



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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Falls Church, Virginia 22041

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1717 Avenue H  
Omaha, NE 68110**

**Name: NGUYEN, LONG DANG**

**A 098-526-352**

**Date of this notice: 1/3/2017**

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.  
Mann, Ana  
O'Connor, Blair

Userteam: Docket

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Falls Church, Virginia 22041

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File: A098 526 352 – Omaha, NE

Date:

**JAN - 3 2017**

In re: LONG DANG NGUYEN

IN REMOVAL PROCEEDINGS

ON APPEAL

ON BEHALF OF RESPONDENT: Timothy A. Gambacorta, Esquire


ON BEHALF OF DHS: Anna L. Speas  
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated June 17, 2016, denying his motion to reopen. The Immigration Judge had previously ordered the respondent removed in absentia for his failure to appear at the hearing on August 4, 2010. We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii). We have considered the totality of the circumstances presented in this case, and find that the evidence is sufficient to establish that the respondent did not receive proper notice of the hearing below, and that reopening and rescission of the in absentia removal order is therefore warranted. *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: These proceedings are reopened, the in absentia order of removal is vacated, and the record is remanded to the Immigration Court for further proceedings.

  
\_\_\_\_\_  
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
1717 AVENUE H, SUITE 100  
OMAHA, NE 68110

The Gambacorta Law Office, LLC  
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Skokie, IL 60077

IN THE MATTER OF  
NGUYEN, LONG DANG

FILE A 098-526-352

DATE: Jun 17, 2016

UNABLE TO FORWARD - NO ADDRESS PROVIDED

X 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 22041

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  
1717 AVENUE H, SUITE 100  
OMAHA, NE 68110

OTHER: \_\_\_\_\_

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**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
OMAHA, NEBRASKA**

File #: 098-526-352

Date: 6/17/10

In the Matter of:

**Long Dang NGUYEN**

Respondent.

IN REMOVAL  
PROCEEDINGS

**CHARGE:** Section 237(a)(1)(C)(i) of the Immigration and Nationality Act ("INA" or "the Act")—admission as a nonimmigrant and subsequent change to another nonimmigrant status pursuant to Section 248 of the Act and failure to comply with conditions of changed status.

**MOTION:** Motion to Reopen and Rescind Removal Order.

**ON BEHALF OF RESPONDENT:**

Timothy A. Gambacorta  
5250 Old Orchard Road  
Suite 300  
Skokie, Illinois 60077

**ON BEHALF OF THE GOVERNMENT:**

Anna L. Speas, Assistant Chief Counsel  
U.S. Department of Homeland Security  
U.S. Immigration and Customs Enforcement  
1717 Avenue H, Suite 174  
Omaha, NE 68110

**DECISION OF THE IMMIGRATION JUDGE**

**I. Background and Procedural History**

The Department of Homeland Security ("DHS") alleges Respondent is a native and citizen of Vietnam who was admitted to the United States at Chicago, Illinois on December 1, 2005 as a K1 nonimmigrant visa-for-fiancés. Exh. 1. DHS further alleges Respondent was married to Trang Bui Lai on December 9, 2005, filed for Adjustment of Status ("I-485") on February 8, 2006, and divorced Trang Bui Lai On June 7, 2007. *Id.* Respondent's I-485 was denied on August 17, 2006. Respondent allegedly then failed to maintain status or to comply with the conditions of his change of status in that Respondent's nonimmigrant visa expired March 1, 2006 and he abandoned his I-485 application. Exh. 1.

DHS issued a Notice to Appear "NTA" to Respondent on May 5, 2010. Exh 1. The Court notified him of his removal proceedings on August 4, 2010. Notice of Hearing in Removal Proceedings (May 25, 2010) ("NOH"). Proceedings were set in Omaha, Nebraska. *See id.* Respondent failed to appear at this hearing and the Court ordered him removed *in absentia*. *See* Decision of the Immigration Judge ("IJ") (August 4, 2010).

On March 16, 2016, Respondent filed a Motion to Reopen. *See* Respondent's Motion to Re-Open an *In Absentia* Order Supporting Documents (Jan. 11, 2016) ("Motion to Reopen"). On February 1, 2016, DHS filed a motion in opposition. *See* Government's Opposition to Respondent's Motion to Rescind and Reopen *In Absentia* Removal Order (Feb. 1, 2016) ("DHS Response"). For the following reasons the Court will deny Respondent's motion..

## II. Statement of Law

A respondent who "does not attend a proceeding under this section, shall be ordered removed in absentia if the service establishes by clear, unequivocal, and convincing evidence that the written notice was [properly] provided and that the [respondent] is removable." INA § 240(b)(5). If ordered removed for failure to attend a proceeding, a respondent may generally file one motion to reopen proceedings. INA § 240(c)(7).

Removal proceedings entered *in absentia* may be reopened if a motion to reopen is filed within 180 days after the date of the order of removal and the alien demonstrates that the failure to appear was because of exceptional circumstances. INA § 240(b)(5)(C)(i). An *in absentia* removal order may also be rescinded at any time upon a motion to reopen if the respondent demonstrates that he did not receive proper written notice as provided in INA § 239(a). INA §§ 239(a), 240(b)(5)(C)(ii). Filing of a motion to reopen "shall stay the removal of the alien pending disposition of the motion by the immigration judge." INA § 240(b)(5)(C).

