LEGAL ACTION CENTER

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RESCINDING AN *IN ABSENTIA* ORDER OF REMOVAL

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The Immigration and Nationality Act (INA) permits an immigration judge to order a person removed *in absentia* if the government establishes by clear, unequivocal and convincing evidence that proper written notice was provided and that the person is removable. 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.[2] This Practice Advisory addresses both situations.

Throughout this Practice Advisory, citations for both the pre-IIRAIRA and post-IIRAIRA statute are provided. Unless otherwise noted, the INA citations refer to the current statute. Individuals whose proceedings commenced prior to April 1, 1997 fall under the pre-IIRAIRA law and are in deportation or exclusion proceedings. Individuals whose proceedings commenced on or after April 1, 1997 are governed by the post-IIRAIRA statute and are in removal proceedings.

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An *in absentia* order may be rescinded by the immigration judge upon the filing of a motion to reopen if the respondent did not receive proper notice of the hearing.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)(B) (pre-IIRAIRA); 8 CFR §1003.23(b)(4)(ii), (iii)(A)(2); *see Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988).

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[2] In addition, an order may be rescinded if the respondent demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the respondent. INA § 240(b)(5)(C)(ii). *See also Matter of Evra*, 25 I&N Dec. 79 (BIA 2009) (discussing what constitutes "fault").

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 CFR §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 based on lack of proper notice can be filed at *anytime*. INA §240(b)(5)(C)(ii); INA §242B(c)(3)(B) (pre-IIRAIRA). This also means that a motion may be filed even after a person has departed the United States. *See Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009).

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 CFR §1003.24(b)(2)(v).

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-IIRAIRA). In deportation cases, the stay remains in effect during the appeal to the Board of Immigration Appeals (BIA or Board). *Matter of Rivera*, 21 I&N Dec. 232, 234 (BIA 1996). The BIA takes the position that for removal cases, the automatic stay does not remain in effect during the appeal process. *See* BIA Practice Manual, chapter 6, *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap6.pdf.

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.

Consideration of the following questions will help a person to determine whether he or she received proper notice and then demonstrate to the immigration court that rescission of the *in absentia* order is warranted.

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 respondent must provide a change of address or telephone number. INA §239(a)(1); INA §242B(a)(1) (pre-IIRAIRA). 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) (pre-IIRAIRA).

What are Proper Methods of Service?

As discussed in a subsection below, there is a presumption of effective delivery where the evidence indicates that the notice was properly served. However, if the respondent can show that the notice was not served properly, the presumption of effective delivery should not apply and thus there is no need to rebut the presumption. The following are the service requirements:

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

Before June 13, 1992, the regulation provided that service of the OSC could be accomplished either by personal service or by routine service. 8 CFR §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 CFR §103.5a(a)(2). The mail receipt must be 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))***

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

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

Like the OSC, the NTA and notice of hearing 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 and Can the Notice Requirements Be Satisfied Without Actual Receipt?

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). This may be the address that was included in an affirmative application that was filed with U.S. United States Citizenship and Immigration Services (USCIS). However, in *Matter of G-Y-R-*, the BIA said that respondents cannot be ordered removed or deported *in absentia* until they are warned (by receipt of the NTA or OSC) that they 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 do not receive the NTA or OSC as a result, cannot be ordered removed *in absentia*.[3] *Id. But see 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).

In a subsequent case, *Matter of M-D-*, the BIA clarified that *Matter of G-Y-R-* applies only in cases where there is a dispute about the correct address. *See Matter of M-D-*, 23 I&N Dec. 540, 545 (BIA 2002). In that case, the NTA was sent by certified mail to the last address on file, which was still the respondent's correct address, but was returned "unclaimed." The BIA found that the notice requirements were satisfied in the absence of actual receipt, and noted that "the respondent [was not allowed] to defeat service by neglecting or refusing to collect his mail." *Id.* at 547.

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-IIRAIRA, 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), (b)(2) (pre-IIRAIRA).

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

Pre-IIRAIRA cases

Where the notice was sent by *certified mail*, 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

[3]Section 265(a) of the INA 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.

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.

Post IIRAIRA Cases

There is a weaker presumption of delivery where the notice was sent by *regular* mail. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008); *Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008). In determining whether the respondent has overcome this presumption, the immigration judge must consider both circumstantial and corroborating evidence, and may consider a variety of factors, including (but not limited) to:

- -- respondent's affidavit
- -- affidavits from family members and other individuals who are knowledgeable about the relevant facts
- -- respondent's actions upon learning about the *in absentia* order and whether he or she exercised due diligence in seeking redress
- -- any prior affirmative application for relief or application filed with USCIS or prima facie eligibility for relief (to help establish an incentive to appear)
- -- previous attendance at immigration court hearings
- -- other circumstances or evidence indicating possible non-receipt

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), (2); INA §§242B(a)(1), (2) (pre-IIRAIRA); *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 have an argument that counsel's failure to properly notify him or her of the hearing was ineffective assistance of counsel and amounts to an exceptional circumstance. *See Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996). However, the respondent generally must comply with the requirements for ineffective assistance of counsel claim as set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *See Matter of Rivera*, 21 I&N Dec. 599, 607 (BIA 1996); *see also Matter of Compean*, 25 I&N Dec. 1 (BIA 2009) (reaffirming the application of the *Lozada* requirements).

