U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: RIVERA-FLORES, MARIO

A 094-451-158

Date of this notice: 8/8/2016

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:
Pauley, Roger

Userteam: Docket

File: A094 451 158 – San Diego, CA

Date: AUG - 8 2016

In re: MARIO RIVERA-FLORES

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Mariela E. Camisassa, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Reopening

This case was last before the Board on January 12, 2015, when we remanded the record to the Immigration Judge for further proceedings. On June 9, 2015, the Immigration Judge issued a written decision and returned the matter of the Board by certification. *See* 8 C.F.R. § 1003.7.

Upon sua sponte reconsideration, we will vacate our October 22, 2012, decision, which dismissed the respondent's appeal from the Immigration Judge's April 30, 2010, decision denying his motion to reopen and rescind his in absentia order of removal entered on March 17, 2010. *See* 8 C.F.R. § 1003.2(a); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (noting that the Board "retains limited discretionary powers under the regulations to reopen or reconsider cases on our own motion."). Given the totality of the circumstances, we now find it appropriate to sustain the respondent's appeal, grant the motion to reopen and rescind the in absentia order, and remand this matter for further proceedings. On remand, the respondent shall have the opportunity to apply for relief.

Additionally, the Immigration Judge denied the respondent's earlier motions to change venue, at least one of which was unopposed by the Department of Homeland Security, and deemed the motion to change venue filed on February 26, 2015, as "held in abeyance" pending the Board's decision upon certification (I.J. at 6; April 30, 2010, I.J. at 2-3). The decision to grant an alien's request to change venue is a matter of discretion and is subject to demonstration of good cause, which is determined by balancing relevant factors. *See* 8 C.F.R. § 1003.20(b); *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992) (setting forth factors to determine whether good cause exists for a change of venue); *Matter of Rivera*, 19 I&N Dec. 688 (BIA 1988). The respondent's request for a change of venue, which was supported by evidence of his address in Los Angeles, California, will be granted.

Accordingly, the following orders will be entered.

ORDER: The Board's October 22, 2012, decision is vacated, and the respondent's appeal is sustained.

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

FURTHER ORDER: Venue is changed from San Diego, California, to Los Angeles, California.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN DIEGO, CALIFORNIA

FILE NO.: 094-451-158

IN THE MATTER OF:	)	
	)	
Mario Rivera Flores	)	
	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF DHS:
Mariela E. Camisassa, Attorney at Law[1]	Ted Y. Yamada Deputy Chief Counsel
	Rhana Ishimoto Assistant Chief Counsel

DECISION AND ORDER OF THE IMMIGRATION JUDGE

On April 30, 2010, the Immigration Court denied the respondent's motion to reopen the *in absentia* order of removal dated March 17, 2010. The respondent appealed, and on May 9, 2011, the Board of Immigration Appeals ("Board") dismissed the appeal. Apparently sensing something was missing, the parties filed a joint motion to reopen on April 27, 2012, asking the Board to consider the respondent's brief and to clarify what evidence the Board considered in dismissing the respondent's appeal. On May 24, 2012, the Board granted the joint motion recognizing that the respondent's appellate brief had not been considered. The brief, as it turns out, also included additional evidence and a motion to reopen, which the Board then treated as a motion to remand. On October 22, 2012, the Board issued a new decision dismissing the respondent's appeal. The Board also found that the respondent did not satisfy the requirements for a motion to remand. The respondent then filed a petition for review with the Court of Appeals for the Ninth Circuit.

In preparing for the petition for review before the Circuit Court, the government representative from the Office of Immigration Litigation ("OIL") found it necessary to move the Circuit Court to send the case back to the Board to give the Board another chance to clarify language in the Board's October 22, 2012, order that was apparently troublesome to the OIL representative. The

[1] Counsel's post-remand Form EOIR-28 *Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court* was filed with the Court February 26, 2015. See *Immigration Court Practice Manual* 2.1(b)(i).

confusion for OIL arises from the fact that the Board references two different time frames when discussing the respondent's burden of presenting evidence that was previously unavailable.

