

STRATEGIES FOR REOPENING IN ABSENTIA
DEPORTATION PROCEEDINGS AND MITIGATING THE EFFECTS
OF THE TIME AND NUMERICAL
LIMITATIONS ON MOTIONS TO REOPEN

By

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During the past three years, there have been revolutionary changes in the law relating to motions to reopen. In addition to the regulations that were promulgated in July 1996, imposing strict time and numerical limitations on the filing of such motions, the Board of Immigration Appeals ("the BIA" or "the Board") and the U.S. Court of Appeals for the Ninth Circuit have issued several significant precedent decisions relating to motions to reopen, particularly motions to reopen *in absentia* proceedings.

This article discusses these recent developments, focusing on strategies to (1) reopen deportation proceedings that were conducted *in absentia* and (2) mitigate the harsh effects of the time and numerical limitations on other kinds of motions to reopen.

I. REOPENING IN ABSENTIA PROCEEDINGS.

There are four different legal standards that can apply to a motion to reopen an *in absentia* proceeding. The applicability of

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one standard over another is often determinative of whether a motion to reopen is successful. So, familiarity with the various standards and the factors that determine the applicability of each is crucial.

A. Evidence that the Alien Did Not Fail to Appear

Not every absence from a deportation or removal hearing constitutes a "failure to appear." This is because the immigration court's hearing notices do not specify the courtroom in which the hearing will be conducted. Instead, the hearing notices instruct the alien to present himself at the immigration court clerk's window.¹ More than occasionally, an alien will arrive at the immigration court but not find her way to the proper courtroom until after the immigration judge has entered an in absentia order. Such cases, however, do not involve a "failure to appear" and are not, therefore, subject to the strict requirements that would apply to an actual "failure to appear." *Romani v. INS*, 146 F.3d 737 (9th Cir. 1998). See also, *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999) ("While an IJ need not linger in the courtroom awaiting tardy litigants, so long as he is there on other business and the delay is short . . . it is an abuse of discretion to treat a slightly late appearance as a nonappearance.").

In *Romani*, for example, the alien arrived at the courthouse promptly at 9:00 a.m., the designated time for her hearing. After waiting in line at the clerk's window, she was told to locate her name on the bulletin board outside the courtroom. By the time she had done so, it was 9:20 a.m. At that point, she located a legal assistant from the office of her attorney, who informed her that the immigration judge had already entered an order of deportation. So, she never actually entered the courtroom. When she moved to reopen, the immigration judge and the BIA applied the "exceptional circumstances" standard set forth in the old INA § 242B and denied the motion. The Ninth Circuit, however, reversed. The court held that it was inappropriate to require the Romanis to show "exceptional circumstances" for their failure to appear, because "under these circumstances," the Romanis "cannot be said to have failed to appear."

¹ In Los Angeles, for example, hearing notices uniformly instruct aliens in deportation proceedings to appear at the Office of the Immigration Judge, 300 North Los Angeles Street, Room 2001, Los Angeles, California. Room 2001, however, is not a courtroom but rather the clerk's office.

B. Reasonable Cause

1. When Does the "Reasonable Cause" Standard Apply?

There are at least two situations in which an alien seeking reopening needs to demonstrate only "reasonable cause" (as opposed to "exceptional circumstances") for his failure to appear: (1) in exclusion proceedings² and (2) in deportation proceedings commenced by issuance of an order to show cause before June 13, 1992 regardless of when the notice of hearing was served. *Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998).

The latter circumstance was the subject of some confusion because, prior to the *Lahmidi* decision, the BIA and several federal courts had often suggested that INA § 242B applies in any case in which "the notice of the hearing was provided after June 13, 1992." *Sharma v. INS*, 89 F.3d 545, 547 n.2 (9th Cir. 1996); *In re Gonzalez-Lopez*, 20 I & N Dec. 644 (BIA 1993) ("the previously followed procedures . . . still remain in effect where an in absentia order is made . . . following service or attempted service of the notice of hearing, for which the alien failed to appear, made prior to June 13, 1992"). This language is dicta, however, because in each of these cases, the order to

² 8 C.F.R. § 3.23(b)(4)(iv). See also, *In re N-K- & V-S-*, Int. Dec. 3312 (BIA 1997); *Matter of Gonzalez-Lopez*, Int. Dec. 3198 (BIA 1993) (INA § 242B does not apply to exclusion proceedings); *Matter of Haim*, 19 I&N Dec. 641 (BIA 1988); *Matter of Nafi*, 19 I & N Dec. 430 (BIA 1987). Also, "[t]hese continue to have no time or number restrictions regardless of the reason asserted in the motion for failure to appear." EOIR, "Questions and Answers Regarding EOIR's New Appeals and Motions Procedures" (May 1986) at 6.

