IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4066
Summary Calendar

EDUARDO SAENZ-VILLAGOMEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A39 284 224)

(December 15, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge:

Petitioner is a 26-year-old man of Mexican birth who entered the United States with his parents on a tourist visa in 1973 and stayed here. He was found deportable after being convicted and sentenced to prison, at the age of 18, for burglary of a motor vehicle. The issue before the INS and in this court is not his deportability, but whether he was eligible to apply for a

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

waiver of deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1988).

INS has consistently maintained that in order to be eligible for a waiver of deportation, a form of discretionary relief, applicants must have accrued seven years of lawful domicile as a permanent legal resident and not otherwise. Two circuit courts have upheld this interpretation of the statute. See Chiravacharadhikul v. INS, 645 F.2d 248, 250 (4th Cir.), cert. denied, 454 U.S. 893 (1981); Castillo-Felix v. INS, 601 F.2d 459, 462-67 (9th Cir. 1979). The Second Circuit is ambivalent. It held in one case that an alien may acquire lawful domicile for purposes of section 212(c) if he has established a lawful intent to remain and live in the United States. See Lok v. INS, 548 F.2d 37, 41 (2d Cir. 1977). In a later appeal of the same case, however, the Second Circuit concluded that a person who entered the U.S. on a student visa could not lawfully form an intent to be domiciled in the United States. See Lok v. INS, 681 F.2d 107, 109 n.3 (2d Cir. 1982). This court has declined to choose sides in the dispute over section 212(c) eligibility. See Brown v. INS, 856 F.2d 728, 730 (5th Cir. 1988).

In the present controversy, we also do not need to choose sides. Under either of two views, petitioner was not a legal permanent resident in this country for seven consecutive years before he was found deportable in 1988. Petitioner alleges that he became a legal permanent resident in 1978 and remained so thereafter until in 1985 he was granted permanent resident alien

status. He and his parents allegedly remained here lawfully from 1978-1985 because of a federal injunction issued in the nationwide class action of Silva v. Levi, No. 76-C-4268 (N.D. Ill. March 22, 1977). Under Silva, prospective immigrants from the Western hemisphere were authorized to remain in this country and seek employment while INS sorted out problems regarding the number of available visas. See Silva v. Bell, 605 F.2d 978 (7th Cir. 1979) (determining method of reallocation of visa numbers).

The government contends, and we are inclined to agree, that the Silva order neither authorized permanent residence in the United States nor granted its beneficiaries any entitlement other than the right to be temporarily free from deportation. See Luciano-Vincente v. INS, 786 F.2d 706, 709 (5th Cir. 1986); Ramirez-Durazo v. INS, 794 F.2d 491, 498 (9th Cir. 1986). As a result, the period during which petitioner could not be deported under the Silva injunction was not a period of legal permanent residence for section 212(c) purposes.

Alternatively, the government points out that the Silva injunction was vacated on November 1, 1981. See Ramirez-Durazo v. INS, 794 F.2d at 495. Petitioner therefore returned to his previous--illegal--status until 1985. The burglary occurred in August, 1985 only a few months after he had become a legal permanent resident alien. His maximum "Silva residence" would have been only 3 years, not 7.

Petitioner's final argument is that between 1988, when the IJ found him deportable, and 1992, when the Board of

Immigration Appeals ruled on his appeal, he did acquire the necessary seven years continuous permanent legal residence. In this court, he urges us to remand for adjudication of his section 212(c) application. This we may not do. Appellant never raised this issue before the Board, and he therefore failed to exhaust his administrative remedies, depriving this court of jurisdiction over the issue. See Vargas v. INS, 831 F.2d 906, 907 (9th Cir. 1987). The Board noted that petitioner's counsel sought remand to the IJ for a determination of the section 212(c) application--in February, 1989. Petitioner did not, however, move to reopen before the Board in 1992 even though he became eligible for section 212(c) relief more than eight months before the Board decided his case. A remand is therefore unwarranted. See Fleurinor v. INS, 585 F.2d 129, 133 (5th Cir. 1978).

For these reasons, the decision of the Board is **AFFIRMED** and the petition for review **DISMISSED**.