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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 85,451

THE FLORIDA BAR FILE NO. 94-50, 161(17C) and 95-50,151(17C)

DAVID SMITH NUNES

Petitioner,

v.

THE FLORIDA BAR

Respondent.

****

PETITIONER'S BRIEF
IN SUPPORT OF PETITION FOR REVIEW
OF REPORT OF REFEREE

****

PETITIONER'S INITIAL BRIEF

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INTRODUCTION

The Petitioner, DAVID NUNES (hereinafter "NUNES" or the "ATTORNEY"), was the Respondent below and the Respondent, THE FLORIDA BAR (hereinafter "TFB") was the Complainant below. References to the Transcript of the proceedings before the Honorable Howard C. Berman below are designated by the symbol "T", and references to the Petitioner's Appendix shall be designated by the symbol "A".

STATEMENT OF THE FACTS AND THE CASE

This Court has jurisdiction to review the decision of the Referee below pursuant to Article V, Section 15 of the Florida Constitution and Rule 3-7.7(c) of the Florida Rules Regulating the Florida Bar.

On March 31, 1995, TFB filed its Complaint against NUNES, alleging four counts of misconduct, which were based on NUNES' representation of two of his clients, namely, Mark Burton and Dennis Whynes. (A. 1)

In regard to each, the position of TFB was that NUNES failed to implement proper procedures and thereby failed to competently represent his clients. In regard to Mark Burton, this was expanded to the related offenses of failing to properly advise his client and of charging an excessive fee. These supplementary charges were based on the same underlying facts as the allegations of incompetent representation. (A. 1-5)

NUNES never disputed the factual allegations that he represented Mark Burton and Dennis Whynes or that he advised that he would be able to obtain the desired results for Mark Burton. He did and does deny that he was incompetent and that the relief he sought to obtain for his clients was unavailable.

Fundamentally, the issue to be decided boiled down to a question of immigration law.

Mark Burton

As TFB alleged, in or about December of 1988, Mark Burton had been deported after being convicted of a controlled substance offense which involved possession of cocaine. (A. 1-2)

Mr. Burton, at that time, was not properly advised of his right to seek a waiver, which is equivalent to a pardon, pursuant to INA 212(c), which is explained below. Mr. Burton was advised that he could apply for such a waiver, but that he would be incarcerated for up to six months if he chose to wait for a hearing. This was untrue and it, at least partially, convinced Mr. Burton to waive his rights. He was also advised that he would be allowed to reenter as an immigrant after five years from his deportation. This was also incorrect advice. Based on the two representations, Mr. Burton failed to make an application under INA 212(c). (A. 9 .)

Subsequently, at approximately the promised five year mark, in or about November, 1993, NUNES was retained by Mark Burton's parents (the "Burtons") to attempt to obtain a green card and reentry to the United States for their son. NUNES advised the Burtons that, notwithstanding the fact that Mark Burton had been convicted for possession of a small quantity of cocaine, he was eligible for a green card to entitle him to lawful permanent residence in the United States. (A. 1-3)

TFB alleged and maintained that Mark Burton was not eligible for such lawful permanent residence in the United States, and it is on this difference of opinion of the law

that the case was tried below. (A. 1)

At the hearing before the Referee, NUNES suffered from two distinct disadvantages. He represented himself, and he was suffering from influenza. As a result, he failed to persuade the Referee of the intricacies of the law regarding immigration. (T. Sept 29, 1995 - p. 7)

The Referee first heard the testimony of an expert on immigration law, Jeffrey N. Brauwerman, who opined as to the following points regarding Mark Burton:

> There is no waiver available for an alien who seeks to immigrate to the United States who has a prior controlled substance conviction, with the exception of a one-time conviction for simple possession for one's own personal use of marijuana less than thirty grams. (T. 30, l. 11 - 15.)
>
> The time for [Mark Burton] to have fought the battle would have been while he was here years before the deportation proceeding. But once he did not seek his 212(c) relief during that proceeding, he was found deportable and once deported, he is excludable for life as far as an immigrant, immigrant visa is concerned. (T. 33, l. 3 - 8.)
>
> There's a possibility that Mr. Burton could enter the country as a non-immigrant if he was granted that non-immigrant visa that we discussed. However, it would be just as impossible to adjust his status to that of lawful permanent resident when he is in the country as it would be to obtain an immigrant visa at the U.S. Embassy. (T. 36, l. 14 - 19.)
>
> At [the] point of time, when the alien had already been deported, and lost his lawful permanent residence status, it is impossible to obtain relief under Section 212(c), which is a section that gives the Attorney General and her delegates the discretion to admit somebody who is returning to his unrelinquished domicile as a lawful permanent resident. So it is impossible to apply for 212(c) once Mr. Burton left the United States under an order of deportation back in the mid or late eighties. (T. 40, l. 2-8.)
>
> [F]ees in [the amount charged by NUNES] for a case that could work are not unreasonable whatsoever. But in this particular case, since it was black letter law that there is no relief available, then the fees I guess by definition would

become excessive. (T. 30, l. 24 - 31, l. 3.)

TFB also called Bruce Marmar as an expert witness. He too testified that INA Section 212(a)(2) bars a person who has been convicted of cocaine possession from gaining a green card, and that this would apply to a lawful resident who was deported and thereby lost his permanent resident status. (T. 107, l. 19 - 15.)

NUNES' had applied to the U.S. Embassy in London , England for a visa for Mr. Burton. The consular officer who responded to NUNES suggested that Mr. Burton apply for discretionary relief, using Section 212(c) as a vehicle. (T. 102 l. 21 - 103, l.5.)

Both Mr. Brauwerman and Mr. Marmar opined that the consular officer was wrong in his opinion. (T. 103, l. 8-9; 119, l. 18 - 19.)

In his testimony, NUNES stated that he could have challenged Mark Burton's exclusion under Section 212(c), as the U.S. Consulate had suggested, by filing a motion to reopen the original 1988 case. (T. 203, l. 20 - 21; 204, l. 12 - 205, l. 7.)

The issue of reopening the original deportation case of Mr. Burton was not directly addressed by TFB's experts.

The Referee has made a finding of law, that "an alien who has been deported as a result of a cocaine conviction" cannot obtain relief under the "waiver" provisions contained in § 212(a) and § 212(c) of the U.S. Immigration and Nationality Act. (A. 28, ¶¶ 11 and 12 of Report of Referee).

This conclusion was reached after consideration of testimony of expert witnesses of Immigration Law, which the Referee incorrectly categorized as "unrebutted". (A. 27, ¶¶ 9 and 10 of Report of Referee).

Based on his conclusion of law that the Petitioner was unable to obtain immigration

relief for his clients, the Referee found that the Petitioner had violated the Rules of Professional Conduct, relating to the Mark Burton matter, by not offering competent representation, by failing to properly explain the matter to his clients, and by charging an excessive fee. (A. 33.)

Following the hearing before the Referee, the ATTORNEY received a September 27, 1995 Notice of Intent to Revoke the approval of Mark Burton's mother's Petition for Alien Relative, which the ATTORNEY filed. The Notice of Intent to Revoke granted the ATTORNEY leave to submit evidence in support of the petition and in opposition to revocation. (A. 6..)

Subsequently, the ATTORNEY filed a Response to Notice of Intent to Revoke. In his Response, the ATTORNEY indicated that the relief that he sought was the reinstatement of status following which Mr. Burton would seek to challenge the grounds for exclusion. The ATTORNEY raised the above stated inappropriate advice that Mr. Burton received in 1988, which was wrong advice, and, in effect, which induced Mr. Burton to waive his rights based on false information. (A. 8-10.)

The application of Mark Burton remains pending.

As a result, the ATTORNEY petitioned this Court to reopen the hearing before the Referee. This Court held that it would consider the issue of reopening hearing at the time that the Petition for Review is considered. (A. 50-55.)

