UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40309
Summary Calendar

JUAN ZAMORA-SANTILLAN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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

(A27-948-013)

(December 14, 1994)

Before POLITZ, Chief Judge, GARWOOD and PARKER, Circuit Judges.

POLITZ, Chief Judge:[*]

Juan Zamora-Santillan petitions for review of the final order of deportation by the Board of Immigration Appeals. Finding no basis for rejecting the BIA's ruling, we deny the petition.

Background

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Zamora-Santillan, a native and citizen of Mexico, entered the United States as a visitor on February 25, 1986. On February 9, 1987 his status was adjusted to that of conditional permanent resident on the basis of his September 24, 1986 marriage to a United States citizen. He became a lawful permanent resident on May 2, 1989.

On July 22, 1992 Zamora pled guillty in a criminal proceeding to a charge that he

> did knowingly and intentionally make a false writing, specifically an Application for Permanent Residence, knowing the same to contain false statements as to material facts, specifically [that his address was in Mission, Texas] and that he had no children, when, in truth and fact, as he then and there well knew, [address was improper] and he had six children.

The Immigration and Naturalization Service instituted deportation proceedings against Zamora-Santillan, charging that he had committed fraud or willful misrepresentation of a material fact in his application for adjustment of status in violation of section 212(a)(6)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(i),[1] and that he was therefore deportable under section 241(a)(1)(A) of the INA, 8 U.S.C. § 1251(a)(1)(A).[2]

---

[1]8 U.S.C. § 1182(a)(6)(C)(i) provides:

> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this Act is excludable.

[2]8 U.S.C. § 1251(a)(1)(A) provides:

> Excludable aliens. Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excluded by the law existing at such

Zamora-Santillan admitted the allegation of the INS's order to show cause that he adjusted his status to lawful permanent resident around December 5, 1986 and that he "did knowingly and intentionally fail to list [his] children in [his] Application for Permanent Residence." An immigration judge found Zamora-Santillan deportable as charged and denied his application for a waiver of deportation under section 241(a)(1)(H) of the INA, 8 U.S.C. § 1251(a)(1)(H).[3] The BIA affirmed, finding that Zamora-Santillan was deportable both because he had willfully misrepresented material facts in his adjustment application and because he had procured the adjustment through fraud. Zamora-Santillan timely filed his petition for review.

Analysis

In deportation hearings the INS has the burden of proving deportability by "clear, unequivocal, and convincing evidence."[4] In reviewing final orders of deportation we examine the law and determine whether the factual findings are supported by substantial

---

time is deportable.

[3]8 U.S.C. § 1251(a)(1)(H) provides that the Attorney General may waive deportation for aliens who were excludable at the time of entry as aliens described in section 212(a)(6)(C)(i) where alien is spouse, parent, or child of a United States citizen or lawful permanent resident, if alien was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of entry.

[4]**Woodby v. Immigration & Naturalization Service**, 385 U.S. 276, 286 (1966); **Hernandez-Garza v. I.N.S.**, 882 F.2d 945 (5th Cir. 1989). See also 8 C.F.R. § 242.14(a).

evidence.[5] In the case at bar, we look to see if there was substantial evidence to support either the BIA's finding that Zamora-Santillan willfully misrepresented a material fact in his adjustment application or that he procured adjustment by fraud, thus rendering himself excludable under section 212(a)(6)(C)(i).

The BIA first determined that Zamora-Santillan was deportable based on his willful misrepresentation. Willfulness in this context has been interpreted to mean voluntary and deliberate activity where an individual was aware of the falsity of the representation.[6] The materiality element of section 212(a)(6)(C)(i) will be satisfied if an alien either (1) would have been excludable on the true facts or (2) the misrepresentation tended to shut off a line of inquiry which was relevant to the alien's eligibility and which might have resulted in a determination of excludability.[7]

Zamora-Santillan admitted, in response to the INS's order to show cause, that he had misrepresented information about his children on his adjustment application. The willfulness of Zamora-Santillan's misrepresentation was established through his

---

[5]**Fonseca-Leite v. I.N.S.**, 961 F.2d 60 (5th Cir. 1992). See also 8 U.S.C. § 1105a(a)(4).

[6]**Suite v. I.N.S.**, 594 F.2d 972 (3d Cir. 1979). Although the court here interpreted the meaning of the term "willful" for purposes of 8 U.S.C. § 1182(a)(19), prior to the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, the provisions of 8 U.S.C. § 1182(a)(6)(C)(i) were found at 8 U.S.C. § 1182(a)(19).

[7]**Matter of Bosuego**, 17 I.&N. Dec. 125 (BIA 1980); **Matter of S- and B-C-**, 9 I.&N. Dec. 436 (BIA 1960; A.G. 1961). See also **Solis-Muela v. I.N.S.**, 13 F.3d 372 (10th Cir. 1993).

admission that the misstatement was knowing and intentional.[8] His misstatement was also material. Although an accurate statement of the truth on the adjustment application, revealing that he had six children, would not have made him excludable, the misrepresentation did tend to deflect a line of inquiry which could have led to investigation of his fraudulent marriage and might have led to his exclusion. As the BIA reasoned, if the INS had known that Zamora-Santillan had six children, the youngest of whom was about two years old at the time of his marriage, it is likely that it would have opened an investigation into his relationship with the children's mother. Thus, Zamora-Santillan's admission in the order to show cause that he misrepresented information about his children on the adjustment application provides substantial evidence of a willful, material misrepresentation.

The BIA's determination that Zamora-Santillan willfully misrepresented a material fact in the adjustment application is further supported by his guilty plea in the criminal proceeding where he admitted knowingly misrepresenting his address.[9] The

---

[8]In view of Zamora-Santillan's admission that he "knowingly and intentionally" failed to list his children in his adjustment application, his argument that he was not legally required to list them because his mere common-law marriage with their mother made the children illegitimate is entirely unconvincing.

[9]Zamora-Santillan objects to the use of his conviction to establish a ground of deportation. Such use was proper; by pleading guilty Zamora-Santillan admitted that he had misstated certain information in his adjustment application. See **United States v. Broce**, 488 U.S. 563 (1989) (guilty plea is admission of guilt). It was also proper for the BIA to rely on this plea. See **Hernandez-Garcia** (finding that prior guilty plea conclusively established elements of deportability "that were elements of offense"). See also 8 C.F.R. § 242.14(c) (1993) (permitting use in

misrepresentation was willful and material. If the INS had learned that Zamora-Santillan did not reside with the woman he claimed to be his wife, it likely would have undertaken an investigation into the marriage's legitimacy which might have resulted in a determination that he be excluded. In all, we find that substantial evidence supports the BIA's determination that Zamora-Santillan willfully misrepresented a material fact in his adjustment application.[10]

Zamora-Santillan next contends that the BIA erred in denying him discretionary relief from deportation pursuant to section 241(a)(1)(H) of the INA. Both the IJ and the BIA found Zamora-Santillan eligible for a section 241 waiver but declined to exercise administrative discretion in his favor. Although we agree that Zamora-Santillan was properly denied relief under section 241, we find that the BIA erroneously determined him eligible to qualify for that discretionary waiver.

Under the terms of section 241, the Attorney General has discretion to waive deportation of "aliens within the United States on the ground that they were excludable at the time of entry as aliens described in section 212(a)(6)(C)(i) [of the INA]."

---

immigration proceedings of any material, relevant oral or written statements made during investigation, examination, hearing, or trial).

[10]Because we find that substantial evidence supports the BIA's determination that Zamora-Santillan knowingly misrepresented a material fact in his adjustment application, we find it unnecessary to review the alternate basis for the BIA's finding of deportability, that Zamora-Santillan procured his adjustment of status by means of a fraudulent marriage.

