AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY[1]
Amended September 21, 2004

RESCINDING AN *IN ABSENTIA* ORDER OF REMOVAL

By Beth Werlin[*]

There are two main situations where individuals who were ordered removed or deported *in absentia* can reopen their cases: (1) they did not receive notice of the hearing, and (2) they did not appear at their hearing because of exceptional circumstances. This Practice Advisory addresses both situations. This information is accurate and authoritative, but does not substitute for independent legal research by a lawyer familiar with the facts of an individual case.

I. "NO NOTICE" CASES

An *in absentia* order may be rescinded by the immigration judge upon the filing of a motion to reopen if the respondent did not receive proper notice of the hearing. INA § 240(b)(5)(C)(ii); INA § 242B(c)(3) (pre-IIRIRA, April 1997);[2] 8 C.F.R. § 1003.23(b)(4)(ii), (iii)(A)(2); *see Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988).

Preliminary Issues:

> ***Where to File the Motion to Reopen*** – The motion should be filed with the immigration court having administrative control over the Record of Proceedings. 8 C.F.R. § 1003.23(b)(1)(ii). Typically, this will be the court where the *in absentia* order of removal or deportation was entered.

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[*] The Legal Action Center gratefully acknowledges the contributions to this practice advisory of law clerk Deborah Morgan, a second year law student at American University.

[2] Throughout this practice advisory, citations for both the pre-IIRIRA and post IIRIRA-statute are provided. Unless otherwise noted, the INA citations refer to post-IIRIRA statute. Individuals who were placed in proceedings commenced prior to April 1, 1997 fall under the old law and were in deportation or exclusion proceedings. Individuals whose proceedings commenced on or after April 1, 1997 are governed by the post-IIRIRA statute and in removal proceedings.

Time for Filing the Motion to Reopen – A motion to reopen based on lack of proper notice can be filed at *anytime*. INA § 240(b)(5)(C)(ii); INA § 242B(c)(3)(B) (pre-IIRIRA, April 1997).

Filing Fees – There is no fee for a motion to reopen if the basis for the motion is lack of notice in removal or deportation proceedings. 8 C.F.R. § 103.7(b).

Automatic Stay of Removal/Deportation – An automatic stay goes into effect when the motion is filed and remains in effect pending disposition of the motion by the immigration judge. INA § 240(b)(5)(C); *see also* INA § 242B(c)(3) (pre-IIRIRA, April 1997). In deportation cases, the stay remains in effect during the pendency of any BIA appeal of the decision on the motion to reopen. *Matter of Rivera*, 21 I&N Dec. 232, 234 (BIA 1996).

To alert the court and the U.S. Immigration and Customs Enforcement (ICE) to the applicability of the automatic stay provision, motions may indicate (in bold letters on the cover page and on the front page of the motion) that an automatic stay applies.

What Does Proper Notice Mean?

Proper notice means that ICE must properly serve the respondent with a charging document at the outset of proceedings. The charging document is an Order to Show Cause (OSC) in deportation and exclusion proceedings and a Notice to Appear (NTA) in removal proceedings. Also, the court must properly serve the respondent with written notice of all hearings.

What Information Must the Government Put in the Notice?

The charging document must include: the nature of the proceedings, the legal authority for the proceedings, the acts/conduct alleged to be in violation of the law, the charges against the respondent, notification of the right to be represented by counsel, and the requirement that the alien must provide a change of address or telephone number. INA § 239(a)(1); INA § 242B(a)(1) (pre-IIRIRA, April 1997). The notice also must inform the respondent of the consequences of not providing a change of address (i.e., that the he or she may be ordered removed or deported *in absentia*). *Id.* The notice of hearing, whether contained in the charging document or as a separate notice, must state the time and place of the proceedings and must inform the respondent of the consequences of failing to attend the hearing. INA § 239(a)(1)(G), (2)(A)(ii); INA § 242B(a)(2)(B)(ii) (pre-IIRIRA, April 1997).

