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IN ABSENTIA HEARINGS AND PROPER SERVICE OF NTAS AND NOHS WITH EMPHASIS ON SECOND CIRCUIT LAW DEVELOPMENT

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This article will explore recent developments of law pertaining to service of notices to appear (NTAs) and notices of hearing (NOHs) when aliens do not appear for their hearings and have orders in absentia entered by the immigration court removing them from the country. The emphasis will be on recent Second Circuit law which has

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heavily diluted the strong presumption of receipt by the alien where the notices are sent by regular instead of certified mail. It has no applicability to situations involving personal service. The article will set out what forms of service have been acceptable in different periods of time, Board of Immigration Appeals (BIA or Board) and Second Circuit decisions, cites on the major cases of other circuits which have ruled on the issue, and recommendations on how practitioners can best approach a motion to rescind the in absentia order.

Before 1992, any method of service of the order to show cause (OSC—charging document in deportation proceedings) was accepted as the INA provided only that the alien must be given notice, reasonable under all the circumstances, of the nature of the charges against him or her and of the time and place at which the proceedings would be held. However, if the alien did not appear or did not acknowledge service, the legacy INS would have to serve the OSC personally. Personal service could be accomplished by certified mail. Before entering an in absentia order, a return receipt had to be shown proving receipt by the alien or a responsible adult member of the household.

Between June 13, 1992, and March 31, 1997, service had to be personal or by certified mail. Regular mail was no longer permissible. If personal service was not practical, service of the OSC and later NOH could be effected by certified mail. In practice, certified mail was used first to the last known address, and there was no personal service unless there was neither appearance nor acknowledgement of service.

April 1, 1997,[1] and after, regular mail is allowed if personal service is not practicable. In practice, personally serving the alien is only done when the alien is in the Service office at the time that the NTA is issued, e.g., having been apprehended or appearing for a decision on a political asylum application at the asylum office. Otherwise, NTAs and NOHs are generally sent out by regular mail.

In *Matter of G-Y-R-*, 23 I. & N. Dec. 181 (B.I.A. 2001),[2] the Board stated that an in absentia order can only be entered where the alien has received or can be charged with receiving an NTA since the statutory address obligations are only attached in an NTA. In that case, the NTA was sent by certified mail to an address obtained from documents filed with the Service several years earlier so the alien did not receive and could not be charged with receiving the NTA. The Board stated that the sufficiency of constructive notice for purposes of INA § 239(a)(1)(F) [8 USCA § 1229(a)(1)(F)] address depended upon whether he could be charged with receiving the NTA notice.

Previously in *Matter of Grijalva*, 21 I. & N. Dec. 27 (B.I.A. 1995),[3] the Board ruled that an alien could be charged with receipt of the certified return receipt that was signed by the respondent or a responsible person at the respondent's address.

In *Matter of M-D-*, 23 I. & N. Dec. 540 (B.I.A. 2002),[4] the Board held that an alien may be charged with receipt of an NTA or NOH where the notice is sent by certified mail to the alien's correct address, but is returned by the U.S. Postal Service marked "unclaimed." The Board expanded on the *G-Y-R-* ruling that an alien in certain circumstances can be properly charged with receiving notice even though he or she did not personally see the mailed document and that the notice to appear that reaches the correct address but does not reach the alien through some failure in the internal workings of the household is deemed proper notice. The respondent did not claim that the address was improper as he had just given it a few weeks prior to the hearing and was living there at the time, but argued that notice by certified mail violated his due process rights in that service by regular mail was more likely to reach him. The Board equated his neglecting or refusing to collect his mail to defeat service as some failure in the internal workings of a household and stated that proof that the notice was sent by certified mail creates a rebuttable presumption of adequate notice which can be overcome through evidence that the post office had not attempted delivery or had conducted delivery improperly.