In its October 22, 2012, order the Board cited the legal standard in *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) to confirm that a motion to reopen or remand must be based on a proffer of material evidence that was unavailable and could not have been discovered or presented at the former *hearing*. In addition, the Board commented that the respondent was attempting to proffer evidence to the Board without showing that such evidence could not have been presented before the Immigration Judge issued his *decision on the respondent's motion.* Board Dec. dated Oct 22, 2012, p.2 (emphasis added).

The request in the motion for remand from OIL is for the Board to clarify its reference to these two different time frames in the context of the unavailability of evidence. In the words of the OIL remand to the Circuit Court, OIL "respectfully moves this Court to remand these proceedings to the Board of Immigration Appeals ("Board") to permit the Board to reconsider its October 22, 2012 decision denying Petitioner Mario Rivera-Flores' motion to reopen, in light of the record evidence, the precedent decision in Matter of Coelho, 20 I&N Dec. 464, 471 (BIA 1992), and 8 C.F.R. § 1003.23(b)(3), which make the date of the alien's prior *hearing* the relevant date for determining the unavailability of evidence rather than the date of the Immigration Judge's *decision on the motion to reopen.*" OIL Motion for Remand, p.1 (emphasis added). In an order dated December 30, 2013, the Circuit Court returned the case to the Board pursuant to the OIL representative's request.

On remand, the Board issued a decision on January 12, 2015. Unfortunately, there is nothing in the Board's January 12, 2015, decision addressing the request for legal clarification of the Board's prior order as indicated in the OIL motion for remand. Rather, the Board's order simply refers to "under the circumstances and in view of our limited fact-finding ability," and remands to the Court.

It appears to this Court that the OIL representative is asking the Court to direct the Board to clarify the Board's language on a general legal question, while the Board appears to be asking the Court to answer OIL and the Circuit Court on the Board's behalf, and the Board is also asking the Court to decide the respondent's motion to reopen previously filed with the Board. It is not clear why the Board is asking this Court to explain the Board's language to OIL and the Circuit Court, or even whether this Court has the legal authority to step into the shoes of the Board to clarify the Board's order on the Board's behalf. It is also not clear why the Board would ask the Court to decide the motion to reopen filed with the Board, and which the Board itself previously addressed, or even whether this Court has the jurisdiction to perform this role for the Board. As such, and even though the Court already has a full docket of trial level cases, the Court will attempt to assist, and will address these matters, but will do so in the form of a recommendation to the Board.

First, it would seem that the Board can readily clarify the legal question posed by OIL. The Board is correct in emphasizing that both the date of the hearing and the date of the motion are critical under the current regulations. It is well-settled that a motion to reopen before the Immigration Judge will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former *hearing*. 8 C.F.R. § 1003.23(b)(3); *see also Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (reopening requires both a showing of prima facie eligibility for relief and the proffer of material evidence that was "unavailable and could not have been discovered or presented at the former *hearing*."). But, under the current regulations, the timing of the motion to reopen is also critical. The current regulations give the respondent only one motion to reopen an *in absentia* order based on exceptional circumstances and the regulations give the respondent 180 days to file it. 8 C.F.R. § 1003.23(b)(4)(iii). Thus, when the Board stated that the respondent's assertion "does not adequately establish that such evidence could not have been presented before the Immigration Judge issued his April 30, 2010, *decision on the respondent's motion,*" the Board was highlighting the importance of the timing of the motion under the current regulations. Board Dec. dated Oct 22, 2012, p.2 (emphasis added). Put simply, even if the evidence offered in support of the motion is material and was not available and could not have been presented at the former hearing, it is still a relevant question to ask -- as indicated in the Board's October 22, 2012, decision -- why the respondent did not give the evidence to the Immigration Judge in support of the motion to reopen. The current regulations do not give the respondent the option of filing one motion to reopen an *in absentia* order based on exceptional circumstances, waiting for a decision, and then attempting to supplement the motion after the fact or to file additional motions if the outcome is not in the respondent's favor. The regulations permit one motion based on exceptional circumstances and 180 days to file it. After all, the purpose behind the regulations imposing the time and numerical limitations with respect to motions to reopen was to give an applicant a meaningful opportunity to come forward with new information, but also to avoid piecemeal litigation and reasonably bring proceedings to a close. As such, if the respondent in this case was still collecting evidence to support his motion, the regulations anticipate that he use the 180 days provided to first collect the evidence he needed and then and file his one and best motion. The Court would therefore recommend that the Board confirm, as it found in the October 22, 2012, decision that both the date of the hearing and the date of the motion are important for the reasons noted above.

