UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5260
Summary Calendar

J. GREGORIO LOPEZ-ZUNIGA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A36-602-506)

(August 3, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Petitioner Gregorio Lopez-Zuniga (Lopez) seeks review of the decision of the Board of Immigration Appeals (BIA or the Board) summarily dismissing his appeal from an immigration judge's order of deportation pursuant to the Immigration and Nationality Act (INA) § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1988), and denial of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

his application for a waiver of deportation under INA § 212(c), 8 U.S.C. § 1182(c) (1988). We deny the petition for review.

Facts and Proceedings Below

Lopez is a native and citizen of Mexico who has lived continuously in the United States as a permanent resident alien since October 2, 1980. Over the years, he has demonstrated a continuing unwillingness to conform his actions to the laws of this nation. Prior to his admission into lawful residence, he made several illegal entries into the United States and was once deported in July 1974. Even after obtaining legal status, Lopez repeatedly aided in the smuggling of undocumented aliens. On April 9, 1987, police stopped Lopez for erratic driving and, upon searching his car, found two packages containing large quantities of heroin. On October 26, 1987, Lopez was convicted in state court in Williamson County, Texas, of aggravated possession of twenty-eight grams of heroin and was sentenced to eight years' imprisonment.[1]

On November 10, 1988, the Immigration and Naturalization Service (INS) issued an Order to Show Cause (OSC) charging that Lopez was deportable under INA § 241(a)(11), 8 U.S.C. § 1251(a)(11), as an alien convicted of a controlled substance offense.[2] At his hearing before the immigration judge (IJ), Lopez

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[1] Lopez was initially indicted for aggravated possession of more than 400 grams of heroine, which carried a maximum sentence of life imprisonment. Pursuant to a plea agreement, he pleaded guilty to the lesser included charge of aggravated possession of more than 28 but less than 400 grams of heroine.

[2] Section 241(a)(11) provides, in relevant part:

admitted the allegations in the OSC except for his conviction of a deportable offense. Lopez denied deportability, claiming the heroin conviction was invalid because the state court failed to admonish him of the consequences of his guilty plea as required by the Texas Code of Criminal ProceduresQspecifically, that his conviction could result in deportation. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon 1987).[3] In addition, he applied for a discretionary waiver of deportation under INA § 212(c), 8 U.S.C. § 1182(c), because he had resided in the United States for a continuous period of at least seven years and his family would face severe hardship should he be deported.

On October 18, 1989, relying on Lopez's admissions to the OSC and a certified copy of his Texas state court conviction for the

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> "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana . . . ."

In 1990, section 241(a)(11) was amended and now appears as section 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i). Pub.L. No. 101-649, § 602(a). All references to this section will be to the pre-1990 version, as the amendments only apply to proceedings for which notice of a deportation hearing was given on or after March 1, 1991. *See Rodriguez v. INS*, 9 F.3d 408, 409 n.3 (5th Cir. 1993). Lopez was given notice on November 10, 1988.

[3] The Texas Code of Criminal Procedure provides:

> "Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of . . . the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4).

controlled substance offense, the IJ rendered his decision finding Lopez deportable under Section 241(a)(11). The IJ also rejected Lopez's application for waiver of deportation, finding that while Lopez met the statutory eligibility for such relief, the negative factors in his case, including a serious criminal record, far outweighed the favorable factors. Thus, the IJ concluded that Lopez did not merit discretionary relief from deportation and further added that "it would be abusive of discretionary authority . . . to permit this man to remain in the United States any longer."

Lopez promptly appealed the IJ's decision to the BIA on October 24, 1989, reiterating his position that his prior state court conviction was invalid and that he should have received a favorable exercise of discretionary relief. Lopez expressed his desire to submit a brief in support of his appeal, but requested an additional ninety days for preparation after the receipt of the transcript of the hearing. On July 20, 1990, the court clerk forwarded Lopez a copy of the IJ's decision and the transcript and informed Lopez that he had until August 31, 1990, to file his brief. But Lopez never filed a brief; instead, on September 4, 1990, his counsel wrote a letter to the IJ requesting additional time to file his brief because he had not received the transcript. Thereafter, Lopez neglected to file even a belated brief (or file anything else with the BIA) during the thirty-five months after being notified that his case had been submitted to the BIA and until the date of the BIA's decision.

On August 2, 1993, the Board summarily dismissed the appeal

pursuant to 8 C.F.R. §§ 3.1(d)(1-a)(A) and (D). The Board found that Lopez's challenge to the validity of his state controlled substance conviction lacked any basis in law and fact because conviction documents indicated Lopez had received proper admonishments before entering his plea. The Board also noted that, since direct appellate review of the conviction had been exhausted or waived, the conviction was final for deportation purposes and collateral attack in deportation proceedings was precluded. Further, the Board rejected the challenge to the IJ's denial of discretionary relief under Section 212(c), finding that Lopez failed to explain specifically which aspects of the IJ's decision he believed to be incorrect.

Discussion

We review the BIA's summary dismissal for abuse of discretion. *Verduzco-Arevalo* v. INS, 989 F.2d 186 (5th Cir. 1993). The INS urges that we refuse to entertain this appeal because Lopez failed to file a brief in his appeal to the BIA. We cannot dispense with the matter that simply, however, because the regulations governing immigration appeals do not necessarily require the filing of a brief. *See Medrano-Villatoro v. INS*, 866 F.2d 132, 133 (5th Cir. 1989) ("Although the petitioner could have set out his reasons for appeal at greater length in a brief or separate written statement, he was not required to do so.").[4] Nevertheless, the regulations do

[4] We note that this aspect of *Medrano* may no longer be applicable. The 1992 Amendments to Title 8 of the Code of Federal Regulations replaced section 3.1(d)(1-a)(i-iv), upon which *Medrano* relied, with section 3.1(d)(1-a)(A-F). *See* 57 Fed. Reg. 11570 (Apr. 6, 1992). The revised section provides, in relevant part that:

require some specificity; and "[t]he Board may summarily dismiss any appeal in any case in which . . . the party concerned fails to specify the reasons for his appeal on Form I-290A (Notice of Appeal)." 8 C.F.R. § 3.1(d)(1-a)(i). At a minimum, "[t]he reasons for appeal must inform the BIA what was wrong about the immigration judge's decision and why." *Medrano*, 866 F.2d at 133-34. As this Court and the BIA have often noted "'generalized statements of the reasons for these appeals . . . are totally inadequate [because t]hey do not tell [the BIA] what aspect of the [IJ]'s order they consider incorrect and for what reason.'" *Townsend v. INS*, 799 F.2d 179, 181 (5th Cir. 1986) (quoting *Matter of Holguin*, 13 I & N Dec. 423, 425 (BIA 1969)). The petitioner must specifically indicate whether he challenges erroneous findings of fact or law, or both. *Medrano*, 866 F.2d at 134. If his challenge concerns a question of law, he must cite supporting authority; and if he

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> "The Board may summarily dismiss any appeal . . . in any case in which . . . [t]he party concerned indicates on Form EOIR-26 or FORM EOIR-29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing." 8 C.F.R. 3.1(d)(1-a)(E) (1993).

Thus, while the regulations still do not require the submission of a brief or other statement, once the alien requests permission to submit additional supportive material, he must do so or face summary dismissal. *See, e.g., Chevers v. INS*, 21 F.3d 1111 (table), 1994 WL 124481 (9th Cir. 1994). The problem remains, however, in situations where, as with Lopez, the petitioner filed his Notice of Appeal prior to April 6, 1992, but the BIA rendered its decision after that date. Our research has uncovered no published opinion of this or any other circuit resolving the matter. Because we conclude the Notice of Appeal in the present case failed to satisfy even the more lenient pre-1992 specificity requirement, however, we take no position as to the applicability of section 3.1(d)(1-a)(E).

challenges factual matters, he must identify the particular details he considers inaccurate. *Id.*; *Townsend*, 799 F.2d at 182; *Matter of Valencia*, 19 I & N Dec. 354 (BIA 1986).

I. Validity of State Court Conviction

Lopez first argues that his conviction for a controlled substance offense cannot serve as the basis for deportation because the state court failed to warn him that pleading guilty could lead to his deportation. Although Lopez failed to submit a brief, his Notice of Appeal was adequate to detail this claim. The Board had no difficulty addressing this argument, nor did it abuse its discretion by finding it meritless.

The law in the Fifth Circuit is well settled that a petitioner cannot collaterally attack the legitimacy of a criminal conviction in a deportation proceeding. *Howard v. INS*, 930 F.2d 432, 435 (5th Cir. 1991); *Brown v. INS*, 856 F.2d 728, 731 (5th Cir. 1988); *Zinnanti v. INS*, 651 F.2d 420, 421 (5th Cir. Unit A July 1981). This rule applies with equal force where the challenged conviction derived from the petitioner's plea of guilty. "Immigration authorities must look solely to the judicial record of final conviction and may not make their own independent assessment of the validity of [the petitioner's] guilty plea." *Zinnanti*, 651 F.2d at 421. For instance, the petitioner in *Zinnanti* pleaded guilty to possession of an unregistered sawed-off shotgun in violation of Louisiana law and was thereby found deportable under INA § 241(a)(14).[5] *Id*. While admitting deportability, Zinnanti claimed

[5] For the issues raised in this appeal, section 241(a)(14), relating to the possession of illegal weapons, is functionally

he was denied effective assistance of counsel in his state court weapons conviction because his attorney failed to warn him that his guilty plea could subject him to deportation. *Id*. The Court refused to allow the challenge, holding that "[o]nce the conviction becomes final, it provides a valid basis for deportation unless it is overturned in a judicial post-conviction proceeding." *Id*. In the present case, Lopez's state court conviction was final for immigration purposes once he waived direct appellate review at the state level. "'Since the convictions were finalsQthere were no appeals taken from themsQthere was an adequate basis for the order of deportation.'" *Id*. (quoting *Ocon-Perez*, 550 F.2d 1153, 1154 (9th Cir. 1977)).

Lopez attempts to persuade this Court that he was coaxed into accepting an unfavorable plea agreement without fully comprehending its ramifications. However, there is every indication from the record that the state court properly admonished Lopez of the effects of his guilty plea, and there is no evidence, save his own conclusory assertion, to the contrary. In addition, Lopez was initially arrested and charged with possession of over 400 grams of heroin, an offense that carried a life sentence. By accepting the proposed plea agreement, he was able to have the charge reduced to possession of a mere twenty-eight grams of heroin and received only eight years in prison (of which he would serve only fourteen months). The decision to avoid life imprisonment for the price of

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indistinguishable from section 241(a)(11), relating to possession of controlled substances. *See Brown*, 856 F.2d at 731 (applying *Zinnanti* to deportation under section 241(a)(11)).

risking possible deportation can hardly be described as irrational.

II. Waiver of Deportation

Lopez's second argument is that the IJ erred in refusing to grant his application for waiver of deportation. Specifically, he argues that the IJ failed to consider the equitable factors favoring discretionary relief, which, according to Lopez, should have outweighed the negative factors relied on by the IJ. Lopez relies primarily on this Court's holding in *Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992). There, we stated that "[t]he immigration judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country."[6] *Id*. at 495-96 (quoting *Matter of Marin*, 16 I & N Dec. 581, 584 (BIA 1978)). The *Diaz* Court also recognized, however, that "[a]pplicants for discretionary relief who have been convicted of serious drug offenses must show 'unusual or outstanding equities.'" *Id*. at 496 (quoting *Matter of Marin*, 16 I & N Dec. at 586 n.4).

While we doubt that Lopez's case presents as "unusual or

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[6] The *Diaz* Court enumerated several factors that favor a grant of section 212(c) relief, including: family ties within the United States, long term residence in the United States (especially when inception of residence occurred when petitioner was very young), hardship to petitioner or his family, service in the American Armed Forces, a history of employment, property, or business ties in the United States, evidence of value or service to the community, proof of genuine rehabilitation if criminal record exists, and other evidence of his good character. *Diaz*, 960 F.2d at 496.

outstanding" circumstances as did *Diaz*,[7] the Board was not required to reach this issue. The BIA rejected Lopez's claim based on his failure to specify what aspects of the IJ's denial of discretionary relief were incorrect. Because the weighing of equities described in *Diaz* entails such a fact-intensive analysis, an alien challenging the IJ's decision must set forth specific facts in sufficient detail to apprise the Board of the substance of his argument. *See Medrano*, 866 F.2d at 133-34; *Townsend*, 799 F.2d at 181-82. In the case at bar, the Notice of Appeal alone was clearly insufficient to do so, and Lopez filed nothing else; thus, the Board was within its discretion in summarily dismissing this portion of the appeal.

Conclusion

We find no error in the decision of the BIA; accordingly, the petition for review is denied and the decision of the BIA is

AFFIRMED.

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[7] While the equitable considerations Lopez presents are similar to those at issue in *Diaz*, the situations are distinctly distinguishable. Diaz had continuously resided in the United States for thirty-seven years, since the age of seventeen, and had been married to a United States citizen for twenty-nine years. Lopez had only resided in this country legally for nine years at the time of his hearingSQslightly longer than the seven year minimum required by section 212(c). In addition, the controlled substance offense in the present case involved an extremely large load of heroine, as opposed to Diaz's relatively minor marihuana offense. And Diaz had no prior criminal record other than a nine-year-old DWI conviction, while Lopez had repeatedly violated federal immigration laws by aiding in the smuggling of undocumented aliens and had himself illegally entered the country at least eight times.