An alien must be properly served with the Notice to Appear before the IJ is authorized to proceed *in absentia*. The INA states that in removal proceedings "written notice . . . shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)" INA § 239(a)(1). The notice must specify the nature of the proceedings, the legal authority under which the proceedings are conducted, the acts alleged to be in violation of the law, the charges against the alien and the accompanying statutory provisions, the alien's available representation options, the requirement that the alien must provide the Attorney General with a written record of an address or change of address and consequences for failing to do so, the time and place of proceedings and the consequences of failing to appear. INA § 239(a)(1)(A)–(G)(ii). Notice is deemed sufficient if an alien could be charged with having received the certified mailing. *Matter of Grijalva*, 21 I&N Dec. 27, 32 (BIA 1995).

An alien may file a motion to reopen his immigration proceedings in order to rescind an *in absentia* deportation order at any time if the alien demonstrates that he did not receive proper notice of the proceedings. Personal service is adequate notice in any type of proceeding. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). An alien contesting service by mail, however, must overcome "a strong presumption of effective service" via certified mail through the United States Postal Service. *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995). Certified mail which is sent to the respondent's last known address is sufficient notice. *Id.* The presumption of effective service may be overcome by providing probative evidence of non-delivery or improper delivery. *Id.* at 37. An alien failing to provide an address where he can receive mail will not qualify as improper delivery or non-delivery. *Id.* An alien must provide the Attorney General a written record of an address at which the alien may be

contacted about removal proceedings. INA § 239(a)(1)(F). Each alien is then to “notify the Attorney General in writing of each change of address and new address within ten days from the date of such change.” INA § 265(a). Addresses provided by the alien on applications filed with the Attorney General are sufficient written record and all certified mail regarding. Proceedings will be sent there unless an alien directs otherwise. *Patel v. Holder*, 652 F.3d 962 (8th Cir. 2011).

An IJ also possess the discretion to reopen a case *sua sponte*. 8 C.F.R. § 1003.23(b)(1); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). However, the power to reopen a case *sua sponte* is invoked “sparingly” and treated as an “extraordinary remedy reserved for truly exceptional situations” including fundamental changes in law on which the case “manifestly turn[s].” *G-D-*, 22 I&N Dec. at 1141. Discretionary *sua sponte* openings are not to be used to treat a general remedy for any hardships created by the enforcement of the motions regulations. *G-D-*, 22 I&N Dec. at 1134.

### III. Analysis and Findings

Respondent was removed *in absentia* on August 4, 2010, and filed a Motion to Reopen on January 11, 2016, and therefore his motion was not timely. See INA § 240(b)(5)(C)(i). If Respondent demonstrates he was not given proper notice, his case is eligible for reopening. See INA § 240(b)(5).

Respondent concedes he applied to adjust his status. Respondent completed the form and signed below the statement listing his responsibilities in relation to his address and all future address changes. DHS Response, Tab 1, pg. 4. Respondent states that his wife at the time filled out the form, and he was not aware of the responsibilities he was adopting when signing his name. See DHS Response, Tab 1, pg. 4; Motion to Reopen an *In Absentia* Order Supporting Documents, pg. 6. Regardless who filled out the form for Respondent, it still bears Respondent’s signature indicating acknowledgement of the paragraph directly above it, stating:

I am required to provide USCIS with my current address and written notice of any change of address within ten days of the change. I understand and acknowledge that USCIS will use the most recent address that I provide to USCIS, on any form containing these acknowledgments, for all purposes, including the service of a Notice to Appear.

*Id.* Respondent states that he never received his NTA or NOH, however, by signing this form, he should have been aware that receiving an NTA was a possibility. It was his duty to keep his address up to date in the event of that happening.

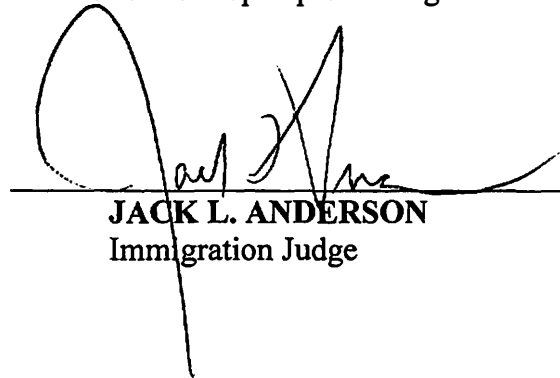
DHS mailed the NTA to the last known address provided by Respondent on his I-485. Exh 1. Addresses provided by the alien on applications filed with the Attorney General are sufficient written record and all certified mail regarding, and proceedings will be sent there unless an alien directs otherwise. *Patel*, 652 F.3d at 962. As the NTA was sent to this last known address, and Respondent was aware that such documents may be sent to the address provided in his I-485, the Court finds that notice was sufficient.

The Court will also decline to exercise its authority to reopen the proceeding *sua sponte*. See 8 C.F.R. § 1003.23(b)(1). The Court recognizes that a significant amount of time has passed since Respondent was removed *in absentia*, and Respondent has since remarried and had a child. See Motion to Reopen an *In Absentia* Order Supporting Documents, pg 5. However, the authority to open *sua sponte* is not to be used as a remedy for any hardships created by the enforcement of the motions regulations. *G-D-*, 22 I&N Dec. at 1134. Respondent was given proper notice, and whatever hardships may come of the decision entered *in absentia*, they do not negate this procedural fact.

The following order will be entered:

**ORDER OF THE IMMIGRATION JUDGE**

**IT IS HEREBY ORDERED** that Respondent's motion to reopen proceedings and rescind his *in absentia* removal order is **DENIED**.



**JACK L. ANDERSON**  
Immigration Judge