



Removal Defense

Online Course

American Immigration Lawyers Association

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NEW YORK IMMIGRATION COURT

In the Matter of

Respondent

File No. [REDACTED]

In Deportation Proceedings

Judge: Unknown

Hearing Date: None

MOTION TO RESCIND IN ABSENTIA ORDER OF DEPORTATION FOR LACK OF NOTICE

No filing fee required; Automatic stay provisions trigger



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[REDACTED]
Respondent

In Deportation Proceedings

MOTION TO RESCIND ABSENTIA ORDER OF DEPORTATION FOR LACK OF NOTICE

Respondent, [REDACTED] by and through her attorney, Rekha Sharma-Crawford, moves the Immigration Judge to Reopen Respondent's deportation proceedings pursuant to 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2). This motion is neither time barred nor numerically limited. 8 C.F.R. § 1003.23(b)(4)(iii)(D). *See Matter of Cruz-Garcia*, 22 I&N Dec. 1155 (BIA 1999). Additionally, automatic stay provisions are regulatorily triggered upon filing of this Motion. 8 C.F.R. § 1003.23(b)(4)(iii)(C).

INTRODUCTION

There are some cases that become complicated despite there being a clear and modest path forward. Cases that for some reason become so completely tangled that they seem forever lost. Yet, when these cases are examined closely, some reveal the efforts of a dedicated government attorney desperately trying to point out the injustice that has occurred. *See* Exhibit A; Memorandum by INS Trial Attorney [REDACTED]. They show how a case veered off course so unexpectedly that despite these efforts, the stain of injustice could not be washed off. Still, where the Supreme Court has found that "to deport someone may result in loss of both property and life, or all that makes life worth living" it becomes imperative that the injustice-no matter the lapse of time-be undone. *See Chin Yow v. United States*, 28 U.S. 8



(1908). For this case, that time is now.

JURISDICTION OF THE IMMIGRATION COURT

This Motion is properly brought before the Immigration Court despite there having been two prior incorrect filings to the Board of Immigration Appeals. This is because under BIA precedence, the Board never had jurisdiction to adjudicate the prior filings. *See Matter of Jean*, 23 I&N Dec. 373, 378-80 (A.G. 2002); *see also* Exhibit B: Decisions of the Board specifically finding that motions to rescind/reopen should be filed with the Immigration Court.

FACTS

[REDACTED] is a citizen and national of Guatemala who last entered the United States on or about December 14, 1991. While she was encountered by immigration officials near San Ysidro, California, her case was scheduled for hearing on February 11, 1992, before the New York Immigration Court. She appeared pro se and was given time to seek out legal assistance. The case was continued to March 31, 1992. *See* Exhibits C-1 through C-3.

On March 31, 1992, [REDACTED] appeared in court with a representative of the Committee of Senior de Loretto, who entered pleadings to the Order to Show Cause and sought relief in the form of asylum. The Court gave a due date of April 17, 1992 for the filing of the asylum application and an Individual hearing date of March 3, 1993. No other dates relating to the asylum application are mentioned. *See* Exhibit C-4.

Although the record is devoid as to the reason for the delay, on May 27, 1992 – some eight and a half months before the Individual hearing date – an unsigned asylum application was filed with the Immigration Court in New York [REDACTED]. *See* attached

¹ The record contains a singular entry of appearance for [REDACTED] dated



Exhibit C-5.

Despite the asylum application having been filed, the matter was advanced from the prescheduled Individual hearing date of March 3, 1993 to June 2, 1992. *See* Exhibit C-7. No hearing notice for June 2, 1992 exists in the record, a fact the Trial Attorney for the government, [REDACTED], subsequently sought to highlight. *See* Exhibit A.

The record from the June 2, 1992 provides an important insight into the Court's actions. The hearing, conducted without [REDACTED] present, shows an attorney, [REDACTED] confused as to the nature of the hearing and whether Fajardo-Barrios even knew to attend the hearing. *See* attached Exhibit C-7. The record is without information to explain how or why [REDACTED] was present in the courtroom and it is unknown if he was there specifically for this hearing, or simply happened to be in the courtroom when the Court decided to take up [REDACTED] case. However, [REDACTED] has always maintained she never received notice of any hearing scheduled for that day. *See* Exhibit D: Statement of Respondent.

Nonetheless, the Court for the first time explained that the genesis of the June 2, 1992 hearing triggered from a "call up date" of April 20, 1992 – a date that is not mentioned at the prior hearing, has no hearing notice and did not, apparently, require anyone else to be present. *See* Exhibit C-7. Even though these procedural safeguards were absent, the Court nonetheless imposed the harshest of results: he deemed [REDACTED] asylum application abandoned and ordered her removed without her even present. *See* Exhibit C-8. The record contains no evidence that the government was prejudiced in any way as a result of [REDACTED] delay in filing the asylum application or that some 8 months – the time from the filing

March 31, 1992, but, that form is not been signed by [REDACTED]. Additionally, the record establishes that only [REDACTED] appeared at the hearing on March 31, 1992 and was not present at the hearing on June 2, 1992. *See* Exhibit C-6.



of the asylum application to the individual hearing – would not have been sufficient for the parties to adequately prepare for the hearing. Unconcerned, the Court focused only on the completion of the case rather than to ensure that due process had been preserved.

