

Please note: This successful motion was prepared by the Asylum Seeker Advocacy Project (ASAP) and Catholic Legal Immigration Network, Inc. (CLINIC) in May 2016 for Houston Immigration Court. Please be sure to check the relevant and up-to-date caselaw in your jurisdiction. Exhibits have been omitted.

NON-DETAINED

[REDACTED]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

In the Matter of:)
)
)
 [REDACTED])
)
 [REDACTED])
 Respondents)
_____)

File No. A [REDACTED]

File No. A [REDACTED]

Post-Decision Motion

MOTION TO REOPEN PROCEEDINGS AND
RESCIND *IN ABSENTIA* REMOVAL ORDER

NO FEE REQUIRED PER 8 C.F.R. §§ 1003.23(b)(1), 1003.24, 1103.7
AS MOTION BASED ON ASYLUM

AUTOMATIC STAY OF REMOVAL PER INA §240(b)(5)(C)

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS**

In the Matter of: _____)
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 Respondents _____)
)

File No. _____
File No. _____

**MOTION TO REOPEN PROCEEDINGS AND
RESCIND *IN ABSENTIA* REMOVAL ORDER**

Respondents, _____ and _____, respectfully request that this Court rescind its _____ *in absentia* order of removal and reopen their proceedings pursuant to INA § 240(b)(5)(C)(ii), 8 C.F.R. § 1003.23(b)(4)(ii), because they did not receive notice of their _____ hearing. Because their failure to appear was due to lack of notice and exceptional circumstances, their removal from the United States is automatically stayed until such a time as the Court renders a decision. INA §240(b)(5)(C).

Statement of Facts and Procedural History

_____ came to the United States with her three-year-old daughter to escape death threats in Honduras stemming from her father's murder and their involvement in the _____ party. Declaration of _____ (Decl."), Tab A, ¶ 2. She was apprehended upon arrival in the United States and held at the South Texas Family Residential Center ("STFRC") for approximately one month. The STFRC is run

by Corrections Corporations of America (“CCA”), the contractor, and DHS.¹ While detained, she was given a Credible Fear Interview, at which an asylum officer determined that she had a credible fear of returning to Honduras. *See* Credible Fear Determination. The Immigration Judge set a low bond of \$2000 for Ms. [REDACTED] and her daughter, which her U.S. citizen uncle and sponsor, Mr. [REDACTED] paid in order to secure their release. Exh. B, Declaration of [REDACTED] Decl.”), ¶ 7.

Ms. [REDACTED] was released on approximately [REDACTED], and she provided DHS with the address at which she and her child intended to reside: [REDACTED] [REDACTED]. *Id.* After their release, Ms. [REDACTED] and her daughter resided with her uncle and his wife at [REDACTED], as they had informed DHS they would. *Id.* While living with her uncle and aunt, Ms. [REDACTED] went to the Houston ICE office for a check-in. Once there, ICE officials informed her that she had not needed to check in and that they would let her know of any future appointments by mail. *Id.* ¶ 4.

Ms. [REDACTED] then moved with her daughter to [REDACTED] Virginia in late October 2015. She submitted Form EOIR-33, “Alien Change of Address Form,” to the Houston ICE office, believing that office to have full control over her immigration case. *Id.* ¶ 8. She was never informed that she had to update both the Department of Homeland Security and the Houston Immigration Court of her change in address, and she was under the impression that that the Houston ICE office would automatically update her address for any future hearing or appointment. *Id.* ¶¶ 8-10. Ms. [REDACTED] intended to do everything correctly so as to be able to present her case in immigration court, and she complied with all requirements as they

¹ See South Texas Family Residential Center, at <https://www.cca.com/facilities/south-texas-family-residential-center>

were explained to her while she was in detention and at the ICE office in Houston. *Id.* ¶¶ 9, 11.

After Ms. [REDACTED] and her daughter moved to Virginia, her uncle, Mr. [REDACTED] [REDACTED] received notice to the above address that venue had been transferred to this Immigration Court via DHS motion. [REDACTED] Decl., Tab B, ¶ 7. That notice did not include the date of Ms. [REDACTED] next immigration court hearing. *Id.* The next document he received from the Immigration Court was a notice informing Ms. [REDACTED] that she had missed the [REDACTED] hearing and had been ordered removed *in absentia*. *Id.* ¶ 8. Mr. [REDACTED] never received notice at [REDACTED] of Ms. [REDACTED] hearing date on [REDACTED]. *Id.* ¶ 9. Had Mr. [REDACTED] received notice of her hearing date, he would have informed Ms. [REDACTED] and assisted her in returning to Houston to appear in court. *Id.* ¶ 11.

