U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: SIAHAAN, BINSAR RIONALD **A 095-536-096**

Riders: 095-536-099

Date of this Notice: 2/23/2022

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:
Manuel, Elise

Userteam: Docket

NOT FOR PUBLICATION

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

MATTER OF:

Binsar Rionald SIAHAAN, A095-536-096
Eko Dr SUKEMI, A095-536-099

Respondents

FILED
Feb 23, 2022

ON BEHALF OF RESPONDENTS: Elsy M. Ramos Velasquez, Esquire

ON BEHALF OF DHS: Kathleen B. Moreland, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS
On Motion from a Decision of the Board of Immigration Appeals

Before: Manuel, Temporary Appellate Immigration Judge[1]

MANUEL, Temporary Appellate Immigration Judge

This matter was last before the Board on May 31, 2005, when we adopted and affirmed the Immigration Judge's December 19, 2003, decision denying the respondents' applications for asylum, withholding of removal, and their request for protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) (CAT). *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.16-18. The respondents, natives and citizens of Indonesia, filed a motion to reopen on March 16, 2020. On September 10, 2020, they filed an amended motion to reopen, requesting that it be substituted in place of the March 16, 2020, motion. The Department of Homeland Security (DHS) opposes the motion. The motion will be granted.

A motion to reopen must generally be filed within 90 days of the date of entry of a final administrative order. *See* section 240(c)(7)(C)(i) of the Act; 8 C.F.R. § 1003.2(c)(2). However, there is no time or number limit on the filing of a motion to reopen if the basis of the motion is to apply for asylum, withholding of removal, or protection under the CAT based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* section 240(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007).

[1] Temporary Appellate Immigration Judges sit pursuant to appointment by the Attorney General. *See generally* 8 C.F.R. § 1003.1(a)(1), (4).

The respondents first request reopening on the basis of ineffective assistance of their former counsel (Respondents' Mot. at 10-15). With respect to this claim, the respondents concede that their motion is untimely, but request that the deadline be equitably tolled (Respondents' Mot. at 14-15).

Equitable tolling may be applied where extraordinary circumstances beyond the respondents' control made it impossible to file within the statutory deadline and the respondents show that they have been pursuing their rights with reasonable diligence. *See Lawrence v. Lynch*, 826 F.3d 198, 203-04 (4th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302, 305–06 (4th Cir. 2013). Here, the respondents' final order of removal was entered on May 31, 2005, and they argue that they could not have raised their ineffective assistance claim at that time because their former counsel "was still involved in the case and failed to adequately inform them of the status of their case and the implications of the decisions" (Respondents' Br. at 15). Additionally, the respondents argue that while proceedings were still pending, they became eligible for cancellation of removal, but their former counsel did not take any actions to seek this form of relief (Respondents' Mot. at 10). They also argue that they did not timely file their motion because during regular check-ins with Immigration and Customs Enforcement (ICE), they were told that there was "nothing more they could do" with respect to their case and that they were "genuinely not aware of the full implications of being ordered removed nor aware of the possible remedies available to them" (Respondents' Mot. at 15, Tab G).

Upon our review, we are satisfied that the respondents exercised reasonable diligence in pursuing their claim. *See Lawrence v. Lynch*, 826 F.3d at 203-04; *Kuusk v. Holder*, 732 F.3d at 305–06. They have provided evidence indicating that in 2004, while their proceedings were open and their appeal was pending before the Board, their United States citizen child was born (Respondents' Mot., Tab L). Their former counsel, however, did not file a motion to remand or a motion to reopen proceedings in light of this new potentially available relief or otherwise inform them of the possibility of pursuing such motions. Rather, the respondents assert after their petition for review was denied by the United States Court of Appeals for the Fourth Circuit in February 2006, their former counsel "disappeared" and they were unable to get in contact with him (Respondents' Mot., Tab G). They have provided evidence indicating that he was disbarred in November 2008 for, among other things, failure to represent clients promptly and with reasonable diligence and failure to communicate with his clients (Respondents' Mot., Tabs R-T). Additionally, the respondents assert that despite informing immigration officials of their intent get a new attorney and "sort out [their] case," ICE officials told them that they were not priorities for deportation and there was nothing more they could do with respect to their case (Respondents' Mot., Tab G). Accordingly, under these circumstances, we will equitably toll the filing deadline for the respondents' motion to reopen. *See Lawrence v. Lynch*, 826 F.3d at 203-04; *Kuusk v. Holder*, 732 F.3d at 305–06.

