U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Asylum Division
Washington, DC 20529-3300

U.S. Citizenship and Immigration Services

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Memorandum

TO: All Asylum Office Staff

FROM: John Lafferty
Chief, Asylum Division

SUBJECT: Application of the "Exceptional Circumstances" standard in cases where an applicant has failed to appear for an asylum interview.

I. Introduction

The Asylum Division issued revised procedures governing an applicant's failure to appear for an asylum interview and the submission of requests to reschedule an asylum interview pursuant to the settlement agreement in *B.H., et al. v. USCIS, et al.*, No. CV11-2108-RAJ (W.D. Wash.) (also referred to as "ABT Settlement"). *See* Lafferty, John, Memorandum to All Asylum Office Staff, Issuance of Revised Procedures Regarding Failure to Appear and Reschedule Requests, October 17, 2013. This memorandum provides companion guidance regarding the legal standard of exceptional circumstances.

Under the revised procedures, once 45 days have passed after an applicant's failure to appear for an interview, the Asylum Office either will refer the applicant to an immigration judge for adjudication in removal proceedings if the applicant is not in lawful immigration status or will administratively close and dismiss the application if the applicant is in lawful immigration status. Revised AAPM Procedures, Section III.I.2.b, III.I.2.c.

When an applicant seeks to re-schedule his/her asylum application with the Asylum Office more than 45 days after his or her failure to appear for the scheduled asylum interview, the applicant must demonstrate "exceptional circumstances" to account for his or her failure to appear at the asylum interview with the Asylum Office. Revised AAPM Procedures, Section III.I.2.b.ii, III.I.2.c.ii.

If the adjudicating individual finds "exceptional circumstances," he or she should issue a *Determination Demonstrating "Exceptional Circumstances" [In-Status]* (Appendix 76) or *Determination Demonstrating "Exceptional Circumstances"*(Appendix 71). If the Immigration Judge dismisses removal proceedings based on the Asylum Office's determination that the

applicant's failure to appear at the Asylum Office for the interview was due to exceptional circumstances, ICE will notify the Asylum Office so that the case may be reopened and rescheduled.

II. "Exceptional Circumstances" Standard

"Exceptional Circumstances" is defined in the Immigration and Nationality Act (INA), section 240(e)(1) as:

> "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."

Exceptional circumstances are not limited to the express examples provided in the above definition. Determining what constitutes exceptional circumstances is a fact-driven inquiry that requires a case-by-case analysis.[1] Nonetheless, the Asylum Offices should apply the general guidelines from case law outlined below in evaluating exceptional circumstances and in exercising their discretion to determine whether particular circumstances may qualify as exceptional.

III. Using a "Totality of the Circumstances" Approach

Courts have applied a "totality of the circumstances" approach in evaluating exceptional circumstances.[2] As the court in *Kaweesa v. Gonzales* explained, the "totality of the circumstances must be considered," and a proper inquiry into whether there are exceptional circumstances looks to the specific facts of each case. *Kaweesa*, 450 F.3d 62, 68-70 (1st Cir. 2006).

In *Kaweesa*, the court set out a non-exhaustive list of factors to be considered:

- supporting documentary evidence,
- the alien's efforts in contacting the immigration court,
- 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

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[1] *See* Notice of Final Rule Implementing IIRIRA Governing Asylum Claims, 65 Fed. Reg. 76,125 (Dec. 6, 2000) (codified at 8 C.F.R. § 208.10).

[2] Although there is no case law providing guidance on "exceptional circumstances" with regard to an applicant's failure to appear for an asylum interview, the "exceptional circumstances" standard has been examined in the context of removal proceedings with respect to an applicant's failure to appear for removal hearings and motions to reopen and rescind removal orders entered *in absentia*. *See* 8 C.F.R. § 1003.23(b)(4)(ii) (order of removal *in absentia* may be rescinded if alien demonstrates failure to appear was because of exceptional circumstances); INA § 240(b)(5)(C)(i) (statute of limitations for filing a motion to reopen deportation proceedings in which the alien did not appear permitted only "if the alien demonstrates that the failure to appeal was because of exceptional circumstances"); INA § 240(b)(7) (finding alien with a final order of removal entered *in absentia* to be ineligible for various forms of relief absent exceptional circumstances).

