Exhibit 2

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA STREET, SUITE 300
SAN ANTONIO, TX 78207

IN THE MATTER OF	)	
	)	
JOSE DIMAS MALDONADO	)	Case No. **A029-318-865**
	)	
RESPONDENT	)	
	)	
IN DEPORTATION PROCEEDINGS	)	

CHARGE: Former Section 241(a)(2) of the Immigration and Nationality Act, as amended, in that you entered the United States without inspection.

APPLICATION: 8 C.F.R. § 1003.23(b): Motion to Reopen.

ON BEHALF OF THE RESPONDENT
Bonnie Smerdon, Esq.
1410 Sheridan Street
#7
Hollywood, FL 33020

ON BEHALF OF THE GOVERNMENT
U.S. Immigration & Customs Enforcement
Office of the Chief Counsel
1015 Jackson-Keller Rd., Suite 100
San Antonio, TX 78213

WRITTEN DECISION & ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

The respondent is a fifty-two-year-old male, native and citizen of Honduras, who entered the United States at or near Laredo, Texas on or about February 12, 1989. Exhibit #4; Exhibit #1. On February 13, 1989, the former Immigration and Naturalization Service (INS), now the Department of Homeland Security (DHS), personally served the respondent with an Order to Show Cause (OSC), charging him as deportable pursuant to former section 241(a)(2) of the Immigration and Nationality Act (the Act). Exhibit #1.

On May 30, 1990, the Court mailed a notice of hearing to the respondent at the following address: C/O La Frontera, 1616 Callaghan, Laredo, TX 78040. Exhibit #3. On August 1, 1990, the respondent was not present for his hearing and was unavailable for examination under oath. As

the respondent failed to appear for his hearing, the Court proceeded *in absentia* and ordered the respondent deported from the United States to Honduras on the charge contained in the OSC.

On June 23, 2021, the respondent, through counsel, filed with the Court a motion to reopen his deportation proceedings.

II. Motion to Reopen

An *in absentia* order may be rescinded only (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances, or (ii) upon a motion to reopen filed at any time if the alien demonstrates that he did not receive notice in accordance with paragraph (1) or (2) of section 239(a) of the Act or the alien demonstrates that he was in Federal or State custody and the failure to appear was through no fault of his own. Section 240(b)(5)(C) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

A. Exceptional Circumstances

Almost 31 years passed between the date the Court ordered the respondent deported *in absentia* and the date the respondent filed his motion to reopen. Accordingly, any motion to reopen based on exceptional circumstances is time-barred. *See* Section 240(b)(5)(C) of the Act; *see also* 8 C.F.R. § 1003.23(b)(4)(ii).

B. Notice

When a notice of hearing is sent by regular mail and is properly stamped and addressed to an alien, there is a presumption of delivery. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). The presumption is weaker, however, than the presumption that applies to documents sent by certified mail. *Id.* To determine whether an alien has overcome the "weaker" presumption of delivery, the Court considers all of the submitted evidence, including the respondent's affidavit, affidavits from family members and other individuals, the respondent's actions upon learning of the *in absentia* order, prior affirmative applications for relief, the respondent's prior Court appearances, and any other evidence or circumstances indicating non-receipt. *Id.* at 674; *Matter of C-R-C-*, 24 I&N Dec. 677, 679 (BIA 2008).

The respondent, through counsel, filed an affidavit stating that he came to the United States in 1990 and does not recall any encounter with immigration officials. Respondent's Motion to Reopen at Exhibit A. However, the record of proceedings indicates that the respondent did, in fact, encounter an immigration official on February 13, 1989 because he was personally served with an OSC on that date. Exhibit #1. The OSC also indicates that the respondent requested a prompt hearing, and he waived any right to extended notice of hearing. *Id.* On May 24, 1990, the Court

received an INS motion to recalendar proceedings, in which the Service advised the Court that the respondent provided the address of 1616 Callaghan, Laredo, Texas 78040 as the address for notification of hearing. Exhibit #2.

The respondent's affidavit does not assist the Court in determining whether he was properly served with notice of his August 1, 1990 hearing. The record establishes that contrary to the respondent's assertion, he did have an encounter with immigration officials after his entry into the United States. Exhibit #1; Exhibit #4. The respondent has not adequately explained the circumstances concerning his address after he was encountered and released from INS custody. He has not informed the Court as to whether he was residing with friends or relatives upon his release. He has not submitted affidavits from other residents at the address where he was staying concerning problems with the delivery of mail. Indeed, the respondent has not confirmed that 1616 Callaghan, Laredo, Texas 78040 was the address at which he was residing upon his release from INS custody.

It is incumbent upon a respondent to provide an address where he can receive mail. Section 239(a)(1)(F) of the Act. Further, if the respondent changes his address, he must provide written notice of an address where he can be contacted. 8 C.F.R. §1003.15(d)(2). A thorough review of the record of proceedings fails to reveal that during the 30-year time period the respondent has lived in the United States, he never once submitted a change of address form to the Court or attempted to notify the Court of an address where he could receive mail. The United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this case arises, has held that a respondent's failure to receive actual notice of his removal proceeding due to his neglect of his obligation to keep the Immigration Court apprised of his current mailing address does not mean that the respondent did not receive notice under section 240(b)(5)(C)(ii) of the Act. *See Gomez-Palacios v. Holder,* 560 F.3d 354, 360 (5th Cir. 2009).

C. Previously Unavailable Relief

As for the respondent's claim that reopening is warranted based on his eligibility for new relief, the respondent asserts that his former spouse filed an I-130 petition on his behalf which could render him eligible for adjustment of status pursuant to section 245(i) of the Act. The respondent has not provided the Court with a photocopy of the receipt indicating that such a petition was filed and approved on his behalf. Likewise, the respondent asserts that he has known his present United States citizen spouse since 2011. The respondent's evidence attached to his motion indicates that the couple married in 2019; however, there is no evidence in the record to indicate that the respondent's current spouse has filed a petition on his behalf. Respondent's Motion to Reopen, Tabs

A, F. The respondent does not appear to have an immigrant visa immediately available to him for purposes of adjustment of status, and he does not otherwise appear to be eligible for any other relief before the Court at the present time. In addition, a motion to reopen based on previously unavailable relief is time-barred. *See* Section 240(c)(7)(C)(i); *see also* 8 C.F.R. § 1003.23(b).

Accordingly, the following order is hereby entered:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reopen is **DENIED**.

Date: 9-17, 2021

Craig A. Harlow
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL SERVICE(P)
TO: [ ]ALIEN [ ]ALIEN c/o Custody Officer
[M]ALIEN'S ATT/REP [P] DHS
DATE: 9/20/2021
COURT STAFF
Attachments: [ ]Eoir33 [ ]Eoir28
Legal Services List [ ]Other [ ]