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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DHS/ICE Office of Chief Counsel - HOU
126 Northpoint Drive, Suite 2020
Houston, TX 77060

Name: MARQUEZ AGUILAR, ARMANDO **A 098-897-922**

Date of this notice: 7/28/2016

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.

Userteam: Docket

File: A098 897 922 – Houston, TX

Date: JUL 2 8 2016

In re: ARMANDO MARQUEZ-AGUILAR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Liliana Lisbeth Quiroz, Esquire

ON BEHALF OF DHS: John Donovan
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Honduras, has appealed the Immigration Judge's March 7, 2016, decision denying his motion to reopen his removal proceedings after the issuance of an in absentia order of removal on October 31, 2005. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be sustained in part, and the record will be remanded.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. § 1003.1(d)(3).

The respondent claims that he did not receive proper notice of his removal proceedings, arguing that immigration officers did not translate the contents of the Notice to Appear (NTA) into his native Spanish. He contends that he did not know to provide an updated address if he moved and that he did not understand the consequences of failing to attend his removal hearing. Despite these contentions, the record demonstrates that a Border Patrol Agent personally served the NTA upon the respondent (I.J. at 2; Exh. 1). The NTA evidences the fact that the Border Patrol Agent explained to the respondent, in his native Spanish, the information contained therein, including the requirement of updating the Immigration Court with any new address if he moved and the consequences should he not appear at his removal hearing (I.J. at 2-3; Exh. 1). *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

Even if the respondent did not fully understand his obligations to the Immigration Court or the consequences of failing to attend his removal hearing, his lack of understanding did not render notice of his removal hearing to be ineffective. *See Ojeda-Calderon v. Holder*, 726 F.3d 669, 675 (5th Cir. 2013); *see also* section 239(a)(1)(G)(ii) of the Act, 8 U.S.C. § 1229(a)(1)(G)(ii) (indicating that an alien need only be provided with written notice of the consequences of failing to appear). The Act does not impose a requirement that the alien also understand said consequences before an Immigration Judge may enter an in absentia order of

removal. *See* section 240(b)(5)(A) of the Act (mandating the entry of an in absentia order of removal where the DHS establishes that the alien received written notice of his removal hearing and is removable). Thus, reopening is not appropriate on account of lack of notice.

The respondent also argued in his motion that his proceedings should be reopened for the purpose of applying for asylum and withholding of removal based on a particular social group consisting of his family. In support of his application, the respondent alleged that his brother was recently murdered in Honduras and that his family continues to be threatened and harassed.[1] The Immigration Judge did not address the merits of the respondent's argument that reopening of the proceedings is warranted because of changed country conditions in Honduras. Moreover, the Immigration Judge did not evaluate whether the evidence the respondent submitted in support of his motion is material and was not available and could not have been discovered or presented at the prior hearing. Therefore, the respondent's appeal will be sustained in part and the record will be remanded. Section 240(c)(7)(C)(ii) of the Act; 8 C.F.R. § 1003.23(b)(4)(i); *see also Matter of J-G-*, 26 I&N Dec. 161, 169-70 (BIA 2013). On remand, the Immigration Judge should evaluate whether the evidence submitted by the respondent indicates a reasonable likelihood that his application will succeed on the merits if the proceedings are reopened.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained in part.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

[1] One basis of the respondent's motion to reopen is to apply for asylum and withholding of removal based on changed country conditions. In that situation, the time and numerical limitations in 8 C.F.R. § 1003.23(b)(1) do not apply. *See* 8 C.F.R. § 1003.23(b)(4)(i).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
600 JEFFERSON, SUITE 900
HOUSTON, TX 77002

Law Offices of Cesar Martin Estela
Estela, Cesar Martin
24 Commerce Street
Suite 1729
Newark, NJ 07102

IN THE MATTER OF FILE A 098-897-922 DATE: Mar 14, 2016
MARQUEZ AGUILAR, ARMANDO

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
600 JEFFERSON, SUITE 900
HOUSTON, TX 77002

X OTHER: EJ Order

COURT CLERK
IMMIGRATION COURT

FF

CC: JOHN DONOVAN, A.C.C.
126 NORTHPOINT DR, RM 2020
HOUSTON, TX, 77060

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

In the Matter of:

MARQUEZ AGUILAR, Armando
AKA: BENITEZ, Manuel Antonio

Respondent.