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.[4]
>
> (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-IIRAIRA) (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-IIRAIRA). This section explicitly allows respondents to apply for relief when they were not warned verbally 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 CFR §1003.23(b)(1) and (3). 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. *Id*.

What Should You Look for in the Record of Proceedings?

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

- Are there any typos in the mailing address?
- Was the hearing date correct?

[4] The oral notice sometimes is provided upon service of the NTA or OSC (if service in person) or at the first immigration court hearing.

- 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? Did the respondent receive the required oral notice regarding the consequences of failing to attend a hearing?

- 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-IIRAIRA). 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 CFR §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-IIRAIRA); 8 CFR §§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 CFR §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 BIA has taken the position that the 180 day filing deadline is not subject to equitable tolling,[5] all but one of the courts of appeals to consider this issue have

[5] In *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998), the Board held that the ineffectiveness of counsel does not create an "exception" to the 180-day time limit for

reached the opposite conclusion.[6] 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. However, equitable tolling generally is available only where the person exercised due diligence in pursuing his or her immigration case. *See, e.g.*, *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 CFR §1103.7(b)(2). Respondents who cannot afford the fee may request a fee waiver. 8 CFR §1003.24.

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-IIRAIRA). 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). The BIA takes the position that for removal cases, the automatic stay does not remain in effect during the appeal process. *See* BIA Practice Manual, chapter 6, *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap6.pdf.

To alert the court and the 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 INA states, "the term 'exceptional circumstances' refers to exceptional 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) beyond the control of the alien." INA §240(e)(1); *see also* INA §242B(f)(2) (pre-IIRAIRA).

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*,

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filing a motion to reopen under INA §242B(c)(3)(A) (pre-IIRAIRA), and has taken the position that the deadline is not subject to equitable tolling.

[6] *See Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *see also Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004) (finding 90 day deadline for general motion to reopen subject to equitable tolling); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002) (same); *but see Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

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 immigration courts employ 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 respondent should try to include the following in the motion to reopen:

- A detailed and plausible explanation for why he or she failed to appear.

- Adequate documentation in support of the motion. 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).

- A statement that the respondent attempted to contact the Immigration Court on the date of the hearing or 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 helpful to provide as much detail as possible and to try to submit evidence with the initial motion. Also, consider including information about the issues the respondent plans to raise upon reopening and attach any applications for relief that have not been submitted. Immigration judges may be more inclined to reopen cases where the respondent has a meritorious claim for relief or there is a strong argument challenging removability 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?

There is a significant body of case law on what constitutes an exceptional circumstance, so be sure to consult with the law in the circuit in which you are filing the motion. However, the following are general guidelines:

Illness can be an exceptional circumstance/reasonable cause, but the respondent must provide 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").

Generally, filing a motion for change of venue or for a continuance 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). However, one court said that an immigration judge should not have entered *in absentia* order where the attorney filed a motion for continuance because he was ordered to appear in U.S. District Court at the same time of the immigration court hearing. *See Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003); *see also Romero-Morales v. INS*, 25 F.3d 125, 130 (2d Cir. 1994). Further, the BIA found that where the respondent requested multiple continuances because his employment prevented him from attending the hearing, the respondent had not established exceptional circumstances. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

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). In one case 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). Moreover, 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 Cir. 2004) (traffic and multitude of other factors constitute reasonable cause for failure to appear for exclusion hearing).

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). *See also Galvez-Vergara v. Gonzales*, 484 F.3d 798 (5th Cir. 2007). A respondent claiming ineffective assistance of counsel generally must comply with the requirements set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *See Matter of Rivera*, 21 I&N Dec. 599, 607 (BIA 1996); *see also Matter of Compean*, 25 I&N Dec. 1 (BIA 2009) (reaffirming the application of the *Lozada* requirements).

What Happens if the Respondent Appears Late for a Hearing?

Although it may difficult to show that a late arrival constitutes an exceptional circumstance, the respondent may be able to establish that a late arrival does not constitute a failure to appear for the hearing. Several courts of appeals have reached this conclusion, especially if the delay was short and the IJ was still on the bench or had recently retired when the respondent arrived. *See Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008); *Abu Hasirah v. Dep't of Homeland Sec.*, 478 F.3d 474 (2d Cir. 2007); *Cabrera-Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005); *Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999); *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). In such a case, the respondent may argue that the immigration judge entered the in absentia order in error and therefore, it is not necessary to establish exceptional circumstance.