U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: CARRERA-REYES, JAIRO **A 074-259-776**

Date of this notice: 3/21/2016

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:
O'Leary, Brian M.
Grant, Edward R.
Guendelsberger, John

Userteam: Docket

File: A074 259 776 – Dallas, TX

Date: MAR 21 2016

In re: JAIRO CARRERA-REYES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Faustino B. Larrea, Esquire

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated August 27, 2015, denying his motion to reopen.[1] The respondent had previously been ordered removed in absentia for his failure to appear for the scheduled hearing on May 4, 2015. The appeal will be sustained, proceedings will be reopened, and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Board possesses discretion to reopen or reconsider cases sua sponte. *See* 8 C.F.R. § 1003.2(a); *see also Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Based on the totality of the circumstances in this case, we will grant the respondent's motion to reopen to rescind his in absentia order pursuant to our sua sponte authority. *See* 8 C.F.R. § 1003.2(a); *see also Matter of J-J-*, *supra*. Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[1] Based on a review of the footnote in the Immigration Judge's decision dated August 27, 2015, it is clear that the Immigration Judge meant that A075 885 423 (*see* Notice to Appear, issued on May 13, 2014), was consolidated with the file herein, A074 259 776, on August 1, 2014. *See* 'Notice to the Executive Office for Immigration Review' from DHS Assistant Chief Counsel, filed on August 1, 2014.

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

IN THE MATTER OF:	)	
	)	IN REMOVAL PROCEEDINGS
CARRERA-REYES, Jairo	)	
	)	A 074-259-776
RESPONDENT	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Motion to Reopen

ON BEHALF OF THE RESPONDENT:

Faustino B. Larrea, Esq.
P.O. Box 191947
Dallas, Texas 75219

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Paul B. Hunker III, Esq.
Chief Counsel- DHS/ICE
125 E. John Carpenter Freeway, Ste. 500
Dallas, Texas 75242

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Factual & procedural history

The Respondent is a native and citizen of Mexico. Exhibit 1. He arrived in the United States at an unknown date and time, without being admitted or paroled after inspection by an immigration officer. *Id.* The Respondent was taken into ICE custody on May 13, 2014, following an arrest and conviction for possession of a weapon. *See* Exhibit 4. He was subsequently served with a Notice to Appear (NTA)[1] charging him with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or Act). Exhibit 1. During

[1] The NTA had the A-number: 074-259-776. That A-file was consolidated into A-file number 074-259-776 on August 1, 2014.

a hearing before the Oakdale, Louisiana Immigration Court, the Respondent admitted to the factual allegations contained in the NTA and conceded to the charge of removal.

On August 5, 2014, the Respondent was released from ICE custody. *See* Exhibit 2. Upon release, he reported his address as 6333 Christensen Dr. Dallas, TX 75227. *Id.* He also filed a motion for change of venue to Dallas, Texas with that same address. *See* Motion for Change of Venue (dated July 31, 2014). That request was granted on August 5, 2014, and on February 7, 2015, a Notice of Hearing was mailed to the Respondent at 6333 Christensen Dr., Dallas, TX 75227, notifying him that he was scheduled to appear before the Dallas Immigration Court on May 4, 2015 at 9:00 A.M. *See* Exhibit 3.

At the May 4, 2015 hearing, the Respondent did not appear. The Court concluded that notice was proper and proceeded *in absentia* pursuant to section 240(b)(5)(A) of the Act. During the hearing, the Government submitted Form I-213, which established the truth of the factual allegations contained in the NTA. Exhibit 4. Based on the evidence submitted and the Respondent's prior admissions, the Court found removability established as charged and ordered the Respondent removed to Mexico. *See* Decision of the Immigration Judge. That decision was mailed to the Respondent at 6333 Christensen Dr., Dallas, TX 75227.

The Respondent, through counsel, has now filed a motion to reopen claiming that *his in absentia* order should be rescinded based on lack of notice. The Government has not filed a response.

