

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-4450

(Summary Calendar)

RAQUEL ARGENTINA ESPINOZA,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A28-601-436)

(December 20, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Petitioner, Raquel Argentina Espinoza, seeks review of a final order of deportation entered by the Board of Immigration Appeals ("the Board"). Espinoza argues that she is entitled to asylum, pursuant to 8 U.S.C. § 1158(a) (1988), and to withholding of deportation, pursuant to 8 U.S.C. § 1253(h) (1988), because she has demonstrated a well-founded fear and a clear probability of persecution at the hands of the Sandinistas in Nicaragua on account

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of her political opinion. Espinoza contends that, since the Board took administrative notice of the fact that the Sandinistas are no longer in power in Nicaragua, the Board erred by failing to afford her an opportunity to present evidence that the Sandinistas are nevertheless still capable of persecuting her. Finding no reversible error, we affirm the Board's decision.

I

Espinoza is a native and citizen of Nicaragua. Both before and after the Sandinistas took control of the Nicaraguan government, Espinoza was engaged in the import-export business. Espinoza traveled outside Nicaragua, purchasing shoes, clothing, and other textiles, which she then sold in Nicaragua. Espinoza operated this business without government interference before the Sandinistas seized power. Thereafter, however, a license was required for engaging in the import-export business in Nicaragua. Espinoza acquired one such license, but when that license expired her application for a new license was denied. The notice of denial stated that Espinoza's application was denied because she had failed to join certain Sandinista organizations))the Sandinista Defense Committee, the Luisa Amanta Espinoza Organization of Sandinista Women, and a trade cooperative.

The Sandinistas also placed limits on the amount of currency which Nicaraguan citizens could transport out of the country. Because the currency restrictions made it impossible for Espinoza to purchase sufficient goods on her trips abroad, she began carrying furniture out of Nicaragua, selling it in other countries,

and then using the funds thus acquired to purchase the goods which she needed. The Sandinistas carefully inspected her goods at the border when she left and when she returned. Espinoza was also interrogated about whether she had seen or spoken to anyone abroad who was associated with the Nicaraguan *Contra* rebels. Espinoza was asked whether she was a *Contra* informant. These interrogations often lasted up to twenty minutes.

At one point, upon returning from El Salvador with a load of purchased goods, Espinoza was required to pay a tax on the goods. Because she lacked sufficient funds to pay the tax, Espinoza refused to pay it. She argued with the Sandinistas about the tax, contending that she should not be required to pay it because it had not been in effect when she left the country. Because Espinoza refused to pay the tax, she was detained for two days by the Sandinistas. When she was released, she left the goods behind and later acquired enough money to pay the tax. Shortly thereafter, Espinoza decided that she could no longer carry on her business in Nicaragua under the circumstances imposed by the Sandinistas. As a result, she emigrated to the United States, leaving behind her husband and children.¹

¹ While Espinoza was still living in Nicaragua, her home was the subject of attacks by mobs associated with the Sandinista Defense Committee. On several occasions the mobs would surround the house, bang on the doors, shout, and paint threatening messages on the exterior walls, such as "this house is watched" and "do not think you can escape." According to Espinoza, the mobs considered her and her family to be imperialists and reactionaries because her in-laws live in the United States.

These proceedings began when Espinoza was served with an order to show cause why she should not be deported for entering the United States without inspection. Espinoza appeared, admitted entering the United States without inspection, and conceded deportability. However, Espinoza sought asylum, pursuant to 8 U.S.C. § 1158(a), and withholding of deportation, pursuant to 8 U.S.C. § 1253(h), contending that she should not be returned to Nicaragua because she would be persecuted there on account of her political opinion. After a hearing, at which Espinoza testified, the Immigration Judge determined that Espinoza was not entitled to asylum or withholding of deportation. Espinoza appealed that decision to the Board, which also held that Espinoza was not entitled to asylum or withholding of deportation. The Board then entered a final order of deportation. Espinoza is before this Court seeking review of the Board's decision.

II

In reaching its decision, the Board took administrative notice of the Sandinistas' fall from power in Nicaragua. Espinoza contends that she was therefore entitled to a chance to prove that the Sandinistas))although no longer in power))were, nevertheless, still capable of persecuting her on account of her political opinion.² Had she been given the opportunity to offer such proof, Espinoza contends, she could have demonstrated her entitlement to

² Espinoza cites no authority for the proposition that she was entitled to offer proof of the Sandinistas' ability to persecute her. She merely asserts that "[t]he introduction of new evidence . . . without allowing [her] the opportunity to rebut it, lacks any notion of due process and fundamental fairness."

asylum, pursuant to 8 U.S.C. § 1158(a), and to withholding of deportation, pursuant to 8 U.S.C. § 1253(h). We disagree, because the record demonstrates))regardless of the Sandinistas' fall from power))that the Board correctly determined that Espinoza is entitled neither to asylum nor to withholding of deportation. Consequently, there is no reason to believe that the outcome of the proceeding below would have been different had Espinoza been allowed to offer rebuttal evidence, and the Board's action was, at most, harmless error.

An "alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C. § 1101(a)(42)(A)]." Under § 1101(a)(42)(A),

[t]he term `refugee' means any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (1988). As the terms of the statute indicate, an alien))such as Espinoza))who would show persecution or a well-founded fear of persecution "on account of . . . political opinion" must show that she will be persecuted *because of her opinion*. See *Immigration & Naturalization Serv. v. Elias-Zacarias*, ___ U.S. ___, ___, 112 S. Ct. 812, 815, 117 L. Ed. 2d 38 (1992) ("Elias-Zacarias . . . has to establish that . . . the guerrillas will persecute him *because of* [his] political opinion"). An alien seeking asylum bears the burden of proving that she

satisfies the statutory requirements for asylum. *Guevara Flores v. Immigration & Naturalization Serv.*, 786 F.2d 1242, 1248 (5th Cir. 1986), *cert. denied*, 480 U.S. 930, 107 S. Ct. 1565, 94 L. Ed. 2d 757 (1987).

The Board held that Espinoza had not proven that she experienced persecution or should reasonably fear persecution on account of her political opinion.³ We agree, since nothing in the record indicates that the Sandinistas ever knew about Espinoza's

³ The Board's decision states:

The licensing requirements, customs declarations, import taxes, and price controls imposed by the Sandinistas do not lend support to [Espinoza's] claim of past persecution to warrant the granting of asylum relief. While these measures, which were part and parcel of the Sandinistas' efforts to centralize Nicaragua's economy, may have made it difficult for [Espinoza], a self-employed entrepreneur, to transact business, [she] has not shown that these measures were imposed upon her as some form of punishment because of her political opinion. See *I.N.S. v. Elias-Zacarias*.

The Sandinistas may have refused to renew [Espinoza's] import license. However, according to this record, the denial was premised on her failure to satisfy the licensing requirements, one being membership in any one of a number of Sandinista organizations, rather than on account of one of the grounds [including political opinion] proscribed by the [Immigration and Naturalization] Act. And, while it may have been her political opposition to the Sandinistas which prevented her joining these organizations, there is no evidence that the Sandinistas knew of her opinion, or interpreted her failure to participate in these groups as a political expression and persecuted her as a result.

Similarly, absent any evidence that the interrogations she reportedly underwent and the 2-day detention she allegedly received occurred on account of her political opinion, these incidents do not qualify her for asylum relief.

Record on Appeal at 3-4 (citations omitted).

political opinions, which she describes as follows: "I was an entrepreneur like my mother was[,] and I believed in the capitalist way of conducting one's business at a profit in order to make a living."

In the brief which she submitted to the Board, Espinoza argued that the Sandinistas knew about her political views because of (1) her "ability to argue with the Sandinistas about their import/tax laws," (2) "the fact that she traveled outside of Nicaragua frequently," and (3) "the fact that she openly refused to support any Sandinista organization." However, none of these matters supports the conclusion that the Sandinistas are or ever were aware of Espinoza's political leanings. When Espinoza argued with the Sandinistas about taxes which they imposed on her imported goods, she did not tell them about her belief in capitalism or her opposition to Sandinista policies. According to Espinoza, she merely objected to the collection of the taxes because they had not been in effect when she left Nicaragua to go to El Salvador. Furthermore, we fail to see how Espinoza's habit of traveling outside Nicaragua would have revealed to the Sandinistas that she was a capitalist. Finally, nothing in the record indicates that the Sandinistas knew that political opposition to the Sandinista government led Espinoza not to join Sandinista organizations. A variety of motives may lead an individual not to join a political organization. See *Elias-Zacarias*, ___ U.S. ___, 112 S. Ct. at 815-16 (holding that (1) refusal to join guerrillas might have been motivated by a number of considerations other than disagreement

