UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 92-5042 & 93-4861

(Summary Calendar)

DANIEL AUGUSTO QUINTERO-ALVAREZ,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A26 266 945)

(February 17, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

In these consolidated cases, Daniel Augusto Quintero-Alvarez ("Quintero"), a native and citizen of Nicaragua, petitions this Court for review of a final order of deportation, pursuant to 8 U.S.C. § 1105a (1988 & West Supp. 1993). Quintero applied for asylum[1] and withholding of deportation,[2] arguing that he will be

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] *See* 8 U.S.C. §§ 1101(a)(42)(A), 1158 (1988).

[2] *See id.* § 1253(h).

arrested and imprisoned or killed by the Sandinistas if he is deported to Nicaragua, since in Nicaragua he was a business owner and a member of the bourgeoisie, and did not accept the Marxist-Leninist doctrines of the Sandinistas.[3] Quintero's application for asylum and withholding of deportation was denied by the immigration judge, and that denial was affirmed by the Board of Immigration Appeals ("the Board"), which took administrative notice "that the Sandinista party no longer controls the Nicaraguan government." Quintero filed No. 92-5042, in which he contends that (1) the Board abused its discretion by taking administrative notice that the Sandinistas no longer control the government in Nicaragua, and (2) the facts of his case require that he be granted asylum and withholding of deportation, on account of the persecution he has suffered in Nicaragua and the persecution that he expects to suffer if he returns there. Quintero filed with the Board a motion to reopen his deportation proceedings, in order (1) to present new evidence that the Sandinistas continue to control the government in

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[3] An "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" 8 U.S.C. § 1101(a)(42)(A). 8 U.S.C. § 1158(a). Under § 1101(a)(42)(A), "[t]he term `refugee' means any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* "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." *Id.* § 1253(h) (West Supp. 1993).

Nicaragua; and (2) to apply for suspension of deportation.[4] The Board denied Quintero's motion to reopen, and Quintero filed No. 93-4861, seeking review of that denial.[5] Finding no reversible error, we affirm in No. 92-5042. We reverse and remand in No. 93-4861 for the Board to reconsider Quintero's motion to reopen.

I

In No. 92-5042, Quintero argues that the Board should not have taken administrative notice of the change of government in Nicaragua because the noticed fact "that the Sandinista party no longer controls the Nicaraguan government" is neither correct nor commonly acknowledged.[6] "Because the taking of notice is committed to the broad discretion of the agency, we review the taking of administrative notice by the Board under the abuse of discretion standard." *Rivera-Cruz v. Immigration and Naturalization Serv.,* 948 F.2d 962, 966 (5th Cir. 1991). Quintero's argument)that the

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[4] *See id.* § 1254(a).

[5] The Board construed Quintero's motion as seeking reconsideration of the Board's decision, as well as reopening of the deportation proceeding. *See* 8 C.F.R. § 3.8 ("Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent."). The Board denied reconsideration as well as reopening. Quintero does not argue on appeal that he was entitled to reconsideration. Therefore, we need not address the Board's denial of that form of relief.

[6] "Notice can be taken only of facts with a generally known and accepted quality." *Rojas v. Immigration and Naturalization Serv.,* 937 F.2d 186, 190 n.1 (5th Cir. 1991). "[T]he Board may take official notice of `commonly acknowledged facts . . . .'" *Rivera-Cruz v. Immigration and Naturalization Serv.,* 948 F.2d 962, 967 (5th Cir. 1991).

facts noticed by the Board were incorrect and not commonly acknowledged))is premised on congressional and U.S. State Department reports which Quintero presents for the first time before this Court. We cannot find that the Board abused its discretion based on that information, because "we cannot weigh evidence that has not been brought previously before the Board." *Id.* at 967 (upholding Board's administrative notice of change of government in Nicaragua; *see also* 8 U.S.C. § 1105a(a)(4) (providing that a petition for review of a final order of deportation "shall be determined solely upon the administrative record upon which the deportation order is based"); *Rhoa-Zamora v. Immigration and Naturalization Serv.,* 971 F.2d 26, 34 (7th Cir. 1992) (upholding Board's administrative notice of change of government in Nicaragua) ("We will not weigh evidence that the Board has not previously considered . . . ." (citing *Rivera-Cruz*)), *cert. denied,* ___ U.S. ___, 113 S. Ct. 2331, 124 L. Ed. 2d 243

(1993).[7] Because Quintero's argument is premised on evidence which has not been presented to the Board, it is without merit.

