

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 94-41117
Summary Calendar
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OSMAN RUIZ ESPINOZA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

S)))))))))Q

Appeal from an Order of the
Board of Immigration Appeals
(A28 583 540)

S)))))))))Q
July 7, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

GARWOOD, Circuit Judge:

Osman Ruiz Espinoza (Espinoza) appeals the order of the Board of Immigration Appeals (the Board) dismissing his appeal from the decision of the Immigration Judge (IJ) denying asylum and withholding of deportation. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Espinoza is a native and citizen of Nicaragua who entered the United States at Brownsville, Texas, on September 5, 1988, without inspection in violation of 8 U.S.C. § 1251(a)(2). Espinoza appeared before the IJ on September 5, 1989, and conceded deportability. On September 27, 1989, Espinoza submitted an application for asylum and withholding of deportation, claiming that he would be persecuted if he returned to Nicaragua because of his lack of cooperation with the Sandinista Defense Committee (CDS) and his involvement with the Conservative Democratic Party (CDP), a political group opposed to the Sandinista regime.

The IJ forwarded Espinoza's asylum application to the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA) for an assessment of his claim. In a letter dated March 22, 1990, the BHRHA stated its opinion that Espinoza had not established a well-founded fear of persecution upon return to Nicaragua. The BHRHA noted that its conclusion was "reinforced by our current analysis and the outcome of the elections held February 25, 1990."

On August 28, 1990, the IJ held a hearing on Espinoza's application. Espinoza was the only witness. At this hearing, Espinoza testified that he feared persecution because of his participation in the CDP. He also stated that he had served in the Sandinista army for two years.¹ Espinoza testified that, after his

¹ Espinoza testified that he served full-time in the military from 1985 to 1987. On cross-examination, he admitted that his asylum application indicated that he attended school in 1986. In

discharge from the army, he became involved with the CDP, that he was involved with the CDP for approximately six months in 1987, and that his participation consisted of "[e]xpressing [his] opinion towards the government and about the government."² Although he was not an official member of the party, Espinoza attended meetings and participated in strikes and demonstrations. Espinoza testified that he had trouble finding employment and getting admitted to school because of his involvement with the CDP and his refusal to participate with the CDS.

He also stated that members of his family experienced problems with the Sandinista government because of their association with the previous Somoza regime. Espinoza testified that one uncle, an officer in the Somoza government, was killed by the Sandinistas in 1978.³ He testified that the Sandinistas questioned him in 1987 about his involvement in the CDP and that the Sandinistas

an effort to explain this inconsistency, Espinoza vaguely stated that the dates must be wrong.

² In contrast to his testimony, his application indicates that he was active with the CDP until the time of his departure from Nicaragua in 1988.

³ At the hearing, Espinoza testified that he could not remember this uncle's name. Espinoza's statements in his asylum application are somewhat inconsistent with his testimony. In his application, he stated that Absalon Ruiz, an uncle, was a lieutenant in the Somoza National Guard who was imprisoned by the Sandinistas in 1981 and subsequently disappeared. Assuming this is the same uncle that Espinoza referred to at the hearing, this statement contradicts his testimony that his uncle was killed by the Sandinistas in 1978. In his application, Espinoza also stated that his step-father was a member of the Somoza National Guard and was imprisoned by the Sandinistas for three years. Finally, Espinoza stated that another uncle was a member of the Contras from 1982 to 1985 and mysteriously disappeared in 1986.

threatened to take away his mother's job. Espinoza testified that the Sandinistas never "detained [him] personally." In his application, however, Espinoza stated that "on two occasions [he] was detained and interrogated in July and August, 1988 regarding his involvement with the [CDP]." Espinoza did not allege that he was subjected to physical abuse. Espinoza also testified that his mother, who still lives in Nicaragua, told him that he would be persecuted if he returned and that there were rumors of another revolution.

After the hearing, the IJ denied Espinoza's application for asylum and withholding of deportation, reasoning that he had failed to show that he "had been persecuted prior to his departure from Nicaragua or faces a well-founded fear of persecution upon his return." On September 21, 1994, the Board dismissed Espinoza's appeal, finding that he had failed to satisfy his burden of proving persecution or a well-founded fear of persecution upon his return to Nicaragua. The Board commented that the government of Nicaragua has changed hands since Espinoza departed in 1988 and that the Sandinistas no longer exert exclusive control over the Nicaraguan government. The Board observed that Espinoza had failed to present "any evidence that anyone in circumstances substantially similar to his own has ever been persecuted by the Sandinistas in Nicaragua subsequent to the change in government in his country in 1990." Espinoza now appeals.

Discussion

The standard for determining whether asylum should be granted

is whether a reasonable person in the applicant's position would fear persecution. *Guevara Flores v. I.N.S.*, 786 F.2d 1242, 1249, (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1565 (1987). It is sufficient under this standard to show that persecution is a reasonable possibility or that the applicant has a well-founded fear of persecution. *Rivera-Cruz v. I.N.S.*, 948 F.2d 962 F.2d 966 (5th Cir. 1991). To qualify for withholding of deportation, a "clear probability" of persecution must be shown. *I.N.S. v. Stevic*, 104 S.Ct. 2489, 2492 (1984).

The standard we apply in reviewing the decision of the Board is a deferential one. We will uphold the Board's factual conclusion that Espinoza is not eligible for asylum or withholding of deportation under the appropriate legal standard if the record as a whole shows that the factual conclusion is supported by substantial evidence. *I.N.S. v. Elias Zacarias*, 112 S.Ct. 812, 815 (1992). This means that, if the Board's conclusion is substantially reasonable, based on the evidence presented, we must affirm. *Rojas v. I.N.S.*, 937 F.2d 186, 189 (5th Cir. 1991). "[T]o obtain judicial reversal of the [Board's] determination, [the applicant] must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Elias Zacarias*, 112 S.Ct. at 817. Even when an applicant has shown that he has a well-founded fear of persecution in the nation of origin and is therefore eligible for asylum, the ultimate decision to grant or deny the application rests in the sound discretion of the Attorney General; exercise of

that discretion will be upheld "absent a showing that such action was arbitrary, capricious or an abuse of discretion." *Zamora-Morel v. I.N.S.*, 905 F.2d 833, 838 (5th Cir. 1990) (citation and internal quotation marks omitted).

Espinoza argues that he has a well-founded fear of persecution because he was detained twice in 1988 by the Sandinistas and interrogated about his CDP activities. Brief detention without physical abuse, however, does not necessarily constitute persecution. *Kubon v. I.N.S.*, 913 F.2d 386, 388 (7th Cir. 1990). Espinoza also argues that he has a well-founded fear of persecution because, as a result of their political activities, he and his family were discriminated against, were kept in low-paying jobs, and were denied letters of recommendation for admission to schools. However, in *Youssefina v. I.N.S.*, 784 F.2d 1254, 1261 (5th Cir. 1986), we stated that "economic detriment due to a change in political fortune is alone insufficient to establish a well-founded fear of persecution." See also *DeSouza v. I.N.S.*, 999 F.2d 1156, 1159 (7th Cir. 1993) (holding that denial of public education is insufficient to establish a well-founded fear of persecution). In any event, the significance of all these facts is properly discounted in light of the 1990 change of government in Nicaragua, as noted below.

Espinoza further argues that he has a well-founded fear of persecution based on his family's association with the Contras and the Somoza regime. However, this argument, as well as Espinoza's other above-referenced contentions, could properly be and was

rejected by the Board in light of the change of government in Nicaragua following the 1990 election. The Board properly took administrative notice of the change in governments in Nicaragua and the Sandinistas' loss of power. *Rivera-Cruz*, 948 F.2d at 966 (holding that Board is entitled to take administrative notice of the change in government in Nicaragua).

We therefore affirm the Board's order dismissing Espinoza's appeal from the IJ's decision finding that he is ineligible for asylum. Because Espinoza has failed to satisfy the lower burden of proof required for asylum, we need not decide whether he is eligible for withholding of deportation. Espinoza's failure to establish a well-founded fear of persecution necessarily implies that he is unable to satisfy the more demanding standard of clear probability of persecution. *Rivera-Cruz*, 948 F.2d at 969.

Conclusion

Accordingly, the decision of the Board is

AFFIRMED.