UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40026
Summary Calendar

FEREYDOUN ZARE MONTANAGH,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals

(A26-542-823)

(February 2, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:[*]

This appeal is taken from a final order of the Board of Immigration Appeals ("BIA") denying Petitioner's application for an 8 U.S.C. § 1182(c) ("section 212(c)") waiver of inadmissibility--a waiver from deportation that is available to a lawful permanent resident who is deportable or excludable and who has maintained a lawful unrelinquished domicile in the United States for at least

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

seven consecutive years. The sole issue is whether the BIA abused its discretion in determining that Fereydoun Zare Montanagh ("Montanagh") was not eligible for a waiver of deportation. For the reasons set forth below, we hold that the BIA did not abuse its discretion.

FACTS

The BIA considered the following factors in making its decision not to grant a waiver of deportability.

Montanagh stands convicted in two different courts of four counts of burglary of dwelling places. On May 21, 1992, in the Superior Court of Fulton County, Georgia, Montanagh pled guilty to two counts of burglary of the dwelling places of two individuals on February 29, 1992. He was sentenced to two years on each count. On June 5, 1992, in the Superior Court of Dekalb County, Georgia, Montanagh pled guilty to two counts of burglary of the dwelling houses of different individuals on February 18, 1992. He again received sentences of two years on each count.

Based on these convictions, an Order to Show Cause ("OSC") was issued to Montanagh on May 25, 1993, charging him with deportability for conviction of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. At his concluding evidentiary hearing, Montanagh testified about his application for a section 212(c) waiver.

Montanagh first entered the United States in August 1977, at the age of twenty-five, with a nonimmigrant student visa. He received a bachelor's degree in engineering from a community

college in Bridgeport, Connecticut. He adjusted his status in 1980 to lawful permanent resident, based upon his marriage to a United States citizen or a permanent resident.

Montanagh has a son, who was born in the United States in December 1985. Shortly after the child's birth, Montanagh and his wife were divorced. Since late 1988, Montanagh has had no contact with his son. Montanagh testified that he sent money for his son approximately every two months to the address of his mother-in-law, but he never received any response. He last sent money in January 1991.

Montanagh's employment history consists of ownership of a gas station, carpet sales, construction work, driving a tractor-trailer, and design and building houses. As a result of his divorce, he had to sell his business and house. He drove a truck until late 1991.

Montanagh admitted that he pled guilty to each of the indictments for burglary; however, he maintains that he did not commit the burglaries. He served fourteen months in prison. While in prison, he worked in the kitchen, ran a painting crew, helped organize an alcohol and drug treatment group, and assisted Turkish-speaking inmates to communicate with their counsel. Montanagh declared that his prison experience taught him not to associate with the "wrong crowd."

Montanagh testified that his siblings told him that awful things happened to his family in Iran because they were "kind of rich." The family was associated with the previous government,

under the Shah, and they were threatened with losing their property or being imprisoned. Most of Montanagh's family lives in the United States, including his parents, a brother, and two sisters. Montanagh lost contact with his family after his divorce in December 1986.

Montanagh testified that he is concerned about returning to Iran because he served two years of military service under the Shah. He claimed that he did not apply for asylum because an Iranian told him that the Iranian counselor in Washington knows most of the time who asks for asylum. Montanagh said that if he returned to Iran, he would be placed under arrest. Also, the new government might raise questions as to why he had not earlier gone back to visit anybody. He also stated that it is a hardship for everyone in Iran because the government is still not stable.

Montanagh testified that if he is required to return to Iran, it will be a hardship on his son, who expects to see his father. Also, he hopes to see his parents one day. If allowed to remain in the United States, Montanagh states that he could get his job back driving tractor-trailers, or he could work at designing blueprints for construction jobs.

STANDARD OF REVIEW

This Circuit follows a standard of "most restricted review" to apply to Attorney General discretionary decisions whether to suspend deportation for aliens who satisfy the statutory requirements for suspension of deportation. See Sanchez v. United

States I.N.S., 755 F.2d 1158, 1160 (5th Cir. 1985); Childress & Davis, Federal Standards of Review, § 15.12 (2d ed. 1992).

> This standard accords greater freedom from judicial review to the agency than is granted by the seventh amendment to the verdict of a jury, whose conduct we may overturn if not supported by substantial evidence, and far greater latitude for unreviewable judgment than is accorded to the fact findings of a trial judge, whose determination may not be overturned if not clearly erroneous.

