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9 UNITED STATES DEPARTMENT OF JUSTICE  
10 EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
11 IMMIGRATION COURT  
12 SAN FRANCISCO, CALIFORNIA

13 \_\_\_\_\_ )  
14 In the Matter of: ) File No. A  
15 )  
16 ) Before:  
17 Respondent, ) The Honorable Carol A. King  
18 In Removal Proceedings. )  
19 \_\_\_\_\_ )

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21  
22  
23 RESPONDENT’S MOTION TO REOPEN AND RESCIND  
24 *IN ABSENTIA* ORDER OF REMOVAL  
25 INCLUDING  
26 AN AUTOMATIC STAY OF REMOVAL  
27  
28

1  
2 I. INTRODUCTION

3 Respondent (“Respondent”), through counsel, respectfully requests this Court reopen and  
4 rescind Respondent’s *in absentia* order of removal due to exceptional circumstances.  
5 Specifically, because Respondent confused and conflated his need to appear at Immigration  
6 Customs & Enforcement (“ICE”) with his need to appear before this Court, Respondent  
7 establishes exceptional circumstances for his failure to appear. Moreover, Respondent has been  
8 appearing before ICE as required, wishes to pursue relief from removal, has retained counsel to  
9 assist him and has every incentive to appear before this Court for any future hearings.  
10

11 This Court may rescind an *in absentia* order of removal if the respondent’s failure to  
12 appear for the hearing was because of exceptional circumstances. INA §240(b)(5)(C)(i). An  
13 automatic stay goes into effect when the motion is filed and remains in effect pending disposition  
14 of the motion by the immigration judge. See INA §240(b)(5)(C).  
15

16 With this Motion, Respondent submits:

- 17 • Exhibit A (Declaration of Respondent);  
18 • Exhibit B (Form I-220A, Personal Report Record); and  
19 • Exhibit C (Declaration of Counsel).  
20

21 The validity of the order Respondent seeks to reopen is not been the subject of any  
22 judicial proceedings. See 8 C.F.R. § 1003.2(e). Respondent is not the subject of any pending  
23 criminal proceedings under the Immigration and Nationality Act. See 8 C.F.R. *supra*.  
24 Respondent is not the subject of any criminal prosecution. *Id.* Furthermore, on January 14,  
25 2014 the Department of Homeland Security indicated they did not have a position at this time.  
26 See Exh. C.

27 For all the set forth reasons, Respondent respectfully requests this Court grant the motion  
28 to reopen and rescind the *in absentia* order.

1 II. ARGUMENT

2 A motion to reopen and rescind an *in absentia* order must be filed within 180 days of the  
3 entry of the *in absentia* order. INA §240(b)(5)(C)(i); 8 CFR §§1003.23 (b)(4)(ii), (iii)(A)(1).  
4 Here, this Court ordered Respondent removed on December 19, 2013. Therefore this motion is  
5 timely. As such, the issue before this Court is whether Respondent’s failure to appear was due to  
6 “exceptional circumstances.”  
7

8 According to the Immigration and Nationality Act, ““exceptional circumstances”” refers  
9 to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or  
10 parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or  
11 parent of the alien, but not including less compelling circumstances) beyond the control of the  
12 alien.” INA §240(e)(1).  
13

14 The determination of whether “exceptional circumstances” exist will be based upon the  
15 particularized facts presented in each case. Singh v. INS, 213 F.3d 1050, 1052 (9th Cir. 2000).  
16 As such, there is not a single circumstance that will either qualify or disqualify a situation from  
17 consideration as exceptional. Vukmirovic v. Holder, 621 F.3d 1043, 1047 (9th Cir. 2010).  
18 Furthermore, The immigration courts employ a “totality of the circumstances” test to determine  
19 whether the respondent’s reason for not attending the hearing is an exceptional circumstance.  
20 Matter of W-F-, 21 I&N Dec. 503, 509 (BIA 1996) *citing* H.R. Conf. Rep. No. 955, 101st Cong.,  
21 2d Sess. 132 (1990); Matter of Grijalva, 21 I&N Dec. 472, 474 (BIA 1996).  
22

23 Here, because Respondent confused and conflated his need to appear at ICE with his  
24 need to appear before this Court, he presents exceptional circumstances warranting this Court to  
25 rescind the *in absentia* order. Prior to the scheduled hearing on December 19, 2013, Respondent  
26 appeared several times before ICE as required. See Exh. B. Respondent had never missed a  
27 required appearance. Exh. B, *supra*. At his last appearance on October 22, 2013 an ICE officer  
28 indicated to Respondent that his next required appearance date was January 21, 2014. Exh. A, B.

1 Here is where the confusion occurred. Respondent truly believed that he “had no other  
2 obligations until January 21, 2014.” Exh. A. Respondent believed that the ICE officer spoke on  
3 behalf of all “immigration” and was unaware that ICE was a separate and distinct agency from  
4 this Court. Respondent was further unaware that each agency had their own separate and distinct  
5 appearance requirements. Respondent simply thought that there was one “immigration” and  
6 moreover he believed that he was complying with “immigration’s” appearance requirements.  
7 But as this Court is aware, such is not the case. Respondent confused and conflated the two  
8 appearance requirements.  
9

10 And yet, as soon as Respondent became aware that he failed to meet an immigration  
11 requirement and that he had been ordered removed *in absentia*, he diligently sought out an  
12 attorney to help him understand what exactly had happened. Exh. A, *supra* at *para* 6. Indeed,  
13 once receiving notice of the *in absentia* order, Respondent obtained counsel to file this motion to  
14 reopen. Furthermore, Respondent has every incentive to appear at all future hearings so he can  
15 apply for asylum, withholding of removal and protection under the United Nations Convention  
16 Against Torture. Therefore Respondent presents exceptional circumstances warranting this  
17 Court to rescind the *in absentia* order of removal.  
18  
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20  
21 III. CONCLUSION

22 For all the foregoing reasons, Respondent respectfully requests this Court grant  
23 Respondent’s motion.

24 Dated: January 15, 2014

Respectfully submitted,

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26 \_\_\_\_\_  
27 Jeremiah Johnson  
28 Johnson & McDermed, LLP  
Counsel for Respondent