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[Attorney Name], Esq.
[Attorney Number]
[Organization/Firm Name]
[Organization/Firm Address]
Counsel for Mr. X

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[City, State]

In the Matter Of:	)	IN REMOVAL PROCEEDINGS
X, Y	)	A# XXX XXX XXX
Respondent	)	

Immigration Judge: Last Hearing:

<u>MOTION TO RESCIND AN *IN ABSENTIA* ORDER OF REMOVAL AND REOPEN PROCEEDINGS</u>

**** *<u>AUTOMATIC STAY OF REMOVAL APPLIES</u>* ****

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of:	)	IN REMOVAL PROCEEDINGS
X, Y	)	A# XXX XXX XXX
Respondent	)	

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Respectfully Submitted,

DATED: [City, State]
DATE, 20XX

____

[Attorney Name], Esq.
[Organization/Firm Name]
[Organization/Firm Address]
Tel. ###-###-####
[Email]

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of:	)	IN REMOVAL PROCEEDINGS
X, Y	)	A# XXX XXX XXX
Respondent	)	

MOTION TO RESCIND AN *IN ABSENTIA* ORDER OF REMOVAL AND REOPEN PROCEEDINGS

I. INTRODUCTION AND STATEMENT OF CASE

Respondent, Mr. Y X ("Mr. X" or "Respondent"), through undersigned counsel, respectfully moves to reopen his *in absentia* removal order entered on [DATE], 2017. Respondent also moves for an order staying his removal pursuant to 8 CFR § 1003.23(b)(1)(v), pending final adjudication of this Motion.

The federal regulations require that a respondent seeking to reopen an *in absentia* removal order must prove either exceptional circumstances as defined in Immigration and Nationality Act ("INA") §240(e)(1), or that he did not receive notice in accordance with INA §§239(a)(1) or (2). *See* 8 CFR §3.23(b)(4)(ii). Mr. X moves to reopen his deportation proceedings based on exceptional circumstances due to ineffective assistance of counsel. The motion should be granted because Mr. X's counsel provided deficient service such that Mr. X was unaware that he was required to appear on [DATE], 2017 and subsequently was ordered removed *in absentia*.

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In the alternative, the evidence used by the Court to order Mr. X removed on [DATE], 2017 was unreliable and insufficient to establish removability; Mr. X's removal order should therefore be rescinded and these proceedings reopened. Finally, Mr. X also moves this Court to exercise its *sua sponte* authority to reopen his removal proceedings because of the compelling circumstances associated with his case. *See* 8 CFR § 1003.23(b).

Pursuant to 8 CFR § 1003.23(b)(1)(i), Mr. X hereby notifies the Court that the prior removal order entered by the Court is not subject to any other judicial proceeding and that Mr. X is not the subject of any pending criminal matter. In addition, Mr. X's removal order cannot be effectuated until this motion is adjudicated as the filing of this motion constitutes an automatic stay of his removal. *See* INA § 240(b)(5)(C). This motion is not time-barred. *See* INA § 240(b)(5)(C)(ii). Mr. X has paid the fee and a fee receipt is attached hereto. *See* 8 CFR § 1003.24(b); *see also* 8 CFR § 1103.7(b)(2).

II. FACTUAL AND PROCEDURAL HISTORY[1]

Mr. X entered the United States in 1997 with a visa. *See* Exhibit (Ex.) A, Affidavit of Respondent, at ¶1. He became a lawful permanent resident based on a petition filed by his U.S. citizen wife in 1999. *Id.*; *see also* Ex. B, Notice to Appear (NTA) (dated [DATE], 2014, and filed with the Court on [DATE], 2014). Mr. X has a U.S. citizen wife and four U.S. citizen stepchildren. *See* Ex. A at ¶1. He pays taxes and has worked for the same two companies for many years. *Id.* He economically supports his wife and his mother in [Country]. *Id.*

According to the NTA, Mr. X was convicted under Florida Statute § 893.13(1)(a)(1) in [DATE] 2007. *See* Ex. B. That statute provides "a person may not sell, manufacture, or deliver,

[1] The summary of proceedings and factual history are based on Mr. X's attached affidavit, interviews and conversations between Mr. X and undersigned counsel, as well as undersigned counsel's review of the Freedom of Information Act (FOIA) responses from USCIS and EOIR.

