

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4828
Summary Calendar

LOUIS A. MAZELI,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A26-893-739)

(May 21, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Louis Abiodu Mazeli is a native and citizen of Nigeria.¹ He entered the United States on June 8, 1982 as a nonimmigrant student. From June of 1982 until May 1983, Mazeli attended school in Durant, Oklahoma at Southeastern Oklahoma State University.² In February of 1984 Mazeli married a United States citizen. On March 23, 1984, he petitioned the Immigration and Naturalization Service (INS) to adjust his immigration status. On June 28, 1984, Mazeli's status was adjusted to that of a lawful permanent resident.

On July 1, 1988, Mazeli was convicted in the 291st District Court of Dallas, Texas, for the offense of credit card abuse, a felony. On February 28, 1990, Mazeli was again convicted in the 291st District Court of Dallas, Texas, for possession with intent to deliver cocaine in violation of the Texas Controlled Substance Act.³

After Mazeli had served his minimum prison sentence, the INS filed an immigration detainer and initiated deportation proceedings on January 31, 1992, by issuing an Order to Show Cause (OSC). The

¹ During his deportation hearing, Mr. Mazeli also stated that he was told by his adoptive parents that he had been born in the Virgin Islands and had emigrated to Africa at an early age. Mr. Mazeli later informed the immigration judge that he was unable to obtain documents or witnesses to substantiate his citizenship claim.

² Throughout the administrative record there are conflicting dates indicating when Mr. Mazeli attended Southeastern Oklahoma State University.

³ From June 14, 1987, to October 18, 1989, Mr. Mazeli was arrested ten separate times, used seventeen aliases, listed seven dates of birth and five social security numbers. Further, he was arrested, convicted and sentenced to a prison term of between three and twenty years using the alias, "Anthony A. Hazel."

OSC charged Mazeli deportable under sections 241(a)(2)(A)(iii) and 241(a)(2)(B)(i) of the Immigration and Nationality Act (ACT), 8 U.S.C. § § 1251(a)(2)(A)(iii) and 1251(a)(2)(B)(i).⁴ At his deportation hearing, Mr. Mazeli conceded the truthfulness of the allegations in the OSC, but he contested his deportability based on those allegations.

At his deportation hearing on February 10, 1992, Mazeli appeared pro se and indicated to the Immigration Judge (IJ) that he was ready to proceed with his case and wished to represent himself. At a subsequent deportation hearing, Mazeli again indicted that he would continue to represent himself because he could not afford a lawyer and he had been unable to secure an attorney to represent him pro bono.

In a decision dated March 26, 1992, the IJ found Mazeli deportable as charged, denied Mazeli's requests for relief from deportation, and ordered his deportation to the United Kingdom or, alternatively, to Nigeria. Though Mr. Mazeli claimed on several instances that he was not guilty of the offenses of which he had been convicted, he did admit the convictions. Based upon his admissions to those convictions the IJ found that the allegations

⁴ 8 U.S.C. § § 1251 (a)(2)(A)(iii) and 1251 (a)(2)(B)(iii) provides in relevant part:

[a]ny alien in the United States shall, upon the order of the Attorney General, be deported if the alien is . . . convicted of an aggravated felony at any time after entry . . . , and . . . who . . . has been convicted of a violation of any law or regulation of a State, the United States . . . relating to a controlled substance. . . .

in the OSC had been established by clear, convincing and unequivocal evidence.

After being found deportable, Mazeli sought relief from deportation by applying for relief under Section 212(c) of the Act because he had been a lawful permanent resident for over seven years. Additionally, he sought application for political asylum and withholding of deportation. The IJ denied Mazeli's applications for political asylum and withholding of deportation on the ground that Mazeli has been convicted of an aggravated felony and a particularly serious crime and was thus statutorily barred from relief.⁵

Mazeli appealed the IJ's decision to the Board of Immigration Appeals (Board) on March 29, 1992. The Board dismissed the appeal and affirmed the IJ's findings.

