Practice Advisory[1]

IN ABSENTIA ORDERS

July 14, 2023

In removal proceedings under 8 U.S.C. § 1229a, an immigration judge (IJ) generally issues removal orders following an in-person hearing. However, in limited circumstances set forth in 8 U.S.C. § 1229a(b)(5)(A), IJs may issue removal orders against an individual who fails to appear for their hearing. An order issued against an individual who is absent from the courtroom is known as an in absentia order.

Part A of this advisory discusses when IJs can issue in absentia removal orders, the consequences of such orders, and the circumstances under which individuals can challenge them before an immigration court, the Board of Immigration Appeals (BIA), and/or a federal court. Part A also addresses rescission of in absentia orders based on defective Notices to Appear (NTA), an issue on which the Supreme Court has granted certiorari and will address next term. Part B discusses rescission of deportation and exclusion orders, including the more lenient law applied to rescission of in absentia orders issued in proceedings commenced before June 13, 1992.

PART A – IN ABSENTIA REMOVAL ORDERS

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PART A – IN ABSENTIA REMOVAL ORDERS

1. What is an in absentia removal order?

An in absentia removal order is a removal order issued by an IJ pursuant to 8 U.S.C. § 1229a(b)(5)(A) to an individual who fails to appear before the court. *See* 8 U.S.C. § 1229a(b)(5)(A); 8 C.F.R. § 1003.26(c).

2. What are the consequences of an in absentia removal order?

An individual who is subject to a properly issued in absentia removal order has lost the ability to contest removal and/or apply for relief before an immigration judge in removal proceedings. There is no appeal of an IJ decision issuing in absentia removal order to the BIA. *See, e.g.*, *Matter of Guzman*, 22 I. & N. Dec 722 (BIA 1999). However, an in absentia order may be rescinded under limited circumstances. *See infra* Question 4.

Individuals with in absentia removal orders also are barred from discretionary relief under 8 U.S.C. §§ 1229b (cancellation of removal), 1229c (voluntary departure), 1255 (adjustment of status), 1258 (change of nonimmigrant classification), or 1259 (record of lawful admission) for ten years after entry of the order. 8 U.S.C. § 1229a(b)(7). However, this bar does not apply if the individual did not receive notice in a language that they understand of the time and place of their hearing and the consequences of failing to attend. *Id*.

In addition, an individual is inadmissible for five years if they "without reasonable cause fail[] or refuse[] to attend . . . a [removal] proceeding" and, subsequent to departure or removal, "seek[] admission to the United States." 8 U.S.C. § 1182(a)(6)(B).

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3. When can an IJ issue an in absentia removal order?

Before an IJ is authorized to issue an in absentia removal order, they must ensure that the person received the statutorily required notice of the hearing and that the person is removable. The Department of Homeland Security (DHS) must prove "by clear, unequivocal, and convincing evidence" that the government provided the person or their counsel of record with "written notice required under paragraph (1) or (2) of [8 U.S.C. § 1229(a)]." 8 U.S.C. § 1229a(b)(5)(A); *see also* 8 C.F.R. § 1003.26(c)(2). DHS also must prove by the same standard that the person is "removable," as that term is defined in 8 U.S.C. § 1229(e)(2).[2] 8 U.S.C. § 1229a(b)(5)(A); *see also* 8 C.F.R. § 1003.26(c)(1).

What constitutes the written notice required under 8 U.S.C. § 1229(a)(1) or (2), and, more specifically, whether an NTA that is defective because it does not include a specific date or place of the hearing, is an issue that the Supreme Court soon will decide in the 2023-24 term. This issue is discussed below in Question 6.

Written notice is sufficient to issue an in absentia removal order if it is sent to "the most recent address provided under [8 U.S.C. § 1229(a)(1)(F)]." 8 U.S.C. § 1229a(b)(5)(A). Section 1229(a)(1)(F), in turn, requires noncitizens to provide a written record of their current address and telephone number. However, no written notice is required for issuance of an in absentia order if the person "has failed to provide [a current] address [as] required under [8 U.S.C. § 1229(a)(1)(F)]." 8 U.S.C. § 1229a(b)(5)(B); *see also* 8 C.F.R. §§ 1003.26(d), 1003.15(d).

4. What are the bases and deadlines for rescinding an in absentia removal order?

There are three statutory bases for recission of an in absentia order:

- If "the failure to appear was because of exceptional circumstances;" or
- If the noncitizen "did not receive notice in accordance with paragraph (1) or (2) of [8 U.S.C. § 1229(a)];" or
- If the noncitizen was "in Federal or State custody and the failure to appear was [not the] fault of the [noncitizen]."[3]

8 U.S.C. § 1229a(b)(5)(C)(i), (ii). A noncitizen may seek recission on any of these three bases.

There is no deadline for filing a motion to rescind[4] an in absentia removal order based either on

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[2] 8 U.S.C. § 1229a(e)(2) defines removable as "inadmissible under [8 U.S.C. § 1182]" for individuals not admitted to the United States and "deportable under [8 U.S.C. § 1227]" for individuals admitted to the United States.

[3] This includes a failure to appear due to civil detention. *See Matter of Evra*, 25 I. & N. Dec. 79, 80 n.2 (BIA 2009).

[4] This practice advisory refers to motions filed pursuant to 8 U.S.C. § 1229a(b)(5)(C) as

lack of notice or the fact that the person was in Federal or State custody. By statute, these motions may be filed "upon a motion to reopen filed at any time." 8 U.S.C. § 1229a(b)(5)(C)(ii).