with their political objectives, and (2) it is not ordinarily true "that not taking sides with any political faction is itself the affirmative expression of a political opinion"). So far as the record discloses, Espinoza never communicated to the Sandinistas that she refused to join their organizations because she disagreed with their policies.

Neither does anything else in the record indicate that the Sandinistas were informed of Espinoza's political views. Espinoza testified that she and her family were terrorized by Sandinista mobs, but she concedes that those incidents were motivated by the fact that her in-laws live in the United States, and not by her political opinions. Furthermore, Espinoza's status as a business person is not necessarily indicative of her support of capitalism or her opposition to the Sandinista regime. Since the Sandinista government issued licenses to individuals who engaged in the import-export business, it appears that other people in Nicaragua engaged in that business, and that it was carried on with the approval of the Sandinista government. Engaging in the import-export business as a private business person therefore does not indicate political disagreement with the Sandinista regime. Consequently, the record does not indicate that the Sandinistas knew about Espinoza's political leanings, and we agree with the Board's holding that a finding of persecution or a well-founded fear of persecution on account of Espinoza's political opinion is not warranted.

Neither is Espinoza entitled to withholding of deportation under 8 U.S.C. § 1253(h). Under § 1253(h), "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." In order to qualify for withholding of deportation under § 1253(h), an alien must show a clear probability of persecution. *Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407, 430, 104 S. Ct. 2489, 2501, 81 L. Ed. 2d 321 (1984). The "clear probability" standard is satisfied if it is more likely than not that the alien will be subjected to persecution on account of one of the grounds specified in § 1253(h). *Id.* at 430-31, 104 S. Ct. at 2501.

Espinoza contends there is a clear probability that she will be persecuted on account of her political opinion, but, as we have already indicated, nothing in the record suggests that the Sandinistas know what her political opinion is. Consequently, it is not "more likely than not" that Espinoza will suffer persecution because of her political opinion, and she is not entitled withholding of deportation under § 1253(h).⁴

Thus, even assuming that Espinoza was entitled to an opportunity to prove that the Sandinistas are still capable of

⁴ The Board held that "[i]nsofar as [Espinoza] has failed to satisfy the lower burden of proof required for asylum, it follows that she also has failed to satisfy the clear probability standard of eligibility required for withholding of deportation."

persecuting her, and assuming that the Board erroneously denied her that opportunity, she nevertheless is not entitled to relief from this Court. Proof that the Sandinistas are capable of persecuting Espinoza would do nothing to remedy the fatal flaw which the Board recognized in her case))that nothing in the record suggests that the Sandinistas would persecute her *on account of her political opinion*. Therefore, there is no reason to believe that the outcome of this proceeding would have been different if Espinoza had been afforded an opportunity to present evidence about the Sandinistas' capacity to persecute her. Assuming *arguendo* that the Board erred by taking administrative notice of the Sandinistas' fall from power without affording Espinoza the opportunity to offer rebuttal evidence, we hold that any such error was harmless, and therefore does not entitle Espinoza to relief. See *Iredia v. Immigration & Naturalization Serv.*, 981 F.2d 847, 849 (5th Cir.) (finding harmless immigration judge's failure to allow alien to testify regarding facts that would support his case, where substantial other evidence supported the immigration judge's decision and the decision of the Board), *cert. denied*, ___ U.S. ___, 114 S. Ct. 203, ___ L. Ed. 2d ___ (1993).⁵

⁵ Espinoza also contends that the Immigration Judge committed clear error in finding that she had not met the statutory requirements for asylum or withholding of deportation. Assuming *arguendo* that a challenge to the Immigration Judge's findings is cognizable on petition for review of the Board's decision, for the reasons already stated in this opinion Espinoza's challenge to the Immigration Judge's findings is without merit.

III

For the foregoing reasons, we **AFFIRM**.