**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 92-4684

(Summary Calendar)

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FELIPE AGUIRRE-PEDROZA,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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Petition for Review of an Order of
the Board of Immigration Appeals
(A36 744 081)

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(March 4, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Felipe Aguirre-Pedroza seeks review of a Board of Immigration Appeals ("BIA") decision, arguing that the BIA abused its discretion in denying: (1) his application for relief under § 212(c) of the Immigration and Naturalization Act ("Act"), 8 U.S.C. § 1182(c) (1988); and (2) his motion to reopen and remand deportation proceedings. *See I.N.S. v. Doherty,* ___ U.S. ___, 112 S. Ct. 719, 116 L. Ed. 2d 283 (1992). We affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## I

Aguirre-Pedroza is a 31 year old Mexican citizen who has lived in the United States as a permanent lawful resident for about 11 years. He presently resides at his automotive shop in San Antonio. He is married, and his wife and children are natives and citizens of Mexico, where they live in a home rented by Aguirre-Pedroza in Nuevo Laredo.

In June 1988, Aguirre-Pedroza was convicted of possession of approximately 7.5 pounds of marijuana. He was sentenced to three years probation, and fined $500. He apparently had no prior criminal record.

The same day he was convicted, the Immigration and Naturalization Service ("INS") charged him with deportability under section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11) (1988). The immigration judge denied his application for waiver of deportation, brought under section 212(c) of the Act,[1] 8 U.S.C. § 1182(c), and found him deportable. The BIA affirmed.

Aguirre-Pedroza challenges the BIA's decision, arguing that the BIA abused its discretion in denying his waiver application and motion to reopen.

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[1] Section 212(c) of the Act provides discretionary relief from deportation for permanent resident aliens who have accrued more than seven consecutive years of lawful, unrelinquished domicile in the United States. 8 U.S.C. § 1182(c); *see Mantell v. United States Dept. of Justice, I.N.S.,* 798 F.2d 124, 125 n.2 (5th Cir. 1986).

## II

### A

Aguirre-Pedroza first challenges the BIA's denial of his waiver application. We review the BIA's denial of relief under § 212(c) for abuse of discretion. *Diaz-Resendez v. I.N.S.,* 960 F.2d 493, 495 (5th Cir. 1992). "Such denial will be upheld unless it is arbitrary, irrational, or contrary to law." *Id.* "Findings of fact supporting the Board's exercise of discretion, however, are reviewed merely to determine whether they are supported by substantial evidence." *Id.*

In adjudicating a waiver application under § 212(c) of the Act, the BIA must balance "the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interest of this country." *See id.* at 495-96 (quoting *In Matter of Marin,* 16 I & N Dec. 581 (BIA 1978)). "Applicants for discretionary relief who have been convicted of serious drug offenses must show `unusual or outstanding equities.'" *Id.* at 496 (quoting *Marin,* 16 I & N at 586 n.4).

Aguirre-Pedroza contends that the BIA abused its discretion in applying the outstanding equities standard to his case.[2] This argument is without merit. As the BIA correctly pointed out, 7.5

[2] The BIA found that Aguirre-Pedroza's conviction for possession of 7.5 pounds of marijuana was a serious drug offense, which required that Aguirre-Pedroza demonstrate unusual or outstanding equities before receiving discretionary relief under section 212(c). *See* Record on Appeal at 63-64.

pounds (3397.5 grams) of marijuana is not an unsubstantial amount of marijuana for the purpose of deportation. *See* 8 U.S.C. § 1251(a)(2)(B)(1) (West Supp. 1992) ("Any alien who at any time after entry has been convicted of a violation for a conspiracy or attempt to violate any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana is deportable."); *see also Mantell v. I.N.S.,* 798 F.2d 124, 128 n.4 (5th Cir. 1986) (finding no abuse of discretion in the BIA's finding that petitioner's positive equities did not outweigh conviction for usable quantity of marijuana). Furthermore, though Aguirre-Pedroza was only convicted of simple possession, the amount of 7.5 pounds of marijuana could support an inference that the marijuana was not for Aguirre-Pedroza's personal use.[3] *See United States v. Nash,* 876 F.2d 1359, 1361 n.2 (7th Cir. 1989) ("[Defendant's] claim, that possession of five pounds of marijuana is consistent with personal use, is, as the district court found, simply unbelievable."), *cert. denied,* 493 U.S. 1084, 110 S. Ct. 1145, 107 L. Ed. 2d 1049 (1990); *United States v. Blakeney,* 753 F.2d 152, 154 (D.C. Cir. 1985) ("Possession of [4.8 pounds] of marijuana alone is sufficient evidence to justify appellant's conviction for possession with intent to distribute marijuana . . . ."). Therefore, the BIA did not abuse its discretion in finding that Aguirre-Pedroza's

[3] The trafficking or selling of controlled substances is *per se* a serious drug offense. *See Ayala-Chavez v. I.N.S.,* 944 F.2d 638, 641 (9th Cir. 1991) (citing *Marin,* 16 I & N at 586 n.4).

conviction for possession of 7.5 pounds of marijuana was a serious drug offense, warranting the application of the outstanding equities standard.[4]

Aguirre-Pedroza also argues that the BIA abused its discretion in weighing his positive and negative factors. He specifically argues that his favorable factors))namely eleven years of lawful residency in the United States; the presence of his father and mother, four sisters and three brothers in the United States; and his history of employment and good character))outweigh his criminal conviction. We disagree. At the time of the deportation hearing, Aguirre-Pedroza had barely established a seven-year residency in this country. *See* Record on Appeal at 113. Although Aguirre-Pedroza's father, mother and at least five siblings are lawful residents or U.S. citizens, *see id.* at 114, Aguirre-Pedroza failed to establish))even with the additional testimony included in his motion to reopen[5]))any unusual ties or dependencies. Not even

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[4] Aguirre-Pedroza maintains that the BIA arbitrarily applied the outstanding equities standard because the BIA has consistently held that the selling, and not mere possession, of drugs is a serious offense. *See* Brief for Aguirre-Pedroza at 15. We disagree because the BIA has not limited the scope of "serious drug offenses" to the trafficking or selling of drugs. *See Marin,* 16 I & N. at 586 n.4 ("[W]e require a showing of unusual or outstanding countervailing equities by applicants for discretionary relief who have been convicted of serious drug offenses, particularly those involving the trafficking or sale of drugs.").

[5] Aguirre-Pedroza's motion to reopen included letters and affidavits from his probation officer, family, and friends, attesting to his gainful employment as a mechanic, *see* Record on Appeal at 11, and good character. *See, e.g., id.* at 49 ("[Felipe] has become a hard worker and a responsible individual."), 50 ("[Felipe] is caring and respectful to his clients and I am sure he treats them with honesty."), 52 ("Felipe is a good person, is a hard worker and of good moral character.").

Aguirre-Pedroza disputes that his wife and four children live in Mexico, *see id.* at 116, and that he no longer lives with his parents. *See id.* at 48. Therefore, we cannot conclude that the BIA acted in a capricious or arbitrary manner in balancing the equities. *See Diaz-Resendez,* 960 F.2d at 497 (finding that the BIA arbitrarily held that petitioner failed to demonstrate outstanding equities, where the petitioner's positive factors included: (a) his age of 54 years; (b) his 37 years in the U.S.; (c) the fathering of six citizen children, three of whom were dependent on him; (d) his reputation for being a "hardworking family man and provider"; and (e) his almost spotless criminal record).

**B**

Aguirre-Pedroza also maintains that the BIA abused its discretion by denying his motion to reopen based upon ineffective assistance of counsel. The BIA's denial of a motion to reopen deportation proceeding is reviewed for abuse of discretion. *I.N.S. v. Doherty,* ___ U.S. ___, 112 S. Ct. 719, 725. Motions to reopen immigration proceedings are plainly disfavored. *Id.* at 724. The Attorney General has broad discretion to grant or deny such motions, *see id.,* and a party seeking to reopen bears a heavy burden. *I.N.S. v Abudu,* 485 U.S. 94, 110, 108 S. Ct. 904, 914, 99 L. Ed. 2d 90 (1988).

Aguirre-Pedroza contends that his attorney's failure to submit evidence of demonstrated rehabilitation to the immigration judge denied him effective assistance of counsel. We disagree. Although ineffective assistance of counsel may be so egregious as to

constitute a fifth amendment due process violation,[6] Aguirre-Pedroza failed to establish the required element of prejudice. *See Mantell,* 798 F.2d at 128. Aguirre-Pedroza was represented by counsel before the BIA and the evidence he sought to submit before the immigration judge was considered by the BIA. *See* Record on Appeal at 60-61; *supra* note 5. Thus, he was not prejudiced by any errors made by his attorney. Accordingly, the BIA did not abuse its discretion in denying his motion to reopen.

**III**

For the foregoing reasons, we **AFFIRM.**

[6] "The sixth amendment . . . right to `effective' counsel, is limited to criminal prosecutions and thus has no application in deportation proceedings." *Mantell,* 798 F.2d at 127.