APPENDIX A.
TEMPLATE: SAMPLE LETTER TO INEFFECTIVE COUNSEL

Template A1: Sample Letter to Ineffective Counsel

[LETTERHEAD]

[DATE]

[FORMER ATTORNEY'S ADDRESS]

RE: [CLIENT/A#]

Dear [MR./MS.] [ATTORNEY]:

My office has been retained to represent [CLIENT] in connection with a Motion to Reopen her removal proceedings. As described in detail in the attached affidavit and complaint to [LICENSING AUTHORITY], [CLIENT] contends that your prior representation of her in removal proceedings was deficient and amounted to ineffective assistance of counsel. Accordingly, our office intends to file a Motion to Reopen with the [NAME OF IMMIGRATION COURT OR BOARD OF IMMIGRATION APPEALS] on [FUTURE DATE].

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), provides that prior counsel must be informed of the allegations leveled against [HIM/HER] and be given an opportunity to respond. I have enclosed [CLIENT]'s affidavit and bar complaint detailing the deficiencies in your prior representation. If you want your response to these allegations to be submitted together with [CLIENT]'s Motion to Reopen, your response, if any, must be received by our office no later than [DAY BEFORE FILING OR OTHER REASONABLE DATE] at the above address.

Sincerely,

[SIGNATURE]
[NEW COUNSEL]

Enclosures:

1. Affidavit of [CLIENT]
2. Complaint to [LICENSING AUTHORITY]

APPENDIX B. TEMPLATES: SAMPLE MOTION TO RESCIND AND REOPEN FILING

Template B1: Cover Letter

[FULL NAME]
[CLIENT ADDRESS]

[DATE]

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court
[IC ADDRESS]

Re: [FULL NAME], A XXX-XXX-XXX
[CHILD NAME], A XXX-XXX-XXX
Motion to Rescind and Reopen *In Absentia* Removal Orders

Dear Immigration Judge:

Enclosed please find a Motion to Rescind and Reopen *In Absentia* Removal Orders dated [date], for the above-named individuals. Please do not hesitate to contact me by phone ([Phone Number]) or email ([EMAIL ADDRESS]) with any questions.

Thank you for your time and consideration.

Sincerely,

[ATTORNEY NAME]
[ADDRESS]
[PHONE]
[FAX]
[EMAIL]

EOIR # XXXXXXXX

Cc: Office of Chief Counsel

Enclosures:

[LIST ENCLOSED DOCUMENTS]

Template B2: Cover Page

[ATTORNEY NAME]
[ADDRESS]
[PHONE]
[FAX]
[EMAIL]
EOIR # XXXXXXXX

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[IMMIGRATION COURT CITY, STATE]

In the Matter of:	)	
[FULL NAME]	)	**File No. A XXX-XXX-XXX**
[CHILD NAME]	)	**File No. A XXX-XXX-XXX**
Respondents	)	

Post-Decision Motion

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

NO FEE REQUIRED PER 1003.24(b)(2) AS MOTION BASED ON ASYLUM

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

[DATE]

Template B3: MTRRR

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[IMMIGRATION COURT CITY, STATE]

In the Matter of:	
[FULL NAME]	**File No. A XXX-XXX-XXX**
[CHILD NAME]	**File No. A XXX-XXX-XXX**
Respondents	

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

Respondents, [FULL NAME] and [CHILD NAME], respectfully request through this timely motion that this Court rescind its [DATE] *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 [1) THIS FAMILY DID NOT RECEIVE NOTICE OF THEIR [HEARING DATE] HEARING. 2) THIS FAMILY WAS UNABLE TO ATTEND THEIR [HEARING DATE] HEARING DUE TO EXCEPTIONAL CIRCUMSTANCES.] Ex. A, [FULL NAME] Decl. at ¶ #. Instead, Ms. [NAME] received a notice for an immigration court hearing that listed [DATE] as her first court date. Because Ms. [NAME]'s failure to appear was due to [1) LACK OF NOTICE 2) EXCEPTIONAL CIRCUMSTANCES 3) LACK OF NOTICE AND EXCEPTIONAL CIRCUMSTANCES], her removal from the United States and that of her minor [CHILD NAME], is automatically stayed until such a time as the Court renders a decision. INA § 240(b)(5)(C).

Statement of Facts and Procedural History

As described in her attached declaration, Ms. [NAME] came to the United States with her

minor CHILD[REN] to escape persecution based on [CREDIBLE FEAR CLAIM]. [IF CLAIM SEEMS VERY STRONG, SLIGHT EXPANSION ON CLAIM ELEMENTS (DEATH THREATS, ETC.) COULD BE APPROPRIATE.] Ex. B, Credible Fear Determination. She was apprehended upon arrival in the United States and held at [DETENTION FACILITY] in [CITY, STATE] for [TIME PERIOD]. She was given a Credible Fear Interview, at which an asylum officer determined that she had a credible fear of returning to [COUNTRY OF ORIGIN]. *See* Ex. B.

[Option 1] She then received a Notice to Appear. Ex. C. However, this Notice to Appear [DID NOT STATE A DATE AND TIME OF HER FIRST IMMIGRATION COURT HEARING OR WAS FILED IN THE [CITY] IMMIGRATION COURT AND INSTRUCTED HER TO APPEAR AT A HEARING TO BE HELD IN THE DETENTION CENTER VIA VIDEOCONFERENCE.] *Id.* Before her first master calendar hearing before the [CITY] Immigration Court, Ms. [NAME] was released. *Id.* ¶ #.

[Option 2] Ms. [NAME] requested a bond hearing, collected and submitted documents in support of that request to the Immigration Court, and appeared at a video conference bond hearing before The Honorable [JUDGE NAME] located at EOIR in [CITY, STATE]. Ex. A at ¶ #. On [DATE], Judge [JUDGE NAME] granted Ms. [NAME]'s request for release on bond, and transferred venue to the Immigration Court in [CITY CLIENT PLANNED TO RESIDE IN]. *Id.* ¶ #. The [IC CITY] Court scheduled her for a master calendar hearing on [DATE]. *Id.* ¶ #.

Ms. [NAME] provided the Department of Homeland Security ("DHS") with the address at which she and her child intended to reside: [ADDRESS]. Ex. A at ¶ #. After their release on [DATE], [FULL NAME] and [CHILD NAME] resided at this address for [LENGTH OF TIME]. *Id.* ¶ #.

Template B3: MTRRR

Venue was then transferred to this Court either *sua sponte* or by DHS motion.

[Option 1: wrong address, told ICE about change but not IC]

Ms. [NAME] has been in regular contact with Immigration and Customs Enforcement (ICE). Ex. A at ¶ #. When Ms. [NAME] left detention, ICE officials told her she needed to go to her ICE check in on [DATE] in [CITY]. *Id.* ¶ #. Upon arriving in [CITY], Ms. [NAME] went to ICE's offices before she had her first check in, on or about [DATE]. *Id.* ¶ #. Ms. [NAME] then went to her ICE check-in on [DATE]. *Id.* ¶ #. On [DATE], Ms. [NAME] also notified ICE that she would be moving to [NEW CITY, STATE]. *Id.* ¶ #. She did not submit a Form EOIR-33, Change of Address, to the Immigration Court because she believed informing ICE of her new address was all that was required. *Id.* ¶ #. Ms. [NAME] was told she would receive something in the mail with information about her next check-in with ICE, so she checked the mail frequently, but did not receive any mail from either the immigration court or ICE while she lived in [NEW CITY]. *Id.* ¶ #. [DESCRIBE ANY SUBSEQUENT MOVES, IF APPLICABLE.]

Nervous that she had not received a notice from ICE about an upcoming check-in, Ms. [NAME] went in person to ICE's offices in [NEW CITY] on [DATE]. [OR CALLED ICE OFFICE ON [DATE].] *Id.* ¶ #. An ICE officer told her that she also had to change her address with the immigration court. *Id.* ¶ #. This was the first time she realized she also needed to change my address with the immigration court, not just with ICE. *Id.* ¶ #. [DESCRIBE HOW CLIENT LEARNED OF ORDER OF REMOVAL (ICE, IC LETTER, VOLUNTEER, ETC.)]

[Option 2: right address, but still didn't get notice for some reason]

At the time of release, Ms. [NAME] was informed that she would need to report to ICE in [CITY, STATE] on [DATE]. Ex. A at ¶ #. On [DATE], Ms. [NAME] reported to ICE as she was

instructed to do upon release. *Id.* ¶ #. The ICE officer who interviewed Ms. [NAME] on [DATE] did not inform her that she had an Immigration Court hearing on [DATE] in [IC CITY] Immigration Court. *Id.* ¶ #. The [NAME] family never received a hearing notice at [ADDRESS] informing them they needed to appear at the [DATE] hearing. *Id.* ¶ #. The [NAME] family first learned of this hearing on [DATE], when [REASON]. *Id.* ¶ #. Ms. [NAME] was informed that the EOIR hotline reported that she had been ordered removed on [DATE]. *Id.* ¶ #. The volunteer let Ms. [NAME] know that she could file a Motion to Reopen, and she discussed the benefits of doing so with the volunteer. *Id.* ¶ #.

[Option 3: Sort of got notice, but could not attend hearing due to exceptional circumstances (tried to change venue but could not do so in time.)]

Ms. [NAME] and her CHILD[REN] ultimately had to leave [ADDRESS] because [REASON]. Ex. A at ¶ #. On [DATE], Ms. [NAME] moved to [ADDRESS, CITY, STATE]. *Id.* ¶ #. On [DATE], Ms. [NAME] mailed a change of address form to the Immigration Court in [CITY], and a copy to the DHS/ICE Office of Chief Counsel. *Id.* ¶ #. She sought *pro se* assistance from a non-profit to file a motion to change venue to the Immigration Court in [NEW STATE]. *Id.* ¶ #. The Immigration Court denied that motion because they did not attach sufficient evidence of Ms. [NAME]'s residence in [NEW STATE]. [ADD ANY OTHER INFORMATION ABOUT CLIENT'S ATTEMPTS TO CHANGE VENUE, INCLUDING SUBSEQUENT MOTIONS TO CHANGE VENUE, CALLS TO THE IC OR ICE, ETC.] Despite her efforts, on [DATE], the Court ordered Ms. [NAME] removed *in absentia*.

[Option 4: Got notice, but could not attend hearing due to other exceptional circumstances.]

[STATE SUMMARY OF RELEVANT FACTS, HIGHLIGHTING ANY AND ALL CHALLENGES OR OBSTACLES FACED BY CLIENT. SUPPORT WITH EXHIBITS WHEN POSSIBLE.]

[Option 5: No notice because IC did not mail notice to foreign address. This may be fact specific, so modify the below as needed.]

On [DATE], a border patrol agent served a Notice to Appear on Ms. [NAME]. The NTA charged her with being inadmissible to the United States for being present without admission or parole under INA § 212(a)(6)(A)(i). Notably, the NTA indicates that Ms. [NAME] would be provided a copy of the Immigration Court change of address form, Form EOIR-33. Ex. C. No such form was provided to Ms. [NAME]. Ex. A at ¶ #. The NTA she was issued did not contain a hearing date or a hearing location. Ex. C. Ms. [NAME] anticipated getting a notice of the hearing at the address she provided to immigration officials. Ex. A at ¶#.

On [DATE], CBP filed two documents with the Immigration Court: the Notice to Appear (Ex. A) and the Form I-213 (Ex. X). Although the Form I-213 contains an address at which Ms. [NAME] could be contacted, the Immigration Court did not register that address. Likewise, the CBP failed to list the [COUNTRY OF ORIGIN] address on the Notice to Appear. On [DATE], the Immigration Judge held a hearing and ordered Ms. [NAME] removed *in absentia*. The Immigration Judge did not provide any notice of the hearing in advance. According to the *in absentia* order, "[QUOTE FROM ORDER IF POSSIBLE]" *See* Ex. X, Order of Immigration Judge. The *in absentia* removal order was never served on Ms. [NAME]. Ex. A at ¶ #.

[Option 6: No notice because of ineffective counsel.]

[SUMMARIZE HISTORY OF CONTACT WITH COUNSEL, USING DATES WHEN POSSIBLE, SUPPORTING WITH DOCUMENTS WHEN POSSIBLE.]

Legal Argument

I. [Full name] and [child name] have demonstrated that their failure to appear was due to lack of notice.

Template B3: MTRRR

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. [NAME] and her CHILD[REN] have demonstrated they did not receive notice. *Matter of M-R-A-*, 24 I. & N. Dec. 665, 673-74 (BIA 2008).

A. [FULL NAME] and [CHILD NAME] 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. [NAME] duly informed DHS of her address as instructed prior to her release on bond. Ex. A at ¶ #. Ms. [NAME] diligently checked her mail. *Id.* ¶ #.

[If client filed an updated address with DHS, but not with the immigration court, use the following, modifying as needed. If not, delete the following paragraph.]

At neither her release nor her [DATE] check-in was Ms. [NAME] informed she needed to also update her address with the Immigration Court, nor was she provided a copy of form EOIR-33 with which to do so. Ex. A at ¶ #. Furthermore, the NTA was in English, and Ms. [NAME] relied on the ICE officer's explanation of the form in Spanish. *Id.* ¶ #. Because the [NAME] family was never put on notice of the consequences for failing to provide the Immigration Court with their address, and never received notice of their hearing, an *in absentia* removal order is inappropriate. *See Matter of G-Y-R-*, 23 I. & N. Dec. 181 (BIA 2001) (finding that an *in absentia* removal order cannot be entered where respondent has not received NTA). Moreover, Ms. [NAME] could reasonably assume that DHS would update her address with the immigration court, an assumption bolstered by the fact that venue was transferred in this case without a motion by the respondents.

In light of these facts, the address information Ms. [NAME] provided to DHS satisfies the [NAME] family's obligation under INA § 239(a)(1)(F).

[If client did not receive notice because of ineffective counsel, make sure that you add in the statement of facts when she retained the counsel. Use section A, modifying as needed. Use the below section B, modifying as needed. Change the second section B to section C, again modifying as needed.]

B. Prior counsel was ineffective in failing to notify *[NAME]* of her hearing date.

The Immigration and Nationality Act provides that an alien may file one motion to reopen proceedings, and that the motion shall "state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material." INA § 240(c)(7)(A)-(B). The Board has held that any right a respondent in deportation proceedings may have to counsel is grounded in the Fifth Amendment guarantee of due process. *Matter of Lozada*, 19 I. & N. Dec. 637, 638 (BIA 1988) (citing, *inter alia*, *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986)). In *Lozada*, the Board held that ineffective assistance of counsel is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case. *Id.* The Board in *Lozada* set forth the circumstances under which an *in absentia* removal order may be rescinded and proceedings reopened based on ineffective assistance of counsel, viz., that the motion be supported by an affidavit of the aggrieved respondent (*see* Ex. A), that prior counsel be given an opportunity to respond (*see* Certificate of Service), and that the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities (SEE EX. X, DISCIPLINARY COMPLAINT).

The legal standard in deciding ineffective assistance of counsel claims in the immigration context is whether counsel's performance may have affected the outcome of the proceedings. *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (reversing Board's denial of motion to reopen for ineffective assistance where the Board had erroneously held that respondents must show that the outcome of the case would have been "different" and not simply "affected"). The Board has also held

that an order of deportation issued following a hearing conducted *in absentia* may be rescinded where the alien establishes that her failure to appear was the result of ineffective assistance of counsel, which the Board held amounted to "exceptional circumstances" within the meaning of section 242(B)(f)(2) of the Act. *In Re Grijalva-Barrera,* 21 I. & N. Dec. 472 (BIA 1996). Here, there can be no doubt that prior counsel's failure to communicate with Ms. [NAME] about her [DATE] hearing prejudiced her by directly causing her failure to appear. Ms. [NAME] submits that, because she would not have failed to appear for the hearing had prior counsel communicated the date and time of the hearing to her, or at the very least communicated that [S/HE] was no longer representing her, the outcome of the proceeding was thus affected by counsel's failure, which constituted ineffective assistance, and therefore exceptional circumstances under the Board's holding in *Grijalva-Barrera.*

B. *[FULL NAME]* and *[CHILD NAME]* would have attended the hearing had they been notified.

Ms. [NAME]'s actions in [ATTENDING ICE CHECK-INS, GOING TO ICE CHECK-INS WHEN SHE WAS CONCERNED ABOUT NOT RECEIVING MAIL FROM ICE AND CONSULTING AN ATTORNEY TO HELP HER FILE A MOTION TO CHANGE VENUE] demonstrate that she would have attended her [DATE] Immigration Court hearing had she been informed of the hearing prior to it taking place. Ex. A at ¶ #. In *Matter of M-R-A-*, the Board of Immigration Appeals ("Board") held that the respondent was entitled to have his proceedings reopened after an 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. [NAME] and her CHILD[REN] seek relief in the form of asylum, have a positive credible fear determination, complied with INA § 239(a)(1)(F) and are making a prompt request to reopen proceedings. Moreover, this Court will likely agree that Respondent has been

much more diligent than many in [CONSTANTLY CHECKING HER MAIL, VISITING ICE OFFICES, AND TRYING TO FIND AN ATTORNEY TO HELP HER WITH HER CASE. || ANY OTHER SHOW OF DILIGENCE WOULD BE USEFUL HERE.]

[If the client did not receive notice because she provided a foreign address, delete everything under section A and B, and use the following template.]

The Immigration Judge was required to have provided Ms. [NAME] notice of the hearing and the Immigration Judge should not have proceeded *in absentia* because s/he did not provide notice. Ms. [NAME] was entitled to receive notice of the hearing because she had provided a statutorily compliant address to receive notices about the hearing. The plain language of the statute provided Ms. [NAME] with a right to have a written notice of her removal hearing because notice is always required under INA § 240(b)(5)(A) unless the exception under INA § 240(b)(5)(B) applies. Congress created a single exception to the statutory notice requirement. If a noncitizen does not provide an address compliant with § 239(a)(1)(F), then no written notice of the removal hearing is required. *See* INA §§ 239(a)(2)(B), 240(b)(5)(B).

Section 239(a)(1)(F) sets forth the address reporting obligations of a noncitizen. The address must be one at which the noncitizen "may be contacted" respecting removal proceedings. The statute is aimed at protecting a noncitizen's right to notice by authorizing the use of an address of the noncitizen's choice. It does not limit the address to the noncitizen's physical, residential address. There is no text that limits the address to a U.S. address. The only limitation is that the noncitizen must be able to be contacted through that address. In fact, the statute plainly provides that a foreign address can be used. Under § 240(b)(5)(E), *in absentia* proceedings may be held against noncitizens awaiting a hearing who are physically outside the United States. *See also Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996) (describing pre-1996, historical practice of respondents being physically outside the US for exclusion hearings and use of foreign address). The regulations and government forms echo the "may be contacted" language of the statute. The regulations refer to the address as the address where the noncitizen "can be contacted." *See* 8

C.F.R. § 1003.15(d)(1). Nothing in the regulations indicates that a U.S. address is required. If a foreign address is provided, then the Immigration Judge must give written notice of the time and place of the hearing.

Ms. [NAME] was entitled to notice of the removal hearing because she provided a statutorily compliant address. Ms. [NAME] provided a [COUNTRY OF ORIGIN] address to receive notifications. Her address satisfies all the requirements of INA § 239(a)(1)(F). It was a written notice of an address at which she "may be contacted" respecting the removal proceedings. Once a compliant address is given, the Immigration Judge must provide written notice of the time and place of the removal hearing. It is a mandatory obligation that the Immigration Judge was not free to disregard. Rather, the Immigration Judge is required to send notification of the hearing to that address. The DHS and former INS have a long history of providing notices to foreign addresses. *See Matter of Sanchez-Avila*, 21 I. & N. Dec. at 445 (mailing notice of hearing to Mexican address). If the court has an address at which the Respondent may be contacted, then the court is required to use it.

Alternatively, if a U.S. address was required, the failure to provide notice of that requirement constitutes a separate, alternative ground for reopening the proceedings. Ms. [NAME] was entitled to notice of that requirement.

Ms. [NAME] cannot be held to the notification obligations until the government gives her notice of those obligations by serving her with a Notice to Appear. *Matter of G-Y-R-*, 23 I. & N. Dec. 181, 184-87 (BIA 2001); *see also Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1006 (9th Cir. 2014) (determining that "even aliens who have been served an NTA cannot be held to the address obligation in § 1003.15(d)(1) because the NTA does not mention it."). Therefore, unless a NTA directly notifies an alien of her obligation to provide an U.S. address, the alien is not obliged to do so.

Here, Ms. [NAME] was not provided with any notice that she was required to provide the Immigration Court with a U.S. address. Instead, Ms. [NAME] was required to provide her "full mailing

address" which is an address at which she "may be reached". There is no language in the notices that would indicate that a U.S. address was required. Therefore, Ms. [NAME] could not be in default of the address reporting obligations because the statutorily required notifications were not properly provided.

II. [FULL NAME] presents 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). THE TERM "EXCEPTIONAL CIRCUMSTANCES" IS DEFINED AS "CIRCUMSTANCES SUCH AS BATTERY OR EXTREME CRUELTY TO THE ALIEN OR ANY CHILD OR PARENT OF THE ALIEN, 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 [EVEN IF] BEYOND THE CONTROL OF THE ALIEN." INA § 240(E)(L). [[YOU MAY WANT TO DELETE THE ABOVE IF THE EXCEPTIONAL CIRCUMSTANCES DO NOT SEEM TO FIT IN THAT CATEGORY.]] The applicable standard for determining exceptional circumstances is consideration of the totality of the circumstances. *See Matter of W-F-*, 21 I. & N. Dec. 503, 509 (BIA 1996). Ms. [NAME]'s failure to appear at the [DATE] master calendar hearing was due to exceptional circumstances. As such, she moves this Court to rescind the *in absentia* order issued on that day, and to reopen these removal proceedings.

[Option 1: If client did not attend hearing due to obvious exceptional circumstances, such as illness or death in the family.]

