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Non-Detained

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
BOSTON, MASSACHUSETTS

In the Matter of:
Xxxxx Xxxxx Axxx xxx xxx

In Removal Proceedings

Immigration Judge: Paul M. Gagnon **Next Hearing: N/A**

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

I Statement of the Case

Respondent Xxxxx Xxxxx moves this honorable Court to rescind the *in absentia* deportation order which it entered against her on January 14th, 2014, and to reopen these removal proceedings.

Because Ms. Xxxx contends that her failure to appear was due to lack of notice, the filing of this motion effects an automatic stay of her removal from the United States. INA 240(b) (5) (C). *Matter of Rivera*, 21 I & N Dec. 232 (BIA 1996). And, because she did not receive notice of the hearing, no fee is levied for this motion, 8 CFR 1003.24(b) (2) (v) and the time and number limitations which normally attach to motions to reopen do not apply. 8 CFR §1003.23(b)(4)(iii)(A).

Although an Immigration Judge is authorized to proceed *in absentia* when a respondent

fails to appear at a hearing after written notice has been provided to the last address which she has provided to DHS, the BIA has instructed that a Judge should rescind that order, and reopen removal proceedings, when the respondent comes forward with evidence that she did not actually receive that notice. INA 240(b) (5) (C) (ii); 8 CFR 1003.23(b) (4) (ii); *Matter of M-R-A-*, 24 I & N Dec. 665 (BIA 2008) (only a relatively weak presumption of delivery attaches to properly addressed regular mail, and that presumption may be rebutted with evidence, including testimonial evidence, that the respondent did not actually receive the notice and did not intentionally fail to appear); *Matter of C-R-C-*, 24 I & N Dec. 677 (BIA 2008) (same); *Kozak v. Gonzales*, 502 F.3d 34, 38 (1st Cir. 2007) (same).

Ms. Xxxxx respectfully submits that, even if the Court mailed her notice of hearing to a correct address, she did not receive that notice. Because the evidence which she has presented to the Court is more than sufficient to establish a lack of notice, and because all of the other factors at play in her case reflect that she did not intentionally fail to appear, rescission is appropriate.

II Facts

Xxxxx Xxxxx is a native and citizen of Xxxxx, and an applicant for asylum in the United States. In removal proceedings in the Immigration Court in Boston, Ms. Xxxxx asserted that she had been arrested, detained, and fired from her job because of her involvement with Xxxxx, and that she had a well-founded fear of persecution on account of her Xxxxx activities. Among other things, Ms. Xxxxx submitted a copy of her daughter Xxxxx Xxxxx's application for asylum, which had been granted by DHS on April 23rd, 2010. In that application, Ms. Xxxxx expressed a fear of persecution on account of her Xxxxx activities, and cited to her mother's experiences.

The Immigration Judge found Ms. Xxxxx credible, but held that she had not established

either past persecution or a well-founded fear of future persecution on account of her activities. On August 13th, 2012, the Board of Immigration Appeals dismissed her appeal.

Ms. Xxxxx timely petitioned the First Circuit Court of Appeals to review that decision and, on March 13th, 2013, the Attorney General moved the First Circuit to remand proceedings to the BIA. The AG pointed to *Ticoalu v. Holder*, in which the First Circuit had found that the Board erred in failing to consider the relevance of the fact that the applicant's brother had been granted asylum under facts similar to the applicant's own, and argued that remand was appropriate in Ms. Xxxxx's case for the Board to assess the relevance of her daughter's grant of asylum to her mother's case.

Ms. Xxxxx was represented in the Circuit Court proceedings by Xxxxx Xxxxx, a law fellow at the nonprofit Human Rights Law Foundation in Washington DC. After the case was remanded, the Board notified Mr. Xxxxx that it had received the case, and invited him to submit an EOIR-27 notice of entry of appearance. He filed his appearance in accordance with that invitation, and instructed Ms. Xxxxx to wait.

When the case was subsequently remanded from the Board to this Court, Mr. Xxxxx assumed that the Court would notify him when it had received the case, as the Board had. Ms. Xxxxx and her daughter kept in constant contact with him, and called him to check on the status of the case numerous times between November of 2013 and April of 2014. On each occasion, Mr. Xxxxx assured them that the Court would notify them when a hearing had been scheduled, and that no purpose would be served in their contacting the Court directly.

