David Antón Armendáriz
De Mott, McChesney, Curtright & Armendáriz, LLP
800 Dolorosa, Suite 100
San Antonio, Texas 78207-4559
(210) 354-1844
(210) 212-2116 Fax

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF [redacted]	§	RE: [redacted]
Respondent	§	In REMOVAL Proceedings

RESPONDENT'S MOTION TO REOPEN BASED UPON
INEFFECTIVE ASSITANCE OF PRIOR COUNSEL
AND BASED UPON INTERVENING CASE LAW

Introduction

Respondent, [redacted] through undersigned counsel, requests that the Board reopen his removal case based upon the ineffective assistance of prior counsel and based upon intervening case law.

The Board should reopen this case because Mr. [redacted] prior counsel failed to submit documentary evidence supporting the claim that Mr. [redacted] entered the U.S. in February of 2002 and that failure constituted ineffective assistance of counsel that prejudiced Mr. [redacted] Additionally, the Board should reopen this case because the judge's finding that the 2009 return broke time is contrary to Board precedent, including, Matter of Castrejon-Colino, 26 I&N Dec. 667 (BIA 2015), which was issued after the immigration judge's denial and after the Board's affirmance in May of 2015.

This motion is timely as it is being brought within ninety days of the Board's reissuance of its final decision on February 11, 2016.

Pertinent Facts and Procedural History

Mr. [redacted] was placed into removal proceedings by issuance of Notice to Appear ("NTA") dated [redacted] See ROP Exh. 1. On [redacted] attorney [redacted] appeared before the immigration court and filed his EOIR-28. The court took pleadings to the NTA on July 29, 2013.

See Tr., pg. 3. Mr. [redacted] announced that his client would seek cancelation of removal for non-lawful permanent residents pursuant to Immigration and Nationality Act ("INA") section 240A(b). See Tr., pg. 4.

On [redacted] the court held a hearing which concerned exclusively the subject of whether Mr. [redacted] was eligible for that form of relief from removal, specifically, whether Mr. [redacted] 2009 return to Mexico at the hands of immigration officials stopped his accrual of the necessary continuous physical presence. Related to that subject, the court accepted into the record, as Exhibit 5, the government's filing of various governmental forms, including several forms I-213 and an I-94. See Exh. 5. Notably, the government did not produce the one document that by regulation is required to be used to record administrative voluntary departures, to wit, the Form I-210.[1] Mr. [redacted] reports that he was not prepared by his counsel for what was to happen at that hearing, that he met his counsel only minutes beforehand at the courthouse. See Indx., pg. 76, ¶ 6.

The evidence relevant to the subject of whether Mr. [redacted] had the necessary continuous physical presence to be eligible for cancellation relief

[1] See 8 C.F.R. § 240.25 ("Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action – Voluntary Departure. Voluntary departure shall not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.").

is as follows. Mr. [redacted] was born on [redacted] See Exh. 3, pgs. 5 – 8 (identification documents). He began living in the United States on February 2, 2002, at which time he was only fourteen years of age. See Tr., pg. 12, lines 21 – 24; Tr., pg. 13, lines 10 – 11; Exh. 2, pg. 1, questions 17, 19. When his counsel first asked him how old he was when he first came to the United States, Mr. [redacted] replied 19 or 20 but then immediately corrected himself to say 14. Tr., pg. 13, lines 1 – 11. Mr. [redacted] later explained, when questioned about this misstatement, that he was confusing how old he was subsequent to the 2009 departure and return with how old he was when he first came to the United States. See Tr., pg. 37, lines 12 – 22.

After entry, he went to live with some uncles and cousins in Arizona. See id., lines 15 – 20. He came to the U.S. because he had "decided to study," but after his entry, he "studied just for the first month" then went to work. Tr., pg. 13, lines, 23 – 25; pg. 14, lines 14 – 15. Subsequent to that entry in 2002, he did not leave until he was sent out in 2009. See Tr., pg. 14, lines 1 – 5; Exh. 2, pg. 1, question 23.

What happened in 2009 began with him being picked up by the police for speeding and later turned over to immigration authorities, see Tr., pg. 14, line 20 – pg. 16, line 6, which sent him out of the country. Mr. [redacted] testified that he was returned to Mexico the same day that he was handed

over to immigration officials. See Tr., pg. 23, lines 3 – 6. But within a day and a half or so, he had returned to the U.S., crossing without permission at Laredo and he has not left again since. See Tr., pg. 23, line 8 – pg. 24, line 2.

Returning to the subject of the events that led to his being returned to Mexico in 2009, Mr. [redacted] testified that, after being stopped for speeding, he was arrested and convicted of interring with police duties because, during the initial stop, he had asked the officer why he was arresting the two men with whom he had been driving. See Tr., pg. 16, line 18 – pg. 17, line 10. His testimony corresponds to the conviction records which reveal a September 5, 2009 arrest and a September 23, 2009 conviction. See Exh. 3, pgs. 110 – 112. After his conviction, he was turned over to immigration authorities. See Tr., pg. 17, lines 6 – 10. He was taken to an office and locked in a room with about ten other individuals for about two hours until he spoke with an immigration officer. See Tr., pg. 17, line 11 – page 18, line 8. Mr. [redacted] described his interaction with this officer as follows:

> "...[H]e told me that I had to sign some documents. And if I would not do that, I would go to prison …[,] that I would be in jail for … one year or one year and a half. And of course I did not want to stay that long and I did not want to be in jail.
> ….
> [The officer] had a packet of the documents …. [T]here was one page on top of the other. And he kept on flipping and turning those pages. And he would ask me for my initials, to initial each page that he was covering."

Tr., pg. 18, lines 11 – 23. Later, Mr. [redacted] would testify that the official "would not tell [him] anything except to sign," Tr., pg. 41, lines 15 – 16, that if he did not sign he could be in prison for a year, give or take, id., lines 17 – 21, that he was not given any other information as to what his options might be, see Tr., pg. 42, lines 21 – 24, and specifically that he was not told about immigration bonds. See Tr., pg. 43, lines 1 – 3.

The government submitted into evidence a form I-826 in Spanish signed by Mr. [redacted] See Exh. 5, pg. 6. The government also submitted what purported to be an English version of the same form (although the government failed to comply with the requirement of submitting a certificate of translation so whether the English language version is an accurate translation of the Spanish version is unknown). See id., pg. 7. Although the Spanish version is signed by Mr. [redacted] and initialed next to the box which corresponds (purportedly) to a waiver of the right to a hearing before an immigration court, see id., pg. 6, Mr. [redacted] specifically testified that he was not given any opportunity to read it before signing it and that it was not read to him in Spanish, contrary to the officer's signature on the same form attesting to the opposite. See Tr., pg. 20, line 1 – line 8; pg. 29, lines 8 - 23. Importantly, Mr. [redacted] stated that if he had known that he could seek an immigration bond, i.e., that if he had known that the ICE officer's threat of a

year and a half in jail was false, then he would not have signed any documents. See Tr., pg. 20, lines 9 – 14.

He testified that he was given the opportunity to make a phone call but that the person he called did not answer and the officer with whom he was dealing did not allow him to make another call but, later, a different officer allowed him to use that officer's personal cell-phone. Tr., pg. 22, lines 1 – 13. This narration relating to his ability to make a phone call is contradicted by the government's records which claim that Mr. [redacted] was "allowed telephone usage…. [but that he] declined his right to a phone call." Exh. 5, pg. 9.

Under cross-examination – not by the ICE attorney, who rested on the government's documents, see Tr., pg. 24, lines 9 – 11, but by the immigration judge – Mr. [redacted] was questioned about where he got his birth certificate, see Tr., pg. 24, lines 12 – 14, which certificate was issued on October 12, 2009. See Exh. 3, pg. 5. Mr. [redacted] testified that the certificate was issued after he came back to the U.S. and was sent to him by his parents in Mexico. See Tr., pg. 24, lines 12 – 20; pg. 25, lines 8 – 11.

During the judge's questioning of Mr. [redacted] about his interactions with ICE in 2009, the following colloquy took place:

> Judge: Now, you were arrested early September, and you said you had a 30-day Sentence?

Mr. [redacted] Around 30 days.

Judge: That was in the county jail.

Mr. [redacted] Yes.

Judge: And you went to immigration on the — well, it was September?

Mr. [redacted] I'm not sure.

Judge: You don't remember?

Mr. [redacted] I do not remember.

Judge: How tong were you in — at immigration?

Mr. [redacted] Only one day.

Judge: Well, that's curious, because their report says that they picked you up on the 12th, but you didn't sign the documents until the 17th.

Mr. [redacted] I'm not sure. Maybe it was more than five days.

Judge: I see. Maybe they talked to you at the county jail on the 12th?

Mr. [redacted] They did speak with me.

Judge: And you might be getting the conversations mixed together?

Mr. [redacted] Possibly.

Judge: Because the documents I have indicate that you had already agreed to the voluntary departure [indiscernible] on the 17th.

> Mr. [redacted] Well, they went to see me when I was in jail. And they told me they were immigration officers. And they said that after I would serve my time there, they were going to take me to the INS jail for detention.

Tr., pg. 27, line 18 – pg. 29, line 7. It is unclear to exactly which report the immigration judge was referring when he said, while speaking to Mr. [redacted] that ICE's "report says that they picked you upon on the 12th but you didn't sign the documents until the 17th." Tr., pg. 28, lines 13 – 15. Mr. [redacted] was confused by the judge's statement and it is not hard to understand why: there is no report in evidence that indicates that ICE "picked up" Mr. [redacted] on September 12, 2009. Mr. [redacted] was in the custody of Bexar County, as indicated in the judgment against him, from "9/04/09 to 9/23/09." Exh. 5, pg. 112. The judge accused Mr. [redacted] about mixing up the facts but, in fact, it was just the opposite. The judge's question reflected a misunderstanding of the evidence, which misunderstanding caused the confusion on Mr. [redacted] part.

According to the relevant Form I-213 and accompanying I-831 (dated September 12, 2009 and executed and signed by an ICE officer named [redacted] [redacted] an ICE official "interviewed" Mr. [redacted] subsequent to his arrest and placed a detainer on him with the Bexar County jail on September 11, 2009. Exh. 5, pg. 9. According to the same form, on "September 12, 2009 [Mr.] [redacted] was processed prior to his release [from Bexar

County jail] … [but he remained] in the custody of Bexar County Jail pending court for Interference with [the] Duties of [a] Public Servant." Exh. pg. 9. At the bottom of that form, it reads: "[redacted] was granted a Voluntary Return to Mexico on September 12, 2009. [redacted] will return to Mexico once he is released from the Bexar County Jail." Id. Of course, the government, in this case, is relying upon a form signed not on September 12 but rather on September 17, 2009 so the reliability of that September 17, 2009 form is undermined and contradicted as to the date of execution by the other documentation submitted by the government in this case. (This is important because Mr. [redacted] [redacted] inability to testify correctly about the date of execution will be one of the bases for the judge's eventual denial.)

