U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: BOUBBOV, MARIE A

A 091-799-680

Date of this notice: 4/29/2016

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:
Grant, Edward R.
Mann, Ana
O'Leary, Brian M.

Userteam: Docket

U.S. Department of Justice

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5107 Leesburg Pike, Suite 2000
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BOUBBOV, MARIE A
A091-799-680
C/O CUSTODIAL OFFICER
62 CIVIC CENTER PLAZA
SANTA ANA, CA 92701

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: BOUBBOV, MARIE A

A 091-799-680

Date of this notice: 4/29/2016

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:
Grant, Edward R.
Mann, Ana
O'Leary, Brian M.

Userteam:

File: A091 799 680 – Los Angeles, CA

Date: APR 29 2016

In re: MARIE BOUBBOV

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Elif Keles, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of the Philippines who was ordered removed from the United States in absentia on September 16, 2015, appeals the decision of the Immigration Judge, dated December 14, 2015, denying her motion to reopen, which she filed on November 12, 2015. The Department of Homeland Security has not replied to the respondent's appeal.

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

The Immigration Judge has raised significant concerns regarding the respondent and her former counsel engaging in "deception and deceit" (I.J. at 7). For example, the respondent has indicated that her former counsel offered to produce a towing receipt in order to establish that she was unable to attend her removal hearing due to car trouble (I.J. at 6). Moreover, the respondent's decision to travel approximately 23 miles to an urgent care facility, where she had no prior history, on the day of her removal hearing is suspect (I.J. at 6).

Despite the aforementioned factors, we consider the need to fully adjudicate the contested charge of removability to be a significant factor weighing in favor of reopening. On appeal, the respondent, a returning lawful permanent resident, has raised significant arguments regarding whether she is inadmissible as an alien who has been convicted of a crime involving moral turpitude. Moreover, the respondent has raised arguments on appeal in support of her claimed potential eligibility for relief. The respondent exercised diligence in securing her present counsel and filing her motion to reopen, and her desire to remain in the United States with her family would have served as an incentive to appear at her hearing.

Considering the totality of the circumstances presented in this case, we ultimately conclude that reopened removal proceedings are warranted in order to provide the respondent with a renewed opportunity to appear before an Immigration Judge to show why she should not be removed from the United States. *See* 8 C.F.R. § 1003.23(b)(1). However, we deny the respondent's request to have this matter assigned to an Immigration Judge who does not believe that she conspired with her former counsel to avoid removal proceedings. Instead, in the event that such issue should become relevant, i.e., if the respondent seeks a discretionary form of relief from removal, she should be provided with an opportunity to present testimony from herself and

witnesses and additional evidence regarding the alleged deception and deceit on the part of herself and her former counsel.[1]

At the present time, we express no opinion regarding the ultimate outcome of these proceedings.

For the reasons set forth above, the following order is entered.

ORDER: The respondent's appeal is sustained, the order of removal, entered in absentia on September 16, 2015, is vacated, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings and the entry of a new decision.

FOR THE BOARD

[1] In addition, providing the respondent with an opportunity to further discuss these concerns would also provide the Immigration Judge with an opportunity to determine whether it would be appropriate to refer her former counsel to this Agency's Disciplinary Counsel.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No.: **A 091 799 680**	**DETAINED**
In the Matter of:	
BOUBBOV, Marie,	**IN REMOVAL PROCEEDINGS**
The Respondent	

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA) (2014) — *convicted of committing a crime involving moral turpitude*

APPLICATION: Respondent's Motion to Reopen

ON BEHALF OF THE RESPONDENT:
Elif Keles, Esquire
Law Offices of Carl Shusterman
600 Wilshire Boulevard, Suite 1550
Los Angeles, California 90017

ON BEHALF OF THE DEPARTMENT:
Daniel Burkhart, Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Marie Boubbov (the respondent) is a native and citizen of the Philippines. *See* Exh. 1. On December 1, 1990, she obtained lawful permanent resident status. *See id.*

On January 6, 2014, the U.S. Department of Homeland Security (the Department) personally served the respondent with a Notice to Appear. *Id.* Therein, the Department alleged that she arrived at the Honolulu International Airport on January 6, 2014, applied for admission as a lawful permanent resident, and on or about November 30, 2004, was convicted of embezzlement in violation of California Penal Code (CPC) § 504. *See id.* Consequently, the Department charged the respondent with inadmissibility pursuant to INA § 212(a)(2)(A)(i)(I). *Id.* Jurisdiction vested and removal proceedings commenced when the Department filed the NTA with the Court on March 6, 2014. 8 C.F.R. § 1003.14(a) (2014).

