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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 GUISELA JOSEFINA
10 AGUIRRE-GUERRA,
11 Petitioner,
12 vs.
13 MICHAEL CHERTOFF, et al.,
 Respondents.

Case No.: 3:08-CV-338-BES-VPC

ORDER

14 Presently before the Court is an Application for Writ of Habeas Corpus (#1) filed by
15 Petitioner Guisela Josefina Aguirre-Guerra pursuant to 28 U.S.C. § 2241. In response,
16 Respondents filed a Motion to Dismiss for Procedural Default (#3). When Petitioner failed
17 to file a timely respond to the motion, Respondents filed a Notice of Failure to File
18 Response (#5). Thereafter, Petitioner filed a Motion to Permit Out of Time Response to
19 Respondents' Motion to Dismiss and Response to Motion to Dismiss (#6), then
20 Respondents filed their Reply (#7). For the reasons discussed herein, the Court transfers
21 the habeas petition to the Ninth Circuit Court of Appeals.

I. BACKGROUND

23 According to the Application, Petitioner is a native and citizen of Guatemala who
24 entered the United States "without inspection" in 1994 and has resided in the U.S. since
25 that time. Her application for asylum was denied by the former Immigration and
26 Naturalization Service and removal proceedings were initiated in 2003. An Immigration

1 Judge denied Petitioner's renewed asylum application in removal proceedings, granting her
2 voluntary departure with an alternative order of removal to Guatemala. Her timely appeal
3 to the BIA was denied on November 8, 2005. Following the adverse ruling by the BIA,
4 Petitioner retained counsel to file a petition for review with the Ninth Circuit Court of
5 Appeals. However, Petitioner's attorney miscalculated the filing deadline and Petitioner's
6 petition for review was filed one day late. Accordingly, on March 17, 2008, the Ninth Circuit
7 Court of Appeals dismissed Petitioner's petition for review as untimely.

8 On March 20, 2008 Petitioner filed a motion to reopen with the BIA, requesting that
9 the BIA reissue its November 8, 2005 decision, thereby restarting the thirty-day period for
10 the filing of a timely petition for review with the Ninth Circuit. The motion to reissue was
11 denied by the BIA on June 11, 2008 and Petitioner filed her Application for Writ of Habeas
12 Corpus with this Court on June 18, 2008. Petitioner requests this Court to direct the BIA to
13 reissue its November 8, 2005 decision and claims the Court has jurisdiction to review her
14 Application because she is in (non-detained) custody by means of the final order of
15 removal and because she raises constitutional claims of denial of due process as a result
16 of ineffective assistance of counsel in relation to her petition for review to the Ninth Circuit.
17 Alternatively, Petitioner suggests that the Court transfer this case to the Ninth Circuit for
18 review. Respondents argue that Petitioner has procedurally defaulted by failing to file a
19 direct appeal the BIA's denial of the motion to reopen and reissue with the Ninth Circuit
20 Court of Appeals. The Court agrees with Respondents. However, rather than simply
21 dismiss the petition, the Court opts to transfer the petition to the proper court.

22 II. ANALYSIS

23 A. Untimely Response

24 As an initial matter, the Court notes that Petitioner did not file a timely response to
25 Respondents' Motion to Dismiss. Pursuant to Local Rule 7-2(d), Petitioner's failure to
26 timely respond "shall constitute a consent to the granting of the motion." However, in the

1 Motion to Permit Out of Time Response (#6), counsel for Petitioner has established that
2 the Response was filed late because of counsel's excusable neglect. Moreover,
3 Respondents do not oppose Petitioner's request to allow the late-filed Response.
4 Accordingly, the Court has accepted and considered Petitioner's untimely Response.

5 **B. Procedural Default**

6 Before seeking habeas corpus relief, Petitioner raised her ineffective assistance of
7 counsel claim with the BIA by way of a motion to reopen and reissue the BIA's November
8 8, 2005 order for removal. When the motion to reopen and reissue was denied by the BIA,
9 Petitioner filed her habeas petition with this Court instead of seeking direct review with the
10 Ninth Circuit Court.¹ Accordingly, Respondents maintain that this action is barred by the
11 doctrine of procedural default.

12 Section 2241, the statute under which Petitioner files her habeas petition, "does not
13 specifically require petitioners to exhaust direct appeals before filing petitions for habeas
14 corpus." Castro-Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001), abrogated on other
15 grounds by Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006). However, the Ninth
16 Circuit Court requires, "as a prudential matter, that habeas petitioners exhaust available
17 judicial and administrative remedies before seeking relief under § 2241." Id. Thus, an
18 alien must ordinarily satisfy procedural prerequisites by attempting to reopen the
19 administrative proceedings on the basis of ineffective assistance of counsel. Rodriguez-
20 Lariz v. INS, 282 F.3d 1218, 1226 (9th Cir. 2002).

21 Although Petitioner properly filed a motion to reopen and reissue with the BIA, it is
22 unclear why Petitioner did not seek direct review of the BIA's denial with the Ninth Circuit.
23 Petitioner relies upon Singh v. Gonzales, 499 F.3d 969, 977-80 (9th Cir. 2007) and
24 Dearinger v. Reno, 232 F.3d 1042 (9th Cir. 2000) to argue that this Court has habeas

25 _____
26 ¹ At the time Respondents filed their Motion to Dismiss on July 3, 2008, Petitioner still had time
to seek judicial review of the BIA's June 11, 2008 order of denial with the Ninth Circuit because
Petitioner had until July 11, 2008 to file such an appeal.