**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Garzon, John J.**
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**DHS/ICE Office of Chief Counsel - NYC**
**26 Federal Plaza, 11th Floor**
**New York, NY 10278**

**Name: ARIAS-REYES, CECILIA ELIZAB...** **A 206-234-448**

**Date of this notice: 8/25/2016**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
O'Leary, Brian M.
Mann, Ana

Userteam: Docket

File: A206 234 448 – New York, NY Date:

AUG 25 2016

In re: CECILIA ELIZABETH ARIAS-REYES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John Garzon, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's October 27, 2014, decision denying the respondent's motion to reopen, seeking rescission of an in absentia order of removal that was entered on June 18, 2014. The Department of Homeland Security ("DHS") has not filed an opposition to the appeal. The appeal will be sustained.

Upon de novo review, and while we acknowledge the Immigration Judge's sound reasoning in his decision, we conclude that it is appropriate to allow the respondent another opportunity to appear for a hearing. We consider the totality of circumstances presented in this case, including the fact that the notice of hearing was returned by the postal service, the notice of hearing reflected a slightly different address than the Immigration Judge's order, the respondent's diligence in seeking reopening, the credible fear finding, and the absence of any DHS opposition to the respondent's motion to reopen and appeal.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

**U.S. DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**26 Federal Plaza, Room 1237, New York, New York 10278**

**In the Matter of**
**ARIAS-Reyes, Cecilia Elizabeth**
**Respondent**

**File No. A 205-234-448**

**In behalf of Respondent:**
**John J. Garzon, Esq.**
**46-12 Queens Blvd Suite 204**
**Sunnyside, NY 11104**

**In behalf of Dept. of Homeland Security:**
**Office of Chief Counsel, I.CE. – D.H.S.**
**26 Federal Plaza, llth Floor**
**New York, N.Y. 10278**

## ORDER DENYING MOTION TO REOPEN

**ORDER: For the reasons stated in the Decision below, it is hereby**

**ORDERED that respondent's motion to reopen the removal proceeding, and rescind the order or removal issued on June 17, 2014, is hereby DENIED. It is further**

**ORDERED that the request for a stay of removal is hereby DENIED.**

**Dated:** 10-27-14.

Alan Vomacka
**Alan Vomacka, Immigration Judge**

## DECISION ON MOTION TO REOPEN

***History of the proceeding.***

**The removal proceeding commenced with the issuance of a Notice to Appear [Exhibit 1] issued October 10, 2013 and served on respondent in person as evidenced by her signature on page two of the NTA. The NTA was filed with the court on at Eloy, Arizona. Respondent was released from custody [Exhibit 4] and filed a pro se motion to change venue [Exhibit 5] stating she would reside at 147 Gibson Avenue, Brentwood, NY 11717. The court in Eloy changed venue to New York City and mailed a copy of the order to respondent at the Gibson Avenue address. That order was returned to the court as undeliverable, "Attempted – Not Known." The court in New York had already issued a notice of hearing to the same address, notifying respondent to appear at a hearing on June 17, 2014. That notice was also returned to the court with the same notation by the post office. Respondent did not appear for her hearing on June 17. At the request of the Department of Homeland Security, the court conducted the hearing in respondent's absence. The court found**

**respondent removable based on a Question and Answer Statement [Exhibit 3] given to DHS just after respondent's apprehension. On the next day, the court mailed an order of removal to the same address, advising respondent that she could submit a motion to reopen.1**

**Respondent filed a motion to reopen on October 17, 2014. The motion itself refers to a due process necessity for respondent to be able to submit "his Cancellation claim." [Motion, page two]. This respondent is female and there is no apparent basis for any cancellation of removal application. Since the motion is unsigned by the attorney, it is likely the motion was not carefully reviewed. Instead the court reviews the motion in light of the supporting statements, including one from counsel.**

**The supporting statements from respondent and Marlene Reyes are consistent as to respondent originally residing at the Gibson Avenue address, and then going to stay "for a short period" at Marlene Reyes' home on Bridgette Boulevard in Central Islip. They are also consistent in that both say this was not a permanent relocation or change of address, but neither seems able to state when respondent left Gibson Avenue or when she returned to Gibson – not even the month is approximated. They both state that respondent's cousin Aristedes Gomez did not deliver the court notice to respondent until after the hearing date had passed. Their statements are dated July 15, 2014, but were not filed until about 90 days later. Their statements each state that the person "duly sworn, deposes and says", but there is no indication of who administered any oath; the statements do not contain an averral that the contents are true or stated under penalty of perjury.**