File Number: A 098-897-922

APPLICATION: Respondent's Motion to Reopen

FOR THE RESPONDENT:
Cesar Martin Estela, Esq.
Law Offices of Cesar Martin Estela
24 Commerce Street
Newark, NJ 07102

FOR DHS:
Department of Homeland Security
126 Northpoint Drive, Room 2020
Houston, Texas 77060

ORDER ON MOTION

Pending before the Court is Respondent's Motion to Reopen filed on January 22, 2016. Respondent, through counsel, argues that his case should be reopened based on the exceptional circumstance of lack of notice. The Department of Homeland Security (DHS) filed a brief in opposition to Respondent's Motion to Reopen on January 14, 2016. For the reasons stated below, the Court will deny Respondent's motion.

I. Factual and Procedural History

Respondent is a native and citizen of Honduras. Exh. 1. He arrived in the United States at or near Hidalgo, Texas on or about June 15, 2005. *Id.* He was not admitted or paroled after inspection by an immigration officer. *Id.* On June 15, 2005, DHS personally served Respondent with a Notice to Appear (NTA), charging him as removable under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or Act), as an alien present in the United States without being admitted or paroled, or an alien who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.*

Upon his apprehension by immigration authorities, Respondent was questioned by border patrol. He furnished a fake name (Armando Marquez Aguilar) and a fake date of birth May 21, 1986. Respondent's actual name is Manuel Antonio Benitez and his date of birth is May 20, 1989. Respondent also provided a United States address of 5830 Hornwood Drive, Houston, Texas, 77081, as his planned place of residence. Respondent was subsequently released from DHS custody on his own recognizance. Respondent asserts that he never received a notice to appear and that he was under the impression that he was given a some kind of legal status. *See* Respondent's Motion to Reopen, Tab B. However, during his detention, Respondent was served and advised of the charges against him, given a notification of his rights in Spanish and given a copy of his NTA. He further signed the NTA and was fingerprinted by an officer. He was also told the time, date and place of his hearing. Officers informed him of the importance of attending his Immigration Court hearing and that failure to attend would result in him being deported *in absentia.* Respondent was also advised that if he changed his address in the United States, he would have to fill out a change of address form, EOIR-33, which was given to him, and submit it via mail. Exh. 2. Respondent never submitted a change of address form. Consequently, when Respondent failed to appear at a hearing on October 31, 2005, the Immigration Judge ordered him removed to Honduras *in absentia. See* Order of the Immigration Judge (Oct. 31, 2005).

II. Findings of the Court

An *in absentia* order of removal may be rescinded only in the following circumstances: (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was due to exceptional circumstances; or (ii) upon a motion to reopen filed at any time if the alien demonstrates that he did not receive notice in accordance with paragraph (1) or (2) of section 239(a) of the INA, or the alien demonstrates that he was in Federal or State custody and the failure to appear was through no fault of his own. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii) (2011). An *in absentia* order may only be entered where the alien has received, or can be charged with receiving, the charging document. *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). Furthermore, the filing of this motion shall stay the removal of the alien until the Immigration Judge issues his decision. *See* 8 C.F.R. § 1003.23(b)(4)(ii).

Respondent argues that he did not receive proper notice. *See* Respondent's Motion to Reopen at 8. He submitted an affidavit in which he states that he never received notice of his scheduled hearing. *See id.*, Tab B ("I never received notification that I was supposed to be present in court that day... I do not recall that they provided me with any information as to what were my responsibilities after my apprehension at the border"). He also claims that upon his release he was under the impression that he was granted some sort of status. *See id.* However, this claim is inconsistent with the NTA bearing his signature and fingerprint.

Respondent was personally served with the NTA, as evidence by Respondent's signature and fingerprint. Exh. 1. The NTA indicates that Respondent's hearing was scheduled for October 31, 2005 at the Houston Immigration Court at 2320 La Branch St. Room 2235, Houston, Texas, 77004. *Id.* The NTA and Form I-213 further indicate that Respondent received oral notice in the Spanish language of the time and place of his hearing and of the consequences for

failing to appear. Exh. 1; Exh. 2. According to these documents, Respondent was informed of his responsibility to notify the Court of any changes in his address and the consequences of failing to do so. Exh. 1; Exh. 2.

