

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 01-3564

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YELENA TSYMBALENKO;  
ALEKSEY TSYMBALENKO, Petitioners

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF  
THE UNITED STATES, Respondent

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On Petition for Review of an Order of the  
Board of Immigration Appeals  
(Board No. A78726981)

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Argued: April 26, 2002

Before: BECKER, Chief Judge, SCIRICA and RENDELL  
Circuit Judges.

(Filed: June 14, 2002)

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Transcribed by: Tracey J. Williams, CET

(Proceedings recorded by electronic sound recording;  
transcript provided by AAERT-certified transcriber.)

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BENCH OPINION

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BECKER, Chief Judge.

(The following is the bench opinion of the Court in the above-captioned matter:)

THE HONORABLE JUDGE BECKER: I have conferred with the panel, and the panel, having studied this matter, grants the motion to dismiss the appeal for want of appellate jurisdiction. We are satisfied that the jurisdiction of this Court is squarely controlled by the plain text of Section 1249(a)(b)(5)(C), which provides that an in absentia removal order may be rescinded only upon a motion to reopen; we believe that we are also controlled by *Marrero v. INS*, 990 Fed.2d 772, Third Circuit, 1993, that a petition for review an in absentia deportation order is not proper where the alien had failed to file a motion to reopen the deportation order. Now, we are aware that one has now been filed, but that fact subsumes what is the animating spirit of both the statute and *Marrero* case, that the petitioner must exhaust administrative remedies; under these circumstances, petitioner has not exhausted them. And we have no idea what the Board will do: The Board may very well grant the motion to reopen, and this Court has made some remarks on the record that it has no objection if Ms. Aristova communicates to the Board.

We are also satisfied that there would be no difference, given the clear, unequivocal proof of notice required for service, whatever the standard of review. We are, should we reach the merits, concerned about the sloppy manner in which the form was filled out by the Immigration Judge.

At all events, we are satisfied that we lack

jurisdiction and, accordingly, the appeal will be dismissed.  
The Clerk will arrange for a transcript of this bench  
opinion, which will be a non-precedential opinion.

Judge Scirica, anything to add or do you concur?

THE HONORABLE JUDGE SCIRICA: I concur.

JUDGE BECKER: Judge Rendell?

THE HONORABLE JUDGE RENDELL: Yes, I concur as well.

JUDGE BECKER: Thank you very much.

(Bench opinion concluded.)

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TO THE CLERK:

Please file the foregoing Bench Opinion.

BY THE COURT:

/s/ Edward R. Becker  
Chief Judge