

No. 00-12345

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

XYZ, et. al.,

Petitioners

vs.

A, Attorney General,

Respondent.

ON APPEAL FROM THE BOARD OF IMMGRATION APPEALS

BRIEF OF PETITIONERS XYZ, ET AL

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SUMMARY OF ARGUMENT

The finding of the Board of Immigration Appeals denying the petitioners' applications for cancellation of removal under § 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1), should be reversed. Despite the clear mandate of 8 C.F.R. § 1240.10(a), the Immigration Judge never specifically requested whether petitioners desired representation in their removal hearing. Thus, the petitioners never affirmatively or negatively stated whether or not they desired representation. By failing to comply with 8 C.F.R. § 1240.10(a), the Immigration Judge effectively deprived Petitioners of their statutory right to be represented by counsel at their deportation hearing.

Consistent with the Second Circuit's position on this issue, this court should find that the failure of the Immigration Judge to comply with the mandate of 8 C.F.R. § 1240.10(a) constitutes a per se violation of petitioners' due process rights. As such, the petitioners should not be required to show that they were prejudiced as a result of the effective deprivation of their right to counsel.

Finally, if a showing of prejudice is required in this Circuit, the due process deprivations that occurred in this case as a result of the Immigration Judge's failure to comply with 8 C.F.R. § 1240.10(a) clearly prejudiced the petitioners. Competent counsel would have advised the petitioners to refer their infant son to a child psychiatrist for evaluation and for rendering expert testimony related to the

unusual hardship to the son if removed. Such testimony would have clearly established that petitioners were eligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1) based on their long years of residence, good moral character, and projected exceptional and extremely unusual hardship to their infant son, who suffers from learning disabilities and mental retardation.

ARGUMENT

I. DISREGARDING THE MANDATE OF 8 C.F.R. § 1240.10(a), THE IMMIGRATION JUDGE FAILED TO REQUIRE THAT PETITIONERS EXPRESSLY STATE THEIR WILLINGNESS TO PROCEED PRO SE.

Despite the clear mandate of 8 C.F.R. § 1240.10(a), the Immigration Judge never required that the petitioners state whether or not they desired representation in their removal hearing. 8 C.F.R. § 1240.10(a) provides, in relevant part:

(a) Opening. In a removal proceeding, the immigration judge shall:

(1) Advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice authorized to practice in the proceedings *and require the respondent to state then and there whether he or she desires representation....*

8 C.F.R. § 1240.10(a)-(a)(1) (emphasis added.) The plain language of this regulation clearly provides that the immigration judge “must require the alien to state on the record – affirmatively or negatively – whether or not he desires representation.” *Montilla v. I.N.S.*, 926 F.2d 162, 166 (2nd Cir. 1991).

In *USA v. Ahumada-Aguila*, 295 F.3d 943 (9th Cir. 2002), this court held that “an implicit waiver of the right to counsel is unequivocally inconsistent with [8 C.F.R. § 1240.10(a)].” *Id.* at 947. Thus, silence by the respondent in that case was insufficient for purposes of establishing that they “knowingly and voluntarily waived their right to counsel.” *Id.* at 948. Indeed, “[b]y forcing the alien to state his preference on the record, the regulation is clearly designed to force that person to confront this choice ... [and] assures that the decision to forego the right to counsel was voluntarily and knowingly made.” *Montilla*, 926 F.2d at 166.