The Second Circuit reached the same viewpoint in *Maghradze v. Gonzales*, 462 F.3d 150 (2d Cir. 2006), stating that, where the alien had thwarted delivery of the NOH, he was deemed to be in constructive receipt of a properly provided notice and ineligible for rescission of his in absentia order of removal. In the case, Maghradze was apprehended in November 2001 and personally served with an NTA which explained that he had an obligation to appear at all hearings and to provide the Service with updates regarding address changes. The court mailed him an NOH in January 2002, which was returned undelivered to the Service. In July 2005, Maghradze filed a motion to rescind the in absentia order and to reopen the case to apply for withholding and the Convention Against Torture (CAT).[5] The court distinguished the parts of his motion and said that it was in fact two motions as the one to rescind sought to restart proceedings as if the previous proceedings had never occurred and the one to reopen required adherence to the rules for motions to reopen. The court concluded that the BIA's interpretation was permissible that aliens who fail to provide a written update of change of address are deemed to have constructively received notice provided in accordance with the requirements of 8 USCA § 1229(a).

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In two decisions favorable to the petitioners, the Second Circuit in *Lopes v. Gonzales*, 468 F.3d 81 (2d Cir. 2006),[6] held that the BIA acted in excess of discretion by failing to consider evidence that the respondent had not received the hearing notice sent by regular mail and, in *Alrefae v. Chertoff*, 471 F.3d 353 (2d Cir. 2006),[7] that, in a motion to rescind an in absentia order of removal for lack of notice, the central issue was no longer whether the notice was properly mailed (as it is for the purpose of initially entering the in absentia order), but whether the alien actually received it and concluded that he had not.

The *Lopes* court held that, where notice of a removal hearing was sent by first-class mail as opposed to certified mail, the Board may not apply the same presumption of delivery set forth in *Matter of Grijalva*. The court noted that *Grijalva* was decided back when the INA required service by certified mail, whereas the statute has since been changed to permit service by regular mail. The Second Circuit explained that courts have continued to provide for some presumption of receipt when notice is sent by regular mail and that a presumption of receipt was proper so long as the record established that the notice was accurately addressed and mailed in accordance with normal office procedures. In such case, the BIA is to apply a rebuttable presumption that the petitioner received the notice and must consider all relevant evidence, including circumstantial evidence to determine whether the petitioner rebutted the presumption. The court opined that an affidavit of non receipt may be insufficient in itself to rebut the presumption, but it does raise a factual issue for the BIA to resolve.

The favorable factors in *Lopes* that the court looked at were evidence that he had initiated a proceeding to obtain the benefit by submitting a labor certification application, properly notified the government of his change of address, and subsequently filed an application with the government for adjustment of status in which he disclosed his order of removal.

In *Alrefae,* where the alien claimed non-receipt of the NOH sent by first-class mail, there was evidence that the alien had filed the motion to rescind and reopen within a few months of the rescheduled removal hearing; he appeared voluntarily to register for the NSEERS Program, and he offered a police report as support for his claim that he began receiving mail at a friend's house after his home was burglarized. The court pointed out the mistakes of the immigration judge (IJ) as failing to explain why he found that the evidence that Alrefae submitted did not rebut the presumption and not analyzing Alrefae's claim of exceptional circumstances independently from his claim of nonreceipt. The court also noted that the IJ should assess Alrefae's claim of exceptional circumstances independently of his claim of nonreceipt and explain whether the respondent was entitled to rescission on that ground based on his claim that he did not receive notice because his friend lost his mail.

The Second Circuit outlined the limits of those two decisions in *Bhanot v. Chertoff*, 474 F.3d 71 (2d Cir. 2007), where the alien received an NTA but did not receive a notice announcing a change in the date of his hearing. The court noted that in *Lopes* a presumption of receipt applies to NTAs which are properly addressed and mailed according to normal office procedures, but the court had nevertheless granted the petition because the BIA failed to consider in its opinion circumstantial evidence in the record that might have rebutted the presumption of receipt. The court initially found that the notice of change was sent to the petitioner's most recent address and a presumption of receipt applied—and that the only rebutting evidence was the petitioner's signed affidavit containing a simple, uncorroborated statement of nonreceipt. The court noted that two of the three affidavits submitted by the petitioner were only presented to the BIA on appeal, and this undermined his claim that the BIA abused its discretion since the BIA need not consider evidence presented for the first time on administrative appeal. The court noted that the petitioner did not even claim to have appeared for removal proceedings on the date for which he was originally scheduled or to having inquired with the government regarding any changes in the date of his proceedings.

