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US IMMIGRATION & NATIONALITY LAW

SECOND CIRCUIT PROVIDES MORE GROUNDS FOR NON-CITIZENS TO REOPEN AND RESCIND *IN ABSENTIA* REMOVAL ORDERS FOR LACK OF NOTICE

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By
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A potential client tells you that he was ordered removed *in absentia* years ago, and that he failed to appear before the Immigration Court in New York because he never received notice of his hearing, although he claims to have provided his correct address. He tells you that the Immigration Judge (IJ) denied his Motion to Reopen on the basis that notification of the hearing was properly sent to the address provided via first class mail. The IJ noted in his decision, however, that he believes your potential client never received the notification. The time for appeal has passed, but the potential client's wife, a US citizen to whom he has been happily married for several years insisted that he consult you to see if there's any other way to rescind the removal order so that she can sponsor him for a green card.

What are his options? You contemplate seeking consent from the (generally unsympathetic) Department of Homeland Security to a Joint Motion to Reopen based on the potential client's many equities.[1] After all, the IJ acknowledged that he did not receive the hearing notice and he has also entered into a bona fide marriage. Your chances of success vary from office to office, and you know that in your location, the Office of Chief Counsel does not join many motions and takes a long time to make a decision. You get on the computer to see if any new law has been decided that affects your potential client's claim. Lo and behold, you find it: two new cases decided by the Second Circuit Court of Appeals that directly impact your potential client's claim and practically ensure

him victory – assuming you can get around the pesky issue of numerical limitations on filing Motions to Reopen for lack of notice.[2] As your client never received notice of the hearing, the Motion is not time-barred.[3] See *Matter* of G-Y-R-, 23 I. & N. Dec. 181 (BIA 2001). You take the case, agreeing to file a Motion asking the IJ to Reopen the proceedings using his or her *sua sponte* authority.[4]

The Board of Immigration Appeals has held that it, or in this case the Immigration Court, may invoke its *sua sponte* authority to reopen proceedings in "truly exceptional situations." *See In Re G-D-*, 22 I & N Dec. 1132 (BIA 1999). Exceptional situations include fundamental changes in law, introduced by either the legislature or the courts. *See id*. The change must be fundamental, not incremental, and the regulations must otherwise "severely restrict[] the espondent's ability to revive proceedings." *Id*. Based on these new Second Circuit cases, you can argue that there has been a fundamental change in law that requires exercise of the IJ's *sua sponte* authority to reopen these proceedings.

On November 2, 2006, the U.S. Court of Appeals for the Second Circuit filed its decision in *Lopes v. Gonzales*, 468 F.3d 81 (2d Cir. 2006) (per curiam), in which it held that the BIA acted in "excess of discretion" by failing to consider evidence that the Respondent had not received the hearing notice. On December 14, 2006, the Second Circuit filed its decision in *Alrefae v. Chertoff*, 471 F.3d 353 (2d Cir. 2006), which reiterated its *Lopes* holding that, in a motion to rescind an in absentia order of removal for lack of notice, "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." Id. (quoting Lopes, 468 F.3d at 84). The *Lopes* and *Alrefae* decisions significantly alter the standard by which Motions to Rescind *in Absentia* Orders are adjudicated. They form the basis of your Motion to Reopen *sua sponte*.

In the Motion, you explain how these cases, which are binding on the IJ and the BIA in the Second Circuit,[5] changed the evidentiary standard to be applied in Motions to Reopen based on lack of notice. The *Lopes* court held that where notice of a removal hearing was sent via "regular first class mail" as opposed to certified mail, the Board may not apply the presumption of delivery set forth in *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995). The court noted that *Matter of Grijalva* was decided back when the Immigration and Nationality Act (INA)

required service by certified mail, whereas the statute has since been changed to permit service by regular mail.[6] The court then established a less stringent rebuttable presumption to be applied where a Respondent claims non-receipt of a hearing notice sent by first class mail. Similarly, in *Alrefae*, the court held that the Immigration Judge below had erred by applying the *Grijalva* standard because the notice of hearing was sent by first class mail.

