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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAURA CATALINA JUAREZ CASTRO, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 20-73313 Agency No. A212-967-593 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted October 18, 2022[**]
Pasadena, California

Before: HIGGINSON,[***] CHRISTEN, and BUMATAY, Circuit Judges.
Dissent by Judge BUMATAY.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Stephen A. Higginson, United States Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

Petitioner Laura Catalina Juarez Castro, a native and citizen of El Salvador, petitions for review of the Board of Immigration Appeals' (BIA) order affirming the immigration judge's (IJ) denial of Juarez Castro's motion to reopen her asylum proceedings. We have jurisdiction pursuant to 8 U.S.C. § 1252, and we grant the petition and remand for reconsideration of petitioner's motion to reopen. Because the parties are familiar with the facts, we do not recite them here.

Our review is confined to the grounds relied upon by the BIA. *Garcia v. Wilkinson*, 988 F.3d 1136, 1142 (9th Cir. 2021). We review the denial of a motion to reopen for an abuse of discretion. *Sembiring v. Gonzales*, 499 F.3d 981, 985 (9th Cir. 2007). The BIA abuses its discretion when it acts "arbitrarily, irrationally or contrary to the law." *Id.* We review de novo questions of law, and we review the agency's factual findings for substantial evidence. *Abebe v. Gonzales*, 432 F.3d 1037, 1039–40 (9th Cir. 2005) (en banc).

We conclude that Juarez Castro's exceptional circumstances and notice arguments were exhausted as a matter of law, and we reject the government's suggestion to the contrary. Juarez Castro's submissions to the IJ and BIA both invoked the challenges that Juarez Castro faces while taking care of her autistic children and explained the circumstances that prevented her from attending her

hearing. *See Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020) (observing that a claim is exhausted when a petitioner raises it before the BIA).

The BIA correctly recognized that a presumption of receipt attaches to notices sent by regular mail, and this presumption is weaker than the presumption that applies to certified mail. *See Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002). But the BIA failed to apply our case law when it determined the facts and circumstances in petitioner's case did not rebut this presumption because it concluded that petitioner's "unsupported denial of receipt" was "weak evidence" that she did not receive the notice of hearing. "[C]redibility determinations on motions to reopen are inappropriate," *Yang v. Lynch*, 822 F.3d 504, 508 (9th Cir. 2016) (quoting *Bhasin v. Gonzales*, 423 F.3d 977, 986 (9th Cir. 2005)), and the BIA is required to "accept as true the facts asserted by the petitioner" unless an assertion is"inherently unbelievable," *Agonafer v. Sessions*, 859 F.3d 1198, 1203 (9th Cir. 2017) (internal quotation marks omitted). The test for whether a petitioner has overcome the presumption of receipt for regular mail is "practical and commonsensical." *Sembiring*, 499 F.3d at 987. In *Salta*, we explained that "[w]here a petitioner actually initiates a proceeding to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing, a sworn affidavit from [petitioner] that neither she nor a responsible party residing at her address received

the notice should ordinarily be sufficient to rebut the presumption of delivery and entitle [her] to an evidentiary hearing to consider the veracity of her allegations." *Salta*, 314 F.3d at 1079. Similarly, in *Sembiring*, we held that a petitioner overcame the presumption of effective service of regular mail because, among other things, she "initiat[ed] a proceeding to obtain a benefit" by filing an affirmative application for asylum, her letter to the IJ for reopening was "written promptly," and the government's circumstantial evidence that the mail was delivered was weak. 499 F.3d at 989. We did not fault Sembiring for her failure to submit a sworn affidavit because pro se submissions for aliens are "liberally construed." *Id.* at 990.

Juarez Castro initiated proceedings for her benefit by filing an affirmative application for asylum; her pro se motion to reopen and supporting affidavit were submitted to the IJ one day after her hearing was scheduled and the same day she learned she missed the hearing; she had a strong motive to attend the hearing because she has two disabled children, and no motive to avoid the hearing; and she submitted a sworn statement that she did not receive the notice of hearing. These factors align with the factors our case law has deemed sufficient to overcome the presumption of receipt. *See id.* at 988–90; *Salta*, 314 F.3d at 1079.