On April 21, 2014, the respondent appeared telephonically in her counsel's office in California for the initial hearing before the Honolulu Immigration Court. On May 19, 2014, the respondent, appearing telephonically with counsel, admitted the factual allegations and conceded the charge of inadmissibility in the NTA. Based on the respondent's admissions and the documentary evidence submitted by the Department, the Court sustained the charge of

inadmissibility. The respondent indicated that she would seek relief from removal through cancellation of removal for certain permanent residents, or in the alternative, a waiver of inadmissibility under INA § 212(h) based on her marriage to her U.S.-citizen spouse. The Department asserted that the respondent was not eligible for either form of relief because her conviction constituted an aggravated felony pursuant to INA § 101(a)(43)(M). The Court continued the matter and requested that the respondent submit a brief as to her eligibility for relief along with her applications for relief.

On September 8, 2014, the respondent appeared with new counsel, Sergio Rodriguez. At this hearing, the Court found that the respondent had articulated a basis to argue that she is not barred from applying for the relief she sought. Thus, the Honolulu Immigration Court granted the motion to change venue to the Los Angeles Immigration Court.

On September 16, 2015, the respondent failed to appear for her scheduled hearing. Her attorney, Mr. Rodriguez, appeared on her behalf. He initially informed the Court that the respondent was in transit to the hearing. Then he stated that the respondent had no means of transportation and requested that the Court continue her matter to the afternoon docket so that Mr. Rodriguez could travel to the respondent's home to personally drive her to court. Later he stated that the respondent was experiencing a medical situation and that an individual had contacted his office to inform him of the medical issue.

The Court denied the motion to continue. Proceeding *in absentia*, the Court found that the respondent's inadmissibility had been established based on documentary evidence and the respondent's admissions and concession. Accordingly, the Court ordered the respondent removed to the Philippines.

On November 12, 2015, the respondent filed the pending motion to reopen through new counsel. In the motion, the respondent alleges that she lacked notice of her scheduled hearing due to the ineffective assistance of her previous counsel. She seeks to reopen her case so that she may apply for cancellation of removal for certain permanent residents or for a waiver of inadmissibility under INA § 212(h).

Although the respondent claims she experienced ineffective assistance of counsel, the record demonstrates that she colluded with her former counsel to manipulate the Immigration Court system. Furthermore, the present motion and supplemental evidence obfuscate the record and still fail to comply with the requirements for establishing a claim of ineffective assistance of counsel. For the following reasons, the Court denies the respondent's motion to reopen.

II. Law and Analysis

A. Notice

The Court may rescind an *in absentia* removal order upon a motion to reopen filed at any time if the respondent demonstrates that she did not receive proper notice. INA § 240(b)(5)(C)(ii); *see also* 8 C.F.R. § 1003.23(b)(4)(ii). Written notice of the hearing shall be given in person to the individual or, if personal service is not practicable, through service by mail

to the individual or to the individual's counsel of record. INA § 239(a)(1); *Matter of G-Y-R-*, 23 I&N Dec. 181, 185 (BIA 2001). Notice to counsel of record constitutes notice to the respondent. *See* 8 C.F.R. § 1003.26(c)(2); *see also Matter of Barocio*, 19 I&N Dec. 255, 259 (BIA 1985).

The Court finds that the respondent received legally sufficient notice of her hearing on September 16, 2015. The Court mailed the notice of hearing (NOH) on April 13, 2015, to the respondent's counsel of record at the time. *See* Exh. 8. Written notice of a scheduled hearing provided to the respondent's counsel of record constitutes notice to the respondent. *See* 8 C.F.R. § 1003.26(c)(2); *see also Barocio*, 19 I&N Dec. at 259. Moreover, the respondent received oral and written warnings of the consequences of failing to appear for her hearing. INA § 240(b)(7). Consequently, the Court declines to reopen the respondent's case based on lack of notice.

B. Ineffective Assistance of Counsel

The Court may rescind an *in absentia* order of removal upon a motion filed within 180 days of the date of the order if the individual demonstrates that she failed to appear because of exceptional circumstances beyond her control. 8 C.F.R. § 1003.23(b)(4)(ii). Exceptional circumstances include the serious illness of the respondent or the serious illness or death of the respondent's spouse, child, or parent, but do not include less compelling circumstances. INA § 240(e)(1). Ineffective assistance of counsel constitutes an exceptional circumstance that justifies rescission. *Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004).

To prevail on a claim of ineffective assistance of counsel, a respondent must first satisfy the three threshold requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). A respondent must: (1) submit an affidavit setting forth the agreement she had with counsel regarding representation; (2) provide documentation that counsel was informed of the allegations against him and given the opportunity to respond; and (3) explain "whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." *Id.* at 639-40. These factors are not rigidly applied, especially where the record clearly indicates ineffective assistance of counsel. *See Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1132 (9th Cir. 2013). However, this flexibility serves important policy goals. The *Lozada* requirements provide a framework to facilitate the evaluation of a claim, to prevent meritless claims, and to uplift the standards of performance expected of attorneys. *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000); *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003); *Lozada*, 19 I&N Dec. at 639.

Here, the respondent substantially complied with the first two *Lozada* requirements, but her claim ultimately fails because she did not meet the third factor. Regarding the first requirement, the respondent submitted a declaration dated November 25, 2015, in which she generally states that Mr. Rodriguez agreed to represent her in removal proceedings.[1] *See* Resp't

[1] An affidavit is "a voluntary declaration of facts written down and sworn to by a declarant, [usually] before an officer authorized to administer oaths." *Black's Law Dictionary* (10th ed. 2014). Since the respondent is currently detained, the Court recognizes the difficulty in obtaining a sworn declaration and will accept her unsworn declarations as meeting the purposes of formality sought by this requirement. At the same time, the respondent's declaration lacks detail as to the attorney-client agreement she executed with Mr. Rodriguez and the expectations of

Reply to DHS Br. in Opposition to Resp't Mot. to Reopen (Dec. 1, 2015), Tab G at 12 (hereinafter "Resp't Reply Br.").

For the second requirement, the respondent's letter dated November 5, 2015, informed her former counsel of her allegation that he provided deficient representation when he failed to inform her of the scheduled hearing. *See* Resp't Mot. to Reopen, Tab C. Specifically, the respondent alleges that Mr. Rodriguez did not inform her of the hearing until it was in progress. She contends that she had been in contact with his office on several occasions in August 2015 yet counsel failed to inform her of the hearing date. Notably, she states that she sent an e-mail to his office on August 17, 2015, notifying him of her new address, but she did not receive a response. She sent a second e-mail to confirm her address change on August 24, 2015, and when she did not receive a response, she called the office and spoke with her counsel's administrative assistant Sonia Pena. Ms. Pena acknowledged receipt of her updated address and instructed the respondent to send the completed change of address form (Form EOIR-33) to her counsel's office instead of to the Court.

In response to the respondent's letter and allegations, Mr. Rodriguez replied in a letter dated November 16, 2015. Resp't Reply Br., Tab F at 10. He asserts that, on June 30, 2015, he provided the respondent with a copy of the NOH. *Id.* Also, he avers that Ms. Pena spoke with the respondent on September 2, 2015, regarding the upcoming hearing and the address change. *Id.*

In light of this correspondence and the facts in dispute, the Court looks to the third *Lozada* factor to evaluate the merits of the respondent's claim. However, the respondent failed to provide evidence that she submitted a complaint against Mr. Rodriguez with the State Bar of California or an explanation as to why she did not do so. The submission of a disciplinary complaint serves the important function of informing an outside authority about matters that occurred privately between the respondent and her attorney. *See Correa-Rivera*, 706 F.3d at 1132. Where the facts are in dispute, the filing of a complaint provides a "public event that can be confirmed or refuted by objective sources," thus deterring baseless allegations of deficient attorney performance and decreasing the potential for collusion. *See id.*; *see also Rivera-Claros*, 21 I&N Dec. at 604-05. Absent evidence that a disciplinary complaint was filed or an explanation for its omission, the Court finds the record in this matter reveals obvious collusion between the respondent and her former attorney.

In the pending motion, the respondent and her former counsel dispute two factual determinations: (1) whether the respondent had notice of the hearing, and (2) what events transpired on the morning of the hearing.

