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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

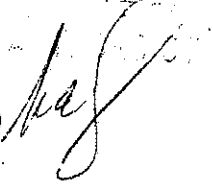
VASO NIKPRELJEVIC,
Petitioner,

v.

JOHN ASHCROFT, Attorney General of
the United States,
Respondent.

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No. 3:02CV2204 (DJS)



MEMORANDUM OF DECISION

Now pending before the Court is petitioner's Petition for Writ of Habeas Corpus [doc. # 1]. Petitioner argues that because an alien relative petition was approved on his behalf, he is entitled to adjust his status under 8 U.S.C. § 1255 and 8 C.F.R. § 245(j). Petitioner also challenges the propriety of his continued detention. In response to the Petition, respondent filed a written response, arguing that the petition should be dismissed for lack of subject matter jurisdiction, and that petitioner is not entitled to an individualized bond hearing.

I. BACKGROUND

Petitioner Vaso Nikpreljevic ("petitioner") is a citizen of Montenegro and was born in Yugoslavia on July 2, 1968. (Gov't Ex. A). In 1992, petitioner's father filed an alien relative petition ("I-130 Petition") on behalf of petitioner, in an attempt to adjust his status.¹ This petition

¹Petitioner claims that his mother, Ljeza Nikpreljevic, also filed a relative petition on his behalf after his father's death.

was approved on April 8, 1992.² At that time there was not a current visa number available to petitioner, and thus he was not able to adjust his status until one became available.

Nevertheless, petitioner entered the United States on August 11, 1994, without authorization. (Gov't Ex. A). Petitioner entered the United States without a valid immigrant visa, reentry permit, border identification crossing card, or other valid entry document. (Gov't Ex. B). Thereafter, the Immigration and Naturalization Service³ ("INS") commenced exclusion proceedings against petitioner. (Gov't Ex. C). During those proceedings, petitioner applied for asylum and withholding of exclusion. The Immigration Judge ("IJ") denied these requests. (Id.). Petitioner subsequently appealed the IJ's decision to the BIA, but the BIA affirmed the IJ's decision. (Gov't Ex. D). Accordingly, a final order of exclusion was entered against petitioner in 1995, and he was subsequently deported to Yugoslavia on March 2, 1995. (Gov't Ex. B).

In January 1999, petitioner again unlawfully reentered the United States without inspection in Detroit, Michigan. (Gov't Ex. E). Petitioner entered the United States in a van at the Canadian border by using another person's passport. (Id.). Thereafter, petitioner filed an application to adjust his status ("I-485 application"). The April 21, 1999 application claimed that petitioner was entitled to adjust to permanent resident status because he had an immediately

²The I-130 approval is in the name of Baco Nikpreljevic, not Vaso Nikpreljevic. On a Biographic Information form supplied to the INS by petitioner, he states that he has also used the name Baco Nikpreljevic. Petition for Writ of Habeas Corpus Ex. C. In pleadings he has filed, petitioner explains that Baco is the Albanian spelling of Vaso, and notes that the Immigration number used is the same on all documents. In addition, petitioner has provided a official record of birth for Baco Nikpreljevic. Id.

³On March 1, 2003, the INS was abolished and its functions were transferred to three bureaus within the Department of Homeland Security. The enforcement functions of INS were transferred to the Bureau of Immigration and Customs Enforcement ("BICE"). Nevertheless, the Court will use the term INS, as that was the agency's title at all relevant times.

available visa number approved. (Gov't Ex. F). As part of his I-485 application, petitioner also filed an I-485 Supplement A seeking to waive the consequences of his entry without inspection into the United States. Such a waiver is available to aliens who pay a \$1,000 fee, pursuant to § 245(i) of the Immigration and Nationality Act ("INA"). On May 18, 2001, petitioner's I-485 Application for adjustment of status was terminated without explanation. (Gov't Ex. G).

Petitioner is currently engaged to Elizabeta Markvukaj, an Albanian citizen granted asylum in the United States. Petitioner also has a daughter, Nina Nikpreljevic, born January 17, 2002 in Westchester, New York. On November 29, 2002, petitioner was taken into custody by the Glastonbury Police Department. At that time, the INS reinstated petitioner's prior order of exclusion in accordance with § 241(a)(5) of the INA. (Gov't Ex. H).

Thereafter, petitioner filed the instant petition for writ of habeas corpus, which is now before the Court.

II. LEGAL STANDARD

This Court has jurisdiction under 28 U.S.C. § 2241 to hear habeas corpus petitions which challenge removal orders that violate the Constitution or laws of the United States. 28 U.S.C. § 2241(c)(3); Sol v. INS, 274 F.3d 648, 651 (2d Cir. 2001) (finding that habeas review pursuant to § 2241 withstood the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"))(citing INS v. St. Cyr, 533 U.S. 289 (2001)). The Court's jurisdiction does not extend to factual and discretionary determinations made by the INS, however. Sol, 274 F.3d at 651.

