

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4854

MAURO PAZ-AVILA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Review Of An Order of the
Immigration and Naturalization Service
(A26 945 830)

(September 22, 1994)

Before GOLDBERG, GARWOOD and WIENER, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner Mauro Paz-Avila requests review of a decision of the Board of Immigration Appeals (BIA) dismissing his appeal from an immigration judge's order of deportation. The BIA agreed with the immigration judge that Paz was not entitled to statutory or discretionary relief in the form of suspension of deportation or voluntary departure. We deny his petition for review.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Petitioner Mauro Paz-Avila (Paz) is a forty-nine-year-old native and citizen of Mexico who, at the time of his deportation hearings, resided in Edinberg, Texas. He first entered the United States at Hidalgo, Texas, in January 1971 by presenting the United States birth certificate of Mario Molina, a cousin who had died at the age of one year. Once in the United States, Paz assumed the identity of Molina and used the birth certificate to obtain a social security number, citizen identification, Texas birth document, and voter registration cards. With his new identity, he helped both his wives obtain permanent resident alien status.¹ His children bear the name Molina.²

Paz last entered the United States in October 1983 at Progresso, Texas, again by presenting Molina's birth certificate.³ He was arrested on October 26, 1983, and charged with falsely representing himself to be a United States citizen and with possession of an identification document knowing it was stolen or produced without lawful authority. In December 1983, Paz pleaded guilty to false representation of United States citizenship, in

¹ Paz's first wife, Maria Inez Magdaleno, entered the United States in April 1973. His second wife, Humberta Camacho, entered the country in 1976. Based upon Paz's applications under the name Molina, both wives received first preference treatment, as wives of a United States citizen.

² From his first marriage, Paz has one son, who was born in the United States. Paz remarried in 1976 and has four children from that marriage, two of whom were born in this country.

³ The BIA's decision states that Paz entered the United States on either October 22 or October 26 of 1983. During the hearing before the immigration judge, Paz testified that he entered on October 22, 1983.

violation of 18 U.S.C. § 911.⁴ He received a two-year suspended sentence and a three-year term of supervised probation. The BIA decision reflects that he served two and one-half months in prison.

On October 26, 1983, an order to show cause issued, charging Paz with deportability under the Immigration & Nationality Act, as a person excludable at the time of entry for not having proper immigration documents. 8 U.S.C. §§ 1251(a)(1), 1182(a)(20).⁵ At an initial appearance before an immigration judge on March 23, 1984, Paz conceded his deportability and requested discretionary relief in the form of suspension of deportation under 8 U.S.C. § 1254(a)(1).⁶ The immigration judge held an evidentiary hearing on

⁴ This statute provides that "[w]hoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than \$1,000 or imprisoned not more than three years, or both."

⁵ The Immigration and Nationality Act has been amended since Paz was charged with deportability in 1983. All references and quotations will be from the version in force in 1983, with new section numbers noted where applicable. No substantive changes have been made to the provisions pertinent to this case.

Section 1251(a)(1) (now codified as section 1251(a)(1)(A)) provides for the deportation of any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."

Section 1182(a)(20) (now section 1182(a)(7)(A)(i)(I)) directs the exclusion of

"any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title."

⁶ The version of section 1254(a)(1) current at the time of these proceedings provided:

the requested relief on May 18, 1984, during which Paz applied, in the alternative, to be allowed to depart voluntarily in lieu of deportation.⁷

On October 27, 1986, the immigration judge issued a written decision finding Paz deportable under 8 U.S.C. § 1251(a)(1). The immigration judge denied his applications for suspension of deportation or voluntary departure, on the ground that Paz failed to meet the statutory requirement of good moral character based on his impersonation of his deceased cousin for over ten years and his

"As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and S0

(1) is deportable under any law of the United States except [provisions not applicable here]; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

⁷ Voluntary departure is provided in the immigration statutes pursuant to 8 U.S.C. § Section 1254(e):

"The Attorney General may, in his discretion, permit any alien under deportation proceedings, [subject to exceptions not applicable here], to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

acceptance of the benefits of United States citizenship. The immigration judge ordered Paz to be deported to Mexico.

