No. ___

IN THE

Supreme Court of the United States

ANTHONY THOMPSON,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an alien who fails to correct an address erroneously recorded by the government on a Notice to Appear, and who is subsequently ordered removed in absentia, may reopen his removal order when he was never advised of his obligation under 8 C.F.R. § 1003.15(d)(1) to correct the government's error.

PARTIES TO THE PROCEEDING

The Petitioner below, who is the Petitioner before this Court, is Anthony Thompson.

The Respondent below, who is the Respondent before this Court, is Loretta E. Lynch, Attorney General.

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The opinion of the BIA affirming the Immigration Judge's denial of Petitioner's motion to reopen is unreported and is reproduced at Pet. App. 22a-28a.

The opinion of the Immigration Judge denying Petitioner's motion to reopen is unreported and is reproduced at Pet. App. 29a-35a.

JURISDICTION

The Sixth Circuit issued its opinion on June 12, 2015. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 8 U.S.C. § 1229 and 8 C.F.R. § 1003.15, which are set forth in the Appendix to the Petition ("Pet. App."). Pet. App. 48a-55a.

STATEMENT OF THE CASE

Petitioner was detained by immigration officials and was asked for an address at which he could be contacted regarding his immigration proceedings. Petitioner provided his home address, but the immigration officer recorded a different address on the Notice to Appear setting forth a charge of removability. Petitioner then signed the Notice to Appear listing the erroneous address. The government subsequently sent the Notice of Hearing, providing the

date and time of Petitioner's removal hearing, to the erroneous address, and Petitioner was ordered removed in absentia.

Petitioner subsequently discovered that he had been ordered removed without his knowledge, and he moved to reopen his removal proceedings. The Sixth Circuit nevertheless held that Petitioner had received adequate notice of his removal hearing, relying on a regulation, 8 C.F.R. § 1003.15(d)(1), that requires aliens to correct errors made by the government on the Notice to Appear. The court therefore affirmed the agency's denial of the motion to reopen. Pet. App. 19a.

In reaching that conclusion, the court acknowledged that the Ninth Circuit had reached the opposite conclusion on materially identical facts in *Velasquez-Escovar v. Holder*, 768 F.3d 1000 (9th Cir. 2014), and that "we would arguably be obliged to grant Thompson's petition if *Velasquez* were a binding precedent in this circuit." Pet. App. 13a.

As the Ninth Circuit explained in *Velasquez*, the BIA has interpreted the statutory scheme to hold an alien responsible under Section 1003.15(d)(1) for failing to correct his address only if he has been made aware of his obligation to do so. *Velasquez*, 768 F.3d at 1006 (citing *In re G—Y—R—*, 23 I. & N. Dec. 181, 184-86 (BIA 2001) (en banc)). In short, "no notice, no obligation." *Id.* And here, as in *Velasquez*, the Notice to Appear failed to inform Petitioner of his obligation to correct government errors on that document. Thus, according to the Ninth Circuit, "even if the BIA had relied on § 1003.15(d)(1) here, the BIA's own precedent would still compel us to reverse." *Id.*

Because the Sixth Circuit's ruling in this case cannot be reconciled with the Ninth Circuit's ruling in *Velasquez*, this Court's intervention is needed to resolve the conflict.

A. Factual Background

1. Petitioner, a citizen of Jamaica, entered the United States in 1996. Pet. App. 37a. In 1999, he resided at 7305 Colfax Road, Cleveland, Ohio. *Id.* He was arrested by the Cleveland police at his home when he was present during a controlled drug delivery; another person at the residence had signed for a postal delivery containing marijuana. *Id.* at 18a; Administrative Record at 88.

Petitioner was placed under an immigration detainer and subsequently interviewed by an immigration officer. Pet. App. 2a, 37a. The immigration officer asked Petitioner about the circumstances of the arrest. Petitioner explained that the police had entered the Colfax Road house, where Petitioner lived, and arrested all of the adults present in the house. *Id.* at 37a.

The immigration officer suggested that, upon release from custody, Petitioner should stay elsewhere because the Colfax Road residence was a "drug house." Pet. App. 37a. Petitioner responded that he had nowhere else to stay. *Id.* The immigration officer asked Petitioner if he had any friends in Cleveland. *Id.* Petitioner answered that he knew a woman who lived at 2761 E. 126 Street in Cleveland. *Id.* The immigration officer suggested that Petitioner stay there instead of returning to the Colfax Road residence. *Id.* Petitioner said that he would ask the

woman who lived on E. 126 Street, but in no way suggested to the immigration officer that he would be guaranteed a room there. *Id.* at 37a-38a.

The immigration officer then served Petitioner with a Notice to Appear, dated March 9, 1999, charging him with removability and ordering him to appear before an immigration judge at a date and time "to be set." Pet. App. 46a-47a. Despite Petitioner's statement that he had nowhere else to stay other than the Colfax Road address, and that he may not be welcome at the E. 126 Street address, the immigration officer nevertheless listed Petitioner's address on the Notice to Appear as 2761 E. 126 St., Cleveland, Ohio. *Id.* at 46a. Petitioner signed the Notice to Appear. *Id.* at 47a.

The Notice to Appear contained the following advisal:

> You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding… Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration

> judge in your absence, and you may be arrested and detained by the INS.

Pet. App. 47a. After being served with the Notice to Appear, Petitioner was released from custody.

After his release, Petitioner inquired with his friend who resided at the E. 126 Street address concerning whether he could stay there, and she said no. Thus, Petitioner continued living at the same Colfax Road address that he had provided to the immigration officer as his residence. Pet. App. 38a.

2. On April 12, 1999, the government mailed a Notice of Hearing to Petitioner at the E. 126 Street address. The notice indicated that a removal hearing was scheduled for December 17, 1999. Pet. App. 43a-45a. Petitioner, who continued to reside at the Colfax Road address, did not receive the Notice of Hearing. *Id.* at 38a.

Following a hearing conducted in absentia on December 17, 1999, Petitioner was ordered removed. Pet. App. 41a-42a. Under 8 U.S.C. § 1229a(b)(5)(A), a removal order may be issued in absentia if the government establishes "by clear, unequivocal, and convincing evidence that … written notice [of the hearing] was … provided and that the alien is removable." Under the statute, "written notice … shall be considered sufficient … if provided at the most recent address provided under Section 1229(a)(1)(F)." *Id.*

Section 1229(a)(1)(F), in turn, requires that the alien "immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be

contacted respecting [removal] proceedings"; that the alien "provide the Attorney General immediately with a written record of any change of the alien's address or telephone number"; and that the government notify the alien of "[t]he consequences" of "fail[ing] to provide" the required "address and telephone information." 8 U.S.C. § 1229(a)(1)(F)(i)-(iii).

3. Because Petitioner heard nothing from the Immigration Court, he continued to live his life in the United States. In the years following, he married a United States citizen and is helping to raise her United States citizen children. Pet. App. 40a.

B. Procedural Background

1. Petitioner subsequently learned of the removal order that had been entered against him in absentia. On March 13, 2014, he moved to reopen his removal proceedings based on his failure to receive proper notice of the removal hearing. Pet. App. 30a. Under 8 U.S.C. § 1229a(b)(5)(C), a removal order issued in absentia may be rescinded "upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)…"

Section 1229(a), in turn, provides that when the time and place of removal proceedings is changed – as was the case here, since the Notice to Appear listed a time and place "to be set," Pet. App. 46a – "written notice shall be given … to the alien" by personal service or by mail, if personal service is not practicable. 8 U.S.C. § 1229(a)(2)(A); *see also id.* § 1229(c) (requiring that the government serve by mail to "the last address provided by the alien."). However, "[i]n the case of

alien not in detention, a written notice shall not be required … if the alien has failed to provide the address required under paragraph (1)(F)." *Id.* § 1229(a)(2)(B).

Petitioner argued that he had met his obligations under Section 1229(a)(1)(F). He had provided to the government the address at which he could be contacted regarding his removal proceedings – namely, the Colfax Road address – and thereby satisfied Section 1229(a)(1)(F)(i). He did not change his address – he continued living at the Colfax Road address – so did not trigger the obligation under Section 1229(a)(1)(F)(ii) to "provide the Attorney General immediately with a written record of *any change* of the alien's address." 8 U.S.C. § 1229(a)(1)(F)(ii) (emphasis added). Yet, because the immigration officer had recorded a different address (the E. 126 Street address) on the Notice to Appear, and the government then sent the Notice of Hearing to that address, Petitioner did not receive notice in accordance with Section 1229(a).

2. The Immigration Judge denied the motion to reopen, *see* Pet. App. 35a, and the BIA affirmed. *See id.* at 25a. The BIA's affirmance rested on two primary grounds. First, the BIA held that Petitioner failed to establish that he resided at the Colfax Road address in 1999 when he was arrested and when the Notice of Hearing was mailed. *Id.* Second, the BIA held that Petitioner had received personal service of the Notice to Appear, which listed the E. 126 Street address as his residence and which contained information about an alien's responsibility to report any address changes and the consequences for failure to appear. *Id.* at 25a-26a. The BIA stated, "If [Petitioner] was not living at the E. 126 Street address listed in the Notice to Appear, then

it was his responsibility to immediately notify immigration authorities of his correct address…. Because [Petitioner] did not fulfill his obligation to report his address, then a hearing notice was not required…." *Id.* at 27a.