III. DISCUSSION

The petitioner raises several substantive issues in his Petition for Writ of Habeas Corpus. In response, respondent has suggested that the Court should dismiss petitioner's claims for lack of subject matter jurisdiction. Specifically, respondent claims that the Court cannot review the INS' decision on petitioner's adjustment of status petition because it was discretionary. Furthermore, respondent argues that the INS did not commit any statutory or constitutional error in the handling of petitioner's case. Finally, respondent argues that petitioner's continued detention is lawful. The Court will now address these issues:

In this case, petitioner seeks an order from this Court declaring him eligible for adjustment of status relief. This Court cannot order the petitioner's eligibility for adjustment of status, however, since that is a discretionary determination to be made by the Attorney General. Rather, the Court may only consider whether the INS committed a constitutional or statutory error in its adjustment of status review. If this is the case, it is proper for the Court to remand petitioner's claims for reconsideration of petitioner's application. As will be discussed below, it is this course that the Court finds is most appropriate.

Petitioner's primary contention is that his I-485 adjustment of status application was not lawfully processed. In this regard, the record simply indicates that petitioner's application was terminated on May 18, 2001. The only indication of this disposition is a notation on petitioner's application that says "action terminated; 5/18/01." Petitioner argues that this is not a disposition on the merits, and thus the INS did not fulfill its duty to consider his application.

In response, respondent asserts a number of arguments. First, respondent argues that this Court cannot opine on the INS' procedure for disposing of applications, because INS decisions

regarding processing and adjudicating of adjustment of status applications is discretionary. In addition, respondent argues that there can be no constitutional error, because petitioner does not have any interest in his lawful permanent resident status that is protected by the Constitution or created by statute. Finally, respondent argues that petitioner was not entitled to adjustment of status as a matter of law, based on the prevailing statutory requirements for acquiring such status.

The Court agrees with respondent to the extent that this last point, regarding the merits of petitioner's application, is not for this Court to decide. The parties go into great detail about the statutory requirements for adjustment of status, and discuss whether certain actions by petitioner preclude him from seeking such an adjustment. Whether or not petitioner meets the statutory requirements for adjustment of status is a discretionary decision for the INS to make, however, and not for this Court to decide.

However, the Court disagrees with respondent insofar as it argues that petitioner's claim was lawfully reviewed on the merits. Respondent admits that "[i]t is not entirely clear whether petitioner's I-485 application was denied or whether it was terminated for some other reason. In the event it was terminated and denied on the merits, the [respondent's brief] applies." Response to Petition for Habeas Corpus, at 5 n.3. Thus, in order to counter petitioner's argument, respondent must rely on assumptions about the reasons for the "termination" of petitioner's application. In particular, respondent distinguishes cases favorable to petitioner by assuming that petitioner's application was terminated for other reasons, on the merits. The Court cannot fault respondent in this exercise, since the administrative record is without any detail as to the reason for the termination of petitioner's adjustment of status application.

This type of guesswork does not give the Court enough information to make a sound

decision on the merits of petitioner's claims, however. Without a clear administrative record, it is difficult for the Court to determine whether any constitutional or statutory error occurred. This puts the Court in an uncomfortable position, especially in light of the enormity of the issues at hand. For these reasons alone, the Court believes that it might be proper to remand this matter for a clearer disposition on the merits of petitioner's I-485 application.

Furthermore, petitioner asserts a convincing argument that the mere termination of the application was not a true adjudication of the application. See, e.g. Iddir v. INS, 301 F.3d 492, 497-98 (7th Cir. 2002) (finding that a denial upon expiration was not a decision on the merits); see also Hernandez v. Reno, 86 F. Supp. 2d 1037, 1041 (W.D. Wash. 1999). Petitioner suggests that the type of termination notation that appears on petitioner's application is perhaps outside the INS' normal code of conduct. Petitioner cites operating instructions which note that the issuance of a written opinion is more appropriate. INS Operating Instructions § 245.5(d) ("when a section 245 application is denied as a matter of discretion, the written decision prepared by the adjudicator shall cite any published precedent which is applicable or which reasonably approximates the situation in the case; if the adjudicating officer finds that there is no such published precedent and that any equities in the case are not substantial, the decision shall so state and shall include a full discussion of the favorable and unfavorable factors which were considered in reaching the conclusion that the application should be denied."). While these are simply internal guidelines issued by the INS, they do indicate that the disposition of petitioner's application was unusual.

