

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4248
Summary Calendar

OLANREWAJU OLAYINKA AJAYI,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration
and Naturalization Service
(A26 542 823)

(November 3, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Olanrewaju Olayinka Ajayi, *pro se*, challenges the dismissal by the Board of Immigration Appeals (BIA) of his appeal of an Immigration Judge's (IJ) order that he be deported to Nigeria. We **DENY** the petition for review.

I.

Ajayi is a native and citizen of Nigeria. His wife is also a citizen of Nigeria, and he has three children, all of whom are

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

United States citizens. In 1992, the Immigration and Naturalization Service (INS) issued an Order to Show Cause and Notice of Hearing, in which it alleged that Ajayi had overstayed his visa in violation of 8 U.S.C. § 1251(a)(1)(B),² and that Ajayi had been convicted of a crime of moral turpitude within five years after the date of his entry into the United States, thereby violating 8 U.S.C. § 1251(a)(2)(A)(i). Thus, the INS charged that Ajayi was subject to deportation. Ajayi also was informed that he could seek an attorney to represent him.

Ajayi appeared at a joint deportation hearing before an IJ on September 15, 1992, and was presented with a list of lawyers who provided free or low-cost services. The IJ asked Ajayi if he wanted time to try to obtain counsel, and Ajayi responded both that he would like time to "review the file", and that his conviction was under appeal. The IJ continued Ajayi's hearing until September 30, telling Ajayi that he should bring papers to show that his conviction was under appeal, and that he should "decide whether you're going to represent yourself or get an attorney."³

Because the facility in which the hearing was to take place was closed on September 30, the hearing did not take place until October 13. Ajayi stated then that he had not obtained counsel, and requested a continuance, claiming that he did not realize he

² Apparently, the visa expired in June 1981.

³ The IJ also required that the INS amend its charge against Ajayi on the moral turpitude deportation ground, demanding that the INS include a date of commission for the underlying criminal charge.

would have to attend the hearing until that morning. The IJ denied this request, reasoning that Ajayi already had been afforded a month in which to secure representation.

Ajayi testified that he was deportable because he had remained in the United States longer than permitted by his visa. On the basis of this admission, the IJ concluded that "deportability has been established by clear, convincing, and unequivocal evidence"; however, the IJ did not find Ajayi deportable on the criminal conviction ground. The IJ ordered that Ajayi be deported to Nigeria, having ascertained that Ajayi would wish to be sent there if deportation were necessary.

Ajayi appealed to the BIA, which determined that the appeal was without merit.

II.

Generally, we will "affirm the decision of the BIA if it has made no error in law and if reasonable, substantial, and probative evidence on the record considered as a whole supports its factual findings." **Howard v. INS**, 930 F.2d 432, 434 (5th Cir. 1991); 8 U.S.C. § 1105a(a)(4). The decision of the IJ is relevant only insofar as its errors affect the decision of the BIA. **Ogbemudia v. INS**, 988 F.2d 595, 598 (5th Cir. 1993).

A.

Ajayi challenges the refusal of the BIA (and the IJ) to find him eligible for suspension of deportation under § 244(a)(1) of the

Immigration and Nationality Act (INA), 8 U.S.C. § 1254(a)(1).⁴ Section 244(a)(1) allows for the suspension of a deportation if the deportee "has been physically present in the United States for a continuous period of not less than seven years immediately preceding" the date of the application for suspension *and* can prove "that during all of such period he was and is a person of good moral character". 8 U.S.C. § 1254(a)(1). The INA explicitly states that "[n]o person shall be regarded as, or found to be, a person of good moral character who ... has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred eighty days or more" during the period in which good moral character is required. 8 U.S.C. § 1101(f)(7).

