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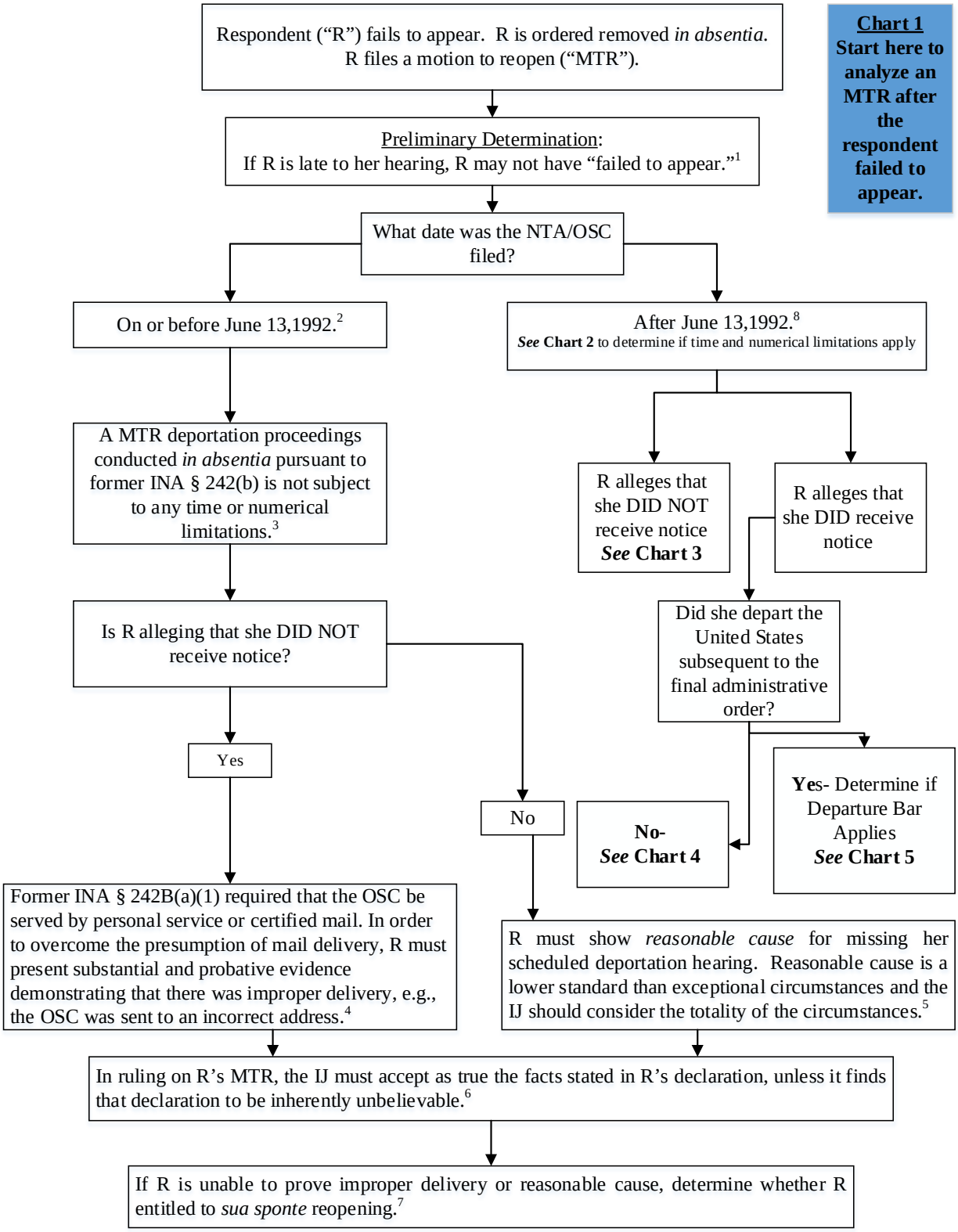

FN 1 Where an alien arrives to her hearing late, the motion to reopen, in certain circumstances, should be granted in the Second, Third, Fifth, Seventh, and Ninth Circuits, because the alien has not failed to appear.

- *Abu Hasirah v. Dep't of Homeland Sec.*, 478 F.3d 474 (2d Cir. 2007) (holding that the respondent's brief and unintentional lateness to the removal proceedings did not constitute a failure to appear within the meaning of INA § 240(b)(5) and that it was legal error for the Board to apply the *in absentia* statutory provision to the respondent);
- *Cabrera-Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006) (holding that it is a due process violation to treat tardiness as a failure to appear when the delay in arriving for a hearing is short, there have been no prior instances of tardiness, and the IJ is either still on the bench or recently retired and close by);
- *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005) (holding that slight tardiness is not a non-appearance when the IJ is either still on the bench or recently retired and still close by and the respondent's delayed arrival is still during "business hours");
- *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999) (holding that the IJ and Board must distinguish between a failure to appear at all and a failure to appear at exactly the appointed hour; the respondent appeared two hours late after waiting for her interpreter to arrive) (Note – 242B deportation case);
- *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008) (holding that a petitioner who arrives late for an immigration hearing, but while the IJ is still in the courtroom has not "failed to appear" for that hearing and accordingly is not required to show exceptional circumstances in order to reopen proceedings); *but see Valencia-Fragoso*, 321 F.3d 1204 (9th Cir. 2003) (holding that a respondent who arrived 4.5 hours late for her hearing failed to appear).

FN 2 Section 242(b) applies when service, or attempted service, of the OSC is made prior to June 13, 1992. *See Matter of Gonzalez-Lopez*, 20 I&N Dec. 644 (BIA 1993).

The Ninth Circuit held that where the OSC is issued before June 13, 1992, but the notice of hearing is issued after that date, apply § 242(b). *See Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998).

FN 3 A motion to reopen deportation proceedings conducted *in absentia* pursuant to former INA § 242(b) is not subject to any time or numerical limitations. *See Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1158-59 (BIA 1999); *Matter of N-B-*, 22 I&N Dec. 590 (BIA 1999)*; Matter of Mancera*, 22 I&N Dec. 79 (BIA 1998).

FN 4 "This presumption of effective service may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service. However, in order to support this affirmative defense, the respondent must present substantial and probative evidence . . . demonstrating that there was improper delivery or that nondelivery was not due to the respondent's failure to provide an address where he could receive mail." *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995); *see also Mejia-Hernandez v. Holder*, 644 F.3d 818 (9th Cir. 2011); *Sanchez v. Holder*, 627 F.3d 226 (6th Cir. 2010); *Rigriguez-Cuate v. Gonzales*, 444 F.3d 1015 (8th Cir. 2006).

FN 5 To rescind a prior *in absentia* deportation order and reopen proceedings, a respondent must show that she had "reasonable cause" for missing her scheduled deportation hearing. INA § 242(b) (1992); *Cruz-Garcia*, 22 I&N Dec. at 1159. A respondent does not need to demonstrate prima facie relief or exceptional circumstances for failure to appear. *Matter of Haim*, 19 I&N Dec. 641 (BIA 1988). Reasonable cause is a lower standard than exceptional circumstances.

Where reasonable cause for failure to appear found:

- Illness - *See Matter of Ruiz*, 20 I&N Dec. 91 (BIA 1989) and *Matter of N-B*, 22 I&N Dec. 590 (BIA 1999);
- Where an alien claims that her attorney failed to notify her about her hearing, and complied with the standards for making an ineffective assistance of counsel claim in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *See Matter of N-K- & V-S-*, 21 I&N Dec. 879 (BIA 1997).

Where reasonable cause for failure to appear *not* found:

- Where notice of the hearing was sent only to the alien's attorney and the attorney claimed that he was unable to be present at the hearing because he was busy. *See Matter of Marallag*, 13 I&N Dec. 775 (BIA 1971);
- Where an alien requested a continuance, assumed it would be granted, and failed to appear. *See Matter of Patel*, 19 I&N Dec. 260 (BIA 1985) and *Matter of Rivera*, 19 I&N Dec. 688 (BIA 1988);
- Where an alien merely asserted, without complying with the standards set forth in *Matter of Lozada*, that she missed her scheduled hearing because her former attorney had been suspended by the Bar at the time he appeared on her behalf and did not effectively represent her. *See Matter of Cruz-Garcia*, 22 I&N Dec. 1155 (BIA 1999);
- Where an alien claimed that he missed his hearing because he was stuck in traffic, did not provide any evidence or facts beyond his naked assertion that traffic was heavy, did not alert anyone at the Immigration Court as to his predicament upon his alleged late arrival, and had already filed a previous motion to reopen for the same absence but offered an inconsistent explanation for his absence. *See Matter of S-A-*, 21 I&N Dec. 1050 (BIA 1997).

FN 6 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)); *M.A. A26851062 v. USINS*, 858 F.2d 210, 216 (4th Cir. 1988), *on reh'g sub nom. M.A. v. USINS*, 899 F.2d 304 (4th Cir. 1990).

FN 7 An IJ may, at any time, reopen proceedings upon her own *sua sponte* motion in any case where she has made a decision, unless jurisdiction has vested with the BIA. 8 C.F.R. § 1003.23(b)(1).

The BIA has limited its own power to reopen cases *sua sponte* to cases where "exceptional circumstances" are present. *Matter of L-V-K-*, 22 I&N Dec. 976, 980 (BIA 1999). A fundamental change in immigration law is such a circumstance. *See Matter of G-D-*, 22 I &N Dec. 1132, 1135 (BIA 1999) (holding that, for the respondent to prevail, the Board must be persuaded that a change in law is sufficiently compelling that the extraordinary intervention of the Board's *sua sponte* authority is warranted).

However, the BIA has also emphasized that the power to reopen on its own motion is "not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations when enforcing the regulations could result in hardship." *L-V-K-*, 22 I&N Dec. at 980. The purpose of the numerical and time limitations set forth in the regulations are to "bring finality to immigration proceedings, not merely to prevent the filing of dilatory or frivolous motions." *See id.*

If the IJ determines that she is willing to entertain the respondent's request to reopen *sua sponte*, the respondent bears the burden of demonstrating that exceptional circumstances exist. *See Matter of Beckford*, 22 I&N Dec. 1216, 1218 (BIA 2000).

FN 8 Section 242(b) applies when service, or attempted service, of the OSC is made prior to June 13, 1992. *See Matter of Gonzalez-Lopez*, 20 I&N Dec. 644 (BIA 1993).

The Ninth Circuit held that where the OSC is issued before June 13, 1992, but the notice of hearing is issued after that date, apply § 242(b). *See Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998).