Motions to rescind based on exceptional circumstances must be filed within 180 days of the in absentia order. *See* 8 U.S.C. § 1229a(b)(5)(C)(i); *see also* 8 C.F.R. § 1003.23(b)(4)(ii). Significantly, however, all courts of appeals that have addressed the issue to date have recognized that the 180-day deadline is subject to equitable tolling. *See Aris v. Mukasey*, 517 F.3d 595, 599 n.7 (2d Cir. 2008); *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002); *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1362 n.4 (11th Cir. 2013).[5]

5. How will IJs, the BIA, and federal courts assess notice claims?

Rescission of an in absentia removal order for lack of notice is warranted where a noncitizen demonstrates that they did not *receive* notice—even though an in absentia order may be issued upon proof that notice was provided. *Compare* 8 U.S.C. § 1229a(b)(5)(A) *with* (C).

Thus, individuals seeking rescission based on lack of notice must establish *either* (1) that the immigration court or DHS failed to provide sufficient notice *or* (2) that they did not receive notice (even if sufficient notice was sent). *Compare Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009-10 (9th Cir. 2003) (assessing sufficient provision of notice where NTA failed to use correct zip code) *with Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2003) (rebutting presumption of delivery).

a. Court/DHS failure to provide sufficient notice

The government must provide an individual with written notice by regular mail to their last address before an IJ can issue an in absentia order. The government need not serve the notice of the removal hearing by certified mail. 8 U.S.C. §§ 1229a(b)(5)(A), 1229(a). *But see* Question 17 (discussing different service requirements for deportation and exclusion cases). The BIA will assess whether service resulted in actual or constructive notice. *See Matter of G-Y-R-*, 23 I. & N. Dec. 181, 185-87 (BIA 2001); *see also* Question 5.b. Service is sufficient if the individual refuses to receive mail sent to the correct address. *See Matter of M-D-*, 23 I. & N. Dec. 540, 547 (BIA 2002) (finding an individual who failed to collect mail after the Post Office attempted to

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motions to rescind an in absentia order, to distinguish them from motions to reopen pursuant to 8 U.S.C. § 1229a(c)(7), which have different statutory bases and procedural requirements. Note, however, that IJs and the BIA often refer to § 1229a(b)(5)(C) motions as motions to reopen.

[5] The remaining courts of appeals, other than the First Circuit, have recognized that tolling applies to the 90-day limit for motions to reopen under 8 U.S.C. § 1229a(c)(7)(C). *See Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Harchenko v. INS*, 379 F.3d 405, 409-10 (6th Cir. 2004); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *cf. Bolieiro v. Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013) (finding it "notabl[e]" that "every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen").

notify him of certified mail received proper notice).

Importantly, the immigration court is not required to provide notice where an individual fails to comply with the statutory requirements "to provide the address required under [8 U.S.C. § 1229(a)(1)(F)]." 8 U.S.C. § 1229a(b)(5)(B). However, DHS or the court must provide proper service of an NTA, putting an individual on notice of the address and appearance requirements set forth in § 1229(a)(1)(F), before the address update requirements apply. *See Matter of G-Y-R-*, 23 I. & N. Dec. at 187.

In order to show compliance with § 1229(a)(1)(F), notice claims should include evidence demonstrating when and how that individual provided a sufficient address for notice. *See, e.g.*, *Fuentes-Pena v. Barr*, 917 F.3d 827, 831 (5th Cir. 2019) (finding that an individual could satisfy the address requirement by providing it to ICE prior to filing of the NTA); *Arrieta v. INS*, 117 F.3d 429, 431-32 (9th Cir. 1997) (finding an address where an individual can be contacted, even if they do not reside there, to be sufficient).

Proof of providing an updated address may include, for example, a copy of the submitted change of address form (EOIR Form-33), proof of mailing, and/or declarations from the individual and/or counsel who submitted the form. *See, e.g.*, *Terezov v. Gonzales*, 480 F.3d 558, 564 (7th Cir. 2007) (recognizing that return receipts, even without copies of the change of address forms, "provide strong circumstantial evidence" of providing notice of change of address); *Beltran v. INS*, 332 F.3d 407, 412 (6th Cir. 2003) (finding copy of letter providing immigration officials with new address, without use of EOIR Form-33, was sufficient evidence of providing change of address).

b. Failure to receive notice

The BIA, IJs, and federal courts assess no receipt claims by considering "all relevant evidence." *Matter of M-R-A-*, 24 I. & N. Dec. 665, 673-75 (BIA 2008) (discussing the "weaker" presumption of delivery in removal proceedings and considering factors including affidavits, the individual's diligence after learning of an in absentia order, prior hearing attendance, prior claims for relief, and other relevant evidence); *see also Kozak v. Gonzales*, 502 F.3d 34, 36 (1st Cir. 2007) (faulting BIA reliance on pre-Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA) standards).

Thus, individuals seeking to establish lack of receipt of notice may wish to submit evidence, including declarations from the individual and/or others who lived at the address on file with the immigration court attesting to mail delivery practices, proof of receipt of other mail at the relevant address, and evidence regarding the individual's prior attendance at immigration court establishing that they did not evade service of court documents. *See, e.g.*, *Ba v. Holder*, 561 F.3d 604, 607-08 (6th Cir. 2009) (applying *Matter of M-R-A-* and remanding so that the noncitizen could be provided an opportunity to submit proof of residence at the address to which service was provided); *Smykiene v. Holder*, 707 F.3d 785, 787-90 (7th Cir. 2013) (relying on affidavit describing non-receipt); *Hernandez v. Lynch*, 825 F.3d 266, 270-71 (5th Cir. 2016) (same); *Perez-Portillo v. Garland*, 56 F.4th 788, 794-96 (9th Cir. 2022) (requiring consideration of pro se movant's credibility, even absent an affidavit, in assessing lack of receipt claim).

