IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TURGUT TARHAN,	)	
Petitioner,	)	**No. 11-71854**
v.	)	**A 088-737-523**
	)	
ERIC H. HOLDER, JR.,	)	
U.S. Attorney General,	)	
Respondent.	)	
	)	

RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

INTRODUCTION

Respondent Eric H. Holder, Jr. hereby submits that summary disposition is appropriate. This case is pending before the Court on a petition for review filed on July 5, 2011. Petitioner Turgut Tarhan ("Petitioner") seeks review of the Board of Immigration Appeal's ("Board") order of removal issued on June 6, 2011. See Certified Administrative Record ("A.R.") 3-4. On August 16, 2011, the Court issued an order to show cause stating that summary disposition pursuant to Ninth Circuit Rule 3-6(b) may be appropriate because the agency's denial of Petitioner's request for a continuance was not an abuse of discretion. Respondent submits that summary disposition is appropriate.

BACKGROUND

On July 3, 2003, Petitioner, a native and citizen of Turkey, was admitted to the United States on an F-1 student visa in order to attend Central Washington University in Seattle, Washington. A.R. 60, 105. On August 1, 2008, Petitioner was convicted of the offense of rape in the third degree in the State of Washington in violation of section 9A.44.060(1)(B) of the Revised Code of Washington ("RCW"), and was sentenced to a term of ten months imprisonment. A.R. 77-80. On September 4, 2008, Petitioner filed a direct appeal of his judgment to the Court of Appeal in the State of Washington.[1] A.R. 74. On February 19, 2009, the Department of Homeland Security ("DHS") issued a Notice to Appear charging Petitioner as removable pursuant to section 237(a)(1)(C)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(C)(i) (2006), as an non-immigrant, who after admission, failed to maintain or comply with the conditions of the non-immigrant status under which Petitioner was admitted. A.R. 105. The DHS alleged that Petitioner was in noncompliance with his non-immigrant status due to his failure to attend Central Washington University from September 22, 2008, to December 16, 2008. A.R. 105.

[1] As the Board noted, Petitioner's rape conviction had not been vacated at the time of the agency's decision. A.R. 3.

On April 28, 2009, Petitioner, through counsel, admitted to the factual allegations and conceded removability as charged before an immigration judge at a master calendar hearing. A.R. 48-49. Petitioner was granted a continuance so as to be given the opportunity to apply for asylum. A.R. 53. At his subsequent hearing on May 5, 2009, Petitioner declined to seek asylum. A.R. 53. Petitioner, however, sought an indefinite continuance based on his optimism that "Congress will pass comprehensive immigration reform legislation" that will benefit him based on his belief that his rape conviction would be overturned on appeal. A.R. 55. Petitioner also requested voluntary departure. A.R. 54.

On May 5, 2009, the immigration judge rendered an oral decision denying Petitioner's motion for a continuance. A.R. 45. The immigration judge also denied Petitioner's request for voluntary departure. A.R. 44. While finding that Petitioner was statutorily eligible for voluntary departure, the immigration judge determined that Petitioner did not meet his burden in establishing that he merits a favorable exercise of discretion in light of the seriousness of his conviction. A.R. 44-45.

On June 6, 2011, the Board agreed with the immigration judge and dismissed Petitioner's appeal of the immigration judge's denial of his request for a continuance and for voluntary departure. A.R. 3. The Board found that Petitioner failed to establish the requisite good cause for a continuance, where the basis of

his continuance was "speculation regarding possible future legislation which might provide him relief." A.R. 3. The Board noted that Petitioner failed to establish any prejudice on account of the denial of his continuance in light of the fact that no immigration reform legislation had been enacted that would render him prima facie eligible for relief. A.R. 3. The Board further noted that, at that time, Petitioner's rape conviction had not been vacated and that Petitioner was provided a full and fair hearing in this case. A.R. 3.

The Board found no error in the immigration judge's denial of Petitioner's request for voluntary departure in the exercise of discretion. A.R. 3-4. The Board noted that Petitioner failed to set forth favorable factors to outweigh the negative factor of his rape conviction so as to warrant a favorable exercise of discretion. A.R. 4.

DISCUSSION

Summary disposition is appropriate in this case as the agency acted within its discretion in declining to grant Petitioner's request for an indefinite continuance of his removal proceedings. The Attorney General's regulations authorize immigration judges in their discretion to grant or deny continuances. 8 C.F.R. § 1003.29 (2011) ("The immigration judge may grant a motion for continuance for good cause shown."); 8 C.F.R. § 1240.6 (2011) ("the immigration judge may grant a reasonable adjournment . . . for good cause shown"). The

immigration judge's discretionary decision to deny a continuance is reviewed by the Court under the highly deferential abuse of discretion standard. See Barapind v. Reno, 225 F.3d 1100, 1113 (9th Cir. 2000). An immigration judge's decision whether to grant a continuance "will not be overturned except on a showing of clear abuse." Gonzalez v. INS, 82 F.3d 903, 908 (9th Cir. 1996).

In Petitioner's September 6, 2011 response to the Court's order to show cause, Petitioner contends that the agency abused its discretion in denying his request for a continuance. See Pet'r's Resp. 3. Petitioner seemingly contends that his request for an indefinite continuance on account of the possibility of future "comprehensive immigration reform" was a demonstration of good cause. See id. Such a request for an indefinite continuance based on a speculative future event – congressional legislation on immigration – is not a demonstration of good cause so as to warrant a continuance of proceedings, especially considering that two years after his request for a continuance no such legislation has been enacted. A.R. 3.

Petitioner contends that his request for a continuance is analogous to continuances that are granted in order to permit an individual to pursue adjustment of status based on an I-130 visa petition. See Pet'r's Resp. 3. The comparison is without merit as individuals that are granted a continuance as a matter of discretion in such circumstances are required to demonstrate good cause by, among other factors, putting forth sufficient evidence to establish a likelihood of

success for their adjustment of status application.[2] Here, as the Board concluded, Petitioner simply requested an indefinite continuance based on the possibility of a future event, comprehensive immigration reform, without more. A.R. 3. Moreover, Petitioner has not established that he was prejudiced by the denial of a continuance because nothing in the record shows that he was eligible for any form of relief from removal, especially in light of his criminal conviction. See Vargas-Hernandez v. Gonzales, 497 F.3d 919, 926 (9th Cir. 2007). Although Petitioner claims that his United States citizen sister recently submitted an I-130 visa petition for alien relative on his behalf, he fails to present any evidence to support that contention. See Pet'r's Resp. 7. Moreover, such a claim was never presented to the Board, thereby depriving the Court of jurisdiction over the claim. See 8 U.S.C. § 1252(d)(1).

Petitioner cites to the DHS guidelines regarding removal priorities set forth in the memorandum issued by Immigration & Customs Enforcement Director John Morton ("Morton Memo") on June 17, 2011, in supporting his contention that

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[2] The Board addressed what constitutes "good cause" in Matter of Hashmi, 24 I. & N. Dec. 785 (BIA 2009). In that decision, the Board provided a non-exclusive list of factors an immigration judge may consider in reviewing a request for a continuance to await adjudication of a pending immigrant visa petition, including: (1) DHS's response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the alien's statutory eligibility for adjustment of status; (4) whether the alien is entitled to a favorable exercise of discretion on his application for adjustment of status; and (5) the reason for the continuance or other procedural factors. Id. at 790.

their has been "progress toward comprehensive immigration reform." See Pet'r's Resp. 6. However, the Morton Memo is intended solely for internal agency use and does not create any additional rights for aliens. Moreover, even if such guidelines were applicable, the seriousness of Petitioner's criminal conviction would likely preclude him from benefitting, contrary to his claim that he would merit a favorable exercise discretion. See Pet'r's Resp. 6.

CONCLUSION

For the foregoing reasons, summary disposition of the petition for review is appropriate.

Respectfully submitted,

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September 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by the using the appellate CM/ECF system.

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