U.S. Department of Justice

Executive Office for Immigration Review

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Name: FRAZI, AMALIA GEORGIOS

A 046-880-198

Date of this notice: 8/29/2014

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:
Creppy, Michael J.
Mullane, Hugh G.
Liebowitz, Ellen C

Userteam: Docket

File: A046 880 198 - Orlando, FL

Date: AUG 29 2014

In re: AMALIA GEORGIOS FRAZI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christina G.A. Zeller, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(D)(i), I&N Act [8 U.S.C. § 1227(a)(1)(D)(i)] - Conditional resident status terminated

APPLICATION: Reopening; remand

The respondent, a native and citizen of Greece, has appealed from an Immigration Judge's August 14, 2013, decision denying her motion to reopen removal proceedings which were conducted in absentia on June 18, 2007. The Department of Homeland Security (DHS) has not filed a brief in opposition. The appeal will be sustained in part.

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

The facts relevant to our decision are not in dispute. The respondent was admitted to the United States as a conditional permanent resident on October 16, 2000 (I.J. at 1). The respondent filed a petition to remove the conditions on her residence (Form I-751) on December 5, 2002 (I.J. at 1; Exh. 2; Resp. Motion at Tab B). In the Form I-751, the respondent provided an address in Tarpon Springs, Florida (I.J. at 1; Exh. 2; Resp. Motion at Tab B). The former Immigration & Naturalization Service (INS) returned the I-751 to the respondent stating "a written explanation is required for late filing" (I.J. at 2; Resp. Motion at Tab C-2). The respondent submitted a typewritten business letter to the INS explaining the late filing and containing an address in Holiday, Florida, in the formal heading of the letter (I.J. at 2; Resp. Motion at Tab C-3). In her motion, the respondent also provided a copy of the mailing envelope used for her letter, which was postmarked on December 24, 2002, by the United States Postal Service, and which contained the same return address in Holiday, Florida, as listed in the heading of the letter (Resp. Motion at Tab C-3). After the respondent failed to attend her interview, both a Notice to Appear (NTA) and a notice of hearing were mailed to the respondent by regular mail on July 24, 2006, and July 31, 2006, respectively, to the address in Tarpon Springs, Florida (I.J. at 2; Exh. 1).

The respondent did not appear at her hearing on June 21, 2007, and was ordered removed after a hearing held in absentia (I.J. at 2). The respondent filed a motion to reopen on June 4, 2013, and claimed, among other things, that the NTA was not mailed to the address in Holiday, Florida, that she provided in the heading of her resubmission of her Form I-751 (Resp. Motion at 2 and at Tab C-3). The Immigration Judge applied the factors from *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008), and concluded the respondent had not overcome the presumption of delivery. *Id.* at 673. The respondent appealed.

We agree with the respondent that she was not afforded proper notice of her hearing in accordance with the Immigration and Nationality Act (the "Act"). Written notice is considered sufficient if provided at the most recent address provided under section 239(a)(1)(F) of the Act. *See* section 240(b)(5)(A) of the Act, 8 U.S.C. § 1229a(b)(5)(A). Section 239(c) of the Act indicates that service of a notice of hearing by mail is sufficient if there is "proof of attempted delivery" to the last address provided by the alien in accordance with subsection 239(a)(1)(F) of the Act. The presumption of delivery and the factors from *Matter of M-R-A-, supra,* apply when the NTA and notice of hearing are mailed to the most recent address provided by the alien. *Id.* at 674.

The record shows that the DHS mailed the NTA and the notice of hearing to an address in Tarpon Springs, Florida (Exh. 1). However, the last address provided by the respondent was an address in Holiday, Florida (I.J. at 2; Resp. Motion at Tab C). While the Immigration Judge reasoned that the respondent did not provide a "change of address form" (I.J. at 2), the statutory change of address obligations do not apply until *after* the respondent can be charged with receiving the warnings and advisals contained in the NTA. *See Matter of G-Y-R-*, 23 I&N Dec. 181, 186-87 (BIA 2001). The respondent provided her new address in Holiday, Florida, in the typewritten heading of a formal business letter to the INS and provided the new address as her return address for the official purpose of utilizing the United States postal service. Based on the Immigration Judge's findings of fact, we conclude that the Holiday, Florida, address qualifies as the "last address provided" by the respondent. *See* sections 239(a)(1)(F) and (C) of the Act. As the DHS has not provided sufficient proof of attempted delivery to the respondent at the last address she provided, the record will be remanded.

