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

Cambria, Bridget
Cambria & Kline, P.C.
123 N. 3rd Street
Reading, PA 19601

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: A[redacted]-A[redacted] S[redacted] **A[redacted]-716**
Riders: [redacted]-717

Date of this notice: 12/27/2016

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:
O'Herron, Margaret M

Userteam: Docket

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

A[redacted]-A[redacted], S[redacted] D[redacted]
A[redacted]716
BERKS CNTY FAMILY RESIDENTIAL
1040 BERKS ROAD
LEESPORT, PA 19533

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: A[redacted]-A[redacted], S[redacted] **A[redacted]-716**
Riders: [redacted]-717

Date of this notice: 12/27/2016

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
O'Herron, Margaret M

Userteam:

Files: A[redacted]716 – Dallas, TX
A[redacted]717

Date: DEC 27 2016

In re: S[redacted] D[redacted] A[redacted] A[redacted]
[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENTS: Bridget Cambria, Esquire

ON BEHALF OF DHS: Judson J. Davis
Senior Attorney

APPLICATION: Reopening; remand

ORDER:

The respondents,[1] natives and citizens of Honduras, appeal from the Immigration Judge's decision dated August 4, 2016, denying their motion to reopen and rescind the in absentia removal order entered on October 6, 2015. The Department of Homeland Security opposes the appeal. While the appeal was pending, the respondents submitted evidence showing that the United States Citizenship and Immigration Services granted the minor respondent's petition for Special Immigrant Juvenile status. In light of this evidence, as well as the unique circumstances presented this case, including the minor respondent's young age, we will reopen the proceedings on our own motion. *See* 8 C.F.R. § 1003.2(a). Accordingly, the in absentia order of removal is rescinded, the respondents' removal proceedings are reopened, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[1] The respondents in this case include the lead respondent (A[redacted]716), and her minor daughter (A[redacted]717).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

Casa Marianella
Willis, Gracie
821 Gunter St
Austin, TX 78702

IN THE MATTER OF FILE A [redacted]-716 DATE: Aug 5, 2016
A[redacted]-A[redacted], S[redacted] D[redacted]

__ 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
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT

CC: GONZALEZ, ROSLYN
125 E. HWY 114, STE 500
IRVING, TX, 75062

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

IN THE MATTER OF: S[redacted] A[redacted] -A[redacted] A[redacted] -716 [redacted] A[redacted] -717 RESPONDENTS	)	IN REMOVAL PROCEEDINGS **DETAINED**

ON BEHALF OF RESPONDENTS:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Gracie Willis, Esq.	Judson Davis, Esq.

Order Denying Motion to Reopen

On August 1, 2016, Respondent filed a motion to rescind an absentia order of removal issued on Oct. 6, 2015, based on exceptional circumstances. DHS opposes the motion.[1] The motion is denied.

The lead respondent, hereafter respondent, was personally served with the Notice to Appear for herself and her minor child on April 20, 2015. That notice advised Respondent of the requirement to notify the Immigration Court of any change of address, and also notified Respondent of the consequences of failing to appear for her hearing.

Respondent was released from custody due to lack of space on April 20, 2015. On that date, Respondent signed form I-220A, listing her address in Denver City, Texas. This form bears the fingerprint and photograph of Respondent. The MTR identifies this address as belonging to Respondent's "friend" Homer.

According to the MTR, Respondent lived at this address for one month, and then relocated to Hobbs, New Mexico, where she engaged in unauthorized employment, making no effort to notify the Immigration Court of her new address. In September,

[1] The motion to rescind was initially received by the court on July 6, 2016, but rejected due to a lack of notice of appearance of the attorney for case A208-163-717. DHS filed its opposition to this motion on July 13, 2016. Respondent's cured the deficiency and refiled the motion on August 1, 2016.

2015, Respondent relocated to McAllen, Texas for employment, making no effort to notify the Immigration Court of her new address.