show cause and the notice of hearing were issued prior to June 13, 1992.³

In *Lahmidi*, the Ninth Circuit distinguished these cases and held that the "exceptional circumstances" standard was not intended to apply to cases in which the order to show cause was issued before June 13, 1992, because such OSCs generally do not include advisals about (1) the alien's obligation to inform the immigration court of any change of address, and (2) the consequences of the alien's failure to appear at his or her hearing. "In short, what Congress contemplated [in enacting § 242B] was a single integrated procedure to be implemented simultaneously and to be construed so as to operate as a single whole." *Lahmidi, supra*. Congress did not intend that aliens would be subject to the drastic consequences of § 242B(c)(3) if they had not "receive[d] the benefit of the enhanced notice procedures first." *Id.*

Given the *Lahmidi* court's focus on the INS's obligation to advise aliens of (1) their obligation to apprise the immigration court of any change of address and (2) the consequences of a failure to appear, it is highly likely that § 242B would not apply in the absence of such advisals even if the order to show cause was issued after June 13, 1992. So, check those old OSCs for the required advisals!

2. What Constitutes "Reasonable Cause"?

Although it would be impossible to discuss the myriad circumstances which can constitute "reasonable cause," a few of the more common scenarios must be

³ See, *Sharma, supra*; *Gonzalez-Lopez, supra*; *De Morales v. INS*, 116 F.3d 145 (5th Cir. 1997); *Fuentes-Argueta v. INS*, 101 F.3d 867 (2nd Cir. 1996); *cf. United States v. Perez-Valdera*, 899 F.Supp. 181, 184 (S.D.N.Y. 1995)(examining § 242B but applying the pre-§242B procedures when both the order to show cause and the notice of hearing were issued prior to June 13, 1992).

addressed briefly.

a. Ineffective Assistance of Counsel

An attorney's failure to provide an alien with proper notice of a hearing constitutes "reasonable cause" for the alien's failure to appear, *In re N-K- & V-S-*, Int. Dec. 3312 (BIA 1997), provided that the alien's motion to reopen complies with the substantive requirements of *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). In *Lozada*, the BIA held that:

- a motion to reopen based upon a claim of ineffective assistance of counsel should be supported by an affidavit from the respondent attesting to the relevant facts and describing the agreement that was entered into with former counsel;
- before allegations of ineffective assistance of counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond (any subsequent response from counsel, or report of counsel's failure to respond, should be submitted with the motion); and
- if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

Id. at 639; see also, *Matter of Grijalva*, Int. Dec. 3284 (BIA 1996). Obviously, the most troubling part of *Lozada* is its suggestion that the aggrieved alien must file a State Bar complaint against his former counsel. Although the State Bar will generally not act upon complaints of simple negligence, the BIA has made clear that it nevertheless expects a complaint to be filed. See, *In re Rivera-Claros*, Int. Dec. 3296 (BIA 1996)(alien's explanation for not filing State Bar complaint -- e.g. attorney's error was mere "inadvertence" -- was insufficient). Rarely

will it accept an explanation for the failure to file a complaint.⁴

b. Lack of Notice Resulting from a Change of Address

An extremely common scenario finds the alien in receipt of an *in absentia* order of deportation because he or she moved without alerting the immigration court of the new address. The Ninth Circuit has made clear, however, that "there is reasonable cause for failure to appear when an alien has not received notice of the time and place of the hearing due to a change of address" if the alien was not informed of the requirement that he or she advise the INS of any change of address. *Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998), quoting *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997).

This appears to be a blanket rule and thus applicable regardless of the age, education, and English-speaking abilities of your client. *Lahmidi, supra*. So, in such situations, it is imperative that you examine the order to show cause and determine whether it contains the necessary advisal. If it does not, and your client was not otherwise informed of his obligations, the case should be reopened.

c. Traffic Problems

A general assertion that an alien was prevented from reaching his hearing on time by heavy traffic does not constitute reasonable cause. *In re S-A-*, Int. Dec. 3331 (BIA 1997). Tardiness because of traffic congestion can, however, constitute reasonable cause if the alien's account is detailed and corroborated. *Id.*

In such cases, the BIA would like evidence of:

⁴ Cf., *Esposito v. INS*, 987 F.2d 108, 110-11 (2d Cir. 1993) (Post *Lozada* case not requiring bar complaint to establish ineffective assistance of counsel); *Figeroa v. INS*, 886 F.2d 76 (4th Cir. 1989) (same).

- the alien's time of departure and how much time he had allocated for travel to the immigration court;
- the location of the heavy traffic;
- the reason for the unexpectedly heavy traffic; and
- the efforts the applicant made upon reaching the immigration court to alert personnel that he had arrived and was available for his hearing.

C. "Exceptional Circumstances" or Lack of Notice under Former INA § 242B

Former INA § 242B(c) provides that "[a]ny alien who, after written notice required under subsection (a)(2) has been provided to the alien or the alien's counsel of record, does not attend a proceeding under section 242, shall be ordered deported . . . in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable." Such an order "may be rescinded only":

- upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2)), or
- upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien."⁵

Although these strict requirements are generally applicable to deportation cases commenced before April 1, 1997, they do not apply to aliens who were served an order

⁵ A nearly identical standard governs the reopening of in absentia removal proceedings conducted under the new INA § 240. See, part I.D. below.

to show cause or a notice of hearing before June 13, 1992. If either the order to show or the notice of hearing was served before that date, § 242B does not apply and the deportation proceeding should be reopened upon a showing of "reasonable cause" for the alien's failure to appear. *Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998).

1. Appealing an In Absentia Order Versus Filing a Motion to Reopen.

Former INA § 242B provides that an *in absentia* deportation order "may be rescinded *only*" through the filing of a motion to reopen which establishes (1) "exceptional circumstances," (2) improper notice or (3) that the alien was detained in State or Federal custody. According to the Board, § 242B's "use of the term `only' makes this the exclusive method of reviewing the *in absentia* order." *Matter of Gonzalez-Lopez*, 20 I & N Dec. 644 (BIA 1993). But is it? If so, an alien subject to an *in absentia* deportation order would be unable to challenge the immigration judge's finding of deportability. This is not what Congress intended.

An alien ordered deported in absentia must be able to contest the finding of deportability through a direct appeal to the BIA and then to the circuit court.

This is confirmed by § 242B(c)(4) and § 240(b)(5)(D), which authorizes the circuit courts to review *in absentia* decisions for three possible flaws: (1) the validity of the notice provided; (2) the reasons for the alien's not attending the proceeding; and (3) *whether or not the alien is removable*. If the circuit courts have jurisdiction to review the immigration judge's determination of deportability, there is no reason that the BIA would not also have jurisdiction. Because of the wording of § 242B, however, practitioners may be better advised to file a direct appeal to the BIA rather than through a motion to "rescind" the deportation order. The Board should have jurisdiction over such an appeal because there is a clear difference between a motion to reopen which seeks to "rescind" an *in absentia* order and a direct appeal which seeks to "reverse" it.

2. Establishing "Exceptional Circumstances."

Exceptional circumstances are defined as

"circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." INA § 242B(f)(2). To determine whether exceptional circumstances exist, immigration judges and the Board must look to the "totality of circumstances." *In re W-F-*, Int. Dec. 3288, slip op. at 17, *citing*, H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 132 (1990), reprinted 1990 U.S.C.C.A.N. 6784, 6797 ("The conferees expect that in determining whether an alien's failure to appear was justifiable the Attorney General will look at the totality of the circumstances to determine whether the alien could not reasonably have been expected to appear.").

The Board and the federal courts have recognized the existence of "exceptional circumstances" in very few cases. See, *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996) (no "exceptional circumstances," where alien had arrived at the deportation hearing between 45 minutes to an hour late due to traffic congestion and trouble finding parking); *In re W-G-*, *supra* (no exceptional circumstances where alien was on a fishing vessel for employment at the time of his hearing, there was no evidence that he departed on the vessel prior to the institution of the deportation proceedings, and no evidence that he could not have returned at some point prior to the hearing). The most significant published cases, however, have concerned either allegations of serious illness or the ineffective assistance of counsel.

a. Ineffective Assistance of Counsel

In *In re Grijalva*, Int. Dec. 3284 (BIA 1996), the Board recognized that ineffective assistance of counsel could be an exceptional circumstance. There, the alien was "blatantly misled [by his attorney] regarding the need to appear at the scheduled hearing." In agreeing to reopen the case, the Board found that "the level of incompetence involved . . . establishes that the respondent's absence was the result of exceptional circumstances." Thus, the decision suggests that a showing of ineffective assistance may not satisfy the statutory requirement for reopening absent a showing that the "level of incompetence" was exceptional.

In addition, any motion to reopen that is based on the ineffective assistance of counsel must comply with the requirements of *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). See, part I.B.2.a above.

b. Serious Illness

Generally, an alien's claim of serious illness must be supported by more than the alien's self-serving affidavit. *In re B-A-S-*, Int. Dec. 3350 (BIA 1998)("twisted foot"); *In re J-P-*, Int. Dec. 3348 (BIA 1998)("strong headache"). The alien must provide evidence of the "cause, severity, and treatment of the alleged illness." *J-P-*. In assessing such claims, the Board will consider:

- the severity of the illness, *In re B-A-S-*, Int. Dec. 3350 (BIA 1998)("In general, a **`twisted foot'** would not rise to the level of a serious illness . . .); *In re J-P-*, Int. Dec. 3348 (BIA 1998) ("Generally, a **common headache** would not rise to the level of a serious illness . . .");
- whether the motion is supported by medical evidence, *B-A-S-*, *supra* ("Where the alien argues that his failure to appear resulted from a `serious illness,' we normally would expect specific, detailed medical evidence to corroborate the alien's claim");⁶
- the nature of the treatment, *B-A-S-*, *supra* (rejecting claim regarding the "alleged seriousness of the injury" because "the only treatment . . . involved massaging the foot

⁶ The lack of medical evidence is not necessarily "dispositive." *In re J-P-*, *supra*.

with oil and taking Tylenol caplets to
alleviate [the] pain");⁷

⁷ Where the alien claims to have been treated with "home remedies," the Board wants corroboration in the form of: (1) affidavits from roommates or friends, and (2) evidence "that free or low cost emergency medical care was unavailable to the respondent in his area of residence at the time of the scheduled hearing," *J-P-*, *supra*.