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c. Notice issues for children

Additional notice requirements apply in certain cases involving children. By regulation, service of an NTA to minors under 14 years old and in cases of "mental incompetency" must be provided to the person with whom the child or individual with competency issues resides, as well as "whenever possible" to a "near relative, guardian, committee, or friend." 8 C.F.R. § 103.8(c)(2)(ii); *see also* 8 C.F.R. § 236.2(a). Thus, when assessing proper service—and therefore proper notice for an in absentia order—for children under 14, courts will assess whether the adult(s) with whom the child resides were served with notice. *See, e.g.*, *Matter of Amaya*, 21 I. & N. Dec. 583, 585 (BIA 1996). Where the government did not serve the adult, rescission of an in absentia order is warranted.

However, for children 14 years old and older, some courts have held that service on the child suffices. *See, e.g.*, *Matter of Cubor*, 25 I. & N. Dec. 470, 473 (BIA 2011); *Lopez-Dubon v. Holder*, 609 F.3d 642, 645-47 (5th Cir. 2010); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897, 899-901 (8th Cir. 2008). Conversely, in the Ninth Circuit, service on a parent or guardian also may be required even if a child is 14 years old or older. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004) (vacating in absentia order where 15-year-old child was served with charging document, not parents). This exception does not extend to cases in which the child is not released to the custody of an adult. *See, e.g.*, *Jimenez-Sandoval v. Garland*, 22 F.4th 866, 870 (9th Cir. 2022) (noting child was released on her own recognizance); *Cruz Pleitez v. Barr*, 938 F.3d 1141, 1145 (9th Cir. 2019) (stating child was never detained or released to an adult).

Where a child 14 years old or older did not receive service—and instead notice was provided *only* to a parent—at least one court has held that rescission is appropriate because such notice is insufficient for an in absentia order. *See Barrios-Cantarero v. Holder*, 772 F.3d 1019, 1021-22 (5th Cir. 2014).

d. Oral notice of time and place of proceedings and the consequences of failure to appear

Immigration courts may also need to assess whether an individual issued an in absentia order of removal received *oral* notice of the time and place at which removal proceedings would occur, as well as notice of the consequences of failing to appear for reasons other than exceptional circumstances. *See* 8 U.S.C. § 1229a(b)(7).

While irrelevant to whether rescission is warranted under 8 U.S.C. § 1229a(b)(5)(C)(ii) for lack of notice, individuals who did not receive such oral notice may be able to seek reopening in order to apply for forms of relief that would otherwise be barred under 8 U.S.C. § 1229a(b)(7) without seeking to rescind the in absentia order, provided they otherwise meet the requirements for reopening. *See Matter of M-S-*, 22 I. & N. Dec. 349, 352-57 (BIA 1998); *Wu v. INS*, 436 F.3d 157, 162-64 (2d Cir. 2006).

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6. What is the state of the law regarding rescinding in absentia orders in removal proceedings initiated by NTAs without time and/or place information?

In recent years, the Supreme Court has held that 8 U.S.C. § 1229(a)(1) requires the inclusion of time and place information in NTAs and that failure to include such information cannot be remedied by providing it in a change-of-hearing notice. *See Pereira v. Sessions*, 138 S. Ct. 2105 (2018); *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). Because the in absentia notice provisions at 8 U.S.C. § 1229a(b)(5)(A) and (C)(ii) require written notice under 8 U.S.C. § 1229(a), some circuit courts have recognized that *Pereira* and *Niz-Chavez* require rescission of in absentia removal orders if their underlying NTAs are defective, i.e., lack time and/or place of hearing.[6] For more information regarding this argument, see the Template Motions to Rescind In Absentia Removal Order and Reopen Removal Proceedings Based on Defective Notices to Appear on NILA's Practice Advisories page.[7] Because there is a circuit split on this issue, the Supreme Court has granted certiorari and will ultimately decide this issue next term.

The First, Third, Fourth, Fifth, and Ninth Circuits have held that where an NTA lacks time and/or place information, rescission is warranted under 8 U.S.C. § 1229a(b)(5)(C)(ii). *See Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021); *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022) (cert. granted June 30, 2023); *Mendez-Colin v. Garland*, 50 F.4th 942 (9th Cir. 2022) (cert. granted June 30, 2023 *sub. nom. Garland v. Singh*); *Laparra-Deleon v. Garland*, 52 F.4th 514 (1st Cir. 2022); *Madrid-Mancia v. Att'y Gen*., _ F.4th _, 2023 WL 4311979 (3d Cir. July 3, 2023); *Lazo-Gavidia v. Garland*, _ F.4th _, 2023 WL 4479339 (4th Cir. July 12, 2023). The Fifth Circuit, however, has since backtracked from its holding in *Rodriguez* by limiting the availability of reopening for defective NTAs where the individual does not claim lack of actual notice and/or has not provided EOIR with a viable mailing address. *See, e.g.*, *Campos-Chaves v. Garland*, 54 F.4th 314 (5th Cir. 2022) (cert. granted June 30, 2023); *Nivelo Cardenas v. Garland*, 70 F.4th 232 (5th Cir. 2023); *Platero-Rosales v. Garland*, 55 F.4th 974 (5th Cir. 2022); *Spagnol-Bastos v. Garland*, 19 F.4th 802 (5th Cir. 2021).

The Eleventh Circuit has rejected the argument that an insufficient NTA will render an in absentia order issued at *any* subsequent hearing subject to rescission. *See Dacostagomez-Aguilar v. Att'y Gen.*, 40 F.4th 1312 (11th Cir. 2022). However, in that case, the court stated that individuals who received in absentia orders based on NTAs lacking time and/or place information at their *first* scheduled hearing are entitled to rescission. *See id.* at 1317. While petitioners in the case filed a petition for certiorari, it was dismissed by agreement of the parties. *Dacostagomez-Aguilar v. Garland*, 143 S. Ct. 1102 (2023).

