U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: RAMIREZ PEDROSA, ALDO GU... **A 205-700-672**

Date of this notice: 6/26/2015

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.
Adkins-Blanch, Charles K.
Guendelsberger, John

Userteam: Docket

File: A205 700 672 – Dallas, TX Date: JUN 26 2015

In re: ALDO GUSTAVO RAMIREZ PEDROSA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christopher R. Carlston, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated July 24, 2014. We review questions of law, discretion, and judgment arising in appeals from decisions of Immigration Judges de novo, whereas we review findings of fact in such appeals under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3). The appeal will be sustained.

The Immigration Judge denied the respondent's motion to reopen his removal proceedings after the issuance of an in absentia order of removal on March 18, 2014. Pursuant to section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C), an in absentia removal order may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice of the hearing in accordance with sections 239(a)(1) or (2) of the Act. Sections 240(b)(5)(C)(i) and (ii) of the Act; *see also Matter of Guzman*, 22 I&N Dec. 722, 722-23 (BIA 1999).

The December 13, 2013, Notice of Hearing (NOH) informing the respondent of the March 18, 2014, hearing was mailed to the address the respondent provided upon his release from DHS custody. However, both the respondent and his wife stated in their sworn statements that they had checked the mail every day and that the NOH had not been received. The respondent's motion also submitted evidence that he is the beneficiary of an approved immigrant visa petition filed by his father, and this fact tends to show that the respondent would have an incentive to comply with the obligations imposed during his removal proceedings. The motion also includes evidence that the respondent had been released from DHS custody on a $4,000 bond and had not fled the area. These facts also tend to show that the respondent intended to comply with his Immigration Court obligations. We further consider the fact that the respondent exercised due diligence by filing his initial motion to reopen on May 2, 2014, just 6 weeks after the missed hearing. Finally, although the respondent submitted a change of address form dated April 29, 2014, he also showed that he had received the mailed copy of the Immigration Judge's March 18, 2014, order of removal and thereby provided evidence that the address he provided to DHS was a correct address. *See Gomez-Palacios v. Holder*, 560 F.3d 354, 361 (5th Cir. 2009) (noting as a factor whether there is evidence showing that the address provided to the Immigration Court was an accurate mailing address).

Given the foregoing, we conclude that the respondent has overcome the presumption of delivery of the NOH. *See Matter of M-R-A-*, 24 I&N Dec. 665, 675 (BIA 2008). Consequently, we conclude that the respondent's motion did meet the statutory grounds for rescission of his order of removal under section 240(b)(5)(C) of the Act.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The motion to reopen is granted, the proceedings are reopened, and 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

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

McGregor and Oblad PLLC
Carlston, Chris Ryan
3010 LBJ Freeway Suite 200
Dallas, TX 75234

IN THE MATTER OF FILE A 205-700-672 DATE: Jul 24, 2014
RAMIREZ PEDROSA, ALDO GUSTAVO

__ 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 20530

__ 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
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

X OTHER: Order on Motion to Reopen

COURT CLERK
IMMIGRATION COURT FF

CC: GRIMES, DAWNITA
125 E. HWY 114, STE 500
IRVING, TX, 75062

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

IN THE MATTER OF:	)	
	)	IN REMOVAL PROCEEDINGS
RAMIREZ PEDROSA, Aldo	)	
	)	A205-700-672
RESPONDENT	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are 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: Motion to Reopen

ON BEHALF OF THE RESPONDENT:

Chris Carlston, Esq.
McGregor & Oblad, PLLC
3010 LBJ Freeway, Ste. 200
Dallas, Texas 75234

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Dawnita Gimes, Esq.
Assistant Chief Counsel- ICE
125 E. John Carpenter Fwy., Ste. 500
Irving, Texas 75062

WRITTEN DECISION OF THE IMMIGRATION JUDGE

Respondent filed motions on May 2, 2014 and July 16, 2014 to reopen an absentia order issued on March 18, 2014. The second motion is numerically barred, but will be considered as a supplement to the first motion. Respondent asserts lack of notice. The Department of Homeland Security has not filed a response.

The Respondent's Notice to Appear reflects that he was personally served. *See* Exhibit 1. Thus, the Respondent was on notice of the initiation of removal proceedings, his obligation to update the immigration court with any change of address, and the consequences of failing to appear as required by Section 239(a)(1) of the Act. *See Matter of G-Y-R-*, 23 I&N Dec. 181, 186 (BIA 2001).

The Respondent alleges that he did not receive his Notice of Hearing (NOH), and thus did not have actual notice of the time and date of his proceeding. Subsequent to the issuance of the absentia order, the Respondent has submitted Form EOIR-33 to the Court indicating his correct address. *See* Motion to Reopen, Tab E. Importantly, the affidavits submitted by the Respondent are silent as to whether the Respondent moved before or after the NOH was mailed or how the Respondent notified the Government of his correct address. Thus, while Respondent asserts that he did not receive the Notice of Hearing in his mailbox, he does not assert that he checked the mailbox of his address of record (as opposed to where he was actually living).

If the Respondent moved prior to the removal order, there is no evidence that he filed a Form EOIR-33 prior to the *in absentia* hearing. The last address the Respondent provided in accordance with Section 239(a)(1)(F) of the Act was the address given upon his release from detention. The NOH was mailed to the Respondent at this address. Service by mail of the NOH to the last address provided by the Respondent in accordance with Section 239(a)(1)(F) of the Act is sufficient due to the presence of proof of attempted delivery to such address. INA § 239(c). Thus, *in absentia* proceedings were properly authorized. *See* INA § 240(b)(5)(B); *Matter of G-Y-R-*, 23 I&N Dec. at 187.

As to the Respondent's claim for rescission based on lack of notice, the Court must determine whether the Respondent received actual notice of the hearing. *See Gomez v. Holder*, 560 F.3d 354, 360-61 (5th Cir. 2009). However, this does not mean that failure to receive notice of a removal hearing always entitles an alien to rescission of a removal order. *Id.* at 360. If the Respondent moved prior to the *in absentia* hearing and did not receive actual notice of the time and date of the hearing due to his failure to provide an updated address to the Court, he would

not be entitled to rescission of an *in absentia* removal order. *Id.* at 360; *see Matter of M-R-A-*, 24 I&N Dec. 655, 675 (BIA 2008).

Conversely, if the Respondent moved *after* the NOH was mailed, he will be required to rebut the presumption of delivery. The Respondent's NOH was mailed to his most recent address of record according to normal office procedures. Thus, a presumption of delivery arose. *See Matter of M-R-A-*, 24 I&N Dec. at 673. The Court must consider all evidence submitted by the Respondent to overcome the presumption of delivery.[1] *Id.* at 674-75. The Respondent has provided two affidavits, written by himself and his wife, stating that they did not receive notice. In addition, the Respondent filed this motion to reopen approximately six weeks after his *in absentia* removal order. However, the Respondent has no prior affirmative applications for relief. In addition, though his attorney contends that he is eligible for cancellation of removal and adjustment of status, there is no evidence in the record that the Respondent has an immigrant visa immediately available to him, or that he is grandfathered under 245(i). Importantly, even if Respondent could establish grandfather status under 245(i), he still would be ineligible for adjustment because the priority date on his current visa petition, which is family 3rd preference, is backlogged to 1993. Concerning cancellation of removal, Respondent has not shown that he has a qualifying relative who could experience "exceptional and extremely unusual hardship" upon his removal. *See* INA §§ 245(a); 240A(b)(1). In further support of the presumption of delivery, the NOH was not returned to the Court as undeliverable by the United States Postal Service.

[1] Evidence may include, but is not limited to: (1) [T]he 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 non-receipt of notice. *Id.* at 674.

Respondent's affidavit is not inconsistent with the presumption of delivery. Respondent's affidavit does not state that he actually lived at his address of record at the time the Notice of Hearing was mailed. Respondent bears the burden of proof on his motion, yet his entire motion and accompanying evidence is devoid of any statement of when he changed his address, a key piece of information. Of the seven factors listed in Matter of M-R-A-, *see footnote 1*, only one of the factors cuts in favor or Respondent (number 3).

Based on the foregoing, the Court finds there is insufficient evidence in the record to rebut the presumption of delivery. *See id.* at 673-76.

Accordingly, the following Order shall be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion to Reopen is **DENIED**.

Date: 7-24-14
Dallas, Texas

R. Wayne Kimball
Immigration Judge