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Non-Detained

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
EL PASO, TEXAS

In the Matter of:) File No.: [Redacted]
)
[Redacted],)
)
In Removal Proceedings.)
_____)

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

[Redacted]

I. INTRODUCTION

[Redacted] (“Respondent”) respectfully moves this honorable Court to rescind the *in absentia* removal order which was entered against him on February 19, 2020 and to reopen his removal proceedings based on (a) exceptional circumstances preventing him from attending his hearing and (b) the manifest injustice that would result if not reopened. Because Respondent seeks the opportunity to apply for a form of relief for which no filing fee is levied, there is no filing fee for this motion. EOIR Policy Manual Chapter 3.4(b)(1); 8 C.F.R. § 1003.23(b)(1). Moreover, because this motion to reopen is not for the purpose of acting on an application for relief, but rather seeks the opportunity to reopen proceedings for the purpose of applying for such relief, no application for relief is included in this motion. 8 C.F.R. § 1003.23(b)(3).

II. STATEMENT OF FACTS

Respondent is a citizen and national of Cuba. Respondent attempted to enter the United States from Juarez in November of 2019 requesting asylum. He was stopped by Customs and Border Patrol (“CBP”), and he was processed and released to Mexico the next day. At this time, he was given a court notice hearing and told he had to wait in Mexico for his court hearing (i.e. Respondent was subject to the Migrant Protection Protocols (“MPP”)). Respondent’s hearing date was scheduled for approximately 3 months after he was released.

As was common with the MPP, Respondent was told to return specifically to the Juarez port of entry at the date and time specified in his court hearing. However, after being released, Respondent fled Juarez, fearing for his life, and he was too afraid to return to Juarez for entry to the United States for his hearing. When Respondent was released to Juarez, he did not know anyone there, and he did not have any money. Respondent ended up staying in a house that belonged to men who were smuggling people across the border. Several days after being

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released to Mexico, Respondent was told by the smugglers he needed to pay \$2,500 or they would kill him. The men had guns and proceeded to threaten Respondent with the guns. When Respondent said he did not have the money, the men told him to call family and ask for the money. Respondent had so little money at this time that he was unable to even afford food.

Immediately following these threats, Respondent was told by another Cuban man in the house that he had personally seen these men kill a man for not getting them the money they demanded. The individual who told Respondent this story fled Juarez because he was afraid for his life. After this happened, Respondent talked with some friends that lived in another part of Mexico, and ultimately, these friends bought him a ticket to Cancun. When the smugglers were out of the house, Respondent fled the house and traveled to Cancun. Respondent missed his hearing because he was afraid he would be killed if he returned to Juarez to cross the border for his hearing. In his absence, Respondent was ordered removed on February 19, 2020 by the Immigration Court in El Paso, Texas.

Prior to his time in Mexico, Respondent lived in Cuba and worked as a radio show host. According to Respondent, jobs in Cuba are extensions of the government and always carry messages of ideology and pro-government rhetoric. As a radio show host, Respondent was given scripts to follow and had to always be careful about what he said. At this job, Respondent worked under the Director, who was a well-known police informant and in charge of communicating with the police about any public dissonance or discontent. For instance, Respondent explained that if a caller on his show made any statements against the government, then Respondent was instructed by the Director to get the caller to provide personal information so the Director could turn this information over the police. The police would then go the caller's home.

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On one show in particular, Respondent was given a script on the topic of gay marriage and gay rights. Respondent is a gay man, and because he felt passionate about this topic, he did not stick to the script for this show. Rather, Respondent stated that Cuba pretends to be tolerant and in support of gay rights, but that it is all a lie. He stated that members of the LGBTQ community do not have the same rights in Cuba. Rather, they are marginalized and targeted for humiliation. Respondent was so upset that for the first time in his life, he publicly admitted that he is gay. Respondent also made statements about Cuba's healthcare and education, stating that they are crumbling. Immediately after making these statements, the Director fired Respondent and did not allow him to finish the show.

A few days later, Respondent received a summons to be questioned by the Chief of Police. The Chief of Police repeatedly told Respondent his statements indicated he was against the government. As a result, Respondent would be required to collect garbage in the streets. Respondent said he was being made an example of, and that the police wanted the public seeing him being demeaned for the statements he made. Respondent was told that if he did not report to collect garbage, or if he made any additional statements similar to those he made on his show, he would be tried for his statements.

Respondent believed that if he stayed in Cuba he would be badly beaten and he would be disappeared. Respondent stated that family members of those arrested often do not know whether their loved ones are in jail or dead, and even though Respondent did not want to leave his parents behind in Cuba, he also could not subject them to the emotional toll of never having closure if he were disappeared. All of these beliefs are supported by the fact that recently, individuals protesting against the government were badly beaten and imprisoned for up to 30 years. Human Rights Watch reported that the Cuban government has systematically engaged in

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arbitrary detention, ill-treatment of detainees, and abuse-ridden criminal prosecutions in response to peaceful anti-government protests.¹ Of the hundreds of protesters and bystanders arrested, many were subjected to brutal abuses, including gender-based violence, and they were prosecuted in trials that violated basic due process guarantees. Respondent believes his punishment would be worse than those who protested, as he made statements both against the government and in favor of LGBTQ rights, and because he made these statements publicly.

