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YOUR IMMIGRATION SOLUTION



ATTY. ROBERT REEVES & NANCY MILLER

Ignoring a notice to appear doesn't make the problem go away

proof that the notice was properly served and that the person named is removable, the court can hold a hearing and make a removal order *in absentia*. *In absentia* means in the person's absence. Proof of proper service can consist of showing that the notice was mailed, by regular mail, to the alien's last known address. If the alien did not get the notice because he failed to notify the government of his current address, his failure to appear is not excused.

A person who has a final order entered against her *in absentia* after receiving oral notice is barred from most forms of relief, including cancellation of removal, adjustment of status, change of status and voluntary departure for 10 years. The bar only applies where the failure to appear is not due to exceptional circumstances and the person received oral notice in her own language or in a language she understands regarding the time and place of the hearing and the consequences for failing to appear. Exceptional circumstances includes events such as serious illness and death in the family.

In absentia orders are not appealable. An *in absentia* order may only be rescinded by a motion to reopen. The filing of the motion stays the deportation order until the judge rules on it. If the alien did not receive notice of the hearing for reasons other than his own fault, the motion can be filed at any time. If the alien received notice of the hearing, the motion must be filed within 180 days of the date of the order. This 180 day period can be tolled (held) if the failure to appear was the result of ineffective assistance

of counsel. However, the tolling is not indefinite. The alien must act with due diligence after learning of the existence of the order.

The 9th Circuit has held that a judge can not issue an *in absentia* order where the alien arrived at court while the judge was still in the courtroom, even if the alien arrived late. The court distinguished between failing to appear and appearing tardy. Clearly, however, it is risky to arrive late and hope that the judge will still be on the bench. A miscalculation could result in an *in absentia* order.

A person who has an *in absentia* order is subject to being removed from the United States. Sometimes, a person learns about the *in absentia* order when Immigration and Customs Enforcement (ICE) takes them into custody. Anyone who has ever filed an application for an immigration benefit may be at risk. Denials of applications are often followed by a notice to appear. Anyone who suspects that proceedings may have been instituted against them should consult a knowledgeable and experienced immigration lawyer.

Atty. Reeves has represented clients in numerous landmark immigration cases that have set new policies regarding INS action and immigrants' rights. His offices are located in Pasadena, San Francisco, Las Vegas and Makati City.
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The analysis and suggestions offered in this column do not create a lawyer-client relationship and are not a substitute for the personalized representation that is essential to every case.

(Advertising Supplement)

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