

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4895
Summary Calendar

LEON ALEXANDER GAYLE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A34 091 119)

(December 16, 1993)

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

PER CURIAM:*

I

The petitioner, Leon Alexander Gayle, is a native son and citizen of Jamaica. He entered the United States at the age of eight, and at the time of his appearance before the immigration judge ("IJ"), Mr. Gayle was thirty years old. During his many

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

years in this country, Mr. Gayle has lived a life of crime and has habitually abused alcohol and drugs.

Mr. Gayle's drug and alcohol use started in 1981. He testified that his use of alcohol eventually became abusive to the point that he turned to alcohol every day. He further testified that he eventually used about one gram of cocaine a day, and that this drug habit cost him about \$100 daily.

In 1983, Mr. Gayle was convicted of robbery in the second degree. In 1985, he was convicted of forgery, and he was convicted of attempted robbery in the third degree in 1986. In 1989, Mr. Gayle was convicted for possession of burglary tools and burglary in the third degree. Finally, in 1990, he was convicted for criminal possession of stolen property and unauthorized use of a vehicle without the owner's consent.

In the light of these criminal convictions, Mr. Gayle admitted his deportability during deportation proceedings before the IJ on December 7, 1992, but he requested the opportunity to apply for a discretionary waiver of deportation under Section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Through counsel, Mr. Gayle indicated that he was also considering an application for an exclusionary waiver under Section 212(h) of the INA, 8 U.S.C. § 1182(h), but at the suggestion of the IJ and by the agreement of Mr. Gayle's counsel, the hearing proceeded on Mr. Gayle's application for a Section 212(c) waiver alone.

At the close of the deportation hearing, the IJ issued an oral decision denying Mr. Gayle's application for Section 212(c) relief from deportation. The Board of Immigration Appeals (the "Board") later affirmed the decision of the IJ. On appeal to this court, Mr. Gayle asserts that (1) the Board erred in affirming the IJ's determination that Mr. Gayle did not meet the criteria necessary to be eligible for relief under Section 212(c) of the INA, and (2) the Board erred in concluding that the IJ acted properly and that Mr. Gayle's counsel provided effective assistance when Mr. Gayle's hearing proceeded without application for relief under Section 212(h) of the INA and without consulting Mr. Gayle on this matter. We find that the Board of Immigration Appeals committed no reversible error and that Mr. Gayle's counsel did not fail to provide effective assistance.

II

A

Mr. Gayle first asserts that the Board of Immigration Appeals erred and should be reversed in its affirmance of the Immigration Judge's determination not to waive Mr. Gayle's deportability under Section 212(c) of the INA. That section grants the Attorney General, in cases involving lawful permanent resident aliens like Mr. Gayle, the discretionary authority to waive the INA's provisions governing exclusion of aliens from this country. See U.S.C. § 1182(c); see also Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988) (applying the statute beyond its literal language to aliens

who have not "temporarily proceeded abroad"). The Attorney General's discretion under this statute is "unusually broad." Ashby v. INS, 961 F.2d 555, 557 (5th Cir. 1992); Perales v. Casillas, 903 F.2d 1043, 1051 (5th Cir. 1990).

We review the Board's decision in this case for an abuse of discretion, Villarreal-San Miguel v. INS, 975 F.2d 248, 250-51 (5th Cir. 1992), and this review is "exceedingly narrow" and "severely limited," Ashby, 961 F.2d at 557. In fact, the Board's decision will be upheld as long as its decision is not "arbitrary, irrational, or contrary to law." Villarreal-San Miguel, 975 F.2d at 250. On this issue, we find that the Board did not abuse its discretion.

In support of his case, Mr. Gayle first testified that he suffers from hypertension for which he must take medication daily. The IJ noted, however, that Mr. Gayle's medication is available in Jamaica, and that the only concern is whether Mr. Gayle would have enough money to buy the medication. To that end, Mr. Gayle testified that he has worked construction and that such jobs are available in Jamaica. Furthermore, Mr. Gayle speaks the language of Jamaica.

