A CLOSER LOOK AT MOTIONS TO REOPEN AND RESCIND IN ABSENTIA ORDERS

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MOTION TO REOPEN AND RESCIND AN IN ABSENTIA ORDER OF DEPORTATION, EXCLUSION OR REMOVAL[1]

There are two situations where individuals who were ordered deported, excluded or removed in absentia can reopen their cases: (1) they did not receive notice of the hearing and/or the charging document (*i.e.*, the Notice to Appear (NTA) or the Order to Show Cause (OSC)); and/or (2) they did not appear at their hearing because of "exceptional circumstances" beyond the control of the respondent. Orders to Show Cause were issued for noncitizens placed in deportation proceedings and Forms I-122 (Notice to Applicant for Admission Detained for Hearing Before Immigration Judge) were issued for noncitizens in exclusion proceedings prior to April 1, 1997; Notices to Appear have been issued for noncitizens placed in removal proceedings on or after April 1, 1997.[2] The difference between the two types of proceedings is relevant with respect to statutory provisions, regulatory provisions, and standards for motions to reopen in absentia orders.

Lack of Proper Notice

An in absentia order may be rescinded by the immigration judge upon the filing of a motion to reopen if the respondent did not receive proper notice of the hearing.[3]

Preliminary Issues—Filing, Fees, Stay, and Notice Requirements

Where to File the Motion to Reopen—The motion should be filed with the immigration court having administrative control over the Record of Proceedings.[4] Typically, this will be the court where the in absentia order was entered. If an appeal was incorrectly filed with the Board of Immigration Appeals (BIA) to reopen an in absentia order, and was dismissed by the BIA for lack of jurisdiction, the motion to reopen must still be

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[1] Motions to reopen and rescind *in absentia* orders are discussed in "Rescinding an In absentia Order of Removal", American Immigration Law Foundation, *amended* 9/21/2004, available at www.ailf.org/lac/pa/lac_pa_092104.pdf.

[2] *See* INA §239(a)(1); INA §242B(a)(1) (1995).

[3] INA §240(b)(5)(C)(ii) (removal proceedings); INA §242B(c)(3) (deportation proceedings) (1995); 8 CFR §§1003.23(b)(4)(ii) ("order entered in absentia removal proceedings"), (iii)(A)(2) ("order entered in absentia in deportation or exclusion proceedings"); *see Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988). Unless otherwise noted, the Immigration and Nationality Act (INA) citations refer to the statute as amended by the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, and subsequent statutes.

[4] 8 CFR §1003.23(b)(1)(ii).

filed with the court where the *in absentia* order of removal or deportation was entered because the motion to reopen is seeking to rescind the *in absentia* order.[5]

Time for Filing the Motion to Reopen—A motion to reopen based on lack of proper notice can be filed at any time (*i.e.*, there is no time restriction for filing).[6]

Filing Fees—There is no fee for a motion to reopen if the basis for the motion is lack of notice in removal or deportation proceedings.[7]

Automatic Stay of Removal/Deportation—An automatic stay of removal/deportation goes into effect when the motion is filed and remains in effect pending disposition of the motion by the immigration judge.[8] In deportation cases, the stay remains in effect during the pendency of any BIA appeal of the decision on the motion to reopen.[9]

Practice Pointer: To alert the court and U.S. Immigration and Customs Enforcement (ICE) to the applicability of the automatic stay provision, the motion should indicate (*i.e.*, in bold letters on the cover page and on the first page of the motion) that an automatic stay applies.

Requirements for Proper Notice—Proper notice means that the Department of Homeland Security (DHS) must properly serve the respondent with a charging document at the outset of proceedings. Also, the court must properly serve the respondent with written notice of all hearings.[10]

What Information Must the Notice Contain—The OSC or NTA must include:

- Nature of the proceedings;
- Legal authority for the proceedings;
- Acts/conduct alleged to be in violation of the law;
- Charges against the respondent;
- Notification of the right to be represented by counsel; and
- Requirement that the alien must notify the court and the government of any change of address and/or telephone number.[11] The notice also must inform the respondent of the consequences of not providing a change of address (*i.e.*, that he or she may be ordered removed or deported *in absentia*).[12] The notice of hearing, whether contained in the charging document or as a separate notice, must state the time and place of the proceedings and must inform the respondent of the consequences of failing to attend the hearing.[13]

Proper Methods of Service—Charging Document and Notice of Hearing

Exclusion Cases and Deportation Cases Filed Prior to June 13, 1992

If the respondent was ordered deported or excluded *in absentia* and there is no evidence that the respondent was *personally* served the OSC, then the respondent's case should be reopened for lack of notice. Prior to June 13, 1992, the regulation provided that service of the OSC could be accomplished either by personal service or by routine service.[14] However, the regulation stated that when routine service was used and the re-

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[5] *See EOIR Immigration Court Practice Manual*, Appendix K. The *Practice Manual* establishes that if an appeal has been filed with the Board of Immigration Appeals (BIA) *and* the appeal was dismissed for lack of jurisdiction, the motion to reopen *must* be filed with the Immigration Court since the motion is not challenging the BIA's dismissal by the BIA for lack of jurisdiction.

[6] INA §240(b)(5)(C)(ii); INA §242B(c)(3)(B) (1995).

[7] 8 CFR §1003.24(b)(2)(v); *see also EOIR Practice Manual*, ch. 3, Section 3.4(b)(ii).

[8] INA §240(b)(5)(C); *see also* INA §242B(c)(3) (1995).

[9] *Matter of Rivera*, 21 I&N Dec. 232, 234 (BIA 1996).

[10] *See* INA §239(a)(2); INA §242B(a)(2) (1995).

[11] INA §239(a)(1); INA §242B(a)(1) (1995).

[12] *See id.*

[13] INA §§239(a)(1)(G), (2)(A)(ii); INA §§242B(a)(2), (B)(ii) (1995).