The Court doubts the respondent's claim that she was unaware of the hearing on September 16, 2015. The Court mailed the NOH to Mr. Rodriguez on April 13, 2015, to schedule the September 2015 hearing. Exh. 8. Since both the respondent and Mr. Rodriguez

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his representation. Given these circumstances and based on the flexible application of the *Lozada* requirements, the Court finds the respondent substantially complied with the first requirement.

assert that they corresponded more than once between April and September, the Court cannot rely solely on the respondent's assertion that she was not informed about the hearing.

The Court doubts that, knowing she was in removal proceedings, the respondent would not inquire about the scheduled hearing during any interaction with her attorney between April and September. Notably, the respondent has remained active in pursuing her case and communicating with counsel since proceedings commenced in 2014. She has been involved enough to hire three attorneys to aid her in her case. More recently, she completed a change of address form in August, and then sent two e-mails and called her counsel's office to confirm they received it and would file it with the Court. *See* Resp't Mot. to Reopen, Tab C. The respondent understood the importance of updating her address and to confirm its receipt with her counsel. Her counsel's office mailed the Form EOIR-33 to the Court on September 11, 2015, five days before the scheduled hearing. Given these interactions and the respondent's historical involvement in her case, the Court questions her allegation that she was not informed.

Since the respondent disputes that Mr. Rodriguez notified her of the hearing, her failure to introduce key documentary evidence is highly suspect. Notably, the respondent did not submit an e-mail from her counsel's office from the afternoon of her *in absentia* hearing.[2] Critically, the respondent's declaration suggests that she requested evidence from her attorney's office that he had notified her of the hearing. *Id.*, Tab G at 11-12. The respondent received an e-mail and attachments "a few hours later." *See id.* However, she does not state that the evidence was inadequate to demonstrate notice. Instead, her declaration implies that she may have received evidence that her attorney mailed her the NOH in June. *See id.* This is further supported by the fact that she elected not to submit this correspondence to the Court. Whether her former counsel's office sent correspondence about the hearing date is directly at issue in the respondent's allegation of ineffective assistance of counsel. To the extent that the respondent claims to possess an e-mail that may resolve the question of notification, its omission from her motion leads the Court to question the veracity of her claim.

Furthermore, the respondent submitted an invoice from Mr. Rodriguez regarding his work to prepare the motion to reopen. *See* Resp't Reply Br., Tab G at 26. However, the invoice does not relate to dates concerning the notice issue. Based on the invoice submitted, the Court notes that Mr. Rodriguez appears to maintain meticulous records that could assist the Court's analysis of the respondent's motion. Despite the availability of this evidence, the respondent did not provide any other invoice regarding what transpired between April and September. Nor did she submit records summarizing her interaction with Ms. Pena concerning her change of address between August and September. Thus, the record contains no evidence of work performed by her former attorney or contact with his office during the essential time period. Consequently, the respondent's submission of attorney invoices wholly unrelated to the notification issue and the

[2] Importantly, the record demonstrates that the respondent regularly communicates with counsel through e-mail. The motion to withdraw as counsel filed by her first attorney, Ellaine Goss, is supported by an e-mail exchange initiated by the respondent to confirm that Ms. Goss had been contacted by Mr. Rodriguez. *See* Mot. to Withdraw as Counsel at 5 (Jul. 3, 2014). In support of the present motion, the respondent submitted an e-mail she received from Ms. Pena dated October 21, 2015, seeking the respondent's approval of declarations supporting reopening her case. *See* Resp't Reply Br., Tab G at 18.

absence of similar records supporting her allegations seriously undermine the integrity of her claim.

In addition, the respondent and Mr. Rodriguez dispute the events that occurred on the morning of the hearing. Despite their current disagreement, the Court believes they acted in concert on the morning of the hearing. To begin, the Court finds that Mr. Rodriguez purposefully misled the Court by stating conflicting reasons for the respondent's absence. He first asserted that the respondent was on her way; he then stated she lacked transportation; finally, he claimed that she was experiencing a medical situation that prevented her from attending. In her declarations, the respondent asserts that Mr. Rodriguez suggested various actions that the respondent could pursue to remedy her absence, including "seek[ing] medical attention" to establish a medical condition as "extenuating circumstances [sic]" to explain her absence. *See* Resp't Reply Br., Tab G at 11. She states she subsequently experienced a panic attack and independently sought medical attention for this purpose. *Id.* She further asserts that, during a meeting with Mr. Rodriguez to discuss filing a motion to reopen, he suggested that she claim she experienced "car trouble" and told her that "I can produce a towing receipt for you." *Id.*, Tab G at 12 (internal quotations omitted). Upon receiving fabricated declarations for her and her husband to sign feigning car trouble the morning of the hearing, the respondent states that she sought new legal representation. *Id.*

