



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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U.S. DHS - Trial Attorney Unit/ELC  
1115 N. Imperial Ave.  
El Centro, CA 92243

Name: OROZCO, BRIAN

A077-981-235

Date of this notice: 5/12/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

*Donna Carr*

Donna Carr  
Chief Clerk

Enclosure

Panel Members:  
Grant, Edward R.

Falls Church, Virginia 22041

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File: A077 981 235 - El Centro, CA

Date: MAY 12 2009

In re: BRIAN OROZCO

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Jaime Jasso, Esquire

ON BEHALF OF DHS: Ronald A. Lapid  
Deputy Chief

In a September 29, 2006, decision, we dismissed the respondent's appeal of the Immigration Judge's denial of his application for adjustment of status, but granted him voluntary departure. The respondent subsequently filed a petition for review of this decision with the United States Court of Appeals for the Ninth Circuit. On March 25, 2008, the Ninth Circuit dismissed the respondent's petition in *Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir. 2008) ("*Orozco I*"). On May 29, 2008, the respondent and the Department of Homeland Security ("DHS") thereafter submitted with the Board a joint motion to reopen proceedings to "provide the parties with an opportunity to submit briefs." During the pendency of the motion before the Board, the Ninth Circuit, on October 20, 2008, granted the parties' "Joint Motion to Vacate and Motion to Dismiss Voluntarily" its opinion in *Orozco I*. *Orozco v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008). On October 24, 2008, the Board ultimately granted the respondent and the DHS's joint motion to reopen, reinstated the appeal, and set a briefing schedule.

In its brief to the Board, the DHS moved to remand this case to the Immigration Court, indicating its intent to amend the Notice to Appear ("NTA") to charge the respondent with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i). Because the Ninth Circuit vacated *Orozco I*, and the Board granted the parties' joint motion to reopen, there is no longer a final order of removal. *See, e.g., Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745-46 (9th Cir. 2008), *overruled on other grounds; Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002). The respondent remains in removal proceedings. The regulations provide that at any time during removal proceedings, the DHS may lodge additional or substituted charges of deportability and/or factual allegations in writing. *See* 8 C.F.R. §§ 1003.30, 1240.10(e). Thus, the DHS is permitted to file additional or substituted factual allegations or charges of removability, and the regulations require that the respondent be given an opportunity to respond to the additional factual allegations and charges.<sup>1</sup> *See id.* Accordingly, the record will be returned to the Immigration Judge

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<sup>1</sup> We note that *res judicata* would not have precluded the DHS from amending the NTA under 8 C.F.R. §§ 1003.30 and 1240.10(e), as there is no final order of removal issued in the instant case. *Cf., e.g., AlMutarreb v. Holder*, 561 F.3d 1023, 1031 (9th Cir. 2009) (holding that because the first  
(continued...)

for further proceedings, and entry of a new decision. In view of the foregoing, the following order shall be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion, and entry of a new decision.

  
FOR THE BOARD

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<sup>1</sup> (...continued)

NTA was the subject of a final judgment on the merits, *res judicata* barred the Service from “initiating a second deportation case on the basis of a charge that [it] could have brought in the first case”); *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1358-1360 (9th Cir.2007) (same).