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**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS  
FALLS CHURCH, VIRGINIA**

11 In the matter of: ) Case No.: A012-345-678  
12 )  
13 LASTNAME, Firstname ) **Automatic Stay Of Removal Applies**  
14 Respondent ) **Pursuant to INA §240(b)(5)(C), 8 C.F.R.**  
15 ) **§1229(b)(5)(C)**  
16 )  
17 )  
18 )  
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**MOTION TO REOPEN  
AND  
RESCIND *IN ABSENTIA* ORDER,**

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1  
2 I. Introduction  
3

4 This motion to reopen is for failure to receive notice and does not require any fee.  
5

6 Respondent asserts under penalty of perjury that he did *not* receive a court notice of hearing  
7 from his former counsel, Mr. XXXXX, Esq. (*Affidavit as Attch.A.*)  
8

9 Respondent's former counsel, Mr. XXXXX, Esq., sent a letter to Respondent stating an  
10 *incorrect date* of hearing. The former counsel's letter states in pertinent part as follows,  
11 "*Please be advised that you have an adjourned hearing before IJ Elstein on May 30, 2011 at*  
12 *8:30 am – a copy of the hearing notice is enclosed.*" (Emphasis added.) (See Attorney's letter  
13 as Attch. B.) The date of "May 30, 2011" is incorrect. Respondent asserts under penalty of  
14 perjury that the actual court notice was not enclosed with the letter. (*Affidavit as Attch.A.*)  
15

16 In addition to reopening for non-receipt of the notice, Respondents prays to reopen as  
17 follows:

- 18 - for ineffective and fraudulent representation by the "immigration service" firm  
19 Lime2Lime, which contracted to change venue of the hearing to Phoenix Immigration  
20 Court, while unauthorized to practice before immigration courts;  
21 - for inability to appear in court for serious (life threatening) illness of his wife and serious  
22 illness of his mother on the day of hearing;  
23 - new circumstances  
24 - pursuant to this Honorable Court's *sua sponte* authority.  
25

1 Respondent, through undersigned counsel, moves this Court to reopen and remand the  
2 Respondent’s case to the Immigration Judge (“IJ”) in New York, New York. Respondent  
3 intends to apply for the following relief:

- 4 - Adjustment of Status based on a pending I-130 immigrant visa petition by the  
5 Respondent’s U.S. citizen wife under the Immigration and Nationality Act (“INA”) Sec.  
6 245(a);
- 7 - Adjudication of the I-751 Petition to Remove Conditions previously denied by the  
8 USCIS;
- 9 - I-589 Application for Asylum and Withholding of Removal, based on changed country  
10 conditions in the Russian Federation;
- 11 - Alternatively, voluntary departure.

12  
13 Respondent is worthy of the favorable discretion and exercise of the Board’s *sua sponte*  
14 authority, because Respondent has no criminal history ( *See FBI “No Arrest” record as*  
15 Attachment F) and contributes to the community by:

- 16 - voluntary blood donations (Attachment G);
- 17 - financial donor to charity (Attachment I).

18  
19  
20 II. Statement of the Facts and Case

21  
22 Respondent is a 29-year-old male, native and citizen of the Russian Federation, formerly an  
23 LPR with his LPR status terminated based on a denied I-751, residing in Scottsdale, AZ,  
24 married to a U.S. citizen, never arrested or convicted for a crime, engaged in service for his  
25 community as voluntary blood donor and a financial sponsor of a charity.

1 This Honorable Court ordered Respondent removed *in absentia* on 5/31/2011.

2  
3 Respondent attended his 2/23/2011 hearing and was represented at that time by Mr.  
4 XXXXX, Esq. Respondent asserts under penalty of perjury that his former counsel, Mr.  
5 XXXXX, Esq., did not give him the actual court's notice of his next hearing. (Attch. A)

6  
7 Respondent believed that his hearing was set on 5/30/2011, because his former counsel, Mr.  
8 XXXXX advised him so in a letter. (Attch. B)

9  
10 Respondent relocated from Brooklyn, NY to Scottsdale, AZ in in March 2011. Upon  
11 relocation to Arizona, Respondent hired a firm Lime2Lime, which he believed to be a  
12 lawfully operating low cost "immigration service" firm on basis of their large sign displaying  
13 the word "Immigration". Respondent contracted with the firm Lime2Lime to change the  
14 location of his hearing from New York to Phoenix. Respondent was under impression that  
15 the date of his hearing would remain the same, and only the location of his court hearing  
16 would change. Respondent further believed that the change of venue was permitted, because  
17 the firm Lime2Lime "guaranteed" the result.

