UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MAHER QUMBARJI,	:	
Petitioner,	:	
	:	CIVIL ACTION NO.
v.	:	3:03cv809 (SRU)
	:	
JOHN ASHCROFT,	:	
Attorney General of the United States,	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Maher Qumbargi ("Qumbargi"), a citizen of Jordan, twice failed to voluntarily depart the country and, consequently, was removed on June 19, 2003. Just prior to removal, he filed a motion to reopen with the Immigration and Naturalization Service ("INS"), arguing that, because he had married a United States citizen, he was entitled to apply for adjustment of status. The Immigration Judge denied Qumbargi's motion; the Board of Immigration Appeals ("BIA") affirmed. Qumbargi then petitioned this court for writ of habeas corpus and a stay of removal. On March 24, 2004, this court denied Qumbargi's motion for stay as moot but concluded that it had jurisdiction to consider whether the INS had committed legal error in refusing to grant Qumbargi's motion to reopen. For the reasons set forth below, this court has no jurisdiction to hear Qumbargi's petition, and it must be dismissed.

I. Background

Qumbargi entered the United States without inspection in 1983. On June 12, 1985, at an immigration hearing, he was given leave to voluntarily depart the country within a month in lieu of deportation. Qumbargi did not comply, and an order of deportation entered. On January 24, 1986, he filed a motion to reopen his deportation proceedings. The Immigration Judge granted the motion,

withdrew the order of deportation, and again offered Qumbargi the opportunity to voluntarily depart. He did not comply.

On October 11, 1986, before his second voluntary departure date, Qumbargi married a United States citizen. His wife then filed an I-130 visa application on his behalf – a prerequisite to seeking adjustment of status under section 245(a) of the Immigration and Naturalization Act, 8 U.S.C. § 1255. In 1995, Qumbargi filed another motion to reopen in order to allow him to seek an adjustment of status based on his marriage to a United States citizen. The Immigration Judge denied this motion on several grounds, including Qumbargi's failure to voluntarily depart and his lying to the INS about his arrest record. The BIA affirmed the denial.

II. Discussion

Qumbargi's argument is that, under the case of In re Velarde-Pacheco, 23 I. & N. Dec. 253 (2002), the Immigration Judge committed legal error in not granting Qumbargi's motion to reopen. This court does have limited jurisdiction to review a denial of a motion for reconsideration, namely, if the claim is that the denial was based on legal or constitutional error. Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. 2000).

Velarde-Pacheco sets out the elements that must be present in order for a motion for reopen to be granted to allow for adjustment of status. Specifically: the motion must be: (1) timely filed, (2) not numerically barred, (3) not barred by Matter of Shaar, 21 I. & N. Dec. 541 (1996), (4) supported by clear and convincing evidence that the respondent's marriage is bona fine; and (5) not opposed by the service or opposed solely on the basis of Matter of Arthur, 20 I. & N. Dec. 475 (1992). Velarde-Pacheco, 23 I. & N. Dec. at 256. These factors, however, are nothing more than a list of the

necessary elements of a successful motion to reopen. An Immigration Judge still must, *in the exercise of discretion*, grant the motion. Id. Satisfaction of the prima facie case, therefore, does not require an Immigration Judge to grant the motion, it merely allows the Immigration Judge to do so.

Velarde-Pacheco makes this clear. "[O]ur decision today does not require Immigration Judges to reopen proceedings pending adjudication of an I-130 visa petition in every case in which the respondent meets all five of the aforementioned factors." Velarde-Pacheco, 23 I. & N. Dec. at 257. More generally, the Supreme Court has held that the decision whether to grant a motion to reopen is a discretionary matter, entrusted to the Attorney General, even when an alien has made out a prima facie case of eligibility for relief. I.N.S. v. Rios-Pineda, 471 U.S. 444, 449 (1985).

At the time Qumbarji's motion was decided, Velarde had yet to be decided. Nevertheless, the Immigration Judge found no need to reach the issue of Qumbarji's eligibility for status adjustment. Instead, the Immigration Judge noted that Qumbarji had lied on his adjustment application and had failed twice to comply with voluntary departure orders. He went on to conclude that:

> . . . a favorable exercise of discretion [] appears to be totally unwarranted and undeserved in this case.
>
> This respondent has completely ignored prior orders of this court and has remained in the United States in violation of two prior orders. He has, in every respect, totally disregarded the orders of the court and the Immigration & Naturalization Service for the last nine years. Now, because he is married to a United States citizen, he seeks reopening. It is not warranted or deserved.

There is no question that the Immigration Judge was exercising his discretion in denying the motion to reopen. Denying a motion because of flagrant violation of the immigration laws is entirely appropriate. See Rios-Pineda, 471 U.S. at 451 ("it is untenable to suggest that the Attorney General has no

discretion to consider [aliens'] individual conduct and distinguish among them on the basis of the flagrancy and nature of their violations"). In any event, the decision – because it represents an exercise of discretion – is not reviewable. See Sol v. I.N.S., 274 F.3d 648 (2d Cir. 2001) (habeas jurisdiction does not extend to review of discretionary INS determinations).

It is worth mentioning that, even if there were jurisdiction to hear Qumbargi's petition, it appears very likely it would be moot. Qumbargi has been removed pursuant to a valid removal order for not departing on his voluntary departure date. He does not challenge that order, nor could he. A meritorious case for adjustment of status does not excuse a failure to voluntarily depart. See Mardones v. McElroy, 197 F.3d 619, 624 (2d Cir. 1999) ("An alien thus allowed to depart the United States voluntarily was required to do so unless it was *impossible* for physical reasons, such as serious illness, or by reason of a moral imperative, such as the death of an immediate relative.") (emphasis in original); In re Shaar, 21 I. & N. Dec. 541 (1996) (filing of motion to reopen does not excuse failure to voluntarily depart). Thus, removal, coupled with the fact that Qumbargi was illegally in the United States for over a year, makes him ineligible to reenter the country until 10 years after the date of his removal, i.e., until June 2013. See 8 U.S.C. 1182(a)(9)(B)(i)(II). Accordingly, even a successful motion to reopen, followed by a status adjustment, would not allow Qumbargi to reenter. After 10 years, of course, Qumbargi may be able to reenter the United States, but it is not at all clear why, at that time, he could not simply apply for adjustment of status from outside the country rather than seek to reopen what will have been an almost 30-year old deportation proceeding.

Because the court lacks jurisdiction, Qumbargi's Petition for Writ of Habeas Corpus is DISMISSED. The clerk shall close the file.

It is so ordered.

Dated at Bridgeport, Connecticut, this 6th day of July 2004.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge