

JAN 15 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RIADH BEN MANSOUR CHERIFI,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,** Attorney General,

Respondent.

No. 06-70078

Agency No. A79-625-765

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted December 4, 2007
San Francisco, California

Before: BRIGHT***, FARRIS, and THOMAS, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Michael B. Mukasey is substituted for his predecessor, Alberto R. Gonzales, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

*** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Riadh Ben Mansour Cherifi petitions for review of a summary dismissal by a single member of the Board of Immigration Appeals (BIA) of an appeal from a decision of an immigration judge (IJ) denying of withholding of removal. We grant the petition for review. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

I

The BIA properly rejected the IJ's reliance on 8 C.F.R. § 1208.10 (1998) in deeming the petitioner's application for withholding of removal abandoned for failure to submit fingerprints. When the IJ considered Cherifi's petition, § 1208.10 provided, in relevant part:

§1208.10 Failure to appear at an interview before an asylum officer or failure to follow requirements for fingerprint processing.

Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to an interview. Failure to comply with fingerprint processing requirements without good cause may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer. Failure to appear shall be excused if the notice of the interview or fingerprint appointment was not mailed to the applicant's current address and such address had been provided to the Office of International Affairs by the applicant prior to the date of the mailing in accordance with section 265 of the Act and regulations promulgated thereunder, unless the asylum officer determines that the applicant received reasonable notice of the interview or fingerprinting appointment. Failure to appear at the interview or fingerprint appointment will be excused if

the applicant demonstrates that such failure was the result of exceptional circumstances.

As the BIA correctly recognized, this regulation pertains to interviews before asylum officers and does not apply to proceedings before immigration judges.¹ Therefore, as the BIA held, the IJ erred in determining Cherifi's request for withholding to have been abandoned for failure to comply with the regulation. However, the BIA affirmed the decision of the IJ on the ground that Cherifi had failed to comply with 8 C.F.R. § 1003.31(c) relating to filing of documents before an IJ.

II

Cherifi argues that the BIA violated his due process rights by affirming the IJ and summarily dismissing his appeal from the IJ's decision on different grounds without affording him the opportunity to address the BIA's new grounds for denial. We agree.

“The Due Process Clause of the Fifth Amendment guarantees an alien a ‘full and fair hearing of his claims and a reasonable opportunity to present evidence on

¹ Although it is not applicable here, it is worth noting to avoid confusion in future cases that the regulation upon which the IJ relied was substantially amended effective April 1, 2005. See 70 Fed. Reg. 4754 (Jan. 31, 2005). The amended regulation applies to proceedings before immigration judges. However, the new regulation became effective more than a year after the IJ rendered his decision in this case, and the IJ specifically relied on the old regulation in rendering his decision.

his behalf.” Khan v. Ashcroft, 374 F.3d 825, 829 (9th Cir. 2004) (quoting Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000)). When the BIA relies on an entirely different rationale than the IJ in deciding an appeal, the Due Process Clause requires that the alien be afforded notice and an opportunity to address the reasons for the agency rejecting his petition. See Circu v. Gonzales, 450 F.3d 990, 993 (9th Cir. 2006); Compos-Sanchez v. INS, 164 F.3d 448, 450 (9th Cir. 1999).

Here, although the BIA rightfully rejected the IJ’s rationale, it adopted an entirely new theory on appeal. The BIA sustained the IJ’s holding on the basis of a regulation that was not at issue in the hearing before the IJ, namely 8 C.F.R. § 1003.31(c) (2003). Because his administrative appeal was summarily dismissed by a single board member, Cherifi had no opportunity to present evidence on the question of the applicability of the regulation. Therefore, his due process rights were violated.

“As a predicate to obtaining relief for a violation of procedural due process rights in immigration proceedings, an alien must show that the violation prejudiced him.” Ramirez-Alejandre v. Ashcroft, 320 F.3d 858, 875 (9th Cir. 2003). “This standard is met under circumstances in which an alien’s rights are violated ‘in such a way as to affect potentially the outcome of [his] deportation proceedings.’” Id. (quoting United States v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986)).

Here, Cherifi had viable challenges to the applicability of the regulation upon which the BIA relied that he was unable to present. Therefore, we must grant the petition and remand to the BIA for further proceedings. In doing so, we express no opinion on the merits of any of the issues to be considered on remand. Given our resolution of this question we need not, and do not, resolve any other issue urged by the parties.

PETITION GRANTED; REMANDED.