3. The Sixth Circuit affirmed. It rejected the BIA's first holding that Petitioner had failed to provide evidence that he resided at the Colfax Road address. As the court explained, Petitioner's own affidavit was corroborated by arrest records included in the administrative record. Pet. App. 17a-18a.

However, it affirmed the BIA's second holding, agreeing that Petitioner had reason to know that the government had recorded an erroneous address and that he had an obligation to correct the government's error. The court stated that "the government is entitled to rely on the accuracy of the last address provided by an alien. [Petitioner] signed the Notice to Appear that listed 2761 East 126 Street as his address, and he did not subsequently notify the government of a correct and/or changed address." Pet. App. 18a-19a.

The Sixth Circuit reached that conclusion by relying on 8 C.F.R. § 1003.15(d)(1), *see* Pet. App. 19a, a regulation that the BIA did not even cite in its opinion. *See id.* at 15a-17a. That regulation provides:

> [I]f the address on the … Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted.

8 C.F.R. § 1003.15(d)(1). According to the Sixth Circuit, Petitioner was "required to comply with [this regulation] regardless of his knowledge thereof," Pet. App. 16a – even though the BIA's own precedent allows aliens to be charged with that address obligation only if they are notified of it. *See Velasquez*, 768 F.3d at 1005-06 (discussing *In re G—Y—R—*, 23 I. & N. Dec. 181 (BIA 2001) (en banc)).

The Sixth Circuit acknowledged that its decision conflicted with the Ninth Circuit's decision in *Velasquez*, and that "we would arguably be obliged to grant Thompson's petition if *Velasquez* were a binding precedent in this circuit." Pet. App. 13a. However, it "respectfully disagree[d] with [its] sister circuit's conclusion." *Id.*

Judge Sutton concurred, faulting the majority for "affirm[ing] the [BIA's] decision on the basis of a regulation … that neither the immigration judge nor the [BIA] invoked." Pet. App. 20a. That affirmance, Judge Sutton explained, "is arguably at odds" with the *Chenery* doctrine, which prohibits courts from affirming agency decisions on grounds other than those articulated by the agency itself in the decision under review. *Id.* at 20a-21a.

Instead, Judge Sutton would have affirmed on the ground that, because Petitioner signed the Notice to Appear, he "knew where the government believed he could be reached." Pet. App. 20a. Thus, "the government mailed Thompson's hearing notice to the last address he knowingly provided." *Id.* According to Judge Sutton, that distinguished the present case from *Velasquez*. *Id.*

REASONS FOR GRANTING THE PETITION

This Court has long recognized that deportation can result in the loss of "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). In light of these high stakes, the BIA has interpreted the relevant statutes to authorize the issuance of removal orders in absentia only when an alien has been fully advised of the alien's legal obligation to keep the government apprised of his or her correct address, and when the government has sent notice of the removal hearing to the last address provided by the alien. 8 U.S.C. § 1229(a)(1)(F), (c); *In re G—Y—R—*, 23 I. & N. Dec. 181 (BIA 2001) (en banc).

In this case, the Sixth Circuit simply ignored the relevant BIA precedent in order to uphold the BIA's decision on a ground that the BIA itself did not invoke. And in so doing, it self-consciously "disagree[d] with [its] sister circuit's conclusion" in *Velasquez*, Pet. App. 13a, which, as the Sixth Circuit acknowledged, involved "a strikingly similar set of facts." *Id.* at 9a. This Court's intervention is needed to resolve the resulting conflict between the Sixth and Ninth Circuits.

A. The Sixth Circuit's Interpretation of 8 C.F.R. § 1003.15(d)(1) Squarely Conflicts With the Ninth Circuit's Interpretation.

The Sixth Circuit rested its affirmance on a regulation that imposes certain address obligations on aliens. Pet. App. 15a-17a, 19a. Under that regulation, 8 C.F.R. § 1003.15(d)(1), "if the address on the … Notice to Appear is incorrect, the alien must provide to the Immigration Court …, within five days of service of

that document, a written notice of an address … at which the alien can be contacted." *Id.*

The Sixth Circuit held that Petitioner was required to comply with that regulation regardless of whether he had been apprised of it. Pet. App. 16a. It stated: "Even if Thompson were to argue that the warning on the Notice to Appear was too vague to fully apprise him of his obligation to correct the incorrect address on his form, the maxim that 'ignorance of the law is no defense' curtails such an argument." *Id.* "Put simply," the Sixth Circuit held, "Thompson was required to comply with 8 C.F.R. § 1003.15(d)(1) regardless of his knowledge thereof." *Id.*

That holding squarely conflicts with the Ninth Circuit's ruling in *Velasquez*. In that case, addressing a set of facts that the Sixth Circuit recognized was materially identical to those in the present case, Pet. App. 12a-13a, the Ninth Circuit rejected the government's attempt to rely on Section 1003.15(d)(1). It explained that the BIA's own precedent provides that an alien cannot be "held to the address obligation in § 1003.15(d)(1)" unless the government provided notice of that obligation. *Velasquez*, 768 F.3d at 1006 (citing *In re G—Y—R—*, 23 I. & N. Dec. at 184-86).

The Ninth Circuit's holding is rooted in the BIA's own interpretation of the statute in a precedential opinion.[1] The BIA reasoned:

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[1] It bears noting that neither in this case nor in *Velasquez* did the BIA cite or expressly rely on Section 1003.15(d)(1) in its decision. Instead, it relied solely on Section 1229(a). *See* Pet. App. 22a-28a; *Velasquez*, 768 F.3d at 1005. In both cases, the government first raised Section 1003.15(d)(1) in appellate briefing. Thus, in

> [S]ection [1229(a)(1)(F)] itself … requires the Notice to Appear to inform the alien of the particular address obligations associated with removal proceedings…. Section [1229(a)(1)(F)] mandates that the Notice to Appear … inform the alien of the in absentia consequences of failing to comply with those address requirements…. Simply put, an alien cannot be expected to provide an address 'under' or 'in accordance with' section [1229(a)(1)(F)] until the alien has been informed of the particular address obligations contained in [that] section … itself.

In re G—Y—R—, 23 I. & N. Dec. at 187. The same is true of the regulatory address obligations, including Section 1003.15.[2] *See In re G—Y—R—*, 23 I. & N. Dec. at 191-92 ("We understand the regulations to derive from and to track the language of the statute… We find the regulations to be consistent with the statute and our reading of it.").

Thus, under the BIA's own precedent as applied by the Ninth Circuit in *Velasquez*, the rule is very simple: aliens cannot be held to the address obligations under Section 1229(a)(1)(F) or related regulations, including Section 1003.15(d)(1), unless they are first given notice

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Velasquez, the Ninth Circuit held in the alternative that a remand was warranted under the rule that an agency cannot be affirmed on a ground on which it did not rely. *Velasquez*, 768 F.3d at 1005; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The Sixth Circuit, however, held that "the regulation's content clearly undergirds the logic" of the BIA's decision, Pet. App. 14a, and thus the *Chenery* rule was not implicated.

[2] 8 C.F.R. § 1003.15 was previously codified as 8 C.F.R. § 3.15.

of those obligations. *In re G—Y—R—*, 23 I. & N. Dec. at 187-88, 191-92. "In other words: no notice, no obligation." *Velasquez*, 768 F.3d at 1006. Whatever the merits in general of the principle that "ignorance of the law is no defense," Pet. App. 16a, it has no application here, where the statutory scheme specifically contemplates that proper notice of an alien's address-related obligations is a prerequisite to their effectiveness.

The Sixth Circuit also held that the advisal given to Petitioner on the Notice to Appear ("NTA") was sufficient to apprise him of his obligations under Section 1003.15(d)(1), but that further conflicts with the Ninth Circuit's ruling in *Velasquez*. *See* Pet. App. 15a ("[T]he Ninth Circuit's reading of the Notice to Appear ignores the fact that the form also warns aliens that the address on the NTA, if not updated, will be used by the government for future immigration-related communications[.]"). Faced with the identical advisal in *Velasquez*, *compare* Pet. App. 47a *with Velasquez*, 768 F.3d at 1005 n.2, the Ninth Circuit concluded that it did not adequately apprise aliens of their obligations under Section 1003.15(d)(1).

As the Ninth Circuit explained, the advisal on the Notice to Appear "never mentions § 1003.15(d)(1) or otherwise puts aliens on notice that an NTA with an incorrect address is their problem. Rather, the NTA warns aliens that they will be removed in absentia if they fail to appear and that 'the government shall not be required to provide [them] with written notice' if they fail to provide a current address or fail to notify the government when they move. This tracks the

statutes but not the regulation." *Velasquez*, 768 F.3d at 1005 (bracket in original) (footnote omitted).

