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

Ley, Robert
Law Offices of Johanna Herrero
1 State Street
2nd Floor
Boston, MA 02109

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

Name: GARCIA-HERRERA, WILL BALM... **A 026-399-937**

Date of this notice: 4/21/2020

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'Connor, Blair

Userteam: Docket

File: A026-399-937 – Houston, TX Date: APR 21 2020

In re: Will Balmore GARCIA-HERRERA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Ley, Esquire

APPLICATION: Reopening; rescission of in absentia order

The respondent appeals from an Immigration Judge's August 15, 2019, decision denying his motion to reopen his deportation proceedings and to rescind an *in absentia* removal order issued against him on December 16, 1985. The appeal will be sustained.

On February 12, 2019, the respondent, a native and citizen of El Salvador, filed a motion to reopen, submitted an affidavit in support of reopening, and filed substantial documentation reflecting his lengthy residence and his significant family ties in the United States – including his wife, minor children, parents, and five siblings, who are all United States citizens. The respondent averred that he was a 16-year old minor at the time of entry, a minor at the time the Order to Show Cause was issued, and that he never received actual notice of his hearing because the clerk of the court sent the Notice of Hearing to an incorrect address, resulting in the return of the notice to the Immigration Court. *Cf. Ojeda-Calderon v. Holder,* 726 F.3d 669, 673 (5th Cir. 2013) (holding that alien's unsupported denial of receipt of hearing notice was insufficient to rebut presumption of effective service accorded to notices sent via certified mail where the hearing notice was delivered via certified mail to address provided by alien and was signed for). The respondent also claims that he currently has valid Temporary Protected Status and is prima facie eligible for Adjustment of Status as well as Special Rule Cancellation of Removal upon the reopening of the proceedings.

The Immigration Judge denied the motion to reopen in a form order, marking the box that the motion to reopen is denied and further stating that the "[r]emoval order is almost 35 years old. No basis in law or fact to reopen this case" (IJ at 1).

There was not a hearing on the motion to reopen, and the reasons for the denial of the motion to reopen on the form order are insufficient in light of the substantial arguments provided by the respondent. *See generally Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999); *Matter of M-P-*, 20 I&N Dec. 786, 787-88 (BIA 1994) (stating that an Immigration Judge must fully explain a decision to deny reopening in order to allow the respondent a fair opportunity to contest the decision and the Board an opportunity for meaningful appellate review). We express no present opinion about the respondent's assertions, the merit of which can only be resolved through fact-finding, which is not our function. 8 C.F.R. § 1003.1(d)(3)(iv). Instead, the record will be remanded for further factual development and legal analysis of the respondent's motion to reopen.

Accordingly, the record will be returned to the Immigration Judge for preparation of a more thorough decision and for any other appropriate actions.

ORDER: The record is returned to the Immigration Court for further proceedings consistent with this decision.

FOR THE BOARD