05-5821-ag

To Be Argued By:
ROBERT M. SPECTOR

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5821-ag

RONY DANILO FIGUEROA,
Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES
ATTORNEY GENERAL OF THE UNITED STATES

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

ROBERT M. SPECTOR
Assistant United States Attorney
SANDRA S. GLOVER
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Statement of Jurisdiction

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review the petitioner's timely challenge to the final order by the Board of Immigration Appeals ("BIA"), dated September 30, 2005, which affirmed the May 12, 2004 ruling of the Immigration Judge ("IJ"), ordering the petitioner's removal.

Statement of Issue Presented for Review

Whether the BIA properly concluded that the IJ's order of removal did not violate the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991)?

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BRIEF FOR ALBERTO R. GONZALES
Attorney General of the United States

Preliminary Statement

Rony Danilo Figueroa, a native and citizen of Guatemala, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated September 30, 2005. The BIA, by *per curiam* order, affirmed the decision of the Immigration Judge ("IJ") dated May 12, 2004, ordering the petitioner removed from the United States. Administrative Record ("AR") at 2,

AR40-41 (BIA's decision and IJ's decision). The petitioner claimed before both the IJ and the BIA that he was a class member under the settlement agreement reached in *American Baptist Churches ("ABC") v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), and as such, was entitled to the administrative closure of the removal proceedings and referral to an asylum officer for review of his asylum claim. The IJ rejected the petitioner's request, offered to conduct an asylum hearing, and ordered the petitioner removed after he admitted the allegations contained in the Notice to Appear and refused to ask for asylum or make any other request for relief. AR28-36. The BIA affirmed the IJ's decision and specifically held that the petitioner was not an ABC class member because he was not present in the United States as of October 1, 1990, which the BIA held was a requirement for membership in the class. AR2.

In this pro-se appeal, the petitioner challenges the BIA's decision and asserts that he was a member of the ABC settlement class. This claim has no merit, and the BIA properly affirmed the IJ's Order of Removal.

Statement of the Case

On April 17, 2002, the petitioner was deported from Canada and entered the United States in Champlain, New York. AR82-83. He was placed in removal proceedings and released on his own recognizance. AR83. An IJ in Buffalo, New York held hearings on June 26, 2002, November 21, 2003, and May 12, 2004 to determine the petitioner's immigration status and removability. AR10-39.

On May 12, 2004, the IJ denied the petitioner's request for administrative closure of the proceedings and referral to an asylum officer, found that the petitioner was a native and citizen of Guatemala, noted that the petitioner was not applying for any forms of relief before the IJ, and entered an order of removal. AR29-35, AR40-41. On June 10, 2004, the petitioner filed a Notice of Appeal of the IJ's decision to the BIA. AR71-74. On September 30, 2005, the BIA affirmed the IJ's decision in a written, *per curiam* order. AR2. On October 25, 2005, the petitioner filed a petition for review of the BIA's decision with this Court.

Statement of Facts

According to the Notice to Appear, the petitioner, a native and citizen of Guatemala, entered the United States near San Ysidro, California on September 8, 1986 without being admitted or paroled into the country. AR211-13. The petitioner filed an application for asylum on February 6, 1988 and then changed his address on March 1, 1988. AR47. On March 28, 1989, a notice to appear for an asylum interview was sent to the petitioner's old address and was returned without being delivered to the petitioner. AR47. The petitioner did not appear at the interview, and, on June 23, 1989, the asylum request was terminated for lack of prosecution. AR47-48.

The petitioner went to Canada on August 11, 1989 and applied for asylum. AR82. According to the Form I-213, he was advised at that time to return to the United States and come back to Canada in thirty days. AR82-83. The petitioner returned to Miami, Florida, got married, and returned to Canada with his wife and two children on September 30, 1989. AR83. The petitioner was permitted entry into Canada to await a decision on his asylum claim. AR83. Canada eventually denied the petitioner's application, and he was deported to the United States on April 17, 2002. AR82-83. On April 18, 2002, the petitioner was served with a Notice to Appear before an IJ, charging him with being removable from the United States on the grounds that he was an alien present in the United States without having been admitted or paroled, or having arrived in the United States at any time or place other than designated by the Attorney General. AR211.

On May 12, 2004, after several continuances, the IJ conducted removal proceedings. AR25-39. The petitioner's sole claim before the IJ was that his case should be referred to an asylum officer under the *ABC* agreement. AR26-27. The IJ refused this request and offered the petitioner a trial on his request for asylum. AR29-30. The petitioner specifically refused to go forward with any hearing on an asylum claim before the IJ and instead requested again that his case be referred to an asylum officer for adjudication. AR30. The IJ refused the petitioner's request, confirmed that the petitioner was making no other claims for relief and rendered an oral decision ordering that the petitioner be removed from the United States and deported to Guatemala based on the charges in the Notice to Appear. AR30-GA36.

The IJ did not base its ruling on a decision that the petitioner was not entitled to the benefits conferred by the *ABC* agreement. AR29. Instead, the IJ simply stated that the petitioner could have an asylum hearing before the IJ and did not have to go before an asylum officer. AR29. When the petitioner made it clear that he was relying on the portion of the *ABC* agreement which indicated that class members were entitled to administrative closure of removal proceedings and an interview with an asylum officer, the IJ stated, "I'm not deprived the jurisdiction to send it back to an asylum officer in my view." AR28. Specifically, the IJ held:

> I don't see here in this decision that this is binding on this Court here with reference to that particular issue. . . . I'm not sure specifically how the settlement agreement applies to a Notice to Appear

> that's been served on the court so much later than the date of the settlement agreement. . . . I'm going to deny the request to administratively close[]. The Court has jurisdiction. There is nothing that I can see at this time that would not afford him a de novo review of an asylum application . . . .

AR29.

The petitioner opted not to go forward with a trial on his asylum application before the IJ and conceded the factual allegations set forth in the Notice to Appear. AR31, AR34. Based on this concession and the absence of any claims for relief, the IJ issued an order of removal. AR40-41, AR34-36.

The petitioner appealed the IJ's decision to the BIA. AR71-74. His sole claim before the BIA was that the IJ erred in refusing to refer the petitioner's case to an asylum officer, as required under the *ABC* agreement. AR49-51. On September 30, 2005, the BIA issued a written, *per curiam* decision dismissing the appeal. AR2.

Specifically, the BIA held that the petitioner could not claim benefit from the *ABC* agreement because he was not a member of the settlement class. AR2. The BIA concluded that because the petitioner was in Canada, not the United States, as of October 1, 1990, he could not claim membership in the *ABC* settlement class. AR2. The BIA also concluded that the petitioner was not entitled to any notice of his rights under the *ABC* agreement and had not complied with the requirements for *de novo* application for asylum under the agreement. AR2. Thus,

according to the BIA, the petitioner was not a member of the *ABC* settlement class, was not entitled to rely upon provisions of the *ABC* agreement, and, nevertheless, did not comply with the requirements of the agreement to qualify for benefits. AR2. Because the petitioner was in the United States without admission or parole, and declined to apply for any relief from removal before the IJ, the BIA dismissed the appeal. AR2.

The petitioner has filed a timely *pro se* petition for review with this Court claiming that the IJ and the BIA erred by not permitting his asylum claim to be adjudicated by an asylum officer.

Summary of Argument

The BIA properly concluded that the petitioner did not qualify as an *ABC* class member. It is undisputed that the petitioner, a Guatemalan national, was not in the United States as of October 1, 1990.

Argument

I. The Board of Immigration Appeals properly determined that the petitioner was not a member of the *ABC* class and was not entitled to any benefits under the settlement agreement.