Indeed, in stark contrast to the advisal provided on the NTA, which "never says anything like 'if the address listed on the front of this form is incorrect, it is your responsibility to notify the immigration court,'" *id.* at 1005-06, the advisal provided on the Notice of Hearing *does* expressly track the language of Section 1003.15(d)(1).[3] However, Petitioner never received the Notice of Hearing because it was sent to the E 126 Street address instead of the Colfax Road address, and thus was never apprised of his obligation under Section 1003.15(d)(1).

B. The Conflict Cannot Be Avoided Based on the Factual Distinctions Asserted in Judge Sutton's Concurrence.

In concurrence, Judge Sutton identified certain facts that he believed would allow the BIA's ruling to stand without relying on Section 1003.15(d)(1), thereby avoiding any conflict with the Ninth Circuit. *See* Pet. App. 19a-20a. As the majority correctly recognized, however, this case and *Velasquez* are materially identical. *Id.* at 13a ("Given the factual similarities between the two cases, we would arguably be obligated

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[3] That advisal warns: "IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT … THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS." Pet. App. 44a-45a.

to grant Thompson's petition if *Velasquez* were a binding precedent in this circuit.").

In *Velasquez*, "[t]he petitioner … claimed that, although she verbally gave immigration officials her current address, the officials recorded a different, outdated address on her Notice to Appear. Despite the error, Velasquez signed the Notice to Appear, and the immigration court subsequently mailed her hearing notice to the addressed contained therein. Because she no longer lived at that address, she never received the notice" and was removed in absentia. Pet. App. 10a.

The majority correctly found there to be no material distinction between this case and *Velasquez*:

> Both Thompson and Velasquez allegedly provided immigration officials with their correct addresses, only to have those officials transcribe the wrong addresses onto their respective Notices to Appear. Both individuals signed their Notices to Appear despite the erroneous addresses and, as a result, failed to receive the notices of hearing mailed to them. Consequently, both were ordered removed *in absentia* and later moved to reopen proceedings against them. And in each instance, their motions were denied … on the basis that the petitioners had failed to comply with the requirement that they inform the government of their current mailing address.

Pet. App. 12a.

According to Judge Sutton's concurrence, the two cases could be distinguished because, "[u]nlike Velasquez, Thompson knew where the government

believed he could be reached." Pet. App. 20a. As the majority correctly recognized, however, there was "no basis in the record" for that distinction. *Id.* at 12a. "The two records instead indicate that neither individual was aware of the allegedly erroneous address on their respective forms. But both had reason to realize the mistake because each signed their Notice to Appear." *Id.*

Judge Sutton also sought to distinguish between the two cases on the ground that the Notice to Appear advised Petitioner of his obligations under Section 1229(a)(1)(F) to provide the government with his mailing address and inform the government of any change in his address. Pet. App. 20a. But as the majority rightly noted, relying on the Section 1229(a)(1)(F) advisal given on the Notice to Appear "does not avoid the conflict between this case and *Velasquez* because that rationale would have been equally applicable to the facts before the Ninth Circuit." Pet. App. 12a. Indeed, as discussed above, the Ninth Circuit considered that advisal and expressly held that "[n]othing in the advisal mentions or fairly implies any continuing duty, much less a continuing duty to correct the government" if the immigration officer writes down the wrong address. *Velasquez*, 768 F.3d at 1004-05. Instead, "[o]nce the alien provides an address and phone number, the alien's work is done." *Id.* at 1005.

In sum, this case squarely presents a conflict between the Sixth Circuit and the Ninth Circuit concerning whether Section 1003.15(d)(1) can be applied to uphold a removal order issued in absentia,

even where the alien was never advised of his obligations under Section 1003.15(d)(1).

The Sixth Circuit's rule has draconian consequences for aliens like Petitioner, who will be removed without ever having received notice of his hearing, despite having provided the government with the address at which he could be reached.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

September 8, 2015

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals,
Sixth Circuit.

Anthony THOMPSON, Petitioner,

v.

Loretta E. LYNCH, Attorney General, Respondent.

No. 14–3899. | June 12, 2015.

Before: GILMAN, ROGERS, and SUTTON, Circuit Judges.

OPINION

Petitioner Anthony Thompson, a native of Jamaica, was arrested on marijuana-trafficking charges in Cleveland, Ohio in March 1999. While he was detained, an officer of the former Immigration and Naturalization Service ("INS") processed Thompson and personally issued him a Notice to Appear. Soon thereafter, the immigration court in Cleveland mailed Thompson notice of his upcoming removal hearing. Thompson failed to appear at the hearing and was ordered removed *in absentia.* Fourteen years later, Thompson moved to reopen his removal proceedings, arguing that he did not receive notice of the 1999 hearing. The immigration judge ("IJ") denied Thompson's motion and the Board of Immigration Appeals ("BIA") upheld that order. Thompson now petitions this court for review. For the reasons set forth below, we **DENY** his petition.

I. BACKGROUND

A. Factual and procedural background

The relevant facts in this case are not disputed and were aptly summarized by the BIA as follows:

> The respondent was arrested by the Cleveland police department in 1999 because he was present at a house during a controlled drug delivery at 7305 Colfax Road, Cleveland, Ohio 44104, and he was placed under an immigration detainer. The Notice to Appear was issued on March 9, 1999, and it alleged that the respondent entered the United States on an unknown date at an unspecified location. The respondent received personal service of the Notice to Appear, which he signed, and which listed his address as 2761 E. 126 Street, Cleveland, Ohio 44120. It informed him about his responsibility to inform immigration authorities about any address changes and the consequences for failure to appear. The Form I–213 also listed the respondent's address as 2761 E. 126 Street, Cleveland, Ohio 44120. A hearing notice was mailed to the respondent at the E. 126 Street address informing him of a hearing scheduled for December 17, 1999. It was not returned by the Postal Service.
>
> Following a hearing conducted in absentia on December 17, 1999, at which [Thompson] failed to appear and the legacy Immigration and Naturalization Service ("INS") presented evidence regarding his removability, an Immigration Judge found him subject to removal as charged, determined that he had abandoned

all potential applications for relief, and ordered him removed from the United States. A copy of the removal order was mailed to the respondent at the E. 126 Street address and it was not returned by the Postal Service.

Over 14 years later, on March 13, 2014, [Thompson], through counsel, filed a motion to rescind his in absentia removal order. He alleged that the INS officer who interviewed him in the Cleveland jail told him that the house on Colfax Road was a "drug house," and that he should move to a different house. [Thompson] further claimed that he told the INS officer that he knew a woman who lived at the E. 126 Street address. However, after his release from jail, he indicated that the woman refused to permit him to live at the E. 126 Street address and that he therefore resided at the Colfax Road address. [Thompson] alleged that it was error for the INS officer to list the E. 126 Street address on the Notice to Appear because he did not inform the officer that he resided at that address. He did not deny that he received and signed the Notice to Appear, which contained detailed information about an alien's responsibility to inform immigration authorities about any address changes and about the consequences for failure to appear.

...

... In a decision dated August 2, 2014, the Immigration Judge denied the respondent's motion to reopen because the hearing notice was mailed to the E. 126 Street address listed in the

> Notice to Appear and the Notice to Appear informed him of his responsibility to report any address changes. Although he claimed that he did not live at the E. 126 Street address, the Immigration Judge noted that he had not provided any information about where he was living in 1999, and that his affidavit about his residence in 1999 was insufficient corroboration. Furthermore, the respondent did not report his Colfax Road address as his residence after he allegedly learned that he could not live at the E. 126 Street address and therefore he did not fulfill his obligation to report any address changes as set forth in the instructions contained in the Notice to Appear. Finally, the Immigration Judge observed that the respondent did not take any action to resolve his immigration status even though he knew he had been placed in removal proceedings when he signed the Notice to Appear in 1999, and he did not indicate whether he was eligible for any form of relief in 1999 which would have motivated him to appear for his hearing.

(citations omitted) (brackets added).

The BIA affirmed the IJ's decision. It found that the IJ was justified in ordering Thompson's removal *in absentia* because either (1) Thompson did not actually live at East 126 Street and failed to "fulfill his obligation to report his address change," or (2) he did live at the East 126 Street address but failed to receive the mailed notice due to "some failure in the internal workings of the household" (quoting *Matter of G–Y–R–*, 23 I. & N. Dec. 181, 189 (BIA 2001)). The BIA did not

attribute Thompson's failure to appear to any mistake by the government.

II. DISCUSSION

A. Standard of review

"A motion to reopen is a form of procedural relief that asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing." *Dada v. Mukasey*, 554 U.S. 1, 12, 128 S.Ct. 2307, 171 L.Ed.2d 178 (2008) (internal quotation marks omitted). We review the BIA's denial of such a motion under the abuse-of-discretion standard. *Camaj v. Holder*, 625 F.3d 988, 991 (6th Cir.2010). The BIA abuses its discretion only when its determination was made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group." *Id.* (quoting *Haddad v. Gonzales*, 437 F.3d 515, 517 (6th Cir.2006)). Where, as here, the BIA provides its own reasoning for the denial, rather than summarily affirming the IJ, we review only the BIA's decision. *Cordova v. Gonzales*, 245 Fed.Appx. 508, 511–12 (6th Cir.2007).

