IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-4653
Summary Calendar

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SAMUEL OJO ADETIBA,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

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Petition for Review on an Order of the
Immigration and Naturalization Service (A29 571 508)

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October 6, 1993

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Samuel Ojo Adetiba appeals his deportation pursuant to section 241(a)(2)(A)(ii), codified at 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp. 1990), which provides for deportation of aliens who have been convicted of two or more crimes involving moral turpitude not arising out of a single scheme. In this petition for review of the Board of Immigration Appeal's ("BIA")

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

deportation order, Adetiba claims that his due process rights were violated and that his crimes involved only a single scheme. Jurisdiction in this court is proper because decisions of the BIA are appealable directly to this court. 8 U.S.C. § 1105a(a)(2). We affirm the decision of the BIA.

## I. Background

Samuel Ojo Adetiba was admitted as a visitor to the United States on October 27, 1980. On June 8, 1989, he was granted permanent resident status pursuant to section 245A of the Act, 8 U.S.C. § 1255a. The next year, he was convicted of fifteen counts of postal fraud, postal fraud using a false name, falsely misrepresenting a social security number, and using access devices. His appeal of the conviction to the Fourth Circuit was dismissed on October 23, 1991 for failure to file a timely appeal.

On October 24, 1991, the INS began deportation proceedings against Adetiba by filing an order to show cause with the Immigration Judge ("IJ"). In the hearing on the order, Adetiba, then represented by counsel, denied the allegations concerning his conviction and requested relief under section 212(c), codified at 8 U.S.C. § 1182(c). However, the IJ ruled that petitioner was not eligible for this relief because he had not achieved the requisite seven consecutive years as a permanent resident alien. At a subsequent hearing, at which petitioner was not represented by counsel, the IJ ruled that he was deportable

because of his convictions for fraud, pursuant to section 241(a)(2)(A)(ii) of the Act. 8 U.S.C. § 1251(a)(2)(A)(ii).

Petitioner appealed the decision of the IJ to the BIA on several grounds, including claims that the IJ erred in finding that the crimes committed by petitioner were two crimes not arising out of a single scheme, that his conviction was not final, and that the INS had violated due process by charging him and issuing a detainer in Oakdale, Louisiana. The BIA addressed the "single scheme" and finality of the conviction claims, finding that all others lacked merit. The BIA dismissed Adetiba's appeal, from which he appeals to this court.

## II. ANALYSIS

Adetiba, appearing pro se, appeals the decision of the BIA on the grounds that the BIA erred in determining that his crimes were not a single scheme and that his conviction was final. He also claims that the BIA's and Immigration and Naturalization Service's ("INS") procedure used for filing the order to show cause and for venue as well as the denial of section 212(c) relief deprived him of due process.

The BIA's opinion discussed section 241(a)(2)(A)(ii) of the Act, entitled "Multiple criminal convictions", which provides:

> Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

8 U.S.C. § 1251(a)(2)(A)(ii). According to the BIA, Adetiba's crimes did not arise out of a single scheme of criminal conduct

because "when an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct." The BIA cited with approval Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976), cert. denied, 430 U.S. 985 (1977), which stated that "a scheme, to be a 'single scheme', must take place at one time; there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done." Id. at 451.

Congress has not defined the phrase "a single scheme," leaving its meaning up to the BIA and other courts. This court reviews determinations made by administrative agencies concerning ambiguous law using a two-prong test. Iredia v. INS, 981 F.2d 847, 848 (5th Cir. 1993), petition for cert. filed, (U.S. Apr. 7, 1993). First, the court considers the interpretation of law by the agency, which is given considerable weight and deference. Id. The court will uphold the agency's interpretation of ambiguous law when it is reasonable. Id.; see Chevron, U.S.A., Inc. v. National Resources Defense Counsel, Inc., 467 U.S. 837, 844-45 (1984). After considering the BIA's analysis of law, the court should consider the agency's findings of fact under the substantial evidence test. Iredia, 981 F.2d at 848. This test provides that the agency's conclusion will be upheld if its conclusion is based on the evidence and is substantially

reasonable. Rojas v. INS, 937 F.2d 186 (5th Cir. 1991). See also Animashaun v. INS, 990 F.2d 234, 237-38 (5th Cir. 1993) (upholding the standard of review enunciated in Iredia), petition for cert. filed, (U.S. Aug. 9, 1993).

In Iredia, the petitioner was a permanent resident who was convicted of thirteen counts of unauthorized use of credit cards. Iredia, 981 F.2d at 848. Iredia had applied for the cards using false names and social security numbers, and received the cards at post office boxes rented under false names. He used the cards to make fictitious purchases of equipment so that he could deposit the card vouchers in a bank. Id. Both the IJ and the BIA ruled that each time Iredia used a card illegally was a separate and distinct crime. Thus, Iredia's conduct involved more than one single scheme of criminal misconduct pursuant to section 241(a)(2)(A)(ii), and he was subject to deportation, according to the BIA. Id. This court upheld the BIA's interpretation of the statute, finding that it was not unreasonable. Id. at 849. In addition, the convictions on multiple counts were "substantial evidence" of criminal activity involving more than one single scheme. Id. See also Animashaun, 990 F.2d at 237-38 (holding, on very similar facts, that the BIA's interpretation of "a single scheme" was reasonable).

The facts in the instant case are almost identical to those in Iredia. Adetiba was convicted of fifteen counts of postal fraud, postal fraud using a false name, falsely misrepresenting a social security number, and using access devices. He had applied

for credit cards under four false names and social security numbers and charged several thousand dollars. The test enunciated by the BIA below is substantially similar to the test upheld in Iredia and Animashaun. Adetiba cites United States v. Lemons, 941 F.2d 309 (5th Cir. 1991), for the proposition that this court has previously defined the phrase "a single scheme" to mean other than the BIA's definition. This case involved a conviction for bank fraud and did not touch on issues of immigration law. Petitioner cites many other cases also for the proposition that the BIA's interpretation is not the only one possible and that other interpretations have been upheld by the courts. However, petitioner's reliance on these cases is misplaced. The issue in a case challenging a statutory interpretation by the BIA is whether it is reasonable, not whether it is the most reasonable of all possible interpretations. Iredia, 981 F.2d at 849. The BIA has met this burden of proving that its interpretation is not unreasonable. In addition, Adetiba's conviction on multiple counts, like Iredia's conviction, is "substantial evidence" of criminal activity involving more than one single scheme.

Petitioner also claims that his due process rights were violated when the court refused to allow him to present additional evidence concerning his crimes to show that they were part of a single scheme.[1] However, presenting additional

[1]Petitioner also claims that the judgment against him had been altered to reflect a fine of $71,386.19 instead of $7,386.19. The amount of the fine is not relevant to these

evidence to explain his crimes would not have helped petitioner. The BIA has stated that an alien is deportable under section 241(a)(2)(A)(ii) if he performs a criminal act and then performs another criminal act, even if the two acts are similar and part of an overall criminal plan. 8 U.S.C. § 1251(a)(2)(A)(ii). Adetiba was convicted of several counts of postal fraud involving use of different credit cards on different dates which were obtained using false names and false social security numbers. This is substantial evidence to support the BIA's order of deportation; refusing to take additional evidence was not a violation of due process. See Iredia, 981 F.2d at 849 (holding that petitioner's conviction on separate counts of credit card fraud was substantial evidence of his participation in multiple schemes).[2]

Adetiba makes an allegation less directly, incorporating previous statements from briefs into his brief before this court. This claim involves the finality of his conviction for fraud. Petitioner's attorney missed the deadline for appeal of this

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proceedings.

[2]In his reply brief, petitioner claims for the first time that he was denied access to legal materials or a law library, which he needed to prepare his reply brief. Specifically, he alleges that he was unable to obtain access to or copies of two cases, Iredia and Animashaun, cited by the INS. A prisoner retains the right of access to the courts; however, he must show prejudice to maintain a valid claim of denial of access. Henthorn v. Swinson, 955 F.2d 351, 354 (5th Cir. 1992), cert. denied, 112 S. Ct. 2947 (1992). We have reviewed these cases carefully and do not believe that petitioner's case would have been aided by addressing these cases because they are both entirely dispositive of the case against him.

conviction to the Fourth Circuit. Although petitioner still has the possibility for collateral review of the conviction, the direct appeal has ended. For immigration purposes, a conviction is final when direct appellate review is exhausted, and the possibility of collateral relief does not change Adetiba's eligibility for deportation. See Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982) (stating that post conviction motions do not affect the finality of the conviction for immigration purposes until it is overturned). In addition, the BIA found that the conviction was final for immigration purposes. This court reviews the BIA's interpretation of the Act with great deference, and will uphold it if it is not unreasonable. Rivera v. INS, 810 F.2d 540, 540 (5th Cir. 1987). The BIA's decision that conviction is final for immigration purposes when direct appeal has ended, which is based soundly on this court's prior decisions, is not unreasonable.

Adetiba also claims that the BIA violated due process by denying that he was eligible for relief pursuant to section 212(c) of the Act. 8 U.S.C. § 1182(c). Petitioner failed to raise this question with the BIA. This court does not address issues not raised below unless they are purely legal issues and failure to do so would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36 (5th Cir. 1990). On the facts, we are not convinced that failure to address this claim

would result in manifest injustice because petitioner has not demonstrated that he was eligible for this relief.[3]

Petitioner makes several additional allegations, all of which the BIA decided had no merit. As to the BIA's factual findings, this court must affirm the BIA's decision that petitioner's claims had no merit if the BIA has made no error in law and if its factual findings are supported by reasonable, substantial and probative evidence on the record as a whole supports its findings. Howard v. INS, 930 F.2d 432, 434 (5th Cir. 1991). As to interpretations of the Act, this court reviews the BIA's decision with great deference. Rivera, 810 F.2d at 540. One of the claims the BIA found to be without merit is a challenge to the venue, in which Adetiba argues that his due process rights were violated by venue in Louisiana.[4] According