The judge's cross-examination of Mr. [redacted] continued. This time, in an effort to undermine Mr. [redacted] claim that he did not knowingly accept voluntary departure, the judge interrogated him as to whether he would have had any relief at the time, even if he had rejected the "voluntary departure" in 2009:

> Judge: … [Y]our attorney asked you, if you were given a change, would you have presented your case? Remember that?
>
> Mr. [redacted] … Yes.
> ….

Judge: [M]y question is, what case was it that you would [have] present[ed]? What case did you have to present? …. Just what case did you think you would present?

Mr. [redacted] Well, not to go back… to stay here in the United States.

Judge: And what case did you have for that?

Mr. [redacted] The time I had been – that I had here.

Judge: Yeah. Did you know immigration law?

Mr. [redacted] No.

Judge: You hadn't been here enough time. Did you have relatives?

Mr. [redacted] Uncle and sister.

Judge: Your sister? She's not legal though, is she? …. So you didn't have any relatives here that could help you in immigration did you?

Mr. [redacted] My uncles.

Judge: What had he done for you – in immigration? Or didn't you care about getting a card?

Mr. [redacted] Of course I am interested.

Judge: Yeah. So what did you ask your uncle to do for you, for immigration? You said he could help.

….

I'm still left with [the fact] that you didn't have any case to present.

….

So what case were you planning to present?

Tr. pg. 31, line 7 – pg. 33, line 25. Here the immigration judge simultaneously mocks Mr. [redacted] for his lack of immigration law knowledge and his supposed lack of desire to get a green card. It was at this point that Mr. [redacted] counsel finally objected to this line of questioning, see Tr., pg. 34, lines 1 – 4, but the judge's point and effect – to cow Mr. [redacted] – was made. The judge then moved on to elicit an admission from Mr. [redacted] that his intent was to get out of jail as soon as possible, see Tr., pg. 34, line 6 – pg. 35, line 21, as if that had any bearing on the legal question at hand – whether Mr. [redacted] was aware of and knowingly waived his right to an immigration hearing.

Then the judge accused Mr. [redacted] of reporting to ICE in 2009 a different date of entry than the date of entry he was not claiming:

> Judge: When you met the immigration officers in September of 2009, at the jail, you told them that you came in September of 2002 – not in February. Did you remember --
>
> Mr. [redacted] I don't remember.
>
> Judge: better then?
>
> Mr. [redacted] I don't remember. I'm not sure.
>
> Judge: … Because there's a big difference between the time of year, and the weather, and other such things, between February and September. I was wondering why you told two different dates?

Mr. [redacted] I don't know. I'm not too sure.

Tr., pg. 38, lines 6 – 20. The judge's reference here to the weather makes little sense. The judge did not ask Mr. [redacted] whether the ICE officers in 2009 asked him about the weather at the time of his initial entry in order to focus his memory. Recalling surrounding events and circumstances is a good way to focus memory but there is no evidence that the ICE officers in 2009 asked Mr. [redacted] to focus his memory in that fashion. If Mr. [redacted] had, e.g., told the ICE officers in 2009 that he came in before the winter weather at the end of 2002 and then had he later told the officers (in 2013) that he came in before the summer heat in 2002, then there would be a clear contradiction. The judge's explicit assumption that Mr. [redacted] would remember the date of entry better in 2009 – in the context of a jail interrogation with no preparation – then he would in 2013 during a removal process is just nonsensical.

After his interrogation, the judge turned to the issue of Mr. [redacted] documentary evidence of continuous physical presence. The judge pointed out to Mr. [redacted] counsel, [redacted] [redacted] that he saw no documentation predating 2008. Mr. [redacted] on the record, told that judge: "we did have an affidavit from the family [but i]'m not seeing it in the index. But I do remember reviewing it in the packet." Tr., pg. 44, lines 9 – 14.

The judge then issued his oral decision pretermitting cancellation of removal on the basis of his finding that Mr. [redacted] had failed to demonstrate the necessary continuous physical presence, citing to Matter of Romalez, 23 I&N Dec., 423 (BIA, 2002). The immigration judge rested his denial upon the following:

- Mr. [redacted] first testified that he entered at the age of nineteen or twenty but then changed it to fourteen, see Dec., pg. 3;
- while in Bexar County jail in 2009, Mr. [redacted] provided an initial entry date of September 11, 2002, which the judge stated would have been "a somewhat memorable date," see Dec., pg. 3;
- when apprehended in 2013, Mr. [redacted] gave a last entry date of January of 2010, see Dec., pg. 3;
- Mr. [redacted] testified that, after being returned to the Mexico in 2009, he returned to the United States "within a day or a day-and-a-half" but that, in his "sworn application, … [he] indicates that he departed September 24, 2009 and did not return until September 27, 2009," see Dec., pgs. 3 – 4;
- Mr. [redacted] had submitted a birth certificate that was issued in October of 2009; given that he testified that his parents got it and sent it to him and given that he had told ICE in 2013 that he

returned to the U.S. subsequent to being returned in January of 2010, "it is much more likely that [he] would take the opportunity of his return to Mexico to visit his parents, secure a birth certificate … for use on his return to the United States and perhaps spend the holidays," Dec., pg. 4;

- Mr. [redacted] "testimony was that he departed the [U.S.] "the specific intent of being released from the custody of the [DHS] without being put through deportation proceedings, and then returning to the [U.S.] as soon as possible," Dec., pg. 4;
- Mr. [redacted] "documentation does not extend back in time any farther than 2008," Dec., pg. 4;
- Mr. [redacted] continuous physical presence was "broken in September of 2009" because he was "interviewed [on] September 12, 2009 [and] turned over [to] the custody of the [DHS] and allowed to voluntarily depart the [US] for Mexico [on] September 24, 2009," and because Mr. [redacted] testified that he signed documentation and was returned to Mexico on the same day but the documentation was in fact signed on September 17, 2009, Dec., pg. 5;

- Mr. [redacted] could not identify "any case that he could have presented [in 2009] that he could have presented to remain in the United States … [and] posting a bond and [obtaining] release from custody is not relief under the [INA] and does not allow one to remain in the United States indefinitely, Dec., pg. 6; and
- Mr. [redacted] was incarcerated and "did not like it and was anxious to be released as soon as possible for the purpose of returning to the [U.S.] as soon as possible." Dec., pg. 6.

Subsequent to the denial by the immigration judge, Mr. [redacted] counsel, [redacted] filed a timely appeal. On May 13, 2015, the Board upheld the judge's denial. First the Board found that the 2009 return had broken Mr. [redacted] continuous physical presence because of the execution of the I-826 and of the I-213. See BIA Dec., pgs. 1 – 2. Elaborating on this point in a footnote, the Board suggested that it did not matter whether Mr. [redacted] understood what he was signing and that the judge had rightly determined that Mr. [redacted] had "knowingly departed under threat of removal proceedings" within the meaning of Matter of Romalez because he had testified that he "intended to depart the [U.S.] as quickly as possible following his release from custody, and that he intended to avoid deportation proceedings." BIA Dec., pg. 2, (citing Dec., pgs. 4, 6 and to Tr., pgs. 35, 40

– 43).[2] But in fact, contrary to both the judge's and the Board's affirmance, there is nowhere in the transcript any statement by Mr. [redacted] that he "intended to avoid deportation proceedings." He certainly testified to wanting to avoid jail time – which the immigration officer had falsely threatened – but that is obviously not the same as being aware of and knowingly waiving the right to defend himself in a removal process.

Beyond the question of whether the 2009 return interrupted the accumulation of physical presence, the Board additionally held, without

[2] In full, the passage at footnote 1 reads:

> The respondent indicates on appeal that he did not understand what he was signing and therefore did not depart under threat of removal proceedings such that his continuous physical presence ended. In support of this argument, he asserts that immigration officials did not read the documents to him in Spanish, and that they did not give him the option of undergoing removal proceedings in lieu of removal. First, as established above, an alien who is subject to a formal, documented process pursuant to which he is determined to be inadmissible to the United States, has suffered a break in his continuous physical presence. See Matter of Avilez, [23 I&N Dec. 799,]805-06 [(BIA 2005)]. However, even if the record did not show that the respondent indeed underwent this formal, document process, the Immigration Judge determined that the respondent knowingly departed under threat of removal proceedings. See Matter of Romalez, 23 l&N Dec. 423, 429 (BIA 2002) (holding that continuous physical presence is deemed to end at the time an alien is compelled to depart the United States under the threat of the institution of deportation or removal proceedings); see also Matter of D-R-, 25 I&N Dec. 445, 453-56 (BIA 2011) (explaining that an Immigration Judge may make reasonable inferences from direct and circumstantial evidence in the record as a whole and is not required to accept an alien's account where other plausible views of the evidence are supported by the record). Specifically, the Immigration) Judge noted the respondent's testimony that at the time of his interaction with immigration officials, he intended to depart the United States as quickly as possible following his release from custody, and that he intended to avoid deportation proceedings (I.J. at 4, 6; Tr. at *35,* 40-43).

elaboration, that Mr. [redacted] had not shown ten years continuous physical presence because he had given "conflicting dates as to his initial entry" and because he had "submitted no documentary evidence corroborating his physical presence prior to 2008." See BIA Dec., pg. 2.

The Board sent its May 13, 2015 decision to Mr. [redacted] at the address that it had on file. But because Mr. [redacted] had moved suites and had not notified the Board of his change of address, he never got it and neither did Mr. [redacted] Subsequently, undersigned counsel moved the Board to reissue its decision on the basis of Mr. [redacted] error and the Board did so, reissuing the decision on February 11, 2016.[3] This timely motion to reopen followed.

Argument

I. The Board should reopen this case because Mr. [redacted] prior counsel failed to submit documentary evidence supporting the claim that Mr. [redacted] entered the U.S. in February of 2002 and that failure constituted ineffective assistance of counsel that prejudiced Mr. [redacted]

There were two bases for the judge's denial and the Board's affirmance of the same. The first was that Mr. [redacted] had failed to prove up ten years continuance physical presence by means of testimony and documentation. The second was that the 2009 return broke time.

[3] Thereafter, Mr. [redacted] through counsel, on or about March 9, 2016, filed notice to the Board of his withdrawal of the request for voluntary departure that his prior counsel requested as alternative relief on his behalf at the final hearing. See copy attached at Indx, pgs. 80 – 92.

With regard to the first, the judge asked Mr. [redacted] counsel on the record about the lack of any submission of documentary evidence of continuous physical presence prior to 2008. Mr. [redacted] on the record, told that judge: "we did have an affidavit from the family [but i]'m not seeing it in the index. But I do remember reviewing it in the packet." Tr., pg. 44, lines 9 – 14. When confronted by undersigned counsel on this subject, Mr. [redacted] wrote, contrary to his prior statement to the judge, that he "didn't think" that they ever received them. Indx., pg. 95. His statement that he never got them is simply not credible in light of his specific statement to the judge that he specifically remembered receiving something. Mr. [redacted] confirms that he obtained letters from family and friends attesting to his presence in Arizona in February of 2012 and that he submitted these to Mr. [redacted] for presentation to the immigration court. See Indx., pg. 76, ¶ 3..