II

Also in No. 92-5042 Quintero contends that the Board erred because the facts of his case require that he be granted asylum and withholding of deportation. To qualify for asylum, an alien must show that persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, "is a reasonable possibility, or that the applicant has a `well-founded' fear of persecution." *Rivera-Cruz,* 948 F.2d at 966. "[A]

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[7] Quintero recognizes that "an alien may not generally introduce evidence on judicial review to rebut [the Board's taking of] administrative notice." Quintero argues, nevertheless, that in light of footnote 4 of our opinion in *Rivera-Cruz* we may overturn the Board's taking of administrative notice in this case. Footnote 4 states:

> It is hypothetically possible, though practically unlikely, that the Board might take official notice of a "fact" that a court could recognize as wrong or not "commonly acknowledged." In that situation, the court need not wait for rehearing by the agency, and may, in assessing whether the taking of notice was proper, reverse the noticed finding or remand to the agency for further explanation. We note that the instant case does not present such a situation.

Id., 948 F.2d at 967 n.4. We do not regard footnote 4 as stating an exception to the well-settled rule that we will not consider evidence which was not presented to the Board. As a result, footnote 4 does not support Quintero's argument.

Apparently anticipating that we would follow *Rivera-Cruz,* Quintero asks us to "reconsider" an important holding in that case: that the availability of a motion to reopen protects an alien's right to challenge facts administratively noticed by the Board. *See id.* at 968. That we may not do. "[I]t is the firm rule of this circuit that one panel may not overrule the decisions of another." *United States v. Taylor,* 933 F.2d 307, 313 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 235, 116 L. Ed. 2d 191 (1991).

grant of asylum may be proper under certain circumstances even if there is no reasonable likelihood of present persecution. Discretionary asylum may be granted if the past persecution was so severe that repatriation of the applicant would be inhumane." *Id.* at 969 (citing *Matter of Chen,* Int. Dec. 3104 (BIA 1989)). To qualify for withholding of deportation, an alien must show a "clear probability" of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* at 966.

The Board held that Quintero was not entitled to relief on any of the foregoing bases. Based on its administrative notice of the change of government in Nicaragua, the Board concluded that Quintero was not entitled to asylum because he did not have a well-founded fear of future persecution in Nicaragua. Since Quintero had not shown a well-founded fear of persecution, the Board decided that he also had not met the higher burden for withholding of deportation))a "clear probability" of persecution. The Board further determined that, assuming Quintero had suffered persecution in the past in Nicaragua, that persecution was not so severe that it would be inhumane to return Quintero to Nicaragua now.

"We review the Board's factual findings [such as well-founded fear and clear probability of persecution] to determine if they are supported by substantial evidence." *Rojas v. Immigration and Naturalization Serv.,* 937 F.2d 186, 189 (5th Cir. 1991) (citing 8 U.S.C. § 1105a(a)(4)). "The substantial evidence standard requires only that the Board's conclusion be based upon the

evidence presented and be substantially reasonable." *Id.* The Board's determination that an alien is not entitled to discretionary asylum on the basis of severe past persecution is reviewed for abuse of discretion. *See id.* at 190; *see also Gutierrez-Rogue v. Immigration and Naturalization Serv.,* 954 F.2d 769, 772 (D.C.Cir. 1992).

Substantial evidence supports the Board's finding that Quintero does not have a well-founded fear of persecution in Nicaragua. Quintero fears that he will be arrested and imprisoned or killed by the Sandinistas because they are hostile to persons of his socio-economic class, and because he did not accept their ideology. The Board's administrative notice "that the Sandinista party no longer controls the Nicaraguan government" provides substantial evidence that Quintero's fear of the Sandinistas is not well-founded. It is at least "substantially reasonable" to conclude that a political party which is no longer in power in Nicaragua will not be able to persecute its citizens. *See Rhoa-Zamora,* 971 F.2d at 34, 36 (holding that substantial evidence supported denial of Nicaraguan's asylum application, where evidence showed that Sandinistas no longer controlled Nicaraguan government); *Gutierrez-Rogue,* 954 F.2d at 772 ("The nature of the change of government in Nicaragua is substantial evidence that Gutierrez does not have a well-founded fear of persecution and is thus not eligible for asylum upon that ground."). Furthermore, the Board correctly held that the failure of Quintero's asylum claim implies the failure of his claim for withholding of deportation.

See Rivera-Cruz, 948 F.2d at 969 ("Rivera'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.").

