

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

YURI BADIM ARRIOLA-ARENAS,	:	CIVIL ACTION
	:	
Petitioner,	:	
	:	
v.	:	No. 04-4399
	:	
JOHN ASHCROFT, ATTORNEY	:	
GENERAL OF THE UNITED STATES	:	
	:	
Respondent.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

NOVEMBER 8, 2004

Presently before this Court is Petitioner Yuri Badim Arriola-Arenas' Petition for Writ of Habeas Corpus and Motion for Emergency Stay of Removal. For the reasons that follow, both the Petition and Motion for Stay of Removal will be denied.

Petitioner is a citizen of Guatemala through birth. He was admitted to the United States as a lawful permanent resident in 1978. On July 30, 2000, Petitioner was issued a Notice to Appear by the Immigration and Naturalization Service ("INS").¹ The Notice alleged that Petitioner was deportable based upon a 1985 conviction for robbery and other related crimes under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii). On August 10, 2001, the Board of Immigration Appeals ("BIA") remanded Petitioner's removal proceeding to allow Petitioner to apply for a Section 212(c) waiver of

¹ Effective March 1, 2003, the INS became part of the Department of Homeland Security. The Service was split into the Citizenship and Immigration Services Bureau and the Bureau of Immigration and Customs Enforcement ("ICE"), which is responsible for prosecuting administrative deportation cases.

deportation. On November 7, 2003, the Government issued an additional ground of removal against Petitioner, alleging a February 13, 2001, conviction for offensive touching under INA § 237 (a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

A hearing on Petitioner's application for discretionary relief was held before an Immigration Judge ("IJ") on February 25, 2004. The IJ ruled on March 5, 2004, that Petitioner was entitled to a simultaneous waiver of deportation pursuant to former INA § 212(c) for his robbery conviction ground of removal and cancellation of removal pursuant to INA § 240A for the ground of removal based upon his 2001 conviction for offensive touching. The IJ's decision was overturned by the BIA on September 3, 2004. Petitioner filed the instant petition and motion for emergency stay of removal on September 17, 2004.

This Court has jurisdiction to review the petition under 28 U.S.C. § 2241. Review is limited, however, to pure questions of law. The factual and discretionary determinations of the Attorney General must remain undisturbed. See Bakhtriger v. Elwood, 360 F.3d 414 (3d Cir. Mar. 10, 2004) ("the scope of review under section 2241 must be confined to questions of constitutional and statutory law"); Kanivets v. Riley, 320 F. Supp. 2d 297, 299-300 (E.D.Pa. Jun. 1, 2004).

Petitioner argues that he is entitled to a simultaneous waiver of deportation and cancellation of removal for his convictions, and that the BIA erred when it applied Matter of Balderas, 20 I. & N. Dec. 389 (BIA 1991), in denying Petitioner relief. The Government responds that Petitioner has improperly named the Attorney General as Respondent in this case, and that Petitioner is not entitled to simultaneous waivers because he has been convicted of an aggravated felony. I will consider each question.

First, the Government contends that the Attorney General is not the proper respondent in this case because the proper venue for a petition for writ of habeas corpus against Mr. Ashcroft is in the District of the District of Columbia. The Government proffers Thomas Decker, the Philadelphia Acting Field Office Director, as the proper respondent. The identity of the proper respondent to a petition for writ of habeas corpus filed by an alien in removal proceedings is not a settled question of law. The United States Supreme Court left the question of whether the Attorney General is the proper respondent to a deportable alien's petition open in Ahrens v. Clark, 335 U.S. 188 (1948), and the Courts of Appeals have subsequently reached differing conclusions on the issue. Rumsfeld v. Padilla, 124 S. Ct. 2711, 2718 n.8 (2004). As Padilla dealt with a petitioner in military custody, the Court declined to resolve the discrepancy in that decision. Id. Since the Third Circuit has not weighed in on this issue and Mr. Ashcroft has responded to the petition on the merits, I will also decline to decide the question.

As to the substance of the petition, I conclude that Petitioner is not entitled to a simultaneous waiver of deportation and cancellation of removal. Petitioner faces two grounds of removal. The first ground of removal, premised upon his 1985 conviction for robbery, may be waived by the Attorney General pursuant to former INA § 212(c). The second ground of removal, premised upon Petitioner's 2001 conviction for offensive touching, may not be waived as the conviction occurred after the 1996 amendments to the INA. See Almeida v. Ashcroft, 2003 WL 22533686, at *2 (D.R.I. Oct. 30, 2003). Petitioner may seek relief from that ground only through cancellation of removal pursuant to INA § 240A, 8 U.S.C. § 1229b.

While the pre-1996 waiver remedy applied to a large group of aliens, cancellation of removal is much more limited. Cancellation of removal is not available to aliens who have

been convicted of an aggravated felony, 8 U.S.C. § 1229b(a)(3). Petitioner's robbery conviction meets the definition of an aggravated felony as defined by the INA. 8 U.S.C. § 1101(43). As a result, even though the ground of removal based upon that conviction has been waived, the robbery conviction precludes the cancellation of removal on the second ground. A waiver offers relief from removal, not from the underlying criminal conviction. See Matter of Balderas, supra. As a result, the conviction remains part of the alien's immigration record for consideration at any time. Id.; see also Almeida, supra. In this case, the conviction renders Petitioner ineligible for cancellation of removal.

Petitioner seeks to distinguish Matter of Balderas from this case because Petitioner made simultaneous applications for waiver and cancellation. In Balderas the alien was in his second removal proceeding after having received a waiver of deportation years before the proceeding at which he sought a cancellation of removal. The BIA held that, even though the previous ground for removal had been waived, the conviction remained a part of the alien's immigration record and would preclude cancellation. Even though the alien in Balderas was also ineligible for cancellation because he received a previous waiver, Balderas still applies to Petitioner as it speaks to his conviction of an aggravated felony.

As I conclude that Petitioner is not entitled to a simultaneous waiver of deportation and cancellation of removal, the petition will accordingly be denied. Furthermore, the petition has been denied, the motion for stay of removal will also be denied.

An appropriate Order follows.

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GENERAL OF THE UNITED STATES	:	
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Respondent.	:	
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ORDER

AND NOW, this 8th day of November, 2004, upon consideration of the Petition for Writ of Habeas Corpus (Doc. No. 1), and the Government's Response in opposition thereto, it is hereby **ORDERED** that the Petition is **DENIED**.

IT IS FURTHER ORDERED that the Petitioner's Emergency Motion for Stay of Removal (Doc. No. 2) is hereby **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly, Sr. J.