



U.S. Department of Justice

Civil Division

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39-12C-11260

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VIA FEDERAL EXPRESS

Honorable Cathy A. Catterson, Clerk
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

JAN 16 2004

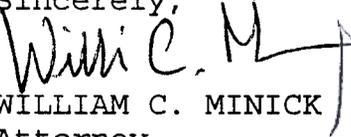
Re Benjamin Cabrera, et al. v.
John Ashcroft, Attorney General
No. 03-73811 (9th Cir.); A75 710 964/965

Dear Ms Catterson

Enclosed for filing with this Court are the original and four (4) copies of Respondent's Motion to Dismiss for Lack of Jurisdiction, Opposition to Petitioners' Motion For a Stay of Removal and Voluntary Departure, And, In the Alternative, Request to Reset the Schedule for Filing the Administrative Record.

Also enclosed is an appearance form executed by Christopher C. Fuller and the undersigned, attorneys with this office. Please enter our appearance as counsel for the respondent in this case. Service was made in accordance with the attached Certificate of Service.

Sincerely,


WILLIAM C. MINICK

Attorney

United States Department of Justice
Civil Division

Office of Immigration Litigation

P.O. Box 878

Ben Franklin Station

Washington, D.C. 20044

Enclosures

cc: Carl Shusterman, Esq.
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624 South Grand Avenue, Suite 1608
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**United States Court of Appeals
FOR THE NINTH CIRCUIT**

Case No. 03-73811

BENJAMIN CABRERA, ET AL.

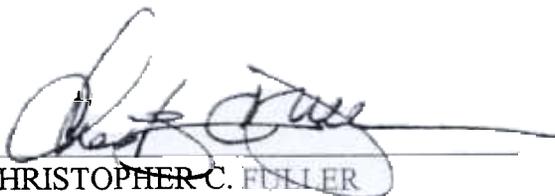
Petitioner,

vs.

JOHN ASHCROFT, ATTORNEY GENERAL,

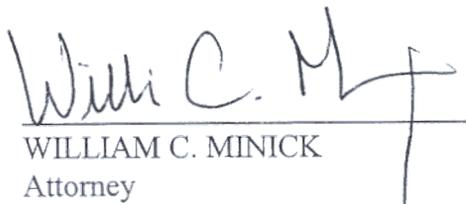
Respondent,

The Clerk will enter our appearance as counsel for Respondent



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Note — Appearance can not be entered unless the counsel signing is a member of the Bar of this Court, or of the Supreme Court of the United States, or of District Court within the Ninth Circuit . See Rule 7, C, A. Individual and not firm names must be signed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN CABRERA
A75-710-964,
LONDY CABRERA,
A75-710-965,

Petitioners,

v.

JOHN ASHCROFT,
Attorney General of the United States

Respondent.

RESPONDENT'S MOTION TO DISMISS FOR LACK
OF JURISDICTION, OPPOSITION TO PETITIONERS'
MOTION FOR A STAY OF REMOVAL AND VOLUNTARY DEPARTURE,
AND, IN THE ALTERNATIVE, REQUEST TO RESET THE
SCHEDULE FOR FILING THE ADMINISTRATIVE RECORD

Respondent respectfully requests that the Court dismiss this petition for review for lack of jurisdiction under Montero-Martinez v. Ashcroft, 277 F.3d 1137 (9th Cir 2002), and section 242(a (2) (B) (i) of the Immigration and Nationality Act ("INA"), 8 U.S.C § 1252(a (2) (B) i on the ground that Petitioners Benjamin Cabrera and Londy Cabrera are aliens attempting to challenge a discretionary determination of the Attorney General regarding cancellation of removal pursuant to section 240A(b) of the INA. Additionally because the Court does not have

jurisdiction to review the only issue in the petition for review the Court should deny Petitioners' motion for a stay of removal and a stay of voluntary departure as moot

PROCEDURAL BACKGROUND

On March 29, 2002 an immigration judge granted Petitioners' applications for cancellation of removal. The Immigration and Naturalization Service appealed the grant of cancellation of removal to the Board of Immigration Appeals ("Board")

On September 22, 2003 the Board sustained the appeal, vacated the decision of the immigration judge, and denied Petitioners' applications for cancellation of removal. See Attachment to Petition for Review (decision of Board). The Board determined that Petitioners failed to demonstrate hardship that rose to the level of "exceptional and extremely unusual hardship" as required by INA section 240A(b). The Board granted Petitioners the privilege of voluntary departure from the United States in lieu of removal.

On October 21, 2003, Petitioners petitioned for review of the Board's decision denying their request for cancellation of removal. The only issue in this case is the Board's denial of cancellation of removal based on the discretionary ground of failure to demonstrate "exceptional and extremely unusual hardship."

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THE PETITION FOR REVIEW BECAUSE SECTION 242(a)(2)(B) PRECLUDES REVIEW OF THE BOARD'S DISCRETIONARY DECISION THAT PETITIONERS FAILED TO ESTABLISH "EXCEPTIONAL AND EXTREMELY UNUSUAL HARDSHIP"

INA § 242(a)(2)(B) 8 J.S. § 1252(a)(2)(B) provides that no court shall have jurisdiction to review any judgment regarding the granting of relief under section 1229b of this title." Section 1229b of Title 8 deals with cancellation of removal and adjustment of status. Under this Court's decision in Montero-Martinez, INA § 242(a)(2)(B)(i) does not remove this Court's jurisdiction to review determinations of whether an alien is statutorily eligible for cancellation of removal, but it does remove this Court's jurisdiction to review the discretionary determination of who among the eligible persons should be granted discretionary relief." See id. at 1142-1144.

Petitioners seek review of the decision denying them cancellation of removal because they failed to establish "exceptional and extremely unusual hardship" upon removal. See Attachment to Petition for Review (decision of Board). Cancellation of removal is a form of relief formerly referred to as suspension of deportation. See Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") § 304(a)(3), Pub.L. 104-208, 110 Stat. 3009-598 (creating cancellation of removal);

IIR CA 308(k)minating suspensior

Montero-Martinez 277 F.3d at 1140 2 Kalaw v. INS 133 F.3d

114 1150 (9th Cir 997 (stating that suspension of
deportation was recodi ed at 8 U.S C § 1229b) Under the
former suspensior of deportation provision an alien could be
ranted relief if or she

(1) has been physically present in the United
States for a continuous period of not less
than seven years immediately preceding the
date of such application;

(2) proves that during all of such period he
was and is a person of good moral character;
and

(3) is a person whose deportation would, in
the opinion of the Attorney General, result
in extreme hardship to the alien or to his
spouse, parent, or child, who is a citizen of
the United States or an alien lawfully
admitted for permanent residence.

Kalaw 133 F 3d at 1150-51 As aliens who are not lawful
permanent residents, Petitioners would be eligible for
cancellation of removal if they

(A) ha[d] been physically present in the
United States for a continuous period of not
less than 10 years immediately preceding the
date of such application;

(B) ha[d] been a person of good moral
character during such period;

(C) ha[d] not been convicted of an offense
under section 1182(a)(2), 1227(a)(2), or
1227(a)(3) of this title (except in a case
described in section 1227(a)(7) of this title
where the Attorney General exercises
discretion to grant a waiver); and

(D) establish[ed] that removal would result
in exceptional and extremely unusual hardship
to [their] spouse, parent, or child, who is a
citizen of the United States or an alien

lawfully admitted for permanent residence

8 U.S.C § 1229b(b) 1 Thus, as was the case with suspension of deportation, an alien must demonstrate significant hardship albeit "exceptional and extremely unusual hardship" rather than simply the "extreme hardship" of the former provision) in order to be eligible for cancellation of removal.

In Kalaw, this Court determined whether it had jurisdiction to review the decision to deny suspension of deportation under IIRIRA § 309(c)(4)(E), which provided that there would be no review of any discretionary decision under former INA § 244 suspension of deportation) Kalaw, 133 F.3d at 1150 As is relevant herein, this Court found that the "[d]etermination of the third statutory requirement, 'extreme hardship,' is clearly a discretionary act," over which it lacked jurisdiction Id. at 1152 This is because "extreme hardship is by the express terms of the statute a discretionary determination." Id. (quoting Carnalla-Munoz v. INS, 627 F.2d 1004, 1006 (9th Cir. 1980))