- whether the alien was absent from work around the time of the alleged illness, *J-P-* ("we find that any evidence of absence from work due to an illness would normally bolster a respondent's claim that the illness is serious and that it constitutes exceptional circumstances");⁸
- whether the alien "made any attempt to contact the Immigration Court, either on the day of his hearing or immediately thereafter, to alert the court to his inability to attend or to explain the reasons for his absence," *B-A-S-*, *supra*;⁹
- the length of time that the alien delayed in filing his MTR. *B-A-S-* (suggesting that failure to file MTR until more than 3 months after the *in absentia* hearing suggests a "lack of diligence" that undermines his claim);¹⁰

⁸ Where the alien claims that he missed work as a result of the "alleged illness," however, the Board will expect "documentary evidence **from his employer** to corroborate his claim." *B-A-S-*, *supra*.

⁹ In *B-A-S-*, the Board found that "[n]otifying the Immigration Court of the respondent's unavailability is a minimal and logical step that, if not taken, is a factor which tends to undermine a claim of exceptional circumstances." See also, *De Morales v. INS*, 116 F.3d 145, 149 (5th Cir. 1997)(considering the fact that the alien "made no effort to contact the court beyond a cursory search for the phone number" in finding that he failed to establish "exceptional circumstances" for failure to appear).

¹⁰ This requirement appears to clash with the Congressional determination that an alien subject to an *in absentia* order shall have 180 days in which to file a motion to reopen based on exceptional circumstances.

3. Can a Motion Based on "Exceptional Circumstances" Ever be Filed Outside the 180 Day Statutory Period?

In some situations, due process may require the immigration court or the BIA to accept a motion to reopen based on "exceptional circumstances" outside of the 180 day statutory period. Where an attorney's misconduct causes an alien to miss the 180 day deadline, for example, there is a strong argument that due process requires the acceptance and adjudication of the alien's untimely motion. In two recent cases, however, the BIA refused "to create an exception to the 180-day rule, where the failure to timely file a motion to reopen is due to the ineffective assistance of counsel." *In re Lei*, Int. Dec. 3356 (BIA 1998); *In re A-A-*, Int. Dec. 3357 (BIA 1998). Strangely, however, the Board framed the issue as one of statutory construction and never specifically addressed the constitutional question of whether due process would require the acceptance and adjudication of the motion.¹¹ This was erroneous because although "[c]learly the BIA has no jurisdiction to decide questions of the constitutionality of the immigration laws . . . [i]t is equally clear that the BIA does have the authority to reopen cases to fix administratively correctable procedural errors, even when these errors are failures to follow due process." *Liu v. INS*, 55 F.3d 421, 425 (9th Cir. 1994). Thus, the "key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative

¹¹ In *Matter of A-A-*, for example, the Board said simply: "Had Congress intended to provide for an exception to the 180-day time limit based on the ineffective assistance of counsel, it could have done so." Obviously, this does not even begin to address the due process question that is presented by gross ineffective assistance of counsel.

tribunal from those that lie outside the BIA's ken." *Id.*¹² An immigration judge's refusal to accept a motion to reopen that is untimely only because of the ineffective assistance of counsel is surely the type of "correctable" error that lies within the BIA's ken.

Moreover, *A-A-* and *Lei* appear to be inconsistent with several federal court decisions, in which the BIA was ordered to accept untimely applications for discretionary relief from deportation where the delay was the result of ineffective assistance of counsel. See *Esposito v. INS*, 987 F.2d 108 (2d. Cir. 1993) (the BIA must review the merits of applicant's untimely appeal when ineffective assistance of counsel was the cause); *Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Motto v. District Director*, 869 F.Supp. 80 (D. Mass. 1994).

4. Lack of Adequate Notice

A motion to reopen based on improper notice of the hearing can be filed at any time. INA § 242B(c)(3); 8 C.F.R. § 3.23(b)(4)(iii). The most common types of such motions are discussed below.

a. Rebutting the Presumption of Proper Service

INS has the burden of establishing by "clear unequivocal and convincing evidence" that written notice was provided to the alien. Where the notice of hearing was served by certified mail, however, there is no requirement that the certified mail receipt be signed by the alien or a responsible person at his address in order to effect service. *In re Grijalva*, Int Dec. 3246 (BIA 1995); *Arrieta v. INS*, 117 F.3d 429 (9th Cir. 1997) ("We conclude that the BIA's ruling in

¹² See also, *Rashtabadi v. INS*, 23 F.3d 1562 (9th Cir. 1994) (petitioner's allegations of "due process violations," i.e. his attorney's failure to obtain consent to admitting deportability, are "exactly the sorts of procedural errors which require exhaustion."); *Roque-Carranza v. INS*, 778 F.2d 1373 (9th Cir. 1985).

