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Non-Detained

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

In the Matter of:
Xxxx Xxxx Axxx xxx xxx

In Removal Proceedings

Immigration Judge: Matthew D'Angelo **Next Hearing: N/A**

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

I Statement of the Case

Respondent Xxxx Xxxx moves this honorable Court to rescind the *in absentia* deportation order which it entered against her on January October 1st, 2014, and to reopen these removal proceedings. Because Ms. Xxxx alleges that her failure to appear was due to exceptional circumstances, her removal from the United States is automatically stayed until such a time as the Court renders a decision. INA §240(b)(5)(C).

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hearing after written notice has been provided to the last address which she has provided to DHS, that order should be rescinded, and removal proceedings reopened, when the respondent comes forward with evidence that her failure to appear was due to exceptional

circumstances. INA 240(b) (5) (C); 8 CFR 1003.23(b) (4); *Kaweesa v. Gonzales*, 450 F.3d 62 (1st Cir. 2006); *Matter of W-F-*, 21 I & N Dec. 503 (BIA 1996); *Matter of B-A-S-*, 22 I & N Dec. 57 (BIA 1998).

In this case, Ms. Xxxx does not contest that she received proper notice of the October 1st, 2014 master calendar hearing. She asserts, however, that recission and reopening is warranted because her failure to appear was due to exceptional circumstances.

II Facts

Xxxx is a native and citizen of Xxxx, the mother of three U.S. citizen children, ages eleven, nine and four years respectively, and the daughter of a lawful permanent resident mother and stepfather.

Removal proceedings were instituted against Ms. Xxxx in December of 2012, when the USCIS Asylum Office referred her application for derivative NACARA benefits to the Court. Ms. Xxxx appeared at a master calendar hearing on January 9th, 2013, on which day this Court continued proceedings to October 16th, 2013. On October 1st, 2013, however, the federal government shut down, and the Immigration Court remained closed through October 16th. Ms. Xxxx's master calendar hearing was cancelled and, on October 31st of that year, the Court mailed her counsel notice that the case had been continued yet again to October 1st, 2014. On November 7th, 2013, counsel mailed Ms. Xxxx a copy of that hearing notice, with a letter written in Spanish informing her of the hearing date.

On October 18th, 2013, Ms. Xxxx submitted a complete application for cancellation of removal under INA 240A(b).

Employees in counsel's office attempted to communicate with Ms. Xxxx by telephone in

the week preceding the On October 1st, 2014 master calendar hearing, but were not able to speak with her. On October 1st, Ms. Xxxx's counsel appeared at the master calendar hearing, but she herself did not. It was not until approximately 10:30am that counsel's office was able to reach Ms. Xxxx by telephone. By that time, the Court had entered an *in absentia* order against her. She offered to come to Court at that time, but when the Court declined to consider an oral motion to reopen, she instead proceeded directly to counsel's office.

III Argument

Ms. Xxxx's failure to appear at the October 1st, 2014 master calendar hearing was due to exceptional circumstances. 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.

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), a case which bears striking factual similarity to Ms. Lainez', the Court 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 *Kaweesa* Court emphasized that, "in deciding the validity of a claim of exceptional circumstances, the 'totality of the circumstances *must* be considered.'" 450 F.3d at 68, *quoting Matter of B-A-S-*, 22 I & N Dec. 57, 58-59 (BIA 1998). Specifically, it posited that relevant factors would include: the existence of supporting documents; the non-citizen's efforts in contacting the Court; her promptness in filing a motion to reopen; the strength of her underlying claim; the harm she would suffer if the motion were denied; and the inconvenience the government would suffer if the motion were granted. *Kaweesa* at 68-69.

Ms. Xxxx's case is precisely analogous to Ms. Kaweesa's and, indeed, presents more compelling equitable factors (her lengthy residence in the United States, strong family ties, and eligibility for multiple forms of relief from removal). And all of the factors which the First Circuit identified in *Kaweesa* mitigate in favor of reopening in Ms. Xxxx's case: She offered to rush to the court on October 1st, 2014 as soon as she discovered that she had mistaken the date of the hearing, and files this motion the day after the *in absentia* order issued. She is statutorily eligible for NACARA and cancellation of removal, and has filed complete applications for both. She faces forced removal from a country where she has resided for well over a decade, and separation from three U.S. citizen children and two lawful permanent resident parents. The inconvenience to the Court and the Department of Homeland Security in reopening proceedings and allowing her to pursue her applications for relief pales in comparison to the equitable factors at play; indeed, DHS counsel has indicated that he has no objection to reopening.

Finally, even if the Court is disinclined to reopen for 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 NACARA and cancellation of removal, and has diligently pursued both claims over the course of many years. She has appeared at a scheduled Asylum Office interview and a master calendar hearing, and has presented evidence that her failure to appear at the hearing which was rescheduled from January, 2013 to October 1, 2014 was due to a simple error of record-keeping on her part. Before October, 2014 she 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* removal order which it entered against her on October 1st, 2014, and to reopen her removal proceedings.

Respectfully submitted this 2nd day of October, 2014

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Xxxx Xxxx, by her attorney,
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