B. The BIA did not abuse its discretion in finding that Thompson failed to rebut the presumption of receipt of notice

1. Notice of removal proceedings

Removal proceedings under the Immigration and Nationality Act are initiated when an alien is provided with notice of the proceedings through service of a Notice to Appear. 8 U.S.C. § 1229(a)(1). A Notice to Appear must provide the alien with notice of particular

information, including the nature of the proceedings against him, the acts or conduct alleged to be in violation of law, and the time and place at which the removal proceedings will be held. *Id.* § 1229(a)(1). Where, as here, the Notice lists the hearing time as "to be set," "the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. § 1003.18(b).

An alien may be served with a Notice to Appear (or notice of the time and place of the removal hearing) either in person or by mail. 8 U.S.C. § 1229(a)(1). Pursuant to § 1229(c), service by mail is considered sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with § 1229(a)(1)(F). Section 1229(a)(1)(F), in turn, requires that the Notice inform the alien of his affirmative duty to provide "the Attorney General" with a written record of (1) "an address and telephone number (if any) at which the alien may be contacted," and (2) "any [subsequent] change of the alien's address or telephone number." Change-of-address notifications provided to either the Attorney General or to the immigration court—both of which are under the Department of Justice's umbrella—are sufficient to satisfy § 1229(a)(1)(F). *Qumsieh v. Ashcroft*, 134 Fed.Appx. 48, 50–51 (6th Cir.2005).

2. Reopening of removal proceedings

Failure to appear at a removal hearing may result, as it did here, in the IJ's ordering that the alien be removed *in absentia.* 8 U.S.C. § 1229a(b)(5). The immigration court may rescind an *in absentia* removal order and reopen proceedings in one of three

circumstances: (1) the alien files a motion within 180 days of the removal order and demonstrates that he failed to appear due to exceptional circumstances, (2) the alien files a motion at any time showing that he failed to appear because he was in federal or state custody, or (3) the alien files a motion at any time showing that he did not receive proper written notice. *Id.* § 1229a(b)(5)(C). Thompson's motion proceeds under the third category.

In order to prevail on his claim of nonreceipt, Thompson must overcome the presumption of delivery that arises when a Notice to Appear or notice of hearing is properly addressed and mailed to the last address provided by the alien. *See Ba v. Holder*, 561 F.3d 604, 607 (6th Cir.2009) (citing *Matter of M–R–A–*, 24 I. & N. Dec. 665, 673 (BIA 2008)). "To do so, [Thompson] must show: (1) that he provided the court with a correct, current address; and (2) that the notice was never received." *See Timchenko v. Holder*, 485 Fed.Appx. 813, 815 (6th Cir.2012) (citing *Ba,* 561 F.3d at 607) (brackets added). This circuit, in assessing nonreceipt claims like Thompson's, has looked to the following nonexhaustive list of evidence, both direct and circumstantial, as set forth in *Matter of M–R–A–:*

> (1) the 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 nonreceipt of notice.

Ly v. Holder, 327 Fed.Appx. 616, 622 (6th Cir.2009) (quoting *Matter of M–R–A*, 24 I. & N. Dec. at 674).

There is no dispute that the immigration court mailed Thompson's notice of hearing to the East 126 Street address. As a result, only two related issues were before the BIA: (1) whether Thompson's address was on Colfax Road or on East 126 Street at the time that the immigration court mailed the notice; and (2) whether Thompson lived up to his obligation to supply the immigration court with his current address, as required by 8 U.S.C. § 1229(a)(1)(F).

The BIA posited two possible scenarios relating to these issues, both of which end poorly for Thompson. Option one: Thompson's address was 2761 East 126 Street as indicated in the Notice to Appear. In this scenario, Thompson fulfilled his duty to report his current address under § 1229(a)(1)(F)(i), but his motion to reopen should be denied because the court mailed the notice of hearing to the proper address and Thompson failed to rebut the presumption of delivery. Option two: Thompson's address was 7305 Colfax Road, as he now claims. Under this scenario, Thompson failed to provide the immigration court with his updated address as required by 8 U.S.C. § 1229(a)(1)(F)(ii). Having failed to do so, Thompson

has no basis to object to his lack of notice and, pursuant to § 1229a(b)(5)(B), to his removal *in absentia*.

But Thompson presents a third option. He argues that, although the East 126 Street address was listed on the Notice to Appear,

> this was not the "last address provided by" Mr. Thompson, as required by 8 U.S.C. § 1229(a). While the E. 126 Street address was *an* address that Mr. Thompson told the immigration officer about during his interview, it was not the address he provided as his address or even as somewhere he could receive mail. It was simply the address of a woman he knew, and he described it as such. The "last address provided" by Mr. Thompson, therefore, is not E. 126 Street, but Colfax Road.

(Emphasis in original.) In other words, Thompson argues that even though the Notice to Appear did not list his current address, he did not violate the requirements of § 1229(a)(1)(F)(ii) because he gave his current address to the immigration officials and never *changed* his residence prior to the court's mailing of his hearing notice. *Cf.* 8 U.S.C. § 1229(a)(1)(F)(ii) ("[T]he alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.").

3. The Ninth Circuit granted a petition for review under similar facts in Velasquez–Escover

Thompson's narrow reading of the immigration statutes is not without support. Based on a strikingly similar set of facts, a divided panel of the Ninth Circuit recently granted a petition for review in

Velasquez–Escovar v. Holder, 768 F.3d 1000 (9th Cir.2014). The petitioner in *Velasquez–Escovar* claimed that, although she verbally gave immigration officials her current address, the officials recorded a different, outdated address on her Notice to Appear. Despite the error, Velasquez signed the Notice to Appear, and the immigration court subsequently mailed her hearing notice to the address contained therein. Because she no longer lived at that address, she never received the notice. And because she never received the notice, Velasquez did not appear at her removal proceeding. She was thus ordered removed *in absentia*. An IJ denied her subsequent motion to reopen and the BIA affirmed, finding that Velasquez was not entitled to notice for two reasons: (1) she "was informed of her obligation to inform the Immigration Court of her mailing address [but] did not do so"; and (2) "it was incumbent on Velasquez to ensure that a correct address was supplied [but] she did not do so." *Id.* at 1004 (alterations omitted).

The Ninth Circuit rejected both of the BIA's rationales. First, the court's majority concluded that the BIA abused its discretion by irrationally rejecting Velasquez's assertion that she had, in fact, provided officials with her current address: Per the majority, "[t]he claim is facially plausible and supported by Velasquez's declaration. There is no contrary evidence, and no adverse credibility finding." *Id.* As to the BIA's second line of reasoning, the Ninth Circuit held that the BIA abused its discretion by taking the Notice to Appear's instructions too far:

> That advisal says only that "You are required to provide the DHS, in writing, with your full mailing address and telephone number."

> Nothing in the advisal mentions or fairly implies any continuing duty, much less a continuing duty to correct the government. Once the alien provides an address and phone number, the alien's work is done. If the BIA meant to say otherwise, then it abused its discretion.

Id. at 1004–05.

In dissent, Judge Johnnie Rawlinson was of the opinion that the petition should be denied given the deferential abuse-of-discretion standard. *Id.* at 1006 (Rawlinson, J., dissenting). She particularly took issue with the notion that the BIA could abuse its discretion by enforcing an applicable regulation, namely 8 C.F.R. § 1003.15(d)(1), which the government had raised in its brief. That regulation provides that "if the address on the ... Notice to Appear is incorrect, the alien must provide to the Immigration Court ... a written notice of an address ... at which the alien can be contacted." 8 C.F.R. § 1003.15(d)(1). As Judge Rawlinson reasoned, "the BIA could not act arbitrarily or irrationally by imposing an obligation that has been memorialized in a regulation." *Velasquez–Escovar*, 768 F.3d at 1007 (Rawlinson, J., dissenting).

The majority, however, deemed the regulation irrelevant with regard to Velasquez because (1) the BIA did not invoke the regulation in its opinion, and (2) "the NTA [Notice to Appear] itself never mentions [the regulation] or otherwise puts aliens on notice that an NTA with an incorrect address is their problem.... It never says anything like 'if the address listed on the front of this form is incorrect, it is your responsibility to notify the immigration court.'" *Id.* at 1005–06.

The key facts in the case before us are quite similar to those in *Velasquez*. Both Thompson and Velasquez allegedly provided immigration officials with their correct addresses, only to have those officials transcribe the wrong address onto their respective Notices to Appear. Both individuals signed their Notices to Appear despite the erroneous addresses and, as a result, failed to receive the notices of hearing mailed to them. Consequently, both were ordered removed *in absentia* and later moved to reopen the proceedings against them. And in each instance, their motions were denied by an IJ and the BIA on the basis that the petitioners had failed to comply with the requirement that they inform the government of their current mailing address, thereby forfeiting the right to notice of any subsequent removal proceedings against them.

