

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4085
Summary Calendar

ABIODUN DAVID ADEOLA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A29 077 383)

(August 17, 1993)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Abiodun David Adeola was found deportable by an immigration judge (IJ) under section 241(a)(2) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1251(a)(2), as a nonimmigrant who remained in this country longer than permitted. The IJ granted Adeola voluntary departure in lieu of deportation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Adeola then filed a motion to reopen his deportation proceedings to allow him to apply for adjustment of status; the IJ denied Adeola's motion. Adeola then appealed to the Board of Immigration Appeals ("the Board"), which dismissed his appeal. Adeola now seeks review in this court of the Board's decision. Because we find that the Board did not abuse its discretion in denying Adeola's motion to reopen his deportation proceedings, we affirm.

I

Adeola, a 33-year old native and citizen of Nigeria, entered this country in transit on December 13, 1989. Adeola arrived in the United States en route from Nigeria to Mexico City, Mexico; he stopped in Dallas, Texas, to visit and obtain funds from his brother, a legal permanent resident living in Dallas. Adeola was admitted into the country as a transient, which allowed him to remain in the country without a visa for one day. His passport and ticket, however, were impounded by his airline. Although Adeola insists that the INS issued him a visa at the airport, there is no documentary evidence of any such visa.

Adeola did not return to the airline to reclaim his ticket and passport or to continue his journey to Mexico, but instead remained in Dallas. On August 25, 1990, Adeola married a United States citizen, and on October 17, 1991 his son was born. The INS became aware that Adeola was illegally in the United States after he was detained by mistake by Dallas authorities on an arrest warrant for his brother. Adeola was charged with deportability under section

241(a)(2) of the Act and was issued an order to show cause why he should not be deported. The INS charged Adeola was deportable as a nonimmigrant alien in transit who was admitted to the United States for one day without a visa and who remained in this country longer than permitted.

Adeola's deportation hearing was conducted on November 30, 1990. Although Adeola could not attend, he was represented at the hearing by counsel. At the hearing, the INS informed the IJ that the order to show cause contained an error; instead of alleging that Adeola had been admitted as a transit, it should have alleged that he had been admitted as a transit without visa. Adeola's attorney agreed to the amendment of the order.

The addition of "without visa" did not alter the charge of deportation against Adeola. This factor did, however, affect Adeola's right to apply for relief under section 245 of the Act, which is an adjustment of immigration status to lawful permanent resident as the beneficiary of an approved relative visa based upon Adeola's marriage to an American citizen. An alien entering the United States in transit without a visa is statutorily ineligible to adjust immigration status in this country under this section.

At his deportation hearing, Adeola, through his attorney, admitted the charge, conceded deportability, and requested voluntary departure in lieu of deportation. The INS opposed the request but, after an evidentiary hearing, the IJ granted Adeola

voluntary departure. The IJ also granted, in the alternative, a deportation order.

Adeola did not voluntarily leave this country, but instead on August 27, 1992, filed a motion to reopen his deportation case to reconsider the IJ's decision and stay its execution. This motion was denied on September 9, 1992, and Adeola appealed. The Board affirmed the decision of the IJ and dismissed his appeal on January 13, 1993. Adeola now petitions this court for review.

II

A

The reopening of deportation proceedings is discretionary with the Board. INS v. Phinpathya, 464 U.S. 183, 188 n.6, 104 S.Ct. 584, 588 n.6, 78 L.Ed.2d 401 (1984). The Board's denials of a motion to reopen is not to be casually reversed. INS v. Jong Ha Wang, 450 U.S. 139, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1981). We review the Board's determination only for abuse of discretion. Bahramnia v. INS, 782 F.2d 1243, 1245 (5th Cir. 1986).

B

On appeal, Adeola argues that the Board's decision denying his motion to reopen his case was improper. Adeola argues that his case should be reopened because he wishes to introduce new evidence that was not available to him, discoverable, or existing during his original hearing. Adeola lists this evidence as (1) an arrival/departure record issued by the INS; (2) a relative visa

petition from his wife; and (3) a visa number immediately available to him.

C

On the other hand, the INS argues that Adeola has failed to make out a prima facie case for the relief he seeks. The INS argues that there is no evidence in the record that Adeola was carrying a visa permitting his entry into the United States, nor is there evidence supporting his assertion that he was issued a one-day visa in Dallas, which he claims the INS has since misplaced or concealed.

The INS argues that Adeola must produce material evidence which was previously unavailable, reasonably explain his failure to apply for suspension of deportation in the earlier proceedings, and establish a prima facie eligibility for such relief. The INS argues that Adeola has failed to do this because he has failed to prove that he had a United States visa when he arrived in Dallas or that he was given a visa by the INS when he was allowed to stay in the country for one day while en route to Mexico.

The INS points out that it is irrelevant that Adeola is the beneficiary of an approved relative visa petition and thus eligible for adjustment under section 245(e) of the Act because section 245(c) bars such relief to a transit who enters this country without a visa.

An alien seeking to have his case reopened must satisfy the following requirement:

Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the former hearing... .

8 C.F.R. § 3.2 (1991). In denying Adeola's motion to reopen his deportation proceedings, the Board found, first, that Adeola's counsel's assistance at the deportation proceedings was not ineffective. The Board then found that Adeola could not challenge the IJ's initial decision that he was deportable as an "overstay" based on the fact that he admitted he was an alien in transit without visa who remained longer than permitted in this country. The Board therefore determined that Adeola was unable to demonstrate prima facie eligibility for adjustment because he falls within a category of aliens who are ineligible to adjust their status within the United States.

We conclude that the Board did not abuse its discretion in denying Adeola's motion to reopen his case. The essential issue before the Board and this Court is whether Adeola can establish on reopening that he was a transit with a visa when he arrived--and stayed--in Dallas on December 13, 1989. In order to demonstrate that his deportation proceedings should be reopened, Adeola would need to present evidence that he was indeed issued a visa when he arrived in Dallas; this Adeola has failed to do. Adeola's naked

assertion that he should not suffer the incompetency and inability of the INS to keep its records will not substitute for the evidence he needs to satisfy his burden of demonstrating that there is new material evidence in his case.

III

For the reasons stated above, the Board's decision denying Adeola's motion to reopen his deportation proceedings is

A F F I R M E D.