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 20530

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DHS/ICE Office of Chief Counsel - HOU
126 Northpoint Drive, Suite 2020
Houston, TX 77060

Name: ZAPATA LAGUNA, JOSE MANU... **A 090-916-088**

Date of this notice: 5/21/2015

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:
Greer, Anne J.
Pauley, Roger
O'Herron, Margaret M

Userteam: Docket

File: A090 916 088 – Houston, TX Date: MAY 21 2015

In re: JOSE MANUEL ZAPATA LAGUNA a.k.a. Jose Manuel Zapata

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lawrence Erik Rushton, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, has appealed from the decision of the Immigration Judge dated March 24, 2014. In that decision, the Immigration Judge denied the respondent's June 26, 2013, motion to reopen the proceedings and rescind the in absentia order of removal entered on July 30, 2012, pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A). The respondent's appeal will be sustained, and the record of proceeding will be remanded for further proceedings.

There is no question that the respondent did not have notice for the July 30, 2012, hearing because the November 22, 2011, notice for that hearing was returned to the Immigration Court after attempted, but unsuccessful delivery. So too was the July 30, 2012, in absentia order, although the Notice to Appear was not returned after it was served by regular mail on October 20, 2011, at the last known address for the respondent.

In support of the motion to reopen, the respondent submitted an affidavit from himself and from his wife, each of which reflects that the respondent had moved and therefore changed mailing addresses on July 29, 2011, prior to the issuance of the Notice to Appear. The respondent also submitted a copy of an apartment lease agreement dated July 29, 2011, corresponding with his changed mailing address and bearing his wife's signature. In addition, the respondent provided money order receipts reflecting monthly payments corresponding with the amount of rent provided for in the lease agreement. Finally, the respondent presented his 2011 federal income tax filing which reflects the changed mailing address and the marital relationship described in the affidavits. The respondent submitted some additional documents as well, but those just described suffice to support our reversal of the Immigration Judge's March 24, 2014, decision.

The respondent has established that he no longer resided at the address at which the Notice to Appear and subsequent hearing notice were served by regular mail and that he did not receive those notices. Because the respondent has established that he did not receive the Notice to

Appear, he cannot be charged with the obligation to "provide the Attorney General immediately with a written record of any change of the alien's address or telephone number." *See* section 239(a)(1)(F)(ii) of the Act, 8 U.S.C. § 1229(a)(1)(F)(ii). Accordingly, the respondent has established that he was deprived of the required notice for the July 30, 2012, hearing. *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001) ("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 Notice to Appear that was served by certified mail at an address obtained from documents filed with the Immigration and Naturalization Service several years earlier."). Therefore, the removal proceedings will be reopened, and the following orders will be entered.

ORDER: The respondent's appeal is sustained, and the record of proceeding is remanded for further proceedings.

FURTHER ORDER: The respondent's Motion to Expedite is denied as moot.

FOR THE BOARD

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

THE RUSHTON LAW FIRM
LAWRENCE E. RUSHTON, ESQ.
5909 WEST LOOP SOUTH, STE. 150
BELLAIRE, TX 77401

IN THE MATTER OF FILE A 090-916-088 DATE: Mar 24, 2014
ZAPATA LAGUNA, JOSE MANUEL

__ 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: bj - order

COURT CLERK
IMMIGRATION COURT

FF

CC: JOHN DONOVAN, A.C.C.
126 NORTHPOINT DR, RM 2020
HOUSTON, TX, 77060

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

In the Matter of:

Jose Manuel **ZAPATA-LAGUNA**

Respondent.

File Number: **A 090-916-088**

APPLICATION: **Respondent's Motion to Reopen and Terminate Removal Proceedings**

ON BEHALF OF RESPONDENTS:
Lawrence E. Rushton, Esq.
The Rushton Law Firm
5909 West Loop S., Ste. 150
Bellaire, Texas 77401

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

ORDERS ON MOTION

Pending before the Court is Respondent's Motion to Reopen and Terminate Proceedings, filed on June 26, 2013. Respondent, through counsel, asks the Court to reopen his removal proceedings for lack of notice and, in the alternative, *sua sponte*. The Department of Homeland Security (DHS or the Government) filed an opposition. For the reasons stated below, the Court denies Respondent's requests.

I. Factual & Procedural History

Respondent is a native and citizen of Mexico. Exh. 1. He entered the United States on or about March 17, 1988 as a temporary resident and adjusted his status to that of a lawful permanent resident on November 13, 1990. *Id.* On September 8, 1997, Respondent was convicted for Possession of Marijuana, zero to two ounces, in the State of Texas. *Id.* On February 24, 2003, Respondent was again convicted in the State of Texas for Possession of Cocaine, less than one gram. *Id.* The Government issued a Notice to Appear (NTA), charging Respondent as removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act (INA or the Act). *Id.* The NTA was served on Respondent via regular mail on October 20, 2011. *Id.*

The Court mailed Respondent notice of his hearing on November 28, 2011 but it was returned to the Court for lack of a forwarding address. *See* Exh. 2. Respondent failed to appear at his hearing and was ordered removed *in absentia* to Mexico. *See* Order of the Immigration Judge (Jul. 30, 2012). A copy of the Court's Order was mailed to Respondent but again returned to the Court. *Id.*