18  
19 Respondent asserts under penalty of perjury that he appeared in the Phoenix Immigration  
20 Court on 5/30/2011 for the hearing he believed to be held there and then. (Attch. A)

21  
22 Respondent states under penalty of perjury that his wife was seriously ill and bedridden on  
23 5/31/2011, and that he was unable to leave he unattended. Respondent further asserts under  
24 penalty of perjury that his mother was also seriously ill on 5/31/2011 and he assisted her by  
25 making telephone calls on her behalf.

1  
2 III. Legal Argument  
3

4 **(A) Non-receipt of a court's notice of hearing and defective notice by former counsel.**  
5

6 Respondent asserts he did not receive a court's notice of hearing and received a misleading  
7 (incorrect date) notice from his former counsel. (Attch. A)  
8

9 This motion is timely pursuant to INA Sec. 240(b)(5)(C)(ii), which provides in pertinent part  
10 as follows,

11 *“Rescission of order. – Such an order may be rescinded only – [ ]upon a motion to*  
12 *reopen filed **at any time** if the alien demonstrates that the alien did not receive*  
13 *notice in accordance with paragraph (1) or (2) of section 239(a) “.*  
14

15 This motion to reopen is duly supported by affidavits pursuant to 8 C.F.R. Sec. 1003,  
16 23(b)(3). Respondent stated in his sworn affidavit as follows,

17 “Affidavit

18 I, LASTNAME Firstname, first being duly sworn state as follows:  
19

- 20 1. This affidavit is for the New York Immigration Court in support of the  
21 appeal and motion to reopen my immigration case.
- 22 2. I am now under the **in absentia** Order of Removal by a U.S. Immigration  
23 Judge for non-appearance at my court hearing in New York Immigration  
24 Court.
- 25 3. I did not appear at my hearing in New York for a mixture of three  
reasons:

1 a) I did **not** have the actual court notice and I had a **wrong date** of May  
2 30 given to me by my former lawyer XXXXX, Esq. in a lawyer's letter  
3 (letter enclosed);

4 b) I was under mistaken belief that my representative immigration firm  
5 Lime2Lime had changed my court location (venue) from New York to Phoenix  
6 for my May 30 hearing (because they guaranteed they would) and I actually  
7 appeared in the Phoenix Immigration Court at 200 E. Mitchell Dr., Phoenix,  
8 AZ 85012 on May 30, 2011 because I thought it was a proper court to appear  
9 (the court was closed);

10 c) On the actual day of my hearing May 31, I was overwhelmed with  
11 simultaneous serious medical illnesses of my wife and my mother to such an  
12 extend that I would not be able to go to my hearing even if I was informed  
13 that my hearing was on May 31 and not on May 30. My wife was so ill, I  
14 feared she would die on that day.

15 4. My removal is a direct result of negligence, incompetence and fraud of  
16 the immigration firm Lime2Lime of 4011 75<sup>th</sup> Avenue in Phoenix, AZ85033  
17 that represented me in immigration matters. I now learned that the  
18 immigration firm Lime2Lime is not and has never been authorized to  
19 practice immigration law, contrary to their big sign "Immigration".  
20 This firm is all fraud as it is not even properly registered to do  
21 business in Arizona, but is simply a trade name.

22 5. I hired the immigration firm Lime2Lime to help me with my immigration  
23 problems, because they guarantee results and guarantee the lowest  
24 prices in town for immigration services. The immigration firm Lime2Lime  
25 has many offices around Phoenix with big signs "Immigration". The firm  
is busy with immigration clients and looks legitimate, prominent and  
solid. (Photos enclosed.) Their claim that their prices are low because  
they handle volume of cases makes sense from the stand point of economy  
of scale. That is how I was deceived by them.

6. I hired Lime2Lime on March 25, 2011 to transfer the location (venue) of  
my immigration hearing from the New York Immigration Court to the  
Phoenix Immigration Court and to file an I-130 Petition for Alien



1 Relative from my wife. They charged me \$70 for venue change from New  
2 York to Phoenix, and \$70 for I-130 petition. They also collected \$420  
3 for the INS application fee. They guaranteed that their prices are best  
4 in town and they guaranteed that location of my court hearing be  
5 changed to Phoenix. I believed.

6 7. They guaranteed(!!!) that my court hearing would be in Phoenix, and  
7 that I do not have to travel to New York for my May 30 court  
8 appearance. I liked the convenience of going to the Phoenix Immigration  
9 Court. Because the firm Lime2Lime appear immigration professional, and  
10 because I paid them and gave them all the necessary documents, I  
11 believed them. I believed that on May 30, 2011 I must go to the Phoenix  
12 Immigration Court instead of the New York Immigration Court. The date  
13 May 30, 2011 was incorrectly given to me by my former lawyer XXXXX,  
14 Esq., but as for the location of my hearing, I believed that it was  
15 changed to Phoenix.

16 8. Having hired Lime2Lime to transfer my court case from New York, I  
17 switched my attention to my wife's and my mother's health problems. My  
18 wife is very ill with lupus autoimmune disease. She had an attack of  
19 her illness at the last week of May, and I was consumed with the  
20 medical issues. My wife was placed on an increased dose of a powerful  
21 immune suppressing medication, which rendered her susceptible to  
22 infections. I cared for her in every way that she does not contract any  
23 infection. On May 30, 2011 I left my wife for a brief period of time to  
24 appear in the Phoenix Immigration Court. (That effort was for nothing,  
25 as the court was closed and my hearing - contrary to my lawyer's letter  
- was not May 30.) When I got back, my wife has gotten worse. The next  
day, May 31, my wife was so weak I could not have left her, even if I  
knew that I had a hearing on May 31. My mother had an anxiety attack on  
May 31 (because her boyfriend threatened to kill her) and I helped her  
by calling different places on her behalf. I had been torn between my  
bedridden wife and the telephone with my mother's medical provider's.  
My mother is not able to communicate effectively in the English  
language when she is under stress, and I had to help her when she had  
crisis. My wife was very ill, and I feared she might die. The day of  
May 31 was a very bad day.

1  
2 9. In the first week of June, as I did not actually have the court hearing  
3 on May 30 (which I still believed to be date based on my former  
4 lawyer's letter) I asked Lime2Lime when I shall go to the Phoenix  
5 Immigration Court. They told me to go to the firm's different location  
6 at 2202 24<sup>th</sup> Street and ask there. I went there on two occasions and did  
7 not get any answers, because the knowledgeable person was never there.  
8 I could not go more often or wait for unpredictable amount of time,  
9 because my wife was very ill. While in the vicinity of the 24<sup>th</sup> Street  
10 and trying to get answers from Lime2Lime, I drove by the State Bar of  
11 Arizona at 4201 N. 24<sup>th</sup> Street. I came in, explained my situation and  
12 the front desk person gave me the complaint form. I now filed the  
13 complaint against Lime2Lime with the State Bar of Arizona.

14 10. In mid June the firm Lime2Lime admitted that they lost my case  
15 and said 'sorry'. They refunded \$140 legal fee I paid to their firm and  
16 gave back the \$420 they collected for the INS application fee. They hid  
17 from me that I was already ordered removed for nonappearance in court.

18 11. I at all times wanted to go to my court hearing, but in Phoenix  
19 instead of New York. The immigration firm Lime2Lime guaranteed to  
20 change location (venue) of my May 30 court hearing from the New York  
21 Immigration Court to Phoenix. Intending to appear at my court hearing I  
22 dutifully went to the Phoenix Immigration Court on May 30, which I  
23 believed to be the date of my hearing based on my lawyer's letter. It  
24 turned out that the immigration firm Lime2Lime did nothing on changing  
25 the location of my hearing, and the location (venue) was still in New  
York. I am now convinced that they failed to change the location of my  
hearing, because they are simply not authorized to practice immigration  
law. I am a victim of unauthorized practice of law by the immigration  
firm Lime2Lime. If that firm Lime2Lime was not sprawling over the  
Phoenix area and loudly advertising their low-cost one-stop-for-all  
services with their big "Immigration" signs on the building tops, I  
would have not entrusted my immigration matters to their care. The fact  
is, I missed my court hearing in New York in false reliance on their  
guaranteed venue change of my May 30 hearing to Phoenix.