In the instant case, the decision of the Board of Immigration of Appeals found that on three separate occasions before petitioners’ removal hearing, the Immigration Judge advised them of their right to be represented by counsel and possible sources of representation. In addition, the petitioners “consulted with but did not retain counsel.” *Id.* Based on these facts alone, and without any reference to the specific mandate of 8 C.F.R. § 1240.10(a)-(a)(1), the Board held that no error was committed by the Immigration Judge. However, in light of this court’s holding in *Ahumada-Aguila*, 295 F.3d 943, it is clear that mere silence by the petitioners in response to the Immigration Judge’s multiple advisements of their right to counsel did not satisfy the requirement of 8 C.F.R. § 1240.10(a)(1). Furthermore, the fact that petitioners previously consulted with an attorney but did not retain one is irrelevant for purposes of the requirement that the alien state his or

her preference on the record in accordance with 8 C.F.R. § 1240.10(a)(1). As such, the Immigration Judge “deprived the [petitioners] of [their] statutory right to be represented by counsel at [their] deportation hearing,” and the Board’s decision was clearly in error. *Id.* at 950.

II. AN EFFECTIVE DEPRIVATION OF THE RIGHT TO COUNSEL IN A REMOVAL HEARING IS A PER SE VIOLATION OF DUE PROCESS, AND THEREFORE NO SHOWING OF PREJUDICE IS REQUIRED.

The failure of the Immigration Judge to comply with the mandate of 8 C.F.R. § 1240.10(a) should be found to be a per se violation of petitioners’ due process rights. This court has previously noted that “[i]t remains unsettled in this circuit whether a showing of prejudice must be made where the right to counsel has effectively been denied a respondent in a deportation hearing.” *Ahumada-Aguilar*, 295 F.3d at 950, citing *Baires v. INS*, 856 F.2d 89, 91 n. 3 (9th Cir. 1988); *Colindres-Aguilar v. INS*, 819 F.2d 259, 262 (9th Cir. 1987 (citing *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985))). However, this court should follow the lead of the Second Circuit in *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991) in putting this issue to rest.

In *Montilla*, the Second Circuit held as follows:

[W]e hold that an alien claiming the INS has failed to adhere to its own regulations regarding the right to counsel in a deportation hearing is not required to make a showing of prejudice before he is entitled to relief. All that need be shown is that the subject regulations were for the alien’s benefit and that the INS failed to adhere to them.

Id. at 169. In *Waldron v. INS*, 17 F.3d 511 (2nd Cir. 1993), the Second Circuit noted that the “that the reasons articulated by the *Montilla* Court for adopting a ‘no prejudice’ standard are particularly important where fundamental rights derived from the Constitution or federal statutes are implicated, such as the right to counsel.” *Id.* at 518. “As the Supreme Court has stated, ‘[a] court’s duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law.’” *Waldron*, 17 F.3d at 517, quoting *United States v. Caceres*, 440 U.S. 741, 749 (1979). Like the Second Circuit, this court should hold that the failure of the Immigration Judge to comply with 8 C.F.R. § 1240.10(a) is a per se violation of petitioners’ right to due process.

III. EVEN IF A SHOWING OF PREJUDICE IS REQUIRED, THE EFFECTIVE DEPRIVATION OF PETITIONERS’ RIGHT TO COUNSEL WAS PREJUDICIAL BECAUSE COMPETENT COUNSEL WOULD HAVE ADVISED PETITIONERS TO REFER THEIR INFANT SON TO A CHILD PSYCHIATRIST FOR EVALUATION AND TO OFFER THE EXPERT TESTIMONY OF THE CHILD PSYCHIATRIST.

Even if a showing of prejudice is required in this Circuit, the due process deprivations that occurred in this case as a result of the Immigration Judge’s failure to comply with 8 C.F.R. § 1240.10(a) clearly prejudiced the petitioners. Being effectively deprived of the advice of competent counsel, the petitioners failed to refer their infant U.S. son to a child psychiatrist for evaluation and to offer the expert testimony of the child psychiatrist. Such evidence would have undoubtedly

made petitioners eligible for cancellation of removal under 8 U.S.C. § 1229b(b) based on their long years of residence, good moral character, and projected exceptional and extremely unusual hardship to their infant U.S. son, who, as would have been proved, suffers from learning disabilities and mental retardation.

