

DEC 14 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORGE TORRES-RAMOS,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 04-73331

Agency No. A13-125-338

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted November 6, 2007
Pasadena, California

Before: B. FLETCHER, REINHARDT, and RYMER, Circuit Judges.

Petitioner Jorge Torres-Ramos (“Ramos”) appeals the Board of Immigration’s (“BIA”) summary affirmance of the Immigration Judge’s (“IJ”) order of removal. The IJ ordered Ramos removed *in absentia* as an alien

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

previously convicted of a deportable firearms offense. 8 U.S.C. § 1227(a)(2)(C). Ramos makes three principal arguments on appeal. First, he argues that the notice of his removal hearing was fatally defective because it failed to comply with certain statutory requirements. Second, he contends that his failure to appear at the removal hearing was due to ineffective assistance of counsel, thus constituting “exceptional circumstances.” 8 U.S.C. § 1229a(b)(5)(c)(i). Third, Ramos argues that the proof of the prior conviction offered by the government at the removal hearing did not amount to “clear, unequivocal, and convincing evidence . . . that [he] is removable.” 8 U.S.C. § 1229a(b)(5)(A).

We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D), and grant the petition with instructions to the BIA to reverse and vacate the IJ’s removal order. Counsel’s admitted negligent failure to inform Ramos of his hearing date constitutes exceptional circumstances that would entitle him to an *in personam* hearing. But further, Ramos’ removal order must be vacated and removal

proceedings terminated because the government failed to present “clear, unequivocal, and convincing” evidence of a prior conviction.¹

Ineffective assistance of counsel qualifies as “exceptional circumstances” warranting rescission of a removal order entered *in absentia*. *Lo v. Ashcroft*, 341 F.3d 934, 935 (9th Cir. 2003) (“We conclude that the petitioners’ failure to attend their removal hearing was due to ineffective assistance of counsel which was an ‘exceptional circumstance’ within the meaning of § 1229a(e)(1), requiring rescission of their removal order pursuant to § 1229a(b)(5)(C)(i).”). Ramos, who has a ninth grade education and cannot read, faxed the notice of his removal hearing to counsel immediately upon receiving it. Ramos’ counsel admits that due to his office’s failure to properly calendar the hearing date and “negligence in communicating vital information regarding [Ramos’] hearing,” Ramos was never informed of the time and date of his hearing. This admitted negligent failure to communicate with and advise Ramos rises to the level of ineffective assistance of counsel constituting exceptional circumstances. *Monjaraz-Munoz v. INS*, 327 F.3d 892, 897 (9th Cir. 2003).

¹We reject Ramos’ claim that his hearing notice was fatally defective. In order to be entitled to relief based on a defective notice to appear, the “[petitioner] must show that . . . [he] was prejudiced by the alleged defect in the [notice].” *Kohli v. Gonzales*, 473 F.3d 1061, 1067 (9th Cir. 2007). Ramos has failed to demonstrate any prejudice from the claimed defects.

Next, in order to sustain the order of removal based on Ramos' alleged prior conviction, we "must determine whether substantial evidence supports a finding by clear and convincing evidence" that Ramos was convicted of the alleged offense. *Nakamoto v. Ashcroft*, 363 F.3d 874, 881 (9th Cir. 2004). Although we owe the agency decision deference under this standard of review, we are nonetheless required to take account of the government's underlying burden of proof by clear, unequivocal, and convincing evidence. *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 679 (9th Cir. 2005) ("Although we review for reasonable, substantial, and probative evidence in the record as a whole,' we affirm only if 'the [agency] has successfully carried this heavy burden of clear, unequivocal, and convincing evidence.'" (internal citations omitted).

To carry this burden, the government relied exclusively on one document—an unauthenticated I-213 form bearing an INS agent's unsupported representation that Ramos had been convicted of the alleged offense. Although the government is not necessarily limited to proving a conviction by the forms of evidence enumerated in 8 U.S.C. § 1229a(c)(3), *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196 (9th Cir. 2006), the evidence here was patently deficient. *Hernandez-Guadarrama*, 394 F.3d at 683 ("A single affidavit from a self-interested witness not subject to cross-examination simply does not rise to the level of clear, unequivocal, and

convincing evidence required to prove deportability.”). When given the opportunity, the government failed to introduce any additional evidence at the removal hearing beyond this document.

Because the government failed to provide clear, unequivocal, and convincing evidence of Ramos’ conviction, we vacate the order of removal. Any records of Ramos’ alleged prior conviction, to the extent such records exist, would have been available to the government at the time of the removal hearing; we therefore need not and do not remand to the BIA for further development of the administrative record. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1133 (9th Cir. 2006) (en banc) (no remand necessary where “all relevant documents of conviction became available before the DHS initiated removal proceedings”); *Hernandez-Guadarrama*, 394 F.3d at 683 n.13 (removal order vacated on government’s failure of proof).

PETITION GRANTED AND VACATED.