In light of the foregoing, Respondent respectfully requests that this Court rescind the *in absentia* removal order and reopen the removal proceedings to allow Respondent to pursue relief.

III. Legal Arguments

An alien ordered removed *in absentia* may file a motion to reopen his removal order within 180 days after the date of the order of removal if his failure to appear was due to exceptional circumstances. INA § 240(b)(5)(C). However, this 180-day deadline is subject to equitable tolling. *See, e.g., Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002). Moreover, the Court can use its *sua sponte* authority to rescind Respondent's removal order and reopen his case if it would be manifestly unjust not to. *See* 8 C.F.R. § 1003.23(b)(1); *Matter of Yewondwosen*, 21 I&N Dec. 2015, 1027.

A. Respondent missed his hearing due to exceptional circumstances and this motion should be treated as timely.

1. Respondent has demonstrated exceptional circumstances for missing his hearing, which warrants the rescission of his *in absentia* removal order and the reopening of his case.

¹ Human Rights Watch, "Cuba: Peaceful Protesters Systematically Detained, Abused." October 19, 2021.

The extreme danger and insecurity that Respondent faced when returned to Mexico to await his hearing constitutes exceptional circumstances for missing his hearing. Even though Respondent expressed these fears to the CBP officer, the CBP officer did not follow the MPP guidelines. Under the MPP guidelines, if an asylum seeker expressed fear of harm in Mexico, that person had to be referred to an asylum officer for an interview about their fear.² Respondent received no such interview. This is consistent with the findings of a study of 607 asylum seekers subject to the MPP, which determined that only 40 percent of asylum seekers who expressed a fear of returning to Mexico to CBP were given the required fear-screening interview.³

Moreover, Respondent's fear was well founded. According to Human Rights First, through February 2021, there were at least 1,544 publicly documented cases of rape, kidnapping, assault and other crimes committed against individuals sent back under the MPP and countless others that went undocumented.⁴ Respondent's life was threatened by a group of smugglers, and Respondent heard stories of these same smugglers killing other men. On top of this, Respondent is a gay man, and he believed these smugglers, as well as many others, to be homophobic. This concern also appears to be well founded, as the new MPP reinstated under President Biden in December 2021 created a new exemption for individuals at risk of harm in Mexico due to their sexual orientation.⁵ Ultimately, Respondent felt he had no choice but to flee Juarez even though it meant missing his hearing. Because Respondent's failure to appear was due to exceptional circumstances, this Court should rescind the February 19, 2020 *in absentia* order and reopen his removal proceedings.

² U.S. Customs and Border Protection, U.S. Department of Homeland Security, "MPP Guiding Principles," January 28, 2019.

³ Tom Wong, *Seeking Asylum: Part 2* (U.S. Immigration Policy Center, University of California, San Diego, October 29, 2019).

⁴ Human Rights First, "Delivered to Danger," current as of February 19, 2021.

⁵ Robert Silvers, Under Secretary, Office of Strategy, Policy and Plans, U.S. Department of Homeland Security, "Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols," December 2, 2021.

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2. The Court Should Treat the Motion as Timely Filed.

Although Respondent files this motion to reopen more than 180 days after the entry of the prior final administrative order of removal, he warrants reopening under the doctrine of equitable tolling. *See, e.g., Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *accord Lugo-Resendez v. Lynch*, 831 F.3d 337, 343-44 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013); *Avila-Santoyo v. Att’y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (en banc); *Alzaarir v. Att’y Gen.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Gaberov v. Mukasey*, 516 F.3d 590, 594-597 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000).

A litigant is entitled to equitable tolling if he shows that extraordinary circumstances prevented timely filing and that he has been pursuing his rights diligently. *See, e.g., Holland v. Florida*, 560 U.S. 631, 649 (2010). Extraordinary circumstances prevented Respondent from timely filing. The COVID-19 pandemic began immediately following Respondent’s missed hearing in late February 2020, and in March 2020, all pending MPP hearings were suspended temporarily, and then later indefinitely. Due to the indefinite suspension of MPP hearings as a result of the COVID-19 pandemic, Respondent reasonably believed, as someone not familiar with the United States legal system, that there was nothing that could be done regarding his missed hearing. Moreover, during the time asylum seekers subject to the MPP remained in Mexico, it was extremely difficult to obtain counsel. According to an independent analysis of data obtained from the Executive Office for Immigration Review, as few as 7.5 percent of asylum seekers subject to the MPP were able to obtain counsel.⁶ As a result of his

⁶ Transactional Records Access Clearinghouse, “Access to Attorneys Difficult for Those Required to Remain in Mexico” (Syracuse, NY: Syracuse University, July 29, 2019).

circumstances, it was not until Respondent spoke with the Immigration Justice Campaign in January of 2022 that he understood his options for reopening his immigration case and obtained pro bono counsel willing to help him do so.