On July 27, 2015, the Court sent Respondents' first notice of hearing to the Denver City address on July 27, 2015, for a hearing on August 17, 2015. Respondent failed to appear for her hearing on August 17, 2015. Rather than ordering her removal in absentia, the undersigned judge (generously) reset the case to Oct. 6, 2015, allowing the Respondent another opportunity to appear. On August 17, 2015, the Court sent a hearing notice to the Denver City address notifying Respondent of her hearing on Oct. 6, 2015.

In September 2015, a DHS officer contacted Respondent's friend Homer, instructing Respondent to report for an appointment with DHS in September. Respondent and her friend Homer attended the DHS appointment. At that time, Respondent was served a second copy of the hearing notice for the Oct. 6, 2016 hearing.[2] Respondent's fingerprint and signature were placed on the hearing notice as clear evidence that Respondent was served with the hearing notice. MTR, Tab B. Respondent was again allowed to leave without being detained.

Respondent asserts in her MTR that she then sought legal advice. She asserts that she talked to an attorney in Seminole, Texas, who said that she *could not* represent her but referred her to another attorney. She talked to the other attorney by phone, who said that he *could* represent her. According to Respondent's affidavit, this second attorney[3] did not ask whether she had fear of return, nor did Respondent inform the attorney that she had a fear. But, according to Respondent this attorney said that the only thing he could do for her was to arrange a voluntary departure, and that there was no way she could stay in the U.S. Respondent thereafter did not retain the services of this or any other attorney, and made no further effort to seek legal advice prior to the hearing.

Respondent failed to appear for hearing on Oct. 6, 2015, and was ordered removed in absentia. Although Respondent's affidavit does not state why she did not appear, counsel for Respondent, MTR at 3, states that after talking to this attorney Respondent "simply gave up" and "abandoned her hopes of being protected in the U.S." "Due to the aforementioned factors, Ms. Antunez Antunez and her daughter failed to appear at their master calendar hearing on Oct. 6, 2015."

Following her failure to appear, Respondent continued to work without authorization, making no effort to determine the outcome of her case or regularize her immigration status. In March 2016, her friend Homer notified Respondent that she and

[2] Respondent's attorney states, in error, that this meeting occurred in August 2015 and that the officer gave Respondent a copy of the initial hearing notice. Respondent's affidavit indicates that the meeting was conducted in Sept. 2015, and the hearing notice contained in the MTR at Tab B clearly corresponds to the second hearing notice for the Oct. 6, 2015 hearing. The initial hearing notice for the August hearing was typewritten, and thus could not possibly be the notice contained in the MTR at Tab B.

[3] According to research later conducted by Respondent's attorneys, MTR, Tab C, the phone number for the first "attorney" Respondent talked to belongs to a paralegal named Elisha Bergen, and the second phone number belongs to an attorney named David Arditti. The Court takes administrative notice that David Arditti is a well known immigration attorney who practices in Dallas, Texas.

her child had been ordered removed. Respondent's affidavit, para. 31. She continued to make no effort to address her immigration status. She was finally apprehended by the Border Patrol at a checkpoint on June 16, 2016. She has been detained since that time.

Initially, I conclude that the instant motion [to "rescind pursuant to INA 240(b)(5)(C)(i)"] is a statutory motion. Since the motion was not filed within 180 days, as required by 8 CFR 1003.23(b)(4)(ii), the Court must determine whether the 180 deadline is subject to equitable tolling. *See Lugo-Resendez v. Lynch,* No. 14-60865, (5th Cir., July 28, 2016.

Respondent asserts that equitable tolling does apply, based upon a theory of ineffective assistance of counsel. While ineffective assistance of counsel can in some circumstances be a basis for equitable tolling, I find in this case that ineffective assistance of counsel has not been shown, and that, even if it had been, respondent has not been prejudiced and that ineffective assistance was not the reason for her failure to appear or her failure to file the motion within the 180 day deadline.

