U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

Aldana, Francisco Javier
The Advocates' Law Firm, LLP
600 B Street, Ste 2130
San Diego, CA 92101

DHS/ICE Office of Chief Counsel - SND
880 Front St., Room 1234
San Diego, CA 92101-8834

Name: ESTRADA GARCIA, JOSE JESUS **A087-749-680**

Date of this notice: 7/20/2012

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:
Guendelsberger, John
Hoffman, Sharon
Manuel, Elise L.

File: A087 749 680 - San Diego, CA Date: JUL 20 2012

In re: JOSE JESUS ESTRADA-GARCIA a.k.a. Jose Garcia Estrada

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Francisco Javier Aldana, Esquire

ON BEHALF OF DHS: Ted Y. Yamada
Deputy Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Mexico, was ordered removed in absentia on June 9, 2011. On June 13, 2011, the respondent filed a motion to reopen proceedings, which the Immigration Judge denied on August 15, 2011. The respondent filed a timely appeal of that decision. The appeal will be sustained, proceedings will be reopened and the record will be remanded.

The Immigration Judge denied the respondent's motion to reopen finding that he had received proper notice for his June 9, 2011, hearing. We have held that ineffective assistance of counsel can constitute an "exceptional circumstance" for purposes of rescission of an in absentia order where the alien establishes that the failure to appear was the result of ineffective assistance of counsel and where the criteria set forth in *Matter of Lozada* 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), are satisfied.

Upon review, we find that in view of the above and in light of the totality of circumstances presented in this case, including evidence reflecting that the respondent's counsel conceded that he provided ineffective assistance by failing to appear at the June 9, 2011, hearing, we will allow the respondent another opportunity to appear for a hearing.

ORDER: The appeal is sustained, proceedings are reopened and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
401 WEST A STREET, SUITE #800
SAN DIEGO, CA 92101

ALDANA, FRANCISCO J., ESQ.
600 "B" STREET SUITE 2130
SAN DIEGO, CA 92101

Date: Aug 15, 2011

File A087-749-680

In the Matter of:
ESTRADA GARCIA, JOSE JESUS

✓ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before 9/14/11. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

_____ Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

Immigration Court Clerk UL

cc: GRANT, JONATHAN, ASSISTANT CHIEF COUNSEL
880 FRONT STREET, ROOM #2246
SAN DIEGO, CA 921010000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
401 West A Street, Suite 800
San Diego, California 92101

File No.: A087 749 680	Date: August 15, 2011
In the Matter of	
	IN REMOVAL PROCEEDINGS
Jose Jesus ESTRADA GARCIA, a.k.a. Jose Garcia ESTRADA,	
Respondent	

ON BEHALF OF RESPONDENT:	**ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:**
Francisco J. Aldana, Esquire 600 B Street, Suite 2130 San Diego, California 92101	Ted Y. Yamada, Esquire 880 Front Street, Suite 2246 San Diego, California 92101

CHARGE: Section 212(a)(6)(A)(I) of the Immigration and Nationality Act, (Present Without Being Admitted or Paroled).

APPLICATIONS: Motion to Reopen and Rescind *In Absentia* Order of Removal; Motion to Terminate.

DECISION AND ORDER OF THE IMMIGRATION JUDGE

On March 30, 2010, the Department of Homeland Security ("DHS") served the respondent with a Notice to Appear ("NTA") (Form I-862) (Exh. 1), charging him with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act"). The DHS alleged that the respondent is a native and citizen of Mexico who arrived in the United States at or near Tecate, California, on or about April 29, 2006, and was not then admitted or paroled after inspection by an immigration officer. On April 5, 2010, the DHS filed the NTA with the San Diego Immigration Court, thereby vesting it with jurisdiction over the proceedings. *See* 8 C.F.R. § 1003.14(a) (2010).