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[6] This argument is not available in cases involving in absentia orders issued in deportation or exclusion proceedings as those proceedings were initiated by Orders to Show Cause and Form I-122, respectively, which do not require compliance with 8 U.S.C. § 1229(a). *See, e.g.*, *Matter of J-L-L-*, 28 I. & N. Dec. 684, 685-86 (BIA 2023); *Maradia v. Garland*, 18 F.4th 458, 462-63 (5th Cir. 2021).

[7] Additional information is also available in the National Immigration Project of the National Lawyer's Guild's Practice Advisory *Strategies and Considerations in the Wake of Niz-Chavez v. Garland*.

The Supreme Court has consolidated review over the Fifth and Ninth Circuit cases in which it granted certiorari. *See Campos-Chaves v. Garland*, No. 22-674, _ S. Ct. _, 2023 WL 4278443 (June 30, 2023); *Garland v. Singh*, No. 22-884, _ S. Ct. _, 2023 WL 4278445 (June 30, 2023) (addressing review of both *Singh* and *Mendez-Colin*). The Court will consider "whether the failure to receive, in a single document, all of the information specified in [8 U.S.C. § 1229(a)(1)] precludes an additional document from providing adequate notice under [8 U.S.C. § 1229(a)(2)], and renders any in absentia removal order subject, indefinitely, to rescission," *Garland v. Singh*, No. 22-884 (June 30, 2023) (question presented), and "[i]f the government serves an initial notice document that does not include the 'time and place' of proceedings, followed by an additional document containing that information, has the government provided notice 'required under' and 'in accordance with paragraph (1) or (2) of section 1229(a)' such that an immigration court must enter a removal order in absentia and deny a noncitizen's request to rescind that order?" *See Campos-Chaves*, No. 22-674 (June 30, 2023) (question presented). Briefing is likely to occur over the summer and early fall of 2023; as of July 2023, the Court has not set an argument date.

In all other circuits, as of the date of this advisory, the BIA's precedential decision in *Matter of Laparra*, 28 I. & N. Dec. 425 (BIA 2022), will control. In that case, the BIA ruled that an individual who was ordered removed in absentia after receiving an NTA without time or place information, and then a hearing notice with the missing information, received sufficient notice and, thus, was not entitled to rescission. *Id*. at 425. Thus, IJs and the BIA likely will deny motions on this basis in circuits that have not yet issued published decisions on the issue. Importantly, however, because the Supreme Court has granted certiorari on this issue, if the IJ relies on *Matter of Laparra* to deny a rescission motion, individuals have a strong argument that the BIA should grant a stay of removal in conjunction with an appeal of the IJ's denial.

7. How will IJs, the BIA, and federal courts assess exceptional circumstances claims?

The starting point for assessing whether exceptional circumstances prevented an individual from appearing at their removal hearing is the statute itself. Section § 1229a(e)(1) defines exceptional circumstances as "exceptional circumstances (such as battery or extreme cruelty to the [noncitizen] or any child or parent of the [noncitizen], serious illness of the [noncitizen], or serious illness or death of the spouse, child, or parent of the [noncitizen], but not including less compelling circumstances) beyond the control of the [noncitizen]."[8] However, courts have recognized that a wide variety of other factors are relevant when assessing exceptional circumstances.

IJs should apply a "totality of the circumstances" test to assess whether an individual's failure to appear was due to exceptional circumstances. *Matter of S-L-H-& L-B-L-*, 28 I. & N. Dec. 318, 321 (BIA 2021); *see also, e.g.*, *Kaweesa v. Gonzales*, 450 F.3d 62, 68-69 (1st Cir. 2006). To pass this test, individuals should, wherever possible, provide detailed accounts of their reason(s) for missing the hearing, including *all* compelling factors and supported by declarations/affidavits and all possible corroborating evidence. It is also advisable to note in the motion if the individual

[8] Note that, prior to June 13, 1992, the relevant standard was reasonable cause. *See infra* Question 18.

has previously attended hearings, has strong claims for relief, and/or attempted to inform the court in advance of delays. The BIA has recognized that relevant factors include the individual's age, prior hearing attendance, relief eligibility, diligence, and corroborated unforeseeable traffic or weather problems that lead to reasonable tardiness. *Matter of S-L-H-& L-B-L-*, 28 I. & N. Dec. at 321-24.

For example, courts have found exceptional circumstances where there was evidence of:

- Ineffective assistance of counsel that prevented the individual's attendance at the hearing, *see, e.g.*, *Matter of Grijalva*, 21 I. & N. Dec. 472, 473-74 (BIA 1996); *Saakian v. INS*, 252 F.3d 21, 25 (1st Cir. 2001); *Aris v. Mukasey*, 517 F.3d 595, 596 (2d Cir. 2008); *Borges v. Gonzales*, 402 F.3d 398, 407-08 (3d Cir. 2005);
- Confusion over hearing date due to trauma-inflicted memory problems, inability to read hearing notice, and family member's misinterpretation of hearing date, *see Hernandez-Galand v. Garland*, 996 F.3d 1030, 1035-37 (9th Cir. 2021);
- Petitioner's young age and inability to travel to the hearing location, petitioner's mother's recent childbirth and unsuccessful attempt to find counsel for change of venue motion, *see E.A.C.A. v. Rosen*, 985 F.3d 499, 504-06 (6th Cir. 2021);
- Arriving at court two hours late after waiting for a translator who individual believed was required for the hearing, *see Nazarova v. INS*, 171 F.3d 478, 480 (7th Cir. 1998);
- Diligence in pursuing claims, history of attending court, and eligibility for relief from removal, *see Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir. 2002); and
- Timely informing the court of counsel's conflicting court date, appearance in court after brief delay caused by unexpected traffic and weather, and presence of other witnesses in court at time of hearing, *see Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003).

