

No. 08-2455

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

ROLANDO HERNANDEZ

Petitioner,

v.

ERIC H. HOLDER, JR.,

Attorney General of the United States,

Respondent

Appeal from the United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

PETITION FOR PANEL REHEARING

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ATTORNEYS FOR PETITIONER

Pursuant to Federal Rule of Appellate Procedure 40 and 8th Cir. R. 40A, Petitioner, Rolando Hernandez, respectfully requests panel rehearing of his petition for review from the decision of the Board of Immigration Appeals (“BIA” or “Board”). A panel of this Court granted the petition in part and denied the petition in part in a published opinion, *Hernandez v. Holder*, No. 08-2455, 2009 U.S. App. LEXIS 19637 (8th Cir. Sept. 1, 2009).

Mr. Hernandez agrees with part II, C of the panel’s opinion and this Court’s order granting his petition for review with respect to his claim for humanitarian asylum. *Hernandez*, No. 08-2455, 2009 U.S. LEXIS 19637 at *23 - 31. Here, Mr. Hernandez seeks rehearing with respect to the portion of part II, D that addresses his motion for a continuance. *Id.* at *31 – 34. He submits that both the Immigration Judge (“IJ”) and BIA decisions rejecting Mr. Hernandez’s motion for a continuance were infected with legal error that this Court has jurisdiction to review under 8 U.S.C. § 1252(a)(2)(D). Mr. Hernandez therefore respectfully contends that the panel was mistaken when it ruled,

Although Hernandez contends that this is not the typical discretionary denial because the IJ failed to specifically address his continuance request and, in turn, violated his due process rights, the BIA's denial of the continuance is a discretionary determination over which we lack jurisdiction.

Hernandez, No. 08-2455, 2009 U.S. LEXIS 19637 at *33.

Before the BIA, Mr. Hernandez argued that he had established his “apparent eligibility” for cancellation of removal relief within the meaning of 8 C.F.R. § 1240.49 and 8 C.F.R. §1240.11. Administrative Record (“AR”) at 34 – 35. Both regulatory provisions dictate that an IJ “shall afford” a respondent who is apparently eligible for immigration relief the fair opportunity to make an application for such relief during his hearing. Mr. Hernandez argued that his apparent eligibility for cancellation relief was established by: (1) the proposed repapering regulation, (2) repeated Federal Register notices stating that the final repapering rule remains a DHS priority, (3) DHS and EOIR policies dictating administrative closure in deportation proceedings for aliens exactly like Mr. Hernandez, and (4) the cancellation application and extensive supporting evidence Mr. Hernandez had filed with the IJ. AR at 34 – 35, 48 – 59, 386 – 387, 390 – 399, 463 – 483, 519 – 560; 566 – 649. The BIA ignored this argument in its decision and it ignored the renewed motion for a continuance that Mr. Hernandez presented to the Board on this basis. AR at 2 – 3; 34 - 35.

Mr. Hernandez respectfully submits that the panel overlooked these aspects of his appeal when it held that the BIA’s decision regarding the continuance was a discretionary determination outside the scope of 8 U.S.C. § 1252(a)(2)(D). The Board was obligated to rule on this legal argument for a continuance but it did not. Mr. Hernandez’s legal argument is a substantial one well grounded in the

repapering statute, which construes repapered removal proceedings as a “reinitiation” of the terminated deportation proceedings. Immigration Reform and Immigrant Responsibility Act (IIRAIRA) §309(c)(3), Pub. L. 104-208 (1996) Given the purpose of the repapering statute, the purpose of the proposed regulations, and the DHS and EOIR policies promulgated to give effect to both, Mr. Hernandez was entitled to a continuance because he demonstrated his apparent eligibility for cancellation relief as a matter of regulation.

Additionally, Mr. Hernandez does not agree with the Court’s holding that it lacks jurisdiction to review the denial of his continuance for abuse of discretion under 8 U.S.C. § 1252(a)(2)(B)(ii). *Hernandez*, No. 08-2455, 2009 U.S. LEXIS 19637 at *33 (citing *Grass v. Gonzales*, 418 F.3d 876 (8th Cir. 2005); *Ikenokwalu-White v. I.N.S.*, 495 F.3d 919, 923-24 (8th Cir. 2007)). He contends that judicial review is not barred by 8 U.S.C. §1252(a)(2)(B)(ii) because the discretion to deny a continuance is conferred by regulation and not statute. The Supreme Court has granted certiorari in *Kucana v. Holder* and will decide whether 8 U.S.C. §1252(a)(2)(B)(ii) eliminates jurisdiction over agency decisions to reopen removal proceedings, a decision whose discretionary nature is also specified only by regulation. Supreme Court File No. 08-911. The Solicitor General has taken the side of the alien petitioner in *Kucana* and oral arguments are scheduled for November 10, 2009. If the Supreme Court rules in favor of *Kucana* it is very

likely the decision will also effectively overrule *Grass*, *Ikenokwalu-White*, and *Hernandez*.

CONCLUSION

Petitioner Rolando Hernandez's petition for panel rehearing should be granted and for the reasons the Court identified in its opinion it should remand to the BIA for further consideration of the humanitarian asylum claim. The Court should also remand to the BIA for proper consideration of Mr. Hernandez's legal argument that he is entitled to a continuance as a matter of regulation. The Court should also review the BIA decision regarding the motion for a continuance under the abuse of discretion standard, then either reverse or vacate the BIA and remand for further proceedings.

Respectfully submitted,

October 16, 2009

s/ Benjamin Casper

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

_____)	
Rolando Hernandez,)	No. 08-2455
)	
Petitioner,)	
)	Immigration File No.
v.)	A072 717 694
)	
)	
Eric H. Holder, Jr., U.S. Attorney General,)	Petition for Review
)	from the Decision of
Respondent)	the Board of
)	Immigration Appeals
_____)	

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, I electronically filed the foregoing Petition for Panel Rehearing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

s/ Benjamin Casper

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