A. Governing law and standard of review

In 1985, the American Baptist Churches filed a class action lawsuit against the United States Immigration and Naturalization Service ("INS"), the Executive Office for

Immigration Review ("EOIR") and the United States Department of State claiming that the government agencies discriminated against Guatemalan and Salvadoran immigrants in their asylum claims. The parties agreed to settle the matter and, on January 31, 1991, United States District Judge Peckham filed a Stipulated Order Approving the Class Action Settlement Agreement. *See ABC*, 760 F. Supp. 796. This case became commonly referred to as *ABC*, and individuals that qualify for benefits under the settlement agreement are commonly referred to as *ABC* class members.

The *ABC* litigation arose out of systemic challenges by certain Salvadorans and Guatemalans in the United States to the processing of asylum claims filed under 8 U.S.C. § 1158(a) (1988). *See ABC*, 760 F. Supp. at 799. The settlement class itself includes "only . . . all Salvadorans in the United States as of September 19, 1990; and . . . all Guatemalans in the United States as of October 1, 1990." *Id.* at 799, ¶ 1. As described by the BIA, "[t]he settlement agreement contemplates a special procedure under which alien class members are entitled, under certain specified conditions, to new proceedings before [the INS] to determine their right to asylum or any other rights and benefits established under the agreement." *In re Morales*, 21 I. & N. Dec. 130, 132 (BIA 1995). *See ABC*, 760 F. Supp. at 799-805.

Specifically, the agreement provides for a *de novo* asylum adjudication before an asylum officer for class members who meet the criteria set forth in paragraph 2. As relevant here, that paragraph provides that Guatemalan class members who have not been convicted of an

aggravated felony are eligible for an asylum adjudication before an asylum officer if they "indicate to the INS in writing their intent to apply for a de novo asylum adjudication before an Asylum Officer, or otherwise to receive the benefits of this agreement, within the period of time commencing July 1, 1991 and ending on December 31, 1991." *ABC*, 760 F. Supp. at 799-800, ¶ 2.

In paragraph 19 of the *ABC* agreement, the INS agreed to stay the deportation of *ABC* class members and stay or administratively close the EOIR proceedings of any class member whose case was pending on November 30, 1990 until the class member had the opportunity to effectuate his or her rights under the agreement. *See ABC*, 760 F. Supp. at 805, ¶ 19. For any class member whose deportation or removal proceedings began after November 30, 1990, however, the agreement provides that the case will not be "automatically administratively closed." *Id.* In those cases, the agreement provides, rather, that the "individual may ask the Immigration Court or the BIA to administratively close his or her case and the case will be administratively closed unless the class member has been convicted of an aggravated felony or is subject to detention under paragraph 17." *Id.* "The administrative closing of a case does not result in a final order. It is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations." *Matter of Amico*, 19 I. & N. Dec. 652, 654 n.1 (BIA 1988).

As set forth in paragraph 19, *ABC* class members are not eligible for administrative closure if they have been convicted of an aggravated felony. *See ABC*, 760 F. Supp.

at 799, ¶ 19. Further, for those class members whose removal proceedings began after November 30, 1990, administrative closure is not available if the individual has been convicted of a crime involving moral turpitude resulting in a sentence of greater than six months, poses a threat to national security, or poses a threat to public safety. *See id.* at 804-805, ¶¶ 17, 19.

The role of the IJ and the BIA in making eligibility determinations related to the *ABC* agreement is minimal. *See In re Morales*, 21 I. & N. Dec. at 134-35. In a 1995 decision addressing the *ABC* agreement, the BIA held that when faced with a request for administrative closure, the Immigration Court and the BIA should focus their attention solely on the eligibility criteria set forth in paragraph 19 of the agreement: "In our view, the process of adjudication will be more orderly if the function of EOIR is restricted to the inquiries required under paragraph 19, i.e., whether an alien is a class member, whether he has been convicted of an aggravated felony, and whether he poses one of the safety concerns enumerated in paragraph 17." *Id.* at 135. "Involving EOIR in issues of substantive eligibility under paragraph 2 of the agreement would only further complicate its already cumbersome process and invite additional legal challenges to the procedure." *Id.*

