UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4700

JOSEPH EXANTUS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
A71 551 172

July 9, 1993

Before JOHNSON, JOLLY and JONES, Circuit Judges.

EDITH H. JONES:[*]

This is an appeal by a Haitian national attacking his deportation order. Exantus challenges the Board of Immigration Appeals decision on a variety of grounds, none of which have merit. We therefore affirm the Board's decision.

Before addressing the merits, it is necessary to note a sticky jurisdictional issue. This court's jurisdiction to review final orders of the Board arises under § 106(a) of the Immigration

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and Nationality Act, 8 U.S.C. § 1105(a). Diaz-Salazar v. INS, 700 F.2d 1156, 1159 (9th Cir. 1983), cert. denied, 462 U.S. 1132, 103 S. Ct. 3112, 77 L.Ed.2d 1367 (1983). No order of deportation shall be reviewed by any court, however, if the alien has not exhausted INS administrative remedies. Foti v. INS, 375 U.S. 217, 224, 84 S. Ct. 306, 311, 11 L.Ed.2d 281 (1963). A timely notice of appeal is a mandatory prerequisite to exercising appellate jurisdiction. United States v. Robinson, 361 U.S. 220, 224, 80 S. Ct. 282, 285, 4 L.Ed.2d 259 (1960).

The Board's order in this case was entered on July 15, 1992, but Exantus's petition for review was filed one week earlier, on July 8, 1992. Obviously, at the time petitioner filed his petition for review, the Board had not yet entered its decision.

A premature notice of appeal is not necessarily ineffective. In some circumstances, Federal Rule of Appellate Procedure 4(a)(2) will permit an appellate court to exercise its jurisdiction despite a premature notice of appeal. The Supreme Court discussed this rule in FirstTier Mortgage Company v. Investors Mortgage Insurance Company, 498 U.S. 648, 111 S. Ct. 648, 112 L.Ed.2d 743 (1991). In FirstTier, the Supreme Court determined that certain premature notices do not prejudice opposing parties and therefore "should not be allowed to extinguish an otherwise proper appeal." 111 S. Ct. at 651. Consequently, the Court held, a premature notice of appeal relates forward to a final judgment and serves as a timely notice whenever it follows "a decision that would be appealable if immediately followed by the entry of

judgment." 111 S. Ct. at 653. In this case, there is nothing to indicate that as of July 8, 1992 there was any final judgment that would be appealable.

The Fifth Circuit, however, has a unique saving exception for premature notices, whereby "as long as the parties in a case had not filed post judgment or post trial motions, notice of appeal [is] effective even if filed before the district court announced the final judgment." Alcom Electronics Exchange v. Burgess, 849 F.2d 964, 967 (5th Cir. 1988); Alcorn County v. United States Interstate Supply, 731 F.2d 1160, 1165-66 (5th Cir. 1984). Here, there is no mention in the record that any post-trial or post-judgment motions were filed. Therefore, the question becomes whether FirstTier overturned this exception.

The effect of FirstTier on Alcom is an open question of law. Resolution Trust Corporation v. North Park Joint Venture, 958 F.2d 1313, 1317 n.5 (5th Cir. 1991). In Resolution Trust Corporation, the panel held that "because we conclude that the facts of the instant case fall within the exception described in FirstTier Mortgage, we do not address whether the rule of Alcom Electronics and Alcorn County survives First Tier Mortgage." Id.

Because this issue is not briefed well by the government or at all by Exantus and because the outcome of the underlying case is certain, we opt to pretermit this jurisdictional issue in accord with circuit and Supreme Court law. Texas Employers Insurance Association v. Jackson, 862 F.2d 491, 496-97 n.8 (5th Cir. 1988) (en banc). (omitting Supreme Court citations).

Exantus raises five substantive issues regarding his deportation order, which was based upon his conviction for aggravated assault with a deadly weapon: (1) whether conviction under Florida's deferred adjudication statute was proper grounds for his deportation under section 241(a)(2)(C), 8 U.S.C. § 1251(a)(2)(C); (2) whether his conviction for an aggravated assault with a weapon was a "serious crime" rendering him ineligible for withholding of deportation or asylum; (3) whether Exantus was eligible for suspension of deportation, 8 U.S.C. § 1254(a)(2); (4) whether he was entitled to be considered for a waiver of deportation under 8 U.S.C. § 1182(c); and (5) whether the immigration judge's failure to change venue and grant a further continuance violated his due process rights. We address each of these questions in turn.

A two-prong standard of review applies to cases such as these. Interpretations of the law and immigration regulations by INS are ordinarily reviewed in a deferential light, while the Board's factual findings are reviewed under the substantial evidence test. 8 U.S.C. § 1105(a)(4); Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991); Zamora-Morel v. INS, 905 F.2d 833, 837 (5th Cir. 1990).

1. Status of Exantus's "Conviction"

Federal law controls whether a person has been "convicted" within the meaning of the immigration statutes even though a given state may later expunge or suspend the conviction. Arrellano-Flores v. Hoy, 262 F.2d 667 (9th Cir. 1958), cert.

denied, 362 U.S. 921, 80 S. Ct. 673, 4 L.Ed.2d 740 (1960); de La Cruz-Martinez v. INS, 404 F.2d 1198, 1200 (9th Cir. 1968), cert. denied, 394 U.S. 955, 89 S. Ct. 1291, 22 L.Ed.2d 491 (1969); Garcia Gonzales v. INS, 344 F.2d 804-808 (9th Cir.) cert. denied, 382 U.S. 840 (1965); Ocon-Perez v. INS, 550 F.2d 1153, 1154 (9th Cir. 1977); Gonzalez de Lara v. INS, 439 F.2d 1316, 1312-18 (5th Cir. 1971). In this case, Exantus pled guilty to the charge of aggravated assault with a deadly weapon. The state court then ordered the adjudication of guilt with imposition of sentence withheld and placed him on probation. The court further ordered that if Exantus violates the conditions of his probation, the court could revoke it and impose any lawful sentence. Exantus argues that this finding did not constitute a "conviction."

The test for a "conviction" as used in the immigration statutes is set forth In the Matter of Ozkok, 19 I&N Dec. 546, 551-52 (BIA 1988). This standard requires that (1) the alien has entered an appearance and pleaded guilty to an offense; (2) a punishment, penalty, or restraint has been imposed on the person's liberty; and (3) a judgment or adjudication of guilt may be entered if the person violates the court's order without the necessity for further proceedings regarding guilt or innocence on the original charge. Under Florida law, the petitioner was found guilty at his original hearing, and if he violated the condition of probation, there would be no need for a further proceeding. There is thus no doubt that under Ozkok, the Board's finding that Exantus was "convicted" is not clearly erroneous.

2. Whether Aggravated Assault with a Deadly Weapon is a "Serious Crime"

Under 8 U.S.C. § 1253(h)(2)(B), denial of withholding of deportation is mandatory as a matter of law if the alien has been convicted of a particularly serious crime. An application for political asylum must also be denied in such instance. 8 CFR § 208.14(c)(1); Martins v. INS, 972 F.2d 657, 659 (5th Cir. 1992). The Board's finding that assault with a deadly weapon, the offense to which Exantus pled guilty, is a particularly serious offense is a reasonable interpretation of the statute. Matter of Carboli, 19 I&N Dec. 357, 360 (BIA 1986); Matter of Garcia-Garrocho, 19 I&N Dec. 423, 426 (BIA 1986).

3. Suspension of Deportation

Exantus is not eligible for suspension of deportation because, whether or not he fulfilled the seven-year continuous residency requirement of the statute, his crime was committed in 1990. Thus, he has not been physically present in the U.S. for ten years following commission of the crime, as required by 8 U.S.C. § 1254(a)(2).

4. Waiver of Deportation

Petitioner next argues that he should have been eligible for a waiver of deportation under section 212(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c).

The pertinent part of § 212(c) provides that aliens in exclusion proceedings shall not be deported for a variety of reasons. However, the section is applied in some cases to deportation hearings. Francis v. INS, 532 F.2d 268, 273 (2d Cir.

1976); Matter of Silva, 16 I&N Dec. 26, 30 (BIA 1976). The decision of the Attorney General in the Matter of Hernandez-Casills II, (Int. Dec. Att. Gen. March 18, 1991), limited the reach of § 212(c) waivers to deportation proceedings where the ground of deportability charged is also a ground of excludability of permanent resident aliens who voluntarily travelled abroad and are seeking re-entry to their U.S. domicile. 8 U.S.C. § 1182(a). Cabasug v. INS, 847 F.2d 1321, 1323 (9th Cir. 1988); Matter of Montenegro, Interim Decision 3192 (BIA 1992). The Attorney General has concluded that equal protection justifies no more than the Silva result. Campos v. INS, 961 F.2d 309, 313 (1st Cir. 1992).

Firearms charges, such as those leveled against Exantus, do not fall within the scope of a § 212(c) waiver of exclusion. Matter of Montenegro, supra; Campos, 961 F.2d at 314. Since Exantus was found deportable under a firearms conviction, the petitioner is not eligible for waiver of deportation under § 212(c) waiver of exclusion.

5. Change of Venue and Continuance

An immigration judge's decision to change venue in both exclusion and deportation cases is based upon a finding of good cause. 8 C.F.R. § 3.20(a). Good cause is determined by balancing the factors that have been found relevant to the venue issue. Matter of Rivera, 19 I&N Dec. 688 (BIA 1988); Matter of Vasquez, 19 I&N Dec. 377 (1986); La-Franca v. INS, 413 F.2d 686, 689 (2d Cir. 1969). Our standard of review for these matters is abuse of discretion. Castro-Nuno v. INS, 577 F.2d 577, 578-79 (9th Cir.

1978); Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988). Further, because deportation is civil in nature, the full protections of the criminal law do not apply. Patel v. INS, 803 F.2d 804, 806 (5th Cir. 1986). The deportee does, however, have a statutory right to be represented by the counsel of his choice at no expense to the government. Baires v. INS, 856 F.2d 89, 91 (9th Cir. 1988).

Exantus never presented a valid reason for a venue change. His sole rationale for desiring a change of venue was that he could better retain counsel elsewhere through the help of family and friends. But he furnished no evidence, such as letters or affidavits from persons living in Miami or anywhere else, that his friends or family were willing to help him.

Exantus also failed to demonstrate good cause for seeking a further continuance to obtain an attorney or to gather witnesses or evidence. After the issuance of the Order to Show Cause in his case, the petitioner's hearing was continued four times over a two-month period. Exantus was advised of his right to counsel at the time the OSC was issued and at each appearance before the immigration judge. He never alleged any special circumstances beyond the lack of funds which prevented him from obtaining representation.

Because Exantus's legal issues are devoid of merit, we affirm the order of the Board of Immigration Appeals without visiting the as yet unresolved effect of FirstTier Mortgage on the Fifth Circuit rule of Alcorn and Alcom.

AFFIRMED.