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No. 07-070707

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NAHOMI DESAH,

Petitioner Pro Se,

v.

JOHN ASHCROFT,
UNITED STATES ATTORNEY GENERAL,

Respondent.

PETITIONER'S PRO SE MOTION ASKING THAT THE COURT APPOINT HER COUNSEL, OR IN THE ALTERNATIVE, ACCEPT HER BRIEF BEFORE THE BOARD OF IMMIGRATION APPEALS AS HER BRIEF IN SUPPORT OF HER PETITION FOR REVIEW

Come now I, Nahomi Desah, pro se, to ask this Honorable Court to appoint me counsel. In the alternative, I ask that the Court accept the brief

which I submitted to the United States Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals ("Board") as my brief in support of my Petition for Review. In support of my motion, I state and argue as follows.

A. Appointment of Counsel.

I am appealing to this Honorable Court the Board's summary adoption of the decision which the Immigration Judge reached in my case. I attach a copy of the Board's decision to this motion as Exhibit B. I attach a copy of the Immigration Judge's decision as Exhibit D. The Immigration Judge erred, and the Board compounded that error with its adoption. Their errors put my life at grave risk.

The Department of Homeland Security ("DHS") has detained me in South Texas since I arrived in the United States in September 2006. I have no funds to engage an attorney to represent me before this Court. No pro bono attorney has agreed to take my case. I am therefore proceeding pro se with my appeal of the Board's decision. I acted pro se when I timely filed my Petition for Review on Friday, June 15, 2007. I attest to these and other facts in my unsworn declaration, which I attach to my motion as Exhibit A.

I respectfully plead that this Honorable Court appoint counsel to represent me on appeal. Congress has chosen to eliminate government

appointed counsel in proceedings before immigration judges, and on administrative appeals before the Attorney General. *See* INA § 292, 8 U.S.C. § 1362. However, Congress does not address the issue of court appointed counsel when aliens appeal to federal courts. That decision therefore rests within the discretion of those courts. Courts have exercised this discretion on behalf of other aliens. *See, e.g.*, *Foster v. INS*, 376 F.3d 75, 77 (2d Cir. 2004); *Reyes v. INS*, 141 Fed. Appx. 96, 2005 WL 1663508, *1 (4th Cir. 2005); *Campos v. INS*, 62 F.3d 311, 312 (9th Cir. 1995); *Alim v. Gonzales*, 446 F.3d 1239, 1241 (11th Cir. 2006).

If counsel is not appointed, and even if this Honorable Court accepts my brief before the Board, I risk the loss of Due Process. Due Process requires that aliens have the opportunity to present their cases effectively. *Landon v. Plasencia*, 459 U.S. 21, 36 (1982). Although *Landon v. Plasencia* addresses the issue of Due Process in a hearing before an Immigration Judge, the Constitution requires that Due Process also be protected at appellate levels if there is an opportunity for appellate review. *See, e.g., Evitts v. Lucey*, 469 U.S. 387 (1985); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Griffin v. Illinois*, 351 U.S. 12 (1956). *See also Vargas-Garcia v. INS*, 287 F.3d 882 (9th Cir. 2002) (concatenation of deficient notice of appeal, the Board's strict appeal filing requirements, and the Board's failure

to give advance warning before summarily dismissing appeal, deprives pro se alien appellant of Due Process). Due Process concerns therefore also prevail at the level of this Honorable Court. Under *Landon v. Plasencia*, Due Process mandates that I receive the opportunity to present my case effectively to you.

The Department of Justice ("DOJ") will respond to my brief and my request, and I have the right to receive those responses, and to reply. *See, e.g.*, Fed. R. App. P. 28(c). In Ethiopia, my country of origin, where DHS intends to remove me as soon as it obtains travel papers from the Government of Ethiopia, there are few attorneys who might know United States law, and none I can afford. I will have no access to any law libraries, assuming that those which do exist might contain materials pertinent to my case. If by some miracle I obtain access to relevant legal materials, my communication with this Court and opposing DOJ counsel is not assured. I doubt that I would ever timely receive from this Court any materials which it might send to me at my address in Ethiopia (assuming that the Court mails care related materials to foreign addresses). I doubt that I will ever timely receive copies of opposing briefs or motions from DOJ. Finally, I doubt that any materials which I might send this Court in reply to DOJ would ever

timely arrive. My right to receive opposing materials, and to reply, will therefore be rendered nugatory.

