NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WADYD MONTES CALDERON,

Petitioner,

v.

JEH JOHNSON in his official capacity as Secretary of Homeland Security; LEÓN RODRÍGUEZ in his official capacity as the Director of the U.S. Citizenship and Immigration Services; JOHN THOMPSON in his official capacity as District Director of the U.S. Citizenship and Immigration Services, Newark Field Office; RANDI BORGEN, Field Office Director of the U.S. Citizenship and Immigration Services; the U.S. DEPARTMENT OF HOMELAND SECURITY; and the U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Respondents.

Civ. No. 16-0383

OPINION

THOMPSON, U.S.D.J.

This matter appears before the Court on the motion of Respondents Jeh Johnson, Secretary of Homeland Security, León Rodríguez, Director of U.S. Citizenship and Immigration Services, John Thompson, District Director of the U.S. Citizenship and Immigration Services, Newark Field Office, Randi Borgen, Field Office Director of the U.S. Citizenship and Immigration Services, the U.S. Department of Homeland Security, and the U.S. Citizenship and Immigration Services (collectively, "Respondents") for reconsideration (ECF No. 17), challenging this Court's October 13, 2016 Order denying Respondents' motion to dismiss (Opinion, ECF No. 15; Order, ECF No. 16). Petitioner Wadyd Montes Calderon ("Petitioner")

opposes. (ECF No. 24). The Court has decided these motions based on the written submissions of the parties and without oral argument pursuant to Local Civil Rule 78.1(b). For the reasons stated herein, Respondents' motion will be denied.

BACKGROUND

This case concerns the denial of Petitioner's application for naturalization. Petitioner's allegations are as follows: Petitioner entered the United States as a lawful permanent resident on May 5, 1995. (Compl. ¶ 13, ECF No. 1). His mother is a United States citizen and he has two United States citizen children. (*Id.*). Petitioner served in the United States Navy from January 28, 2000 to August 19, 2003. (Resp'ts' Mot. Dismiss, Ex. 1, ECF No. 10-2). Petitioner has multiple state criminal convictions, including two felonies. (Compl. ¶ 13, ECF No. 1). He was placed in removal proceedings in 2010 and ordered removed *in absentia* on September 30, 2011. (*Id.* ¶ 14).

Petitioner moved to reopen that removal order and explain his absence at the immigration court hearing. His motion was denied on December 9, 2011. (*Id.*).

In August 2012, Petitioner applied for naturalization under 8 U.S.C. § 1440, which established relaxed naturalization requirements for individuals who have served in the Armed Forces of the United States during certain qualifying military hostilities, including Operation Enduring Freedom from September 11, 2001 to present. (Compl. ¶ 1, ¶ 15, ECF No. 1). On November 18, 2012, Petitioner was arrested in New York City and pleaded guilty to disorderly conduct, a violation. (*Id.* ¶ 16). On January 18, 2014, Petitioner was arrested on a New Jersey Transit train after being found in possession of a BB gun and pleaded guilty to unlawful possession of a weapon under N.J. Stat. Ann. § 2C:39-5b. (*Id.*). On October 27, 2014, Petitioner was sentenced to three years of probation for the latter offense. (*Id.*).

On January 6, 2015, USCIS denied Petitioner's application for naturalization on the ground that Petitioner at the time was subject to a probationary sentence and agency regulation prevented USCIS from approving a naturalization application while the applicant was subject to a probationary sentence. (*Id.* ¶ 17, citing 8 C.F.R. § 316.10(c)(1)). On February 19, 2015, Petitioner sought review of that decision and USCIS again denied Petitioner's application and cited 8 C.F.R. § 316.10(c)(1) to state that Petitioner was unable to establish the requisite good moral character for naturalization because he was currently on probation. (Compl. ¶ 18, ECF No. 1; Compl. Ex. A, p. 2, ECF No. 1-3).

Petitioner then appealed the final USCIS decision to this District Court pursuant to 8 U.S.C. § 1421(c). Respondents moved to dismiss the appeal, arguing that Petitioner had failed to state a claim because his application for naturalization was barred by 8 C.F.R. § 316.10(c)(1). This Court denied that motion, finding that courts have required a case-by-case analysis of a petitioner's good moral character and thus, Petitioner had stated a claim. Respondents move for reconsideration of that decision. That motion is presently before the Court.

