UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Turgut Tarhan **A088 737 523** **Petitioner,** **vs.** **ERIC H. HOLDER, Attorney General,** **Respondent**	**Case No. 11-71854** **Agency No. 088 737 523** **Petitioner's Response to Motion to Show Cause**

Petitioner, makes this response to the Court's Order to Show Cause dated August 16, 2011 and requests that the Court hear his Petition For Review.

Petitioner does not petition this Court for review of the portion of the BIA's Order dated June 6, 2011 (CAR 3) upholding the Immigration Court's ruling dated May 5, 2009 (CAR 20) with regard to a denial of voluntary departure.

Petitioner seeks review of the Immigration Court's denial of a requested continuance.

This Court has jurisdiction to review a denial of a request for continuance. In doing so the Court will look to see if the Immigration Court abused its discretion. *See Nakamoto v. Ashcroft*, 363 F.3d 874, 883 n. 6 (9th Cir.2004); *see also Baires v. INS*, 856 F.2d 89, 91 (9th Cir.1988).

The record indicates that, in this case, the Immigration Judge gave no explanation for denying Mr. Tarhan's request for a continuance (CAR 20-22), and therefore Mr. Tarhan is not able to address the Immigration Judge's reasoning.

The Court will review questions of law *de novo*. *Baballah v. Ashcroft*, 367 F.3d 1067, 1073 (9th Cir.2004). The Court will review factual findings for substantial evidence. *Abebe v. Gonzales*, 432 F.3d 1037, 1039 (9th Cir.2005).

For the following reasons Petitioner seeks review of the BIA's and the Immigration Court's refusal to grant a continuance of Petitioner's removal

hearing.

Continuances to Wait for the Results of Future "speculative" Immigration Benefits are Common in Immigration Court and are Favored under EOIR Precedent Decisions

It is well settled that an Immigration Judge is *required* to continue proceedings in order to allow additional legal processes to take place that will result in a beneficial outcome to an alien in proceedings. *See Matter of Garcia,* 16 I&N Dec. 653 (BIA 1978); *Matter of Velarde-Pacheco*, 23 I & N Dec. 253 (2002); *Matter of Fatmir Libohova*, A73-591-296 (BIA Jan. 28, 2003); *Matter of Sohail Raza*, A76-231-298 (BIA Oct. 11, 2002); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009); *Rajah v. Mukasey*, 544 F.3d 449 (2d Cir. 2008).

In the cases cited above, the potential benefit is "speculative" in that an I-130 or I-140 petition may not be approved. The impending and inevitable comprehensive immigration reform may be equally "speculative" in the opinion of DHS. However the fact is that courts and the EOIR find it reasonable and a matter of fairness and due process to allow an alien an opportunity to apply for potential relief to which he may be entitled.

We attach copies of press reports, as well as a direct quote from President Barack Obama dating back to April 2009, indicating that comprehensive immigration reform is imminent and will benefit Mr. Tarhan. (See Exhibit B)

Specifically, President Obama stated the following on April 17, 2009 at a press conference, which was widely reported in the press at the time:

> "What I've also said is that for those immigrants who are already in the United States -- and by the way, we focus a lot on Mexicans who have come into the United States, but the number of immigrants from Central America, from Ireland, from Poland are substantial as well; it's not -- this is not just an issue with respect to Mexico -- for those immigrants who have put down roots, may have come there illegally, I think they need to pay a penalty for having broken the law. **They need to come out of the shadows, and then we have to put them through a process where, if they want to stay in the United States, they have an opportunity over time to earn that opportunity, for a legal status in the United States."**
>
> (Emphasis added)
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> April 16, 2009 JOINT PRESS CONFERENCE WITH PRESIDENT BARACK OBAMA AND PRESIDENT FELIPE CALDERÓN OF MEXICO, Los Pinos Mexico City, Mexico – available at: http://blogs.suntimes.com/sweet/2009/04/obama_calderon_mexico_city_pre.html (accessed on 16 July 2011)

President Obama is the ultimate authority in charge of executing immigration laws and regulations. Clearly, the process that the executive branch of government is currently seeking to employ – the process

described by President Obama in early 2009 – will benefit Mr. Tarhan, when implemented.

Just as clearly, the fact that the Immigration Court did not adequately consider a continuance in order to allow him to pursue this form of relief, has robbed him of the right to pursue the relief, absent this Court ordering the Executive Office of Immigration Review to reconsider the denial.

Although the BIA decision states that the Immigration Court "did explain why he denied the request for a continuance," (CAR 3) the record indicates that the Immigration Judge gave no explanation at all for his decision to deny the continuance. (CAR 20-22)

It may also be argued that it has been two years since the President – and the head of the Department of Homeland Security – declared that comprehensive immigration reform is a governmental priority. However, we ask the Court to consider that it is not unusual for the analogous relief of an I-140 or I-130 approval to take two, three, four, or more years to process.

