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

ASCENCIO, PORFIRIO ALFONSO
[redacted]

DHS/ICE Office of Chief Counsel - OMA
1717 Avenue H, Room 174
Omaha, NE 68110

Name: ASCENCIO, PORFIRIO ALFONSO **A 094-320-692**

Date of this notice: 6/4/2020

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kelly, Edward F.
Couch, Stuart V.
Adkins-Blanch, Charles K.

Userteam: Docket

File: A094-320-692 – Omaha, NE

Date: JUN - 4 2020

In re: Porfirio Alfonso ASCENCIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Heather E. Caylor
Assistant Chief Counsel

APPLICATION: Reopening

The respondent appeals from the Immigration Judge's May 23, 2018, decision denying his motion to reopen. The respondent was ordered removed in absentia on October 4, 2005, after he did not appear for a scheduled hearing. The respondent argues that he did not receive notice of removal proceedings. The respondent's appeal will be sustained and the record will be remanded for further proceedings and the entry of a new decision.

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 Immigration Judge denied the respondent's motion to reopen because the respondent did not inform the Immigration Court that he had changed his address (IJ at 2-3). The respondent argues that he was unaware of the duty to inform the Immigration Court of a change of address because he moved in early 2004, prior to the service by mail of the Notice to Appear and subsequent hearing notice.

We will sustain the respondent's appeal as we are persuaded that the respondent has established that he did not have notice of these removal proceedings. In order for an in absentia removal order to be proper, a hearing notice must have been sent to an address that comports with the requirements contained in section 239(a)(1)(F) of the Act, 8 U.S.C. § 1229(a)(1)(F). *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). Section 239(a)(1)(F) of the Act provides that an alien must be informed of the duty to inform the Attorney General of any change in address, and also of the consequences that may result under section 240(b)(5) of the Act, 8 U.S.C. § 1229a(c)(5), if the alien fails to do so. The respondent has submitted an affidavit from another resident of the address where the Notice to Appear was mailed stating that the respondent had moved from that address prior to the service of that document. The Board held in *Matter of G-Y-R-*, 23 I&N Dec. at 190-91, that an address does not qualify as a section 239(a)(1)(F) address if the alien cannot be charged with having received the Notice to Appear. If the respondent did not, as he alleges, receive the Notice to Appear, then he cannot be charged with failing to fulfill the duty to provide the

Immigration Court with a change of address. *Id.* While the Immigration Judge correctly noted the respondent's substantial delay in seeking reopening, section 240(b)(5)(C)(ii) of the Act allows for such a motion to be filed at any time where notice is at issue. Based on the record before us, we conclude that the respondent has established that proceedings should be reopened based on lack of notice. Accordingly, the following order will be entered.

ORDER: The respondent's 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

DISSENTING OPINION: V. Stuart Couch, Appellate Immigration Judge

I respectfully dissent because I believe the Immigration Judge correctly denied the respondent's motion to rescind his *in absentia* order of removal, and disagree he has demonstrated lack of notice to warrant an exercise of our authority to reopen his proceedings. While I recognize the majority's reliance on *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA2001), I agree with the Immigration Judge that the respondent's evidence is insufficient to overcome the presumption of delivery. *Matter of M-R-A-*, 24 I&N Dec. 665, 672-73 (BIA 2008); *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002).