[14] 8 CFR §242.1(c) (1992).

spondent did not appear for the hearing (or did not acknowledge in writing that the OSC was received), personal service was required.[15] Personal service included mailing the notice by certified or registered mail, return receipt requested.[16] The mail receipt must have been signed by the respondent or a responsible person at the respondent's address and returned to effect personal service.[17]

Deportation Cases Filed Between June 13, 1992, and April 1, 1997 (INA §242B(a)(1) (pre-IIRAIRA, April 1997))

If the OSC was filed between June 13, 1992, and March 31, 1997, the OSC and all notices of hearing must have been served in person or by *certified mail* to the respondent or the attorney of record, if any.[18] The OSC also must have been mailed return receipt requested.[19] Therefore, in order to accomplish service, the certified mail receipt must have been signed by the respondent or a responsible person at the respondent's address.[20] However, a signature was not required to effect service of a notice of hearing.[21]

Removal Proceedings Filed on or After April 1, 1997 (INA § 239(c))

The NTA may be served in person or by mail, but there is no requirement that the NTA be mailed by certified mail.[22] Regular mail is sufficient. Consequently, signatures of receipt are not required.[23]

How Does the "Change of Address" Requirement Affect Proper Service?

DHS may mail the NTA to the last address on file for the respondent.[24] However, a respondent cannot be ordered removed or deported *in absentia* until he or she is warned (by receipt of the NTA or OSC) that he or she may be ordered removed or deported *in absentia* as a consequence of failing to inform the government of a change of address.[25] Therefore, individuals who failed to report a change of address and, as a result, did not receive the NTA or OSC, cannot be ordered removed in absentia.[26]

Section 265(a) of the Immigration and Nationality Act (INA)[27] requires that all noncitizens inform the Attorney General of any change of address.[28] However, in *Matter of G–Y–R–,* 23 I&N Dec. 181 (BIA 2001), the BIA held that failure to comply with this section does not automatically subject an individual to an in absentia order of removal.[29]

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[15] *See id.*

[16] 8 CFR §103.5a(a)(2) (1992).

[17] *Matter of Huete*, 20 I&N Dec. 250, 253 (BIA 1991).

[18] INA §§242B(a)(1), (2) (1995).

[19] *Matter of Grijalva*, 21 I&N Dec. 27, 32 (BIA 1995).

[20] *See id*. In a precedent Seventh Circuit case, the court found that the government had not met its burden of proof to create a presumption of actual delivery. *See Adeyemo v. Ashcroft*, 383 F.3d 558 (7th Cir. 2004). Although the government had sent the OSC by certified mail, the signature obtained was illegible; the respondent provided evidence that the signature did not belong to him or his wife, and he asserted that an unknown resident in the large apartment building must have signed and not delivered the mail. The court distinguished this case from *Tapia v. Ashcroft*, 351 F.3d 795 (7th Cir. 2003), a case in which the court held that an adult sister's signature was sufficient to prove a presumption of actual delivery. In *Tapia*, there was no evidence that the signature did not belong to the respondent's adult sister or that his sister was not a responsible adult.

[21] *See Matter of Grijalva*, 21 I&N Dec. at 34.

[22] INA §239(c).

[23] *See id*.

[24] *Matter of G–Y–R–*, 23 I&N Dec. 181, 189–90 (BIA 2001).

[25] *See id.* at 190.

[26] *See id*.

[27] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §1101 *et seq*.).

[28] INA §265(a).

[29] *Matter of G–Y–R–,* 23 I&N Dec. at 190 (BIA 2001).

It appears that some federal courts, and even the BIA, are interpreting the holding of *Matter of G–Y–R–* narrowly, or ignoring it altogether.[30] For example, in *Matter of M–D–*, the BIA read *Matter of G–Y–R–* as applying only in cases where the address of record was in dispute.[31] The BIA found that notice requirements may be satisfied in the absence of actual receipt of the NTA.[32] Where the NTA was sent by certified mail to the correct address, but was returned "unclaimed," "the respondent [was not allowed] to defeat service by neglecting or refusing to collect his mail."[33] Furthermore, some cases seem to ignore the finding of the BIA that "an address does not become a section 239(a)(1)(F) address unless the alien receives the warnings and advisals contained in the Notice to Appear."[34]

After receiving the OSC or NTA, service of additional hearing notices by the immigration court is sufficient where there is proof of attempted delivery to the last address provided by the respondent, even if the respondent does not receive the notice.[35] Moreover, if the respondent fails to notify the court of a change of address, the court is not required to serve respondent a notice of hearing.[36] Therefore, if a respondent received the OSC or NTA but did not notify the court of a subsequent change of address (and did not receive a hearing notice), then respondent may not claim lack of notice.

What Happens if the Respondent Does Not Receive the Notice Because It Is Served on the Attorney of Record?

Service on the attorney of record constitutes service on the respondent.[37] Therefore, if the attorney of record is properly served, in most cases, a motion to reopen for lack of notice will fail even if the attorney did not inform the respondent of the hearing. The respondent may argue that counsel's failure to notify him or her of the hearing was ineffective assistance of counsel and amounts to an exceptional circumstance.[38] However, the respondent must comply with the new requirements set out in *Matter of Compean, Bangaly, & J–E–C–*[39] for ineffective assistance claims.[40]

How Can the Respondent Prove that He or She Did Not Receive Notice If the Record Shows that It Was Mailed to the Correct Address?

The Board has held that there is a presumption of effective service by mail.[41] An unsupported denial of receipt is insufficient to support a motion to reopen in deportation proceedings.[42] Therefore, if the record shows

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[30] *See Dominguez v. U.S. Att'y Gen.,*284 F.3d 1258, 1259–60 (11th Cir. 2002); *Gurung v. Ashcroft,* 371 F.3d 718, 721 (10th Cir. 2004); *Matter of M–D–,* 23 I & N Dec. 540, 542 (BIA 2002).

[31] *See Matter of M–D–*, 23 I&N Dec. 540, 545 (BIA 2002).

[32] *See id.* at 547.

