

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JEAN CLAUDE CANTAVE, :

Petitioner, :

:

-vs-

: Civil No. 3:01cv1787 (PCD)

:

STEVEN FARQUHARSON, *et al.*, :

Respondents. :

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that he is illegally detained by the Immigration and Naturalization Service (“INS”). For the reasons set forth herein, the petition for writ of habeas corpus is denied.

I. BACKGROUND

Petitioner, a native and citizen of Haiti, has resided in the United States since 1994. On March 27, 2000, counsel filed an application for adjustment of status of petitioner under the Haitian Refugee Immigration Fairness Act (“HRIFA”), Pub. L. No. 105-277, § 901, 112 Stat. 2681, 2681-538-542 (1998) (codified at 8 C.F.R. § 245.15), along with the applications of three other applicants, supporting documents and a single check for the four applications. On April 12, 2000, the INS responded that a single check must be submitted for each applicant, to which counsel remitted four separate checks. In August 2000, the application was rejected as untimely for failure to remit the filing fee.

In May, 2000, petitioner was convicted of attempted sexual assault in a spousal or cohabiting relationship against Marie Fernande Jean-Baptiste in violation of CONN. GEN. STAT.

§§ 53a-49, 53a-70b.¹ Jean-Baptiste and petitioner have two children, born in 1996 and 1999. On October 27, 2000, the INS reinitiated removal proceedings for the criminal conviction based on § 212(a)(2)(A)(I)(1) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1227(a)(2)(A)(I)(1).

On December 27, 2000, an Immigration Judge (“IJ”) ordered petitioner removed pursuant to § 237(a)(2)(A)(i)(I) of the INA, 8 U.S.C. § 1227(a)(2)(A)(i)(I). The IJ heard testimony of petitioner, who denied that he was guilty of the crime of which he was convicted and Jean-Baptiste, who testified that his children would not return with him to Haiti and that they would be harmed emotionally and financially by his absence. The IJ concluded that his HRIFA application was late, thus properly denied, but held an evidentiary hearing in order to determine whether a § 212(h) of the INA, 8 U.S.C. § 1182(h), waiver was appropriate. The IJ concluded that petitioner established that his deportation would create an extreme hardship for his children but that the factors weighing in favor of granting a waiver were outweighed by those against granting the waiver, specifically his lack of remorse regarding the offenses surrounding his criminal conviction.

On January 26, 2001, petitioner appealed the order to the Board of Immigration Appeals (“BIA”). On August 15, 2001, the BIA concluded that petitioner did not establish his eligibility for a waiver under § 212(h) and thus was ineligible, based on his conviction, to apply for an adjustment of status under HRIFA.

¹ Petitioner alleges that he was convicted of attempted sexual assault in the second degree in violation of CONN. GEN. STAT. § 53a-71. The record reflects that he was convicted of attempted sexual assault in a spousal or cohabiting relationship in violation of CONN. GEN. STAT. § 53a-70b.

Petitioner then moved for an order requiring respondent to rebut the presumption that he would not be removed in the reasonably foreseeable future pursuant to *Zadvydas v. Davis*, 533 U.S. 678, 699, 121 S. Ct. 2491, 2497-98, 150 L. Ed. 2d 653 (2001). Respondent has since filed a notice of its intent to deport petitioner on April 22, 2002.

II. DISCUSSION

Petitioner argues two separate due process violations for which his petition should be granted. First, that the IJ improperly found that his HRIFA adjustment application was not timely filed and denied his waiver application. Next, that his continued pre-removal detention violates his due process rights. Respondent responds that there is no jurisdiction for review of petitioner's claims or, if there is jurisdiction, petitioner has failed to establish a due process violation.

A. The IJ's Decision

Petitioner argues that the IJ's decision is not supported by the record before her and thus denied him due process. The IJ was presented with two questions: (1) whether his HRIFA application was timely filed and thus should have been considered² and (2) whether petitioner was entitled to a waiver or removal under § 212(h).³ Petitioner does not contend that he was

² "Judicial review" is defined as a "full, nonhabeas review." *INS v. St. Cyr*, 533 U.S. 289, 312, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001). Judicial review is not available for denials of applications for adjustment of status brought pursuant to HRIFA. The procedures for review of a HRIFA adjustment application are set forth in 8 C.F.R. § 245.15. That section provides that "[p]ursuant to the provisions of section 902(f) of HRIFA, there shall be no judicial appeal or review of any administrative determination as to whether the status of an alien should be adjusted under the provisions of section 902 of HRIFA." 8 C.F.R. § 245.15(v).

³ Judicial review is not available for denial of waivers sought pursuant to § 212(h) *See* 8 U.S.C. § 1252(a)(2)(B)(i).

denied the opportunity for review of these claims before the IJ, nor does he allege that he was denied the opportunity for review of the IJ's decision. Petitioner further does not allege that the procedures in place denied him due process. His petition consists of factual allegations on which he claims that the IJ's decision is not supported by the record. Such a fact-based inquiry or review of discretionary decisions is not a part of habeas review. *See Sol v. INS*, 274 F.3d 648 651 (2d Cir. 2001); *see also Zadvydas*, 533 U.S. at 688. In light of the express preclusion of judicial review as to these claims, and the failure to identify a claim cognizable on habeas review, these claims are dismissed for want of jurisdiction.⁴

B. Continued Pre-removal Detention

Petitioner also argues that his continued, pre-removal detention violates his procedural and substantive due process rights guaranteed by the Fifth Amendment. Although the indefinite or permanent confinement aliens awaiting deportation without hearing is violative of due process, a six-month delay in processing deportation orders is presumptively constitutional. *See Zadvydas*, 533 U.S. at 701. Outside this six-month window, respondent may be called upon to respond to the allegation that removal is unlikely in the reasonably foreseeable future. *See id.* Petitioner sought such a showing, which was met with the respondent's notice of intent

⁴ If petitioner's claim were to be construed as alleging that the failure to process the HRIFA adjustment application constituted a violation of his right to due process, such claim would be without merit. He cannot establish the loss of a liberty interest through an allegedly defective process since he cannot establish that his application would have been granted if timely filed. Petitioner filed the application on March 27, 2000 and was convicted in May 2000 of second degree sexual assault. The HRIFA authorized the Attorney General to change the status of certain Haitian nationals to that of an alien lawfully admitted for permanent residence if (1) the petition was filed before April 1, 2000 and (2) is otherwise admissible under § 212(a). *See* Pub. L. No. 105-277, § 902(1). Section 212(a)(i)(I) excludes from permanent residence those convicted of crimes involving moral turpitude, the basis on which petitioner was ordered deported.

to deport petitioner within two weeks. In doing so, the respondent has carried its burden in rebutting the presumption that petitioner will not be removed in the reasonably foreseeable future. *See id.* The petition is therefore denied.

III. CONCLUSION

Petitioner's petition for writ of habeas corpus (Doc. 1) is **denied**. Petitioner's motion for review of custody (Doc. 9) is **denied as moot**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, April ____, 2002.

Peter C. Dorsey
United States District Judge