Due to the nature of our disposition of this matter, we need not address the respondent's other contention on appeal. *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (as a general rule, courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's decisions dated June 18, 2007, and August 14, 2013, are vacated.

FURTHER ORDER: The respondent's appeal is sustained in part, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
ORLANDO IMMIGRATION COURT
ORLANDO, FLORIDA

IN THE MATTER OF:

FRAZI, Amalia Georgios
A# 046-880-198

RESPONDENT

IN REMOVAL PROCEEDINGS

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT
Shanti Chadeesingh, Esq.
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ON BEHALF OF THE DEPARTMENT
Assistant Chief Counsel
U.S. Department of Homeland Security
3535 Lawton Road, Suite 100
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WRITTEN DECISION AND ORDERS OF THE IMMIGRATION JUDGE

Respondent filed a **MOTION TO REOPEN** in the above-captioned case. For the reasons explained below, Respondent's motion is **DENIED.**

I. Factual and Procedural History

Amalia Georgios Frazi ("Respondent") is a native and citizen of Greece who first entered the United States on or about October 16, 2000, at New York, New York. Notice to Appear ("NTA") (July 28, 2006). Respondent was admitted as a conditional permanent resident. *Id.* On December 5, 2002, Respondent filed an I-751 Petition to Remove the Conditions on Residence with the Immigration and Naturalization Service ("INS," now Department of Homeland Security[1] or "DHS"). Respondent's Motion to Reopen, Tab C-1 (I-751). Respondent listed 14 Mill Street Tarpon Springs, Florida, 34689 as her address on her I-751. *Id.* United States Citizenship and Immigration Services ("USCIS") returned the I-751 petition to Respondent on

[1] On March 1, 2003, the Homeland Security Act of 2002 dismantled the INS and separated the former agency into three components within DHS: U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP). Pub. L. No. 107–296, 116 Stat. 2135 (2003).

December 6, 2002, and requested a written explanation for the late filing. *Id.*, Tab C-2 (USCIS letter). On December 24, 2002, Respondent mailed USCIS a letter explaining she did not timely file her I-751 because she was not aware of the requirement. *Id.*, Tab C-3 (Respondent's letter). The heading of Respondent's letter listed an address in Holiday, Florida. *Id.* However, the contents of Respondent's letter did not inform USCIS of a new address, and Respondent did not file a change of address form with the letter.

On August 8, 2005, USCIS mailed Respondent a notice of her interview scheduled for September 22, 2005, to her Tarpon Springs, Florida, address. *Id.*, Tab F. Respondent did not attend the scheduled interview, and USCIS denied her I-751 petition and terminated Respondent's permanent residence status for her failure to appear at the interview pursuant to section 216(c)(2)(A)(ii) of the Immigration and Nationality Act ("INA" or "the Act"). *Id.*

DHS served Respondent with a NTA by regular mail on July 24, 2006, to her Tarpon Springs address, charging removability under section 237(a)(1)(D)(i) of the INA, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under section 216 or 216A of the Act, the status was terminated under such respective section. *See* NTA. The NTA ordered Respondent to appear at the Orlando Immigration Court at a time and date to be set. *Id.* DHS filed the NTA with the Orlando Immigration Court on July 28, 2006. *Id.* On July 31, 2006, the Court sent Respondent a Notice of Hearing by regular mail to the address on the NTA scheduling a master calendar hearing on June 21, 2007. The Notice of Hearing was not returned to the Court as undeliverable.

On May 21, 2007, Respondent filed an I-407, Abandonment of Lawful Permanent Resident Status at the U.S. Embassy in Athens, Greece. Respondent's Motion to Reopen, Tab I. Respondent listed her last departure from the United States as October 16, 2000. *Id.* Respondent indicated she had voluntarily, willingly, and affirmatively abandoned her status as a permanent resident because she lived in Greece permanently since 2000. *Id.* USCIS approved her request for abandonment of status on August 16, 2007. *Id.*

Respondent failed to appear before the Orlando Immigration Court on June 21, 2007. The Court sustained the charges contained in the NTA by clear and convincing evidence and ordered Respondent removed to Greece *in absentia*. Order of the Immigration Judge (June 21, 2007).

On May 4, 2011, Respondent entered the United States with authorization to stay until August 2, 2011. Respondent's Motion to Reopen, Tab K (Respondent's Greek Passport). Mr. Pastrikos, Respondent's spouse, filed a new I-130, Petition for Alien Relative, on her behalf on July 29, 2011. *Id.*, Tab L (I-130). On August 9, 2011, Respondent filed an I-485, Application to Register Permanent Residence or Adjust Status with USCIS. *Id.* (I-797C, Notice of Action for I-485). USCIS approved the I-130 on October 5, 2011, but it denied the I-485 Application to Adjust Status due to Respondent's removal order. *Id.*, Tab M (USCIS, Notice of Decision, I-485).

