U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: H[redacted]O[redacted], S[redacted] **A [redacted]-761**
Riders:[redacted]

Date of this notice: 2/12/2018

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:
Kendall Clark, Molly

SmithKi
Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A[redacted]761 – Atlanta, GA
A[redacted]

Date: FEB 12 2018

In re: S[redacted] H[redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Michelle N. Mendez, Esquire

ON BEHALF OF DHS: Donald W. Cassidy
Associate Legal Advisor

APPLICATION: Reconsideration

On October 11, 2017, this Board determined that the respondent's appeal was untimely filed and that the appeal should be dismissed for that reason.[1] The respondent has filed a timely motion to reconsider and remand. The Department of Homeland Security (DHS) has filed an opposition to the motion, and the respondent has filed a reply.[2] The motion will be granted, and the record will be remanded.

The record establishes that the respondent's appeal was filed over 2 years after the 30-day appeal period set out at 8 C.F.R. § 1003.38(b), (c). The Notice of Appeal, however, was accompanied by a claim of ineffective assistance of counsel by Christopher Taylor, Esquire. The Notice of Appeal did not include sufficient documentation to show that the respondent had complied with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). However, on September 20, 2017, the respondent filed an emergency motion to stay removal and additional documents in support of the respondent's appeal. These documents included the bar complaint filed against Attorney Taylor and a statement by the respondent concerning both her claim of ineffective assistance and an explanation of why she was still working with the attorney and the attorney's law firm until a short time before she filed the untimely appeal. The respondent asserts, among other things, that the attorney did not file an asylum application on her behalf even though she feared return to

[1] All references to "the respondent" in the singular are to the lead respondent (A[redacted]). Her minor child (A[redacted]) has a derivative asylum claim.

[2] We also acknowledge the brief submitted by Amicus Curiae and the reply to that brief filed by the DHS.

El Salvador and that the attorney sought only a removal order, contrary to her understanding of what the attorney had been paid to do. In this regard, the respondent observes that her contract was in Spanish except for the form of relief she would be seeking, which was in English (Mot. to Reconsider, Exh. A at 5-6). She states that the English was not translated or explained to her (*Id.*). She states that she would not have paid an attorney for a removal order (*Id.*).

It does not appear that the additional documents filed by the respondent on September 20, 2017, were considered by this Board prior to the issuance of our decision on October 11, 2017. Furthermore, the Board's last decision did not address the previously filed response by the law firm to another complaint, in which there was an apparent admission that the firm policy was that persons from Central American countries generally did not have a valid claim to asylum so the firm did not file asylum applications except in rare cases and instead accepted client fees for the purpose of seeking delays in the client's removal.

Given that the respondent substantially complied with *Lozada* before our last decision was issued, that decision will be reconsidered.[3] Upon reconsideration, we conclude that the respondent has sufficiently established ineffective assistance of counsel. *See Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1272–74 (11th Cir. 2004). Although two attorneys at the law firm representing the respondent wrote letters denying the allegations against them (Emergency Motion to Stay Removal filed Oct. 30, 2017, Exh. K at 53, 57), we note that the respondent has produced documents that call into question the statements in the letters. For example both letters report that the respondent did not show up for her immigration check-in on May 24, 2017, but the respondent produced evidence that she did appear (Mot. to Reconsider Exh. E at 49). The respondent claims that it was the attorneys who did not show up to meet with her at the check-in even though an attorney was supposed to go with her (Mot. to Reconsider, Exh. A at 13).[4] Based on the evidence before us, it appears that the respondent sought to apply for asylum and might have qualified for asylum but was not given the chance to present her case due to the ineffective assistance she received.

Furthermore, we find that the respondent has demonstrated due diligence in pursuing her case such that equitable tolling applies to the filing deadline for the respondent's appeal. *See Ruiz-Turcios v. U.S. Att'y Gen.*, 717 F.3d 847, 851 (11th Cir. 2013) (holding that an alien is entitled to equitable tolling generally where he shows that he has been pursuing his rights diligently and that

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[3] The DHS appears to acknowledge the respondent's compliance with *Lozada* but argues that the respondent did not establish ineffective assistance in light of the reply letters from the law firm (DHS Opposition to Motion to Reconsider and Stay at 2).

[4] The letters from Christopher Taylor and Jerome Lee were filed at the Board on October 30, 2017 (Emergency Mot. to Stay Removal filed Oct. 30, 2017, Exh. K). Both letters state that the respondent was given the chance to apply for asylum and decided not to. It appears from the record that the respondent was assigned to different attorneys from Taylor Lee & Associates at different times. The respondent states that she had never seen or talked with the attorney who was sent to her hearing at which a removal order was requested (Mot. to Reconsider, Exh. A).

some extraordinary circumstance stood in his way); *Avila-Santoyo v. U.S. Att'y. Gen.*, 713 F.3d 1357, 1363 (11th Cir. 2013). The respondent explained that her attorneys convinced her that her case was not over and that they were still working to assist her (Filing Dated Sept. 20, 2017, Exh. F).

Finally, while the respondents could have filed a motion to reopen with the Immigration Judge alleging ineffective assistance as opposed to an appeal with the Board, the particular circumstances presented by this matter persuade us to accept the respondents' appeal on certification. We find that a remand is warranted to allow the respondents to have a hearing on the application for asylum and related relief.

ORDER: The respondents' motion to reconsider is granted.

FURTHER ORDER: The Board's decision dated October 11, 2017, is vacated.

FURTHER ORDER: The respondents' appeal is taken on certification and upon consideration of the appeal, the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD