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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

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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.

1 corpus jurisdiction over her current claim of ineffective assistance of counsel. However,
2 unlike Singh and Dearinger, in which the aliens sought habeas review in district court
3 without first filing a motion to reopen with the BIA, Petitioner in this case has already filed a
4 motion to reopen/reissue with the BIA and could have sought direct review of the BIA's
5 adverse decision with the Ninth Circuit. Petitioner also relies upon the fact that this Court
6 previously exercised jurisdiction over three habeas petitions filed under similar
7 circumstances. However, the fact that this Court has jurisdiction does not mean that the
8 prudential exhaustion requirement is automatically excused, particularly when another
9 remedy exists for the petitioner. See, e.g., Laing v. Ashcroft, 370 F.3d 994, 998 (9th Cir.
10 2004) ("Although courts have discretion to waive the exhaustion requirement when it is
11 prudentially required, this discretion is not unfettered.").

12 In the present case, prudential considerations weigh in favor of requiring exhaustion.
13 A person aggrieved by a decision of the BIA has 30 days in which to seek review in the
14 appropriate court of appeals. 8 U.S.C. § 1252(a)(2)(C). Adopting the approach Petitioner
15 has proffered would allow a person to circumvent the 30-day deadline set by 8 U.S.C. §
16 1252(a)(2)(C) and file a habeas petition in a district court within a year of the BIA's
17 decision. See 28 U.S.C. § 2244. Waiver of the prudential exhaustion requirement in a
18 case like this "would permit aliens to bypass the deadlines and pathways of judicial review
19 prescribed by the [immigration statute] by converting time-barred petitions to the courts of
20 appeals into habeas petitions." Laing, 370 F.3d at 1000. Because the BIA has already
21 issued a decision on Petitioner's motion to reopen, the appropriate procedural process is to
22 allow the Ninth Circuit Court to review the BIA's decision for an abuse of discretion. See
23 INS v. Doherty, 502 U.S. 314, 232 (1992). Because Petitioner could, and should have,
24 exhausted her ineffective assistance of counsel claim by seeking judicial review of the
25 BIA's denial of the motion to reopen/reissue, her habeas petition is not properly before this
26 Court.

1 **C. Transfer of This Case is Proper**

2 Petitioner suggests that, in lieu of outright dismissal, this case should be directly
3 transferred to the Ninth Circuit "in the interest of justice" pursuant to 28 U.S.C. § 1631.
4 Respondents state that they do not oppose transfer of this action. An immigration case is
5 "transferable" from district court when the following three conditions are met: (1) the Ninth
6 Circuit would have been able to exercise jurisdiction on the date the petition was filed in
7 this Court; (2) this Court lacks jurisdiction over the case; and (3) the transfer serves the
8 interest of justice. See Baeta v. Sonchik, 273 F.3d 1261, 1264-65 (9th Cir. 2001) (citing
9 Castro-Cortez, 239 F.3d at 1046). Applying this standard, the Court concludes that
10 transfer is appropriate. The BIA issued its order denying reopening on June 11, 2008 and
11 Petitioner filed her habeas petition with this Court on June 18, 2008. Accordingly, the Ninth
12 Circuit would have been able to exercise jurisdiction over Petitioner's claim on the date the
13 action was filed with this Court. Moreover, although the prudential exhaustion requirement
14 of § 2241 may be characterized as "not jurisdictional," as noted above, the Ninth Circuit
15 has instructed that "the district court's habeas jurisdiction under 28 U.S.C. § 2241 is
16 ordinarily reserved for instances in which no other judicial remedy is available." See Laing,
17 370 F.3d at 1000 (citing Barahona-Gomez v. Reno, 167 F.3d 1228, 1239 (9th Cir. 1999)).
18 Finally, the Court concludes that the "interest of justice" requires preservation of
19 Petitioner's ineffective assistance of counsel claim through a transfer of the petition to the
20 Ninth Circuit. The petition would be time-barred without a transfer and "given the uncertain
21 nature of jurisdiction in this area, the 'mistaken' filing of the habeas petition is
22 understandable." See Baeta, 273 F.3d at 1264 (citations omitted).

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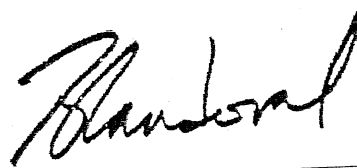
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III. CONCLUSION

1
2 IT IS HEREBY ORDERED that Respondents' Motion to Dismiss for Procedural
3 Default (#3) is DENIED. However, the Court will transfer this case to the Ninth Circuit
4 Court of Appeals for further proceedings pursuant to 28 U.S.C. § 1631.

5 DATED: This 16th day of January, 2009.
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13 United States District Judge
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9
10 UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF NEVADA
12

13
14 GUISELA JOSEFINA
15 AGUIRRE-GUERRA

16 Petitioners

17 vs.

Case Docket No.:

Alien Number: A 72 009 967

18 MICHAEL CHERTOFF, Secretary
19 of the U.S. Department of Homeland
20 Security; MICHAEL E. MUKASEY,
21 Attorney General of the United States;
22 NANCY ALCANTAR, Field Office
23 Director, San Francisco, California
24 District Office of the U.S.
25 Immigration and Customs
26 Enforcement, CURTIS HEMPHILL,
27 Special Officer in Charge of the Reno,
28 Nevada sub-office of the U.S.
Immigration and Customs
Enforcement, and DOES I - X

APPLICATION FOR WRIT
OF HABEAS CORPUS

[28 U.S.C. § 2241]

Respondents

JURISDICTIONAL ALLEGATIONS

1
2 1. This Court has jurisdiction under 28 U.S.C. §
3 2241 to consider the constitutional claims raised
4 herein by Petitioner.

5 2. Petitioner is the subject of a final
6 administrative order of removal dated November 8, 2005
7 and she is in the (non-detained) custody of the U.S.
8 Department of Homeland Security, Bureau of Immigrations
9 and Customs Enforcement ("ICE"), awaiting removal to
10 Guatemala.

11 3. Petitioner is in the custody of the United
12 States government, specifically the Reno, Nevada sub-
13 office of ICE, in violation of the United States
14 Constitution.

15 4. Petitioner is raising constitutional claims in
16 relation to her former's attorney's ineffective
17 assistance of counsel in relation to her petition for
18 review to the Ninth Circuit Court of Appeals.

19 5. The Ninth Circuit Court of Appeals is without
20 jurisdiction to address the constitutional questions
21 raised by Petitioners because the Ninth Circuit
22 dismissed Petitioner's petition for review for lack of
23 jurisdiction due to the untimely filing of said
24 petition by Petitioner's former attorney.

25 6. Petitioner has exhausted her administrative
26 remedies and there is no other legal avenue,
27 administrative or judicial, other than through this
28 habeas action, for Petitioner to contest the final

1 administrative order of removal, and this is the only
2 forum available to Petitioner to bring these claims.

3 7. This Court is the proper venue for this action.

4 **FACTUAL BACKGROUND**

5 8. Petitioner is a native and citizen of Guatemala
6 and a resident of this judicial district.

7 9. Petitioner entered the United States without
8 inspection in 1994, she applied for asylum in the United
9 States the same year, and she has resided continuously in
10 the United States since her entry.

11 10. Petitioner's asylum application was denied by the
12 former Immigration and Naturalization Service and she was
13 placed into removal proceedings in 2003.

14 11. In 2004, an Immigration Judge denied Petitioner's
15 renewed asylum application in removal proceedings,
16 granting her voluntary departure with an alternative
17 order of removal to Guatemala.

18 12. Petitioner timely appealed the Immigration
19 Judge's decision to the Board of Immigration Appeals
20 ("BIA").

21 13. While her appeal was pending before the BIA,
22 Petitioner filed with the BIA a motion to remand for
23 consideration of a new claim for asylum, based upon her
24 fear of persecution in Guatemala on account of her sexual
25 orientation.

26 14. With her motion to remand, Petitioner submitted
27 substantial evidence of her sexual orientation as a
28 lesbian and of the persecution of persons in Guatemala

1 because of their identity as lesbians.

2 15. The BIA denied Petitioner's appeal and motion to
3 remand on November 8, 2005.

4 16. Petitioner retained the former law firm of
5 Brazelton & Arango to file a timely petition for review
6 of the BIA's decision with the Ninth Circuit Court of
7 Appeals.

8 17. Attorney Rosalba Arango was the attorney
9 responsible for preparing and filing Petitioner's
10 petition for review with the Ninth Circuit.

11 18. Ms. Arango miscalculated the filing deadline for
12 Petitioner's petition for review, and as a result,
13 Petitioner's petition for review was filed one day late
14 by Ms. Arango.

15 19. On or about March 17, 2008, the Ninth Circuit
16 Court of Appeals dismissed Petitioners' petition for
17 review as untimely.

18 20. On or about March 20, 2008, Petitioner, through
19 the undersigned counsel, filed with the BIA a motion to
20 reopen and reissue the BIA's November 8, 2005 decision so
21 that Petitioner could file a timely petition for review
22 with the Ninth Circuit.

23 21. On or about June 11, 2008, the BIA denied
24 Petitioner's motion to re-issue its November 8, 2005
25 decision.

26 22. Within a period of several months from late 2005
27 to early 2006, Attorney Rosalba Arango filed a total of
28 five petitions for review late with the Ninth Circuit

1 Court of Appeals (including the case at bar).

2 23. The Ninth Circuit dismissed each of those five
3 late filed petitions for review.

4 24. With respect to those five cases, the BIA has re-
5 issued its decisions in three of those cases, one in
6 response to an administrative motion to re-issue and two
7 in response to orders from this Court in habeas
8 proceedings. With respect to the fourth case, this Court
9 has ordered the BIA to re-issue its decision.

10 **GENERAL ALLEGATIONS**

11 25. Petitioner hereby incorporates by reference the
12 allegations set forth herein-above.

13 26. Petitioner enjoys a right to due process of law
14 under the Fifth and Fourteenth Amendments of the United
15 States Constitution in Removal Proceedings. *INS v. St.*
16 *Cyr*, 121 S. Ct. 2271 (2001).

17 27. Petitioner enjoys a due process right to
18 effective assistance of counsel in removal proceedings
19 under the Fifth Amendment of the United States
20 Constitution; this right includes appeals of final
21 administrative decisions to the federal courts.
22 *Dearinger v. Reno*, 232 F.3d 1042 (9th Cir. 2000).

23 28. Petitioner's former counsel's failure to timely
24 file Petitioner's petition for review with the Ninth
25 Circuit Court of Appeals violated her right to
26 effective assistance of counsel under the Fifth
27 Amendment of the United States Constitution.

28 29. Petitioner enjoyed plausible grounds for relief

1 in relation to her petition for review to the Ninth
2 Circuit in that Petitioner's motion to remand set forth
3 a prima facie case for asylum.

4 30. The documentation submitted with Ms. Aguirre's
5 motion to remand, demonstrating Petitioner's sexual
6 orientation as a lesbian and that lesbians in Guatemala
7 face a pattern of persecution, is enough to establish
8 past persecution, which in turn creates a rebuttable
9 presumption of future persecution. See, e.g., *Himri v.*
10 *Ashcroft*, 378 F.3d 932, 936-38 (9th Cir. 2004)
11 (Palistinians in Kuwait were persecuted minority),
12 *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211-12 (9th Cir.
13 2004) (Serb in Croatian Bosnia-Herzegovina).

14 31. The ineffective assistance of Petitioner's
15 counsel impinged upon the fundamental fairness of her
16 removal proceedings.

17 32. Where an attorney's ineffective assistance of
18 counsel results in the deprivation of judicial review,
19 prejudice is presumed. *Dearinger v. Reno*, 232 F.3d 1042
20 (9th Cir. 2000).

21 33. Petitioner has complied with *Matter of Lozada*,
22 19 I&N Dec. 637 (BIA 1988) and its progeny.

23 34. Petitioner has exhausted her administrative
24 remedies.

25 PRAYER FOR RELIEF

26 Based on the foregoing, Petitioner makes the
27 following prayer for relief:

28 (1) For an order directing the BIA to re-issue its

1 November 8, 2005 decision in Petitioners' removal
2 proceedings to afford Petitioner the opportunity to
3 file a new petition for review with the Ninth Circuit
4 Court of Appeals within thirty days of the re-issued
5 BIA order;

6 (2) For an order staying Petitioner's voluntary
7 departure and removal from the United States until 30
8 days following the BIA's; and

9 (3) Any other relief the Court deems appropriate in
10 the circumstances.

11 Respectfully submitted this 18th day of June, 2008

12
13 By: /s/Steven P. Brazelton
14 Steven P. Brazelton
15 Law Office of Steven P. Brazelton
16 Attorney for Petitioner
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VERIFICATION

1
2 I, Steven P. Brazelton, hereby affirm the following
3 under penalty of perjury:

4 1. I am an attorney admitted to practice in the
5 State of Nevada, the United States District Court,
6 District of Nevada, and the Ninth Circuit Court of
7 Appeals. My office is located at 520 Holcomb Avenue,
8 Reno, Nevada 89502.

9 2. I have been authorized by Petitioner to
10 represent her with respect to this Petition.

11 3. I have read the foregoing Petition and know the
12 contents thereof to be true based upon information and
13 belief.

14 Executed this 18th day of June, 2008

15
16 By: /s/Steven P. Brazelton
17 Steven P. Brazelton
18 Law Office of Steven P. Brazelton
19 Attorney for Petitioner
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