At a master calendar hearing on August 31, 2010, the respondent, through counsel, admitted factual allegations number one and two, and denied factual allegations number three and four pertaining to the time, place, and manner of his entry into the United States. (Exh. 4.) The respondent contested removability, but also indicated that he would seek relief in the form of cancellation of removal for certain nonpermanent residents, adjustment of status, termination under the Morton and Howard Memos or, alternatively, post-conclusion voluntary departure. *Id.* The respondent named Mexico as his country of choice for removal purposes and stated that he has no fear of returning to Mexico. *Id.* The DHS submitted a Form I-213, Record of Deportable/Inadmissible Alien (Exh. 5) and an Apprehension History (Exh. 6). The Court then

ordered the respondent to file his motion to terminate and written objections to the documents submitted by the DHS by March 3, 2011. *Id.*

At the next master calendar hearing on March 3, 2011, the respondent again appeared before the Court with his counsel of record. No motion to terminate or written objections to the DHS's evidence had been filed by the Court-imposed deadline of March 3, 2011. When the Court inquired as to why no motion or objections were filed, counsel for the respondent explained that he had a problem with a paralegal in his office, which caused him to overlook the March 3, 2011 filing deadline, and he asked for an extension of time to file.[1] The Court granted the respondent an extension of the filing deadline until May 26, 2011. The Court scheduled the matter for further hearing on the master calendar on May 26, 2011, at 1:00 p.m.

On May 26, 2011, the respondent still had not filed his motion to terminate or written objections to the DHS's evidence. At the master calendar hearing held that day, the Court again asked the respondent's counsel why he had not made any filings by the Court-imposed deadline. Counsel responded that he was not sure why nothing had been filed, but that he was involved in an auto accident the day before the hearing and was on pain medication. Giving counsel and the respondent the benefit of the doubt, the Court then once again extended the filing deadline and rescheduled the matter to the master calendar hearing on June 9, 2011 at 1:00 p.m.

On June 9, 2011, neither the respondent nor the attorney were present at the hearing. There being no explanation for the absence of respondent and his counsel, the DHS moved to proceed *in absentia*. Pursuant to section 240(b)(5)(A) of the Act, the Court granted the DHS's motion and conducted an *in absentia* hearing, concluding that the DHS had demonstrated through clear and convincing evidence that the respondent received proper notice and was removable based on the charge contained in the NTA. The Court deemed all relief abandoned and ordered the respondent removed to Mexico. *See* INA § 240(b)(5)(A).

On June 13, 2011, the respondent filed a motion to reopen and rescind the *in absentia* order of removal. He argued that his failure to appear was due to the ineffective assistance of his counsel. He further argued that on June 9, 2011, he waited in his attorney's office for the attorney to arrive, but the attorney arrived late and by the time they came to Court, the respondent's hearing had ended. (Resp't Mot. To Reopen, 1-2.) The respondent also explained that his attorney had arrived late at his office because he was resting at home due to ongoing treatment after an auto accident that he was involved in on May 24, 2011. *Id.* at 1. The respondent also argued that he thought the hearing was scheduled for 3:00 p.m., and that he relied on his attorney to tell him when to go to Court. *Id.* at 2-3. Attached to the motion to reopen, the respondent filed a personal declaration and a declaration from his attorney admitting that he arrived late at his office where the respondent was waiting for him, that no one in his office told the respondent to go to Court without him, and that by the time he arrived at the Court with the respondent, the respondent had been ordered removed *in absentia*. *Id.*

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[1] Since no appeal was filed in this case, no transcript has been produced; however, this information is gleaned from the record of proceedings and from listening to the audio recording of the hearings.

at 8.

Also on June 13, 2011, the respondent filed a motion to terminate. In the motion, the respondent argued that the removal proceedings should be terminated under the Morton and Howard Memos because he is the subject of an approved Petition for Alien Relative, Form I-130, filed by his United States citizen wife. (Resp't Mot. to Terminate, 1-3.) He also objected to exhibits number five and six submitted by the DHS on the basis that they contain hearsay, lack foundation, and lack authentication. *Id.* at 2.

On June 20, 2011, the DHS filed its opposition to the respondent's motion to reopen and motion to terminate. In its opposition to the motion to reopen, the DHS argued that the respondent had notice of his hearing, that his failure to appear was not due to exceptional circumstances, and that he failed to comply with the requirements for an ineffective assistance of counsel claim under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). (DHS's Opp. to Resp't Mot. to Reopen, 1.) In the DHS's opposition to the respondent's motion to terminate for adjustment of status, the DHS argued that the respondent is not eligible to adjust his status under section 245(I) of the Act. (DHS's Opp. to Resp't Mot. to Terminate, 1.)

