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United States Court of Appeals,
Ninth Circuit.

Leonardo Chito **ALGARNE**, Petitioner,

v.

John **ASHCROFT**, Attorney General, Respondent.

No. 02-72045.

INS No. A29-236-933.

Submitted May 12, 2003. [FN*]

FN* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

Decided May 20, 2003.

Alien petitioned for review of the Board of Immigration Appeals' (BIA) decision denying as untimely his motion to reopen deportation proceedings after BIA affirmed immigration judge's denial of his request for suspension of deportation. The Court of Appeals held that alien was entitled to equitably toll period for filing motion to reopen deportation proceedings.

Petition granted; reversed and remanded.

Graber, Circuit Judge, dissented and filed opinion.

West Headnotes

Aliens, Immigration, and Citizenship ⇨360(2)
24k360(2) Most Cited Cases

(Formerly 24k54(5))

Alien was entitled to equitably toll period for filing motion to reopen deportation proceedings after Board of Immigration Appeals (BIA) affirmed immigration judge's denial of his request for suspension of deportation, where alien's delay was result of his reasonable reliance on false assurances from his former attorney that his appeal was still pending before court.

*168 On Petition for Review of an Order of the Board of Immigration Appeals.

Before **PREGERSON**, **REINHARDT**, and **GRABER**, Circuit Judges.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Leonardo Chito **Algarne**, a native and citizen of the Philippines, petitions for review of the Board of Immigration Appeals' ("BIA") decision denying as untimely his motion to reopen deportation proceedings after the BIA affirmed an immigration judge's denial of his request for suspension of deportation. Because the transitional rules apply, *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1183 (9th Cir.2001) (en banc), we have jurisdiction under 8 U.S.C. § 1105a(a). We review for abuse of discretion the denial of a motion to reopen and review de novo claims of due process violations. *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1222 (9th Cir.2002). We grant the petition and remand.

The filing period for a motion to reopen is subject to equitable tolling. See *Socop-Gonzalez*, 272 F.3d at 1193. Because the record demonstrates that **Algarne** exercised reasonable diligence by relying

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on false assurances from his former attorney that his appeal was still pending before this court, equitable tolling is warranted, and the BIA improperly denied **Algarne's** motion as untimely. See *Rodriguez-Lariz*, 282 F.3d at 1224-25 (applying equitable tolling where counsel made false representations to petitioner).

On the merits of his motion to reopen, **Algarne** met the standard for ineffective assistance of counsel because the defective representation he received violated his due process right to a fair hearing on the issue of suspension of deportation, *see id.* at 1226-27, and demonstrated prejudice. See *Dearinger v. Reno*, 232 F.3d 1042, 1045-46 (9th Cir.2000) (holding that prejudice for ineffective assistance of counsel shown where counsel filed late brief and petitioner demonstrated "plausible grounds for relief"). Accordingly, the petition for review is granted. The BIA's decision is reversed and remanded with directions to grant petitioner's motion to reopen. See *Rodriguez-Lariz*, 282 F.3d at 1227.

The court sua sponte changes the docket to reflect that John Ashcroft, Attorney General, is the proper respondent. The Clerk shall amend the docket to reflect the above caption.

**PETITION FOR REVIEW GRANTED;
REVERSED AND REMANDED.**

GRABER, Circuit Judge, dissenting.

In the circumstances, I would not conclude the BIA abused its discretion.

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- 2003 WL 22047364 (Appellate Brief) Petitioner's Reply Brief (Feb. 05, 2003)Original Image of this Document (PDF)
- 2003 WL 22047365 (Appellate Brief) Respondent's Brief (Jan. 22, 2003)Original Image

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• 02-72045 (Docket) (Jul. 10, 2002)

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