



**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1705 EAST HANNA ROAD, SUITE 366
ELOY, AZ 85231**

IN THE MATTER OF

[Redacted])
 [Redacted])
 aka [Redacted])
 aka [Redacted])
 [Redacted])
 aka [Redacted])
 aka [Redacted])
 aka [Redacted])
 aka [Redacted])
 Respondent)
 _____)

IN REMOVAL PROCEEDINGS

FILE NO.: [Redacted]

DATE: January 27, 2010

MOTIONS: Motion to Reconsider
 Motion to Reopen
 Motion for Administrative Closure

ON BEHALF OF THE RESPONDENT:

[Redacted], *Pro se*
 c/o Pasadena Parole Department
 Unit 3
 333 East Walnut Street
 Pasadena, CA 91101
 [Redacted]

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel
 Department of Homeland Security
 1705 East Hanna Road
 Eloy, AZ 85231

DECISION AND ORDER OF THE IMMIGRATION COURT

I. JURISDICTION AND PROCEDURAL HISTORY

On February 3, 2009, the Department of Homeland Security (the “Department” or “DHS”) filed a Notice to Appear (“NTA”) against the above-mentioned respondent. The NTA asserts that the respondent is a native and citizen of Liberia, and that he was admitted to the United States at New York, New York, on or about [Redacted], 1974, as an immigrant. (Exh. 1,

[REDACTED]

Form I-862, 1.) The Department further asserts that the respondent was, on [REDACTED], 2008, convicted in the California Superior Court, County of Los Angeles for the offense of Unlawful Sexual Penetration with Force, in violation of Section 289(A)(1), of the California Penal Code, for which he was sentenced to a term of imprisonment of three (3) years. (*Id.*) The Department charged the respondent as removable from the United States pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (“Act”), as amended, in that, at any time after admission, he was convicted of an aggravated felony as defined in INA § 101(a)(43)(F), a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment ordered is at least one year. (*Id.*)

During the removal proceedings, the respondent was unable to acknowledge receipt of the NTA, or to address the allegations or charges. On November 14, 2009, during a master calendar hearing, the Court, in agreement with the Department, found the respondent to be mentally incompetent. The Court informed the Department of its concerns regarding the respondent’s lack of adequate representation, and that the Department must *expeditiously* seek a custodian to represent the respondent so as not to unnecessarily continue his already prolonged detention. In response to the Court’s directive, the Department informed the Court that it would present Michelle Lee, Assistant Field Office Director (“AFOD”), to appear as a custodian for the respondent at the next scheduled hearing. (Audio Record of Proceedings (Nov. 14, 2009).)

At the following hearing, on December 3, 2009, without providing prior notice to the Court, AFOD [REDACTED] failed to appear. On her behalf, the Department presented [REDACTED], Assistant Officer-in-Charge, Office of Detention and Removal Operations, of the Department of Homeland Security, to appear on behalf of the respondent as his custodian/representative. At that time, the Court determined there was an inherent conflict of interest for a supervisory deportation officer to act as the custodial representative for an incompetent alien when that same officer is employed to accomplish the goal of removing the alien from the United States. (Audio Record of Proceedings (Dec. 3, 2009).)

On December 3, 2009, in open court, the Department informed the Court that it would inquire as to whether the Warden of the Eloy Detention Center, [REDACTED], would appear at future proceedings on behalf of the respondent as his custodial representative. (*Id.*) The Department explicitly advised the Court that it would submit a written response to the Court’s inquiry. (*Id.*) The written response would be submitted within approximately one week’s time. (*Id.*) In response, the Court stated that it would set a hearing for December 29, 2009, to monitor the case status, but would not proceed with a hearing if it was determined that a written decision was appropriate. (*Id.*)

As of December 28, 2009, the Court failed to receive any written submissions or notifications from the Department regarding the status of the respondent’s case or the appointment of the warden as an appropriate custodial representative. Based on the Department’s failure to offer the Court any viable alternative, the Court terminated the removal proceedings. (*See Order*, (Dec. 28, 2009) *amended on* (Dec. 30, 2009).) The Court found that in light of the Department’s repeated failures to comply with Court orders, allowing the respondent



to proceed unrepresented in removal proceedings and continue his prolonged detention would be in violation of his civil and constitutional rights. (*Id.*) Thereafter, on January 8, 2010, the Department filed a motion to reconsider, reopen, and administratively close the proceedings. (Department Motion (Jan. 8, 2010).)