LEGAL STANDARD

Reconsideration is an extraordinary remedy that is to be granted "very sparingly." *Friedman v. Bank of Am., N.A.*, No. 09-2214, 2012 WL 3146875, at *2 (D.N.J. Aug. 1, 2012). Pursuant to Federal Rule of Civil Procedure 59(e) and Local Civil Rule 7.1(i), a motion for reconsideration may be based on one of three separate grounds: (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) to correct a clear error of law or to prevent manifest injustice. *See North River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). A motion must present "dispositive factual matters or controlling decisions

of law [that] were overlooked by the court in reaching its prior decision." *Dunn v. Reed Group*, 2010 U.S. Dist. LEXIS 2438 (D.N.J. Jan. 13, 2010).

When the court considers the merits rather than solely the procedural propriety of a reconsideration motion, the motion for reconsideration has been granted. *In re Telfair*, 745 F. Supp. 2d 536, 538 n.1 (D.N.J. 2010). However, reconsideration does not guarantee a different or even a better result. *Rojas v. City of New Brunswick*, 2007 U.S. Dist. LEXIS 26303, 7-10 (D.N.J. Apr. 9, 2007).

A motion for reconsideration is not an opportunity to ask the Court to rethink what it has already thought through. *See Oritani S & L v. Fidelity & Deposit*, 744 F. Supp. 1311, 1314 (D.N.J. 1990). Rather, a motion for reconsideration may be granted only if there is a dispositive factual or legal matter that was presented but not considered that would have reasonably resulted in a different conclusion by the court. *See Champion Labs., Inc. v. Metex Corp.*, 677 F. Supp. 2d 748, 750 (D.N.J. 2010). Mere disagreement with a court's decision should be raised through the appellate process and is inappropriate on a motion for reconsideration. *United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339, 345 (D.N.J. 1999).

ANALYSIS

Respondents present two arguments in support of the motion for reconsideration. First, that a district court must defer to the agency's interpretation of law when conducting *de novo* review of immigration decisions, and this Court erred in finding otherwise. Second, that the regulation at issue—8 C.F.R. § 316.10(c)(1)—is valid and can categorically bar an immigrant from having his naturalization application considered while he is on probation, and this Court erred in finding otherwise. Thus, Respondents seek reconsideration under the third option—to correct a clear error of law. The Court will address each argument in turn.

I. The Court Did Not Err in Finding that It Is Unclear whether the Court Should Grant *Chevron* Deference to Agency Regulation 8 C.F.R. § 316.10(c)(1) in its *de novo* Review of Naturalization Denials

Respondents argue that a district court must defer to an agency's own regulations, promulgated through notice-and-comment rulemaking pursuant to Congressional authority. (Resp'ts' Br., ECF No. 17-2 at 2-3). Respondents argue that the district court need not defer to an agency's decision in a particular case nor to an agency's interpretation of other law, but that where it is an agency's interpretation of its own law, a court cannot replace the agency's interpretation with its own. (Resp'ts' Br., ECF No. 17-2 at 2-3). Respondents challenge this Court's citations of *Borrome v. Attorney General of the United States*, 687 F.3d 150 (3d Cir. 2012) and *Dennis v. Attorney General of the United States*, 633 F.3d 201 (3d Cir. 2011) in support of the idea that it is not clear that a district court must defer to the agency when reviewing immigration decisions *de novo*. Respondents argue that those decisions reflected the Third Circuit's unwillingness to defer to the Board of Immigration Appeals' interpretation of other laws, not the Board's own regulations. Therefore, the district courts' refusal to defer to the BIA's interpretation of other laws in *Borrome* and *Dennis* was proper and is inapplicable here, where the agency interpreted its own law via its own regulation.

First, *Borrome* was clearly cited as an instance in which the district court declined to give deference to the agency, and was affirmed, while *Dennis* was clearly cited as contrary authority, in which the district court granted deference and was affirmed. (Op. at 8, ECF No. 15). Thus, Respondents' description of *Dennis*—as an instance where the court declined to defer to the BIA—is without merit.

Second, both cases were instances in which the district court reviewed the BIA's interpretation of the Immigration and Nationality Act (INA), which it is charged with implementing. The BIA and the United States Citizenship and Immigration Services (USCIS) are charged with implementing and interpreting the INA. In *Borrome*, the Third Circuit upheld the district court's refusal to defer to the BIA's interpretation of the INA. 687 F.3d 150, 154 (3d Cir. 2012). In *Dennis*, the Third Circuit upheld the district court's deference to the BIA's interpretation of the INA. 633 F.3d 201, 214 (3d Cir. 2011). As Respondents point out, each of these decisions by the BIA required the BIA to consider how other statutes or regulations interacted with the INA. However, that does not change the fact that at heart, the BIA interpreted how those other statutes or regulations interacted with its own law and regulations, and the Third Circuit found in one case that deference was warranted under *Chevron* and in the other case deference was not warranted. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council. Inc.*, 467 U.S. 837 (1984).