Template B3: MTRRR

[JUST EXPLAIN THE CIRCUMSTANCES, REFERRING TO THE DECLARATION AND SUPPORTING DOCUMENTS AS NECESSARY.]

[Option 2: If there was no notice due to clerical error, client did not receive mail even though client provided correct address, client did not receive mail because changed address with ICE and not IC, etc., the following is the basic template.]

Assuming *arguendo* that Ms. [NAME] did receive notice, which she does not concede, there were exceptional circumstances that prevented her from attending her [DATE] hearing. In an unpublished decision in the matter of *Aminadad Natanael Mendez-Perez*, No. A099 623 872 (BIA Oct. 30, 2013) (*see* Ex. D), the Board found that an alleged clerical error by the immigration court advising respondent to appear a day after his hearing constituted 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*, No. A099 273 416 (BIA May 31, 2013) (*see* Ex. E).

Ms. [NAME] provided a correct address to ICE while she and her CHILD[REN] were detained at [DETENTION FACILITY] in [CITY, STATE]. Since her release on bond, she has diligently checked in with ICE and made sure to change her address with ICE. Given that she received a Notice of Hearing on or around [DATE 1] for a hearing on [DATE 2], it seems that there was likely a clerical error, either in the Notice of Hearing or the issuing of the *in absentia* removal order. Therefore, this case is analogous to *Aminadad Natanael Mendez-Perez*, No. A099 623 872 (BIA Oct. 30, 2013) (Ex. D) and *Marie N. Peli*, No. A099 273 416 (BIA May 31, 2013) (Ex. E) as Ms. [NAME] seems to have experienced an Immigration Court clerical error in addition to a potential U.S. Post Office error leading her to be unaware of her hearing date, causing her to miss it. The Board has also 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. at 673 (BIA 2008). This holding indicates that the Board has specifically contemplated that problems with the mail can and do occur. Ms. [NAME]'s case should therefore be reopened due to the exceptional circumstances that led to her lack of prior notice of her hearing.

Template B3: MTRRR

The Ninth Circuit Court of Appeals, in whose jurisdiction this case arises, has held that it is incumbent upon the Court to "look to the 'particularized facts presented in each case' in determining whether the petitioner has established exceptional circumstances." *Singh v. INS*, 295 F.3d 1037 (9th Cir. 2002) (*quoting Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000)). In *Singh*, the Court found that the facts that the petitioner had appeared at several hearings in the past, had requested a change of venue when he believed he was going to move, and appeared eligible to apply for discretionary relief to mitigate in favor of reopening. *Id.* Similarly, the First Circuit Court of Appeals has held that an applicant's unintentional failure to appear can constitute an exceptional circumstance which warrants rescission and reopening. In *Kaweesa v. Gonzales*, 450 F.3d 62 (1st Cir. 2006), the Court held that an asylum applicant who had mistakenly believed her hearing was scheduled four days after the actual date had established exceptional circumstances where she had diligently pursued her application up until that point, and promptly sought legal redress after she discovered her error. The *Kaweesa* Court found that it did not "appear that Kaweesa's failure to appear was deliberate or due to a desire to delay proceedings." *Id.* at 70. For that reason, and because the harm to her in losing the opportunity to pursue her asylum claim paled in comparison to the inconvenience to the government in reopening it, the Court reversed the denial of the motion to reopen, and remanded for a hearing on the merits of her claims for relief from removal. *Id.* at 70-71.

The *Kaweesa* Court emphasized that, "in deciding the validity of a claim of exceptional circumstances, the 'totality of the circumstances must be considered.'" *Id.* at 68 (quoting *Matter of B-A-S-*, 22 I. & N. Dec. 57, 58-59 (BIA 1998)). Specifically, it posited that relevant factors would include: the existence of supporting documents; the non-citizen's efforts in contacting the Court; her promptness in filing a motion to reopen; the strength of her underlying claim; the harm she would suffer if the motion were denied; and the inconvenience the government would suffer if the motion were granted. *Id.* at 68-69.

Ms. [NAME]'s case is precisely analogous to *Singh* and *Kaweesa*; all of the factors which the First and Ninth Circuits identified in those cases mitigate in favor of reopening in Ms. [NAME]'s removal proceedings: She has asserted her fear of return to [COUNTRY OF ORIGIN] and her desire to apply

for asylum repeatedly and consistently since her apprehension at the U.S./Mexico border approximately [NUMBER] months ago. She has been deemed by an [IMMIGRATION JUDGE OR ASYLUM OFFICER] to have a credible fear of persecution on account of a protected ground. And since her release from detention, she has pursued her case diligently, and has done everything possible to comply with this country's rules and procedures. [[FOR EXAMPLE: SHE FILED A CHANGE OF ADDRESS FORM WITH THE COURT WHEN SHE MOVED FROM [LOCATION 1] TO [LOCATION 2], AND SERVED A COPY ON THE OFFICE OF CHIEF COUNSEL. SHE RETAINED PRIVATE COUNSEL TO HELP FILE A PRO SE MOTION TO TRANSFER VENUE TO [LOCATION 2] AND WHEN THAT MOTION WAS DENIED, SHE WENT BACK TO THE ATTORNEY FOR ASSISTANCE WITH A SECOND MOTION. SHE FOLLOWED UP ON THAT SECOND MOTION DIRECTLY WITH THE COURT, LEAVING NUMEROUS MESSAGES AND SPEAKING WITH COURT STAFF DURING THE FIVE DAYS PRIOR TO THE [DATE] HEARING. CALLS WERE ALL SHE COULD REASONABLY DO IN THE CIRCUMSTANCES AS SHE LACKED FINANCIAL MEANS TO PURCHASE AIRPLANE TICKETS FOR HERSELF AND HER SON TO FLY THE 3,000 MILES FROM [LOCATION 2] TO [LOCATION 1] TO ATTEND THE HEARING.]]

The inconvenience to the Court and DHS in reopening proceedings and allowing her to pursue her applications for relief pales in comparison to the equitable factors at play.

III. In the alternative, the Court should reopen these proceedings sua sponte.

Even if this Court is not persuaded that this matter should be reopened due to the lack of actual notice resulting from exceptional circumstances, the Court should reopen these proceedings *sua sponte*. In addition to reopening a case pursuant to the INA, an Immigration Judge may at any time reopen a proceeding in which he or she has made a decision. 8 C.F.R. § 1003.23(b)(1). The Board has held that this *sua sponte* authority is "not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, when enforcing them might result in hardship." *Matter of J- J-*, 21 I. & N.

Dec. 976, 984 (BIA 1997). *Sua sponte* authority is "an extraordinary remedy reserved for truly exceptional situations." *Matter of G- D-*, 22 I. & N. Dec. 1132, 1134 (BIA 1999).

The Executive Office for Immigration Review (EOIR) has broad equitable authority to take any actions it deems appropriate to serve the interests of justice, including the authority of to reopen proceedings *sua sponte* in appropriate circumstances. Indeed, the regulations "give the Board clear authority to reopen and remand cases without regard to other regulatory provisions." *Matter of Yewondwosen*, 21 I. & N. Dec. 1025, 1027 (BIA 1997); *see also* 8 C.F.R. §§ 1003.23(b)(1), 1003.2(a) (providing authority for *sua sponte* reopening to immigration judges and the Board); 8 C.F.R. § 1003.1(d) (granting the Board authority to return any case to an IJ "for further action as may be appropriate, without entering a final decision on the merits of the case."). And the Board has recognized that,

It would therefore appear that this Board has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone would not preclude such action.