[33] *See id*.

[34] *Matter of G–Y–R–*, 23 I&N Dec. at 187 (BIA 2001). *See, e.g., Dominguez v. U.S. Att'y Gen.*, 284 F.3d 1258, 1259–60 (11th Cir. 2002) (holding that notice is statutorily sufficient if the NTA is sent to the most recent address provided by the petitioner, even if the petitioner has moved). *See also Gurung v. Ashcroft*, 371 F.3d 718, 721 (10th Cir. 2004) (citing *Dominguez* and finding notice sufficient if the NTA is sent by regular mail to the correct address); *Matter of M–D–*, 23 I&N Dec. 540, 542 (BIA 2002) (citing *Dominguez*).

[35] *See* INA §239(c); INA §242B(c)(1) (1995); *Matter of G–Y–R–*, 23 I&N Dec. at 187–88 (BIA 2001).

[36] INA §239(a)(2)(B); INA §242B(a)(2) (1995).

[37] INA §§239(a)(1) and (2); INA §242B(a)(1)–(2) (1995); *Matter of Peugnet*, 20 I&N Dec. 233, 237 (BIA 1991).

[38] *See Matter of Rivera*, 21 I&N Dec. 599, 607 (BIA 1996) (pre-*Matter of Compean* case law).

[39] *Matter of Compean, Bangaly, & J–E–C–,* 24 I&N Dec. 710 (AG 2009).

[40] *See Oseiwusu v. Filip,* 2009 WL 190085 (10th Cir. Jan. 28, 2009) (establishing that claim of "exceptional circumstance" premised on ineffective assistance of counsel survives *Matter of Compean* decision). For a discussion regarding *Matter of Compean*, *supra*, *see* "Practice Advisory: Summary of *Matter of Compean*," American Immigration Law Foundation, 1/12/2009, *available at* www.ailf.org/lac/lac-ineffective.shtml. This website is an Issues Page with briefs, updates to pending ineffective assistance of counsel cases, and links to articles regarding the *Compean* decision and requests to Attorney General Eric Holder Jr. to review and vacate the *Compean* decision.

[41] *See Matter of Grijalva*, 21 I&N Dec. at 37 (BIA 1995) (*citing Powell v. C.I.R.*, 958 F.2d 53 (4th Cir.), *cert. denied*, 506 U.S. 965 (1992); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926) ("There is a presumption that public officers, including Postal Service employees, properly discharge their duties.")).

[42] *Matter of Grijalva,* 21 I & N Dec. at 37.

that the mail was delivered to the correct address by the appropriate method, the court usually will presume that the notice was served. The presumption of effective service can be overcome if the respondent demonstrates nondelivery or improper delivery by the Postal Service.[43] Nondelivery or improper delivery can be established by submitting substantial and probative evidence, such as documentary evidence from the Postal Service and affidavits.[44] For example, if there were ongoing problems with the mail delivery to the address where the respondent resided, counsel may want to provide details about the problems, such as affidavits from people with direct knowledge of the problems and photographs of the place to where the mail is delivered.

Because the INA no longer requires delivery by certified mail, the courts may apply a weaker presumption of delivery and lesser evidentiary requirements to rebut the presumption. In *Matter of M–R–A–,*[45] the BIA held that there is a weaker presumption of delivery where service is by regular mail, rather than certified mail.[46] Relevant evidence to overcome the presumption of service includes affidavits, due diligence to redress the situation, prior applications for relief, and prior appearance at earlier removal hearings.[47] Additionally, the BIA held that the immigration court and BIA may rely on circumstantial evidence to overcome the presumption of delivery to determine that notice did not in fact arrive and notice was not received.[48] In *Matter of C–R–C–,* the BIA noticed that the respondent had not moved, had incentive to appear (*i.e.*, relief was available), and exercised due diligence in redressing the situation.[49]

What Happens if the Respondent Did Not Receive Oral Notice of the Consequences of Failing to Appear?

The statute only provides for rescission of an *in absentia* order when the government fails to properly serve the respondent with *written* notice. However, respondents who did not receive oral warnings of the consequences of failing to appear may be able to reopen their cases even if the court properly entered an *in absentia* order of deportation. The leading case on this issue is *Matter of M–S–*.[50] This holding of the case applies if: (1) no oral warnings were provided in the respondent's native language or a language the respondent understands—the oral warnings must give notice of the time and place of the proceedings and the consequences of failing to appear at the hearing; and (2) the respondent is eligible for a form of relief that was unavailable at the time of the hearing.[51]

In *Matter of M–S–*, the Board held that the limitations on reopening to rescind an *in absentia* order do not serve as limitations on reopening for other purposes.[52] The Board focused on INA §242B(e)(1) (1995),[53] which states that any respondent who is provided with oral notice, in a language he or she understands, of the time and place of the proceedings and of the consequences of failing to attend will be ineligible for various forms of relief, including adjustment of status and voluntary departure, for five years.[54] This section explicitly

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[43] *See id.*

[44] *See id.*

[45] *Matter of M–R–A–,* 24 I&N Dec. 665 (BIA 2008).

[46] *Matter of M–R–A–,* 24 I & N Dec. 665, 673 (BIA 2008).

[47] *See id*.; *see also Ghounem v. Ashcroft*, 378 F.3d 740 (8th Cir. 2004) (finding petitioner's sworn statement sufficient to rebut the presumption of delivery by regular mail); *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003) (finding that DHS could not invoke a presumption of notice where it used an erroneous zip code for an address); *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (noting that a sworn affidavit was sufficient to rebut the presumption of delivery where the petitioner had appeared at earlier hearings, and had no motive to avoid the hearing). *But see, Gurung v. Ashcroft*, 371 F.3d 718, 722 (10th Cir. 2004) (noting that the petitioner's conclusory statement was insufficient to meet the burden of proof to rebut the presumption of receipt of a notice "properly mailed to the authorized address").

[48] *Matter of C–R–C–,* 24 I&N Dec. 677, 679-80 (BIA 2008).