Respondent, through counsel, filed the instant Motion to Reopen removal proceedings and rescind the *in absentia* removal order on June 4, 2013. Respondent alleged she lacked notice

of her removal proceedings because she was not present in the United States when DHS served the NTA to her address in Tarpon Springs. Respondent further argued the Immigration Judge lacked jurisdiction to order her removed *in absentia* because she departed the United States three years prior to the issuance of the NTA. DHS did not file a reply.

II. Legal Analysis

In general, the Court may upon its own motion at any time, or upon the motion of DHS or the alien, reopen any case in which it has issued a decision, unless jurisdiction is vested with the Board of Immigration Appeals. 8 C.F.R. § 1003.23(b)(1). Any alien who fails to attend a removal proceeding shall be ordered removed *in absentia* if the government establishes by "clear, unequivocal, and convincing evidence" that the alien is removable and written notice was provided pursuant to INA section 239(a). INA § 240(b)(5)(A). An *in absentia* removal order may be rescinded upon a motion to reopen filed at any time if the respondent demonstrates that she did not receive proper notice or that she was in federal or state custody and her failure to appear was through no fault of her own. 8 C.F.R. § 1003.23(b)(4)(ii); *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009).

Respondent's motion to reopen argues she did not receive the NTA or Notice of Hearing because she resided in Greece when they were served. An alien has an affirmative duty to change her address once she has been advised of the address obligations for removal proceedings contained in the NTA. INA § 239(a)(1)(F); *Matter of G-Y-R-*, 23 I&N Dec. 181, 187 (BIA 2001). Before an alien can provide an address in accordance with section 239(a)(1)(F), the alien must receive the NTA warnings and advisals. *Id.* at 187; *Matter of Anyelo*, 25 I&N Dec. 337, 339 (BIA 2010). An *in absentia* order of removal must be rescinded when the record reflects that the alien did not receive, or could not be charged with receiving, an NTA that was served by mail to an address filed with DHS several years prior. *Matter of Anyelo*, 25 I&N Dec. at 338. The record must reflect that the NTA never reached the respondent for the Court to consider a motion to reopen an *in absentia* order of removal. *Matter of G-Y-R-*, 23 I&N Dec. 181 at 192.

However, the requirement for the alien to receive the NTA at the last known address does not mean she must personally receive, read, and understand it. *Matter of G-Y-R-*, 23 I&N Dec. 181 at 189. An alien may be properly charged with receiving the NTA even though she did not personally view the document. *Id.* For example, the Board noted that that a NTA may be properly served if it reached the correct address but did not reach the respondent because of "some failure in the internal workings of the household." *Id.* When the NTA or notice of hearing is sent by regular mail, there is a weaker presumption that the respondent receives the notice when it is properly addressed and mailed according to normal office procedures. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). The Court considers all relevant evidence to overcome the notices' presumption of delivery, including but not limited to:

> (1) the respondent's affidavit; (2) affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received; (3) the respondent's actions upon learning of the in absentia order, and whether due diligence was exercised in seeking to redress the situation; (4) any prior affirmative application for relief, indicating that the respondent had an

> incentive to appear; (5) any prior application for relief filed with the Immigration Court or any prima facie evidence in the record or the respondent's motion of statutory eligibility for relief, indicating that the respondent had an incentive to appear; (6) the respondent's previous attendance at Immigration Court hearings, if applicable; and (7) any other circumstances or evidence indicating possible nonreceipt of notice.

Id. at 671. The Board explained that failing to meet all or some of the factors enumerated above is insufficient to deny a respondent's lack of notice claim. *Id.* at 674.

In this case, Respondent did not file an affidavit explaining her alleged move to Greece and exact whereabouts when the notices were mailed to her address in in Tarpon Springs, Florida, in 2006. Without an affidavit, the Court cannot assess Respondent's due diligence upon discovering her *in absentia* order of removal. The Court notes that statements of Respondent's counsel in the Motion to Reopen are not evidence. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, Respondent's piecemeal evidence does not show that she had departed from the United States when the NTA and Notice of Hearing were sent in 2006. The motion contained three Greek documents from 2006: an insurance company receipt dated January 27, 2006, an exchange purchase from March 2, 2006, and a baptismal record with Respondent's name as Godmother from April 24, 2006. Respondent's Motion to Reopen, Tab R. The Court finds these documents are inconclusive to show Respondent resided in Greece and did not receive the NTA in July 2006. The mere submission of Greek documents with Respondent's name on them does not establish her presence in Greece. Respondent also submitted her Greek passport from 2002 to 2007, but the stamps contained in it are illegible and unable to detail her travel history. *See id.*, Tab N. Although Respondent filed copies of her son's passports showing they were born in Greece in 2003 and 2008, *see id.*, Tabs E, S, the Court notes that these documents do not show Respondent was in Greece in 2006 when the notices were issued. Thus, the Court finds the documentary evidence as a whole fails to demonstrate her whereabouts during the relevant period.