This Court reviews legal conclusions by the BIA or IJ under the *de novo* standard, *see Mardones v. McElroy*, 197 F.3d 619, 624 (2d Cir. 1999), and factual findings under the "substantial evidence" standard, *see Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000) (factual findings must be upheld if they are supported by "reasonable, substantial,

and probative" evidence in the record). In general, mixed questions of law and fact are reviewed under the *de novo* standard. *See id.*

B. Discussion

The first paragraph of the settlement agreement states that, to be considered a member of the settlement class, a Guatemalan must have been present in the United States as of October 1, 1990. *See ABC*, 760 F. Supp. at 799, ¶ 1. The language is unambiguous. To qualify for class membership, an alien from Guatemala must have been in the United States on October 1, 1990. There is no way to read the language to apply to all Guatemalans like the petitioner who were in the United States at some point before October 1, 1990, but who left before that date. It is undisputed that, in this case, the petitioner was in Canada, not the United States, as of October 1, 1990. Thus, the BIA correctly concluded that the petitioner was not a member of the settlement class.

Although there are certain inquiries with respect to eligibility for benefits under the *ABC* agreement that should be made by an asylum officer in the first instance, the IJ or the BIA need not administratively close proceedings to make the following eligibility determinations: (1) whether the petitioner qualifies as a class member under paragraph 1 of the agreement because he was present in the United States as of October 1, 1990; (2) whether the petitioner is ineligible because he is an aggravated felon; (3) whether the petitioner is ineligible because he has been convicted of a crime involving moral turpitude and been sentenced to more than six months in

prison; and (4) whether the petitioner is ineligible because he poses a national security risk or a threat to public safety. *See In re Morales*, 21 I. & N. Dec. at 134. Said another way, although the settlement agreement does not call on the EOIR to make substantive determinations regarding an alien's eligibility for benefits under certain provisions of the agreement, it does require the EOIR, in the first instance, to decide whether "the alien requesting administrative closure is a class member under paragraph 1 of the agreement," *id.*, which indicates, among other things, that the Guatemalan national must have been in the United States as of October 1, 1990. Thus, whereas the "role of EOIR in administering the ABC agreement . . . [is] minimal," *id.* at 135, it still must determine whether a petitioner is a member of the ABC class.

Here, the BIA properly determined, in the first instance, that the petitioner did not qualify as a class member under paragraph 1 of the settlement agreement because he was not present in the United States as of October 1, 1990. Although this specific issue does not appear to have been addressed by any Circuit Court of Appeals, the case law is replete with references to the settlement agreement's requirement that, to be a class member, a Guatemalan petitioner must have been *present* in the country as of October 1, 1990. *See, e.g.*, *Lopez-Reyes v. Gonzales*, 2007 WL 2178454, at *1 (1st Cir. July 31, 2007); *Majd v. Gonzales*, 446 F.3d 590, 598 (5th Cir. 2006); *Mardones*, 197 F.3d at 621. Because the petitioner is not a member of the settlement class, he is not entitled to assert rights under the agreement. *See Majd*, 446 F.3d at 598 ("Because [the petitioner] is not a member of the class, he cannot assert rights under the agreement.").

Moreover, the petitioner has never asserted – whether before the agency or this Court – that he complied with the requirements of paragraph 2 that would make him eligible for a *de novo* asylum adjudication. Specifically, he has never asserted that he complied with paragraph 2 of the agreement by notifying the INS of his intent to apply for a *de novo* asylum adjudication before an asylum officer between July 1, 1991 and December 31, 1991. *See ABC*, 760 F. Supp. at 800. Thus, because he never asserted his rights under the agreement, he is not entitled to any relief under the agreement. The petition for review should be denied.

Conclusion

For each of the foregoing reasons, the petition for review should be denied.

Dated: September 10, 2007

Respectfully submitted,

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Addendum

Relevant Provisions from *ABC* Settlement Agreement, *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991)

1. AMENDMENT OF CLASS. At or before the time this agreement is submitted to the Court for final approval, the parties will submit a joint motion for recertification of the class to include only:

a. all Salvadorans in the United States as of September 19, 1990; and

b. all Guatemalans in the United States as of October 1, 1990.