Dennis Whynes

NUNES also represented Dennis Whynes who had been convicted of armed burglary, aggravated assault on a law enforcement officer, and grand theft, for which he

had been sentenced to four years. (A. 3, 30-32.)

As TFB's Complaint alleged, in or about March of 1993, NUNES was retained in connection with the pending deportation of Dennis Whynes. TFB alleged that the Petitioner had failed to provide competent representation because he used procedures which are not the ones that would have been used by the practitioners upon whom TFB relied. (A. 3-4.)

When NUNES was retained, Mr. Whynes was already being transported from the Oakdale Federal Detention in Oakdale, Louisiana to West Palm Beach Airport, via Jacksonville, for purposes of being physically put on an airplane back to Jamaica.

TFB's expert, Jeffery Brauwerman, testified that:

> any kind of a stay, no matter how short, is success for an attorney. I explain that to my clients. I may stop that plane, but there may be a new plane two days or three days from now. If you're hiring me to stop that plane, I'll do the best I can. In this case, I think a number of months transpired before Mr. Whynes was actually deported... (T. 60, l. 20 - 61, l. 7.)

Mr. Brauwerman agreed that Mr. Whynes' deportation was "ultimately delayed," although he was "not sure we know the reason why it was delayed..." (T. 95, l. 20 - 23.)

TFB's Complaint alleged that NUNES was incompetent because he failed to file an application for a Stay to the District Director of the INS. The fact that no such application was made is readily admitted by NUNES. (A. 4.)

NUNES disputes that the failure to make such an application was incompetent because to do so would be an act of futility. Instead, as the Complaint alleges, he filed a petition for adjustment of status and motions, including a motion to reopen and reconsideration and stay of deportation to the immigration judge. (A. 3, Complaint ¶ 26.)

The gravamen of TFB's Complaint was that NUNES should have followed the

procedure of filing a form (an I-246) which is an application for a stay to the District Director of the INS. (T. 52, l. 14 - 17.)

Mr. Brauwerman testified that by not filing the proper form, NUNES prejudiced Mr. Whynes' chance of receiving a stay by Kenneth Powers, the District Director of the INS, and "to that extent", there was prejudice. (T. 61, l. 11 - 22.)

However, the District Director, Kenneth Powers, himself, made it clear that any such application to him for a stay would have been more or less futile. (T. 136, l. 17 - 20; 137, l. 19 - 23; 145 l. 25 - 146, l. 3.)

Moreover, it was clear from Mr. Power's testimony that if an Immigration Judge reopens a case, the deportation is stayed, and that if the Immigration Judge refuses, the Board of Immigration Appeals (the "BIA") has the authority to Stay the deportation. (T. 142, l. 14 - 20.)

NUNES filed the documents that he filed after conferring with, not only counsel for the INS, but the actual prosecutor in the Whynes case. That prosecutor acquiesced to the filing of the Motion to Reopen. (A. 14-24.)

After NUNES filed his motions, Mr. Whynes' trip to Jamaica was interrupted. Suddenly, he was transferred back to Oakville, Louisiana, instead of being physically deported. Mr. Brauwerman interpreted the reason to be that there was a "proceeding still pending." (T. 95, l. 8 - 19.)

On October 30, 1995, the Honorable Howard C. Berman, Referee, entered his Report of Referee which has been filed with this Court. (A. 25.)

This Petition for Review follows.

SUMMARY OF ARGUMENT

This entire matter hinges on the one question in two cases, whether or not it was possible for the Petitioner to have succeeded in obtaining some assistance in the course of rendering the legal services which he had undertaken.

Since, as a matter of law, Mark Burton's cocaine conviction was not a necessary dead end to any chance of his obtaining a green card, the Petitioner is not guilty of any of the misconduct alleged in Counts I, II, and III of the Complaint.

As NUNES had testified, by moving to reopen the original deportation proceedings on the basis of ineffective assistance of counsel or for failure of the Immigration Judge to have properly advised Mark Burton of his option to apply for Section 212(c) relief without the need of being incarcerated for six months, Section 212(c) could have been implemented.