We thus respectfully disagree with our concurring colleague's characterization that this case is "materially distinct" from *Velasquez*. In particular, we see no basis in the record for the concurrence's suggestion that "[u]nlike Velasquez, Thompson knew where the government believed he could be reached," *Concurring Opinion*, p. 649. The two records instead indicate that neither individual was aware of the allegedly erroneous address on their respective forms. But both had reason to realize the mistake because each signed their Notice to Appear. Furthermore, the concurrence's rationale that we can deny Thompson's petition based solely on his failure to meet the address-reporting requirements of 8 U.S.C. § 1229(a)(1)(F) does not avoid the conflict between this case and *Velasquez* because that rationale would have been equally applicable to the facts before the Ninth Circuit.

Even the most striking difference between the two cases—the fact that Thompson filed his motion to reopen 14 years after his hearing date as opposed to Velasquez who waited only 6 months—is not as significant as it might first appear. According to the Ninth Circuit, Velasquez "spent roughly six months [after her Notice to Appear] regularly visiting an attorney's office to check on the status of her case. Eventually she gave up. Having received no further word from the government, she assumed her case had been closed. She was wrong." *Velasquez–Escovar*, 768 F.3d at 1002. But 15 months after "giving up," Immigration and Customs Enforcement officers detained her on unrelated grounds. At that point she discovered the outstanding removal order against her, and only then did she proceed to file her motion to reopen. That is, had she not been detained, she presumably would have continued taking no action on her case for an indefinite period of time in the mistaken belief that the case had been closed.

4. We respectfully disagree with the outcome in Velasquez

Given the factual similarities between the two cases, we would arguably be obliged to grant Thompson's petition if *Velasquez* were a binding precedent in this circuit. But the Ninth Circuit's holding in *Velasquez* is in fact persuasive authority only and, after careful consideration, we respectfully disagree with our sister circuit's conclusion.

The majority opinion in *Velasquez* determined that the BIA abused its discretion based on two purported errors. First, the Ninth Circuit determined that, even though 8 C.F.R. § 1003.15(d)(1) "fit the situation," it

was not relevant in Velasquez's case "because the BIA's decision failed to invoke § 1003.15(d)(1), either by its name or by its logic." *Velasquez–Escovar*, 768 F.3d at 1005. The Ninth Circuit's reasoning rests on the following guidance from the Supreme Court: "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

The key phrase in the above excerpt, for our purposes, is "the grounds invoked." Although the BIA failed to cite the relevant regulation in either Velasquez's or Thompson's case, the regulation's content clearly undergirds the logic of "the grounds invoked" in each. Judge Rawlinson made the same point in her dissent in *Velasquez*. *Velasquez–Escovar*, 768 F.3d at 1007 ("Because [the BIA's opinion] reflects the requirements of the regulation, there was no abuse of discretion.") (Rawlinson, J., dissenting). Here, the BIA's reliance on § 1003.15(d)(1) is clear from its determination that "[i]f [Thompson] was not living at the E. 126 Street address ..., then it was his responsibility to immediately notify immigration authorities of his correct address." We agree with Judge Rawlinson's analysis on this point. Furthermore, contrary to our concurring colleague's suggestion, we have not "needlessly implicate[d]" *Chenery* in our analysis. *Concurring Opinion*, p. 649. Rather, Thompson relies heavily on *Chenery* and its progeny for his argument that we should follow the Ninth Circuit's lead and grant his petition for review.

The *Velasquez* majority's second rationale for granting review was the failure of the Notice to Appear to explicitly alert aliens that they have an obligation under 8 C.F.R. § 1003.15(d)(1) to correct any government errors made on that form. Rather, the Notice to Appear warns that one must (1) provide the government with a current address, and (2) alert the government of any changes thereto. These requirements track the statutory language found in 8 U.S.C. § 1229(a)(1)(F)(i)-(ii). But the Ninth Circuit's reading of the Notice to Appear ignores the fact that the form also warns aliens that the address on the NTA, if not updated, will be used by the government for future immigration-related communications: "You will be provided with a copy of this form. Notices of hearing will be mailed to this address." The form goes on to caution that "[i]f you fail to attend the hearing ..., a removal order may be made by the immigration judge in your absence." Thompson signed his Notice to Appear despite this admonition and the fact that the form listed an address where he knew he could not be reached. We are left to wonder how Thompson expected the government to contact him regarding his pending removal hearing when the form he signed listed an incorrect address.

The fact that the immigration official made the alleged error does not absolve Thompson. Thompson had both the opportunity to provide his current, correct address at the time he received the Notice to Appear and the obligation to ensure that the INS had an address at which he could be reached throughout the proceedings. This obligation necessarily included a duty to correct the address listed on the Notice to Appear, particularly since the Notice to Appear

informed him that all future mailings would be sent to the address listed on the form.

As this and other courts have noted in various contexts, including immigration cases, one's signature on a form or contract establishes a strong presumption that "[o]ne who accepts a written contract is conclusively presumed to know its contents and to assent to them." *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231, 239 (6th Cir.2000) (quoting 17A Am. Jur. 2d Contracts § 224 (1991)); *see also*, *Hanna v. Gonzales*, 128 Fed.Appx. 478, 480 (6th Cir.2005) (holding that because the petitioner signed, under oath, his adjustment-of-status application, the law charges him with knowledge of the application's substance despite his assertion that he was never actually aware of its contents); *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir.2005) (noting that one "who has executed a written contract and is ignorant of its contents cannot set up that ignorance to avoid the obligation") (internal quotation marks omitted); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir.1993) (holding that "a defendant who deliberately avoids reading the form he is signing cannot avoid criminal sanctions for any false statements contained therein").

Even if Thompson were to argue that the warning on the Notice to Appear was too vague to fully apprise him of his obligation to correct the incorrect address on his form, the maxim that "ignorance of the law is no defense" curtails such an argument. Put simply, Thompson was required to comply with 8 C.F.R. § 1003.15(d)(1) regardless of his knowledge thereof. *See Trinidad–Contreras v. Gonzales*, 202 Fed.Appx. 943, 945 (9th Cir.2006) (explaining that regulations are binding regardless of actual knowledge or the hardship

resulting from innocent ignorance) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385, 68 S.Ct. 1, 92 L.Ed. 10 (1947)).

The propriety of this outcome is supported by the adverse implications of the alternative. Specifically, the holding in *Velasquez* renders the requirements of 8 U.S.C. § 1229(a)(1)(F) and the related threat of *in absentia* removal relatively toothless. Under *Velasquez*, an alien can ignore an incorrect address listed on her Notice to Appear, skip her removal hearing, and then reopen the proceedings against her at any time in the future by claiming that the error was the government's fault. Although there is nothing in the record to suggest that Thompson (or Velasquez, for that matter) intentionally created this unfortunate situation, Thompson's lack of diligence in correcting the mistaken mailing address has led to the very problem that the relevant statutory and regulatory provisions are designed to avoid. For these reasons, we conclude that the BIA did not abuse its discretion by declining to reopen Thompson's case.

The BIA's opinion, however, appears to have relied in part on a misreading of Thompson's arrest records. Thompson argued below that the records corroborated his claim that he lived on Colfax Road at the time that his hearing notice was mailed by the immigration court. But the BIA mistakenly concluded that "the arrest records reflect only that he was arrested at the Colfax Road address without any indication that this address was his residence." This reading of the arrest records is inaccurate.

Thompson attached the "Offense/Incident Reports" for three individuals—himself, Haieema Winsom, and

Cynthia Tell—to his motion to reopen. Each report includes two separate address fields: one labeled "Primary Arrested" and the other labeled "Arrest Location." The former address field falls under the heading of "Arrestee: Present Information," and the latter is part of the section entitled "Arrest Information." For Thompson and Winsom, the addresses listed in each field are the same: "7305 COLFAX RD." That is not the case for Tell, however. Although her "Arrest Location" was also the Colfax address, her "Primary Arrested" is listed as "11602 CROMWELL AV." This strongly indicates, consistent with Thompson's motion to reopen, that Tell was arrested while visiting the residence where both Thompson and Winsom lived.

But the BIA's apparent misreading of the records is harmless. Although the arrest records help prove that Thompson lived on Colfax Road at the time he was arrested, they do not tell us where he resided several months later when the immigration court mailed him the notice of hearing. Only the latter address is relevant to our analysis in light of the requirement that Thompson "immediately" provide the government with a record of any change to his address. *See* 8 U.S.C. § 1229(a)(1)(F)(ii). More importantly, even if Thompson consistently resided on Colfax Road, that does not change the fact that the Notice to Appear listed the East 126 Street address. If, as Thompson now claims, the form was filled out in error, then Thompson failed to comply with 8 C.F.R. § 1003.15(d)(1) by not correcting that mistake.