The IJ did not consider whether Juarez Castro demonstrated exceptional circumstances, and the BIA did not apply the appropriate standard when it considered Juarez Castro's sworn declaration. Juarez Castro provided records corroborating the severity of her children's autism, which complicates her own ability to communicate with them and requires intensive therapy from several psychologists and therapists. The dissent questions whether Juarez Castro's failure to appear was "because of" her children's conditions, but her statement explains how her autistic children climbed on a chair, knocked her calendar to the floor, and it appears papers in the calendar were misplaced in the process of putting the calendar back. Juarez Castro's explanation is not inherently unbelievable. *See Agonafer*, 859 F.3d at 1203. We remand to the BIA with directions to apply the correct legal standard to Juarez Castro's notice argument and reconsider whether Juarez Castro has shown exceptional circumstances under our case law, given the corroborating evidence of her children's condition filed in conjunction with her motion to reopen.

PETITION GRANTED AND REMANDED.

Laura Catalina Juarez Castro v. Merrick B. Garland, No. 20-73313
BUMATAY, Circuit Judge, dissenting:

Under the presumptions and deferential standard of review that guide our analysis, I would deny this petition. Because Laura Juarez Castro has not shown that the BIA acted "arbitrarily, irrationally, or contrary to the law," *Sembiring v. Gonzales*, 499 F.3d 981, 985 (9th Cir. 2007), I respectfully dissent.

I.

A.

There's a presumption that aliens receive notices sent by immigration courts through the mail. *Salta* v. INS, 314 F.3d 1076, 1079 (9th Cir. 2002); *Sembiring*, 499 F.3d at 986. While the presumption is at its strongest when the notice is sent by certified mail, the presumption exists nonetheless for regular mail. *Sembiring*, 499 F.3d at 987. In reviewing an alien's claim that she didn't receive notice, our inquiry is "practical and commonsensical rather than rigidly formulaic." *Id.* at 988.

Here, the BIA had ample grounds to conclude that Juarez Castro failed to rebut the presumption that she received notice of her June 13 hearing date. First, the notice to appear was sent to the address that Juarez Castro provided in her asylum application. Second, Juarez Castro's affidavit to the immigration judge strongly suggests that she *did* receive notice for her June 13 hearing. She acknowledged that she knew that the date of her originally scheduled hearing was May 10. And she acknowledged that she knew her May 10 hearing had been rescheduled. But

according to the record, the only document that notified Juarez Castro that the May 10 hearing was rescheduled was the *same* notice that provided for the June 12 hearing date. So Juarez Castro's own affidavit is strong evidence that she received notice of the June 12 hearing. Third, as the BIA noted, Juarez Castro provided no support for her claim of not receiving notice, even though such corroboration could have easily been provided.

Because the record contains indications that Juarez Castro did receive notice of her hearing, the BIA did not abuse its discretion by holding that she did not rebut the presumption of effective service.

B.

The record also supports the BIA's determination that Juarez Castro did not show exceptional circumstances sufficient to excuse her failure to appear. Exceptional circumstances are defined as instances like "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien." 8 U.S.C. § 1129a(b)(5)(C)(i), (e)(1). To succeed on a motion to reopen based on exceptional circumstances, an alien must establish "that the failure to appear was *because of* exceptional circumstances." 8 U.S.C. § 1129a(b)(5)(C)(i) (emphasis added).

Though the record indicates that her children suffer from autism, Juarez Castro did not explain how she missed her hearing "because of" her children's

conditions. Instead, she ascribes her failure to appear to confusion over the hearing date after her children knocked her calendar off the wall and pages fell loose. But as any parent knows, such incidents can occur whether or not children suffer from medical conditions. While I'm sympathetic to Juarez Castro's situation, her explanation stops short of showing that her "'exceptional circumstances' prevented [her] from appearing." *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891 (9th Cir. 2002) (simplified). I therefore cannot say that the BIA abused its discretion.

II.

Because we should have denied the petition for review, I respectfully dissent.