U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Hall, Erin T., Esq.
Global Justice Law Group, PLLC
216 1st Avenue South
Suite 420
Seattle, WA 98104

DHS/ICE Office of Chief Counsel - SEA
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Name: GONZALEZ-ALONZO, SANTIAGO **A 200-883-832**

Date of this notice: 3/6/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Grant, Edward R.
Mann, Ana

Luisegas
Userteam: Docket

File: A200 883 832 – Seattle, WA Date: MAR - 6 2017

In re: SANTIAGO GONZALEZ-ALONZO a.k.a. Alonzo Santiago-Gonzalez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Erin T. Hall, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's March 16, 2016, decision denying his motion to reopen his removal proceedings after the issuance of an in absentia order of removal. The Department of Homeland Security opposes the appeal. The appeal will be sustained, the proceedings will be reopened, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

On January 25, 2016, the respondent filed a motion to reopen his removal proceedings following the issuance of an in absentia order on October 20, 2015. Pursuant to section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C), an in absentia removal order may be rescinded upon (1) a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances; or (2) a motion to reopen filed at any time if the alien demonstrates that he did not receive notice of the hearing, or that the alien was in Federal or State custody and did not appear through no fault of his own. *See also Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999).

The respondent alleges that he did not receive notice of his October 20, 2015, hearing because the notice was sent to his former attorney, he had been unable to reach his attorney for some time, and his former attorney did not inform him of his hearing (Respondent's Brief at 3, 8; Respondent's Motion to Reopen at 9). Although the respondent states that he did not receive notice of his October 20, 2015, hearing, he does not base his motion on lack of notice. Rather, he alleges that he did not appear because of exceptional circumstances. Specifically, the respondent alleges that he was unable to reach his prior attorney despite making several attempts, and he eventually retained another attorney to represent him (Respondent's Brief at 8-9; Respondent's Motion to Reopen at 7-8).

The record reflects that on October 20, 2015, the respondent's former attorney attended the respondent's hearing, and submitted a motion to withdraw as counsel, which was granted by the Immigration Judge. In the motion to withdraw, prior counsel states that she had been unable to communicate with the respondent for several months and was unsure if he still resided at the same address, which was last confirmed in July 2013 (*see* Administrative Record of Proceedings, Motion to Withdraw as Counsel, dated October 20, 2015). We note that although prior counsel indicates in her motion that a copy of the respondent's hearing notice was mailed to his last

known address, the motion does not include a copy of counsel's letter or indicate the date that the hearing notice was mailed.

The record also reflects that the respondent had timely appeared for his prior hearing, on May 10, 2013. Furthermore, the respondent promptly filed a timely motion to reopen his removal proceedings and to rescind the in absentia removal order. *See* section 240(b)(5)(C)(i) of the Act; *see Lo v. Ashcroft,* 341 F.3d 934, 938–39 (9th Cir. 2003) (holding that where counsel's secretary misinformed petitioners of the date of their hearing, causing them to be absent, ineffective assistance of counsel constitutes exceptional circumstances); *see also Singh v. Gonzales*, 168 F. App'x 800, 801 (9th Cir. 2006) (finding that because petitioner was provided the wrong time of his hearing by his attorney, ineffective assistance of counsel constituted an exceptional circumstance under the circumstances, which warranted reopening).

We conclude that the respondent's actions before and after the entry of the in absentia removal order exhibited a reasonable level of diligence. *See Avagyan v. Holder*, 646 F.3d 672, 677 (9th Cir. 2011) (stating that due diligence is determined by assessing when a reasonable person in the alien's position would suspect fraud or error, what steps, if any, the alien took to investigate, and at what point the alien learns of the harm); *Singh v. Gonzales,* 491 F.3d 1090, 1095-97 (9th Cir. 2007) (requiring due diligence for equitable tolling of the time limitations for motions to reopen). Consequently, under the totality of the circumstances, we conclude that reopening of proceedings is warranted. Thus, the respondent's appeal will be sustained, and the record of proceeding will be remanded for further proceedings. *See Matter of Patel,* 16 I&N Dec. 600 (BIA 1978) (stating that a "remand is effective for the stated purpose and for consideration of any and all matters which the immigration judge deems appropriate in the exercise of his administrative discretion").

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The in absentia order of removal is rescinded, the proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1000 SECOND AVE., SUITE 2500
SEATTLE, WA 98104

Global Justice Law Group, PLLC
Hall, Erin Trusler
216 1st Avenue South, Suite 420
Seattle, WA 98104

IN THE MATTER OF
GONZALEZ-ALONZO, SANTIAGO

FILE A 200-883-832

DATE: Mar 16, 2016

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1000 SECOND AVE., SUITE 2500
SEATTLE, WA 98104

__ OTHER: _____

COURT CLERK
IMMIGRATION COURT

FF

CC: TIFFANY TULL, ICE ASST. CHIEF COUNSEL
1000 2ND AVE., SUITE 2900
SEATTLE, WA, 98104

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SEATTLE, WASHINGTON

In the Matter of: **Santiago GONZALEZ-Alonzo,** *Respondent.*	File Number: **A200-883-832** **IN REMOVAL PROCEEDINGS**

CHARGE: INA § 212(a)(6)(A)(i) – Alien Present without Admission or Parole

APPLICATION: Motion to Reopen and Rescind *In Absentia* Order of Removal

ON BEHALF OF RESPONDENT
Erin T. Hall, Esquire
Global Justice Law Group, PLLC
216 First Avenue South, Suite 420
Seattle, WA 98104

