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

Thanesnant, Napatr
The Law Offices of Mario DeMarco, P.C.
1 Gateway Plaza, Suite 2A
Port Chester, NY 10573

DHS/ICE Office of Chief Counsel - HLG
1717 Zoy Street
Harlingen, TX 78552

Name: MALDONADO-LOPEZ, JORGE B... **A 206-881-099**

Date of this notice: 2/17/2016

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:
Pauley, Roger
Wendtland, Linda S.
Cole, Patricia A.

Userteam: Docket

File: A206 881 099 – Harlingen, TX Date:

In re: JORGE BOLIVAR MALDONADO-LOPEZ FEB 17 2016

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Napatr Thanesnant, Esquire

ON BEHALF OF DHS: Iris Guerra Bravo
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Reopening

On July 27, 2015, an Immigration Judge ordered the respondent removed in absentia. On August 24, 2015, the respondent filed a motion to reopen and rescind the in absentia order of removal. On September 22, 2015, the Immigration Judge denied the motion. The respondent, a native and citizen of Ecuador, now appeals. The record will be remanded.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

Pursuant to section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C), an order issued following proceedings conducted in absentia may be rescinded only upon a motion to reopen filed (a) within 180 days after the date of the order of removal if the alien demonstrates that he failed to appear because of exceptional circumstances; or (b) at any time if the alien demonstrates he did not receive proper notice of the hearing, or because he was in Federal or State custody and failed to appear through no fault of his own.

It is undisputed that the respondent did not receive notice of his July 27, 2015, hearing, which was sent by regular mail. The record reflects that the notice of hearing was returned to the Immigration Court as undeliverable with the notation "insufficient address" (I.J. at 1-2). The record also reflects that the respondent did not receive notice of the Immigration Judge's July 27, 2015, in absentia order of removal because it, too, was returned to the Immigration Court for an "insufficient address" (I.J. at 1-2; Respondent's Br. at 4; Motion to Reopen at 2).

The respondent explained in his motion and supporting affidavit that the street address in Norwalk, Connecticut that he provided when he was released on bond was correct, but did not specify that the respondent lived on the second floor of the three-story building (Motion to Reopen at 2; Respondent's Affidavit at 1). He also indicated that he was still living at the Norwalk address (Motion to Reopen at 2; Respondent's Affidavit at 1). The Immigration Judge found, however, that reopening was not warranted because the respondent provided an incorrect address when he was released on bond (I.J. at 2).

We acknowledge that the address that the respondent first provided was not technically complete because he did not include the floor number on which he lived. It also is the respondent's obligation to provide a complete address, which the respondent subsequently provided when he submitted with his motion the change of address form noting the complete address with the floor number.

We conclude that a remand is warranted in this case for the Immigration Judge to reopen proceedings sua sponte.[1] *See* 8 C.F.R. § 1003.1(d)(7) (providing that the Board may return a case to an Immigration Judge for such further action as may be appropriate, without entering a final decision on the merits of the case.). The respondent indicated that he learned of the in absentia order of removal when his bond obligor, with whom the respondent lived at the Norwalk address, received the July 30, 2015, "Notice to Obligor to Deliver Alien," which had been sent by certified mail (Respondent's Br. at 2, 3, Attached Tab B).[2] It appears that when the respondent learned of his order of removal, he exercised due diligence in obtaining counsel and filing his motion to reopen, as evidenced by the filing of his motion less than 1 month after the obligor received the Notice to Obligor (Respondent's Br. at 7).

Accordingly, the following order shall be entered.

ORDER: The record is remanded for further proceedings consistent with this opinion.

FOR THE BOARD

[1] The Board is unable to reopen sua sponte because we have not "rendered a decision" in this case for reopening purposes. *See* 8 C.F.R. § 1003.2(a); *see also* 8 C.F.R. § 1003.23(b).

[2] It is notable that the Notice to Obligor was mailed to the exact address the respondent provided, *i.e.*, the Norwalk street address without the second floor designation (Respondent's Br. at 6).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2009 W. JEFFERSON AVE, STE 300
HARLINGEN, TX 78550

De Castro Foden, LLC
Foden, Mary
107 Oak Street
Hartford, CT 06106

IN THE MATTER OF FILE A 206-881-099 DATE: Sep 24, 2015
MALDONADO-LOPEZ, JORGE BOLIVAR

__ 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
2009 W. JEFFERSON AVE, STE 300
HARLINGEN, TX 78550

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: ASSISTANT CHIEF COUNSEL
1717 ZOY ST.
HARLINGEN, TX, 785520000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
HARLINGEN IMMIGRATION COURT
HARLINGEN, TEXAS

