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28IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FERNANDO MORENO MENDEZ et al.,

No. C12-06069 CRB

Petitioners,

**ORDER LIFTING STAY AND
DISMISSING CASE**

v.

JANET NAPOLITANO et al.,

Respondents.

Petitioners Fernando Moreno Mendez and Maria Del Carmen Moreno Gomez are husband and wife and citizens of Mexico. Pet. (dkt. 1) ¶ 1. In this habeas case, Petitioners argue that several attorneys rendered ineffective assistance throughout Petitioners' removal proceedings, subsequent appeals, and motions to reopen and reconsider. See generally id. Respondents Janet Napolitano, Secretary of the Department of Homeland Security, Timothy Aiken, ICE Field Office Director, and Eric Holder Jr., U.S. Attorney General, move to dismiss on a variety of grounds. See generally MTD (dkt. 15).

The ground that found traction with this Court was that the Ninth Circuit already had jurisdiction over the same claims. See id. at 12-14. "Prudential concerns, such as comity . . . may require a federal court to forgo the exercise of its habeas corpus power." Munaf v. Geren, 553 U.S. 674, 693 (2008) (internal citation and quotation marks omitted). Pending before the Ninth Circuit was Petitioners' petition for review (PFR) of the BIA's denial of

1 Petitioners’ motion to reopen. See Pet. ¶ 7; Pet. Ex. KKK. The BIA denied Petitioners’
2 motion to reopen in part based on its finding that Petitioners had failed to make an adequate
3 showing that they suffered prejudice as a result of the alleged ineffective assistance. See Pet.
4 Ex. JJJ at 390-91 (“Thus, the respondents have not demonstrated that they were prejudiced
5 by the actions of their prior representatives with respect to these issues”). The merits of
6 Petitioners’ ineffective assistance claims were therefore before the Ninth Circuit. Pet. Ex.
7 KKK; Pet. at 1. Finding that it would be a waste of judicial resources to address the same
8 claims, and noting that Petitioners did not disagree that the claims raised in this Petition were
9 also before the Ninth Circuit, see Opp’n at 10, the Court agreed to hold this Petition in
10 abeyance until the Ninth Circuit issued a decision on Petitioners’ PFR.

11 The Ninth Circuit has now denied in part and dismissed in part Petitioners’ PFR,
12 holding that the BIA did not abuse its discretion by denying Petitioners’ motion to reopen
13 based on ineffective assistance of counsel because Petitioners failed to establish prejudice.
14 See Resp. Supp. Br. (dkt. 23) Ex. B at 2. The Ninth Circuit further held that the BIA did not
15 abuse its discretion by denying Petitioners’ request to reissue its decision of March 6, 2006.
16 Id. at 3. This Court ordered the parties to submit supplemental briefing about the impact of
17 the Ninth Circuit’s decision on this case. See Order (dkt. 22). The parties agreed in their
18 simultaneous supplemental briefing that the Ninth Circuit’s decision is res judicata here.
19 See Resp. Supp. Br. (dkt. 23) at 4-7; Pet. Supp. Br. (dkt. 24) at 5. Petitioners concede that
20 “essentially the same issues of ineffective assistance of counsel were addressed in the judicial
21 review proceeding as were subsequently raised in the present habeas proceeding,” and that
22 five of the Petition’s six claims (paragraph 41.a-e) are therefore out. Pet. Supp. Br. at 4, 5.

23 Petitioners assert, however, that the Ninth Circuit’s decision does not foreclose claim
24 41.f in their Petition. Id. at 5-6. That claim pertains to the alleged failure of attorney Meeks
25 to raise the BIA’s failure to reissue the voluntary departure order in its January 29, 2009
26 order, and the BIA’s unilateral vacating of the voluntary departure applications. Pet. ¶ 41.f.
27 Petitioners argue that they can “now demonstrate prejudice since they can demonstrate
28 plausible relief since their United States citizen daughter has attained her majority and is able

1 to file immediate relative visa petitions for them.” Pet. Supp. Br. at 6. They maintain that
2 the loss of their voluntary departure claim is prejudicial because, among other things, in its
3 absence they are statutorily barred from re-immigrating. Id. The Court directed Respondents
4 to respond to this argument, and Respondents did so. See Order (dkt. 25); Response (dkt.
5 26). Respondents argue that Petitioner’s remaining claim also fails, because Petitioners
6 “asserted the very same argument concerning prejudice to the Ninth Circuit in their Opening
7 Brief.” Response at 2. Indeed, Petitioners argued in their Opening Brief:

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9 Second, as to Meeks’ failure to seek cognizable review of the January 29, 2009
10 order of the BIA vacating the voluntary departure order, petitioners lost their
11 grant of voluntary departure, are barred from reimmigrating for five years
12 under 8 USC, Section 1182(a)(9)(A) and now have a United States citizen
13 daughter of age to petition for their reimmigration but for the alternative entry
14 of removal order in lieu of voluntary departure.

15 Resp. Br. Ex. A at 46.

16 Given this overlap, the Court concludes that “the issue necessarily decided at the
17 previous proceeding is identical to the one which is sought to be relitigated.” See Paulo v.
18 Holder, 669 F.3d 911, 917 (9th Cir. 2011) (quoting Hudranautics v. FilmTec Corp., 204 F.3d
19 880, 885 (9th Cir. 2000)); see also id. at 918 (issue preclusion also applies to arguments on
20 such issues that could have been, but were not, raised in the prior litigation).¹ The Ninth
21 Circuit considered and rejected claim 41.f. See Resp. Br. Ex. B at 2 (“[P]etitioners failed to
22 establish grounds for the relief that they seek.”). Accordingly, the Ninth Circuit’s opinion
23 precludes all of Petitioners’ claims in the present Petition.

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28 ¹ In addition, as Respondents point out, the asserted prejudice is not really new: even if
Petitioners’ daughter did not attain the age of majority until January 2013, Petitioners did not lack notice
in January 2009 that they would eventually be in this position. See Response at 3.

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For the foregoing reasons, the Court LIFTS the stay, and DISMISSES this case.
IT IS SO ORDERED.

Dated: March 23, 2015



CHARLES R. BREYER
UNITED STATES DISTRICT
JUDGE