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

Stewart, Daniel
Verdin Law Firm
900 Jackson St., #535
Dallas, TX 75202

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: ALFREDO CASTRO, LUIS

A 200-226-899

Date of this notice: 10/29/2015

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.
O'Leary, Brian M.
Grant, Edward R.

Userteam: Docket

Immigrant & Refugee Appellate Center, LLC | www.irac.net

For more unpublished BIA decisions, visit
www.irac.net/unpublished/index/

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

ALFREDO CASTRO, LUIS
A200-226-899
ROLLING PLAINS DETENTION CENTER
118 COUNTY ROAD 206
HASKELL, TX 79521

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: ALFREDO CASTRO, LUIS **A 200-226-899**

Date of this notice: 10/29/2015

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). 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 the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
O'Leary, Brian M.
Grant, Edward R.

Userteam:

Immigrant & Refugee Appellate Center, LLC | www.irac.net

File: A200 226 899 – Dallas, TX Date:

In re: LUIS ALFREDO CASTRO **OCT 29 2015**

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Daniel Stewart, Esquire

ON BEHALF OF DHS: Judson Davis
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Honduras, appeals the decision of the Immigration Judge, dated April 23, 2015, denying his motion to reopen. The Department of Homeland Security is opposed to the respondent's appeal.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

Considering the totality of the circumstances presented, we conclude that the respondent has established that his failure to appear at his removal hearing on October 25, 2012, was the result of exceptional circumstances, specifically, the ineffective assistance of his former counsel. *See* section 240(b)(5)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C)(i); *Matter of Grijalva*, 21 I&N Dec. 472 (1996); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Moreover, we conclude that the respondent has established the requisite due diligence needed to toll the applicable 180-day filing deadline governing his motion to reopen on equitable grounds. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Rashidi v. Am. President Lines*, 96 F.3d 124, 128 (5th Cir. 1996). Accordingly, the following order is entered.

ORDER: The respondent's appeal is sustained, the in absentia order of removal, entered on October 25, 2012, is rescinded, these removal proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

Immigrant & Refugee Appellate Center, LLC | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

Verdin Law Firm
Stewart, Daniel
900 Jackson St. #535
Dallas, TX 75202

IN THE MATTER OF
ALFREDO CASTRO, LUIS

FILE A 200-226-899

DATE: May 1, 2015

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

XX 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 20530

__ 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
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

XX OTHER: **COPY OF THE ORDER IS ENCLOSED.**

DPA
COURT CLERK
IMMIGRATION COURT

FF

CC: PEGGY PRICE
125 E. HWY 114, STE 500
IRVING, TX, 75062

Immigrant & Refugee Appellate Center, LLC | www.irac.net

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

IN THE MATTER OF:	)	
	)	IN REMOVAL PROCEEDINGS
ALFREDO CASTRO, Luis	)	
	)	A 200-226-899
RESPONDENT	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Motion to Reopen

ON BEHALF OF THE RESPONDENT:

Daniel Stewart, Esq.
Petty & Stewart, PLLC
P.O. Box 540665
Dallas, TX 75354

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Paul B. Hunker III, Esq.
Chief Counsel - DHS/ICE
125 E. John Carpenter Freeway, Suite 500
Irving, TX 75062

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Factual and Procedural History

The Respondent is a native and a citizen of Honduras. Exhibit 1. He arrived in the United States at an unknown place and time. *Id.* At the time of his arrival, he was not admitted or paroled by an immigration officer. *Id.* Consequently, on July 19, 2012, the Respondent was personally served with a Notice to Appear (NTA) charging him with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or Act). *Id.* During that time, the Department of Homeland Security (DHS or Government) was detaining the Respondent at the Johnson County Jail.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

On September 6, 2012, the Respondent appeared before this Court with former attorney Robert Campos. On behalf of the Respondent, Mr. Campos admitted all the factual allegations contained in the NTA and conceded the charge of removability. Accordingly, the Court found removability established by clear, unequivocal, and convincing evidence. The Respondent requested relief in the form of cancellation of removal for certain nonpermanent residents. Therefore, the Court continued the matter until October 25, 2012, at 9:30 a.m., and ordered the Respondent to submit his cancellation application on that date. The Court advised both the Respondent and counsel of the consequences for failure to submit his application on October 25, 2012. A Notice of Hearing was also provided to the Respondent's counsel. *See* Exhibit 3. The hearing notice informed the Respondent and counsel of the hearing date and of the consequences for the Respondent's failure to appear.

On September 25, 2012, the Respondent was released from Government custody and on October 25, 2012, he failed to appear at his scheduled hearing. His attorney was also not present. Therefore, the Court proceeded *in absentia* and ordered the Respondent removed to Honduras based on the charge contained in the Notice to Appear.

On March 3, 2015, the Respondent, through counsel of record, filed a motion to reopen requesting that his *in absentia* order be rescinded based on ineffective assistance of counsel. The Government has not filed a response.

II. Applicable Law

If an alien does not attend a removal hearing after written notice has been provided to the alien or the alien's counsel of record, the alien will be ordered removed *in absentia* if the Government establishes by clear, unequivocal, and convincing evidence that written notice was provided and that the alien is removable. INA § 240(b)(5). A party is limited to only one

Immigrant & Refugee Appellate Center, LLC | www.irac.net

motion to reopen and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceedings sought to be reopened. 8 C.F.R. § 1003.23(b)(1). However, an *in absentia* order may be rescinded upon the filing of a motion to reopen, filed at any time, if an alien did not receive adequate notice of the hearing. INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(iii)(2). Adequate notice can be accomplished through personal service, or if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record. INA § 239(a)(1).