IN THE MATTER OF	)	September 22, 2015
	)	
MALADONADO-LOPEZ, JORGE BOLIVAR,	)	File Number: A 206-881-099
	)	
Respondent.	)	In Removal Proceedings

APPLICATIONS: Motion to Reopen

ON BEHALF OF THE RESPONDENT
Mary Foden, III, Esq.
De Castro Foden, LLC
107 Oak Street
Hartford, CT 06106
Van Nuys, California 91406

ON BEHALF OF THE GOVERNMENT
Assistant Chief Counsel
U.S. Department of Homeland Security
1717 Zoy St.
Harlingen, TX 78552

DECISION OF THE IMMIGRATION JUDGE

On July 27, 2015, the Court ordered the Respondent removed to Ecuador *in absentia* pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act (INA or ACT) after he failed to appear for a hearing on that date. On August 24, 2015, the Respondent filed a motion to reopen this proceeding arguing that he did not receive notice of his hearing. The motion is DENIED.

On January 20, 2015, the Respondent was personally served with a Notice to Appear (NTA) in accordance with section 239(a)(1) of the Act. The certificate of service on the NTA bears the Respondent's signature, acknowledging that service was made. The NTA also states that oral notice of the consequences of failing to appear were provided to the Respondent in the Spanish Language. Exh. #1. On January 23, 2015, the Respondent bonded out of detention and provided the following address where he would be living: 75 Fairfield Avenue, Norwalk, Connecticut 06854. On January 30, 2015, the Court mailed a hearing notice to that address regarding the Respondent's July 27, 2015 hearing. The notice was returned to the Court by the United States Postal Service. The order of removal entered on July 27, 2015 was also sent to the address provided, and it, too, was returned to the Court.

Written notice is considered sufficient if sent to the most recent address provided by an alien under section 239(a)(1)(F) of the Act. *See* INA § 240(b)(5)(A). Further, service of a hearing notice by regular mail is sufficient if there is proof of attempted delivery to the last address by regular mail is sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with section 239(a)(1)(F) of the Act. *See* INA § 239(c). The hearing notice regarding the Respondent's July 27, 2015 hearing was sent by regular mail to the last address provided by the Respondent – the address he provided when he was released from

custody. Further, there is proof of attempted delivery as evidenced by the envelope returned to the Court.

The Respondent submitted an affidavit stating that he lived at, and continues to live at the address he provided but that he did not receive notice of his hearing. In his affidavit the Respondent notes that he lives on the 2nd Floor at 75 Fairfield Avenue. The Respondent submitted a Change of Address Form with his motion to reopen which states that his new address is: 75 Fairfield Avenue, Floor 2, Norwalk , CT 06854.

It is clear that the Respondent did not receive actual notice of the hearing because the hearing notice was returned to the Court by the post office. However, the record reflects that the Respondent was personally served with an NTA which fully informs the Respondent of his duty to inform the Court of any change of address and of the consequences of failing to provide a current address. The Respondent was therefore informed of his statutory address obligations pursuant to 239(a)(1)(F) of the Act. A removal order will not be set aside "if 'the alien's failure to receive actual notice was due to [her] neglect of [her] obligation to keep the immigration court apprised of [her] current mailing address.'" *Lopez–Dubon v. Holder*, 609 F.3d 642, 647 (5th Cir. 2010) (quoting *Gomez–Palacios v. Holder*, 560 F.3d 354, 360 (5th Cir. 2009)).

The Court finds that the Respondent was properly served with an NTA which advised him of his obligations to keep his address current, and that the Respondent's failure to receive actual notice was a result of his providing the Court with an incorrect address. The Court mailed the relevant hearing notice to the last address Respondent provided. That is all that is required under the Act. Consequently, the Respondent's motion to reopen based on lack of notice will be denied.

Finally, the Court concludes the circumstances of this case do not warrant the exercise of the Court's limited discretion to reopen sua sponte. *See Matter of J-J*, 21 I&N Dec. 976 (BIA 1997).

Accordingly, the following orders shall be entered:

ORDER: The Respondent's motion to reopen is DENIED.

David Ayala
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( )ALIEN C/O CUSTODIAN (M)ALIEN'S ATTY/REP ( ) DHS

DATE: 9-24-15 BY: COURT STAFF D. Rem

ATTACHMENTS: ( ) EOIR-33 ( ) EOIR-28 ( ) LEGAL SERVICES LIST (✓) OTHER

Appeal forms