U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: WAMBUI, ANDRINE WARUGURU **A 089-313-705**

Date of this notice: 4/26/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Malphrus, Garry D.
Liebowitz, Ellen C
Mullane, Hugh G.

Userteam: Docket

File: A089 313 705 – Seattle, WA

Date: APR 26 2017

In re: ANDRINE WARUGURU WAMBUI

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Zachary Dale Aho, Esquire

ON BEHALF OF DHS: Eric Bakken
Senior Attorney

APPLICATION: Reopening

The respondent, a native and citizen of Kenya, appeals from the Immigration Judge's decision dated September 28, 2015, denying her motion to reopen proceedings and rescind the in absentia removal order entered on February 27, 2015. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the record will be remanded to the Immigration Court for further proceedings.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, question of law, judgment and discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that the Immigration Judge erred in declining to reopen and rescind the in absentia removal order pursuant to section 240(b)(5)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C)(i).[1] The respondent claims that she missed the February 27, 2015, hearing due to "exceptional circumstances," namely, ineffective assistance of counsel. In particular, the respondent claims that she was advised by counsel that the February 27, 2015, hearing was to begin at 1:00pm when in fact the hearing was scheduled for 8:30am (Notice of Hearing, dated June 18, 2014). The respondent has provided statements for both herself and counsel verifying these facts. Counsel represents that he mistakenly relied on a February 18, 2015, filing by the DHS, wherein the February 27, 2015, hearing was listed as starting at 1:00pm, in advising the respondent when to appear for the hearing (Statement of Zachary D. Aho, dated Aug. 25, 2015; *see also* DHS's Motion for Late Filing, dated Feb. 18, 2015).

[1] There is no dispute that the present motion, which was filed on August 26, 2015, was filed within 180 days of the February 27, 2015, in absentia order. *See* section 240(b)(5)(C)(i) of the Act (providing that a motion to reopen and rescind on the basis of exceptional circumstances must be filed within 180 days of the date of entry of the order).

The respondent initially raised this claim in a motion to reopen that was filed on May 1, 2015. The Immigration Judge denied this motion on the ground that the respondent did not satisfy the procedural framework set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), for raising an ineffective assistance of counsel claim (June 18, 2015, I.J. Dec.). The Immigration Judge concluded that while the respondent satisfied the first two requirements for raising such a claim—by detailing the agreement with counsel and providing counsel with notice of and an opportunity to respond to the allegations—she did not satisfy the third prong, that is, "the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation and, if not, why not" (*Id.* at 3-4). *Matter of Lozada*, *supra*, at 639.

The respondent sought to rectify this error through the present motion to reopen, which she filed on August 26, 2015. Attached to this motion is a completed bar complaint form detailing the actions of counsel in advising the respondent of the incorrect hearing time. The respondent's motion further represented that this complaint has been presented to the appropriate bar authorities (Aug. 26, 2015, Mot. at 5). The Immigration Judge denied the motion, however, again citing the respondent's failure to meet the third requirement under *Matter of Lozada*, *supra*. In particular, the Immigration Judge concluded that the respondent did not provide sufficient proof that the bar complaint has in fact been filed (Sept. 28, 2015, I.J. Dec. at 3). Concluding that the respondent did not meet the requirements under *Matter of Lozada*, *supra*, the Immigration Judge found the present motion to be number-barred and to not raise a valid claim of exceptional circumstances to warrant rescission of the in absentia order (*Id.*). *See* section 240(c)(7)(A) of the Act. This decision forms the basis of the present appeal.

Upon review, we conclude that the respondent has satisfied the procedural requirements under *Matter of Lozada*, *supra*, in this circuit. As noted, there is no dispute that the respondent has satisfied the first two requirements (June 18, 2015, I.J. Dec. at 3). With respect to the third requirement, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that an applicant for reopening need not present evidence "of having submitted a complaint to the bar, much less correspondence from the bar acknowledging such a complaint." *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013). As the Ninth Circuit has held, all that is required is that "the motion . . . somehow disclose whether [the movant] has filed a complaint with the state bar." *Id.* at 1132. The Ninth Circuit has found this requirement to be satisfied where, as here, the motion is accompanied by a copy of the relevant bar complaint and a representation that the complaint has been filed. *See id.*; *see also Martinez Del Cid v. Lynch*, 652 Fed.Appx. 521, 524 (9th Cir. 2016) ("As to the third factor, it is sufficient that Martinez Del Cid included with the motion to reopen a copy of a completed attorney complaint form and asserted before the BIA that the form was filed with the appropriate state agency."). For these reasons, we conclude that the respondent has satisfied the procedural framework for raising an ineffective assistance of counsel claim.

