



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
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**Name: GOMES, RAFAEL**

**A 088-446-067**

**Date of this notice: 5/17/2019**

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:  
Grant, Edward R.

Userteam: Docket

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Falls Church, Virginia 22041

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File: A088-446-067 – New York, NY

Date:

**MAY 17 2019**

In re: Rafael GOMES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Michael E. Piston, Esquire

APPLICATION: Reconsideration; reopening

This matter was last before the Board on June 7, 2018, when we denied the respondent's motion to reopen his removal proceedings as untimely. The respondent was seeking reopening based on ineffective assistance of counsel from an attorney who represented him before the Immigration Judge and the Board.

The respondent has now filed the instant timely motion for reconsideration of that decision. In the alternative, the respondent seeks sua sponte reopening of his proceedings. The Department of Homeland Security (DHS) has not responded to the motion. The motion to reconsider will be granted, and our June 7, 2018, decision will be vacated. Upon further review, we will grant the motion to reopen and remand for further proceedings on the respondent's application for asylum and withholding of removal.

In our prior decision, we concluded that the respondent did not warrant equitable tolling of the general 90-day deadline for motions to reopen because he failed to show due diligence. We further determined that the respondent had failed to substantially comply with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), for raising an ineffective assistance of counsel claim.

The respondent argues that we erred in finding no due diligence because he only discovered, and could have discovered, the ineffective assistance of counsel about 2 months after counsel ended his representation (Motion to Reconsider at 10-11). Considering the evidence proffered with the instant motion, in conjunction with evidence proffered with the respondent's original motion to reopen, we agree (Motion to Reconsider, Exh. 1; Motion to Reopen filed Jan. 23, 2018, Exh. A at ¶4).

Moreover, the respondent has now proffered evidence that he did in fact comply with all of the requirements of *Lozada* before filing his motion to reopen (Motion to Reconsider, Exhs. 2-4). Given these circumstances, we will grant the motion to reconsider and vacate our prior decision.

Upon further review, we conclude that reopening is warranted. Among other things, the respondent is arguing that former counsel failed to provide the Immigration Court with several hundred pages of articles on conditions in Brazil that were relevant to his claim for asylum and related relief (Motion to Reopen filed Jan. 23, 2018, Exh. A at ¶¶ 8-9). We have no record of

having received a response to this allegation from former counsel. Nevertheless, the record supports the respondent's assertion.


In his brief on appeal, former counsel indicated that "100s of pages" had been filed in the Immigration Court on country conditions (Appeal Br. filed May 4, 2016, at 5). However, a review of the record shows that the respondent's asylum application was supported by only 16 pages of articles on country conditions (Admin. Record, Exh. 5 at Tabs E-L).

The respondent has proffered the country conditions evidence with his motion to reopen that was not provided to the Immigration Court. We conclude that former counsel's failure to submit such evidence deprived the respondent of a full and fair hearing. *See Debeatham v. Holder*, 602 F.3d 481, 485 (2d Cir. 2010) (stating to prevail on an ineffective assistance counsel claim, an alien must show that the ineffectiveness impinged the fundamental fairness of the proceedings). Therefore, we will grant the motion to reopen and remand the record for further proceedings on the respondent's applications for asylum and withholding of removal, and any other relief which he may presently be seeking. On remand, the parties may offer additional evidence and argument. Accordingly, the following orders will be entered.

ORDER: The motion for reconsideration is granted.

FURTHER ORDER: The Board's decision dated June 7, 2018, is vacated.

FURTHER ORDER: The motion to reopen is granted, and the record is remanded for further proceedings consistent with this order and for the entry of a new decision.

  
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FOR THE BOARD