NUNES was effective in his efforts to delay the deportation of Dennis Whynes.

Although TFB's witness believed that an application should have been made for a stay to the District Director, the testimony of the District Director made it obvious that such an application would have been an exercise in futility.

The only chance that Dennis Whynes had to retain lawful permanent residency in the United States was on a reopening of his case. In the meanwhile, while his case was either reopened or while motions were pending to reopen it, Mr. Whynes' deportation was delayed.

Accordingly, NUNES had a measure of success that TFB's expert would never have had, because he would have made only an application to Mr. Powers which would have been useless.

ARGUMENT

I. THE REFEREE ERRED BY FINDING, AS A MATTER OF LAW, THAT "AN ALIEN WHO HAS BEEN DEPORTED AS A RESULT OF A COCAINE CONVICTION" CANNOT OBTAIN RELIEF UNDER THE "WAIVER" PROVISIONS CONTAINED IN § 212(a) AND § 212(c) OF THE U.S. IMMIGRATION AND NATIONALITY ACT

There is no question that NUNES was retained to help Mark Burton to secure his green card, or to lawful permanent residence in the United States.

Also, there was no question that Mr. Burton had been deported in 1988 after he had been convicted of simple possession of cocaine; NUNES knew of that conviction and deportation, and that NUNES, with that knowledge, offered some hope to Mr. Burton and Mr. Burton's parents, that he would try to obtain the relief of lawful residence for their son.

TFB's entire case is based on the legal issue that such an entry is not possible as a matter of law, and that for NUNES to offer such help and accept funds for it is necessarily improper advise, an improper fee, and the effort to obtain admittance is proof of incompetence.

NUNES' plan to attempted to have Mr. Burton admitted relied on § 212(c) of the U.S. Immigration and Nationality Act (hereinafter "§ 212(c)"), which states:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of [the sections of the code that call for the exclusion of an alien resident convicted of a offenses including Mr. Burton's controlled substance offense.]

On first glance, on a strict reading of § 212(c), it appears that one who desires to implement it must be abroad or absent from the United States. However, the Courts have consistently held that § 212(c) may be invoked by one facing exclusion or deportation.

See *Casalena v. INS*, 984 F.2d 105 (4th Cir. 1993); *Nannies-Pena v. INS*, 956 F.2d 223 (10th Cir. 1992); *Cordoba-Chaves v. INS*, 946 F.2d 1244 (7th Cir. 1991); *Chiravacharadhikul v. INS*, 645 F.2d 248 (4th Cir. 1981) cert. den. 454 U.S. 893, 70 L.Ed.2d 207, 102 S.Ct. 389; *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981); *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979); *Francis v. INS*, 532 F.2d 268 (2d. Cir. 1976).

It is also apparent from a strict reading of § 212(c) that one who has already been deported may not seek relief from this waiver (or pardon) provision.

Although this is true for one who has been properly deported for an improper entry into the United States or for one who has been deported after being properly advised of the availability of § 212(c), it is not necessarily true for one such as Mr. Burton.

As NUNES has alleged in Mr. Burton's Response to Notice of Intent to Revoke, which is still pending, Mr. Burton had ineffective assistance of counsel, in that he was advised to plead guilty without any warning that his residential status could be revoked.

Because Mr. Burton had been a lawful resident for over seven consecutive years prior to his conviction, he was eligible for § 212(c) relief at the time that he originally appeared before the immigration judge that deported him.

Mr. Burton was apparently told that although the § 212(c) relief waiver was available, the trial date would not come for six months, during which time, he would remain incarcerated. He was given the alternative, that he could leave the country for five years and then be eligible to return.

Mr. Burton waited the five years, only to learn that he had been wrongly advised and that he was permanently banished from the United States.

NUNES was moving to reopen the exclusion hearing by which Mr. Burton was

excluded back in 1988, and there is authority that this relief is available, notwithstanding that there was a finding of deportability.

NUNES was seeking a decision by an immigration judge and then the BIA for an order *nunc pro tunc*, as in *M___ C___*, 9 I & N Dec 280 (BIA 1961) and *Re Ng*, 171 I & N Dec 63 (BIA 1979), which is cited in the Response to Notice of Intent to Revoke.

An immigration judge and the Board of Immigration Appeals have the power in either exclusion or deportation proceedings to grant *nunc pro tunc* permission to reapply for admission following a deportation when the grant will effect a complete disposition of the case. *Re Ng, id.*; *Matter of Ducret*, 15 I & N Dec. 620 (BIA 1976); *Dragon v. INS*, 748 F.2d 1304 (9th Cir. 1984).

Moreover, an alien may collaterally attack a final order of exclusion or deportation in a subsequent deportation proceeding if he or she can show that the prior order resulted in a gross miscarriage of justice. *Ramirez-Juarez v. INS*, 633 F. 2d 174 (9th Cir. 1980), *Hernandez-Almanza v. INS*, 547 F. 2d 100 (9th Cir. 1976), *Re Roman* 19 I & N Dec 855 (BIA 1988).

The circumstances of the Mark Burton case were that Mr. Burton suffered a greatly unfair consequence of accepting the advise of his counsel in 1988. His choices should have been advised correctly. It would have been that the application for a § 212(c) waiver could have been heard promptly, and that if the application for waiver was waived, that Mr. Burton would be excluded and that he would never be given another opportunity to return to the United States as an lawful resident. Instead, he was given wrong advise, and necessarily, ineffective assistance of counsel. Hence, there was a basis to reopen the 1988 proceeding.

The immigration judge and the Board of Immigration Appeals will look to the fairness of the procedure implemented in inducing a § 212(c) application. *Re Gordon*, 17 I & N Dec 389 (BIA 1990). Also, if an alien is deprived of due process at the deportation hearing, he or she will be entitled to relief. *Vides-Vides v. INS*, 783 F. 2d 1463 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F. 2d 918 (9th Cir. 1974), cert denied, 419 U.S. 1113 (1975). Although there are no cases immediately on point, it is reasonable that they would also look to the fairness of a relinquishment of rights.

TFB claims that the ATTORNEY is incompetent because he sought § 212(c) relief when such relief was not available. Apparently, TFB and the Referee failed to understand, and the ATTORNEY failed to properly explain, though he tried, that § 212(c), though not available after Mark Burton was deported from the United States, it was available before he was deported.

The ATTORNEY was attempting to reopen the original proceeding due to the fact that his client had been denied due process.

TFB's experts never addressed this point, as they simply stated the obvious limitation of § 212(c) and they never attempted to understand the manner in which the ATTORNEY was approaching his case.

No hypothesis was given to any expert as to reopening the original proceeding where Mr. Burton should have been offered the opportunity to apply for § 212(c) relief. They were simply asked if Mr. Burton could now make such an application. Naturally, the answer was "no".

Neither the Referee nor this Court can know what the answer would have been to the question of whether the ATTORNEY might have been successful by petitioning the

immigration judge, and later to the Board of Immigration Appeals, to reopen the deportation proceeding where Mr. Burton had been deprived of his right to due process.

Certainly the case law does not appear to preclude such relief.

In any event, the opinion of the law from a practitioner should not be the final word on such an issue. Perhaps his opinion is necessary in terms of the amount that was charged for a fee, but as to questions of law, the Referee was required to perform his own review.

It should make no difference that Jeffrey N. Brauwerman or Bruce Marmar is of the opinion that there is no § 212(c) waiver available for an alien who has a prior controlled substance conviction. This is a question of law, not fact and this issue should be resolved by the Court's analysis of the law.

Likewise, it should not matter if a consular officer opines that Mr. Burton may apply for discretionary relief, using § 212(c) as a vehicle.

In the case at bar, it appears from his opinion, that the Referee relied on the opinions of the experts, which the Referee deemed to be un-rebutted, notwithstanding the testimony of NUNES and the opinion of the U.S. Consulate.

