UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40015
Summary Calendar

MIGUEL COLLAZO MARTINEZ,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Immigration and Naturalization Service

(A41-320-611)

(July 6, 1994)

Before POLITZ, Chief Judge, KING and WIENER, Circuit Judges.

PER CURIAM:*

Miguel Collazo Martinez petitions for review of a final order of deportation by the Board of Immigration Appeals. We affirm.

Martinez is a native and citizen of Mexico who initially

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

entered the United States without inspection in May 1981. On January 24, 1986 Martinez married a United States citizen. Based upon that marriage he obtained an immigrant visa. On January 8, 1987, Martinez was admitted to the United States as a conditional permanent resident pursuant to section 216 of the Immigration and Nationality Act, 8 U.S.C. § 1186, and entered through El Paso, Texas.[1] Martinez and his wife were divorced in August 1987. On September 26, 1988 Martinez applied for a waiver of the requirement to file a joint petition to remove the conditions of his status which the Immigration and Naturalization Service denied. His immigrant visa expired on January 8, 1989.

At his immigration hearing, Martinez conceded the allegations and charge of deportability contained in the Order to Show Cause, but requested suspension of deportation or voluntary departure. The immigration judge pretermitted consideration of the application for suspension of deportation because Martinez had not maintained seven years' continuous physical presence in the United States. The judge reasoned that Martinez's trip abroad in January 1987 to obtain his immigrant visa had interrupted his continuous physical presence because that departure was not a "casual" act to which the statutory exception, 8 U.S.C. § 1254(b)(2), could be applied. Accordingly, the judge entered his decision granting Martinez three months in which to depart the United States voluntarily, with an

[1]Because Martinez was present in the United States in violation of law, he was required under the immigration laws of the United States to depart in order to obtain his immigrant visa to regularize his status in the United States.

alternate order of deportation to Mexico. The Board of Immigration Appeals affirmed on statutory grounds; Martinez timely petitioned for review.

Martinez first complains of the immigration judge's refusal to grant a waiver of the requirement to file a joint petition for removal of the conditions of his permanent resident status. At his deportation hearing, however, Martinez made no challenge to the INS decision to terminate his conditional status. We will not review an order of deportation absent an exhaustion of administrative remedies.[2]

Martinez also challenges the BIA's determination that his departure was a meaningful interruption of his continuous physical presence in the United States. Martinez argues that his departure to obtain an immigrant visa fits within the section 244(b)(2) exception for "brief, casual, and innocent" absences.[3] The statutory interpretation of this exception is a question of law which will be reviewed *de novo*.[4] Congress has not defined the terms within the statutory exception. Considering the deference

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[2]8 U.S.C. § 1105a(c); **Rivera-Cruz v. INS**, 948 F.2d 962 (5th Cir. 1991).

[3]8 U.S.C. § 1254(b)(2) provides in relevant part:

> An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence.

[4]**Kim Sang Chow v. INS**, 12 F.3d 34 (5th Cir. 1993).

given to the BIA's statutory interpretations,[5] we must conclude that the departure was not a casual act.[6]

The petition for review is DENIED.[7]

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[5]**Hernandez-Cordero v. INS**, 819 F.2d 558 (5th Cir. 1987) (*en banc*).

[6]See, e.g., **Hernandez-Luis v. INS**, 869 F.2d 496 (9th Cir. 1989) (finding that voluntary departure under threat of coerced deportation is not a brief, casual, and innocent absence from the United States). Cf. **Rubio-Rubio v. INS**, _____ F.3d _____, 1994 WL 146197 (10th Cir. 1994) (holding that petitioner's nine-month stay in Mexico where she was gainfully employed was neither brief nor casual).

[7]By the time this petition reached this court, Martinez had been present continuously in the United States from the date of his reentry in January 1987 in excess of the seven-year requirement. Under these circumstances, Martinez might consider moving to reopen his case before the BIA. See **Vargas-Gonzalez v. INS**, 647 F.2d 457 (5th Cir. 1981).