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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Name: [redacted] [redacted]

Date of this notice: 7/27/2012

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.
Hoffman, Sharon
Manuel, Elise L.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] - Helena, MT Date: JUL 27 2012

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Shahid Haque-Hausrath, Esquire

ON BEHALF OF DHS: Ivan Gardzelewski
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, has filed a timely appeal of an Immigration Judge's April 13, 2012, decision, denying the respondent's motion to reopen removal proceedings, and rescind the *in absentia* order of removal that had been entered in his case following the respondent's failure to appear for his scheduled hearing on [redacted]. The appeal will be sustained and the record will be remanded to the Immigration Court for further proceedings in accordance with this opinion and the entry of a new decision.

An order issued following proceedings conducted *in absentia* pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A), may be rescinded only upon a motion to reopen which demonstrates that the alien failed to appear because of exceptional circumstances, because he did not receive proper notice of the hearing, or because he was in Federal or State custody and failed to appear through no fault of his own. Section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C). The term "exceptional circumstances" refers to exceptional circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. Section 240(e)(1) of the Act, 8 U.S.C. § 1229a(e)(1).

On appeal, the respondent contends that he has shown "exceptional circumstances" as to why he failed to appear for his scheduled hearing, maintaining that he never received proper notice of the hearing. We presume that a properly addressed notice sent via regular mail is received by the addressee. *See Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). However, in the matter before us, it appears that the hearing notice was not "properly addressed," as the address the respondent provided to the Department of Homeland Security ("DHS") was not accurately noted. Specifically, the respondent contends that at the time he was detained and placed in removal proceedings by the

DHS, he was residing with his United States citizen spouse and United States citizen children at [redacted] *Mill* Street, Sheridan, Montana (emphasis added). The record reflects that the printed address for the respondent, as set out in the Notice of Custody Determination (form I-286), authorizing the release of the respondent on his own recognizance, at first lists the address for the respondent as [redacted] *Mail* Street, Sheridan, Montana, which appears to have been inked out and changed to [redacted] *Mall* Street, Sheridan, Montana (emphasis added). The incorrect notation of the respondent's address and the inaccurate correction is also similarly reflected in the Notice to Appear (form I-862) and the DHS's Record of Deportable/Inadmissible Alien (form I-213). All hearing notices were sent to the respondent at the incorrect [redacted] *Mall* Street, Sheridan, Montana, address. *See* section 239(c) of the Act, 8 U.S.C. § 1229(c) (finding notice by mail sufficient where there is proof of attempted delivery to the *last address provided by the alien* in accordance with section 239(a)(1)(F) of the Act) (emphasis added); *cf. Sembiring v. Gonzales*, 499 F.3d 981, 989-90 (9th Cir. 2007) (noting that a sworn affidavit is not necessarily required in order for an alien to demonstrate that he did not receive notice); *Singh v. INS*, 362 F.3d 1164, 1169 (9th Cir. 2004) ("Notice mailed to an address different from the one [the alien] provided could not have conceivably been reasonably calculated to reach him.")

The United States Court of Appeals for the Ninth Circuit, the jurisdiction wherein this case arises, looks to the totality of the circumstances in evaluating "exceptional circumstances." *See Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (considering the totality of the circumstances in analyzing reopening of an *in absentia* order); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002) (stating that the Board must examine the totality of the circumstances in analyzing reopening of an *in absentia* order); *Singh v. INS*, 295 F.3d 1037 (9th Cir. 2002) (considering the respondent's motivation to appear for the hearing and diligence in appearing for all previous hearings and holding that reopening of an *in absentia* order should not be denied where such denial would lead to the unconscionable result of deporting an individual eligible for relief), *citing Chowdhury v. INS*, 241 F.3d 848, 853 (7th Cir. 2001) (holding that immigration regulations "should not be so strictly interpreted as to provide unreasonable, unfair, and absurd results").

Under the particular circumstances of this case, we agree with the respondent that the motion to reopen should have been granted. Applying the Ninth Circuit's totality of the circumstances approach to the matter before us,[1] and upon further consideration of the unresolved issues relating

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[1] The respondent erroneously believes that providing his most current address to the United States Citizenship and Immigration Service ("USCIS") did not relieve him of his statutory obligation as set forth in the Notice to Appear (form I-862), to notify the Immigration Court of any changes as to his address. *See* section 239(a)(1)(F) of the Act, 8 U.S.C. § 1229(a)(1)(F). Ordinarily, under such circumstances, even if he did not actually receive it, the respondent could be charged with receiving proper notice, and this would not support the contention that his failure to appear was through no

(continued...)

to the proper service of the hearing notice to the respondent; the affidavits of the respondent's United States citizen spouse and other family members; issues related to the care and welfare of their minor United States citizen children; the respondent's motivation to appear for the hearing in light of the respondent's apparent *prima facie* eligibility for relief from removal, we find that a rescission of the *in absentia* order entered in this case on [redacted], is warranted. Thus, considering the totality of the unique circumstances in this case, the proceedings are reopened under the provision of 8 C.F.R. § 1003.23(b)(4)(ii), and the record will be remanded to the Immigration Court for further proceedings and the entry of a new decision. *See* Section 240(b)(5)(C)(ii) of the Act, 8 U.S.C. § 1229a(b)(5)(C)(ii).

ORDER: The appeal is sustained, proceedings are reopened and the record is remanded to the Immigration Court for further proceedings in accordance with this opinion and the entry of a new decision.

FOR THE BOARD

[1](...continued)
fault of his own. *See* section 240(b)(5)(B) of the Act, 8 U.S.C. § 1229a(b)(5)(B) (eliminating the notice requirement where the alien fails to provide contact information); *see also Matter of M-R-A-*, 24 I&N Dec. 665, 674-75 (BIA 2008) (stating that an alien must comply with the statutory responsibility to provide current address information). However, under the particular circumstances of this case, where it is unclear that the notices sent to the respondent by the Immigration Court were properly sent to *an address provided by him*, as required under section 239(a)(1)(F) of the Act, we find this to be inconclusive on the issue of "proper notice," and but one element to be considered in our "totality of the circumstances" analysis.