U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: JONES, LASHANTE TANOTRA **A 088-958-878**

Date of this notice: 10/23/2013

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.
Guendelsberger, John
Manuel, Elise

schuckec
Userteam: Docket

File: A088 958 878 – Miami, FL Date: OCT 23 2013

In re: LASHANTE TANOTRA JONES a.k.a. Lashante Cooper

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arnold Abdulla, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of the Bahamas, was ordered removed in absentia on August 12, 2010. On July 26, 2012, the respondent filed a motion to reopen proceedings, which the Immigration Judge denied on August 22, 2012. The appeal will be sustained, proceedings will be reopened and the case will be remanded.

The record reflects that the Notice to Appear (NTA) was mailed to the respondent by regular mail on April 12, 2010. On May 10, 2010, notice for her August 12, 2010, hearing (NOH) was sent to the same address and was returned and marked, "moved, no forwarding address." The respondent on appeal contends that she moved from the address to which the NTA and NOH were sent on or about December 3, 2009, and did not receive either the NTA or NOH. She further contends that she informed USCIS of her new address in February 2010.

Considering the totality of circumstances presented in this case, including that the respondent was placed into proceedings following the rejection of her Petition to Remove Conditions on Residence (Form I-751) as a result of improper fee payment, we conclude that reopening is warranted under *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, and could not be charged with receiving, the NTA that was served by mail at an address obtained from documents filed with the Service several years earlier. We found that section 239(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a)(1), authorizes the entry of an in absentia order only after the respondent receives the warnings and advisals contained in the Notice to Appear. *See Matter of G-Y-R-*, *supra*.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, proceedings are reopened and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

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

IN MATTER OF:	)	
	)	
LASHANTE TANOTRA JONES	)	**IN REMOVAL PROCEEDINGS**
	)	
A# 88-958-878	)	
	)	
RESPONDENT	)	
	)	
	)	

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT
Arnold Abdulla, Esquire
Lauderhill Mall
1314A/1316 N.W. 40th Avenue
Lauderhill, Florida 33313

ON BEHALF OF DEPARTMENT
Office of the Chief Counsel
Department of Homeland Security
333 South Miami Avenue, Suite 200
Miami, Florida 33130

DECISION AND ORDER OF THE IMMIGRATION JUDGE

PROCEDURAL HISTORY

On July 26, 2012, Respondent, through counsel, filed a Motion to Reopen. The basis of her claim is that she never received the Notice of Hearing. To date, the Department of Homeland Security ("Department") has not filed its Response.

On April 12, 2010, the Department issued the Notice to Appear ("NTA"). The NTA was mailed to Respondent's last known address and was not returned as undeliverable by the United States Postal Service ("USPS"). *See* Exh.1. The address listed was 900 NE 14th Street, Apt. 12, Ft. Lauderdale, Florida 33304. On May 10, 2010, the Court mailed a Notice of Hearing to this

address. *See* Exh. 2. The Notice of Hearing was returned however it did not have any annotations from the USPS. The hearing date was scheduled for August 12, 2010 at 9:00 AM.

On August 12, 2010, the Respondent did not appear and the Court proceeded *in absentia*. The Department submitted a Record of Deportable Alien. *See* Exh. 3. The Department's exhibits established the factual allegations in the NTA and the Court found the Respondent removable as charged. The Respondent was ordered removed from the United States to the Bahamas and all applications were deemed abandoned for lack of prosecution.

ANALYSIS

Respondent's Motion to Reopen provides that she did not receive the Notice of Hearing or the NTA which were mailed to the last known address. The Respondent does not provide any documents which support that claim. The Respondent's Motion to Reopen has Notices of Action, Form I-797C, which list the same address where the NTA and Notice of Hearing were mailed. The Respondent has not submitted any affidavits to buttress her claim that she did not receive either the NTA or Notice of Hearing.