Grijalva is correct that notice by certified mail sent to an alien's last known address can be sufficient under the Act, even if no one signed for it."); *Fuentes-Argueta v. INS*, 101 F.3d 867, 871 (2d Cir. 1996). Moreover, "where service of a notice of deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises." *Grijalva*. This presumption can be overcome "by the affirmative defense of nondelivery or improper delivery by the Postal Service." *Id.* In *Arrieta v. INS*, 117 F.3d 429 (9th Cir. 1997), the Ninth Circuit ruled that an alien can rebut the presumption of effective service by showing:

- her mailing address remained unchanged (even if she had physically relocated);
- neither she nor a responsible party working or residing at that address refused service; and
- that there was nondelivery by the Postal Service.

Upon such a showing, the burden would then "shift[] to the INS to show that a responsible party refused service." *Id.* If the INS were unable to make such a showing, the deportation proceedings would have to be reopened.

b. Ineffective Assistance of Counsel

Where an attorney fails to provide his client with notice of a deportation hearing, a motion to reopen based on lack of notice can be filed. Section 242B(a)(2)(A) provides that if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any. This does not mean, however, that service of the hearing notice upon counsel precludes an alien from seeking reopening based on lack of notice. This is because of the differing language in § 242B(c)(1) (which governs when an in absentia hearing may be conducted) and § 242B(c)(3) (which governs when an in absentia order may be rescinded). Significantly, while

subsection (c)(1) permits a hearing to be held in absentia where an alien fails to attend a proceeding "after written notice required under subsection (a)(2) has been provided to the alien or the alien's counsel," section 242B(c)(3)(B) permits an alien to rescind such an order where the alien can demonstrate that "the alien did not receive notice in accordance with subsection (a)(2)." As Board member Guendelsberger points out in his dissent in *Matter of A-A-*, *supra*,¹³ "[t]his variance in the statutory language demonstrates that Congress intended for the alien, as opposed to the alien's counsel as agent, to have notice of his or her hearing for rescinding under section 242B(c)(3)." See, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (it is presumed that "Congress acts intentionally" when it "includes particular language in one section of a statute but omits it in another"). In such case, however, the alien would presumably have to comply with the requirements set forth in *Lozada*, *supra*, including, in most cases, the filing of a complaint with the State Bar.

c. Improper Service of the Order to Show Cause

Even if the alien received the notice of hearing, the *in absentia* deportation order should be invalidated on notice grounds if the alien demonstrates improper service of the order to show cause, because (1) proper service of the order to show cause is an integral part of providing the alien with proper notice of his or her hearing and (2) an immigration judge has no jurisdiction to order an alien's deportation if the order to show cause was not properly served.¹⁴

In order to demonstrate proper service of an order to show cause or a Notice to Appear by certified mail,

¹³ In *A-A-*, *supra*, the Board did not consider this issue. so, although the argument appears in a dissent, it was not rejected by the Board.

¹⁴ "A party may raise jurisdictional challenges at any time during proceedings." *Attorney's Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 595 (9th Cir. 1996), *citing May Dep't. Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980).

the INS must present a signed certified return receipt. *In re Grijalva*, Int. Dec. 3246 (BIA 1995) and *Matter of Huete*, Int. Dec. 3144 (BIA 1991). In *Matter of Grijalva*, the BIA held that notice of a deportation hearing:

must be given by certified mail to the alien or his counsel of record, if any, *with the requirement that the certified mail receipt be signed by the respondent or a responsible person at the respondent's address to accomplish personal service* (emphasis added).¹⁵

So, where the INS alleges service of the order to show cause by certified mail but can not produce the certified return receipt, the proceedings should be reopened.

D. "Exceptional Circumstances" or Lack of Notice Under INA § 240(b)(5)(C)

The standards for reopening an *in absentia* removal proceeding under INA § 240(b)(5)(C) are nearly identical to those for reopening an *in absentia* deportation proceeding under former INA § 242B. There are two principal differences. First, under the new law, the INS can establish proper service of the charging document (the Notice to Appear) by simply showing "attempted delivery [by regular mail] to the last address provided by the alien." It is unlikely, however, that a showing of mere "attempted delivery" of a Notice to Appear would satisfy due process. See, *In re Grijalva*, Int. Dec. 3246 (BIA 1995) and *Matter of Huete*, Int. Dec. #3144 (BIA 1991). Second, although former § 242B(f) defined "exceptional circumstances" as including "serious illness of the alien or death of an immediate relative of the alien," the new law says that "exceptional circumstances" includes "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." INA § 240(e)(1).