On appeal to this court, Mazeli contends that the Board's finding of his deportability as both a convicted drug trafficker and aggravated felon was erroneous; that the IJ and the Board abused its discretion in denying him a Section 212(c) waiver from deportation; and that he did not receive a full and fair hearing. Because we find Mazeli's challenges to the deportation proceedings meritless, we AFFIRM.

II.

⁵ The IJ indicated that Mazeli is an aggravated felon and that an aggravated felon may neither apply for nor receive political asylum. Additionally, an individual who has been convicted of an aggravated felony has been convicted of a particularly serious crime. Having been convicted of a particularly serious crime, Mazeli may not receive withholding of deportation.

A. WHETHER THE BOARD'S DETERMINATION OF DEPORTABILITY WAS ERRONEOUS.

Mazel indirectly challenges the IJ's and the Board's determination of his deportability as both a convicted drug trafficker and aggravated felon, by asserting a collateral attack upon the validity of his underlying criminal conviction for Possession With Intent To Deliver A Control Substance, To Wit: Cocaine. Although he does not cite any authority, Mr. Mazeli argues that "a collateral attack of an order of deportation is warranted when that order results in a gross miscarriage of justice."

He submits that the State of Texas unjustly convicted him on a trumped up cocaine trafficking charge after his court-appointed attorney failed to investigate case facts or subpoena a witness who could exonerate him.⁶ Mr. Mazeli also contends that his state conviction was erroneously construed by the immigration court as an aggravated felony. He complains that the IJ should have considered the excluded hearsay testimony and his explanations, in deciding whether his offense merited deportation as a drug trafficking offense or as an aggravated felony.

In deportation proceedings, the government has the burden of proving deportability.⁷ However, a deportability determination of

⁶ The trial and state appellate court refused to admit hearsay evidence, which if heard by the jury, might have absolved him.

⁷ The INS must show deportability by "clear, unequivocal, and convincing evidence." Woodby v. United States, 385 U.S. 276, 286, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966). This particular standard applies only to the administrative consideration of the

the immigration court "need be based only on reasonable, substantial, and probative evidence.'" INS v. Lopez-Mendoza, 468 U.S. 1032, 1039, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) (citing section 242(b)(4) of the Act, 8 U.S.C. § 1252(b)(4)). "All the substantial evidence standard requires is that the [Board's] conclusion, based upon the evidence presented, be substantially reasonable." DeValle v. INS, 901 F.2d 787, 791 (9th Cir. 1990). This is a deferential standard and "we may not reverse the [Board] simply because we disagree with its evaluation of the facts." Id.

"[T]he rule [of the "substantial evidence" review] is that the administrative determination must be sustained unless no reasonable fact-finder could ... find' that the factual basis for deportability was proven by the evidence of record." INS v. Elias Zacarias, ___ U.S. ___, 112 S. Ct. 812, 815, 117 L. Ed. 2d 38 (1992). The evidence in this record supports a finding that deportability of Mr. Mazeli was established by the INS. A post-conviction attack upon criminal proceedings does not negate the finality of the criminal conviction for deportation purposes. Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982). A deportation hearing is intended only to provide a determination of eligibility to remain in this country. INS v. Lopez-Mendoza, 468 U.S. at 1039. That determination is of an alien's present, not future eligibility to remain. Future plans to seek review of a drug conviction will not preclude the enforcement of Mazeli's deportation order.

case, however, and does not apply to this Court's review of the deportability finding. Espinoza-Espinoza v. INS, 554 F.2d 921, 924 (9th Cir. 1977).

Although immigration courts are allowed to consider the deportable alien's excuses and explanations for his arrest and conviction including evidence excluded during the trial in determining whether to grant discretionary section 212(c) relief, the court cannot go behind the alien's conviction record to review questions of guilt or innocence in determining his deportability. See Matter of Khalik, 17 I&N Dec. 519, (BIA 1980).

Mazeli was found guilty and convicted of a drug trafficking crime, an aggravated felony,⁸ as provided by section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). See Matter of Davis, Interim Decision 3181 (BIA 1992), Matter of Barrett, Interim Decision 3131 (BIA 1990). Accordingly, deportability as an aggravated felon was correctly established under section 241(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(iii).

Finally, the record discloses that Mr. Mazeli admitted paragraphs in the OSC alleging he was criminally convicted in the 291st Judicial District Court of Dallas County, under the Texas Controlled Substance Act for "possession With Intent To Deliver A Controlled Substance. The only evidence in the record countering the allegation in the OSC are Mazeli's self-serving protestations of innocence, hearsay testimony from a convicted cocaine dealer,

⁸ Section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), defines the term "aggravated felony" inter alia as "any illicit trafficking in any controlled substance (as defined in Section 102 of the Controlled Substance Act) including any drug trafficking crime as defined in section 924(c) of Title 18, United States Code,"

who told police that he never bought cocaine from, nor sold cocaine to Mr. Mazeli.

The IJ could properly find that this evidence was neither credible nor could it be used to retry the deportability issue. Matter of Khalik, 17 I&N Dec. 518 (BIA 1980).

B. WHETHER THE BOARD ABUSED ITS DISCRETION IN DENYING MAZELI A SECTION 212 (c) WAIVER FROM DEPORTATION.

Mazeli contends that the Board's denial of section 212(c) relief was an abuse of discretion because it failed to consider the total picture of hardship factors to Mazeli and his family. As favorable factors, he lists: his ten years in the United States; his wife and three citizen children; his favorable and stable work history; his educational achievements; a rosy future if he obtains a masters degree; personal hardship of five additional years imprisonment if he returns to Nigeria, his excellent record in government custody evidencing his commitment to rehabilitation including Alcoholics and Narcotic anonymous membership and his "reborn" dedication to being a good Christian. Mazeli also challenges the nature and underlying circumstances of the exclusion ground at issue, deportability as a controlled substance abuser and an aggravated felon.

The IJ found that Mazeli was eligible for a discretionary waiver of deportation under section 212(c). Under section 212(c) of the Act, 8 U.S.C. § 1182(c), discretionary relief is available to those aliens with permanent resident status who have accrued seven consecutive years of lawful, unrelinquished domicile in the United States. See, Mantell v. INS, 798 F.2d 124, 125 n.2 (5th

cir. 1986). However, in weighing whether such relief was merited, the IJ declared that Mazeli was "involved in the trafficking of one of the most pernicious drugs ever to appear on the American scene, cocaine" which "is under the law an aggravated felony"; and that this conviction by "itself require a showing of unusual or outstanding equities" but when combined with the rest of his record "certainly requires unusual or outstanding equities to be shown before relief can be considered."

Section 212(c) makes a waiver of deportability available "in the discretion of the Attorney General," (the Board) thus, the standard of review for denial of such relief is "abuse of discretion." Osuchukwu v. INS, 744 F.2d 1136, 1140 (5th Cir. 1984).

The Board's denial of discretionary relief must be upheld unless it is arbitrary, capricious, irrational, or contrary to law. Id. A review of the exercise of discretion is "most restricted" and this court lacks authority to determine the weight, if any, to be afforded each factor. Id. at 1140-41. The scope of review of the exercise of discretion is "exceedingly narrow." Ashby v. INS, 961 F.2d 555 (5th Cir. 1992).

A negative "extreme hardship" determination can be deemed an abuse of discretion only if the hardship is "so severe that any reasonable person would necessarily conclude that the hardship is extreme." Hernandez-Cordero v. INS, 819 F.2d 558, 563 (5th Cir. 1987).

The denial of a 212(c) waiver must be sustained "unless it was made without rational explanation, it inexplicably departed from established policies, or it rested on an impermissible basis" such as "invidious discrimination against a particular race or group." See Cordoba-Chaves v. INS, 946 F.2d 1244, 1246 (7th Cir. 1991). Denial of relief in the context of a section 212(c) application may be set aside "only if the Board failed to support its conclusions with a reasoned explanation based upon legitimate concerns." Ayala-Chavez v. INS, 944 F.2d 638, 642 (9th Cir. 1991).

An alien applicant for section 212(c) waiver relief must satisfy the statutory requirements of the Act. Blackwood v. INS, 803 F.2d 1165, 1167 (11th Cir. 1986). The Board must then make a discretionary determination of whether the applicant merits favorable consideration for a waiver under the provisions of section 212(c). See Variamparambil v. INS, 831 F.2d 1362, 1366 (7th Cir. 1987).

The burden is upon the resident alien to establish that he is deserving of a section 212(c) discretionary waiver. Matter of Buscemi, 19 I&N Dec. at 633 (BIA 1988). The favorable factors for consideration in section 212(c) waiver relief include, for example, family ties, residence of long duration in this country, hardship to applicant and his family, armed forces service, business ties, community service, employment history and rehabilitation. Id. The court must also evaluate the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the

existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of an applicant's bad character or undesirability as a permanent resident of this country. Id.

After considering and weighing both the negative and positive factors in the record, the Board affirmed the conclusions of the IJ that Mazeli had fallen far short of showing unusual or outstanding equities to balance his serious drug trafficking conviction; that he was not a credible witness, that he had a long criminal record replete with multiple dates of birth, and that he tried to commit a fraud upon the Immigration Court during these proceedings; and finally, that since he was completely devoid of remorse for his criminal actions and that he was no way deserving of section 212(c) relief.

Mazeli has not identified any error in the decision of the IJ to deny his 212(c) application and there is no evidence in the record that the IJ was biased. Mazeli does not contradict the IJ's findings that he had a pattern of very serious criminal misconduct and that there was no proof of any family hardship if he were to be deported, requiring him to demonstrate unusual and outstanding equities.

The Board applied the proper standards to the facts in the record and has correctly determined that Mazeli does not merit relief.

C. WHETHER MAZELI RECEIVED A FULL AND FAIR HEARING.

Mazeli contends that during his hearing, the government violated his constitutional right to due process. Specifically, he asserts that his right under 8 C.F.R. § 1362 to a bond hearing, separate and apart from his deportation hearing, was violated when the IJ, in setting his bail, inquired into his possibly meriting section 212(c) relief; that his hearing was unfair because he did not have legal representation; and that he was never informed of his right to apply for a discretionary suspension of deportation.

First, Mazeli claims that he was mistreated at the February 10, 1992 bond hearing held concurrently with the first day of his deportation hearing. During the bond hearing, the IJ briefly inquired into Mazeli's record and background. In setting bond at \$100,000 the IJ observed that in view of his criminal record, Mazeli's prospects for 212(c) relief were poor. This, Mazeli argued, demonstrated the IJ's bias; i.e., that he was predisposed to deny discretionary 212(c) relief before he had even heard any evidence.

INS regulations require that custody and bond hearings be kept separate from deportation proceedings. Title 8 C.F.R. § 242(d). However, the IJ's brief inquiry with respect to an alien's possible application for section 212(c) relief is not inappropriate in bond hearings. In Matter of Andrade, 19 I&N Dec. 488, 491 (BIA 1987). There is no indication in the record that the IJ was predisposed to deny Mazeli's application for a waiver.

Mazeli next contends that his deportation hearing was unfair because he was unable to obtain legal representation. When

Mazeli's hearing commenced on February 10, 1992, the record reflects that Mazeli had been advised of his right to obtain an attorney at no expense to the government but that he did not do so. The IJ then advised Mazeli of his right to an adjournment to find legal representation. Mazeli told the court that he wanted to go ahead with the hearing and represent himself. Mazeli again informed the judge on March 2 that he wished to represent himself. Mazeli thus waived his right to have an attorney. Moreover, Mazeli failed to show that the result in his case would have differed if he had a lawyer.

Finally, Mazeli complains that he was not advised by the IJ of his right to apply for a suspension of deportation. Mazeli's conviction of a drug trafficking offense, which is also an aggravated felony and a particularly serious crime, precluded him from establishing a 10-year period of "good moral character" as required under section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2).

AFFIRMED.