

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: September 25, 2008 Decided: December 3, 2008)

Docket No. 07-4126-ag

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Ramon Julian Severino,

Petitioner,

- v.-

Michael B. Mukasey, Attorney General
for the United States,

Respondent.

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Before: JACOBS, Chief Judge, WESLEY and HALL,
Circuit Judges.

Petitioner Ramon Julian Severino petitions from a final order of removal entered in the Board of Immigration Appeals on August 27, 2007. An Immigration Judge found that Severino's status had been terminated by law when he failed to appear at a personal interview in connection with his petition to remove conditions on his status. Severino argues that his filing of a second petition to remove conditions extended his term of residency and entitles him

1 to withholding of removal. For the following reasons, we
2 deny the petition for review in part and dismiss in part.

3 JAMES A. WELCOME, Esq.,
4 Waterbury, Connecticut, for
5 Appellant.
6

7 MICHAEL F. SARKO, Esq., United
8 States Department of Justice,
9 Office of Immigration
10 Litigation, for Gregory G.
11 Katsas, Acting Assistant
12 Attorney General for the United
13 States, for Appellee.
14

15 DENNIS JACOBS, Chief Judge:
16

17 Ramon Julian Severino appeals from a final order of
18 removal by the Board of Immigration Appeals (BIA). Severino
19 entered this country illegally in 1995; he obtained lawful
20 conditional permanent residency on the basis of his 1997
21 marriage to a citizen; he timely filed to remove the
22 conditions within two years, as required by regulation; but
23 he failed to appear with his wife at a 1999 personal
24 interview, as the regulation also required--his wife having
25 left him early in 1998. An immigration judge (IJ) ordered
26 Severino removed in March, 2006, and the Board of
27 Immigration Appeals (BIA) affirmed. In this petition,
28 Severino argues (1) that he was eligible for cancellation of
29 removal because he enjoyed the status of a lawful permanent

1 resident; and (2) that the IJ denied Severino due process by
2 placing the burden of proof on Severino rather than on the
3 government. For the reasons stated in this opinion, we
4 conclude that Severino's status was terminated by law in
5 March, 1999, that he was therefore ineligible for
6 cancellation of removal, and that the burden of proof rested
7 on him in the proceedings before the immigration judge. We
8 accordingly deny Severino's petition for review, except
9 insofar as we lack jurisdiction over part of the petition,
10 in which respect we dismiss.

11 12 **BACKGROUND**

13 Ramon Julian Severino, a citizen of the Dominican
14 Republic, entered the United States illegally in September,
15 1995. He married Andrea Santa, an American citizen, on
16 August 15, 1996, a marriage he claims was bona fide. Based
17 on this marriage, Severino was granted conditional permanent
18 resident status on March 20, 1997. The marriage soon broke
19 down; Severino claims that Santa abruptly left their house
20 and terminated all communication with him on January 24,
21 1998. The couple was divorced in April, 2000.

22 Severino's conditional permanent resident status
23 required him to file a Form I-751 Petition to Remove

1 Conditions on Residence within a ninety-day window
2 immediately prior to the two-year anniversary of his
3 obtaining status. 8 U.S.C. § 1186a(c)(1). He and his
4 spouse were also required to attend a personal interview in
5 connection with this petition. 8 U.S.C. § 1186a(c)(1).
6 Severino filed a timely Form I-751 petition in February,
7 1999, and a personal interview was scheduled for September
8 30, 1999, but Severino and Santa failed to attend. By law,
9 Severino's unexplained failure to attend the interview
10 resulted in the termination of his permanent resident status
11 as of March 20, 1999, the second anniversary of his lawful
12 admission. 8 U.S.C. § 1186a(c)(2)(A). The United States
13 Citizenship and Immigration Services (CIS) issued a decision
14 on February 22, 2000, notifying Severino that his status had
15 been terminated by reason of his failure to attend the
16 scheduled interview.

17 Severino filed a second I-751 petition on March 21,
18 2001, together with a request for a waiver of the joint
19 application requirement in light of his divorce. The CIS
20 denied this second I-751 petition on August 15, 2003.

21 The CIS then served Severino with a Notice to Appear
22 dated March 18, 2005, charging him with removability on the
23 basis of the termination of his status, which the CIS

1 unaccountably dated as having occurred when Severino's
2 second I-751 petition was denied on August 15, 2003. In the
3 ensuing proceeding before the IJ, Severino contested
4 removability based on the termination of his status and
5 requested cancellation of removal pursuant to 8 U.S.C. §
6 1229b.

