U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr., SW, Ste 332
Atlanta, GA 30303

Name: ASCENCIO MARTINEZ, RENE E... **A 088-968-133**

Date of this notice: 9/20/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Kelly, Edward F.
Adkins-Blanch, Charles K.
Mann, Ana

Userteam: Docket

File: A088 968 133 – Atlanta, GA

Date: SEP 20 2017

In re: Rene Enrique ASCENCIO MARTINEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Eli Aragorn Echols, Esquire

ON BEHALF OF DHS: Antonio E. Veal
Assistant Chief Counsel

APPLICATION: Reopening

The respondent appeals the March 30, 2017, Immigration Judge's decision denying his motion to reopen his removal proceedings after the issuance of an in absentia order of removal on February 9, 2010. The respondent has filed an appeal brief. The Department of Homeland Security (DHS) has filed a brief in opposition to the appeal. The appeal will be sustained.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent filed an application for TPS on October 18, 2007 (Exh. 38, Form I-821, Application for Temporary Protected Status (TPS)). The DHS denied the respondent's TPS application on May 23, 2008 (*Id.*). By affidavit, the respondent states that he hired an immigration consultant to assist him in filing his TPS application in 2007 and that the consultant instructed him to provide the address of Tax Immigration USA on his TPS application (Respondent's Motion to Reopen at Tab I). The address of Tax Immigration USA was 1210 Rockbridge Rd. Suite J, Norcross, Georgia 30093 (*Id.*). The respondent states that the consultant was initially responsive to him but he eventually stopped returning the respondent's phone calls (*Id.*). One month later, the respondent went to the office of Tax Immigration USA and found that the business was no longer operating and the consultant and business had disappeared from the address (*Id.*).

The respondent, who had not received a Notice to Appear (NTA) setting forth his obligation to provide a written record of his address, did not send a change of address form to the DHS. On September 9, 2008, the DHS sent an NTA to the respondent at the address he had provided on his TPS application. The respondent states that he did not receive the NTA (Motion to Reopen at Tab I). The Immigration Court sent the respondent a Notice of Hearing on January 13, 2009, and a second Notice of Hearing on February 13, 2009, which scheduled the respondent's hearing for February 9, 2010. The Notice of Hearing sent on February 13, 2009, was returned as undeliverable. The respondent did not appear at his hearing. The Immigration Judge ordered the respondent removed in absentia on February 9, 2010.

On February 24, 2017, the respondent filed a motion to reopen, which the Immigration Judge denied. The Immigration Judge found that the respondent was properly charged with receipt of the Notice to Appear because the respondent had not informed DHS of his updated address, because the NTA was sent to the last known address the respondent provided, and because the NTA was not returned as undeliverable. Therefore, he concluded that the court had properly ordered the respondent removed in absentia in 2010 (IJ at 3-4).

On appeal, the respondent argues that he never received his NTA, that he was not given adequate notice of the consequences of failing to change his address, that he was misled by Tax Immigration USA, that he was unaware of the in absentia hearing, and that he should not have been ordered removed without notice.

In *Matter of G-Y-R-*, 23 I&N Dec. 181, 192 (BIA 2001), in similar circumstances, we held that "an Immigration Judge may not order an alien removed in absentia when the Service [DHS] 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 alien's obligations under section 239(a)(1) of the Act." We also noted that an alien cannot be properly charged with constructive notice of his or her address obligations in accordance with section 239(a)(1)(F) of the Act, until the alien is informed of his address obligations as contained in section 239(a)(1)(F). That information is contained in the NTA, which the respondent in this case never received because it was sent to an address he had provided at the behest of an immigration consultant who absconded along with the entire business from that address.

We note that under section 265(a) of the Act, a respondent is required to update his address within 10 days of any change of address. *See also* 8 CFR § 265.1. However, we have held that while failure to comply with section 265 of the Act may incur various penalties, the entry of an in absentia order is not one of them. *Matter of G-Y-R-*, 23 I&N Dec. at 190; *See also Matter of Anyelo,* 25 I&N Dec. 337, 339 (BIA 2010) (Board determined that our holding in *Matter of G-Y-R-* should be applied to cases arising in the Eleventh Circuit). We conclude that the respondent in the instant case cannot be charged with having received adequate notice under *Matter of G-Y-R-*, because he did not receive the NTA containing the required warnings and advisals concerning his obligations to advise the Immigration Court and DHS of any change of address. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained, and the Immigration Judge's decision is vacated. The order of removal entered in absentia, on February 9, 2010, is rescinded.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
180 TED TURNER DR SW, STE. 241
ATLANTA, GA 30303

