InvalidDeportationFailureToInformofRelief[2012]

STATEMENT OF FACTS

Mr. CLIENT is a long-time resident of the United States and a devoted family man. According to information provided by the government, he first entered the United States in 1988. Over the next 20 years, he maintained a steady history of employment in the United States. For the past three years, he has been in a common-law relationship with Esther Garibay, a United States citizen. The couple have two children together, both United States citizens: Abraham Rigo Hernandez, age 2, and Emmanuel Hernandez, who was born just one month ago, in May, 2008, after Mr. CLIENT's arrest in this case, and following a difficult and high-risk pregnancy. Ms. Garibay also has a son from a prior relationship, Elijah Hernandez, age 5, who is also a United States citizen. Mr. CLIENT had planned to legally adopt Elijah, who has lived with Mr. CLIENT since he was just one year old and who has been raised to believe that Mr. CLIENT is his true father. Mr. CLIENT is a devoted and beloved husband and father, and supports his family financially by working as a laborer and foreman for a pallet company. Recently, Mr. CLIENT and his common-law wife proudly purchased their first home together in Hemet, California. Unfortunately, due to Mr. CLIENT's deportation, the couple have been unable to make their mortgage payments, and the home is now at grave risk of foreclosure. The couple had also recently purchased a new Ford F-150 truck together, but because they were unable to make their car payments after Mr. CLIENT's deportation, the vehicle was repossessed.

According to information provided by the government, on January 23, 2008, an immigration judge ordered Mr. CLIENT removed from the United States. *See* Exhibit A (Order of the Immigration Judge).[1] The proceedings were initiated by a Notice to Appear ("NTA") dated

[1] Supporting exhibits and a transcript of relevant portions of the deportation tape will be submitted under

January 14, 2008. *See* Exhibit B (Notice to Appear). In the NTA, the government alleged that Mr. CLIENT had entered the United States without inspection in 1988, and suffered a conviction on July 7, 2005, for attempted sodomy with force and attempted kidnapping in violation of Cal. Penal Code §§ 664 and 286(c)(2).[2] *See id.* The government further alleged that Mr. CLIENT was removable because he had entered without admission and because he had been convicted of a crime of moral turpitude. *See id.*

At the removal hearing, the immigration judge ("IJ") misinformed Mr. CLIENT that he was not eligible for any kind of relief, including voluntary departure. The IJ also failed to inform him that he qualified for a number of other forms of relief, including a Section 212(h) waiver and adjustment of status. Despite Mr. CLIENT's statement at the outset of the hearing, that "What happened is that I have my family outside and I cannot be locked up," the IJ failed to inquire about Mr. CLIENT's immediate family or the hardship that his deportation would cause. Finally, although the IJ inquired whether Mr. CLIENT wanted to appeal, he never explained what an appeal was or ensured that Mr. CLIENT understood the meaning of that right. At the conclusion of Mr. CLIENT's deportation hearing, the IJ ordered him deported to Mexico. At the time of his deportation, Mr. CLIENT had the financial ability and the will to depart the United States on his own.

2. <u>Mr. CLIENT Was Eligible for Adjustment of Status and a § 212(h) Waiver</u>

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separate cover.

[2] Material produced by the government in discovery indicates that Mr. CLIENT maintained his innocence of the charges and fought the case through trial. At the time of his sentencing in November 2005, he was released from custody with a time-served sentence of 866 days. He was not deported at that time, and continued to comply with his conditions of probation, until he was arrested by border patrol agents at the probation office in January 2008 and placed in deportation proceedings.

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As a separate and independent ground for this motion, and irrespective of whether Mr. CLIENT was eligible for pre-conclusion voluntary departure, Mr. CLIENT's deportation was invalid because the IJ failed to advise him of his eligibility for adjustment of status and waiver of inadmissibility under Section 212(h). Pursuant to Immigration and Nationality Act § 212(h), the Attorney General may grant a waiver of inadmissibility to aliens convicted of certain crimes, if the failure to do so would result in extreme hardship to a U.S. citizen or lawfully resident spouse or child. See 8 U.S.C. § 1182(h)(1)(B). In the cases involving "violent or dangerous crimes," the alien must demonstrate that the denial of relief would result in "exceptional and extremely unusual hardship." 8 C.F.R. § 212.7(d); see also Mejia v. Gonzales, 499 F.3d 991, 997 (9th Cir. 2007) (upholding validity of regulation).

