

U.S. COURT OF APPEALS
FILED

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CHARLES R. FULBRUGE III
CLERK

04-61167

**UNITED COURT OF APPEALS
5TH JUDICIAL CIRCUIT**

04-61167

BRIGHTMAN NWATU, A27174038
208 Vines Drive
Cedar Hill, TX 75104
14th Day of February 2005

In the matter of
Brightman Nwatu
Respondent

In Removal Proceedings
No. A27174038

v.

Aaron Cabrera, Officer in Charge
Alberto Gonzalez, Attorney General
Alfonso Deleon, District Director et al.

ISSUE

- I. The September 10, 1992 memorandum of the oral decision of the Immigration Judge, Honorable Bernal Maldonado of San Antonio in the matter of Brightman Nwatu reads: "The proceedings were suspended [until] probation is revoked, or expungement is refused, or until respondent has had a reasonable opportunity to obtain an expungement after discharge from probation, which event occurs first.

In 1996, the Service moved to recalendar proceedings and a hearing was set for February 14, 1996 despite the fact that none of the stipulations of the 1992 decision had been met as to warrant a re-opening of the proceedings.

- II. Application of Section 440(d) of AEDPA and Panel's Interpretation of Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act.

PETITIONER'S PETITION AND SUPPLEMENTAL MOTION, AND ARGUMENT

ALIENS STATEMENT OF PURPOSE

In the judgment of undersigned alien, the Petitioner's appeal merits rehearing for the following reasons:

1. The Panel overlooked a material principle of law in its decision. Specifically, it completely ignored longstanding United States Supreme Court precedent holding that the Immigration and Naturalization Services bears the burden of establishing an alien's deportability by clear and convincing evidence. See *Woodby v. INS* 385 US 276 (1966).
2. The Panel's decision is in conflict with prior rulings of the BIA, Supreme Court, Federal Courts, and District Courts in that it affirms an order of deportation based on a ground of deportability not final where all legal remedies have not been exhausted. Petitioner had clearly made it known that allegations would be contested. The Panel further ignored the prior IJ ruling—"Until petitioner has had reasonable time after discharge from probation."
3. The Panel's decision is in conflict with the decisions of the United States Supreme Court, in that it violates applicable canons of statutory construction. First, it failed to interpret the statute at issue (241)(a)(2)(ii) of the Immigration and Nationality Act and AEDPA 12)(ii) of the Immigration and Nationality Act and AEDPA 440(d), in accordance with its plain meaning. In addition, it failed to apply the principle of "expression unius est exclusio alterius," which dictates that the enumeration of particular things in the language of a statute excludes the idea of something else not mentioned. Finally, it ignored the principle that statutes regarding deportability are to be strictly construed in favor of the alien.
4. The proceedings involve two issues of exceptional importance:
 - a. The proper application of the government's burden of proof in establishing the deportability of a lawful permanent resident of the United States. The BIA's decision, if left undisturbed, presents a substantial risk that decisions with the courts and the BIA itself, the US Supreme Court regarding deportability from the United States will be made or reviewed pursuant to the wrong legal standard.
 - b. The proper role of the judiciary in interpreting statutes. Here the BIA failed to interpret the statute at issue according to three longstanding canons of statutory construction. The plain meaning doctrine, the doctrine of "expressio unius est exclusio alterius," and the doctrine requiring the deportability statute a crime not expressly enumerated or act therein by Congress.

SUGGESTION

Because the BIA's decision ignored the applicable burden of proof upheld a finding of deportability based on ground of wrong interpretation and violated applicable canons of statutory construction, Petitioner requests a re-hearing and termination of proceedings and grant of naturalization.

BACKGROUND FACTS

Petitioner is a native and citizen of Nigeria, who has been a lawful permanent resident of the United States since 1990. He lives and contributes to the support of his family who are United States citizens. Mr. Nwatu had no criminal record until he was convicted of theft by check and theft from a person. Those convictions gave rise to the issues presented in this appeal.

Mr. Nwatu was placed in deportation proceedings by the Immigration Service. The INS issued an Order of Show Cause (OSC or charging document), which alleged in pertinent part that Mr. Nwatu deportable pursuant 241(a)(2)(ii) of the Immigration and Nationality Act (INA).

The Immigration Judge Honorable Bernal Maldonado in 1992 suspended petitioner's deportation proceedings. The Immigration Service concurred by not filing an appeal but sought to recalendar case years later with no just cause. Petitioner's probation had not ended, expungement had not been sought since petitioner was still on probation and meeting the conditions set by the Court.