An *in absentia* order may also be rescinded upon a motion to reopen filed 180 days after an administratively final order of removal is entered if the alien shows "exceptional circumstances" leading to his absence from the hearing. INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(iii). "Exceptional circumstances" are circumstances beyond the control of the alien, including "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." INA § 240(e)(1).

An alien alleging ineffective assistance of counsel, who satisfies the requirements set out by the Board of Immigration Appeals in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), has established "exceptional circumstances" for purposes of rescinding an *in absentia* order. *See Matter of Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996). According to *Matter of Lozada*, a motion to reopen based upon a claim of ineffective assistance of counsel requires:

> (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
>
> (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given the opportunity to respond, and

Immigrant & Refugee Appellate Center, LLC | www.irac.net

(3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

19 I&N Dec. at 639; *see also De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (alien must also make "an initial showing of substantial prejudice").

III. Analysis

The Respondent argues that his case should be reopened based on ineffective assistance of his prior counsel, Mr. Campos. His motion is accompanied by an affidavit, a copy of the complaint filed with the Texas Bar, and evidence that he contacted Mr. Campos informing him of the allegations against him. *See* Motion to Reopen, Tab A. Thus, the Court finds that the Respondent has fully complied with the requirements outlined in *Matter of Lozada*. 19 I&N Dec. 637. *See* Motion to Reopen. However, as the Respondent did not file his motion to reopen until March 3, 2015, over two years after his final order of removal was entered on October 25, 2012, his motion is time-barred. *See* 8 C.F.R. § 1003.23(b)(4)(iii) (providing that a motion to reopen must be filed within 180 days after an administratively final order of removal is entered if the alien shows "exceptional circumstances" leading to his absence from the hearing.) *see also Matter of Lei*, 22 I&N Dec. 113, 116 (BIA 1998) (holding that a claim of ineffective assistance of counsel does not constitute an exception to the 180-day time limit, on the basis of exceptional circumstances). Therefore, the Court lacks jurisdiction over the Respondent's motion.

The Court acknowledges that there are some circuits that allow equitable tolling of filing deadlines for ineffective assistance of counsel claims. *See Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000), *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005), *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999). However, the Fifth Circuit has not expressly decided whether equitable tolling applies in this context. Even if equitable tolling were available in the Fifth Circuit, the alien

Immigrant & Refugee Appellate Center, LLC | www.irac.net

would have to make a showing of due diligence to invoke the equitable tolling doctrine. *See Cavazos v. Gonżales*, 181 Fed. App'x 453, 461 (5th Cir. 2006) (unpublished); *Oliveira v. Gonzales*, 127 Fed. Appx. 720, 723 (5th Cir. 2005) (unpublished); *Panova-Bohannan v. Gonzales*, 157 Fed. Appx. 706, 707 (5th Cir. 2005) (unpublished).

Here, the Respondent claims that he did not attend his hearing because his previous attorney, Mr. Campos, told him that since he was no longer detained his hearing would be rescheduled to a later date. *See* Motion to Reopen at 3. He also alleges that Mr. Campos never told him that he was ordered removed on October 25, 2012. *See id.* He only learned about his *in absentia* order in September of 2014.[1] *Id.* at 4. However, a review of the Respondent's record of proceeding indicates the following. On November 29, 2012, an appeal of the Court's *in absentia* decision was filed with the Board of Immigration Appeals (BIA or Board) on behalf of the Respondent. The appeal was filed by attorney Sanjay Mathur. The appeal was rejected on May 20, 2013, and the decision was mailed to Mathur Law Offices. A copy was also mailed to the Respondent at 1819 Harlandale Ave., Dallas, TX 75216. As indicated on his 42B application, the Respondent still lives at that address. *See* Motion to Reopen, Tab B (indicating that he has lived at that address since 2011). Thus, the evidence supports the conclusion that the Respondent was aware of his removal order since at least May 2013, as is apparent in his affidavit. *See id.*, Tab A at 4. Yet, he waited until March 3, 2015, to seek reopening of his proceedings. Therefore, the Court finds that even assuming *arguendo* that equitable tolling was available to the Respondent, his failure to file the motion to reopen until almost two years after

[1] The Court notes that this is contrary to the statements contained in the Respondent's affidavit, which was submitted along with his motion. There, the Respondent states "I did not find about that removal order until months later, after Mr. Campos referred me to another lawyer, Sanjay Mathur, to handle my appeal." *See* Motion to Reopen, Tab A at 4.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

he learned of his removal order does not demonstrate the due diligence necessary for equitable tolling.[2]

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion to Reopen is **DENIED**.

Date: 23rd day of April, 2015
Dallas, Texas

Deitrich H. Sims
Immigration Judge

[2] Even considering the lesser six-month filing delay, the Court still concludes that the Respondent has not acted diligently. *See Cavazos*, 181 Fed. App'x at 461 (failure to file motion until nearly three months after voluntary departure date had passed did not demonstrate due diligence); *Panova-Bohannan*, 157 Fed. Appx. at 708-09 (BIA did not abuse discretion in refusing to equitably toll the limitations period when alien waited four months after she learned of the alleged exceptional circumstances to seek reopening based on ineffective assistance of counsel).

Immigrant & Refugee Appellate Center, LLC | www.irac.net