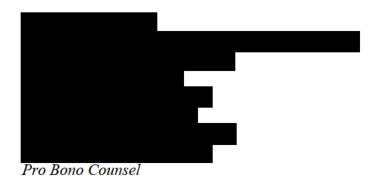
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NON-DETAINED

Comment [1]: This successful motion was prepared by Catholic Legal Immigration Network, Inc. (CLINIC) and the Asylum Seeker Advocacy Project (ASAP) in March 2017 for Orlando Immigration Court. Please be sure to check the relevant and up-todate caselaw in your jurisdiction. Exhibits have been omitted.

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT ORLANDO, FLORIDA

In the Matter of:)	
)	File No. A
)	File No. A
Respondents.	,)	THE TOO. 21

Post-Decision Motion

MOTION TO RESCIND IN ABSENTIA REMOVAL ORDER AND REOPEN PROCEEDINGS

NO FEE REQUIRED PER 1003.24(b)(2) AS MOTION BASED ON ASYLUM

AUTOMATIC STAY OF REMOVAL PER INA § 240(b)(5)(C)

2017

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT ORLANDO, FLORIDA

In the Matter of:	
) File No. A
) File No. A
Respondents.	
)
	RESCIND <i>IN ABSENTIA</i> REMOVAL ORDER AND REOPEN PROCEEDINGS
Respondents,	and , respectfully
request through this timely mot	tion that this Court rescind its in absentia order of removal dated
and reopen th	neir proceedings pursuant to INA § 240(b)(5)(C)(ii), 8 C.F.R. §
1003.23(b)(4)(ii). Ms.	and her minor daughter were unable to attend their
hearing due to the inte	erference and ineffective assistance of a "notario" posing as an
attorney. Exh. A, Declaration o	of Decl.") at ¶¶ 27-29.

representing himself as counsel – is an "exceptional circumstance" that explains Ms.

and her daughter's absence at their master calendar hearing and merits reopening their case. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988); *Montano Cisneros v. U.S. Atty. Gen.*, 514 F.3d 1224 (11th Cir. 2008). Ms.

and her daughter seek asylum in the United States and hired to represent them in their underlying case. Exh. B, Payment

Ineffective assistance of counsel – in this case by a non-attorney fraudulently

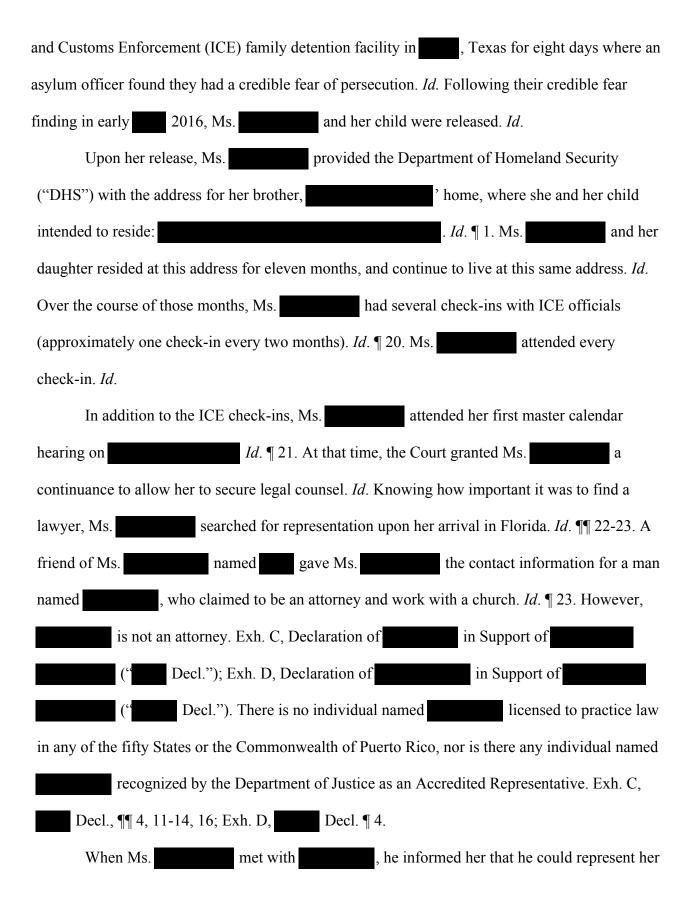
¹ Unauthorized practitioners of immigration law are often referred to as "notarios," which is notary public in Spanish.

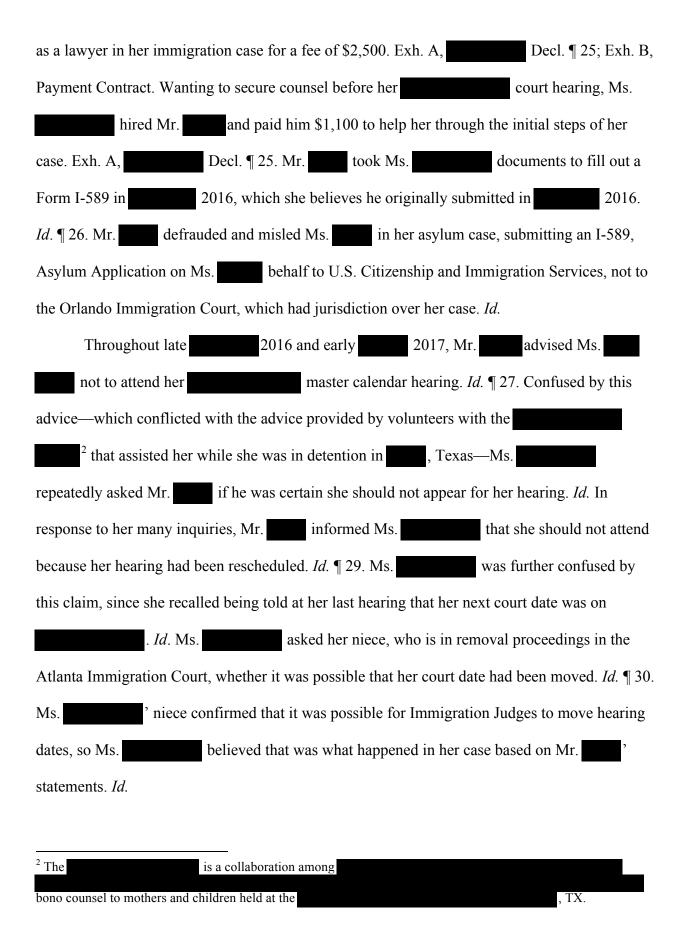
contract. In the was an attorney and minister, deliberately misled Ms. It is by telling her that her is hearing had been rescheduled and that she should not attend. Exh. A, is incorrect advice should be considered an exceptional circumstance and their case should be reopened. See Montano Cisneros v. U.S. Atty. Gen., 514 F.3d 1224 (11th Cir. 2008); see also Exh. N, In re Juarez Gonzalez, 2011 WL 1373694, *2 (BIA 2011) (holding that the ineffective assistance of a non-attorney can be sufficient for reopening where the consultant held himself out as an attorney).

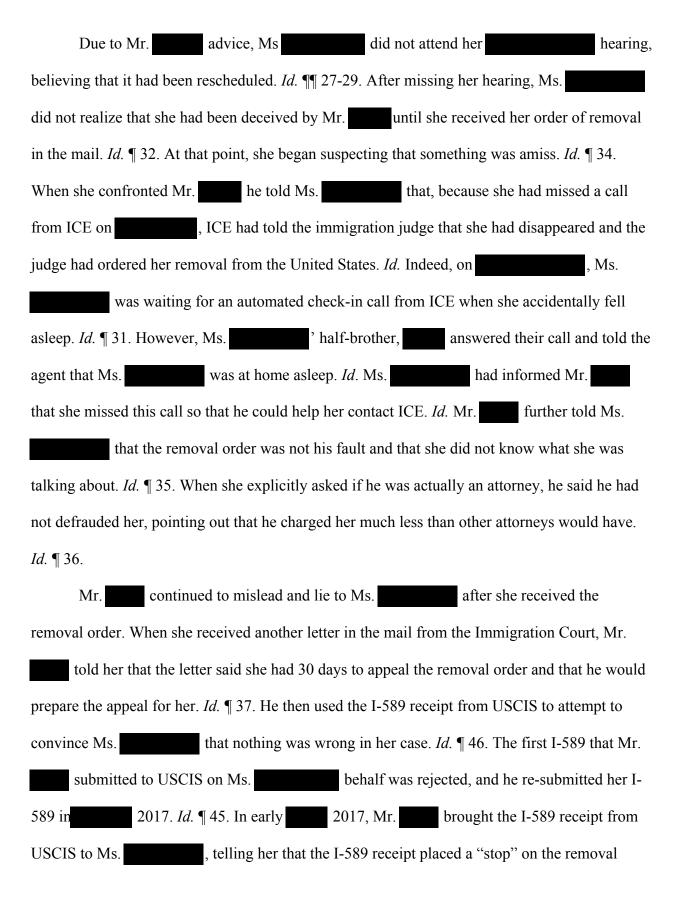
Because Ms. seeks to reopen an *in absentia* removal order based on exceptional circumstances within 180 days of receiving the order, her removal from the United States and that of her minor daughter is automatically stayed until such a time as the Court renders a decision. INA § 240(b)(5)(C).