What are Proper Methods of Service?

a. ***Exclusion Cases and Deportation Cases Filed Prior to June 13, 1992***

If the respondent was ordered deported or excluded *in absentia*, and there is no evidence that the respondent was *personally* served the OSC, the respondent's case should be reopened for lack of notice.

Before June 13, 1992, the regulation provided that service of the OSC could be accomplished either by personal service or by routine service. 8 C.F.R. § 242.1(c). However, the regulation stated that when routine service was used and the respondent did not appear for the hearing (or acknowledge in writing that the OSC was received), personal service was required. *Id.* Personal service included mailing the notice by certified or registered mail, return receipt requested. 8 C.F.R. § 103.5a(a)(2). The mail receipt must have been signed by the respondent or a responsible person at the respondent's address and returned to effect personal service. *Matter of Huete*, 20 I&N Dec. 250, 253 (BIA 1991).

b. *Deportation Cases Filed Between June 13, 1992 and April 1, 1997 (INA § 242B(a)(1) (pre-IIRIRA, April 1997))*

If the OSC was filed between June 13, 1992 and April 1, 1997, the OSC and all notices of hearing must have been served in person or by *certified mail* to the respondent or the attorney of record, if any. INA § 242B(a)(1), (2) (pre-IIRIRA, April 1997). The OSC also must have been mailed return receipt requested. *Matter of Grijalva*, 21 I&N Dec. 27, 32 (BIA 1995). Thus, in order to accomplish service, the certified mail receipt must have been signed by the respondent or a responsible person at the respondent's address. *Id.* However, a signature was not required to effect service of a notice of hearing. *Id.* at 34.

In a recent Seventh Circuit case, the court found that the government had not met its burden of proof to create a presumption of actual delivery. *See Adeyemo v. Ashcroft*, No. 03-2640, 2004 U.S. App. LEXIS 18684 (7th Cir. Sept. 2, 2004). Although the government had sent the OSC by certified mail, the signature obtained was illegible; the respondent provided evidence that the signature did not belong to him or wife, and asserted that an unknown resident in the large apartment building must have signed and not delivered the mail. The court distinguished this case from *Tapia v. Ashcroft*, 351 F.3d 795 (7th Cir. 2003), a case in which the court held that an adult sister's signature was sufficient to prove a presumption of actual delivery. In *Tapia*, there was no evidence that the signature did not belong to the respondent's adult sister or that his sister was not a responsible adult.

c. *Removal Proceedings Filed On or After April 1, 1997 (INA § 239(c))*

Like the OSC, the NTA may be served in person or by mail, but *there is no requirement that the NTA be mailed by certified mail*. INA § 239(c). Regular mail is sufficient. Consequently, signatures of receipt are not required.

How Does the "Change of Address" Requirement Affect Proper Service?

ICE may mail the NTA to the last address on file for the respondent. *Matter of G-Y-R-*, 23 I&N Dec. 181, 189-90 (BIA 2001). However, a respondent cannot be ordered removed or deported *in absentia* until he or she is warned (by receipt of the NTA or OSC) that he or she may be ordered removed or deported *in absentia* as a consequence of failing to inform the government of a change of address. *See id.* at 190. Thus, individuals who failed to report a change of address and did not receive the NTA or OSC as a result, cannot be ordered removed *in absentia*.[3] *Id.*

However, it appears that courts, and even the BIA, are interpreting the holding of *Matter of G-Y-R-* narrowly, or ignoring it altogether. In *Matter of M-D-*, the BIA read *Matter of G-Y-R-* as applying only in cases where the address of record was in dispute. *See Matter of M-D-*, 23 I&N Dec. 540, 545 (BIA 2002). The BIA found that notice requirements may be satisfied in the absence of actual receipt of the NTA. *Id.* at 547. Where the NTA was sent by certified mail to the correct address, but was returned "unclaimed," "the respondent [was not allowed] to defeat service by neglecting or refusing to collect his mail." *Id.*