Socheat Chea P.C.
Davalos, Juan Francisco
3500 Duluth Park Lane
Building 300
Duluth, GA 30096

IN THE MATTER OF FILE A 088-968-133 DATE: May 25, 2017
ASCENCIO MARTINEZ, RENE ENRIQUE

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__X__ 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
180 TED TURNER DR SW, STE. 241
ATLANTA, GA 30303

__X__ OTHER: Administrative Return To Board

COURT CLERK
IMMIGRATION COURT FF

CC: OFFICE OF THE CHIEF COUNSEL
180 TED TURNER DR SW, STE 332
ATLANTA, GA, 30303

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
180 TED TURNER DR SW, STE. 241
ATLANTA, GA 30303

Socheat Chea P.C.
Davalos, Juan Francisco
3500 Duluth Park Lane
Building 300
Duluth, GA 30096

Date: Mar 31, 2017

File A088-968-133

In the Matter of:
ASCENCIO MARTINEZ, RENE ENRIQUE

_____ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____.
The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

✓ Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

_____
Immigration Court Clerk UL

cc: OFFICE OF THE CHIEF COUNSEL
180 TED TURNER DR SW, STE 332
ATLANTA, GA 30303

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Atlanta, Georgia

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
	)	
ASCENCIO MARTINEZ, Rene Enrique	)	**File No. A# 088-968-133**
	)	
Respondent	)	
	)	

CHARGE: Section 212(a)(6)(A)(i) of the Act, in that Respondent is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Respondent's Motion to Reopen *In Absentia* Order

APPEARANCES

ON BEHALF OF RESPONDENT:

Juan F. Davalos II, Esq.
Socheat Chea, P.C.
3500 Duluth Park Lane, Building 300
Duluth, Georgia 30096

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel
Department of Homeland Security
180 Ted Turner Drive SW, Suite 332
Atlanta, Georgia 30303

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Rene Enrique Ascencio Martinez ("Respondent") is an adult male native and citizen of El Salvador. Respondent entered the United States at or near an unknown place, on or about an unknown date, without being admitted or paroled after inspection by an immigration officer. See NTA.

On September 9, 2008, the Department of Homeland Security ("Department") issued Respondent a Form I-862, Notice to Appear ("NTA"), charging him as removable under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended ("INA" or "Act"). Respondent was served with his NTA by regular mail. See NTA.

On February 13, 2009, the Court sent a Notice of Hearing in Removal Proceedings ("Notice of Hearing") to Respondent informing him that he was scheduled to appear before the Atlanta Immigration Court on February 9, 2010.

On February 9, 2010, Respondent failed to appear before the Court and was ordered removed to El Salvador *in absentia* on that date.

On February 24, 2017, Respondent filed a *Sua Sponte* Motion to Reopen ("Motion to Reopen") with the Court. The Department filed an Opposition to Respondent's Motion to Reopen on March 13, 2017.

The Court has carefully reviewed the entire record before it. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny Respondent's Motion to Reopen.

II. STATEMENT OF LAW

Only one motion to reopen may be filed by an alien. 8 C.F.R. § 1003.23(b)(4)(ii). Generally, motions to reopen for the purpose of rescinding an *in absentia* removal order must be filed within 180 days of the date of the removal order, and the alien must demonstrate that his failure to appear was due to exceptional circumstances. See INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). However, a motion to reopen for the purpose of rescinding an *in absentia* removal order may be filed at any time, including after the 180-day deadline, if the alien demonstrates that he did not receive notice of the hearing or that he was in Federal or State custody and the failure to appear was through no fault of his own. See INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii).

The Code of Federal Regulations also grants an Immigration Judge *sua sponte* authority to reopen, at any time, any case in which he has made a decision. See 8 C.F.R. § 1003.23(b)(1). The Board of Immigration Appeals ("Board") has explained that exercising *sua sponte* authority is "an extraordinary remedy reserved for truly exceptional situations." Matter of G-D-, 22 I&N Dec. 1132, 1133–34 (BIA 1999) (citing Matter of J-J-, 21 I&N Dec. 976, 984 (BIA 1997)).

Finally, the Supreme Court has held that "motions to reopen are disfavored" and "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." INS v. Abudu, 485 U.S. 94, 107 (1988). "This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." INS v. Doherty, 502 U.S. 314, 323 (1992).

III. DISCUSSION

A. Respondent's Motion to Reopen is untimely.

Respondent was ordered removed *in absentia* on February 9, 2017. He filed his Motion to Reopen seven (7) years later, on February 24, 2017. Therefore, Respondent filed his Motion to Reopen more than 180 days after the final administrative order of removal, and the Motion is untimely.