**Respondent's counsel submitted a signed statement of his own in which he recapitulates this explanation, but his statement seems to be based only on hearsay.**

**An accompanying statement purportedly from Aristedes Gomez – the cousin who is supposedly responsible for not delivering the court notice to respondent – includes the statements that he received a letter from the immigration court, that he was not aware it was the court hearing notice, and that he did not deliver the letter to her urgently because he did not see her for some time, but that it was after June 18 when he gave her the notice. This statement bears no signature and the motion fails to explain why it was not signed. The court could only speculate that respondent's counsel prepared a statement for Gomez based on an explanation from respondent, but that Gomez was never willing to sign it.**

***Discussion.***

**Considering the motion and the record of proceedings as a whole, the court concludes that the motion should be denied for at least two reasons.**

**First, the court finds that respondent has not argued that she was not properly served with the Notice to Appear. She does not specifically concede that point, but the evidence of her**

1 The motion refers to the hearing in absentia taking place on June 18, 2014. The hearing was scheduled for, and took place on, June 17. However, because the court waited to conduct hearings in absentia until the end of the docket, the clerk had already left, and the order or removal was printed and mailed the next day.

**signature on the court copy is uncontested, and it is clear she understood she was in removal proceedings. The NTA on page two is signed also by an officer of DHS, who certified that he explained the consequences of failure to appear to her in Spanish. The NTA includes a specific advisal to the alien of the need to notify the court of any change of address.**

**Second, respondent has given an explanation for her failure to appear which is not corroborated by any sworn statement from the person she says is directly responsible for failing to advise her of mail from the immigration court, even though the motion indicates (in counsel's E-28) that respondent is again living in that person's home. Further, the explanation that that person received the hearing notice but negligently failed to deliver it to her, or let her know she had a court notice at his home which she should claim, *is directly contradicted by the evidence* in the court record: the only notice of the hearing was not delivered, it was returned by the post office to the court. In short, the motion and respondent's statement essentially blames Aristedes Gomez for failing to alert respondent, but he has not signed a statement which is meant to corroborate that story, and the court file contradicts it.**

***Discretionary Ruling on Motion.***

**The court finds that respondent has failed to establish that this motion should be granted as a matter of discretion. Motions to reopen are disfavored, and may be denied as a matter of discretion even if not untimely and even if filed as a joint motion. *I.N.S. v. Rios-Pineda*, 471 U.S. 444 (1985); *Esposito v. INS*, 987 F.2d 108, 110 (2d Cir. 1993); *Vlassis v. INS*, 963 F.2d 547, 551 (2d Cir. 1992). *See, e.g., Manzano-Garcia v. Gonzales*, 413 F.3d 462, 469-471 (5th Cir. 2005) [motion to reopen for adjustment of status was properly denied where alien failed to file I-140 petition for several months despite ability to do so]; *Williams v. INS*, 773 F.2d 8 (lst Cir. 1985) [motion to reopen denied where alien "overstayed by many years," ignored grants of voluntary departure, etc.]. *See also Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985); *Hibbert v. INS*, 554 F.2d 17 (2nd Cir. 1977).**

**In the present case, respondent was 19 years old when placed in proceedings and 20 by the time the hearing in absentia occurred. She has failed to give a convincing explanation for her failure to attend the hearing; she has suggested no basis for relief she might be eligible for if the case were reopened; she has not alleged any debilitating illness or other sympathetic factor which would rebut the appearance of plain negligence on her part. The motion presents an explanation for her failure to appear –that the notice arrived at her cousin's house and he failed to alert her to it – which is contradicted by the record of proceedings, which shows that the notice was *not* received at her cousin's address. This explanation at variance with the known facts is a negative discretionary factor, since it seems respondent made up an explanation for her failure to appear.**

**Dated:** 10-27-14.

Alan Vomacka

**Alan Vomacka, Immigration Judge**