This would not necessarily be error, if it so happened that the law was consistent with the findings of the Referee. However, they were not consistent. The experts were correct that there is no relief under § 212(c) for one who has been deported. However, they failed to apply the facts in the Burton case to that general proposition.

TFB's experts are obviously the kind of conservative attorneys who will sit on their hands while they sing "Too bad. So sad.", and offer no relief. They were not the ones faced with the task of righting the wrong that caused Mr. Burton to be deported and totally

excluded or banished from the land in which his parents reside. The experts observed the gross injustice, but they would have made no move to correct it.

NUNES, on the other hand, took a more radical approach. He chose to challenge a five year old deportation decision. For this efforts, his fee was reasonable, if not low. Moreover, there has been no determination as to NUNES' success. That is why the proceeding before the Referee should be reopened.

There is a distinct possibility that NUNES may be disciplined for being incompetent because he pursued a path that may end up being proved the correct path.

Lastly, in considering the issue in the Burton case, it is necessary to consider what degree of inability is tantamount to incompetence. Certainly, lack of success in the outcome of a case is not sufficient to deem an attorney incompetent. If that were the case, there would be few attorneys that could pass, and most of them would be involved in transactional work, not litigation.

Malpractice, in itself is not necessarily tantamount to incompetence. *The Florida Bar v. Kneal*, 384 So. 2d 1264 (Fla. 1980).

Here, NUNES tried to accomplish what he believes he can. The experts have not opined as to the reopening of the original deportation. There is no black letter law that NUNES is precluded from reopening the original deportation proceeding. In fact, he may yet be successful.

If it turns out that NUNES was wrong, such was not an indication of incompetence. In fact, it was indicative of a higher level of skill and effort than that which the experts would have attempted.

Certainly, the evidence is not sufficient to prove clearly and convincingly that

NUNES is incompetent.

II. THE REFEREE ERRED BY FINDING THAT THE PETITIONER WAS INCOMPETENT FOR FILING THE FORMS THAT HE FILED FOR DENNIS WHYNES

NUNES again had the success that TFB's experts would have missed.

NUNES was retained to stop the deportation. According to Jeffery Brauwerman, ***"any kind of a stay, no matter how short, is success for an attorney."***

There is no question that Mr. Whynes was en route to an airplane ride to Jamaica. NUNES filed some documents and suddenly Mr. Whynes' trip to Jamaica was stopped and he was returned to being held in Louisiana for a few months.

The basis of TFB's case was that NUNES failed to file an application for a Stay to the District Director of the INS, Kenneth Powers. Mr. Brauwerman was clear that this was the form of relief that should have been presented. However, it is also clear that NUNES knew that such an effort would have been futile, notwithstanding that it was theoretically available.

In the trial before the Referee, there was not only insufficient evidence presented to show clearly and convincingly that NUNES was wrong in his opinion that such an application to Kenneth Powers would have been useless, but Mr. Powers' testimony was convincing that he would have done just what NUNES expected.

The only place that Mr. Brauwerman opined that NUNES had prejudiced Mr. Whynes was in that NUNES had not made the application to Mr. Powers. Therefore, there was no evidence that NUNES had done anything incompetent in regard to his

representation of Mr. Whynes.

In fact, it is likely that Mr. Brauwerman would have been the one who would have been acting frivolously by making futile applications for relief which is realistically unavailable. Moreover, it must be remembered that Mr. Whynes was on his way out of the country. He was already in transit. If his attorney were to waste time with futile applications to the District Director of the INS, valuable time would have been wasted and the likelihood would be that Mr. Whynes would have been physically deported before further motions, such as the ones that NUNES successfully presented. They would have been too late if they were the second procedure implimented.

NUNES conferred with Counsel of the INS and he did as he was advised.

