U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Cavanaugh, Daniel Michael
Hurtado Immigration Law Firm
3880 Colonial Blvd
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Fort Myers, FL 33966

DHS/ICE Office of Chief Counsel - SEA
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Name: ALVARADO-MENDOZA, DARIEL... **A 208-448-674**

Date of this notice: 11/9/2017

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: A208 448 674 – Seattle, WA

Date: NOV - 9 2017

In re: Dariela Patricia ALVARADO-MENDOZA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Daniel M. Cavanaugh, Esquire

ON BEHALF OF DHS: Tiffany T. Tull
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Honduras, was ordered removed from the United States in absentia on May 3, 2016, after not appearing at a hearing. She filed a motion to reopen on December 28, 2016, and appeals from the Immigration Judge's decision denying the motion. The appeal will be sustained.[1]

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).

We have considered the totality of the circumstances presented in this case, and find that an exceptional situation has been demonstrated warranting reopening to allow the respondent another opportunity to apply for relief from removal. *See* 8 C.F.R. § 1003.23(b)(1); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). The respondent was diligent regarding her obligations before the Department of Homeland Security, and the Notice to Appear states that her hearing would be in Miami. The respondent was therefore likely unaware of her obligation to notify the Seattle Immigration Court of her current address. Accordingly, the appeal will be sustained, the proceedings will be reopened, and the record will be remanded.

ORDER: The appeal is sustained; the order of removal entered in absentia is vacated, and these proceedings are reopened and remanded for a hearing consistent with the foregoing opinion.

FOR THE BOARD

[1] On appeal, the respondent states that she is also appealing from the Immigration Judge's denial of her minor child's motion to reopen. However, the record does not contain evidence that the respondent actually appealed from the Immigration Judge's decision as it pertains to her child.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1000 SECOND AVE., SUITE 2500
SEATTLE, WA 98104

Pablo S. Hurtado
Hurtado, Pablo Sergio
3880 Colonial Blvd Suite 2
Fort Myers, FL 33966

Date: Mar 15, 2017

File A208-448-674 AND RIDER: 208-448-673
In the Matter of:
ALVARADO-MENDOZA, DARIELA PATRICIA

_____ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

✓ **Enclosed is a copy of the order/decision of the Immigration Judge.**
RE: MOTION TO REOPEN AND RESCIND IN ABSENTIA ORDER

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

_____
Immigration Court Clerk UL

cc: TIFFANY TULL, ICE ASST. CHIEF COUNSEL
1000 2ND AVE., SUITE 2900
SEATTLE, WA 98104

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
SEATTLE IMMIGRATION COURT
SEATTLE, WASHINGTON

In the Matter of: **Dariela Patricia ALVARADO-MENDOZA,** **Carlos Antonio SEVILLA ALVARADO** **(rider)** *Respondent.*	File Number: **A208-448-674** **A208-448-673** **IN REMOVAL PROCEEDINGS**

CHARGE: INA § 212(a)(7)(A)(i) – Alien Not in Possession of Valid Documents

APPLICATION: Motion to Reopen and Rescind *In Absentia* Order

ON BEHALF OF RESPONDENT
Pablo S. Hurtado, Esq.
The Hurtado Law Firm, P.A.
3880 Colonial Boulevard, Suite 2
Fort Meyers, FL 33966

ON BEHALF OF ICE
Tiffany Tull, Esq.
Assistant Chief Counsel
Department of Homeland Security –ICE
1000 Second Avenue, Suite 2900
Seattle, WA 98104

DECISION OF THE IMMIGRATION JUDGE

I. Introduction and Procedural History

The Department of Homeland Security ("DHS") initiated removal proceedings against Respondents, Dariela Patricia Alvarado-Mendoza and Carlos Antonio Sevilla Alvarado, by filing Notices to Appear ("NTA") with the Miami Immigration Court on September 24, 2015. Exhs. 1, 1A. DHS alleges Respondents are natives and citizens of Honduras who arrived in the United States at or near Hidalgo, Texas on or about August 31, 2015. *Id.* DHS further alleged Respondents are ineligible for admission to the United States because at the time of their application for admission to the United States, they were not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Immigration and Nationality Act ("INA"). *Id.*

On the basis of these allegations, DHS charged Respondents as removable under INA § 212(a)(7)(A)(i)(I) as immigrants not in possession of valid documents. *Id.* The DHS personally

served Respondents with their NTAs on September 24, 2015. *Id.* The case was transferred to the Seattle Immigration Court on April 13, 2016, upon Respondents' release from DHS custody.

On May 3, 2016, Respondents failed to appear at their initial master calendar hearing at the Seattle Immigration Court. The Court granted DHS's motion to proceed *in absentia.* The Court found the NTAs were properly served on the lead respondent. Exhs. 1, 1A. The Court found the hearing notice was sent on April 12, 2016, to: 12225 NE 5th St, Apt B101, Bellevue, Washington, 98005 and was not returned to the Court. Exh. 3. At no time did the Court receive a change of address form. DHS submitted I-213s for each Respondent. Exhs. 4, 5. The Court found that DHS had established removability by clear and convincing evidence, and ordered Respondents removed *in absentia* to Honduras. *See* IJ Removal Proceedings Order (May 3, 2016).