"The decision to grant or deny a motion to reopen . . . is within the discretion of the Immigration Judge." 8 C.F.R. § 1003.23(b)(i)(iv). An alien may seek rescission of an *in absentia* removal order by filing a motion to reopen (1) within 180 days after the order of removal by demonstrating that his failure to appear was because of exceptional circumstances; or (2) at any time if the alien demonstrates that he did not receive proper notice of the removal proceedings. § 240(b)(5)(C) of the Immigration and Nationality Act ("Act"). Respondent seeks to reopen her case on the grounds that she never received the Notice of Hearing. The motion to reopen is respectfully denied.

"Due process requires that aliens be given notice and [an] opportunity to be heard in their

removal proceedings." Fernandez-Bernal v. U.S. Att'y Gen., 257 F.3d 1304, 1310 n.8 (11th Cir.2001). "Due process is satisfied so long as the method of notice is conducted in a manner reasonably calculated to ensure that notice reaches the alien." Dominguez v. U.S. Att'y. Gen., 284 F.3d 1258, 1259 (11th Cir.2002). Service of the NTA instituting proceedings may be provided to Respondent via regular mail. § 239(a)(1) of the Act. Moreover, an alien need not personally receive, read, and understand the NTA for the notice requirements to be satisfied. Matter of M-D-, 23 I&N Dec. 540 (BIA 2002). *In absentia* proceedings are authorized if the alien actually receives or can be charged with receiving the mailed notice. Matter of G-Y-R- 23 I&N Dec. 181, 189-190 (BIA 2001)

In Dominguez, the Eleventh Circuit indicated that notice sent to the last address submitted by the alien to the DHS was conducted in a manner reasonably calculated to ensure it reached the alien. 284 F.3d at 1259; see also Matter of M-D-, 23 I&N Dec. 540 (BIA 2002) (BIA held a respondent could be "charged with receiving the Notice to Appear" where the Service used an address that the respondent provided on a Form I-589).

USPS did not return the NTA to the Department. The Notice of Hearing issued by the Court was returned without any markings from the USPS. The Respondent is obligated to keep the government informed of her current address. Therefore, notice comports with the requirements of due process in this case, and Respondent can be charged with receiving the NTA See Matter of G-Y-R- 23 I&N Dec. at 189 (the alien can be charged with receiving proper notice if "the Notice to Appear reaches the correct address but does not reach the alien through some failure in the internal workings of the household.").

A letter that is properly addressed, stamped, and mailed is presumed to have been duly delivered. Matter of M-R-A-, 24 I&N Dec. 665 (BIA 2008). The Board of Immigration Appeals

("BIA") established a weaker presumption of delivery for regular mail when compared to the "strong presumption" of delivery for certified mail. Matter of M-R-A-, 24 I&N Dec. 665 (BIA 2008).

Each case presents different facts and circumstances and the Court must conduct a practical evaluation of all the evidence, both circumstantial and corroborating evidence. In Matter of M-R-A-, the respondent overcame the presumption of delivery of a Notice of Hearing that was sent by regular mail where he submitted affidavits indicating that he did not receive the notice, had previously filed an asylum application and appeared for his first removal hearing, and exercised due diligence in promptly obtaining counsel and requesting reopening of the proceedings. 24 I&N Dec. 665.

In Matter of C-R-C-, the respondent overcame the presumption of delivery of a Notice to Appear that was sent by regular mail by submitting an affidavit stating that he did not receive the notice and that he has continued to reside at the address to which it was sent, as well as other circumstantial evidence indicating that he had an incentive to appear, and by exercising due diligence in promptly seeking to redress the situation by obtaining counsel and requesting reopening of the proceedings. 24 I&N Dec. 677.

Here, after careful review of the available evidence, the Court finds that Respondent has not overcome the weak presumption of delivery. Further, the Respondent having been ordered removed from the United States on August 12, 2010 has not exercised due diligence by filing a Motion almost two (2) years from the date of the issuance of the *in absentia* order. Based on the aforementioned, the Court finds that there are no grounds on which to grant a motion to reopen and therefore denies Respondent's motion.

ORDER

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

RENE D. MATEO
IMMIGRATION JUDGE

DONE AND ORDERED IN CHAMBERS this 22nd day of August 2012.

APPEAL DUE: SEPTEMBER 21, 2012.

cc: Respondent
Attorney of Record
Office of the Chief Counsel