II. NUMERICAL AND TIME LIMITATIONS

Under regulations that took effect on July 1, 1996, motions to reopen and reconsider are now subject to strict time and

¹⁵ This is quite unlike service of the notice of hearing, for which the INS must simply demonstrate attempted -- but not actual -- delivery.

number limitations. Generally, after an order of deportation or exclusion becomes administratively final, an alien is allowed only one motion to reopen and one motion to reconsider. Subject to limited exceptions (discussed below), a motion to reopen must be filed within 90 days of the decision, 8 C.F.R. § 3.2(c)(2), and a motion to reconsider must be filed within 30 days of the mailing of the decision. 8 C.F.R. § 3.2(b).

This section examines possible strategies for presenting material evidence that was discovered more than 90 days after the entry of a final removal order.

A. Motions to the Court of Appeals

Frequently, new evidence will come to light while your client's case is on appeal to the circuit court. If less than 90 days have elapsed since the entry of the Board of Immigration Appeals' decision, your client can file a motion to reopen with the Board. If, on the other hand, more than 90 days have elapsed, you may be barred from filing a motion to reopen. Is it possible in such cases to present the evidence to the Court of Appeals?

1. Motion to Remand Pursuant to 28 U.S.C. § 2347(c)

28 U.S.C. § 2347(c) allows individuals who are seeking review of administrative decisions to move the Court of Appeals for permission to "adduce additional evidence." The moving party must establish to the satisfaction of the court that:

- the additional evidence is material; and
- there are reasonable grounds for the failure to present the evidence before the agency.

For most aliens subject to an administratively final removal order, 28 U.S.C. § 2347(c) will not mitigate the harshness of the 90 day limit on the filing of a motion to reopen, because IIRIRA precludes a circuit court from receiving additional evidence under 28 U.S.C. § 2347(c) in cases in which a final order of deportation, exclusion, or removal was entered after October 30, 1996. IIRIRA § 309(c)(4)(B) and INA § 242(a)(1). See also, *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367 (9th Cir. 1997) ("IIRIRA expressly forecloses the appellate courts from remanding such cases . . . for further factual development under . . . 28 U.S.C. § 2347(c)").

So, 28 U.S.C. § 2347(c) remains available only for aliens

who presently have cases pending in the Court of Appeals and who received an administratively final order on or before October 30, 1996. Moreover, the Eleventh Circuit has suggested that even in those cases, the use of § 2347(c) would be inappropriate where it would circumvent the regulatory preclusion against filing more than one MTR. *Saiyid v. INS*, 132 F.3d 1380 (11th Cir. 1998).

2. Judicial Notice

Where 28 U.S.C. § 2347(c) is unavailable, it may be possible to move the circuit court to take judicial notice of the new evidence. A court may take judicial notice at any stage of the proceeding. Fed. R. Evid. 201(f). See, *Opoka v. INS*, 94 F.3d 392 (7th Cir. 1996) (taking judicial notice of the fact that petitioner's wife had been granted suspension after the husband was denied and reversed and remanded in light of the wife's grant).

The Ninth Circuit is reluctant in immigration cases, however, to take judicial notice of facts that are outside of the administrative record. See, *Fisher v. INS*, 79 F.3d 955 (1996). In *Fisher*, an *en banc* panel of the Ninth Circuit overruled at least four cases in which the Court had taken judicial notice of evidence relating to current country conditions while reviewing a BIA decision denying asylum. The court said that it could review out-of-record evidence "only" where:

- the BIA has considered the evidence, or
- the alien moved the BIA to consider the evidence and the BIA abused its discretion by refusing to do so.

In all other cases, the court said, the alien's remedy is to file a motion to reopen with the Board.

The court has, however, carved out one significant exception to the *Fisher* rule. In *Lising v. INS*, 124 F.3d 996 (9th Cir. 1997), the Court held that *Fisher* does not preclude the Court from taking judicial notice of the INS's own records. See also, *Opoka v. INS*, *supra*.

If the Court is willing to take judicial notice of official INS records, it may also be willing to take judicial notice of official state documents. The Court may, for example, be willing to take judicial notice of the fact that an alien's state criminal conviction has been vacated, particularly where that conviction is the basis for the removal proceedings.

B. Motions to the Board of Immigration Appeals

Generally, the Board will not accept a motion to reopen that is filed more than 90 days after it has rendered its decision. This rule, however, is subject to three exceptions.

1. Changed Circumstances Which Render an Alien Prima Facie Eligible for Asylum or Withholding of Deportation

The time and number limitations do not apply to motions to reopen through which an alien seeks to apply or reapply for asylum or withholding of deportation "*based on changed circumstances arising in the country of nationality . . . if such evidence is material and was not available and could not have been discovered or presented at the previous hearing.*" 8 C.F.R. § 3.2(c)(3)(ii).

The language of 8 C.F.R. § 3.2(c)(3)(ii) is to be contrasted with

the language of INA § 208(D), which establishes an exception to the requirement that asylum applications be filed within one year of an alien's arrival. Under that provision, changed circumstances -- which would justify late filing of an asylum application -- are defined as including either:

- changes in conditions in the applicant's country, or
- changes in the applicant's objective circumstances . . . that create a reasonable possibility that [the] applicant may qualify for asylum.