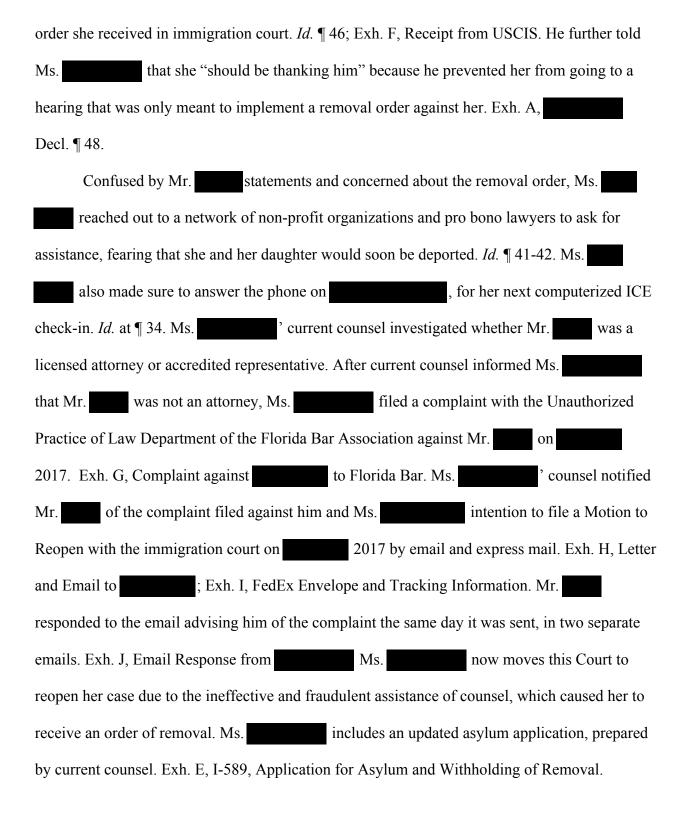
Statement of Facts and Procedural History

As described in her attached declaration, Ms. came to the United States with her minor daughter after Ms. ' brothers were murdered and her family was threatened by members of a group of hitmen with connections to drug and her daughter fled with her trafficking. Exh. A, at ¶¶ 9-15. Ms. nieces, who witnessed the murder of Ms. ' brother. *Id.* ¶ 15; Exh. E, I-589 Application for Asylum and Withholding of Removal. Ms. nieces and mother provided testimony in the ongoing criminal prosecution of a subset of the group of men who murdered Ms. brothers. Exh. A, Decl. at ¶¶ 12. Customs and Border Protection officers apprehended Ms. and her family members upon arrival in the United States. *Id.* ¶ 17. Ms. and her daughter were then transferred to an Immigration









Legal Argument

I. Ms. presents exceptional circumstances that merit rescinding her *in absentia* removal order and reopening her case.

A respondent ordered removed *in absentia* may seek to rescind the order "upon a motion to reopen filed within 180 days after the date of the order of removal or deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances. INA § 240(b)(5)(C). The applicable standard for determining exceptional circumstances is consideration of the totality of the circumstances. *See Matter of W-F-*, 21 I. & N. Dec. 503, 509 (BIA 1996).

