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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

YAKI ELBAUM,

Petitioner,

V.

WILLIAM HARRINGTON, DISTRICT DIRECTOR, IMMIGRATION & NATURALI-ATION SERVICE, AND JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

CAUSE NO.

3-99CV1717-D

PETITION FOR A WRIT OF HABEAS CORPUS, ALTERNATIVE SUIT FOR A DECLARATORY JUDGMENT, AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES YAKI ELBAUM, PETITIONER HEREIN, by and through his undersigned Attorneys and files this *Petition for a Writ of Habeas Corpus, Alternative Suit for a Declaratory Judgment, and Brief in support thereof,* as to which the following is submitted respectfully:

***Habeas Corpus* Jurisdiction**. This Honorable Court has a virtually inalienable power to issue Writs of *Habeas Corpus.* U.S. Const., Art. I, Sec. 9, cl. 2. This constitutionally guaranteed Writ "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290 (1969). Our federal courts have **"plenary"** power to entertain petitions for this

writ. *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

The present action challenges a final order of deportation against your Petitioner; it is an "immigration case." There has been a considerable amount of federal litigation in this area of the law, due to substantial amendments to the Immigration and Nationality Act of 1952 [the "INA," Title 8, U.S. Code]. Despite the recent amendments to the INA, which have dramatically curtailed the traditional means for aliens facing deportation to obtain judicial review, *habeas corpus* remains available. The "Great Writ" cannot be repealed **by implication.** *Felker v. Turpin*, 116 S.Ct. 2333 (1996).

Most federal courts have held that aliens facing deportation must have recourse to *habeas corpus* proceedings. *Perceira-Goncalves v. INS*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, No. 98-835 (Mar. 5, 1999); *Henderson v. INS*, 157 F.3d 106 (2nd Cir. 1998), *cert. denied*, Nos. 98-996 and 98-1160 (Mar. 5, 1998); Hincapie-*Nieto v. INS*, 92 F.3d 27 (2nd Cir. 1996); *Sandoval v. Reno*, 1999 U.S.App. LEXIS 989 (3rd Cir. Jan. 26, 1999); *Salazar-Haro v. INS*, 95 F.3d 309 (3rd Cir. 1996); *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996); *Sabino v. Reno*, 8 F.Supp.2d 622 (S.D. Tex. 1998); *Homayun v. INS*, 1999 U.S.Dist. LEXIS 3186 (Mar. 19, 1999); *Perez v. Reno*, 18 F.Supp.2d 674 (W.D. Tex. 1998); *Mojica v. Reno*, 970 F.Supp. 130 (S.D.N.Y. 1997).[1]

Federal Question Jurisdiction. In enacting recent amendments to the INA, Congress unquestionably has sought to limit criminal aliens' rights to circuit court review of deportation orders. The Fifth Circuit has recently declined jurisdiction via petitions for review. *Eyoum v. INS*, 125 F.3d 889, 891 (5th Cir. 1997). However, the Fifth Circuit has stated in *dicta* that *habeas corpus* jurisdiction may remain in the federal district courts to

[1] *Contra* is *Abangwu v. Reno*, 1999 WL 78788 (N.D.Tex. Feb. 3, 1999); however, this authority is called

review deportation matters. *Williams v. INS*, 114 F.3d 82 (5th Cir. 1997); *Lerma de Garcia*, 141 F.3d 215 (5th Cir. 1998). The Fifth Circuit has not ruled definitively on this. (5) In addition S.Ct. 2047 (1988); *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996).

(6) Specifically, when a litigant can show an "improper policy determination" by the Attorney General, federal question jurisdiction will arise. *McNary, supra.* Your Petitioner will show that just such an "improper policy determination" has led to his currently enforceable order of deportation.[2] The Attorney General has made an "across-the-board policy change," the lawfulness of which is challenged, and not an individualized exercise of discretion as to your Petitioner.

Federal question jurisdiction exists where it is **not** the merits of the denial of a single application, but a policy determination relating to a pure question of law which is in issue. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Morales v. Yeuttner*, 952 F.2d 954, 956-57 (7th Cir. 1991); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (*en banc*), *aff'd on other grounds*, 472 U.S. 846 (1985). **There are no material fact disputes in this suit.**

Jurisdiction under the All Writs Act. The jurisdiction of this Court to provide interim injunctive orders arises pursuant to the All Writs Act, 28 U.S.C. Sec. 1651. The Court has inherent power to preserve the *status quo* during the pendency of this suit. *Michael v. INS*, 48 F.3d 657 (2nd Cir. 1995); *Reid v. INS*, 766 F.3d 113, 116, n.9 (3rd Cir. 1985); *Daborne v. Karn*, 763 F.2d 593, 597, n.2 (3rd Cir. 1985). Accordingly, Petitioner seeks a Temporary Restraining Order, to enjoin his deportation, during the

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into question by *American Arab Anti-Discrimination Committee, et al. v. Reno*, 1999 WL 88922 (Feb. 24, 1999).