Immigration relief often moves at a glacial and incomprehensible pace – though no fault of the hapless and effected alien.

We ask that the Court take note of two recent developments that indicate progress toward comprehensive immigration reform.

First, ICE Director John Morton issued a memorandum dated June 17, 2011, entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens." (See Exhibit A)

The memo sets forth categories that DHS officers, agents, and attorneys are to consider in determining whether or not to cancel deportation/removal proceedings or efforts — regardless of where in the system an alien may be.

Mr. Tarhan is eligible for, and should be granted that discretion, per a balancing of factors listed in Director Morton's memo.

Specifically, Petitioner has close family members in the US, he has

graduated from a US school, and despite having been convicted of a crime at age 20, he has gone on with his life and, on information and belief, he can and will submit numerous testimonials from those who know him indicating his good moral character.

On information and belief his US Citizen sister has recently submitted an Alien Relative Petition seeking to sponsor Mr. Tarhan for US permanent residence.

Second, federal immigration authorities, including immigration courts, have recently implemented a policy of continuing removal actions against the married same-sex partners of gay US citizens, while awaiting the implementation of comprehensive immigration reform. According to the *Los Angeles Times*:

> "On Wednesday [13 July, 2011], a Southern California couple — Doug Gentry and Venezuelan native Alex Benshimol, who married last year in Connecticut — appeared before a San Francisco judge and asked the government to use its discretion to drop deportation proceedings against Benshimol. Judge Marilyn Teeter gave immigration officials 60 days to respond. Teeter postponed the next deportation hearing until September 2013 if the government does not drop the case."
>
> 'Gay couples in legal limbo with immigration' by David G. Savage, Washington Bureau, *Los Angeles Times*; 14 July 2011 (attached in Exhibit B)

Clearly, the events described in these recent news stories indicate *both a rapidly-changing immigration law landscape* that is quickly rushing toward a resolution of the comprehensive immigration reform dilemma that has been pending for two years – and – importantly – *a willingness and precedent on the part of the executive branch agencies to continue immigration proceedings* in order to allow foreign nationals like Mr. Tarhan to benefit from these "speculative" reforms.

Personal Background of Petitioner

Petitioner is one of three siblings. When he was three years old his mother was tragically killed in an automobile accident.

Petitioner and his twin brother were essentially raised by their older sister, Revna Tarhan, who is a US Citizen and resides in Seattle.

Because of the circumstances of their growing up, these siblings' family ties are stronger than the ties that would commonly be expected between siblings.

Petitioner's brother is currently awaiting the results of an application for permanent residence, and expects to obtain permanent residence in the US and to therefore live in the US with his US Citizen wife. If Petitioner is removed from the US, he will be forcibly removed from his family.

Family Unity is a Fundamental Pillar of US Immigration Law

Immigration law has historically emphasized family unity as one of its *primary policy goals*, along with enforcement.

Department of Homeland Security Secretary, Janet Napolitano, initiated a policy review known as the *National Dialogue on the Quadrennial Homeland Security Review* (QHSR). As one of 37 current immigration goals, the QHSR is recommending that Congress and USCIS emphasize the following policy:

> "DHS must improve its immigration services and enforcement measures to protect family unity and in particular to stop separating children from parents. This should be explicitly included in agency goals, both as part of the detention and removal objectives and the goal of making good, prompt, decisions.
> **Why the contribution is important?**
> Separating families is un-American and deprives immigrants of their most fundamental support networks and resources.

> Family unity should be an absolute priority for DHS at all levels."
> http://www.homelandsecuritydialogue.org/dialogue3 (last accessed Nov. 16, 2009) [Emphasis in original]

Not granting Petitioner a continuance to allow him to seek relief under changing immigration laws amounts to removing Petitioner from his family. Such forced family separation violates a valid, humane, and important public policy, that has been a fundamental pillar of US Immigration law.

The Rule of Lenity Should Be Applied

The rule of lenity, or the principle that when any doubt(s) exist as to the proper interpretation of the law, we construe that ambiguity in favor of the alien, is a longstanding principle. *INS v. Cardoza-Fonseca*, 480 U.S. 421, at 448 (1987); *INS v. Errico*, 385 U.S. 214, 225 (1966); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Matter of Tiwari*, 19 I&N Dec. 875, 881 (BIA 1989).

For the reasons set forth above, we respectfully ask that the Court grant Mr. Tarhan's Petition For Review, and set the case for briefing.

RESPECTFULLY SUBMITTED this 5th day of September 2011.

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CERTIFICATE OF SERVICE

I, WILLIAM FRICK, do hereby declare that I caused to be delivered via electronic filing, the **Petitioner's Response to Order to Show Cause** to:

Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
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DATED this 6th day of September 2011.

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