Courts are less likely to recognize exceptional circumstances where the claim consists only of:

- Insufficiently documented or minor claims of illness, *see, e.g.*, *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 890 (9th Cir. 2002); *Ursachi v. INS*, 296 F.3d 592, 594 (7th Cir. 2002);
- Having filed an unadjudicated continuance or change of venue motion, *see, e.g.*, *Tang v. Ashcroft*, 354 F.3d 1192, 1195 (10th Cir. 2003); *Georcely v. Ashcroft*, 375 F.3d 45, 49-51 (1st Cir. 2004);
- Mistake regarding the hearing date, *see, e.g.*, *Acquaah v. Holder*, 589 F.3d 332, 336 (6th Cir. 2009);
- Run-of-the-mill car trouble or traffic without additional factors and/or corroboration, *see, e.g.*, *Matter of S-A-*, 21 I. & N. Dec. 1050, 1051 (BIA 1997); *Arredondo v. Lynch*, 824 F.3d 801, 806 (9th Cir. 2016); or
- Ineffective assistance of counsel where the individual has not complied with the requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), *see, e.g.*, *Asaba v. Ashcroft*, 377 F.3d 9, 12-13 (1st Cir. 2004).

Practitioners who represent children should note that the BIA does not consider a child's age to be *per se* an exceptional circumstance. *See, e.g.*, *Matter of Mejia-Andino*, 23 I. & N. Dec. 533, 536 (BIA 2002); *Matter of Gomez-Gomez*, 23 I. & N. Dec. 522, 528 (BIA 2002). However, age

should be "an important factor" relevant to exceptional circumstances analysis. *E.A.C.A.*, 985 F.3d at 505 (holding that a child's "young age contributes to [the court's] conclusion that exceptional circumstances exist" in combination with other factors, including the impact of age on a child's ability to "navigat[e] the immigration process," seek to change venue, and travel to a distant immigration court).[9]

8. Can an individual who received an in absentia order after arriving late to court challenge the order?

Yes, although practitioners should consult relevant circuit law to determine whether cases involving late arrivals fall within the ambit of "exceptional circumstances." For example, the First Circuit considers tardiness as a factor in its exceptional circumstances analysis but has recognized that "minor tardiness should be excused more readily than more flagrant absences." *Murillo-Robles v. Lynch*, 839 F.3d 88, 92 (1st Cir. 2016); *see also Nazarova v. INS*, 171 F.3d 478, 485 (7th Cir. 1999); *Matter of S-L-H- & L-B-L-*, 28 I. & N. Dec. 318, 325 (BIA 2021) (finding that IJs "may exercise their discretion to rescind an in absentia removal order and grant a motion to reopen where [a noncitizen] has established through corroborating evidence that his or her late arrival to the removal hearing was due to 'exceptional circumstances'").

Most other circuit courts that have considered the issue have recognized that late arrivals to immigration court should not be considered failures to appear. *See Perez v. Mukasey*, 516 F.3d 770, 774-75 (9th Cir. 2008) (finding no failure to appear for late arrival where IJ in the courtroom); *Abu Hasirah v. DHS*, 478 F.3d 474, 477-78 (2d Cir. 2007) (per curiam) (same for "brief, innocent lateness"); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343, 346 (5th Cir. 2005) (same for "slight tardiness" where IJ has recently left the bench); *Cabrera-Perez v. Gonzales*, 456 F.3d 109, 117 (3d Cir. 2006) (per curiam) (same); *Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999) (same for 15-20 minute delay where IJ remains on the bench); *cf. Camaj v. Holder*, 625 F.3d 988, 992-93 (6th Cir. 2010) (declining to address the issue but suggesting that tardiness does not constitute failure to appear).

Thus, if an individual merely arrives to court late but an IJ nonetheless issues an in absentia order in error, they can move to reopen removal proceedings based on these facts, which should be documented. In this situation, the individual need not establish that an exceptional circumstance prevented their appearance in court in order to warrant reopening.

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[9] In addition, the BIA has rescinded in absentia orders issued to minors in removal proceedings based on exceptional circumstances in unpublished cases. *See, e.g.*, *C-R-S-*, AXXX-XXX-025, 2019 WL 2464460 (BIA Feb. 28, 2019) (rescinding after promptly filed motion where minor's guardian mistakenly mis-recorded date of hearing and hearing notice was not delivered); *K-A-B-V-*, AXXX-XXX-317, 2017 WL 4118908 (BIA June 27, 2017) (rescinding where mother mistakenly thought infant's presence at consolidated hearing was waived). Additional unpublished decisions, including those involving minors with in absentia orders, are available through the Immigrant & Refugee Center's Index of Unpublished Decisions of the Board of Immigration Appeals.

9. Where are motions to rescind filed and is there a filing fee?

Because there is no direct appeal to the BIA of in absentia removal orders, motions to rescind are filed with the immigration court that has administrative control over the Record of Proceeding—generally, the court that issued the in absentia order. 8 C.F.R. § 1003.23(b)(1)(ii).[10]

There is no filing fee for motions to rescind. *See* 8 C.F.R. § 1003.24(b)(2)(v).

10. Does a motion to rescind an in absentia removal order automatically stay removal?

Motions to rescind based either on exceptional circumstances, lack of notice, or being in custody trigger an automatic stay of removal while the motion is pending before the IJ. *See* 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(1)(v), (b)(4)(ii). If the IJ grants the motion, the person is back in removal proceedings and cannot be deported.