[49] *See id*.

[50] *Matter of M–S–*, 22 I&N Dec. 349 (BIA 1998).

[51] *Id*.

[52] *See id*. at 354.

[53] This section is presently found at INA §240(b)(7).

[54] INA §242B(c)(1), (e)(1) (1995); this section is presently found at INA §240(b)(7).

allows respondents to apply for relief when they were not verbally warned of the consequences of failing to appear for a hearing.[55]

Therefore, respondents who did not receive oral warnings and are eligible for a form of relief that was unavailable to them at their last hearing can reopen their cases under the general motion to reopen rules.[56] These provisions require that the motion be filed within 90 days of the final order of removal or deportation and that the respondent submit the application for relief with the motion to reopen.[57] If a case is reopened pursuant to *Matter of M–S–*, the respondent cannot challenge the finding of deportability.[58]

What to Look for in the Record of Proceedings

A review of the record of proceedings (ROP) may provide evidence of lack of proper notice. Counsel should consider the following when reviewing the ROP:

- Is there evidence that the respondent received the charging document? Did the respondent sign the document? Is there a fingerprint?
- Are there any typographical errors in the mailing address of the respondent?
- Was the hearing date correct on the OSC or NTA and/or the hearing notice?
- Was the mailing address the last one provided by the respondent?
- Is there a change of address form in the court file that was not processed by the clerk's office?
- If the notice was returned to the court undelivered, was a reason for non-delivery provided by the postmaster?
- Was the notice mailed by the proper method (*e.g.*, certified mail if applicable)?
- Did an attorney enter an appearance and then withdraw from the case? If yes, was the notice of the hearing mailed to him or her in error?
- If an attorney was of record in the case, was the hearing notice properly addressed to the attorney's last known address?

The Departure Bar and Motions to Reopen and Rescind an In Absentia Order

In *Matter of Armendarez-Mendez,*[59] the BIA held that pursuant to 8 CFR §1003.2(d) the BIA lacks authority to reopen removal, deportation, or exclusion proceedings—whether on motion of a respondent or sua sponte—if the respondent has departed the United States after those administrative proceedings have been completed (*i.e.*, the "departure bar").[60] However, the holding of *Matter of Armendarez-Mendez* is limited to "motions to reopen other than those seeking rescission of in absentia orders of removal, which are not involved [in *Matter of Armendarez-Mendez*] and are subject to different time and number limits.[61]

In *Matter of Armendarez-Mendez,* the BIA specifically stated that the Board "express[es] no opinion on whether a [respondent's] departure would foreclose the filing of a rescission motion [to reopen], as rescission can be viewed as vacating the in absentia order from the outset" (citing *Contreras-Rodriguez v. U.S. Attorney*

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[55] *See id*.

[56] *See* INA §240(c)(7)(A); 8 CFR §§1003.23(b)(1) and (3).

[57] INA §240(c)(6); 8 CFR §1003.23(b)(1).

[58] *Matter of M–S–,* 22 I & N Dec. at 354.

[59] *Matter of Armendarez-Mendez,* 24 I&N Dec. 646 (BIA 2008).

[60] Please note that although the *Matter of Armendarez-Mendez* decision addressed the BIA departure bar regulations, the departure bar regulations governing proceedings before the Immigration Court and before Immigration Judges are identical to the BIA departure bar regulations. *See* 8 CFR §1003.23(b)(1) (2008). Therefore, the holding of *Matter of Armendarez-Mendez* regarding the effects of the departure bar is probably binding on cases before the Immigration Court and Immigration Judges.

[61] *Matter of Armendarez-Mendez,* 24 I&N Dec. at 654, n.6.

General).[62] In essence, therefore, based on the reasoning in *Contreras-Rodriguez*, the "departure bar" is not applicable to a motion to reopen and rescind an *in absentia* order of removal based on lack of notice.

EXCEPTIONAL CIRCUMSTANCES CASES

There are cases where the respondent received proper notice, but failed to appear for the hearing and was ordered removed or deported *in absentia* as a result. The immigration judge may rescind an *in absentia* order of removal or deportation if the respondent's failure to appear for the hearing was because of exceptional circumstances.[63] In exclusion and deportation cases prior to June 13, 1992, a less stringent standard, "reasonable cause," applies.[64]

Preliminary Issues—Filing, Fees, Stay, Filing Deadlines, and Equitable Tolling

Where to File the Motion to Reopen—The motion should be filed with the immigration court having administrative control over the Record of Proceedings.[65] Typically, this will be the court where the *in absentia* order was entered. In addition, if an appeal was filed with the BIA to reopen an in absentia order and was dismissed for lack of jurisdiction, the motion must be filed with the court where the *in absentia* order of removal or deportation was entered because the motion to reopen is seeking to rescind the in absentia order.[66]

Time for Filing the Motion to Reopen—A motion to reopen in removal or deportation proceedings initiated on or after June 13, 1992, must be filed within *180 days* of the entry of the *in absentia* order.[67] A motion to reopen in exclusion or deportation proceedings before June 13, 1992, may be filed at any time.[68]

Equitable Tolling of the 180-Day Filing Requirement Based on Exceptional Circumstance Claim Based Upon Counsel's Ineffective Assistance—Although the BIA has held that there is no exception to the filing deadline, the Second, Third, Seventh, Ninth, and Tenth Circuits have held that the filing deadlines are subject to equitable tolling.[69] This means that a respondent may file a motion to reopen after 180 days, particularly in situations where he or she did not know about the *in absentia* order because prior counsel was ineffective.[70]

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[62] *Contreras-Rodriguez v. U.S. Attorney General,* 462 F.3d 1314 (11th Cir. 2006) (holding even if respondent departed from the United States, that the immigration judge and BIA retained jurisdiction to reopen removal proceedings of in absentia order of removal to address whether alien received sufficient notice of the removal hearing).

[63] INA §240(b)(5)(C)(i); INA §242B(c)(3)(A) (1995).

[64] *See, e.g., Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988).

[65] 8 CFR §1003.23(b)(1)(ii).

[66] *See EOIR Immigration Court Practice Manual*, Appendix K (establishing that if an appeal has been filed with the BIA and the appeal was dismissed for lack of jurisdiction, the motion to reopen must be filed with the Immigration Court since the motion is not challenging the BIA's dismissal by the BIA for lack of jurisdiction); *see also* INA §240(b)(5)(c)(ii).

[67] INA §240(b)(5)(C)(i); INA §242B(c)(3)(A) (1995); 8 CFR §§1003.23 (b)(4)(ii), (iii)(A)(1).

[68] 8 CFR §1003.23(b)(4)(iii)(B); *Matter of N–B–-*, 22 I&N Dec. 590, 593 (BIA 1999); *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1159 (BIA 1999).

[69] *Compare Matter of A–A–*, 22 I&N Dec. 140, 144 (BIA 1998) (the exceptional circumstance claim based upon counsel's failure to inform client of deportation hearing may not be heard because it was not brought within the 180-day period and the period is jurisdictional); *Matter of Lei*, 22 I&N Dec. 113, 116 (BIA 1998), *with Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1225 (9th Cir. 2002); *Iavorski v. INS*, 232 F.3d 124, 130 (2d Cir. 2000); *Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097, 1100 n.3 (9th Cir. 1999).

[70] *See Aris v. Mukasey,* 517 F.3d 595 (2d Cir. 2008) (ineffective assistance of counsel even if it occurs through a paralegal's misrepresentation is an exceptional circumstance and also tolls the 180-day period); *Pervaiz v. Gonzales,* 405 F.3d 488, 490 (7th Cir. 2005) (because the 180-day period to reopen an in absentia determination is not jurisdictional, but a statute of limitations, it may be tolled for ineffective assistance of counsel where counsel failed to distinguish between the adequacy of notice and his client's failure to receive notice of a change in time of hearing); *Borges v. Gonzales,* 402 F.3d 398 (3d Cir. 2005) (if notary working with lawyer committed fraud, then 180-day period is tolled, then motion to reopen is timely filed, and ineffectiveness of counsel would thereafter constitute an exceptional circumstance to rescind order; *Bejar* distinguished); *Lopez v. INS,* 184 F.3d 1097 (9th Cir. 1999) (where respondent did not appear at hearing because of fraudulent misrepresentation of nonlawyer, the 180-day period for filing reopening under former INA §242B(c)(3)(A) was tolled).

The numerical limits are also not jurisdictional and therefore subject to tolling.[71] Equitable tolling is also appropriate where the fraudulent actions are by persons who are immigration consultants and not attorneys.[72] The limitations period is tolled until the respondent "definitively learns" of counsel's ineffectiveness or fraud.[73] However, one circuit has taken the view that the 180-day filing requirement is jurisdictional and time periods may not be waived or tolled.[74]

Equitable tolling generally is available only where the alien exercised due diligence in pursuing his or her immigration case.[75] Therefore, where a party fails to exercise due diligence in pursuing her rights, equitable tolling is unavailable.[76]

Filing Fees—The filing fee for a motion to reopen is $110.[77] Respondents who cannot afford the fee may request a fee waiver.[78] The regulation states that "[a] properly executed affidavit or unsworn declaration made pursuant to 28 USC 1746 by the respondent/applicant must accompany the request for waiver of fees and shall substantiate the indigency of the respondent."[79]

Automatic Stay of Removal/Deportation—An automatic stay goes into effect when the motion to reopen an *in absentia* order is filed and remains in effect pending disposition of the motion by the immigration judge.[80]

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[71] *Joshi v. Ashcroft,* 389 F.3d 732, 734–35 (7th Cir. 2004) (deadlines that govern transitions from one court to another such as from the BIA to the circuit court are jurisdictional but other deadlines such as the number or time limitation on motions to reopen are not and court could review BIA's denial of fourth motion to reopen in absentia order); *Varela v. INS,* 204 F.3d 1237 (9th Cir. 2000) (numerical limitation on motions to reopen is equitably tolled where second motion was filed after person was defrauded by notary purporting to provide legal representation).

[72] *Fajardo v. INS,* 300 F.3d 1018 (9th Cir. 2002) (180-day period equitably tolled where immigration consultants made misrepresentations that prevented respondent from attending hearing or appealing; court suggested in fn.8 that misrepresentation would constitute an exceptional circumstance).

[73] *Albillo-De Leon v. Gonzales,* 410 F.3d 1090, 1100 (9th Cir. 2005) (where respondent was defrauded by nonlawyer who posed as a lawyer, the time period for filing a motion to reopen under NACARA §203(c) and 8 CFR §1003.43(e)(1) was tolled until date that current attorney found out that motion was not filed).

[74] *See Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (finding without explanation that motion to reopen deadline is jurisdictional and not subject to equitable tolling).

[75] *See Scorteanu v. INS*, 339 F.3d 407, 413–14 (6th Cir. 2003); *Jobe v. INS*, 238 F.3d 96, 101 (1st Cir. 2001); *Iavorski*, 232 F.3d at 134.

