA, but on appeal, the respondent's brief implies that he did not actually receive the NTA. Consequently, the record is ambiguous whether he actually received the NTA.

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

KRIEZELMAN BURTON & ASSOCIATES, LLC
KRIEZELMAN, JEFFREY A.
200 W. ADAMS / SUITE 2211
CHICAGO, IL 60606

IN THE MATTER OF **HAMDAN, MAHMOUD NABEEL** FILE **A 087-240-107** DATE: Sep 12, 2012

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

_X_ 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
P.O. BOX 8530
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: _____

_____

JK
COURT CLERK
IMMIGRATION COURT FF

CC: ELIZABETH TREACY, ASST. CHIEF COUNSEL
525 W. VAN BUREN, SUITE 701
CHICAGO, IL, 60607

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

In the Matter of: Case No.: A087-240-107

Mahmoud Hamdan

Docket: _____

Respondent/Applicant IN Removal Proceedings

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondent's/applicant's

___ Motion to Reconsider an Immigration Judge's decision

_X_ Motion to Reopen proceedings

filed in the above entitled matter, it is **HEREBY ORDERED** that the motion

____ be granted.

_X_ be denied for the reasons indicated below. 1/

Robert D. Vinikoor
Immigration Judge

Date: September 12, 2012

_1/ The respondent's motion fails to meet the requirements for reopening an inabsentia hearing under Section 240(b)(5)(C). The record reflects that the respondent submitted an application for permanent residence to the USCIS on August 15, 2008. The application provided the notice requirements under Section 239(a)(1)(F) and advised the respondent that he was required to provide USCIS with his current address and written notice of any change of address within ten days of the change. The application further provided the respondent the following advisals: "I understand and acknowledge that if I change my address without providing written notice to USCIS, I will be held responsible for any communications sent to me at the most recent address that I provided to USCIS. I further understand and acknowledge that, if removal proceedings are initiated against me and I fail to attend any hearing, including an initial hearing based on service of the Notice to Appear at the most recent address that I provided to USCIS or otherwise provided by law, **I may be ordered removed in my absence, arrested and removed from the**

United States."

The respondent's motion is inaccurate and does not explain why he never notified the USCIS or the court concerning any change of address. Here, the respondent motion and affidavit acknowledges that he received the Notice to Appear at the address he provided in his application for permanent residence. Additionally, the record reflects that the respondent was notified to appear for hearings on June 30, 2010, December 2, 2010 and December 29, 2010. However, the notices were returned by the Post Office "attempted not known, unable to forward" and the respondent never appeared for any of these hearings. Thus, the respondent's motion which alleges that he appeared for the June 30, 2010 hearing is inaccurate. Additionally, while the respondent may have been represented by an attorney before USCIS no notice of appearance was ever filed with the court, and therefore, the notices were sent to the respondent at his last known address.

Because the hearing notice for the *inabsentia* hearing was returned to the court as undeliverable, its clear that the respondent did not receive actual notice of his hearing date. Whether the respondent can be "charged" with receipt of the notice of the hearing for purpose of an *inabsentia* hearing is the question in this case. Under the 7th Circuit Court decision in *Peralta-Cabrera,* 501 F.3d 837 (7th Cir. 2007), the respondent can only be "charged' with receiving the notice because he "made himself unreachable." In this case, I find that the respondent made himself unreachable and therefore can be "charged" with receipt of the notice of hearing. In reaching this conclusion, this court has reviewed the respondent's limited evidence. No information has been provided concerning when he moved to a new address or even when he separated from his spouse. No affidavit has been filed by the respondent's ex-spouse concerning the forwarding of mail to the respondent at all. The respondent contends that he moved to a new address because of separation from his wife but was still receiving his mail at the address contained in his adjustment of status application. However, without more this explanation is insufficient and doesn't explain why all 3 notices were returned as "attempted - not known." Moreover, the respondent never notified the USCIS or the court of his new address after he was served with the Notice to Appear in April, 2010. The respondent provided no explanation why he waited more than two and half years to inquire about his case. Therefore, the court finds that the respondent has failed to meet his burden warranting reopening. Here, the application for permanent residence I-485 contained the proper warning about failure to appear and the address listed therein can serve as a 239(a)(1)(F) address for purposes of an in absentia hearing. See *GYR*, 23 I&N Dec.181 (2001).