

continuance so that he could obtain counsel. The Court provided Respondent with oral and written notice of his upcoming hearing, to be held on April 21, 1997.

On April 21, 1997, Respondent failed to appear for his scheduled hearing. The Court proceeded *in absentia* and found Respondent deportable under former section 241(a)(2)(B)(i) of the Act based on the documentary evidence submitted by the Government. The Court ordered Respondent deported to Mexico.

On August 13, 2009, Respondent filed his first motion to reopen with the Court, arguing that he lacked notice of his April 21, 1997 hearing and that he failed to appear because he was in state custody at the time of the hearing. On November 12, 2009, the Court denied Respondent's first motion to reopen, finding that Respondent had received proper notice of his hearing and did not present sufficient evidence demonstrating that he was in state custody at the time of the hearing.

On December 14, 2009, Respondent filed a second Motion to Reopen ("Motion") with the Court. In his instant Motion, Respondent argues that reopening of his case is proper under section 240(b)(5)(C)(ii) of the Act because he was in state custody at the time of his hearing, and submits new evidence in support thereof.

Based on the following, the Court GRANTS Respondent's motion:

II. Law and Analysis

A. Numerical Limitation

While an alien may file only one motion to reopen an *in absentia* removal order, the same numerical limitation does not apply to motions to reopen an *in absentia* deportation order under former section 242B of the Act. 8 C.F.R. § 1002.23(b)(4)(iii) (stating that the numerical limitations for motions to reopen removal proceedings do not apply to motions to reopen deportation proceedings); *cf.* 8 C.F.R. § 1003.23(b)(4)(ii); Fajardo v. INS, 300 F.3d 1018, 1021 (9th Cir. 2002).

In the present matter, though Respondent has previously submitted a motion to reopen, his pending Motion is not numerically barred because he is attempting to reopen an *in absentia* deportation order under former section 242B of the Act. See 8 C.F.R. 1003.23(b)(4)(iii).

B. Timeliness

Generally, a motion to reopen must be filed within ninety days of a final order of deportation or removal. 8 C.F.R. § 1003.23(b)(1). Respondent filed his Motion on December 14, 2009, approximately twelve years after the entry of his final deportation order on April 21, 1997. Therefore, his motion is untimely. Id.

However, the Act and regulations provide for certain exceptions to the filing deadline in cases involving *in absentia* deportation orders. An order entered *in absentia* in deportation

proceedings may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he did not receive notice or if the alien demonstrates that he was in federal or state custody and the failure to appear was through no fault of the alien. 8 C.F.R. § 1003.23(b)(4)(iii).

1. State Custody

In his Motion, Respondent argues that he failed to appear at his April 21, 1997 hearing because he was serving a sentence in the Los Angeles County Jail for a probation violation relating to his CHSC § 11377(a) conviction for misdemeanor possession of a controlled substance. In support thereof, Respondent has submitted a sworn affidavit, a certified copy of an electric docket of his Superior Court proceedings, and Respondent's incarceration and release records from the County of Los Angeles Sheriff's Department Headquarters.

In his sworn affidavit, Respondent asserts that on September 23, 1996, he was convicted of misdemeanor possession of a controlled substance in violation of CHSC § 11377(a), and sentenced to forty-five days confinement and thirty-six months summary probation. See Respondent's Motion to Reopen (Dec. 14, 2009). Respondent further asserts that upon completing his jail sentence and being released, he was arrested on March 20, 1997, for providing false identification to a peace officer in violation of section 148.9 of the California Penal Code ("CPC"). Id. Finally, Respondent asserts that on March 31, 1997, he was sentenced to ninety days confinement for violating his probation relating to his CHSC § 11377(A) conviction. Id. Therefore, Respondent contends that he was unable to appear at his April 21, 1997 hearing because he was in state custody serving his ninety day sentence for a probation violation.

Respondent's assertions have been sufficiently corroborated by the evidence in the record. First, the electronic docket indicates that on March 31, 1997, Respondent appeared at a hearing in criminal court where he admitted to violating his probation and was sentenced to an additional ninety days of confinement at the Los Angeles County Jail. Id. at Tab A. While the electronic docket does not indicate that Respondent was remanded to custody at the time of his March 31, 1997 criminal hearing, Respondent has provided Respondent's incarceration and release records from the County of Los Angeles Sheriff's Department Headquarters, indicating that Respondent was incarcerated from March 30, 1997 through June 19, 1997. Id. at Tab B.

Given the information contained in Respondent's affidavit, the electronic docket and the incarceration and release records, the Court finds that the evidence in the record is sufficient to establish that Respondent was in fact in state custody at the time of his April 21, 1997 hearing. Therefore, the Court will grant Respondent's Motion pursuant to 8 C.F.R. § 1003.23(b)(4)(iii). In addition, the Court will hold an evidentiary hearing regarding any relief for which Respondent may be eligible. See Matter of Ruiz, 20 I&N Dec. 91, 92 (BIA 1889) (holding that "in the context of a prior *in absentia* hearing, the underlying relief being sought by way of the motion to reopen is the opportunity to present the applications for relief at a full evidentiary hearing").

Accordingly, the following order shall be entered:

ORDER


IT IS ORDERED that Respondent's Motion to Reopen be **GRANTED**.

DATE:

3/4/10



Dorothy Dunkel-Bradley
U.S. Immigration Judge

CERTIFICATE OF SERVICE	
THIS DOCUMENT WAS SERVED BY:	
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DATE: 3-4-10	BY: COURT STAFF 
Attachments: <input type="checkbox"/> EOIR-33	<input checked="" type="checkbox"/> EOIR-28
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