IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 92-4769 & 92-5241
Summary Calendar

JAIRO ANTONIO GONZALES-BUITRAGO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A39 263 328)

September 24, 1993

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

The Board of Immigration Appeals ("BIA") dismissed Gonzales-Buitrago's appeal from the Immigration Judge's ("IJ") decision to deny him relief from deportation under sections 212(c) (providing for waiver of inadmissibility), 208(a) (providing for asylum), and 243(h) (providing for withholding of deportation) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(c), 1158(a),

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.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 1253(h) (1988 and Supp. 1990) and to deport him. After the BIA denied the appeal, he moved to reopen proceedings because he claimed that he had acquired the requisite seven years lawful, unrelinquished domicile required to be eligible for section 212(c) relief. The BIA denied petitioner's motion, which he appeals. He also challenges, based on claims of due process violations, the BIA's dismissal of his appeal from the IJ's order to deport him. His two separate appeals have been consolidated. Jurisdiction is proper because decisions of the BIA are appealable directly to this court. 8 U.S.C. § 1105a(a)(2). We affirm the decisions of the BIA.

I. Background

Jairo Antonio Gonzales-Buitrago is a 40-year-old citizen of Colombia who claims to have lived and worked in the United States since 1979. He also claims that he has been married to a U.S. citizen since 1980, although this is not reflected in the record on appeal. In addition, he is the father of a four-year-old girl, who is a U.S. citizen. On September 4, 1985, he was granted permanent resident alien status.

On February 7, 1990, he was convicted of possession with intent to deliver cocaine and was sentenced to twenty-two years confinement. He only served twenty-seven months of this sentence.[1] On March 20, 1990, an order to show cause was issued against Gonzales-Buitrago, charging that he was a citizen of

[1]The IJ stated that, although his actual time served was not reflected in the record, petitioner had certified that his actual time served was twenty-seven months.

Colombia and had been convicted of knowingly possessing cocaine with intent to deliver. This conviction rendered him deportable under section 241(a)(11) of the Immigration and Nationality Act, which has subsequently been amended and codified at 8 U.S.C. § 1251(a)(2)(B). On September 3, 1991, an additional charge of deportability was lodged against him, stating that he had been convicted of an aggravated felony. This conviction rendered him deportable under section 241(a)(4)(B).

In a short hearing on the show cause order on September 25, 1991, petitioner admitted the allegations of the order and the additional charge and conceded deportability. At the hearing, he requested asylum and withholding of deportation eligibility and was granted time to file an application and brief. On November 14, 1991, the IJ issued a written order finding that petitioner was ineligible for asylum, withholding, or section 212(c) relief because of his twenty-two year sentence for possession with intent to deliver cocaine. Gonzales-Buitrago appealed from this order, claiming that the IJ had erred by using the sentence rather than the actual time served for the determination that he was ineligible for section 212(c) relief and that a conviction for possession should not render him ineligible for asylum or withholding. On March 11, 1992, the IJ amended the original order to change the reasons for denying section 212(c) relief from the sentence imposed for cocaine possession to the lack of seven years consecutive lawful residence.

On appeal, petitioner challenged the amended order and claimed that his appeal had deprived the IJ of jurisdiction to make the amended order. On June 30, 1992, the BIA issued a decision stating that the IJ's first order was in error and the amended order was without effect because the appeal deprived the judge of jurisdiction. However, after an independent and de novo review, the BIA found that the error in the first order was harmless and did not result in prejudice or render the proceedings fundamentally unfair. The BIA dismissed petitioner's appeal.

On September 9, 1992, Gonzales-Buitrago filed a motion to reopen with the BIA, claiming that he had acquired the requisite seven consecutive years lawful residence for section 212(c) relief and challenging the BIA's and the IJ's decisions. The BIA denied this motion because petitioner's lawful domicile ended when it dismissed the appeal, which happened less than seven years after he was granted permanent resident status. Thus, according to the BIA, Gonzales-Buitrago was no longer eligible for section 212(c) relief.