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or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Statute § 893.13(1)(a)(1). On [DATE], 2014, Mr. X returned from a two-week trip to see his mother in [country]. *See* Ex. B; *see also* Ex. A at ¶3. Mr. X was stopped at the airport, his lawful permanent resident card was taken away, and a Notice to Appear was issued. *Id.*

After Mr. X was placed in removal proceedings, he began looking for an attorney. *See* Ex. A at ¶3-4. He met with at least two attorneys before someone recommended he meet with [C.D.]. *Id.* at ¶4-5. [C.D.] promised he could resolve Mr. X's case and restore his lawful permanent residence. *Id.* at ¶5. Mr. X paid him a total of $3,500 made in three payments. *Id.*; *see also* Ex. C, business cards and receipts from [C.D.]. Around [DATE] 2017, Mr. X went to court with [Mr. C.D.] as his representative. *Id.* at ¶6. [Mr. C.D.] told Mr. X that his next court date was on [DATE], 2017. *Id.* Following the court appearance in June, Mr. X began making numerous attempts to contact [Mr. C.D.] by phone and then went to [Mr. C.D.]'s office in person, but he was unable to contact [Mr. C.D.]. *Id.* at ¶7. On [DATE], 2017, Mr. X again went to [Mr. C.D.]'s office, and found that it was closed. *Id.* He then went to the immigration court at [ADDRESS] on [DATE], 2017—the date he believed he was supposed to return—but could not find his name or evidence of his court date. *Id.* at ¶8.

Mr. X then sought a consultation with another attorney and discovered that he had an *in absentia* removal order from [DATE], 2017. *Id.* at ¶9. He never knew that he had court on that date and would have gone to court had he known about it. *Id.* Mr. X met with multiple attorneys, including an attorney at [Organization/Firm Name], after he found out about his removal order. *Id.* Mr. X also learned of [Mr. C.D.]'s deceptive practices and met with the XXX District Attorney to file a complaint against [Mr. C.D.]. *Id.* at ¶10; *see also* Ex. C, business card of [MBB], Office of the District Attorney, XXX County. [Organization/Firm Name] was able to

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take on the representation of [Mr. C.D.] in [DATE] 2018. *See* Ex. A at ¶11. This motion followed.

III. ARGUMENT

In order to reopen an *in absentia* order of removal, the Respondent must prove either exceptional circumstances beyond his control as defined in INA § 240(e)(1), or that he did not receive notice in accordance with INA §§239(a)(1) or (2). Mr. X moves to reopen his removal proceedings based on exceptional circumstances due to ineffective assistance of counsel. *See Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996) (holding that ineffective assistance of counsel is an exceptional circumstance).

Respondent asserts that his motion is timely pursuant to INA §240(b)(5)(C)(i) and 8 CFR §1003.23(b)(4)(ii). "An order of removal entered in absentia . . . may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in Section 240(e)(1) of the Act." 8 CFR §1003.23(b)(4)(ii). Mr. X in compliance with this requirement and is filing within 180 days of the [DATE], 2017 order of removal. As demonstrated *infra*, Mr. X's failure to appear was due to exceptional circumstances and these proceedings should therefore be reopened.

In the alternative, the removal order should be rescinded and these proceedings reopened because DHS failed to meets its burden of showing by clear, unequivocal and convincing evidence that Mr. X was removable as charged. DHS further failed to meet its burden of showing that Mr. X was "seeking admission" following his brief trip to [Country]. Also in the alternative, Mr. X moves this Court to exercise its *sua sponte* authority to reopen his removal proceedings because of the compelling circumstances associated with his case. *See* 8 CFR § 1003.23(b).

A. This Court Should Grant Mr. X's Motion to Rescind and Reopen because His Representation Constituted Ineffective Assistance of Counsel.

Ineffective assistance of counsel is a recognized basis for establishing exceptional circumstances under INA § 240(e)(1). *Grijalva*, 21 I&N Dec. at 474. Claims of ineffective assistance of counsel "satisfy the general requirement that motions to reopen present 'new facts' that are 'material and not available and could not have been discovered or presented at the former hearing.'" *Cekic v. INS*, 435 F.3d 167, 170 (2d Cir. 2006) (quoting *Iavorski v. INS*, 232 F.3d 124, 129 (2d Cir. 2000)). Noncitizens have Fifth Amendment due process right to effective assistance of counsel in removal proceedings. *Matter of Assaad*, 23 I&N Dec. 553, 560 (BIA 2003). In order to grant a motion to reopen based on ineffective assistance of counsel, Mr. X must demonstrate that "counsel's performance was so ineffective . . . that it impinged upon fundamental fairness of the hearing in violation of the fifth amendment due process clause." *Rashid*, 533 F.3d at 130-31 (quoting *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 2006)). To do so, Mr. X must "allege facts sufficient to show that competent counsel would have acted otherwise, and that he was prejudiced by his counsel's performance." *Id.*

i. [Mr. C.D.]'s Legal Representation was Ineffective.

1. [Mr. C.D.] Did Not Competently Represent Mr. X's Interest and Failed to Notify Him of His Last Court Hearing.

[Mr. C.D.] was Mr. X's representative until the suspension of his BIA accreditation and, as such, he had a duty to inform Mr. X of his upcoming court hearings. The [CITY] Rules of Professional Conduct ("N.Y.R.P.C.") dictate that a lawyer "shall act with reasonable diligence and promptness in representing a client" and that he "shall not neglect a legal matter entrusted" to him. N.Y.R.P.C. Rule 1.3(a)-(b); *see also* 8 CFR § 1003.102(q)(1)-(2). Moreover, "[c]ompetent representation requires the . . . thoroughness and preparation reasonably necessary

for the representation." N.Y.R.P.C. Rule 1.1(a). The Immigration Court Practice Manual states the following behavior constitutes grounds for discipline, "ineffective assistance of counsel . . . failing to provide competent representation . . . failing to maintain communication with the client." Chapter 10.2. Furthermore, counsel's conduct is deemed deficient when he misinforms a client about a scheduled hearing or advises a client not to attend a hearing. *See Aris v. Musakey*, 517 F.3d 595, 599-601 (2d Cir. 2008).

Mr. X relied on [Mr. C.D.] for information on when to attend court, and believed [Mr. C.D.]'s representation that his next court date was on [DATE], 2017. *See* Ex. A at ¶6. Mr. X made many efforts to contact [Mr. C.D.] by phone and in person prior to that court date, and was unable to do so. *Id.* at ¶7. Because [Mr. C.D.] failed to notify Mr. X of his [DATE], 2017 court hearing, Mr. X did not know he had court on that date and did not attend. *Id.* at ¶9. As a result, Mr. X was ordered removed *in absentia* on that date. Additionally, Mr. X hired [Mr. C.D.] and paid him starting in 2015 to 2016 and [Mr. C.D.] attended court with Mr. X in 2017, *Id.* at ¶5-6; *see also* Ex. C, receipts. Despite this, there is no indication that [Mr. C.D.] filed any applications for relief or was otherwise prepared for court. Competent counsel would have been prepared at court and would have informed Mr. X of his [DATE], 2017 court date.

2. [Mr. C.D.] Never Withdrew as Mr. X's Representative on Record and Therefore Never Relinquished His Legal Responsibilities as his Attorney.

The Immigration Court Practice Manual provides that "[o]nce an attorney has made an appearance, that attorney has an obligation to continue representation until such time as a motion to withdraw or substitute counsel has been granted by the Immigration Court." Chapter 2.3(d). The [CITY] Rules of Professional Conduct stipulate that a lawyer shall withdraw as client's representation when "the lawyer's physical or mental condition materially impairs the lawyer's

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ability to represent the client" and/or when "the lawyer is discharged." N.Y.R.P.C. Rule 1.16(b)(1)-(3). The Rules also provide that "upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client." N.Y.R.P.C. Rule 1.16(e).

