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

Cooke, Arthur Campbell, Esq.
Law Office of Campbell Cooke
4627 East 91 Street
Tulsa, OK 74137

DHS/ICE Office of Chief Counsel - OKC
4400 SW 44th Street, Suite A
Oklahoma City, OK 73119-2800

Name: AMINZADEM, ALI

A 028-218-004

Date of this notice: 5/20/2016

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:
Mann, Ana
O'Leary, Brian M.
O'Connor, Blair

Userteam: Docket

File: A028 218 004 – Oklahoma City, OK

Date: MAY 20 2016

In re: ALI AMINZADEM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arthur Campbell Cooke, Esquire

APPLICATION: Motion to reopen

The respondent, a native and citizen of Iran, has appealed from the Immigration Judge's August 4, 2015, decision denying his motion to reopen proceedings. The Department of Homeland Security ("DHS") has not filed a brief in opposition to the appeal. Proceedings will be reopened and the record will be remanded to the Immigration Judge for further proceedings.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. *See* 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

The Immigration Judge determined that the respondent did not establish ineffective assistance of counsel such that his proceedings should be reopened. The Immigration Judge acknowledged that the respondent's previous counsel did not file the application for relief from removal – specifically, cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) – within the time frame the Immigration Judge had set (I.J. at 1). However, the Immigration Judge determined that the respondent's own acts contributed to his counsel not filing the application, and therefore, he had not demonstrated that ineffective assistance had prejudiced the outcome of proceedings (I.J. at 2).

Upon our de novo review, we determine that the respondent's proceedings merit reopening. We first note that the respondent's motion to reopen was filed jointly with the DHS (I.J. at 1). Further, as noted above, the DHS has not filed an opposition to the respondent's current appeal. Second, the respondent has met the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) (I.J. at 2). The respondent's previous counsel was aware of the filing deadline and did not file the cancellation application within the time frame set by the Immigration Judge or withdraw her representation of the respondent (I.J. at 1).

Thus, while we acknowledge the Immigration Judge's determination that the respondent was afforded an opportunity to apply for relief, we do not agree that the application was waived, when the respondent affirmatively hired counsel to file the application, and counsel neglected to do so. Finally, the respondent is prima facie eligible for relief from removal and has submitted the relevant application. *See* Joint Motion to Reopen Proceedings filed June 15, 2015. Under the totality of the circumstances, we agree that the respondent's proceedings merit reopening and the record should be remanded to the Immigration Judge for a hearing on the respondent's

eligibility for relief from removal under section 240A(a) of the Act. Accordingly, the following order will be entered.

ORDER: The respondent's proceedings are reopened.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this opinion.

FOR THE BOARD

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

Law Office of Campbell Cooke
Cooke, Arthur Campbell
4627 East 91 Street
Tulsa, OK 74137

IN THE MATTER OF FILE A 028-218-004 DATE: Aug 7, 2015
AMINZADEM, ALI

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

X OTHER: Copy of Order

COURT CLERK
IMMIGRATION COURT FF

CC: SPENCER, JACK
4400 SW 44TH STREET, STE A
OKLAHOMA CITY, OK, 73119

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

In Re: Ali Aminzadem

Case No. 028-218-004

ORDER

This matter is before the Court pursuant to the parties' June 15, 2015, Joint Motion to Reopen. For the reasons set forth below, the motion will be DENIED.

The Respondent is a 25 year old male, native and citizen of Iran. Exhibit 1. He was admitted to the United States at New York, New York on or about September 25, 1999 as a lawful permanent resident. *Id.* On December 5, 2007, the Respondent was convicted in Tulsa, Oklahoma for the offense of Possession of a Controlled Substance within One Thousand Feet of a School and sentenced to three years deferred adjudication. *Id.*

On April 29, 2009, the Department of Homeland Security personally served the Respondent with a Notice to Appear (NTA), charging him with removability pursuant to Section 237(a)(2)(B)(i) of the Act. *Id.* On June 3, 2009, the Dallas Immigration Court mailed the Respondent a Notice of Hearing (NOH) advising him of the time and date of his hearing. The Respondent failed to appear for his hearing and was ordered removed *in absentia*. The Court reopened the Respondent's case pursuant to a motion to reopen on December 17, 2009.