RELEVANT ASPECTS OF THE PANEL'S DECISION

Nowhere in the Panel's decision does it even address the burden of proof the INS must satisfy to establish an alien's deportability. Obviously, it never determined whether the IJ had satisfied that standard.

With regard to the specific issues by Mr. Nwatu, the BIA and IJ's decision was in error in a number of respects. First, the Panel (BIA) dismissed the issue concerning the propriety of the second IJ recalendar the case when none of the conditions by Judge Bernal Maldonado had been met. The Panel stated the OSC "did cite the statutory authority for deportation" INA 241(a)(2)(ii) and this was sufficient to give notice of the change.

Further, the Board concluded that the recalendar proceedings were sent to the respondent's counsel of record and the respondent's last known address. This is further from the truth. Enclosed is a copy of a rental box agreement with the US Post Office. The Immigration Service alleged that the box address was closed.

This language and interpretation illustrates the Immigration Judge and the BIA error. Rather than reading the statute to determine what type of method was used to contact respondent, the BIA ignored is previous precedent that held—INS must show thorough convincing and clear process was used to contact alien. The BIA standard also mandates that correspondence to alien must be made directly to alien. The Service even concluded in their argument that it was aware last address was not valid through mere assumption. They never directly attempted to contact alien but rather relied on hearsay by former counsel.

Similarly, the Board failed to directly address the canon of statutory construction adopted by earlier (BIA) decisions, circuit courts, providing that "expression unius est exclusio alterius." The language set forth demonstrates that it failed to abide by that controlling principle.

ARGUMENT

- I. The Panel completely ignored the standard of proof, identified by the United States Supreme Court, by which the Immigration and Naturalization Service must establish deportability.

The seminal case regarding the burden the INS must satisfy in establishing an individual alien's deportability from the United States is *Woodby v. INS*, 385 US 276 (1966). In *Woodby*, which also involved a lawful permanent resident alien, the Supreme Court specifically analyzed the burden the INS must satisfy, recognizing "the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake bonds formed here..." *Id.* at 285. The Court rejected the preponderance of the entire standard urged by INS, and held instead that the agency must meet the same high standards of proof required in denaturalization and expatriation causes; if the INS must establish its allegations by clear, unequivocal, and convincing evidence. *Id.* The Supreme Court based its ruling on the fact that deportation sometimes imposes greater hardship than denaturalization, because it necessarily results in expulsion from our shores.

Moreover, the Court recognized that in some cases, permanent residents have lived in the United States longer than some who have become citizens, and as a result, have established stronger family, social, and economic ties *Id.*

This is precisely the situation in the instant case. Mr. Nwatu has been a permanent resident for a period now exceeding 24 years. He has virtually no ties to Nigeria, but lives here in an intact nuclear family unit with a U.S. citizen child and mother. His social and economic support system is exclusively in the United States. Supreme Court precedent demands that his deportability be established by clear, unequivocal, and convincing evidence.

The INS has failed to meet the burden in this case. To the contrary, Mr. Nwatu has been found deportable on a ground of deportability that the INS did not convincingly establish against him. His probation was not complete, expungement had not been sought, and all legal remedies had not been exhausted.

To make matters worse, the BIA and the IJ have interpreted the statute of 440(d) in an expansive manner inconsistent with the principles established by the Supreme Court and Congress.

- II. THE PANEL ERRONEOUSLY UPHELD THE IJ INCOMPLETE FINDING IN RECALENDARING CASE AGAINST PETITIONER

The petitioner has consistently argued that he can not be found deportable on the basis of a charge that its final remedy has not been achieved and in which an IJ had suspended proceedings until Respondent has had time to seek expungement.

- III. THE PANEL EXCEEDED ITS AUTHORITY BY EFFECTIVELY BROADENING AEDPA TO ELIMINATE RELIEF OF 212(C) WHEN IT WAS NOT EXPRESSLY ENUMERATED BY CONGRESS WHEN

theft conviction was not an argument which resulted in this charge was not expressly enumerated therein, the Panel would have been compelled to reach a different result.

A re-examination of the Panel's decision reveals a decision made too hastily. A closer examination of the record and applicable law, including canons of statutory construction, show that the Panel and the IJ ignored the burden of proof and the law; and in doing, reached an incorrect decision on an issue of highest importance, the deportation of a lawful permanent resident of the United States.