The Board also did not abuse its discretion by deciding that any persecution suffered by Quintero in the past was not so severe that it would be inhumane to return him to Nicaragua. Quintero alleges that he was kidnapped but quickly released, that his car was stolen, that he was arrested and interrogated, and that he was continually harassed by threatening phone calls, vandalism to his home, confiscation of his merchandise and ultimately his business, and angry mobs shouting threats and insults and burning tires and effigies outside his house. Quintero also alleges that his wife was arrested and interrogated for four days, that his sister and brother-in-law were jailed and mistreated, and that the Sandinista police tried unsuccessfully on several occasions to arrest his son and daughter. While we are not unmindful of the seriousness of the persecution which Quintero alleges, we are guided by prior decisions upholding denials of asylum in cases involving equally severe persecution. In *Rivera-Cruz,* we held that the facts did not "indicate a level of persecution such that repatriation would be inhumane," *id.*, 948 F.2d at 969, even though the alien there was beaten by Sandinista soldiers, resulting in a broken leg and broken finger, and thereafter was forced to move from town to town and live under assumed names for several years to avoid being arrested. *Id.* at 965. In *Rojas v. Immigration and Naturalization Service,* we

found that the Board had not abused its discretion by denying asylum on the basis of past persecution, even though the alien was arrested, beaten, tortured, fired from his job, and refused other employment. *Id.*, 937 F.2d at 188, 190. In light of these decisions, we cannot say that the past persecution alleged by Quintero was so severe that the Board abused its discretion by rejecting his claim for asylum.

III

In No. 93-4861 Quintero contends that he was entitled to reopen his deportation proceeding in order to present evidence that, contrary to the facts administratively noticed by the Board, the Sandinistas continue to control the government in Nicaragua. "The granting of a motion to reopen is . . . discretionary, and the Attorney General has `broad discretion' to grant or deny such motions. Accordingly, we generally review the [Board's] denial of a motion to reopen only for abuse of discretion." *Pritchett v. Immigration and Naturalization Serv.,* 993 F.2d 80, 83 (5th Cir.) (citing *Immigration and Naturalization Serv. v. Doherty,* ___ U.S. ___, 112 S. Ct. 719, 724-25, 116 L. Ed. 2d 823 (1992)), *cert. denied,* ___ U.S. ___, 114 S. Ct. 345, 126 L. Ed. 2d 310 (1993). We find no abuse of discretion here.

There are "`at least' three independent grounds on which the [Board] might deny a motion to reopen))failure to establish a prima facie case for the relief sought, failure to introduce previously unavailable, material evidence, and a determination that even if these requirements were satisfied, the movant would not be entitled

to the discretionary grant of relief which he sought." *Doherty,* ___ U.S. at ___, 112 S. Ct. at 725. The Board denied Quintero's motion to reopen on the first ground above))that Quintero had failed to establish a prima facie case of entitlement to asylum or withholding of deportation.[8] The evidence presented by Quintero in support of his motion to reopen did not convince the Board that the Sandinistas continue to control the Nicaraguan government. Therefore the Board determined that Quintero had not made a prima facie showing of a well-founded fear or clear probability of persecution in Nicaragua:

> We . . . conclude that reopening of [Quintero's] deportation proceedings is not warranted, as we are unpersuaded by [his] assertion that current conditions in Nicaragua are essentially the same as they were when he left Nicaragua in 1985. The newspaper articles and the staff report on Nicaragua submitted with [Quintero's] motion are insufficient to make a prima facie showing that [he] has a well-founded fear or a clear probability of persecution in Nicaragua.

The Board did not abuse its discretion, since it considered all of the evidence submitted by Quintero in support of his motion to reopen. Quintero submitted his own affidavit, the affidavit of his wife's sister-in-law, a number of newspaper articles, and a Senate Foreign Relations Committee staff report, all of which indicate that the Sandinistas continue to exert considerable influence in Nicaragua. In its opinion the Board mentioned all of

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[8] The Board mentioned other grounds for denying Quintero's motion to reopen. However, because the Board properly relied on Quintero's failure to make out a prima facie case of entitlement to the relief sought, which is an "independent" ground for the denial of his motion to reopen, *see Doherty,* ___ U.S. at ___, 112 S. Ct. at 725, we need not address the Board's other grounds for denial.

those sources, but was not persuaded by them that the Sandinistas remain in control in Nicaragua. The fact that we might draw a different conclusion from Quintero's evidence does not mean that the Board abused its discretion. "It is our duty to allow [the] decision to be made by the Attorney General's delegate, even a decision that we deem in error, so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so aberrational that it is arbitrary rather than the result of any perceptible rational approach." *Pritchett,* 993 F.2d at 83 (quoting *Osuchukwu v. Immigration and Naturalization Serv.,* 744 F.2d 1136, 1141-42 (5th Cir. 1984)). "[W]e are not permitted to review the Board's opinion for the sufficiency of record support or even for clear error." *Osuchukwu,* 744 F.2d at 1142 (describing abuse of discretion standard in context of determination of "extreme hardship" to alien). Furthermore, the Board "has no duty to write an exegesis on every contention. What is required is merely that it consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Id.* at 1142-43. The Board did not fail to satisfy these minimal requirements.

IV

Lastly, in No. 93-4861 Quintero contends that he was entitled to reopen his deportation proceeding in order to apply for suspension of deportation, pursuant to 8 U.S.C. § 1254. Reopening on these grounds is not available unless the alien makes out a

prima facie case of entitlement to suspension of deportation. *Immigration and Naturalization Serv. v. Jong Ha Wang,* 450 U.S. 139, 141, 101 S. Ct. 1027, 1029, 67 L. Ed. 2d 123 (1981), *cited in Ganjour v. Immigration and Naturalization Serv.,* 796 F.2d 832, 838 (5th Cir. 1986). The Board denied reopening on the grounds that Quintero had not proven that he would suffer extreme hardship if deported, and therefore he had not established a prima facie case for suspension of deportation.[9]

The Board has "discretion in determining under what circumstances proceedings should be reopened." *Wang,* 450 U.S. at 143 n.5, 101 S. Ct. at 1030 n.5. A determination of extreme hardship is also reviewed for abuse of discretion. *Hernandez-Cordero v. Immigration and Naturalization Serv.,* 819 F.2d 558, 560 (1987) (en banc). Judicial review is "available to ensure that an alien denied relief under suspension of deportation has had a full and fair consideration of his claim, which includes consideration of all relevant factors." *Ganjour,* 796 F.2d at 839. "[W]e lack

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[9] Under 8 U.S.C. § 1254(a)(1),

> the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and . . . has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; *and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien* or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . . .

Id. (emphasis added).

the authority to determine the weight [to be] given each of the factors" that the Board must consider in deciding whether a showing of extreme hardship is made. *Id.*

Quintero contends that the Board abused its discretion by failing to take into account two important factors))his separation from his wife and children and his history of persecution in Nicaragua. We agree that the Board did not consider either of these matters in denying Quintero's motion to reopen. The Board stated: "[Quintero's] wife and four children are citizens of Nicaragua and do not qualify for extreme hardship consideration . . . ." The Board further stated that Quintero's "claims of persecution have no relation to a determination of extreme hardship."

The Board did not abuse its discretion by disregarding Quintero's claims of persecution. *See Farzad v. Immigration and Naturalization Serv.,* 802 F.2d 123, 126 (5th Cir. 1986) ("[T]he Board does not abuse its discretion when it concludes that claims of political persecution have no relationship to determining whether `extreme hardship' exists, which would warrant suspension of deportation.").

However, the Board did abuse its discretion by failing to consider the harm which Quintero would suffer as a result of being separated from his wife and children.[10] "We recognize, as should

[10] Quintero does not argue that the Board should have considered the hardship which would be inflicted on his wife and children, who are citizens of Nicaragua. *See* 8 U.S.C. § 1254(a)(1) (referring to "extreme hardship to the alien or to his spouse, parent, or child, *who is a citizen of the United States or an alien*

the Board, the nature of the hardship posed by the separation of family members." *Zamora-Garcia v. Immigration and Naturalization Serv.,* 737 F.2d 488, 491 n.2 (1984). "[T]he `most important single factor [in determining extreme hardship] may be the separation of the alien from family living in the United States . . . . [S]eparation from family alone may establish extreme hardship.'" *Id.* (quoting *Mejia-Carrillo v. Immigration and Naturalization Serv.,* 656 F.2d 520, 521-22 (9th Cir. 1981)). We therefore reverse the Board's denial of Quintero's motion to reopen and remand for the Board to reconsider that motion, with due regard for any hardship that Quintero may suffer as a result of separation from his family. *See id.* at 495.

V

For the foregoing reasons, we **AFFIRM** in No. 92-5042 and **REVERSE AND REMAND** in No. 93-4861.

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lawfully admitted for permanent residence" (emphasis added)).