IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40025

Summary Calendar

JOSHUA FRED MICHAEL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Immigration and Naturalization Serivce
(A28-393-037)

(July 13, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

An immigration judge found Joshua Fred Michael to be deportable under 8 U.S.C. § 1251(a)(2)(B)(i). The immigration judge also determined that Michael was ineligible for relief from deportation. The Board of Immigration Appeals (Board) affirmed

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

the decision of the immigration judge. Michael filed the present petition for review. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Michael is a native and citizen of Kenya. He entered the United States at New York on August 23, 1984, pursuant to a student visa. On March 19, 1987, he adjusted his status to permanent resident.

At a hearing on October 12, 1993, Michael conceded that because he had been convicted in a Texas state court on three counts of possession of cocaine, he was deportable under 8 U.S.C. § 1251(a)(2)(B)(i). The immigration judge then set a hearing for October 20, 1993, to give Michael and his attorney an opportunity to prepare a request for relief.

Michael's attorney failed to attend the October 20, 1993, hearing. Michael appeared and requested that the immigration judge grant him a continuance because his attorney failed to attend the hearing, which the immigration judge denied. The immigration judge then issued her decision that Michael was deportable and that he was not eligible for any type of relief from deportation. Michael appealed the immigration judge's decision to the Board.

On appeal to the Board, Michael asserted that he had received ineffective assistance of counsel because his attorney failed to attend the October 20, 1993, hearing. He also asserted that he received ineffective assistance of counsel in relation to his state court convictions for possession of cocaine.

The Board concluded that Michael's assertions that he received ineffective assistance of counsel were without merit. In relation to Michael's assertion that he received ineffective assistance of counsel as the result of his attorney's failure to attend his deportation hearing, the Board concluded that Michael had failed to establish that his attorney's failure to attend the hearing materially affected the outcome of his case. The Board further determined that Michael's assertion that he received ineffective assistance of counsel during his state court convictions was equally meritless because neither the Board nor the immigration judge has jurisdiction to hear a collateral attack on those convictions.

After concluding that Michael's deportability was established by “clear, unequivocal, and convincing” evidence, the Board then went on to discuss Michael's eligibility for relief. First, the Board concluded that Michael was ineligible for a waiver of admissibility under 8 U.S.C. § 1182(c) because he did not satisfy the statutorily-required seven consecutive years of lawful unrelinquished domicile. The Board also concluded that Michael was ineligible for suspension of deportation pursuant to 8 U.S.C. § 1254(a)(2) because he had not been physically present in the United States for a continuous period of at least ten years following his convictions for possession of cocaine. The Board further determined that “[n]o purpose would have been served by a continuance in this case.”

II. DISCUSSION

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Initially, Michael asserts that the Board erred in determining that he was deportable under § 1251(a)(2)(B)(i). Section 1251(a)(2)(B)(i) provides that "[a]ny alien who at any time after entry has been convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance . . . is deportable." Michael asserts that he pled guilty to the charges of possession of cocaine in reliance on his attorney's erroneous advice that he would receive probation; he further claims that his attorney did not inform him of the possibility of his being deported. Thus, according to Michael, the convictions are invalid as being obtained due to ineffective assistance of counsel. This claim is without merit.

Section 1251(a)(2)(B)(i) provides that any alien convicted of a violation of a law relating to a controlled substance is deportable. The only question to be resolved under the statute is the _fact_ of conviction. _See_ _Yazdchi v. INS_, 878 F.2d 166, 167 (5th Cir.), _cert. denied_, 493 U.S. 978 (1989). As we stated in _Qureshi v. INS_, 519 F.2d 1174, 1176 (5th Cir. 1975), "it is the _fact_ of conviction that is of moment here, not the collateral evidentiary uses of whatever plea may have resulted in it. The federal statute, 8 U.S.C. § 1251(a)(5), attaches deportable status as a consequence to conviction. Its language encourages no inquiry into howSQonly into whetherSQone was convicted." Likewise, in this case, 8 U.S.C. § 1251(a)(2)(B)(i), "attaches

deportable status as a consequence to conviction. Its language encourages no inquiry into howSQonly into whetherSQone was convicted." Moreover, Michael may not collaterally attack the legitimacy of those convictions in a deportation proceeding. Brown v. INS, 856 F.2d 728, 731 (5th Cir. 1988).

Michael also asserted that he was denied ineffective assistance of counsel because his attorney did not show up to his hearing on October 20, 1993. In order to establish a claim of ineffective assistance of counsel at a deportation proceeding, an alien must show (1) ineffective representation and (2) substantial prejudice, which occurred as a result of the ineffective representation. Miranda-Lores v. INS, 17 F.3d 84, 85 (5th Cir. 1994). We agree with the Board that Michael did not demonstrate that he was substantially prejudiced by his attorney's absence at the hearing. Michael conceded that he was deportable. Further, as will be seen infra, Michael is statutorily ineligible for relief from deportation and the record does not reveal any other basis for relief.

B. DENIAL OF RELIEF FROM DEPORTATION

Next, Michael asserts that the Board erred in denying him relief from deportation. It is clear that Michael is ineligible for discretionary relief as provided by 8 U.S.C. § 1182(c). Section 1182(c) provides that "[a]liens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be

admitted in the discretion of the Attorney General . . . ." An alien cannot lawfully possess an intent to be domiciled in this country while he is here on a student visa. Brown v. INS, 856 F.2d 728, 731 (5th Cir. 1988). Therefore, an alien may not use his student visa time to satisfy the seven-year domicile requirement of § 1182(c). Id. Because Michael entered the country on a student visa and his legal permanent residence did not begin until March 19, 1987, the Board's determination, rendered on December 10, 1993, that Michael was ineligible for relief under § 1182(c) was correct.

Michael asserts that this court should remand the case to the Board for a determination of whether he is now eligible for relief because he has now satisfied the requisite seven-year domicile requirement. However, once the Board ruled Michael to be deportable, his lawful resident status ended. Ghassan v. INS, 972 F.2d 631, 637-38 (5th Cir. 1992), cert. denied 113 S. Ct. 1412 (1993). Thus, after the Board determines that an alien is deportable, he is no longer a legal resident and cannot satisfy the domicile requirement. Therefore, this request is meritless.

Further, Michael is ineligible for suspension of deportation pursuant to § 1254(a)(2), because he has not been in the United States for ten years since his convictions. Brown v. INS, 856 F.2d 728, 731 (5th Cir. 1988). We also agree with the Board that the record does not demonstrate that Michael is eligible for any other relief from deportation.

C. DENIAL OF CONTINUANCE

Lastly, Michael argues that the Board erred in determining that “[n]o purpose would have been served by a continuance in this case.” The decision to grant or deny a continuance is in the sound discretion of the judge and will not be overturned except on a showing of clear abuse. De La Cruz v. INS, 951 F.2d 226, 229 (9th Cir. 1991). Because Michael has not shown himself to be eligible for relief from deportation on any statutory ground, we cannot conclude that the Board's determination that no purpose would have been served by a continuance was in error. See id.

III.

For the foregoing reasons, we AFFIRM the order of the Board.