U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: KALENIKOVA, LILIIA
Riders: [redacted]

A 202-188-709

Date of this notice: 8/15/2019

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:
Cole, Patricia A.
Greer, Anne J.
Donovan, Teresa L.

Userteam: Docket

Files: A202-188-709 – Houston, TX [redacted]

Date: AUG 15 2019

In re: Liliia KALENIKOVA [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Lawrence Erik Rushton, Esquire

APPLICATION: Reopening

This case was previously before us on September 25, 2017, when we vacated the Immigration Judge's April 11, 2017, decisions denying the respondents' motions to reopen and rescind in absentia orders of removal entered on September 21, 2016, and remanded the record for the Immigration Judge to issue a full decision on the respondents' motions.[1] On January 23, 2018, the Immigration Judge issued a new decision again denying the respondents' motions. The respondents now timely appeal. The Department of Homeland Security (DHS) has not filed an opposition to this appeal. The appeal will be sustained, the motions will be granted, the in absentia orders will be rescinded, and the record will be remanded for further proceedings.

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 the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On November 10, 2014, the DHS personally served the respondents with Notices to Appear (NTAs) (Exhs. 1). The DHS later filed the NTAs with the Immigration Court on August 1, 2016 (Exhs. 1). On August 5, 2016, Notices of Hearing (NOHs) were sent by regular mail to the respondents at the address listed on their NTAs (Exhs. 1, 3). The respondents were ordered removed in absentia on September 21, 2016, after failing to appear for their hearing. On February 22, 2017, the respondents timely filed motions to reopen their removal proceedings and rescind their in absentia removal orders. In their motions, the respondents argued that they were unaware of their September 21, 2016, hearing because the church that was housing them deliberately withheld their mail (Respondents' Mot. to Reopen).

As relevant here, an in absentia removal order may be rescinded (1) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances, or (2) upon a motion to reopen filed at any time if the alien demonstrates that she did not receive notice of the hearing in accordance with

[1] The respondents, natives and citizens of Ukraine, are a mother and her 9-year-old daughter. The mother will be referred to as the "lead respondent."

section 239(a)(1) or (2) of the Act, 8 U.S.C. § 1229(a)(1) or (2). Section 240(b)(5)(C) of the Act, 8 U.S.C. § 1229a(b)(5)(C).

On April 11, 2017, the Immigration Judge denied the respondents' motions in summary orders, noting only that the respondents failed to establish that exceptional circumstances caused their failure to appear. On September 25, 2017, we vacated those orders and remanded for the Immigration Judge to issue a full decision on the respondents' motions. On January 23, 2018, the Immigration Judge issued a new decision again denying the respondents' motions.[2] Given that the NOHs were mailed to the respondents' last known address and were not returned as undeliverable, the Immigration Judge determined that the respondents failed to overcome the presumption of delivery afforded to notices sent by regular mail (IJ at 3). *See Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). The Immigration Judge further concluded that the respondents' failure to receive their NOHs was due to the inner workings of their household—specifically, the church's withholding of their mail—rather than any exceptional circumstance (IJ at 3). *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). Finally, the Immigration Judge considered that the respondents moved out of the church and to a new address in early 2016—months prior to the mailing of the NOHs—and provided this updated address to the DHS, but failed to provide it to the Immigration Court (IJ at 3-4).

On appeal, the respondents emphasize the lengthy delay between the DHS's service of the NTAs in November 2014, and filing of the NTAs with the Immigration Court in August 2016 (Respondents' Br. at 4-5). The respondents do not dispute that, months prior to the DHS's filing of the NTAs with the Immigration Court, they notified the DHS of their change in address (Respondents' Br. at 9). *See* DHS's Opposition to Motion to Reopen at 11-12 (demonstrating that the lead respondent updated her address with the United States Citizenship and Immigration Service (USCIS) in early 2016). However, the respondents assert that notifying the DHS of this change of address shifted the burden to the DHS to provide the Immigration Court with this most recent address when filing their NTAs (Respondents' Br. at 9-10).

In light of intervening precedent, we agree that the respondents satisfied their obligation to provide notice of their change of address and, therefore, their failure to appear for their September 21, 2016, removal hearing must be excused. *See Fuentes-Pena v. Barr*, 917 F.3d 827 (5th Cir. 2019), *distinguishing Gomez-Palacios v. Holder*, 560 F.3d 354 (5th Cir. 2009). In *Fuentes-Pena*, as in the case at hand, the respondent notified the DHS of her change in address prior to the DHS's filing of her NTA with the Immigration Court; however, her NOH was subsequently mailed to the outdated address listed on the NTA, and she was ordered removed in absentia when she failed to appear for her hearing. *Id.* at 828-29. The Fifth Circuit held that—prior to the filing of an NTA with the Immigration Court—an alien may satisfy her obligation to update her address under section 239(a)(1)(f) of the Act by notifying the DHS of this change of address.[3] *Id.* at 830-31 (noting that 8 C.F.R. § 1003.15(d) "requires aliens to notify the

[2] All citations to the Immigration Judge's decision refer to this January 23, 2018, decision.

[3] In *Fuentes-Pena*, the respondent specifically notified United States Immigration and Customs Enforcement (ICE) of her change of address whereas, here, the lead respondent notified USCIS of

immigration court of any change of address only *after* the NTA has been filed"). As the respondents in the instant case notified the DHS of their change of address in early 2016, months prior to the filing of the NTAs, the respondents satisfied their statutory obligation to provide notice of their change of address, and their failure to remove is excused.[4] Accordingly, the following order is entered.

ORDER: The appeal is sustained, the Immigration Judge's September 21, 2016, in absentia orders of removal are rescinded, the respondents' removal proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings consistent with the forgoing opinion.

FOR THE BOARD

her change of address. *See* DHS's Opposition to Motion at 11. As both ICE and the USCIS are components of the DHS, we find this difference to be immaterial. *See* Exhs. 1 (providing that the respondents were "required to provide *the DHS*, in writing, with [their] full mailing address" (emphasis added)).

[4] Because we sustain the respondents' appeal on this ground, we need not reach their additional challenges to the Immigration Judge's decision. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (reiterating the general rule that courts and agencies are not required to make findings on issues which are not dispositive to the outcome of cases) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976)).