In order to prove a case of ineffective assistance of counsel the respondent must meet the requirements stated by the board in *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988). The requirements have not been met in this case. Specifically the respondent has not filed a bar complaint against attorney David Arditti, and has not offered Mr. Arditti a chance to respond to the allegations.[4] This is a direct violation of the *Lozada* requirements. Because the respondent has not offered Mr. Arditti a chance to respond to her allegations, her claim cannot be credited.[5]

Additionally the respondent did not retain Mr. Arditti or any other attorney prior to the hearing, and never sought a proper evaluation of her case. No objectively reasonable person would rely on a brief telephone conversation that was an initial consultation and believe that this was a thorough examination of their case. According to the respondent's affidavit, the attorney offered to represent her but she declined the offer.

Furthermore, respondent was not prejudiced by the legal advice that she asserts she received or did not receive. Respondent has not made the claim that she was advised not to attend the hearing. As the respondent had the legal duty to attend her hearing, as a

[4] The MTR inexplicably and incorrectly asserts that Respondent is unable to locate a phone number for or the identity the "second attorney" she talked to. **Tab C** attached to the motion, **para. 7** clearly contains the phone number **214-741-1158** and also contains the name of the attorney **David Arditti.** Respondents' attorneys apparently made no attempt to call this number or to locate a number for attorney Arditti from publicly available sources. The attorney who prepared the MTR apparently did not read the report prepared by the attorney who authored Tab C.

[5] Although Respondent in her affidavit also refers to the first person she spoke to [later identified as Elisha Bergen] as an attorney, and has offered screenshots from 3rd party data mining sites listing Ms. Bergen as an attorney, none of those screen shots show that Ms. Bergen herself advertised herself as an attorney. According to Respondent's affidavit, Ms. Bergen told Respondent that she could *not* represent her, referring her instead to attorney Arditti. Had Respondent allowed Mr. Arditti an opportunity to respond to the allegations, he presumably would have addressed the allegations against paralegal Bergen as well, insofar as Respondent implies they are linked together in a pattern of improper conduct.

matter of law she cannot have been prejudiced. If the respondent had attended the hearing, the undersigned immigration judge would have made sure that she received proper notice of the right to apply for any relief that she may have been eligible for. Thus, any incorrect advice she may have received prior to the hearing would have had no impact on the outcome of the hearing or her case.

Moreover, the incorrect legal advice that the respondent says that she received was after she had failed to appear for her first hearing on August 17, 2015, and thus can have had no impact on the respondent's decision not to attend her first hearing. I could have ordered her removal on that date, and while it is true that the court allowed the respondent a second opportunity to appear on October 6, that opportunity was conditional upon the respondent actually appearing on that date. The order of removal which was issued on October 6 was based not merely upon the respondent's failure to appear on October 6 but was also based on the respondent's failure to appear on August 17. The respondent has made no explanation for her failure to appear on August 17 and makes no claim that exceptional circumstances prevented her appearance on that date.

Equitable tolling does not apply to this case. Respondent has failed to show that she has been diligent in pursuing her rights and has failed to show that ineffective assistance of counsel constitutes an extraordinary circumstance which stood in her way. To the contrary there has been a gross lack of diligence. Respondent has provided no explanation for her failure to appear on August 17. When respondent was notified in March 2016 that a removal order had been issued against her, she took no action to address the situation, but instead continued to operate in the underground, working without authorization, and failing to notify the court of her changes of address. The instant motion has been filed solely because the respondent was caught and detained. In sum, the respondent has grossly, intentionally, and unlawfully thwarted the lawful actions of the Attorney General.

Therefore the respondent is barred from statutory reopening by the 180 day deadline cited above.