Turning to the ineffective assistance of counsel claim, we note that in raising this claim, the respondents have substantially complied with the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), including providing: (1) an affidavit describing their agreement with their former counsel; (2) evidence of a letter mailed to their former counsel detailing the allegations against him, and (3) evidence that a bar complaint was filed with the

Attorney Grievance Commission of Maryland against their former counsel (Respondents' Mot., Tabs G, P-Q). The respondents have also provided evidence indicating that their former counsel has been disbarred from practicing in the State of Maryland and before the Board, Immigration Courts, and the DHS (Respondents' Mot., Tabs R, T). *See also Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006) (explaining that strict compliance with the requirements of *Matter of Lozada* is not required in order to raise an ineffective assistance of counsel, but rather substantial compliance is sufficient where the claim is not frivolous or otherwise asserted to delay deportation).

In addition to complying with the *Matter of Lozada* requirements, the respondents must also demonstrate that they were prejudiced as a result of their former counsel's alleged ineffectiveness. *See Matter of Lozada*, 19 I&N Dec. at 640; *see also Adeaga v. Holder*, 548 F. App'x 68, 69 (4th Cir. 2013). To demonstrate prejudice, they must show that their former counsel's alleged deficiencies likely affected the outcome of their proceedings. *See Rusu v. INS*, 296 F.3d 316, 324 (4th Cir. 2002) (citing *Perez-Lastor v. INS*, 208 F.3d 773, 780 (9th Cir. 2000)), and noting that the prejudice standard in due process claims requires a showing that the alleged violation likely affected the outcome of the hearing). Here, as discussed above, the respondents have presented evidence that while proceedings were pending, their United States citizen daughter was born (Respondents' Mot., Tab L).

Further, the record reveals that the lead respondent entered the United States in June 1989 and was not served with a Notice to Appear (NTA) until June 2003, indicating that he may satisfy the continuous physical presence requirement under section 240A(b)(1)(A) of the Act.[2] The respondents have also have presented voluminous evidence related to conditions in Indonesia (Respondents' Mot., Tabs U-LL). *See Matter of D-*, 20 I&N Dec. 915 (BIA 1994) (explaining that evidence of general conditions in a noncitizen's home country may be weighed as a factor in evaluating discretionary relief). As discussed, the respondent's former counsel did not file a motion to remand or a motion to reopen to pursue this potentially available relief or otherwise advise them of their ability to pursue such motions.

Accordingly, as the lead respondent has demonstrated prima facie eligibility for cancellation of removal and their former counsel failed to advise him of this form of relief, we are satisfied that the respondents have established that they were prejudiced by their former counsel's deficient performance. *See Matter of Lozada*, 19 I&N Dec. at 640; *Adeaga v. Holder*, 548 F. App'x at 69. We will therefore grant the motion to reopen and remand proceedings to the Immigration Judge in order for the lead respondent to apply for cancellation of removal under section 240A(b) of the Act. Additionally, if necessary, the Immigration Judge may consider the respondents' eligibility for asylum in light of the new country conditions evidence submitted. On remand, the Immigration

[2] The rider respondent (A095-536-099) entered the United States in August 1995 and was served with an NTA in April 2003. We note that because her NTA included the time, date, and place of her removal hearing date, *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), and other related cases are not implicated here, and therefore she is statutorily ineligible for cancellation of removal under section 240A(b)(1) of the Act.

Judge should allow the parties to submit additional evidence pertinent to the respondents' applications for relief. Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted.

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