

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4653  
Summary Calendar

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JAVIER ALBAR MOLINA-GUAJARDO,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION  
SERVICE,

Respondent.

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Petition for Review of an Order  
of the Immigration and Naturalization Service  
(A30 569 067)

(January 4, 1994)

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

POLITZ, Chief Judge:\*

Javier Albar Molina-Guajardo seeks review of an order of the Board of Immigration Appeals affirming his deportation. Finding no abuse of discretion, we deny the petition for review.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## Background

Molina-Guajardo, a Mexican national, entered the United States as a lawful permanent resident at the age of 19. He has continuously resided in this country for over 20 years, has been married for most of those years, and is the father of three children who are United States citizens by birth. The oldest child attends school in Mexico City; Molina-Guajardo lives with and supports his wife and the two younger children. They have acquired a mobile home, a vacant lot, and two cars, despite Molina-Guajardo's sketchy employment history. Presently Molina-Guajardo works for his brother.

An admitted user of marihuana, Molina-Guajardo was convicted twice for possession of the illegal substance. In 1986 a sweep of his home turned up approximately one ounce of the drug and in 1989 a search of his car uncovered one marihuana joint. Two other instances occurred in which Molina-Guajardo was placed in close proximity to drugs, but neither resulted in a criminal conviction.<sup>1</sup>

On February 1, 1990 an Order to Show Cause issued charging Molina-Guajardo with deportability.<sup>2</sup> Acknowledging his convictions and conceding deportability, Molina-Guajardo filed an application for section 212(c) relief.<sup>3</sup> Before the immigration judge could

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<sup>1</sup>In 1978 Molina-Guajardo was stopped as a passenger of a car discovered to be transporting 150 pounds of marihuana. The 1986 search of his home also uncovered a small glass square marked "Cocaine, rich man's aspirin," which contained a white, powdery substance.

<sup>2</sup>8 U.S.C. § 1251(a)(11).

<sup>3</sup>8 U.S.C. § 1182(c).

rule, however, Molina-Guajardo tested positive for cocaine use in violation of his probation. Confronted with this evidence of continued substance abuse the immigration judge exercised his discretion and denied the requested section 212(c) relief. The BIA affirmed and the instant petition for review followed.

#### Analysis

Section 212(c) of the Immigration and Nationality Act gives the Attorney General the discretion to waive deportation for excludable lawful permanent residents who have maintained a lawful domicile in the United States for seven consecutive years.<sup>4</sup> In addition to statutory eligibility, the alien must demonstrate that he warrants discretionary relief.<sup>5</sup> Because section 212(c) does not provide standards to guide this determination, we afford the BIA wide latitude and will reject its rulings only for abuse of discretion.<sup>6</sup>

In exercising its discretion, the BIA should consider all facts and circumstances involved. **Matter of Marin** and its progeny<sup>7</sup>

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<sup>4</sup>It is now well settled that this discretion extends to all excludable lawful permanent residents, whether or not they have "temporarily proceeded abroad." **Madrid-Tavarez v. I.N.S.**, 999 F.2d 111 (5th Cir. 1993); **Francis v. I.N.S.**, 532 F.2d 268 (2d Cir. 1976); **Matter of Hernandez-Casillas**, Int. Dec. 3147 (BIA 1990; AG 1991).

<sup>5</sup>**Matter of Buscemi**, 19 I&N Dec. 628 (BIA 1988); **Matter of Marin**, 16 I&N Dec. 581 (BIA 1978).

<sup>6</sup>**Diaz-Resendez v. I.N.S.**, 960 F.2d 493 (5th Cir. 1992).

<sup>7</sup>**Molenda v. I.N.S.**, 998 F.2d 291 (5th Cir. 1993); **Diaz-Resendez; Buscemi**.

advocate a balancing of the social and humane considerations in the alien's favor against the adverse factors opposing his continued presence in the United States. As the adverse factors grow more serious, it becomes incumbent upon the alien to advance sufficient offsetting equities. Moreover, although it is not an absolute prerequisite, an alien with a criminal record ordinarily must show rehabilitation to obtain section 212(c) relief.

Molina-Guajardo charges that the BIA exceeded its discretion by accepting the credibility determinations made by the immigration judge. He insists that the immigration judge engaged in mere speculation in suggesting that he may be more than a casual drug user. This challenge founders. "[I]t is the duty of the Immigration Judge to determine the credibility of witnesses. '[W]e are not permitted to substitute our judgment for that of the Board or the [Judge] with respect to the credibility of testimony or the ultimate findings of fact based thereon.'"<sup>8</sup>

Molina-Guajardo also insists that the immigration judge failed to balance the positive and negative factors of his application for relief but, instead, placed dispositive emphasis on the issue of rehabilitation. A review of the record demonstrates otherwise. Noting Molina-Guajardo's family ties in the United States, his residence of long duration, and his arrival at an early age, the

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<sup>8</sup>**Vasquez-Mondragon v. I.N.S.**, 560 F.2d 1225, 1226 (5th Cir. 1977) (quoting **Yaldo v. I.N.S.**, 424 F.2d 501, 503 (6th Cir. 1970); see also **Matter of Coelho**, Int. Dec. on 3172 (BIA 1992) (affirming judge's adverse credibility determination where alien made contradictory statements and gave evasive answers about his drug involvement).

judge nonetheless concluded that Molina-Guajardo's recent drug convictions, his use of illegal substances in the family home, and his violation of probation during the very pendency of deportation proceedings necessitated a showing of rehabilitation. The BIA, while acknowledging that rehabilitation is not an absolute prerequisite to relief, concurred that the specifics of Molina-Guajardo's case required some proof thereof. We agree with this determination.<sup>9</sup> No such proof was forthcoming. The order of deportation was not the result of an abuse of discretion by the BIA or immigration judge.

The petition for review is DENIED.

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<sup>9</sup>See also Ghassan v. INS, 972 F.2d 631, 636 (5th Cir. 1992), cert. denied, 113 S.Ct. 1412 (1993) ("Although rehabilitation is not a formal prerequisite for waiver, it is a crucial factor.").