File: (b) (6)

Date: FEB 26 2004

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jim Salvator, Esquire

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - In the United States in violation of law

APPLICATION: Reopening; adjustment of status

ORDER:

PER CURIAM. This case was last before us on May 30, 2002, when we denied the respondent's motion to reconsider our February 15, 2002, denial of her motion to reopen which was filed with the Board on November 30, 2000. The respondent sought reopening in order to apply for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, based upon her selection in the 1994 diversity visa lottery, the application for which was not processed due to the alleged ineffective assistance of her former counsel. The respondent also sought the reopening of her case, with her case then administratively closed, while she pursues her claim for adjustment of status. On (b) (6) the United States Court of Appeals for the (b) (6) (b) (6) remanded this case to us in order for us to provide greater specificity for our denial of the respondent's motion to reopen. (b) (6) The respondent's motion to reopen is denied for the following reasons.

The respondent ultimately seeks adjustment of status based upon her selection in the 1994 diversity visa lottery. We find that the respondent has not established prima facie eligibility for the underlying relief sought – adjustment of status. *See INS v. Abudu*, 485 U.S. 94, 104-105 (1988). The respondent has not demonstrated that she is presently eligible for adjustment of status. Her status as an alien selected in the 1994 diversity visa lottery does not entitle her to adjustment of status approximately 10 years later. The respondent's eligibility to adjust her status under the diversity visa lottery ceased at the end of the fiscal year in which she was selected. *See* section 204(a)(1)(I)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(I)(ii)(II); 22 C.F.R. § 42.33(A)(1). *See also Coraggioso v. Ashcroft*, ___ F.3d ___, 2004 WL 1033410 (3rd Cir. Jan. 23, 2004) (language in statute regarding fiscal year deadline for diversity visa applicants mandatory and not extended due to any delays in processing application); *Carrillo-Gonzalez v. INS*, ___ F.3d ___, 2003 WL 23095705 (9th Cir. Dec. 31, 2003) (Immigration Judge without authority to grant equitable relief, where alien sought

adjustment of status where diversity visa application not filed within statutory deadline due to alleged fraud by notary, and alien not entitled to a diversity visa once eligibility for such visa had expired); *Nyaga v. Aschcroft*, 323 F.3d 906, 916 (11th Cir. 2003) (finding that district court could not provide meaningful relief to alien once diversity visa eligibility had expired); *Iddir v. INS*, 301 F.3d 492, 500-501 (7th Cir. 2002) (no jurisdiction where diversity visa claim made after expiration of statutory 1-year deadline); *Ticheva v. Ashcroft*, 241 F.Supp.2d 1115 (D. Nev. 2002) (same); *Zapata v. INS*, 93 F.Supp.2d 355, 358 (S.D. N.Y. 2000) (same); *Diallo v. Reno*, 61 F.Supp.2d 1361, 1368 (N.D. Ga. 1999) (same). The cessation of the respondent's eligibility occurred regardless of whether her former attorney provided her ineffective assistance or provided her the best possible assistance but, due to delays or other reasons, her application was not approved prior to the statutory expiration of the 1-year deadline for such applications. As the respondent is not eligible to adjust her status pursuant to her selection in the 1994 diversity visa lottery, she has not, and cannot, establish that she is eligible for adjustment of status.

In addition, we find that the respondent has failed to establish her entitlement to have the Board exercise its discretion to reopen proceedings or to have the Board or the Immigration Judge exercise its/his/her discretion to administratively close the newly reopened proceedings. *See INS v. Abudu*, 485 U.S. at 104-105. The respondent has not established prima facie eligibility for any form of relief from deportation and the Board will not exercise its discretion to reopen proceedings absent such a showing. Moreover, the decision to administratively close a case is discretionary and not mandated by statute or regulation. In order to administratively close proceedings, there must be proceedings pending. In the instant case, the respondent has an administratively final order of deportation. She does not have any proceedings pending before either the Board or the Immigration Judge. We will not exercise our discretion to reopen proceedings which are final solely to have such proceedings administratively closed so that new proceedings can be initiated at an unspecified later date.

In this regard, we observe that neither the reopening of proceedings nor the administrative closure of proceedings is a form of relief from deportation. The reopening of proceedings is simply the procedure by which relief from deportation can be sought. The administrative closure of proceedings is the removal of a case from an Immigration Judge's calendar or the Board's docket and is merely "an administrative convenience which allows the removal of cases from the calendar in appropriate situations." *See Matter of Gutierrez-Lopez,* 21 I&N Dec. 479, 480 (BIA 1996), quoting *Matter of Amico*, 19 I&N Dec. 652, 654 N.1 (BIA 1988). Thus, any argument that the reopening of proceedings or the administrative closure of proceedings is a form of relief from deportation is legally incorrect and without merit.

Finally, we find that aliens seeking reopening of proceedings must demonstrate that the Board, and an Immigration Judge, has the jurisdiction over, or authority to grant, the substantive relief requested in the motion to reopen. In the present case, the respondent ultimately seeks to avoid deportation and have her status adjusted to that of a lawful permanent resident based upon her selection in the 1994 diversity visa lottery. As discussed above, her eligibility for adjustment of status ended upon the statutory expiration of the fiscal year in which she was selected. *See* section 204(a)(1)(I)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(I)(ii)(II); 22 C.F.R. § 42.33(A)(1). Neither the Board nor the Immigration Judges have the authority to adjudicate an application for adjustment of status once that statutory deadline has passed. The respondent has not established that either the

Board or the Immigration Judge has the authority to adjust her status based upon her selection in the 1994 diversity visa lottery. There is no point in reopening administratively final proceedings where neither the Board nor an Immigration Judge has jurisdiction over, or the authority to grant, the underlying relief sought.

Furthermore, our holding that an alien is required to demonstrate that the relief sought is within the Board's, or the Immigration Judge's, jurisdiction or authority does not contravene the Supreme Court's decision in *Abudu*. The Supreme Court explicitly stated that there were "at least" three independent grounds on which the Board may deny a motion to reopen and then identified the three grounds which it found to be the minimal number of reasons supporting denial of a motion to reopen. *See INS v. Abudu*, 485 U.S. at 104. There is nothing in the Supreme Court's decision which prevents the Board from denying a motion to reopen on a different basis from the three grounds specifically identified in the Court's decision. We find that where the Board, or the Immigration Judge, lacks jurisdiction or the authority over the *substantive* relief requested by an alien, such lack constitutes an independent, permissible basis upon which to deny the motion to reopen.

Accordingly, the respondent's motion to reopen is denied.

FOR THE BOARD