UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
SAN FRANCISCO IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

Matter of	Date: FEB 19 2014
	File Number: A
Respondent	In Removal Proceedings

Charge: Section 212(a)(6)(A)(i) Present without having been admitted or paroled

Applications: Motion to Reopen and rescind *in absentia* removal order

On Behalf of Respondent:
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On Behalf of the DHS:
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DECISION OF THE IMMIGRATION JUDGE

The respondent has moved to rescind the *in absentia* order of removal entered by this court on December 19, 2013 and to reopen the proceedings. The motion is timely. Immigration and Customs Enforcement (ICE) opposes the motion. For the following reasons, the motion will be granted.

An order entered *in absentia* in deportation proceedings may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of deportation *if* the alien demonstrates that the failure to appear was because of *exceptional circumstances* beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances). *See* 8 C.F.R. § 1003.23(b)(iv)(ii) (2008). It is well settled in the Ninth Circuit that in the context of a motion to reopen, an IJ must accept as true the facts stated in an alien's declaration unless it finds those facts to be inherently unbelievable. *See Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007) (citing *Maroufi v. INS*, 772 F.2d 597, 600 (9th Cir. 1985)). In this case, the facts contained in Respondent's declaration are not overstated or inherently unbelievable. ICE has not offered any contrary evidence. Therefore, the court must and will assume them to be true for purposes of this motion.

To determine whether the exceptional circumstances standard has been met, the Court must look to the particularized facts presented in each case, *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000), and the "totality of the circumstances." *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996). Unsupported statements alleging exceptional circumstances alone do not satisfy the respondent's burden of proving exceptional circumstances; rather the respondent must also document their occurrence through sworn affidavits or other documentary evidence. *See Matter of J-P-*, 22 I&N Dec. 33 (BIA 1998) (holding that an alien's perfunctory statement that a headache prevented him from attending his hearing was insufficient to prove exceptional circumstances and observing that his statement contained no details regarding the cause, severity, or treatment of the alleged illness and was unsupported by medical or other records); *See also Singh*, 213 F.3d at 1054 (holding that in lieu of evidence from an official source, an alien may submit detailed affidavits from roommates, friends, co-workers or the alien herself). In this case, the respondent has submitted a detailed, sworn declaration regarding the reasons for his failure to appear.

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). In *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), the Board, in seeking to define the term "exceptional circumstances" in the context of former INA § 242(e)(B)(2), referred to Webster's II New Riverside University Dictionary (1984) and noted that, therein, the term "exception" is defined as "[o]ne that is excepted, esp. a case not conforming to normal rules" and the term "exceptional" is defined as "[b]eing an exception: unusual."

Under Ninth Circuit precedent, where relief is available and the respondent has otherwise acted diligently, exceptional circumstances may be shown, even where no illness or death are involved. In *Singh v. INS*, 295 F.3d 1037 (9th Cir. 2002), the respondent had diligently pursued his efforts to obtain lawful permanent residence status on the basis of his marriage. He appeared for five deportation hearings between October 1995 and October 1997, which were all continued. Several other hearings were continued upon his request until his wife could obtain citizenship. After his wife had become a naturalized United States citizen, and he became facially eligible for the status adjustment, he drove several hours with his wife and newborn baby to attend a deportation hearing on January 21, 1998 at 1:00 p.m., only to discover that the hearing had been scheduled for 11:00 a.m. and that he had been ordered deported *in absentia*. The Ninth Circuit found exceptional circumstances because the alien had no possible reason to try to delay the hearing and noted that the hearing was the culmination of years of efforts to obtain lawful permanent residence status. The instant case shares much in common with *Singh* in that Respondent's failure to appear was due to confusion about where and when he was to appear, not an avoidance of appearing. Because Respondent wants to pursue an application for asylum and withholding of removal, he has no incentive to miss his hearing, and he filed his motion to rescind and reopen very quickly after learning he had missed a hearing, further demonstrating his desire to appear. While this case has not been pending as long as was the *Singh* case, and Respondent missed his first master calendar hearing, he had regularly been appearing at ICE offices in connection with his conditional release from custody, further demonstrating his cooperation with the process. *See also, De Jesus Chete Juarez v. Ashcroft*, 376 F.3d 944 (9th

Cir. 2004) (respondent proved exceptional circumstances where she appeared for all but the last scheduled hearing, the hearing she missed represented years of efforts to regularize her status, she had no reason to try to delay the hearing, and the IJ likely would have granted suspension of deportation had the alien had an opportunity to appear before him to present her case.)

Respondent's failure to appear was unintentional. He has established that he wishes to, and always wished to, comply with the rules of the court and to attend any hearings. He was *pro se* at the time of the *in absentia* hearing. His unsophistication in failing to understand that the ICE order to appear in connection with his custody status was different from and additional to his obligation to appear in court in no way reflected disrespect of the court's authority and, under Ninth Circuit law, constitutes an exceptional circumstance under the specific circumstances present in this case. Therefore, his motion will be granted and the following order entered.

ORDER

IT IS HEREBY ORDERED that Respondent's motion to rescind the *in absentia* order dated December 19, 2013 and to reopen proceedings be, and hereby is, **GRANTED.**

IT IS FURTHER ORDERED that the parties appear as required in the attached notice of hearing.

Carol A. King
Immigration Judge