IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40617
Summary Calendar

ANITONI MURTON,
a/k/a Anthony Cudjoe,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
(A20 631 978)

July 7, 1995

Before KING, JOLLY and SMITH, Circuit Judges.

PER CURIAM:[*]

Anitoni Murton, proceeding *pro se*, appeals the Board of Immigration Appeals' denial of his petition seeking relief from deportation. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Murton, a native and citizen of Nigeria, entered the United States in 1974 on a nonimmigrant student visa. After his entry into the United States, the record indicates that Murton attended Catholic University during the fall semester of 1975. In May of 1978, Murton married Roberta Wood, a United States citizen. Following his initial entry, Murton left the United States and reentered on three occasions: (1) in December 1976, in order to introduce his fiance to his parents in Nigeria; (2) in December 1984, in order to attend the burial of his father in Nigeria; and (3) in December 1987, in order to attend the burial of his mother in Nigeria. Murton's reentry on each of these three occasions was made pursuant to his original nonimmigrant student visa.

In August 1992, Murton pleaded guilty to an information charging him with one count of bank fraud for his role in passing forged checks. See 18 U.S.C. § 1344. A federal judge sentenced Murton to a twelve month term of imprisonment. On May 7, 1993, the INS issued Murton a notice of a hearing for him to show cause why he should not be deported. Specifically, Murton was accused of being deportable for failing to maintain or comply with the conditions of his nonimmigrant (i.e., student) status with which he was admitted, 8 U.S.C. § 1251(a)(1)(C)(i),[1] and for being

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[1] The section states in relevant part:

> **(i) Nonimmigrant status violators**
> Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted . . . is deportable.

8 U.S.C. § 1251(a)(1)(C)(i).

convicted of a crime involving moral turpitude within five years of entry. 8 U.S.C. § 1251(a)(2)(A)(i).[2]

In an oral decision rendered October 5, 1993, the Immigration Judge ("IJ") ordered Murton deported to Nigeria on the alternate grounds of failing to maintain status and of being convicted of a crime of moral turpitude within five years of entry. Murton appealed to the Board of Immigration Appeals, which affirmed the IJ's decision in a per curiam decision on June 22, 1994. Murton then filed a timely appeal to this court.

II. ANALYSIS

The IJ determined that Murton had only two available grounds for relief from deportation: (1) an adjustment of status to a permanent resident alien pursuant to § 245 of the Immigration and Nationality Act, see 8 U.S.C. § 1255(a); or (2) a so-called Section 212(h) waiver for extreme hardship. See 8 U.S.C. § 1254(a)(1). Murton contests the IJ's conclusions with regard to each of these two categories of relief. Additionally, Murton

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[2] The section states in relevant part:

> **(i) Crimes of moral turpitude**
> Any alien who--
> **(I)** is convicted of a crime involving moral turpitude committed within five years . . . after the date of entry, and
> **(II)** either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer,
> is deportable.

8 U.S.C. § 1251(a)(2)(A)(i).

argues that he is a lawful permanent resident of the United States and that he is therefore not an "alien" subject to deportation under 8 U.S.C. §§ 1251(a)(1)(C)(i) (violation of status) or 1251(a)(2)(A)(i) (crime of moral turpitude within five years of entry).

A. Lawful Permanent Resident Status.

Murton argues that he is a lawful permanent resident of the United States and therefore cannot be considered an "alien" subject to deportation for violation of 8 U.S.C. §§ 1251(a)(1)(C)(i) or 1251(a)(2)(A)(i). We disagree.

On December 8, 1978, Murton's wife filed a Form I-130 with the INS seeking to obtain lawful permanent residence for Murton based upon his marriage to a U.S. citizen. On February 12, 1979, Murton received a "Notice of Approval of Relative Immigrant Visa Petition" from the Immigration and Naturalization Service ("INS"). In this notice, Murton was informed that, pursuant to then existing immigration law, he had to return to Nigeria for final approval by the U.S. consul in Lagos before an immigrant visa could be issued.

Although Murton claims to have requested the U.S. consulate in Lagos to issue a visa upon Murton's return to Nigeria in 1984, a computer search of INS files revealed no record of any reentry Murton as an immigrant. If Murton had entered the United pursuant to an immigrant visa, he would have received a "green card," but Murton has produced no such document and the INS has

no record of ever having issued a green card to Murton. Indeed, a document submitted by Murton for the first time on appeal entitled "Memorandum of Creation of Record of Lawful Permanent Residence" clearly indicates that Murton never received final approval for an immigrant visa by the U.S. consul in Nigeria. Specifically, the document contains a space "For Use by Visa Control Office" which provides space for U.S. consular officials to record the date, preference category, number, and month of issuance of the immigrant visa. This portion of the document submitted by Murton is blank and unsigned-- unequivocally indicating that Murton never received final approval for his immigrant visa by the U.S. consulate in Nigeria. Moreover, it is significant that on May 6, 1993, in an proceeding following his detention by INS officials, Murton provided a sworn statement to an immigration officer in which he admitted that "I came back in January 1985, through New York as student, by airplane." He also admitted that, with regard to departure in 1987 to attend his mother's funeral, "I came the last time in January 1988, through New York as a [s]tudent, airplane. My passport still had my three year visa as [s]tudent."

Under these circumstances, we think it clear that Murton never obtained lawful permanent resident status and therefore the IJ did not err in determining that he was an "alien" subject to deportability under 8 U.S.C. §§ 1251(a)(1)(C)(i) or 1251(a)(2)(A)(i).

B. Section 245 Adjustment of Status.

In order to qualify for an adjustment of status pursuant to § 245, an alien must: (1) make application for such adjustment (on an "I-130 form"); (2) be eligible to receive an immigration visa and be admissible to the United States for permanent residence; and (3) have an immigrant visa immediately available to him at the time his application is filed. 8 U.S.C. § 1255(a)(1). Even if the alien meets these three requirements, however, an adjustment of status is not automatic but a matter of "discretion" under the terms of the statute. Id.; accord INS v. Rios-Pineda, 471 U.S. 444, 446 (1985). The IJ concluded that, even assuming arguendo that Murton satisfied all three requirements for an adjustment of status under § 245, he was not entitled to such discretionary relief. Specifically, the IJ balanced the evidence and concluded that the evidence opposing relief outweighed the evidence supporting relief. The IJ noted that "[g]enerally favorable factors to be considered are such factors as family ties and hardship." Counselling in favor of granting relief, the IJ noted, was Murton's extended length of residence in the United States (approximately 20 years). The IJ then noted that while Murton has a wife who is a U.S. citizen, she had "not even written a letter for him." With regard to hardship, the IJ concluded that "I can't find any hardship except the ordinary hardship that would be faced by someone who would be deported." Finally, the IJ noted that Murton had committed

several crimes,[3] including the 1992 conviction for bank fraud. In short, because of his criminal history, the IJ concluded that Murton did not present a sufficiently meritorious case for discretionary relief under § 245.

As an initial matter, we note that the burden of proving entitlement to a suspension of deportation rests with the alien. 8 C.F.R. § 242.17(e); Hernandez-Cordero v. INS, 819 F.2d 558, 560 (5th Cir. 1987). A decision regarding whether to grant discretionary relief from deportation is reviewable only for an abuse of discretion. Hernandez-Cordero, 819 F.2d at 560. Further, we have previously recognized that the Attorney General (or his agent) enjoys "unfettered" discretion to decide whether to suspend the deportation of an alien. Id. (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976)); see also 8 C.F.R. § 242.8 (delegating discretionary

[3] A report prepared by the Department of State dated January 24, 1977, which was submitted to the IJ without objection. The report indicates that Murton, under the alias Anthony Alvis Cudjoe, was arrested in October 1974 in Washington, D.C. on three counts of forgery-uttering. The report further indicates that Murton never appeared in court on those charges and a warrant was issued. Moreover, Murton was arrested in November 1973-- prior to entering the United States-- by Nigerian officials on charges that he posed as a Nigerian army officer and attempted fraudulently to obtain several visas to the United States. At the time the report was prepared, Murton was incarcerated in London, England, after having been convicted for obtaining goods by forged instrument and deception on December 19, 1976. The report also indicates that, on several occasions, Murton told various authorities that he was a native and citizen of Ghana and a native and citizen of Sacramento, California, both of which are, of course, false. Finally, during the hearings before the IJ, Murton initially denied but later admitted to having been arrested in 1968 in London on charges of having sexual relations with an underage girl, although the disposition of this charge is unclear from the record.

power to immigration judges). This is so because "the subject is uniquely within the competence and power of the political branches." Hernandez-Cordero, 819 F.2d at 561. Moreover, in exercising the discretion provided under § 245, the Board of Immigration Appeals has stated that "[w]hen adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities." Matter of Arai, 13 I. & N. Dec. 484 (BIA 1970); cf. Rashtabadi v. INS, 23 F.3d 1562, 1570 (9th Cir. 1994) ("Where an alien has committed a particularly grave criminal offense, he may be required to make a heightened showing that his case presents unusual or outstanding equities.").

