U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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P.O. Box 8728
Boston, MA 02114

Name: HIRALDO ARIAS, MICHAEL

A 057-150-954

Date of this notice: 8/31/2016

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:
Adkins-Blanch, Charles K.
O'Connor, Blair
O'Leary, Brian M.

Userteam: Docket

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HIRALDO ARIAS, MICHAEL
A057-150-954
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DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114

Name: HIRALDO ARIAS, MICHAEL **A 057-150-954**

Date of this notice: 8/31/2016

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
O'Connor, Blair
O'Leary, Brian M.

Userteam:

File: A057 150 954 – Boston, MA Date: AUG 31 2016

In re: MICHAEL HIRALDO ARIAS a.k.a. Michael Hiraldo a.k.a. Michael Arias Hiralgo

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Layne C. Savage, Esquire

APPLICATION: Reopening; termination; remand

The respondent, a native and citizen of the Dominican Republic, appeals the decision of the Immigration Judge, dated April 22, 2016, denying his motion to reopen. He has also filed a motion to terminate, or, in the alternative, to remand with this Board. The Department of Homeland Security has not replied to the respondent's appeal or his motion.

We review Immigration Judges' findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Considering the totality of the circumstances presented in this case, we conclude that reopened removal proceedings are warranted in order to provide the respondent with a renewed opportunity to appear before an Immigration Judge to show why he should not be removed from the United States. *See* 8 C.F.R. § 1003.23(b)(1). The record does not contain a Notice to Appear ("NTA") which was personally served upon the respondent. Instead, the NTA contained in the record reflects that it was mailed to the respondent at an address which did not contain an internal apartment number (Exh. 1). The respondent's claim that he did not receive the hearing notice has not been refuted.

Upon remand, the respondent is not precluded from requesting that the Immigration Judge consider his request to terminate these proceedings. However, at the present time, we express no opinion regarding the ultimate outcome of these proceedings. Accordingly, the following order is entered.

ORDER: The respondent's appeal is sustained, the order of removal, entered in absentia on August 28, 2013, is vacated, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings and the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

IN THE MATTER OF:

HIRALDO ARIAS, Michael)	**In Removal Proceedings**
a.k.a. Michael Hiraldo, Michael Arias Hiralgo)	**DETAINED**
A 057-150-954)	
)	APR 22 2016
Respondent)	

CHARGE: Immigration and Nationality Act (INA or Act) § 212(a)(2)(A)(i)(II): Alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of, a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802)

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT
Luanne Santelises, Esq.
222 Reservoir Avenue, 2nd Floor
Providence, Rhode Island 02907

ON BEHALF OF DHS
Assistant Chief Counsel
Office of the Chief Counsel
15 New Sudbury Street, Room 425
Boston, Massachusetts 02203

ON RESPONDENT'S MOTION TO REOPEN

I. Procedural History

The Respondent, Michael Hiraldo Arias, is a 29 year old native and citizen of the Dominican Republic. Exh. 1. The Respondent became a lawful permanent resident (LPR) of the United States on June 23, 2005. *Id.* On or about September 23, 2010, the Respondent was convicted in the Providence District Court at Providence, Rhode Island, of the offense of "possession of marijuana first [offense, in] violation of 21-28-4-01(c)(1)(B) of the Rhode Island General Laws. *Id.*; Exh. 2 (Rhode Island District Court Docket No. 2010 013696). On April 3, 2013, the Respondent arrived at Boston Logan International Airport in East Boston, Massachusetts, and sought admission to the United States as an LPR. Exh. 1, Exh. 2 (Form I-213, Record of Deportable/Inadmissible Alien, p. 2). Based on his September 2010 conviction, Department of Homeland Security (DHS) immigration officials determined that the Respondent was inadmissible to the United States and should be placed into removal proceedings. *See* Exh. 2 (Form I-213, Record of Deportable/Inadmissible Alien, p. 2). The Respondent provided immigration officials at the airport with the following home address: "74 Daboll Street

Providence, Rhode Island 02907." *Id.* (Form I-213, Record of Deportable/Inadmissible Alien, p. 1); *see* Resp't's Mot. to Reopen, p. 2, Tab A, p. 1 (Feb. 23, 2016).

