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Name: MALDONADO, SERGIO

A 078-567-541

Date of this notice: 3/21/2016

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
O'Leary, Brian M.
Grant, Edward R.

Userteam: Docket

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File: A078 567 541 – Houston, TX

Date: MAR 21 2016

In re: SERGIO MALDONADO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Amanda Lea Waterhouse, Esquire

ON BEHALF OF DHS: Nora E. Norman
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, was ordered removed in absentia on April 21, 2003. On December 22, 2014, the respondent filed a motion to reopen proceedings that was denied by the Immigration Judge on March 17, 2015. The respondent filed a timely appeal. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The record reflects that a Notice to Appear ("NTA") was served on the respondent by regular mail on December 23, 2002, to the address that he provided on his application for adjustment of status based on his marriage to a United States citizen (Form I-485), dated February 27, 2001 (I.J. at 1; Exh. 1; Resp.'s Motion to Reopen at 3, Tab C). The respondent was subsequently sent a notice of hearing by regular mail to that same address on January 15, 2003, informing the respondent of an April 22, 2003, hearing date (I.J. at 1; Exh. 2). The respondent did not appear for his hearing, and on April 22, 2003, an in absentia order of removal was entered and mailed to the respondent via regular mail, again to the same address (I.J. at 1). On December 22, 2014, the respondent, through counsel, filed a motion to reopen in which the respondent alleged a lack of receipt of both the NTA and his notice of hearing. The Immigration Judge denied the motion to reopen, finding that both notices were properly sent to the respondent's last known address, and that the respondent had not presented evidence sufficient to demonstrate that he had not received them.

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The respondent argues on appeal that he did not receive the NTA or the notice of hearing because it was sent to a "stale" address at which he no longer resided (Resp.'s Brief at 5). He does not dispute that it was mailed to the address he provided on his Form I-485. Rather, he argues that he did not receive it there because it was actually his landlord's address and he moved after he and his spouse separated, and he had provided a different address on a Form G-325A, also dated February 27, 2001 (Respondent's Brief at 3-4, Tab B at 4, Tab C at 11).

We find that this case is governed by our decision in *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). In that case we held that entry of an in absentia order of removal is inappropriate where the record reflects that the alien did not receive, or could not be charged with receiving, the NTA that was served by mail at an address obtained from documents filed with the DHS several years earlier. Furthermore, when an alien does not appear for a hearing, there remains an uncertainty as to whether the alien received the address notification warnings set forth in the NTA. Here, the respondent's NTA and notice of hearing were sent to an address that was approximately 2 years old, and he has provided an affidavit that they were mailed to an address in which he did not physically live and he did not receive them (Resp.'s Brief at 3-5, Tab B at 4, Tab C at 11). We agree with the respondent that he did not receive adequate notice under *Matter of G-Y-R-*, *supra*, because he did not receive, and cannot be charged with receiving the NTA. Hence, the appeal will be sustained and the record remanded for further proceedings.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
600 JEFFERSON, SUITE 900
HOUSTON, TX 77002

Reina & Bates Immigration & Nationality Law
Waterhouse, Amanda Lea
PO Box 670608
Houston, TX 77267

IN THE MATTER OF
MALDONADO, SERGIO

FILE A 078-567-541 DATE: Mar 17, 2015

__ 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
600 JEFFERSON, SUITE 900
HOUSTON, TX 77002

✓ __ OTHER: IJ order on motion to Reopen.

RR

COURT CLERK
IMMIGRATION COURT FF

CC: MARK EVANS, SENIOR ATTORNEY
126 NORTHPOINT DR., ROOM 2020
HOUSTON, TX, 770600000

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

In the Matter of:

Sergio MALDONADO

Respondent.

File Number: A 078-567-541

APPLICATIONS: Respondent's Motion to Reopen

ON BEHALF OF RESPONDENT:
Amanda L. Waterhouse, Esq.
P.O. Box 670608
Houston, Texas 77267

ON BEHALF OF DHS:
Nora E. Norman, Esq.
Department of Homeland Security
126 Northpoint Drive, #2020
Houston, Texas 77060

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is a native and citizen of Mexico who entered the United States without being inspected, admitted, or paroled. Exh. 1. On March 1, 2001, the respondent applied for adjustment of status based on his marriage to a U.S. citizen. Respondent's Motion at 3. The respondent provided his mailing address as 3201 Laura Koppe Road, Apt. 1, Houston, Texas 77093. *Id.* On March 28, 2002, the Department of Homeland Security (DHS) sent a denial notice to the address provided on the respondent's application. *Id.* On December 23, 2002, DHS served the respondent, by regular mail to the same address, with a Notice to Appear (NTA), charging him as removable from the U.S. pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or the Act). Exh. 1.