The enclosed evidence indicates that the [CITY] Attorney General cancelled the recognition of [Mr. C.D.]'s charity around [DATE], 2017, *see* Ex. E ("*[STATE] Attorney General Closes XXX Businessman's Charity*,"), and the Department of Justice terminated [Mr. C.D.]'s BIA accreditation in late [DATE] 2017. *See* Ex. E ("*Immigrant 'Representative' Loses Accreditation"*); *see also* Ex. E, lists of accredited representative. Nevertheless, [Mr. C.D.] attended Mr. X's court hearing as his representative on or about [DATE], 2017, and advised Mr. X that his next court date was on [DATE], 2017. *See* Ex. A at ¶6. Although his BIA accreditation was apparently rescinded in late [DATE] 2017, [Mr. C.D.] never withdrew as [Mr. C.D.]'s representative, nor did [Mr. C.D.] advise Mr. X that he would no longer be legally allowed to represent Mr. X in his removal proceedings. Competent counsel would have acted differently and formally withdrawn as Mr. X's representative so that Mr. X could seek alternate counsel to effectively represent him.

ii. Mr. X Was Prejudiced by [Mr. C.D.]'s Incompetent Representation.

When counsel's ineffectiveness results in the entry of an *in absentia* order of removal, an individual need not show prejudice. *Matter of Grijalva*, 21 I&N Dec. 472, 474 n.2 (BIA 1996). Notwithstanding this rule, however, Mr. X can clearly establish that his counsel's deficient performance prejudiced him. [Mr. C.D.] failed to inform Mr. X that his business's registration had been cancelled and that his BIA accreditation terminated. [Mr. C.D.] also affirmatively misadvised [Mr. C.D.] of his next court date. *See* Ex. A at ¶6. Through no fault of his own,

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therefore, Mr. X unknowingly failed to attend his [DATE], 2017 court hearing, and, as a result, was ordered removed *in absentia*. *Id.* at ¶9.

Upon information and belief, Mr. X had several potential avenues of relief from removal. First, for the reasons discussed in Section III(B), *infra*, the proceedings should have been terminated because DHS failed to meet its burden of establishing by clear, Furthermore, because Mr. X was charged as a returning lawful permanent resident seeking admission, *see* Ex. B, NTA, DHS carries the burden to prove, by clear and convincing evidence that he fell under one of the exceptions at INA § 101(a)(13)(C). *See Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). Because DHS failed to meet this burden, Mr. X was not "seeking admission" when he returned to the United States. *See* INA § 101(a)(13)(C)(v). Therefore Mr. X was improperly charged as an arriving alien. Furthermore, because Mr. X was not seeking admission upon his return to the United States, he is not subject to the "reason to believe" ground of inadmissibility under INA § 212(a)(2)(C)(i).[2]

Second, even if the offense on the Notice to Appear renders Mr. X removable, it is not an aggravated felony that would render him ineligible for cancellation of removal. *See* INA 240A(a). Mr. X is eligible for cancellation of removal for certain permanent residents because at the time the NTA was issued, Mr. X had been a permanent resident since 1999, had resided in the United States continuously since 1997—accruing more than seven years of residence prior to his 2007 conviction, *see* Ex. B, NTA, and because he has not been convicted of an aggravated felony. *Id.*

[2] Mr. X also preserves the argument that Florida statute § 893.13(1)(a)(1) is not an offense subjecting him to the grounds of inadmissibility because the Florida statute is not an offense "relating to" a controlled substance. The Florida controlled substance schedule under which Mr. X was convicted is broader than the federal schedule and the statute is not divisible with regard to the substance. *See Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017).

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The statute of conviction on the NTA, Florida Statute § 893.13(1)(a)(1), provides in pertinent part:

> a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. A person who violates this provision with respect to:
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2) as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. Ann. § 893.13(1)(a)(1) (West 2017). The Eleventh Circuit has held that a conviction under Florida Statute § 893.13(1)(a)(2) is not a drug trafficking aggravated felony because the amendments to the Florida controlled substance statutes removed the requirement for knowledge of the illicit nature of the substance and rendered all offenses under § 893.13 indivisibly overbroad. *See Donawa v. Att'y Gen.*, 735 F.3d 1275, 1282-83 (11th Cir. 2013). The Eleventh Circuit held that the Florida statute was not divisible as to the *mens rea* element, but declined to consider whether the statute could still be an aggravated felony under the "illicit trafficking" clause of INA § 101(a)(43)(B). *Id.* at 1283-84. In a subsequent case, the Board followed *Donawa* to hold that § 893.13(1)(a)(1) could not be a drug trafficking aggravated felony. *Matter of L-G-H-*, 26 I. & N. Dec. 365, 367–68 (BIA 2014). However, the Board considered the Florida statute under the "illicit trafficking" prong of INA § 101(a)(43)(B) and held that it could be an aggravated felony. *Id.* at 373. Specifically, the Board held that § 893.13(1)(a)(1) was divisible as to the *actus reus* element and would constitute an aggravated felony for "illict trafficking" if the criminal act was the sale of a controlled substance. *Id.* at 372-73.

