IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41193
Summary Calendar

CARLOS RANALDO CORTEZ, a/k/a
Carlos Ronaldo Cortez-Martinez,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
(INS No. A29-966-238)

July 7, 1995

Before KING, JOLLY and SMITH, Circuit Judges.

PER CURIAM:*

Carlos Ranaldo Cortez appeals the dismissal of his petition for asylum or withholding of deportation by the Board of Immigration Appeals. 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

On January 25, 1989, Cortez illegally entered the United States by foot near Brownsville, Texas. On August 16, 1990, Cortez filed an application for asylum with the Immigration and Naturalization Service ("INS") in which he stated that he was fleeing from the Sandinista regime, which was "harassing [him] by wanting [him] to go to the mountains and fight with the regular army." He further stated that he was a member of the Liberal Party, had already served in the army reserves under the Sandinistas, and was afraid that the order of conscription issued just before he fled Nicaragua was "an excuse to shoot [him] and blame it on the contras . . . . "

On April 30, 1990, the INS issued an Order to Show Cause on Cortez, charging him with deportability for having entered the United States without inspection. 8 U.S.C. § 1251(a)(1)(B).[1] Cortez conceded deportability but requested asylum, withholding of deportation, or, in the alternative, voluntary departure. On May 28, 1991, an Immigration Judge ("IJ") denied Cortez's requested relief and ordered him deported. Cortez appealed to the Board of Immigration Appeals ("BIA"), which issued a per curiam opinion on October 19, 1994, concluding that "the

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[1] That section states:

> **(B) Entered without inspection**
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> 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 chapter or any other law of the United States is deportable.

8 U.S.C. § 1251(a)(1)(B).

immigration judge adequately and correctly addressed the issue raised on appeal, [therefore] her decision is affirmed based upon and for the reasons set forth therein." Cortez filed a timely appeal to this court, asserting that the BIA and the IJ erred in denying his petition for asylum, withholding of deportation, and voluntary departure.

II. ANALYSIS

As an initial matter, we note that we are authorized to review an order only of the BIA, not the IJ. Chun v. INS, 40 F.3d 76, 78 (5th Cir. 1994); Adebisi v. INS, 952 F.2d 910, 912 (5th Cir. 1992). In this case, however, the BIA specifically adopted the findings of the IJ; therefore, we may review the findings of the IJ. Chun, 40 F.3d at 78.

Cortez seeks asylum and withholding of deportation under §§ 208(a) and 243(h) of the Immigration and Nationality Act. See 8

U.S.C. §§ 1158(a)[2] and 1253(h).[3] Asylum is a purely discretionary form of relief which is available to an alien who proves that he is a "refugee," which is defined as any person who has a "well grounded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." 8 U.S.C. § 1101(a)(42)(A). To be eligible for asylum, the alien's burden is to prove that persecution is a "reasonable probability." Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991) (citing INS v. Cardoza-Fonesca, 480 U.S. 421 (1987)). The withholding of deportation, on the other hand, is a mandatory form of relief available to an alien who proves that his life or freedom would be threatened upon return

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[2] That section states:

(a) Establishment by Attorney General; coverage

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1158(a).

[3] That section states in relevant part:

(h) Withholding of deportation or return

> (1) The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

8 U.S.C. § 1253(h)(1).

to the country of deportation. Campos-Guardado v. INS, 809 F.2d 285, 287 (5th Cir.), cert. denied, 484 U.S. 826 (1987). To be eligible for withholding of deportation, the alien's burden is to prove that there is a "clear probability" of persecution. INS v. Stevic, 467 U.S. 407, 430 (1984); Rojas, 937 F.2d at 189. The BIA's factual finding that an alien is not eligible for consideration of asylum must be upheld if it is supported by substantial evidence. Zheng v. INS, 44 F.3d 379, 380 (5th Cir. 1995); Chun, 40 F.3d at 78.[4] Under substantial evidence review, we may not reverse the BIA's factual determinations unless the alien proves "that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." INS v. Elias-Zacarias, 502 U.S. 478, 484-85 (1992); Zheng, 44 F.3d at 380.

The question before us, therefore, is whether the evidence would compel a reasonable factfinder to conclude that Cortez had established the requisite fear of persecution by the Sandinistas on account of his political views. The IJ determined that Cortez had not met his burden of proving persecution because he had worked for nine years in responsible positions in the Sandinista government prior to leaving Nicaragua, neither he nor his wife or children had ever been physically harmed or imprisoned, and he was issued a passport and visa by the Sandinistas to leave the

[4] This same substantial evidence standard applies to the BIA's factual conclusion that an alien is not eligible for withholding of deportation. Chun, 40 F.3d at 78. Adebisi, 952 F.2d at 912.

country. Cortez argues that he feared that the Sandinistas were going to investigate him, that they tried to conscript him for military service, that they took away his food ration cards, and that he was demoted at work because he refused to assist in the evacuation of peasants from the countryside. Even assuming all of these facts are true, however, they do not *compel* a finding of persecution. A government does not, *per se*, engage in persecution based upon political opinion when it requires that its citizens perform military service. Umanzor-Alvarado v. INS, 896 F.2d 14, 15 (1st Cir. 1990); cf. Barraza-Rivera v. INS, 913 F.2d 1443, 1450 (9th Cir. 1990) (noting that persecution may exist if petitioner is a conscientious objector). Likewise, we think it evident that an employer does not "persecute" an employee by demoting him if he fails to carry out his lawful duties. This is especially so where, as here, the employee had previously been promoted despite his known political disagreement with the employer and his subsequent demotion was not accompanied by a reduction in salary.

Moreover, even assuming arguendo that Cortez has proven past persecution, the BIA did not think that Cortez sustained his burden of proving a "reasonable probability" of persecution upon his return to Nicaragua. Specifically, the BIA stated that Cortez "failed on appeal to convincingly rebut the evidence in the record regarding the change in government in Nicaragua." We agree. An advisory letter dated April 11, 1991 from the Department of State to the IJ states that the defeat of the

Sandinistas by the National Opposition Union in early 1990 "dramatically altered political and human rights situations" and that "[t]he Chamorro Administration has . . . abolished the military draft, and has issued a general amnesty." Cortez attempted to rebut this evidence by submitting several news articles regarding the Sandinistas' continued existence and influence. We note that none of these articles was published after 1991 and therefore their continued relevance, if any, is questionable. Even assuming they are relevant to determining whether Cortez would be persecuted upon his return to Nicaragua, they do not alter our conclusion. The State Department determined that Cortez would not likely face persecution under the new Nicaraguan government and the IJ and the BIA were entitled to credit the State Department's assessment over that of media reports which merely speculate that some Sandinistas remain in power. In the face of such conflicting evidence, we cannot say that a reasonable factfinder would be "compelled" to find that Cortez faces a "reasonable probability" of persecution upon return to Nicaragua. In short, there is more than one reasonable conclusion to be drawn from the evidence in the record, and we will not disturb the BIA's reasonable conclusion simply because Cortez disagrees with it.

Cortez also argues that even if he has not sustained his burden of proving a reasonable probability of future persecution, he is entitled to asylum based upon *past* persecution. We disagree. As an initial matter, Cortez failed to make this

argument below and he is therefore deemed to have waived it on appeal. Calderon-Ontiveros v. INS, 809 F.2d 1050, 1052 (5th Cir. 1986). Even assuming, however, that Cortez had presented this claim below, he fares no better on the merits. While past persecution may warrant a grant of asylum even when there is no likelihood of present or future persecution, it is only available if the past persecution was so severe that return to the country of persecution would be "inhumane." Rivera-Cruz v. INS, 948 F.2d 962, 969 (5th Cir. 1991). Cortez's relatively weak evidence of past persecution falls far short of this threshold.

Finally, because eligibility for both asylum and the withholding of deportation hinges upon the alien proving persecution and because the burden of proving persecution is higher for the withholding of deportation than for asylum-- i.e., "clear probability" versus "reasonable probability"-- *a fortiori* an alien who is ineligible for asylum is ineligible for withholding of deportation. Accordingly, the BIA did not err in determining that Cortez was ineligible for the withholding of deportation.

III. CONCLUSION

For the foregoing reasons, the judgment of the BIA is AFFIRMED.[5]

[5] We note that Cortez does not contest the IJ's determination that Cortez is ineligible for voluntary deportation and any argument he may have in this regard is therefore waived on appeal.