In an attempt to reproduce the documents that Mr. [redacted] lost, Mr. [redacted] has produced, attached herewith, new letters from persons attesting to his presence in the U.S. in February of 2002. Specifically, there are several letters attesting to his presence on February 2, 2002 at a birthday party in Arizona to celebrate the eleventh birthday of family friend, [redacted] who was born on February 2, 1991. [redacted] provides an affidavit and her identification and discussed Mr. [redacted]

presence at her party, see Indx, pgs. 48 – 50, as does [redacted] mother, see Indx, pgs. 51 – 53, and Mr. [redacted] cousin, [redacted]. See Indx, pgs. 54 – 56. Another affiant, [redacted], an uncle of [redacted], also attests to Mr. [redacted] being in Arizona in February of 2002. In his letter, he explains that he tried to help Mr. [redacted] find work at that time. See Indx, pgs. 57 – 59.

Mr. [redacted] has complied with Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). Attached is his affidavit on the subject, see Indx, pg. 76, the related bar complaint, see Indx, pgs. 98 – 99,[4] and proof of notice to the same to Mr. [redacted] See Indx., pgs. 94 – 97. This very specific documentary evidence from several persons attesting to Mr. [redacted] physical presence in Arizona on February 2, 2012 for the same event undercuts not only the basis of the judge's denial (and the affirmance) rooted in the lack of documentation but also the basis of the judge's denial (and the affirmance) rooted in Mr. [redacted] allegedly inconsistent memory and statements as to the precise date of his initial entry as a fourteen year old boy. Lots of people do not have good memories about dates of events long past and the capacity of most of to recall them instantly when under the interrogation of a judge or

[4] The bar complaint was sent to the state bar authorities on April 20, 2016, as dated, but, because the undersigned could not later find proof of that mailing, it was resent to the bar authorities by certified mail on May 9, 2016. See Indx. pg. 99.

governmental official makes it no doubt even worse but, in this case, whatever the defects from which Mr. [redacted] memory suffers, there is specific and reliable documentary evidence of his physical presence in the U.S. in February of 2002 – one month before the ten year clock for cancellation relief began. The only reason that evidence did not make it into the record was his counsel's ineffective assistance.

The Board should reopen this case because Mr. [redacted] prior counsel failed to submit documentary evidence supporting the claim that Mr. [redacted] entered in February of 2002 and that failure constituted ineffective assistance of counsel that prejudiced Mr. [redacted]

II. The Board should reopen this case because the judge's finding that the 2009 return broke time is contrary to Board precedent, including, Matter of Castrejon-Colino, 26 I&N Dec. 667 (BIA 2015), which was issued after the immigration judge's denial and after the Board's affirmance in May of 2015.

a. The relevant case law requires, for there to be a break in the accumulation of continuous physical presence, that the alien knowingly accept voluntary departure and agree to leave in exchange for not being put in removal proceedings.

To meet the continuous physical presence requirement, the respondent must show that he or she "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date" of the application for cancellation of removal. INA § 240A(b)(1)(A). Under section 240A(d)(2), "[a]n alien shall be considered to have failed to

maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." However, this statute "does not purport to be the exclusive rule respecting all departures." Romalez-Alcaide, 23 I.&N. Dec. at 425.

Just as the execution of an order of removal will result in the termination of continuous physical presence, the same holds true for an action taken in lieu of formal removal that also results in an enforced departure, such as an order of voluntary departure knowingly accepted in lieu of removal proceedings. See Romalez-Alcaide, 23 I.&N. Dec. at 426 - 27. Thus, before continuous physical presence may be deemed to be interrupted, such as in the instant case, there must be evidence that the respondent accepted her departure knowing that formal proceedings would be commenced if she did not agree to voluntary return to her native country. See Matter of Avilez, 23 I&N Dec. 799 (BIA 2005) (finding no break in time because, inter alia, "the evidence in that case did not show that she was aware of the opportunity for exclusion proceedings…."). "The salient point to be taken from Avilez is that a voluntary departure will not break the alien's continuous physical presence unless there is evidence that he or she

knowingly accepted its terms." Castrejon-Colino, 26 I&N Dec. at 670 (emphasis added). "Simply put, there must be evidence that the alien was made aware of the possibility of appearing at a hearing before an Immigration Judge and affirmatively agreed to depart in lieu of being subjected to removal proceedings." Id (emphasis added).

Numerous decisions reflect this legal principle. In Romalez-Alcaide, the facts on appeal were not in dispute. The respondent therein "initially entered the United States in 1984. In January 1993 and April 1994, he departed the United States under threat of deportation. On each occasion, the respondent remained in Mexico for a day or 2 and then unlawfully returned to the United States." 23 I.&N. Dec. at 423. Before the IJ, he applied for cancellation pursuant to § 240A(b)(1). The IJ denied it on the basis, inter alia, of his finding that the respondent had failed to meet both the 10-year continuous physical presence requirement. See id. at 424. On appeal, the Board looked exclusively at the continuous physical presence requirement and held that § 240A(d)(2) is not "the exclusive measure of what constitutes a break in continuous physical presence" and that "a departure that is compelled under threat of the institution of deportation or removal proceedings is a break in physical presence" for purposes of § 240A(b)(1)(A). Id (emphasis added). More specifically stated, "a departure

following an arrest by the Border Patrol with the threat that formal proceedings will be commenced absent the alien's voluntary return to his or her native country" will stop the accrual of physical presence for purposes of § 240A(b)(1)(A). Id. at 426 (emphasis added). Under these circumstances, "[t]he alien leaves with the knowledge that he does so in lieu of being placed in proceedings." Id. at 429 (emphasis added). "The BIA's analysis makes clear that its holding in Romalez-Alcaide applies only to aliens who accept voluntary departure under threat of deportation or removal proceedings." Morales-Morales v. Ashcroft, 384 F.3d 418, 425 (7th Cir. 2004) (emphasis added) (rejecting government argument that respondent's several arrests and returns to Mexico interrupted continuous residency for purposes of cancellation relief where there was "absolutely no evidence in the record … that [respondent] voluntarily departed … under threat of removal or deportation proceedings").