Based on Mr. Rodriguez's in-court statements and the record, the Court believes that the respondent and her attorney conversed the morning of the hearing initially about car trouble and then about a medical situation. Both the attorney's misleading statements in court and the evidence submitted with the present motion seriously undermine the integrity of the respondent's allegation against her former attorney. Namely, the Court cannot conclude that the respondent's medical situation was genuine. The respondent departed work at 9:52 a.m., claiming she suffered from a panic attack and a heart condition. *See id.*, Tab H at 28. She then traveled approximately twenty-three miles to an urgent care clinic at which she had no patient history or relationship with any physician. *See id.*, Tab H at 29-30, Tab I (stating that she presented for a "new patient visit"). The urgent care records indicate that she complained of symptoms of "Anxiety, Dizziness, Headache, palpitations," which began five days before the visit and "seem to happen when she does something strenuous." *Id.*, Tab I. The clinic records do not include a diagnosis or treatment plan. *Id.* The Court cannot believe that a reasonable person under these circumstances would travel a great distance by taxi to seek urgent medical care by a new doctor. Further, the medical records do not establish she experienced a serious medical situation. *See* INA § 240(e)(1). Based on the foregoing, the Court finds that the respondent and her former attorney colluded to explain away her absence by misleading the Court.

In summary, as a result of the absence of key documentary evidence, the Court draws two conclusions. First, the respondent likely *did* receive notice of her hearing. The respondent never submitted the September 16, 2015, e-mail from Ms. Pena that would have clearly indicated whether her attorney gave her notice. Because the respondent included some e-mails but omitted this critical evidence, the Court concludes that the respondent likely received notice. Second, the respondent's claimed ethical concerns regarding Mr. Rodriguez's advice are circular. Considering the record as a whole, the Court finds it very likely that the attorney told her (a) that he could obtain a towing receipt to claim she had car trouble, and (b) that she should seek

medical attention and obtain evidence that she consulted a medical provider. More than likely the respondent's former counsel advised her about both avenues for action and that the respondent followed through with the intention to manipulate the Immigration Court system.

Through her motions and supplemental evidence, the respondent intended to obfuscate the record and cause confusion. The Court grants motions to reopen when a respondent genuinely experiences a medical emergency or other exceptional circumstance. *See Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002); *see also Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996). Conversely, the Court cannot tolerate situations where, as here, there is obvious collusion between the respondent and her former attorney. Namely, the attorney told the Court his client was in transit to her hearing, the Court allowed the respondent time to arrive, and subsequently the attorney instead claimed the respondent's absence resulted from an alleged medical issue. The record demonstrates true manipulation of the system and that the respondent and her attorney acted with deception and deceit. The respondent's failure to file a California Bar complaint thus speaks to the veracity of her claim of ineffective assistance of counsel. *See Rivera-Claros*, 21 I&N Dec. at 604-05.

Moreover, there is a strong argument that the respondent is not eligible for any form of relief. The respondent was convicted of embezzlement in violation of CPC § 504, which may constitute an aggravated felony. *See* Exh. 6; *see also* INA § 101(a)(43)(M). Given the uncertainty of available relief, the respondent may have greater motive to prolong her case even through dilatory tactics. *See Lo*, 341 F.3d at 938.

In light of the foregoing, the Court finds that the respondent has not satisfied the *Lozada* requirements and consequently has not articulated an exceptional circumstance meriting reopening and rescission of the *in absentia* removal order. The Court denies her motion to reopen on this basis.

Accordingly, the following order is entered:

ORDER

IT IS HEREBY ORDERED that the respondent's motion to reopen be **DENIED**.

Date: 12/14/15

Jan D. Latimore
Immigration Judge

Appeal Rights: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals within thirty (30) calendar days of service of this decision. 8 C.F.R. § 1003.38.