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[3]Section 212(c) provides an exception to deportation for permanent resident aliens who have lived in the United States for seven consecutive years. Ghassan v. INS, 972 F.2d 631, 634 (5th Cir. 1992), cert. denied, 113 S. Ct. 1412 (1993); Mantell v. United States Dep't of Justice, INS, 798 F.2d 124, 125 (5th Cir. 1986). Petitioner claims that when he was granted permanent resident alien status, his status dated back to January 1, 1982. The section that petitioner has apparently cited for this proposition is section 202 of Pub. L. 99-603, as amended Pub. L. 100-525, § 2(i), Oct. 24, 1988, 102 Stat. 2612. This is part of a superseded section which only applied to Cuban or Haitian entrants under certain circumstances. Petitioner is Nigerian. Because Adetiba received permanent resident status in 1989, he is ineligible for section 212(c) relief, having failed to acquire the requisite seven years lawful permanent residence required by the statute and this court's decisions. 8 U.S.C. § 1182(c); Ghassan, 972 F.2d at 634; Mantell, 798 F.2d at 125.

[4]Petitioner claims that several of his exhibits from his appeal of the IJ's order do not appear in the record. However, they do appear in the record before this Court. Also, petitioner claims that the charging instrument was falsified, although this is apparently the subject of an appeal pending before the BIA and

to 8 CFR § 3.14(a), cited by Adetiba, jurisdiction vests when a charging document is filed with the IJ by the INS, except in circumstances not at issue here. In addition, 8 CFR § 3.20 provides that venue shall lie at the office of the IJ where the charging document is filed. The IJ may allow a change of venue only upon motion of one of the parties for good cause after the other party has been given notice and an opportunity to respond. 8 CFR § 3.20. Thus, merely because petitioner preferred venue in Texas does not mean that venue in Louisiana was improper.

Adetiba also challenges assertion of jurisdiction over him in Louisiana instead of in Texas, where he and favorable witnesses to his case resided. It is possible that he would have been eligible for a change of venue had he moved for one. See Baires v. INS, 856 F.2d 89, 92-93 (9th Cir. 1988) (stating that the IJ should have granted the petitioner's motion to change venue where the petitioner had worked in another area, had family there, had acquired an attorney and expert witnesses there and where he had not asked the court for unreasonable delays); Chlomos v. United States Dep't of Justice, INS, 516 F.2d 310, 312-15 (3d Cir. 1975) (holding that due process was violated where location for the deportation hearing prevented petitioner's attorney from representing him and where the INS failed to provide notice to that attorney of the proceedings). Although petitioner claims that detaining him in Louisiana rather than in Texas was unfair, it does not appear in the record or his brief

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is not at issue here.

that he ever requested or moved for the court to transfer him. Absent even a request that could be loosely construed as a motion to change venue, this court can not find that maintaining venue in Louisiana violated due process. Thus, the BIA's decision that petitioner's claims regarding venue and jurisdiction lacked merit is not unreasonable. Howard, 930 F.2d 434.

In addition, Adetiba apparently challenges the use by the INS of a detainer, which he claims was filed and withdrawn several times. It is not apparent how this violated his due process rights. The INS has the authority to issue a detainer pursuant to 8 U.S.C. § 1357(d). Petitioner's real complaint in this context may be that he should not have been detained in Louisiana. However, as discussed previously, detention in Louisiana was proper without a motion to change venue. Again, the BIA's decision that this claim lacked merit not an error of law and is supported by reasonable, substantial and probative evidence. Howard, 930 F.2d at 434.

He also challenges an order to show cause, dated in handwriting February 6, 1990. If this document had been issued on this date, it would have preceded his arrest on fraud charges; petitioner claims that this document shows that the INS prejudged him and violated his due process rights. However, two date stamps on this document indicate that it was filed in February 1991, not 1990. Thus, in all probability, this document was issued after his arrest, and does not demonstrate that the INS prejudged him. See United States v. Woods, 995 F.2d 713, 715

(7th Cir. 1993) (holding that the appellant had failed to show that there was a factual dispute where a date stamp conflicted with a handwritten date and that it was a trivial matter). This was one of the claims that the BIA dismissed as lacking merit. The determination of the BIA as to a factual conclusion should be upheld by the court if it is supported by substantial evidence in the record. Howard, 930 F.2d at 434. Under these circumstances, there is sufficient evidence to support the determination of the BIA that this issue lacked merit.

## III. Conclusion

In sum, we find that the BIA's interpretation of "a single scheme" and the finality of convictions for immigration purposes was reasonable. In addition, its determination that Adetiba's other claims lacked merit was reasonable and supported by substantial evidence. For the foregoing reasons, we find that the BIA was correct in dismissing petitioner's appeal. The order of the BIA is affirmed.