UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-4139
Summary Calendar

IKECHUKWU UZOMA UMEH,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A28 660 041)

(August 13, 1993)

Before JOLLY, DUHE, AND BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Petitioner, Ikechukwu Uzoma Umeh, seeks review of a final order of the Board of Immigration Appeals (BIA). The BIA affirmed the immigration judge's denial of relief from deportation under sections 212(c) and 212(h) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c), (h) (Supp. 1993). We affirm.

Background

Umeh, a native and citizen of Nigeria, entered the United States in 1984 as a student. Umeh became a lawful permanent

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

resident in 1989 after marrying a United States citizen. Umeh and his wife have two children.

On October 16, 1991, Umeh was convicted, following a guilty plea, of mail fraud. He was sentenced to six months and ordered to make restitution. Three months later, he pleaded guilty to financial transaction card theft. He was sentenced to community service and probation.

In August 1992, the INS initiated deportation proceedings. Umeh conceded deportability, but sought relief under sections 212(c) and 212(h).[2] The immigration judge denied Umeh's request for statutory relief, finding him deportable. The BIA upheld that decision.

Discussion

A. Section 212(c)

Umeh argues that his time spent in the United States as a student should count in the calculation of the seven year lawful unrelinquished domicile requirement under § 212(c). An alien cannot, however, lawfully intend to be domiciled while he or she is in the country on a student visa. Brown v. INS, 856 F.2d 728, 731 (5th Cir. 1988). Because Umeh did not obtain lawful permanent residence until 1989, the BIA correctly held that he was statutorily ineligible for § 212(c) relief.

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[2] Because Umeh's convictions occurred within fifteen years of his request for adjustment of status, he is ineligible for waiver under § 212(h)(1)(A). His marriage to a United States citizen makes him eligible for waiver under § 212(h)(1)(B), which requires that he establish that his deportation would result in extreme hardship to his family.

B. Section 212(h)

Umeh first argues that the BIA failed to consider evidence in the record of his rehabilitation. The 1991 amendments to § 212(h) eliminated the requirement of rehabilitation for an immigrant seeking waiver whose spouse or child is a United States citizen. 8 U.S.C. § 1182(h)(1)(B); see also Osuchukwu v. INS, 744 F.2d 1136, 1142 (5th Cir. 1984) (concluding that it may be unnecessary to reach the issue of rehabilitation if no extreme hardship is found).

Umeh next contends that the BIA erred in concluding that Umeh's deportation would not cause an extreme hardship to his wife or children. Congress has granted the Attorney General and her delegate, the BIA, broad discretion in determining extreme hardship, and accordingly, we are to review the BIA's decision for an abuse of that discretion. Osuchukwu, 744 F.2d at 1140. We are to "ensure that the alien has received full and fair consideration of all circumstances that occasion the claim, and may find an abuse of discretion if the Board utterly failed or refused to consider relevant hardship factors . . . ." Id. at 1141 (footnote omitted). We must, however, consider only the evidence in the record. Rivera-Cruz v. INS, 948 F.2d 962, 967 (5th Cir. 1991). The BIA demonstrated that it considered Umeh's contentions of hardship, and its finding of no extreme hardship as supported by the evidence in the record is not an abuse of its discretion. See Hernandez-Cordero v. INS, 819 F.2d 558, 563 (5th Cir. 1987) (en banc); Osuchukwu, 744 F.2d at 1142.

Umeh's final complaint is that he was denied due process when

he was not granted a change of venue. Umeh conceded, however, that he did not request a change of venue. Moreover, the BIA noted that the absence of Umeh's wife from the proceedings would not prejudice his case. Umeh has not shown the substantial prejudice necessary to sustain a due process claim. See Hernandez-Garza v. INS, 882 F.2d 945, 947 (5th Cir. 1989).

Conclusion

For the foregoing reasons, the judgment of the Board of Immigration Appeals is AFFIRMED.