Furthermore, some cases seem to ignore the finding of the BIA that "an address does not become a section 239(a)(1)(F) address unless the alien receives the warnings and advisals contained in the Notice to Appear." *Matter of G-Y-R-*, 23 I&N Dec. 181, 187 (BIA 2001). *See, e.g., Dominguez v. U.S. Att'y Gen.*, 284 F.3d 1258, 1259-60 (11th Cir. 2002) (holding that notice is statutorily sufficient if the NTA is sent to the most recent address provided by the petitioner, even if the petitioner has moved). *See also Gurung v. Ashcroft*, 371 F.3d 718, 721 (10th Cir. 2004) (citing *Dominguez* and finding notice sufficient if the NTA is sent by regular mail to the correct address); *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002) (citing *Dominguez*).

After receiving the OSC or NTA, service of additional hearing notices is sufficient if there is proof of attempted delivery to the last address provided by the respondent, even if the respondent does not receive the notice. *See* INA § 239(c); INA § 242B(c)(1) (pre-IIRIRA, April 1997); *Matter of G-Y-R-*, 23 I&N Dec. 181, 187-88 (BIA 2001). Moreover, if the respondent fails to notify the court of a change of address, the court is not required to serve respondent a notice of hearing. INA § 239(a)(2)(B); INA § 242B(a)(2) (pre-IIRIRA, April 1997). Therefore, if a respondent received the OSC or NTA, but did not notify the court of a subsequent change of address (and did not receive a hearing notice), the respondent may not claim lack of notice.

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[3]Section 265(a) of the Act requires all noncitizens who must be registered to inform the Attorney General of any change of address. INA § 265(a). However, *Matter of G-Y-R-* held that failure to comply with this section does not automatically subject an individual to an *in absentia* order of removal. Importantly, a proposed rule attempts to amend 8 C.F.R. § 103.2 by mandating that numerous immigration forms inform noncitizens of their obligation to promptly notify the government of changes of address and that failure to do so can result in being ordered removed in absentia. *See* 67 Fed. Reg. 48818 (July 26, 2002). According to the federal register notice, this regulation would satisfy the requirements of advance notice regarding the consequences of failing to report a change of address and thus allow immigration judges to enter in absentia orders against noncitizens who did not receive notice the NTA (even if the NTA was not sent to current address). The government has not published a final rule, and thus this regulation is not in effect.

What Happens if the Respondent Does Not Receive the Notice Because It Is Served on the Attorney of Record?

Service on the attorney of record constitutes service on the respondent. INA § 239(a)(1) and (2); INA § 242B(a)(1)-(2) (pre-IIRIRA, April 1997); *Matter of Peugnet*, 20 I&N Dec. 233, 237 (BIA 1991). Therefore, if the attorney of record is properly served, in most cases, a motion to reopen for lack of notice will fail even if the attorney did not inform the respondent of the hearing. The respondent may argue that counsel's failure to notify him or her of the hearing was ineffective assistance of counsel and amounts to an exceptional circumstance. However, the respondent usually must comply with the requirements set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), for ineffective assistance claims. *See Matter of Rivera*, 21 I&N Dec. 599, 607 (BIA 1996). This issue is discussed briefly in the second section of this practice advisory and in greater detail in AILF's April 2002 Practice Advisory entitled, *Protecting Your Client When Prior Counsel Was Ineffective: Expanding the Bounds of Lozada* (http://www.ailf.org/lac).

How Can the Respondent Prove that He or She Did Not Receive Notice If the Record Shows that It Was Mailed to the Correct Address?