On November 6th, 2013, this Court issued a hearing notice for a January 14th, 2014 master calendar, and mailed it to Ms. Xxxxx at ADDRESS 1. On November 14th, 2013, Ms. Xxxxx and Ms. Xxxxx moved from that address to ADDRESS 2. Ms. Xxxxx prepared an EOIR-33IC

change of address form for her mother, which Ms. Xxxxx signed. She filed it with the Court on November 21st, 2013.

Ms. Xxxxx did not receive the hearing notice and, when she failed to appear on January 14th, 2014, the Court ordered her removed *in absentia*. On that same day, it mailed a notice of its decision to her at ADDRESS 2. On January 15th, 2014, the post office returned the decision to the Court as undeliverable. At that time, neither Ms. Xxxx nor her daughter were aware that the post office was failing to deliver mail to them at their new address. It was not until February of 2014, when Xxxxx College contacted Ms. Xxxxx to inform her that the diploma which it had mailed to her at that address had been returned as undeliverable that they realized there was a problem. It was not until then that she contacted the post office, and was informed that it would not deliver mail to an individual whose name did not appear on the door/mailbox of a residence. Ms. Xxxxx promptly put her and Ms. Xxxxx's names on their mailbox and, from then on received mail without a problem. Ms. Xxxxx submits today evidence that other mail, from Xxxxx and Xxxxx, which had been sent to her at ADDRESS 2 in January and February of 2014 had been returned to the senders as undeliverable.

On April 2nd, 2014, Ms. He contacted Mr. Xxxxx again, to inquire as to the status of her mother's case. On that day, Mr. Xxxxx informed Ms. Xxxxx that he was leaving the Human Rights Law Foundation, and suggested that she contact the Court directly to make arrangements for his supervisor to take over Ms. Xxxxx's representation. She called the Court on that same day, and was informed that her mother had been ordered removed *in absentia* on January 14th.

Within a mater of days, Mr. Xxxxx promptly filed a motion to reopen Ms. Xxxxx's removal proceedings. That motion was rejected on April 9th, 2014 for failure to comply with various provisions of the Practice Manual. On April 17th, 2014, Ms. Xxxxx filed a *pro se* motion

to reopen with sworn statements from herself, her daughter, and Mr. Xxxxx attesting to her lack of notice, copies of the motions to remand and remand orders, and two expert affidavits discussing the persecution of Xxxxx followers by the Xxxxx government.

On May 22nd, 2014, the Honorable Paul M. Gagnon denied Ms. Xxxxx's motion to reopen. In his decision, Judge Gagnon indicates that the "notice of hearing was sent to the address provided by the respondent on the EOIR-33 received by the Court on November 21st, 2013." Ms. Xxxxx promptly retained new counsel.

III Argument

Ms. Xxxx failed to appear at her January 14th, 2014 master calendar hearing because she never received notice of that hearing. As such, she moves this Court to rescind the *in absentia* order which it issued on January 14th, 2014, and to reopen these removal proceedings.

Although an Immigration Judge is authorized to proceed *in absentia* when a respondent fails to appear at a hearing after written notice has been provided to the last address which she has provided to DHS, the BIA has instructed that a Judge should rescind that order, and reopen removal proceedings, when the respondent comes forward with evidence that she did not actually receive that notice. INA 240(b) (5) (C) (ii); 8 CFR 1003.23(b) (4) (ii); *Matter of M-R-A-*, 24 I & N Dec. 665 (BIA 2008); *Matter of C-R-C-*, 24 I & N Dec. 677 (BIA 2008); *Kozak v. Gonzales*, 502 F.3d 34, 38 (1st Cir. 2007).

Prior to April 1st, 1997, notices to appear and notices of hearing were required to be served upon respondents in deportation and exclusion proceedings via personal service or certified mail to the respondent's last known address. In that context, the Board of Immigration Appeals held that,

> where a Notice of Hearing is sent 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 because public officers, including Postal Service employees, are presumed to properly discharge their duties.