In other words, the alien must knowingly accept voluntary departure and agree to leave in exchange for not being put in removal proceedings. See Vasquez-Lopez v. Ashcroft, 343 F.3d 961, 974 (9th Cir. 2003) (administrative "voluntary departure" occurs "pursuant to an agreement between Petitioner and the Attorney General under which Petitioner agreed to depart and not to return other than in accordance with the entry process

applicable to all aliens."); Ortiz-Cornejo v. Gonzalez, 400 F.3d 610 (8th Cir. 2005) (holding that the record was insufficient to conclude that departures were under the threat of deportation where the alien was stopped and returned to Mexico two times by immigration officials); Reyes-Vasquez v. Ashcroft, 395 F.3d 903, 908 (8th Cir. 2005) (finding that an apprehension and return by the Border Patrol was not a "presence-breaking voluntary departure" where there was no evidence the respondent was informed of and accepted the terms); Morales-Morales, 384 F.3d at 428 (voluntary departure under threat of deportation or removal proceedings ... constitutes a break in continuous physical presence but an informal agreement to leave the country after brief detention by Border Patrol agents does not).

The Board upheld and clarified this principle of law recently in Matter of Castrejon-Colino, 26 I&N Dec. 667 (BIA 2015). Therein, the respondent was "was apprehended by Border Patrol agents, fingerprinted and photographed, and asked to sign the screen of a small electronic device that displayed unknown content." Id., at 667 – 668. Just as in Castrejon-Colino, Mr. [redacted] was told to sign something of unknown content. As did Mr. [redacted] the respondent in Castrejon-Colino maintained "that he was not threatened with removal proceedings or provided any explanation of rights or warnings." Id., at 668. As the Board in Castrejon-Colino emphasizes,

although "[t]he evidence required to show a process of sufficient formality to break continuous physical presence will depend on the circumstances of each case," Id., at 671, in fact, the question of whether the process is sufficiently formal to break time is intimately tied to the question of whether the alien was aware of and knowingly waived the right to a hearing: "[m]ost of the circuit courts[5] that have addressed this question have looked at whether there is evidence that the alien was advised of and waived the right to have a hearing before an Immigration Judge." Id., at 671. "Consistent with this jurisprudence, [this Board] conclude[d] that where an alien has a right to a hearing before an Immigration Judge, there must be reliable testimonial and/or documentary evidence in the record to establish that the alien was informed of that right and waived it before a voluntary departure will be considered a sufficiently formal process to break his or her physical presence." Id.

[5] See e.g., Palomino v. Ashcroft, 354 F.3d 942, 943 (8th Cir. 2004) (finding break in continuous presence because INS officials "gave [respondent] the option of voluntarily departing or facing formal administrative deportation proceedings"); Mireles-Valdez v. Ashcroft, 349 F.3d 213, 214 (5th Cir. 2003) (finding break in continuous presence because Respondent "agreed to accept an administrative voluntary departure; and was returned to Mexico without having proceedings brought against him"); Reyes-Vasquez, 395 F.3d at 908 (concluding that presence-breaking voluntary departure had not occurred where record "insufficient to support a finding that Reyes-Vasquez knowingly agreed to administrative voluntary departure … and was made aware that he would otherwise face removal proceedings."); Gutierrez v. Mukasey, 521 F.3d 1114, 1117 (9th Cir. 2008) (finding break in continuous presence because Respondent's "own testimony establishes that he was given a choice between deportation proceedings and leaving voluntarily," "he chose the latter" and thus made "a knowing and voluntary agreement to depart in lieu of removal proceedings.").

b. <u>The Board should reopen this case because neither the immigration judge nor the Board had the benefit of the Board's clarification in Castrejon-Colino and, contrary to the judge's decision, Mr. [redacted] never testified that he was aware of his right to a court hearing or that he knowingly accepted voluntary departure and agreed to leave in exchange for not being put in removal proceedings</u>.

The judge found that the 2009 return stopped the clock on continuous physical presence for Mr. [redacted] because:

- he testified that "that he departed the [U.S.] "the specific intent of being released from the custody of the [DHS] without being put through deportation proceedings, and then returning to the [U.S.] as soon as possible," Dec., pg. 4;
- he was "interviewed [on] September 12, 2009 [and] turned over [to] the custody of the [DHS] and allowed to voluntarily depart the [US] for Mexico [on] September 24, 2009";
- Mr. [redacted] testified that he signed documentation and was returned to Mexico on the same day but the documentation was in fact signed on September 17, 2009, Dec., pg. 5;
- Mr. [redacted] could not identify "any case that he could have presented [in 2009] that he could have presented to remain in the United States … [and] posting a bond and [obtaining] release from

custody is not relief under the [INA] and does not allow one to remain in the United States indefinitely, Dec., pg. 6; and because

- Mr. [redacted] was incarcerated and "did not like it and was anxious to be released as soon as possible for the purpose of returning to the [U.S.] as soon as possible." Dec., pg. 6.