7 By oral Order on March 24, 2006, the IJ denied
8 Severino's application for cancellation of removal,
9 determining that Severino's status was terminated in 2000
10 because of his failure to attend the personal interview in
11 connection with his original I-751 petition. The IJ then
12 determined that Severino had failed to sustain his burden in
13 connection with his request for a waiver of the joint
14 application requirement, and concluded that the CIS had
15 properly denied his I-751 petition.¹ Finally, the IJ
16 ordered Severino's removal to the Dominican Republic.

17 The BIA adopted and affirmed the ruling by per curiam
18 Order dated August 27, 2007. The BIA was not persuaded that
19 the IJ's findings of fact were clearly erroneous, or that

¹ Following the CIS's denial of his second I-751 petition, but prior to the IJ's Order, Severino had filed a third I-751. Noting this fact, the IJ ruled that because one I-751 had already been adjudicated on the merits, "there is no reason to consider another one."

1 the IJ had erred in finding that Severino had failed to
2 sustain his burden of proof. Severino filed a timely
3 petition for review with this Court.
4

5 DISCUSSION

6 When the BIA issues an opinion, that opinion becomes
7 the basis for review. Chen v. Gonzales, 417 F.3d 268, 271
8 (2d Cir. 2005). When--as here--the BIA adopts a decision of
9 the IJ and supplements it, this Court reviews the IJ's
10 decision as supplemented by the BIA. Id. Administrative
11 findings of fact "are conclusive unless any reasonable
12 adjudicator would be compelled to conclude to the contrary."
13 8 U.S.C. § 1252(b)(4)(B). Questions of law, including
14 applications of law to undisputed fact, are reviewed de
15 novo. Delgado v. Mukasey, 508 F.3d 702, 705 (2d Cir. 2007).
16

17 I

18 As the IJ recognized, the threshold issue is Severino's
19 immigration status at the time he filed his second Form I-
20 751. Entitlement to relief and the applicable burden of
21 proof vary depending on whether--and when--his status was
22 terminated.

1 The Immigration and Nationality Act (INA) provides that
2 an alien who obtains permanent resident status based on
3 marriage to an American citizen is considered to have
4 obtained such status on a conditional basis only. 8 U.S.C.
5 § 1186a(a)(1). To remove the conditions, the alien and the
6 American spouse must petition the Attorney General within
7 the ninety-day period prior to the second anniversary of the
8 granting of conditional permanent residency, and must appear
9 for a personal interview in connection with their petition.
10 8 U.S.C. § 1186a(c)(1). If the alien fails to appear with
11 spouse at the required interview, without good cause, "the
12 Attorney General shall terminate the permanent resident
13 status of the alien as of the second anniversary of the
14 alien's lawful admission for permanent residence." 8 U.S.C.
15 § 1186a(c)(2)(A). Severino did not comply with the
16 requirement to appear, and consequently his status was
17 terminated on March 20, 1999.

18 To avoid this legal conclusion, Severino argues that
19 his failure to appear at the interview in September, 1999
20 constituted an "abandonment" of his petition, see 8 C.F.R.
21 § 103.2(b)(13)(ii) (failure to appear at a scheduled
22 personal interview results in application being considered
23 abandoned); that he was therefore entitled to file a second

1 petition without prejudice, see 8 C.F.R. § 103.2(b)(15)
2 (“Withdrawal or denial due to abandonment does not preclude
3 the filing of a new application or petition with a new fee.
4 . . . Withdrawal or denial due to abandonment shall not
5 itself affect the new proceeding; but the facts and
6 circumstances surrounding the prior application or petition
7 shall otherwise be material to the new application or
8 petition.”); and that his filing of a second I-751 petition
9 on March 21, 2001 extended his status at least until the
10 second petition was denied on August 15, 2003.

11 Severino’s argument does not withstand a review of the
12 statute. Severino had a right to file a motion to reopen or
13 reconsider, but he did not do so, because his second I-751
14 petition did not comply with the requirements for such a
15 motion: in particular, his second I-751 petition was not
16 filed within thirty days of the decision at issue. See 8
17 C.F.R. § 103.5(a)(1)(i) & (iii) (listing filing requirements
18 for a motion to reopen or reconsider).² True, the filing of
19 an I-751 petition automatically extends conditional

² Even if Severino’s second I-751 petition were construed as a motion to reopen or reconsider, it is clear that such a motion “does not stay the execution of any decision in a case or extend a previously set departure date” “[u]nless the Service directs otherwise.” 8 C.F.R. § 103.5(a)(1)(iv). The CIS did not direct otherwise here.

1 permanent resident status until the petition is adjudicated,
2 8 C.F.R. § 216.4(a)(1). But the Attorney General
3 necessarily terminated Severino's permanent resident status
4 after he and his spouse failed to appear at the personal
5 interview without good cause, 8 U.S.C. § 1186a(c)(2)(A), and
6 Severino has cited no law in support of his contention that
7 filing a second I-751 petition will restore resident status
8 that has already been terminated. In a nutshell, Severino's
9 status was terminated by law when he failed to appear with
10 his wife at the personal interview in connection with his
11 first I-751 petition, and the filing of a second I-751
12 petition did not restore his status.

14 II

15 Severino challenges the IJ's determination that he was
16 ineligible for cancellation of removal pursuant to 8 U.S.C.
17 § 1229b. That statute permits the Attorney General, in his
18 discretion, to cancel removal of an alien who (1) has been
19 lawfully admitted for at least five years, (2) has resided
20 in the U.S. continuously for seven years, and (3) has not
21 been convicted of any aggravated felony. 8 U.S.C. §
22 1229b(a).

1 Severino argues that the IJ erroneously held that a
2 conditional permanent resident--unlike other permanent
3 residents--is categorically ineligible for cancellation of
4 removal. This mis-characterizes the IJ's ruling. The IJ
5 concluded that because Severino's status was terminated by
6 February 22, 2000 at the latest, Severino had not been
7 lawfully admitted for permanent resident status for the
8 requisite five years. As discussed above, Severino's status
9 was actually terminated by operation of law on March 20,
10 1999; but in any event it is clear that Severino lacked the
11 requisite five years of lawful permanent residency. We
12 therefore affirm the IJ's determination that Severino was
13 not entitled to cancellation of removal.

14 15 **III**

16 Severino claims that he was denied due process during
17 the removal proceeding because the IJ erroneously assigned
18 him the burden to prove his entitlement to relief. The IJ
19 relied on 8 U.S.C. § 1186a, which places the burden in a
20 removal proceeding on an alien whose status has been
21 terminated for failure to appear at a personal interview
22 with spouse. Severino's premise is that because his status

1 as a lawful permanent resident was not terminated until an
2 adverse determination on his second I-751 petition, the
3 government bore the burden of proving that Severino was not
4 entitled to relief. See 8 U.S.C. § 1186a(c) (3) (D).

5 Severino did not present this due process claim to the
6 BIA. "Congress has limited this court's power to review a
7 final order of removal to those removal orders for which
8 'the alien has exhausted all administrative remedies
9 available to the alien as of right.'" Karaj v. Gonzales,
10 462 F.3d 113, 117 (2d Cir. 2006) (citing 8 U.S.C. §
11 1252(d) (1)). Because the bar is jurisdictional, the Court
12 may consider only those issues that the petitioner has
13 presented in substance to the BIA. Id. And although an
14 alien need not exhaust issues--including constitutional
15 claims--over which the BIA lacks jurisdiction, an alien must
16 raise procedural defects that the BIA has the power to
17 correct. United States v. Gonzales-Roque, 301 F.3d 39, 47-
18 48 (2d Cir. 2002) ("While constitutional claims lie outside
19 the BIA's jurisdiction, it clearly can address procedural
20 defects in deportation proceedings.").

21 Even if he had preserved the issue for review, however,
22 Severino is not entitled to relief on his due process claim.

1 Contrary to his assertion, and as discussed above,
2 Severino's status was terminated because of his failure to
3 appear at the personal interview scheduled in connection
4 with his first I-751 petition. In such a case, the statute
5 clearly places the burden on the alien to establish his
6 compliance with the requirements for removal of conditions
7 on status. 8 U.S.C. § 1186a(c)(2)(B).

8
9 **IV**

10 Finally, Severino argues that the IJ erred when he
11 permitted the government, during the March 2006 immigration
12 hearing, to amend the Notice to Appear to allege that his
13 conditional permanent resident status had been terminated on
14 February 22, 2000. Severino failed to raise this claim before
15 the BIA, and we therefore lack jurisdiction to consider it.
16 8 U.S.C. § 1252(d)(1).

17
18 **CONCLUSION**

19 For the foregoing reasons, we deny Severino's petition
20 for review, except to the degree that we lack jurisdiction
21 over his unexhausted claims, in which respect we dismiss.