IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40574
Summary Calendar

MOAFAK KHAWAM

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
(A28-989-480)

(March 3, 1995)

Before KING, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Petitioner Moafak Khawam seeks review of an order of deportation issued by the Immigration Judge ("IJ") and affirmed by the Board of Immigration Appeals ("BIA"). The deportation order stems from the INS's denial of a joint petition to remove Khawam's conditional permanent resident status. We affirm the decision of the BIA.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

Khawam is a thirty-two year old male native and citizen of Syria. He entered the United States as a visitor on July 10, 1987 with authorization to remain for six months -- until January 9, 1988. On December 17, 1987, Khawam married Lydia Flores, a United States citizen. Because of this marriage, Khawam was accorded permanent resident status on a conditional basis. On November 5, 1990, Khawam and his wife filed a joint petition with the INS to remove Khawam's conditional status (Form I-751).

On March 14, 1991, Khawam and his wife were interviewed by the INS regarding the removal of Khawam's conditional status. During the course of the interview, the INS examiner contacted the employer of Flores by telephone. The employer had no record of Flores under her married name (Khawam), but they did verify her employment under her maiden name (Flores). The employer was unaware that Flores was married. In addition, because of the paucity of information presented by Khawam and Flores at the interview, the INS examiner concluded that there was insufficient evidence to demonstrate that the couple had not married solely to procure immigration benefits. The INS examiner told Khawam and Flores that they could submit further evidence to rebut this conclusion, but no additional evidence was ever submitted to the INS after the interview.[1]

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[1] At his deportation hearing, Khawam acknowledged that he was told that he could submit further evidence to demonstrate that his marriage was not solely to evade the immigration laws:

[INS]: Weren't you told at the interview that

As a consequence of the interview, the INS terminated Khawam's conditional permanent residence on September 16, 1991. On February 20, 1992, the INS charged Khawam with deportability as an alien whose conditional permanent resident status had been terminated. At a deportation hearing on February 27, 1992, Khawam denied that his marriage was solely to evade the immigration laws. The INS examiner testified to the above-mentioned facts, and she also testified that subsequent to the interview, Khawam had requested an extension of his conditional residence card because he had to travel to Syria to visit his sick father. The examiner testified that she contacted Flores at work to ask her if she had any knowledge of her husband's travel plans. Flores had no knowledge of the need for her husband to travel.

Khawam testified that he and his wife had recently separated, but they had previously lived together until that time. The INS requested a continuance such that Flores could be subpoenaed, and the IJ granted the subpoena request. At the April 28, 1992 reconvened deportation hearing, however, the INS merely presented a letter, purportedly from Flores, stating that she wished to withdraw her consent to the Form I-751 joint petition. The IJ noted that "I believe that a preponderance of the evidence in this

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	you could submit additional documentation even after the interview was over?
[Khawam]:	Yes, sir, I was told that.
[INS]:	Why didn't you do it?
[Khawam]:	It was my mistake, sir.

case indicates that the marriage was for convenience purposes and for the purpose of [Khawam] securing status in the United States." The IJ, however, did not base his decision on this finding; instead, he concluded that Flores's withdrawal from the joint petition had terminated Khawam's conditional permanent residence.

The BIA found that the IJ erred in using the letter as the basis for a finding of deportability because the purported author, Flores, was not made available for cross-examination by the INS. The BIA stated, however, that:

> we do not find that the result in this matter is altered by this error. We conclude that the testimony of the Service examiner in addition to the acknowledged inability of [Khawam] to produce persuasive documentation of the validity of his marriage establishes, by a preponderance of the evidence, that the Service's denial of the Joint Petition was proper.

Khawam appeals from this determination, asserting that there is not substantial evidence to support the BIA's decision, that he was denied a fair hearing, and that the BIA erred in not informing him of his eligibility for relief under section 216(c)(4)(B) of the Immigration and Nationality Act ("INA").

II. STANDARD OF REVIEW

In immigration cases, we review "only the decision of the BIA, not that of the IJ." Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993). We consider the errors of the IJ only to the extent that they affect the decision of the BIA, which itself conducts a de novo review of the administrative record. See id. The BIA's findings of fact, upon which a deportation order is based, must be supported by "reasonable, substantial, and probative evidence on

the record considered as a whole." 8 U.S.C. § 1105a(a)(4). The Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 522 (1981) (internal quotation omitted); see also INS v. Elias-Zacarias, 112 S. Ct. 812, 815, 817 (stating that to reverse the BIA's determination under the substantial evidence test, "a reasonable factfinder would have to conclude [that the statutory requisites had been met]."). The Court has also stated that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Donovan, 452 U.S. at 523 (internal quotation omitted).