II. MOTION TO RECONSIDER

A motion to reconsider must specify the errors of law or fact in the previous order and must be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. §§ 1003.23(b)(2); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). In the motion to reconsider, the Department states:

[t]his request for reconsideration is due to the fact that the court's decision was based on an error of fact. On December 3, 2009, the court specifically instructed the Department to produce the warden on December 29, 2009, to appear as the respondent's custodian on that date. However, the court failed to give the warden the stated opportunity, and instead terminated proceedings before he could appear. In short, the court's termination was premature and contrary to the request made by the court at the December 3, 2009, hearing.

(Department Motion, 7-8 (Jan. 8, 2009).)

The Department's motion to reconsider grossly misstates the Court's orders, and completely ignores the Department's failure to comply with the Court's directives. In reviewing the audio record of proceedings, *see supra*, the Court finds its decision was not based on an error of fact. The Court was unequivocally clear regarding the necessity to expedite the proceedings, the Department's role in seeking a custodian for the respondent, and the requirement to provide the Court with numerous written submissions. The Court's decision to terminate the proceedings was not made in error. Therefore, the Department's motion to reconsider will be denied.

III. MOTION TO REOPEN

An Immigration Judge ("IJ"), upon his or her motion, or upon motion of the Department or an alien, may reopen any case in which he has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals ("Board"). 8 C.F.R. § 1003.23(b)(1). A motion to reopen must be filed within ninety (90) days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 20, 1996, whichever is later. *Id.*; INA § 240(c)(6)(C)(i). A motion to reopen must state the new facts that will be proven at a hearing to be held if the motion is granted, and it must be supported by affidavits or other evidentiary material. INA § 240(c)(6)(B).

A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. §§ 1003.23(b)(3); *INS v. Wang*, 450 U.S.

[REDACTED]

139 (1981); *Matter of Coehlo*, 20 I&N Dec. 464 (BIA 1992); *Matter of Barrera*, 19 I&N Dec. 837 (BIA 1989); *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979); *Matter of Sipus*, 14 I&N Dec. 229 (BIA 1972); *Matter of Lam*, 14 I&N Dec. 98 (BIA 1972).

In the motion to reopen, the Department submits evidence demonstrating that on January 7, 2010, the respondent was transferred into the custody of the Pasadena Parole Department, Unit 3, State of California. (Department Motion, 5, Attach. C (Jan. 8, 2010).) The Department further asserts that the Pasadena Parole Department has consented to placing the respondent into a mental health treatment program. (*Id.*)

As the respondent has been released into a mental health treatment program, the Court finds the Department has presented new facts which are material and relevant; these new facts merit the reopening of the respondent's matter. In reopening the removal proceedings, the Court finds that the respondent's civil and constitutional rights will be preserved, in that, he is no longer the subject of prolonged detention, and that he may seek and receive adequate representation through the assistance of a mental health program. ¹

IV. MOTION FOR ADMINISTRATIVE CLOSURE

Administrative closure of a case is appropriate to temporarily remove a matter from an Immigration Judge's calendar. *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996). Proceedings may not be administratively closed if opposed by either party. *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990); *see also Matter of Peugnet*, 20 I&N Dec. 233 (BIA 1991); *Matter of Munoz-Santos*, 20 I&N Dec. 205 (BIA 1990). Administrative closure does not result in a final order, and only serves as an administrative convenience in appropriate situations. *Matter of Amico*, 19 I&N Dec. 652, 654 n. 1 (BIA 1988); *see also Matter of Peugnet, supra; Matter of Munoz-Santos, supra; Matter of Lopez-Barrios, supra.*

The Court presently declines to rule on the motion to administratively close the proceedings, so that the respondent may be permitted an opportunity to respond upon receipt of adequate representation.

V. CONCLUSION

Accordingly, the Court will enter the following Orders:

IT IS ORDERED THAT the Department's MOTION TO RECONSIDER be **DENIED.**

¹ The Department asserts "[REDACTED] remains ready to appear on the respondent's behalf as contemplated under 8 C.F.R. Section 1240.4, should the court reopen proceedings." (Department Motion, 8 (Jan. 8, 2010).) The Court grants the motion to reopen on the basis of the materiality of the new facts presented. The granting of the motion to reopen should not be construed as a mere opportunity for the Department to cure its prior failures to comply with this Court's orders.



IT IS FURTHER ORDERED THAT the Department's MOTION TO REOPEN be **GRANTED**.

Immigration Judge