U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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80 Monroe Ave., Ste 502
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Name: CRUZ-CRUZ, ALEJANDRO

A 205-393-424

Date of this notice: 12/23/2015

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'Leary, Brian M.
Guendelsberger, John
Grant, Edward R.

Userteam: Docket

File: A205 393 424 – Memphis, TN Date: DEC 23 2015

In re: ALEJANDRO CRUZ-CRUZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Charles C. Nett, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated September 19, 2014, denying his timely filed motion to reopen of his June 23, 2014, order of removal. The appeal will be sustained.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding questions of law and the application of a particular standard of law to those facts. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

The Board will reopen these proceedings to allow the respondent to apply for adjustment of status pursuant to section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255. *See Matter of Velarde,* 23 I&N Dec. 253 (BIA 2002) (holding that a properly filed motion to reopen for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted in the exercise of discretion, notwithstanding the pendency of a visa petition filed on the alien's behalf, where: (1) the motion to reopen is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds; (4) clear and convincing evidence is presented indicating a strong likelihood that the marriage is bona fide; and (5) the Department of Homeland Security (DHS) does not oppose the motion or bases its opposition solely on *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992)). *See also Matter of Lamus*, 25 I&N Dec. 61 (2009). The respondent presented evidence establishing that he married a United States citizen on May 3, 2013, and the couple has a child who was born on November 21, 2012. In addition, the respondent's spouse filed a visa petition (Form I-130) on his behalf on August 1, 2014, which was more than a month after the hearing, and he states that unfortunate events prevented her from filing the visa petition prior to the hearing. Moreover, the DHS has not filed an opposition on appeal to the reopening of these proceedings. In light of the foregoing, the proceedings will be reopened.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, and these proceedings are reopened and remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MEMPHIS, TENNESSEE

IN THE MATTER OF:	)
	)
	) **September 4, 2014**
CRUZ-CRUZ, Alejandro	)
A 205-393-424	)
	)
RESPONDENT	)
	)

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT
Charles C. Nett, Esq.
Nett Immigration Law Office
746 E. Broadway
Louisville, KY 40202

ON BEHALF OF DHS
Department of Homeland Security
167 North Main Street, Suite 737A
Memphis, Tennessee 38103

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Alejandro Cruz-Cruz (Respondent), a native and citizen of Mexico, entered the United States at an unknown place, on an unknown date. On September 13, 2012, the Department of Homeland Security (DHS) personally served Respondent with a Notice to Appear (NTA), which charged him as removable under INA § 212(a)(6)(A)(i) (present in the United States without having been admitted or paroled). The NTA scheduled Respondent for a master calendar hearing before the Chicago Immigration Court at a date and time to be set. Venue of Respondent's case was transferred to this Court on May 22, 2013. Exh. 3. On June 3, 2013, this Court mailed Respondent a Notice of Hearing, setting him for a Master Calendar Hearing on June 23, 2014. On that date, this Court denied Respondent's Motion for Continuance and ordered Respondent removed.

On September 5, 2014, Respondent filed a Motion to Reopen. Respondent was subsequently taken into ICE custody and on September 15, 2014, Respondent filed an Emergency Motion to Stay Removal. DHS did not file a response to either of Respondent's Motions. The Court now issues this decision.

II. ANALYSIS

A motion to reopen must be filed within ninety days of the date of entry of a final administrative order of removal. 8 C.F.R. § 1003.23(b)(1) (2011). Further, the motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3) (2011). The Court will only grant the motion if it is satisfied that "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.* Any motion to reopen in order to proceed with an application for relief must be accompanied by the appropriate application for relief and all supporting documents. *Id.* Additionally, such motions to reopen to apply for discretionary relief will not be granted "if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing." *Id.*

Respondent was ordered removed on June 23, 2014. Respondent filed his Motion to Reopen on September 5, 2014, within the 90-day period, and therefore his Motion is timely.

However, Respondent's Motion does not demonstrate that the evidence he wishes to offer "is material and was not available and could not have been discovered or presented at a former hearing." Respondent argues that at his master calendar hearing on June 23, 2014, this Court asked Respondent's prior counsel, Rusty O'Brien, whether an immigrant visa petition had been filed, to which Mr. O'Brien answered in the negative and requested a continuance. Respondent states that this Court inquired as to why such a petition had not been filed, and "[b]efore Respondent could offer a response, he maintains that Mr. O'Brien advised the Court that he had notified Respondent/his wife – on *multiple* occasions – of the need to file an Immigrant Visa Petition and that Respondent had failed to contact him." Motion at 2. Respondent states that the Court then denied Respondent's request for a continuance, allowed Respondent to consider voluntary departure, and then ordered Respondent removed. Respondent argues that his and his wife's failure to file an immigrant visa petition prior to his master calendar hearing was for good cause, including: "(1) His/his wife's preoccupation with the fallout from two serious crimes apparently perpetrated first against his two young step-children and then against his wife and step-daughter; (2) His temporary inability as the sole provider for a family of six, whose income was disrupted for a period of two months after his February 2013 arrest, to meet Mr. O'Brien's demand for a $2,000.00 payment toward the $8,768.00 *remaining* balance of his account; and (3) His unawareness of the severe consequences of failing to have an immigrant visa petition filed for his benefit on/before his June 23, 2014 hearing." Motion at 3. In support of his petition, Respondent provides an Assessment of Alleged Child Abuse or Neglect, evidence of his step-children's counseling, an Incident Report from the Jeffersonville Police Department, an Indictment in State of Indiana v. Charles Evans, correspondence from Respondent's previous counsel, a copy of Respondent's wife's immigrant visa petition, and a receipt notice for that petition. Motion to Reopen.