If the IJ denies the motion, the stay dissolves, i.e., it does not extend through any administrative appeal. *See, e.g.*, *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 803 n.7 (5th Cir. 2007); *Bejar v. Ashcroft*, 324 F.3d 127, 132-33 (3d Cir. 2003). In that situation, the person may wish to immediately appeal the IJ's denial of the rescission motion to the BIA, and separately file a motion to stay removal with the BIA. *See* 8 C.F.R. § 1003.1(b)(1)-(3) (providing for administrative appeals to the BIA in removal, deportation, and exclusion proceedings); 8 C.F.R. § 1003.6(b) (permitting the BIA to stay removal on appeal of the denial of a motion to reopen); *see also Matter of Guzman*, 22 I. & N. Dec. 722, 723 (BIA 1999) (discussing administrative appeals after denials of rescission motions).

11. Can an individual with an in absentia removal order file a statutory or regulatory motion to reopen in conjunction with or in lieu of a motion to rescind?

Yes, individuals who have in absentia removal orders can seek statutory or regulatory or sua sponte reopening either in conjunction with a rescission motion or as a stand-alone motion.

Noncitizens are statutorily entitled to file a motion to reopen removal proceedings based on new facts and supported by new and previously unavailable evidence. *See* 8 U.S.C. § 1229a(c)(7)(A), (B); 8 C.F.R. § 1003.23(b)(3). If more than 90 days have passed since issuance of the in absentia removal order and no other exception to the motion to reopen deadline applies, the individual must request equitable tolling of the motion to reopen filing deadline in 8 U.S.C. §

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[10] Where an individual already has sought reopening of the order and then appealed the denial of that motion to the BIA, choice of venue is less straightforward. The immigration court and BIA practice manuals require filing motions to reopen with the BIA if the BIA has decided the appeal in the case on the merits and no case is currently pending. *See* BIA Practice Manual § 5.2(a)(3)(A) (May 8, 2023); Immigration Court Practice Manual § 5.2(a) (June 1, 2023). Practitioners may wish to file with the relevant immigration court but include a request to transfer the motion to the BIA if the IJ finds the motion is filed in the incorrect venue. *Cf. Singh v. Gonzales*, 436 F.3d 484, 488-89 (5th Cir. 2006) (finding that motions to rescind must be filed with an IJ).

1229a(c)(7)(C). Immigration judges also have the authority to reopen sua sponte at any time. *See* 8 C.F.R. § 1003.23(b).[11]
An individual who has an in absentia removal order can seek both rescission under 8 U.S.C. § 1229a(b)(5)(C) and also reopening under 8 U.S.C. § 1229a(c)(7). *See, e.g.*, *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 818 (5th Cir. 2020) (finding that BIA erred in affirming the denial of a motion to reopen an in absentia order based on changed country conditions pursuant to 8 U.S.C. § 1229a(c)(7)(C)(ii)). Where a single motion seeks both rescission pursuant to 8 U.S.C. § 1229a(b)(5)(C) and reopening pursuant to 8 U.S.C. § 1229a(c)(7), courts will treat the filing as two motions, each subject to the relevant procedural requirements. *See, e.g.*, *Maghradze v. Gonzales*, 462 F.3d 150, 152 n.1 (2d Cir. 2006). If rescission is not granted, the bar to discretionary relief for failure to appear will apply. *See, e.g.*, *Matter of Monges*, 25 I. & N. Dec. 246, 251-53 (BIA 2010).

Where an individual has no basis to seek rescission for exceptional circumstances, lack of notice, or custody, they can instead elect to file a stand-alone motion to reopen pursuant to 8 U.S.C. § 1229a(c)(7) and/or 8 C.F.R. § 1003.23(b).

For more information regarding motions to reopen, see The Basics of Motions to Reopen EOIR-Issued Removal Orders on NILA's Practice Advisories page.

12. Can a circuit court review a BIA decision affirming an IJ's denial of a motion to rescind an in absentia removal order?

Yes, circuit courts regularly review BIA affirmances of IJ denials of motions to rescind in absentia orders on petitions for review. It is necessary to have first appealed the IJ's denial of a motion to rescind to the BIA in order to exhaust administrative remedies. *See* 8 U.S.C. § 1252(d)(1).

Under 8 U.S.C. § 1229a(b)(5)(D), with the exception of petitions for review involving nationality claims, judicial review of in absentia removal orders "shall . . . be confined to" (i) the validity of the notice provided [to the noncitizen], (ii) the reasons for the [noncitizen's] not attending the proceeding, and (iii) whether or not the [noncitizen] is removable." But, as the citations in this advisory illustrate, federal courts regularly review BIA decisions affirming denials of motions to rescind in absentia orders.

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[11] Pursuant to 8 C.F.R. § 1003.23(b)(1), IJs may reopen sua sponte "at any time" in "any case in which [the immigration judge] has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." In 2020, EOIR sought to amend that regulation to, *inter alia*, limit the availability of sua sponte reopening. *See* EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings, 85 Fed. Reg. 81,588 (Dec. 16, 2020). However, two district courts stayed or enjoined the 2020 rule on a nationwide basis. *See Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919 (N.D. Cal. 2021); *Catholic Legal Immigration Network, Inc. v. EOIR*, No. 21-cv-00094 (RJL), 2021 WL 3609986 (D.D.C. Apr. 4, 2021). While those stays remain in effect, sua sponte reopening is permitted at any time; EOIR is engaged in reconsideration of the amendments to the regulation. *See Matter of Cruz-Valdez*, 28 I. & N. Dec. 326, 329 (BIA 2021).

On petitions for review, the courts of appeals apply an abuse of discretion standard but review legal and constitutional questions de novo. *See, e.g.*, *E.A.C.A. v. Rosen*, 985 F.3d 499, 503-04 (6th Cir. 2021); *Laparra-Deleon v. Garland*, 52 F.4th 514, 519 (1st Cir. 2022).