Ajayi cannot prove the requisite "good moral character" during the seven years preceding his application for suspension. He admits that he was incarcerated for about 10 months during 1991-1992. Now, Ajayi raises a number of arguments in support of his contention that his "ten (10) month confinement does not preclude establishing 'good moral character'". For example, he argues that his confinement may not create "moral blame, even though there may be legal obligation." These arguments are irrelevant; the statute precludes a finding of good moral character. Indeed, once a

⁴ Ajayi seeks suspension under § 244(a)(2) of the INA, 8 U.S.C. § 1254(a)(2). The government notes that this section would be applicable only if Ajayi had been found deportable on the basis of his criminal conviction; thus, the government addresses his claim as if it were made under § 244(a)(1), which is a more lenient section. Accordingly, and because Ajayi proceeds *pro se*, we will address Ajayi's contention as if it were made pursuant to § 244(a)(1).

dispositive ground for rejecting an alien's claim of relief has been identified, the BIA need not inquire into all facets of the alien's character. See **Nunez-Payan v. INS**, 811 F.2d 264, 267 (5th Cir. 1987) ("the Immigration Judge did not have to consider the positive evidence of good moral character produced by [the alien] at his hearing, because [he] was precluded by statute from proving" it).

Similarly, Ajayi challenges the refusal to grant him a waiver under § 212(h) or § 212(i) of the INA, 8 U.S.C. § 1182(h)-(i). This contention is devoid of merit. Such a waiver can only be heard if presented in conjunction with an application for adjustment of status. See **Matter of Balao**, Interim Decision 3167, 1992 WL 195801 at 13 (BIA). Ajayi did not make such an application.

B.

Ajayi also asserts that his due process rights were violated by the denial of a continuance so that he might obtain counsel. We review due process claims *de novo*. See **Ogbemudia**, 988 F.2d at 598.

Ajayi's claim is without merit. As discussed *supra*, Ajayi: (1) received notice prior to his first hearing that he could retain counsel; (2) was told by the IJ, at the first hearing, that he should consider obtaining counsel for the next hearing (and was provided a list of potential lawyers); and, (3) had not retained a lawyer one month later at that second hearing. Ajayi's "failure to obtain counsel is exactly that -- his failure." See **id.** at 599. This court recently held in **Ogbemudia** that one month *in detention*

was adequate time in which to get a lawyer for a deportation proceeding. **Id.** ("Although obtaining counsel while in detention pending a hearing may prove inconvenient, it does not rise to the level of a due process violation. This is especially true ... given that the IJ allowed [appellant] an entire month within which to obtain counsel.")

C.

Liberally construed, Ajayi's brief raises a due process claim regarding the IJ's admission of an uncertified record of conviction. "The test for admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law." **Bustos-Torres v. INS**, 898 F.2d 1053, 1055 (5th Cir. 1990).

The crux of Ajayi's complaint appears to be that, because he was not found deportable on the criminal conviction ground, the record of the conviction was irrelevant. We disagree. The record of the conviction was probative as to whether Ajayi was eligible for a suspension of deportation; moreover, the record of the conviction merely confirmed Ajayi's own testimony, i.e., that he had served ten months in prison. Ajayi cannot, therefore, establish prejudice. See **Patel v. INS**, 803 F.2d 804, 807 (5th Cir. 1986) (requiring a demonstration of substantial prejudice to make a due process attack on a deportation proceeding).

Closely related to Ajayi's contention regarding the admissibility of the record of conviction is his assertion that the

IJ was biased against him. Based on our review of the record, we concur with the determination of the BIA that this contention is without merit.

D.

Finally, a liberal construction of Ajayi's brief reveals that Ajayi believes his due process rights were violated because he received insufficient notice of the October 13 hearing. Even assuming both that Ajayi was not notified of the hearing until the morning of October 13, and that such notice would be inadequate, we find that he was not substantially prejudiced. See *Patel*, 803 F.2d at 807 ("to sustain a due process challenge to a deportation proceeding, an alien must show substantial prejudice"). First, it would not have adversely affected his ability to obtain counsel; Ajayi admitted that he had not retained a lawyer, even though the hearing was to have taken place two weeks earlier. Second, greater notice could not have rendered Ajayi less deportable; by his own admission, he had overstayed his visa.

III.

For the foregoing reasons, the petition for review of the order of the BIA is

DENIED.