The judge's claim that Mr. [redacted] testified that he accepted being returned to Mexico so as to be released from the custody of the DHS "without being put through deportation proceedings," Dec., pg. 4, is simply false and unrooted in the record. Mr. [redacted] certainly wanted to be released from jail, having been threatened falsely with extended detention, but there is nowhere in the transcript any statement whatsoever from him attesting his knowledge that he had the right to a hearing before an immigration judge. The only evidence in the record at all of that allegation is the Form I-826 signed by Mr. [redacted] See Exh. 5, pg. 6. Mr. [redacted] specifically testified that he was not given any opportunity to read that before signing it and that it was not read to him in Spanish, contrary to the officer's signature on the same form attesting to the opposite. See Tr., pg. 20, line 1 – line 8; pg. 29, lines 8 - 23. Like the respondent in Matter of Castrejon-Colino, Mr. [redacted] was forced to sign something of "unknown content." Id., at 667 – 668.

As for the fact that Mr. [redacted] testified that he signed documentation and was returned to Mexico on the same day while the government's Form I-826 was dated September 17, 2009, Dec., pg. 5, which was several days before he was removed, this does not undermine Mr. [redacted] credibility. First off, the government's own records, specifically the I-213, contradicts the claim that Mr. [redacted] accepted voluntary departure on September 17, 2009. The I-213 claims that voluntary departure was given and accepted on September 12, 2009. See Exh. 5, pg. 9. And it is undisputed that ICE officials talked to Mr. [redacted] several times – once prior to issuing the detainer, at least once while he was incarcerated at Bexar County, and then when he came into ICE's custody after being convicted. The judge himself misrepresented the record to Mr. [redacted] at least once causing confusion when he said, while speaking to Mr. [redacted] that ICE's "report says that they picked you upon on the 12th but you didn't sign the documents until the 17th." Tr., pg. 28, lines 13 – 15. That was false. There is no report identifying ICE as having picked up Mr. [redacted] on the 12th. In any case, Mr. [redacted] relates that he signed documents on more than one occasion. See Indx., pg. 77, ¶¶ 9 – 10. The immigration judge's punctilious focus on when the I-826 was signed to the exclusion of whether Mr. [redacted] even

understood what was written, is clear error, especially in light of the fact that the I-213 contradicts the I-826 as to when it was executed.

Now to address the judge's basis of denial rooted in Mr. [redacted] being unable to identify "any case that he could have presented [in 2009] that he could have presented to remain in the United States … [and] posting a bond and [obtaining] release from custody is not relief under the [INA] and does not allow one to remain in the United States indefinitely. Dec., pg. 6. This is a naked incorporation of a prejudice requirement that finds foundation in none of this Board's precedent. Nowhere has the Board ruled that, for time to stop accruing for cancellation relief, it must be shown that the respondent knowingly accepted voluntary departure and agreed to leave in exchange for not being put in removal proceedings but only where the respondent otherwise had relief.[6]

[6] The immigration judge's ruling on this point rests upon a misapplication of the law rooted in his longstanding rejection of the legal principle that, in this context, a judge must conduct an inquiry into whether the respondent knowingly accepted voluntary departure in lieu of being placed into proceedings. This particular judge applies a completely inapposite prejudice analysis every time he is confronted with this issue, despite being told repeatedly by the Board that he is misapplying the law. Attached to this brief are the relevant documents, explained below, relating to several other cases in which this judge applied this prejudice analysis and refused to consider whether the alien knowingly accepted voluntary departure in lieu of being placed in removal proceedings.

[redacted] Mr. [redacted] see Indx, pg. 173 (Board opinion, dated March 18, 2008), Indx, pg. 176 (IJ opinion, dated November 2, 2006), was defended by undersigned counsel. Mr. [redacted] had twice been apprehended by Border Patrol within the U.S. without legal status and each time returned to Mexico. He disputed that these two enforced returns to

Mexico were done voluntarily and with knowledge that they were in lieu of being placed in removal proceedings. See Indx, pgs. 174 – 178. Without even taking testimony, the judge pretermitted Mr. [redacted] cancellation application, claiming that, based upon the government's documentation, his forced returns cut his physical presence. See 178 – 180. Then as now, the judge presumed what needed to be proven; he presumed that because Mr. [redacted] had been returned to Mexico, it was done ipso facto under the threat of removal proceedings. In his decision, the judge explicitly rejected the notion that the analysis involved any inquiry into whether the alien made a knowing decision to accept voluntary departure in lieu of being put into proceedings, saying:

> I find no authority in Matter of Romalez, 23 I&N Dec. 423 (BIA 2002), for inquiry as to the state of mind of the respondent when he was allowed to depart the United States voluntarily in lieu of the institution of removal proceedings after apprehension by the United States Border Patrol.

Indx, pgs. 178 – 179. Rather than conducting a proper analysis, the judge applied his prejudice analysis:

> The respondent's first apprehension by the United States Border Patrol was on March 1, 2000, a little over six years after the respondent's entry to the United States. An application for cancellation of removal would not have been available at that time, and no other relief than voluntary departure has been identified that would have been available to the respondent at that time. I, therefore, am not convinced that the respondent was materially prejudiced in March of 2000 by being allowed to voluntarily return to Mexico rather than being deported.... I conclude, again, that there has been no showing of prejudice at that time, and no basis for the Court to continue to inquire as to the state of mind, nature, and circumstances of the respondent's apprehension and his being allowed to voluntarily depart the United States for Mexico either in 2000 or 2003.

Id. The Board overturned him, calling direct attention due to his misapplication of Romalez:

> We also note the [IJ's] incorrect statements regarding our precedent decisions. There must be a finding that the alien knowingly accepted voluntary departure in lieu of removal proceedings; this is the heart of our holdings in Matter of Romalez, [], and Matter of Avilez, [23 I. & N. Dec. 799 (BIA 2005)]. To say that whether an alien makes a knowing bargain is not significant is simply inaccurate.

