

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 94-40829  
(Summary Calendar)

---

OLANREWAJU O. AJAYI,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

---

Petition for Review of an Order of the Immigration  
and Naturalization Service  
(A26 542 823)

---

(July 20, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges:

PER CURIAM\*:

Olanrewaju O. Ajayi, pro se, petitions us for review of the dismissal by the Board of Immigration Appeals (BIA) of his fourth appeal of an Immigration Judge's (IJ) order deporting him to Nigeria. We must decide whether the BIA abused its discretion in

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismissing Ajayi's appeal. Finding no abuse of discretion, we deny the petition for review.

I.

FACTS AND PROCEEDINGS

For a third time, Ajayi, a native and citizen of Nigeria, petitions us for review of his deportation order. Ajayi's story begins in December 1980, when he entered the United States at St. Louis, Missouri, as a non-immigrant visitor on a B-1 visa. The visa authorized him to remain in the United States until June 18, 1981, but Ajayi stayed well beyond this date.

In August 1992, the Immigration and Naturalization Service (INS) issued an Order to Show Cause and Notice of Hearing, alleging that Ajayi had (1) overstayed his visa, in violation of section 241(a)(1)(B) of the Immigration and Nationality Act (the INA) (the overstay section),<sup>1</sup> and (2) been convicted of a crime of moral

---

<sup>1</sup> 8 U.S.C. § 1251(a)(1)(B) (West Supp. 1994) provides in pertinent part:

(a) Classes of deportable aliens.

\* \* \* \*

(1) Excludable at time of entry or of adjustment of status or violates status.

\* \* \* \*

(B) Entered without inspection. Any alien who entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or any other law of the United States is deportable.

turpitude within five years after the date of his entry into the United States, in violation of section 241(a)(2)(A)(i) of the INA (the crimes of moral turpitude section).<sup>2</sup> The INS charged that, in light of those facts, Ajayi was subject to deportation.

At his deportation hearing, Ajayi admitted he had overstayed his visa and conceded that he was deportable under the overstay section. As to the second charge, however, Ajayi correctly noted that the INS had failed to support its allegations. Specifically, the charge omitted the date of Ajayi's conviction for the crime of moral turpitude. Without evidence of the conviction date, the IJ was unable to determine whether Ajayi had been convicted of a crime of moral turpitude within five years after June 18, 1981, the date Ajayi entered the United States. Accordingly, the IJ found Ajayi deportable under the overstay section, but not under the crimes of moral turpitude section.

Individuals deportable under the overstay section may apply for suspension from deportation under section 244(a)(1) of the INA.<sup>3</sup> Ajayi applied to the IJ for suspension from deportation;

---

<sup>2</sup> 8 U.S.C. § 1251(a)(2)(A)(i) (West Supp. 1994) provides in pertinent part:

(2) Criminal Offenses. (A) General Crimes. (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 a year or longer,  
is deportable.

<sup>3</sup> See 8 U.S.C. § 1254(a)(1) (West Supp. 1994).

however, the IJ denied the application. The IJ found Ajayi ineligible for suspension, as he could not satisfy the good moral character prerequisite.

As one of the prerequisites of suspension under section 244(a)(1), the alien must prove that "he was a person of good moral character" throughout the seven years preceding his application.<sup>4</sup> Section 101(f)(7) of the INA provides that a person confined in a penal institution, as a result of a conviction, for 180 days or more during the relevant time shall not be found to be a person of good moral character.<sup>5</sup> During the suspension stage of the hearing, Ajayi admitted that on September 1, 1992, he had finished a ten month prison term. In addition, the INS introduced conviction records revealing that Ajayi had pleaded guilty to two counts of fraud.<sup>6</sup> As Ajayi had been incarcerated for more than six months during the period of required good moral character, the IJ found Ajayi statutorily ineligible for suspension from deportation under section 244(a)(1). This ruling has spawned a sequence of appeals to the BIA and several petitions to this court.

First, Ajayi appealed the IJ's decision to the BIA, arguing that he was eligible for suspension of deportation under section 244(a)(1). Finding that the IJ's decision correctly resolved this issue, the BIA dismissed the appeal. Subsequently, Ajayi

---

<sup>4</sup> 8 U.S.C. § 1254(a).

<sup>5</sup> 8 U.S.C. 1101(f)(7) (West 1987).

<sup>6</sup> 20 U.S.C. § 1097(a) (knowingly and willfully by fraud, false statements, and forgery obtaining money in the form of a guaranteed student loan, a Pell Grant, and a national direct student loan).

petitioned us to review the BIA's decision. We found no error and denied Ajayi's petition.<sup>7</sup>

In his second round of appeals, Ajayi filed a motion to reconsider, reiterating that he was entitled to suspension of deportation under section 244(a)(1), and claiming that the BIA and the IJ wrongly denied him the opportunity to make such application and to have it adjudicated. The BIA denied Ajayi's motion to reconsider, repeating that the IJ's decision had correctly resolved these issues. Ajayi did not petition us to review this second round of appeals.

Instead, Ajayi initiated a third round of appeals. He filed a motion to reopen and a second motion to reconsider, contending that (1) the BIA and the IJ had erred in not allowing him to apply for suspension of deportation under section 244(a)(2) of the INA,<sup>8</sup> and (2) he satisfied the good moral character prerequisite for suspension under section 244(a)(2). The BIA denied Ajayi's motion to reopen, but granted his second motion to reconsider. In this round, Ajayi argued that the applicable suspension section was section 244(a)(2), rather than section 244(a)(1).

First, the BIA held that section 244(a)(2) was inapplicable and that section 244(a)(1) is the appropriate section. As the BIA noted, Section 244(a)(2) applies to, among others, individuals deportable under the crimes of moral turpitude section, but not to

---

<sup>7</sup> Ajayi v. INS, No. 93-4248 (5th Cir. Nov. 3, 1993)(table opinion at 9 F.3d 103), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2750, 129 L.Ed.2d 867 (1994).

<sup>8</sup> 8 U.S.C. § 1254(a)(2) (West Supp. 1994).

individuals, like Ajayi, deportable under the overstay section. Second, the BIA reaffirmed that Ajayi was ineligible for suspension of deportation under Section 244(a)(1), as he failed to satisfy the good moral character prerequisite. For a second time, Ajayi petitioned us for review. Eventually, we were forced to dismiss his petition for want of prosecution.<sup>9</sup>

In his fourth round of appeals, Ajayi filed a second motion to reopen, a third motion to reconsider and motion to remand, contending that (1) he was deportable under the crimes of moral turpitude section, (2) he should have been allowed to plead to this charge of deportability, and (3) he would then be eligible for suspension of deportation under Section 244(a)(2). The BIA denied Ajayi's motion to reopen, finding that the affidavit in support of his motion failed to raise any new issues. The BIA granted Ajayi's third motion to reconsider, but only to clarify that Ajayi suffered no prejudice from the IJ's determination that Ajayi was deportable under the overstay statute, but not under the crimes of moral turpitude statute.

In its clarifying decision, the BIA spelled out three separate and independent grounds for dismissal. First, the decision that Ajayi was not deportable under the crimes of moral turpitude section was final and no longer subject to review. As Ajayi prevailed on that charge, the sole right to appeal that decision rested with the INS, and it did not appeal. Thus, the decision was final and no longer subject to review. Ajayi was thus deportable

---

<sup>9</sup> Ajayi v. INS, No. 94-40213 (5th Cir. June 28, 1994).

under the overstay section, and the overstay section only.

Second, even assuming *arguendo* that Ajayi were deportable under the crimes of moral turpitude section, he would nonetheless be statutorily ineligible for suspension of deportation under section 244(a)(2). That section requires that the alien show good moral character "for a continuous period of not less than ten years immediately following the commission of an act, or assumption of a status constituting a ground for deportation."<sup>10</sup> Section 101(f)(7) provides that a person confined in a penal institution, as a result of a conviction, for 180 days or more during the relevant time period shall not be found to be a person of good moral character. In 1991-92, Ajayi served ten months in prison for fraud. Consequently, even if Ajayi were found deportable under the crimes of moral turpitude section, he would still be statutorily ineligible for suspension of deportation.

Third, the BIA exercised its discretion and dismissed Ajayi's appeal as repetitive and unnecessary. The BIA noted that the alien had filed (1) an appeal, (2) a motion to reconsider, (3) a motion to reopen and reconsider, and (4) a motion to reopen, reconsider or remand, or all three. The arguments made in Ajayi's third and fourth rounds of appeals could have and should have been presented in either of his first two rounds of appeals. Unpersuaded by Ajayi's explanation for his multiple appeals, the BIA found that Ajayi had engaged in piecemeal litigation and declined to exercise its discretion in his favor. Once again, the BIA affirmed Ajayi's

---

<sup>10</sup> 8 U.S.C. § 1254(a)(2).

deportation order. This petition for review followed.

Construing the petition for review liberally, Ajayi asserts three points of error: (1) He should have been allowed to plead to deportability under the crimes of moral turpitude section; (2) he would then be eligible for suspension under section 244(a)(2); and (3) as a result of these two legal errors, he has been denied due process.

## II.

### DISCUSSION

#### A. STANDARD OF REVIEW

The BIA may deny a motion to reopen on three independent grounds: (1) The movant has failed to establish a prima facie case for the underlying substantive relief sought; (2) the movant has failed to introduce previously unavailable, material evidence; and (3) in cases in which the ultimate grant of relief is discretionary, such as suspension of deportation, the BIA may bypass the first two threshold requirements and simply determine that, even if they were met, the movant would not be entitled to a discretionary grant of relief.<sup>11</sup> We review the BIA's grant or denial of motions to reopen and reconsider for abuse of discretion.<sup>12</sup>

---

<sup>11</sup> INS v. Abudu, 485 U.S. 94, 104, 108 S.Ct. 904, 912, 99 L.Ed.2d 90 (1988).

