



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: DIAZ ARVELO, CRISTIAN ANEU... A 056-024-351

Date of this notice: 3/6/2020

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:
Adkins-Blanch, Charles K.
Mullane, Hugh G.
Kelly, Edward F.

Userteam: Docket

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22

Falls Church, Virginia 22041

File: A056-024-351 – Napanoch, NY

Date: **MAR - 6 2020**

In re: Cristian Aneury DIAZ ARVELO a.k.a. Cristian Diazarvelo a.k.a. Cristian Diaz Arvelo
IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Siana J. McLean, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of the Dominican Republic appeals the decision of the Immigration Judge, dated August 20, 2019, denying his motion to reopen. The record will be remanded to the Immigration Judge for the limited purpose of further considering the respondent's motion to reopen.

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).

These removal proceedings were completed when, on July 26, 2019, the Immigration Judge ordered the respondent's removal from the United States upon concluding that he had abandoned his opportunity to file an Application for Cancellation of Removal for Certain Permanent Residents (Form EOIR-42A).¹ 8 C.F.R. § 1003.31(c). On appeal, the respondent, for the first time, contends that these removal proceedings should be reopened and remanded as his former counsel engaged in ineffective assistance by not timely filing a Form EOIR-42A in accordance with the Immigration Judge's filing deadline, i.e., July 22, 2019. On appeal, he has presented evidence which, among other things, indicates that he has filed a complaint against his former attorney.

The respondent's claims to ineffective assistance of counsel have not been evaluated by the Immigration Judge. Given this Board's limited fact-finding ability, we will remand the record to the Immigration Judge for the limited purpose of further considering the respondent's motion to reopen. Upon remand, the Immigration Judge should issue a new decision addressing whether the respondent has sufficiently complied with the evidentiary requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and established that he was prejudiced by his former counsel's non-compliance with the filing deadline for the Form EOIR-42A. In considering the issue of prejudice, the Immigration Judge should determine whether, even if his former counsel had properly filed the Form EOIR-42A and the merits of such application had been fully considered, the outcome of these removal proceedings would have likely been any different. See *Debeatham v. Holder*, 602 F.3d 481, 486 (2d Cir. 2010).

¹ On appeal, the respondent indicates that he does not wish to pursue an Application for Asylum and for Withholding of Removal (Form I-589) (Respondent's Br. at 8).

We express no opinion, at the present time, regarding the ultimate outcome of the adjudication of the respondent's motion to reopen upon remand. The following order is entered.

ORDER: The record is remanded to the Immigration Judge for further consideration of the respondent's motion to reopen and the entry of a new decision.



FOR THE BOARD