III. ANALYSIS AND DISCUSSION

A. Substantial Evidence of a "Sham" Marriage?

Congress enacted 8 U.S.C. § 1186a in 1986 to deter people from entering into fraudulent marriages in order to gain residency in the United States. See Olabanji v. INS, 973 F.2d 1232, 1233 (5th Cir. 1992). As we stated in Olabanji:

> Section 1186a facilitates the detection of fraudulent marriages by withholding permanent resident status from immigrants who marry United States citizens unless these couples meet two conditions. First, within the 90 days that precede the second anniversary of the date that the immigrant spouse receives conditional permanent resident status, the couple must file a petition to remove the conditional character of the immigrant spouse's permanent resident status. . . .
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> As the second condition imposed by section 1186a, each couple must appear for an interview with an INS official after they file their petition. The INS official interviews the couple to determine the veracity of the

> statements that they made in their petition. If the official determines that the statements are true, INS changes the immigrant spouse's status from "conditional permanent resident" to "permanent resident." If the official determines that the statements are false, INS terminates the immigrant spouse's conditional permanent resident status; the immigrant spouse may challenge this determination in deportation proceedings.

Id. (citations omitted). As part of the petition, the couple must state that they did not marry to procure immigration benefits. See id. Khawam contends that the evidence adduced at the interview and at the deportation hearing was insufficient to support a finding that his marriage was solely to evade the immigration laws.

At Khawam's deportation hearings, the following evidence was presented to support the INS's sham marriage contentions: 1) Flores does not speak Arabic, and Khawam spoke only "a little bit" of English when he met and married her; 2) Flores is Christian, and Khawam is Muslim; 3) Khawam married Flores after knowing her for only two and one-half months; 4) Flores did not know of a serious family emergency that required her husband to return immediately to Syria; 5) Flores did not use her married name at work and her employer did not know that she was married; 6) Khawam acknowledged that he could submit more information to demonstrate the validity of his marriage, yet he failed to submit any additional information to the INS, even though he was told that the existing information was insufficient; 7) Khawam and Flores are now separated.

To support the validity of his marriage, the following evidence was produced by Khawam: 1) A letter from Flores's sister indicating that Flores and Khawam help to pay half of the house

payment, land payment, utilities, and house insurance;[2] 2) 1989 and 1990 joint tax returns for "Moafak Khawam" and "Lydia Flores"; 3) One blank check and two checks drawn for small amounts indicating "Moafak Khawam or Lydia Flores Khawam" as the account holders; 4) A witness who testified that he went with Khawam and Flores for lunch and supper on one occasion.

Based on this evidence, and given our narrow standard of review, we believe that a reasonable mind might believe that this evidence is adequate to support a conclusion that the Khawam-Flores marriage was entered into only to procure immigration benefits. We emphasize that our belief is not based upon any one factor, as some of these factors are not particularly probative in and of themselves. Our belief is based, however, upon a view of the evidence in its totality and upon the cumulative effect of the various factors. Simply put, in the context of our reversal standard, we do not believe that a reasonable factfinder would ***have*** to conclude that the marriage was validly entered into. Thus, we find that there is substantial evidence to support the BIA's determination that the joint petition was properly denied and that the deportation order was properly issued.

B. A Fair Hearing?

Khawam alleges that a number of errors in his deportation hearing acted to deprive him of due process. Aside from his insufficient evidence challenges, Khawam contests the hearsay

[2] Interestingly, the letter is dated October 29, 1990, but it was not produced by Khawam until the February 27, 1992 deportation hearing.

statements uttered by the INS examiner (i.e., the information relayed by Flores's employer and by Flores herself), the INS's inability to produce Flores, the IJ's leading questions to the INS examiner, and the pro se status of Khawam's defense.

"The rules of evidence, including those that exclude hearsay, do not govern deportation proceedings." Olabanji, 973 F.2d at 1234; see Calderon-Ontiveros v. INS, 809 F.2d 1050, 1053 (5th Cir. 1986) ("It is well established that hearsay is admissible in administrative proceedings."); Cunanan v. INS, 856 F.2d 1373, 1374 (9th Cir. 1988). Nevertheless, "immigration judges must conduct deportation hearings in accord with due process standards of fundamental fairness." Olabanji, 973 F.2d at 1234; see also Bustos-Torres v. INS, 898 F.2d 1053, 1055 (5th Cir. 1990) ("The test for admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law."). We have previously noted that people in deportation proceedings must have a reasonable opportunity to cross-examine witnesses presented by the government. See Olabanji, 973 F.2d at 1234.

In this case, the BIA's consideration of the hearsay statements uttered by the INS examiner is not fundamentally unfair to Khawam. First, as mentioned, the general principle is that the rules of evidence, including the prohibition on hearsay, are not applicable in deportation proceedings. Second, in immigration cases, we have held that "people may not assert a cross-examination

right to prevent the government from establishing uncontested facts." Id. at 1235 n.1; see Bustos-Torres, 898 F.2d at 1056. Khawam does not contest the fact that Flores's employer was unaware that she was married; instead, he merely explained that Flores's co-workers knew of her marriage, but not the Personnel Office. Similarly, Khawam does not contest the fact that Flores was unaware that he needed to leave the country for an emergency; instead, he explained that he did not specify why he was leaving, presumably because he did not want to worry her. In both hearsay instances, Khawam merely clarifies the statements, rather than disagreeing with them.