Matter of Grijalva, 21 I & N dec. 27, 37 (BIA 1995). The 1997 amendments to the Immigration and Nationality Act, however, struck the requirement that notices of hearings be served by certified mail; in its current incarnation, the Act authorizes service by regular mail when personal service is impracticable.

In that context, the BIA held that *Grijalva's* strong presumption of service does not apply. In *Matter of M-R-A-*, 24 I & N Dec. 665 (BIA 2008) and *Matter of C-R-C-*, 24 I & N Dec. 677 (BIA 2008), the Board held that, although "it is proper to apply some presumption of receipt to a Notice to Appear or Notice of Hearing sent by regular mail when the notice was properly addressed and mailed according to normal office procedures," *M-R-A-* at 673,

> This presumption [] is weaker than that accorded to notice sent by certified mail. Therefore, when a respondent seeks to reopen proceedings based on a claim of lack of notice, the question to be determined is whether the respondent has presented sufficient evidence to overcome the weaker presumption of delivery attached to notices delivered by regular mail.

Id.

The nation's Circuit Courts of Appeals (including the First Circuit) have agreed. *See Kozak v. Gonzales*, 502 F.3d 34, 36-38 (1st Cir. 2007) (the relevant question is whether an alien received the notice and that the standard enunciated in *Grijalva* cannot be applied to notices sent by regular mail because "[a]lthough most mail reaches its intended destination, it is commonsensical that at least some does not."); *see also Lopez v. Gonzales,* 468 F.3d 81, 84 (2nd Cir. 2006) ("As the use of the word 'receive' establishes, when considering the motion to reopen, the central issue no longer is whether the notice was properly mailed (as it is for the purpose of initially entering the *in absentia* order), but rather whether the alien actually *received* the

notice."); *Hussain v. Gonzales,* 207 Fed. Appx. 687m 689 (7th Cir. 2006) ("The relevant question in deciding a motion to reopen is not notice but receipt..."); *Smykiene v. Holder*, 707 F.3d 785, 788 (7th Cir. 2013) ("Mail is sometimes misdelivered."); *Joshi v. Ashcroft*, 389 F.3d 732, 735 (7th Cir. 2004).

And, although a respondent in removal proceedings bears the responsibility of notifying the Court of her address in a timely fashion, "[a]n alien also has no obligation to inquire with the Postal Service as to whether it has misplaced any of his or her letters." *Kozak*, 502 F.3d at 37.

The *M-R-A-* Board determined that "[a]n inflexible and rigid application of the presumption of delivery is not appropriate when regular mail is the method of service of a Notice to Appear or Notice of Hearing." *M-R-A-* at 674. It authorized Immigration Judges to consider "a variety of factors," including (but not limited to):

1. The respondent's affidavit;
2. Affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received;
3. The respondent's actions upon learning of the in absentia order, and whether due diligence was exercised in seeking to redress the situation;
4. Any prior affirmative applications for relief, indicating that the respondent had an incentive to appear;
5. Any prior application for relief filed with the Immigration Court or any prima facie evidence in the record or the respondent's motion of statutory eligibility for relief, indicating that the respondent had an incentive to appear;
6. The respondent's previous attendance at Immigration Court hearings, if

applicable; and

7. Any other circumstances or evidence indicating possible nonreceipt of notice.

M-R-A- at 674.

In *C-R-C-*, the Board found the fact that the respondent had submitted a sworn statement asserting that he had not received notice, coupled with the fact that he promptly retained counsel after learning of the *in absentia* order, to be sufficient to establish a lack of notice, and to warrant reopening. 24 I & N Dec. 677, 680 (BIA 2008). In *M-R-A-*, the Board found the facts that the respondent had affirmatively filed for asylum, appeared for his first hearing, had sought counsel to represent him in his removal proceedings, and had retained an attorney promptly after learning of the *in absentia* order to suffice.