This court has previously recognized that the immigrations laws are extremely complex and, ordinarily, un-navigable without the advice of a competent immigration attorney. *Ahumada-Aguilar*, 295 F.3d at 950-51, quoting *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988). In order to show prejudice, petitioners are not required to prove that they would have received discretionary relief from deportation. *Ahumada-Aguilar*, 295 F.3d at 951. Instead, petitioners only need to show that they have “plausible grounds for relief.” *Id.* It is clear that petitioners would have had a plausible ground for relief under 8 U.S.C. § 1229b(b).

8 U.S.C. § 1229b(b) provides:

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien--

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b). Although the Immigration Judge found that petitioners satisfied requirements (A) through (C) of § 1229b(b)(1), the Judge denied relief, finding no basis for determining that the child would suffer hardship as required by subpart (D). Unfortunately, petitioners were never advised to present evidence by a child psychiatrist, which would have shown what is known now as a result of a psychiatric and psychoeducational evaluation – that the child suffers from learning disabilities and mental retardation. In the child’s psychiatric and psychoeducational evaluation, dated February 8, 2004 (hereinafter, “Psychiatric Evaluation”), Dr. JKL concludes:

To a reasonable degree of medical certainty, I find X to manifest a true deficit in his ability to comprehend and assimilate information in English, and he will be unable to adapt psychologically or cognitively, to a second language environment. The result of such a transition will result in behavioral, and social disorders and emotional damage.

Offering this expert testimony in the removal proceedings would have undoubtedly created a “plausible ground” for relief under 8 U.S.C. § 1229b(b).

This court has previously held that “borderline retardation” of a petitioner is a plausible ground for relief from removal. *U.S. v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996) (finding a plausible ground for relief from deportation existed where a petitioner was “borderline retarded and so may have an extraordinary need for family guidance and assistance.” *Id.*). Likewise, in this case, the mental retardation and learning disabilities of petitioners’ son creates an extraordinary need for family guidance and professional assistance only available in the United States. Furthermore, as established in the Psychiatric Evaluation, Petitioners’ son will not be able to adapt to a second language environment without suffering from behavioral and social disorders and emotional damage. Therefore, his removal would result in exceptional and extremely unusual hardship.

Based on the conclusions of the Psychiatric Evaluation, it is clear that petitioners were prejudiced by the effective deprivation of their right to counsel. A competent immigration attorney would have advised petitioners to have their infant son referred to a child psychiatrist for evaluation and to offer the expert testimony of the child psychiatrist. Such evidence would undoubtedly have made petitioners eligible for cancellation of removal under 8 U.S.C. § 1229b(b) based on their long years of residence, good moral character, and projected exceptional and extremely unusual hardship to their infant son.

CONCLUSION

Pursuant to the clear mandate of 8 C.F.R. § 1240.10(a), the Immigration Judge is required to not only advise the respondents of their right to counsel, but to elicit from the respondent in clear terms in open court their willingness to proceed pro se in the matter. In this case, the Judge deprived the Petitioners of their statutory right to be represented by counsel at their deportation hearing by failing to elicit whether the petitioners did or did not require representation. Such deprivation to the right to counsel in a deportation hearing is a per se violation of due process. And, even if a showing of prejudice is required, it is clear that petitioners were prejudiced because competent counsel would have advised the petitioners to refer their infant son to a child psychiatrist for evaluation and for rendering expert testimony related to the unusual hardship to the son if removed.

The finding of the Board of Immigration Appeals denying the petitioners' applications for cancellation of removal under § 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1), should be reversed.

Respectfully submitted,

XYZ; ET. AL.,

Dated: _____, 2004

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this ____ day of _____, 2004, a bound copy of the foregoing brief of Petitioners were served via _____, addressed to the following:

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I also certify that on this _____ day of _____, 2004 the required number of the Brief of Petitioners were hand filed at the office of the Clerk, United States Court of Appeals of the Ninth Circuit.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of the Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 2713 words.

2. This brief has been prepared in proportionally spaced to typeface Microsoft Word 2003 in 14 point Times Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.

Dated: _____, 2004

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