The arrest records therefore have no impact on our analysis. Under the Immigration and Nationality Act, the government is entitled to rely on the accuracy of

the last address provided by an alien. Thompson signed the Notice to Appear that listed 2761 East 126 Street as his mailing address, and he did not subsequently notify the government of a correct and/or changed address. By mailing a hearing notification to that address, the government fully satisfied its obligation to provide Thompson with notice of the hearing against him. 8 U.S.C. § 1229(c) ("Service by mail ... shall be sufficient if there is proof of attempted delivery to the last address provided by the alien...."). Whether or not Thompson was actually aware of the immigration official's error on the Notice to Appear, the law charges him with the knowledge of that error, which he was obligated to correct under 8 C.F.R. § 1003.15(d)(1). Accordingly, even taking Thompson's version of the relevant events as true, we cannot conclude that the BIA abused its discretion by refusing to reopen Thompson's removal proceedings.

III. CONCLUSION

For all of the reasons set forth above, we **DENY** the petition for review.

CONCURRENCE

SUTTON, Circuit Judge, concurring in part and concurring in the judgment. I agree with the majority that the government provided sufficient notice to Anthony Thompson when it mailed its hearing notice to the address listed in Thompson's signed Notice to Appear. *See* 8 U.S.C. §§ 1229a(b)(5)(A), 1229(a)(1)(F), 1229(c). I write separately to make two points.

First, there is an additional reason not to be concerned about *Velasquez–Escovar v. Holder*, 768 F.3d 1000 (9th Cir.2014). The two cases are materially distinct. *Velasquez* involved a woman who gave her

address to an immigration official. The official mistakenly wrote down the wrong address. *Id.* at 1002. In this case, by contrast, no one made a mistake; there is no dispute that an immigration official wrote down the last address Thompson provided. And that makes all the difference. Unlike Velasquez, Thompson knew where the government believed he could be reached. So unlike in Velasquez's case, the government mailed Thompson's hearing notice to the last address he knowingly provided. 8 U.S.C. § 1229(a)(1)(F)(i). I therefore do not think our decision is in tension with the Ninth Circuit's opinion.

Second, the majority needlessly implicates *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947), to disagree with the Ninth Circuit (among others) about its scope. *See, e.g.*, *Velasquez–Escovar*, 768 F.3d at 1005; *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir.2006). The immigration judge and Board of Immigration Appeals appear to have relied exclusively on 8 U.S.C. § 1229(a)(1)(F) in deciding that Thompson had an obligation to "immediately notify immigration authorities of his correct address, and not wait until 2014." *See* A.R. 5, 53. But the majority affirms the Board's decision on the basis of a regulation, 8 C.F.R. § 1003.15(d)(1), that neither the immigration judge nor the Board invoked. This affirmance is arguably at odds with the Supreme Court's repeated statements that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943); *see also Chenery II*, 332 U.S. at 196, 67 S.Ct. 1575. Nor may courts "accept appellate

counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). *Chenery* demands that an agency express the reasoning behind its decision, even if it does so with "less than ideal clarity." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). So while it may be true that the Board implicitly relied on 8 C.F.R. § 1003.15(d)(1) in its order, I am uncomfortable affirming the Board for that unspoken reason.

Fortunately, we do not need to rely on the majority's reading of *Chenery*, as there is another sensible ground for decision: the statute. Thompson signed a document that instructed him to provide the government, "in writing, with your full mailing address and telephone number.... If you do not ... provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing." A.R. 116. These instructions derive from 8 U.S.C. § 1229(a)(1)(F), which required Thompson to inform the government in writing of his address and any change in his address. The Board and immigration judge relied on § 1229(a)(1)(F) in upholding the government's conduct. I would deny Thompson's petition on this basis rather than create a circuit split over *Chenery*'s meaning that neither party briefed.

Appendix B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A076 507 897 – Cleveland, Ohio
Date: Aug 13 2014

In re: ANTHONY TREVOR THOMPSON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:	Courtney Smith, Esquire
ON BEHALF OF DHS:	Kris Stoke Assistant Chief Counsel

APPPLICATION: Reopening

The respondent, a native and citizen of Jamaica, has appealed from an Immigration Judge's April 2, 2014, decision which denied his motion to rescind his in absentia removal order. The Department of Homeland Security ("DHS") has requested summary affirmance. The appeal will be dismissed.

We review an Immigration Judge's findings of fact, including the credibility determination, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues involving questions of law, judgment and discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

An order of removal issued following proceedings conducted in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A), may be rescinded only upon a motion to reopen which demonstrates that the alien failed to appear because of exceptional circumstances, because he did not receive proper notice of the hearing, or because he was in federal or state custody and failed to appear through no fault of his own. Section 240(b)(5)(C) of the Act, 8 U.S.C. § 1229a(b)(5)(C).

The respondent was arrested by the Cleveland police department in 1999 because he was present at a house during a controlled drug delivery at 7305 Colfax Road, Cleveland, Ohio 44104, and he was placed under an immigration detainer. The Notice to Appear was issued on March 9, 1999, and it alleged that the respondent entered the United States on an unknown date at an unspecified location (Exh. 1). The respondent received personal service of the Notice to Appear, which he signed, and which listed his address as 2761 E. 126 Street, Cleveland, Ohio 44120. It informed him about his responsibility to inform immigration authorities about any address changes and the consequences for failure to appear. The Form 1-213 also listed the respondent's address as 2761 E. 126 Street, Cleveland, Ohio 44120. A hearing notice

was mailed to the respondent at the E. 126 Street address informing him of a hearing scheduled for December 17, 1999. It was not returned by the Postal Service.

Following a hearing conducted in absentia on December 17, 1999, at which the respondent failed to appear and the legacy Immigration and Naturalization Service ("INS") presented evidence regarding his removability, an Immigration Judge found him subject to removal as charged, determined that he had abandoned all potential applications for relief, and ordered him removed from the United States. *See generally* section 240 of the Act, 8 U.S.C. § 1229a. A copy of the removal order was mailed to the respondent at the E. 126 Street address and it was not returned by the Postal Service.

Over 14 years later, on March 13, 2014, the respondent, through counsel, filed a motion to rescind his in absentia removal order. He alleged that the INS officer who interviewed him in the Cleveland jail told him that the house on Colfax Road was a "drug house," and that he should move to a different house. The respondent further claimed that he told the INS officer that he knew a woman who lived at the E. 126 Street address. However, after his release from jail, he indicated that the woman refused to permit him to live at the E. 126 Street address and that he therefore resided at the Colfax Road address. The respondent alleged that it was error for the INS officer to list the E. 126 Street address on the Notice to Appear because he did not inform the officer that he resided at that address. He did not deny that he received and signed the Notice to Appear, which contained detailed information about an alien's responsibility to inform

immigration authorities about any address changes and about the consequences for failure to appear.

The DHS filed a response in opposition to the motion, noting that the respondent received a copy of the Notice to Appear listing the E. 126 Street address as his address. The DHS contended that if the respondent later learned that he was unable to reside at this address, he was obligated to report his correct address to the Immigration Court as set forth in the instructions in the Notice to Appear.[1]

We will affirm the Immigration Judge's decision. In a decision dated August 2, 2014, the Immigration Judge denied the respondent's motion to reopen because the hearing notice was mailed to the E. 126 Street address listed in the Notice to Appear and the Notice to Appear informed him of his responsibility to report any address changes. Although he claimed that he did not live at the E. 126 Street address, the Immigration Judge noted that he had not provided any information about where he was living in 1999, and that his affidavit about his residence in 1999 was insufficient corroboration. Furthermore, the respondent did not report his Colfax Road address as his residence after he allegedly learned that he could not live at the E. 126 Street address and therefore he did not fulfill his obligation to report any address changes as set forth in the instructions contained in the Notice to Appear. Finally, the Immigration Judge observed that the respondent did not take any action to resolve his immigration status even though he knew he had been

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[1] The DHS submitted copies of state criminal records which reflect that the respondent has two outstanding arrest warrants from 1999 and 2001.

placed in removal proceedings when he signed the Notice to Appear in 1999, and he did not indicate whether he was eligible for any form of relief in 1999 which would have motivated him to appear for his hearing.

A presumption of adequate notice attaches when notice is properly mailed to an address provided by the alien. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008) (presumption of delivery arises when hearing notice is properly addressed and sent by regular mail). In addition, an alien need not actually receive notice of a hearing to satisfy the notice requirements of due process. *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002) (alien can be charged with having received Notice to Appear and notice of hearing even when they are returned as "unclaimed" by Postal Service). In the analogous situation involving the mailing of a Notice to Appear, an alien may be deemed to have received it even if he did not personally receive, read, and understand the Notice to Appear when it "reaches the correct address but does not reach the alien through some failure in the internal workings of the household." *Matter of G-Y-R-*, 23 I&N Dec. 181, 189 (BIA 2001). In such a case, "the alien can be charged with receiving proper notice, and proper service will have been effected." *Id.* If an alien does not fulfill his obligation to report his address change, notice of the hearing is not required pursuant to section 240(b)(5)(B) of the Act, 8 U.S.C. § 1229a(b)(5)(B), and 8 C.F.R. § 1003.23(b)(4)(ii).