Notably, because Mr. CLIENT was never admitted for lawful permanent residency, he could have applied for a § 212(h) waiver whether or not he had a prior conviction for an aggravated felony. See 8 U.S.C. § 1182(h) (barring only permanent residents who have been convicted of aggravated felonies from obtaining a waiver); see also Taniguchi v. Schultz, 303 F.3d 950, 957-58 (9th Cir. 2002) ("[a]lthough it might have been 'wiser, fairer, and more efficacious for Congress to have eliminated § 212(h) relief for non LPR aggravated felons as well,' the decision of Congress [to deny the § 212(h) waiver to aggravated felon LPRs but not to other aliens] was nonetheless a rational 'first step' towards the legitimate goal of rapidly removing criminal aliens").

3. Mr. CLIENT Was Prejudiced by the IJ's Failure to Advise Him of His Eligibility for Relief

As noted above, to establish prejudice, Mr. CLIENT does not have to show that he would have been granted relief. Instead, he need only show that he had a "'plausible' ground for relief

from deportation." United States v. Ubaldo-Figueroa. 364 F.3d 1042, 1050 (9th Cir. 2004). Moreover, once Mr. CLIENT makes a prima facie showing of prejudice, "the *burden shifts* to the government to demonstrate that the procedural violation [i.e., failure to advise alien of eligibility for discretionary relief] would not have changed the proceedings' outcome." United States v. Gonzalez-Valerio, 342 F.3d 1051,1054 (9th Cir. 2004) (emphasis added).

Here, Mr. CLIENT was prejudiced because he had a plausible claim for obtaining a § 212(h) waiver and adjustment of status. At the time of his deportation hearing in January 2008, Mr. CLIENT had lived in the United States for 20 years. He had a strong employment history and strong family ties in the United States. He had a U.S. citizen common-law wife, a U.S. citizen son, a U.S. citizen stepson whom he had raised as his own, and a third U.S. citizen child on the way. The family had recently purchased their first home, which was at risk of foreclosure due to Mr. CLIENT's deportation. The family had also recently purchased a new truck, which was repossessed as a result of his deportation. His common-law wife was in the midst of a difficult and high-risk pregnancy, and was unable to care for or financially support the family on her own. She desperately needed Mr. CLIENT's emotional, physical, and financial assistance, and she and their children faced exceptional and extremely unusual hardship as a result of his deportation. As a result, Mr. CLIENT was both eligible for and had a plausible claim for § 212(h) relief.

Mr. CLIENT was also eligible to adjust status through his common-law wife. At the time of his removal proceeding in January 2008, Mr. CLIENT was in a committed, long-term relationship with his common-law wife, Esther Garibay, a U.S. citizen. Ms. Garibay would have legally married Mr. CLIENT and petitioned for him to receive an immediate visa as the spouse of a U.S. citizen. Importantly, Mr. CLIENT need not show that he had relief immediately available

to him at the time of his removal proceeding. Rather, he must show only that it is "plausible" that relief would have become available during the pendency of the proceedings. See United States v. Jimenez-Marmolejo, 104 F.3d 1083 (9th Cir. 1996) (finding prejudice and reversing § 1326 conviction, where defendant would have accumulated sufficient physical presence in the United States had he appealed his order of deportation); Drax v. Reno, 338 F.3d 98, 111 (2nd Cir. 2003) ("Although Drax was not eligible for an adjustment of status at the time of his immigration hearing, the Immigration Judge erred in holding that Drax could under no circumstances become eligible for such relief, because such relief ... was a reasonable possibility if the Immigration Judge had been willing to grant Drax a continuance"); United States v. Flores-Rodriguez, 236 F. App'x. 338 (9th Cir. 2007) (remanding because it was "plausible [defendant] would have been able to obtain a visa [based on relationship to LPR mother] while his appeal was pending or before the expiration of any continuance the IJ might have granted had he requested it"). Because the IJ was informed of the common-law marriage, this case is distinguishable from cases where the IJ had no basis in the record to consider potential adjustment of status. See United States v. Moriel-Luna, 585 F.3d 1191, 1197 (9th Cir. 2009) (no due process violation, because IJ was unaware of the relationship by which the adjustment of status could be requested).

In sum, the record shows that Mr. CLIENT was both eligible for and had a plausible claim for § 212(h) relief and adjustment of status, as well as voluntary departure. However, to the extent that this Court does not believe that Mr. CLIENT has shown sufficient equities, he requests an evidentiary hearing, during which he can present evidence to show the plausibility that he would have received relief from deportation.