Indx, pg. 175.

[redacted]

Mr. [redacted] was an applicant for cancellation relief but he had been apprehended and returned to Mexico by Border Patrol on one occasion. He presented evidence that he did not knowingly accept his return to Mexico in lieu of being placed in proceedings. The judge nevertheless pretermitted Mr. [redacted] cancellation application on the basis of a break in physical presence caused by the return of Mr. [redacted] to Mexico by the Border Patrol. The judge based his decision not on any factual finding that Mr. [redacted] knowingly accepted his return to Mexico in lieu of being placed in proceedings but rather on a prejudice analysis in conjunction with what the judge called the "presumption of official regularity":

> Where the respondent has been apprehended by the Border Patrol, I must find that there is a presumption of official regularity and that the alternative to the respondent's requesting and being granted voluntary departure would not have been release by the Border Patrol to resume his residence and employment in the United States, but rather would have been removal proceedings instituted at that time. Were removal proceedings instituted at that time, the respondent, who entered at the earliest 1992 and perhaps as late as 1993, would not have been able to request cancellation of removal in those removal proceedings. The respondent voluntarily departed the United States while in the custody of the United States Border Patrol and, therefore, presumptively in lieu of removal proceedings being instituted against him pursuant to Section 240B (a) (1) of the Act.

Indx, pg. 198 – 199. In other words - as demonstrated by the judge's use of the word "presumptively" - the judge presumed that because Mr. [redacted] was returned to Mexico by Border Patrol, it was necessarily done under the threat of removal proceedings and because he would not have then been eligible for cancellation-type relief, he could not show any prejudice that he suffered for having not been given an opportunity to defend himself in a removal case. The Board initially sustained the judge's decision after reviewing other counsel's inadequate arguments on appeal. See Indx, pgs. 186. The office of the undersigned then filed a motion to reopen and reconsider, attacking the IJ's physical presence ruling and this Board then sustained the motion, inter alia, on that basis, once again overturning this judge on this legal issue due to his misapplication of the law. See Indx, pg. 187.

[redacted]
Mr. [redacted] was an applicant for cancellation relief but he had been apprehended and returned to Mexico by Border Patrol on one occasion. He presented evidence that he did knowingly accept his return to Mexico in lieu of being placed in proceedings. The judge, in his 2010 decision, nevertheless pretermitted his cancellation application on the basis of a break in physical presence caused by his return to Mexico by the Border Patrol on that occassion. Once again, the judge, while citing to Romalez, applied a prejudice analysis:

> The respondent was taken into custody by the United States Border Patrol and was detained and there does not appear to be any other alternative for resolution of the case other than the respondent requesting permission to

Finally, to the last point, the evidence is clear that Mr. [redacted] did not like being incarcerated and was anxious to be released. That should be no surprise. But he was faced with a choice that does not comport with the circumstances under which the accumulation of time for cancellation relief will be deemed broken. The choice before him was: be returned to Mexico or face incarceration of a year or more. That is not the choice the Board had in mind in Castrejon-Colino. The real choice that must be presented to an alien who is entitled to a removal hearing is between being returned to Mexico and being placed into removal proceedings. This judge conflates the removal process with incarceration and that was clear error. In any case, a legal principal that deemed a renunciation of rights voluntary where it was

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> voluntarily depart the United States while in custody or his being placed in proceedings for deportation or removal from the United States. There do not appear to be relief options in proceedings.

Supp. Indx, pg. 142. Here the judge makes clear that because, in his view, Mr. [redacted] had no relief options in proceedings at the time of his seizure by Border Patrol, then there had to be a break in continuous physical presence. This Board rejected the IJ's continuous physical presence analysis and overturned the decision. See Indx, pg. 130.

Mr. [redacted] case is proof positive that despite the Board's aforementioned decision in the case of Mr. [redacted] and its personal instruction to the judge in that and this case rejecting his view of the law, and despite being repeatedly overturned, as in the case of Mr. [redacted] and Mr. [redacted] this particular judge disagrees with and refuses to apply Romalez and its progeny properly. Instead, he applies a prejudice analysis that has no place here. The judge simply sees no real need to conduct an inquiry into whether an alien in these circumstances has knowingly accepted voluntary departure in lieu of being placed into proceedings. This Board must not allow the judge to ignore Board precedent and misapply the law.

induced by an immigration agent's false threats of incarceration would seem to obviously implicate due process concerns.

Conclusion

The Board should reopen this case because Mr. [redacted] prior counsel failed to submit documentary evidence supporting the claim that Mr. [redacted] entered the U.S. in February of 2002 and that failure constituted ineffective assistance of counsel that prejudiced Mr. [redacted] Additionally, the Board should reopen this case because the judge's finding that the 2009 return broke time is contrary to Board precedent, including, Matter of Castrejon-Colino, 26 I&N Dec. 667 (BIA 2015), which was issued after the immigration judge's denial and after the Board's affirmance in May of 2015.

April 3, 2017

David Antón Armendáriz
De Mott, McChesney, Curtright & Armendáriz, LLP
800 Dolorosa, Suite 100
San Antonio, Texas 78207-4559
(210) 354-1844
(210) 212-2116 Fax

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, a copy of RESPONDENT'S MOTION TO REOPEN BASED UPON INEFFECTIVE ASSITANCE OF PRIOR COUNSEL AND BASED UPON INTERVENING CASE LAW:

_X_ was sent by first class regular mail to:

U.S. Immigration & Customs Enforcement
Office of the Chief Counsel
8940 Fourwinds Drive, 5th Floor
San Antonio, Texas 78239

_____
David Antón Armendáriz

April 3, 2017