A. Ineffective Assistance of Fraudulent Counsel

Ms. failed to appear at the master calendar hearing as a direct result of the ineffective assistance of fraudulent counsel, which qualifies as an exceptional circumstance. *See Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988) (setting forth standards to reopen a case based on ineffective assistance of counsel); *see also Montano Cisneros v. U.S. Atty. Gen.*, 514 F.3d 1224 (11th Cir. 2008); *Vukaj v. U.S. Att'y Gen.*, 321 Fed. App'x 885 (11th Cir. 2009) (applying *Lozada* to a claim involving an individual fraudulently posing as an attorney). As such, Ms. moves this Court to rescind the *in absentia* order issued on and to reopen these removal proceedings.

1. Ms. claim of ineffective assistance of counsel qualifies as such despite Mr. not being an attorney

Ms. case falls within settled precedent of this U.S. Court of Appeals regarding ineffective assistance of counsel claims against fraudulent attorneys. As the Eleventh Circuit has explained, "[t]he Board has found claims of ineffective assistance of counsel – in particular, when an applicant's failure to appear is due to his attorney's errant instruction –

qualify as exceptional circumstances under [8 U.S.C. § 1229a(e)(1)]." Montano Cisneros v. U.S. Att'y Gen., 514 F.3d 1224, 1226 (11th Cir. 2008) (citing In re Grijalva-Barrera, 21 I. & N. Dec. 472, 474 (BIA 1996)). The holding in *Montano Cisneros* applied the ineffective assistance of counsel analysis equally to a non-attorney con artist who misled Petitioners about their hearing date. Montano Cisneros, 514 F.3d at 1225-27; see also Vukaj, 321 Fed. App'x at 889 ("[In *Montano Cisneros*], we drew no distinction between claims of ineffective assistance rendered by lawyers and claims of ineffective assistance rendered fraudulently by persons engaged in the unauthorized practice of law."). The facts in this case are substantially similar to the facts in Montano Cisneros. In that case, the fraudulent attorney took Petitioners' money and told them that they did not need to appear in immigration court because he had transferred their case to another court. Montano Cisneros, 514 F.3d at 1225. Based on the non-attorney's advice, the Petitioners failed to appear at their hearing and received an *in absentia* removal order. *Id.* a non-attorney who took Ms. Similarly, in this case, Mr. money and engaged in the unauthorized practice of law, told Ms. that she did not need to attend her hearing because it had been rescheduled. Exh. A, Decl. ¶ 29. She relied on his advice and received an *in absentia* removal order as a result. *Id.* ¶ 30-31, 34.

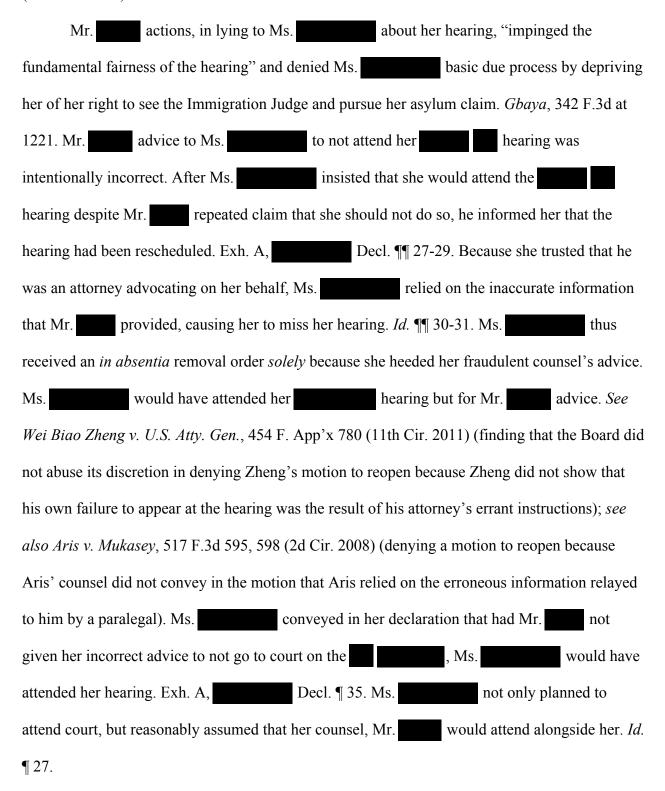
Furthermore, Ms. "claim of ineffective assistance of counsel against Mr." is valid because she reasonably believed that he was a licensed attorney. The Board previously held that an individual's belief that they are dealing with an attorney or licensed representative is necessary in order to file a claim of ineffective assistance of counsel. *See In re Juarez Gonzalez*, 2011 WL 1373694, *2 (BIA 2011) (finding that ineffective assistance of a non-attorney can be sufficient for reopening if the non-attorney held himself out to be an attorney). Unlike cases such as *Hernandez v. Mukasey* and *In re Vasquez-Gonzalez*, the non-attorney