B. Respondent has not overcome the presumption of proper notice.

A motion to reopen may be filed at any time, including after the 180-day deadline, if the alien demonstrates that he did not receive notice of the hearing. See INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii). When notice is sent to an alien by regular mail, properly addressed, and mailed according to normal office procedures, there is a presumption that the alien received proper notice. Matter of M-R-A-, 24 I&N Dec. 665, 673 (BIA 2008). An Immigration Judge may

consider various factors to determine whether an alien has rebutted this presumption of delivery, including, but not limited to, the following: (1) affidavits from the alien and other individuals with knowledge of facts relevant to receipt of notice; (2) whether the alien exercised due diligence upon learning of the *in absentia* removal order; (3) any prior applications for immigration relief that would indicate an incentive to appear at the removal hearing; (4) the alien's attendance at earlier immigration hearings; (5) whether the alien changed his address without filing an EOIR-33, Alien's Change of Address Form ("EOIR-33"); and (6) any other circumstances indicating possible nonreceipt of notice. Markova v. U.S. Att'y Gen., 537 F. App'x 871, 874 (11th Cir. 2013) (unpublished and cited for persuasiveness); M-R-A-, 24 I&N Dec. at 674.

In an affidavit attached to his Motion to Reopen, Respondent claims that he did not receive notice of his hearing. See Mot. to Reopen, Tab I, at 24–27. He states that in 2007, he went to a company called "Taxes Immigration USA," located at "1210 Rockbridge Rd., Suite J, Norcross, Georgia 30093." Id. at 24. He spoke with the owner, Tomas Vilela ("Mr. Vilela"), who told Respondent that he should apply for temporary protected status ("TPS") because he was from El Salvador. Id. Respondent states that Mr. Vilela filed a Form I-821, Application for Temporary Protected Status ("TPS application"), on Respondent's behalf and advised him to use Taxes Immigration USA's business address "in case [Respondent] moved." Id. While Respondent's application was pending, he spoke with Mr. Vilela a few times; at some point, however, Mr. Vilela's phone was disconnected. Id. at 24–25. Three (3) months after he filed his TPS application, Respondent went to the Taxes Immigration USA office and discovered that it was closed; Respondent never heard from Mr. Vilela again. Id. at 25.

An alien in removal proceedings has a statutory duty to provide a correct mailing address on his NTA, and to update the Department and the Court if his address changes or is incorrect by filing an EOIR-33. See INA § 239(a)–(c); Matter of G-Y-R-, 23 I&N Dec. 181, 187–88 (BIA 2001) (holding that once an alien is served with an NTA, he is statutorily obligated to maintain a correct address with the Court). However, an alien "must be properly served with the Notice to Appear before the particular address obligations of removal proceedings are fixed and the Immigration Judge is authorized to proceed in absentia." G-Y-R-, 23 I&N Dec. at 184. Under the Act, a Notice to Appear is properly served if there is "proof of attempted delivery to the last address provided by the alien." INA § 239(c).

In this case, Respondent admits that he reported his address on his TPS application as "1210 Rockbridge Rd., Suite J, Norcross, Georgia 30093." See Mot. to Reopen, Tab I, at 24; id. Tab M, at 36. This is the address that appears on Respondent's NTA, which was issued on September 9, 2008—eleven (11) months after Respondent's TPS application was filed and four (4) months after it was denied. Id. Tab M, at 36; NTA. Respondent's NTA and two (2) Notices of Hearing were sent to this address on September 9, 2008, January 13, 2009, and February 13, 2009, respectively; only the Notice of Hearing mailed on February 13, 2009 was returned as "Vacant—Unable to Forward."

Thus, it appears from the record that Respondent, or someone at the address provided by Respondent, received the NTA and Notice of Hearing mailed on January 13, 2009. This is bolstered by the fact that Respondent admits that mail was received on his behalf by Mr. Vilela at Respondent's reported address. For instance, Respondent states that Mr. Vilela told him to get his fingerprints taken, and that he picked up the appointment sheet from Mr. Vilela. Mot. to

Reopen, Tab I, at 24. Respondent has also provided two (2) Form I-797C, Notice of Action ("Notices of Action"), notifying him that his TPS application and Form I-765, Application for Employment Authorization Document, were received by United States Citizenship & Immigration Services ("USCIS"); the Notices of Action are dated December 3 and December 13, 2007, and contain the Taxes Immigration USA address. Id. Tabs N–O. Respondent's presentation of these documents indicates that he received them.

