IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5217
Summary Calendar

JOSE SANTOS LOZOYA-ZAROTE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of
Immigration and Naturalization Service
(A30 548 608)

(August 17, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

In May of 1986, the Immigration and Naturalization Service (INS) initiated deportation proceedings against Jose Santos Lozoya-Zarote (Lozoya), alleging that at the time of his entry he was not in possession of a valid immigrant visa. After numerous hearings, the immigration judge found Lozoya deportable as charged, denied his application for legal permanent residence,

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.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 granted him one month in which to depart the United States voluntarily. Lozoya appealed from this order to the Board of Immigration Appeals (BIA), which found that the immigration judge did not err in its determinations. Lozoya now appeals from the BIA's decision regarding his deportability to this court. We affirm.

I. Background

Lozoya is a native and citizen of Mexico who entered the United States on an immigrant visa in 1971. The visa was granted on the grounds that Lozoya was then married to a United States citizen, Isabel Delgado. On March 21, 1985, a district court in El Paso found that at the time Lozoya married Delgado, he had not yet ended a previous marriage. The district court accordingly declared Lozoya's marriage with Delgado void ab initio. The record indicates that for a number of years since his arrival in the United States, Lozoya has been involved with yet a third woman, who lives in Mexico and with whom he has had several children. The birth certificates of at least three of those children indicate that Lozoya resided in Mexico at the time of their births.

On May 22, 1986, the INS charged Lozoya with deportability under 8 U.S.C. § 1251(a)(1), as an alien who was excludable at the time of entry because he was not in possession of a valid immigrant visa or other documentation. The INS argued that the nullification of the marriage between Lozoya and Delgado rendered Lozoya's visa invalid. During a series of deportation hearings,

Lozoya denied deportability. He also applied for registry, claiming that he has resided continuously in the United States since 1971. The immigration judge found Lozoya deportable as charged, denied his application for legal permanent residence, and granted him one month in which to depart the United States voluntarily. Lozoya appealed from the immigration judge's order to the BIA, raising only the issue of his application for registry. The BIA, acknowledging that Lozoya had not contested the issue of his deportability, nonetheless held that deportability had been established by "clear, unequivocal, and convincing evidence." It further affirmed the immigration judge's decision denying Lozoya's application for registry on the grounds that Lozoya had not established that he had resided continuously in the United States since 1971. Lozoya appeals only from the BIA's decision as to his deportability.

II. Discussion

This appeal raises, first, a jurisdictional issue. The INS argues that because Lozoya did not raise the issue of his deportability before the BIA, he did not exhaust administrative remedies on the issue; and accordingly we do not have jurisdiction to review his case. The Immigration and Nationality Act requires that we review only those orders of deportation or exclusion in which the alien has exhausted available administrative remedies. 8 U.S.C. § 1105a(c).[1] In general, we

[1] The relevant text of 8 U.S.C. § 1105a(c) states:

An order of deportation or of exclusion shall not be

have held that if a petitioner has not raised an issue before the BIA, we do not have jurisdiction to consider it because he or she has not exhausted administrative remedies with regard to that issue. See Pierre v. INS, 932 F.2d 418, 421 (5th Cir. 1991); Vargas v. INS, 826 F.2d 1394, 1399 (5th Cir. 1987); Carnejo-Molina v. INS, 649 F.2d 1145, 1150 (5th Cir. 1981); Ka Fung Chan v. INS, 634 F.2d 248, 258 (5th Cir. 1981). However, the rationale behind our holdings has been that administrative remedies have not been exhausted because the BIA has not had an opportunity to make findings on the issue in question. See Carnejo-Molina, 649 F.2d at 1150 ("It is well settled that courts of appeals are not required to consider issues raised by an appellant which were not presented to nor considered by an administrative board as part of the appellate process.) (emphasis added). Accordingly, because the BIA here considered an issue sua sponte and made a finding on that issue, we conclude that Lozoya's administrative remedies have been exhausted. We thus have jurisdiction to consider the BIA's determination of the issue presented by this case.

Lozoya argues only that the BIA's finding of deportability should be reversed because the board erred in its factual finding that his marriage to Delgado was void. He contends that there was "not one iota of evidence in the record" to counter his

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> reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations . . . .

assertion that he was single when he married Delgado, and that the immigrant visa he obtained through his marriage to her was therefore valid. We review factual findings by the BIA under a substantial evidence standard. See Silwany-Rodriguez v. INS, 975 F.2d 1157, 1160 (5th Cir. 1992); Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991); Zamora-Morel v. INS, 905 F.2d 833, 838 (5th Cir. 1990). This standard "requires only that the Board's conclusion be based upon the evidence presented and be substantially reasonable." Silwany-Rodriguez, 975 F.2d at 1160, quoting Rojas, 937 F.2d at 189.

In the case at hand, the record included a final adjudication by an El Paso County district court nullifying the marriage between Lozoya and Delgado from its inception. That judgment in and of itself provides ample evidence for the factual finding that Lozoya challenges. We reject as both inaccurate and irrelevant his contention that the judgment provides no evidence of bigamy on his part because it gives no express reason for its nullification of the Delgado marriage. The district court expressly ruled on Delgado's pleading, which alleged only Lozoya's prior marriage as grounds for the annulment. Moreover, whatever the grounds for the annulment, if his marriage to Delgado was void ab initio, the immigrant visa he received as a result was invalid. In sum, Lozoya's challenge to the BIA's finding of deportability is without merit.

III. Conclusion

For the foregoing reasons, we AFFIRM the decision of the

Board of Immigration Appeals.