II. Applicable Law

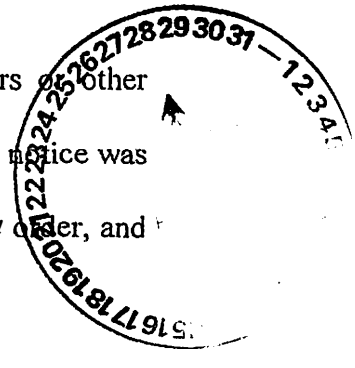
If an alien does not attend a removal hearing after written notice has been provided to the alien or the alien's counsel of record, the alien will be ordered removed *in absentia* if the Government establishes by clear, unequivocal, and convincing evidence that written notice of the

hearing was provided and that the alien is removable. INA § 240(b)(5)(A). Adequate notice can be accomplished through personal service, or if personal service is not practicable, through service by mail to the alien. INA § 239(a)(1). Service by mail is proper upon proof of attempted delivery to the alien's most recently provided address. INA § 239(c).

Within five days of any change of address, the alien must complete and file a change of address form (Form EOIR-33) with the immigration court. 8 C.F.R. § 1003.15(d)(2). The NTA informs the alien of his obligation to immediately provide a written record of any change in address or telephone number and the consequences of failing to do so. *See* INA § 239(a)(1)(F). The NTA also includes the consequences for failing to appear at a scheduled hearing. *See* INA § 239(a)(1)(G). If the alien receives actual notice of the hearing or can be charged with receiving constructive notice, through receipt of a NTA, then *in absentia* proceedings are thereafter authorized. *Matter of G-Y-R-*, 23 I&N Dec. 181, 186 (BIA 2001).

An *in absentia* order may be rescinded upon a motion to reopen filed at any time if an alien did not receive adequate notice of the hearing. INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(iii)(2). When written notice is properly addressed and sent to the alien by regular mail according to normal office procedures, a presumption of delivery arises. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). Once the presumption of delivery arises, the burden is on the alien to provide proof that the document was not received. *Id.* at 674. The Court may consider all relevant evidence of record to overcome the presumption of delivery. *Id.* at 673-74. Evidence may include, but is not limited to:

> (1) [T]he 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 non-receipt of notice.

Id. at 674.

A motion to reopen may also be submitted for the purpose of acting on an application for relief. A motion based on an application for relief will not be granted unless it states the new facts to be proved and is supported by affidavits or other evidentiary material. 8 C.F.R. § 1003.23(b)(3). The alien must also show that the evidence sought to be offered is material, was previously unavailable, and could not have been discovered or presented at the original hearing. *Id.* The motion must be accompanied by the appropriate application and all supporting documents, and the Respondent must establish a *prima facie* case of eligibility. *See INS v. Abudu*, 485 U.S. 94, 104 (1988); *INS v. Doherty*, 502 U.S. 314 (1992).

In addition, the Court may exercise its *sua sponte* authority to reopen in "truly exceptional situations" where the interests of justice would be served. *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999); *see Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).

III. Analysis

The Respondent claims lack of notice. He argues that he "did not receive and/or was not informed of the Removal Hearing set on or about May 4, 2015." *See* Motion to Reopen.

However, the record clearly indicates that a Notice of Hearing was sent to the Respondent at the last known address he provided to the Court, that is 6333 Christensen Dr., Dallas, TX 75227. *See* Exhibit 3. The notice was never returned as undeliverable. In fact, according to the Notice of Entry of Appearance filed by the Respondent's counsel, the Respondent still resides at that address. *See* Motion to Reopen. Therefore, the Court finds that written notice was properly addressed and sent to the Respondent by regular mail according to normal office procedures. *Matter of M-R-A-*, 24 I&N Dec. at 673. As such, a presumption of delivery arises. In his motion, the Respondent makes no attempt to rebut this presumption. A bare assertion that he did not receive notice is insufficient to meet his burden to show that the notice was not received. Accordingly, the Court finds that the Respondent had proper notice.

The Respondent also seeks reopening to apply for adjustment of status based on an approved I-130 petition. *See* Motion to Reopen. However, this relief was available and could have been presented at his former hearing on May 4, 2015. *See* 8 C.F.R. § 1003.23(b)(3). Thus, since the Respondent was given an opportunity to apply for this relief before the Court, his request to reopen on that basis is also denied. *See id.*

Finally, the Court will decline to exercise its *sua sponte* authority to reopen these proceedings as the Respondent has not demonstrated that an "exceptional situation" exists that would warrant a favorable exercise of discretion. *Matter of J-J-*, 21 I&N Dec. at 984.

Accordingly, the following order will be entered:

ORDER

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

Date: 27th day of August, 2015
Dallas, Texas

Deitrich H. Sims
Immigration Judge

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

IN THE MATTER OF:
CARRERA-REYES, JAIRO

DATE: May 4, 2015

CASE NO. A074-259-776

RESPONDENT IN REMOVAL PROCEEDINGS

DECISION

Jurisdiction was established in this matter by the filing of the Notice to Appear issued by the Department of Homeland Security, with the Executive Office for Immigration Review and by service upon the respondent. See 8 C.F.R. § 1003.14(a), 103.5a.

The respondent was provided written notification of the time, date and location of the respondent's removal hearing. The respondent was also provided a written warning that failure to attend this hearing, for other than exceptional circumstances, would result in the issuance of an order of removal in the respondent's absence provided that removability was established. Despite the written notification provided, the respondent failed to appear at his/her hearing, and no exceptional circumstances were shown for his/her failure to appear. This hearing was, therefore, conducted in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act.

[X] At a prior hearing the respondent admitted the factual allegations in the Notice to Appear and conceded removability. I find removability established as charged.

[X] The Department of Homeland Security submitted documentary evidence relating to the respondent which established the truth of the factual allegations contained in the Notice to Appear. I find removability established as charged.

I further find that the respondent's failure to appear and proceed with any applications for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file. Those applications are deemed abandoned and denied for lack of prosecution. See Matter of Pearson, 13 I&N Dec. 152 (BIA 1969); Matter of Perez, 19 I&N Dec. 433 (BIA 1987); Matter of R-R, 20 I&N Dec. 547 (BIA 1992).

ORDER: The respondent shall be removed to MEXICO on the charge(s) contained in the Notice to Appear.

DEITRICH H. SIMS
Immigration Judge

cc: Assistant District Counsel
Attorney for Respondent/Respondent

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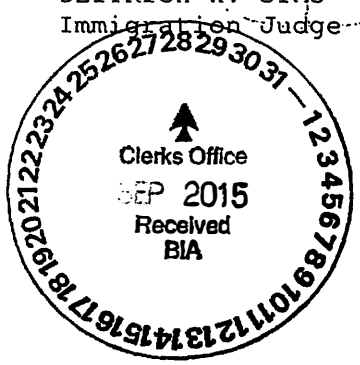


IN THE MATTER OF:

Jose Jairo Carrera-Reyes
A# 074-259-776

Respondent

IN REMOVAL PROCEEDINGS

AFFIDAVIT OF JOSE JAIRO CARRERA REYES

COMES NOW, Jose Jairo Carrera-Reyes, Affiant, and swears that the following information is true and correct:

1. My name is Jose Jairo Carrera-Reyes. I was born on January 22, 1971 in Mexico. I am 44-years of age, and of sound mind and health.
2. I came to the United States without inspection on or about June of 1986.
3. I am the beneficiary of an approved I-130 Petition received on December 31, 1997.
4. With respect to the Notice of Hearing, I did not receive and/or was not informed of the Removal Hearing set on or about May 4, 2015.

The statements contained within this Affidavit are true and within my personal knowledge."

X Jairo Carrera Reyes, Affiant

Jose Jairo Carrera-Reyes

Affiant on oath swears that the statements are true and correct based on his or her personal knowledge and affiant has:

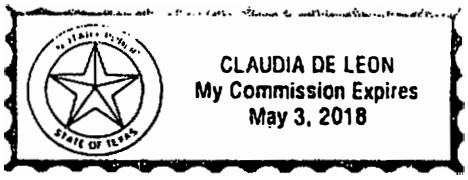
SWORN TO AND SUBSCRIBED BEFORE ME and acknowledged before me on

June 23, 2015 by Claudia Leon

Clerks Office
2015
Received
BIA

C de Leon

Notary Public



Claudia de Leon

(printed name)

Notary Public in and for the State of Texas.

My commission expires: May 3, 2018

[Notary Seal]