U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: R[redacted]-C[redacted], [redacted] **A [redacted]104**

Date of this notice: 12/20/2017

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:
Kelly, Edward F.
Mann, Ana
Grant, Edward R.

Userteam: Docket

File: [redacted] 104 – Dallas, TX Date: DEC 20 2017

In re: [redacted] A[redacted] R[redacted]-C[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Priyamvada Arora, Esquire

APPLICATION: Reopening

The respondent a native and citizen of Honduras, appeals the Immigration Judge's decision dated April 24, 2017, denying her motion to reopen. The respondent had previously been ordered removed in absentia for her failure to appear for the hearing on September 8, 2016. The appeal will be sustained, proceedings will be reopened, the record will be remanded, and venue will be changed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Board possesses discretion to reopen or reconsider cases sua sponte. *See* 8 C.F.R. § 1003.2(a); *see also Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Based on the totality of the circumstances in this case, including that the respondent was age 5 when her parent abandoned her in California, and her potential eligibility for Special Immigrant Juvenile ("SIJ") status through the Department of Homeland Security, we will grant the respondent's motion to reopen, and we will rescind her in absentia order pursuant to our sua sponte authority. *See* 8 C.F.R. § 1003.2(a); *see also Matter of J-J-*, 21 I&N Dec. at 984. (stating that the Board's power to reopen cases sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations).

The respondent is currently residing in San Jose, California. Therefore, we will, upon on our own motion, change the venue of these proceedings to San Francisco, California. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FURTHER ORDER: Venue of these removal proceedings is changed to the Immigration Court in San Francisco, California.

FOR THE BOARD

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

IN THE MATTER OF:	)	
	)	IN REMOVAL PROCEEDINGS
A[redacted] A[redacted] R[redacted],	)	[redacted]104[1]
	)	
RESPONDENT	)	AWC Docket

ON BEHALF OF THE RESPONDENTS:	**ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY**:
Priyamvada Arora, Esq.	Roslyn Gonzalez, Esq.

Order Denying Motion to Reopen

The motion seeks reopening of an absentia order of removal entered on Sept. 8, 2016. The MTR is based on a theory of lack of notice. The motion is denied.

Respondent is a minor child who entered the U.S. without inspection with her father on Sept. 13, 2015.

Respondent's father was personally served with the Notice to Appear for Respondent. The MTR, which asserts that Respondent's father was not served a copy of the NTA, is based on a mistake of fact.[2] The audio transcript of the July 21, 2016 hearing, attended by both Respondent and her father, shows that the Respondent's father not only stated on the record that

[1] The motion to reopen does not list the parent's case ([redacted]105), with which this case is consolidated.
[2] The disingenuous attempt by counsel to provide an "affidavit" from herself purporting to verify that the NTA was not received does not meet the regulatory requirement that a MTR must be supported by affidavits. Counsel was not present when the NTA was served, nor at the hearing at which receipt of the NTA was verified, nor does she have any firsthand knowledge of the facts of this case at all, since she was not hired until after the absentia order was entered. While counsel may offer stipulations on behalf of her client, she may not cite to her own affidavit to established disputed facts.

the child's NTA was served on him at the time it was issued, but also that he brought that NTA with him to the hearing and showed the court that he had it in his possession.

Thus, the Respondent's father, who is legally in charge of Respondent's legal affairs, was on notice of the initiation of removal proceedings, her obligation to update the immigration court with any change of address, and the consequences of failing to appear as required by Section 239(a)(1) of the Act. *See Matter of G-Y-R-*, 23 I&N Dec. 181, 186 (BIA 2001).

At the time of the issuance of the NTA, Respondent's father provided an address for himself and for Respondent Quinlan, Texas. Respondent's father verified on the record that Respondent was still living at this address when she appeared in Immigration Court on June 21, 2016.

The NTA states as follows:

"You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of the this proceeding. You will be provided with a copy of this form. Notices of Hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS."

Respondent's father received additional advisals from the Immigration Judge on June 21, 2016. The audio transcript shows that the Immigration Judge advised Respondent's father of his responsibility to update Respondent's address within five days of changing her address, of his right to have the assistance of legal counsel, and that the consequence of Respondent not appearing in Court would be an order of removal in absentia. Respondent's father verified on the record that he understood these admonitions from the Immigration Judge, which were provided in his own selected language.

During the June 21, 2016 hearing, Respondent's father on behalf of Respondent requested a continuance for the purpose of having more time to obtain legal counsel. That request was granted. Respondent and her father both failed to appear at the next hearing on July 21, 2016. The IJ afforded both Respondents an additional opportunity to appear on Sept. 8, 2016, but they again failed to appear, and this time they were both ordered removed.

The MTR asserts that Respondent and her father changed addresses in July 2016 from Texas to California. MTR at 2. The MTR does not claim that the Court was notified of this address change. MTR at 2. The record shows that the E-33 notifying the Court of this change from the address of record in Quinlan, Texas to a new address in California is dated March 6, 2017, six months after the absentia order was issued. Thus, it is clear that Respondent through her father failed to fulfill the statutory obligation to notify the Court of the address change.