On July 18, 2013, the Department of Homeland Security (DHS) mailed the Respondent, via regular mail to the above-quoted address, a Notice to Appear, bearing the same date. Exh. 1. The NTA makes allegations consistent with the aforementioned facts, and charges the Respondent as removable from the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, as an alien convicted of a controlled substance offense. *Id.* The NTA ordered the Respondent to appear before an Immigration Judge at the Boston Immigration Court (Court) to show why he should not be removed from the United States, but listed the Respondent's hearing date at the Court as "on a date to be set at a time to be set." *See id.* Subsequently, the Court sent the Respondent, via regular mail to the above-quoted address, a hearing notice dated August 1, 2013. Exh. 1A. This notice informed the Respondent that he was scheduled to appear at the Court on August 28, 2013, at 9:30 a.m. *Id.*

The Respondent failed to appear at his August 28, 2013, hearing. *See* Order of the Immigration Judge (Aug. 28, 2013). Based on Record evidence, including a certified record of conviction concerning the Respondent's September 2010 conviction and a Form I-213, Record of Deportable/Inadmissible Alien concerning the Respondent, the Court found the Respondent removable as charged by clear, convincing, and unequivocal evidence. *See* Exh. 2. Accordingly, the Court ordered the Respondent removed to the Dominican Republic *in absentia*. Order of the Immigration Judge (Aug. 28, 2013).

II. Motion to Reopen

On February 23, 2016, the Respondent filed a motion asking the Court to reopen his removal proceedings. *See* Resp't's Mot. to Reopen (Feb. 23, 2016). The Respondent contends that he did not receive notice of his August 28, 2013, hearing. *Id.* at Tab A, p. 1. He explains that when he returned to the United States from the Dominican Republic in April 2013, he was questioned by immigration officials at Boston Logan International Airport. *Id.* According to the Respondent, after he provided these officials with his address – "74 Daboll Street 3rd, Providence, RI 02907" – he was "given a document and told that [he] would receive a notice from the [I]mmigration [C]ourt with a hearing date." *Id.* at 1-2. The Respondent's Motion identifies this document as a "Notice to Appear." *Id.* at Motion, p. 3. The Respondent further submits that he "never received a letter from [the C]ourt or from any other office from immigration." *Id.* at Tab A, p. 2. His Motion cites the decision of the Board of Immigration Appeals (BIA or Board) in *Matter of G-Y-R-*, 23 I&N Dec. 181, 187 (BIA 2001), for the proposition that the Court may conduct proceedings *in absentia* only after an alien receives a NTA apprising the alien of his obligation to provide immigration officials with a current address. *Id.* at Motion, p. 4. Regarding notice, the Motion concludes that, considering this precedent, as well as the circumstances of the Respondent's case, "it was clearly improper for the Court to proceed in absentia." *Id.* at 5. In the alternative, the Motion seeks *sua sponte* reopening, citing the Respondent's United States citizen and LPR relatives residing in Rhode Island, and the plans of the Respondent – who was the victim of a felony assault – to pursue a U visa. *Id.* at 6.

On March 17, 2016, DHS filed a motion opposing the Respondent's Motion to Reopen. DHS Mot. in Opposition to Reopening (Mar. 17, 2016). DHS's motion contends that the Respondent's motion fails to demonstrate that he was not properly notified of his August 28, 2013, hearing. *Id.* Accordingly, DHS's motion urges the Court to deny the Respondent's Motion to Reopen. *Id.*

The Court will now issue a decision on the Respondent's Motion to Reopen.

III. Standards of Law

The Immigration Judge may upon his own motion at any time, or upon a motion by DHS or a respondent, reopen or reconsider any case in which he has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. 8 C.F.R. § 1003.23(b)(1) (2016). Subject to limited exceptions, a motion to reopen must be filed within ninety days of the date of entry of a final administrative order of removal, deportation, or exclusion. 8 C.F.R. § 1003.23(b)(1). An order of removal entered *in absentia* may be rescinded at any time if the alien demonstrates that he or she did not receive notice of the hearing. INA § 240(b)(5)(C)(ii) (2016); 8 C.F.R. § 1003.23(b)(4)(ii).

