U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

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RE: Anil Shah
D2004-121

Date of this notice: November 25, 2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Donna Carr

Donna Carr

Chief Clerk of the Board

Enclosure

Panel Members:
FREDERICK D. HESS
DAVID B. HOLMES
JUAN P. OSUNA

CC: David Landau
Chief Appellate Counsel

CC: Jennifer J. Barnes
Bar Counsel
Executive Office for Immigration Review

File: D2004-121

Date: NOV 25 2008

In re: ANIL SHAH, ATTORNEY

IN PRACTITIONER DISCIPLINARY PROCEEDINGS

APPEAL

ON BEHALF OF DHS: Rachel A. McCarthy
Bar Counsel

ON BEHALF OF GENERAL COUNSEL: Scott Anderson
Deputy Bar Counsel

ON BEHALF OF RESPONDENT: H. Ronald Klasko, Esquire

On May 23, 2008, an Immigration Judge, acting as the adjudicating official in this case, ordered the respondent suspended from practice before the Immigration Courts, Board of Immigration Appeals, and Department of Homeland Security (the "DHS"), for a period of 6 months. The DHS, who initiated these proceedings, has filed an appeal with the Board concerning the discipline imposed against the respondent, and argues that the respondent should be expelled from practice. The appeal will be dismissed.

BACKGROUND

The Board issued a published decision concerning the respondent. In *Matter of Shah*, 24 I&N Dec. 282 (BIA 2007), the Board sustained an earlier appeal filed by the DHS, and found the respondent subject to attorney discipline. The Board stated that "we agree with the DHS that it is in the public interest to discipline the respondent, because by presenting the improperly obtained certified LCA [Labor Condition Application] to the USCIS [United States Citizenship and Immigration Services of the DHS] under his signature, he knowingly and willfully misled the USCIS concerning a material and relevant matter concerning the approval of the nonimmigrant petition. 8 C.F.R. § 1003.102(c)." *Id.* at 288. The case was remanded to the Immigration Judge to consider the appropriate discipline, and the judge determined that a 6-month suspension was the appropriate discipline in this case, after holding a hearing on March 24, 2008. The DHS filed a timely appeal. The DHS, respondent, and Office of General Counsel for the Executive Office for Immigration Review (Office of General Counsel) have filed briefs concerning the Immigration Judge's May 23, 2008, decision.

THE IMMIGRATION JUDGE'S DECISION IS AFFIRMED.

For the reasons discussed below, the Board affirms the Immigration Judge's May 23, 2008, decision, and suspends the respondent from practice before the Immigration Courts, Board of Immigration Appeals, and DHS, for a period of 6 months, effective 30 days from this date. *See* 8 C.F.R. §§ 1292.3(f), 1003.106(c); *Matter of Shah*, *supra*, at 283-84 (Board has jurisdiction to review the decision of the adjudicating official and conducts a *de novo* review of the record).

A. *The Office of General Counsel's Brief is Accepted.*

As noted, the Office of General Counsel filed a brief, which, like that of the DHS, argues that the respondent should be expelled from practice, and also contends that the Board should rely on standards of the American Bar Association ("ABA") for guidance in imposing attorney discipline in the respondent's case and similar cases. The respondent argues that it was improper for the Office of General Counsel to file a brief in this case, and contends that the brief should be stricken (Respondent's Br. at 29-32). According to the respondent, since the DHS has prosecutorial authority over the respondent's case, which involved fraud concerning a petition filed with the DHS, the Office of General Counsel should not have involved itself in the case by filing a brief.

The pertinent regulation provides, however, that when the DHS institutes disciplinary proceedings by filing a Notice of Intent to Discipline, the Office of General Counsel does become involved in the proceedings. That is, 8 C.F.R. § 1292.3(e)(2) states that

> A copy of the Notice of Intent to Discipline [filed by the DHS] shall be forwarded to the Office of the General Counsel of EOIR. The Office of General Counsel of EOIR may submit a written request to the Board or the adjudicating official requesting that any discipline imposed upon a practitioner which restricts his or her authority to practice before the [DHS] also apply to the practitioner's authority to practice before the Board and the Immigration Courts.

As the Office of General Counsel argues, Office of General Counsel's Br. at 2, this provides reason for the Board to consider its views in this proceeding.

B. The ABA's Standards For Imposing Lawyer Sanctions

The DHS, and Office of General Counsel, argue that adjudicators should apply the ABA's "Standards For Imposing Lawyer Sanctions" (ABA Standards) in deciding the appropriate disciplinary sanction in "original" disciplinary cases. *See* DHS Br. at 12-13; Office of General Counsel's Br. at 5-7; Attachment 2; *but see* Respondent's Br. at 21-23 (arguing that Immigration Judge correctly declined to utilize ABA Standards). Such cases, like the instant case, would involve charges against attorneys that do not involve reciprocal discipline based on state or federal court orders, or criminal convictions (Office of General Counsel's Br. at 6).

The Immigration Judge, agreeing with the respondent, determined, after a review of prior Board decisions, that it was not appropriate to use the ABA Standards in arriving at the appropriate sanction (I.J.'s May 23, 2008, dec. at 9).

As the DHS argues, the regulations do not mandate a specific methodology for calculating the appropriate sanction (DHS Br. at 12). Rather, 8 C.F.R. § 1003.106(b) provides that "[t]he adjudicating official shall consider the entire record... and... render a decision... If the adjudicating official determines that the practitioner should be suspended, the time period for such suspension shall be specified."

The Board agrees with the government that it is appropriate for adjudicators to consult the ABA Standards before imposing sanctions in "original" disciplinary cases under 8 C.F.R. § 1003.102 (Office of General Counsel's Br. at 5). At the same time, it must be emphasized that the standards provide a "theoretical framework", or "guideline", with flexibility for the adjudicator to select the appropriate sanction. ABA Standards, at 12.

C. The Immigration Judge's Sanction Was Appropriate.

After consulting the ABA Standards, the Board finds that the Immigration Judge's discipline imposed against the respondent was appropriate, and the judge's decision will be affirmed.

Under the ABA Standards, an adjudicator makes an initial determination as to the appropriate sanction, and then considers any relevant aggravating or mitigating factors (ABA Standards, at 11). In making the initial determination as to the proper sanction, the adjudicator considers (a) the duty violated; (b) the lawyer's mental state; and (c) the potential or actual injury caused by the attorney's actions. *Id.* at 9. The DHS argues that, under the ABA Standards, apparently § 6.1, "False Statements, Fraud, and Misrepresentation", expulsion would be generally appropriate for the actions taken by the respondent (Tr. of Mar. 24, 2008, hearing at 2-16; DHS Br.). The respondent argues that reference to the ABA Standards would not result in an initial finding that expulsion was appropriate (Respondent's Br. at 23-25).

The respondent, "[b]y presenting the improperly obtained certified LCA to the USCIS under his signature ... knowingly and willfully misled the USCIS concerning a material and relevant matter concerning the approval of [a] nonimmigrant petition." *Matter of Shah , supra*, at 286. The respondent's "particularly serious misconduct", I.J.'s May 23, 2008, dec. at 11, merits appropriate discipline. *See also* DHS Br. at 9-11 (discussing formation of fraud detection unit within DHS and seriousness of fraud); Office of General Counsel's Br. at 3-5 (arguing that immigration fraud warrants significant sanctions); DHS Proposed Exh. 22 (affidavit of Rand Gallagher, which the Immigration Judge declined to consider, discussing the creation, and efforts, of the Office of Fraud Detection and National Security within the USCIS).

It is not necessary to further analyze whether the ABA Standards would counsel expulsion as the initially-appropriate discipline for the respondent's wrongful actions. Even if expulsion were the appropriate baseline sanction, upon weighing the other factors present in this case, the Board agrees with the Immigration Judge that a 6-month suspension is the appropriate discipline.

As the Immigration Judge found, I.J.'s May 23, 2008, dec. at 11, the respondent has never been otherwise disciplined in his long legal career, which dates from 1990.

Moreover, as the Immigration Judge stated, I.J.'s May 23, 2008, dec. at 11, the respondent's misconduct occurred over 8 years ago. The Board disagrees with the DHS that the respondent should be blamed for prolonging these proceedings (DHS Br. at 6). *See also* Respondent's Br. at 26-27 and n. 12 (arguing that respondent is not to blame for fact that the respondent is now being sanctioned for wrongful action that took place years ago, in January, 2000).

Additionally, there is no evidence that the respondent has engaged in wrongdoing since that time. *Id. See also* Respondent's Group Exh. 23(2) (certificates of good standing from the United States Supreme Court; United States Tax Court; United States District Court for the Eastern and Southern Districts of New York; and American Immigration Lawyers Association); Respondent's Group Exh. 21(1-16) (certificates and letters concerning employment).

Further, the respondent is held in high esteem by family members, colleagues, clients, employees, and community members, as the Immigration Judge stated (I.J.'s May 23, 2008, dec. at 11). The Immigration Judge also appropriately took into account that the respondent provides free legal services to religious and charitable organizations, as well as those not able to pay for legal services. *Id.* The Immigration Judge took note that expulsion would undermine the respondent's source of income, upon which the respondent's daughters and mother also depend. *Id.*; Respondent's Group Exh. 21(3) (witness statements), as supplemented by Respondent's Group Exh. 23(3-5). The numerous affidavits presented by the respondent from other attorneys, family members, employees, religious/charitable organizations, and clients appear heartfelt, express admiration or appreciation for the respondent's work and activities, and characterize the respondent's errors as an aberration which is regretted.

The Immigration Judge also appropriately recognized that the respondent was already penalized by the Department of Labor for his wrongdoing as an employer. I.J.'s May 23, 2008, dec. at 10-12.[1] Moreover, this Board's publication of a decision concerning the respondent, *Matter of Shah*, *supra*, "would apparently affect [the respondent's] reputation within the immigration law community", as the Immigration Judge said. *Id.* at 12. *See also* 73 Fed. Reg. 44178-01 (July 30, 2008)(proposed regulations concerning attorney discipline proceedings that cite the respondent's case).

The DHS argues that it is significant that the respondent did not express remorse for his wrongful actions, as he waived the right to testify at the March 24, 2008, hearing. *See* DHS Br. at 7, 10, 14, 16; Tr. at 10; Respondent's Group Exh. 23(1) (sworn statement waiving right to testify). Indeed, this is a relevant factor to consider. However, the respondent's counsel spoke at the hearing. Counsel admitted that the respondent "was more lax than he should have been, lowered his standards, acted incorrectly", and said that the respondent's behavior "... is not something that should in any way be condoned, it's wrong", Tr. at 19; *see also* Tr. at 24 (respondent's actions were wrong and he should

[1]The Immigration Judge also observed that the Department of Labor could have sanctioned the respondent as an attorney, but did not (I.J.'s May 23, 2008, dec. at 12). The DHS argues that this observation was incorrect (DHS Br. at 5-6, 11-12), while the respondent argues that the Department of Labor could have sanctioned the respondent (Respondent's Br. at 17-18). While it appears that the Department of Labor could have sanctioned the respondent, under its regulations, but did not, the Board does not find this to be particularly relevant as to the discipline that should be imposed against the respondent in these proceedings.

not have done it); Respondent's Br. at 26 (arguing that silence should not be equated with lack of remorse).

As the Immigration Judge considered, and the respondent argues, a review of Board cases where practitioners challenge the imposition of sanctions shows that expulsion has been "reserved for uniquely egregious conduct" (I.J.'s May 23, 2008, dec. at 8, 11-12; Respondent's Br. at 13). *See e.g. Matter of Ramos*, 23 I&N Dec. 843 (BIA 2005)(respondent disbarred in Florida based on numerous disciplinary violations, including "a myriad of unethical conduct" which precluded reinstatement for 20 years); *Matter of Gadda*, 23 I&N Dec. 645 (BIA 2003)(respondent disbarred by the Supreme Court of California based on his egregious and repeated acts of professional misconduct over a number of years).

After fully considering the factors in this case, the Board cannot find that the respondent Shah merits this ultimate discipline of expulsion for his wrongful actions. The Immigration Judge's imposition of a 6-month suspension will be affirmed.

ORDER: The DHS' appeal is dismissed, and the Immigration Judge's May 23, 2008, decision is affirmed.

FURTHER ORDER: The respondent is suspended from practice before the Immigration Courts, Board of Immigration Appeals, and DHS, for a period of 6 months, effective 30 days from this date.

FOR THE BOARD