

AMY L. BECERRA, ESQ.  
Swynford Law Group, PC  
1101 Professional Drive, Suite D  
Williamsburg, VA 23185  
Telephone: (757) 345-3467

Attorney for Respondent

***UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS***

In Re The Matter of: )  
 )  
BATNAM SINGH, )  
 )  
Respondent, )  
 )  
In Deportation Proceedings. )  
\_\_\_\_\_ )

**File No. A74 444 444**

RESPONDENT'S MOTION TO REOPEN

## I. INTRODUCTION

This motion to reopen deportation proceedings, filed in accordance with 8 C.F.R. §3.2, is made to permit respondent to apply to the immigration judge (IJ) for suspension of deportation under INA §244(a).

## II. FACTS

Respondent is a citizen of India who has been found to be deportable under INA §241(a)(1)(B) for having entered the United States without inspection on July 11, 1985.

At the former hearing, respondent was afforded an opportunity to file an application for suspension of deportation, but failed to apply within the time granted by the IJ. Respondent's application was deemed abandoned.

On June 18, 1997, respondent appeared at a master calendar hearing represented by attorney Larry Smith. Respondent speaks and understands the Punjabi language. At the time of his hearing, his ability to speak and understand English was limited, and there was no Punjabi interpreter present at the hearing. The IJ informed Smith that respondent was granted until January 27, 1998, to file his application for suspension of deportation, and that respondent was to appear for an individual hearing on April 17, 1998 (Transcript of Hearing 4, 7, 10, *hereinafter*, TH). At the end of the hearing, Smith promised the IJ that he would do a background check for the State of California (TH 7). Smith did not state for the record, nor has he ever represented, that he appeared for respondent in a pro bono capacity. Smith did not withdraw his representation of respondent at the master calendar hearing or later at the individual hearing.

Respondent's application was not filed within the time ordered by the IJ.

At the hearing conducted on April 27, 1998, the IJ indicated that respondent's application for the relief of suspension of deportation was deemed abandoned because a written application had not been filed with the Immigration Court by the deadline (TH 12).

Smith's associate, attorney Jack Jones represented respondent at his April 27, 1998 hearing. Smith did not file a motion to withdraw as respondent's attorney of record (TH 11). Jones explained his firm's association with Smith to the IJ. In his attempt to explain the failure to timely file the application, Jones asserted that a non-lawyer, a Mr. Bhat, had been exploiting both respondent and Smith, and that the fault for missing the filing deadline lay with him (TH 10). Jones supplemented his statement by claiming to have a letter with Smith's forged signature, supposedly perpetrated by Bhat. Although Jones represented to the IJ that he had the forged document, he did not produce the letter, nor did he explain how the existence of the alleged document would have excused Smith from his duty to discharge his duties to respondent competently.

Neither Jones nor Smith presented a plausible explanation to the IJ as to why their law firm failed to file an application for relief for respondent with the Court.

The IJ informed respondent that his allegation that "some unknown person other than your attorney" was responsible for the failure to file the application alleged theft of respondent's papers did not constitute reasonable cause for respondent having failed to file the application, and deemed the application abandoned (TH 12).<sup>1</sup> The IJ did not

---

<sup>1</sup>8 C.F.R. § 3.31(c) provides that if an application is not filed within the time ordered by an IJ, the opportunity to file that application shall be deemed waived.

castigate either Smith, or his associate Jones, for their firm's failure to adequately represent respondent thereby prejudicing his case.<sup>2</sup>

The IJ granted respondent one hundred twenty (120) days to voluntarily depart the United States and ordered respondent deported to India should he fail to depart (TH 15; *see also* Order of the Immigration Judge).

On May 7, 1998, respondent, through Jones, filed a notice of appeal form with the Board of Immigration Appeals (Board). The appeal form asserted that the issue involved "applicant[ 's failure] to file timely because of ineffective (sic) assistance of counsel."

Jones thereafter filed a brief in support of respondent's appeal on December 17, 1998. In his brief, Jones changed his story. Jones again mentioned a letter to respondent by Larry Smith, but does not explain its significance; neither does he demonstrate how it excuses him or his associate from failing to timely file an application for respondent. In his brief, Jones asserts that Smith was not aware of the letter and that he did not write it or have it written; Jones refers the Board to Smith's attached declaration as proof of this statement. However, Smith's declaration makes no mention of any letter whatsoever.

Jones also mentions something regarding Smith receiving papers or letters after respondent's merits hearing and refers the Board to Smith's declaration for support. Again, Smith's declaration fails to mention anything in this regard. In fact, Jones'

---

<sup>2</sup>While the IJ was not required to act as respondent's counsel, the IJ did have a duty to ensure that respondent was afforded a full and fair deportation hearing. Both Burrier's and Artz's shortcomings as attorneys were obvious at the individual hearing. The IJ could have remedied the situation by explaining the application process to respondent, providing him with the application form, and adjourning the proceedings to afford respondent a final opportunity to apply. 8 C.F.R. § 240.49 imposes a duty on the IJ to explain the availability of relief to a respondent. The Ninth Circuit Court of Appeals stresses the important role an IJ plays in ensuring that an alien receives a full and fair deportation hearing. *Jacinto v. INS*, 208 F.3d 725 (9<sup>th</sup> Cir. 2000).

statement in his brief about the forged letter being received by Smith after respondent's merits hearing cannot be true because Jones claimed to have said letter with him at the merits hearing. Clearly, the new factual assertions made in Jones' brief were not only not supported by any evidence, but were misrepresentations at best.

Statements contained in Smith's declaration in support of Jones' brief are also questionable. Smith claims that he did not receive payment from respondent for his representation at his master hearing, and he claims that he accepted a payment from an individual he believed to be an attorney for the representation on respondent's behalf. Smith does not explain why an attorney who allegedly already represented respondent would pay Smith for a representation she could have done herself. Smith states that he "hoped" to be respondent's attorney in the future, that he would be willing to appear for respondent's hearing, but that he had not been paid, and then apparently turned down an offer for \$2,000, stating that the payment "would be too much." It is highly unbelievable that an attorney, let alone one so eager to represent a particular client, would turn down an offer of payment, particularly if he had already told the client that he would represent him if he were paid. Smith's declaration statements are incongruent. Furthermore, Smith does not refute any of respondent's claims against him regarding his association with Mr. Bhat or Mr. Dhillon, or his agreement to represent respondent. He does not explain why he failed to file an application for respondent. He does not explain why he never contacted respondent regarding the need to prepare and file his application or to prepare for his hearing.

On January 14, 2003, the Board affirmed the IJ's decision and granted respondent thirty (30) days to voluntarily depart the United States.

Respondent's proposed application, Form EOIR- 40 (along with an index of proposed supporting evidence which is not enclosed due to the extensive and voluminous nature of the documentation, is attached, marked as Exhibit C.

Respondent seeks to offer the IJ evidence regarding his eligibility for suspension of deportation. The evidence is material evidence unavailable at the time of the last deportation hearing due to ineffective assistance of counsel.

### **III. ARGUMENT**

Federal regulation vests the Board with discretion to reopen respondent's deportation proceeding. 8 C.F.R. § 3.2. To meet the regulation's requirements, respondent must demonstrate that the evidence he seeks to offer is material, and was not available and could not be presented at the former hearing.

Proceedings will not be reopened for respondent to apply for a form of discretionary relief available at the time of the former hearing unless it appears that respondent's right to apply for such relief was not fully explained to him and an opportunity to apply for such relief not afforded to respondent at the former hearing.

Respondent may file one motion to reopen. A motion to reopen must be filed within ninety (90) days of a deportation order.

Respondent seeks to reopen proceedings to apply for suspension of deportation. It is submitted that respondent meets the requirements for reopening his proceedings.

Respondent's motion is neither time- nor numerically-barred.

The evidence respondent seeks to offer is that of his prima facie eligibility for relief under INA § 244(a). His application for suspension of deportation, evidence of his

continuous residence, and the hardship he will suffer if he is deported, is attached to respondent's declaration, served and filed herewith.

Respondent attests, that respondent did attempt to comply with the IJ's order to timely apply for suspension of deportation. Respondent brought documents to Smith's employees in a timely manner.