[2]The "improper determination" is the Attorney General's administrative precedent decision in *Matter of Soriano*, Int. Dec. 3289 (AG Feb. 21, 1997), which forecloses administrative relief to your Petitioner.

pendency of this claim and asks that he remain at liberty under his current bond.

(9) **Parties. Yaki Elbaum, the Petitioner** is an Israeli citizen, born on November 25, 1973 in Israel. His address is: 367 Harwell St., Coppell, Texas 75019.

(10) **Janet Reno** is the Attorney General of the United States. **William Harrington** is the Dallas District Director, Immigration & Naturalization Service ["INS"]. They are your **Respondents**. Mr. Harrington is Petitioner's custodian, so venue is proper in this Honorable Court. The Honorable Janet Reno may be served with process at: 950 Pennsylvania Ave., N.W, Washington, D.C. 20530-0001. Mr. Harrington may be served at: INS, 8101 N. Stemmons Freeway, Dallas, Texas 75247.

Petitioner became a conditional lawful permanent resident alien ["LPR"] on July 9, 1990, retroactive to February 9, 1990. The "condition" was removed on December 23, 1992, reverifying his status as an LPR .

(12) On September 5, 1996, in the United States District Court for the Western District of Texas--Austin Division, he was convicted of "fraud and related activity with an access device" in violation of 18 U.S. Code § 1029(a)(5), **for misconduct which occurred between June and November 1995**. He was sentenced to a twenty-four month period of incarceration and ordered to make restitution in the amount of $12,925.76. He was indicted under the pseudonym of Jack Inbar-Prater; however, the record in his criminal trial from Austin reflects a full disclosure of this alias.

Respondents commenced "removal" (i.e., deportation) proceedings against Petitioner, due to his conviction. Their "Notice to Appear" ["NTA"] was executed on March 30, 1998. Since the NTA was issued more than seven years after Mr. Elbaum's acquisition of LPR status, he is eligible for a "waiver of excludibility" under repealed 8 U.S. Code § 1182(c). *Jaramillo v. INS*, 1 F.3d 1149 (11th Cir. 1993) *(en banc)*.

His administrative removal hearing concluded on November 19, 1998. An

Immigration Judge in Dallas, Texas (the Honorable D. Anthony Rogers) ordered him removed to Israel and pretermitted Mr. Elbaum's § 1182(c) application.

Petitioner timely filed an administrative appeal, exhausting his administrative remedies. On June 4, 1999, the Board of Immigration Appeals ["BIA"] entered a **final order** of removal (appended hereto).

Petitioner is engaged to be married to Nicole Bonanno, an U.S. citizen, born on May 27, 1974 in Michigan. They have been cohabiting for a period of one year. Thus, Petitioner has a significant interest in defending his status as an LPR.

Also, Mr. Elbaum is employed as a "Collections Supervior and Quality Control Manager" for Monitronics International, Inc., 12801 Stemmons Fwy., Suite 821, Dallas, TX 75234, which is the fifth largest home security company in the U.S.

Since his aforesaid conviction on 9-5-96, Mr. Elbaum has not been arrested and has not committed any further offenses.

(19) At present, Petitioner is not detained. However, he has been ordered to surrender for deportation to Mr. Harrington's office on August 9, 1999 at 10:00 AM, which makes his deportation "imminent." A copy of this notice is appended hereto.

(20) For purposes of this *habeas corpus* action, your Petitioner is "in custody." *Hensley v. Municipal Court*, 411 U.S. 345, 348-49 (1973); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963); *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 494-95 (1973).

(21) Mr. Elbaum is **bailworthy.** This is evident from the following facts: On July 24, 1995, prior to his conviction, he was contacted by three federal agents, from the U.S. Postal Service, Secret Service and F.B.I., who informed him he was under criminal

investigation. They sought and he voluntarily provided palm prints, fingerprints and a handwriting sample. With the prior knowledge of these agents, Mr. Elbaum traveled to Israel on July 27, 1995, returning on August 17, 1995. Later, subsequently to his conviction in the federal court in Austin, with leave of Court, Mr. Elbaum traveled to Toronto, Canada, between June 8 through June 17, 1996, to attend his sister's wedding. He returned voluntarily to Texas for trial and sentencing. Also, he remained on a personal recognizance bond, as of March 7, 1996 in connection with the criminal case. Additionally, Respondent Harrington currently has a $5,000 cash bond, posted during the removal hearing in the Immigration Court. **Therefore, it is in the interests of justice that INS' demand for his surrender on August 9, 1999 be rescinded. Mr. Elbaum has a consistent record of bailworthiness, throughout both the underlying criminal and administrative proceedings.**

(22) Your Petitioner avers that he has been **rehabilitated**, in view of the fact that he has complied fully with his sentencing order. His probation officer, Mr. David Stout (817) 649-2577, ext. 226, has reduced his reporting requirement from the initial monthly period, to a period of every 90 days.

(23) The deportation order entered against your Petitioner is the direct result of a policy decision or statutory interpretation made by the Attorney General in *Matter of Soriano, supra*. The deportation order is a denial of both statutory and constitutional due process, guaranteed by the Fifth Amendment to the U.S. Constitution. *Perceira-Goncalves, supra; Henderson, supra; Sandoval, supra; Homayun, supra; Sabino v. Reno, supra; Perez, supra; Mojica, supra.*

(24) Repealed 8 U.S.C. Sec. 1182(c) provided a "waiver of excludibility"[3] for

[3] Although the waiver was of "excludibility," for Equal Protection reasons, this waiver was available as to

any alien who could demonstrate two things: (a) that he had been residing lawfully in the U.S. for at least seven years prior to the deportation hearing; and (b) that he merited a grant of the waiver as a matter of discretion.

Because your Petitioner's **crime predated** the enactment of the Illegal Immigration and Immigrant Responsibility Act of 1996 ["IIRAIRA"], Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) and the Antiterrorist and Effective Death Penalty Act of 1996 ["AEDPA"], Pub. L. 104-132, 110 Stat. 279 (April 24, 1996), he has been entitled statutorily under repealed 8 U.S. Code § 1182(c) for a discretionary waiver hearing. The date of the LPR's crime should govern the question of statutory availability of relief under § 1182(c). *Perceira-Goncalves, supra* at 130: ["Thus, that Goncalves' crimes made him deportable prior to the passage of AEDPA and that the new restrictions merely eliminated a possible form of relief from those consequences, do not suffice to rebut the presumption against retroactivity."].

(26) However, in *In re Soriano, supra,* Respondent Reno **retroactively** debars aliens of their statutory right to a hearing for this relief. Ms. Reno's holding in *Soriano, supra* has been expressly rejected in *Perceira-Goncalves, supra; Henderson, supra; Sandoval, supra* and all of the authorities cited in paragragh (3), above. Her ruling is an impermissible, retroactive denial of due process, prohibited by *Landgraf v. U.S.I. Film Products, Corp.*, 511 U.S. 244 (1994).

(27) The Respondents' position is also that it is "too late" for Mr. Elbaum to apply for an 8 U.S. Code § 1182(c) waiver, because he is in "removal" proceedings under new law. However, the Supreme Court has held that the **form of the action** should not govern the procedural rights due to an alien. Rather, the lawfulness of the alien's status and the length and strength of his ties to the community should determine the breadth of

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"deportability" as well. *Francis v. INS*, 532 F.2d 268 (2nd Cir. 1976); *Matter of Silva*, 16 I & N Dec. 26 (BIA 1976).

his rights. *Landon v. Plasencia,* 459 U.S. 21 (1982).

(28) **Prejudice.** Petitioner has been prejudiced by the denial of a § 1182(c) hearing, because more than fifty percent of such waiver applications were granted by Immigration Judges during the period 1989-94. *Perceira-Goncalves, supra* at 128. Thus, he is "likely to prevail" if given a hearing. Moreover, there is strong evidence of rehabilitation, and Elbaum's offense was nonviolent.

(29) **Injunctive Relief**. During the entire pendency of this litigation, your Petitioner seeks injunctive relief against deportation from the United States and also the right of reasonable bail. He should be continued on the $5,000 cash bond currently posted with Respondent Harrington. Injunctive relief is appropriate under *Morgan v. Fletcher*, 518 F.2d 236 (5th Cir. 1975). Based on the authorities cited herein, there is a substantial likelihood that your Petitioner will prevail in this action. If he is deported this would result in irreparable harm, since this Court's jurisdiction and Petitioner's claim would be permanently defeated. The harm of an injunction upon Respondents is negligible—should your Petitioner lose his suit, the Respondents would be free to deport him. Finally, the granting of injunctive relief would not disserve the public interest, because there have been numerous, successful lawsuits presenting similar questions, in other jurisdictions. Reaching the merits serves the interests of justice.

(30) **Due Process Violation and Concluding Argument**. Providing an 8 U.S. Code § 1182(c) hearing is not unduly burdensome, given that Petitioner's future right to reside in the U.S. as an LPR is in question. Therefore, his summary removal, without a hearing on his waiver application fails the Supreme Court's due process test under *Mathews v. Eldridge,* 424 U.S. 319 (1976). His interest in continued lawful residence in this country is weighty and our deportation laws must be strictly construed, with all ambiguities resolved in favor of the alien. *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948);

Cardoza-Fonseca v. INS, 480 U.S. 421 (1987).

PRAYER. PREMISES CONSIDERED, YOUR PETITIONER PRAYS for the following relief:

That a Writ of *Habeas Corpus* be granted, remanding this cause to the BIA for the purpose of ordering a hearing under repealed 8 U.S. Code § 1182(c).

In the alternative, that a Declaratory Judgment of this Court issue, declaring your Petitioner's right to apply to the BIA for a remand, to convene a hearing under former 8 U.S.C. Sec. 1182(c);

That a Temporary Restraining Order and Preliminary Injunction be issued, if necessary, enjoining Respondents from deporting or detaining Petitioner, during the pendency of this suit;

(D) That your Petitioner be awarded reasonable attorney's fees and costs of court, pursuant to the Equal Access to Justice Act, 28 U.S.C. Sec. 2412, should he prevail in this litigation and otherwise show himself entitled thereto; and

That your Petitioner be granted any and all such other relief as the Court may deem lawful and just, in the circumstances.

Respectfully submitted,

JOSHUA TURIN
5847 San Felipe, Suite 2950
Houston, Texas 77057
(713) 781-0071 [tel]
(713) 781-2409 [fax]

Texas Bar No. 20298700
LEAD COUNSEL FOR PETITIONER

MARK E. JACOBS
5050 Quorum Drive, Suite 330
Dallas, Texas 75240
(972) 233-7788 [tel]
(972) 960-8241 [fax]

Texas Bar No.
LOCAL COUNSEL FOR

VERIFICATION

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, THE UNDERSIGNED AUTHORITY, ON THIS DAY APPEARED YAKI ELBAUM, KNOWN TO ME TO BE THE SAME, WHO STATED UPON OATH THE FOLLOWING:

"I, Yaki Elbaum verify that I have read the foregoing *Petition for a Writ of Habeas Corpus, Alternative Suit for a Declaratory Judgment and Brief in Support Thereof.* I verify that all of the facts recited therein are true and correct to the best of my knowledge and belief."

YAKI ELBAUM
Petitioner

Dated: July 29, 1999.

SUBSCRIBED AND SWORN TO THIS 29th DAY OF JULY, 1999, TO CERTIFY WHICH WITNESS MY HAND AND SEAL OF OFFICE.

NOTARY PUBLIC
STATE OF TEXAS

SYLVIA GLORIA LIMON
Notary Public State of Texas
My Commission Expires
MARCH 5, 2000

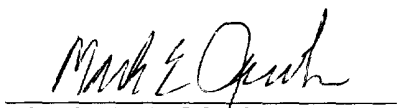
Certificate of Service

I, Mark E. Jacobs, Co-counsel for Petitioner herein, certify that Service of Process has been effectuated pursuant to Rule 4, Federal Rules of Civil Procedure, unto the following parties, this 30th day of July, 1999:

Hon. Janet Reno
Attorney General of the United States
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Mr. William Harrington
District Director
Immigration & Naturalization Service
8101 N. Stemmons Freeway
Dallas, Texas 75247

Mr. James T. Reynolds, Esq.
General Counsel, INS and
Assistant United States Attorney
8101 N. Stemmons Freeway
Dallas, Texas 75247



MARK E. JACOBS
Attorney for Petitioner

LISTS OF EXHIBITS

1. BIA Decision - June 4, 1999;

2. Notice to Deliver Alien on August 9, 1999;

U.S. Department of Jus. Decision o ; Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A29 905 972 - Dallas Date: JUN - 4 1999

In re: YAKI ELBAUM a.k.a. Jack Inbar-Prater

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mark E. Jacobs, Esquire
5050 Quorum Drive, Suite 330
Dallas, Texas 75240

ON BEHALF OF SERVICE: Camille Kirk
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility; cancellation of removal

In a decision dated November 19, 1998, an Immigration Judge found the respondent removable as charged and ineligible for relief from removal. The respondent's appeal from this decision will be dismissed.

