U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: CONTRERAS-SANTOS, VIVIAN ...
Riders:097-834-769

A 097-834-770

Date of this notice: 9/16/2013

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:
Manuel, Elise
Hoffman, Sharon
Guendelsberger, John

TranC
Userteam: Docket

Files: A097 834 770 – San Antonio, TX
A097 834 769

Date: SEP 16 2013

In re: VIVIAN ROSIBEL CONTRERAS-SANTOS
LISBETH GISELA ZAVALA-CONTRERAS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Gita B. Kapur, Esquire

ON BEHALF OF DHS: [signature indecipherable]
Assistant Chief Counsel

APPLICATION: Reopening

The respondents,[1] natives and citizens of Honduras appeal the June 14, 2012,[2] decision of the Immigration Judge denying their motion to reopen removal proceedings conducted in absentia on June 8, 2004. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be sustained and the record will be remanded.

The respondents contend that they never received notice of their hearing, and the record reflects that Notice of Hearing (NOH) was returned by the postal service. In view of the totality of circumstances presented in this case, including the lead respondent's incentive to appear for her hearing because of her potential eligibility for asylum, we will allow the respondents another opportunity to appear for a hearing. *See Matter of J-P-*, 22 I&N Dec. 33 (BIA 1998); *Matter of B-A-S-*, 22 I&N Dec. 57 (BIA 1998).

ORDER: The appeal is sustained and the in absentia order of removal is rescinded.[3]

[1] The respondents are a mother (lead respondent) and her daughter (minor respondent).

[2] The Immigration Judge's decision was first issued on October 19, 2011, but upon grant of a motion to reissue, the Immigration Judge reissued the decision on June 14, 2012.

[3] We note that on June 15, 2012, the Secretary of the Department of Homeland Security (DHS) announced that certain young people, who are low law enforcement priorities, will be eligible for deferred action. The minor respondent may be eligible to seek deferred action. Information regarding DHS' Consideration of Deferred Action for Childhood Arrivals may be obtained on-line (www.uscis.gov or www.ice.gov) or by phone on USCIS hotline at 1-800-375-5283 or ICE hotline at 1-888-351-4024.

FURTHER ORDER: The proceedings are reopened and the record is remanded to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Immigration Court

File A097 834 770 & 769

In the Matter of

Vivian Rosibel Contreras-Santos
Lisbeth Gisela Zavala-Contreras

In Removal Proceedings

Order of the
Immigration Judge

The respondents, mother and daughter, in the above captioned case were scheduled for a Master Docket hearing before the Immigration Court on June 8, 2004 and did not appear. At the request of counsel for the Department of Homeland Security, a hearing was conducted in the respondents' absence and they were ordered removed. The respondents have subsequently filed a motion to reopen the proceeding, alleging that they had not received notice of their hearing, thereby meeting the requirement for reopening under § 240(b)(5)(C)(ii) of the Act [8 USC §1229a(b)(5)(C)(ii)]. The motion to reopen will be denied.

The respondents were personally served with a charging document on January 22, 2004. That charging document was filed with the court February 10, 2004. On January 22, 2004 the respondents were released from DHS custody on recognizance specifying an address in Los Angeles, California. The adult respondent was informed in Spanish that any change or correction of their address must be reported to the court within five days. With respect to the issue of notice to the respondents, proper notice of the hearing was mailed to the address provided by the respondents as required under §239(a)(2)(A) & §239(c) of the Act [8 USC §1229(a)(2)(A) & §1229(c)] on March 17, 2004. The respondents gave that address at the time they were released from DHS custody. Notice of the June 8, 2004 hearing was sent to the specified address on March 17, 2004. No change of address (EOIR - 33) has ever been filed by the respondents as required by § 239(a)(1)(F)(ii) of the Act [8 USC §1229(a)(1)(F)(ii)] and Title 8 CFR §1003.15(d)(2) although the Form I - 589 received with the motion to reopen filed on April 26, 2010 reveals at least two subsequent addresses that were not (and have not to this date) been reported to the court. The notice was not returned as undeliverable by the U. S. Postal Service. Respondents attempt to establish lack of notice with a declaration from the adult respondent and the respondent's aunt that they were at that address until August, 2004 and did not receive any notices for a hearing. I find that notice of the hearing was sent to the respondents on March 17, 2004 to the precise address they specified for that purpose at the time of their release from custody. I also note that the Court's order, served to that same address on June 8, 2004, was returned by the U. S. Postal Service marked "Attempted - not known". I find that notice properly sent to the address provided by the respondent pursuant to §239(a)(1)(F) of the Act [8 USC §1229(a)(1)(F)] is sufficient and requires the Court to proceed *in absentia*. See *Matter of M - D -*, 23 I&N Dec. 540 (BIA 2003), *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001) and *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995). §239(a)(1)(F)(i) [8USC §1229(a)(1)(F)(i)] places responsibility on the respondent of providing an address where the respondent may be contacted. §239(c) of the Act makes clear that "Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F)." There is such proof in this record consisting of the record copy of the notice sent to the address specified by the respondent. The Board of Immigration Appeals directs, in *Matter of M - R - A -*, 24 I&N Dec. 665 (BIA 2008) that all relevant evidence must be considered. In that connection I note that the respondents did not provide the court the changed address where they were actually residing at least as early as August, 2004 or any other changed addresses as required. The respondents now rely on their recall of something not happening in 2004 as remembered in 2010. The occupants at the only address given the court refused delivery of the order in June, 2004. The respondents made no attempt to keep their address current with the court from 2004 forward. The respondents made no effort to inquire about the status of their case for over six years and no effort to reopen the case for over two years from March, 2008, when they allege that they were informed of the outstanding order of removal, to April, 2010 when a motion was filed. The respondents made no effort to present a claim for asylum in the United States to USCIS or anyone else until filing one with the current motion based on events which took place before the respondent's illegal entry to the United States. I find that the intent of the statutory scheme set up by Congress was to make the respondent responsible for providing a valid and reliable address and that notice sent to that address is sufficient under the act to provide the notice required by law and regulation. See §240(b)(5)(A) of the Act [8 USC §1229a(b)(5)(A)]. I note with respect to the question of "due diligence" that the respondents took no action to contact the court in any

way until over 6 years after entry and two years after learning of the outstanding order. The presumption of proper notice has not been overcome on this record. I find that the motion presented does not meet the requirements for reopening under §240(b)(5)(C)(ii)of the Act and Title 8 CFR §1003.23(b)(4)(ii).

The respondents have provided no other ground for reopening their case. I therefore find that the requirements for reopening have not been met on this record and the motion to reopen and accompanying request for a stay of removal shall be and are hereby **DENIED. SO ORDERED.**

Date: October 19, 2011
Place: San Antonio, Texas

Gary Burkholder
Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[M] ALIEN'S ATT/REP [ ] DHS
[E] ALIEN'S ATTY/REP [ ] COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[M] ALIEN'S ATT/REP [ ] INS
DATE: 6-14-12 BY: COURT STAFF MEQ
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other