On December 28, 2016, Respondents, through counsel, filed a motion to reopen. *See* Motion to Reopen *In Absentia* Order (Dec. 28, 2016) [hereinafter "MTR"]. For the reasons that follow, the Court denies the motion.

II. Motion to Reopen

An *in absentia* removal order may be rescinded at any time if the alien demonstrates that he did not receive notice. INA § 240(b)(5)(C); 8 C.F.R. §1003.23(b)(4)(ii). An alien is placed on notice of proceedings and the consequences of failing to appear if they receive the NTA. *See Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1005 (9th Cir. 2014) ("[T]he NTA warns aliens that they will be removed *in absentia* if they fail to appear."); *Matter of G-Y-R-*, 23 I&N Dec. 181, 188-89 (BIA 2001). Following proper service of the NTA, a hearing notice, including a notice of change in time or place of proceedings, may be served, in person or by mail, on the alien. INA § 239(a)(2)(A). However, no written notice is required "if the alien has failed to provide [their] address," as they are required to do by the INA. INA § 240(b)(5)(B); *see also Velasquez-Escovar*, *supra*, at 1003-04. Specifically, an alien must provide a correct mailing address and "must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number." INA § 239(a)(1)(F)(ii).

The Court applies a presumption of receipt to a NTA or hearing notice "sent by regular mail when the notice was properly addressed and mailed according to normal office procedures," but this presumption is weaker than that accorded to notices sent by certified mail. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). When examining "all relevant evidence submitted to overcome the weaker presumption of delivery" by regular mail, the Court "may consider a variety of factors including, but not limited to, the following:" (1) the alien's affidavit; (2) affidavits from others who are knowledgeable about "facts relevant to whether notice was received"; (3) whether the alien exercised due diligence upon learning of the *in absentia* order;

and (4) "any prior affirmative application for relief, indicating that the [alien] had an incentive to appear." *Id.* at 674.

Respondent argues she "failed to appear to her immigration court hearing because she did not have notice and she was not properly served a Notice to Appear." MTR at 5. First, the Court finds Respondent was properly served with her NTA. The Court finds even if Respondent did not have her NTA, she concedes she has her son's NTA. MTR at 5 ("Respondent only has a copy of the Notice to Appear for her son that states Miami Immigration Court for a To Be Determined date and time"). Therefore, the Court finds Respondent was properly served with her NTA.

Second, the Court finds Respondents received notice of their hearing date. Exh. 3. The NTAs personally served upon Respondents warned them that they "must notify the Immigration Court immediately by using Form EOIR-33 whenever [they] change [their] address." Exh. 1 at 2; *see also* MTR at 18. The Court finds the hearing notice was properly sent to the address Respondent provided, and was not returned to the Court as undeliverable. *See* Exh. 2. Additionally, Respondent states she lived with her cousin in Bellevue for a short time and her cousin told her "he was able to recover some notices that had arrived at the old apartment." MTR at 3A. The Court also finds Respondent has failed to provide an updated, accurate mailing address to the Court, and as such, was not entitled to written notice of her hearing in the Seattle Immigration Court. INA § 240(b)(5)(B). The only address Respondent provided the Court was 12225 NE 5th St, Apt B101, Bellevue, Washington, 98005. Exhs. 1, 1A, 3, IJ Removal Proceedings Order (May 3, 2016). Moreover, Respondent has never updated her address with the Court after moving from Bellevue to Florida. The Court notes Respondent's counsel submitted an EOIR Form-28, listing Respondents' address is in Lehigh Acres, Florida; however, Respondents have failed to file any EOIR Form-33. *See* EOIR Form-28, Notice of Entry of Appearance (Jan. 25, 2017).

In sum, because Respondent has not filed any change of address forms, Respondent has failed to fulfill her obligation under the INA. *See* INA § 240(b)(5)(B); *Velasquez-Escovar*, *supra*, at 1003-04. Consequently, the Court finds that notice was proper based on the evidence presented, and the motion is denied on this basis. *See M-R-A-*, 24 I&N Dec. at 674. Specifically, in addition to the fact that the hearing notice was not returned, there is no evidence in the record indicating that Respondent had an incentive to appear—namely, there are no prior affirmative applications for relief. *See id.* Weighing the *Matter of M-R-A-* factors, the Court finds that Respondent has not overcome the presumption of delivery of her hearing notice. *See id.* Therefore, the Court denies Respondents' motion to reopen.

ORDER

IT IS HEREBY ORDERED that Respondent's motion to reopen is **DENIED.**

March 13, 2017
Date

Paul A. DeFonzo
Immigration Judge