To the extent the respondent is seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), we note that this relief is no longer part of the Act, as it was repealed and is not available in removal proceedings. [1] Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009 (enacted Sept. 30, 1996) (IIRIRA).

Although the respondent argues that changes in the law should not apply retroactively, we note that IIRIRA specifically states the changes therein apply to all convictions regardless of whether they "were entered before, on, or after the date of enactment of this paragraph." Section 321(b) of IIRIRA. Further, the changes apply to all actions taken on or after the enactment of IIRIRA, "regardless of when the conviction occurred." Section 321(c) of IIRIRA.

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1 We also note that the respondent is barred, as are all aggravated felons, from applying for cancellation of removal under section 240A of the Immigration and Nationality Act, 8 U.S.C. § 1229b, which superseded section 212(c) of the Act. Section 240A(a)(3).

EXHIBIT 1

While the respondent also argues that his crime does not constitute an aggravated felony, we first note that he conceded to a conviction for an aggravated felony during his proceedings before the Immigration Judge (Tr. at 24). Absent egregious circumstances, such an admission by an attorney representing an alien in proceedings is binding. Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986). Further, the record amply supports such a conclusion. An aggravated felony is defined at section 101(a)(43), 8 U.S.C. § 1101(a)(43), to include:

> (M) an offense that
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

Section 101(a)(43(M) of the Act.

The respondent was convicted of fraud and related activities with access devices and sentenced to 2 years in prison (Exhs. 1, 4). The conviction records also indicate a restitution to be paid of almost $13,000. As noted by the Immigration Judge, this crime clearly falls under the definition of aggravated felony at section 101(a)(43)(M). See Matter of Onyido, Interim Decision 3370 (BIA 1999).

While the respondent argues that his crime would not have been considered an aggravated felony under previous law, as noted above, IIRIRA specifically states the changes therein apply to all convictions regardless of whether they "were entered before, on, or after the date of enactment of this paragraph." Section 321(b) of IIRIRA. To the extent the respondent is arguing that the application of these changes is unconstitutional, it is well settled that we apply the laws as written and lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer. Matter of Fuentes-Campos, Interim Decision 3318 (BIA 1997); Matter of C-, 20 I&N Dec. 529 (BIA 1992).

In closing, we note that the respondent's conviction is final for immigration purposes. Matter of Gabryelsky, 20 I&N Dec. 750 (BIA 1993); see generally Matter of Khalik, 17 I&N Dec. 518 (BIA 1980); Matter of Fortis, 14 I&N Dec. 576 (BIA 1974). As the respondent is not eligible for relief from removal, the following order will be entered.

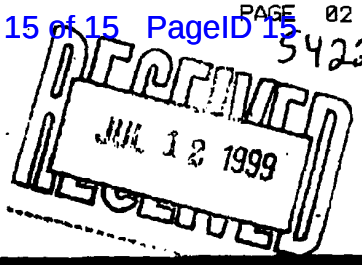
ORDER: The appeal is dismissed.

FOR THE BOARD

542213

U.S. Department of Justice
Immigration and Naturalization Service

Notice To Deliver Alien



FRONTIER INSURANCE COMPANY
1400 Front Street
San Diego, CA 92101

File A29 905 972
Date July 8, 1999
Re: KLBAUM, Yaki
(aka: Jack INBAR-Prater)

Pursuant to the terms of the bond posted by you for the release from custody of the above-named alien(s), demand is hereby made upon you to surrender such alien(s):

☐ for hearing at the following date, time and place.

Date: Time:

Place:

☒ into the custody of an officer of this Service at U. S. Immigration and Naturalization Service, 8101 N. Stemmons Fwy., Dallas, Texas 75247

on AUGUST 9, 1999 (Date) at 10:00 a.m. (Time) for deportation.

You are informed that failure to surrender the alien(s) in accordance with this demand will result in steps being taken toward the breaching of the above mentioned bond and its forfeiture to the Government.

WILLIAM G. HARRINGTON
District Director
DISTRICT DIRECTOR

cc: Frontier Insurance Company
5963 La Place Court, Suite 200
Carlsbad, CA 92008

CERTIFIED MAIL RETURN RECEIPT REQUESTED

GPO 894-822

EXHIBIT 2

Form I-340 (Rev. 11-30-82)Y