IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40422
Summary Calendar

ANTONIO GONZALES-HEREDIA

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
(A 41 935 781)

(November 11, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Petitioner Antonio Gonzales-Heredia seeks review of an order of deportation issued by the Immigration Judge ("IJ") and affirmed by the Board of Immigration Appeals ("BIA"). We affirm the decision of the BIA.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Gonzales-Heredia is a 48 year-old native and citizen of Mexico who entered the United States as a conditional resident on February 1, 1988. On September 4, 1990, Gonzales-Heredia's status changed from conditional resident to lawful permanent resident. Two days later, on September 6, 1990, Gonzales-Heredia was convicted of second degree possession of cocaine in a Texas state court.[1] He was sentenced to probation for a term of six years.

On June 7, 1993, Gonzales-Heredia was served with an order to show cause. The order charged him with deportability under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1251(a)(2)(B)(i),[2] due to his conviction for possession of a controlled substance. The IJ ordered deportation pursuant to the statute, and also made the following observations:

> The respondent has not been a lawful permanent resident of the United States for more than seven years, and therefore cannot prove that he has an unrelinquished lawful domicile in this country for seven years, which is required in order for him to make application to this

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[1] Gonzales-Heredia pleaded guilty to the possession of cocaine charge.

[2] The statutory provision states:

> Any alien who at any time after entry has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1251(a)(2)(B)(i).

> Court for relief from deportation under Section 212(c)[3] of the Immigration and Nationality Act.
>
> The Court sees no other relief from deportation that will eliminate the respondent's deportation charge. The respondent is ineligible for relief of voluntary departure or suspension of deportation under Section 244 of the Immigration and Nationality Act because of his conviction and deportability under Section 241(a)(2) of the . . . Immigration and Nationality Act.

On March 25, 1994, the BIA affirmed the IJ's decision "in its entirety." The BIA noted that the IJ "is precluded from looking behind the judicial record to determine the guilt or innocence of an alien and may not make an independent assessment of the validity of a guilty plea." In addition, the BIA concluded that the IJ "considered all of the facts in this case and correctly decided that the respondent was statutorily ineligible for any form of relief from deportation." Gonzales-Heredia appeals the BIA's decision.

II. STANDARD OF REVIEW

A factual finding of statutory ineligibility for relief from deportation is reviewed "solely to see if such findings are supported by substantial evidence." Fonseca-Leite v. INS, 961 F.2d 60, 62 (5th Cir. 1992); see also Diaz-Resendez v. INS, 960 F.2d

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[3] Section 212(c) of the INA states in the following relevant part:

> Aliens lawfully admitted for permanent residen[ce] 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 . . . .

8 U.S.C. § 1182(c).

493, 495 (5th Cir. 1992) ("Findings of fact supporting the Board's exercise of discretion . . . are reviewed merely to determine whether they are supported by substantial evidence."). Under the "substantial evidence" test, a finding can be reversed only if the evidence presented is "so compelling that no reasonable factfinder could fail to [agree]." INS v. Elias-Zacarias, 112 S. Ct. 812, 815, 817 (1992). The burden is on the alien to establish eligibility for a suspension of deportation. See Hernandez-Cordero v. INS, 819 F.2d 558, 560 (5th Cir. 1987).

III. ANALYSIS AND DISCUSSION

Section 212(c) of the INA provides discretionary relief from deportation for a permanent resident alien who has been lawfully domiciled in the United States for more than seven years. See Molenda v. INS, 998 F.2d 291, 295 (5th Cir. 1993); Ashby v. INS, 961 F.2d 555, 557 (5th Cir. 1992). Even though § 212(c) literally applies only to admissions, the provision has been consistently interpreted to permit permanent aliens in deportation proceedings to apply for a waiver. See Diaz-Resendez, 960 F.2d at 494 n.1.

