

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40466  
(Summary Calendar)

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RONI MARCIANO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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Petition for Review of an Order of the  
Board of Immigration Appeals  
(A13 508 938)

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(March 31, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:\*

Petitioner Roni Marciano seeks review of a final order of deportation. Finding the petition untimely, we dismiss.

I

FACTS AND PROCEEDINGS

Marciano, a native of Morocco and a citizen of Israel, entered this country legally in 1967. In the ensuing years, however, he

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was convicted of several offenses in Minnesota and Florida, and in 1992, the INS ordered him to show cause why he should not be deported as a result of those convictions. Marciano acknowledged receipt of the order by signature and thumb print. In its order the INS fully and clearly explained the consequences, under 8 U.S.C. § 1252b(c), of failing to appear at a deportation hearing.<sup>1</sup>

Proceeding pro se, Marciano appeared at his first deportation hearing on September 21, 1993, and at subsequent hearings on October 7, 1993, October 26, 1993, November 15, 1993, and December 1, 1993. In that last hearing, the Immigration Judge (IJ) ordered a continuance to afford Marciano an additional opportunity to obtain representation, which he had earlier eschewed. The IJ told Marciano that the hearing would be resumed on December 15, 1993, and provided him with a written reminder, "so that you [Marciano] may remember the date and tell it to your lawyer."

But on December 15, 1993, neither Marciano nor counsel representing him appeared before the IJ. After waiting for over an hour, the IJ asked an official from the Bureau of Prisons (Bureau), Captain Vanwey, to take the stand and explain Marciano's absence. Captain Vanwey testified that Marciano refused to leave the facility after correctional officials had notified him that it was time for him to go to court, and that it is the policy of the Bureau not to bring a detainee to court against his will.

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<sup>1</sup>In pertinent part, that subsection provides that an alien "shall be ordered deported . . . in absentia if the [INS] establishes by clear, unequivocal, and convincing evidence that . . . [the requisite] written notice was provided and that the alien is deportable."

After considering Captain Vanwey's testimony, the IJ asked the INS if it would like to proceed against Marciano in absentia as permitted by § 1252b(c)(1). The INS responded that it would, then proceeded to offer evidence that proved the finality of the convictions on which it was relying to establish that Marciano is deportable. After receiving that evidence the IJ closed the hearing. The IJ later rendered a memorandum opinion in which he held that (1) the INS had established that Marciano is deportable by clear, unequivocal, and convincing evidence, and (2) Marciano is not entitled to relief from deportation, as he abandoned any such application by refusing to attend his hearing. The IJ concluded by ordering Marciano deported to Israel or, in the alternative, to Morocco.

Marciano appealed the IJ's order to the Board of Immigration Appeals (BIA), attacking collaterally his convictions and claiming, in an unsworn statement, that he did not attend the December 15, 1993 hearing because he was "starved and harassed" by Bureau personnel. On March 15, 1994, the BIA issued a decision in which it rejected Marciano's contentions and ruled instead that (1) Marciano is deportable as a result of his convictions, which were proven by court records and by his own admissions during the hearings, and (2) Marciano's allegations that the Bureau abused him and prevented him from attending the December 15, 1993 were not credible. A week later, Marciano made a motion to continue his deportation hearing, but that motion was returned without action, as the BIA decision dismissing his appeal was a final agency

action. Marciano did not file a motion to reopen the proceeding, the proper method by which to seek a rescission of an order of deportation issued in absentia.<sup>2</sup> Marciano petitioned for our review on May 20, 1994.

## II

### ANALYSIS

The record conclusively establishes that Marciano received adequate, written notice of the time and place of his hearing and of the consequences, under § 1252b(c), of failing to attend those proceedings. Yet Marciano chose voluntarily not to participate. As such, it was proper for the IJ to conduct the deportation hearing without Marciano being present and to enter a judgment in absentia.

Marciano was ordered deported pursuant to § 1252b(c)(1), and the procedures by which he could seek review of that order are defined in that subsection. Section 1252b(c)(4) provides that,

[a]ny petition for review . . . of an order entered in absentia . . . shall . . . be filed not later than 60 days . . . after the date of the final order of deportation and shall . . . be confined to the issues of validity of the notice provided to the alien, to the reasons for the alien's not attending the proceeding, and to whether . . . clear, convincing, and unequivocal evidence of deportability has been established.

The BIA affirmed the IJ's decision and issued the final order of deportation on March 15, 1993, but Marciano did not file his petition for review with our court until May 20, 1994))more than 60

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<sup>2</sup>See 8 U.S.C. § 1252b(c)(3).

days after the date of the agency's final order of deportation. The time limit for filing a petition for review of a final order of deportation is "mandatory and jurisdictional"; we are "expressly prohibited from enlarging time periods established for filing petitions for review."<sup>3</sup> We therefore lack jurisdiction to consider the BIA's final order and must dismiss Marciano's petition for review as time barred.

PETITION FOR REVIEW DISMISSED.

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<sup>3</sup>Karimian-Kaklaki v. INS, 997 F.2d 108, 111-12 (5th Cir. 1993).