

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5154  
Summary Calendar

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THUAN NGUYEN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION  
SERVICE,

Respondent.

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Petition for Review of an Order of the  
Board of Immigration Appeals  
A25 321 337

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July 16, 1993

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

PER CURIAM:\*

Petitioner has appealed the decision of the Board of Immigration Appeals denying his request for waiver of deportation pursuant to § 212(c) of the Immigration and Naturalization Act. He contends that the INS improperly balanced the factors relevant to a determination of discretionary relief, that the "unusual and outstanding equities" test employed by INS is unduly vague, and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

that he should alternatively have been entitled to receive political asylum or withholding of deportation pursuant to §§ 208 and 243(h) of the Act. Finding no abuse of discretion or error of law, we affirm.

As the parties recognize, in adjudicating a waiver application under § 212(c), the BIA must balance the favorable and adverse factors in the case. Mantel v. INS, 798 F.2d 124, 128 (5th Cir. 1986). In Matter of Marin, 16 I&N Dec. 581, 584-85 (BIA 1978), the Board set forth the factors to be considered. Positive factors can include such matters as the alien's family ties in the United States, his length of residence here, the claim of hardship upon deportation to the alien and his family, employment history, community service, and evidence of rehabilitation following the criminal incidents. Negative factors may include either the absence of any of the potential positive factors or criminal convictions, including their nature, seriousness and proximity to the application. INS is not bound by an inflexible test. Moreover, "[a]s the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities." Matter of Marin, supra at 585. Finally, contrary to the assertion in petitioner's brief, the Board has not stated that an alien demonstrates unusual and outstanding equities merely by satisfying the threshold test, and this circumstance entitles the alien to a favorable exercise of discretion. Instead, the BIA has said, "an alien who demonstrates unusual or outstanding

equities, as required, merely satisfies the threshold test for having a favorable exercise of discretion considered in his case; such a showing does not compel that discretion be exercised in his favor." Matter of Buscemi, 19 I&N Dec. 628, 634 (BIA 1988).

It is evident from the immigration judge's decision that he applied the proper standards and considered thoroughly all the positive and negative factors relevant to Nguyen's application. We will not rehash the evidence, for the petitioner's recitation is very similar to that of the immigration judge, except that petitioner draws different conclusions from it and disagrees with the judge's evaluation of Nguyen's level of remorse for the armed robbery. The essence of discretion, however, is the ability to draw conclusions in the face of conflicting evidence. Where, as here, the immigration judge and BIA considered all the evidence regarding petitioner's background, criminal history, apparent desire to rehabilitate himself, and consequences of deportation and then found that Nguyen did not present unusual or outstanding equities to outweigh his aggravated robbery conviction, there was no abuse of discretion.

Further, the standards applied by BIA to § 212(c) petitions, including the "unusual and outstanding equities" requirement, are not unduly vague and have been recognized by this court on many occasions. See, e.g., Villareal San Miguel v. INS, 975 F.2d 248 (5th Cir. 1992); Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992); Mantel, supra.

Nguyen does not object to the INS's legal conclusion that he is ineligible for asylum or withholding of deportation because one of the crimes of which he was convicted was "particularly serious" according to both the statute and regulation. Immigration and Naturalization Act § 243(h) (withholding of deportation); 8 CFR ¶ 208.14(c)(1) (political asylum). He attempts to argue, however, that United Nations policy prevents his deportation to Viet Nam. At this point was not raised in the administrative proceedings, it will not be considered here.

Finally, Nguyen implies that INS incorrectly applied in his case the recent statutory amendments that would automatically deny petitioner § 212(c) relief based on his aggravated robbery conviction. It is apparent from the BIA and immigration judge's opinions, however, that the statute was used in a purely illustrative sense and did not bind INS.

For the foregoing reasons, the order of deportation is AFFIRMED.