U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

[redacted]

DHS/ICE Office of Chief Counsel - HLG
1717 Zoy Street
Harlingen, TX 78552

Name: EZEQUIEL-CRUZ, JORGE

A 202-132-224

Date of this notice: 7/19/2017

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Mann, Ana
Kelly, Edward F.

Userteam: Docket

File: A202 132 224 – Harlingen, TX

Date: JUL 19 2017

In re: JORGE EZEQUIEL-CRUZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Daniel J. Wright
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Guatemala, was ordered removed in absentia on August 18, 2015. He appeals the Immigration Judge's June 13, 2016, decision denying his motion to reopen the proceedings. We review findings of fact by the Immigration Judge for clear error, while all other issues, including discretion and judgment, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(i)-(ii). The record will be remanded.

An in absentia removal order may be rescinded upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances, as defined in section 240(e)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(e)(1). *See* section 240(b)(5)(C) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii); *see also Matter of Guzman*, 22 I&N Dec. 722, 722-23 (BIA 1999). The term "'exceptional circumstances' refers to exceptional circumstances (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) beyond the control of the alien." Section 240(e)(1) of the Act.

The respondent filed an untimely motion to reopen his in absentia removal order, claiming that his failure to appear at his August 18, 2015, hearing was the result of the ineffective assistance of his prior counsel. *See Rodriguez-Manzano v. Holder*, 666 F.3d 948, 953 (5th Cir. 2012) (holding that ineffective assistance of counsel may qualify as an exceptional circumstance justifying reopening under section 240(b)(5)(C) of the Act). The Immigration Judge concluded that the respondent complied with the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), and that the deadline for filing the motion to reopen should be equitably tolled (I.J. at 2). *See Lugo-Resendez v. Lynch*, 831 F.3d 337, 343-44 (5th Cir. 2016). He denied the motion, however, based on a finding that the respondent did not establish he was prejudiced by his former attorney's actions (I.J. at 2).

The United States Court of Appeals for the Fifth Circuit has stated that a showing of prejudice is not required for ineffective assistance of counsel to constitute exceptional circumstances to rescind an in absentia order of removal. *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 803 n.6 (5th Cir. 2007) (citing *Matter of Grijalva*, 21 I&N Dec. 472, 473 n.2

(BIA 1996)). The relevant issue is whether the respondent's nonappearance at his hearing was because of ineffective assistance by his former attorney, which would constitute exceptional circumstances. *See Rodriguez-Manzano v. Holder*, *supra*, at 953; *see also* section 240(b)(5)(C) of the Act. Contrary to the Immigration Judge's decision, the respondent need not show that he is prima facie eligible for any separate relief from removal in order for his proceedings to be reopened and his in absentia removal order rescinded. *See* section 240(b)(5)(C) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

Based on the foregoing, we remand proceedings to the Immigration Judge for the entry of a new decision. On remand, the Immigration Judge should determine whether the respondent has demonstrated that his former attorney's actions constitute ineffective assistance of counsel and whether the respondent's nonappearance at the hearing was the result of that ineffective assistance. *See Matter of Grijalva*, *supra*, at 473-74 (holding that reasonable reliance on the erroneous advice of counsel may constitute an exceptional circumstance excusing an alien's nonappearance at a hearing). Accordingly, the following order will be entered.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2009 W. JEFFERSON AVE, STE 300
HARLINGEN, TX 78550

EZEQUIEL-CRUZ, JORGE
6643 BEVIS AVE
VAN NUYS, CA 91405

IN THE MATTER OF
EZEQUIEL-CRUZ, JORGE

FILE A 202-132-224 DATE: Jun 14 2016

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

✓ 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
2009 W. JEFFERSON AVE, STE 300
HARLINGEN, TX 78550

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: ASSISTANT CHIEF COUNSEL
1717 ZOY ST.
HARLINGEN, TX, 785520000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
HARLINGEN IMMIGRATION COURT
HARLINGEN, TEXAS

IN THE MATTER OF	)	June 13, 2016
	)	
EZEQUIEL-CRUZ, JORGE	)	Case Number: A 202-132-224
	)	
	)	
RESPONDENT	)	In Removal Proceedings

APPLICATIONS: Motion to Reopen

ON BEHALF OF THE RESPONDENT
Pro Se

ON BEHALF OF THE GOVERNMENT
Daniel Gilbert, Assistant Chief Counsel
U.S. Department of Homeland Security
1717 Zoy Street
Harlingen, TX 78552

ORDER OF THE IMMIGRATION JUDGE

On August 18, 2015, the Court ordered the respondent removed to Guatemala *in absentia* pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act (INA or Act). On May 31, 2016 the respondent filed a motion to reopen. The Department of Homeland Security (DHS) filed a timely response in opposition to the motion to reopen. The respondent's motion to reopen will be denied.

The motion to reopen does not dispute that the respondent received notice of his August 18, 2015 removal hearing in Harlingen, Texas. Rather, the motion contends that the respondent failed to attend his hearing because of exceptional circumstances. Specifically, that the respondent relied on the advice of Frank Carvajal, an attorney who told the respondent he would change the venue for his removal proceeding, and represent him in his removal proceeding. Evidence of representation was submitted with the motion to reopen. The following is a summary of the respondent statement. The respondent first went to the Mr. Carvajal's office in December, 2014. He met with Mr. Carvajal on two more occasions. During those visits the respondent and Mr. Carvajal discussed changing the venue of this proceeding from Harlingen, Texas to Los Angeles, California. The respondent asserts that he paid Mr. Carvajal $400 to prepare the motion to change venue. The respondent's stepfather went to Mr. Carvajal office on August 15, 2015. At that time the respondent was aware that he had a removal hearing on August 18, 2015. The respondent's stepfather was given two envelopes which he was told he should mail to the Immigration Court in Harlingen, Texas.[1] Evidence of disciplinary

[1] The record reflects that the Court received a change of address form and a motion to change venue on August 19, 2015, the day after the respondent was ordered removed *in absentia*.

proceedings against Ms. Vargas was also submitted with the motion.

Ineffective assistance of counsel may qualify as an exceptional circumstance justifying reopening under section 240(b)(5)(c)(i) of the Act. *See Rodriguez-Manzano v. Holder*, 666 F.3d 948, 953 (5th Cir. 2012) (recognizing that ineffective assistance of counsel can constitute exceptional circumstances under section 240(e)(1) of the Act). The Court finds, however, that the motion to reopen is untimely as it was not filed within 180 days of the date of entry of the final administrative order of removal. INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). The respondent has requested that the Court equitably toll the time limitation for filing. DHS has argued in its response that the respondent is relying on case law from the United States Court of Appeals for the Ninth Circuit Court in support of his request for equitable tolling. The Court agrees and finds that the holding of the Ninth Circuit Court of Appeals in *Iturribarrie v. INS*, 321 F.3d, 889 (9th Cir. 2003) is persuasive as it relates to equitable tolling as this Court falls within the territorial jurisdiction of the United States Court of Appeals for the Fifth Circuit. *See Peters v. Ashcroft*, 383 F.3d 302, 305 at n.2 (5th Cir. 2004). DHS has further argued that a request for equitable tolling based on ineffective assistance is tantamount to a request for *sua sponte* relief citing *Ramos–Bonilla v. Mukasey,* 543 F.3d 216, 219–20 (5th Cir.2008). However, in *Mata v. Lynch*, 135 S.Ct. 2150 (2015), the Supreme Court noted that the Fifth Circuit had impermissibly interpreted a request for equitable tolling of the motions deadline as a request for *sua sponte* reopening. Therefore, contrary to DHS's assertion, a request for equitable tolling is a separate request from one that seeks *sua sponte* reopening. Accordingly, the Court will consider the respondent request for equitable tolling of the filing deadline. The Court finds that the respondent has exercised due diligence and that equitable tolling of the filing deadline is appropriate.

The respondent has complied with the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 191). *See Rodriguez-Manzano v. Holder*, *supra*. However, the respondent has not shown that he suffered "substantial prejudice" as a result of his former counsel's actions. *Guiterrez-Morales v. Homan*, 461 F.3d 605, 609 (5th Cir. 2006). To establish prejudice, a respondent must make a *prima facie* showing of eligibility for the relief sought and demonstrate that he or she could have made a strong showing in support of an application for such relief. *Anwar v. INS*, 116 F.3d 140, 144 (5th Cir. 1997*); see Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994). The respondent has stated that Mr. Carvajal was eventually going to file an application for asylum for him. The respondent has attached an Application for Asylum and for Withholding of Removal (Form I-589) to the motion to reopen. However, the I-589 is otherwise unsupported. *See* INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(3). There are no statements from the respondent or others knowledgeable about the events that occurred in Guatemala. No police reports, country reports, or evidence of drug trafficking have been submitted. Based on the documents submitted, the Court finds that the respondent has not demonstrated prima facie evidence of persecution on account of a protected ground. *See INS v. Abudu*, 485 U.S. 94, 104 (1988). Because the respondent has failed to show substantial prejudice his removal order will not be rescinded under section 240(b)(5)(C)(i) of the Act.

Finally, the Court concludes the circumstances of this case do not warrant the exercise of the Court's limited discretion to reopen *sua sponte*. *See Matter of J-J*, 21 I&N Dec. 976 (BIA 1997).

Accordingly, the following orders shall be entered:

ORDER: The respondent's motion to reopen is DENIED.

David Ayala
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: (M) ALIEN ( ) ALIEN C/O CUSTODIAN ( ) ALIEN'S ATTY/REP (P) DHS
DATE: 6-14-16 BY: COURT STAFF
ATTACHMENTS: ( ) EOIR-33 ( ) EOIR-28 ( ) LEGAL SERVICES LIST (✓) OTHER
Appeal form