Whether or not the forms filed by NUNES were the ones that would conventionally be served, it is clear that Mr. Whynes' trip was interrupted and that he was returned to Louisiana. No one seemed to know the reason for the reversal, and TFB would prefer to believe that it was simply a coincidence. However, it is clear that it is at least a coincidence and probably a cause and effect.

As long as there is a pending Motion to Reopen, whether before the Immigration Judge or before the Board of Immigration Appeals, there was a pending matter and Mr. Whynes would not have been physically deported. Moreover, as bad as his conduct had been, there was a basis for a waiver which could have been reopened. In that case, however, Mr. Whynes precluded a final determination by voluntarily departing.

Here, the Court heard from a so called expert who advances a suggestion that NUNES should have applied to Mr. Powers for relief that Mr. Powers would have never given. Perhaps he is incompetent. NUNES was advised by INS counsel, who is presently

sitting as an Immigration judge that he would not oppose NUNES' Motion to Reopen Mr. Whynes' case. Perhaps this was incompetent. The Consulate who suggested that Mr. Burton should have applied for § 212(c) relief must have been just as incompetent as NUNES. Even Mr. Powers did not know that an appeal from the Board of Immigration Appeals is to the Federal Circuit Court of Appeals, rather than the Federal District Court. (T. 142-143.)

The fact of the matter is that NUNES practices in a field of law which is complicated and constantly changing. For TFB to expect a degree of excellence in this field is admirable, but it appears that it is unrealistic. Otherwise, the standard may require the suspension of all of attorneys who strive to find the non-obvious weak points or the exceptions to a law that imposes hardship upon their clients.

If NUNES deserves to be branded an incompetent, when all he was trying to accomplish was to go the extra mile to find the relief that his clients and, especially in the Burton boy's case, to do as justice demanded, then let the attorney who is willing to take a client's money to make a useless application to Mr. Powers also be so branded. Let the U.S. Consulate who advised NUNES to do what is now called incompetent be so branded. Let the INS counsel who advised NUNES also be determined to be incompetent.

TFB is seeking that the state court assess the level of performance in a federal forum which is different and distinct in the manner of practice from any state forum. Perhaps, if TFB attempts to apply its standards to this different area of law, attorneys who are technically incorrect in their methods, but who are effective, nonetheless, will be barred from practicing while those who use only the prescribed forms but are ineffective will carry on.

Here, NUNES accomplished his goal. He delayed Mr. Whynes' deportation. In the

Burton case, he may yet be successful.

Unfortunately, the Referee who was concerned and who appeared to pay close attention to the argument and evidence before him, did not do the type of legal analysis that appears above in this brief. He relied on experts who did not understand nor comment on the particular type of action taken by NUNES. There is a distinction between the normal or standard practice of immigration law and the practice of criminal-immigration law, where a practitioner such as NUNES attempts to assist immigrants who have been convicted.

In the Burton case, TFB's experts did not opine as to the reopening of the original case, and in the Whynes' case, they admittedly did not know why Mr. Whynes was turned around. An analysis of the law was required and NUNES, himself, was not clear and direct in explaining his position or the reasons for his filings. He was ill and made the mistake of representing himself. His emotional involvement and assumption of being understood was apparent throughout the transcript.

However, his point of view should now be apparent, with the assistance of the undersigned counsel. NUNES' representation was above the standard, not below it. Certainly, he was not incompetent.

Again, as in the Burton matter, the onus was upon TFB to prove clearly and convincingly that NUNES had been incompetent. Here, it had to prove that he was incompetent by failing to file the application to Mr. Powers. In that respect, TFB has clearly failed in that there is no competent substantial evidence on the record to support that the making of the application to Mr. Powers would have been anything but a waste of time which was evident from Mr. Power's own testimony.

CONCLUSION

For all of the foregoing reasons, NUNES asks that this Honorable Court reverse the Findings of the Referee, or in the alternative, that this matter be referred back to the Referee to consider the additional evidence that has come into existence after the hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this **10th day of February, 1996**, to **RONNA FRIEDMAN YOUNG, ESQUIRE,** The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309; and **JOHN A. BOGGS**, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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