As mentioned, it is undisputed that Gonzales-Heredia was admitted to the United States as a conditional resident on February 1, 1988, and his status was adjusted to that of lawful permanent resident on September 4, 1990. Thus, at the time of his December 7, 1993 hearing before the IJ, Gonzales-Heredia had been a permanent resident alien for slightly over three years; at best, he had resident status in the United States for approximately five and one-half years. In either case, Gonzales-Heredia fell well short

of the seven-year domicile requirement for § 212(c) discretionary relief. As such, we conclude that the BIA's approval of the IJ's determination that petitioner was ineligible for § 212(c) relief was supported by substantial evidence.

Suspension of deportation under § 244(a)(2) of the INA requires that an alien be physically present in the United States for a continuous period of at least ten years following the commission of a deportable act, during which time the alien must demonstrate that he has been a person of good moral character.[4] Voluntary departure under § 244(e) of the INA requires that an alien establish that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure.[5] Simply put, having been

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[4] The statute provides in relevant part:

> [T]he Attorney General may, in his discretion, suspend deportation . . . in the case of an alien [who] . . . is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1254(a)(2).

[5] The statute provides in relevant part:

> [T]he Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense

convicted for possession of cocaine in 1990, Gonzales-Heredia could not meet these durational requirements at his deportation hearing in 1993. Thus, we conclude that there was substantial evidence to support the BIA's approval of the IJ's determination that petitioner was also ineligible for relief under § 244 of the INA.[6]

Despite his statutory ineligibility, Gonzales-Heredia argues that he is entitled to discretionary relief under § 212(c) and § 244 because of numerous favorable factors in his case, such as his history of employment and possession of property. Gonzales-Heredia's "equity" arguments, however, are misplaced, as the statutory provisions consider the equities of an alien's case only after the alien has met the statute's eligibility requirements (i.e. lawful permanent resident and minimum length of domicile).

> in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. § 1254(e)(1).

[6] Even Gonzales-Heredia's counsel agreed that he was ineligible for any form of deportation relief. The following dialogue occurred at petitioner's December 7, 1993 deportation hearing:

> [IJ]: I do not know of any form of relief available to your client from deportation that I see on this record. Do you have any form of relief that you wish to make application for?
>
> [Gonzalez-Heredia's counsel]: Your Honor, my client had been advised that he does not have the seven years, lawful permanent residence, to apply for any type of waiver, so I don't think that there's any relief available under the law presently.

In other words, the discretionary nature of § 212(c) and § 244 can only be applied to an alien who falls within the scope of these provisions; if an alien cannot met the preliminary requirements, the discretionary nature of the statutes cannot be invoked at all. Cf. INS v. Bagamasbad, 429 U.S. 24, 25-26 (1976) (observing that for statutes with aspects of both eligibility requirements and discretionary considerations, failure to satisfy one aspect makes it unnecessary to consider the other aspect). Thus, Gonzales-Heredia's failure to meet the eligibility requirements of § 212(c) and § 244 precludes any relief under those provisions, and any further evaluation of his favorable equities is unnecessary.

Finally, Gonzales-Heredia argues that the BIA erred in not considering both the amount of cocaine in his possession and the factual circumstances behind his conviction. We find no error on the part of the BIA, as it is well-established that "[i]mmigration authorities must look solely to the judicial record of final conviction and may not make their own independent assessment of the validity of [a] guilty plea." Zinnanti v. INS, 651 F.2d 420, 421 (5th Cir. Unit A July 1981). As we explained in Zinnanti:

> Allowing a collateral attack on a criminal conviction in administrative proceedings concerned with deportation could not, as a practical matter, assure a forum reasonably adapted to ascertaining the truth of the claims raised. It could only improvidently complicate the administrative process. Once the conviction becomes final, it provides a valid basis for deportation unless it is overturned in a judicial post-conviction proceeding.

Id. at 421.

IV. CONCLUSION

Because we find substantial evidence to support the BIA's approval of the IJ's determination that Gonzales-Heredia is ineligible for deportation relief, the decision of the BIA is AFFIRMED.