IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KYUNG SCHENCK, Petitioner, v. DONALD MONICA, United States Citizenship and Immigration Services District Director, Philadelphia District Office; THEODORE NORDMARK, Department of Homeland Security Immigration and Customs Enforcement Deputy Field Office Director; LORI SCIALABBA, Chair, Board Of Immigration Appeals; JOHN ASHCROFT, Attorney General of the United States; UNNAMED EMPLOYEE(S), Department of Justice Drug Enforcement Service Department of Homeland Security, Respondents.	:	No. 04-CV-01750

Green, S.J. **December 14, 2004**

Presently pending is the instant petition for habeas corpus relief. For the reasons set forth below, the petition for habeas corpus relief will be **DENIED** in its entirety.

BACKGROUND

Petitioner, Kyung Hui Schenck, is a native and citizen of Korea who entered the United States on June 11, 1981 as a lawful permanent resident based on her marriage to James Schenck. On March 28, 1987, Petitioner was arrested for drug trafficking in New York. She pleaded guilty to distribution and conspiracy

to distribute heroin in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(B), 846, and 18 U.S.C. § 2 in the United States District Court for the Southern District of New York on June 17, 1987. Ms. Schenck was then sentenced to a one-year and a day term of which she served ten (10) months. On September 3, 1987, the Government issued an Order to Show Cause and Notice of Hearing which informed Petitioner of the Government's plan to deport her. Petitioner was then placed into the custody of the Immigration and Naturalization Service ("INS") on January 22, 1988. She posted a $ 5,000 bond in March 1988 and was released.

On December 2, 1988, Petitioner appeared before an immigration judge of the INS for a deportation hearing. Ms. Schenck was represented by Reverend Robert Vitagoline, an accredited representative working with a church. A Korean interpreter was also present. At the hearing, the immigration judge heard Petitioner's testimony that she: (1) had worked as a prostitute in New York; (2) had failed to pay income tax for a number of years; (3) had repeatedly used cocaine and marijuana; (4) was fully aware that her boyfriend was involved in the sale of drugs months before their arrest; (5) had knowingly brought her boyfriend and a seller of heroin together for the purpose of facilitating the sale of heroin; (6) was separated from her husband who was a United States citizen; (7) had a lawful permanent resident brother that she had not been in contact with for two years; (8) had lived in the United States for seven and a half years; and (9) had developed strong ties to the community.

After considering Petitioner's testimony, the Court denied Petitioner's application for relief under the former Section 212(c) of the Immigration and Nationality Act[1] and ordered her to be deported to Korea.

On December 19, 1988, Petitioner filed her notice of intent to appeal the immigration judge's Order of deportation to the Board of Immigration Appeals ("BIA"). In her appeal brief, Petitioner argued that the immigration judge erred by: (1) failing to adequately consider her family ties; (2) failing to adequately consider her lengthy residence in the United States; (3) placing too much emphasis on Petitioner's drug conviction; and (4) placing too much emphasis on Petitioner's history of prostitution. After reviewing the brief, the BIA issued an order denying Petitioner's appeal on February 16, 1993. The immigration judge's decision became final on March 15, 1993.

After Petitioner failed to produce herself into custody in New York on July 28, 1993, the INS found that Ms. Schenck had breached her immigration bond. The INS issued a notice of this breach on September 14, 1993.

---

[1] "Under former § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), deportable aliens who had accrued seven years of lawful permanent residence in the United States could request discretionary relief from deportation by arguing that the equities weighed in favor of their remaining in the United States. Even an alien deportable because he had been convicted of an aggravated felony, was eligible for such discretionary relief if he served a term of imprisonment less than five years." Ponnapula v. Ashcroft, 373 F.3d 480, 482 (3d Cir. 2004)(citations omitted).

Ten years after breaching her immigration bond, Petitioner was arrested for prostitution in Philadelphia on March 13, 2004. The Bureau of Immigration and Customs Enforcement then issued a Warning to Alien Ordered Removed or Deported on March 23, 2004 informing Petitioner that she will be deported and then prohibited from entering the United States for a period of 10 years. On April 15, 2004, Petitioner filed a Motion to reopen the deportation proceeding and a Motion to Stay Deportation. The BIA denied Petitioner's motion to stay deportation on April 22, 2004. On that same day, Petitioner filed her request for a writ of habeas corpus.

PETITION FOR HABEAS RELIEF

Petitioner raises the following issues in her petition:

1. Whether the Petitioner's Fifth Amendment due process rights were violated during her December 8, 1988 deportation hearing because she was ineffectively represented?
2. Whether the Petitioner's Fifth Amendment due process rights were violated when the DEA withheld its assistance to Petitioner at her deportation hearing?

DISCUSSION

In this matter, Petitioner seeks habeas corpus relief from deportation. She claims that she was prevented from receiving fair consideration for relief under the former Section 212(c) of the Immigration and Nationality Act. Specifically, she

claims that: (1) she was ineffectively represented by counsel at her deportation hearing and (2) the DEA interfered with this hearing by withholding its assistance after Petitioner declined to cooperate with the DEA.

The former Section 212(c) was repealed in 1996 by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). However, at the time the immigration judge's decision became final, in 1993, the former Section 212(c) was still in effect. The former section allowed deportable aliens who had been lawful permanent residents for seven years to be eligible for discretionary relief from deportation when they had been convicted of an aggravated felony and had served a prison term of less than five years. See Ponnapula, 373 F.3d at 482. The enactment of the AEDPA in 1996 eliminated this eligibility. To avoid *ex post facto* problems that would negatively affect Petitioner's current eligibility for discretionary relief from deportation, the Court shall apply the former Section 212(c) to this matter.