II. Law & Analysis

1. *Notice*

Pursuant to the Act, an *in absentia* order of removal may be rescinded upon a motion to reopen filed at any time if the alien demonstrates he did not receive notice in accordance with paragraph (1) or (2) of section 239(a) or the alien demonstrates that he was in Federal or State custody and the failure to appear was through no fault of his own. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). The filing of a motion to reopen shall stay a removal order until the Immigration Judge issues his decision. *See* 8 C.F.R. § 1003.23(b)(4)(ii). An alien may file only one such motion to reopen. *Id.*

When an alien fails to appear at removal proceedings for which notice of the hearing was served by mail, an *in absentia* order may only be entered where the alien has received, or can be charged with receiving, the charging document informing the alien of the statutory address obligations associated with removal proceedings and of the consequences of failing to provide a current address, pursuant to section 239(a)(1)(F) of the Act. *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). Presumption of receipt of the hearing notice is weaker when the document is sent by regular mail instead of certified mail. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008); *see Maknojiya v. Gonzales*, 432 F.3d 588, 590 (5th Cir. 2005). Factors weighing in favor of overcoming the weak presumption of delivery include the movant's affidavit, affidavits from other individuals knowledgeable about the relevant facts, the movant's actions upon learning of the removal order, any prior application for relief indicating an incentive for the movant to appear, and any prior attendance at hearings. *Matter of M-R-A-*, 24 I&N Dec. at 674.

All non-U.S. citizens present in the United States are under an obligation to notify the Attorney General of the address at which they can be contacted, and update their address within ten days of any change of residence. *See* INA § 265(a); 8 C.F.R. § 265.1. The regulations state that failure to file such change of address could result in a number of penalties, including fines, imprisonment, and possibly, removal from the United States. *See* INA § 266(b). An *in absentia* removal order should not be revoked when the alien did not receive actual notice because he neglected his obligation to provide the immigration court with his current mailing address. *See Gomez-Palacios v. Holder*, 560 F.3d 354, 360 (5th Cir. 2009) (finding that failure to receive actual notice of removal hearings due to respondent's neglect of his obligation to keep the court appraised of his current mailing address did not mean the alien "did not receive notice" for purposes of section 240(b)(5)(C)(ii)).

Respondent argues that he did not receive his NTA because it was mailed to an address at which he no longer resided. *See* Respondent's Motion to Reopen, at 2-3 (Jun. 26, 2013). Specifically, the NTA was mailed to 13035 Windfern Rd., Apt. #1009, Houston, Texas, 77064

on October 20, 2011, *see* Exh. 1; Respondent's Motion to Reopen, at 2, and Respondent moved from Windfern Rd. to 8330 Willow Place South, Apt. #709, Houston, Texas 77070 on July 29, 2011. *Id.*, at 3. Even so, Respondent provided the address of service to the Government in 2009 and failed to provide notice of a change of address when he moved. *See Id.*, at 2-3. [1]

Respondent's NTA was sent to his last reported address. *See* Exh. 1; Respondent's Motion to Reopen, at 2-3. If he did not receive actual notice, it is because he neglected his obligation to provide his current mailing address. *See* INA § 265(a); 8 C.F.R. § 265.1; *Gomez-Palacios*, 560 F.3d at 360. Thus, Respondent received proper notice of the proceedings under section 239(a)(1) of the Act. *See* INA § 239(a)(1); *see also Gomez-Palacios*, 560 F.3d at 360.

2. *Sua Sponte*

Pursuant to the regulations a "motion to reopen or reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his departure from the United States."8 C.F.R. § 1003.23(b)(1). The Fifth Circuit has held that this "departure bar" does not apply within the context of statutory motions to reopen made in removal proceedings. *Garcia-Carias v. Holder,* 697 F.3d 257, 263 (5th Cir. 2012) ("Section 1229a(c)(7) unambiguously gives aliens a right to file a motion to reopen regardless of whether they have left the United States"). However, this authority does not extend to *sua sponte* motions to reopen, which are regulatory by nature and subject to the departure bar. *Garcia-Carias,* 697 F.3d at 263; *Ovalles v. Holder,* 577 F.3d 288 (5th Cir. 2009); *Navarro-Miranda v. Ashcroft,* 330 F.3d 672 (5th Cir. 2003).

Respondent has already been removed to Mexico, *see See* Respondent's Motion to Reopen, at 3, pursuant to a properly issued final Order of Removal. *See* Order of the Immigration Judge. As a result, the Court does not have jurisdiction to consider his request for *sua sponte* reopening. *See Garcia-Carias,* 697 F.3d at 263.

III. Conclusion

Based upon the foregoing, the following shall be entered:

ORDERS

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

IT IS FURTHER ORDERED that Respondent's Motion to Terminate be **DENIED** as moot.

March 24, 2014
Date

Richard D. Walton
Federal Immigration Judge

[1] As of the date of this order, Respondent still has not filed the appropriate change of address paperwork with the Court.