The very fact that Respondent is still actively seeking help with his immigration case two years after he was ordered removed demonstrates that Respondent has been pursuing his rights diligently. The Supreme Court has explicitly stated that the standard required for equitable tolling is “reasonable diligence,” not “maximum feasible diligence.” *Holland v. Florida*, 560 U.S. 631, 656 (2010). In light of the circumstances regarding the MPP and the COVID-19 pandemic, Respondent acted with reasonable diligence in pursuing his rights. Despite struggling with both a lack of financial resources as well as his mental health due to the trauma he had endured in both Cuba and Mexico, Respondent continued to communicate with multiple non-profit organizations regarding his immigration case. Moreover, once Respondent obtained pro bono counsel, he was very responsive and eager to finally have the opportunity to take the next steps with regard to his immigration case. These actions demonstrate that Respondent acted with due diligence in light of his circumstances and is accordingly entitled to equitable tolling of the filing deadline.

B. In the alternative, the Court should use its *sua sponte* authority to rescind and reopen Respondent’s case.

Even if the Court does not conclude that Respondent’s case should be reopened due to exceptional circumstances, the Court should use its *sua sponte* authority to reopen Respondent’s case. 8 C.F.R. § 1003.2(b)(1). Immigration Judges have the authority to reopen a case *sua sponte* in “exceptional situations” for “good cause, fairness, or reasons of administrative economy.” *Matter of Yewondwosen*, 21 I. & N. Dec. 1025, 1027 (BIA 1997). Respondent’s

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case is just such a case, with Respondent being a victim of both the MPP and the COVID-19 pandemic.

There have been concerns over whether the MPP is consistent with the fair and efficient adjudication of immigration cases. *See e.g.* Exec. Order No. 14010, 86 Fed. Ref. 8267 (February 2, 2021). In his memorandum terminating the initial form of the MPP, Department of Homeland Security (the “DHS”) Secretary Mayorkas wrote, “The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings.⁷ Moreover, a policy memorandum from Acting Director Jean King of the Department of Justice issued on June 24, 2021 advised immigration judges, in adjudicating motions to reopen filed by respondents who were subject to the MPP, to be aware of these concerns expressed by the DHS Secretary.

Moreover, in considering whether to grant a motion to reopen, immigration judges must take into account whether the parties were provided “a fair opportunity to present their respective cases.” *See INS v. Abudu*, 485 U.S. 94, 107 (1988). As was the case with nearly half of all people sent back to Mexico under the MPP, Respondent was denied the opportunity to present his case.⁸ It is also worth noting that Respondent has made contact with DHS since receiving his final removal order, and DHS chose not to remove Respondent. For the sake of fairness, the Court should consider this a good reason to reopen Respondent’s case under the Court’s *sua sponte* authority. *See Matter of Peña-Diaz*, 20 I&N Dec. 841 (BIA 1994).

Given Respondent’s exceptional circumstances for missing his hearing, and the extremely high likelihood that Respondent will be subject to persecution for both his political

⁷ See Memorandum from Alejandro N. Mayorkas, Secretary, DHS, to Troy A. Miller, Acting Commissioner, U.S. Customs and Border Protection, et al., *Termination of the Migrant Protection Protocols Program* (June 1, 2021).

⁸ Secretary Alejandro N. Mayorkas, U.S. Department of Homeland Security, “Termination of the Migrant Protection Protocols Program,” June 1, 2021.

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statements and for being a gay man if removed to Respondent’s home country, the Court should use its *sua sponte* authority to rescind Respondent’s *in absentia* removal order and reopen Respondent’s case for further proceedings.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court rescind its *in absentia* removal order which it entered against him on February 19, 2020 and reopen his removal proceedings, for the reasons above.

Respectfully submitted this 22nd day of April, 2022

/s/ [Redacted]
[Redacted], by his attorney,
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Dated: April 22, 2022

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File No.: [Redacted]
[Redacted]

PROOF OF SERVICE

On April 22, 2022 , I, **[Redacted]**, served a copy of Respondent's Motion to Reopen by certified mail to the Office of the Principal Legal Advisor at the Immigration and Customs Enforcement Field Office in El Paso at the following address:

Office of the Principal Legal Advisor, El Paso
11541 Montana Avenue, Suite O
El Paso, TX 79936

/s/ [Redacted]
[Redacted]

April 22, 2022
Date

[Redacted]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
IMMIGRATION COURT
EL PASO, TEXAS

In the Matter of: **[Redacted]** File No.: **[Redacted]**

[PROPOSED] ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondent's Emergency Motion to Reopen, it is HEREBY ORDERED that the motion be GRANTED DENIED because:

- DHS does not oppose the motion.
- The respondent does not oppose the motion.
- A response to the motion has not been filed with the court.
- Good cause has been established for the motion.
- The court agrees with the reasons stated in the opposition to the motion.
- The motion is untimely per _____.
- Other: _____.

Deadlines:

- The application(s) for relief must be filed by _____.
- The respondent must comply with DHS biometrics instructions by _____.

Name: _____
Immigration Judge

Date

Certificate of Service

This document was served by: Mail Personal Service
To: Noncitizen Noncitizen c/o Custodial Officer Noncitizen's Attorney DHS
Date: _____ By: Court Staff _____

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