1 12. I never missed any court hearings, before the immigration firm  
2 Lime2Lime mislead me by guaranteeing to transfer location (venue) of my  
3 hearing from New York to Phoenix for my May 30 hearing. I had no  
4 intention of failing to appear, and I went to the Phoenix court on the  
day I thought was my court day.

5 13. My circumstances are more complex, than just fraudulent  
6 representation by the immigration firm Lime2Lime. I was misled about  
7 the date of my hearing by my former attorney XXXXX, Esq. He never gave  
8 me the actual court notice for the hearing, which I ended up missing.  
9 He gave me a letter stating INCORRECT date of my hearing in his letter.  
10 (Letter is enclosed.) The letter makes reference to a court notice, but  
11 the actual court notice was not enclosed with that letter. According to  
12 my former lawyer's letter, my hearing was to happen on May 30, 2011. As  
13 I now learned, I was ordered removed on May 31, 2011, and I assume that  
14 my hearing was in fact set to be held on 31<sup>st</sup>, and not on 30<sup>th</sup> as my  
15 lawyer informed me. I filed a complaint against my former lawyer XXXXX,  
16 Esq. for handling my case negligently and giving me the wrong court  
17 date.

18 14. I state that I had no reason to hide from the hearing, because I  
19 myself asked for adjustment of status through my U.S. citizen wife. I  
20 would be in court if I was not under the mistaken belief that my court  
21 was changed to Phoenix.

22 15. I pray to forgive me for non-appearance at my May 31 hearing in  
23 New York for the following reasons:

24 a) My wife and my mother were very ill on that day and I would not be able  
25 to appear at risk of my wife dying if I left her alone;

b) My former lawyer XXXXX, Esq. gave me the WRONG court date of May 30,  
and never gave me the actual court notice;

c) I was defrauded by the immigration firm Lime2Lime that the location of  
my May 30 hearing was changed to Phoenix, and I actually went to the  
Phoenix court trying to appear as I have always done before.

1 I certify under penalty of perjury that the foregoing is true and correct to  
2 the best of my knowledge and believe.

3 Firstname LASTNAME: /signed/ Date: 6/28/2011".  
4

5 The Respondent's statements that he did not receive a court's notice of hearing, that he  
6 believed his hearing date be 5/30, and that he believed the venue was changed to Phoenix, do  
7 not fall in a category of "inherently unbelievable", therefore, should be accepted as true. *See*  
8 *Celis-Castelano v. Ashcroft*, 298 F.3d 888, 892 (9<sup>th</sup> Cir. 2002); *Maroufi v. INS*, 772 F.2d 597,  
9 600 (9<sup>th</sup> Cir. 1985).

10  
11 Absent of showing that Respondent was served a court notice, it should be found, that  
12 Respondent was not put on notice of an upcoming hearing of 5/31/2011. The attorney's letter  
13 contained in the Attch. B states the date of hearing as "May 30", which is incorrect on it's  
14 face.

15 Even if the notice given in Court to the Respondent's counsel satisfied statutory and  
16 constitutional requirements, Respondent is allowed to reopen his case after *in absentia* order  
17 if he did not receive notice. INA §240(b)(5)(C)(ii). In this case, Respondent has satisfied his  
18 burden to show that he did not receive notice by rebutting the presumption of delivery by  
19 stating that his former counsel did not give him the court's notice and by presenting the  
20 actual letter by his former counsel setting forth the incorrect date of hearing in question.  
21

22 Furthermore, an *in absentia* order in this case would lead to an unconscionable result because  
23 Respondent is an LPR (status terminated by the USCIS and not duly reviewed by an IJ) and  
24 married to a US citizen, and he is removed without adjudication of his claims on merits while  
25

1 clearly defrauded by the non-attorney representative Lime2Lime and misadvised on the date  
2 of hearing by his former counsel.