Legal Argument

I. Respondents Have Demonstrated that Their Failure to Appear was Due to Lack of Notice.

An order of removal *in absentia* may be rescinded at any time upon a showing that the respondent did not receive notice of the hearing at which they were ordered removed due to failure to appear. INA § 240(b)(5)(C)(ii). This court must consider “all relevant evidence submitted,” including the respondent’s own sworn declaration, in determining whether Ms. [REDACTED] has demonstrated that she did not receive notice. *Matter of M-R-A-*, 24 I&N Dec. 665, 673-74 (BIA 2008).

A. Respondents complied with INA § 239(a)(1)(F).

INA § 239(a)(1)(F) requires that a respondent provide the Attorney General with their address and inform the Attorney General of any change in address. It does not require that any specific form be submitted nor that the respondent notify the proper Immigration Court. Ms.

██████████ duly informed DHS of her new address. ██████████ Decl. ¶ 10. However, she did not submit the Change of Address form to the Houston Immigration Court because she was not properly informed to do so. *Id.* ¶ 9. As a result, the address the Houston Immigration Court had for Ms. ██████████ was for Mr. ██████████ residence, which was the address she provided to DHS upon release: ██████████. Mr. ██████████ kept track of all documents that arrived to his house related to Ms. ██████████ case. ██████████ Decl. ¶ 3. Neither Mr. ██████████ nor Ms. ██████████ ever received a Hearing Notice for Ms. ██████████ and her daughter's Master Calendar Hearing on ██████████. *Id.* ¶ 9; ██████████ Decl. ¶ 12.

Because Ms. ██████████ and her daughter never received notice of their hearing date, an *in absentia* removal order is inappropriate. *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001) (*in absentia* removal order cannot be entered where respondent has not received a complete NTA containing the notice of hearing). Moreover, in the absence of an explanation as to the difference between DHS ICE and the DOJ EOIR, Ms. ██████████ could reasonably assume that DHS would update her address with the immigration court, an assumption bolstered by the set-up of the immigration court video-conferencing system at the STFRC that the CCA contractors and DHS ICE oversaw. In light of these facts, the address information Ms. ██████████ provided to DHS satisfies her obligation under INA § 239(a)(1)(F).

B. Respondents would have attended the hearing had they been notified.

Ms. ██████████'s actions demonstrate that had she been informed of the ██████████ hearing, she would have attended. In *Matter of M-R-A-*, the BIA held that the respondent was entitled to have his proceedings reopened after entry of an *in absentia* removal order where he submitted affidavits stating that he did not receive the notice, had filed an

application for affirmative relief, had appeared at an earlier hearing, and exercised due diligence in promptly requesting reopening of proceedings. 24 I&N Dec. at 674-75. Like the respondent in *Matter of M-R-A-*, Ms. [REDACTED] seeks affirmative relief in the form of asylum, has complied with all instructions to report that she has received, and makes the prompt request to reopen proceedings. In fact, Ms. [REDACTED] reported to DHS ICE in Houston when she did not need to report. Ms. [REDACTED] has a colorable claim for asylum as evidenced by her credible fear determination. *See* Credible Fear Determination, Tab C. She has every reason to attend her immigration court hearings in order to gain asylum and legal immigration status in the United States. She would have attended her Immigration Court hearing had she received notice. [REDACTED] Decl. ¶ 10. As soon as Ms. [REDACTED] learned that she could submit a Motion to Reopen, she diligently prepared this motion. *Id.* ¶ 14.

Ms. [REDACTED] has demonstrated that she did not receive notice of their [REDACTED] immigration court hearing. Due process requires that a respondent be provided with notice of proceedings and an opportunity to be heard. *Matter of G-Y-R*, 23 I&N Dec. 181 (BIA 2001) (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)). Because Ms. [REDACTED] and her daughter did not receive notice despite demonstrated efforts to comply with DHS instructions regarding reporting and maintaining current contact information, due process requires that the *in absentia* removal orders against them be rescinded and their proceedings be reopened.

II. Respondents present exceptional circumstances for missing her master calendar hearing that warrant rescission of the *in absentia* removal order and reopening of her case.