Although the Respondent suggests that the framework in *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008) is appropriate to determine lack of notice in this case, the *M-R-A-* framework involved clearly distinguishable facts (hearing notice was sent to the address where Respondent was living) and is primarily useful for situations where it is not known why the hearing notice was not received. That is not the case here, as it is undisputed that Respondent did not receive notice because the mandatory address update was never filed with the Court. The four hearing notices (two each for Respondent and her father) were not returned by the Postal Service, and are presumed delivered in the normal course of business to the address of record (at which Respondent was no longer living).

Because the Respondent failed to notify the Immigration Court of her change of address, she was not entitled to notice of the hearing, INA section 239(a)(2)(B), and it was reasonable for the Immigration Court to send a notice of hearing to the best available address.

See Matter of G-Y-R-, 23 I&N Dec. 181, 186 (BIA 2001). Respondent's lack of actual notice was based on the failure to timely file a change of address form. *See Gomez-Palacios v. Holder*, 560 F.3d 354, 360 (5th Cir. 2009). A failure to receive actual notice due to neglect of the alien's obligation to keep the Court apprised of the alien's current mailing address does not entitle the alien to rescission of the removal order. *Id.* at 360-61; *Matter of M-R-A-*, 24 I&N Dec. 665, 675 (BIA 2008).

Respondent cannot defeat or delay removal proceedings by failing to comply with the statute and the instructions stated on the NTA, and then claiming lack of notice. It was to avoid these kinds of delays that Congress enacted the current statutory scheme. To maintain an orderly docket and avoid even further backlogs in the Court's already overburdened docket, the Court needs for the parties appearing before it to comply with the procedures set forth by Congress and the Attorney General. There has been a lack of diligence and a lack of reasonable care toward these proceedings.

For all the above reasons, Respondent received proper notice.

Respondent also asserts that there are exceptional circumstances for her failure to appear. A failure to comply with a legal obligation is not an exceptional circumstance. Indeed, it was precisely this kind of irresponsible behavior which led to Congress imposing the 1996 requirement that no notice of hearing is required if the alien fails to provide an address where they can be served.

The motion attempts to draw a distinction between the Respondent as a minor and the Respondent's parent, whose case is consolidated, and who was in charge of her legal affairs. Respondent argues that a child should not be bound in legal proceedings by decisions and actions of her legal guardian. No legal precedent is cited in support of this proposition. In *Matter of*

Winkens, 15 I&N Dec. 451 (BIA 1975) (abandonment by parent imputed to child), the Board indicated that legal decisions made by parents are binding on their minor children. Any other rule would be impractical as it would render minors essentially immune to removal proceedings until they were adults. Texas law confers on the parent the right to make legal decisions on behalf of minors, absent an order from a Family Court conferring that right on some other person, including the child. The MTR contains a silly discussion of whether the minor had actual knowledge of the hearing, a fact which is legally irrelevant since the parents had the exclusive privilege of making legal decisions on behalf of Respondent. If Respondent's position were to be adopted as the rule, then parents would have a perverse incentive to refuse to allow their alien children to comply with a Notice to Appear. Furthermore, this would add to the already large caseloads pending before the Immigration Courts, and greatly increase the amount of docket time required for these cases.

The motion speculates that the Respondent may become eligible for adjustment of status as an SIJ, but does not argue that there has been a change in circumstance that has rendered previously unavailable relief available. Respondent has not demonstrated why she could not have appeared and sought a continuance to pursue SIJ status, assuming she is eligible or could become so in the future. Additionally, there is no approved I-360, no fee receipt for any pending I-360, no family court order, and no copy of any petition filed in any family court.

Additionally, I will not infer from the lack of a DHS response to the MTR that DHS supports the MTR. Because of the surge in unlawful entries and the resultant case filings, as well as the additional burdens imposed on the docket due to aliens failing to appear at their hearings and failing to update their addresses, DHS attorneys are as overburdened as the Immigration Courts are. Deference must be given to DHS to allocate its scarce attorney resources where they are most needed. In this case the facts are clear that Respondent acting

through her father breached her duty to notify the Immigration Court of her address change and the law is clear that Respondent was not entitled to actual notice of the hearing due to that breach of duty. In this Court most DHS attorney resources assigned to MTRs are for cases where joint motions are needed to overcome the numerical or temporal limitations on MTRs or where joint motions are otherwise prudent. This scheme benefits everyone, and should not be upset by requiring DHS to reassign its scarce attorney resources to handle non-controversial matters. Thus, I decline to infer that DHS supports the MTR, and instead defer to their last stated position that they seek Respondents' removal.

The Court will also decline to exercise its power to reopen the Respondent's case *sua sponte* as the Court does not find that this case presents a "truly exceptional situation." *See, e.g.*, *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). The fact pattern in this case is the very opposite of "exceptional." It is extremely common, so much so that Congress had to step in and impose a statutory fix in 1996. To reopen this case would vitiate the statutory and regulatory deadlines, which are designed to bring finality to immigration proceedings. *See INS v. Doherty*, 502 U.S. 314 (1992) (motions to reopen are especially disfavored in immigration proceedings because every delay works to the advantage of the deportable alien). Accordingly, the following Orders will be entered:

IT IS HEREBY ORDERED that Respondents' motion to reopen be **DENIED.**

Date: Apr 24, 2017
Dallas, Texas

R. Wayne Kimball
Immigration Judge