Notice of a hearing in removal proceedings, including in the form of a NTA, shall be served either in person or, where personal service is impractical, by regular mail to the alien's last known address. INA § 239(a)(1); 8 C.F.R. § 1003.13. Where a NTA is served by regular mail, the Court may not conduct proceedings *in absentia* unless there is "proof of attempted delivery [of the NTA] to the last address provided by the alien in accordance with [section 239(a)(1)(F) of the Act]." *Id.* at § 239(c). Section 239(a)(1)(F) of the Act provides that an NTA must specify (1) the requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting removal proceedings; (2) the requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number; and (3) the consequences under section 240(b)(5) of the Act of failure to provide address and telephone information pursuant to section 239(a)(1)(F) of the Act. INA § 239(a)(1)(F).

The Board found that an address is provided in accordance with section 239(a)(1)(F) of the Act

> . . . *only* if the alien has first been informed of the particular statutory address obligations associated with removal proceedings and of the consequences of failing to provide a current address. Because that information is first communicated in the [NTA], the alien must receive the [NTA] before he . . . can "provide" an address in accordance with section 239(a)(1)(F). In cases where [DHS] uses the mail to deliver the [NTA] to the alien, the "last address" or the "most recent address" provided by the alien "in accordance [section 239(a)(1)(F)]" will necessarily be an address arising from the alien's receipt of the advisals contained in the [NTA].

Matter of G-Y-R-, 23 I&N Dec. at 187-88 (emphasis and quotations in original). Accordingly, the Board determined that the notice requirement leading to an *in absentia* order cannot be

satisfied by mailing the [NTA] to an alien's last known address when the alien does not receive, or cannot be charged with receiving, the NTA. *Id.* at 189. Regarding when an alien can be charged with receiving a mailed NTA, the Board conceptualized a situation where "the [NTA] reaches the correct address but does not reach the alien through some failure in the internal workings of the household." *See id.*

Following the Board's decision in *Matter of G-Y-R-*, the United States Court of Appeals for the First Circuit (First Circuit) recognized that because the Act no longer contains the requirement that mailed NTAs be sent via certified mail, evidence of non-receipt of a NTA, "such as documentary evidence from the Postal Service, simply [may] not exist." *Kozak v. Gonzales*, 502 F.3d 34, 36 (1st Cir. 2007) (quoting *Nibagwire v. Gonzales*, 450 F.3d 153, 157 (4th Cir. 2006)). The First Circuit reasoned that in some cases, "the only direct evidence of non-receipt may be an affidavit, signed and sworn by the alien, stating that he did not receive the [NTA]," but also acknowledged that "a bare, uncorroborated, self-serving denial of receipt, even if sworn, is weak evidence." *Id.* at 36-37 (citing *Joshi v. Ashcroft*, 389 F.3d 732, 737 (7th Cir. 2004)). Accordingly, the First Circuit determined that the Board should "take into account *all* relevant evidence surrounding the purported non-receipt," and "[left] it to the [Board] to come up with a new standard to be applied to aliens who claim non-receipt of [NTAs] sent by regular mail." *Id.* (emphasis in original) (citing *Lopes v. Gonzales*, 468 F.3d 81, 86 (2d Cir. 2006).

While the Court may reopen a case at any time under its *sua sponte* power, such authority is used sparingly as a general rule; it is not meant to be a "general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but rather as an extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1133 (BIA 1999); *see also Matter of Jean*, 23 I&N Dec. 373, 380 n.9 (A.G. 2002).

IV. Findings of Fact and Conclusions of Law

The Court finds that the Respondent was properly notified of his proceedings. The Respondent's motion admits that he was personally served with a NTA at Boston Logan International Airport in April 2013. *See* Resp't's Mot. to Reopen, Motion, p. 3; Tab A, p. 2. Because the Respondent was personally served with a NTA, it was proper for the Court to proceed *in absentia*. *See* INA §§ 239(a)(1), 240(b)(5)(C)(ii). In this respect, the Court finds that the Respondent's reliance on *Matter of G-Y-R-* and section 239(c) of the Act, each of which apply in circumstances where a NTA is served by mail, is misplaced. Moreover, the NTA that the Respondent received in hand at the airport informed him of "the particular statutory address obligations associated with removal proceedings and of the consequences of failing to provide a current address." *See* INA § 239(a)(1)(F); *Matter of G-Y-R-*, 23 I&N Dec. at 187. Because the Respondent was apprised of these obligations and consequences when he was personally served with the NTA at the airport, the Court finds that the address the Respondent provided to immigration officials at the airport – the same address where DHS mailed a subsequent NTA and where the Court mailed a hearing notice – was provided in accordance with section 239(a)(1)(F) of the Act.[1]