Unless the class is so recertified by the Court at the time the agreement is finally approved this agreement shall be of no force and effect.

2. CLASS MEMBERS ELIGIBLE FOR DE NOVO ASYLUM ADJUDICATION. The following class members, if they have not been convicted of an aggravated felony as that term is defined in the Immigration and Nationality Act, as amended, will be afforded a de novo, unappealable asylum adjudication before an Asylum Officer, including a new interview, under the regulations in effect on October 1, 1990:

a. Salvadorans who:

(1) apply for Temporary Protected Status under Section 303 of the Immigration Act of 1990 within the statutory period designated for registration under Section

303(b)(1)(c) of such Act, whether or not such individual actually qualifies for such status; or

(2) indicate to the INS their intent in writing to apply for a de novo asylum adjudication before an Asylum Officer, or otherwise to receive the benefits of this agreement, within the period of time designated for initial registration under Section 303(b)(1)(C) of the Immigration Act of 1990.

b. Guatemalans who indicate to the INS in writing their intent to apply for a de novo asylum adjudication before an Asylum Officer, or otherwise to receive the benefits of this agreement, within the period of time commencing July 1, 1991 and ending on December 31, 1991.

However, Salvadoran and Guatemalan class members who were interviewed by an Asylum Officer regarding their asylum applications between October 1, 1990 and November 23, 1990, will not be entitled to obtain a new asylum interview or a new initial Asylum Officer adjudication but will be entitled to all other rights and benefits they would otherwise receive under this agreement except for the provisions of paragraph 22 for those BHRHA comments issued prior to the date of preliminary approval. Class members apprehended at time of entry after the date of preliminary approval of this agreement shall not be eligible for the benefits hereunder.

17. DETENTION OF CLASS MEMBERS ELIGIBLE FOR RELIEF. The INS may only detain class members, eligible for relief under paragraph 2, who are otherwise

subject to detention under current law and who: (1) have been convicted of a crime involving moral turpitude for which the sentence actually imposed exceeded a term of imprisonment in excess of six months; or (2) pose a national security risk; or (3) pose a threat to public safety. Where an eligible class member would be subject to detention, regardless of whether the class member is actually in detention, defendants may, at their election, provide notice to the eligible class member and process the class member's readjudication application pursuant to the provisions applying to detained class members. However, the government reserves the right to impose a semi-annual reporting requirement upon those class members whom the government determines are likely to abscond. Notwithstanding any other provision of this agreement, any Guatemalan who was in the United States as of October 1, 1990, who has not been convicted of an aggravated felony, who is in detention and could not be detained under the provisions of this paragraph if he were an eligible class member, shall be released upon delivering to INS the response form attached to Exhibit 2, and he or she shall have 180 days from his release to file a new asylum application if one is not on file. The special rules in this paragraph with respect to detention of class members shall not prevent the INS from detaining a class member after the Asylum Officer has issued a final decision. Such detention, if based on a likelihood of absconding, may only be based on events occurring after the Asylum Officer decision has been rendered.

19. STAY OF DEPORTATION AND DEFERRAL OF EXCLUSION AND DEPORTATION CASES PENDING

NEW ADJUDICATION. Unless an individual class member objects and waives the right to apply hereunder, upon signing of this agreement by the parties, Defendants agree to stay the deportation and, on or before January 31, 1991, (subject to preliminary Court approval of this agreement), to stay or administratively close the EOIR proceedings of any class member (unless they have been convicted of an aggravated felony), whose cases were pending on November 30, 1990, until the class member has had the opportunity to effectuate his or her rights under this agreement. However, any class member whose deportation proceeding is based on a criminal ground of deportability or whose proceeding was commenced after November 30, 1990, will not have his or her case automatically administratively closed on or before January 31, 1991. Rather, that individual may ask the Immigration Court or the BIA to administratively close his or her case and the case will be administratively closed unless the class member has been convicted of an aggravated felony or is subject to detention under paragraph 17.