After careful review of the record of proceedings, the Court will deny the respondent's motion to reopen and will deny the respondent's motion to terminate as moot. An *in absentia* order may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal if the respondent demonstrates that he failed to appear because of exceptional circumstances beyond his control, or at any time if the respondent demonstrates that he did not receive notice, or if the respondent demonstrates that he was in federal or state custody and the failure to appear was through no fault of the respondent. 8 C.F.R. § 1003.23(b)(4)(ii) (2011). Under *Matter of Lozada*, respondents alleging ineffective assistance of counsel must: "(1) provide an affidavit describing in detail the agreement with counsel; (2) inform counsel of the allegations and afford counsel an opportunity to respond; and (3) report whether a complaint of ethical or legal violations has been filed, and if not, why." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071-72 (9th Cir. 2003).

First, the Court finds that the respondent received proper notice of his June 9, 2011 hearing. At the May 26, 2011 hearing, the respondent was present and heard the Immigration Judge schedule the next master calendar hearing for June 9, 2011, at 1:00 p.m.[2] Furthermore, the respondent received proper notice of his June 9, 2011 hearing when the Notice of Hearing, which warned of the consequences of failing to appear, was personally served on the respondent's attorney. (Exh. 12.) Although the respondent argued in his motion to reopen that he thought the hearing was scheduled for 3:00 p.m., the Court does not find it reasonable for the respondent to think the hearing was at 3:00 p.m. when he personally heard the Immigration Judge set it for 1:00 p.m. and he received proper notice of the hearing scheduled for 1:00 p.m.

Second, the Court finds that the respondent did not merely arrive late to his June 9, 2011

[2] *See supra,* note 1.

hearing, but failed to appear. A review of the audio recording of the June 9, 2011 hearing scheduled for 1:00 p.m. shows that the respondent's case was the Court's final matter on the docket. The respondent's hearing began at 2:22 p.m. and concluded at 2:30 p.m. with an *in absentia* ordered entered against the respondent. At 2:30 p.m., the Court went off the record and both the DHS's counsel and the Immigration Judge departed from the courtroom.[3] Although the respondent argued in his motion to reopen that he merely arrived late to his hearing, a review of the audio recording clearly demonstrates that he did not arrive at the Court before the Immigration Judge left the bench; therefore, he failed to appear for his hearing. *See Perez v. Mukasey*, 516 F.3d 770, 774 (9th Cir. 2008).

Third, the Court finds that the respondent has not complied with the requirements for a claim of ineffective assistance of counsel, as articulated in *Matter of Lozada*,19 I&N Dec. 637 (BIA 1988). The respondent failed to submit an affidavit describing his agreement with Counsel and failed to report whether a complaint of ethical or legal violations was filed with the appropriate disciplinary authority. Although the Ninth Circuit has held that the *Lozada* requirements are not sacrosanct (*Castillo-Perez v. I.N.S.*, 212 F.3d 518, 525 (9th Cir. 2000)), the Court finds that, in this case, the record of proceedings demonstrates that a complaint against the respondent's counsel should be filed with the appropriate disciplinary authority. The Court is very troubled by the fact that over the course of three hearings in a row, Counsel failed to comply with Court-imposed filing deadlines and thrice admitted that he failed to give proper attention to the respondent's case.

Furthermore, even if the *Lozada* requirements were met, the Court finds that the respondent has not sufficiently established that he was the victim of ineffective assistance of counsel and that his removal proceedings were so fundamentally unfair that he was prevented from reasonably presenting his case. *See Ortiz v. I.N.S.*, 179 F.3d 1148, 1153 (9th Cir. 1999). The respondent received proper notice of the June 9, 2011 hearing, he was himself present in Court when the Immigration Judge set the hearing for June 9, 2011, at 1:00 p.m., and it was not reasonable for him to wait in the attorney's office instead of attending the hearing by himself when he knew of the consequences of failing to appear. Accordingly, the following orders will be entered:

ORDERS

IT IS ORDERED that the respondent's motion to reopen is hereby **denied.**

IT IS FURTHER ORDERED that the respondent's motion to terminate is **denied** as moot.

RICO A. BARTOLOMEI
Immigration Judge

cc: Mr. Aldana for the Respondent.
Mr. Yamada for the DHS.

[3] *See supra*, note 1.