We further conclude that the respondent has established that her failure to appear at the February 27, 2015, hearing was due to ineffective assistance of counsel. While the respondent had notice of the actual hearing date and time through the underlying hearing notice (Sept. 28, 2015, I.J. Dec. at 3; Notice of Hearing, dated June 18, 2014), there is no reason to suggest that the respondent had any reason to not rely on counsel's subsequent advice to appear at the scheduled hearing at a later time. *See Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996);

accord Monjaraz-Munoz v. INS, 327 F.3d 892, 897 (9th Cir.), *as amended*, 339 F.3d 1012 (9th Cir. 2003) ("For the alien unfamiliar with the laws of our country, an attorney serves a special role in helping the alien through a complex and completely foreign process. It is therefore reasonable for an alien to trust and rely upon an attorney's advice . . . ."). This erroneous advice, which constitutes ineffective assistance of counsel, caused the respondent to miss her scheduled hearing.

For these reasons, we conclude that the respondent has satisfied the procedural framework under *Matter of Lozada*, *supra*, for presenting an ineffective assistance of counsel claim. *See Correa-Rivera v. Holder*, *supra*. We further conclude that the respondent has established that ineffective assistance of counsel caused her to miss the February 27, 2015, hearing. *See Matter of Grijalva*, *supra*. As there is no dispute that the respondent exercised due diligence in seeking to reopen these proceedings, the numerical limitation is subject to equitable tolling. *See Bonilla v. Lynch*, 840 F.3d 575, 582 (9th Cir. 2016). We therefore conclude that reopening is warranted under section 240(b)(5)(C)(i) of the Act on the basis of exceptional circumstances.

Accordingly, the following order will be entered.

ORDER: The February 27, 2015, in absentia removal order is rescinded, these proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1000 SECOND AVE., SUITE 2500
SEATTLE, WA 98104

Orbit Law, PLLC
Upadhyay, Kripa
2226 Eastlake Avenue E. #71
Seattle, WA 98102

IN THE MATTER OF FILE A 089-313-705 DATE: Sep 29, 2015
WAMBUI, ANDRINE WARUGURU

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

V 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
1000 SECOND AVE., SUITE 2500
SEATTLE, WA 98104

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: ERIC BAKKEN, ICE ASST. CHIEF COUNSEL
1000 SECOND AVE, STE 2900
SEATTLE, WA, 98104

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SEATTLE, WASHINGTON

In the Matter of: **Andrine Waruguru WAMBUI,** *Respondent.*	File Number: **A089-313-705** **IN REMOVAL PROCEEDINGS**

CHARGE: INA § 237(a)(1)(C)(i) – Nonimmigrant who Failed to Comply with Conditions of Status

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT
Kripa Upadhyay, Esquire
Orbit Law, PLLC
2226 Eastlake Avenue East, No. 71
Seattle, WA 98102

ON BEHALF OF DHS
Erik Bakken, Senior Attorney
Department of Homeland Security – ICE
1000 Second Avenue, Suite 2900
Seattle, WA 98104

DECISION OF THE IMMIGRATION JUDGE

I. Introduction and Procedural History

The Department of Homeland Security ("DHS") initiated removal proceedings against the respondent by filing a Notice to Appear ("NTA") with the Seattle Immigration Court on April 2, 2010. Exh. 1. The NTA alleges that the respondent is a native and citizen of Kenya, who was admitted to the United States as a nonimmigrant student on March 29, 2009, to attend Highline Community College in Des Moines, Washington. *Id.* The NTA further alleges that the respondent did not attend Highline Community College from June 30, 2009 to present. *Id.* On the basis of these allegations, the DHS charged the respondent with removability under section 237(a)(1)(C)(i) of the Immigration and Nationality Act ("INA" or "Act"), as an alien who, after admission as a nonimmigrant under INA § 101(a)(15), failed to maintain or comply with the conditions of the nonimmigrant status under which she was admitted. *Id.*

At the respondent's initial master calendar hearing on July 15, 2010, the respondent, through a prior attorney, admitted the factual allegations and conceded removability. The Court

designated Kenya as the country for prospective removal. Since then, the respondent has had a number of hearings in regards to her asylum application—on October 28, 2010; February 2, 2012; August 9, 2012; August 27, 2012; August 30, 2012; September 27, 2012; March 7, 2013; and June 18, 2014. At the February 2, 2012, the prior Immigration Judge presiding over the case expressed concern with the authenticity of several documents submitted by the respondent due to their identical appearance, despite being from different sources, different parts of Kenya, and different years. The October 28, 2010 and August 9, 2012 hearings were in regards to the status of the case. In the four hearings following the August 9, 2012 hearing, the prior Immigration Judge, who has since retired, gave the respondent the opportunity to find a new attorney. At the June 18, 2014 hearing, another Immigration Judge, presiding over video teleconference, determined that an in-person hearing was necessary for the respondent's individual hearing. He expressed concern that the respondent's three asylum applications had inconsistencies among the declarations, and emphasized the consequences of filing a frivolous asylum application.

