No. 09-3416

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

RESPONDENT'S OPPOSITION TO
PETITIONER'S PETITION FOR REVIEW AND
MOTION FOR STAY OF REMOVAL
Agency No. A008-237-417

INTRODUCTION

On April 10, 2009, the Board of Immigration Appeals ("BIA") denied Petitioner John Demjanjuk's motion to stay removal, but Petitioner's motion to reopen is still pending before the BIA. Petitioner has now filed in this Court a petition for review and a motion for a stay of removal, challenging the BIA's preliminary order. However, the BIA's preliminary order is neither a final order of removal nor even a removal order at all. *See* 8 U.S.C. § 1101(a)(47).

The courts of appeals have statutory jurisdiction only to review *final* orders of removal in immigration cases. Because there is no reviewable final order of removal, this Court lacks jurisdiction. The petition for review and related motion for a stay of removal must be dismissed under this Court's binding precedent. *Prekaj v. INS,* 384 F.3d 265, 267 (6th Cir. 2004).

PROCEDURAL BACKGROUND[1]

On February 21, 2002, the district court revoked Petitioner's naturalized U.S. citizenship. It found, first, that Petitioner had procured his citizenship by concealing and misrepresenting his service as an armed SS guard of civilians at several Nazi-operated concentration camps and a Nazi-operated extermination center during World War II and, second, Petitioner's assistance in Nazi persecution and his associated fraud rendered him ineligible to enter the United States. *United States v. Demjanjuk,* No. 1:99CV1193, 2002 WL 544622 (N.D. Ohio Feb. 21, 2002).[2]

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[1] This Court is well-versed in the long procedural history concerning Petitioner, so the facts will be presented in a brief, summary fashion.

[2] The district court specifically found that Petitioner "contributed to the process by which thousands of Jews were murdered by asphyxiation with carbon monoxide" in the gas chambers at the Sobibor extermination center, in Nazi-occupied Poland. *Demjanjuk*, 2002 WL 544622 at *8. The district court also held that Petitioner assisted in Nazi persecution by serving as an armed guard at Sobibor extermination center and Majdanek and Flossenburg concentration camps. *Id.* at *27.

On April 30, 2004, this Court affirmed the district court's decision that revoked Petitioner's U.S. citizenship. *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir. 2004), *cert. denied*, 543 U.S. 970 (2004).

Thereafter, an immigration judge ("IJ") found that Petitioner was removable from the United States for, among other reasons, his participation in Nazi persecution under 8 U.S.C. §§ 1227(a)(4)(D) and 1182(a)(3)(E)(I). The IJ also found that Petitioner was statutorily barred from all forms of relief from removal (except Convention Against Torture ("CAT") deferral) because of his assistance in Nazi persecution. In December 2005, the IJ denied Petitioner's application for deferral of removal under CAT, and ordered him removed from the United States to Germany, Poland, or Ukraine.

Petitioner appealed that decision to the BIA, which dismissed his appeal on December 21, 2006. Petitioner then appealed the BIA decision to this Court solely on procedural grounds, and this Court affirmed the BIA's ruling. *Demjanjuk v. Mukasey*, 514 F.3d 616 (6th Cir.), *cert. denied,* 128 S. Ct. 2491 (2008).

On March 10, 2009, a German judge issued an arrest order for Petitioner on suspicion of assisting in the murder of at least 29,000 Jews at the Sobibor extermination center during World War II. Germany then notified U.S. Immigration

and Customs Enforcement that it would re-admit Petitioner onto its territory as a deportee.

On April 2, 2009, Petitioner erroneously filed motions to reopen and for an emergency stay of removal with an Arlington, Virginia-based Immigration Judge, who, though lacking jurisdiction, granted the stay. On April 6, 2009, the IJ reversed himself, holding that the court did not possess jurisdiction to entertain Petitioner's motion to reopen. The IJ nonetheless kept the stay of removal in place until April 8, 2009.

On April 7, 2009, one day before the *ultra vires* stay was due to expire, Petitioner filed a motion before the BIA to reopen his removal case based upon the strained contention that removal to Germany would somehow constitute torture given his age and purported health.[3] On April 8, 2009, Respondent filed its opposition,

[3] Petitioner advocates a position before the BIA , and now before this Court, that is patently frivolous. He asks that this court-ordered removal to modern-day Germany be blocked on the incredible and unsupported surmise that it would, somehow, subject him to treatment constituting "torture" as defined by the Convention Against Torture. This is nothing less than a grotesque debasement of the word "torture," a characterization that makes a mockery of the terrible suffering inflicted on genuine victims of torture at places like the Sobibor extermination center. Ironically, Petitioner's argument is advanced by one who has been confirmed by U.S. courts – including this Court – to have contributed to the mass-asphyxiation of thousands of civilians at a human extermination center on behalf of a regime responsible for some of the largest-scale tortures and murders in history. *United States v. Demjanjuk*, 2002 WL 544622 (N.D. Ohio Feb. 21, 2002), *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir.), *cert. denied*, 543 U.S. 970 (2004); I.J. merits

arguing that Petitioner failed to make a *prima facie* case that he would be tortured in Germany, and that the medical documentation he had submitted—on its face—did not indicate an inability to travel to Germany.

On April 10, 2009, the BIA denied Petitioner's application for a stay of removal because there was "little likelihood" that the motion to reopen would be granted. His motion to reopen, thus, remains "open" and pending before the BIA. Nevertheless, Petitioner has filed with this Court a petition for review of the BIA's denial of his stay request and a motion for a stay of removal. Petitioner's current appeal is filed more than three years since he was ordered removed from the United States by an immigration court based on his assistance in Nazi persecution. Respondent therefore moves to dismiss the petition and stay motion, because this Court lacks jurisdiction to review them.

Petitioner claims that the BIA's denial of his motion for a stay of removal is tantamount to a final order of removal because he may be removed prior to the BIA rendering a decision on his motion to reopen. Petitioner fails to cite, however, any

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decision (June 16, 2005); *In re: John Demjanjuk*, A008 237 417 (BIA Dec. 21, 2006).

supporting authority for this position and, indeed, fails to cite contrary authority from three sister circuit courts which have rejected his argument.

ARGUMENT

THIS COURT SHOULD DISMISS THE PETITION AND MOTION FOR LACK OF JURISDICTION.

This Court lacks jurisdiction over Petitioner's petition for review and motion for a stay of removal, and should dismiss the pending matters for that reason.

Because this Court is a court of limited jurisdiction, it may review agency decisions regarding removal of aliens from the United States only under the conditions specified by statute. *See generally Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). This Court's jurisdiction to review decisions in immigration cases arises under section 242(a)(1) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1252(a)(1) (2000) (as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., 119 Stat. 231 (May 11, 2005)). Under section 242(a)(1), however, courts of appeals are only vested with jurisdiction to review "final order[s] of removal" when the petition for review has been filed within "30 days after the date of the final order of removal." *See* 8 U.S.C. §§ 1252(a)(1) & (b)(1).

Indeed, this Court and others have noted that the plain language of § 242(a)(1) precludes appellate review of orders such as the one at issue here. "There is 'widespread consensus' that, in 8 U.S.C. § 1252(a)(1), Congress has granted the courts power to review only 'final order[s]' of removal." *Prekaj v. INS*, 384 F.3d 265, 267 (6th Cir. 2004) (citations omitted); *see also Mapoy v. Carroll,* 185 F.3d 224, 230 (4th Cir. 1999) (holding that "BIA's order denying his Motion for Stay of Deportation pending his not-yet-acted-upon Motion to Reopen was not a 'final order of removal' for purposes of judicial review under § 1252"); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) ("This Court only reviews final orders of removal"); *Reyes v. INS,* 571 F.2d 505, 506 (9th Cir. 1978) ("In the instant case the petition to the court of appeals challenges the denial of a stay. As such it is inappropriate because it does not request review of a 'final order of deportation' but rather of a discretionary denial of interim relief"); *Vlassis v. INS,* 963 F.2d 547, 549 (2d. Cir. 1992) ("it is well settled . . . that the denial of a motion for stay of deportation is not a final order reviewable in a court of appeals").

Here, Petitioner is asking this Court to review the BIA's April 10, 2009, decision, which denied his request for a stay of removal. Simply put, this Court does not have the statutory authority to entertain his request and related motion. The BIA's adjudication of Petitioner's stay motion is not a final administrative order that

is reviewable by this Court. *See, e.g., Dhangu v. INS,* 812 F.2d 455, 458-59 (9th Cir. 1987) (noting that "the court of appeals will not review a district director's, an IJ's, or the BIA's interim discretionary decision to deny a stay"); *Colato v. INS*, 531 F.2d 678, 679-80 (2d Cir. 1976) (explaining that the denial of a visa petition is not a final order of removal, and not so intimately connected with a removal proceeding that the two should be heard together on direct review).

Petitioner argues that the BIA's denial of his motion for a stay of removal and its failure to rule on his motion to reopen amount to a "final order of removal" because his removal is imminent. Three Circuit Courts of Appeal have rejected this argument. In *Vlassis v. INS,* 963 F.2d 547, 549, cited and quoted above, the status of the proceedings was identical to that of the proceedings in the instant case. As here, "[f]earing that deportation was imminent, Vlassis decided not to wait for the BIA's ruling on his motion to reopen." As here, the BIA had concluded that there "is little likelihood that the motion will be granted." Vlassis argued that the BIA's decision to deny the stay "denied all further administrative review." *Id*. In *Reyes v. INS*, 571 F.2d 505, 506, also cited above, the court noted that "denial of a stay of deportation by the BIA is not the functional equivalent of a final order of deportation." And in *Milosevic v. INS,* 18 F.3d 366, 372-3 (7th Cir. 1994), petitioner argued, as does petitioner here, that "unless the Board grants his stay, he may be deported before the

Board has had an opportunity to decide his motion for reconsideration of his motion to reopen." The Seventh Circuit noted that "[t]his may be so, but it does not alter the fact that as a court of appeal we lack jurisdiction to review stays of deportation." *Id*.

Because the BIA has only denied Petitioner's request for a stay of removal, there is no final administrative order against him at this time in the instant matter. Petitioner's challenge to the BIA's adjudication of his stay motion lies beyond the scope of the statutory jurisdiction Congress has conferred upon this Court. Accordingly, the petition for review and related motion for a stay should be dismissed for want of jurisdiction. *See* 8. U.S.C. 1252(a)(1); *Prekaj*, 384 F.3d at 267; *Mapoy,* 185 F.3d at 230; *Lopez-Ruiz*, 298 F.3d at 887.

CONCLUSION

For all the foregoing reasons, this Court should deny Petitioner's Petition for Review and Motion for a Stay of Removal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2009, the foregoing Respondent's Opposition to Petitioner's Motion for Stay of Removal was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. In addition, a copy was also served by regular U.S. mail and by fax upon John Broadley, counsel for Petitioner on April 14, 2009.

s/Michelle L. Heyer
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