Unpublished decisions since the BIA's decision in *L-G-H-* have held that convictions under Florida Statute § 893.13(1)(a)(1) are not aggravated felonies because there are six different criminal acts prohibited—sale, manufacture, delivery, possession with intent to sell, possession with the intent to manufacture, and possession with the intent to deliver—and only sale meets the

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"unlawful trading or dealing" element of the "illicit trafficking" offense. *See* Ex. F, *M-B-*, [REDATED] (BIA Sept. 25, 2014) (possession of cocaine with intent to sell or deliver under Fla. Stat. § 893.13(1)(a)(1) not an aggravated felony under the illicit trafficking clause because the statute does not require a completed commercial transaction); *Devon Christie*, [REDATED] (BIA April 26, 2017) (possession of cocaine with intent to manufacture or deliver under Fla. Stat. 893.13 not an aggravated felony illicit trafficking offense because neither offense requires unlawful trading or dealing). Thus Mr. X can meet his burden of proving eligibility for cancellation of removal by showing that his conviction did not necessarily constitute a federal aggravated felony. *See Akinsade v. Holder*, 678 F.3d 138, 146 (2d Cir. 2012) (holding that an inconclusive record of conviction did not establish an aggravated felony fraud offense in either the removability or relief context).

Also in the alternative and upon information and belief, Mr. X may be entitled to withholding of removal or protection under the Convention Against Torture because he was a police officer in [Country] for many years who combated organized crime, and he would be at risk if he lived in his country as a result. *See* INA § 241(b)(3)(A); 8 CFR § 1208.18. Due to [Mr. C.D.]'s ineffective assistance of counsel, however, Mr. X was never able to pursue termination or present any other applications for relief from removal.

iii. Mr. X Satisfied the *Lozada* Requirements.

Any respondent moving to rescind and reopen a prior order of removal based on ineffective assistance of counsel must satisfy the procedural requirements detailed in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *Lozada* articulates that a respondent must (a) "include a statement that sets forth in detail the agreement that was entered into with former counsel"; (b) inform former counsel of the allegations and allow him or her an opportunity to respond; and (c)

state "whether a complaint has been filed with appropriate disciplinary authorities regarding [the ineffective] representation, and if not, why not." *Id.* at 639. These requirements "serve to deter meritless claims of ineffective representation." *Id*.

First, Mr. X's attached affidavit provides the necessary detail of how and when [Mr. C.D.] agreed to represent Mr. X. *See* Ex. A at ¶5-6; *see also* Ex. C, business cards and receipts from [C.D.]. Second, Mr. X previously made several attempts to contact [Mr. C.D.] by phone and in person, and was unable to do so because his office had closed. *Id.* at ¶7. In addition, Mr. X filed a complaint with the XXX District Attorney against [Mr. C.D.]. *Id.* at ¶10. Mr. X could not file a bar complaint against [Mr. C.D.] because [Mr. C.D.] was not an attorney. As such, Mr. X complied with the *Lozada* requirements and this Court has the authority to consider Mr. X's claim of ineffective assistance of counsel against [Mr. C.D.].

In addition, the fact that the Department of Justice terminated [Mr. C.D.]'s organization's recognition as well as [Mr. C.D.]'s BIA accreditation, *see* Ex. D and Ex. E, is sufficient, on its own, to establish ineffective assistance of counsel without showing that Mr. X met the *Lozada* requirements. *See Yang v. Gonzales*, 478 F.3d 133 (2d Cir. 2007) (disbarment of attorney obviates need for compliance with *Lozada*); *Matter of Zmijewska*, 24 I&N Dec. 87, 94-95 (BIA 2007) (*Lozada* applies to accredited representatives); *see also Avagyan v. Holder*, 646 F.3d 672, 681 (9th Cir. 2011) (recognizing an ineffective assistance of counsel claim where a non-attorney held themselves out to be an attorney). The Second Circuit has found that a respondent satisfied the requirements for filing a *Lozada* motion to reopen even though the respondent did not file a bar complaint where respondent believed counsel had already been suspended from the practice of law. *Esposito v. INS*, 987 F.2d 108 (2d Cir. 1993). Therefore, this Court should deem the

Lozada requirements satisfied under the facts discussed, *supra*, and because of the termination of [Mr. C.D.]'s BIA accreditation.