3  
4 A *prima facie* showing of eligibility for relief is not a prerequisite to reopening proceedings  
5 following an in absentia hearing. *Matter of Ruiz*, 20 I.&N. 91(BIA 1989). Respondent,  
6 however, proceeds to show his *prima facie* eligibility for relief as he alternatively seeks  
7 reopening based on changed circumstances, based on illness of wife and mother, and *sua*  
8 *sponte* authority of this Court.

9  
10 **(B) Serious illness of wife and mother preventing appearance.**

11  
12 This motion is pursuant to INA sec. 240(b)(5)(C)(i) and is based on exceptional  
13 circumstances. The INA provides as follows, “*Rescission of order.-Such an order may be*  
14 *rescinded only – (i) upon a motion to reopen filed within 180 days after the date of the order*  
15 *of removal if the alien demonstrates that the failure to appear was because of exceptional*  
16 *circumstances (as defined in subsection (e)(1))*”]. See INA sec. 240(b)(5)(C)(i). The  
17 Respondent’s wife and mother ill on 5/31/2011. Respondent stated in details that his wife  
18 was bedridden and he could not leave her on 5/31/2011. (Attch. A.) His wife supports his  
19 statement in her own declaration. (Attch. E)

20  
21  
22 ;  
23 ;  
24 ;  
25

1 **(C) Ineffective assistance of the former counsel and fraud by non-attorney**  
2 **representative.**

3 This motion is based upon the attached affidavits of Respondent. *See Attch. A.* Respondent  
4 believes that his former attorney, XXXXX, Esq., prejudiced him by misinforming him about  
5 the date of the very hearing he missed.

6  
7 Respondent raises claim of ineffective assistance by his prior counsel, therefore no  
8 production of new evidence shall be required. *See Matter of N-K- & V-S-*, 21 I&N Dec. 879,  
9 880 (BIA 1977); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) *aff'd*, 857 F.2d 10(1<sup>st</sup> Cir.  
10 1988); *Osei v. INS*, 305 F.3d 1205 (10<sup>th</sup> Cir. 2002).

11  
12 Ineffective assistance of counsel may constitute ‘exceptional circumstances’ as defined in the  
13 Immigration and Nationality Act, in order to reopen removal proceedings. Respondent seeks  
14 the Court’s *sua sponte* authority in this matter, but satisfied the requirements of *Matter of*  
15 *Lozada*, 19 I&N Dec. 637 (BIA 1988). Pursuant to *Lozada*, a motion to reopen based upon a  
16 claim of ineffective assistance of counsel requires the following:

- 17 (1) that the motion be supported by an affidavit of the aggrieved respondent setting forth  
18 in detail the agreement that was entered into with counsel with respect to actions to be  
19 taken and the representations made by counsel;
- 20 (2) that counsel whose competence is impugned be informed of the allegations and be  
21 given an opportunity to respond, and
- 22 (3) that the motion reflect whether a bar complaint has been filed and, if not, why not.

23 Respondent is in compliance with these requirements.  
24  
25

1 Respondent provided an affidavit given under penalty of perjury. His first affidavit is  
2 contained in the Attachment A and sets forth in detail the agreement that was entered into  
3 with counsel with respect to actions to be taken and the representations made by former  
4 counsel. This affidavit reflects Respondent’s position on the bar complaint against his former  
5 counsel.

6  
7 The certificate of service of the instant motion indicates that the same was served on the  
8 Respondent’s former counsel. The former counsel, Mr. XXXXX, Esq., therefore has an  
9 opportunity to know the Respondent’s allegations and respond to them.

10  
11  
12 The right to counsel is grounded in the Fifth Amendment guarantee of Due Process, *Matter*  
13 *of Lozada*. Although non-citizens do not possess a Six Amendment right to assistance of  
14 counsel at government expense in immigration proceedings, they do have a right to  
15 competent representation at their own expense. INA Sec. 242(b)(2) & 292, 8 U.S.C. Sec.  
16 1252(b)(2) & (1362); 8 C.F.R. Sec. 238.1(b)(2)(i), 1003.102; *Olvera v. INS*, 504 F.2d 1372  
17 (5<sup>th</sup> Cir. 1974) This fundamental right is considered a part of the Due Process guarantees  
18 under the Fifth Amendment to the Constitution. *Orantes-Hernandez v. Thornburgh*, 919 F.  
19 2d 549, 554 (9<sup>th</sup> Cir. 1994.)

