

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4320
Summary Calendar

ALBERTO RAMIREZ-CORDOVA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Immigration and Naturalization Service
(A36 579 726)

(August 31, 1993)

Before POLITZ, Chief Judge, JOLLY and DUHÉ, Circuit Judges.

PER CURIAM:*

Albert Ramirez-Cordova petitions for review of the affirmance by the Board of Immigration Appeals of the refusal by the immigration judge to consider his application for suspension of deportation. Finding no error, we deny the petition.

Entering the United States in 1971, Ramirez-Cordova and his mother became lawful permanent residents when his mother married an American in 1979. When Ramirez-Cordova's permanent resident status

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was revoked and deportation proceedings were initiated against him in 1987, he agreed to a voluntary departure. Shortly after that departure he re-entered the country without inspection. After again entering the United States without inspection in March 1991, new deportation proceedings were initiated. The immigration judge found him ineligible for suspension of deportation and the BIA affirmed that decision. Ramirez-Cordova timely filed a petition for review of the BIA's order.

Pursuant to section 244(a)(1) of the Immigration and Nationality Act,¹ an otherwise deportable alien may apply for a suspension of deportation if he physically has been present in the United States for a continuous period of not less than seven years immediately preceding the date of the application. Continuous physical presence is not broken for purposes of section 244 by absence which is "brief, casual, and innocent and [does] not meaningfully interrupt the continuous physical presence."²

Ramirez-Cordova challenges the BIA's determination that his voluntary departure in 1987, under threat of coerced deportation, broke the continuity of his physical presence in the United States thus making him ineligible for suspension of deportation. He claims that because he re-entered the United States almost immediately following the voluntary departure, his brief absence

¹ 8 U.S.C. § 1254(a)(1).

² 8 U.S.C. § 1254(b)(2). This reflects a 1986 amendment to the Immigration and Nationality Act. Prior to the amendment, the Supreme Court had determined that any absence from the United States would constitute a break in continuous physical presence. **INS v. Phinpathya**, 464 U.S. 183 (1984).

should be excepted under section 244(b)(2).

We have held that voluntary departure under threat of deportation is a "significant" departure from the United States.³ We agree with our colleagues in the Ninth Circuit that "a voluntary departure under threat of deportation is not a brief, casual, and innocent absence from the United States."⁴ The BIA properly found Ramirez-Cordova ineligible to apply for suspension of deportation because he was not continuously present in the United States for the requisite period.

Ramirez-Cordova also contends that the 1987 voluntary departure should not be used to prevent his application for suspension of deportation because he was not advised of his right to apply for suspension prior to the 1987 departure. This is nothing more than a collateral attack on the 1987 proceeding. We permit collateral attack on an order of deportation only if the prior order resulted in a gross miscarriage of justice.⁵ We agree with the BIA that Ramirez-Cordova has neither alleged nor demonstrated such miscarriage of justice.

The petition for review is DENIED.

³ **Vargas-Gonzalez v. INS**, 647 F.2d 457, 458 (5th Cir. 1981); **Segura-Viachi v. INS**, 538 F.2d 91 (5th Cir. 1976).

⁴ **Hernandez-Luis v. INS**, 869 F.2d 496 (9th Cir. 1989).

⁵ **Ponce-Gonzalez v. INS**, 775 F.2d 1342 (5th Cir. 1985); see also **Hernandez-Luis**; 8 U.S.C. § 1105a(c) (no review of deportation order if alien departs country per that order).