Finally, assuming, *arguendo*, that this court were to find that Mr. X has not fully complied with the *Lozada* requirements, such a position would frustrate *Lozada's* purpose, since the requirements merely serve to dissuade false claims of ineffective assistance of counsel. *Id*. at 639. As discussed *supra*, [Mr. C.D.]'s representation of Mr. Xwas egregiously ineffective.

B. In the Alternative, this Court Must Rescind the Removal Order and Reopen Proceedings because DHS Failed to Establish by Clear, Unequivocal, and Convincing Evidence that Mr. X Is Removable.

INA § 240(b)(5)(A) provides that a noncitizen who is provided with notice of a hearing and does not attend "shall be ordered removed in absentia if the Service establishes by *clear, unequivocal, and convincing evidence* that the written notice was so provided and that the alien is removable." (emphasis added). Based upon information and belief, there no indication that DHS provided such evidence here.[3]

First, based upon a review of the DHS A file, counsel has reason to believe that the conviction records provided to the Court by DHS, if any, were not properly authenticated. *See* 8 CFR § 287.6(a) ("In any proceeding under this chapter, an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy."); *see also Santos v. Holder*, 486 Fed.Appx 918 (2d Cir. 2012); *see also Iran v. INS*, 656 F.2d 469, 472 (9th Cir. 1981) ("While there is some doubt as to which methods of proof are acceptable in such proceedings, there is no question that authentication is necessary."). This regulatory violation alone is sufficient to invalidate the original removability finding proceedings, as Mr. X

[3] Respondent has requested but not received a copy of the record of proceedings from EOIR.

experienced "prejudice to the rights sought to be protected by the subject regulation." *Waldron v. INS*, 17 F.3d 511, 517-18 (2d Cir. 1993). The regulation at issue in this case, 8 CFR § 287.6(a), is intended to prohibit the use of unauthenticated documents in removal proceedings. Mr. X experienced prejudice against his right to go through removal proceedings where only legally compliant evidence can be used to take a government action as drastic as deportation.

In addition, because Mr. X's prior representation was deficient for the reasons articulated above at Section III(A), *supra*, Mr. X has not had the opportunity to examine and contest any of the evidence presented against him by DHS, if any was presented. *See Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011) (Sole test for admission of evidence is whether the evidence is "probative and its admission is fundamentally fair."); *see also Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996) ("[F]airness is closely related to the reliability and trustworthiness of the evidence."). Finally, for the reasons discussed in Section II(B), *supra*, DHS also failed to meet its burden of showing was seeking admission. *See* INA § 101(a)(13)(C)(v).

The removal order issued against Mr. X was therefore based on unreliable and insufficient evidence and should be rescinded and his proceedings reopened.

C. Also in the Alternative, this Court Should *Sua Sponte* Grant Mr. X's Motion to Rescind and Reopen based on Exceptional Circumstances.

Despite the time bars for motions to reopen, this Court has the authority to reopen or reconsider cases on its own motion in exceptional circumstances. *See* 8 C.F.R. § 1003.23(b)(1); *see also Matter of J-J-*, 21 I. & N. Dec. 976 (BIA 1997). This Court's "*sua sponte* authority is not limited by the requirements set forth in . . . " the regulations, but rather includes a totality of the circumstances approach. *See C.L.O.D.* A [REDATED], 2012 WL 2835212 (BIA 2012) (referring to an analogous provision in the regulations, 8 C.F.R. § 1003.2(a) which gives the BIA

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authority to open cases *sua sponte*). Mr. X's motion, taken in its totality, merits a *sua sponte* reopening of his proceedings based on exceptional circumstances.

i. This Court Should Reopen Mr. X's Proceedings because of Procedural and Legal Errors Prejudiced Mr. Xin his Original Proceeding.

