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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
CHARLOTTE IMMIGRATION COURT

****

In the Matters of	**) IN PROCEEDINGS**
	)
	) A
	) A
Respondents	)

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

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NOW COMES, the Respondent, , by and through undersigned counsel, Anton M. Lebedev, and respectuflly moves this Honorable Charlotte Immigration Court to rescind her *in absentia* removal order and to reopen the removal proceedings *sua sponte*.[1] In support, the Respondent alleges the following:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent is a citizen and national of El Salvador. On 25 November 2016, Respondent entered the United States at or near Hidalgo, Texas. Upon apprehension, she demanded a credible fear interview. On 27

[1] Rsepondent further moves this Honorable Court to rescind her rider daughter's *in absentia* removal order.

November 2016, Respondent was charged with inadmissiblity by a Notice to Appear (NTA). The NTA did not contain a date and time of her hearing. A separate notice was sent on 21 August 2017, requesting the Respondent to appear in Charlotte Immigration Court on 4 April 2018 at 1:00PM. When the Respondent failed to appear at the hearing, the Immigration Judge issued an *in absentia* order for her removal from the United States to El Salvador.

On 29 April 2021, Respondent was deemed to be prima facie eligible for Violence Against Women (VAWA) relief by the United States Citizenship and Immigration Service (USCIS). On 11 May 2021, Respondent requested the government to consent to reopen her removal proceedings. While the government did not consent, on 3 June 2021, the goverment indicated that it will leave the decision on the ultimate requested relief to the discretion of the Immigration Court.

ARGUMENT

A. The Respondent did not receive proper notice of her initial appearance in Immigration Court.

Pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii), "an alien ordered removed *in absentia* can file a "motion to reopen ... *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) of this title. . ." A putative notice to

appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a "notice to appear under section 1229(a)" Pereira v. Sessions, 138 S. Ct. 2105, 2113-14 (2018).

While Pereira was previously interpreted as allowing multiple documents to provide adequate notice, the United States Supreme Court has since rejected such rule, holding that a sufficient notice to appear must be a single document containing all the required information. See Niz-Chavez v. Garland, 141 S.Ct. 1474 (2021). As the Respondent's notice of appear did not contain the specific time of her initial appearance, it did not provide the Respondent adequate notice of her only scheduled appearance and she is entitled to rescind her final order of removal pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii). Id.

B. This Court should reopen the Respondent's removal proceedings *sua sponte*.

The Immigraiton Courts and the BIA are allowed to "reopen proceedings *sua sponte* in exceptional situations," In re J-J, 21 I. & N. Dec. 976, 984, Interim Decision (BIA) 3323, 1997 WL 434418 (BIA July 31, 1997), where the applicant has "demonstrate[d] that such a situation

exists," In re Beckford, Interim Decision (BIA) 3425, 2000 WL 41584 (BIA Jan. 19, 2000) (unpublished).[2]

Sua sponte reopening is justified when it will serve the interests of justice. See Matter of X-G-W-, 22 I&N Dec. 71, 73 (BIA 1998) (finding that *sua sponte* reopening is warranted in "unique situations where it would serve the interest of justice"); see also Matter of Farinas, 12 I&N Dec. 46, 472 7(BIA 1967) (finding that a prior deportation order "can and must" be examined upon a showing of a gross miscarriage of justice); Matter of Malone, 11 I&N Dec. 730, 731 (BIA 1966) (same). In this case, such circumstances exist.

USCIS determined that the Respondent is prima facie eligible for VAWA-based relief. However, the Respondent is not eligible to otherwise reopen the proceedings due to the *in absentia* nature of the removal order. Moreover, it appears that the Respondent was in an abusive relationship within a relevant time of her missing court. Furthermore, without being granted the requested relief, the Respondent will not be able to obtain

[2] The BIA appears to accept the phrase "exceptional circumstances " as a substitute for the phrase "exceptional situation." See, e.g., In re G-D-, Interim Decision (BIA) 3148, 1999 WL 1072237 (BIA Nov. 23, 1999) (unpublished) (citing Motions and Appeals in Immigration Proceedings, 61 Fed.Reg. 18,900, 18,902 (1996) for the proposition that "(S)ection 3.2(a) of the rule provides a mechanism that allows the Board to reopen or reconsider sua sponte and provides a procedural vehicle for the consideration of cases with exceptional circumstances "); In re H-A-, Interim Decision (BIA) 3394, 1999 WL 325675 (BIA May 25, 1999) (unpublished) (characterizing Matter of J-J- as "holding that reopening sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations to prevent hardship").

permanent residence without departing the United States for a period of five years. INA § 212(a)(6)(B). No I-212 waiver is available for this bar. As evidenced by the attached country condition reports, the country conditions in El Salvador are dismal and it is not in the Respondents' interests to return to El Salvador to await consular processing. In fact, the Respondent previously contended that she suffered persecution in El Salvador.

The Respondent does not have any remarkable criminal history and is obviosuly current not a priority for removal from the United States. As far as the rider repsondent is concerned, she was too young to be at fault for missing court. Granting the Respondent *sua sponte* relief will also obviate the need to litigate the Pereira and Niz-Chavez issue in this context. In sum, the Respondent demonstrated the "exceptional circumstances" necessary to reopen her removal proceedings. In re J-J, 21 I. & N. Dec. at 984.[3]

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Charlotte Immigraton Court reopens her removal proceedings, rescinds her *in absentia* order of removal, and grants her any and all other relief that it deems just and proper given the circumstances at hand

[3] Respondent notes that there is no requirement for her to attached EOIR-42B application for her *sua sponte* reopening request. The Respondent does even need to file an EOIR-42B application. She can either adjust status in removal proceedings upon the approval of her I-360 petition or her proceedings can be terminated upon such approval to permit her to seek relief with USCIS.

Respectfully submitted the 2nd day of August, 2021.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing **Motion to Reopen and to Rescind *In Absentia* Removal Order** and the attachments on the Department of Homeland Security through e-service on ICE/DHS – Office of Chief Counsel in Charlotte, North Carolina.

This the 2nd day of August, 2021.

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[PROPOSED] ORDER OF THE IMMIGRATION COURT

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Upon considering the Respondents' Motion to Reopen and to Rescind *In Absentia* Removal Order, **IT IS HEREBY ORDERED** that the same motion be:

[ ] **GRANTED**

[ ] **DENIED**

IT IS SO ORDERED, this the ____ day of _____, 2021.

_____
Immigration Judge Presiding