

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 94-41043
Summary Calendar
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BOUNTOM MOUNIVONG,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

S)))))))))Q

Petition for Review of a Decision of
the Board of Immigration Appeals

(A72 451 068)

S)))))))))Q

(March 1, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

PER CURIAM:

On January 3, 1994, the Immigration Judge found that petitioner was deportable, and ordered him deported and denied his requests for withholding of deportation, for asylum, and for voluntary departure. On the same day, in open court petitioner's then counsel expressly waived appeal. However, on February 23,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

1994, petitioner, through new counsel, who is his present counsel, filed a notice of appeal to the Board of Immigration Appeals (BIA).

By written decision dated July 6, 1994, the BIA dismissed petitioner's appeal for lack of jurisdiction, because petitioner through counsel had waived appeal and because the February 23, 1994, notice of appeal was late. The record reflects that on July 6, 1994, a copy of the BIA's decision and order was mailed to petitioner's counsel at counsel's address as reflected in the record. On Thursday, October 5, 1994, this Court received petitioner's petition for review of the July 6 decision of the BIA. The petition for review is executed by petitioner's counsel, the same one who gave the February 23, 1994, notice of appeal, and contains a certificate of service stating that it was mailed September 30, 1994. Counsel's office address is in Fort Worth, Texas.

Respondent contends that this Court has no jurisdiction because, among other things, the petition for review was not filed until the ninety-first day after the day of issuance of the BIA's order. We agree. Under 8 U.S.C. § 1105a(a)(1), the petition for review must be filed "not later than 90 days after the date of the issuance of the final deportation order." Petitioner does not dispute that the petition for review was not filed until the ninety-first day. However, petitioner contends that under Fed. R. App. P. 26 "since counsel for Petitioner received the BIA's decision by mail several days later after it was rendered, 3 additional days should be added to the computation of time." This argument is without merit because the provision of Fed. R. App. P.

26(c) authorizing additional time where service is by mail applies only when the prescribed time period is one which runs "after service of a paper upon that party." Here, the ninety days commences running upon "the date of the issuance" of the final deportation order. Section 1105a(a)(1). Petitioner also relies on Fed. R. App. P. 31 and Local Rule 31 of this Court. However, Rule 31 only applies to the filing of briefs. Under Fed. R. App. P. 25(a), which is applicable, a filing is "not timely unless the papers are received by the clerk within the time fixed for filing." Hence, the only contentions advanced by Petitioner in respect to the timeliness of the petition for review are without merit.

Here the record reflects, and it is not disputed, that the BIA's decision was mailed to petitioner's counsel at his correct address on July 6, 1994, the date of the decision itself. Petitioner has in substance admitted that the decision was received by petitioner's counsel within a few days thereafter, and in time to timely file a petition for review. Since the petition for review was not filed until the ninety-first day, we have no jurisdiction. See *Soto-Tapia v. INS*, 8 F.3d 1 (5th Cir. 1993); *Karimian-Kaklaki v. INS*, 997 F.2d 108 (5th Cir. 1993); *Guirguis v. INS*, 993 F.2d 508 (5th Cir. 1993).

Accordingly, we have no jurisdiction over the petition for review, and the petition for review is

DISMISSED FOR LACK OF JURISDICTION.