(Emphasis added.) In the present case, Zamora-Santillan's deportability is not based on misrepresentations or fraud made at the time he entered the United States. Rather, the facts giving rise to deportability occurred after entry when Zamora-Santillan attempted to adjust his immigration status. Therefore, by the express language of section 241(a)(1)(H), he is not eligible for a waiver of deportation.[11]

Even if Zamora-Santillan had been eligible for discretionary relief from deportation, the BIA did not err in refusing a favorable grant. We review the BIA's decision for abuse of discretion.[12] Zamora-Santillan argued that he was entitled to a favorable exercise of discretion under section 241(a)(1)(H) because he is the father of a United States citizen child, his other children are lawful permanent residents of the United States, and all his assets are in the United States. In denying relief from deportation, the BIA judged that the immigration status of Zamora-Santillan's permanent resident children was in question because such status depended on the validity of Zamora-Santillan's marriage which it had found to be fraudulent. In this regard, the BIA also noted that Zamora-Santillan never asserted that he would leave his children behind in the United States if he were deported. The BIA also considered the facts that Zamora-Santillan's assets in the United States were primarily in the form of savings, which would be easily transferable to Mexico, and that Zamora-Santillan

---

[11]See **Salas-Velazquez v. I.N.S.**, 34 F.3d 705 (8th Cir. 1994).

[12]**Liwanag v. I.N.S.**, 872 F.2d 685 (5th Cir. 1989).

was not presently employed in the United States. Finally, the BIA stated that its primary reason for finding Zamora-Santillan undeserving of a waiver was the fraud he attempted to perpetrate on the United States through his false marriage.[13] We conclude that the BIA did not abuse its discretion in denying Zamora-Santillan relief under section 241(a)(1)(H).

Zamora-Santillan finally argues that the BIA's refusal to grant oral argument constituted an abuse of discretion, given the complicated and confusing nature of this case. He contends that at least the BIA should have offered reasons for the denial. Zamora-Santillan also maintains that the BIA improperly rushed to judgment in the consideration of his appeal.

The BIA has been granted discretion by regulation to hear oral argument.[14] The regulation does not provide guidance on how it shall be applied or contain any language which could be construed as requiring the BIA to hear oral argument under particular circumstances. Nor does the regulation compel the BIA to explain

---

[13]The BIA determined that Zamora-Santillan had entered into a fraudulent marriage based on its review of the testimony and the record evidence. We find that Zamora-Santillan's testimony before the IJ and his guilty plea provide a substantial basis to support the BIA's determination. Contrary to Zamora-Santillan's assertion, the BIA did not rely on the guilty plea as conclusive evidence of the fraudulent marriage, but only as evidence of Zamora-Santillan's intent to impeach his credibility. Such reliance was proper. See **Yazdchi v. I.N.S.**, 878 F.2d 166 (5th Cir.), cert. denied, 493 U.S. 978 (1989). We also reject Zamora-Santillan's assertion that the BIA did not sufficiently explain why Zamora-Santillan was not credible, when the BIA referred to the implausible nature of the testimony as a whole and the IJ had ruled that Zamora-Santillan's general testimony was "incredible, fantastic, tortuous, and devious."

[14]8 C.F.R. § 3.1(e).

its reasoning when it denies an oral hearing. Zamora-Santillan's references to a few cases where the BIA did state reasons for denying oral argument do not support an inference that the BIA must under certain circumstances either grant oral argument or explain its refusal. It was thus within the BIA's discretion to deny oral argument in this case. Furthermore, the BIA did not abuse its discretion by "rushing to judgment" where it did not issue its decision until nine months after the IJ's ruling.

Judicial review in this context is typically limited to a determination whether the alien was accorded a fair hearing.[15] A denial of a hearing before the BIA does not violate due process,[16] and there is no evidence suggesting that Zamora-Santillan did not receive a fair hearing before the IJ.

The petition for review of the BIA decision and order is DENIED.

---

[15]**Hernandez-Garza**.

[16]See **Zaluski v. I.N.S.**, 37 F.3d 72 (2d Cir. 1994) (finding that BIA's denial of oral argument did not amount to denial of due process where "Zaluski has not cited -- and we do not find -- any case standing for the proposition that due process requires the BIA to grant oral argument in an immigration appeal.").