As an initial matter, this Court has jurisdiction of this habeas petition under Rumsfeld v. Padilla, 124 S.Ct. 2711 (2004). Padilla held that, in a habeas proceeding, the warden of the facility where a petitioner is being detained is his immediate custodian. See id. at 2717-18. This immediate custodian is the person with the power to produce the petitioner before the court. See id. The Supreme Court further held that "[w]hen the Government moves a habeas petitioner after she

properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release." 124 S.Ct. at 2721. Here, Petitioner filed her initial habeas petition on April 22, 2004 while she was detained at the Montgomery County Correctional Facility ("MCCF"). She properly filed her petition in this Court and named her immediate custodian, the warden of the MCCF, as a respondent. Although Petitioner has since been released from the MCCF, under Padilla, this Court retains jurisdiction and may direct the writ to any of the number of respondents that are within its jurisdiction and have legal authority to effectuate her release. Petitioner has named several respondents who meet these requirements, such as the United States Citizenship and Immigration Services District Director of the Philadelphia Office and the Immigration and Customs Enforcement Deputy Field Office Director. We therefore maintain that we have jurisdiction of Petitioner's habeas petition.

This Court, however, does not have jurisdiction to review any claims regarding the immigration judge's exercise of discretion of relief from deportation. A court's exercise of discretion of relief from deportation pursuant to Section 212(c) is a "matter of grace" and is not reviewable on habeas. See INS v. St. Cyr, 533 U.S. 289, 307-08, 121 S.Ct. 2271, 2283 (2001), Bakhtriger v. Elwood, 360 F.3d 414, 422 (3d Cir. 2004)(holding review of exercise of discretion is not reviewable in federal

habeas proceedings). The Court's scope of review is limited to constitutional claims or errors of law. See Bakhtriger, 360 F.3d at 424. Here, the constitutional claims are Fifth Amendment due process claims of ineffective assistance of counsel and equitable estoppel.

First, Petitioner alleges that her ineffective representation denied her the opportunity to adequately present favorable evidence during her deportation hearing. Her pleadings, however, belie this claim. The pleadings show that Petitioner was able to present her evidence to the judge. Moreover, these pleadings show that her counsel appeared for her during the deportation hearing and took an appeal. Although Petitioner's counsel did not submit papers to the immigration judge before the deportation hearing, Petitioner was reasonably able to present her case at the hearing. See Lu v. Ashcroft, 259 F.3d 121, 131 (3d Cir. 2001)("[I]neffective assistance of counsel could constitute a denial of due process if the alien was prevented from reasonably presenting his case."); Da Rosa Silva v. INS, 263 F. Supp. 1005, 1015 (E.D.Pa 2003)("[T]o meet the standard for a due process violation, [petitioner] must show that he was prevented from reasonably presenting his case."). Specifically, at Petitioner's December 8, 1988 deportation hearing, Petitioner testified that she had a spouse who was a United States citizen, had a brother who was a lawful permanent resident, had lived in the United States for seven and a half years, and had developed strong ties to the community. All of

these factors, which were presented to the judge at the deportation hearing, militate towards a granting of discretionary relief under the former Section 212(c). See Matter of Edwards, 20 I. & N. Dec. 191, 195 (BIA 1990). Even in Petitioner's own amended petition, it is clear that any claim of ineffectiveness of her counsel was in her representative not setting forth these favorable factors in her initial pleading. However, since these favorable factors were introduced before the immigration judge at the hearing, there was no due process violation in the presentation of her case. Accordingly, her ineffective assistance claim must fail.

Second, Petitioner claims that the DEA offered to assist her if she agreed to help the DEA with its prosecution of her co-conspirators. When Petitioner refused to help, the DEA withheld its assistance in the deportation hearing. This by itself does not create a viable equitable estoppel claim. To prove equitable estoppel, Petitioner must establish "(1) the occurrence of affirmative government misconduct (2) which caused him to reasonably (though erroneously) believe that a certain state of affairs exists (3) upon which he relied to his determent." Harriott v. Ashcroft, 277 F. Supp.2d 538, 543 (E.D.Pa. 2003). In the instant matter, besides the broad claim that the INS and DEA conspired to remove any fundamental fairness in her deportation hearing, Petitioner has provided no evidence of governmental misconduct. She only gives conclusory allegations. Accordingly, Petitioner's equitable estoppel claim also fails.

The petition for habeas corpus will be denied in its entirety.

BY THE COURT:

S/_____

CLIFFORD SCOTT GREEN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KYUNG SCHENCK, :
:
Petitioner, :

	:	No. 04-CV-01750
v.	:	
	:	
DONALD MONICA,	:	
United States Citizenship	:	
and Immigration Services	:	
District Director, Philadelphia	:	
District Office;	:	
THEODORE NORDMARK,	:	
Department of Homeland Security	:	
Immigration and Customs Enforcement:		
Deputy Field Office Director;	:	
LORI SCIALABBA, Chair,	:	
Board Of Immigration Appeals;	:	
JOHN ASHCROFT,	:	
Attorney General of the United	:	
States;	:	
UNNAMED EMPLOYEE(S),	:	
Department of Justice Drug	:	
Enforcement Service Department of	:	
Homeland Security,	:	
	:	
Respondents.	:	

ORDER

AND NOW, this 14th day of December 2004, **IT IS HEREBY ORDERED** that the petition for habeas corpus relief is **DENIED** in its entirety.

IT IS FURTHER ORDERED that this Court's April 22, 2004 Order granting Petitioner an emergency stay of deportation is **VACATED**.

BY THE COURT:

S/_____

CLIFFORD SCOTT GREEN