U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: AYALA-MEDINA, LEOPOLDO **A 070-826-065**

Date of this notice: 7/18/2019

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:
Greer, Anne J.
Donovan, Teresa L.
Wendtland, Linda S.

Userteam: Docket

File: A070-826-065 – Boise, ID

Date: JUL 18 2019

In re: Leopoldo AYALA-MEDINA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Talia D. Burnett, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, has appealed from an Immigration Judge's December 17, 2018, decision denying his motion to reopen to rescind the Immigration Judge's October 25, 1994, in absentia order. The Department of Homeland Security (DHS) has not responded to the appeal, which will be sustained.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that the Immigration Judge improperly relied on the general motion requirements in 8 C.F.R. § 1003.2(c)(1) to deny his motion to reopen and rescind instead of considering his argument that he was not properly served with the notice of hearing (Respondent's Br. at 2). Specifically, the respondent argues that he was not properly served with the notice of hearing because he was a minor at the time, and the notice should have been served on his parents (Respondent's Br. at 4).

Although the Immigration Judge classified the respondent's case as a removal proceeding and considered the motion to reopen and rescind the in absentia order under section 240(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5), the respondent's case is actually a deportation case (Exh. 1). The respondent's motion is governed by former section 242B(c) of the Act, 8 U.S.C. § 1252b(c), because the Order to Show Cause was issued on May 25, 1994, after the June 13, 1992, effective date of changes made by the Immigration Act of 1990 and subsequent amendments, but prior to the April 1, 1997, effective date of changes made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). *See Matter of Gonzalez-Lopez,* 20 I&N Dec. 644 (BIA 1993).

An order of deportation issued following proceedings conducted in absentia pursuant to section 242B(c) may be rescinded only upon a motion to reopen filed before the Immigration Judge:

> (A) "within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances," or

> (B) "at any time if the alien demonstrates that he did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien."

Section 242B(c)(3). The respondent does not contend that he has established exceptional circumstances, but contends that he did not receive notice of the hearing.

Specifically, the respondent argues that, pursuant to *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004), his parents should have been served with the notice of hearing because he was a minor at the time of the hearing. In that decision, the United States Court of Appeals for the Ninth Circuit, under whose jurisdiction this case arises, held that the government's service of the notice of hearing only on the minor himself, and not on the adult who had custody of him, "deprived [him] of the *effective* notice to which he was legally entitled under § 242B(a)(2)." *Flores-Chavez v. Ashcroft*, 362 F.3d at 1157 (emphasis in original). In this case, although the record establishes that the respondent was sent the hearing notice by certified mail on August 8, 1994, it was received by "Yadi Herrera," who is neither the respondent's mother nor his father. There also is no indication in the record that a separate hearing notice was sent to the respondent's parents. Therefore, the record does not establish that either the respondent or one of his parents was served with the notice of hearing, and we agree with the respondent that he did not receive proper notice under section 242B(c)(3)(B).

In reaching this conclusion, we recognize that we reached a different result from that in *Flores-Chavez* when we held that personal service of a notice to appear on a minor who is 14 years of age or older at the time of service is effective, and the regulations do not require that notice also be served on an adult with responsibility for the minor. *See Matter of Cubor-Cruz*, 25 I&N Dec. 470 (BIA 2011). *Matter of Cubor-Cruz* involved a motion to reopen and rescind an in absentia order issued under the less stringent notice requirements of section 240(b)(5) of the Act, however, rather than pursuant to section 242B(c)(3), which governs in this case.

Further, although the respondent did not file his motion to reopen and rescind until 2018, under the Ninth Circuit's case law, the plain language of section 242B(c)(3)(B) of the Act provides that a motion based on either lack of notice or on the respondent's custody status at the time of the hearing may be filed "at any time." *See Andia v. Ashcroft*, 359 F.3d 1181 (9th Cir. 2004) (holding that motion to reopen an in absentia hearing based on lack of notice can be made at any time and may not be denied for lack of due diligence). Based on the foregoing, we will sustain the appeal and remand the record for further proceedings consistent with this decision.

ORDER: The appeal is sustained.

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