



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: P [REDACTED]-V [REDACTED], F [REDACTED] D [REDACTED]... A [REDACTED]-181

Date of this notice: 6/13/2019

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:
Adkins-Blanch, Charles K.
Morris, Daniel
Mann, Ana

User team: Docket

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Falls Church, Virginia 22041

File: [REDACTED] 181 -- Phoenix, AZ

Date: JUN 13 2019

In re: F [REDACTED] D [REDACTED] P [REDACTED] -V [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Monika Sud-Devaraj, Esquire

APPLICATION: Asylum; withholding of removal; protection under the Convention Against Torture

This matter was last before the Board on February 6, 2018, when we dismissed the respondent's application for asylum and for withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 1231(b)(3), and her request for protection under Article 3 of the Convention Against Torture (Convention), 8 C.F.R. § 1208.16. On September 21, 2018, the United States Court of Appeals for the Ninth Circuit granted the government's unopposed motion to remand. The record will be remanded for further proceedings.

The unopposed motion to remand requested that the Board further consider whether the failure of counsel to timely file an asylum application for the respondent and prepare her for the merits hearing amounted to ineffective assistance of counsel, and if so, whether counsel's incompetence was presumptively prejudicial under *Santiago-Rodriguez v. Holder*, 657 F.3d 820 (9th Cir. 2011).

We review the findings of fact, including the determination of credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002). We review all other issues, including issues of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

As we noted in our prior decision, the respondent argued on appeal that her former attorney rendered ineffective assistance in failing to file an asylum application within one-year of her arrival, submit any corroborating documents, or prepare her for the merits hearing. The respondent also provided documentation to meet the evidentiary requirements for asserting a claim of ineffective assistance of counsel outlined in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988),¹ and she also submitted relevant country conditions information concerning Guatemala.

"Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented

¹ The respondent presented her representation agreement with her former counsel, a letter to her former counsel outlining her ineffective assistance claim, and her complaint to the State Bar alleging deficient performance by her former counsel. She also submitted a response from the State Bar to her complaint, which is mostly in Spanish, but does state in English that "further investigation is not warranted at this time and our file has been closed."

from reasonably presenting his case.” *Ortiz v. INS*, 179 F.3d 1148, 1154 (9th Cir. 1999) (internal quotation marks omitted). “A claim of ineffective assistance of counsel requires a showing of inadequate performance and prejudice.” *Martinez-Hernandez v. Holder*, 778 F.3d 1086, 1088 (9th Cir. 2015). Moreover, where an attorney’s incompetence prevents the alien from presenting her case altogether, the proceedings are subject to a “presumption of prejudice,” and the alien will be found to have been denied due process if she can demonstrate “plausible grounds for relief” on her underlying claim. *Santiago-Rodriguez v. Holder*, 657 F.3d at 835.

The respondent outlined in her appeal brief the deficiencies in her former counsel’s representation. Although the respondent retained her attorney in April 2013, a month after her entry into the United States, the attorney did not file an asylum application on the respondent’s behalf until May 2, 2014, more than one year after her entry. At the hearing on November 12, 2014, the respondent’s counsel indicated that he needed more time to prepare because he intended to submit a substantial amount of corroborating documents from Guatemala (Tr. at 6). The case was continued until March 2, 2017, for the merits hearing, and consideration of any argument that the one-year filing deadline for asylum should be excused (Tr. at 7-8).

On February 28, 2017, two days before the merits hearing, counsel filed a motion to continue, stating that the respondent was “still in the process of receiving documents and evidence from Guatemala.” At the hearing on March 2, 2018, counsel apologized to the court, took responsibility for the case not being ready, confirmed that no supporting documents had been submitted, admitted that he had not done “everything [he was] supposed to do,” and indicated that the case “kind of fell off the calendar” (Tr. at 13-15). Given that the merits hearing had been scheduled for more than two years, the Immigration Judge denied the motion to continue (Tr. at 15-17).

We conclude that the respondent established ineffective assistance by her former counsel. The respondent’s attorney did not timely file an application for asylum, which precluded all consideration of this form of relief from removal. Although counsel indicated that significant documentation from Guatemala would be presented, no supporting documentation was submitted. In her complaint to the State Bar, the respondent stated that her former attorney did not ask for documentation until three days before the merits hearing. Counsel admitted to the court that he was at fault in failing to properly prepare the case for presentation at the merits hearing.

We also conclude that the respondent presented plausible grounds for relief to support a remand. While the Immigration Judge denied withholding of removal, as noted above, no supporting documentation was presented, and only a “barebones” application was submitted (Tr. at 8). The respondent also asserted that her attorney did not prepare her for the hearing. Moreover, the standards for asylum and withholding of removal are different. The respondent alleges that she was threatened in Guatemala and that a close family member was killed based on a protected ground enumerated in the Act. We conclude that the respondent should be afforded an opportunity present her claim for asylum with proper documentation and preparation.

Accordingly, the record will be remanded for further proceedings.

ORDER: The record is remanded for further proceedings consistent with the foregoing decision.

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke.

FOR THE BOARD