Second, it does not appear that the OIL request for remand or the Circuit Court order granting the remand to the Board require anything further than the general legal clarification noted above. While the request for remand leaves open the option for the Board to "take whatever other steps are appropriate," the request for remand and order does not require the Board to revisit the substantive decision it already made on the respondent's appeal and motion to reopen. The recommendation of the Court to the Board is that the Board has the option to reinstate its decision of October 22, 2012, as amended by the explanation offered above, with no further issues being addressed.

Third, in the event that the Board wishes to go beyond the clarification requested by OIL and revisit the motion to reopen that the respondent filed with the Board, and is asking this Court to assist in deciding that motion, the recommendation of the Court would have to be that the respondent's motion to the Board to consider new evidence should have been dismissed in the 2012 decision and must now be dismissed as a numerically barred second motion to reopen. The record reflects that respondent failed to appear on March 17, 2010. He filed his motion to reopen based on exceptional circumstances on April 12, 2010. The motion was denied. The respondent appealed the denial of the motion to the Board. The Board dismissed the appeal. The current remand does not revisit the issue of appeal – in other words the Board order of January 12, 2015, does not remand on the grounds that the Immigration Judge reached the wrong conclusion based on the evidence before the Judge at the time of the April 30, 2012, decision. Rather, the remand refers to consideration of the evidence submitted by the respondent to the Board for the first time on appeal in support of a motion to reopen and rescind an *in absentia* order. Under the regulations, the respondent's submission of new evidence to the Board in support of a motion to reopen and rescind the *in absentia* order is an attempt to file a second motion to reopen which is not permitted under the regulations. The regulations permit the respondent to file one motion based on exceptional circumstances which he did on April 12, 2010. His attempt to file another motion with the Board is not permitted under the regulations.

As noted by the Board in its October 22, 2012, decision, the record "does not adequately establish that such evidence could not have been presented before the Immigration Judge issued his April 30, 2010, *decision on the respondent's motion.*" Again, the respondent is only allowed one motion to reopen based on exceptional circumstances under the regulations, and he is provided 180 days to file it. If the respondent was still collecting evidence, the regulations anticipate that he first collect that evidence and then file it in support of his one motion to reopen within the 180 days provided.[2] The recommendation of the Court to the Board, if the Board

[2] This is not a case where a remand is necessary to decide the *appeal* under 8 C.F.R. § 1003.1(d)(3)(iv). There is no question regarding what evidence had been presented to the Court at the time of the motion. In some cases a party may need to ask for a remand because the Board cannot properly resolve the appeal unless further fact finding is conducted to determine what was before the Court at the time of the Court's decision. For example, it may be unclear what facts were before the Immigration Court when the decision was made. Or perhaps there was a factual dispute presented to the Court that was essential for a proper decision and the record reflects that the finding was not made. This is the situation contemplated by the regulations at 8 C.F.R. § 1003.1(d)(3)(iv) ("A party asserting that the Board cannot properly resolve an *appeal* without further fact-finding must file a motion for remand." Emphasis added). But this is clearly not what the respondent in this case was requesting notwithstanding the Board's citation to 8 C.F.R. § 1003.1(d)(3)(iv) in its one paragraph decision dated January 12, 2015. Rather, the respondent was asking that the Board: 1) reverse the Immigration Court's March 17, 2010, decision based on the record before the Court at the time; or 2) remand based on evidence admittedly not presented to the Immigration Court. In other words, neither party disputed what had been presented to the Court for purposes of the motion to reopen before the Court, nor did either party claim an element essential to deciding the motion before the Court based on the evidence that had been presented had been overlooked. The respondent was simply arguing on appeal that the Court reached the wrong conclusion based on the evidence that had been presented to the Court (an appeal under 8 C.F.R. § 1003.1(b)(3)), or in the alternative, that the Board look at the evidence that the respondent was presenting to the Board, that had not been presented to the Court,