On appeal, the respondent alleges that he provided evidence with his motion that he was living at the Colfax Road address in the form of his 1999 arrest records. However, we observe that the arrest records

reflect only that he was arrested at the Colfax Road address without any indication that this address was his residence. In response to the Immigration Judge's finding that the respondent did not indicate in his motion whether he was eligible for any form of relief in 1999, he claims on appeal that he attached a copy of a page from a passport to his motion which he alleges is his passport, and which purportedly establishes that he was eligible for voluntary departure in 1999 because this passport reflects that the holder was admitted on a visitor's visa in 1996. However, this passport is issued in the name of Anthony Delroy Lindo, and not in the respondent's name as listed in the Notice to Appear and Form I-213 (Anthony Trevor Thompson), and it also lists a different date of birth(July 19, 1966), instead of the date of birth listed for the respondent in the Form I-213 and his 1999 arrest records (October 25, 1966). The respondent had not submitted any evidence that he has legally changed his name. Therefore, he has not established that this passport was issued to him. In addition, if this is his passport, he has not explained why he did not show it to the INS officer in 1999.

The hearing notice was mailed to the address listed for the respondent in the Notice to Appear and the Form I-213, and it was not returned by the Postal Service. Furthermore, he has conceded that he received personal service of the Notice to Appear which contained information about his responsibility to report any address changes and about the consequences for failure to appear. If the respondent was not living at the E. 126 Street address listed in the Notice to Appear, then it was his responsibility to immediately notify immigration authorities of his

correct address, and not wait until 2014 to file a motion to reopen. Because the respondent did not fulfill his obligation to report his address, then a hearing notice was not required under section 240(b)(5)(B) of the Act, 8 U.S.C. § 1229a(b)(5)(B). Finally, he does not address or explain what actions, if any, he initiated between when he signed the Notice to Appear in 1999, and when he filed the motion in 2014, to resolve his immigration status in the United States.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

Appendix C

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
801 WEST SUPERIOR AVENUE, SUITE 13-100
CLEVELAND, OH 44113

In The Matter Of:	)	Date: 4-2-14
	)	
Anthony Trevor THOMPSON,	)	
	)	In Removal Proceedings
Respondent.	)	
	)	
File Number: A076-507-897	)	**DETAINED**
	)	

RE: The Respondent's Motion to Reopen

ON BEHALF OF THE RESPONDENT:
Courtney Smith, Esq.
1443 East Gun Hill Road
Suite 2
Bronx, New York 10469

ON BEHALF OF THE DHS:
Michael A. Tripi, Assistant Chief Counsel
Office of the Chief Counsel
Immigration & Customs Enforcement
1240 East Ninth Street, Suite 519
Cleveland, Ohio 44199

MEMORANDUM AND ORDER

On March 9, 1999, the Immigration and Naturalization Service ("legacy INS," now the Department of Homeland Security ("DHS")) issued a Notice to Appear ("NTA") charging the Respondent with removability under Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i) (present without admission or parole).

On April 12, 1999, the Court sent the Respondent a Notice of Hearing, instructing him to appear for a master calendar hearing scheduled for December 17, 1999. When the Respondent failed to appear at the hearing, the Court ordered him removed *in absentia*.

On March 13, 2014, the Respondent filed a motion to reopen his removal proceedings. On March 20, 2014, the DHS filed a response in opposition.

For the reasons set forth below, the Court will **DENY** the Respondent's motion to reopen.

DISCUSSION

I. Statement of Law

The INA provides for rescission of an *in absentia* removal order and reopening of proceedings at any time if the respondent demonstrates that he did not receive notice in accordance with paragraph (1) or (2) of INA § 239(a). INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2). Written notice of the time and place of proceedings is to be served personally or mailed to the respondent or his counsel of record. INA § 239(a)(2)(A). An NTA or hearing notice may be sent by regular mail. *Matter of M-R-A-*, 24 I&N Dec. 665,

670 (BIA 2008). If the NTA or hearing notice was properly addressed and mailed according to normal office procedures, a presumption of receipt arises. *Id.* at 673; INA § 240(b)(5)(A). The presumption of receipt for regular mail, however, is weaker than the presumption of receipt for certified mail. *M-R-A-*, 24 I&N Dec. at 673.

In determining whether the respondent has overcome the weaker presumption of receipt, the Court must "conduct a practical evaluation of all the evidence, both circumstantial and corroborating evidence." *Id.* at 674. The Court may consider a number of factors in assessing the strength of a respondent's rebuttal evidence, including the respondent's affidavit, the affidavits of others, the respondent's diligence in redressing the situation after learning of the *in absentia* order, prior applications or other eligibility for relief indicating that the respondent had an incentive to appear, the respondent's previous attendance at Immigration Court hearings, and any other evidence of non-receipt. *Id.* Additionally, if "the Notice to Appear reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper service will have been effected." *Matter of G-Y-R-*, 23 I&N Dec. 181, 189 (BIA 2001).

"In those instances where actual notice is not accomplished, the statute will permit constructive notice when the alien is aware of the particular address obligations of removal proceedings and then fails to provide an address for receiving notices of hearing." *G-Y-R-*, 23 I&N Dec. at 189; *see also M-R-A-*, 24 I&N Dec. at 675 ("Once a respondent has received a Notice

to Appear [containing notice of his address reporting obligations, he cannot later] evade delivery of a properly sent Notice of Hearing by relocating without providing the required change of address and then request reopening of *in absentia* proceedings on the basis of a claim that he did not receive notice.").

II. Findings and Analysis

The Respondent was personally served with his NTA on March 9, 1999. Exh. 1. The NTA contains the following notice:

> You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding . . . . Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of you hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence . . . .

Exh. 1. This language reflects the requirement found in INA § 239(a)(1)(F) and indicates that the Respondent was properly notified of his address reporting obligations under INA § 239(a)(1)(F).

The NTA reflects an address of 2761 E. 126 St., Cleveland, Ohio 44120 ("E. 126 Street address"). Exh. 1. The Court mailed the Respondent a notice of

hearing to the E. 126 Street address on April 12, 1999, instructing him to appear for a master calendar hearing on December 17, 1999. Exh. 2. This notice was not returned to the Court. When the Respondent failed to appear for his hearing on December 17, 1999, the Court ordered him removed *in absentia* and mailed the decision to the E. 126 Street address. The decision was not returned to the Court.

In his affidavit, the Respondent states that during 1999 he lived at 7305 Colfax Road, Cleveland, Ohio 44104 ("Colfax Road address"). Resp't Aff. ¶ 5. He was arrested at the Colfax Road address on March 3, 1999, and was later interviewed by an immigration officer. *Id.* at ¶ 6. The immigration officer suggested that the Respondent find another place to stay because he was living in a "drug house." *Id.* The Respondent stated that he knew a woman who lived at the E. 126 Street address, and the officer suggested that he stay there instead of at his home on Colfax Road. *Id.* The Respondent never stated that he would be staying at the E. 126 Street address and instead continued to live at the Colfax Road address for the remainder of 1999. *Id.* at ¶ 7. He never received the hearing notice sent by the Court to the E. 126 Street address. *Id.* at ¶ 8.

The Respondent claims that he did not live at the E. 126 Street address and so did not receive the notice of hearing sent by the Court to that address. The Respondent has not submitted any evidence to corroborate his assertions, including evidence of his residence in 1999. The Court finds the Respondent's affidavit alone insufficient to sustain his burden. Additionally, the Respondent's affidavit does not indicate

what steps the Respondent took to address his removal order after learning of it and does not state whether he had any forms of relief available at the time of the hearing that would have motivated him to appear. *See M-R-A-*, 24 I&N Dec. at 674. The Respondent knew that removal proceedings were instituted against him but never contacted legacy INS, the DHS, or the Immigration Court to inquire about the status of his proceedings, despite having received no hearing notice for over a decade. The evidence suggests that the Respondent provided the E. 126 Street address to the DHS as an address at which he could receive mail. He has not rebutted the presumption of proper delivery as he has not demonstrated that his failure to receive notice was not due to his failure to provide an address where he could receive mail. *See Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995). The Court thus finds that the Respondent has failed to rebut the presumption of receipt.

Even if the Respondent did not receive actual notice of his proceedings, the Court considers him to have constructive notice of it. As noted above, the Respondent was personally served his NTA and was therefore aware of his obligation to provide the Court with an address under INA § 237(a)(1)(F). The NTA contains the E. 126 Street address, and it was to that address that the Respondent's hearing notice was sent.

The Respondent indicates that he considered living at the E. 126 Street address but then later discovered that he could not do so. He had notice of his obligation to provide the Immigration Court with an address at which he could receive mail but failed to provide the Court

with the Colfax Road address after learning that he could not live at the E. 126 Street address. Thus, the Court finds that the Respondent can be charged with constructive notice of his hearing. *See M-R-A-*, 24 I&N Dec. at 673. Therefore, entry of an *in absentia* order of removal was appropriate under INA § 240(b)(5)(A), and the Respondent has not demonstrated that the order should be rescinded pursuant to INA § 240(b)(5)(C).

Accordingly, the Respondent's motion to rescind the *in absentia* removal order and reopen his proceedings will be **DENIED**.

ORDERS

Accordingly, it is hereby ordered that:

1. The Respondent's Motion to Reopen is **DENIED**.
2. The Respondent is ordered **REMOVED** to Jamaica.

Dated: 4-2-14

/s/ Thomas W. Janas
Thomas W. Janas
Immigration Judge

Appendix D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
801 W. Superior Avenue
Suite 13-100
Cleveland, Ohio 44113

IN THE MATTER OF:	)	
	)	
Thompson, Anthony Trevor	)	
A076-507-897	)	
	)	IN REMOVAL
Respondent.	)	PROCEEDINGS
_____	)	

AFFIDAVIT OF
RESPONDENT

STATE OF NEW YORK}

ss.

COUNTY OF WESTCHESTER}

Anthony Thompson also known as Anthony Lindo, being duly sworn, deposes and says:

1. I am over the age of eighteen years and competent to be a witness and I make this affidavit in support of my Motion to Reopen Removal Proceedings and request for a Stay of Deportation.

2. I am a citizen of Jamaica. I was born on July 19th, 1966 in Kingston, Jamaica.

3. I currently reside at Westchester County Jail, 10 Woods Road, Valhalla, N.Y.

4. I last entered the United States in April, 1996 without inspection.

5. I never lived at 2761 E. 126 Street, Cleveland OH 44120. The only address I lived at in Cleveland in the year 1999 was 7305 Colfax Road, Cleveland OH 44104.

6. I was arrested at my home on Colfax Road on March 03, 1999. About two days later, while I was being held in custody by the Cleveland Police Department, I was interviewed by an immigration officer. I was told that the only reason I was still in custody was because of an immigration hold. During the interviewed the immigration officer asked about my arrest. I told him the police entered the house on Colfax Road where I lived and they recovered drugs and arrested all the adults who were in the house. The officer suggested that I should go stay somewhere else because my home was a "drug house." I told him that I had no place else to stay. He asked me if I had any friends in Cleveland. I told him I knew a woman who lived at 2761 E. 126 Street, Cleveland OH 44120. The officer suggested that I stayed there instead of the "drug house" on Colfax Road. I told him I would ask the lady.

7. I never told the immigration officer anything to suggest that I was guaranteed a room at 2761 E. 126

Street. After I was released, I did ask the lady if I could stay there and she said no. I continued living at 7305 Colfax Road for the rest of 1999.

8. I never received the Hearing Notice dated April 12, 1999. I respectfully request that you reopen my removal proceedings.

/s/ Anthony Lindo
Anthony Lindo

Witnessed by Attorney for Respondent

/s/ Courtney Smith
Courtney Smith, Esq.

Dated: March 11, 2014

Appendix E

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
801 W. Superior Avenue
Suite 13-100
Cleveland, OH 44113

In the Matter of the Motion to Reopen the Removal Proceedings of Anthony Thompson — A076-507-897

AFFIDAVIT OF
RESPONDENT'S CITIZEN SPOUSE

STATE OF NEW YORK}
ss.
COUNTY OF BRONX}

JANINE HUGHES-LINDO, being duly sworn, deposes and says:

1. I am over the age of eighteen years and competent to be a witness and I make this affidavit in support of my husband's Motion to Reopen Removal Proceedings.
2. I am a citizen of the United States. I was born on December 10, 1963 in Kingston, Jamaica. I immigrated to the United States and I subsequently became a naturalized citizen (attached hereto is a copy of the identity page of United States passport).

3. I currently reside at 15 Glen Avenue, Mt. Vernon, New York 10550.
4. I am married to Anthony Lindo, who is also known as Anthony Thompson, the respondent in this case.
5. My husband last entered the United States on April 18, 1996 (I have attached a copy of the visa page of his passport).
6. My husband and I are raising four United States kids together.
7. I intend to file an I-130 petition on behalf of my husband (immediate relative of a United States citizen) within the next two weeks after securing the filing fees for the petition.

/s/ Janine Hughes-Lindo
JANINE HUGHES-LINDO

Sworn to before me this
12 day of March, 2014

/s/ Bryan J. Hutchinson
Notary Public

BRYAN J HUTCHINSON
Notary Public, State of New York
No 02HU6047247
Qualified in Bronx County
Commission Expires 8/28/2014

Appendix F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CLEVELAND, OHIO

IN THE MATTER OF: DATE: Dec 17, 1999
THOMPSON, ANTHONY TREVOR
CASE NO. A76-507-897

DECISION

RESPONDENT IN REMOVAL PROCEEDINGS

Jurisdiction was established in this matter by the filing of the Notice to Appear issued by the Immigration and Naturalization Service, with the Executive Office for Immigration Review and by service upon the respondent. See 8 C.F.R. sections 3.14(a), 103.5a.

The respondent was provided written notification of the time, date and location of the respondent's removal hearing. The respondent was also provided a written warning that failure to attend this hearing, for other than exceptional circumstances, would result in the issuance of an order of removal in the respondent's absence provided that removability was established. Despite the written notification provided, the respondent failed to appear at his/her hearing, and no exceptional circumstances were shown for his/her failure to appear. This hearing was, therefore,

conducted in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act.

[ ]At a prior hearing the respondent admitted the factual allegations in the Notice to Appear and conceded removability. I find removability established as charged.

[ ]The Immigration and Naturalization Service submitted documentary evidence relating to the respondent which established the truth of the factual allegations contained in the Notice to Appear. I find removability established as charged.

I further find that the respondent's failure to appear and proceed with any applications for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file. Those applications are deemed abandoned and denied for lack of prosecution. See Matter of Pearson, 13 I&N Dec. 152 (BIA 1969); Matter of Perez, 19 I&N Dec. 433 (BIA 1987); Matter of R-R-Interim Decision 3182 (BIA 1992).

ORDER: The respondent shall be removed to ~~JAPAN~~ JAMAICA or in the alternative to _____ _____ on the charge(s) contained in the Notice to Appear.

/s/ Elizabeth A. Hacker
ELIZABETH A. HACKER
Immigration Judge

cc: Assistant District Counsel
Attorney for Respondent/Respondent

Appendix G

NOTICE OF HEARING IN REMOVAL PROCEEDSINGS
IMMIGRATION COURT
1155 BREWERY PARK BLVD STE 450
DETROIT, MI 48207

RE: THOMPSON, ANTHONY TREVOR
FILE: A76-507-897

DATE: Apr 12, 1999

TO: THOMPSON, ANTHONY TREVOR
2761 E. 126 ST.
CLEVELAND, OH 44120

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Dec 17, 1999 at 9:00 A.M. at:

1240 EAST 9TH ST RM 1917
CLEVELAND, OH 44199

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Immigration and Naturalization Service and held for further action. OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Immigration and Naturalization Service established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT DETROIT, MI THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR

TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 703-305-1662.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) √ PERSONAL SERVICE (P)
TO: [√] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [√] INS
DATE: 4-12-99 BY: COURT STAFF /s/ V3
Attachments: [√] EOIR-33 [ ] EOIR 28 [ ] Legal Services List [ ] Other

U.S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A76 507 897

In the Matter of:

Respondent: Anthony Trevor Thompson

2761 E. 126 St.
Cleveland, OH 44120 n/a
(Number, street, city, state and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.
☒ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:
You are not a citizen or national of the United States;
You are a native of Jamaica and a citizen of Jamaica;

You entered the United States at or near _unknown place on or about unknown date;

You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:
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.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: 1155 Brewery Park Blvd., Suite 450 Detroit, MI 48207
(Complete Address of Immigration Court, Including Room Number, if any)

on to be set (Date) at to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

Assistant District Director, Investigations
(Signature and Title of Issuing Officer)

Date: 3/9/1999

Ex 17
12/17/99
EAH

Cleveland Ohio
(City and State)

See reverse for important information

Form I-862 (Rev. 4-1-97)

Appendix H 46a

See reverse for important information.

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

_____
(Signature of Respondent)

Before:

Date: _____

_____
(Signature and Title of INS Officer)

Certificate of Service

This Notice to Appear was served on the respondent by me on 3-9-99 (Date), in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☒ in person ☐ by certified mail, return receipt requested ☐ by regular mail

☒ Attached is a list of organizations and attorneys which provide free legal services.

☒ The alien was provided oral notice in the English language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

× Anthony Thompson
(Signature of Respondent if Personally Served)

Asstly Dorey SAgent
(Signature and Title of Officer)

47a

Appendix I

STATUTES AND REGULATIONS INVOLVED

8 U.S.C. § 1229

§ 1229. Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) of this section and (ii) a current list of counsel prepared under subsection (b)(2) of this section.

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G) (i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying--

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title.

Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F) of this section.

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at

any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

8 C.F.R. § 1003.15

§ 1003.15 Contents of the order to show cause and notice to appear and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that

failure to provide such information may result in an in absentia hearing in accordance with § 1003.26.

(c) Contents of the Notice to Appear for removal proceedings. In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) Address and telephone number.

(1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR–33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR–33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.