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

Dee, Sofia
Harold Dee, Attorney at Law P.C.
401 Crow Hill Road
Mount Kisco, NY 10549

DHS/ICE Office of Chief Counsel - SNA
8940 Fourwinds Drive, 5th Floor
San Antonio, TX 78239

Name: GREGORIO-DIAS, ROLANDO DE... **A 200-000-324**

Date of this notice: 10/28/2015

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:
Grant, Edward R.
Adkins-Blanch, Charles K.
O'Leary, Brian M.

Userteam: Docket

File: A200 000 324 – San Antonio, TX

Date: OCT 28 2015

In re: ROLANDO DE JESUS GREGORIO-DIAS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sofia M. Dee, Esquire

ON BEHALF OF DHS: Jane H. Thomson
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Guatemala, was ordered removed in absentia on August 17, 2005. The respondent filed a motion to reopen on August 4, 2014, alleging a lack of notice and also seeking sua sponte reopening. The respondent has appealed the Immigration Judge's decision of September 18, 2014, denying the respondent's motion to reopen proceedings. The Department of Homeland Security (DHS) has filed an opposition to the appeal.

Upon de novo review of the record and in light of the totality of circumstances presented in this case, including the fact that DHS did not oppose the motion when it was filed, we conclude that the respondent demonstrated that reopening is warranted. *See* sections 240(b)(5)(C)(i), (e)(1) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(b)(5)(C)(i), (e)(1). We will therefore sustain the respondent's appeal and remand the record for further proceedings.

ORDER: The appeal is sustained, the in absentia order is vacated, proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA STREET, SUITE 300
SAN ANTONIO, TX 78207

Harold Dee, Attorney at Law P.C.
Dee, Sofia
401 crow hill road
Mount Kisco, NY 10549

IN THE MATTER OF FILE A 200-000-324 DATE: Sep 22, 2014
GREGORIO-DIAS, ROLANDO DE JESUS

__ 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 20530

__ 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
800 DOLOROSA STREET, SUITE 300
SAN ANTONIO, TX 78207

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: DISTRICT COUNSEL
8940 FOURWINDS DR., 5TH FLOOR
SAN ANTONIO, TX, 782971939

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

File A200 000 324

In the Matter of

Rolando De Jesus Gregorio-Dias

In Removal Proceedings

Order of the Immigration Judge

The respondent in this case, who was ordered removed on August 17, 2005 in a proceeding conducted *in absentia*, has moved to reopen the proceeding which resulted in his order of removal. The motion will be denied.

The respondent states as grounds for reopening that he never received notice of his hearing. This is correct. The Notice to Appear demonstrates that the respondent was notified when he was apprehended of the requirement to provide a valid address for notice purposes and informed that if no address was provided written notice of the hearing was not required. The respondent did not provide an address for notice purposes at the time he received his Notice to Appear as required by §239(a)(1)(F)(i) of the Act. The charging document and Court record make clear no address was provided. The law and regulations make clear that it is the respondent's responsibility to provide an address for notice purposes and make any corrections or changes (including the initial provision of an address) within 5 days. There is no record of the Court ever receiving any notice of address as required by §239(a)(1)(F)(ii) of the Act and Title 8 CFR §1003.15(d)(1) until the address presented with the motion to reopen on August 4, 2014, over nine years after the time allowed. Where no address for notice purposes is provided, the court is required by the statutory scheme created by Congress to proceed without notice to or participation by the respondent. See §§239(a)(2)(B) and 240(b)(5)(B) of the Act. Any motion based upon "exceptional circumstances" is years out of time and could not be granted for that reason.

The Notice to Appear was personally served upon the respondent as evidenced by his signature acknowledging receipt [see *Matter of Cubor*, 25 I&N Dec. 470 (BIA 2011)] and sets forth the requirements for providing an address where the respondent could receive notice. The respondent in his affidavit asserts " No one asked me to provide an address where I would be living or told me that I had to do anything else." The information taken at the time of his apprehension contradicts this. The respondent gave his date of birth as January 15, 1987, making him 18 years old. This was necessary for the respondent to be released without a custodial adult and makes the apprehension report (Form I-213) credible and reliable and respondent's affidavit incredible. The report also recites that "Gregorio failed to provide a United States address and phone number. The respondent clearly had a number for his brother he did not wish to share. After providing false information to the apprehending border patrol officers, respondent was released on recognizance "due to lack of detention funds". The respondent never provided an address at the time of apprehension or to the Court as required. This is stated on the face of the Notice to Appear served on the

respondent and in the report of his apprehension. The respondent's responsibilities are not obviated by his ignorance of them or by his willfully ignoring them. Therefore I find it clear that the respondent received the notice required in a case such as this where he did not provide an address for notice purposes. The notice required is none. Where no address is given notice is not required. Where an invalid or inaccurate address is given, no notice is required. See *Gomez-Palacios v. Holder*, 560 F. 3rd 354 (5th Cir. 2009). There is no requirement that a Notice to Appear and the advisals thereon be in any language other than English. *See Cruz-Diaz v. Holder*, 388 F. App'x. 429 (5th Cir. 2010; *Chavez v. Holder*, 343 F. App'x. 955 (5th Cir 2009), *Ojeda Calderon v Holder*, 726 F3 669 (5th Cir. 2013). That the respondent gave a fictitious date of birth, ignored the advisals and explanations given on the Notice to Appear and then absconded does not provided any grounds for concluding that reopening for lack of notice is available. Any deferred action, prosecutorial discretion, or other exercise of priorities by the USICE or DHS is outside of and independent of the authority of the Immigration Court. Any of these actions can be taken prior to, at any stage of, or subsequent to removal proceedings and would not provide any justification to reopen the proceedings.

Finally the court will not consider *sua sponte* reopening based upon respondent's motion. The respondent has now been a fugitive from proceedings for over nine years. The respondent made no attempt to obtain counsel, as advised on his charging document. The respondent made no attempt to provide any current address for notice purposes through an undetermined number of relocations and now offers lack of notice as a justification for reopening. The respondent made no attempt to contact the court or the DHS although he was aware that he had entered the United States illegally and had been apprehended and subject to removal proceedings. The respondent simply obtained employment and continued with his life, as he had intended upon entry, for over nine years and until he believed that he could now receive benefits. There is nothing about this that would be an "exceptional situation" [see *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997)] and the hearing will not be reopened *sua sponte* by the court. The parties may file a joint motion at any time under Title 8 CFR §1003.23(b)(4)(iv). The motion to reopen shall therefore be, and is hereby, **DENIED. SO ORDERED.**

Date : September 18, 2014
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
[ ] ALIEN'S ATT/REP [ ] DHS
DATE: 9-22-14 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other