██████████ has spent a lifetime trying to undo an order which was entered without providing her notice of hearing. Despite her multiple efforts, she was led down the wrong path each time by attorneys who insisted on filing motions with the Board of Immigration Appeals (“BIA”) – a forum which had no jurisdiction to grant the relief she requested. *See Exhibit B: BIA Decisions.* The years passed, her youth faded, but still Fajardo-Barrios continued to try to finally conclude her immigration proceedings in a just way.

Fajardo-Barrios is prima facie eligible for adjustment of status. Here too, she was led down the wrong path by an attorney who filed her adjustment application with USCIS – an entity which also lacked jurisdiction to grant the relief she sought. *See Exhibit E: Filing Receipts and I-485 decision from USCIS.*

Perhaps in a final attempt, Fajardo-Barrios asks this Court to recognize the legal error pointed out by the Trial Attorney so long ago and rescind the improper absentia order for a lack of proper notice. ██████████ is eligible for adjustment of status and would seek such relief once the legally flawed order was rescinded. *See Exhibit F: I-485 and supporting evidence.*

LAW AND ARGUMENT²

Although the Immigration & Nationality Act (“INA”) permits an immigration judge to enter a deportation order in absentia if the government establishes by clear, unequivocal and convincing evidence that proper written notice was provided and that the person is

² In the current case, the Order to Show (OSC) cause was issued in 1991 and pre-IIRAIRA statutes and



removable, in the instant matter, the documents clearly reveal that the government cannot meet that burden.

The law provides that an in absentia order may be rescinded by the immigration judge upon the filing of a motion to rescind if the respondent did not receive proper notice of the hearing. INA §240(b)(5)(C)(ii); INA §242B(c)(3)(B) (pre-IIRAIRA); 8 CFR §§1003.23(b)(4)(ii), (iii)(A)(2); *see also Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988). A motion to reopen based on lack of proper notice can be filed at any time. INA §240(b)(5)(C)(ii); INA §242B(c)(3)(B) (pre-IIRAIRA).

Before June 13, 1992, the regulation provided that service could be accomplished either by personal service or by routine service. 8 CFR §242.1(c); *see also Matter of Huete*, 20 I&N Dec. 250, 253 (BIA 1991). In the instant case, however, the INS Trial Attorney himself admitted that the record of proceedings contains no hearing notice for the June 13, 1992 hearing at all. *See Exhibit A*. Therefore, it is logical to conclude that no hearing notice was ever sent to or received by [REDACTED] or her representative. This is true even given the Court's pronouncements that [REDACTED] presence was sufficient to proceed with the hearing. Since the record contains no hearing notice, [REDACTED] also could not have been served either and thus [REDACTED] cannot be imputed with having such knowledge.

The Board has long recognized that a failure of a respondent to receive a hearing notice is a valid legal basis to rescind an in absentia order. *See Matter of Munoz-Santos*, 20 I&N Dec. 205 (BIA 1990); *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990). In fact, the current facts are much like those in *Matter of Mancera*, where the Board found that "the

regulations would apply. In the interest of continuity, both pre and post IIRAIRA statutes are cited.



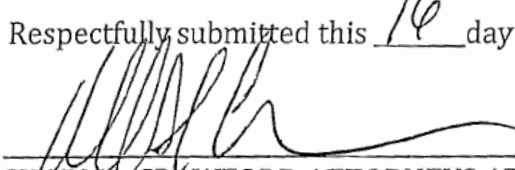
record is devoid of any evidence that the respondent was notified that the hearing was subsequently rescheduled for October 27, 1987, and the respondent has averred that he did not receive such notice," and "[t]herefore, we find that the respondent has demonstrated that the lack of notice excused his absence from the rescheduled deportation hearing." 22 I&N Dec. 79, 81 (BIA 1998). The Board's finding in *Mancera* is directly on point with the case in this instance and the result reached there should also be the one reached here.

Moreover, in the instant matter, it cannot be shown that Fajardo-Barrios was "given a reasonable opportunity to be present . . . and without reasonable cause fail[ed] or refuse[ed] to attend." *Matter of Marallag*, 13 I&N Dec. 775, 776 (BIA 1971). Absent proper notice of the hearing, it cannot reasonably be found that [REDACTED] failed to appear in the first instance. *See Perez v. Mukasey*, 516 F. 3d 770 (9th Cir. 2008). Under these circumstances, the deportation order against [REDACTED] must be vacated.

CONCLUSION

WHEREFORE, Respondent urges this Court to rescind the in absentia order and reopen her immigration case for a complete hearing on the merits of her adjustment of status application.

Respectfully submitted this 16 day of September, 2019


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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NEW YORK, NEW YORK

In the Matter of: _____

File No.: _____

ORDER OF THE IMMIGRATION JUDGE

Upon Consideration of RESPONDENT'S MOTION TO RESCIND IN ABSENTIA ORDER OF DEPORTATION FOR LACK OF NOTICE it is HEREBY ORDERED that the Motion be [] GRANTED or [] DENIED because:

- ☐ DHS does not oppose the Motion.
- ☐ The respondent 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.
- ☐ The Motion is untimely per _____.
- ☐ Other: _____.

Deadlines:

- ☐ The application(s) for relief must be filed by _____.
- ☐ The respondent must comply with DHS biometrics instructions by _____.

Date

Immigration Judge

Certificate of Service

This document was served by: [] Mail [] Personal Service

To [] Alien [] Alien c/o Custodial Officer [] Alien's Atty/Rep [] DHS

Date: _____ By: Court Staff _____

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