wishes to revisit the motion and if the law is to be followed, is that the Board dismiss the respondent's motion to reopen as numerically barred.

Fourth, the filing of new evidence in support of a numerically barred second motion is to be distinguished from a claim of ineffective assistance of counsel with respect to the first motion. As recognized by the Board, this theme was also mixed in with the respondent's submission to the Board. With the evolution of caselaw regarding tolling, it appears that the respondent, recognizing that he only gets one motion based on exceptional circumstances and 180 days to file it, can argue that his counsel was ineffective when he filed the respondent's one motion to reopen just 26 days after the *in absentia* order, instead of waiting for the remainder of the respondent's evidence and then filing his one and best motion still within the 180 days. This would not be an attempt at a second, numerically barred motion to reopen, but rather an attempt to explain that, based on ineffective assistance of counsel, the respondent was deprived of a meaningful first and only motion to reopen before the Immigration Judge as provided by the regulations. For example, in this case, there is no reason offered to the Board as to why the respondent's motion to the Immigration Judge was not supported by an affidavit from or declaration from the respondent describing his failure to appear. In addition, the respondent contends to the Board that he requested his medical records, and he was told it would take two weeks. There is no reason offered to the Board why the respondent through counsel did not wait the two weeks, properly support his motion, and then file it with the Court. Nothing prohibits a respondent through counsel, while he is collecting his evidence, and to allay any concern that he is not acting with due diligence, from notifying the Court and Government counsel of his intention to file a motion to reopen based on exceptional circumstances within the 180 days provided once he has collected all the evidence he believes he needs. However, while the respondent expressed to the Board his disappointment in counsel's performance, and the Board recognized the respondent's concern, for the reasons articulated by the Board in its October 22, 2012, decision, the Board appropriately found that the respondent's supplement did not amount to a proper claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and this is not a case of clear ineffectiveness.[3]

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and asking for the Board to make a call as to whether this evidence met the standard for motion to reopen / remand under 8 C.F.R. § 1003.2(c). But this alternative request was an attempt at a second motion to reopen which is barred by the regulations. 8 C.F.R. § 1003.2(c)(4) presumes that the alien's one motion to reopen has not already been used. The Board's citation to *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995) also seems inapposite. *Matter of Grijalva* was decided before the regulations instituting the time and numerical limitations regarding motions. The current regulations underscore that where a respondent files a motion to reopen and to rescind an *in absentia* order the evidence necessary to support such a motion must be presented to the Immigration Judge because there is only one such motion and 180 days to file that motion. *See Matter of Grijalva, supra*, at 37 (noting also the *absence* of implementing regulations as a reason to remand).

[3] The Boards' general reference in its January 12, 2015, order to its "limited fact-finding ability" is puzzling in this context. As the respondent did not properly submit a *Lozada* motion, there was no additional fact-finding to be done. On the other hand, had the respondent properly filed *a Lozada* motion with the Board, weighing the

Fifth, it may be that the Board wishes to exercise its *sua sponte* reopening authority in the respondent's case, but the Court cannot exercise the Board's discretion for it. The Board has instructed that *sua sponte* authority to reopen is to be used sparingly, treating it not as a general remedy for hardships created by application of the statutory and regulatory scheme, but as an extraordinary remedy reserved for truly exceptional situations. *See* 8 C.F.R. § 1003.23(b)(1); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). However, if the Board determines that this is an appropriate case for its favorable exercise *sua sponte* authority, the Board can articulate its basis consistent with *Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999).