that he was an attorney. *See Hernandez v. Mukasey*, 524 F.3d 1014, 1020 (9th Cir. 2008) (concluding that an immigrant waived their right to counsel and their right to due process if they knowingly relied on a non-attorney immigration consultant for advice); *see also* Exh. K, *In re Vasquez-Gonzalez*, 2011 WL 2261214 (BIA 2011) (affirming the IJ decision not to reopen a case based on error of an unlicensed consultant because the immigrant hired the consultant knowing they were not an attorney.) Mr. told Ms. that he was an attorney and a minister, and she hired him because she believed he was both. Exh. A, Decl. at ¶ 24-25, 30. Ms. also relied on the statements of her friend, who introduced Mr. as an attorney and a minister. *Id.* ¶ 23. Thus, Ms. claim to ineffective of assistance of counsel is viable before the Board and this circuit as an "exceptional circumstance" that merits reopening her case.

2. Ms. 'failure to appear was due to fraudulent counsel's deficient performance

Ms. failure to appear at her hearing was the direct result of the blatantly incorrect advice of fraudulent counsel, which constitutes exceptional circumstances within the meaning of INA § 240(b)(5)(C). *See Montano Cisneros v. U.S. Atty. Gen.*, 514 F.3d 1224, 1226 (11th Cir. 2008) (citing *In re Grijalva-Barrera*, 21 I. & N. Dec. 472, 473-74 (BIA 1996)). In order "to establish the ineffective assistance of counsel in the context of a deportation hearing, an alien must establish that his or her counsel's performance was deficient to the point that it impinged the 'fundamental fairness' of the hearing." *Gbaya v. U.S. Atty. Gen.*, 342 F.3d 1219, 1221 (11th Cir. 2003). Thus, ineffective assistance of counsel can qualify as an "exceptional circumstance" in the context of an *in absentia* order where the respondent "(1) establishes that his failure to appear was the result of counsel's deficient performance *and* (2) satisfies the

procedural requirements set forth in *Lozada*." *Vukaj v. U.S. Atty. Gen.*, 321 F. App'x 885, 888 (11th Cir. 2009).

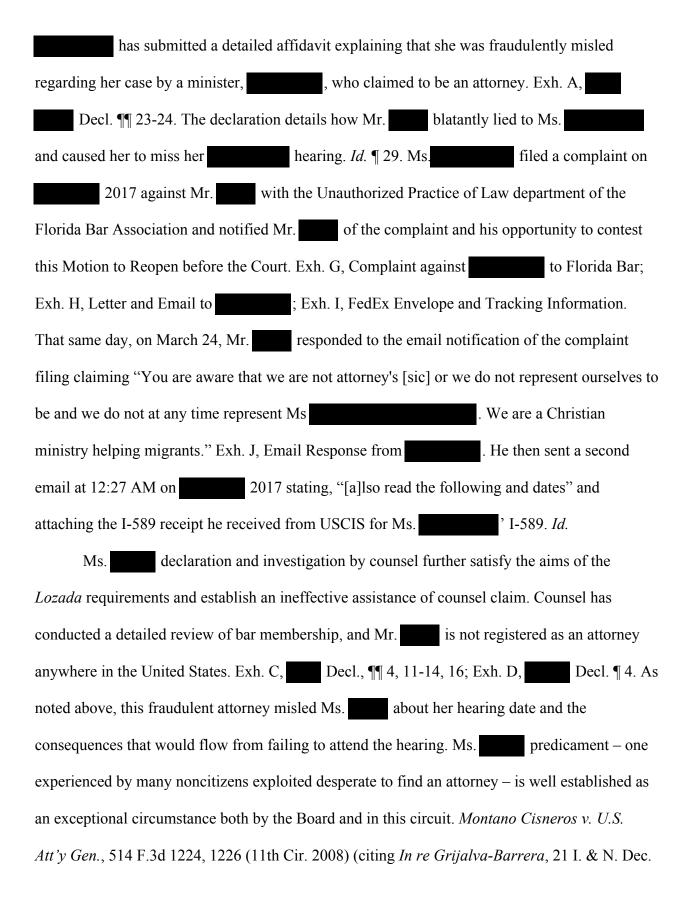


strong underlying asylum claim, her due diligence in retaining counsel, and the prior procedural posture of her case indicate that there was no other motive for her to miss her hearing before the Court. The Board considers whether respondents had other reasons to miss their hearings in analyzing ineffective assistance of counsel claims. Exh. L, In Re Grijalva-Barrera, 21 I&N Dec. 472, 474 (BIA 1996). There is extensive evidence submitted in this case that without Mr. ineffective assistance, Ms. would meet the prima face requirements for eligibility for asylum and would have had over two months before the one-year filing deadline for her I-589. Exh. A, ¶ 3; Exh. E, I-589 Asylum Application. Ms. sought counsel upon release from detention because she intended to apply for asylum and seek legal status in the United States based on threats to her and her family after the murder of her brothers. Exh. A, Decl. ¶ 8, 35. Furthermore, because this was Ms. master calendar hearing and she believed she had completed her asylum application, Ms. did not have any hearing, as she would only have received another hearing motivation to miss her date.

3. Ms. substantially complied with the *Lozada* requirements

Ms. substantially complied with the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). Under *Lozada*, the Board and this Court may assess an ineffective assistance of counsel claim by examining several factors, including (1) the nonctizen's affidavit detailing the representation by the "lawyer," (2) whether the counsel's whose competence has been questioned has been given the opportunity to respond, and (3) whether noncitizen has filed a complaint with the appropriate authority. 19 I&N at 639.

Ms. substantially complied with the *Lozada* procedural requirements. Ms.



472, 474 (BIA 1996)).

has therefore satisfied all three of the requirements set forth in *Matter of* Ms. declaration sets forth in detail the fraudulent Lozada, supra. First, Ms. representation carried out by Mr. and how his fraudulent counsel led to Ms. and her daughter missing court and receiving an *in absentia* removal order. Second, Mr. was informed of the allegations made against him, was provided with an opportunity to respond, and in fact responded. Third, Ms. includes a copy of the complaint she filed with Florida Bar Association on 2017. Finally, Ms. provides additional corroborating evidence including the payment contract signed by her and Mr. see Exh. B, Payment Contract, and declarations confirming that Mr. is not barred in any state or Puerto Rico, see Exh. C, Decl.; Exh. D, Decl. Ms. has therefore provided sufficient evidence to support her claim of ineffective assistance of fraudulent counsel.

B. Ms. confusion over whether she had a hearing rises to the level of extraordinary circumstances.

Ms. Can also establish exceptional circumstances independent of her ineffective assistance of counsel claim, based on her confusion concerning the date of her hearing. The Board has held that an individual's genuine confusion as to the date of an immigration court hearing is an exceptional situation that justifies rescinding an order of removal issued *in absentia*. Exh. M, *In re* (BIA July 19, 2016). In *Conejo-Caceres*, the respondent missed his hearing because he believed his true court date was the date of his next ICE check-in. *Id*. The Board determined that Mr. Conejo-Caceres' confusion was an exceptional circumstance that warranted reopening his removal proceedings. *Id*. In this case, like Mr. Conejo-Caceres's case, Ms.

attend court on a different day than the day the Court held its hearing due to Mr. repeated insistence that her hearing had been rescheduled. Moreover, Ms. confusion was not the result of mere misunderstanding, but intentional deception by a man pretending to be lawyer. When considered in the totality of her circumstances, Ms. confusion due to Mr. unlawful and misleading counsel provide an exceptional circumstance that warrants rescinding the *in absentia* order of removal issued against her.

Ms. prior attendance at her ICE check-ins indicate that she would have attended the hearing had she not been confused about the date. Exh. A, Decl. ¶¶ 27, 35. Ms. continuously questioned Mr. about her court date, reflecting her genuine confusion about the date and concern about continuing to be diligent in proceeding with her case. *Id.* ¶ 28. She remained diligent even after the removal order, consulting numerous individuals to aid in her defense once she realized Mr. had deceived about her has now presented a timely Motion to Reopen, further underscoring her diligence. 8 C.F.R. § 1003.23(b)(1). Her diligent efforts to seek relief demonstrate that a finding of exceptional circumstance due to confusion about the court hearing date would be especially appropriate in this case.