Respondents do not present a dispositive legal matter that was presented but not considered and warrants a different conclusion. As previously discussed, there is no controlling case law in this circuit regarding *de novo* review of naturalization denials under § 1421(c). Respondents present *Bakran*, which is persuasive authority and does not address whether deference is due to a USCIS regulation when a district court conducts a *de* novo review. *Bakran v. Johnson*, 2016 U.S. Dist. LEXIS 83504, *28 (E.D. Pa. June 28, 2010) (cited in Resp'ts' Mot. Recons. at 2, ECF No. 17-2). Rather, it addresses when and how rules may be issued and whether notice and comment rulemaking—versus promulgation of rules without a notice and comment procedure—was required in context of the rule that case. *Id. Chao* addresses labor regulations, not immigration ones, and similarly addresses when a rule needs to be completed

through notice and comment rulemaking, or not, not the degree of deference owed to the subsequent rules. *Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003) (cited in Resp'ts' Mot. Recons. at 2, ECF No. 17-2). As noted in the October 13, 2016 Opinion, circuits are split on whether the courts, in their *de novo* review of naturalization denials under 8 U.S.C. § 1421(c), should give *Chevron* deference to agency interpretations. (Op. at 8, ECF No. 15).

Thus, the Court is not persuaded that it committed a clear error of law in finding that it is unclear if the Court should grant *Chevron* deference to the agency's interpretation of the phrase "good moral character," codified in 8 C.F.R. § 316.10, when reviewing *de novo* a denial of a naturalization application. Therefore, this argument fails.

II. The Court Did Not Err in Finding that Courts Have Required a Case-by-Case Analysis of a Petitioner's Good Moral Character and thus, Petitioner Stated a Claim

Respondents also argue that the Court erroneously found that the single factor stated in 8 C.F.R. 316.10(c)(1) is insufficient to bar naturalization. Respondents argue that such a finding is contrary to the plain language of the regulation.

However, as discussed in the Opinion and again above, it is not clear that the regulation is due deference. In that context, the Court turns to case law interpreting and applying this regulation. There is no binding case law on this issue and Respondents do not present a dispositive factual or legal matter that was presented but not considered. Rather, Respondents reiterate prior arguments. *Dunn*, 2010 U.S. Dist. LEXIS 2438; *Champion Labs.*, 677 F. Supp. 2d at 750. Therefore, Respondents have not presented an argument that the Court committed a clear error of law that justifies reconsideration.

The Court notes for the record, however, that it made a slight error in its characterization of *Jimenez*. The Court correctly stated that the District of Alaska found that whether an individual was on probation, parole, or supervised sentence was an appropriate *factor* for

consideration and was especially appropriate in that case given the type of underlying offense and the petitioner's criminal history. *Jimenez*, 153 F. Supp. 2d 1105, 1107–08. However, the description that that court "did not reach the issue of if the applicant could be barred from naturalization solely because he was on probation, parole, or suspended sentence at the time of application" was an incomplete characterization. (Op. at 10, ECF No. 15). While the court did not find that the petitioner's application was absolutely barred on the basis of the regulation because it was a summary judgment motion brought by the petitioner, it did find generally that the regulation was valid, and denied the petitioner summary judgment on that basis. *Jimenez*, 153 F. Supp. 2d 1105, 1108. Thus, arguably, the district courts in both *Jimenez* and *Kiang* found the regulation to be a sufficient independent basis for a categorical bar on the immigrant's application. However, each noted several additional reasons to deny the application. No such additional factors are alleged in this case. Additionally, Petitioner highlights another case in which the court found that this regulation exceeds the agency's congressional authority insofar as it creates an additional, categorical bar to naturalization applications rather than simply adding an additional factor. *Angel v. Chertoff*, 2007 WL 3085962 (S.D. Ill. Oct. 22, 2007).

The cited cases are not binding on this Court and are therefore an insufficient basis for reconsideration for clear error of law.

CONCLUSION

For the reasons discussed above, Respondents' motion will be denied. An appropriate order will follow.

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

Dated: *1/13/17*