13. Can individuals seek rescission of in absentia orders where they are also subject to reinstatement under 8 U.S.C. § 1231(a)(5)?

Pursuant to 8 U.S.C. § 1231(a)(5), DHS can reinstate a prior order of removal if a noncitizen returns to the United States without authorization after having been removed under a prior order of deportation, exclusion, or removal. If DHS issues a reinstatement order, the statute provides that the prior order "is not subject to being reopened or reviewed." *Id*. Although courts have found that this language strips IJs and the BIA of jurisdiction to review motions to reopen filed pursuant to 8 U.S.C. § 1229a(c)(7),[12] there is a strong statutory argument that they retain jurisdiction to review motions to rescind prior orders as reopening and rescissions are governed by different statutory provisions. *Compare* 8 U.S.C. § 1229a(c)(7) *with* 8 U.S.C. § 1229a(b)(5)(C).

Indeed, the Ninth Circuit has recognized an exception for motions to reopen in absentia orders based on lack of notice, finding that the language in § 1231(a)(5) conflicts with the language in 8 U.S.C. § 1229a(b)(5)(C)(ii) providing that such motions can be filed "at any time" and also noting that barring rescission against individuals "who never actually received the required notice" would raise due process concerns. *See Miller v. Sessions*, 889 F.3d 998, 1001 (9th Cir. 2018). The Fifth Circuit has also held that it may review notice rescission motions notwithstanding the limiting language in § 1231(a)(5). *See Mejia v. Whitaker*, 913 F.3d 482, 487-88 (5th Cir. 2019) (noting that an individual challenging a reinstated in absentia removal order for lack of notice "implicates due process and legal questions").

PART B – IN ABSENTIA DEPORTATION AND EXCLUSION ORDERS

14. When could an IJ issue an in absentia order in deportation and exclusion proceedings?

Deportation and exclusion proceedings were types of immigration proceedings commenced prior to April 1, 1997 (the effective date of IIRAIRA). The law governing in absentia deportation and exclusion orders is based on different statues and regulations. *See, e.g*., 8 U.S.C. § 1252b(c)(1) (1996) (governing in absentia deportation proceedings); *Matter of Nafi*, 19 I. & N. Dec. 430, 431 (BIA 1987) (providing for in absentia exclusion proceedings despite lack of express statutory authorization); 8 C.F.R. §§ 1003.23(b)(4)(iii)(A) (rescission of in absentia orders in deportation proceedings), 1003.23(b)(4)(iii)(B) (rescission of in absentia orders in exclusion proceedings), 1003.26(a) (in absentia exclusion proceedings), 1003.26(b) (in absentia deportation proceedings). However, some of the concepts applicable to in absentia removal orders overlap.

[12] *See, e.g.*, *Tarango-Delgado v. Garland*, 19 F.4th 1233, 1238-39 (10th Cir. 2021) (citing cases).

In deportation proceedings commenced between June 13, 1992 and March 31, 1997, an IJ could issue an in absentia order after determining that the person has been provided the statutorily required notice and is deportable. The IJ was required to determine that the government provided the noncitizen with "written notice required [8 U.S.C. § 1252b(a)(2) (1996), i.e., an Order to Show Cause (OSC)]." 8 U.S.C. § 1252b(c)(1) (1996). Unlike the current statute, an OSC was required to be served through personal service or certified mail. 8 U.S.C. § 1252b(a)(1) (1996). Second, the former Immigration Nationality Service must have "establishe[d] by clear, unequivocal, and convincing evidence that the written notice was so provided and that the [noncitizen] is deportable." 8 U.S.C. § 1252b(c)(1) (1996); *see also* 8 C.F.R. § 1003.26(b).

In exclusion proceedings, despite lack of express statutory authority, the BIA recognized that "when an applicant for admission has notice of his exclusion hearing and fails to appear, the immigration judge may, in his discretion, find that the applicant has failed to establish his admissibility . . . and order the applicant excluded and deported." *Matter of Nafi*, 19 I. & N. Dec. at 431; *see also Matter of N-B-*, 22 I. & N. Dec. 590, 591 (BIA 1999) (same). Exclusion proceedings were commenced by Form I-122, Notice to Applicant for Admission Detained for Hearing Before Immigration Judge. *Matter of J-L-L-*, 28 I. & N. Dec. 684, 684 (BIA 2023). By regulation, IJs proceeded in absentia in exclusion proceedings if they were "satisfied that notice of the time and place of the proceeding was provided to the applicant on the record at a prior hearing or by written notice to the applicant or to the applicant's counsel of record on the charging document or at the most recent address in the Record of Proceeding." 8 C.F.R. § 1003.26(a).

In deportation or exclusion proceedings commenced by a charging document issued prior to June 13, 1992, an IJ could only issue an in absentia order if the noncitizen was "given a reasonable opportunity to be present" and failed to appear "without reasonable cause." *Matter of Gonzalez-Lopez*, 20 I. & N. Dec. 644, 645 (BIA 1993). Service of the OSC was required "by personal service or by routine service," 8 C.F.R. § 242.1(c) (1991), but in absentia proceedings were not permitted if the government used service by regular mail absent written acknowledgment of receipt of the charging document. *Id.*; *Matter of Peugnet*, 20 I. & N. Dec. 233, 235-37 (BIA 1991). Thus, such cases may be rescinded upon a showing of reasonable cause for failure to appear. *See Matter of Haim*, 19 I. & N. Dec. 641, 642 (BIA 1988).

15. What are the consequences of an in absentia deportation order?

Individuals with in absentia deportation orders also are barred from discretionary relief in the form of voluntary departure, suspension of deportation, adjustment of status, and change of status for five years after entry of the order. 8 U.S.C. § 1252b(e)(1) (1996).

