



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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27991 Buena Vista Blvd
Los Fresnos, TX 78566**

Name: DEL FIERRO-GARCIA, SERGIO ... A 043-791-852

Date of this notice: 12/19/2016

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:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

Luis Seges
Userteam: Docket

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837

Falls Church, Virginia 22041

File: A043 791 852 – Los Fresnos, TX

Date:

DEC 19 2016

In re: SERGIO LUIS DEL FIERRO-GARCIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raed Olivieri Gonzalez, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

APPLICATION: Motion to reopen; remand

The respondent appeals the Immigration Judge's July 21, 2016, decision denying his untimely motion to reopen his proceedings. During the pendency of his appeal, the respondent filed a motion to remand. The appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

The record reflects that the respondent was ordered removed on July 14, 2000, by an Immigration Judge (I.J. at 1). The respondent waived appeal (I.J. at 1). On June 29, 2016, approximately 16 years later, the respondent filed a motion to reopen with the Immigration Judge setting forth an ineffective assistance of counsel claim against his attorney during his prior proceedings and arguing that the motions deadline for his motion to reopen should be equitably tolled (I.J. at 1-2). In particular, the respondent argued that, during his prior proceedings, his former attorney did not advise him of his eligibility for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and failed to apply for said relief on his behalf. The Department of Homeland Security ("DHS") opposed the motion (I.J. at 1-2).

The Immigration Judge denied the respondent's motion as untimely (I.J. at 1). Specifically, the Immigration Judge found the respondent did not meet his burden in establishing an exception to the 90-day regulatory motions deadline applicable to his motion (I.J. at 1). *See* 8 C.F.R. §§ 1003.23(b)(4)(i)-(iv). In regard to the respondent's claim of ineffective assistance of counsel, the Immigration Judge found the respondent did not show he exercised due diligence during the interstitial period after the motions deadline had passed, as required for equitable tolling to apply (I.J. at 1-2).

On appeal and through his motion to remand, the respondent argues his motion is subject to equitable tolling in light of the United States Court of Appeals for the Fifth Circuit's decision in *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016). *See* Respondent's Brief and Motion at 7-10. According to the respondent, under *Lugo-Resendez*, he established that he exercised due

diligence because he “has been pursuing his rights diligently.” *See id.* at 9. The respondent claims he could not timely file the motion to reopen because he relied on his prior attorney’s “defective” assurances that he did not qualify for any relief from removal. *See id.* The respondent further argues that his case presents “exceptional circumstances” such that he can invoke equitable tolling. *See id.* at 9-12. In this regard, the respondent contends that his prior attorney was not competent, neglected her duties, and “emphatically” failed to identify or apply for relief for which he qualified. *See id.* at 10. The respondent argues that her “mishandling” of his case resulted in a denial of due process and that this amounts to “exceptional circumstances” justifying the reopening of his case. *See id.* at 11.

There is no dispute the respondent’s motion to reopen is untimely inasmuch as it was filed approximately 16 years after the regulatory due date (I.J. at 1). Further, there is no dispute that the respondent complied with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), for purposes of his claim of ineffective assistance of counsel (I.J. at 1). Given the totality of the circumstances in this case, including the respondent’s lengthy residence in the United States, most of which was spent as a lawful permanent resident; his United States citizen wife and mother who both suffer from health problems; his United States citizen children, one with autism; and, his employment history, coupled with his *Lozada* compliance, we find that reopening is warranted. *See* Respondent’s Brief at 12.

Accordingly, the appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

ORDER: The appeal is sustained, and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.



FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would affirm the Immigration Judge’s decision for the reasons stated therein.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
27991 BUENA VISTA BLVD
LOS FRESNOS, TX 78566

Gonzalez Olivieri LLC
Gonzalez, Raed Olivieri
2200 Southwest Frwy Ste 550
Houston, TX 77098

IN THE MATTER OF FILE A 043-791-852 DATE: Jul 21, 2016
DEL FIERRO-GARCIA, SERGIO LUIS

☐ UNABLE TO FORWARD - NO ADDRESS PROVIDED

☒ 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
27991 BUENA VISTA BLVD
LOS FRESNOS, TX 78566

☒ OTHER: ORDER OF IMMIGRATION JUDGE

COURT CLERK
IMMIGRATION COURT

CC: DISTRICT COUNSEL
1717 ZOY ST.
HARLINGEN, TX, 785520000

FF

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS FRESNOS, TEXAS

IN THE MATTER OF)	July 21, 2016
)	
SERGIO LUIS)	Case Number: A 043 791 852
DEL FIERRO-GARCIA)	
)	
RESPONDENT)	In Removal Proceedings

APPLICATIONS: Motion to Reopen

ORDER OF THE IMMIGRATION JUDGE

On July 14, 2000, Respondent was ordered removed from the United States to Mexico. Respondent waived appeal. On June 29, 2016, Respondent, through counsel, filed a motion to reopen, arguing that he received ineffective assistance of counsel. The government filed an opposition to Respondent's motion to reopen. Respondent's motion to reopen will be denied.

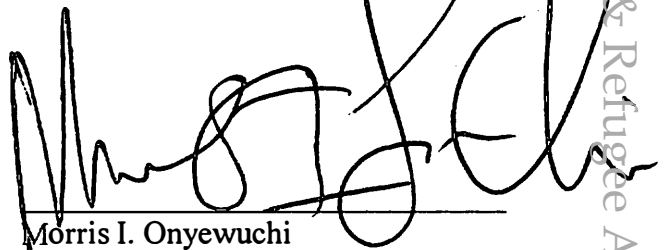
Respondent's motion argues that he did not apply for relief at the time of his removal proceedings because his counsel at that time, Ms. Jodi Goodwin, failed to advise him of his ability to apply for cancellation of removal for certain permanent residents under INA section 240A(a). In Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), the BIA held that in order to reopen a case based on ineffective assistance of counsel, Respondent is required to (1) provide an affidavit attesting to the relevant facts, including a statement of the terms of the attorney-client agreement; (2) inform counsel of the allegations and allow counsel an opportunity to respond; and (3) file a grievance against the offending attorney with the state attorney licensing authority or explain why a grievance has not been filed. See Rodriguez –Manzano v. Holder, 666 F.3d 948, 953 (5th Cir. 2012). Although Respondent has complied with the procedural requirements set forth in Matter of Lozada, the Court finds that Respondent's motion to reopen was untimely under the general rule requiring aliens to file a motion to reopen within 90 days of the entry of a final administrative order of removal. *See* section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.23(b)(1). Respondent was ordered removed on July 14, 2000, and his motion to reopen was not filed until almost sixteen years later. Respondent also failed to demonstrate that any of the statutory or regulatory exceptions to the time limitation on motions to reopen apply to his case. *See* sections 240(c)(7)(C)(ii)-(iv) of the Act; 8 C.F.R. §§ 1003.23(b)(4)(i)-(iv).

Further, Respondent has not demonstrated that he exercised due diligence in seeking to address his immigration status. Respondent waited almost sixteen years later to file a motion to

reopen, even though he was fully aware of his lack of immigration status after re-entering illegally. Thus, equitable tolling is not warranted. See Panova-Bohannan v. Gonzales, 157 Fed.Appx. 706, 708 (5th Cir. 2005) (finding that a motion to reopen predicated on ineffective assistance of counsel, filed "469 days after the final administrative order" demonstrates lack of due diligence, and "[t]he application of equitable tolling requires due diligence during the interstitial period after the passing of the deadline.") citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) (requiring diligence for invocation of equitable tolling).

Accordingly, the following orders shall be entered:

ORDER: The respondent's motion to reopen is DENIED.


Morris I. Onyewuchi
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: () ALIEN () ALIEN C/O CUSTODIAN (M) ALIEN'S ATTORNEY (P) DHS

DATE: 7-21-16 BY: COURT STAFF 

ATTACHMENTS: () EOIR-33 () EOIR-28 () LEGAL SERVICES LIST () OTHER