[76] *Yuan Gao v. Mukasey,* 519 F.3d 376 (7th Cir. 2008) (a 75-day wait to file motion to reopen was deemed to be lack of due diligence); *Singh v. Gonzales,* 491 F.3d 1090, 1096–97 (9th Cir. 2007) (upheld lack of due diligence where respondent waited approximately six months to take any action with a new lawyer after he became suspicious); *Wang v. Board of Immigration Appeals,* 508 F.3d 710, 715 (2d Cir. 2007) (upheld denial of motion to reopen where petitioner waited eight months after learning of ineffective assistance and five months after complying with *Lozada* to file motion); *Tapia-Martinez v. Gonzales,* 482 F.3d 417, 423–24 (6th Cir. 2007) (equitable tolling not applied to numerical limitations where respondent failed to exercise due diligence and file motions regarding her former lawyers); *Habchy v. Gonzales,* 471 F.3d 858, 864–66 (8th Cir. 2006) (no equitable tolling where respondent's argument was that he lost the opportunity to reopen his case because of his own *pro se* initial motion to reopen); *Patel v. Gonzales,* 442 F.3d 1011 (7th Cir. 2006) (court upheld BIA decision not to allow equitable tolling where respondent family failed to exercise due diligence as they waited almost two years to file motion to reopen based upon ineffective assistance); *Mahmood v. Gonzales,* 427 F.3d 248 (3d Cir. 2005) recognized equitable tolling for ineffective assistance in failing to notify client about prior order thereby missing the time for filing a motion to reopen, but denied petition for lack of due diligence by respondent); *Kanyi v. Gonzales,* 406 F.3d 1087, 1090–91 (8th Cir. 2005) (court did not decide equitable tolling of 180-day period for in absentia reopening because respondent did not act with due diligence); *Scorteanu v. INS,* 339 F.3d 407, 412–14 (6th Cir. 2003) (where respondent failed to file motion to reopen within 180 days after he learned of prior lawyer's misfeasance the doctrine of equitable tolling did not apply because of lack of due diligence); *Jobe v. INS,* 238 F.3d 96 (1st Cir. 2001) (en banc) (failure by respondent to file motion to reopen for several months after he received notice that removal order had been entered in absentia six months before prevents equitable tolling).

[77] 8 CFR §1103.7(b)(2).

[78] 8 CFR §1003.24(d).

[79] *See id*.

[80] INA §240(b)(5)(C); *see also* INA § 242B(c)(3) (1995).

In deportation cases, the stay remains in effect during the pendency of any BIA appeal of the decision on the motion to reopen.[81]

Practice Pointer: To alert the court and ICE to the applicability of the automatic stay provision, counsel should indicate (*i.e.*, in bold letters on the cover page and on the front page of the motion) that an automatic stay applies.

The Meaning of "Exceptional Circumstances"

The term "exceptional circumstances" was added to the INA by the Immigration Act of 1990 (IMMACT90).[82] It is defined as those "exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien."[83]

Prior to IMMACT90, the standard for determining whether an *in absentia* order should be rescinded was "reasonable cause" for failure to appear.[84] The reasonable cause standard applies to deportation cases initiated before June 13, 1992, and exclusion cases. The BIA has held that "exceptional circumstances" is a more stringent standard than "reasonable cause."[85]

Establishing Exceptional Circumstances

The Board uses a "totality of the circumstances" test to determine whether the respondent's reason for not attending the hearing is an exceptional circumstance.[86] In general, the BIA will only find that an exceptional circumstance exists where: (1) the respondent provides a detailed and plausible explanation for why he or she failed to appear; (2) the respondent provides adequate documentation in support of the motion to reopen—if documentation is not available, the respondent should submit signed affidavits;[87] and (3) the respondent attempted to contact the Immigration Court on the date of the hearing or provides an explanation for why he or she did not do so.[88]

It is critical to provide as much detail as possible and submit all evidence with the initial motion. Also, it is recommended that counsel include as much information about the issues that the respondent plans to raise upon reopening of the proceedings as well as attach any applications for relief that have not already been submitted. Immigration judges have broad discretion to reopen cases. However, judges will be more inclined to reopen cases where the respondent has a meritorious claim for relief or when there is strong argument challenging deportability and the respondent has demonstrated a commitment to resolve his immigration case.[89] Furthermore, judges are more likely to reopen the case if the respondent attempted to contact the court prior to the hearing.

Practice Pointer: In preparing clients for upcoming hearings, counsel should advise them to contact the court if they are delayed.

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[81] *Matter of Rivera*, 21 I&N Dec. 232, 234 (BIA 1996).

[82] Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978.

[83] INA §240(e)(1); *see also* INA § 242B(f)(2) (1995).

[84] *See, e.g., Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1158 (BIA 1999); *Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988); *see also De Jimenez v. Ashcroft*, 370 F.3d 783, 790 (8th Cir. 2004).

[85] *Matter of N–B–-*, 22 I&N Dec. 590, 593 (BIA 1999).

[86] *Matter of W–F–*, 21 I&N Dec. 503, 509 (BIA 1996) (*citing* H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 132 (1990)); *Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996).

[87] *See Matter of J–P–*, 22 I&N Dec. 33, 34-35 (BIA 1998).

[88] *See Matter of J–P–,* 22 I&N Dec. 33, 35 (BIA 1998); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002); *Morales v. INS*, 116 F.3d 145, 149 (5th Cir. 1995).

[89] *See, e.g.*, *Herbert v. Ashcroft*, 325 F.3d 68, 72 & n.1 (1st Cir. 2003) (noting that there was no meaningful delay by respondent); *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) (remanding the case for review on the merits where the petitioner "had no possible reason to try to delay the hearing," had a basis for relief, had previously attended all hearings, and where the deportation would break up a family or force U.S. citizen children overseas).

Examples of Exceptional Circumstances

The following is a non-exhaustive list of some of the cases in which the Board or the circuit courts have addressed exceptional circumstances or reasonable cause for failure to appear.

- *Illness*—Illness is an exceptional circumstance/reasonable cause if the respondent provides adequate documentation.[90]
- *Filing a Motion for Change of Venue/Continuance*—Generally, filing a motion does not excuse the respondent's appearance at the hearing.[91] The First Circuit found that there is no exceptional circumstance where the respondent assumed that his motion for change of venue would be granted because DHS did not object.[92] Also, where the respondent requested multiple continuances because his employment prevented him from attending the hearing, the BIA held that he had not established exceptional circumstances.[93]
- *Traffic/Car Trouble*—The courts and the BIA have found that traffic and car trouble usually are not exceptional circumstances.[94] However, the Board has indicated that a detailed (and well documented) explanation of why there was an extraordinary amount of traffic can establish an exceptional circumstance.[95] Where the court found that car trouble was not an exceptional circumstance, the respondents were faulted for failing to contact the immigration court and/or attempting to find an alternate means for getting to the court.[96] Traffic, when combined with other factors, including that the attorney timely notified the immigration judge that he had a conflict, may result in exceptional circumstances.[97]
- *Arriving Late*—The Ninth Circuit has held that the court should not deny reopening of an *in absentia* deportation order where the petitioner, who had a basis for relief, arrived late and where the result would be unconscionable.[98] Further, arriving slightly late for a hearing may not mean that the respondent failed to appear, especially since the immigration judge was still on the bench when the respondent arrived.[99] Likewise, the Seventh Circuit has excused a respondent's late arrival where the respondent was denied a meaningful opportunity to be heard.[100] If a client is going to be late to court, it is advisable to contact the court.