Given the evidentiary issues presented in Section III(B), *supra*, this Court should rescind the removal order and reopen proceedings. Mr. X's case presents important legal issues that were ignored due to Mr. X's ineffective assistance of counsel. *See* Sections III(A) and III(B), *supra*. These proceedings should therefore be reopened in order to address those live legal issues.

ii. This Court Should Reopen Mr. X's Original Proceedings because it would be Unjust to do Otherwise

Taken in its totality, Mr. X's circumstances justify a *sua sponte* reopening of his proceedings. *See Guan Shan Liao v. US Dept. of Justice*, 293, F.3d 61, 72 (2d. Cir. 2002) (stating that exceptional or extraordinary circumstances arise "in unique situations where it would serve the interest of justice" to *sua sponte* reopen proceedings). Because of Mr. X's ineffective assistance of counsel, he did not have an opportunity to contest his removability, the information on which it was established, or present any claims for relief. *See* Section III(A), *supra*. Prior to his brief 2014 trip to [Country] to see his mother, Mr. X was a longtime lawful permanent resident. *See* Ex. A at ¶1, 3; *see also* Ex. B, NTA. In addition, Mr. X has a U.S. citizen wife and four U.S. citizen stepchildren. *See* Ex. A at ¶1. He has worked for the same two companies for many years and paid taxes, economically supporting both his wife and mother. *Id.* After Mr. X was placed in removal proceedings, he made many efforts to obtain legal counsel and comply with this Court's orders, but was ultimately duped by [C.D.]. *Id.* at ¶3-9. Mr. X paid [Mr. C.D.] $3,500, but [Mr. C.D.] did nothing for his case and misadvised Mr. X regarding his court date. *Id.* at ¶5-8. As a result, Mr. X missed his court date and was ordered removed *in absentia.*

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After all of this occurred, Mr. X realized that [Mr. C.D.] was not an attorney at all and had defrauded him as well as many other immigrants. *Id.* at ¶10. [Mr. C.D.]'s misdeeds were so egregious that they became headline news last year. *See* Ex. F, news articles and press release. Indeed, [Mr. C.D.] was apparently investigated by the [CITY] Attorney General, the Department of Justice, and the [CITY] City Department of Consumer Affairs, which alleged numerous violations and sought more than $1.3 million in fines. *Id*. This, therefore, is the type of scenario in which the Court should use its ability to *sua sponte* reopen proceedings in the interest of justice.

IV. **CONCLUSION**

For the reasons set forth above, Mr. X respectfully requests that the Court grant this Motion to Rescind his *In Absentia* Removal Order and Reopen Removal Proceedings.

Respectfully Submitted,

DATED: [City, State]
[DATE], 20XX

____

[Attorney Name], Esq.
Attorney for the Respondent
[Organization/Firm Name]
[Address]
Tel. ###-###-###
[Email]

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter Of:	)	IN REMOVAL PROCEEDINGS
X, Y	)	A# XXX XXX XXX
Respondent	)	

[DRAFT / PROPOSED] ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the Respondent's Motion to Rescind an *In Absentia* Order of Removal and Reopen Proceedings, it is HISEBY ORDERED that the motion be GRANTED / DENIED because:

___ DHS does not oppose the motion.

___ The Respondent does not oppose the motion.

___ A response to the motion has not been filed with the court.

___ Good cause has been established for the motion.

___ The Court agrees with the reasons stated in the opposition to the motion.

___ The motion is untimely per __________________.

___ Other:

______________________ ____________________________________
Date Honorable Judge

Certificate of Service

The document was served by: [ ] Mail [ ] Personal Service
To: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien's Atty/Rep [ ] DHS
Date: By: Court Staff

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CERTIFICATE OF SERVICE

I, _______________, hereby certify under penalty of perjury that a true and correct copy of Respondent's Motion to Rescind an *In Absentia* Order of Removal and Reopen Proceedings was served on:

U.S. Immigration and Customs Enforcement
Office of the Chief Counsel
[ADDRESS]

by hand delivery on DATE, 2018.

Dated this DATE, 2018.

____
[Organization/Firm Name]