Paz appealed to the BIA.⁸ Because the immigration judge had given no statutory basis for his finding that Paz lacked good moral character, the BIA reviewed his applications for suspension of deportation and for voluntary departure *de novo*. The BIA dismissed the appeal, holding, *sua sponte*, that Paz's conviction for false claim to United States citizenship, under 18 U.S.C. § 911, constituted a crime of moral turpitude, which precluded a finding of good moral character under 8 U.S.C. § 1101(f)(3).⁹ The BIA held, in the alternative, that Paz's actions in assuming a false

⁸ Although Paz filed his notice of appeal to the BIA on November 5, 1986, the transcript of the proceedings before the immigration judge was not prepared until February 1989, and the Immigration and Naturalization Service did not file its brief until over a year and a half after its due date.

⁹ Section 1101(f) provides:

"For the purposes of this chapter

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was

(3) a member of one or more of the classes of persons, whether excludable or not, described in . . . paragraph (9) . . . of section 1182(a) of this title, if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period."

Paragraph (9) of section 1182(a) describes aliens "who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime. . . ."

identity and falsely claiming United States citizenship demonstrated that he did not possess good moral character.

Paz now petitions for review of the BIA decision.

Discussion

Our review of immigration decisions is extremely limited. *Fiallo v. Bell*, 97 S.Ct. 1473, 1478 (1977) ("the power over aliens is of a political character and therefore subject only to narrow judicial review") (quoting *Hampton v. Mow Sun Wong*, 96 S.Ct. 1895, 1904-1905 (1976)). We will affirm the BIA's determination that Paz is not eligible for the requested relief if the BIA made no material error of law and if the record, considered in its entirety, contains reasonable, substantial, and probative evidence supporting the factual findings. *Molenda v. I.N.S.*, 998 F.2d 291, 293 (5th Cir. 1993).

I. Issue of Good Moral Character

Paz contends that the BIA erred in determining that he lacked the required good moral character. He challenges the BIA's conclusion that his conviction under 18 U.S.C. § 911 involved moral turpitude as well as its alternative holding that he was otherwise not of good moral character due to his impersonation of his deceased cousin.

8 U.S.C. § 1254 sets forth the conditions which Paz must meet in order to be entitled to the requested relief. The burden is on Paz to establish his eligibility. *In re Y-*, 7 I. & N. Dec. 697, 699 (BIA 1958). The requirements of good moral character are factual in nature; findings on these requirements must be supported by reasonable evidence. *Ganjour v. I.N.S.*, 796 F.2d 832, 839 (5th

Cir. 1986).

In order to qualify for suspension of deportation, Paz must have been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application for relief; he must establish that he was and is a person of good moral character during that whole period; and, finally, his deportation must result in extreme hardship to himself, or to a spouse, parent, or child who is a United States citizen or permanent resident. 8 U.S.C. § 1254(a)(1). The parties have stipulated that Paz has been physically present in the United States for the statutory seven-year period. The Immigration and Naturalization Service (INS) contested the issues of good moral character and potential hardship to Paz's children who are citizens of this country. Neither the immigration judge nor the BIA reached the question of hardship, as each found that Paz was not entitled to suspension of deportation based on a lack of good moral character.

For purposes of voluntary departure, Paz must show that he "is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection." 8 U.S.C. § 1254(e). Again, the immigration judge and the BIA denied Paz this relief based upon their findings that he lacked good moral character.

8 U.S.C. § 1101(f) sets forth statutory conditions which preclude a finding of good moral character.¹⁰ The BIA found, *sua*

¹⁰ The INS claimed below that Paz lacked a good moral character under section 1101(f)(6), which concerns an alien "who has given

sponte, that Paz had been convicted of a crime involving moral turpitude and denied him relief on this basis. 8 U.S.C. § 1101(f)(3), referencing 8 U.S.C. § 1182(a)(9). In the alternative, the BIA agreed with the immigration judge that Paz's actions in assuming a false identity and availing himself of the benefits of United States citizenship, knowing his actions were illegal, reflected that he was not of good moral character.

Paz argues in this appeal that, under the BIA's own precedent, a conviction for falsely claiming United States citizenship does not involve moral turpitude.¹¹ We do not reach the question whether a conviction for falsely claiming United States citizenship is a

false testimony for the purpose of obtaining any benefits under this chapter." In *In re W--- J--- W---*, 7 I. & N. Dec. 706 (BIA 1958), the BIA held that an alien's execution of visa petitions for his spouse, in which he stated under oath that he was a United States citizen, constituted a false statement within the meaning of section 1101(f)(6) and denied his application for suspension of deportation. "An alien who has given false testimony for the purpose of obtaining benefits under the Immigration and Nationality Act is precluded from establishing good moral character." *Id.*

In the present case, the BIA rejected this argument on the ground that Paz's use of Molina's birth certificate to live and work in the United States did not amount to giving false testimony within the provision of section 1101(f)(6). *Cf. In re Barcenas*, 19 I. & N. Dec. 609 (BIA 1988) (alien not eligible for voluntary departure because he gave false testimony under oath at deportation proceeding). The BIA also noted that there was no evidence in the record indicating that Paz had made false claims to citizenship while under oath.

¹¹ In some circumstances, it may be an abuse of discretion for the BIA to depart from its own precedent without reasonable explanation. *Diaz-Resendez v. I.N.S.*, 960 F.2d 493, 497 (5th Cir. 1992) (quoting *Israel v. I.N.S.*, 785 F.2d 738, 740 (9th Cir. 1986)). Any departure here in its holding that Paz's conviction was for a crime involving moral turpitude is harmless, because, as will be seen below, the BIA was not limited to the classes of section 1101(f) in determining whether Paz met the moral character requirement.

crime of moral turpitude, precluding deportation relief, because Paz's actions in falsely assuming the identity and concomitant benefits of a United States citizen provide adequate ground for the BIA's decision.¹²

¹² We observe that there is BIA precedent indicating that a conviction under 18 U.S.C. § 911 does not involve moral turpitude. In *In re K-*, 3 I. & N. Dec. 69 (BIA 1947), the BIA considered the case of an alien, a native and citizen of Greece, who upon his arrival in the United States in 1931, while he was under the age of 18, testified under oath before a Board of Special Inquiry that he was born in New York City. The alien produced a birth certificate in his assumed name establishing that fact. He was admitted to this country as an American citizen.

In 1946, the alien was convicted on four counts of an indictment charging him with falsely representing himself to be a United States citizen. He received a suspended sentence and was fined. During subsequent deportation hearings, the alien admitted committing the crime of perjury when he testified falsely before the Board of Special Inquiry in order to gain entrance to the United States. The BIA held that this admission rendered him subject to deportation. The alien requested discretionary relief in the form of suspension of deportation or voluntary departure.

The BIA found that the alien was not eligible for suspension of deportation, due to the perjury offense in 1931, but held that he did qualify for voluntary departure:

"While we do not condone respondent's illegal actions in misrepresenting himself as a citizen, we nevertheless do not think that he is precluded from establishing his good moral character. Considering the record in its entirety, we think that he does have the requisite character to establish his eligibility for voluntary departure. In view of his close family ties, his long residence and his good moral character record except for his false claims to citizenship, we shall grant his application for voluntary departure"
3 I. & N. Dec. at 71.

The BIA stated that the prior version of 18 U.S.C. § 911 (section 346(a)(18) of the Nationality Act of 1940) had been held not to involve moral turpitude. *Id.* (Citing *In re G-*, 56088/788, August 26, 1941).

BIA decisions subsequent to *In re K-*, although decided on other grounds, generally accept the holding that a conviction for falsely claiming United States citizenship does not involve moral turpitude. See *In re Y-*, 7 I. & N. Dec. 697, 699 (BIA 1958)

The BIA's finding that Paz lacked good moral character may be based on grounds other than those enumerated in 8 U.S.C. § 1101(f): "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." 8 U.S.C. § 1101(f). Thus, contrary to Paz's contentions, his actions in impersonating his cousin and accepting the benefits of citizenship, although not an enumerated ground for denial of relief, may support a finding that he lacked good moral character.

Paz relies on *In re K-*, 3 I. & N. Dec. 69 (BIA 1947),

("this Board has held that a false claim to citizenship does not involve moral turpitude"); *In re B-*, 7 I. & N. Dec. 342, 345 (BIA 1956) ("We note that counsel has cited the *Duncan* case as holding that the crime of making a false statement in the passport application (18 U.S.C. 1542) requires less than the crime of making a false representation of United States citizenship (18 U.S.C. 911), which latter statute we have held does not involve moral turpitude").

Although the question of what constitutes a crime of moral turpitude has no easy answer, it appears that crimes falling within that category generally involve the element of fraud. Distinctions are drawn between fraudulent and false conduct. See, e.g., *In re Acosta*, 14 I. & N. Dec. 338 (BIA 1973) ("Moral turpitude is present in connection with the respondent's [conviction of making a false statement in the acquisition of a firearm] because fraud and materiality are essential elements of the crime"); *In re R-*, 5 I. & N. Dec. 29 (BIA 1952) (offenses of making false statements for purposes of avoiding military service were essentially a fraud perpetrated against the United States by the respondent for the purpose of evading an obligation which he owed to the Government and, therefore, involved moral turpitude). In the present case, Paz was convicted on a false claim to United States citizenship, 18 U.S.C. section 911. This offense is grouped with other offenses of false personation (Chapter 43 of Title 18) rather than with offenses of fraud or false statements (Chapter 47 of Title 18). Even in this latter section, offenses have been held not to involve moral turpitude where it is not clear whether the conduct in question was fraudulent or merely false. See *In re Espinosa*, 10 I. & N. Dec. 98 (BIA 1962) (finding no moral turpitude where question remained whether conviction under 18 U.S.C. section 1001 was based on fraudulent conduct or on false conduct).

contending that the BIA's decision in that case was based both on its determination that the alien's conviction was not of a crime involving moral turpitude and on its finding, based on the entire record, that the alien was of good moral character.¹³ Paz claims that the facts of that case are virtually identical to his own and that, for this reason, the BIA arbitrarily departed from its precedent in the earlier case in finding him generally to lack good moral character. The *In re K-* case is distinguishable, however. Among other things, in *In re K-*, the alien was married to a United States citizen, while here, Paz has used his false birth certificate to enable his two wives to petition for admission to this country.

We have observed, without so holding, that false claims of citizenship may be evidence of bad moral character. See *Nunez-Payan v. I.N.S.*, 811 F.2d 264, 267 n.3 (5th Cir. 1987) (citing *Wong Wing Hang v. I.N.S.*, 360 F.2d 715, 719 (2d Cir. 1965) and *Orlando v. Robinson*, 262 F.2d 850 (7th Cir.), *cert. denied*, 79 S.Ct. 898 (1959)). In *Orlando v. Robinson*, the Seventh Circuit considered false statements in an application for registry and in a petition for naturalization to be evidence of bad moral character. 262 F.2d at 851 ("At the risk of being labeled prosaic we do not classify a prevaricator as a person of good moral character"). See also *Becerra-Jimenez v. I.N. S.*, 829 F.2d 996, 999 (10th Cir. 1987) (repeated reentry into United States by falsely claiming United States citizenship, in addition to prior convictions and earlier

¹³ See discussion of *In re K-*, *supra* note 12.

deportations, strongly supported denial of voluntary departure).

Paz emphasizes that the reason he entered and remained in this country using Molina's birth certificate was to help his family. This claim does not preclude a finding that he lacked good moral character. *See Wong Wing Hang v. I.N.S.*, 360 F.2d 715, 719 (2d Cir. 1966) (denying petition to review of alien motivated by desire to help family).

The record provides ample, reasonable evidence supporting the BIA's decision that Paz lacked the good moral character required to be eligible for deportation relief.