Additionally the respondent has failed to show that her failure to appear was because of an exceptional circumstance. 8 C.F.R. § 1003.23(b)(4)(ii). A belief that one has no relief from removal or a desire to avoid deportation does not constitute an exceptional circumstance for failure to appear. To the contrary, respondent had a legal duty to appear even if she believed that it would result in her deportation.

Further, the respondent is not eligible for *sua sponte* reopening. This case does not represent an exceptional circumstance warranting reopening. Respondent intentionally tried to thwart the lawful authority of the Atty. Gen. The ineffective assistance of counsel claim is without merit and would not in any event excuse her multiple failures to appear. The Respondents' claim that *sua sponte* reopening is warranted because they "never had an opportunity to present the facts of their case to any representative of the United States government," MTR at 13, is demonstrably false, as the

undersigned judge twice offered Respondents an opportunity to speak with me in court, but they instead refused to appear.

Moreover the respondent is barred by the clean hands doctrine and the fugitive disentitlement doctrine. Respondent is willing to subject yourself to the authority of the court only to the extent that the court is willing to rule in her favor. When she believed that she would derive no benefit from attending court she unlawfully absconded. The respondent cannot on the one hand seek the benefit of asylum from the court while on the other hand refusing to submit to the possibility of removal. As the respondent has clearly chosen to reject this court's authority she cannot now seek a benefit from the court. Any other conclusion would eviscerate the operation of the immigration courts because few would want to come to court if there were no penalty for failing to appear.

The Fifth Circuit has held that the fugitive disentitlement doctrine applies to fugitive aliens who evade custody and fail to comply with a court's order. *See Giri v. Keisler,* 507 F.3d 833 (5th Cir. 2007). The fugitive disentitlement doctrine limits a fugitive alien's access to the judicial system "whose authority he evades." *Id.* at 835 (quoting *Bagwell v. Dretke*, 376 F.3d 408, 410 (5th Cir. 2004)). As the Fifth Circuit has noted, "A litigant whose disappearance makes an adverse judgment difficult if not impossible to enforce cannot expect favorable action . . . the best solution is to dismiss the proceeding." *Id.* at 836 (quoting *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728-29 (7th Cir. 2004)). Here, the Respondent has evaded the authority of the Court and refused to comply with the Court's orders, notices and instructions.

For all of the above reasons, the MTR should also be denied as a matter of discretion.

I note that the Respondent has attached an application for relief to the MTR. I do not understand the motion to be based on an argument that there has been a change of circumstance, such that new relief is available. To the extent Respondent intended to make that argument, I note that the matters raised in the application predate the failure to appear. As the Respondent could have sought this relief at the hearing, but did not, she cannot present it at this time absent a showing that the application is based on circumstances arising after the hearing. 8 C.F.R. § 1003.23(b)(3). As that showing cannot be made, nor does Respondent even make this argument, the I-589 application cannot be considered at this late date.

Finally, with respect to the respondent's argument that the age of the minor child constitutes an exceptional circumstance for the child's failing to appear, I disagree. Legal decisions made by parents are imputed to the child. *See Matter of Winkens,* 15 I&N Dec. 451 (BIA 1975) (parents' decision to surrender lawful residency imputed to child). Just as the respondent sought to avoid her own removal so she sought to avoid also the removal of her child. Any other rule would render children immune to legal proceedings, a clearly absurd result, and one which would be inconsistent with the holding of the 5th Circuit in the case of *Lopez-Dubon v. Holder,* 609 F.3d 642 (2010). In that case the court held that the notice to appear for a minor child under the age of 14 could be served on the

parent, thus subjecting the child to removal proceedings. Implicit in that holding was that the parent had the right and the responsibility to make legal decisions on behalf of the child and that the child would be bound by those decisions.

Accordingly, the following Order will be entered:

ORDER

IT IS HEREBY ORDERED that the Respondents' Motion to Reopen be **DENIED**. The stay of removal is lifted.

This 4th day of August, 2016.

Wayne Kimball

R. Wayne Kimball
Immigration Judge