U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Seyfried, Brian
Wang, Leonard & Condon
33 N. LaSalle St., Suite 2020
Chicago, IL 60602

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: ABARCA, JULIO NEFTALY

A 098-885-524

Date of this notice: 12/6/2018

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:
Grant, Edward R.
Guendelsberger, John
Kendall Clark, Molly

Userteam: Docket

File: A098-885-524 – Los Angeles, CA Date: DEC - 6 2018

In re: Julio Neftaly ABARCA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brian A. Seyfried, Esquire

APPLICATION: Reopening

The respondent has appealed an Immigration Judge's decision dated July 9, 2018, denying his motion to reopen. The respondent had previously been ordered removed in absentia, but asserts he had not received notice of his hearing. The Department of Homeland Security (DHS) submitted nothing in opposition to the respondent's motion or to challenge his appeal. The appeal will be sustained, the in absentia order of removal rescinded, proceedings reopened, and the record remanded for further proceedings.

This Board reviews Immigration Judge's findings of fact for clear error; but reviews issues of law, discretion, and judgment, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

"Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the [DHS]." 8 C.F.R. § 1003.14(a). An order entered in absentia pursuant to section 240(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5), may be rescinded upon a motion to reopen filed at any time if the respondent demonstrates that he did not receive notice in accordance with sections 239(a)(1) or (2) of the Act, 8 U.S.C. §§ 1229(a)(1), (2). 8 C.F.R. § 1003.23(b)(4)(ii). Under controlling precedent of the United States Court of Appeals for the Ninth Circuit, a respondent's statements are generally taken as true for purposes of evaluating a motion to reopen, unless those statements are inherently unbelievable. *See Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991) ("[b]ecause motions to reopen are decided without a hearing, we generally require the [agency] to accept the [respondent's] affidavits as true"); *see also Sembiring v. Gonzales*, 499 F.3d 981, 988-989 (9th Cir. 2007) (discussing the weaker presumption of delivery of a hearing notice sent through regular mail, and holding that an unsworn written statement of non-receipt of the notice may be sufficient to rebut the presumption of delivery).

The Immigration Judge found that the respondent was personally served a Notice to Appear ("NTA") (Form I-862) on March 6, 2005. As the respondent's apparent signature and purported fingerprint appear on the form, in addition to an attestation by the servicing officer that the notice was provided to the respondent in Spanish, we discern no clear error with this finding (IJ at 1). Moreover, the NTA indicates that the respondent's hearing was to take place at the Los Angeles Immigration Court on April 21, 2005.

However, a "Request to Reschedule" the NTA was filed by the DHS in November 2006. Therein, the DHS conceded that the NTA had not been timely filed with the Immigration Court.[1] The DHS resubmitted, *i.e.*, refiled, the original NTA and requested a new hearing over a year after the hearing had originally been scheduled. This would indicate that the NTA was not processed by the Immigration Court in 2005, and that the April 21, 2005, hearing did not, therefore, take place. There is no indication of record that that hearing occurred on that date or that removal proceedings were otherwise commenced by the Immigration Court, nor did an Immigration Judge enter an in absentia order or grant a continuance on that date. The NTA therefore lapsed when the April 21, 2005, hearing date passed. If the respondent had attempted to appear at that time, he presumably would have been informed that his case was not on the court's docket, and that he was not in removal proceedings, as no NTA was filed with the Immigration Court. *See* 8 C.F.R. § 1003.14(a). Thus, he would not have been subject to any requirement to maintain his address with the Immigration Court, as proceedings were not properly initiated. *See* Section 239(a)(1)(F) of the Act.

The Immigration Judge found that two new hearing notices, dated December 2006 and January 2007, respectively, were sent to the respondent's original address of record (IJ at 1). We note that this occurred only after the DHS attempted to revive the lapsed, un-docketed NTA. Those notices both reflect scheduled hearing dates in early 2007, and ultimately a hearing was set for February 6, 2007. The respondent failed to appear on that day, and was ordered removed in absentia.

Many years later, the respondent was detained, and filed a motion to reopen with the Immigration Court, asserting in a sworn statement that he was unaware that a removal order had been entered against him. At that time, the respondent also filed an application for Asylum and Withholding of Removal, in which he indicated that he had moved to another address in March 2006, prior to the DHS's attempt to refile the NTA and mailing of the new hearing notices.[2]

We conclude that because the DHS previously conceded that the original NTA was not properly filed, removal proceedings were not begun. Consequently, the respondent was not given a viable hearing date from the NTA, and had no obligation to update his address with the Immigration Court as he was not in proceedings. Indeed, had the respondent appeared on the original hearing of April 21, 2005, he presumably would have been told he was not in proceedings. Thus, any obligation to update his address with the Immigration Court was vitiated by the DHS's failure to commence proceedings.

Moreover, the Immigration Judge's finding in the July 18, 2018, decision that the respondent did not submit a sworn declaration in support of the motion is clearly erroneous. 8 C.F.R.

[1] While the Board is generally prohibited from fact-finding when deciding appeals, an exception exists for taking administrative notice of the contents of official documents. 8 C.F.R. § 1003.1(d)(3)(iv).

[2] The second hearing notice reflects both mail and personal service, but this is presumably a clerical error, as there is no other indication that the court did anything other than mail it. In any event, as the respondent had apparently moved to another address, the notice would not have been served in person.

§ 1003.1(d)(3)(i). In any event, pursuant to *Sembiring*, such a statement does not necessarily have to be a notarized affidavit. *See id.*, 499 F.3d at 988-989. The respondent's sworn statement, essentially that he did not receive the notices for the 2007 hearings, is consistent with his new asylum application. Merely because the notices were not returned by the Postal Service to the court does not necessarily mean that the respondent continued to reside at that old address. As the respondent's removal proceedings had not been properly commenced, he also had no obligation of due diligence to attempt to "reopen" proceedings.

Accordingly, we will sustain the respondent's appeal and remand the record for him to have a new hearing on the merits, and for him to be afforded the opportunity apply for any relief for which he may be eligible. The following orders will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, and proceedings are reopened.

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

FOR THE BOARD