II. Timing of Determination of Eligibility

Next, Paz argues that the BIA erred in failing to follow binding precedent, treating applications for relief as continuing applications and determining eligibility for relief on the basis of the law and facts in existence at the time the application is finally adjudicated. He contends that the BIA should have measured the statutory time periods for assessing good moral character from the date of its consideration in 1992 rather than from the date of his application for relief in 1984.¹⁴

Paz's error is in assuming that an application for relief from deportation is ongoing for purposes of changes in both law and

¹⁴ The import of this argument is that, if his application is decided wholly on the law and facts extant in 1992, neither his conviction under 18 U.S.C. section 911 nor his false representation of his identity, which ended with his conviction, could be considered in determining his good moral character or lack thereof. *See, e.g.*, 8 U.S.C. § 1101(f)(3) (crimes of moral turpitude prevent a finding of good moral character "if the offense . . . was committed during [the period for which good moral character is required to be established]").

facts. The cases upon which he relies, decided in the context of applications for deportation relief, focus only on changes in law occurring between the time the application is made and the time it is adjudicated. See *Matter of A-A-*, Interim Decision 3176 (BIA 1992) ("An application for relief from deportation is a continuing one, and the law to be applied is that existing at the time the final administrative decision is made"; applying amended version of immigration statute to application for withholding of deportation without regard to the date upon which application was made).

Paz also relies on *In re Kazemi*, 19 I. & N. Dec. 49 (BIA 1984), which holds that "an application for admission to the United States is a continuing application and admissibility is determined on the basis of the law and the facts existing at the time the application is finally considered." This case is distinguishable, however, because it was decided in the context of applications for admission, rather than for relief from deportation.

Because there were no substantive changes made in the statutes affecting Paz's deportation proceedings, the BIA had no need to treat his application for relief as ongoing. Subsequent facts or circumstances, none of which relate to the facts on which the finding concerning lack of good moral character was based, do not mandate a different result.

III. Hardship Issue

Finally, Paz contends that it was an abuse of discretion for the BIA not to address the issue of whether his deportation would result in extreme hardship to the members of his family who are United States citizens, an issue which is one of the three factors

that must be established in order for an alien to be eligible for suspension of deportation. The BIA did not reach this issue because it found that Paz had not established the required good moral character.

As a general rule, the BIA is "not required to make findings on issues the decision of which is unnecessary to the results [it] reach[es]." *I.N.S. v. Bagamasbad*, 97 S.Ct. 200, 201 (1976). In *Bagamasbad*, an immigration judge denied an alien's application for a change in status pursuant to 8 U.S.C. § 1255(a), on the ground that the alien had made serious misrepresentations to the United States consul who had issued her tourist visa. The judge did not reach the issue of whether the alien satisfied the statutory requirements for permanent residence. The BIA affirmed, but a divided court of appeals, *en banc*, held that the immigration judge was required by statute to make findings and conclusions regarding the alien's eligibility for admission as a permanent resident. *Bagamasbad v. I.N.S.*, 531 F.2d 111 (3d Cir. 1976). The Supreme Court reversed. Because the alien's application was properly denied on the basis of the misrepresentations, without regard to the eligibility requirements, the Court found "no reason to depart from the general rule and require the immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility." *Bagamasbad*, 97 S.Ct. at 201.

Again, Paz's cases are distinguishable. In each, the BIA reached the issue of hardship because character was not at issue. See, e.g., *Ganjour v. I.N.S.*, 796 F.2d at 838, 839 (BIA reached hardship issue where INS did not contest character); *Zamora-Garcia*

v. United States Dep't of Justice I.N.S., 737 F.2d 488, 490 (5th Cir. 1984) (no dispute that alien met character criteria).

Because the BIA properly denied Paz's application for relief on the basis of his lack of good moral character, it was not required to address the issue of hardship.

Conclusion

The BIA properly determined that Paz lacked the requisite good moral character, based on his impersonation of his deceased cousin. Paz's petition for relief is

DENIED.