



**U.S. Department of Justice**

**Executive Office for Immigration Review**

*Board of Immigration Appeals  
Office of the Clerk*

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

**Byung J. Kim, Esq.  
8801 E. Hampden Avenue Ste., 104  
Denver, CO 80231**

**DHS/ICE Office of Chief Counsel - DEN  
12445 East Caley Avenue  
Centennial, CO 80111-5663**

**Name: ARAIZA, JORGE EDUARDO**

**A 201-221-422**

**Date of this notice: 8/12/2013**

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:  
Manuel, Elise  
Hoffman, Sharon  
Guendelsberger, John

Lulsegas  
Userteam: Docket

Immigrant & Refugee Appellate Center | [www.irac.net](http://www.irac.net)

Falls Church, Virginia 22041

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File: A201 221 422 – Denver, CO

Date:

AUG 12 2013

In re: JORGE EDUARDO ARAIZA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Byung J. Kim, Esquire

ON BEHALF OF DHS: Ivan Gardzelewski  
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has appealed the Immigration Judge's decision dated August 28, 2012, denying his motion to reopen. The respondent had previously been ordered removed in absentia for his failure to appear for the hearing on August 6, 2012. On appeal, the respondent asserts that he did not receive proper notice of his removal hearing and that his failure to appear was due to exceptional circumstances, the ineffective assistance of his former counsel. The appeal will be sustained and the record will be remanded.

We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

As an initial matter, we agree with the Immigration Judge's determination that the respondent received proper notice of his removal hearing. *See Matter of Barocio*, 19 I&N Dec. 255, 288 (BIA 1985). However, upon our de novo review, in light of the totality of the circumstances presented in this matter, we conclude that the respondent has established that his failure to appear was because of exceptional circumstances. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) ("We note that one must look to the "totality of circumstances" to resolve this issue of exceptional circumstances."). Therefore, we will sustain the appeal and reopen the proceedings to allow the respondent another opportunity to appear for a hearing. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, the Immigration Judge's in absentia order is vacated, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

  
\_\_\_\_\_  
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
DENVER, COLORADO

In the Matter of:	)	
	)	
ARAIZA, Jorge Eduardo,	)	<b>IN REMOVAL PROCEEDINGS</b>
	)	
Respondent	)	File Number 201 221 422
	)	

For the Respondent:  
B. Kent Felty, Esq.  
2329 W. Main Street, Suite 106  
Littleton, CO 80120

For the Department of Homeland Security:  
Ivan Gardzelewski, Assistant Chief Counsel  
Department of Homeland Security  
12445 E. Caley Avenue  
Centennial, CO 80111-6432

**ORDER**

On September 17, 2011, Removal Proceedings were initiated against the above-named Respondent when the Respondent was served in person with a Notice to Appear dated September 17, 2011. See Exhibit 1. On September 20, 2011, the Notice to Appear was filed with the Denver Detention Facility Immigration Court, thereby vesting jurisdiction with the Immigration Court. Id. On April 4, 2012, a Notice of Hearing was served on the Respondent, through counsel of record, advising the Respondent of a scheduled hearing on August 6, 2012. See Exhibit 2.

On August 6, 2012, after the Respondent failed to appear for his scheduled Removal hearing, the Immigration Court conducted the hearing *in absentia* and ordered the Respondent removed from the U.S. to Mexico having found that evidence submitted by the Department of Homeland Security supported the allegations and the charge. See Exhibits 3 and 4.

On August 24, 2012, the Respondent filed a Motion to Reopen Removal Proceedings. See Exhibit 5. On August 27, 2012, the Department of Homeland Security filed a brief in opposition to Respondent's Motion to Reopen. See Exhibit 6.

The Court will deny the Respondent's Motion to Reopen Removal Proceedings. An order of removal may be rescinded only upon a motion to reopen which demonstrates that the alien failed to appear because of exceptional circumstances, because the alien did not receive proper notice of the time and place of the hearing, or because the alien was in federal or state custody and failed to appear through no fault of his own. See Matter of Grijalva, 21 I&N Dec.

27 (BIA 1995). In its opposition, the Department of Homeland Security points out that counsel for the Respondent, Mr. B. Kent Felty, acknowledges that he received a hearing notice from the Court, but that he could not provide the Respondent with the notice of the hearing because the Respondent had moved, had disconnected his phone, and had not stayed in contact with Mr. Felty. See Exhibit 6. The Department of Homeland Security argues that notice to counsel constitutes notice to the alien, and that the Court provided sufficient notice of this hearing via the proper service to Mr. Felty. The Respondent has not provided a sworn affidavit or some other evidence that he received insufficient notice of this hearing. Statements made by counsel are not to be considered evidence. See INS v. Phinpathya, 464 U.S. 183, 188-89 n.6 (1984); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).


The Court finds that the record does not support a finding that the alien failed to appear because of exceptional circumstances, because the alien did not receive proper notice of the time and place of the hearing, or because the alien was in federal or state custody and failed to appear through no fault of his own. The Court will therefore deny the Respondent's Motion to Reopen.

Accordingly the following order is entered.

ORDER

Respondent's Motion to Reopen is DENIED.

August 28, 2012

  
MIMI E. TSANKOV  
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
621 17TH STREET, SUITE 300  
DENVER, CO 80293

FELTY, B. KENT  
2329 W MAIN ST STE 106  
LITTLETON, CO 80120

Date: Aug 28, 2012

File A201-221-422

In the Matter of:  
ARAIZA, JORGE EDUARDO

\_\_\_\_ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before \_\_\_\_\_. The appeal must be accompanied by proof of paid fee (\$110.00).

\_\_\_\_ Enclosed is a copy of the oral decision.

\_\_\_\_ Enclosed is a transcript of the testimony of record.


\_\_\_\_ You are granted until \_\_\_\_\_ to submit a brief to this office in support of your appeal.

\_\_\_\_ Opposing counsel is granted until \_\_\_\_\_ to submit a brief in opposition to the appeal.

  b   Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

  
\_\_\_\_\_  
Immigration Court Clerk

cc: DHS

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