Matter of Yewondwosen, 21 I. & N. Dec. 1025, 1027 (BIA 1997).

Ms. [NAME]'s case is precisely the type of case in which *sua sponte* reopening is appropriate. She has a strong claim to asylum, and has diligently pursued it [FOR TIME PERIOD]. [[SHE HAS APPEARED AT BOND AND CREDIBLE FEAR HEARINGS, AND DILIGENTLY PURSUED A MOTION TO TRANSFER VENUE WHEN SHE MOVED. || SHE DID NOT RECEIVE ADEQUATE NOTICE OF HER HEARING, BUT IF SHE HAD, SHE WOULD HAVE CONTINUED TO PURSUE HER CLAIM. || SHE SUFFERED FROM EXCEPTIONAL CIRCUMSTANCES WHICH PREVENTED HER FROM ATTENDING HER HEARING EVEN THOUGH SHE HAD CLEARLY INTENDED TO DO SO.]] Before [DATE OF COURT HEARING], she had never failed to comply with a deadline or instruction by the Court. Reopening these proceedings will clearly further the interests of justice.

Template B3: MTRRR

Ample published evidence supports that fact that individuals deported to Northern Triangle countries are at very real risk of death. Ex. F, *U.S. Government Deporting Central American Migrants to Their Deaths*, The Guardian, Oct. 12, 2015. Ms. [NAME] and her CHILD[REN] have received credible death threats in [COUNTRY OF ORIGIN] as determined by an Asylum Officer (*see* Ex. B), and respectfully ask this Court to consider the continuing danger to them in [COUNTRY OF ORIGIN] in concluding that they should be given a chance to litigate their asylum claim on its merits.

Conclusion and prayer for relief.

Ms. [NAME]'s case should be reopened to allow her and her CHILD[REN] to pursue asylum claims. They have a colorable claim for asylum as evidenced by their positive credible fear determination. *See* Ex. B. They had every reason to attend her immigration court hearings in order to gain asylum and legal immigration status in the United States. Further, as soon as Ms. [NAME] learned of the *in absentia* removal orders entered against her and her children, she began working to reopen her case. Ex. A at ¶ #.

For all of these reasons, [FULL NAME] and her CHILD[REN] have demonstrated that they did not receive adequate notice of their [DATE] hearing. Due process requires that a respondent be provided with adequate notice of proceedings and an opportunity to be heard. *Matter of G-Y-R*, 23 I. & N. Dec. at 186 (BIA 2001) (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)). Because Ms. [NAME] did not receive timely, adequate, or accurate notice of her immigration court proceedings, due process requires that the *in absentia* removal orders against her and her CHILD[REN] be rescinded and their proceedings be reopened.

Template B3: MTRRR

Dated: [DATE]

Respectfully submitted,

[ATTORNEY NAME]
[ADDRESS]
[PHONE]
[FAX]
[EMAIL]
EOIR # XXXXXXXX

Counsel for Respondents

Table of Exhibits

[LIST ALL EXHIBITS THAT YOU HAVE USED AND ENSURE THAT EXHIBIT CITES IN MOTION ARE UPDATED]

Exhibit	Description	Page

Template B4: Sample Exhibits

A	Declaration of [FULL NAME]	#-#
B	Credible Fear Interview or Reasonable Fear Interview (if no concerns or inconsistencies)	#-#
C	Notice to Appear	#-#
D	*Aminadad Natanael Mendez-Perez*, A099 623 872 (BIA Oct. 30, 2013) (UNPUBLISHED DECISION INCLUDED BELOW)	#-#
E	*Marie N. Peli*, A099 273 416 (BIA May 31, 2013) (UNPUBLISHED DECISION INCLUDED BELOW)	#-#
F	*U.S. Government Deporting Central American Migrants to Their Deaths*, The Guardian, Oct. 12, 2015, www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america	#-#
G	(Potentially) I-589, Application for Asylum and Withholding of Removal	#-#

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Casta, Lymari, Esq.
The Casta Law Office
372 East 204th Street, Ste. A
Bronx, NY 10467

DHS/ICE Office of Chief Counsel - NYC
26 Federal Plaza, 11th Floor
New York, NY 10278

Name: MENDEZ PEREZ, AMINADAD N... **A 099-623-872**

Date of this notice: 10/30/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Hoffman, Sharon
Manuel, Elise
Guendelsberger, John

lulseges
Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A099 623 872 – New York, NY Date: OCT 30 2013

In re: AMINADAD NATANAEL MENDEZ-PEREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lymari Casta, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of the Dominican Republic, appeals the Immigration Judge's decision dated May 29, 2012, denying the respondent's motion to reopen an order of removal entered in absentia on February 14, 2012. The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 8 C.F.R. § 1003.1(d)(3). Under the totality of the circumstances, we are persuaded by the respondent's argument that he established exceptional circumstances" for his failure to appear, and that the in absentia order should therefore be rescinded. *See* section 240(b)(5)(C)(i) of the Immigration and Nationality Act , 8 U.S.C. § 1229a(b)(5)(C)(i); *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the in absentia order of removal is rescinded, these proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

Cite as: Aminadad Natanael Mendez-Perez, A099 623 872 (BIA Oct. 30, 2013)

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

File No. A# 099 623 872

In the Matter of:	)	
	)	
MENDEZ-Perez, Aminadad Natanael	)	**IN REMOVAL PROCEEDINGS**
	)	
Respondent	)	
	)	

CHARGE: INA § 237(a)(1)(B)
APPLICATION: Motion to Reopen

ON BEHALF OF THE RESPONDENT:
H. Benjamin Perez, Esq.
350 Broadway, Suite 400
New York, NY 10013

ON BEHALF OF THE SERVICE:
Renata Parras
Assistant Chief Counsel, New York OCC
New York, NY 10278

DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent, Aminadad MENDEZ, is a native and citizen of Dominican Republic who was admitted to the United States at New York, NY as nonimmigrant B-2 on August 27, 2007 as a nonimmigrant visitor with authorization to remain in the United states for a temporary period not to exceed 6 months. The Respondent remained in the United States beyond the allowable amount of time without authorization from the Department of Homeland Security (DHS). On April 4, 2011, DHS issued and personally served a Notice to Appear (NTA) (Form I-862), alleging that the respondent entered the United States ("US") on or about August 27, 2007, as a nonimmigrant B-2 with authorization to remain in the US for a temporary period not to exceed six months. The NTA charges Respondent with removability pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act (the "Act") in that after his admission as a nonimmigrant B-1, the alien remained in the United States beyond November 15, 2008 without authorization.

On November 15, 2011, Respondent appeared with his attorney and requested an adjournment in order for the Respondent criminal matter to be resolved as well as to give the Respondent an opportunity to address what forms of relief he will be seeking with the Court. The Court adjourned the matter to February 14, 2012 at 9:30 am. The original notice clearly states the correct date and time of the hearing. Both parties were personally served with a copy of the notice. Further, the Court also announced orally the accurate date of the incoming hearing. On November 15, 2011, the Respondent was provided written notice of his incoming hearing scheduled for February 14, 2012 at 9:30am.

On February 14, 2012, the Respondent failed to appear at his scheduled hearing and the Court conducted an *in absentia* hearing and ordered Respondent removed to the Dominican republic pursuant to the charge contained in the NTA.

On March 29, 2012 , Respondent, through his counsel, filed a motion to reopen. Respondent requests that proceedings be reopened because he claims that he missed his scheduled hearing due to clerical mistake on the Court's part. More specifically, the Respondent alleges that he received a hearing notice from the Court, which indicated that he was scheduled for a hearing on February 15, 2012. On April 5, 2012, DHS filed a reply in opposition to the respondent's motion to reopen.

II. Legal Standard & Analysis

An order entered *in absentia* in removal proceedings may only be rescinded upon a motion to reopen filed: (1) within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances beyond their control; or (2) at any time if the alien demonstrates that they did not receive notice or that they were in federal or state custody and their failure to appear was through no fault of their own. See 8 CFR § 3.23(b)(4)(iii)(A).

The Court finds that the Respondent received proper notice. The record of proceedings reflects that the proper notice of hearing was served on the Respondent on November 15, 2011 when he attended to his last master calendar hearing with his counsel and he was aware of his February 14, 2012 master calendar hearing date. The original notice of the hearing clearly states the date of February 14, 2012. The original notice of the hearing fails to contain the allege correction or amendment. The Court reviewed its original hearing notice in the record of proceedings and concluded that this alteration is not in the original document. Although it is unclear who made this change to the Notice of the hearing, based on the totality of the evidence, it appears that this Court was not responsible for this alteration. Based on my review of the evidence provided in the motion to reopen, it also appears that the number "5" has been handwritten over the number that originally was below. Based on the totality of the evidence, the Respondent was properly served with a notice of the hearing as he was present in Court and received oral notice in person. Therefore, the Respondent has not sufficiently demonstrated that the notice was defective or improper or that an exceptional circumstances prevented him from

appearing in Court on February 14, 2012.

ORDER

IT IS HEREBY ORDERED that Respondents motion to reopen proceedings be DENIED.

Date 5-29-12

Javier Balasquide
United States Immigration Judge

THIS DOCUMENT WAS SERVED:

	ALIEN/ATTY	TA'S
IN PERSON	☐	☐
VIA US MAIL	☑	☐
VIA FEDERAL EXPRESS	☐	☐

DATE 5/29/12 JEB CLK

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Enow, Kell, Esq
Enow & Associates
2470 Windy Hill Road, #138
Marietta, GA 30067

DHS/ICE Office of Chief Counsel - ATL
180 Spring Street, Suite 332
Atlanta, GA 30303

Name: PELI, MARIE N

A 099-273-416

Date of this notice: 5/31/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Hoffman, Sharon
Manuel, Elise

schuckec
Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A099 273 416 – Atlanta, GA

Date: MAY 31 2013

In re: MARIE N. PELI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kell Enow, Esquire

ON BEHALF OF DHS: Jill K. Krishnan
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Cameroon, has appealed the Immigration Judge's decision of August 2, 2012. In that decision, the Immigration Judge denied the respondent's motion to reopen and rescind the in absentia order of removal entered on April 18, 2012. The Department of Homeland Security (DHS) has filed a brief in opposition to the appeal. The appeal will be sustained and the record will be remanded.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii).

Under the totality of the circumstances, upon de novo review, we conclude that the respondent established exceptional circumstances for her failure to appear in a timely fashion for the rescheduled hearing on April 18, 2012.[1] Sections 240(b)(5)(C) and (e)(1) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(b)(5)(C), (e)(1); 8 C.F.R. § 1003.23(b)(4)(ii). The respondent had appeared at two prior hearings, was potentially eligible for adjustment of status based on her marriage to a United States citizen, and apparently had no motive to avoid the rescheduled April 18, 2012, hearing. She filed her motion in a timely manner, which explained the unique circumstances that resulted in her failure to appear. The following order will be entered.

ORDER: The appeal is sustained, the in absentia order is vacated, proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

[1] We also note that it is impossible for the Board to determine if notice that the hearing was rescheduled from April 19, 2012, to April 18, 2012, was properly served on attorney Echols, as the Immigration Judge found, where the record forwarded to the Board does not contain a Form EOIR-28 (Notice of Appearance) filed by attorney Echols.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
180 Spring Street Suite 241
Atlanta, Georgia 30303

IN THE MATTER OF:	CASE NO.
PELI, Marie	**A 099-273-416**
RESPONDENT	IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT: **Kell Enow, Esq**
ON BEHALF OF DHS: **Jill Jensen, Assistant Chief Counsel**

DECISION ON A MOTION

A **Motion to Reopen/Rescind** has been filed by the Respondent in the above-referenced case. DHS opposes the motion. The motion has been duly considered and, for reasons explained more fully below, the motion will be denied.

BACKGROUND

By a hearing notice dated December 13, 2011, which was mailed to Respondent's attorney of record, the Court scheduled a hearing in this case for April 18, 2012. On April 18, 2012, Respondent's attorney of record, Eli Echols, appeared in Court. Respondent failed to appear at the scheduled hearing on April 18, 2012, and she was ordered removed *in absentia*.

Approximately three months later, on July 17, 2012, Respondent filed the instant motion to reopen. DHS has filed an opposition.

DISCUSSION

The Immigration and Nationality Act ("INA") provides that an order of removal entered *in absentia* in removal proceedings may be rescinded at any time, upon a motion to reopen, if the alien demonstrates that he or she did not receive notice in accordance with section 239(a) of the Act. INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii) (2007). However, if an alien received notice of the hearing, he or she must (1) file a motion to reopen within 180 days of the date of the order of removal and (2) demonstrate that the failure to appear was due to "exceptional circumstances." INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii) (2007). The term "exceptional circumstances" is defined as "circumstances such as battery or extreme cruelty to the alien or any child or parent of the alien, 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 [even if] beyond the control of the alien." INA § 240(e)(1).

Pursuant to applicable regulations, notice to counsel constitutes notice to Respondent. 8 C.F.R. § 1003.26(c)(2); see also Matter of Barocio, 19 I&N Dec. 255 (BIA 1985) (holding that notice to an alien's counsel constitutes notice to the alien). In this case, the record reflects that the hearing notice was mailed to Respondent's counsel, who appeared in Court on April 18, 2012. Respondent's motion indicates that her then-attorney, Eli Echols, contacted her and advised her of the hearing on April 18, 2012. The Court finds that notice of the hearing was

properly provided to the Respondent.

Respondent contends that she failed to appear due to exceptional circumstances. Respondent's contentions are without merit.

Respondent says that sometime after the death of attorney Akuoko on February 11, 2012 and before the scheduled hearing on April 18, 2012, she hired her present attorney, Kell Enow, to represent her in these proceedings.[1] In the motion, Respondent's present attorney, Mr. Enow, has not explained why he did not file an entry of appearance upon allegedly being retained by Respondent.[2]

Moreover, although Mr. Enow claims he was aware of the April 18th hearing, he has not explained why he did not seek a continuance, call the Court on April 18th, call Mr. Echols (the attorney of record) or appear in Court on the hearing date.[3] Moreover, as discussed above, there is no evidence that Mr. Enow contacted the prior attorney to inquire regarding the status of the case or about the April 18th hearing.

---

[1] In the motion, Respondent suggests that Mr. Akuoko was hired to represent her during removal proceedings and states that she is not sure if Mr. Akuoko entered an appearance in this case. The record shows that Mr. Akuoko was retained to represent Respondent in connection with the appeal of the denial of the I-130 visa petition, and that he filed the appeal on February 9, 2012. See Motion at page 72. Contrary to Respondent's suggestion, there is no evidence that Mr. Akuoko was hired to represent Respondent in these proceedings or that he filed an entry of appearance in this case.

[2] Pursuant to the Immigration Practice Manual, an attorney must file a Form EOIR 28. Mr. Enow filed an EOIR 28 on April 18, 2012 at 2:56 pm.

[3] Mr. Enow vaguely asserts that, on April 18, 2012, while he was preparing for the hearing, he checked the automated system and learned that the hearing was actually scheduled for April 18, 2012 at 9:30 am. Counsel fails to state the date on which he was allegedly hired to represent Respondent and why, upon being retained, he never either contacted Mr. Echols or checked the automated system.

The Court is also mindful that the motion states that Respondent contacted Mr. Echols and "he indicated that he forwarded the hearing notice to Respondent at her last known address." Motion at page 2. Since the hearing notice was mailed to Mr. Echols on December 13, 2011, it appears that Respondent must have known sometime in late December 2011 that a new hearing notice was issued.

Since Mr. Echols told Respondent that the new hearing notice was being sent to her, Respondent has not explained why (1) she did not follow up with Mr. Echols when she did not receive the hearing notice and (2) did not tell Mr. Enow, when she allegedly hired him, that she had been told by Mr. Echols that a new hearing notice was issued. Finally, it seems implausible that Mr. Echols would have told Respondent that a new hearing notice was issued, but did not also tell Respondent that the new hearing notice was issued because the date of the hearing was changed to April 18, 2012.


Respondent's affidavit and other parts of the record contain only vague allegations regarding Respondent's assertion that she hired Mr. Enow to represent her at the April 18th hearing. For example, Respondent's affidavit states "[a]fter Mr. Yaw Akuoko passed away, I hired Mr. Enow Kell and I gave him all of the documents." However, since a period of two months elapsed between Mr. Akuoko's passing and the April 18th hearing, the Court is left to speculate as to the date Mr. Enow was allegedly hired. Moreover, Respondent's affidavit fails to indicate that, when she hired Mr. Enow, she informed him that a new hearing notice had been issued and that Mr. Echols had mailed the new hearing notice to Respondent's last known address.[4] In view of the foregoing, Respondent has not shown that she did not know, or could not reasonably have known, of the April 18th hearing date.

Assuming that Mr. Enow represented Respondent at the time of the April 18th hearing, the record in this case fails to show diligence by Respondent. In this regard, there is no explanation as to why Respondent waited approximately three months to file a motion to reopen.

In sum, Respondent's affidavit contains assertions that seem contrary to the facts of this case. The Court finds that Respondent was made aware of the new hearing date. Respondent has not shown exceptional circumstances based on lack of notice, heavy traffic, or any circumstance beyond her control.

To the extent that Respondent, through counsel, implies that she received ineffective assistance of counsel, she has not complied with Matter of Lozada, 1988 WL 235454, 19 I. & N. Dec. 637, 639 (1988).[5]

---

[4] Also, Respondent's affidavit states that Mr. Enow called Mr. Echols' office. Interestingly, Mr. Enow makes no mention of such a telephone conversation.

[5] The Court acknowledges that, in a response to DHS's Opposition, Respondent states that Mr. Echols is "willing to submit any affidavit to support Respondent's contention that he had not been in contact with" Respondent. Any such affidavit will be contrary to evidence in this case. After all, as discussed above, the motion to reopen states that Respondent spoke to Mr. Echols and was told that the new hearing notice will be mailed to Respondent's last known address and Respondent's affidavit indicates that Respondent and Mr. Enow called Mr. Echols' office and discussed the need for a G-28 as a prerequisite for the release of Respondent's file.

In view of the foregoing, the Court finds that Respondent has failed to demonstrate that this matter should be reopened. Accordingly, the Court will issue the following order:

ORDER

WHEREFORE, IT IS HEREBY ORDERED that Respondent's motion to rescind the April 18, 2012 *in absentia* order be, and hereby is, DENIED.

August 2, 2012

Earle B. Wilson
U.S. Immigration Judge

Template B5: IJ Order

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[IMMIGRATION COURT CITY, STATE]

In the Matter of:	)	
[FULL NAME]	)	**File No.** A XXX-XXX-XXX
[CHILD NAME]	)	**File No.** A XXX-XXX-XXX
Respondents	)	

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondent's Motion to Rescind *In Absentia* Removal Order and Reopen Proceedings, 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: _____

Deadlines:

___ The application(s) for relief must be filed by _____.

___ The respondent must comply with DHS biometrics instructions by _____.

_____ _____

Date The Hon. [NAME]

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_____

Template B6: Declaration

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[IMMIGRATION COURT CITY, STATE]

In the Matter of:	)	
[FULL NAME]	)	**File No. A XXX-XXX-XXX**
[CHILD NAME]	)	**File No. A XXX-XXX-XXX**
Respondents	)	

DECLARATION OF [FULL NAME]

I, [FULL NAME], declare upon my personal knowledge and under penalty of perjury that the following is true:

1. My name is [FULL NAME], I was born on [DATE] in [LOCATION]. I am the mother of [CHILD], born on [DATE]. I make this declaration in support of my Motion to Reopen Proceedings and Rescind *In Absentia* Removal Order for myself and my [CHILD/REN].

2. I came to the United States with my [CHILD/REN] to escape [INCLUDE SHORT STATEMENT ON THE BASIS FOR ASYLUM CLAIM, FOR EXAMPLE: I came to the United States with my youngest son to escape his father, who constantly harassed, abused, and threatened me and my son].

3. I arrived to the United States on or about [DATE], close to [LOCATION], where I was detained upon entering without a visa or permission. [INCLUDE BRIEF DESCRIPTION OF CIRCUMSTANCES OF DETAINMENT, FOR EXAMPLE: For the next three days, I was separated from my son and taken to a very cold detention center that people called "the ice box" and then transferred to another center people referred to as the "dog pound." I did not

Template B6: Declaration

understand why I had been separated from my son. I was worried about his safety and very distressed because I did not know when I would be able to see him again].

4. On [DATE], I was transferred to [DETENTION CENTER]. [INCLUDE BRIEF DESCRIPTION OF CONDITIONS].

5. I was released on [BOND OR MY OWN RECOGNIZANCE] on [DATE]. Before I was released, however, I had a Credible Fear Interview with an asylum officer, who found that I had a credible fear of returning to [LOCATION].

6. When I went to court for my bond hearing, [BRIEF DESCRIPTION OF BOND HEARING, FOR EXAMPLE: the judge spoke to me in English. I do not speak English and no one was present to help me during my proceeding, but I was provided with an interpreter via the telephone. Although the interpreter was not present in the room with me, I thought I could hear and understand him well enough to generally follow what was happening. Through the interpreter, the judge informed me that my first Immigration and Customs Enforcement (ICE) check-in would be on December 15, 2015. This information was then written down and given to me in Spanish by an official].

7. After my release, I moved to the home of my sponsor, [NAME], at [ADDRESS]. I was required to provide this address to Immigration and Customs Enforcement (ICE) before I was released to ensure I would receive any correspondence pertaining to my case. [I HAVE RESIDED AT THIS ADDRESS SINCE MY RELEASE OR I MOVED TO [ADDRESS] ON [DATE] BECAUSE [REASON], BUT I WAS NEVER TOLD THAT I NEEDED TO NOTIFY ICE BY FILLING OUT A FORM IF I MOVED].

8. [BRIEF DESCRIPTION OF CIRCUMSTANCES SURROUNDING NOTICE OR LACK OF NOTICE, FOR EXAMPLE: I never received a Hearing Notice in the mail

Template B6: Declaration

informing me of my court date OR I received the first notice pertaining to my case through the mail in early September. I could not read the notice because it was written entirely in English and I can neither speak nor read English. I asked my sixteen-year-old neighbor to read the letter and tell me what it said. I did not know how well my young neighbor speaks English, but I asked him to read the letter because I have heard him speaking English with his friends around the neighborhood. I do not know anyone else who can speak English. My neighbor read the letter and informed me of its general contents, but he did not directly translate it in its entirety. My neighbor simply told me that I needed to report to immigration on September 17].

9. I reported to ICE as instructed on [DATE] in [LOCATION.] The ICE official who interviewed me did not inform me that I had a hearing in Immigration Court on [DATE,] nor that I needed to take any action to update my address with the Immigration Court. [INCLUDE DESCRIPTION OF EACH ICE CHECK-IN, ALSO INCLUDE REASONS FOR MISSING ANY ICE CHECK-INS].

10. [ADDITIONAL DESCRIPTION OF ANY EXCEPTIONAL CIRCUMSTANCES, OTHER THAN LACK OF NOTICE, THAT CONTRIBUTED TO CLIENT'S FAILURE TO APPEAR].

11. I only learned that I missed my court hearing on or about [DATE]. [FURTHER ELABORATION, FOR EXAMPLE: I was confused when I found this information out because I had diligently been attending my ICE check-ins and I had not received any notice about my court date].

12. I am scared for my safety and the safety of my [CHILD/REN] because of this removal order.

13. I intend to apply for Asylum, Withholding of Removal, and withholding under the

Template B6: Declaration

Convention Against Torture. [HAD I KNOWN ABOUT MY IMMIGRATION COURT HEARING OR BUT FOR THESE EXCEPTIONAL CIRCUMSTANCES] I would have attended in order to present this claim for relief.

Template B6: Declaration

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

_____ _____

[FULL NAME] Date

I declare that I am proficient in the English and Spanish languages and that the foregoing was read to [FULL NAME] in Spanish before [s/he] signed the document. I further declare that I am competent to render this translation and that I would testify to the same under penalty of perjury if I were called upon to do so.

_____ _____

Template B7: Certificate of Service

Respondents: [FULL NAME], A XXX-XXX-XXX
[CHILD NAME], A XXX-XXX-XXX

CERTIFICATE OF SERVICE

I, [NAME], 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 [DATE] by mail to:

Department of Homeland Security
Office of Chief Counsel
[STREET ADDRESS]
[CITY, STATE, ZIP]
Phone: [PHONE NUMBER]

_____
[NAME]

APPENDIX C. TEMPLATES: SAMPLE CHANGE OF VENUE FILING

Template C1: Cover Letter

[FULL NAME]
[CLIENT ADDRESS]

[DATE]

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court
[IC ADDRESS]

Re: [FULL NAME], A XXX-XXX-XXX
[CHILD NAME], A XXX-XXX-XXX
Motion to Reopen *In Absentia* Removal Orders

Dear Immigration Judge:

Enclosed please find a Motion to Change Venue dated [DATE], for the above-named individuals. Please do not hesitate to contact me by phone ([PHONE NUMBER]) or email ([EMAIL ADDRESS]) with any questions.

Thank you for your time and consideration.

Sincerely,

_____

[ATTORNEY NAME]
[ADDRESS]
[PHONE]
[FAX]
[EMAIL]
EOIR # XXXXXXXX

Cc: Office of Chief Counsel

Enclosures:

[LIST ENCLOSED DOCUMENTS]

Template C2: Cover Page

[ATTORNEY NAME]
[ADDRESS]
[PHONE]
[FAX]
[EMAIL]
EOIR # XXXXXXXX

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[IMMIGRATION COURT CITY, STATE]

In the Matter of:	)	
[FULL NAME]	)	**File No. A XXX-XXX-XXX**
[CHILD NAME]	)	**File No. A XXX-XXX-XXX**
Respondents	)	

Post-Decision Motion

MOTION TO CHANGE VENUE

[DATE]

Template C3: Motion to Change Venue

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[IMMIGRATION COURT CITY, STATE]

In the Matter of:	)	
[FULL NAME]	)	**File No. A XXX-XXX-XXX**
[CHILD NAME]	)	**File No. A XXX-XXX-XXX**
Respondents	)	

MOTION TO CHANGE VENUE

The Respondents, NAMES, respectfully request that their case be transferred to the [NEW CITY] Immigration Court at [NEW IC ADDRESS], which has jurisdiction over the address where she resides. Lead respondent attaches Ex. A, EOIR Form 33, Change of Address Form.

The Immigration Judge, for good cause, may change venue only upon motion by one of the parties, after the charging document has been filed with the Immigration Court. 8 C.F.R. § 1003.20(b). "Good cause is determined by balancing the factors . . . relevant to the venue issue." *Matter of Rahman*, 20 I. & N. Dec. 480, 482–83 (BIA 1992). Such factors include administrative convenience, expeditious treatment of the case, location of witnesses, and costs of transporting witnesses or evidence to a new location. *Id*. (citing *Matter of Velasquez*, 19 I. & N. Dec. 377 (BIA 1986)).

Respondents have bonded out of the [DETENTION FACILITY] following a Credible Fear Interview during which they established a credible fear of returning. Respondents have since moved to the following address: [NEW ADDRESS]. Respondents will continue to reside at this address so the costs of transportation from her residence in [City, STATE OF RESIDENCE] to [City, STATE OF

Template C3: Motion to Change Venue

CURRENT IMMIGRATION COURT] would be very burdensome. Administrative convenience is not affected by a change of venue in this case nor is the location of witnesses implicated. Respondents cannot offer a pleading in support of this motion for a change of venue because she does not possess a copy of the Notice to Appear. Respondents intend to enter a pleading at the first master calendar hearing should her case be reopened. Respondents intend to apply for asylum, withholding of removal under the INA, and protection under the Convention Against Torture, as supported by the prior credible fear determination. DHS will not be prejudiced by this procedural process and Respondents request a copy of the NTA prior to or at the first mater calendar hearing. Respondents therefore have established good cause for a change of venue.

Dated: [DATE]

Respectfully submitted,

_____

[ATTORNEY NAME]
[ADDRESS]
[PHONE]
[FAX]
[EMAIL]
EOIR # XXXXXXXX

Counsel for Respondents

Template C4: Motion to Change Venue IJ Order

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[IMMIGRATION COURT CITY, STATE]

In the Matter of:	)	
[FULL NAME]	)	**File No. A XXX-XXX-XXX**
[CHILD NAME]	)	**File No. A XXX-XXX-XXX**
Respondents	)	

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondent's Motion to Rescind *In Absentia* Removal Order and Reopen Proceedings, 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 The Hon. [NAME]

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_____

Template C5: EOIR-33 Change of Address Forms

This form varies slightly by Immigration Court. PDFs are available for download by court at www.justice.gov/eoir/form-eoir-33-eoir-immigration-court-listing.

Template C6: Certificate of Service

Respondents: [FULL NAME], A XXX-XXX-XXX
[CHILD NAME], A XXX-XXX-XXX

CERTIFICATE OF SERVICE

I, [NAME], 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 [DATE] by mail to:

Department of Homeland Security
Office of Chief Counsel
[STREET ADDRESS]
[CITY, STATE, ZIP]
Phone: [PHONE NUMBER]

_____
[NAME]