While the factors in *Kaweesa* are tailored to the immigration court context, the considerations for the Asylum Office remain largely the same, with a focus on the supporting documentary evidence, the effort and promptness of the applicant, and whether circumstances were truly "beyond the control of the alien."

A large part of what makes circumstances beyond the control of the alien is the inability to anticipate them. For example, in the context of cases involving late-arriving individuals, the courts have been unwilling to see delays due to traffic or parking problems as exceptional circumstances, but have recognized mechanical failures or car breakdowns as exceptional circumstances. *See, e.g., Perez v. Mukasey*, 516 F.3d 770, 774 (9th Cir. 2008) (explaining that "a car's mechanical failure is generally an unanticipated occurrence beyond the control of the alien" in contrast to traffic and parking delays, which did not qualify as exceptional circumstances); *see also In re Rafael Flores Morfin*, 2003 WL 23216785 (BIA 2003), 1 (unpublished) (finding exceptional circumstances where respondent provided written evidence verifying that his car was towed to an automobile repair shop after mechanical failure on the day of the hearing).

The cases on mechanical failure of the car illustrate two important points. First, the courts have focused on whether the circumstances could have been anticipated (like traffic or parking) or were unanticipated (such as engine failure) in terms of deciding whether the circumstance was beyond the control of the alien. Second, these cases underscore the need to provide corroborating evidence of the exceptional circumstances, which in the case of mechanical trouble could have been a tow-truck receipt or an auto shop estimate or a police report about the roadside breakdown.

In sum, the "totality of the circumstances" approach requires the adjudicating individual to look at the particularized facts presented in each case, using the factors identified in *Kaweesa* as a guide. For more fact-specific examples, consult the list of cases at the end of this document.

IV. Review of the Most Common Grounds for Exceptional Circumstances

(A) Ineffective Assistance of Counsel and Fraud

The ineffective assistance of counsel constitutes exceptional circumstances excusing the failure to appear. *See Matter of Grijalva*, 21 I&N Dec. 472, 473-74 (BIA 1996). Establishing exceptional circumstances based on ineffective assistance of counsel requires compliance with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

An applicant fulfills the *Lozada* requirements by providing (1) an affidavit by the alien setting forth the agreement with counsel regarding the representation the alien would receive; (2) evidence that counsel was informed of the allegations and allowed to respond; and (3) an indication that a complaint has been lodged with the appropriate disciplinary authority, or reasons explaining why not. *See* The Asylum Division's *One Year Filing Deadline* Lesson Plan, section V.B.2.d. The totality of the circumstances approach encourages an adjudicating individual to recognize substantial compliance with *Lozada*. Here, the affidavit of the applicant will be the most important evidence in

meeting the *Lozada* requirements, along with records of communication between the applicant and his or her representative and any complaints filed with the state bar or other disciplinary authority.

(B) Health-Related Issues: A Serious Illness Must Prevent Ability to Attend Hearing

The standard for exceptional circumstances based on health or medical problems is particularly stringent, presumably because the definition of exceptional circumstances explicitly contemplates injury by citing to "serious illness of the alien, or serious illness or death of the spouse . . . but not including less compelling circumstances." The main considerations for courts have been: (1) whether the injury would have prevented an applicant from attending the hearing; and (2) whether the applicant provided sufficient evidence that such an injury was severe enough to prevent the applicant's attendance at the scheduled hearing. In this regard, the Asylum Office should consider what types of evidence might be persuasive, such as proof of medical treatment, an affidavit or declaration from the applicant, evidence that applicant was absent from work because of the injury, whether there are any affidavits of witnesses attesting to the nature or extent of the injury, etc. The Asylum Office must consider the totality of the circumstances, and it is unlikely an applicant's affidavit alone would meet the exceptional circumstances standard.