The undisputed facts of Ms. Xxxx's case are much stronger than those considered by the Board in either *M-R-A* or *C-R-C-*. In this case, a review of Ms. Xxxx's EOIR file reflects that the Court mailed a notice of the January 14th, 2014 hearing to Ms. Xxxx at ADDRESS 1 November 6th, 2013, that it received a change of address form informing the Court of ADDRESS 2 on November 21st, 2013, and that correspondence sent by the Court to ADDRESS 2 in January of 2014 was returned to the Court as undeliverable. With her first motion to reopen, Ms. Xxxx submitted sworn statements by herself, her daughter, and former counsel, each asserting that she did not receive notice of the hearing, and outlining the steps which Ms. Xxxx had taken to pursue her case. She submits today evidence that other mail sent to her daughter at ADDRESS 2 between November, 2013 and February, 2014 was returned to the senders as undeliverable by the Postal Service, as well as a second sworn statement from her daughter explaining that it was not until she failed to receive her diploma in February of 2014 that she became aware that her

and her mother's mail was not being delivered, and took steps to rectify the situation.

Ms. Xxxx pursued her application for asylum diligently, from this Court to the BIA, to the First Circuit, and throughout remanded proceedings. During the course of those proceedings, she appeared for numerous hearings, and complied with court-ordered deadlines. The government itself recognized the strength of the merits of her claim when it moved for remand. And her actions after learning of the *in absentia* order - promptly contacting her attorney, filing a motion to reopen within a matter of days, and retaining new counsel when that motion was denied - speak volumes. Nothing about her conduct during the course of the past four years reflects that she had any intention to fail to appear for her scheduled hearing; to the contrary, they reflect that she had every reason to appear and no reason to abscond.

The evidence of record clearly establishes all of the factors which the *M-R-A-* Board found relevant in assessing a respondent's claim of lack of notice, and warrant recision and reopening.

IV Motion to Reopen for Exceptional Circumstances or *Sua Sponte*

In the event that this Court finds that Ms. Xxxx's failure to appear at the November 1st, 2014 hearing was not due to lack of notice, it should nonetheless reopen these proceedings for exceptional circumstances or *sua sponte*.

Even if a Judge determines that a respondent's failure to appear at a scheduled hearing was not due to a lack of notice, he may rescind an *in absentia* order and reopen removal proceedings if exceptional circumstances caused the failure to appear. INA 240(b)(5)(C)(I). The First Circuit Court of Appeals has held that an applicant's unintentional failure to appear can constitute an exceptional circumstance which warrants rescission and reopening. In *Kaweesa v.*

Gonzales, 450 F.3d 62 (1st Cir. 2006), the First Circuit held that an asylum applicant who had mistakenly believed her hearing was scheduled two days after the actual date had established exceptional circumstances where she had diligently pursued her application up until that point, and promptly sought legal redress after she discovered her error. The *Kaweesa* Court found that it did not "appear that Kaweesa's failure to appear was deliberate or due to a desire to delay proceedings." For that reason, and because the harm to her in losing the opportunity to pursue her asylum claim paled in comparison to the inconvenience to the government in reopening it, the Court reversed the denial of the motion to reopen, and remanded for a hearing on the merits of her claims for relief from removal. *Id*. at 70-71.

The facts of the *Kaweesa* case are analogous to those of Ms. Xxxx's. As such, even if this Court finds that they do not establish a lack of notice, she respectfully submits that they do constitute exceptional circumstances which warrant reopening.

Finally, even if the Court is disinclined to reopen for either lack of notice or exceptional circumstances, Ms. Xxxx respectfully submits that hers is an appropriate case for reopening *sua sponte*.

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

recognized that,

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

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

Ms. Xxxx's case is precisely the type of case in which *sua sponte* reopening is appropriate. She has a strong claim to asylum - indeed, a claim so strong that the Attorney General moved to remand her case from the First Circuit for reconsideration. She has diligently pursued her claim for more than four years, and before January, 2014 had never failed to comply with a deadline or instruction by the Court. Reopening these proceedings will clearly further the interests of justice.

V Conclusion

For all of these reasons, the respondent respectfully moves this Court to rescind the *in absentia* deportation order which it entered against her on January 14th, 2014, and to reopen her removal proceedings.

Respectfully submitted this ___ day of June, 2014

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Xxxx Xxxx, by her attorney,
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