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Chart 3
Continue here where the respondent alleges s/he did not receive notice

R fails to appear and alleges that she **DID NOT** receive notice.

Did the R EVER receive an NTA or OSC associated with the proceedings?

If so, then R has received notice of the address obligations and the consequences of failing to appear.[1] The question, then, is whether R can overcome the presumption of effective delivery of the notice of hearing.

If not, then until the R receives the NTA, the IJ lacks authority to proceed *in absentia*.[10]

Exception: *Matter of M-D-*

- An NTA will be considered to have been delivered if:
  (1) The NTA reaches the R's correct address but does not reach the R through some failure in the internal workings of R's household;
  (2) The NTA was mailed to the R's correct address and returned and the R does not challenge the fact that he lived at the address to which the NTA was sent. [11]

If Exception Applies, Stop! Deny the MTR!

Assuming the notice was properly addressed, stamped, and mailed, the BIA and Ninth Circuit assume a presumption of effective delivery; the presumption of effective delivery is constructive notice.[2] If the R claims she did not receive notice, but notice was mailed to the R, the IJ must determine whether the R can rebut the presumption of effective delivery.

Determine how the notice of hearing was mailed.

Certified Mail

- Where service of a notice of a deportation proceeding is sent by certified mail, and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises.[3]
- The presumption of effective service of certified mail may be overcome by the affirmative defense of nondelivery or improper delivery.[4]
- A bald and unsupported denial of receipt of notice sent by certified mail is insufficient.[5]
- The R must present substantial and probative evidence such as documentary evidence from the Postal Service, third party affidavits, or other similar evidence.[6]

Regular Mail

- The presumption of effective service of regular is less strong than the presumption for certified mail.[7]
- The BIA developed a test that is practical and commonsensical rather than rigidly formulaic.[8]
- In the Ninth Circuit, the presumption may be overcome where an R initiates proceedings to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing, and submits a sworn affidavit that neither she not a responsible party residing at her address received the notice.[9]

If R rebuts the presumption of effective delivery, grant the MTR!

If R is unable rebut presumption of effective delivery and was properly served before being removed *in absentia*, determine whether R entitled to *sua sponte* reopening.[12]

FN 1 *See infra* note 2.

FN 2 The Ninth Circuit and Board have recognized that, once an alien has received the NTA or OSC, and the address obligations have attached (this of course assumes that the OSC contained the advisory provisions regarding the address obligations), there is a presumption of effective delivery of the hearing notice. *See Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995). This presumption is premised on the theory that "[t]here is a presumption that public officers, including Postal Service employees, properly discharge their duties." *Salta v. INS*, 314 F.3d 1076, 1078 (9th Cir. 2002).

The Board has alternatively referred to this presumption of effective delivery as constructive notice. *See Matter of G-Y-R-*, 23 I&N Dec. at 189 ("As we read the statute, its intent is to accomplish actual notice. In those instances where actual notice is not accomplished, the statute will permit constructive notice when the alien is aware of the particular address obligations of removal proceedings and then fails to provide an address for receiving notices of hearing."); *Matter of M-D-*, 23 I&N Dec. 540, 541 (BIA 2002). *See also Maghradze v. Gonzales*, 462 F.3d 150, 153-55 (2d Cir. 2006)

Notice to counsel constitutes notice to the respondent. *See* INA § 240(b)(5)(A); 8 C.F.R. § 1003.26(c)(2); *See also Matter of Barocio*, 19 I&N Dec. 255, 259 (BIA 1985).

FN 3 With respect to the strength of the presumption of effective delivery when notice is sent via certified mail, the Board stated: "[w]e find that in cases where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises." *See Matter of Grijalva*, 21 I&N Dec. at 37.

FN4 The "presumption of effective service [by certified mail] may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service." *See id.*

FN5 "A bald and unsupported denial of receipt of certified mail notices is not sufficient to support a motion to reopen to rescind an in absentia order . . . ." *See id.*

FN 6 In order to support the affirmative defense of nondelivery or improper delivery by certified mail, the alien must "present substantial and probative evidence such as documentary evidence from the Postal Service, third party affidavits, or other similar evidence demonstrating that there was improper delivery or that nondelivery was not due to the [alien's] failure to provide an address where he could receive mail." *See id.*

FN 7 The presumption of effective delivery by regular mail does not raise the same strong presumption as by certified mail. *Sembiring v. Gonzales*, 499 F.3d 981, 986 (9th Cir. 2007); *Kozak v. Gonzales*, 502 F.3d 34 (1st Cir. 2007); *Lopes v. Mukasey*, 517 F.3d 156 (2d Cir. 2008); *Santana Gonzalez v. Att'y Gen.,* 506 F.3d 274 (3d Cir. 2007); *Nibagwire v. Gonzales*, 450 F.3d 153 (4th Cir. 2006); *Maknojiya v. Gonzales*, 432 F.3d 588 (5th Cir. 2005).

FN 8 The Board held:

> In determining whether a respondent has rebutted the weaker presumption of delivery applicable in these circumstances, an Immigration Judge may consider a variety of factors including, but not limited to, the following: (1) the 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 nonreceipt of notice. We emphasize that these are just examples of the types of evidence that can support a motion to reopen.

Matter of M-R-A-, 24 I&N Dec. 665, 674 (BIA 2008).

FN 9 The Ninth Circuit, in *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2003), expressed one manner in which an alien could overcome the presumption of effective service by regular mail: "[w]here a petitioner actually initiates a proceeding to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing, a sworn affidavit . . . that neither she nor a responsible party residing at her address received the notice should ordinarily be sufficient to rebut the presumption of delivery [of the hearing notice by regular mail] . . . ." *Id.* at 1079.

FN 10 In *Matter of G-Y-R-*, 23 I&N Dec. 181, 188-89 (BIA 2001), the Board stated that "the notice requirement leading to an *in absentia* order cannot be satisfied by mailing the Notice to Appear to the last known address of the alien when the alien [has] not receive[d] the [NTA]." The Board explained that

> "[w]hile the statute may permit the regular mailing of the Notice to Appear to the last known address, the '(a)(1)' address so to speak, the statute does not authorize the entry of an *in absentia* order unless the advisals in the Notice to Appear are

> properly conveyed, at which time the address will have become an '(a)(1)(F)' address."

Id. The Board's reference to the "(a)(1)(F) address" is a reference to section 239(a)(1)(F) of the Act. That section of the Act outlines what must be included in the NTA when removal proceedings have been initiated. Subsection (a)(1)(F) of section 239 specifically indicates that, once removal proceedings have been initiated under section 240 of the Act, the NTA must inform the respondent of the requirements that the alien must provide the DHS a mailing address and must immediately apprise the DHS of any changes of address. Because this requirement (that the alien keep the DHS apprised of address changes) is only made known to the alien when she receives the NTA, the Board concluded that

> "[T]he 'last address' or the 'most recent address' provided by the alien 'in accordance with' or 'under' subsection (a)(1)(F) must be an address consequent to the alien's being put on notice of the particular address obligations contained in the Notice to Appear."

Id. Put more plainly, an alien does not possess a "last address" for purposes of mailing an NTA or notice of hearing until the alien has received the NTA. As a necessary result of this conclusion, an alien is bound by the address reporting requirements and the consequences of failing to adhere to those requirements only after that alien receives the NTA, the sole document which apprises aliens of those obligations and consequences.

> "[A]n Immigration Judge may not order an alien removed *in absentia* when the Service mails the Notice to Appear to the last address it has on file for an alien, but the record reflects that the alien did not receive the Notice to Appear, and the notice of hearing it contains, and therefore has never been notified of the initiation of removal proceedings or the [sic.] alien's address obligations . . . ."

Matter of G-Y-R-, 23 I&N at 192.

FN 1 The Board recognizes the principle of constructive notice with respect to the service of NTAs. *See Matter of G-Y-R-*, 23 I&N Dec. at 189. As such, the Board has identified two constructive notice based exceptions to the rule established in *Matter of G-Y-R-* that a respondent who has not received an NTA cannot be ordered removed *in absentia*. *Id.* at 192. First, an NTA will have been considered effectively delivered if internal failures within the respondent's household prevented the alien herself from receiving the letter. *Id.* at 189. Second, in *Matter of M-D-*, 23 I&N Dec. 540, 541 (BIA 2002), the Board concluded that an alien will also be considered to have received constructive notice of an NTA if the NTA was mailed to the respondent's correct address and the respondent simply failed to accept delivery.

FN 12 An IJ may, at any time, reopen proceedings upon her own *sua sponte* motion in any case where she has made a decision, unless jurisdiction has vested with the BIA. 8 C.F.R. § 1003.23(b)(1).

The BIA has limited its own power to reopen cases *sua sponte* to cases where "exceptional circumstances" are present. *Matter of L-V-K-*, 22 I&N Dec. 976, 980 (BIA 1999). A fundamental change in immigration law is such a circumstance. *See Matter of G-D-*, 22 I &N Dec. 1132, 1135 (BIA 1999) (holding that, for the respondent to prevail, the Board must be persuaded that a change in law is sufficiently compelling that the extraordinary intervention of our *sua sponte* authority is warranted).

However, the BIA has also emphasized that the power to reopen on its own motion is "not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations when enforcing the regulations could result in hardship." *L-V-K-*, 22 I&N Dec. at 980. The purpose of the numerical and time limitations set forth in the regulations are to "bring finality to immigration proceedings, not merely to prevent the filing of dilatory or frivolous motions." *See id.*

If the IJ determines that she is willing to entertain the respondent's request to reopen *sua sponte*, the respondent bears the burden of demonstrating that exceptional circumstances exist. *See Matter of Beckford*, 22 I&N Dec. 1216, 1218 (BIA 2000).