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Chart 4
Continue here where the respondent alleges s/he did receive notice.

R failed to appear, and admits that she DID receive notice.

Is R seeking rescission of the *in absentia* order?[1]

If so, two preliminary questions:

(1) Was the MTR filed w/in 180 days of the *in absentia* order of removal?[3]
-AND-
(2) Has the R filed ONLY one MTR?[4]

If the answer to both questions is YES, determine whether exceptional circumstances exist.[5]

I. When determining whether exceptional circumstances exist, the Court must:
- **(1)** Accept as true the facts stated in the alien's declaration unless it finds those facts to be inherently unbelievable.[6]
- **(2)** Look to the "totality of the circumstances" presented in each case.[7]

II. Exceptional circumstances are:
- Circumstances, that are unusual and unanticipated, and beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances.[8]
- Ineffective assistance of counsel may constitute an exceptional circumstance.[9]

III. Evidence that R must submit:
- Unsupported statements alleging exceptional circumstances alone cannot satisfy the respondent's burden; rather the respondent must also document their occurrence through sworn affidavits or other documentary evidence.[10]

If not, determine whether R eligible to reopen pursuant to *Matter of M-S-*.[2]

I. R is eligible for previously unavailable relief and seeks only adjudication of the new application.
II. R must comply with 8 C.F.R. § 1003.23(b)(1).
III. If R received oral warnings of the consequences of failing to appear in a language she understood, she MAY NOT reopen to apply for relief under:
- § 240A – Cancellation;
- § 240B – Voluntary Departure;
- § 245 – Adjustment of Status;
- § 248 – Change of Nonimmigrant Classification;
- § 249 – Entered before January of 1972 and is seeking a record of admission as an LPR.

If not eligible, STOP! Deny the MTR

If R unable to show exceptional circumstances, is ineligible for equitable tolling, and ineligible for reopening under *M-S-*, determine whether R entitled to *sua sponte* reopening?[12]

If not, determine whether R eligible for exception: Equitable Tolling.

Many Circuit courts recognize equitable tolling of deadlines and/or numerical limits on motions to reopen in certain situations. Often, a showing of due diligence by R is required.[11]

If Equitable Tolling applies, determine whether exceptional circumstances exist.

If exceptional circumstances exist, grant the MTR.

FN 1 An order of removal entered *in absentia* may be rescinded upon a motion to reopen, filed by the alien within 180 days of the date of the order of removal. *See* 8 C.F.R. § 1003.23(b)(iv)(ii) (2008).

FN 2 In *Matter of M-S-*, 22 I&N Dec. 349, 352 (BIA 1998) (en banc), the Board resolved the question "whether an *in absentia* order must always be rescinded before reopening proceedings, or whether a motion to reopen may be granted without first rescinding the [*in absentia*] deportation order where an alien is eligible for previously unavailable relief and seeks only adjudication of the new application." The Board concluded that the language of the Act, specifically what is now section 240(b)(7) of the Act, provides a clear answer to this question: an *in absentia* order need not be rescinded in order for the respondent to apply for the specific forms of relief designated in section 240(b)(7) of the Act. *Id.* at 353-56. That includes relief pursuant to sections 240A, 240B, 245, 248 and 249 of the Act. *See* INA § 240(b)(7); *Wu v. INS*, 436 F.3d 157 (2d Cir. 2006); *Grigous v. Gonzales*, 460 F.3d 156 (1st Cir. 2006).

In addition, because the alien is seeking relief through a motion to reopen, she is required to comply with the requirements for the filing of motions to reopen as set forth in 8 C.F.R. § 1003.23(b)(1). That regulation requires the alien to have submitted the motion to reopen within ninety days of the order of removal, permits the alien to file only one motion to reopen, and requires the alien demonstrate a prima facie showing of eligibility for the relief sought including an application for said relief and material evidence in support thereof.

FN 3 *See supra* note 1.

FN 4 "[A] party may file only one . . . motion to reopen proceedings." *See* 8 CFR § 1003.23(b)(4)(ii).

FN 5 An order entered *in absentia* in deportation proceedings may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of deportation *if* the alien demonstrates that the failure to appear was because of *exceptional circumstances* beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances). *See* INA 240(e); 8 C.F.R. § 1003.23(b)(iv)(ii).

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 *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996). The First Circuit, in *Kaweesa v. Gonzales*, 450 F.3d 62 (1st Cir. 2006), held that

> among the factors that may be considered are supporting documentary evidence, the alien's efforts in contacting the immigration court, and the alien's promptness in filing the motion to reopen . . . the strength of the alien's underlying claim, the harm the alien would suffer if the motion to reopen is denied, and the inconvenience the government would suffer if the motion is granted.