Respondent acted diligently to prosecute his application and, being represented by counsel, had every reason to believe that his attorney would discharge his duties competently and comply with all of the requirements in order to seek benefits under INA § 244(a).

Respondent's failure to file his application was the result of Smith's ineffective assistance of counsel.

Burrier made no effort to communicate with respondent regarding the nature of the proceedings, or what respondent needed to do in order to perfect his application. Smith never advised respondent, either orally or in writing, that a form was required to be completed and filed, and a filing fee paid, nor that a deadline existed for filing evidence in support of such a form. In fact, between hearings, Smith never communicated with respondent at all. In fact, as respondent attests, when he contacted Smith regarding his case, Smith claimed he did not know anything about his case and told him to go talk to the people he had been working with.

The deportation proceeding record shows that Smith did not discharge his duties competently, and that his failure to do so resulted in prejudice to the respondent. Respondent was the innocent victim of an attorney and the people with whom that attorney was associated. Smith's business relationship with these other people is unclear

based on this record. What is clear, however, is that Smith and these others worked in tandem to contribute to respondent being denied a fair opportunity to apply for suspension of deportation.

An alien claiming ineffective assistance of counsel must (1) offer an affidavit setting forth the details of the legal relationship, (2) show that counsel has been informed and afforded an opportunity to respond, and (3) advise whether a complaint has been filed against the attorney with disciplinary authorities. Matter of Lozada, 19 I&N Dec. 637 (BIA 1988).

Respondent has satisfied the requirements of Lozada. Respondent's declaration describes his relationship with Smith, as well as the actions Smith, and those individuals allegedly associated with him, took (and did not take) that gave rise to the claim of ineffective assistance of counsel.

Served and filed herewith is the Declaration of Alan Murray. The declaration attests that on April 2, 2003, a complaint was mailed to the legal disciplinary authority exercising jurisdiction over Smith, the Judicial Branch of the State of Connecticut, and that on the same date, a copy of the complaint was also mailed to Smith. The declaration further attests that a copy of the motion to reopen and its supporting evidence and declarations have been served on Smith.

It is submitted that respondent's failure to file his application for suspension of deportation resulted primarily from the ineffective assistance of Smith's counsel. Moreover, the IJ, as well as Smith, failed to fully explain the availability of suspension relief to respondent at his former hearing. As a result, respondent did not receive an opportunity to apply for suspension of deportation at the former hearing.



Respondent's evidence shows that he satisfies the statutory requirements for suspension of deportation. The evidence establishes respondent's seven years of continuous residence and good moral character during the period. Respondent will suffer hardship if he is deported to India. The evidence shows that the very least, respondent should be afforded an opportunity to present his application to the IJ for a hearing.

For all of the reasons mentioned above, it is respectfully submitted that respondent merits the favorable exercise of the Board's discretion, and that proceedings should be reopened to afford respondent the opportunity to apply for suspension of deportation.

#### **V. STATEMENT REGARDING JUDICIAL PROCEEDINGS**

The Board's June 24, 2002 order is the subject of judicial review. Satnam Satnam v. Ashcroft, Case No. 03-70596 (9<sup>th</sup> Cir. February 18, 2003).

#### **VI. STATEMENT REGARDING PENDING CRIMINAL PROCEEDINGS**

Applicant is not the subject of any criminal proceeding under the INA, or the subject of any other criminal prosecution.

#### **VII. CONCLUSION**

Based upon the foregoing, it is respectfully submitted that this motion be granted.  
Dated: April 10, 2003.

Respectfully submitted,

---

AMY L. BECERRA  
Attorney for Respondent

## **CERTIFICATE OF SERVICE**

I, Amy L. Becerra, do hereby certify that on April 10, 2003, copies of respondent's motion to reopen and its supporting documentation were served on the ICE by placing copies in the U.S. Mail at San Francisco, California, addressed to Office of District Counsel, Bureau of Citizenship and Immigration Services, P.O. Box 26449, San Francisco, CA 94126-6449.

Dated: April 10, 2003.

---

AMY L. BECERRA