The Court also notes that Respondent's substantial delay in investigating the status of his immigration case undercuts his claim that he lacked proper notice. See M-R-A-, 24 I&N Dec. at 674. In his affidavit, Respondent asserts that he learned that Taxes Immigration USA had closed three (3) months after he filed his TPS application. See Mot. to Reopen, Tab I, at 24–25. The TPS application provided by Respondent indicates that it was filed October 10, 2007, id. Tab M, at 36; thus, Respondent claims that, in January of 2008, he lost contact with the individual who filed his TPS application and became aware that the address he provided to USCIS was no longer valid. Yet, he does not allege that he attempted to contact USCIS to change his address or check on the status of his application. In addition, he admits that it was not until two (2) years later, when he was "talking to a man [he] knew from church," that he found out that his TPS application had been denied. Id. Tab I, at 25. Respondent states that, at some point, he "went to an immigration attorney," who told him to "pack [his] bags and be ready to go," because "there was nothing she could do to help [him]." Id. Notably, Respondent has not attempted to file an ineffective assistance of counsel claim against this attorney, nor has he provided any evidence to corroborate this claim. As a result, the record evinces that, despite his knowledge that Taxes Immigration USA had closed in early 2008, and his additional knowledge that his TPS application had been denied in 2010, Respondent waited six (6) years to locate an attorney and file the present Motion. Id. (stating that Respondent hired his current attorney in January of 2016).

As a result, the Court finds that Respondent has not overcome the presumption that the Notice to Appear and Notice of Hearing, which were sent by regular mail, properly addressed, and mailed according to normal office procedures to Respondent's last reported address, was not properly served. For these reasons, the Court finds that Respondent had proper notice of his February 9, 2010 hearing, and therefore denies his Motion to Reopen.

C. Respondent has not demonstrated that his case warrants sua sponte *reopening.*

The Court may *sua sponte* reopen a case over which it has jurisdiction at any time. 8 C.F.R. § 1003.23(b)(1). However, such power should only be exercised in "exceptional situations." J-J-, 21 I&N Dec. at 984. The alien has the burden to show that an exceptional situation exists. Matter of Beckford, 22 I&N Dec. 1216, 1218–19 (BIA 2000). Moreover, the power to reopen a case *sua sponte* "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." J-J-, 21 I&N Dec. at 984. As a general matter, the Court "invoke[s] [its] *sua sponte* authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." G-D-, 22 I&N Dec. at 1133–34 (citing J-J-, 21 I&N Dec. at 984). Finally, the United States Court of Appeals for the Eleventh Circuit has held that discretion to reopen proceedings *sua sponte* is exceptionally broad and not subject to judicial review. Lenis v. U.S. Att'y Gen., 525 F.3d 1291, 1293 (11th Cir. 2008).

The Court is not convinced that Respondent's situation is "truly exceptional." G-D-, 22 I&N Dec. at 1133–34. Respondent's Motion to Reopen was filed seven (7) years after he was ordered removed *in absentia*, and nine (9) years after he learned that the address he provided to USCIS was no longer valid. See Mot. to Reopen, Tab I, at 24–25. This demonstrates a lack of due diligence, in light of the fact that Respondent's explanations for his delay in filing the present Motion are neither exceptional nor persuasive. Moreover, the fact that Respondent is allegedly eligible for lawful permanent residence status is not an exceptional situation, as it is commonplace for an alien to become eligible for relief many years after disregarding the entry of a final order of removal. See INS v. Rios-Pineda, 471 U.S. 444, 1950–52 (1985). Thus, the Court finds that Respondent has not demonstrated that his case warrants use of the Court's discretionary power to reopen *sua sponte*.

IV. CONCLUSION

Respondent's Motion to Reopen is untimely. He has not demonstrated that he did not receive proper notice of his hearing, nor has he shown that his case warrants use of the Court's *sua sponte* authority to reopen. As a result, the Court will deny Respondent's Motion to Reopen.

Accordingly, the Court will enter the following order:

ORDER OF THE IMMIGRATION JUDGE

It is ordered that: Respondent's Motion to Reopen is hereby **DENIED**.

3/30/17
Date

Earle B. Wilson
United States Immigration Judge
Atlanta, Georgia

NOTICE OF THE RIGHT TO APPEAL: You are hereby notified that both parties have the right to appeal the Immigration Judge's decision in this case to the Board of Immigration Appeals ("Board"). 8 C.F.R. § 1003.38(a). A Notice of Appeal (Form EOIR-26) must be submitted to the Board within 30 calendar days from the issuance or mailing of this decision. 8 C.F.R. § 1003.38(b). If the final date for filing falls on a Saturday, Sunday, or legal holiday, the filing date is extended to the next business day. Id. If no appeal has been taken within the time allotted to appeal, the Immigration Judge's decision becomes final. Id. By failing to timely file an appeal, a party irrevocably relinquishes the opportunity to obtain review of the Immigration Judge's decision and challenge the ruling.