Id. at 68-69. *See also Singh v. INS*, 295 F.3d 1037, 1039-40 (9th Cir. 2002); *Matter of B-A-S*, 22 I&N Dec. 57, 58-59 (BIA 1998).

FN 8 The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien. INA § 240(e)(1). In *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), the Board, in seeking to define the term "exceptional circumstances" in the context of former INA § 242(e)(B)(2), referred to Webster's II New Riverside University Dictionary (1984) and noted that, therein, the term "exception" is defined as "[o]ne that is excepted, esp. a case not conforming to normal rules" and the term "exceptional" is defined as "[b]eing an exception: unusual."

<u>Exceptional Circumstances Found</u>

A. Ineffective Assistance of Counsel

See infra note 9.

B. Erroneous Reliance on Attorney's Agent

Aris v. Mukasey, 517 F.3d 595 (2d Cir. 2008) (ineffective assistance of counsel even if occurs though a paralegal's misrepresentation);

Monjaraz-Munoz v. INS, 327 F.3d 892 (9th Cir. 2003), *amended by* 339 F.3d 1012 (9th Cir. 2003) (alien's reliance on the deficient advice of an attorney's agent was reasonable and therefore met the statutory definition of exceptional circumstances and warranted reopening of the *in absentia* order);

Cisneros v. Att'y Gen of the U.S., 514 F.3d 1223 (11th Cir. 2004) (person impersonated a lawyer and told client he did not have to appear).

C. Other

Saakain v. INS, 252 F.3d 21, 25 (IJ previously denied a continuance to respondent's counsel who was required to be before a federal magistrate at the same time he was required to appear before the IJ);

Nazarova v. INS, 171 F.3d 478 (7th Cir. 1999) (Respondent was two hours late for court after waiting for a translator she reasonably thought was necessary);

Chete Juarez v. Ashcroft, 376 F.3d 944 (9th Cir. 2004) (Respondent appeared for all but the last scheduled hearing, she had no reason to try to delay the hearing, and she demonstrated eligibility for relief).

Exceptional Circumstances Not Found

A. Misunderstanding Regarding Time/Date of Hearing

Valencia-Fragoso v. INS, 321 F.3d 1204 (9th Cir. 2003) (appearing 4.5 hours late for hearing because respondent mistakenly believed the hearing was later without any showing of relief)

Uriostegui v. Gonzales, 415 F.3d 660, 663-64 (7th Cir. 2005) (Respondent misheard the correct month for the hearing)

Gitau v. Mukasey, 520 F.2d 906 (8th Cir. 2008) (Respondent misunderstood his attorney's instructions regarding his appearance)

Acquaah v. Holder, 589 F.3d 332 (6th Cir. 2009) (mistaken belief as to the correct hearing date without other compelling factors)

B. Car Trouble/Parking Trouble

Sharma v. INS, 89 F.3d 545 (9th Cir. 1996) (traffic congestion)

Magdeleno de Morales v. INS 116 F.3d 145 (5th Cir. 1997) (breakdown of automobile on way to court coupled with other factors)

C. Illness

Ursachi v. INS, 296 F.3d 592 (7th Cir. 2002) (conclusory allegations in the form of a general affidavit of illness by respondent and general note by physician was insufficient)

Celis-Castellano v. Ashcroft, 298 F.3d 888 (9th Cir. 2002) (Respondent failed to present evidence of severity of asthma attack)

Matter of B-A-S-, 22 I&N Dec. 57 (BIA 1998) (Respondent did not provide sufficient evidence to show that his twisted foot constituted an exceptional circumstance);

Matter of J-P-, 22 I&N Dec. 33 (BIA 1998) (Respondent did not provide sufficient evidence to show that his serious headache constituted an exceptional circumstance).

D. Did not read/understand English

Matter of S-M-, 22 I&N Dec, 49 (BIA 1998) (Respondent's claims that the notice of hearing was illegible and that he did not speak English)

Kulhawik v. Holder, 571 F.3d 296 (2d Cir. 2009) (misunderstanding the court's notice due to limited English and believing another notice would be sent).

FN 9 Ineffective assistance of counsel may constitute an exceptional circumstance. *See Asaba v. Ashcroft*, 377 F.3d 9 (1st Cir. 2004); *Lo v. Ashcroft*, 341 F.3d 934 (9th Cir. 2003); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Matter of Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996); *Scorteanu v. INS*, 339 F.3d 407 (6th Cir. 2003)

In *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), the BIA prescribed that, to support a claim of ineffective assistance of counsel, an aggrieved party must (1) submit an affidavit setting forth in detail the agreement entered into with counsel regarding the alien's representation; (2) present evidence that counsel was informed of the allegations of ineffective assistance and given an opportunity to respond; and (3) either show that a complaint against counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed.