20  
21 Respondent is a victim of unauthorized practice of law by a firm Lime2Lime, loudly  
22 advertising their low-cost services under the “Immigration” street sign. The firm Lime2Lime  
23 promised to change the venue of the next hearing (implying to retain the date of the hearing),  
24 and failed to do so. Failure to provide the service specifically promised to a client is fraud. In  
25

1 similar circumstances courts have granted relief even absent a showing of prejudice. *See,*  
2 *e.g., Waldron v. INS*, 17 F. 3d 511, 518 (2<sup>nd</sup> Cir. 1994).

3  
4 Respondent was misled about the date of the hearing by Mr. XXXXX, Esq., which deprived  
5 him of an opportunity to arrange his appearance. Subsequently, Respondent was defrauded  
6 by the non-attorney representative Lime2Lime and led to believe that his hearing is in  
7 Phoenix. The cumulative effect of these two consecutive errors by the former representatives  
8 constitutes prejudice to Respondent and outright violation of his Due Process right for  
9 competent representation. Fraud by a non-attorney representative is a valid factor in  
10 reopening a case. *See Valera v. INS*, 204 F.3d 1237 (9<sup>th</sup> Cir. 2000). (In *Valera* the one-motion  
11 rule was equitable tolled where the second motion was filed after respondent was defrauded  
12 by a non-attorney purporting to provide legal representation.) Errors of two different  
13 representatives is also a supporting factor in reopening matter. *See Ray v. Gonzalez*, 439 F.3d  
14 582, 588-92 (9<sup>th</sup> Cir. 2006). (In *Ray* two attorneys failed to properly file motions to reopen,  
15 and errors of more than one attorney was a factor in reopening.)

16  
17  
18 **(D) Changed circumstance.**

19 This motion is based in part on the changed circumstances which renders respondent *prima*  
20 *facie* eligible for adjustment of status. In accordance with *Matter of Arthur*, 20 I&N Dec.  
21 475, (BIA 1992) Respondent now has pending immigrant visa petition, that he did not have  
22 at the time of his last hearing. The immigrant visa petition on behalf of Respondent by his  
23 U.S. citizen wife was just filed on 6/28/2011. The freshly filed I-130 immigrant visa petition  
24 is evidence that is material, new and could not have been introduced at the Respondents last  
25 hearing. *See* 8 C.F.R. Sec. 1003.2(e).



1  
2 Respondent represents that he did not leave the United States during or after the pendency of  
3 his removal proceedings. Respondent represents that he is not a party to any criminal  
4 proceedings. *See* 8 C.F.R. Sec. 1003.2.

5  
6 An alien is *prima facie* eligible for adjustment of status if he (1) makes an application for  
7 adjustment, (2) is eligible to receive an immigrant visa and is admissible in the United States  
8 for permanent residence, (3) an immigrant visa is immediately available to him at the time of  
9 making application. *See* INA Sec. 245(a). Respondent meets this requirements.

10  
11 The Board finds *prima facie* eligibility where “*the evidence reveals a reasonable likelihood*  
12 *that the statutory requirements for relief have been satisfied. We have not required a*  
13 *conclusive showing that eligibility for relief has been established. Rather, we have reopened*  
14 *proceedings ‘where the new facts alleged, when coupled with the facts already of record,*  
15 *satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on*  
16 *reopening’” *Matter of S-V-*, 22 I&N Dec. 1306, 1308 (BIA 2000) (citations omitted).*

17  
18 Respondent supplied the I-485 application for adjustment of status package with supporting  
19 documents in the Attachment D. Because the U.S. Citizenship and Immigration Services  
20 does not have a jurisdiction to adjudicate the Respondent’s application for adjustment of  
21 status, Respondent seeks to reopen his removal proceedings so that an Immigration Judge can  
22 decide his application. The grant of the adjustment of status by an Immigration Judge would  
23 allow Respondent to lawfully remain in the United States. Respondent is mindful of his  
24 burden to prove bond fides of his marriage pursuant to the *Matter of Velarde*. *Matter of*

1 *Velarde*, 23 I&N Dec.253 (BIA 2002). Respondent respectfully reserves to supplement  
2 evidence.