The Board has held that there is a presumption of effective service by mail. *See Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995) *citing Powell v. C.I.R.*, 958 F.2d 53 (4th Cir.), *cert. denied*, 506 U.S. 965 (1992); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926) ("There is a presumption that public officers, including Postal Service employees, properly discharge their duties."). An unsupported denial of receipt is insufficient to support a motion to reopen in deportation proceedings. *Id.* Therefore, if the record shows that the mail was delivered to the correct address by the appropriate method, the court usually will presume that the notice was served.

The presumption of effective service can be overcome if the respondent demonstrates nondelivery or improper delivery by the Postal Service. *Id.* Nondelivery or improper delivery can be established by submitting substantial and probative evidence, such as documentary evidence from the Postal Service and affidavits. *Id.* For example, if there were ongoing problems with the mail delivery, you may want to provide details about the problems and affidavits from people with direct knowledge of the problem.

Because the statute no longer requires delivery by certified mail, the courts may apply a weaker presumption of delivery and lesser evidentiary requirements to rebut the presumption. *Ghounem v. Ashcroft*, 378 F.3d 740, 2004 U.S. App. LEXIS 15991 at * 14 (8th Cir. Aug. 4, 2004) (finding petitioner's sworn statement sufficient to rebut the presumption of delivery by regular mail). *See also Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003) (finding that INS could not invoke a presumption of notice where it used an erroneous zip code for an address); *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (noting that a sworn affidavit was sufficient to rebut the presumption of delivery where the petitioner had appeared at earlier hearings, and had no motive to avoid the hearing). *But see Gurung v. Ashcroft*, 371 F.3d 718, 722 (10th Cir. 2004) (noting that

the petitioner's conclusory statement was insufficient to meet the burden of proof to rebut the presumption of receipt of a notice "properly mailed to the authorized address").

What if the Respondent Did Not Receive *Oral Notice* of the Consequences of Failing to Appear?

The statute only provides for rescission of an *in absentia* order when the government fails to properly serve the respondent with *written* notice. However, respondents who did not receive oral warnings of the consequences of failing to appear may be able to reopen their cases even if the court properly entered an *in absentia* order of deportation. The leading case on this issue is *Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998). This case applies if:

> (1) No oral warnings were provided in the respondent's native language or a language the respondent understands. The oral warnings must give notice of the time and place of the proceedings and the consequences of failing to appear at the hearing.
>
> (2) Respondent is eligible for a form of relief that was unavailable at the time of the hearing.

In *Matter of M-S-*, the Board held that the limitations on reopening to rescind an *in absentia* order do not serve as limitations on reopening for other purposes. The Board focused on INA § 242B(e)(1) (pre-IIRIRA, April 1997) (now, INA § 240(b)(7)) which states that any respondent who is provided with oral notice, in a language he or she understands, of the time and place of the proceedings and of the consequences of failing to attend will be ineligible for various forms of relief, including adjustment of status and voluntary departure, for five years (now, ten years). INA § 240(b)(7); INA § 242B(c)(1), (e)(1) (pre-IIRIRA, April 1997). This section explicitly allows respondents to apply for relief when they were not verbally warned of the consequences of failing to appear for a hearing.

Therefore, respondents who did not receive oral warnings and are eligible for a form of relief that was unavailable to them at their last hearing can reopen their cases under the general motion to reopen rules. *See* 8 C.F.R. § 1003.23(b)(1) and (2). These provisions require that the motion be filed within 90 days of the final order of removal or deportation and that the respondent submit the application for relief with the motion to reopen. INA § 240(c)(6); 8 C.F.R. § 1003.23(b)(1). If a case is reopened pursuant to *Matter of M-S-*, the respondent cannot challenge the finding of deportability.

What Should You Look for in the Record of Proceedings?

A review of the record of proceedings (ROP) may provide evidence of lack of proper notice. Consider the following when reviewing the ROP:

- Are there any typos in the mailing address?

- Was the hearing date correct?

- Was the mailing address the last one provided by the respondent? Is there a change of address form that was not processed by the clerk's office?

- Is there evidence that the respondent received the charging document? Did the respondent sign the document? Is there a fingerprint?

- If the notice was returned to the court undelivered, was a reason for nondelivery provided?

- Was the notice mailed by the proper method (e.g., certified mail if applicable)?

- Did an attorney withdraw from the case? Was notice mailed to him or her in error?

II. EXCEPTIONAL CIRCUMSTANCES CASES

There are cases where the respondent received proper notice, but failed to appear for the hearing and was ordered removed or deported *in absentia* as a result. The immigration judge may rescind an *in absentia* order of removal or deportation if the respondent's failure to appear for the hearing was because of exceptional circumstances. INA § 240(b)(5)(C)(i); INA § 242B(c)(3)(A) (pre-IIRIRA, April 1997). In exclusion and deportation cases prior to June 13, 1992, a less stringent standard, "reasonable cause," applies. *See, e.g., Matter of Haim,* 19 I&N Dec. 641, 642 (BIA 1988).

Preliminary Issues:

Where to File the Motion to Reopen – The motion should be filed with the immigration court having administrative control over the Record of Proceedings. 8 C.F.R. § 1003.23(b)(1)(ii). Typically, this will be the court where the *in absentia* order of removal or deportation was entered.

Time for Filing the Motion to Reopen – A motion to reopen in removal proceedings or deportation proceedings initiated on or after June 13, 1992 must be filed within *180 days* of the entry of the *in absentia* order. INA § 240(b)(5)(C)(i); INA § 242B(c)(3)(A) (pre-IIRIRA, April 1997); 8 C.F.R. § 1003.23 (b)(4)(ii), (iii)(A)(1). A motion to reopen in exclusion proceedings or deportation proceedings before June 13, 1992 may be filed at anytime. *See* 8 C.F.R. § 1003.23(b)(4)(iii)(B); *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999); *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1159 (BIA 1999).

Although the Board has held that there is no exception to the filing deadline, the Second, Ninth, and Tenth Circuits have held that the filing deadlines are subject to equitable tolling. *Compare Matter of A-A-*, 22 I&N Dec. 140, 144 (BIA 1998); *Matter of Lei*, 22 I&N Dec. 113, 116 (BIA 1998), *with Riley v. INS*, 310 F.3d 1253,

1258 (10th Cir. 2002); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1225 (9th Cir. 2002); *Iavorski v. INS*, 232 F.3d 124, 130 (2d Cir. 2000); *Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097, 1100 n.3 (9th Cir. 1999). This means that the respondent may be able to file a motion to reopen after 180 days, particularly in situations where he or she did not know about the *in absentia* order because prior counsel was ineffective. *But see Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (finding without explanation that motion to reopen deadline not subject to equitable tolling). However, equitable tolling generally is available only where the person exercised due diligence in pursuing his or her immigration case. *See Scorteanu v. INS*, 339 F.3d 407, 413-14 (6th Cir. 2003); *Jobe v. INS*, 238 F.3d 96, 101 (1st Cir. 2001); *Iavorski*, 232 F.3d at 134.

Filing Fees – The filing fee for a motion to reopen is $110. 8 C.F.R. § 103.7(b).

Respondents who cannot afford the fee may request a fee waiver. 8 C.F.R. § 1003.24. The regulation states that "[a] properly executed affidavit or unsworn declaration made pursuant to 28 U.S.C. 1746 by the respondent/applicant must accompany the request for waiver of fees and shall substantiate the indigency of the respondent." *Id.*

Automatic Stay of Removal/Deportation – An automatic stay goes into effect when the motion is filed and remains in effect pending disposition of the motion by the immigration judge. INA § 240(b)(5)(C); *see also* INA § 242B(c)(3) (pre-IIRIRA, April 1997). In deportation cases, the stay remains in effect during the pendency of any BIA appeal of the decision on the motion to reopen. *Matter of Rivera*, 21 I&N Dec. 232, 234 (BIA 1996).