Osuchukwu v. I.N.S., 744 F.2d 1136, 1140-41 (5th Cir. 1984) (footnotes omitted). This standard of review is exceedingly narrow, for the ultimate decision whether to suspend deportation is "a matter of grace 'similar to a Presidential pardon,'" and judicial review is strictly limited because the subject is uniquely within the competence and power of the Attorney General. Ashby v. I.N.S., 961 F.2d 555, 557 n.3 (5th Cir. 1992)(quoting Perales v. Casillas, 903 F.2d 1043, 1051 (5th Cir. 1990)). In short, the Attorney General has unusually broad discretion, severely limiting our review. Id. at 557.

ANALYSIS

Montanagh does not contest his deportability; rather, he complains of the BIA's failure to declare him eligible for a waiver of deportability under section 212(c) of the Immigration and Nationality Act. Under this section, aliens admitted for permanent residence who have maintained a lawful unrelinquished domicile in the United States for seven consecutive years may, in the Attorney General's discretion, be permitted to continue residing in the United States notwithstanding their deportability under other

sections of the Act.[1] Montanagh bore the burden of demonstrating that his request for a waiver warranted favorable consideration. See Matter of Marrin, 16 I & N Dec. 581, 582-83 (BIA 1978). In addition, a serious deportable offense requires the introduction of additional offsetting evidence, including evidence of rehabilitation. See Villarreal-San Miguel v. I.N.S., 975 F.2d 248, 251 (5thCir. 1992).

In exercising its unusually broad discretion, the BIA considered all the facts and circumstances involved, balancing the social and humane considerations against the adverse factors. The BIA discredited Montanagh's claims of innocence of the criminal acts for which he was convicted, explaining that neither it nor the immigration judge can go behind the convictions to determine the guilt or innocence of the alien. Specifically, the BIA found that Montanagh offered no underlying mitigating circumstances; rather, he simply claimed innocence, a claim which is not reviewable in deportation proceedings.

The BIA similarly rejected Montanagh's argument that the immigration judge underestimated the hardship to Montanagh's family, if Montanagh was deported. The BIA pointed out that Montanagh had no contact with his son and ex-wife, since 1988, and

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[1] We note that, on its face, section 212(c) does not apply to Montanagh's situation. However, the scope of the statute was extended to include all persons who were lawfully admitted for permanent residence, have maintained a lawful unrelinquished domicile in the United States for seven consecutive years, and merit a favorable exercise of discretion. Ashby v. I.N.S., 961 F.2d 555, 557 n.2 (citing Mantell v. United States Dept. of Justice, 798 F.2d 124, 125 (5th Cir. 1986) and Matter of Silva, 16 I & N 26 Dec. (BIA 1976)).

his parents or siblings, since 1986. The BIA also observed that Montanagh never substantiated his claim that he had been sending money to his son. The BIA found that there was no evidence to indicate that the child would suffer financial or emotional hardship from Montanagh's deportation.

The BIA also pointed out that, although Montanagh claimed that he feared persecution on return to Iran, he did not apply for asylum or withholding of deportation. Moreover, the BIA found that Montanagh's testimony was not "sufficiently detailed to conclude that he would suffer retribution for actions of his own or those of his family."

The BIA concluded that the responsibility for any hardship occasioned by a return to Iran rests solely with Montanagh. With regard to Montanagh's claim of rehabilitation, the BIA observed that his claim that he will no longer commit criminal acts was untested because of the recency of his conviction and incarceration, concluding that a section 212(c) waiver was neither warranted nor in the best interests of the country.

CONCLUSION

The BIA weighed Montanagh's relevant equities and favorable factors, including his sixteen years of residence and his employment record, but found that the serious nature of his crimes were not overcome by these factors. Montanagh's complete lack of contact with his child, parents, and siblings, hardly provided a compelling factor upon which a waiver should have been granted. Nonetheless, this Court is without authority to determine how much

weight must be given to a factor once it is considered; it is necessary only that the BIA give some actual consideration to the hardship factors. See Sanchez, 755 F.2d at 1161.

With regard to his claims of persecution, Montanagh had his opportunity to apply for asylum and withholding of deportation, but consciously and explicitly declined to do so. Appealing from the denial of a waiver of deportation under section 212(c) is not the proper forum to raise questions related to an unasserted application for asylum.

The BIA sufficiently balanced the factors, in favor and against, the granting of a waiver of deportation. We find no abuse of discretion in the BIA's denial of Montanagh's request for a waiver under section 212(c). The judgment is **AFFIRMED**.