3  
4 The IJ or the Board may grant a motion to reopen when the motion offers new material facts  
5 that were not available at trial and “*could not have been discovered or presented at the*  
6 *former hearing*”. 8 C.F.R. Sec. 1003.2(c )(1). The Board has ruled: “[*W*]here an alien is  
7 *seeking previously unavailable relief and has not had an opportunity to present h[is]*  
8 *application before the Immigration Judge, the Board will look to whether the alien has*  
9 *proffered sufficient evidence to indicate that there is a reasonable likelihood of success on*  
10 *the merits so as to make it worthwhile to develop the issues further at a full evidentiary*  
11 *hearing.*” *In Re M- S-*, 22 I. & N. Dec. 349 (BIA 1998); *See also Matter of L-O-G-*, 21  
12 I.&N. Dec. 413 (BIA 1996). The Board grants a motion to reopen in part “*upon the*  
13 *likelihood that the applicant will be granted the relief sought [] if reopening is permitted.*”  
14 *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1970).

15  
16 The legal argument for reopening in the instant case is similar to that in *Cao v. DOJ*, 421  
17 F.3d 149, 156-58 (2<sup>nd</sup> Cir. 2005). In *Cao* presence of the respondent’s wife in the United  
18 States, her testimony and medical record constituted new evidence, and the court reversed the  
19 BIA’s denial to remand. In the instant case, the fresh filing of the immigrant visa petition,  
20 presence of the Respondent’s wife in the United States, her testimony and medical condition  
21 should constitute new evidence justifying remand.

22  
23 Respondent is mindful of the fact that he must prove that his marriage is *bona fide*.

24 Respondent submits evidence that his marriage is *bona fide*. Respondent’s wife provided her  
25

1 detailed affidavit. See Attachment E. Respondent provided his family photos as further  
2 evidence of bona fides of his marriage. Attch. F.

3  
4 Absent DHS opposition, remand for adjustment of status should be granted even if  
5 Respondent fails to meet all the requirements. See *Konstantinova v. INS*, 195 F.3d 528 (9<sup>th</sup>  
6 Cir. 1999), see also *Matter of Yeondwosen*, 21 I&N Dec. 1025 (BIA 1997). Respondent  
7 prays that the Department does not oppose to reopen and remand.

8  
9 Respondent respectfully requests the Court's *sua sponte* authority to remand the instant case  
10 for additional fact finding. (In the event this matter is referred to the Board, Respondent  
11 prays for the Board's *sua sponte* authority to remand. See *Matter of A-H-*, 23 I&N  
12 Dec.774, 790-91 (A.G. 2005))

13  
14 IV. Conclusion

15 WHEREFORE, the instant case should be reopen, rescind *in absentia* order and remanded to the  
16 New York Immigration Court.

17  
18 Respectfully submitted on 6/28/2011

19  
20  
21 \_\_\_\_\_  
22 Marina Alexandrovich

23 IMMIGRATION ATTORNEY  
24  
25

V. CERTIFICATE OF SERVICE

I hereby certify that I am a United States citizen and over eighteen (18) years of age and that I served a true copy of the foregoing

**MOTION TO REOPEN AND RESCIND *IN ABSENTIA* ORDER**

with attachments by USPS first class mail by placing designated USPS mail box with postage prepaid on :

Office of District Counsel

U.S. Immigration and Custom Enforcement

P.O. Box 3507

New York, New York 10008-3507

And

**XXXXX, Esq.**

**123 Some Street, Suite XXX**

**New York, NY 10001**

This 28th day of June, 2011.

By:

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Marina Alexandrovich  
IMMIGRATION ATTORNEY

VI. Index of Attachments

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A – Respondent’s Affidavit ..... Page

B – Letter by former counsel advising the incorrect “May 30” date of hearing .....

C – Photos of the non-attorney “immigration” firm Lime2Lime .....

D – Proposed relief applications .....

E – Wife’s affidavit .....

F – Family photos .....