16. What are the bases and deadlines for rescinding in absentia deportation and exclusion orders?

In deportation hearings, commenced by an OSC issued between June 13, 1992 and March 31, 1997, there are three statutory bases to file a motion to rescind:

- If "the failure to appear was because of exceptional circumstances;"

- If the noncitizen "did not receive notice in accordance with [8 U.S.C. § 1252b(a)(2)];" or

- If the noncitizen "was in Federal or State custody and did not appear through no fault of the [noncitizen]."

8 U.S.C. § 1252b(c)(3) (1996); *see also* 8 C.F.R. § 1003.23(b)(4)(iii)(A).

There is no deadline for filing a motion to rescind an in absentia deportation order based on lack of notice or based on the fact that the person was in Federal or State Custody. 8 U.S.C. § 1252b(c)(3)(B) (1996). Motions to rescind based on exceptional circumstances must be filed within 180 days of the order. 8 U.S.C. § 1252b(c)(3)(B) (1996). That deadline should be treated as subject to tolling for the same reasons discussed above. *See* Question 4.

In exclusion hearings, commenced by Form I-122, individuals could seek rescission for an in absentia order improperly entered based upon evidence that they had "reasonable cause" for failure to appear. 8 C.F.R. § 1003.23(b)(4)(iii)(B); *see also Matter of S-A-*, 21 I. & N. Dec. 1050, 1050 (BIA 1997).

In deportation or exclusion proceedings commenced by a charging document issued prior to June 13, 1992, in absentia orders—which were then subject to administrative appeal—could be rescinded upon a showing of reasonable cause. *See Matter of Haim*, 19 I. & N. Dec. 641, 642 (BIA 1988).

Importantly, for pre-April 1, 1997 in absentia deportation orders, numeric limits do not apply. 8 C.F.R. § 1003.23(b)(4)(iii)(A), (D). In other words, individuals are permitted to file more than one motion to rescind such in absentia orders. For pre-June 13, 1992 in absentia orders, neither time nor numeric limits apply. *Matter of Cruz-Garcia*, 22 I. & N. Dec. 1155, 1159 (BIA 1999); *Rodriguez-Manzano v. Holder*, 666 F.3d 948, 951 (5th Cir. 2012); *Lahmidi v. INS*, 149 F.3d 1011, 1016-17 (9th Cir. 1998) (affirming that, for cases with charging documents issued prior to June 13, 1992, the prior standards apply); *Calle-Yanza v. Garland*, No. 20-60834, 2022 WL 3153807, *6 (5th Cir. Aug. 8, 2022) (applying *Lahmidi*). Thus, for these orders, individuals may file more than one motion to rescind, and the motion can be filed at any time, regardless of whether it is based on lack of notice.

17. How will IJs, the BIA, and federal courts assess notice claims?

Unlike the notice statute in removal proceedings, which does not require mailed service by certified mail, a "strong presumption of effective service" applies in deportation and exclusion cases. *See Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822-23 (9th Cir. 2011).

However, individuals may overcome the presumption, including where there is evidence that service did not compile with certified mail requirements or where there is evidence of improper delivery or non-delivery. *See, e.g.*, *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (finding

presumption could be overcome if individual's "mailing address has remained unchanged, that neither she nor a responsible party working or residing at that address refused service, and that there was non-delivery or improper delivery of her deportation notice by the Postal Service"); *Chaidez v. Gonzales*, 486 F.3d 1079, 1085-86 (9th Cir. 2007) (finding no notice where individual attesting to not knowing the individual who signed for OSC, who was not a responsible person at the residence).

18. How will IJs, the BIA, and federal courts assess reasonable cause claims?

For exclusion and deportations initiated by charging documents filed before June 13, 1992, immigration courts apply a lower standard to motions to rescind in absentia orders. Rather than having to demonstrate exceptional circumstances (as required under current law), movants need only establish "reasonable cause" for their failure to appear. *Matter of Cruz-Garcia*, 22 I. & N. Dec. 1155, 1159 (BIA 1999). Importantly, with respect to these cases, IJs must apply "the 'reasonable cause' standard, not the 'exceptional circumstances' standard set forth in section 242B of the Act." *Id.* at 1159 (deportation cases); *see also Twum v. INS*, 411 F.3d 54, 61-62 (2d Cir. 2005) (exclusion cases).

Although there is no statutory or regulatory definition for reasonable cause, the BIA has referred to the reasonable cause standard "interchangeably as a 'valid excuse.'" *Matter of S-A-*, 21 I. & N Dec. 1050, 1053 (BIA 1997) (Rosenberg, dissenting) (quoting *Matter of Ruiz*, 20 I. & N. Dec. 91, 92 (BIA 1989). This includes ineffective assistance of counsel and serious illness. *See Matter of N-K- & V-S-*, 21 I. & N. Dec. 879, 880-81 (BIA 1997); *Matter of N-B-*, 22 I. & N. Dec. 590, 593 (BIA 1999). However, "[g]eneral assertions, without more, do not constitute reasonable cause." *De Jimenez v. Ashcroft*, 370 F.3d 783, 787 (8th Cir. 2004) ("Claims of an ill child without corroborative evidence, or mere good intentions toward her family, are insufficient for satisfying the reasonable cause standard.").

19. Does a motion to rescind an in absentia deportation or exclusion order automatically stay removal?

For in absentia orders in deportation cases, motions to rescind trigger an automatic stay of removal, which extends through a decision on any administrative appeal. 8 C.F.R. § 1003.23(b)(4)(iii)(C). However, the regulation is silent as to an automatic stay in exclusion cases. *Compare id*. *with* 8 C.F.R. § 1003.23(b)(4)(iii)(B).