



U.S. Department of Justice

Executive Office for Immigration Review

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Name: RAMIREZ-PEREZ, JOSE LEONA... A 029-277-936

Date of this notice: 2/4/2020

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:
Mann, Ana

User team: Docket

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Falls Church, Virginia 22041

File: A029-277-936 – San Diego, CA

Date: **FEB - 4 2020**

In re: Jose Leonardo RAMIREZ-PEREZ

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Anna M. Hysell, Esquire

APPLICATION: Reopening

This matter is before us pursuant to the April 30, 2019, decision of the United States Court of Appeals for the Ninth Circuit, which granted the respondent's petition for review and remanded the record to the Board. *See Ramirez-Perez v. Barr*, 775 F.App'x. 833 (9th Cir. April 30, 2019) (unpublished). We will remand the record to the Immigration Court for further proceedings.

The Ninth Circuit remanded the record in order for the Board to further assess the respondent's claim of ineffective assistance of counsel, a claim which we addressed in three separate decisions dated October 10, 2014, January 27, 2015, and April 27, 2016.¹ Specifically, the court directed the Board to review the respondent's request for equitable tolling pursuant to *Avagyan v. Holder*, 646 F.3d 672 (9th Cir. 2011) (recognizing that a motion filed beyond ninety days of the date of entry of a final administrative order of removal is untimely, unless subject to equitable tolling of the deadline during periods when a petitioner is prevented from filing because of a deception, fraud, or error, as long as petitioner acts with due diligence in discovering the deception, fraud or error) citing *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003); *see also Bonilla v. Lynch*, 840 F.3d 575, 582 (9th Cir. 2016) (listing the three factors to consider when determining whether a petitioner has exercised due diligence). The court also remanded the record to allow the Board to further determine whether the respondent had demonstrated "plausible grounds for relief" and whether the deficient performance by the respondent's prior counsel affected the respondent's pursuit of such relief. *See Jie Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004).

In his first motion to reopen claiming ineffective assistance of counsel, the respondent claimed that after the Board dismissed his appeal in 2002, he attempted to secure other counsel, but that he was removed before he could fully consult with them (2014 Motion Ev. at 94). He further explained that he attempted to find counsel in Mexico, but he was told repeatedly that there was nothing that could be done in his case. *Id.* After his return to the United States, he again attempted

¹ The court remanded the record based on our first decision dated October 10, 2014, and for an issue of fraud by the respondent's prior attorney, which occurred in the filing of the first motion, and was raised by the respondent in his second motion. The respondent's former attorney filed a response to the respondent's motion under name of the respondent's current counsel. As such, the court has directed the Board to strike this correspondence from the record, and we do not rely on it in any manner.

to secure counsel in 2012, and was again informed that there was nothing that could be done to help his case. *Id.* He was again removed in 2012. *Id.* at 95.

The question of due diligence depends on: (1) when a reasonable person would suspect his former counsel's misconduct; (2) whether the respondent then took reasonable steps to investigate it or pursue relief; and (3) when the respondent conclusively learned of his former counsel's deficient representation. *See Avagyan v. Holder*, 646 F.3d at 679. In the instant case, the respondent was repeatedly told by attorneys he consulted that there were no legal avenues to pursue, and he did not suspect his prior counsel's ineffectiveness until he spoke with current counsel in March of 2014 (Resp's. 2019 Motion at 24). Subsequent to speaking with current counsel, the respondent pursued his ineffective assistance of counsel claim diligently, and filed his first motion on July 2, 2014. Accordingly, the respondent's filing deadline is tolled until March of 2014, when the respondent discovered his prior counsel's ineffectiveness. *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1194-97 (9th Cir. 2001). Upon such discovery, the respondent filed his first motion with due diligence, and we find that the respondent is not precluded from demonstrating ineffective assistance of counsel based on a lack of due diligence in pursuing his claim. *See Matter of Lozada*, 18 I&N Dec. 637 (BIA 1988).

To prevail on a claim of ineffective assistance of counsel, the respondent must also demonstrate that his former counsel failed to perform with sufficient competence and that he was prejudiced by this performance. *See Maravilla Maravilla v. Ashcroft*, 381 F.3d at 858. In its prior decision, the Board found no prejudice, and relied, in part, on this finding to deny the respondent's various motions. However, in its order, the court has directed the Board to reevaluate whether plausible grounds for relief existed for the respondent in 1999. Despite the Immigration Judge's determination that the respondent did not demonstrate continuous physical presence and exceptional and unusual hardship, he plausibly could have succeeded in his pursuit of cancellation of removal under section 240A(b) of the Act. As the court pointed out, the respondent's role as the sole surviving parent to a U.S. citizen child and involvement in a dispute over his son's custody plausibly could have met the hardship threshold for purposes of section 240A(b) of the Act. *See Ramirez-Perez v. Barr*, 775 F.App'x at 833-34.

As the respondent argues in his various motions, his ability to demonstrate the requisite hardship and physical presence was hampered by his prior attorney's deficient representation. For example, the Immigration Judge denied the respondent's cancellation application, in part, due to his failure to demonstrate that his son was a qualifying relative (IJ at 11-12). The respondent's current counsel has submitted a DNA test, and we agree that this document at the hearing would have cured the evidentiary gap noted by the Immigration Judge. Similarly, the respondent could have provided further documentation regarding his physical presence since childhood, and could have provided further evidence regarding the hardship his son would experience upon his sole parent's removal from the United States.² Lastly, as the respondent currently argues, his prior counsel's original appeal brief inadequately raised the appellate arguments at issue in his case.

² Although the various Board decisions do not address the continuous physical presence requirement, the Immigration Judge's 1999 decision found "a scarcity of documentation" demonstrating the requisite presence (IJ at 4). On remand, the Immigration Judge may consider

In sum, given the evidence of record, the arguments set forth in the respondent's current and prior motions, and the lack of DHS opposition to the respondent's current arguments, we will reopen the proceedings to allow the respondent to present his arguments and evidence regarding his pursuit of cancellation of removal under section 240A(b) of the Act. The following orders will, thus, be entered.

ORDER: The Board's October 10, 2014, decision is vacated.

FURTHER ORDER: The motion is granted, and the record is remanded for further proceedings consistent with the foregoing decision.



FOR THE BOARD

whether this requirement was met, taking into account any new evidence submitted by the respondent.