Therefore, in the event the Board deems it necessary to go beyond item number two above, the Court would alternatively recommend to the Board that the Board vacate any continuing viability of the Board's May 9, 2011, decision -- an order which clearly had evidentiary issues -- and to reinstate the October 22, 2012, order and decision of the Board, as modified by the above recommendations to the extent adopted by the Board, including any finding with respect to the exercise of *sua sponte* authority, in order to answer the concerns of the OIL representative and the Circuit Court in its remand to the Board, as well as the concerns of the Board in its request for assistance in its remand to the Court.

Finally, any current claim the respondent may have regarding prosecutorial discretion, Deferred Action for Childhood Arrivals, Deferred Action for Parental Accountability, or any other collateral relief before the DHS may be made directly to the Board. While the respondent filed a motion to change venue on February 26, 2015, the motion is deemed held in abeyance pending the Board's consideration of this recommendation and issuance of the Board's order on remand from the Circuit Court. As this order is legally relegated to the form of a recommendation at the request of the Board in response to the Circuit Court's request for the Board to clarify its own order, the Court will certify to the Board for consideration without the need for additional fee from the respondent.

ORDER: The record is ordered certified and returned to the Board of Immigration Appeals under 8 C.F.R. §§ 1003.1(c), 1003.7.

The Court **certifies** this case to the BIA. The parties are hereby notified of the provisions of Title 8 Code of Federal Regulations, Section 1003.7, which provides as follows:

Whenever, in accordance with the provisions of § 1003.1(c), a case is certified to the Board, the alien or other party affected shall be given notice of certification. An Immigration Judge or

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evidence being offered to the Board in support of the motion based on ineffective assistance of counsel and deciding if the evidence offered meets the "heavy burden" of showing it "would likely change the result in the case" is *exactly* what Board's own precedent in *Matter of Coelho* requires it to do. The plain language of 8 C.F.R. § 1003.2(c)(1) indicates that the Board must weigh the evidence offered with respect to such a motion. To remand simply because evidence is offered on appeal invites "a sort of Zeno's Paradox in which the arrow could never reach the target." *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 n.6 (9th Cir. 2000).

Service officer may certify a case only after an initial decision has been made and before an appeal has been taken. If it is known at the time the initial decision is rendered that the case will be certified, the notice of certification shall be included in such decision and no further notice of certification shall be required. If it is not known until after the initial decision is rendered that the case will be certified, the office of the Service or the Immigration Court having administrative control over the record of proceeding shall cause a Notice of Certification to be served upon the parties. In either case, the notice shall inform the parties that the case is required to be certified to the Board and that they have the right to make representations before the Board, including the making of a request for oral argument and the submission of a brief. [If either party desires to submit a brief, it shall be submitted to the office of the Service or the Immigration Court having administrative control over the record of proceeding for transmittal to the Board within the time prescribed in § 1003.3(c). The case shall be certified and forwarded to the Board by the office of the Service or Immigration Court having administrative jurisdiction over the case upon receipt of the brief, or upon the expiration of the time within which the brief may be submitted, or upon receipt of a written waiver of the right to submit a brief.][4] The Board in its discretion may elect to accept for review or not accept for review any such certified case. If the Board declines to accept a certified case for review, the underlying decision shall become final on the date the Board declined to accept the case.

6-9-2015

Henry P. Ipema, Jr.
Immigration Judge

[4] To ensure compliance with the regulatory mandate, the Court provides verbatim the entirety of the regulation pertaining to notice of certification. The Court believes, however, that the bracketed provision has been superseded by 8 C.F.R. § 1003.3(c) and that the parties, should they wish to file a brief, should file the brief directly with the BIA.