CONCLUSION

A decision regarding deportability is extremely serious. Indeed, the Supreme Court has recognized the importance that deportation implicated "issues basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 US 33 (1950). When a lawful permanent resident is involved, deportation is the equivalent of banishment or exile *DelGadillo v. Carmichael*, 332 US 388 (1947). With this degree of constitutionally protected interests at stake, and the requirement that this Court Board should construe statutes establishing deportability narrowly rather than broadly; the cumulative impact of errors in the IJ and BIA decision are obvious. This is particularly true in light of the burden of proof the INS must bear in establishing deportability.

For all of the reasons set forth above, Petitioner respectfully urges this Court to vacate the IJ and BIA decision, order immediate release of the Petitioner, a lawful permanent resident. Declare that the retroactive application of AEDPA 440 in Petitioner's case violates the due process clause of the Fifth Amendment. Vacate the order of deportability and grant relief under former INA 212(c). Declare that INA 236(c) violates the Due Process Clause of the Fifth Amendment of the United States Constitution and that persons such as Petitioner are entitled to a prompt custody hearing.

Grant petitioner asylum under the Torture Convention.

Grant petitioner application for naturalization.

Respectfully Submitted,

 2/14/05

Brightman Nwatu, A27174038
208 Vines Drive
Cedar Hill, TX 75104
(972) 291-6990

February 14, 2005

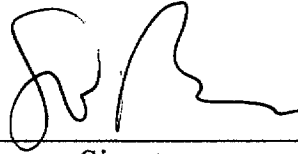
FYI...Petitioner was released from detention on January 28, 2005 and is awaiting a decision from the Courts. It is the hope that the Courts will concur and rule in favor of the Petitioner.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing review, motion was served this 11th day of FEB, 2005 on the INS, TRIAL & LITIGATION UNIT at PO Box 1939, by first class U.S. mail, postage prepaid. SAN ANTONIO TX 78297-1939

2/11/05

Date



Signature

OLD ADDRESS

PISPC

RT 3, Box 341

LOS FRESNOS, TX 78566

NEW ADDRESS

208 VINES DRIVE

CEDAR HILL, TX 75104

214-497-6816

BRIGHTMAN O. NWATU, A27174038

NEW ADDRESS

208 Vines Drive
Cedar Hill, TX 75104
(214) 497-6816
c/o Tamika Carr


OLD ADDRESS

PISPC
Rt. 3, Box 341
Los Fresnos, TX 78566

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the new address has been sent to all opposing parties.

Respectfully,



2/14/05

Brightman O. Nwatu, A27174038
February 14, 2005

1. Name to which box number(s) is (are) assigned
Nwatu - Brightman - Chicago

2. Box/Caller Nos. Thru _____

3. Name of person making application (If representing an organization, show title and name of organization if different from above)

4. Will this box be used for soliciting or doing business with the public? (Check one)
a. YES b. NO

5. Address (No., Street, City, State and ZIP Code. Record address change on reverse and line out address below.)
7600 Woodhollow #202

6. Telephone No. (If any)

7. Signature of applicant (Same as Item 3)
See part II

8. Date of application

ITEMS 8-15: TO BE COMPLETED BY POST OFFICE

9. Type of identification (Driver's license, military identification, other; show identification no.)

10. Eligibility for carrier-delivery
 CITY
 RURAL
 NONE

11. Box size needed
2

12. Dates of Service
a. Started **5-12-92** b. Ended **MAY 29 1990**

13. Service Assigned
a. Post Office Box b. Caller c. Reserve Number

14. Information Verified by
update

PS Form 1093, July 1992

(PART I) APPLICATION FOR POST OFFICE BOX OR CALLER SERVICE

CUSTOMER: Complete Items 15 and 19.

SPECIAL ORDERS

15. Postmaster:
The following named persons, or authorized representatives of the organizations listed are authorized to accept mail addressed to this (these) post office box or caller number(s). Continue on reverse if necessary.
 Check if reverse is used.

a. Applicant (Same as Item 3)
Brian Nwatu

b. Name in which box rented (Same as Item 1)

c. Other

d. Other
d
MAY 29 1990

ITEMS 16-18: TO BE COMPLETED BY POST OFFICE

16. Post Office Box/Caller number for which this card is applicable through _____

17. Check if box is to be used for Express Mail reshipment.

18. Post Office Date Stamp

19. I have _____ copy
Brian Nwatu
Signature of Applicant (Same as Item 3)

PS Form 1093, July 1992

(PART II) APPLICATION FOR POST OFFICE BOX OR CALLER SERVICE

Mr. Nwatu,
Sorry for the delay
but I hope this is
of some help. we