ON BEHALF OF DHS
Office of the Chief Counsel
Department of Homeland Security – ICE
1000 Second Avenue, Suite 2900
Seattle, WA 98104

DECISION OF THE IMMIGRATION JUDGE

I. Introduction and Procedural History

The Department of Homeland Security ("DHS") initiated removal proceedings against the respondent by filing a Notice to Appear ("NTA") with the Tacoma Immigration Court on April 22, 2013. Exh. 1. The case was transferred to the Seattle Immigration Court on June 13, 2013. The NTA alleges that the respondent is a native and citizen of Guatemala, who arrived in the United States at an unknown city on an unknown date, without having been admitted or paroled. *Id.* On the basis of these allegations, the DHS charged the respondent with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "Act"), as an alien who is present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.*

At a master calendar hearing on May 10, 2013, in the Tacoma Immigration Court, the respondent, through former counsel, admitted the allegations and conceded removability. On June 17, 2013, the Court mailed the respondent's former attorney a hearing notice, ordering the respondent to appear at his master calendar hearing on July 2, 2014. On February 6, 2014, the

Court mailed another notice to the former attorney, ordering the respondent to appear on December 30, 2014, and then a third notice on October 22, 2014, ordering the respondent to appear on October 20, 2015.

The respondent's former attorney appeared for his hearing, but the respondent did not. On that date, the respondent's former attorney filed a motion to withdraw, stating that she had tried to communicate the respondent by phone and by written communication, but had been unable to reach him. Motion to Withdraw as Counsel, at 2 (Oct. 20, 2015). The Court granted the motion for good cause. IJ Order (Oct. 20, 2015). The Court also granted the DHS's motion to proceed *in absentia* and ordered the respondent removed *in absentia* to Guatemala, both because the respondent had previously conceded removability and because the DHS had established removability by clear and convincing evidence through the Form I-213. *See* IJ Removal Proceedings Order (Oct. 20, 2015); *see also* Exh. 2 (Form I-213). On January 25, 2016, the respondent, through current counsel, filed a motion to reopen and rescind the *in absentia* order of removal. Motion to Reopen and Rescind Order of Removal In Absentia (Jan. 25, 2016) [hereinafter "MTR"]. For the following reasons, the Court denies the respondent's motion to reopen.

II. Motion to Reopen

The Court may rescind an *in absentia* order of removal only where (1) an alien files a motion to reopen within 180 days of the date of the order of removal and demonstrates that the failure to appear was due to exceptional circumstances as defined in INA § 240(e)(1) or (2) the alien, at any time, demonstrates that he did not receive notice. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). Here, the respondent argues that the exceptional circumstance is his former attorney's failure to provide him with notice. MTR at 9. The Court will construe this as a claim of ineffective assistance of counsel.

To bring a claim of ineffective assistance of counsel, an alien generally must satisfy the *Lozada* requirements. Under *Lozada*, a motion to reopen based on ineffective assistance of counsel requires: (1) an affidavit from the respondent detailing the agreement that was entered into with counsel; (2) proof that counsel was informed of the allegations, and had an opportunity to respond; and (3) proof that a bar complaint has been filed with the appropriate disciplinary authority and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). Here, the respondent not satisfied the requirements.

Regarding the first requirement, the respondent's affidavit does not detail his agreement with his former attorney. *See* MTR at 11-13. The affidavit states that she represented him (successfully) in his bond proceedings but does not state what their agreement was after he was released from detention. *Id.* at 11. Second, there is no indication that he has informed his former

counsel of the allegations against her. The brief in support of the motion indicates that the respondent's current attorney spoke with his former attorney on December 14, 2015, but the only aspect of this conversation that has been provided to the Court is the allegation that the former attorney "did not have any staff working for her until April 2015." *Id.* at 3. It is not clear if, in the context of this conversation, the former attorney was informed of the claim of ineffective assistance of counsel. Moreover, statements by the respondent's counsel in a brief are not evidence. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Third, the respondent has not submitted proof of a complaint with the appropriate disciplinary authority or explained why such a complaint has not been filed.

The Court recognizes that the *Lozada* "requirements 'are not rigidly applied [in the Ninth Circuit], especially when the record shows a clear and obvious case of ineffective assistance.'" *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (quoting *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002)); *see also Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (citing *Rodriguez-Lariz*, 282 F.3d at 1227; *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000); *Escobar-Grivalja v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000)). By contrast, in this case, there is no clear indication of ineffective assistance of counsel, so the application of the *Lozada* requirements is not excused. *See Correa-Rivera*, 706 F.3d at 1131 (quoting *Rodriguez-Lariz*, 282 F.3d at 1227). Indeed, the respondent's former attorney's motion to withdraw greatly contrasts with the respondent's affidavit (and his wife's affidavit) as to which of them was not answering calls or was generally unavailable. *Compare* MTR at 11-14 *with* Motion to Withdraw, *supra*, at 2. Because the respondent has failed to demonstrate that his failure to appear was based on exceptional circumstances, his motion is denied.[1]

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reopen is **DENIED.**

3-16-16
Date

Brett M. Parchert
Immigration Judge

[1] The Court notes that the respondent submitted an application for cancellation of removal with his motion. *See* MTR at 20-29. It is exceedingly unlikely that such application would be granted in the exercise of discretion considering his recent DUI arrest. *See* Exh. 2 at 4.