Moreover, the Court notes major contradictions in Respondent's evidence. For example, Respondent stated on her I-407, Abandonment of Lawful Permanent Resident Status in 2007 that her last departure from the United States was in October 16, 2000, and that she "live[s] permanently in Greece since 10/16/2000."[2] *Id.*, Tab I. However, the NTA alleged Respondent was admitted on this date, and she listed a United States address on her I-751 Petition dated December 5, 2002. *See* NTA; Respondent's Motion to Reopen, Tab C-1. The Court finds that these inconsistencies mean she either fabricated her I-407 or I-751 as they cannot be reconciled and no evidence in the record corroborates them. Finally, Mr. Pastrikos's signed and sworn affidavit claimed Respondent departed from the United States "on or about November 2002." Respondent's Motion to Reopen, Tab D, ¶ 8. Yet Respondent's own letter to USCIS explaining her late I-751 filing was dated December 23, 2002, and was sent from Florida in an envelope with U.S. postage, which contradicts the date given by Mr. Pastrikos. *Id.*, Tab C-3. Mr. Pastrikos does not mention anything about not receiving the notices at his U.S. address in 2006.

[2] The I-407, Abandonment of Lawful Permanent Resident Status advises Respondent that "[i]f you seek a later hearing, the Immigration Judge can and will take into account all statements you have made concerning your abandonment of residence in the United States." Respondent's Motion to Reopen, Tab I.

The Court also finds it significant that the U.S. Postal Service did not return Respondent's Notice of Hearing to the Court as undeliverable. Given the aforementioned inconsistencies, the Court cannot find this evidence credible. Moreover, some of Respondent's documents were not translated, and the Court cannot consider them. *See id.*, Tabs E, S. The Court finds Respondent did not submit sufficient evidence to rebut the presumption of delivery.

Even if Respondent had submitted more complete documentation to rebut the presumption of delivery and to reopen proceedings, this Court lacks jurisdiction to adjudicate an application for adjustment of status filed by an arriving alien in removal proceedings. The general rule is that an arriving alien can only adjust before the immigration judge if: (A) the alien properly filed the application to adjust with USCIS while in the United States; (B) the alien departed from and returned to the United States under a grant of advance parole pursuant to a previously filed application for adjustment; (C) USCIS denied the adjustment application; and (D) DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application. 8 C.F.R. § 1245.2(a)(1)(i). Respondent is an arriving alien because she previously abandoned her status and was thus seeking admission when she entered on the United States in May 2011. *See* INA § 101(a)(13)(C). She did not return to the United States under a grant of advance parole, and thus does not qualify for the limited exception for the Court to consider her adjustment application.

III. Conclusion

Based on all of the above, the Court concludes that Respondent has not established a basis for rescinding her *in absentia* removal order. This Court finds that Respondent has not rebutted the presumption of delivery when the Court served her Notice of Hearing to her Tarpon Springs address because of insufficient evidence. Additionally, Respondent has not presented sufficient evidence that the Court lacked jurisdiction to order her removed, though the Court now lacks jurisdiction to consider her adjustment application. Furthermore, the Court declines to exercise its *sua sponte* authority to reopen Respondent's case. 8 C.F.R. § 1003.23(b). Accordingly, the Court will **deny** Respondent's Motion to Reopen, and hereby enters the following orders.

ORDERS

IT IS HEREBY ORDERED that Respondent's Motion to Reopen be **DENIED**;

IT IS FURTHER ORDERED that Respondent's stay of removal pursuant to 8 C.F.R. § 1003.23(b)(1)(v) be **RESCINDED**;

IT IS FURTHER ORDERED that Respondent be **REMOVED** to **GREECE**.

DATED this 14th of August, 2013.

Hon. Rafael Ortiz-Segura
Immigration Judge

cc: Shanti Chadeesingh, Esq.
Assistant Chief Counsel

Certificate of Service

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Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other