To alert the court and ICE to the applicability of the automatic stay provision, motions may indicate (in bold letters on the cover page and on the front page of the motion) that an automatic stay applies.

What Does "Exceptional Circumstances" Mean?

The Act states, "the term 'exceptional circumstances' refers to exceptional circumstances (such as the serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." INA § 240(e)(1); *see also* INA § 242B(f)(2) (pre-IIRIRA, April 1997).

The term "exceptional circumstances" was added to the Act by the Immigration Act of 1990 (effective June 13, 1992). Prior to that, the standard for determining whether an *in absentia* order should be rescinded was "reasonable cause" for failure to appear. *See, e.g., Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1158 (BIA 1999); *Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988). *See also De Jimenez v. Ashcroft*, 370 F.3d 783, 790 (8th Cir. 2004). This standard applies to deportation cases initiated before June 13, 1992 and exclusion cases. The Board has held that "exceptional circumstances" is a more stringent standard than "reasonable cause." *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999).

What Must the Respondent Do to Establish Exceptional Circumstances?

The Board uses a "totality of the circumstances" test to determine whether the respondent's reason for not attending the hearing is an exceptional circumstance. *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) *citing* H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 132 (1990); *Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996).

In general, the BIA will only find that an exceptional circumstance exists where:

- The respondent provides a detailed and plausible explanation for why he or she failed to appear.

- The respondent provides adequate documentation in support of the motion to reopen. If documentation is not available, the respondent should submit signed affidavits. *See Matter of J-P-*, 22 I&N Dec. 33, 34-35 (BIA 1998).

- The respondent attempted to contact the Immigration Court on the date of the hearing or provides an explanation for why he or she did not do so. *See Matter of J-P-*, 22 I&N Dec. 33, 35 (BIA 1998); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002); *Morales v. INS*, 116 F.3d 145, 149 (5th Cir. 1995).

It is very important to provide as much detail as possible and submit all evidence with the initial motion. Also, you should consider including as much information about the issues that the respondent plans to raise upon reopening and attach any applications for relief that have not been submitted. Remember that immigration judges have broad discretion to reopen cases. They will be more inclined to reopen cases where the respondent has a meritorious claim for relief or that there is strong argument challenging deportability and where the respondent has demonstrated a commitment to resolve his immigration case. *See, e.g.*, *Herbert v. Ashcroft*, 325 F.3d 68, 72 & n.1 (1st Cir. 2003) (noting that there was no meaningful delay by respondent); *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) (remanding the case for review on the merits where the petitioner "had no possible reason to try to delay the hearing," had a basis for relief, had previously attended all hearings, and where the deportation would break up a family or force U.S. citizen children overseas). Furthermore, courts are more likely to reopen the case if the respondent had attempted to contact the court prior to the hearing; therefore, in preparing clients for upcoming hearings, you may want to advise them to contact the court if they are delayed.

What is an Exceptional Circumstance?

The following is a non-exhaustive list of some of the cases where the Board or the circuit courts have addressed exceptional circumstances or reasonable cause for failure to appear.

Illness – Illness is an exceptional circumstance/reasonable cause, if the respondent provides adequate documentation. *See Matter of J-P-*, 22 I&N Dec. 33, 34 (BIA 1998)

(need documentation); *Matter of Singh*, 21 I&N Dec. 998, 1000 (BIA 1997) (stepson's illness is an exceptional circumstance); *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999) (serious illness requiring surgery is reasonable cause for failure to appear). *But see Lonyem v. U.S. Att'y Gen.*, 352 F.3d 1338, 1341 (11th Cir. 2003) (upholding the IJ's determination that a nurse's affidavit stating that petitioner had been treated for malaria the day before the hearing was not credible in the absence of further documentation and because he had failed to contact the immigration court on the day of the hearing); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 890 (9th Cir. 2002) (finding inadequate a hospital form that failed to indicate that petitioner's asthma attack was a "serious health condition").

Filing a Motion for Change of Venue/Continuance – Generally, filing a motion does not excuse the respondent's appearance at the hearing. *See Jian Jun Tang v. Ashcroft*, 354 F.3d 1192, 1195 (10th Cir. 2003); *Hernandez-Vivas v. INS*, 23 F.3d 1557, 1560 (9th Cir. 1994); *Patel v. INS*, 803 F.2d 804, 806 (5th Cir. 1986); *Maldonado-Perez v. INS*, 865 F.2d 328, 335 (D.C. Cir. 1989). *But see Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003) (IJ should not have entered in absentia order where attorney filed motion for continuance because he was ordered to appear in U.S. District Court at the time of immigration hearing); *Romero-Morales v. INS*, 25 F.3d 125, 130 (2d Cir. 1994) (IJ should have examined motion for change of venue before issuing *in absentia* order). The First Circuit found that there is no exceptional circumstance where the respondent assumed that his motion for change of venue would be granted because INS did not object. *See Georcely v. Ashcroft*, 375 F.3d 45, 50 (1st Cir. 2004). Also, where the respondent requested multiple continuances because his employment prevented him from attending the hearing, the BIA held that he had not established exceptional circumstances. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

Traffic/Car Trouble – The courts and the BIA have found that traffic and car trouble usually are not exceptional circumstances. *See Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996); *De Morales v. INS*, 116 F.3d 145, 148 (5th Cir. 1995); *Matter of S-A-*, 21 I&N Dec. 1050, 1051 (BIA 1997). However, the Board has indicated that a detailed (and well documented) explanation of why there was an extraordinary amount of traffic can establish an exceptional circumstance. *Matter of S-A-*, 21 I&N Dec. 1050, 1051 (BIA 1997). Where the court found that car trouble was not an exceptional circumstance, the respondents were faulted for failing to contact the immigration court and/or attempting to find an alternate means for getting to the court. *See De Morales v. INS*, 116 F.3d 145, 149 (5th Cir. 1997). Traffic, when combined with other factors, including that the attorney timely notified the IJ that he had a conflict, may result in exceptional circumstances. *Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003); *see De Jimenez v. Ashcroft*, 370 F.3d 783, 789-90 (8th 2004) (traffic and multitude of other factors constitute reasonable cause for failure to appear for exclusion hearing).

Arriving Late – The Ninth Circuit has held that the court should not deny reopening of an *in absentia* deportation order where the petitioner, who had a basis for relief, arrived late and where the result would be unconscionable. *See Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002). Further, arriving slightly late for a hearing may not mean that the

respondent failed to appear, especially since the IJ was still on the bench when the respondent arrived. *See Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999); *see also Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003). Likewise, the Seventh Circuit has excused a respondent's late arrival where the respondent was denied a meaningful opportunity to be heard. *See Nazarova v. INS*, 171 F.3d 478, 480 (7th Cir. 1998). *But see Thomas v. INS*, 976 F.2d 786, 790 (1st Cir. 1992) (not reasonable cause where respondent and counsel arrived ten minutes after IJ entered order of deportation). If a client is going to be late to court, it is advisable to contact the court.

Ineffective Assistance of Counsel – The BIA has held that ineffective assistance of counsel can be an exceptional circumstance. *Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996). However, the Board also has held that the respondent must comply with the requirements for establishing ineffective assistance of counsel as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1996). *See Matter of Rivera*, 21 I&N Dec. 599, 607 (BIA 1996). Some of the circuit courts have adopted a flexible application of the *Lozada* requirements. For a discussion of the *Lozada* requirements and the developments in the circuit courts, please see AILF's April 2002 Practice Advisory entitled, *Protecting Your Client When Prior Counsel Was Ineffective: Expanding the Bounds of Lozada* (http://www.ailf.org/lac).