Respondent argues that any action taken by the INS, either on the disposition of petitioner's application or the manner in which it announced its decision on the application, is a

discretionary action that lies outside of this Court's review. In response, petitioner argues that the INS actually failed to exercise this discretion by not publishing any written decision of its ruling. *C.f. Zemin Hu v. Reno*, 2000 WL 425174 (N.D. Tx. Apr. 18, 2000); *Yu v. Brown*, 36 F. Supp. 2d 922, 931 (D. N.M. 1999) (finding that the district court has the authority to order the INS to adjudicate an application); *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1182 (2d Cir. 1978). Other courts have agreed that while many INS decisions are within the agency's discretion, "[d]efendant INS is apparently confusing its discretion over how it resolves the applications with its discretion over whether it resolves them." *Yu*, 36 F. Supp. at 931 (internal quotations omitted). "The fact that INS has discretion in the ultimate decision whether to grant [legal permanent resident] status is simply irrelevant to the question of whether it has discretion to refuse to act on Plaintiffs' applications." *Id.*

The Court does not mean to suggest that the INS "refused to act" on petitioner's application. Indeed, this case is different from some of those cited by petitioner where the INS failed to take any action whatsoever on a petitioner's application. In this case, however, the Court cannot rule out the fact that the INS simply terminated petitioner's application without an adjudication on the merits, since there was no decision rendered. In such a case as this, the termination of a petitioner's application in this manner may in essence constitute such a "refusal to act." In addition, the limited record produced by the INS limits this Court's ability to review the merits of the adjudication to determine if any legal or statutory errors occurred. Accordingly, the Court hereby REMANDS this case so that a complete and documented adjudication on petitioner's 1999 application for adjustment of status can be made. Thus, petitioner's petition for a writ of habeas corpus is GRANTED in part. It may be that after such an adjudication, other

legal issues on the petitioner's eligibility for adjustment of status will come to light, as suggested in the parties' papers.⁴ Until the INS' decision on petitioner's application has been articulated, this Court cannot opine on these issues.

B. Detention

Finally, petitioner asks the Court to order the INS to hold a bond hearing on his behalf, based on the Second Circuit's ruling in Wang v. Ashcroft. Petitioner argues that he should be afforded an individualized bond determination because this Court has stayed the removal order entered against petitioner, and thus the INS now detains him under the authority granted by 8 U.S.C. § 1226, which applies to the detention of aliens during removal proceedings. Under § 1226, aliens may be released on bond or paroled. After entry of a final order of removal and during the ninety-day removal period, however, aliens must be held in custody. 8 U.S.C. § 1231(a)(2). The post-removal statute also provides that after the ninety-day period, the INS may continue to detain an alien, or choose to release the alien. Id. § 1231(a)(6).

Recently, the Second Circuit suggested that aliens who were granted a stay of removal were subject to § 1226, the pre-removal statute, versus § 1231, the post-removal statute. Wang v. Ashcroft, 320 F.3d 130, 147 (2d Cir. 2003) (“[W]here a court issues a stay pending its review of an administrative removal order, the alien continues to be detained under [8 U.S.C. § 1226] until the court renders its decision.”). If this were true, it might be appropriate for the Court to

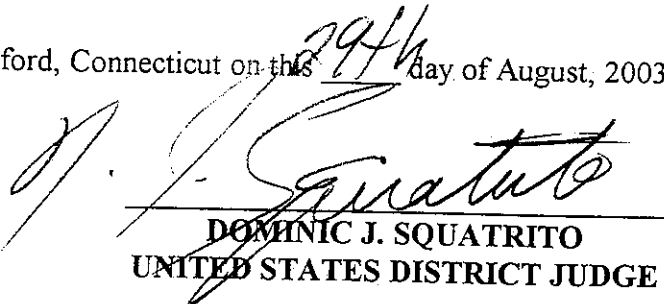
⁴For example, respondent argues, in part, that petitioner is not eligible for adjustment of status because his removal had been reinstated. In response, petitioner asserts that he is eligible for adjustment of status because he applied for such relief *before* his reinstatement, citing Hernandez v. Reno, 86 F. Supp. 2d 1037, 1041 (W.D. Wash. 1999); see also Padilla v. Ashcroft, 334 F.3d 921, 927 (9th Cir. 2003).

order that there be an individualized bond hearing. In this case, however, it is undisputed that the Court did not order a stay. While petitioner asks this court to construe its order to show cause as a stay of removal, the Court cannot do so as it is clear that the Court did not issue a stay of deportation. Thus, to the extent petitioner requests an individualized bond hearing, his petition is DENIED.

IV. CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus [doc. # 1] is **GRANTED in part, DENIED in part**. This case is REMANDED, and respondent shall review petitioner's application for adjustment of status. After such review, respondent shall issue a written decision discussing its disposition of the application.

IT IS SO ORDERED at Hartford, Connecticut on this ^{29th} day of August, 2003.


DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE