U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: C[redacted]-O[redacted], L[redacted]

A [redacted]-443

Date of this notice: 2/13/2018

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:
Malphrus, Garry D.
Creppy, Michael J.
Liebowitz, Ellen C

Userteam: Docket

File: [redacted] 443 – Los Angeles, CA Date: FEB 13 2018

In re: L[redacted] C[redacted]-O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mackenzie W. Mackins, Esquire

APPLICATION: Reopening

The respondent appeals from the Immigration Judge's decision dated February 2, 2017, denying his motion to reopen. The Department of Homeland Security has not filed an opposition to the appeal. The record will be remanded for the limited purpose of reissuing the Immigration Judge's decision dated November 17, 2014.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On November 17, 2014, the Immigration Judge denied the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture. On December 19, 2016, the respondent filed a motion to reopen, asserting that ineffective assistance of counsel prevented him from appealing the Immigration Judge's decision to the Board. On February 2, 2017, the Immigration Judge issued the decision currently under review, denying the respondent's motion after concluding that although the respondent substantially complied with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), he did not establish the requisite prejudice (IJ at 2-3).

The Immigration Judge did properly recognize that an attorney's failure to file an appeal with the Board may constitute ineffective assistance of counsel (IJ at 2). *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826-27 (9th Cir. 2003); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000). However, the Immigration Judge erred in concluding that the respondent failed to establish prejudice because he did not present any "plausible ground for relief," and the respondent's current claim "is the same claim that was adjudicated and denied by this Court" (IJ at 2).

While the Immigration Judge may have already denied the respondent's claims for asylum, withholding of removal, and protection under the Convention Against Torture (IJ at 2), respondent's former counsel conceded that he rendered ineffective assistance by failing to file the respondent's appeal with the Board, despite a partial payment by the respondent and verbal assurances that the appeal had been filed by one of former counsel's employees (IJ at 2; Respondent's Motion, at Tabs B-C). As former counsel's ineffective assistance deprived the respondent of the appellate process entirely, the respondent has established a "presumption of

prejudice," which has not been rebutted. *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921-22 (9th Cir. 2015); *see also Roe v. Flores–Ortega*, 528 U.S. 470, 483 (2000); *Dearinger v. Reno*, 232 F.3d at 1045 (applying presumption of prejudice because when "an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely").

Therefore, upon our de novo review, we conclude that it is necessary to remand this case to the Immigration Judge for the limited purpose of reissuing her decision dated November 17, 2014, which will provide the respondent with the opportunity to appeal such decision. 8 C.F.R. § 1003.1(d)(3)(ii); *see also Dearinger v. Reno*, 232 F.3d at 1045; *United States v. Jimenez–Marmolejo,* 104 F.3d 1083, 1086 (9th Cir.1996); *see also, e.g., Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) (regarding limited scope of a Board's remand); *Matter of M-D-*, 24 I&N Dec. 138 (BIA 2007) (an Immigration Judge who reacquires jurisdiction over proceedings on remand may consider additional evidence regarding new or previously considered relief only if it meets the requirements for reopening of the proceedings); *Fernandes v. Holder*, 619 F.3d 1069 (9th Cir. 2010).

Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's decision dated February 2, 2017, is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD