

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5244
Summary Calendar

XIENGLAI PHETSENGDARA,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A25 323 962)

(February 1, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

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

I.

Phetsengdara, a native and citizen of Laos, arrived in this country as a refugee in 1981 or 1982. From then until 1986, he worked in Nashville, Tennessee. He had a wife and two sons.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Phetsengdara murdered his wife in 1986. According to his testimony before the IJ, Phetsengdara learned that his wife had a boyfriend. Phetsengdara went to the boyfriend's residence and shot his wife when she got between him and the boyfriend. According to Phetsengdara, he purchased the gun employed -- a .22 caliber rifle -- to hunt squirrel; however, he later admitted that the weapon was a fully automatic weapon, and that "all the bullets went" when he shot his wife. He then returned home, where his two sons were. There, he engaged in a three to four hour stand-off with the Nashville police, who apparently thought he was holding hostages. Ultimately, tear gas had to be used to force him out of the home. Phetsengdara was convicted of murder in July, 1986, and sentenced to 25 years in prison. After serving slightly over three years, he was released.

Phetsengdara then took up with a girlfriend (with whom he had another son); they quarrelled and separated. In late 1991, he was convicted of assaulting a different girlfriend. He was sentenced to six months incarceration (sentence suspended in favor of 30 days in prison), and his parole from the murder sentence was revoked; he served another year in prison. Upon release, the Immigration and Naturalization Service detained him.

After a hearing in June 1993, the IJ held that Phetsengdara is not eligible for waiver or withholding of deportation, or asylum, and ordered that he be deported to Laos. The BIA affirmed that August.

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 IJ's decision 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.

Phetsengdara does not deny that his crimes involving moral turpitude render him deportable. See 8 U.S.C. § 1251(a)(2)(A). Rather, he contends initially that he is entitled to a waiver of deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). We review a denial of the waiver only for abuse of discretion. *E.g.*, **Ghassan v. INS**, 972 F.2d 631, 634-35 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1412 (1993).

Whether a deportable alien is entitled to the waiver involves balancing the alien's undesirability with equities favoring his application for waiver. **Id.** at 634. The seriousness of an alien's criminal offense is among the factors to be considered as adverse to granting it. **Id.** Among the factors to be considered in favor of a waiver are: family ties within the United States, residence of long duration (particularly if the alien was very young upon arrival), service in our armed forces, employment, the existence of property or business ties, and evidence of rehabilitation if the alien is a criminal. See **id.**

The BIA affirmed the IJ's decision that the balance of these factors counseled deportation, and we find no abuse of discretion in that decision. Phetsengdara was convicted of murder. And, his subsequent assault conviction undercuts his claim of rehabilitation. The principle reason given by him for the waiver is the need to be close to his children. Even if we were to disregard the undeniable fact that he killed the mother of two of them, we do not find that the BIA abused its discretion in refusing to decide that Phetesengdara's interest in his children entitled him to the waiver in light of the serious nature of his crimes. Moreover, Phetsengdara has displayed scant interest in his children. His first two are living with "friends"; but, at the time of the June 1993 hearing, he had last talked to those friends in December 1992. He could not say how his children were being treated. In addition, he has apparently had little contact with his third child since the child was three months old. The girlfriend by whom he had that child now lives with another man and has other children.

B.

Phetsengdara also claims that he should be entitled to asylum or withholding of deportation.

1.

Under 8 U.S.C. § 1158(d) he is statutorily ineligible to apply for asylum; an alien who has been convicted of an "aggravated felony ... may not apply for or be granted asylum." *Id.*; see generally *Martins v. INS*, 972 F.2d 657, 659 (5th Cir. 1992).

Needless to say, murder is an "aggravated felony". 8 U.S.C. § 1101(a)(43). Phetsengdara can neither apply for, nor be granted, asylum. He admits as much by stating that he "is an Aggravated Felon and thus is ineligible for Political Asylum".

2.

For a similar reason, Phetsengdara is also ineligible for withholding of deportation under section 243 of the Act. See 8 U.S.C. § 1253(h)(1), (h)(2)(B) (allowing for withholding of deportation unless the alien, "having been convicted ... of a particularly serious crime, constitutes a danger to the community of the United States").

III.

For the foregoing reasons, the petition for review is

DENIED.