FN 10 Unsupported statements alleging exceptional circumstances alone do not satisfy the respondent's burden of proving exceptional circumstances; rather the respondent must also document their occurrence through sworn affidavits or other documentary evidence. *See Matter of J-P-*, 22 I&N Dec. 33 (BIA 1998) (holding that an alien's perfunctory statement that a headache prevented him from attending his hearing was insufficient to prove exceptional circumstances observing that his statement contained no details regarding the cause, severity, or treatment of the alleged illness and was unsupported by medical or other records).

FN 11 **First Circuit:** Whether time limits may be tolled remains an open question under *Chen v. Gonzales*, 415 F.3d 151 (1st Cir. 2005). However, the First Circuit has held that if equitable tolling is available an alien would need to demonstrate lack of actual notice of a time limit, lack of constructive notice, the reasonableness of the alien's continued ignorance of the time limit, due diligence in pursuit of one's

rights, and lack of prejudice to the opposing party. *See Dawoud v. Holder*, 561 F.3d 31 (1st Cir. 2009).

Second Circuit: Time limits may be tolled. *Iavorski v. INS*, 232 F.3d 124, 129-133 (2d Cir. 2000). In *Wang v. BIA*, 508 F.3d 710 (2d Cir. 2007), the Second Circuit articulated a two-step inquiry for equitably tolling deadlines for motions to reopen for ineffective assistance of counsel. First, the court evaluates when the ineffective assistance should have been discovered by a reasonable person. Second, the court asks whether the alien showed due diligence in the period between discovering the ineffective assistance and filing the motion to reopen. The court emphasized that there is no per se time period within which the motion must be filed.

Third Circuit: Time limits may be tolled where fraud and due diligence were shown. *Borges v. Gonzales*, 402 F.3d 398, 406-407 (3d Cir. 2005). In *Borges*, the Court also found that the alien acted with requisite due diligence to resolve his immigration status over the course of five years. In contrast, the court found the alien in *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005), did not demonstrate due diligence. He allowed his case to lapse twice over one year intervals, without taking steps to inquire about the status of his case.

Fifth Circuit: The Fifth Circuit has held that it lacked jurisdiction to consider requests for equitable tolling, as they fell within the Board's authority to reopen *sua sponte*. That holding has been overruled by *Mata v. Lynch*, 135 S. Ct. 2150 (2015).

Sixth Circuit: Time limits may be tolled. *Harchenko v. INS*, 379 F.3d 405, 409-10 (6th Cir. 2004). The court found in *Tapia-Martinez v. Gonzales*, 482 F.3d 417 (6th Cir. 2007), that waiting fifteen months after discovery of counsel's deficient performance to raise an ineffective assistance claim does not satisfy the due diligence requirement.

Seventh Circuit: Tolling of numerical limits permitted. *Joshi v. Ashcroft*, 389 F.3d 732, 735 (7th Cir. 2004). Tolling of time limits for motions to reopen may be warranted in in absentia proceedings. *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005). Due diligence is required. *Patel v. Gonzales*, 442 F.3d 1011 (7th Cir. 2006).

Eighth Circuit: Equitable tolling of time limits permitted sparingly, when extraordinary circumstances beyond the alien's control prevented timely filing. *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005). Due diligence is required. *Habchy v. Gonzales*, 471 F.3d 858 (8th Cir. 2006). In *Habchy*, the court held that waiting four months to file a second motion to reopen absent any explanation for delay, does not constitute due diligence.

Ninth Circuit: Time and numerical limits may be equitably tolled "during periods when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud or error." *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). Further, in *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001), the Ninth Circuit held that equitable tolling applied where an alien was misinformed by the INS about the effective date of his removal order. *Id.* at 1194. The Court found that the effective date was a piece of "vital information" because the alien "needed [it] in order to determine that a motion to reopen was required . . . ." *Id.*

Tenth Circuit: Equitable tolling is permitted, and due diligence required. *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002).

Eleventh Circuit: The 90-day and 180-day bar is not jurisdictional but a "claims processing rule that may be equitably tolled," overruling *Abdi v. Att'y Gen.*, 430 F.3d 1148 (11th Cir. 2005) and *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999). *Avila-Santoyo v. U.S. Atty. Gen.*, 713 F.3d 1357, 1365 (11th Cir. 2013). The 11th Circuit extended its rationale in *Avila-Santoyo* to allow equitable tolling for numerical limitations on motions to reopen. *Ruiz-Turcios v. Att'y Gen. of the U.S.*, 717 F.3d 847 (11th Cir. 2013).

FN 12 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 our *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).