An alien ordered removed *in absentia* may rescind the order “upon a motion to reopen filed within 180 days after the date of the order of removal or deportation if the alien

demonstrates that the failure to appear was because of exceptional circumstances; or upon a motion to reopen filed at any time if the alien demonstrates: (1) that he or she did not receive notice in accordance with INA § 239(a)(1) or (2) [removal proceedings], INA § 242B(a)(2) [deportation proceedings], or; (2) the alien demonstrates that he or she was in Federal or State custody and the failure to appear was through no fault of the alien.” INA §240(b)(5)(C)(i). Ms. [REDACTED] failure to appear at the [REDACTED] hearing was due to exceptional circumstances. Not only did she not receive a hearing notice, but she was also never informed of the difference between the ICE office in Houston and the Immigration Court, therefore believing that the ICE office would inform her of any future appointments or hearings and would automatically update her address. As such, she moves this Court to rescind the *in absentia* order issued on [REDACTED] and to reopen these removal proceedings.

Assuming *arguendo* that Ms. [REDACTED] did receive notice, which she does not concede, there were exceptional circumstances that prevented her from attending her [REDACTED] hearing. In an unpublished decision in the matter of *Aminadad Natanael Mendez-Perez*, A099 623 872 (BIA Oct. 30, 2013), the Board of Immigration Appeals (“BIA” or “the Board”) found that an alleged clerical error by the immigration court advising respondent to appear the day after his hearing constitutes exceptional circumstances. Similarly, unawareness of a new hearing date was held to constitute exceptional circumstances in another unpublished decision in the matter of *Marie N. Peli*, A099 273 416 (BIA May 31, 2013). Ms. [REDACTED] provided a correct address to ICE while she and her daughter were detained at the Dilley Family Detention Center in Texas. After her release, Ms. [REDACTED] was entirely reliant on her uncle for assistance in tracking her appointments and court dates because she does not read or understand English. Ex. A, [REDACTED] Decl. ¶¶ 4, 7; Ex. B, [REDACTED] Decl., ¶¶ 4, 5. Ms. [REDACTED]

also relied on the information provided to her by ICE officers in the detention facility, and they did not fully explain the requirements for changing her address in immigration court or the difference between the court and the ICE office. Ms. [REDACTED] thus believed that she was complying with the instructions given to her when she submitted the form to the ICE office in Houston; she thought they would take care of transferring her whole case to an office in Virginia. Ex. A, [REDACTED] Decl. ¶¶ 8, 11.

Moreover, since her release on bond, someone at the address she provided has regularly checked the mail. Exh. B, [REDACTED] Decl. ¶ 3. As she never received the Notice of Hearing and only received an *in absentia* order, it seems that, even if Ms. [REDACTED] had been checking her mail every day, the Immigration Court either did not send the Notice of Hearing or sent it to the wrong address, or the U.S. Post Office delivered it to the wrong address. Therefore, this case is analogous to *Aminadad Natanael Mendez-Perez*, A099 623 872 (BIA Oct. 30, 2013) and *Marie N. Peli*, A099 273 416 (BIA May 31, 2013) as Ms. [REDACTED] seems to have experienced Immigration Court or U.S. Post Office clerical error, leading her to be unaware of her new hearing date and causing her to miss it. The BIA has held that there is a weaker presumption of delivery where notice is sent by regular mail. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). This holding indicates that the Board has specifically contemplated that problems with the mail can and do occur.

Dated: May 5, 2016

Respectfully submitted,
[REDACTED]

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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS**

In the Matter of:

[REDACTED]

Respondents

File No. [REDACTED]

File No. [REDACTED]

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondent's Motion to Reopen Proceedings and Rescind *In Absentia* Removal Order, it is HEREBY ORDERED that the motion be _____ because:

- ___ DHS does not oppose the motion.
- ___ A response to the motion has not been filed with the court.
- ___ Good cause has been established for the motion.
- ___ The court agrees with the reasons stated in the opposition to the motion.
- ___ Other:

Date

Immigration Judge

Certificate of Service

This document was served by: Mail Personal Service

To: Alien Alien c/o Custodial Officer Atty/Rep DHS

Date: _____ By: Court Staff _____

Respondents:



CERTIFICATE OF SERVICE

I,  hereby certify that I served the attached Motion to Rescind *In Absentia* Removal Order and Reopen Proceedings and supporting documents upon the Office of Chief Counsel, Department of Homeland Security, on 5/9/16 by mail to:

Department of Homeland Security
Office of Chief Counsel
126 Northpoint Drive Room 2020
Houston, TX, 77060
Phone: (281) 931-2046



NAME