While Murton produced evidence that he had been in the United States for almost twenty years and married for over fifteen years, we find it significant that his wife did not submit an affidavit or testify on his behalf, nor did Murton appear to know her current address. Thus, the factors favoring suspension of Murton's deportation are, at best, weak. Counterbalanced against these favorable factors is Murton's substantial criminal history, particularly his history of engaging in fraudulent activities. In light of these relevant facts, we cannot say that the IJ abused his discretion by recommending that Murton be denied an adjustment of status pursuant to § 245.

B. Section 212(h) Waiver for "Extreme Hardship."

Murton next argues that the IJ abused his discretion in concluding that Murton was not entitled to relief from deportation for "extreme hardship" pursuant to § 212(h) of the Immigration and Nationality Act. See 8 U.S.C. § 1254(a)(1). We disagree.

We have previously held that the Supreme Court's decision in INS v. Wang, 450 U.S. 139 (1981), recognizes the broad discretion afforded to the BIA to narrowly define "extreme hardship." Hernandez-Cordero, 819 F.2d at 561. We also noted that the BIA is "doubly-insulated from substantive review of a finding of `no extreme hardship'," id. at 562, because it may narrowly define the term and the term itself is "a highly subjective standard that is difficult, if not impossible, to review." Id. Finally, we concluded that this court has "an exceedingly narrow substantive review of the BIA's determination of no `extreme hardship'," id., and that

> we are entitled to find that the BIA abused its discretion only in a case where the hardship is uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship is extreme.

Id. at 563.

In the case at hand, Murton's circumstances are not "uniquely extreme" such that they "closely approach[] the outer limits of the most severe hardship the alien could suffer . . . ." Id. Murton has no dependent children living in the United States. Murton's wife has not submitted any evidence for the

record in support of her husband. Murton has no other relatives living in the United States. Murton owns little personal property and no real property in the United States. In short, there is no evidence that Murton will suffer "uniquely extreme" financial or emotional hardship if he is deported. Indeed, as the IJ noted, the hardship that Murton will experience from deportation is no greater than that which would be experienced by any other alien. Accordingly, we cannot say that the BIA abused its discretion in adopting the IJ's recommendation that Murton be denied a waiver for extreme hardship under § 212(h) of the Immigration and Nationality Act.

III. CONCLUSION

For the foregoing reasons, the judgment of the BIA is AFFIRMED. Murton's "Motion to Hold in Abeyance or to Remand to the Board of Immigration Appeals" as well as his "Motion to Reopen and Reconsider and/or Vacate or Remand to the Immigration Judge," are hereby DENIED.[4]

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[4] Contemporaneous with his appeal, Murton filed two motions in this court: (1) a motion entitled "Motion to Hold in Abeyance or to Remand to the Board of Immigration Appeals"; and (2) a motion entitled "Motion to Reopen and Reconsider and/or Vacate or Remand to the Immigration Judge." In support of both of these motions, Murton submitted a copy of an INS document entitled "Memorandum of Creation of Record of Lawful Permanent Residence," which Murton asserts is "additional material evidence now available [regarding] Petitioner's eligibility for a termination of the deportation proceeding[s] and for a waiver of deportability . . . ." We disagree. As stated above, this document is little more than an incomplete application for an immigrant visa. The document itself clearly indicates that no such visa was ever issued. In fact, it merely echoes a document submitted to the IJ by Murton which informed Murton that his

application had been forwarded to the U.S. consulate in Nigeria, and that the final issuance of an immigrant visa was contingent upon Murton's return to Lagos and the discretionary approval of the U.S. consul. In short, the evidence submitted by Murton in support of these two motions is simply immaterial to the validity of the decision of the IJ or the BIA.