

Falls Church, Virginia 22041

File: A75 721 022 - Miami, FL

Date:

JUL 31 2007

In re: LEO CAZEAU

IN REMOVAL PROCEEDINGS

(592) 692 -2621

MOTION

ON BEHALF OF RESPONDENT: David Asser, Esquire

APPLICATION: Reconsideration; continuance of a stay of removal

The respondent moves the Board to reconsider our decision dated April 30, 2007. In that decision, we affirmed the Immigration Judge's November 17, 2006, denial of a joint motion to reopen filed by the respondent and the Department of Homeland Security (the "DHS"). The respondent also moves for a continuance of a stay of removal while his motion to reconsider is pending before the Board. The motion to reconsider will be granted, and our April 30, 2007, order will be vacated. The proceedings will be reopened, and the record will be remanded for further proceedings. The motion for a continuance is moot.

In his motion to reconsider, the respondent does not challenge our decision that the Immigration Judge correctly denied the joint motion to reopen to the extent that it was based on ineffective assistance of counsel. However, the respondent continues to argue that he is eligible for reopening to seek adjustment of status under section 245 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1255, based on an approved Form I-130 filed by his United States citizen spouse. The respondent asserts that a grant of reopening in this case would cure any inadmissibility he had due to a final order of removal and that he also warrants a favorable exercise of discretion. He also reiterates that reopening is warranted based on new evidence and changed personal circumstances that would affect his eligibility for asylum and withholding of removal.

In our April 30, 2007, decision, we determined, among other things, that the respondent was not *prima facie* eligible for adjustment of status under section 245(a) of the Act because he is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. 1182(a)(9)(A)(ii), as an alien subject to a final order of removal. Upon reconsideration, it appears to us that we made an error of law in that regard. 8 C.F.R. § 1003.2(b)(1). The language of section 212(a)(9)(A)(ii) provides, in relevant part: "Any alien [who is not an arriving alien] who . . . has been ordered removed under section 240 [of the Act] . . . or . . . departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal . . . is inadmissible." See INA § 212(a)(9)(A)(ii)(I), (II). Although the language of this provision is ambiguous, it appears to us that this bar to admissibility is not triggered unless an alien has actually been removed from or has departed from the United States following the issuance of his removal order. Our interpretation of this provision is supported by the language contained in section

212(a)(9)(A)(iii) of the Act, which expressly states that the section 212(a)(9)(A)(ii) bar to admissibility does not apply to an alien seeking admission within the relevant period if he has obtained permission to apply for readmission "prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory." INA § 212(a)(9)(A)(iii). The language contained in this provision also seems to suggest that a physical departure or removal must occur before the section 212(a)(9)(A)(ii) admissibility bar is implicated.

Based on the foregoing, the respondent appears to be *prima facie* eligible for adjustment of status under section 245(a) of the Act. Moreover, in light of the respondent's *prima facie* eligibility for relief and the fact that the DHS has joined in the motion to reopen, we conclude that reopening is warranted as a matter of discretion. Accordingly, we hereby vacate our April 30, 2007, decision and reopen these proceedings. We will remand the case to the Immigration Judge to determine whether the respondent is eligible for adjustment of status and, if so, whether he warrants a favorable exercise of discretion. Upon remand, the Immigration Judge should also address any issues that the respondent raises that may affect his eligibility for other relief from removal.

Accordingly, the following orders will be entered.

ORDER: The motion to reconsider is granted, and the Board's order dated April 30, 2007, is vacated.

FURTHER ORDER: The motion for a continuance is denied as moot.

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


FOR THE BOARD

Board Member Patricia A. Cole concurs in the result reached by the majority, but not its analysis and interpretation of INA § 212(a)(9)(A)(ii). I would grant respondent's motion to reconsider because of the DHS joinder in respondent's motion.

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5 **U.S. DEPARTMENT OF JUSTICE**
6 **EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
7 **BOARD OF IMMIGRATION APPEALS**
8 **FALLS CHURCH, VIRGINIA**

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9 IN THE MATTER OF:)
10 CAZEAU, Leo) MOTION TO RECONSIDER
11 A75-721-022)
12 Respondent)
13 _____)

14
15 Now comes Respondent in the above-entitled matter and moves this Court to reconsider its
16 decision of April 30, 2007 to dismiss Respondent's appeal of the decision by the Immigration
17 Court to deny the Joint Motion to Reconsider.

18
19 **DECISION BY THE IMMIGRATION COURT**

20 The Immigration Judge denied the appeal solely because he determined that the Respondent
21 failed to comply with the strict requirements of Lozada. However, the Judge did not consider the
22 other arguments that both parties brought forth, including the fact that the Respondent is the
23 beneficiary of an approved I-130 and that Respondent is eligible to adjust his status under INA
24 Sec. 245 based on marriage to a US citizen. Prior to joining the motion to reopen, the
25 government considered the statutory eligibility of the respondent to adjust status, the exceptional
26 and compelling circumstances, and whether the respondent merits a favorable exercise of
27 discretion. In addition to the ineffective assistance argument, the Immigration Judge should have
28

1 considered the argument that Respondent was a beneficiary of an approved I -130 and that
2 Respondent met the requirements to have the case reopened.

4 THE BIA DECISION

5 1. Ineffective Assistance of Counsel

6 The Board found that the ineffective assistance of counsel argument failed and Respondent will
7 not argue this part of the decision at this time.

9 2. New Evidence, Changed Personal Circumstances Eligibility for Adjustment of 10 Status

11 The Board believed there was an implicit denial by the Immigration Judge of the joint motion to
12 the extent that the parties seek reopening based on new evidence, changed personal
13 circumstances in the respondent's home country, and the respondent's eligibility. However, as
14 stated above, the Immigration Judge didn't rule on the additional arguments, never even
15 addressed the additional arguments. Therefore the Board could not have drawn the conclusion
16 that the order of the Immigration Judge included an implicit denial of these arguments. As a
17 result the Board erred by stating that it found no error in the Immigration Judge's implicit denial.

18
19 In addition the Board states that the new evidence or changed personal conditions would affect
20 the outcome of this case. The Board failed to address the new evidence that was submitted with
21 the appeal in the form of two notarized affidavits, showing direct causal relationship between
22 Respondent's fear of persecution and government activity.

24 3. Eligibility for Adjustment of Status

25 In its decision the Board stated that it was uncertain of the respondent's present eligibility for
26 adjustment status. In this matter the relevant issues that the Board based this uncertainty on are
27 twofold:

- 1 1. The respondent is not prima facie eligible under 245(i); and,
- 2 2. The respondent is inadmissible as an alien subject to a final order of removal.

3
4 Respondent entered legally into the United States on July 11, 2000. He was therefore admitted
5 and inspected into the United States. He has continuously resided in the United States since. As a
6 matter of law, this is not an 245(i) case. The respondent has an approved I-130 and is therefore
7 eligible to adjust his status under INA Sec. 245 as an immediate relative of a US citizen, since an
8 immigrant visa is immediately available to him.

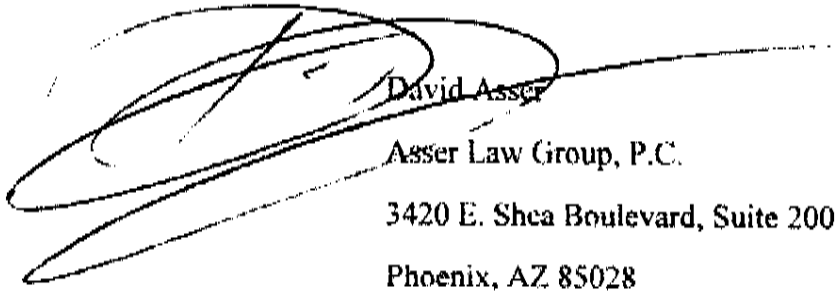
9
10 The main purpose of filing a Motion to Reopen is to cure the inadmissibility of the respondent
11 due to a final order of removal. If, and when the previous case would be reopened, the
12 respondent would no longer be subject to a final order of removal. Moreover, the respondent
13 would be eligible for relief in the form of adjustment as a spouse of a US citizen.

14
15 Lastly, the Board states that even if the respondent would be eligible for adjustment of status,
16 such relief would not be warranted due to the fact that the relief became available nearly three
17 years after the entry of a final administrative order of removal. The Board bases this argument on
18 the notion that motions to reopen are especially disfavored in immigration proceedings because
19 every delay works to the advantage of the deportable alien. The Board disregards that the
20 government has shown equal interest in having the matter reopened and that "advantage" to the
21 deportable alien is not a relevant factor in this case. Moreover, the Board did not recognize that
22 the government already had been required to consider such factors when deciding to join the
23 Motion to Reopen and had concluded that particularly in this matter, relief was warranted.

24 25 **CONCLUSION**

26 Based on the foregoing, we respectfully request the Board to reconsider its decision, particularly
27 on the legal argumentation that the respondent is not prima facie eligible under 245(i) and

1 inadmissible because he is subject to a final order of removal and that relief would not be
2 warranted, because every delay works in the advantage of the deportable alien.

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APR 30 2007

In re: LEO CAZEAU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David Asser, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Reopening

The respondent, a native and citizen of Haiti, appeals from the Immigration Judge's November 17, 2006, order denying a joint motion to reopen and change venue from the Miami, Florida, Immigration Court to the Eloy, Arizona, Immigration Court that was filed by the Department of Homeland Security (the "DHS") and the respondent. The appeal will be dismissed.

I. PROCEDURAL AND FACTUAL BACKGROUND

On July 2, 2002, an Immigration Judge in the Miami, Florida, Immigration Court issued an order denying the respondent's applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §§ 1158, 1231(b)(3), as well as his request for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-18. In that decision, the Immigration Judge expressly found not credible the respondent's fear of future persecution by corrupt police officers who support the Lavalas Party and whose criminal activities the respondent, himself a former police officer in Haiti, reported to Haitian authorities. The respondent was represented during the removal proceedings by Mr. Clarel Cyriaque. The respondent filed a *pro se* appeal to the Board.¹ On September 8, 2002, while his appeal was still pending, the respondent married a lawful permanent resident of the United States. On October 23, 2003, the Board affirmed the Immigration Judge's July 2, 2002, decision without opinion, thereby rendering a final order of removal. According to

¹ The administrative record reflects that the respondent filled out his own notice of appeal, wherein he reserved the right to file a brief if he retained the funds to hire an attorney, as well as an appeal fee waiver request and a change of address form designating his new address in Gilbert, Arizona. It appears, though, that Cyriaque actually mailed these items to the Board.

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the administrative record, the decision was mailed to the respondent's home address in Gilbert, Arizona. There is no indication that the order was returned to the Board. The respondent remained in the United States. On August 30, 2006, the respondent presented himself at a DHS, Citizenship and Immigration Services ("CIS") office in Phoenix, Arizona, for an appointment regarding a Petition for Alien Relative ("Form I-130") that had been filed on his behalf by his spouse on October 24, 2005, after she became a United States citizen. CIS approved the Form I-130; however, an immigration official then notified the respondent that he was subject to a final order of removal and immediately detained him. The respondent has remained in custody in Eloy, Arizona, since August 30, 2006.

On September 28, 2006, the DHS and the respondent filed the instant joint motion to reopen in the Immigration Court in Miami, Florida. In their joint motion to reopen, the DHS and the respondent alleged that Cyriaque had failed to adequately prepare his case, had failed to answer the respondent's queries about the status of his case after the Immigration Judge issued the original July 2, 2002, removal decision, and had failed to advise the respondent of the consequences of his being subject to a final order of removal. They further alleged that the respondent recently learned, upon review of the administrative record, that the court interpreter mistranslated testimony that was crucial to the respondent's claim, and that Cyriaque failed to object to such mistranslation despite his having been fluent in the respondent's native Creole. The parties asserted that Cyriaque did not advise the respondent of the Board's October 23, 2003, removal order or his subsequent need to present himself to the DHS for removal. They further averred that the respondent only became aware of the Board's final order of removal on August 30, 2006.

The parties further charged that Cyriaque failed to file a timely motion to reopen for presentation of new evidence pertaining to his original asylum, withholding of removal, and Convention Against Torture claims. In that regard, the joint motion to reopen also seeks reopening in light of new evidence that allegedly would materially affect the respondent's eligibility for relief — namely, details of his original claim that the respondent was afraid to disclose during his July 2, 2002, removal hearing out of fear of repercussions against him and his family by certain individuals in Haiti. The parties attached to the joint motion to reopen documentary evidence issued before and after the July 2, 2002, removal hearing, ostensibly in support of this claim, and further vaguely stated that "witness testimony . . . will be available shortly (Joint Motion to Reopen, Exh. 6)."