Obviously, the exception for untimely motions to reopen is more narrow, and at least in unpublished decisions, it has been construed literally. In one case, for example, the Second Circuit upheld the denial of an asylum applicant's motion to reopen, because "the argument [that the applicant's] personal circumstances had changed does not meet the standard set by the regulation." *Boustati v. INS*, 1997 U.S. App. LEXIS 26397 (2nd Cir. 1997)

The only published Board case addressing this exception is *Matter of J-J*, Int. Dec. 3323 (BIA 1997).

In that case, the alien had been denied asylum on nexus grounds. He subsequently filed a MTR -- outside the normal 90 day period -- in which he presented evidence of arguably worsening country conditions. The BIA ruled that the motion did not come within the asylum exception to the 90 day rule because it did not alter the Board's conclusion that whatever harm he faced was not on account of political opinion.

If an alien seeks to reopen in order to apply for asylum in the first instance, she must:

- "reasonably explain the failure to request asylum prior to the completion of the . . . deportation proceedings," 8 C.F.R. § 208.4(b)(4);
- show that she qualifies for an exception to the requirement that he file for asylum within one year of his last arrival (by showing either "changed circumstances" or "extraordinary circumstances" as defined in 8 C.F.R. § 208.4);
- show that she is making the motion within 90 days of the Board's decision or that she is excepted from that requirement (most probably because of changed circumstances in her home country), 8 C.F.R. § 3.23(b)(4);
- show that the evidence is new, material, and could not have been discovered or presented at the earlier hearing; and
- that she is prima facie eligible for asylum.

See, *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996)(alien who seeks reopening in order to apply for asylum must both (1) reasonably explain his failure to apply before the completion of the deportation proceedings and (2) show that the evidence he seeks to present is material, previously unavailable and could not have been discovered or presented at the earlier hearing).

2. Joint Motions to Reopen

Motions to reopen that are "agreed upon by all the parties and jointly filed" are not subject to the normal time and number limitations. 8 C.F.R. §

3.2(c)(3)(iii); 3.23(b)(4)(iv). To seek the consent of the INS for the filing of an otherwise untimely motion to reopen, practitioners must contact the District Counsel's office that represented the Service during the alien's immigration proceedings. Such a request must be supported by affidavits or other evidentiary material, including a complete copy of the appropriate application for relief, if applicable, and it must include the proposed joint motion in a format that includes a signature block for the INS attorney.

Only the District Counsel or a designated Deputy District Counsel is permitted to sign a joint motion. Service consent to the filing of a joint motion will be given only where there are "exceptional and compelling circumstances." In considering whether to agree to such a motion, the Service will consider:

- whether the alien has presented new evidence that is material and was not available and could not have been discovered or presented at the former hearing;
- whether the alien is statutorily eligible for the relief sought;
- whether the alien merits a favorable exercise of discretion;
- the hardship to the alien and/or his USC or LPR family members if the alien were required to procure a visa through consular processing (including the potential applicability of section 212(a)(9) should the alien depart the United States);
- the alien's criminal history, if any;
- the number and severity of the alien's immigration violations;
- whether the alien has cooperated with, or his continued presence in the United States is desired for, a criminal or civil investigation or prosecution conducted by a federal, state, or local law enforcement agency, and whether the alien's removal is consistent with INS objectives.

Memorandum from David Martin, dated December 23, 1997, reprinted 75 *Interpreter Releases* 275 (February 23 1998).

3. Sua Sponte Reopening

The Board "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 3.2. See also, 8 C.F.R. § 3.23(b) (an IJ "may upon his or her own motion at any time, . . . reopen or reconsider any case in which he has made a decision, unless jurisdiction is vested in the Board of Immigration Appeals"). In *Matter of J-J-*, Int. Dec. 3323 (BIA 1997), the Board said that the "limited discretionary powers" conferred upon it by the regulations should be used only in "exceptional circumstances." This power is "not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *Id.*

III. BARS TO ESTABLISHING ELIGIBILITY FOR RELIEF

A. Failure to Comply with the Terms of a Grant of Voluntary Departure.

Under former INA § 242B (applicable to deportation proceedings commenced before April 1, 1997) and INA § 240B(d) (applicable to removal proceedings commenced on or after April 1, 1997), an alien is barred¹⁶ from certain forms of relief -- including adjustment, suspension, cancellation of removal and registry -- if she remains in the United States, *absent exceptional circumstances*, after

¹⁶ Former INA § 242B imposes a five year bar and INA § 240B(d) imposes a 10 year bar on the specified forms of relief.

the expiration of their period of voluntary departure.¹⁷

What happens, however, if the alien presents a motion to reopen prior to the expiration of the voluntary departure and the immigration judge fails to rule on it before the alien's grant of voluntary departure expires? In *In re Shaar*, Int. Dec. 3290 (BIA 1996), *aff'd*, *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1997), the Board held that the filing of a motion to reopen:

- does not toll the voluntary departure period; and
- is not an exceptional circumstance that would excuse the alien for having remained in the United States after the expiration of her voluntary departure decision.