II. ANALYSIS

There are two different issues presented in this appeal: whether the BIA erred in denying Gonzales-Buitrago's motion to reopen the deportation proceedings so that he could apply for relief under section 212(c); and whether the BIA violated due process by affirming the IJ's decision based on an allegedly

incomplete record and a finding that petitioner had not acquired seven years of lawful residence.

The only statute really at issue before the Court is section 212(c), which provides:

> Aliens lawfully admitted for permanent resident [sic] who temporarily proceeded 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 subsection (a) of this section [governing classes of excludable aliens]. . . .

8 U.S.C. § 1182(c). This provision has been interpreted to allow aliens to apply for a discretionary waiver after an order of deportation regardless of whether they have departed and returned to the United States. See, e.g., Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976) (holding that the distinction between aliens who had returned to the country after an absence and those who had never left was irrational and thus unconstitutional); Mantell v. United States Dep't of Justice, INS, 798 F.2d 124, 125 (5th Cir. 1986) (adopting the interpretation that section 1182 allows a permanent resident alien who has resided in the United States for seven consecutive years to apply to the discretion of the Attorney General for a waiver of deportability).

Gonzales-Buitrago admitted to an additional charge lodged against him, stating that he had been convicted of an aggravated felony and was subject to deportation pursuant to section 241(a)(4)(B) of the Immigration and Nationality Act.[2] This

[2]The charge that petitioner admitted to states: "Any alien who has engaged, is engaged, or at any time after entry engages

section would ordinarily exclude him from eligibility for a section 212(c) waiver. 8 U.S.C. § 1182(c). However, because neither party has briefed or even raised this as an issue, we decline to consider it on appeal. Friou v. Phillips Petroleum Co., 948 F.2d 972, 974 (5th Cir. 1991).

A. Motion to reopen

The BIA has discretion to grant or deny a motion to reopen. INS v. Rios-Pineda, 471 U.S. 444, 449 (1985). Thus, the standard of review of the denial of a motion to reopen is abuse of discretion. Ghassan v. INS, 972 F.2d 631, 637 (5th Cir. 1992), cert. denied, 113 S. Ct. 1412 (1993). If the BIA's denial is based on a finding of statutory ineligibility, the appellate court should also review for errors of law. Id. Also, the appellate court should give great weight to the BIA's interpretation of immigration regulations; however, the court may discount the BIA's interpretation if it is plainly unreasonable. Id.; Ka Fung Chan v. INS, 634 F.2d 248, 252 (5th Cir. 1981).

The BIA deems decisions to deport final after it has made a determination on appeal. When the BIA makes this determination, the individual's status as a permanent resident alien has ended. Ghassan, 972 F.2d at 637. Gonzales-Buitrago became a permanent

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in any terrorist activity (as defined in section 1182(a)(3)(B)(iii) of this title) is deportable." 8 U.S.C. § 1251(a)(4)(B). The applicable subsections of section 1182 define terroristic activities as unlawful activities that involve highjacking or sabotage; seizing or detaining and threatening to kill, injure or continue to detain another individual to compel a third person to do or not to do an act; and other similarly violent activities. 8 U.S.C. § 1182(a)(3)(B)(ii).

resident alien on September 4, 1985. The BIA's final decision occurred on June 30, 1992, less than seven years after he became a permanent resident alien.

To warrant a reopening, petitioner must make a prima facie showing that he is entitled to the relief sought. Id. He seeks section 212(c) relief, which requires him to have been a permanent resident alien who has lawfully resided in this country for seven consecutive years before the order of deportation. Mantell, 798 F.2d at 125. Thus, unless petitioner can establish his permanent residence for more than seven years before the order, he is not entitled to reopening.

Gonzales-Buitrago challenges the BIA's decision as to both the point at which the seven year period begins to run and the point at which it stops. For support, petitioner cites Lok v. INS, 548 F.2d 37 (2d Cir. 1977), which held that the court could consider time spent legally in the United States before becoming a permanent resident alien for purposes of calculating the seven year period. However, the Second Circuit is apparently the only Circuit to recognize this rule. Prichard-Ciriza v. INS, 978 F.2d 219, 223 n.6 (5th Cir. 1992) (stating that only the Second Circuit has accepted this rule). This court does not. See, e.g., id. at 223; Ghassan, 972 F.2d at 634; Mantell, 798 F.2d at 125 (all stating that to be eligible for section 212(c) relief, the individual must have resided in the United States as a permanent resident alien for seven consecutive years). Thus, in

this court, the time begins with the permanent resident alien status and not before.[3]

Because the date on which the seven year period begins to run is the receipt of permanent resident alien status, Gonzales-Buitrago must show that his permanent resident alien status continued after the final decision by the BIA to be eligible for section 212(c) relief. However, this court has clearly held that an alien's lawful status ends when the BIA rules him to be deportable. Ghassan, 972 F.2d at 637; Rivera v. INS, 810 F.2d 540, 541 (5th Cir. 1987). Thus, petitioner is not eligible for 212(c) relief because he was not in the United States for seven years from the beginning of his permanent resident status to the final order by the BIA.

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[3]In addition, even applying a rule like the Second Circuit's, Gonzalez-Buitrago has not established that he was lawfully in the United States before he became a resident alien. Although he claims that he worked in the United States from 1979 to 1981 and from 1984 to the present, he does not assert the legality of his work during this time. In addition, he claims in his brief that he married a United States citizen in 1980, but in his answers to his application for asylum, pursuant to 8 CFR 208.11, he responded that he had no wife and no former wife. In his brief, petitioner also claims that "at some point prior to 1985," he was the recipient of an approved relative visa petition, which would give him the right to work in the United States, pending approval of permanent resident status. However, there is no evidence in the record to support this, and petitioner does not give the date in his brief. Thus, in reviewing the record, there is no evidence that petitioner was legally employed during the period prior to 1985 or that he was married in 1980. In addition, his answers are internally inconsistent. Even applying the Second Circuit's rule, petitioner has not established lawful residence before he became a permanent resident alien.

Gonzales-Buitrago failed to establish his prima facie case for entitlement to section 212(c) relief. Therefore, the BIA's denial of his motion to reopen is not an abuse of discretion.

B. Affirmation of the decision to deport petitioner by the BIA

When a petitioner requests section 212(c) relief, he bears the burden of establishing that his application merits consideration. Diaz-Resendez v. INS, 960 F.2d 493, 495 (5th Cir. 1992). In addition, the appellate court should give the BIA's interpretation of the Act deference, unless there are "persuasive indicators" of error. Id. Also, the court should review the BIA's denial of the petition for 212(c) relief for abuse of discretion. Villarreal-San Miguel v. INS, 975 F.2d 248, 250 (5th Cir. 1992). The denial should be upheld unless it is arbitrary, irrational, or not in accordance with the law. Diaz-Resendez, 960 F.2d at 495; Villarreal-San Miguel, 975 F.2d at 250. Petitioner correctly states that the BIA's decision may be found arbitrary if it fails to address meaningfully or consider all of the material factors. Diaz-Resendez, 960 F.2d at 495; Luciano-Vicente v. INS, 786 F.2d 706, 708 (5th Cir. 1986); Zamora-Garcia v. INS, 737 F.2d 488, 490-91 (5th Cir. 1984).

However, the only meaningful factor relevant to Gonzales-Buitrago's application for 212(c) relief was how long he has been a permanent resident alien before the final order by the BIA. Any additional information would have been extraneous to the BIA's decision. Thus, because the extraneous factors regarding

his residence in the United States before he was granted permanent resident alien status are not relevant, the BIA did not abuse its discretion by not taking evidence on them. For these reasons, the record is not incomplete. The BIA did not abuse its discretion or violate due process by dismissing his appeal and ordering him deported.

III. Conclusion

For the foregoing reasons, we find that the BIA was correct in dismissing petitioner's appeal and denying his motion to reopen. The orders of the BIA are AFFIRMED.