The record shows that Respondent was not under Federal or State custody. The record also shows that Respondent received proper notice of his removal proceedings under section 239(a)(1)(F) of the Act. *See* INA § 239(a)(1); *see also G-Y-R-*, 23 I&N Dec. at 189-90. It is unfortunate that Respondent had the impression that he was granted status; however, he had already received notice of his hearing date and the consequences of failing to appear. Accordingly, the fact that Respondent was personally served with the NTA is sufficient to demonstrate that he received proper notice. *See G-Y-R-*, 23 I&N Dec. 181, 186; *see also Ojeda-Calderon v. Holder*, 726 F.3d 669, 675.

An *in absentia* removal order should not be revoked when the alien did not receive the hearing notice because he neglected these obligations by failing to provide the immigration court with his current mailing address. INA § 240(b)(5)(B); *see also Gomez-Palacios v. Holder*, 560 F.3d 354, 360 (5th Cir. 2009). The alien must be properly served with the charging document in person, though service by mail will suffice if personal service is not practicable. INA § 239(a)(1). The charging document informs the alien of the statutory address obligations associated with removal proceedings and of the consequences of failing to provide a current address. *See G-Y-R-*, 23 I&N Dec. 181. Respondent provided a United States mailing address of 5830 Hornwood Drive, Houston, Texas, 77081. Exh. 2. Subsequently, Respondent never provided a change of address. Failure to provide a change of address is a misdemeanor under Sec 266(b) of the act. Therefore, the *in absentia* removal order was proper.

Motions to reopen are governed by INA § 240(c)(7) and 8 C.F.R. § 1003.23(b). Only one motion to reopen is allowed, and it must be filed within 90 days of a final administrative order. INA § 240(c)(7)(A), (c)(7)(C)(i). Respondent's motion to reopen was filed January 11, 2016, more than ten years after the final administrative order in his case. Therefore, it was untimely filed. Respondent's motion to reopen based on exceptional circumstances does not fall within any of the exceptions to timeliness set forth in INA § 240(c)(7)(C) and 8 C.F.R. § 1003.23(b). Consequently, the untimeliness of his motion to reopen is not excused and reopening is not statutorily authorized.

The Court has *sua sponte* discretion to reopen any case in which it has made a decision, unless jurisdiction is vested in the Board. *See* 8 C.F.R. § 1003.23(b)(1). *Sua sponte* authority is to be invoked sparingly and not as a general remedy for any hardships created by enforcement of the time and number limits in the regulations; indeed, it is an extraordinary remedy reserved for truly exceptional situations. *Matter of G-D-*, 22 I&N Dec. 1132, 1133–34 (BIA 1999). For example, a fundamental change in the law, not merely an incremental development, would qualify as an exceptional situation that may merit the use of *sua sponte* authority. *Id.* at 1135; *see Matter of X–G–W–*, 22 I&N Dec. 71 (BIA 1998) (holding that *sua sponte* reopening was warranted because the enactment of IIRIRA significantly changed applicable asylum law four months after the respondent's appeal was denied). It is Respondent's burden to persuade the Court that his circumstances are truly exceptional before the Court will intervene. *See G-D-*, 22 I&N Dec. at 1134; *Matter of Beckford*, 22 I&N Dec. 1216, 1218 (BIA 2000).

Respondent does not set forth any persuasive argument or exceptional circumstance that challenges proper notice. The evidence indicates that Respondent was personally served with the NTA and was advised of the consequences of failing to appear. He subsequently failed to appear at his removal hearing, and then waited roughly ten years to file this motion to reopen. *See Matter of M-R-A-*, 24 I&N Dec. 665, 676 (noting that respondent's due diligence in reopening proceedings was a significant factor). Respondent provides no explanation for this delay except his apparent ignorance of his lack of status. According to the record, Respondent was apprised of his rights and objections in accordance with his apprehension. As a result, the Court finds no basis for reopening Respondent's removal proceedings due to lack of notice. *See* INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii).

Based upon the foregoing, the following shall be entered:

ORDER

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

3/7/16
Date

Clarease Rankin Yates
Immigration Judge