Third, the case law in this area prevents the INS from using affidavits of persons who are unavailable for cross-examination, unless the INS first establishes that it was unable, despite reasonable efforts, to secure the presence of the witness at the hearing. See, e.g., Olabanji, 973 F.2d at 1234; Hernandez-Garza v. INS, 882 F.2d 945, 948 (5th Cir. 1989). The rationale behind these cases is that it is fundamentally unfair to use an affidavit -- a document representing first-hand and independent knowledge -- without allowing the petitioner to cross-examine the affiant who has the first-hand and independent knowledge.[3] See, e.g., Olabanji, 973 F.2d at 1235. In Khawam's case, however, the hearsay

[3] It was for this reason that the BIA found error in the IJ's reliance on the purported letter by Flores. The INS could not use Flores's alleged letter to represent her first-hand and independent knowledge without producing her for cross-examination. It is important to emphasize that the BIA recognized this error and affirmed the deportation order on alternative grounds.

testimony of the INS examiner -- i.e., what she was told by Flores and Flores's employer -- is not being used to represent first-hand and independent knowledge. It merely reflects what the INS examiner was told. In this situation, the availability of the INS examiner for cross-examination is all that due process and fundamental fairness requires, as cross-examination can clarify that the INS examiner does not know if the underlying information is true, and cross-examination can discredit or lessen the importance of the information that the examiner was told. Because Khawam was given the opportunity to cross-examine the INS examiner, there was no fundamental unfairness, and our case law would not support such a finding.

Fourth and finally, the BIA based its findings on all of the evidence produced at the deportation hearing and submitted to the INS. The hearsay statements relayed by the INS examiner were probative, but were not necessarily crucial, to the BIA's conclusions. Because the hearsay statements were probative and were fundamentally fair, we find that Khawam's deportation hearing was proper.

Khawam also contests the INS's inability to produce Flores after receiving a continuance from the IJ to subpoena Flores.[4] As mentioned, Khawam has a right to rely on Flores's production only

[4] Despite Khawam's contentions, we note that the continuance was granted to address the need for the government to conclude its case before Khawam presented his case, such that Khawam could be put on notice of what he needed to respond to. The continuance to subpoena Flores was ***not*** granted because the IJ perceived that the evidence was insufficient at that point.

if Flores's letter or affidavit was used as a basis for his deportation order. The BIA correctly noted that the IJ erred in this respect, and the BIA affirmed by evaluating other evidence, as the purported Flores letter was not considered. Thus, because the INS's case did not rely on Flores's independent testimony, Khawam, despite his contentions, had no "right" to her production. Indeed, in this context, Khawam's assertion that he had a right to cross-examine Flores is strained because there is no direct examination to counter.

At best, Khawam can argue that he needed Flores's testimony to prove his case, but because of the INS's statements to the IJ that she would be subpoenaed, he assumed that his own efforts to produce her were unnecessary. This scenario is unlikely, however, because Khawam did not produce Flores at either of the two prior hearings. Nevertheless, if this were the case, Khawam could have requested a continuance once he realized that the INS was not going to produce her. In short, because the deportation order was affirmed without relying on Flores's alleged letter, Khawam had no right to her production, and correspondingly, the INS did not have the responsibility to produce her.

Khawam's assertions that unfairness resulted because of the IJ's leading questions and Khawam's pro se status are also without merit. The IJ is authorized, under 8 U.S.C. § 1252(b), to "interrogate, examine, and cross-examine the alien." See Calderon-Ontiveros v. INS, 809 F.2d 1050, 1052 n.1 (5th Cir. 1986). Khawam does not allege that he was prejudiced from any leading questions

asked by the IJ, and the IJ's questions did not result in an incorrect resolution of Khawam's case. We conclude that the IJ did not exceed his statutory authority, and the hearing was not unfair in this respect.

In addition, "no sixth amendment right to counsel exists in a deportation proceeding." Prichard-Ciriza v. INS, 978 F.2d 219, 222 (5th Cir. 1992). We have noted that "due process is not equated automatically with a right to counsel," and before we intervene based upon a lack of representation, we have stated that the alien "must demonstrate prejudice which implicates the fundamental unfairness of the proceeding." Id. (internal quotations omitted). Khawam has not demonstrated any prejudice, and we also note that the IJ repeatedly informed Khawam of his right to be represented by counsel during the deportation hearings. Simply put, we find no merit in any of Khawam's challenges.

C. Eligibility for Relief

Khawam's final argument is that the IJ erred in not informing him that he was entitled to a waiver under § 216(c)(4)(B) of the INA. This section provides that the alien's conditional status can be removed if "the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1)." 8 U.S.C. § 1186a(c)(4)(B). The IJ is to inform the alien "of his or her apparent eligibility" for this type of relief.

Khawam, however, was clearly not eligible for a waiver under § 216(c)(4)(B). Khawam testified at the deportation hearing that he had separated from his wife, and that there was a possibility of divorce, although he did not want one. Thus, there is no termination of the marriage, and moreover, we have already concluded that there is substantial evidence to support the proposition that the marriage was not entered into in good faith. Because Khawam is not even apparently eligible for § 216(c)(4)(B) relief, the IJ did not err in failing to inform him about the existence of the waiver.

IV. CONCLUSION

For the foregoing reasons, the decision of the BIA is AFFIRMED.