



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals Office of the Clerk

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Name: RODRIGUEZ DE JESUS, ANGEL...

A 087-321-551

Date of this notice: 3/20/2014

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

Sincerely,

Donna Carr Chief Clerk

Enclosure

Panel Members: Manuel, Elise

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Userteam: Docket

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Falls Church, Virginia 20530

File: A087 321 551 – St. Thomas, VI

Date:

MAR 20 2014

In re: ANGELA REYES RODRIGUEZ DE JESUS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rosaura Gonzalez Rucci, Esquire

ON BEHALF OF DHS:

Jose Rivera

Assistant Chief Counsel

APPLICATION: Reconsideration

The respondent, a native of the Dominican Republic and a citizen of the Netherlands Antilles, appeals the decision of the Immigration Judge, mailed July 20, 2012, denying her motion to reconsider. The Department of Homeland Security is opposed to the respondent's appeal. The record will remanded.

On March 7, 2012, the respondent appeared before the Immigration Judge and was granted the privilege of voluntarily departing the United States on or before July 5, 2012. See section 240B of the Immigration and Nationality Act, 8 U.S.C. § 1229c. On April 9, 2012, the respondent filed a timely motion to reopen claiming ineffective assistance of counsel with regard to the processing of an immigrant visa petition her husband had filed on her behalf. The Immigration Judge denied the motion to reopen in a decision mailed on April 24, 2012. On May 22, 2012, the respondent moved for reconsideration. The Immigration Judge's decision to deny the respondent's motion to reconsider is the subject of the present appeal.

A motion to reconsider is an alien's opportunity to specify the errors of law or fact in the previous order and not an opportunity to present new evidence, nor an opportunity to reiterate or expand upon arguments that have been previously raised and considered. See Matter of O-S-G-, 24 I&N Dec. 56 (BIA 2006); Matter of Cerna, 20 I&N Dec. 399 (BIA 1991). While the Act, vis-à-vis a motion to reopen, allows an alien who is subject to an order of removal to present new evidence, the respondent used her single opportunity to present new evidence when she filed her initial motion to reopen on April 9, 2012. See section 240(c)(7)(A) of the Act, 8 U.S.C. § 1229a(c)(7)(A). As such, to the extent that the respondent attached evidence to her motion to reconsider and has presented evidence to this Board on appeal, we conclude that the presentation of said evidence subsequent to the filing of the respondent's motion to reopen is number-barred. See Matter of Oparah, 23 I&N Dec. 1 (BIA 2000).

By filing her motion to reopen within the voluntary departure period, the grant of voluntary departure terminated automatically and the Immigration Judge's alternate order of removal to the Netherlands Antilles or the Dominican Republic took effect immediately. See 8 C.F.R. §§ 1240.26(b)(1)(iii), (e)(1).

While the presentation of additional evidence is number-barred, we conclude that it is appropriate to remand the record to the Immigration Judge in order to further consider the merits of the respondent's motion to reconsider. In denying the respondent's motion to reconsider, the Immigration Judge found no legal or factual error in her prior conclusion that the respondent had not complied with the evidentiary standards set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Under *Matter of Lozada*, a motion to reopen based upon a claim of ineffective assistance of counsel requires (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

Here, in support of reopening, the respondent presented a personal affidavit, a copy of a complaint letter addressed to the Supreme Court of the Virgin Islands, and, through counsel, indicated that the complaint letter had been filed and her former counsel had been informed of the complaint being filed. In her motion to reconsider, the respondent identified evidence that she had previously offered in support of reopening and argued that her motion to reopen substantially complied with *Lozada*'s evidentiary requirements. The Immigration Judge, in denying the respondent's motion to reconsider, faulted her for not presenting evidence that the complaint letter had been actually filed and questioned whether it was proper to file a letter with the Supreme Court of the Virgin Islands (as opposed Virgin Islands Bar Association) (I.J. at 1).

The Lozada requirements are meant to serve as a threshold and a screening mechanism to help Immigration Judges and this Board assess the substantial number of ineffective assistance claims that they receive, but need not be rigidly enforced where their purpose is fully served by other means. Fadiga v. U.S. Att'y Gen., 488 F.3d 142, 156 (3d Cir. 2007). "[O]nly in rare circumstances have courts refused to reopen immigration proceedings solely because [an alien] failed to file a bar complaint." Xu Yong Lu v. Ashcroft, 259 F.3d 127, 134 (3rd Cir. 2001). However, in the present case, the Immigration Judge appears to have concluded that the respondent was required to strictly comply with Lozada in order to have her claims considered. As the respondent need only establish that the evidentiary requirements set forth in Lozda have been fully served by other means, we will remand the record for the Immigration Judge to further consider the issue of whether the respondent has sufficiently complied with the threshold evidentiary requirements set forth in Matter of Lozada such that the underlying merits of her ineffective assistance of counsel claims should be considered.

In her decision denying the respondent's motion to reopen, the Immigration Judge also held that the respondent had not established that the result in this case would have been different if the errors had not occurred. See Fadiga v. U.S. Att'y Gen., supra, at 159 (holding that an alien claiming ineffective assistance of counsel in removal proceedings must show that there was a "reasonable likelihood that the result would have been different if the claimed error had not occurred"); Matter of Lozada, supra, at 638 ("One must show, moreover, that he was prejudiced by his representative's performance."). However, the Immigration Judge did not address this prior holding in her decision to deny the respondent's motion to reconsider. We observe that, in support of her claim that she was prejudiced by her former counsel, the respondent argued in her

motion to reconsider that her motion to reopen contained approximately 70 pages of evidence concerning the bona fides of her marriage and said evidence was not considered by the Immigration Judge in her decision denying the motion to reopen. As such, upon remand, the Immigration Judge should, among other things, further determine whether the respondent demonstrated legal or factual error in her prior holding that the respondent was not prejudiced by her former counsel.

For the reasons set forth above, the following order is entered.

ORDER: The record is remanded to the Immigration Judge for further consideration of the respondent's motion to reconsider.²

FOR THE BOARD

² The respondent remains subject to removal from the United States pursuant to the Immigration Judge's alternate order of removal, entered on March 7, 2012, to the Netherlands Antilles or the Dominican Republic.

UNITED STATES DEPARTMENT OF JUSTICE

U.S. Immigration Court
San Patricio Office Building #7 Tabonuco St. Room #401
Guaynabo, PR 00968-4605
DOCKET: ST. THOMAS, USVI

IN THE MATTER OF:

REYES-RODRIGUEZ DE JESUS, ANGELA RESPONDENT/APPLICANT CASE NO. <u>A 087-321-551</u>

IN REMOVAL PROCEEDINGS

DECISION ON A MOTION TO RECONSIDER

ROSAURA GONZALEZ-RUCCI, ESQ. ALIEN ATTORNEY VIVIAN REYES, ESQ. CHIEF COUNSEL

On March 7, 2012, the respondent was granted voluntary departure. On April 9, 2012, the respondent, through new counsel, filed a motion to reopen, claiming ineffective assistance of counsel. On April 23, 2012, the Court denied the respondent's motion to reopen for failure to comply with *Lozada* procedure. *See Matter of Lozada*, 19 1&N Dec. 637 (BIA 1988). Specifically, the respondent did not submit any evidence that the attorney against whom she alleged ineffective assistance had been informed of such allegations and given an opportunity respond, or that a complaint had been filed with the appropriate disciplinary authorities.

On May 22, 2012, the respondent timely filed a motion to reconsider.

A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the court's prior decision and shall be supported by pertinent authority. 8 C.F.R. § 1003.23(b)(2). It is a request that the Court reexamine its decision in light of additional legal arguments, a change of law, or an aspect of the case which was overlooked. *In re O-S-G*, 24 I&N Dec. 56, 57 (BIA 2006) and cases cited therein.

In the respondent's motion to reconsider, she now submits evidence that she filed a formal disciplinary complaint against former counsel. That evidence consists of a letter dated April 18, 2012 from the US Virgin Islands Bar Association confirming the respondent's grievance. The respondent's attempt to use a motion to reconsider to include evidence that could have been included with her motion to reopen, and that could perhaps have brought her motion in compliance with *Lozada*, is unavailing. A motion to reconsider contests the correctness of the original decision based on the "previous factual record." *Id.* The previous factual record in this case did not include any evidence that a complaint had been filed; it contained only a complaint letter, dated April 3, 2012, signed by the respondent and directed to the Virgin Islands Supreme Court (with no mailing address), with no evidence that such letter had been mailed. Moreover, even had that letter been mailed, it seems unlikely that the Virgin Islands Supreme Court was the appropriate disciplinary authority, as the April 18, 2012 confirmation letter came from the Virgin Islands Bar Association, not the Supreme Court. In essence, the respondent improperly attempts

¹ In the respondent's motion to reopen, the respondent also failed to show evidence that prior counsel had been alerted of the allegations and given an opportunity to respond.

to use the instant motion to reconsider to supplement the prior factual record, with evidence such as the complaint letter and affidavits attesting to the bona fides of her marriage, when this purpose is not one for which a motion to reconsider may be used. The party filing a motion to reconsider must specify the factual and legal issues that were decided in error or overlooked in the initial decision. Id. at 58. Quite simply, there was no legal error in denying the respondent's motion to reopen when such was procedurally deficient. Cf. Matter of Medrano, 20 I&N Dec. 216, 219 (BIA 1990, 1991) ("Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion.")

Finally, the respondent is reminded that she was granted until July 5, 2012 to depart, and that the filing of a motion to reopen or reconsider prior to the expiration of the period allowed for voluntary departure has the effect of automatically terminating the grant of voluntary departure. and accordingly does not toll, stay, or extend the period allowed for voluntary departure. 8 C.F.R. § 1240.26(e)(1).

In light of the foregoing analysis, the following order shall be entered:

IT IS ORDERED that Respondent's motion to reconsider is hereby **DENIED**.

IRMA LOPEZ-DERILLO

Immigration Judge

PERSONAL.

Date signed:

CC: CHIEF COUNSEL COUNSEL FOR RESPONDENT/APPLICANT RESPONDENT/APPLICANT

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M)
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