To further support his case, Mr. Gayle stated that his son is an epileptic who requires financial assistance from his father in order to receive the appropriate medical care. Mr. Gayle has not supported his epileptic son in the past, however, because of his frequent and extended incarceration. Furthermore, at the time of

the original hearing, testimony showed that Mr. Gayle did not pay child support, he had not seen his son since 1990, he did not know his son's doctor's name or what medication he was taking.

Next, Mr. Gayle elicited testimony at the hearing concerning his additional family ties to the U.S.: Mr Gayle testified that his deportation would be a hardship on his mother, who is a U.S. citizen living in Connecticut. Further testimony showed that Mr. Gayle's four brothers and three sisters also live in the United States. Mr. Gayle has no relatives living in Jamaica and has not been there since he originally came to the United States.

As noted by the IJ, however, Mr. Gayle's deportation would present no extreme hardship to Mr. Gayle's mother. Mr. Gayle does not support his mother financially except for rental payments when he is living with her. She resides with her husband, and she has all of her other children in the United States. Furthermore, although she testified that she would help Mr. Gayle comply with his parole, Mr. Gayle's mother apparently has had no close tie to Mr. Gayle--Mr. Gayle's mother was totally unaware at the hearing that Mr. Gayle had ever been convicted of a crime.

In his final attempt to support his claim, Mr. Gayle testified that he has rehabilitated himself from his drug and alcohol dependency, and that because of this rehabilitation his criminal activity will not continue. Mr Gayle, however, is not necessarily entitled to relief just because he presented some evidence of rehabilitation; the IJ was perfectly reasonable in its

determination that Mr. Gayle's resolution remains untested and that in the light of the length of Mr. Gayle's criminal record, such a "favorable factor" is not sufficient to require a waiver of deportation. See Villarreal-San Miguel, 975 F.2d at 250, 251-52; Ghassan v. INS, 972 F.2d 631, 635-36 (5th Cir. 1992); Ashby 961 F.2d at 557; Ayala-Chavez v. INS, 944 F.2d 638, 642 (9th Cir. 1991).

In sum, Mr. Gayle presented no evidence that would require a waiver of his deportation under Section 212(c) of the INA. Thus, on this issue, the Board of Immigration Appeals made no reversible error and is therefore affirmed.

B

Mr. Gayle next asserts that the IJ erred and that his counsel provided ineffective assistance when, without consulting Mr. Gayle, Mr. Gayle's counsel followed the IJ's suggestion to abandon application for relief under Section 212(h) of the INA. Any right that Mr. Gayle has to meaningful assistance of counsel is grounded in the Fifth Amendment's guarantee of due process. Mantell v. INS, 798 F.2d 124, 127 (5th Cir. 1986); Paul v. INS, 521 F.2d 194, 197 (5th Cir. 1975). Claims by aliens that due process rights were denied in immigration proceedings are reviewed de novo. Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993). We find no reversible error.

In order to demonstrate that the purported defect in the proceedings amounted to a violation of due process, Mr. Gayle must

demonstrate prejudice from this purported ineffective assistance claim. Mantell, 798 F.2d at 127; Paul, 521 F.2d at 199. Mr. Gayle has failed to make such a showing here. In relevant part, Section 212(h) of the INA provides that the Attorney General may, in his discretion, waive the exclusion of an alien who is "the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident, spouse, parent, son, or daughter of such alien." 8 U.S.C. § 1182(h). As detailed above, neither Mr. Gayle's mother nor son would suffer such an extreme hardship from Mr. Gayle's deportation. Thus, Mr. Gayle cannot satisfy the requirements of Section 212(h), and therefore no prejudice occurred from this alleged due process violation of ineffective assistance of counsel.

III

The Board of Immigration Appeals did not abuse its discretion in affirming the IJ's decision not to waive Mr. Gayle's deportation under § 212(c) of the INA. Furthermore, Mr. Gayle suffered no

prejudice from any ineffective assistance of counsel or from any action of the IJ in the decision to abandon his Section 212(h) petition. Accordingly, the Board's decision is hereby

A F F I R M E D.