



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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26 Federal Plaza, 11th Floor
New York, NY 10278**

Name: FOSTER, JERMAINE ST. AUBIN

A 088-444-744

Date of this notice: 4/3/2014

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
Grant, Edward R.
Adkins-Blanch, Charles K.

schwarzA
User team: Docket

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Falls Church, Virginia 20530

File: A088 444 744 – New York, NY

Date: APR - 3 2014

In re: JERMAINE ST. AUBIN FOSTER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Barbara Dominique, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Jamaica, was ordered removed from the United States in absentia on March 20, 2013, after not appearing at a hearing. He filed a motion to reopen on June 17, 2013, which the Immigration Judge denied on July 9, 2013. The respondent's appeal from that decision will be sustained.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 8 C.F.R. § 1003.1(d)(3).

Exceptional circumstances prevented the respondent's appearance at his hearing. *See* section 240(b)(5)(C) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1229a(b)(5)(C) (providing that a motion to reopen based on "exceptional circumstances," as defined in section 240(e)(1) of the Act, 8 U.S.C. § 1229a(e)(1), must be filed within 180 days of the removal order). The Notice of Hearing was mailed only to the respondent's former counsel. In addition, the respondent's former counsel submitted a statement indicating that he did not receive the notice and therefore did not inform the respondent of his hearing date. Moreover, the respondent indicates in his affidavit that he intended to appear at his hearing to adjust his status to a lawful permanent resident and maintain his work permit, was not informed by his former attorney of his hearing date, went to the Immigration Court on June 3, 2013, to schedule his case for a hearing, and immediately hired a new attorney to rectify his immigration status once he learned from the Immigration Court that he had been ordered removed in absentia. Furthermore, the respondent then, with due diligence, filed his motion to reopen on June 17, 2013, through new counsel. In light of the foregoing, we will reopen these proceedings based on "exceptional circumstances," and we need not address whether lack of notice also warrants the reopening of these proceedings.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, and these proceedings are reopened and remanded for further proceedings consistent with the foregoing opinion.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

-----X

In the matter of

July 9, 2013

Jermaine St AUBIN FOSTER,
A088-444-744,

REMOVAL PROCEEDINGS

Respondent.

-----X

On behalf of Respondent

Barbara Dominique, Esq.
225 Broadway, Suite 2515
New York, NY 10007

On behalf of DHS

M. McFarlane, Esq.
Assist. Chief Counsel
New York District, ICE

**DECISION ON RESPONDENT'S REQUEST TO
RESCIND IN ABSENTIA REMOVAL ORDER AND REOPEN**

The respondent filed on a motion on June 17, 2013 to rescind the *in absentia* removal order asserting that he did not receive notice of the proceedings. The Dep't of Homeland Security ("DHS"), Bureau of Immigration and Customs Enforcement ("ICE") filed a written response opposing the motion on June 21, 2013. For the reasons stated herein, the motion to rescind and to reopen is denied.

Procedural History

The respondent was placed in removal proceedings on May 22, 2012 by the personal service of a Notice to Appear ("NTA"). *Exh. 1*. The respondent and his legal counsel appeared on June 12, 2012 before the prior Immigration Judge. On July 6, 2012 the respondent with the assistance of legal counsel admitted to the truth of all of the factual allegations and conceded that he was removable from the US pursuant to § 237(a)(1)(B) of the Immigration and Nationality Act, as amended. *Exh. 1*. After release from custody, the matter was re-assigned to the undersigned and written Notice of Hearing was sent to respondent's counsel pursuant to the Notice of Appearance filed on June 12, 2012. Respondent failed to appear on March 20, 2013 and the court proceeded in the absence of the respondent and issued an order of removal against respondent.

The respondent asserts he never received notice of the proceedings.

DISCUSSION

The respondent seeks to rescind the *in absentia* order claiming was never notified of his hearing date. The analysis will be limited to the issues set forth in *Matter of M-R-A-*, 24 I&N Dec 665 (BIA 2008). The written Notice of Hearing dated Jan 3, 2013 advising the respondent of the new date, time and place of the hearing was sent to respondent's counsel: Michael P. Mays, Esq., 114-73 178th Street, Jamaica, NY 11434 pursuant to an EOIR-28 Notice of Appearance form filed on June 12, 2012. Present counsel was not retained until after the court's *in absentia* order. The Notice was never returned to the court. There is a slight presumption that the Notice was delivered.

The factors for the court to consider are: respondent's affidavit; affidavits from family members or others; respondent's actions upon learning of the *in absentia* order; whether due diligence was exercised in seeking to correct the situation; any prior affirmative applications for relief that may provide an incentive to appear; if there exists any prior applications for relief filed with the court or contained in the Record of Proceedings; respondent's prior attendance at Immigration Court proceedings; and, any other circumstance or evidence that indicates possible non-receipt of the Notice to Appear or hearing notice.

As set out in *M-R-A-*, the respondent must satisfy a lower standard of proof when dealing with notice by regular mail in rebutting the presumption of delivery. The written Notice of Hearing was sent to respondent's legal counsel at the address provided on the EOIR-28 filed with the court on June 12, 2012.

First, there is no affidavit by Mr. Mays, who is currently a suspended from the practice of law. The document titled *Affidavit of Michael P. Mays* fails to show that an oath was administered to Mr. Mays and fails to contain the identity of an authorized person that administered the oath to Mr. Mays. Being suspended, he is not entitled to affirm under the penalty of perjury as permitted in the NY State Civil Practice Laws and Rules (CPLR). Further, fatal to the respondent's motion is the absence of affidavits from his former counsel's office staff outlining the process of how mail is handled in the office and a copy of the office mail log showing incoming and outgoing correspondence to the law firm.

Second, while claiming to be married to the US citizen, the respondent has failed to present sufficient evidence that a petition has been approved in his favor. In fact, the respondent alleged he was married on July 25, 2012 and he had not shown that a petition by his US citizen spouse has ever been filed or is pending on his behalf, despite eleven (11) months having elapsed since his marriage.

Third, respondent's prior appearances occurred while he was in custody; therefore, there is no history of respondent's voluntary appearances for the court to be able to assess respondent's intent in appearing for his removal immigration proceedings.

It is the opinion of the court, while a lesser burden, the respondent has not presented

sufficient evidence to meet the lower standard of proof set forth in *M-R-A-* to set aside the *in absentia* order.

Accordingly, the following order will be entered.

ORDER

IT IS ORDERED that the respondent's motion to rescind the *in absentia* order is denied in its entirety.



SANDY K. HOM
US Immigration Judge