In both cases, the Second Circuit clarified that proof of proper mailing is not conclusive of whether a notice of hearing was received. *Lopes*, 468 F.3d at 84; *Alrefae*, 471 F.3d at 5. The *Lopes* court held that no more than an affidavit from the Respondent was necessary "to raise a factual issue that the must resolve by taking account of *all* relevant evidence – not merely that evidence sufficient under *Grijalva." Lopes*, 468 F.3d at 83 (citing *Joshi*, 389 F.3d at 736-37). Cf. *Bhanot v. Chertoff*, ___ F.3d ____ , 2007 WL 148654 (2d Cir. 2007) (holding that the Petitioner did not successfully rebut the lesser presumption of receipt); *Maghradze* v. Gonzales, 462 F. 3d 150, 152 (2d Cir. 2006) (finding "constructive" receipt where alien failed to notify government of change of address). Other circumstantial evidence of receipt is important as well – including the Respondent's appearance at previous Master Calendar hearings, the Respondent's possession of a colorable claim for relief, and affidavits from disinterested third parties. See *Alrefae*, 471 F.3d at 5.

In a similar case before an IJ in New York City, our office successfully moved to reopen and rescind a removal order on the basis of the decisions discussed in this article. The IJ agreed that these decisions favorably affected our client's claim and exercised his authority to reopen the removal proceedings *sua sponte*.

These decisions are of enormous practical significance in the Second Circuit. Evidence previously considered extraneous to the inquiry of whether the notice was properly mailed has suddenly become relevant and likely to alter the outcome of Motions to Reopen based on lack of notice. To prevail on the standard announced in *Lopes* and *Alrefae*, however, one must submit evidence that the correct address was provided, and that the Respondent would have appeared had he or she received the hearing notice. For example, if your client affirmatively filed a request for asylum, you can argue that he or she intended to appear at all hearings. Finally, you must demonstrate that your client has a realistic basis for relief from removal. If years have passed and the asylum

claim is stale, but your client has since married a US citizen, you can still seek reopening of the case so that your client can obtain permanent residence through a bona fide marriage, but cite your client's affirmative application for asylum as circumstantial evidence that he or she intended to appear at the time the *in absentia* order was entered.

Even where Motions to Reopen were previously denied by the IJ or BIA, the cases discussed in this article may provide a basis for seeking *sua sponte* reopening of a client's proceedings if the order of removal was entered in the jurisdiction of the Second Circuit.

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[1] 8 C.F.R. § 1003.23 provides that the time and numerical limitations for motions shall not apply to a motion to reopen agreed upon by all parties and jointly filed.

[2] There is a numerical bar preventing the Respondent from filing more than one Motion to Reopen of an *in absentia* removal order for failure of notice. 8 C.F.R. § 1003.23(b)(4)(ii). There is no numerical limitation, however, in the case of *deportation* orders entered *in absentia*. 8 C.F.R. § 1003.23. Nevertheless, several courts of appeal have ruled that the numerical limitation is not jurisdictional, because it does not interfere with the finality of the judicial appeals process. See *Joshi v. Ashcroft*, 389 F.3d 732, 734-35 (7th Cir. 2004) (citing *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000)); *See also Hussein v. Gonzales*, 2006 U.S. App LEXIS (7th Cir. Dec. 7, 2006)(holding that the first motion should not count towards the numerical limit if it was erroneously denied).

[3] There is no time limit to file a Motion to Reopen based on failure to receive proper notice of the hearing INA §240(b)(5)(C)(ii).

[4] Both the Board of Immigration Appeals (BIA) and the Immigration Judge have *sua sponte* authority, regardless of the time and numerical limitations, pursuant to 8 C.F.R. 1003.2(a) and 8 C.F.R. 1003.23(b)(1); See *Matter of Muniz, 23 I&N Dec. 207, 208* (BIA 2002) (*sua sponte* reopening of a case where 9th Circuit

interpreted meaning of crime of violence differently from the BIA).

[5] *See Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002); *Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989).

[6] 8 USC §§ 1229(a)(2)(A), (c); 8 USC §§ 1252b(a)(2)(A), (f)(1) (*repealed*, effective 1997).