(C) Errors in Reading Notice

It is important to distinguish between errors with the interview notice and the applicant's error in reading the notice. In the former instance, if the applicant lacked proper notice of the interview location, date and time, the Asylum Office must "excuse" the failure to appear. *See* 8 C.F.R. 208.10.

However, in cases where the exceptional circumstances claim is based on theapplicant's error in reading a notice to appear, courts have not looked favorably on such circumstances. Apart from the applicant's own affidavit, there is often a lack of evidence that applicants can provide to demonstrate that they misread the notice. Nonetheless, applicants may attempt to provide some evidence that they misunderstood the date and time of the interview, such as documentation demonstrating a request for time off from work for the wrong day or arranging to bring an interpreter for the wrong day. Even with evidence of such a mistake, an applicant is unlikely to prove exceptional circumstances based on errors in reading a notice for an interview date for a number of reasons. First, such errors are within the applicant's control. The applicant was provided the notice but failed to ensure they understood it correctly. If the notice is unreadable, an applicant could contact USCIS to verify the date of the interview. Second, in the context of an asylum interview, the totality of the circumstances approach counsels against finding exceptional circumstances based on the applicant's lack of effort in contacting the asylum office, since the applicant would have already missed the 45-day period following the interview in which to demonstrate good cause.

V. Conclusion: Analyze Each Case Individually and Weigh Supporting Evidence

Where the applicant's explanation for exceptional circumstances does not fall neatly into one of the above categories, the Asylum Office should continue to apply the general principles of the "totality of the circumstances" approach by looking at the particularized facts presented in each case. The

Asylum Office should also apply the factors identified in *Kaweesa* as a guide to consider whether: (1) the circumstances prevented someone from attending the interview; (2) the circumstances were within the applicant's control; and (3) the availability of corroborating evidence to support applicant's position that such circumstances prevented them from attending the interview. If the Asylum Office is unable to make a decision based on the evidence submitted by the applicant without further information, the Asylum Office may issue a request for additional information and/or schedule the applicant for an interview to discuss the explanation for exceptional circumstances. *See* Revised AAPM, Section III.I.2.b.ii. Examining "Exceptional Circumstances"; Appendix 75, *Request for Additional Information Regarding "Exceptional Circumstances."*

Examples of Exceptional Circumstances

Ineffective Assistance of Counsel

- *Lo v. Ashcroft*, 341 F.3d 934, 939 (9th Cir. 2003) (counsel's ineffective assistance in giving aliens incorrect date for hearing was exceptional circumstance beyond their control that satisfied standard for reopening).
- *Matter of Grijalva*, 21 I&N Dec. 472, 473-74 (BIA 1996) (respondent satisfied all three *Lozada* requirements to support his claim that he was blatantly misled by his counsel to not appear at his scheduled hearing, where his application for relief was deemed abandoned in his absence).

Fraud

- *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) (stating that fraud is an exceptional circumstance where alien seeking a work permit was deceived by a notary public posing as an attorney who filed a petition for asylum rather than work permit, advised the alien that he did not need to appear at any hearings, and the alien filed a petition for reopening 16 days late as consequence of notary's deception).

Lack of Notice

- *Matter of M-R-A-*, 24 I. & N. Dec. 665, 676 (BIA 2008) ("Respondent has overcome the weaker presumption of delivery of the Notice of Hearing sent by regular mail" and the agency should "consider a significant factor to be the respondent's due diligence in promptly seeking to redress the situation by obtaining counsel and requesting reopening of the proceedings").
- *Lopes v. Gonzales*, 468 F.3d 81, 85 (2d Cir. 2006) (Evidence to rebut presumption of delivery may include: (1) the respondent's affidavit; (2) affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received; (3) the respondent's actions upon learning of the *in absentia* order, and whether due diligence was exercised in seeking to redress the situation; (4) any prior affirmative application for relief, indicating that the respondent had an incentive to appear; (5) any prior application for relief filed with the Immigration Court or any prima facie evidence in the record or the respondent's motion of statutory eligibility for relief, indicating that the respondent had an incentive to appear; (6) the respondent's previous attendance at Immigration Court hearings, if applicable; and (7) any other circumstances or evidence indicating possible non-receipt of notice).

Examples Where Exceptional Circumstances Were Not Found

Ineffective Assistance of Counsel

- *Matter of Rivera-Claros*, 21 I&N Dec. 599 (BIA 1996) (Respondent's inability to communicate with her former counsel and nonreceipt of a letter from her former counsel advising her of her hearing date at her new venue did not establish exceptional circumstances where she failed to comply with third *Lozada* requirement of filing a complaint against former counsel or adequately explaining why a complaint against former counsel has not been filed with the appropriate disciplinary authorities).
- *Reyes v. Ashcroft*, 358 F.3d 592, 598 (9th Cir. 2004) (Petitioner failed to satisfy *Lozada*'s affidavit requirement or provide attorney with notice of the ineffective assistance allegations and an adequate opportunity to respond).
- *Tang v. Ashcroft*, 354 F.3d 1192, 1195 (10th Cir. 2003) (Failure to comply with *Lozada* requirements and mere submission of a motion for change of venue does not excuse an alien's failure to appear).

Fraud

- *Singh-Bhathal v. INS*, 170 F.3d 943, 946 (9th Cir. 1999) (explaining that bad advice by an immigration consultant is not an exceptional circumstance).
- *Scorteanu v. INS*, 339 F.3d 407, 413-14 (6th Cir. 2003) (attorney's failure to notify alien of asylum hearing, and subsequent fraud in advising alien that case was still pending, resulting in alien being ordered removed *in absentia*, was type of exceptional circumstances that could warrant rescission of order of removal if alien filed motion to reopen within 180 days of date of order of removal instead of a year after learning of fraud).

Health-Related

- *Matter of J-P-*, 22 I&N Dec. 33 (BIA 1998) (Respondent's serious headache on the day of his hearing is not an exceptional circumstance – particularly where individual failed to provide detail regarding the cause, severity, or treatment of the alleged illness, failed to provide medical evidence to support his claim, failed to contact the Immigration Court on the date of his hearing, and failed to explain his reasons for neglecting to do so).
- *In re B-A-S-*, 22 I&N Dec. 57, 58-59 (BIA 1998) (Respondent who twisted his foot the day before the hearing did not establish exceptional circumstances as "the evidence submitted does not indicate that the injury to the respondent's foot was severe enough to prevent his attendance at the scheduled hearing... The BIA would normally expect specific, detailed medical evidence to corroborate the alien's claim.").

Error in Reading Notice

- *Matter of S-M-*, 22 I&N Dec. 49, 50-51 (BIA 1998) (Claim of misread or illegible date on notice of hearing was neither inadequate notice nor an exceptional circumstance).
- *Acquaah v. Holder*, 589 F.3d 332, 336 (6th Cir. 2009) (Mistaken belief as to the correct hearing date is not an exceptional circumstance).

Failure to Notify of Change of Address

- *Vukmirovic v. Holder*, 640 F.3d 977, 979 (9th Cir. 2011) (Alien's failure to advise his counsel and EOIR of his change of address violated statute requiring notice to government, and so prevented finding of exceptional circumstances).

Transportation Problems

- *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996) (Respondents' hour late arrival for their hearing due to traffic and parking delays do not constitute exceptional circumstances beyond respondents' control).
- *DeMorales v. INS*, 116 F.3d 145 (5th Cir. 1997) (Respondents' mechanical failure of their car on the way to their hearing was not exceptional circumstance where respondents did not provide any independent confirmation of the mechanical breakdown nor made any effort to contact the court beyond a cursory search for the phone number, or otherwise contact the court until they received the order of deportation).

IV. Training and Additional Guidance

The Asylum Division will provide training for Asylum Office personnel on the revised procedures regarding failure to appear and reschedule requests in coordination with issuance of this memorandum.

For additional questions related to these procedures, please contact Mary Margaret Stone, Chief of Operations, at 202-272-1651. For additional questions related to the legal standard, please contact the local associate chief counsel for the Refugee and Asylum Law Division located at the local asylum office.