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[90] *See Matter of J–P–,* 22 I&N Dec. 33, 34 (BIA 1998) (respondent needs to provide documentation); *Matter of Singh*, 21 I&N Dec. 998, 1000 (BIA 1997) (stepson's illness is an exceptional circumstance); *Matter of N–B–*, 22 I&N Dec. 590, 593 (BIA 1999) (serious illness requiring surgery is reasonable cause for failure to appear). *But see Lonyem v. U.S. Att'y Gen.*, 352 F.3d 1338, 1341 (11th Cir. 2003) (upholding the immigration judge's determination that a nurse's affidavit stating that petitioner had been treated for malaria the day before the hearing was not credible in the absence of further documentation and because he had failed to contact the immigration court on the day of the hearing); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 890 (9th Cir. 2002) (finding inadequate a hospital form that failed to indicate that petitioner's asthma attack was a "serious health condition").

[91] *See Jian Jun Tang v. Ashcroft*, 354 F.3d 1192, 1195 (10th Cir. 2003); *Hernandez-Vivas v. INS*, 23 F.3d 1557, 1560 (9th Cir. 1994); *Patel v. INS*, 803 F.2d 804, 806 (5th Cir. 1986); *Maldonado-Perez v. INS*, 865 F.2d 328, 335 (D.C. Cir. 1989). *But see Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003) (IJ should not have entered in absentia order where attorney filed motion for continuance because he was ordered to appear in U.S. District Court at the time of immigration hearing); *Romero-Morales v. INS*, 25 F.3d 125, 130 (2d Cir. 1994) (IJ should have examined motion for change of venue before issuing *in absentia* order).

[92] *See Georcely v. Ashcroft*, 375 F.3d 45, 50 (1st Cir. 2004).

[93] *See Matter of W–F–,* 21 I&N Dec. 503, 509 (BIA 1996).

[94] *See Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996); *De Morales v. INS*, 116 F.3d 145, 148 (5th Cir. 1995); *Matter of S–A–*, 21 I&N Dec. 1050, 1051 (BIA 1997).

[95] *See Matter of S-A-,* 21 I&N Dec. 1050, 1051 (BIA 1997).

[96] *See De Morales v. INS*, 116 F.3d 145, 149 (5th Cir. 1997).

[97] *See Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003); *see De Jimenez v. Ashcroft*, 370 F.3d 783, 789–90 (8th 2004) (traffic and multitude of other factors constitute reasonable cause for failure to appear for exclusion hearing).

[98] *See Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002).

[99] *See Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999); *see also Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003).

[100] *See Nazarova v. INS*, 171 F.3d 478, 480 (7th Cir. 1998). *But see Thomas v. INS*, 976 F.2d 786, 790 (1st Cir. 1992) (not reasonable cause where respondent and counsel arrived ten minutes after immigration judge entered order of deportation).

- *Ineffective Assistance of Counsel*—The BIA has held that ineffective assistance of counsel can be an exceptional circumstance.[101] Previously, however, the Board also has held that the respondent must comply with the requirements for establishing ineffective assistance of counsel as set forth in *Matter of Lozada*.[102,103] Since *Matter of Lozada* has been overruled by *Matter of Compean, Bangaly, & J–E–C–,*[104] claims of exceptional circumstances based on ineffective assistance of counsel must comply with the *Compean* decision.[105] The *Compean* decision, however, may still be challenged, particularly where the circuit courts of appeals have ruled that there is a Fifth Amendment right to due process, which includes effective assistance of counsel.

Since the issuance of *Matter of Compean*, the Tenth Circuit Court of Appeals has addressed the interplay between the *Matter of Compean* decision and whether ineffective assistance of counsel may serve as an exceptional circumstance. In *Oseiwusu v. Filip*,[106] the respondent claimed that his *in absentia* removal order should be rescinded and his removal proceedings reopened based on the ineffective assistance of his former counsel.[107] In *Oseiwusu*, the Tenth Circuit established that despite the Board's decision on *Matter of Compean,* the task of the court was not to determine whether there is a claim of constitutionally defective performance of counsel but, instead, the court was confronted with the statutory issue of whether Mr. Oseiwusu established exceptional circumstances beyond his control, as defined by the INA §240(e)(1), which is premised on ineffective assistance of counsel for the failure to appear at the scheduled removal hearing.[108] More specifically, the *Oseiwusu* Court provided as follows:

> Mr. Oseiwusu's remaining argument is that his first attorney rendered ineffective assistance of counsel by failing to provide a copy of the written notice and failing to communicate effectively. Mr. Oseiwusu claims that his first attorney's performance constitutes "exceptional circumstances" under [INA §240(b)(5)(C)(i)] that warrant reopening the proceedings and rescinding the *in absentia* removal order. [The government] contends that contrary to our prior case law, *see, e .g., Osei v. INS,* 305 F.3d 1205, 1208 (10th Cir. 2002) (holding that despite lacking a right to appointed counsel, a petitioner "can state a Fifth Amendment violation if he proves that retained counsel was ineffective and, as a result, the petitioner was denied a fundamentally fair proceeding"), an alien in removal proceedings has no right to effective assistance of counsel under the Fifth Amendment because such an alien has no Sixth Amendment right to counsel. Therefore, respondent concludes, Mr. Oseiwusu cannot prevail on his argument. [The government's] contention misses the mark. Despite the semantics of Mr. Oseiwusu's argument, our task is not to resolve a claim of constitutionally defective performance. Rather, we are confronted with a statutory issue-whether Mr. Oseiwusu established exceptional circumstances under [INA §240(b)(5)(C)(i)]. "Exceptional circumstances" is defined by statute: The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien. [INA §240(e)(1)]. Nothing in this definition requires a deprivation of constitutional magnitude, including when, as here, the allegations relate to an attorney's performance. As in the past, we will "assum[e] without deciding that an attorney's deficient performance can amount to exceptional circumstances under [INA §240(e)(1) sufficient to reopen removal proceedings pursuant to [INA §240(b)(5)(C)(i)]." *Tang v. Ashcroft,* 354 F.3d 1192, 1196 (10th Cir. 2003).

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[101] *See Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996).

[102] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1996).

[103] *See Matter of Rivera*, 21 I&N Dec. 599, 607 (BIA 1996).

[104] *Matter of Compean, Bangaly, & J–E–C–,* 24 I&N Dec. 710 (AG 2009).

[105] For a discussion regarding *Matter of Compean*, *supra*, see "Practice Advisory: Summary of *Matter of Compean*," American Immigration Law Foundation, 1/12/2009, *available at* www.ailf.org/lac/lac-ineffective.shtml. This website is an Issues Page with briefs, updates to pending ineffective assistance of counsel cases, and links to articles regarding the *Compean* decision and requests to Attorney General Eric Holder Jr. to review and vacate the *Compean* decision.

[106] *Oseiwusu v. Filip,* 2009 WL 190085 (10th Cir. Jan. 28, 2009).

[107] *Id.* at *2.

[108] *Id.* at *5.

> We consider the totality of the circumstances when analyzing whether the failure to appear at a hearing is due to circumstances beyond the control of the alien. *Id.* at 1194.[109]

Additionally, in footnote 5, the court further analyzed *Matter of Compean* in relation to ineffective assistance of counsel that may constitute an "exceptional circumstance" under the INA:

> We note that since briefing in this matter was completed, the Attorney General has issued an opinion in which he concluded that aliens in removal proceedings do not have a constitutional right to counsel under the Fifth or Sixth Amendments. *Matter of Compean,* 24 I&N Dec. 710, 726 (A.G. 2009), *overruling Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *and Matter of Assaad,* 23 I&N Dec. 553 (BIA 2003). We acknowledge the conflict between *Compean,* which is not binding on this court, *see Edwards v. Carter,* 580 F.2d 1055, 1103 n.42 (D.C. Cir. 1978), and our prior case law with respect to an alien's right to effective assistance of counsel under the rubric of fundamental fairness embodied in the Fifth Amendment's due process clause, *see, e.g., Osei*, 305 F.3d at 1208. But we need not take up the matter in this case, for our concern is with the statutory definition of "exceptional circumstances," not a claim of constitutionally ineffective assistance of counsel. We do note, however, that in a deliberate effort to "avoid confusion with what has heretofore been treated as a constitutional claim of ineffective assistance of counsel," the Attorney General has recognized that IJs and the BIA have statutory discretion to grant motions to reopen based on a showing of " 'deficient performance of counsel.'" *Compean,* 24 I&N Dec. at 730. This comports with our view that something less than constitutionally ineffective assistance of counsel might rise to the level of "exceptional circumstances" under [INA §240(e)(1)].[110]

PRACTICE POINTERS—EVIDENCE TO INCLUDE IN MOTIONS TO REOPEN IN ABSENTIA ORDERS

This part of the article will focus in the cases where the presumption of delivery (*i.e.*, lack of notice cases) is applicable and/or cases where exceptional circumstances are claimed. Obviously, these factors will not address cases where there is clear and unequivocal evidence in the record of proceedings that the charging document and/or the notice of hearing was mailed to an incorrect address thereby conclusively proving reopening based on the record for lack of notice.[111]

The BIA has identified a non-exclusive list of seven factors to be considered in deciding whether the presumption of delivery has been rebutted. These factors include:

- the respondent's affidavit;
- affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received;
- the respondent's actions upon learning of the *in absentia* order and whether due diligence was exercised in seeking to redress the situation;
- any prior affirmative application for relief, indicating that the respondent had an incentive to appear;
- 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;
- the respondent's previous attendance at Immigration Court hearings, if applicable; and
- any other circumstances or evidence indicating possible non-receipt of notice.[112]

In circumstances regarding motions to reopen based on claims of exceptional circumstances, including claims of ineffective assistance of counsel, the list of factors and evidence outlined in *Matter of M–R–A–* is also instructive. For example, in such motions detailed affidavits for all persons who have knowledge of the

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[109] *Id.* at *5.

[110] *Oseiwusu,* 2009 WL 190085 at n.5.

[111] *See* Section I.(B)(8) of this article for factors and evidence to determine and establish lack of notice.

[112] *Matter of M–R–A–,* 24 I&N Dec. 665, 674 (BIA 2008).

facts that constitute an exceptional circumstance must be submitted. In addition, medical records, traffic reports, or any evidence documenting and corroborating the exceptional circumstance must be submitted, including evidence of a respondent's incentive to appear, such as applications for relief. Finally, claims of ineffective assistance of counsel as an exceptional circumstance must comply with the BIA's *Matter of Compean*[113] decision, unless such decision is overturned or overruled.

[113] *Matter of Compean*, *Bangaly, and J–E–C–,* 24 I & N Dec. 710 (AG 2008). For additional discussion regarding the *Lozada* requirements and other types of motions to reopen, *see* Z. Nightingale & A. Shastri, "Legal Strategies Involving Motions to Reopen, Reconsider, and Rescind Before the Board of Immigration Appeals," *Immigration and Nationality Law Handbook* 193 (AILA 2008–09 Ed.).