The Kalaw analysis applies here. This Court "lack[s] jurisdiction to review a discretionary decision to deny cancellation of removal." Molina-Estrada v. INS, 293 F.3d 1089, 1093 (9th Cir. 2002); 8 U.S.C § 1252(a)(2)(B)(i). Determining whether an alien has demonstrated "exceptional and extremely unusual hardship," such that it would make him or her eligible for cancellation of removal, involves the exercise of discretion in the exact same way determining whether an alien has

demonstrated "extreme hardship." See Kalaw 133 F.3d at 1152. Therefore, this Court lacks jurisdiction to review the denial of cancellation of removal based upon a finding that an alien has failed to demonstrate exceptional and extremely unusual hardship.¹

¹ Every other circuit court that has considered this issue has followed Kalaw and found that the Board's determination of either "extreme hardship" from the former suspension provision or "exceptional and extremely unusual hardship" from cancellation provision, is discretionary and cannot be reviewed by the Court because of the jurisdictional bar of INA § 242(a)(2)(B)(i), or its virtually identical predecessor. See Mendez-Moranchel v. Ashcroft, - F.3d - , 2003 WL 21743702, at *3-4 (3d Cir. 2003) (applying the permanent rules version of the jurisdictional bar at INA § 1252(a)(2)(B)(i), court held that "[a] review of the cases addressing both the present "exceptional and extremely unusual" hardship requirement and the predecessor "extreme hardship" requirement supports the conclusion that the hardship determination is discretionary. . . . We hold that § 1252(a)(2)(B)(i) strips us of jurisdiction to review certain discretionary decisions under the Immigration and Naturalization Act as enumerated by the statute."); Valenzuela-Alcantar v. INS, 309 F.3d 946, 949-50 (6th Cir. 2002) (acknowledging that "[i]n addition to the Ninth Circuit in Kalaw, every other circuit to have considered the question has concluded that the "extreme hardship" determination under § 244 is a discretionary one," the court held "that immigration judges and the Board of Immigration Appeals make discretionary decisions when addressing 'extreme hardship' under Section 244. . . . It follows, in accordance with Section 309(c)(4)(E) of the [IIRIRA], that the immigration judge's determination of the 'extreme hardship' issue is not subject to judicial review."); Kalkouli v. Ashcroft, 282 F.3d 202, 204 (2d Cir. 2002) (per curiam) ("We hold that the determination as to whether an alien is eligible for suspension of deportation by reason of extreme hardship is a discretionary decision under § 309(c)(4)(E) of the IIRIRA transitional rules and therefore may not be appealed to this Court."); Okpa v. U.S. INS, 266 F.3d 313, 317 (4th Cir. 2001) ("However, we lack jurisdiction to review Okpa's claim that the BIA abused its discretion in concluding that his wife would not endure extreme hardship. The question of whether an alien can show extreme hardship is committed to the Attorney General's discretion by statute. . . . Because the decision with respect to whether extreme hardship is established is a discretionary one, we may

Because hardship determination was the basis of the Board's decision and is the issue on review, this Court lacks jurisdiction over Petitioner's case. Accordingly, the petition for review must be dismissed.

not review Okpa's abuse of discretion claim."); Al Najjar v. Aschroft, 257 F.3d 1262 (11th Cir. 2001) ("In light of our existing precedent and the sound reasoning of our sister Circuits, we likewise conclude that in transitional cases, 'extreme hardship' under INA § 244 is a discretionary decision that IIRIRA § 309(c)(4)(E) bars from judicial review. Accordingly, we have no jurisdiction to review the BIA's determination that Fedaa failed to demonstrate 'extreme hardship' and decline her request to review the denial of her suspension claim on this ground.") (citing Escalera v. INS, 222 F.3d 753, 755-56 (10th Cir. 2000), Bernal-Vallejo v. INS, 195 F.3d 56, 63 (1st Cir. 1999), Moosa v. INS, 171 F.3d 994, 1012-13 (5th Cir. 1999), and Kalaw, 133 F.3d at 1152); Escalera v. INS, 222 F.3d 753, 755-56 (10th Cir. 2000) ("In short, we conclude that we have no jurisdiction to review the decision by the BIA that Escalera failed to show that his deportation would result in 'extreme hardship.'") (citing Moosa, 171 F.3d at 1012, Kalaw, 133 F.3d at 1152, and Skutnik v. INS, 128 F.3d 512, 514 (7th Cir. 1997)); Bernal-Vallejo v. INS, 195 F.3d 56, 63 (1st Cir. 1999) ("This raises the question of whether the 'extreme hardship' determination is a discretionary decision barred from judicial review by § 309(c)(4)(E). We hold that it is, and, thus, that we have no jurisdiction over Bernal's claim, on that ground, that the INS erred in denying him suspension of deportation. We join the Fifth and Ninth Circuits in so holding." (citing Moosa, 171 F.3d at 1012-13, and Kalaw, 133 F.3d at 1152); Moosa, 171 F.3d at 1012 ("We join our sister circuits in holding that denials of suspension based on the INS § 244 element of 'extreme hardship' are discretionary decisions, which IIRIRA § 309(c) precludes us from reviewing.") (citing Kalaw, 133 F.3d at 1152, and Skutnik, 128 F.3d at 514); Skutnik, 128 F.3d at 514 (7th Cir. 1997) (relying on the Supreme Court's holding that INA § 244 "gives the Attorney General a discretionary power to suspend deportation," the court held that "there can be no doubt that Skutnik's challenge to the Board's denial of suspension of deportation seeks review of a 'discretionary decision,' and, accordingly, held that "Skutnik's petition for review is dismissed for want of jurisdiction") (citing INS v. Yueh-Shaio Yang, 519 U.S. 26, 29-30 (1996), and INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981)).

Petitioners acknowledge the jurisdictional issue in this case, but argue that, in reaching its discretionary decision the Board failed to consider certain factors See Petitioners' Motion for Stay of Removal at 8-12. However, what Petitioners really challenge is the weight the Board accorded to various factors in reaching their discretionary decision. This does not alter the discretionary nature of the Board's decision and this Court's precedence in Kalaw and Montero-Martinez.

Accordingly, this petition must be dismissed for lack of jurisdiction inasmuch as it is seeking review of the Board's discretionary assessment that Petitioners failed to show "exceptional and extremely unusual hardship" which is an unreviewable discretionary decision.

II. THE COURT SHOULD DENY PETITIONERS' MOTION FOR A STAY OF REMOVAL AND FOR A STAY OF VOLUNTARY DEPARTURE BECAUSE IT IS MOOT

Petitioners have also filed a request for a stay of removal and a stay of their period of voluntary departure pending review of their final order. Where the Court is without jurisdiction to consider a petition for review, the Court will deny a motion for a stay of removal pending review as moot. Cf. Narayan v. INS, 105 F.3d 1335, 1335 (9th Cir. 1997) (construing transition rules and dismissing a motion for a stay as moot. Ellis v. Corey (In re Ellis) 674 F.2d 1238, 1243 (9th Cir. 1982) (denying a motion for a stay as moot because the Court lacked jurisdiction over the matter. Indeed, a request for a stay should be denied as moot

where a court lacks jurisdiction because the court has no power over the matter. This is because "without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is [the] power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" Steel Co. v. Citizens for a Better Envirn., 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 74 U.S. 506 (1869)) (emphasis added) Additionally, even where an alien is actually facing removal, if the court has no jurisdiction, there is no need to delay the removal of the alien (or his requirement to voluntarily depart the United States). As shown above, the Court has no jurisdiction to review this case and therefore must deny Petitioners' request for a stay of removal and a stay of voluntary departure pending review as moot.

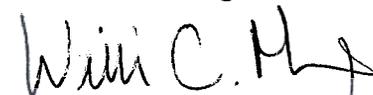
CONCLUSION

For the above reasons the Court should dismiss the petition for review and deny the motion for a stay of removal and voluntary departure as moot. Alternatively, if this Court finds that it has jurisdiction, Respondent requests that the schedule for filing the administrative record be reset.

Respectfully submitted,

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Dated: January 16, 2004

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on the 16th day of January 2004, one copy of Respondent's Motion to Dismiss for Lack of Jurisdiction, Opposition to Petitioners Motion for a Stay of Removal and Voluntary Departure And In The Alternative Request to Reset Schedule For Filing the Administrative Record was caused to be delivered by mail to the petitioners' counsel at the following address:

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