



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: PATRICIO-OJEDA, MARTINIANO

A 205-324-832

Date of this notice: 8/9/2019

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:
O'Connor, Blair
Donovan, Teresa L.
Wendtland, Linda S.**

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Falls Church, Virginia 22041

File: A205-324-832 – West Valley City, UT

Date:

AUG 09 2019

In re: Martiniano PATRICIO-OJEDA a.k.a. Martiniano Patricio

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: J. Christopher Keen, Esquire

ON BEHALF OF DHS: Saida Ulle
Assistant Chief Counsel

APPLICATION: Reopening

The respondent timely appeals an Immigration Judge's January 5, 2018, decision denying his motion to reopen. The appeal will be sustained.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Mexico. On March 19, 2013, the removal proceedings were initiated against the respondent (Exh. 1). On March 14, 2017, the Immigration Judge ordered the respondent removed in absentia. On April 24, 2017, the respondent filed a timely motion to reopen, which the Immigration Judge denied on May 5, 2017. The Immigration Judge found that the respondent received proper notice of his hearing through his attorney of record, that he had not demonstrated that his failure to appear was due to exceptional circumstances, and that the respondent did not comply with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (setting out the requirements for reopening based on ineffective assistance of counsel) (May 5, 2017, IJ at 3).

On June 12, 2017, the respondent filed a second motion to reopen, again alleging lack of notice. He also argued ineffective assistance of counsel, provided *Lozada* documentation, and sought reopening sua sponte. On July 13, 2017, the Immigration Judge denied the respondent's second motion after concluding that the motion was number-barred, that the respondent did not exercise due diligence, and that satisfying the *Lozada* requirements in the second motion did not warrant equitable tolling of the number restriction (July 13, 2017, IJ at 2-3).

On November 24, 2017, the respondent filed a third motion to reopen again alleging lack of notice, as well as ineffective assistance of his two prior counsels, and a request for reopening sua sponte. On January 5, 2018, the Immigration Judge denied the third motion after concluding that the motion was both time and number-barred, did not provide any description of the actions taken

after the July 13, 2017, denial of the prior motion, did not adequately explain the delay in filing his third motion, and did not establish due diligence.

We reverse the Immigration Judge's decision denying the respondent's motion to reopen. The ineffectiveness of the respondent's first attorney is apparent on the face of the record as she failed to give the respondent notice, failed to show up for the hearing herself, and is responsible for the entry of the in absentia order. The respondent's second attorney also filed the first motion to reopen with an incomplete *Lozada* claim, which was ineffective assistance on this record. We further disagree with the Immigration Judge's due diligence finding as the respondent has filed three motions to reopen within an 8-month period and has acted quickly in obtaining new attorneys in an effort to protect his rights. Lastly, the respondent also appears to be prima facie eligible for cancellation of removal and had an incentive to appear at his hearing.

In light of the foregoing, the respondent is entitled to the equitable tolling of both the time and number bars to his motion and his proceedings will be reopened.

Accordingly, the following orders shall be issued.

ORDER: The appeal is sustained and the Immigration Judge's, January 5, 2018, decision is vacated.

FURTHER ORDER: The record is remanded for further proceedings in accordance with this decision.



FOR THE BOARD