Appeals & Motions to Reopen/Reconsider

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Deadline to Appeal

Post Conviction Relief Board of Immigration Appeals 2025

Matter of De Jesus Platon

> **The evidence of post-conviction relief under section 1473.7 of the California Penal Code that the respondent submitted in support of his motion to remand does not demonstrate that his conviction was vacated for a procedural or substantive defect in the underlying criminal proceedings and not for reasons of rehabilitation or immigration hardship.** *See Matter of DE JESUS-PLATON* **, 29 I&N Dec. 7 (BIA 2025).**

Full Decision https://www.justice.gov/d9/2025-02/4086_0.pdf

Follows the decision from In Re Pickering, 223 I&N Dec. 621 (BIA 2003) and Matter of VELASQUEZ-RIOS, 27 I&N Dec. 470 (BIA 2018)

Matter of Pickering (BIA 2003)

> **(1) If a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.**

(2) Where the record indicated that the respondent's conviction for possession of a controlled substance was quashed by a Canadian court for the sole purpose of avoiding the bar to his acquisition of permanent residence, the court's action was not effective to eliminate the conviction for immigration purposes.

In Re Pickering, 223 I&N Dec. 621 (BIA 2003)

> "

Matter of Velasquez Rios (BIA 2018)

> **" The amendment to section 18.5 of the California Penal Code, which retroactively lowered the maximum possible sentence that could have been imposed for an alien's State offense from 365 days to 364 days, does not affect the applicability of section 237(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i)(II) (2012), to a past conviction for a crime involving moral turpitude "for which a sentence of**

> **one year or longer may be imposed.”**

https://www.justice.gov/eoir/page/file/1098611/dl *Matter of Velasquez Rios*, **27 I&N Dec. 470 (BIA 2018)**

Motion to Reopen

Motion to Reopen In Absentia for Late Arrival

Section 240(a)(5)(A) of the Immigration and Nationality Act states that an Immigration Judge may enter a removal order against respondent in their absence, should they fail to appear in court for a scheduled hearing for which they had proper notice. The Respondent believes that the Court erred in ordering removal the Respondent removed under section 240(a)(5)(A) and requests that the Court reopen these proceedings so that she may proceed on the merits of her Form 42A Application for Cancellation of Removal for Certain Legal Permanent Residents.

Pursuant to INA § 240(b)(5)(C)(i) an *in absentia* **removal order may be rescinded "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 "** *See also* **INA §240 (c)(7)(C)(iii) (stating that subsection (b)(5) is the controlling law for decisions entered based on a failure to appear). This motion is being filed on an order of removal that was dated March 21, 2025, therefore this motion is timely having been filed within 180 days of that date.**

The Respondent makes this motion to reopen stating new facts that will be proven at a hearing to be held if the motion is granted, and those facts are supported by affidavits and other evidence.

II. The Department Did Not Establish Removability By Clear, Convincing, and Unequivocal Evidence.

"In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." *See* **INA §240(c)(3). Subsection (3)(B) provides evidenciary requirements for the Department to establish the existence of criminal convictions. All items listed are "official" documents from the criminal court.**

III. The Respondent Has Established Exceptional Circumstances Under the Law to

Respondent's counsel includes this section out of an abundance of caution so that in the unlikely event that it is relevant, this argument will not be deemed waived based on the number bar to motions to reopen and rescind. *See* **INA §240(c)(7)(A).**

In *Matter of S-L-H- & L-B-L-*, **28 I&N Dec. 318 (BIA 2021), the Board of Immigration Appeals considered the question of whether an Immigration Judge should have reopened removal proceedings for a respondent who arrived late to her individual hearing because she was stuck in traffic. The Board determined that the respondent's credible tardiness assertions, together with supporting documentation, were sufficient to meet the exceptional circumstances standard " under section 240(e)(1) of the**

Immigration and Nationality Act, 8 U.S.C. § 1229a(e)(1) (2018).

In *Matter of S-L-H- & L-B-L-,* **the respondent arrived more than forty minutes late to her individual hearing and the Judge had already ordered her removed** *in absentia* **by the time she arrived. She filed a motion to reopen the following week with an affidavit from herself and her driver that explained the exact location where they encountered unusual traffic due to an accident and further detailed how they made an attempt to find alternative routes to Court but were unable to.**

While general statements—without corroborative evidence documenting the cause of the tardiness—are insufficient to establish exceptional circumstances that would warrant reopening removal proceedings. *See Matter of S-A-***, 21 I&N Dec. 1050 (BIA 1997). Statements that are particular in nature along with supporting evidence can meet that burden. 28 I&N Dec. 318.**

The Board further considered the respondent's intent to appear at the individual hearing since she had attended prior hearings, submitted applications for relief, and filed a motion to reopen promptly following the IJ's issuance of the *in absentia* **order of removal. The BIA highlighted that other factors may prove an intention to appear, such as "any prior affirmative application for relief" and "other evidence indicating that [the respondent] intended to appear at the hearing." 28 I&N Dec. at 323.**

If the Court indeed entered the *in absentia* **order in the instant case because the Respondent signed into WebEx approximately five minutes after the scheduled time of 8:30 a.m. the Court should first consider whether this would be considered a failure to appear in light of the additional information provided to the Court. As noted in** *Matter of S-A- it was* **"not necessarily convinced that every incidence of tardiness must be treated as an 'absence' from the hearing." 21 I&N Dec. at 1052. The Respondent was in Court only**

minutes after the scheduled start time and the evidence provided demonstrates that by 8:38 a.m. Respondent and counsel were present in Court and the proceedings had already ended. In several unpublished decisions the Board has found that a respondent's *de minimis* **tardiness was** *not* **an absence.**

Finally, if a Respondent fails to appear at a removal hearing, an Immigration Judge may enter an *in absentia* **removal order "if the Service establishes by clear, unequivocal, and convincing evidence . . . that the alien is removable."** *See* **INA § 240(a)(5)(A). In tee instant case the record did not contain evidence which established established by clear, unequivocal, and convincing evidence that the Respondent was removable. If the** *in absentia* **order was entered within five minutes of the proceedings scheduled start time, it does not seem possible for the Court to have explained on the record the Court's finding that the Respondent removable by the extremely high bar of clear, unequivocal, and convincing evidence**

The Board, in unpublished decisions, have recently granted motions to reopen where it was determined that the respondent had actually failed to appear in court after actually receiving notice of the hearing but the respondent had appeared for multiple appointments with ICE previously pursuant to its *sua sponte* **authority.** *See* **8 CFR 1003.2(a);** *See also Matter of G-D-,* **22 I&N Dec. 1132, 1133-34 (BIA 1999).**

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The Board Reviewing Factual Determinations