In sum, the risk is high that, acting pro se, I cannot present my case to this Court effectively. I respectfully plead that you appoint me counsel on appeal, so that Due Process in my case is satisfied. *See Griffin*, 351 U.S. at 18 (once the State decides to grant appellate review, Due Process precludes it from discriminating between those who can afford that review, and those who, because of poverty, cannot).

B. *Submission of Administrative Brief in Support of Petition for Review.*

If the Court decides not to appoint me counsel, then I must rely on my administrative appeal brief to make my case. To satisfy the requirement of section 242(b)(3)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(3)(C) that I file a brief in connection with my Petition for Review, I am enclosing the brief which I submitted to the Board. I attach a true and complete copy of the brief to this motion as Exhibit C.

DHS officials have assured me that they will remove me from the United States by the end of August 2007. I will not be able to submit any additional briefs or a reply to the Court.

I respectfully plead that this Honorable Court accept the brief which I submit now, and decide my case on the merits. Law favors this action.

Congress intends for aliens to retain the right to appeal their cases to a United States federal circuit court of appeals even though they no longer remain in the United States. *See* INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B); *Tapia-Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001) ("deportation no longer forecloses judicial review"). *See also Scheerer v. U.S. Attorney General*, 445 F.3d 1311, 1315, 1322 (11th Cir. 2006) (DHS removed alien after he timely filed two petitions for review, his appeals continued unabated, and court granted in part and remanded to the Board for further proceedings); *Valencia Blandon v. Ashcroft*, 126 Fed. Appx. 801, 2005 WL 663511 (9th Cir. 2005); (DHS removed alien before he timely filed two petitions for review, his appeals continued unabated, and court granted in part and remanded to the Board for further proceedings). To keep their cases alive on appeal, these aliens, once removed, need only comply with the requirements for appeal set out in the Act. *See, e.g.*, *Tapia-Garcia* at 1217 (judicial review of a deportation order is not barred unless the removed petitioner fails to exhaust administrative remedies or another court has already determined the validity of the petitioner's deportation order.)

Pro se aliens who wish to appeal final orders to a federal circuit court of appeals often find themselves in an impossible situation. DHS has the power to remove them even though they timely file a petition of review

(unless they receive a stay of removal from the court). INA § 242(b)(3)(B) & (b)(8)(C), 8 U.S.C. § 1252(b)(3)(B) & b(8)(C); *Scheerer*. As a consequence, they are no longer in the United States when the administrative record of proceeding issues and they receive schedules for filing the brief required under INA § 242(b)(3)(C), 8 U.S.C. § 1252(b)(3)(C). They never learn of the need to file a brief. Or, even if they remain in the United States, they do not have the resources to obtain legal counsel. In either event, most pro se aliens cannot prepare the mandated brief. Although Congress permits a federal circuit court of appeals to decide that manifest injustice would result if an alien fails to file a brief, and choose not to dismiss that alien's appeal, *see* INA § 242(b)(3)(C), 8 U.S.C. § 1252(b)(3)(C), a court cannot ascertain whether silence from a pro se alien reveals manifest injustice, or an intent to abandon an appeal, or a lost of contact with the court because the alien has been removed. It is therefore not likely that a court will decide that silence from an alien indicates manifest injustice, and proceed to adjudicate the alien's appeal in the absence of a brief.

In light of this reality, it becomes incumbent upon a federal circuit court of appeals to read pro se pleadings liberally, if the court is to effectuate Congress' wish that aliens retain the right of appeal even though removed. Pro se aliens must have the opportunity to file whatever brief they can

manage to produce for the court. The only briefs which pro se aliens have on hand, are the briefs which they submitted to the Board. Courts should accept those immigration administrative appeal briefs, even if in format the briefs may differ from briefs normally filed at the federal circuit court level.

Case law supports the acceptance by a federal circuit court of appeals of briefs which pro se petitioners previously submitted to the Board. The United States Supreme Court has held that courts must take a liberal view of pro se petitions and pleadings in the interest of substantial justice. *See Estelle v. Gamble*, 429 U.S. 97, 99 (1976) (finding that handwritten pro se document should be liberally construed); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (finding pro se complaints "no matter how inartfully pleaded" should be held to less stringent standards than those filed by lawyers); *United States v. Sanders*, 373 U.S. 1, 22 (1963) (holding that pro se defendant's pleading should not be held to niceties of lawyer's pleadings or be dismissed because his claim seems unlikely to prove meritorious). The Supreme Court has recognized that appellate briefs from related proceedings in other forums help provide pro se litigants with meaningful access to courts. *See Pennsylvania v. Finley*, 481 U.S. 551,557 (1987) (postconviction relief); *Ross v. Moffit*, 417 U.S. 600, 614-15 (1974) (discretionary appeals).