<sup>12</sup> INS v. Doherty, 502 U.S. 314, 323, 112 S.Ct. 719, 724, 116 L.Ed.2d 823 (1992) ("Abuse of discretion standard applies to motions to reopen regardless of the underlying basis of the alien's request for relief."); Soto-Tapia v. I.N.S., 8 F.3d 1, 3 (5th Cir. 1993) ("We review the Board's findings only for abuse of discretion."); Osuchukwu v. INS, 744 F.2d 1136, 1141 (5th Cir.



B. FINALITY OF THE IJ'S OPINION

In his first assignment of error, Ajayi contends that he should have been allowed to plead to deportability under the crimes of moral turpitude section. The BIA found, however, that the IJ's decision that Ajayi was not deportable under the crimes of moral turpitude section was final and therefore not open to review.

We deem it unnecessary to determine whether the IJ's decision is final. As explained more fully below, Ajayi is statutorily ineligible for suspension regardless of whether he is deportable under either the overstay section or the crimes of moral turpitude section.

C. PRIMA FACIE CASE FOR DEPORTATION FAILS

In his second assignment of error, Ajayi asserts that he is eligible for suspension under section 244(a)(2). Like the IJ and the BIA before us, we disagree. Assuming, without deciding, that Ajayi were deportable under the crimes of moral turpitude section, he would be unable to make out a prima facie case of eligibility for suspension of deportation, as he fails to satisfy the good moral character prerequisite.

As expressed by the BIA in its decision, Section 244(a)(2) requires an applicant for suspension to prove good moral character "for a 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 . . . ." <sup>13</sup> We noted previously that it is

---

1984)(same).

<sup>13</sup> 8 U.S.C. § 1254(a)(2).

legally impossible for an individual like Ajayi, who has recently finished serving a ten month prison term, to satisfy the good moral character prerequisite.<sup>14</sup> Thus, Ajayi is statutorily ineligible for suspension under section 244(a)(2).

C. DUE PROCESS: NO HARM, NO FOUL

In his third assignment of error, Ajayi argues that preventing him from pleading to deportability under the crimes of moral turpitude section violates due process. We find no merit in this contention either.

It is well established in this circuit that "[a] due process challenge requires a showing of substantial prejudice to the petitioning alien."<sup>15</sup> In our earlier decision,<sup>16</sup> we held that Ajayi was statutorily ineligible for suspension of deportation under section 244(a)(1). Here, we reaffirm the BIA's decision that Ajayi's recent prison term made him ineligible for suspension under section 244(a)(2) as well. Consequently, Ajayi is statutorily

---

<sup>14</sup> 8 U.S.C. § 1101(f)(7).

<sup>15</sup> Hernandez-Garza v. INS, 882 F.2d 945, 947 (5th Cir. 1989); see also Garcia-Ortega v. INS, 862 F.2d 564, 566 (5th Cir. 1989)(finding no prejudice when the INS refused to accept a line's legalization application, where the alien's felony conviction constituted an absolute bar to legalization under the INA); Mantell v. INS, 798 F.2d 124 (5th Cir. 1986) (finding no prejudice where the INS failed to inform the alien that he was eligible for a form of relief from deportation, after the court determined that the Board's ruling on a motion to reopen constituted a finding on the merits of the alien's request for relief from deportation); Soon Bok Yoon v. INS, 538 F.2d 1211 (5th Cir. 1976) (holding that where an alien's record contained clear evidence of ineligibility for any form of discretionary relief other than voluntary departure, no prejudicial error in alleged failure to apprise her of all alternative forms of discretionary relief).

<sup>16</sup> Ajayi v. INS, 9 F.3d 103 (5th Cir. 1993).

ineligible for suspension under both the overstay section and the crimes of moral turpitude section. Irrespective of which charge Ajayi actually pleaded to, or might be allowed to plead to, he would be ineligible for suspension. Accordingly, we hold that Ajayi cannot establish any prejudice, much less substantial prejudice, and therefore find no merit in his due process claim.

D. BIA DID NOT ABUSE ITS DISCRETION

The BIA spelled out three separate and independent grounds for denying Ajayi's appeal, the third of which was discretionary. As Ajayi does not challenge this ground for denial of the motion, we could affirm the BIA's decision on this ground alone.

In its decision, the BIA stated that Ajayi had appealed to it four times, and that the arguments made in his two latest appeals could have and should have been made in his earlier appeals. The BIA found that Ajayi had engaged in piecemeal litigation and, relying on a well established precedent,<sup>17</sup> exercised its discretion to deny Ajayi's appeal. We agree with the BIA: Ajayi has had ample opportunity to present his case; his current appeal is repetitive and seeks only to delay his departure. Accordingly, we find no abuse of discretion in the BIA's decision and in the alternative affirm its decision on Ajayi's failure to challenge that decision

---

<sup>17</sup> INS v. Abudu, 485 U.S. 94 (1988)(stating that there is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest of giving adversaries a fair opportunity to develop and present their respective cases); INS v. Rios-Pineda, 471 U.S. 444 (1985) (stating that the purpose of the appeal is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying the legal prerequisites).

in this petition.

III

CONCLUSION

For the foregoing reasons, the petition for review of the dismissal by the BIA is  
DENIED.