So, a failure to depart within the period of voluntary departure will render an alien ineligible for the specified forms of relief even if a motion to reopen was pending when the voluntary departure expired.

"There may be cases in which the facts that are alleged to constitute a prima facie case of 'extreme hardship' for the purpose of reopening to apply for suspension of deportation [or some other form of relief] may also qualify as an 'exceptional circumstance' beyond the alien's control which prevented the alien from timely departing the country." *Shaar*, supra. The Board suggested however that such an exceptional event must "occur[] following the grant of voluntary departure" in order to qualify. *Id.*

B. Failure to Report for Deportation

¹⁷ The Nicaraguan Adjustment and Central American Relief Act (NACARA) grants NACARA-eligible Salvadorans and Guatemalans an opportunity to file one motion to reopen "notwithstanding any limitation imposed by law on motions to reopen." Despite the language "notwithstanding any limitation," the Department of Justice has determined that NACARA-eligible aliens remain subject to former INA § 242B.

Shaar does not apply to an alien who was ordered deported, rather than having been granted voluntary departure. *Matter of Singh*, Int. Dec. 3324 (BIA 1997).

In *Matter of Barocio*, 19 I&N Dec. (BIA 1985), the Board denied an alien's motion to reopen deportation proceedings on the grounds that he had deliberately flouted the immigration laws, stating: "where an alien has violated a lawful order of deportation by failing to report to the Service following notification that his deportation has been scheduled, he does not merit reopening of his deportation proceedings in the exercise of discretion." See also, *In re Powell*, Int. Dec. 3253 (BIA 1995). The Board made its determination, however, "after having considered the substantial equities" that were present in the case. 19 I & N Dec. at 258.

In recent years, the Board (and many immigration judges) have erroneously viewed *Barocio* as creating a per se rule. The Board's unexplained deviation from the text of *Barocio* -- where it weighed the alien's substantial equities against his failure to report for deportation -- constitutes a clear abuse of discretion. *Israel v. INS*, 785 F.2d 738, 740 (9th Cir. 1986) ("The BIA acts arbitrarily when it disregards its own precedents and policies without giving a reasonable explanation for doing so.")

Moreover, the Board's attempt to apply an absolute rule is inconsistent with the plain language of INA § 242B(e)(3). Under INA § 242B(e)(3)(A)¹⁸, an alien "who fails, other than because of exceptional circumstances, to appear for deportation at the time and place ordered shall not be eligible for . . . [suspension of deportation] for a period of 5 years after the date the alien was required to appear for deportation." That limitation, however, "shall not apply . . . unless the Attorney General has provided, orally in the alien's native language or in another language the alien understands and in the final order of deportation under this section [notice] of the consequences . . . of the alien's failure, other than because of exceptional circumstances, to appear for deportation at the time and

¹⁸ Section 242(B)(e)(3) was added by the Immigration Act of 1990 (IMMACT 90), Pub.L.101-649, 104 Stat.4978 and became effective on November 29, 1990. See, Section 545(g)(2) of IMMACT 90 ("Subsections . . . (e)(3) of section 242B of the Immigration and Nationality Act . . . shall be effective on the date of enactment of this Act").

place ordered." INA § 242B(e)(3)(B).¹⁹ Thus, where an alien has not received oral and written notice of the consequences of his failure to appear for deportation as required by INA § 242B(e)(3)(B), the Board can not apply a *per se* rule against reopening.

An alien who fails to report for deportation after receiving proper notice of the consequences of a failure to do so must establish exceptional circumstances. In *In re Powell*, Int. Dec. 3253 (BIA 1995), the Board held that an alien had failed to establish "exceptional circumstances" for his failure to report for deportation. In that case, the alien argued that although the surrender notice was addressed to him, he had not received it. He also implied that his attorney did not provide him with a copy of the notice. He did not, however, allege ineffective assistance of counsel. The Board found "little reason to believe the respondent's unsubstantiated claim of ignorance as an excuse justifying his failure to report for deportation." Even assuming the truth of the respondent's allegations, however, the Board ruled that he had failed to show exceptional circumstances, because he had offered "no evidence or argument indicating that he attempted to remain in contact with his former counsel or to remain apprised of the status of his case." The Board concluded: "Vague, general, and unsubstantiated allegations that an alien was unaware that he was required to surrender for deportation are not sufficiently compelling to meet this definition."

¹⁹ Although Section 242(B)(e)(3) does not specifically mention motions to reopen, it quite clearly limits the Board's authority to deny such motions that are based on an alien's claimed eligibility for suspension of deportation. In fact, the provision is only relevant to applications for suspension of deportation that arise in the context of a motion to reopen, because it applies only to aliens who have been already ordered deported.