Federal circuit courts have followed the Supreme Court's lead. *See LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 209 (2d Cir. 2001) ("pro se plaintiffs should be granted special leniency regarding procedural matters"); *Tillman v. Lebanon County Correctional Facility*, 221 F.3d 410 (3d Cir. 2000) (pro se briefs held to a lower standard than those prepared by counsel); *Bauer v. C.I.R.*, 97 F.3d 45, 49 (4th Cir. 1996) ("courts are encouraged to liberally treat procedural errors made by pro se litigants, especially when [a] . . . technical procedural rule is involved"); *Henthorn v. Department of the Navy*, 29 F.3d 682 (D.C. Cir. 1994) (pro se complaints held to less stringent standards than formal pleadings drafted by lawyers); *Nunnally v. MacCausland*, 996 F.2d 1 (1st Cir. 1993) (pro se filings are held to less stringent procedural standards); *Hilgeford v. Peoples Bank*, 776 F.2d 176 (7th Cir. 1985) (pro se briefs held to lower standard than those prepared by counsel); *Gochnour v. Marsh*, 754 F.2d 1137 (5th Cir. 1985) ("[the Court] read[s] pro se pleadings and briefs with tolerance and understanding"); *United States v. Sanders*, 434 F.2d 219 (4th Cir. 1970) (pro se brief will not be dismissed due to lack of citations to authority as "[a] criminal defendant appealing pro se should not be denied the ear of the court on so technical a ground").

Federal circuit courts have extended the same lenient reading of pleadings and briefs to pro se aliens who are appealing final orders by the Board. *See Agyeman v. INS*, 296 F.3d 871, 878 (9th Cir. 2002) (court will interpret pro se claims liberally); *Lim v. INS*, 224 F.3d 929, 933-34 (9th Cir. 2000) (holding that alien petitioner's pro bono brief sufficiently raised issues despite lack of jurisdictional statement and citations to authority); *Lorisme v. INS*, 129 F.3d 1441, 1443-44 (11th Cir. 1997) (holding that pro se alien petitioner did not abandon his petition for review when he adopted the Board's dissent as his appellate argument) (citing *Finch v. City of Vernon*, 877 F.2d 1497, 1504 (11th Cir. 1989)); *Chike v. INS*, 948 F.2d 961, 962 (5th Cir. 1991) (construing letter from pro se alien petitioner to the court complaining of INS action as a petition for review).

The language of *Lim* is particularly instructive. The Ninth Circuit states, "[c]ourts frequently refuse to dismiss pro se appeals for formal defects where the opposing party suffers no prejudice . . . Although courts do not offer a briefing service, courts also do not bar the doors to pro se pleaders" *Id.*, 224 F.3d at 934 (citing *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1988) and *United States v. Sanders*, 434 F.2d 219)). The Attorney General suffers no conceivable prejudice if aliens submit to federal

circuit courts the briefs they previously submitted to the Board. Further, the aliens are submitting briefs, not asking the courts to provide them with one.

Courts construe the merits of pro se appellate briefs liberally. They read the briefs to raise the strongest arguments those briefs suggest. *See Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (explaining policy and collecting supporting authority).

C. *Conclusion*.

Permitting me to file the brief which I previously submitted to the Board effectuates Congress' intent that aliens have the right of appeal to federal circuit courts even if pro se, indigent, and removed from the United States. Case law demonstrates that circuit courts have always read pleading requirements liberally in order to preserve the appellate rights of pro se petitioners, including aliens. The Court should therefore accept my brief from before the Board as my brief in support of my Petition for Review, and adjudicate my claim on its merits.

Respectfully submitted,

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Nahomi Desah

Date submitted: Friday, July 27, 2007

Certificate of Service

I certify that on Friday, July 27, 2007, I mailed, first-class mail, postage prepaid, two copies of my foregoing pro se motion with all attachments to this address: Office of Immigration Litigation, United States Department of Justice, P.O. Box 878, Ben Franklin Station, Washington, D.C. 20044.

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Nahomi Desah