On June 18, 2014, the Court mailed the respondent a complete copy of her court file to allow her an opportunity to review the submissions by herself, her prior attorney, and the DHS. On that date, the Court also mailed the respondent a hearing notice ordering her to appear for an in-person individual hearing on February 27, 2015, at 8:30 a.m. The respondent failed to appear at her hearing. The Court then granted the DHS's motion to proceed *in absentia* and ordered the respondent removed *in absentia* to Kenya on the basis of the previously admitted charge of removability. *See* IJ Removal Proceedings Order (Feb. 27, 2015). On April 17, 2015, the Court rejected the motion to reopen filed by the respondent, through her most recent former counsel, because she did not provide a proposed order for the motion to reopen as required. The corrected motion to reopen was filed on May 1, 2015. Motion to Reopen and Stay Removal (Automatic) (May 1, 2015). The DHS filed its response to the motion that had been rejected by the Court on April 17, 2015. Department of Homeland Security Opposition to Motion to Reopen (Apr. 17, 2015). The Court denied the respondent's motion on June 18, 2015.

On August 26, 2015, the respondent, through current counsel, filed another motion to reopen, again on the basis of ineffective assistance of counsel. Motion to Reopen and Stay Removal Proceedings (Aug. 26, 2015) [hereinafter "MTR"]. The DHS filed its response on September 4, 2015. Department of Homeland Security Opposition to Third Motion to Reopen (Sept. 4, 2015). For the following reasons, the Court denies the respondent's motion to reopen.

II. Motion to Reopen

The Court may rescind an *in absentia* order of removal only where (1) an alien files a motion to reopen within 180 days of the date of the order of removal and demonstrates that the failure to appear was due to exceptional circumstances as defined in INA § 240(e)(1) or (2) the alien, at any time, demonstrates that she did not receive notice. INA § 240(b)(5)(C); 8 C.F.R. §

1003.23(b)(4)(ii). Exceptional circumstances are circumstances beyond the control of the alien, "such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." INA § 240(e)(1).

As an initial matter, the respondent's motion is number-barred. Subject to certain exceptions not applicable here, a party may file only one motion to reopen removal proceedings. 8 C.F.R. § 1003.23(b)(4)(ii) ("An alien may file only one motion pursuant to this paragraph"). The respondent previously filed a motion to reopen on May 1, 2015. Accordingly, Respondent's present motion is number-barred and will be denied on this basis.

Second, as noted in the previous order, the respondent admits that she received proper notice of the hearing, but argues that her most recent former attorney's scheduling error caused her to miss the hearing. As the Court noted then, the respondent's former attorney did not file his notice of appearance until May 1, 2015, whereas the hearing was on February 27, 2015. Third, the Court reiterates that even if it accepts as true that the attorney was representing her at the time of her hearing and that he informed her of the incorrect time, it is unclear why this circumstance prevented her from attending her hearing, given that the hearing notice that the Court mailed to her listed the correct time. *See* INA § 240(e)(1). Fourth, the respondent has still failed to assert a valid claim of ineffective assistance of counsel under *Matter of Lozada*. *See* 19 I&N Dec. 637 (BIA 1988).

Under *Lozada*, a motion to reopen based on ineffective assistance of counsel requires: (1) an affidavit from the respondent detailing the agreement that was entered into with counsel; (2) proof that counsel was informed of the allegations, and had an opportunity to respond; and (3) proof that a bar complaint has been filed with the appropriate disciplinary authority and if not, why not. *Id.* at 639; *see also Matter of Rivera-Claros*, 21 I&N Dec. 599, 604 (BIA 1996) (stating that the *Lozada* requirements "serve[] to protect against collusion between alien and counsel in which "ineffective" assistance is tolerated, and goes unchallenged by an alien before disciplinary authorities, because it results in a benefit to the alien in that delay can be a desired end, in itself, in immigration proceedings"). At issue with the previous motion was the fact that the respondent had not complied with the third requirement. In its previous order, the Court explained why the rigid application of this requirement was necessary in the respondent's case. In her new motion, the respondent states "[u]ndersigned counsel has initiated a complaint against [former counsel] with the appropriate authorities . . . ." MTR at 5. However, the attached complaint form lists the former attorney's name as the one requesting an investigation of himself. *Id.* at 6. Moreover, the form provided is the original, and there is no indication that it has actually been submitted. *See id.* This shaky evidence is insufficient to satisfy *Lozada*'s goal of "hold[ing] attorneys to appropriate standards of performance." *See Lo v. Ashcroft*, 341 F.3d at 937 (citing *Lozada*, 19 I&N Dec. at 639).

Finally, the respondent's new motion emphasizes that she is eligible for prosecutorial discretion. MTR at 5, 7-8. However, this claim is belied by the fact that the DHS has so strongly opposed reopening each time a motion has been filed. If current counsel is so certain that the DHS would be offering a favorable exercise of discretion, it is inconceivable to the Court that counsel would not already have secured a joint motion to reopen and administratively close. In sum, because the respondent's motion is number-barred, and she has not demonstrated that her failure to appear was due to exceptional circumstances or a lack of notice, the Court denies the motion to reopen.

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reopen is **DENIED.**

Sept 28, 2015
Date

Brett M. Parchert
Immigration Judge