In an unpublished decision, *Shao Ling Zhang v. Gonzales*, 230 Fed. Appx. 57 (2d Cir. 2007), the court denied the petition where the petitioner alleged that vandalism to her mailbox prevented her receipt of the NTA, yet she failed to present any evidence of a report to any authority regarding vandalism.

In the unpublished *Matter of Beltran-Vanegas*, 2007 WL 1520883 (B.I.A. 2007), where the respondent indicated that she did not receive the NTA or in absentia decision because she lived in an apartment building and had often seen undelivered mail thrown on the floor and that missing mail was a common complaint among the tenants in her building, the Board dismissed the appeal, noting that there was no evidence, such as photos or affidavits from other tenants, to substantiate her claim that mail in her apartment building was frequently not delivered properly.

In the unpublished *Jieng Bin Li v. Gonzales*, 219 Fed. Appx. 64 (2d Cir. 2007), involving a motion to the BIA to reissue a decision on grounds that it was never received, the court granted the petition holding the presumption rebutted where the evidence in the files showed that the copy of the transmittal memo was stamped months after the decision, and there was both a detailed affidavit by the

alien and an affidavit from counsel stating that his office never received the BIA's decision.

In the unpublished BIA decision *Matter of Cardoza-Clavel*, 2007 WL 2299668 (B.I.A. 2007), the Board overturned the IJ's decision not to proceed (one of seven) because the notice had not been sent by certified mail.

In the unpublished BIA decision *Matter of Parsaram*, 2007 WL 1492111 (B.I.A. 2007), where the family claimed that they did not receive the superseding NTA, the Board noted that an affidavit from a member of the family was not provided and that the family made no attempt to verify their immigration status for seven years prior to their arrest in 2006.

Other circuits that have examined the issue have come to like conclusion with the Second Circuit with the exception of the 10th Circuit. See *Nibagwire v. Gonzales*, 450 F.3d 153 , 156 (4th Cir. 2006);[8] *Maknojiya v. Gonzales*, 432 F.3d 588, 589 (5th Cir. 2005) (per curiam);[9] *Joshi v. Ashcroft*, 389 F.3d 732, 735 (7th Cir. 2004);[10] *Ghounem v. Ashcroft*, 378 F.3d 740, 744-45 (8th Cir. 2004);[11] *Salta v. I.N.S.*, 314 F.3d 1076, 1079-80 (9th Cir. 2002).[12] But see *Gurung v. Ashcroft*, 371 F.3d 718, 722 (10th Cir. 2004).

The Ninth Circuit in the recent case of *Sembiring v. Gonzales*, 2007 WL 2406863 (9th Cir. 2007), perhaps best summed up the attitude of the courts in explaining that the test of whether an alien has produced sufficient evidence to overcome the presumption of effective service by regular mail is practical and commonsensical rather than rigidly formulaic.[13]

In dealing with in absentia situations in which the alien is claiming non-receipt of vital notices, the optimum first step for the practitioner would be to examine the alien's file to determine the method of delivery (certified or regular mail) and whether the envelope was properly addressed.[14] This can usually be done fairly quickly through reading the Executive Office for Immigration Review's record of proceedings. Assuming proper mailing by first-class mail, practitioners would be well advised not to rely solely upon the affidavit of non-receipt of the alien, but to put forth evidence and affidavits of others as circumstantial evidence in the motion to rescind. Such items could include the following:

- sworn statements by knowledgeable individuals concerning the reliability of postal delivery in the area and citing specific examples of non-delivery and/or complaint to the postal authorities
- evidence of complaints filed with the post office or building management concerning postal delivery
- sworn statements by all persons living in the household disavowing receipt of official correspondence from the U.S. government to the alien and how they can be so certain, e.g., the alien gave him/her specific warning to look out for government correspondence and to notify him/her immediately if anything arrived
- photographs of mail strewn in the lobby of the alien's address
- certified return receipt notices to U.S. Citizenship and Immigration Services (USCIS) by the alien of change of address
- correspondence from USCIS to the alien at a changed address
- proof of any filings by the alien to USCIS with a later address
- proof of any other filings to USCIS regardless of address which would give the alien a benefit
- certified return-receipt letters by the alien to USCIS inquiring about the status of immigration applications around the time that the NTA or NOH is issued
- proof that the alien attended previous interviews and hearings with USCIS
- proof that the alien went to the immigration court on the originally scheduled date of hearing if the hearing was rescheduled for an earlier date
- filing a motion to rescind the in absentia order or otherwise complaining against the order within a short period of time after the order was issued

The above is certainly not an exhaustive listing of the types of circumstantial evidence that can be used to rebut the presumption of proper delivery. The courts appear willing to listen to these arguments as aliens are entitled to due process under the Fifth Amendment and the courts recognize that there is more opportunity for violation of due process in the use of regular mail than certified as the latter leaves a paper trail that can be followed. A motion to rescind an in absentia order on grounds of nonreceipt of notice has the advantage of not being limited by time, but practitioners should submit all possible evidence in the motion before the IJ as an attempt to introduce evidence on appeal of the IJ's negative decision on the motion will likely not be considered under current Board rules, which do not allow for the consideration of new

evidence on appeal on or after September 25, 2002 (see procedural reforms, 67 Fed. Reg. at 7311-12, 7315).

Notes

[1] The effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

[2] For more on *Matter of G-Y-R-*, see 78 Interpreter Releases 1678 (Oct. 29, 2001).

[3] For more on *Matter of Grijalva*, see discussed in 72 Interpreter Releases 1015 (July 31, 1995).

[4] For more on *Matter of M-D-*, see 80 Interpreter Releases 44 (Jan. 13, 2003).

[5] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp No. 51 at 197, U.N. Doc. A39/51 (1984), art. 3, reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985).

[6] *Lopes v. Gonzales* was summarized in 83 Interpreter Releases 2541, 1545 (Nov. 20, 2006).

[7] *Alrefae v. Chertoff* was summarized in 84 Interpreter Releases 82, 85 (Jan. 8, 2007).

[8] *Nibagwire v. Gonzales* was summarized in 83 Interpreter Releases 1310, 1314 (July 3, 2006).

[9] *Maknojiya v. Gonzales* was summarized in 82 Interpreter Releases 2022, 2025 (Dec. 19, 2005).

[10] *Joshi v. Ashcroft* was summarized in 81 Interpreter Releases 1695, 1700 (Dec. 6, 2004).

[11] *Ghounem v. Ashcroft* was summarized in 81 Interpreter Releases 1191, 1196 (Aug. 30, 2004).

[12] *Salta v. I.N.S.* is discussed in 80 Interpreter Releases 156 (Feb. 3, 2003).

[13] *Sembiring v. Gonzales* was discussed in 84 Interpreter Releases 2089 (Sept. 10, 2007).

[14] The issue of proper address was recently discussed by the Seventh Circuit in *Peralta-Cabrera v. Gonzales*, 2007 WL 2566034 (7th Cir. Sept. 7, 2007), in which the court granted the petition for review and remanded to the BIA to vacate an in absentia deportation order entered on the basis that the alien could be charged with constructive receipt of the NOH sent by certified mail in 1994 as he thwarted service of his hearing notice by not informing legacy INS that his mail needed to contain the words "in care of" and the postal service returned the hearing notice undelivered. To the government's arguments that Peralta-Cabrera had the responsibility to inform INS of the additional line essential for delivery, that he was in the best position to provide a complete address, and because he did not made himself unreachable, the court said that this was too much to expect of him, and it could not see why an alien, having just arrived in the U.S., was in the best position to instruct immigration agents how to address correspondence to him when he told them where he was staying and who he was staying with. See Article No. 4 of this Release. ■