II. In the alternative, the Court should reopen these proceedings *sua sponte*.

Even if this Court is not persuaded that this matter should be reopened due to the lack of actual notice resulting from exceptional circumstances, the Court should reopen these proceedings *sua sponte*. In addition to reopening a case under the INA's motion to reopen provisions, an Immigration Judge may at any time reopen a proceeding in which the judge has made a decision. 8 C.F.R. § 1003.23(b)(1). The Board has held that this *sua sponte* authority is "not meant to be used as a general cure for filing defects or to otherwise circumvent the

regulations, when enforcing them might result in hardship," *Matter of J- J-*, 21 I. & N. Dec. 976, 984 (BIA 1997), but rather is "an extraordinary remedy reserved for truly exceptional situations," *Matter of G- D-*, 22 I. & N. Dec. 1132, 1134 (BIA 1999).

Ms. _______ ' case is precisely the type of "exceptional situation" that merits exercise of this Court's *sua sponte* reopening authority. Ms. ______ has a strong claim to asylum and has diligently pursued this claim for eleven months. A fraudulent attorney posing as a minister misled her to believe that a) her hearing had been rescheduled, and b) she might be deported if she attended her court hearing. Before _______ had never failed to comply with a deadline or instruction by the Court. Reopening these proceedings will clearly further the interests of justice.

Further, Ms. faces a substantial likelihood of severe bodily harm, torture, or murder if returned to her country of origin. As noted above, her family has been targeted by a dangerous group of hitmen with ties to drug trafficking in northern Honduras, *see* Exh. A, Decl. ¶ 10, and her family members have served as state witnesses in the criminal prosecution against some of the murderers. *Id.* ¶ 12. Ample published evidence supports Ms.

'fear, as many individuals deported to Northern Triangle countries have face death upon their return to Central America. Exh. O, *U.S. Government Deporting Central American Migrants to Their Deaths*, The Guardian, Oct. 12, 2015. Because of the great danger they face, Respondents respectfully ask this Court to consider the plight they would face if returned to Honduras and ask that this Court give them the chance to litigate their asylum claim on its merits.

Conclusion and Prayer for Relief

Ms. ______ ' case should be reopened to allow her and her child to pursue their asylum claims. They had every reason to attend her immigration court hearings to gain asylum and legal immigration status in the United States. Further, as soon as Ms. _____ realized that she had been misled by Mr. _____ and that *in absentia* removal orders had been entered against her and her child, she began working to reopen her case. Exh. A, _____ Decl. ¶ 35.

Due process requires that a respondent be provided with adequate opportunity to be heard. *Matter of G-Y-R*, 23 I. & N. Dec. at 186 (BIA 2001) (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)). Here, due process requires that the *in absentia* removal orders against her and her child be rescinded and their proceedings be reopened. For all of these reasons stated above, and her child have demonstrated that their failure constituted an exceptional circumstance that warrants reopening.

Dated: 2017

Respectfully submitted,



Pro Bono Counsel for Respondents

Table of Exhibits

<u>Exhibit</u>	<u>Description</u>	<u>Page</u>
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UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT ORLANDO, FLORIDA

In the Mat	ter of:)				
)	File I	No. A		
			File I	No. A		
Responder	nts.)				
		RDER OF THE IMMIG				
	gs, it is HEREBY DHS does not A response to Good cause I The court agr	ondent's Motion to Resci ORDERED that the motion of oppose the motion. The the motion has not been has been established for the rees with the reasons state	ion be i filed with the motion. ed in the opp	he court.		
Deadlines		on(s) for relief must be frent must comply with DH	iled by IS biometric	s instructions by _		
Date		,	Γhe Hon.			
This docu	ment was served b	Certificate of S	Service [] Persona	al Service		
To:	[] Alien	[] Alien c/o Custodia	l Officer	[] Atty/Rep	[] DHS	
Date:	By: Court Staff					

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Respondents:
CERTIFICATE OF SERVICE
I, hereby certify that I served the attached Motion to Rescind <i>In Absentia</i> Removal Order and Reopen Proceedings and supporting documents upon the Office of Chief Counsel, Department of Homeland Security, on 2017 by mail to:
Department of Homeland Security Office of Chief Counsel