Despite Respondent's assertions, during his hearing, this Court inquired as to why his I-130 petition had not been filed, to which Mr. O'Brien explained that there was some question as to whether it would be filed, because Respondent and his wife were "working through some issues." Additionally, this Court found that Respondent had not demonstrated *prima facie* eligibility for an I-130 petition, as he had not provided a copy of his marriage certificate for him and his wife or a birth certificate for his child. As a result of Respondent's failure to demonstrate *prima facie* eligibility, the Court denied Respondent's request for a continuance to file his I-130 petition. Respondent then declined voluntary departure and the Court ordered him removed.

While the Court sympathizes with the Respondent's family's situation prior to his master calendar hearing, the Court cannot find that the evidence Respondent has now provided "was not available and could not have been discovered or presented at a former hearing." Respondent and his wife were married on May 3, 2013 and Respondent's daughter was born November 21, 2012, well before Respondent's June 23, 2014 hearing. The abuse to Respondent's step-children was reported on or about February 24, 2013 and the incident with Charles Evans in Respondent's home occurred in October 2013, both prior to Respondent's hearing. Respondent has not explained how the events outlined in his affidavit prevented him from providing Mr. O'Brien with the marriage and birth certificates necessary to support his Motion to Continue. Therefore, the Court will deny Respondent's Motion to Reopen.

Further, the Respondent appears to be arguing that Mr. O'Brien was ineffective in his representation of Respondent. In Respondent's Motion he states, "Respondent maintains that Mr. O'Brien neither asked him why he/his wife had failed to schedule an appointment to file an immigrant visa petition nor gave him the opportunity to explain the bases for his failure to the Court." Motion to Reopen at 3.

The United States Court of Appeals for the Sixth Circuit has "recognized that Fifth Amendment guarantees of due process extend to aliens in deportation proceedings, entitling them to a full and fair hearing." *Scorteanu v. INS*, 339 F.3d 407, 413 (6th Cir. 2003). Ineffective assistance of counsel violates an alien's due process rights. *Hamid v. Ashcroft*, 336 F.3d 465, 468 (6th Cir. 2003). In order to prove a denial of due process, the alien must establish that the ineffective assistance of counsel resulted in prejudice or a denial of fundamental fairness. *Scorteanu*, 339 F.3d at 413; *Hamid*, 336 F.3d at 468. Stated another way, ineffective assistance of counsel will rise to the level of a Fifth Amendment due process violation "only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Denko v. INS*, 351 F.3d 717, 723 (6th Cir. 2003); *Matter of Lozada*, 19 I&N Dec. 637, 638 (BIA 1988). In considering whether the alien was prejudiced, the Sixth Circuit instructs that the Court should evaluate "whether the alien's claims could have supported a different outcome." *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006).

In *Matter of Lozada*, the BIA mandated that, in addition to establishing prejudice, the alien must also comply with certain procedural factors. *Lozada*, 19 I&N Dec. at 639. "A motion [to reopen] based upon a claim of ineffective assistance of counsel should be

supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts" . . . "[the] affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel. . ." *Id.* Moreover, "before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond." *Id.* Any response or report of a failure or refusal to respond "should be submitted with the motion." *Id.* Finally, if it is asserted that former counsel's handling of the case involved a violation of ethical or legal responsibilities, "the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." *Id.* An alien who fails to comply with the *Lozada* requirements forfeits his or her ineffective assistance of counsel claim. *See Hamid*, 336 F.3d at 469; *but see Sswajje v. Ashcroft*, 350 F.3d 528 (6th Cir. 2003) (observing that it might be permissible to bypass the first two *Lozada* requirements in that case because the attorney had admitted his ineffectiveness, but then finding that the alien had failed to present the third requirement before the Board and that the Court, therefore, lacked jurisdiction to review the claim).

In the present case, Respondent has not complied with the *Lozada* procedural requirements. Respondent's affidavit does not attest to the relevant facts, nor is there evidence that Respondent contacted Mr. O'Brien to inform him of his alleged ineffectiveness. Respondent has also not provided any evidence that a complaint was filed against Mr. O'Brien with the appropriate disciplinary authorities. As Respondent has not complied with *Lozada*, any alleged ineffectiveness on the part of Mr. O'Brien is not a basis for reopening Respondent's case.

Respondent has failed to demonstrate that the evidence he submits with his Motion to Reopen "was not available and could not have been discovered or presented at a former hearing" and has failed to comply with the requirements of *Lozada*. Therefore, the Court cannot find that Respondent has met his burden to warrant reopening his case. Because the Court will deny Respondent's Motion to Reopen, the Court will also deny the accompanying Emergency Motion to Stay Removal.

III. ORDER

For the foregoing reasons, the following **ORDERS** are **HEREBY ENTERED**:

It is **HEREBY ORDERED** that Respondent's Motion to Reopen be **DENIED**.

It is **FURTHER ORDERED** that Respondent's Emergency Motion to Stay Removal be **DENIED.**

DATED this the 19 day of September 2014.

Rebecca L. Holt

Honorable Rebecca L. Holt
Immigration Judge