On January 15, 2003, the Court served respondent with a hearing notice ordering him to appear before the Court on April 21, 2003. The respondent failed to appear as directed and the Court ordered him removed *in absentia* to Mexico. *See* Order of the Immigration Judge (Apr. 21. 2003).

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On December 22, 2014, the respondent filed the present motion to reopen. *See* Respondent's Motion. DHS has filed an opposition to the respondent's motion to reopen removal proceedings.[1]

II. Law and Analysis

A. Statutory limitations on motions to reopen

A motion to reopen must be filed no later than 90 days from "the date on which the final administrative decision was rendered." 8 C.F.R. § 1003.2(c)(2). Further, a party may file only one motion to reopen proceedings. 8 C.F.R. § 1003.23(b)(1). There are three exceptions to these time and numerical limitations: (1) motions to reopen to rescind orders of removal entered *in absentia*; (2) motions to apply for asylum based on changed country conditions; and (3) motions to reopen in which all of the parties agree to the motion and such motion is filed jointly. 8 C.F.R. § 1003.23(b)(4); *Matter of J-G-*, 26 I&N Dec. 161, 163-64 (BIA 2013). Here, the respondent seeks to reopen proceedings in order to rescind the *in absentia* removal order previously entered against him.

B. Rescission of *in absentia* removal orders

An *in absentia* removal order may be rescinded if: (1) a motion to reopen is filed within 180 days of the date of the order and the alien demonstrates that the absence was due to exceptional circumstances; or (2) a motion to reopen is filed at any time and the alien demonstrates that the failure to appear was due to a lack of proper notice in accordance with INA § 239 or that he or she was in state or federal custody at the time of the original hearing. *See* INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) and 8 C.F.R. § 1003.23(b)(4)(ii).

The respondent contends that he never received notice of the removal proceedings against him. Respondent's Motion at 3. DHS served the NTA by regular mail to an address which the respondent previously provided on his application for adjustment of status. *See* Exh. 3. The respondent claims that he moved away from that address and began living with his father around February 2002, before the NTA and the notice of denial of his application for adjustment of status were sent by DHS. Respondent's Motion, Tab B at 4.

The respondent essentially asserts that (1) he did not receive actual notice of the proceedings against him because he moved, and (2) cannot be charged with receiving constructive notice because he was not informed of the statutory obligations to update his address with the Court, which take effect at the commencement of removal proceedings. The respondent relies on *Matter of G-Y-R*, 23 I&N Dec. 181 (BIA 2001) in arguing that he cannot be charged with receiving notice. In *G-Y-R*, DHS served, by certified mail, an NTA on an alien at

[1] The court observes that DHS's opposition was not timely filed. As a result, the Court will not consider DHS's brief in analyzing the respondent's motion.

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an address that the alien had previously provided in an application for temporary protected status. The certified mailings were returned as undeliverable, providing clear evidence that the alien in that case did not receive actual notice of the proceedings. The Board further determined that the alien could not be charged with receiving constructive notice for failing to update her address because she was not yet under a statutory obligation to update her address.

The present motion is distinguishable from the circumstances in *G-Y-R.* In that case, DHS delayed six years before sending out the NTA. Here, DHS sent the NTA to the respondent nine months after his application for adjustment of status was denied. As a result, even if the respondent had moved, his mail—including the notices—would likely have been forwarded had he exercised reasonable diligence by either updating his address with DHS or making arrangements with the postal service. Additionally, there is no evidence in the record that the NTA or the Notice of Hearing were returned to DHS or the Court.

In *G-Y-R*, the NTA and Notice of Hearing were sent by certified mail and returned as undeliverable—providing concrete evidence that the alien in that case did not actually receive the NTA. Here, the only evidence demonstrating that the respondent did not receive actual notice of the proceedings against him are his own self-serving statements contained in an affidavit attached to his motion. *See* Respondent's Motion, Tab B. The respondent has not submitted any objective evidence that he actually moved away and thus did not receive the NTA or Notice of Hearing. He did not submit affidavits from other parties with knowledge of relevant facts (i.e. his former landlord, his father, his ex-wife); or other evidence that he moved such as utility bills, pay-stubs, or tax records indicating his new address during the relevant time periods.

The Court need not address the issue of whether the respondent can be charged with receiving constructive notice of the proceedings against him as he has failed to present sufficient, credible evidence that he did not receive actual notice of the proceedings.

III. Conclusion

Based on the foregoing, the Court finds no basis for reopening the respondent's removal proceedings. Accordingly, the following order shall be entered:

ORDER

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

March 17, 2015
Date

Clarease R. Yates
Clarease Rankin Yates
Immigration Judge

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