The Respondent appeared in court with prior counsel, Ms. Mawby, on March 30, 2010. Respondent, through counsel, admitted the allegations in the NTA and conceded removability. Based on the admissions and concessions of the Respondent, the Court found removability established. The Respondent designated Iran as the country of removal. The Respondent requested relief in the form of Cancellation of Removal for Permanent Residents pursuant to Section 240A(a) of the Act. The Court set a filing deadline of June 1, 2010 for the corresponding application and advised the Respondent and his counsel that failure to timely file the application would result in the application's pretermission.

The Respondent failed to timely file his application for relief. Consequently, the Court pretermitted the application on July 6, 2010. The Respondent filed a motion to reopen on September 30, 2010 based on ineffective assistance of counsel. The motion was denied for failure to pay a filing fee and submit the corresponding fee receipt.

On June 15, 2015, the Respondent, through new counsel, filed a Joint Motion to Reopen based on ineffective assistance of counsel. This motion is not number or time barred based on the Government's joinder in the motion. *See* 8 C.F.R. § 1003.23(b)(4)(iv). However, the Court does not find that the Respondent has met the requirements to make an ineffective assistance of counsel claim under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

While the Respondent has met the procedural requirements of *Matter of Lozada*,[1] he has not demonstrated substantial prejudice.[2] *See Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994). A showing of prejudice requires that the movant demonstrate that "there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported." *U.S. v. Mendoza-Mata*, 322 F.3d 829, 832 (5th Cir. 2003) (citation omitted). The letters from the Respondent's prior attorneys, Ms. Mawby and Mr. Varshosaz, take issue with the Respondent's conduct during their representation. *See* Motion to Reopen, Tab B, pgs. 40-45. They allege that the Respondent was uncooperative, missed 75% of his appointments, and did not produce records and documents needed to complete the application. *See id.* Notably, both of the Respondent's prior attorneys report similar experiences. Ms. Mawby also states that after his application was pretermitted, the Respondent "admitted to his fault in failing to attend his appointments with me and failing to return the requested documentary in a timely manner." *Id.* at 42. She states that he admitted knowledge that his failure to respond timely would result in his application not being filed. *Id.* Based on the foregoing, the Court is not persuaded that the Respondent is not at fault for contributing to the failure to file the application. The Respondent appears as much to blame as Ms. Mawby for losing the opportunity to file his application and has not demonstrated adequate prejudice from Ms. Mawby's actions, namely, that *but for* the bad conduct of his attorney, the result would have been different.

In the alternative, the Court would deny the motion for failure to comply with the relevant regulations. A motion to reopen will not be granted when an alien previously had an opportunity to file for discretionary relief and did not do so. 8 C.F.R. § 1003.23(b)(3). The relief sought by the Respondent was available to him at his prior hearing. He was advised by the Court of his opportunity to seek this form of relief as well as the consequences of failing to timely file the application. He failed to do so. Therefore, his motion to reopen will also be denied on this basis.

The Court acknowledges the Board's decision in *Matter of Yewondwosen*, 21 I&N Dec. 1025 (BIA 1997) ("We believe that the parties have an important role to play in these administrative proceedings, and that their agreement on an issue or proper course of action should, in most instances, be determinative."). However, that case did not abdicate the Court from its responsibility to adjudicate motions based on the evidence presented. The parties' simply have not persuaded this Court that the case should be reopened based on ineffective assistance of counsel.

The Court also sees no evidence in the record warranting *sua sponte* reopening. *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (describing *sua sponte* reopening as an

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[1] 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 the opportunity to respond; and (3) that the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. 19 I&N Dec. at 639.

[2] The Court notes that the Respondent has failed to include the alleged findings from the State Bar of Oklahoma on Ms. Mawby, alleging that they are privileged. However, if these documents are privileged, the Court does not see how Government counsel was permitted to view the documents.

"extraordinary remedy reserved for truly exceptional situations"); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); *Matter of Beckford*, 22 I&N Dec. 1216, 1218 (BIA 2000) (noting that is it the respondent's burden to demonstrate that an "exceptional situation" exists meriting *sua sponte* reopening).

Accordingly, the parties' Joint Motion to Reopen will be denied.

On this 04 day of August 2015.

Michael P. Baird
United States Immigration Judge

Copy to:
Chief Counsel, DHS/ICE