[1] The Respondent submits that the address he provided to immigration officials at the airport in April 2013 was "74 Daboll Street 3rd, Providence, RI 02907." DHS's records indicate that the Respondent provided only "74 Daboll Street, Providence, Rhode Island 02907," as his address. *See* Exh. 2 (Form I-213, Record of

Furthermore, even if DHS had not personally served the Respondent with a NTA at the airport in April 2013, and instead only mailed the Respondent the July 2013 NTA, the Court would find that the Respondent was properly notified of his removal proceedings. The burden is on the Respondent to demonstrate that he was not properly notified of his proceedings; so, here, to demonstrate non-receipt of his NTA. *See* INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii); *see also Kozak*, 502 F.3d at 35. Although the Respondent submitted a sworn affidavit claiming that he did not receive a NTA or a hearing notice, he does not deny living at this address in July or August of 2013. *See* Resp't's Mot. to Reopen, Tab A, pp. 1-2; *compare id. with Matter of G-Y-R-*, 23 I&N Dec. at 182 (where there was evidence indicating that an alien had moved). Additionally, the NTA sent by DHS to the Respondent and the hearing notice sent by the Court to the Respondent – each of which used the address that DHS's records indicated the Respondent provided at the airport – were not returned as undeliverable. *See* Exhs. 1, 1A; *compare id. with Matter of G-Y-R-*, 23 I&N Dec. at 182 (where a mailed NTA was returned as undeliverable). Considering all of the evidence, the Court finds that the Respondent may be properly charged with receiving the NTA mailed to him by DHS in July 2013. *See Kozak*, 502 F.3d at 37. As such, the address used on this NTA qualifies as an address provided by the Respondent in accordance with section 239(a)(1)(F) of the Act, and the Court was authorized to conduct proceedings *in absentia*. *See Matter of G-Y-R-*, 23 I&N Dec. at 189-90 ("If the alien actually receives or can be charged with receiving that mailed notice, then the address used by [DHS] qualifies as a 239(a)(1)(F) address, and *in absentia* proceedings are thereafter authorized.").

Because the Respondent received adequate notice of his proceedings, and it was therefore appropriate for the Court to proceed *in absentia*, the Court declines to reopen the Respondent's proceedings on lack of notice grounds. *See* INA §§ 239(a)(1), 240(b)(5)(C)(ii).

The Court additionally declines to reopen the Respondent's proceedings *sua sponte*. The Respondent's motion alleges that he has United States citizen and LPR relatives, including a United States citizen child. Resp't's Mot. to Reopen, Motion, p. 6 (Feb. 23, 2016). It also discloses that the Respondent plans to pursue a U visa as the "victim of a felony assault [who has] cooperated with the prosecution of the suspect." *Id.*; *see id.* at Tab B, p. 3. The Respondent is not currently pursuing this relief, and furthermore, the Court is without jurisdiction over such relief. *See Matter of Sanchez Sosa, et al.*, 25 I&N Dec. 807, 811 (BIA 2012) ("The USCIS has exclusive jurisdiction over U visa petitions and applications for adjustment of status under section 245(m) of the Act. *See* 8 C.F.R. §§ 214.14(c)(1), 245.24(f), (k) . . . "); *see also Matter of Yauri*, 25 I&N Dec. 103, 110 (BIA 2009) (agency is without authority to reopen proceedings to allow respondents to pursue matters over which the agency does not have jurisdiction). Ultimately, the Court does not find the Respondent's situation to be of a truly exceptional nature sufficient to warrant the extraordinary remedy of *sua sponte* reopening. *See Matter of G-D-*, 22 I&N Dec. at 1133; *see also Matter of Jean*, 23 I&N Dec. at 380 n.9.

Deportable/Inadmissible Alien, p. 1). The Court considers DHS's records reliable. *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) ("Absent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy . . . "). Moreover, the Court does not consider the minor discrepancy between the address stated by the Respondent in his Motion and the address in DHS's records material; neither the NTA sent to the Respondent by DHS nor the hearing notice sent to the Respondent by the Court, each using the address in DHS's records, was returned as undeliverable. *See* Exhs. 1, 1A.

Based on the foregoing, the following order shall enter:

ORDER

IT IS HEREBY ORDERED that the Respondent's **MOTION TO REOPEN** is **DENIED.**

APR 2 2 2016
Date

MATTHEW D'ANGELO
Immigration Judge