

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5019
Summary Calendar

IMORO SAM,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A28-462-635)

(February 17, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Imoro Sam challenges the Board of Immigration Appeals' (BIA) affirmance of an Immigration Judge's (IJ) order that he be deported to Ghana. We **DENY** the petition.

I.

Sam entered the United States from Ghana in 1987 with a fraudulent United States passport. Nevertheless, he was granted asylum in 1989, and subsequently attained lawful permanent resident status in 1990. In 1992, however, a Texas grand jury issued a

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

three-count indictment against him; ultimately, he entered a plea agreement under which he pled guilty to count three, which charged that he committed aggravated assault by threatening imminent bodily injury to an individual "by using a deadly weapon, namely, a screwdriver." The first two counts were "abandoned", and the judgment of conviction on the aggravated assault count contains the following notation: "without an affirmative finding of a deadly weapon." Sam was sentenced to two years in prison.

In April 1993, the IJ found that Sam's conviction rendered him deportable. See 8 U.S.C. § 1158(a). She also denied Sam's applications for withholding of deportation, pursuant to 8 U.S.C. § 1253(h), and for asylum, pursuant to 8 U.S.C. § 1158(a). The BIA affirmed that June.

II.

Sam does not deny that his guilty plea to the aggravated assault charge renders him deportable. Rather, he contends that he was eligible for withholding of deportation or asylum, especially in light of the claimed great danger he faces if deported (returned) to Ghana.

A.

An alien is not eligible for either if he has been convicted of a "particularly serious crime". See 8 U.S.C. § 1253(h)(2)(B) (excluding aliens from eligibility for withholding of deportation if "convicted ... of a particularly serious crime"); 8 C.F.R. § 208.14(c)(1) (mandating that aliens "convicted ... of a particularly serious crime" are not eligible for asylum); see also

Martins v. INS, 972 F.2d 657, 659-61 (5th Cir. 1992) (concluding that an alien is ineligible for withholding of deportation if convicted of a "particularly serious crime", regardless of whether alien also constitutes a danger to community).

To the extent that Sam raises issues regarding the propriety of the BIA's interpretation of a statute, *i.e.*, § 1253(h)(2)(B), our review is *de novo*, although limited; we will defer to the BIA's interpretation "unless there are compelling indications that [its] interpretation is wrong." **Silwany-Rodriguez v. INS**, 975 F.2d 1157, 1160 (5th Cir. 1992) (citations and internal quotations omitted). As to the BIA's interpretation of a regulation, *i.e.*, 8 C.F.R. § 208.14(c)(1), we defer to the BIA unless its construction is "plainly erroneous or inconsistent with the regulation." **Id.** (citation omitted). Finally, our review of the BIA's factual conclusion that Sam was convicted of a particularly serious crime is guided by the familiar "substantial evidence" standard. See **Martins**, 972 F.2d at 661 (discussing withholding of deportation); **Zamora-Morel v. INS**, 905 F.2d 833, 838 (5th Cir. 1990) (noting that substantial evidence standard governs review of BIA's decision both to withhold deportation and to deny eligibility for asylum).

In affirming Sam's deportation, the BIA identified the factors it considers in deciding whether a crime is a "particularly serious crime":

In judging the seriousness of a crime, the Board will consider such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien

will be a danger to the community. ... Crimes against persons are more likely to be categorized as "particularly serious crimes."

(Citations omitted). There is no "compelling indication" that this interpretation for a "particularly serious crime" is wrong insofar as § 1253(h)(2)(B) is concerned; nor is it a "plainly erroneous" interpretation of the same language employed by 8 C.F.R. § 208.14(c)(1).

The BIA possessed substantial evidence to support its conclusion that Sam's crime was "particularly serious" under its identified factors. Sam pleaded guilty to, and was convicted of, aggravated assault, a crime against a person. The facts underlying the offense also counsel in favor of the BIA's conclusion. The indictment to which he pled guilty recited that, "while in the course of committing theft of property", he exhibited a deadly weapon, and "threaten[ed] imminent bodily injury" to an individual. According to the indictment, Sam's exhibition of the deadly weapon placed the individual in "fear of imminent bodily injury and death".²

² Sam places great emphasis on the aforementioned record of conviction's notation: "without an affirmative finding of a deadly weapon." But, this notation vitiates neither Sam's plea of guilty to aggravated assault nor the indictment's recitation in the aggravated assault count that Sam exhibited a deadly weapon. In Texas, an "affirmative finding" that a deadly weapon was used is significant *only* for the determination of whether and/or when probation or parole can be granted. In other words, the failure to make such an affirmative finding relates to sentencing, not to the underlying offense conduct. See *Ex parte Lucke*, 742 S.W.2d 818, 819-20 (Tex. Ct. App. 1987) (discussing difference between affirmative finding of use of deadly weapon and underlying offense conduct). In *Lucke*, the court found a party eligible for probation (thereby upholding the sentence of probation imposed, despite the party's suggestion that the sentence was void because he used a

Finally, he was sentenced to two years in prison. In sum, our deferential review discloses no basis for reversing the BIA's factual conclusion that Sam committed a "particularly serious crime".

B.

1.

Sam notes that a collateral attack on his criminal conviction is pending. This is irrelevant; so long as no direct appeal is pending, his conviction is final for purposes of deportation. *Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982); see also *Agulera-Enriquez v. INS*, 516 F.2d 565, 570-71 (6th Cir. 1975) ("until a conviction is overturned [by the collateral attack], it is an adequate basis for a deportation order"), *cert. denied*, 423 U.S. 1050 (1976).

2.

Likewise, Sam's contention of innocence must be disregarded. *Zinnanti v. INS*, 651 F.2d 420, 421 (5th Cir. 1981) ("Immigration authorities must look solely to the judicial record of final

deadly weapon in his assault), stating:

The fact that the offense to which appellant pleaded guilty requires the use of a deadly weapon does not affect the outcome. Appellant admitted his use of the weapon, so the State met its burden of proving all elements of the offense. The trial court, as trier of fact, however, simply declined to enter the *additional* affirmative finding in the judgment.

Id. at 820 (emphasis added).

conviction and may not make their own independent assessment of the validity of [petitioner's] guilty plea.").

III.

For the foregoing reasons, the petition is

DENIED.