The DHS and the respondent also jointly sought reopening based on changed personal circumstances in Haiti. In that regard, they vaguely alleged that rumors about the respondent's testimony in these proceedings have been transmitted to Haiti and that, as a result, several groups now believe that the respondent testified about their illegal activities. The DHS and the respondent also jointly sought reopening due to changed circumstances, to wit, the respondent's current eligibility for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. Finally, the parties requested a change of venue to the Eloy, Arizona, Immigration Court, in which jurisdiction the respondent is currently detained.

II. THE IMMIGRATION JUDGE'S DECISION

On November 17, 2006, the Immigration Judge denied the joint motion to reopen. The Immigration Judge expressly concluded that the respondent had failed to show his *prima facie* eligibility for

reopening based on ineffective assistance of counsel, for two reasons. First, the Immigration Judge concluded that the respondent did not strictly comply with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), for motions to reopen alleging ineffective assistance of counsel as is required by the United States Court of Appeals for the Eleventh Circuit's precedential decision in *Gbaya v. U.S. Attorney General*, 342 F.3d 1219 (11th Cir. 2003). Second, the Immigration Judge stated that he had contacted the Florida Bar Association and learned that it had dismissed the bar complaint that was filed by the respondent's relative against Cyriaque without action on October 31, 2006.² Although the Immigration Judge did not explicitly address the respondent's claims that he is eligible for reopening based on new evidence, changed personal circumstances in his home country, and his new eligibility for adjustment of status, he implicitly denied those claims as well.

III. REOPENING BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

We agree with the Immigration Judge that the respondent is ineligible for reopening of the removal proceedings due to ineffective assistance of counsel, but for different reasons. While it is true that, in most instances, an agreement by the parties to reopen the proceedings is determinative, *see, e.g., Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997), we find no merit to the joint motion to reopen these proceedings based on alleged ineffective assistance of counsel. First, we note that the joint motion does not substantially comply with the requirements listed in *Matter of Lozada, supra*. *See Gbaya v. U.S. Attorney General, supra*, at 1222.³ In that regard, the joint motion does not include an affidavit of the respondent attesting to the relevant facts, and it does not show that Cyriaque has been notified of the allegations and given an opportunity to respond.⁴ Regarding the substance of the

² The Immigration Judge did not explain why the Florida Bar Association dismissed the bar complaint against Cyriaque.

³ The respondent's assertion that Ninth Circuit case law governs his need to comply with *Matter of Lozada, supra*, because he is detained in the Ninth Circuit is incorrect. We follow the case law in the jurisdiction where this case arises which, in this case, is the Eleventh Circuit. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989). Further, we disagree with the Immigration Judge's conclusion that *Gbaya v. U.S. Attorney General, supra*, mandates strict compliance with the requirements listed in *Matter of Lozada, supra*, for claims alleging ineffective assistance of counsel. In that case, the Eleventh Circuit expressly decided that it did not need to consider whether strict compliance with *Matter of Lozada, supra*, is required in such cases or whether the Board must accept substantial compliance, in light of the fact that the alien in that case did not even achieve substantial compliance with *Matter of Lozada, supra*. *See Gbaya v. U.S. Attorney General, supra*, at 1222.

⁴ We recognize that the respondent has submitted on appeal proof that he filed a new complaint against Cyriaque with the Florida Bar and that the Florida Bar has sent Cyriaque a copy of that bar complaint. He has also submitted two affidavits concerning an incident that happened to him in November 1999 in Haiti. However, this Board is an appellate body whose function is to review, not create a record. *See*

respondent's claims, we cannot blame Cyriaque for inadequate preparation of the case given the respondent's admitted lack of complete candor with Cyriaque regarding the basis of his fear of persecution and torture. Moreover, even if Cyriaque advised the respondent to marry a United States citizen to "fix" his immigration problems, that fact standing alone would not demonstrate that Cyriaque did not adequately prepare the respondent's asylum case. Also, the parties have not shown that the respondent sustained prejudice from Cyriaque's alleged failure to object to the translation of his testimony. See *Matter of Assaad*, 23 I&N Dec. 553, 561 (BIA 2003). Specifically, although the joint motion generally asserts that testimony was mistranslated, it does not explain what testimony was mistranslated, how it was mistranslated, and how, if at all, a proper translation would have rendered the respondent's otherwise incredible claims credible or otherwise affected the outcome of his case.

Also, we cannot conclude that Cyriaque had a duty to file a motion to reopen based on new evidence because there is no indication that the respondent retained Cyriaque for that purpose or ever even talked to him about his alleged new evidence. Likewise, because the respondent appealed the Immigration Judge's July 2, 2002, decision and Cyriaque did not represent the respondent on appeal, there is no reason Cyriaque would have discussed the status of the respondent's case with him after the July 2, 2002, decision, or that he would have discussed with him the consequences of that decision. Further, there is no reason Cyriaque would have discussed the Board's October 23, 2003, final removal order with the respondent or, for that matter, even been aware of it. Even so, according to the evidence of record, our decision was properly mailed to the address in Gilbert, Arizona, that the respondent provided to the Board, since no attorney had filed an entry of appearance as his counsel. See 8 C.F.R. § 1292.5(a). The respondent has not convincingly explained that he did not receive that decision, especially since materials submitted with the joint motion to reopen show that the respondent still resides at the same address. Moreover, he has not shown that he would have presented himself for removal if Cyriaque had discussed with him the consequences of his failure to present himself for removal. Based on the foregoing, we concur with the Immigration Judge's denial of the respondent's motion to reopen based on ineffective assistance of counsel.

IV. REOPENING BASED ON NEW EVIDENCE, CHANGED PERSONAL CIRCUMSTANCES, AND ELIGIBILITY FOR ADJUSTMENT OF STATUS

We also find no error in the Immigration Judge's implicit denial of the joint motion to the extent that the parties seek reopening based on new evidence, changed personal circumstances in the respondent's home country, and the respondent's eligibility for adjustment of status. In that regard, the parties have not shown that the respondent's new evidence is material and would affect the outcome of this case because his underlying claims remain incredible and without merit. See *Matter of A-S-*, 21 I&N Dec. 1106, 1108-10 (BIA 1998); *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). Regarding reopening based on changed personal conditions in Haiti, the parties have not shown that these changed conditions would affect

¹ (...continued)

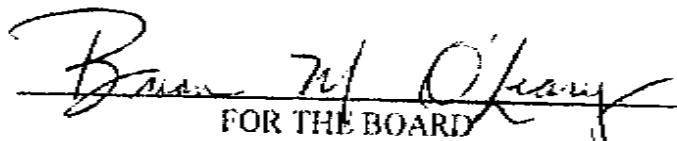
Matter of Fedorenko, 19 I&N Dec. 57, 74 (BIA 1984). The respondent has not filed a motion to remand, and we cannot consider any new evidence presented for the first time on appeal. See 8 C.F.R. § 1003.1(d)(3)(iv). Therefore, we will not consider this evidence.

the outcome of his case. See *Matter of Coelho, supra*, at 473. First, given the confidentiality of asylum proceedings, it is highly unlikely that groups in Haiti would have discovered the respondent's testimony. See 8 C.F.R. § 1208.6. Further, the joint motion to reopen does not give any identifying information about these groups or allege with any specificity what new dangers these groups present to the respondent.

Finally, we are uncertain of the respondent's present eligibility for adjustment of status. The respondent is not *prima facie* eligible for relief under INA § 245(i) because he is not the beneficiary of an approved visa petition filed on or before April 30, 2001, and because he is inadmissible as an alien subject to a final order of removal. See INA §§ 212(a)(9)(A)(ii)(I), 245(i)(1)(B)(i), 245(i)(2)(A). As such an inadmissible alien, he is likewise ineligible to adjust his status under INA § 245(a). See INA §§ 212(a)(9)(A)(ii)(I), 245(a)(2). We also have no reason to believe that he is eligible to adjust his status pursuant to the Haitian Refugee Immigration Fairness Act of 1998, Title IX of Pub. L. No. 105-277, 112 Stat. 2681 ("HRIFA"). See generally 8 C.F.R. § 1245.15. Even if the respondent is statutorily eligible for adjustment of status, though, the parties have not shown that reopening to allow him to seek such relief is warranted as a matter of discretion in light of the fact that the respondent claims to have become eligible for such relief nearly *three years* after the entry of a final administrative order of removal. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (motions to reopen are especially disfavored in immigration proceedings because every delay works to the advantage of the deportable alien).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.


FOR THE BOARD