

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 06-1534

OLATOKUNBO AMUNIKORO,

Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

No. A74-193-228

Immigration Judge: Hon. Daniel A. Meisner

Submitted pursuant to Third Circuit LAR 34.1(a)
January 16, 2007

Before: McKEE, AMBRO and STAPLETON, *Circuit Judges*

(Opinion filed: October 25, 2007)

OPINION

McKEE, *Circuit Judge*.

Olatokunbo Amunikoro petitions for review of a final order of removal issued by the Board of Immigration Appeals. The BIA's order summarily affirmed the decision of the Immigration Judge which found Amunikoro ineligible for discretionary waiver under

former INA § 212(c) and INA § 212(h)(1)(B), or for cancellation of removal under INA § 240A. For the reasons that follow, will deny the petition for review.

I.

Inasmuch as we write primarily for the parties who are familiar with this case, we need not reiterate the rather intricate procedural or factual background of this appeal except insofar as may be helpful to our brief discussion. Amunikoro has previously filed a petition for review with this court and moved for a stay of removal. *Amunikoro v. Department of Homeland Security*, No. 04-4680. The Department of Homeland Security (“DHS”) moved to dismiss the petition for lack of jurisdiction, and on March 1, 2005, we entered the following order:

[DHS’s] Motion to Dismiss Petition for Lack of Jurisdiction is granted. See 8 U.S.C. § 1252(a)(2)(C); *Liang v. INS*, 206 F.3d 308, 332 (3d Cir. 2000) (holding the Court has no jurisdiction to review final orders of removal of aliens with a criminal conviction). Petitioner’s Motion for a Stay of Removal is denied as moot.

On March 2, 2005, Amunikoro filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of New York. In that petition, Amunikoro claimed that he was denied due process at his removal proceeding because the IJ ordered him removed based on an alleged fraud which had not been charged in the original Notice to Appear. The district court rejected that claim, holding that Amunikoro was removed because of his criminal convictions, not because of fraud. Accordingly, the district court denied Amunikoro’s habeas petition.

Amunikoro appealed to the United States Court of Appeals for the Second Circuit.

While that appeal was pending, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Section 106 of the REAL ID Act amended 8 U.S.C. § 1252(a)(2) of the INA by eliminating the district courts' habeas jurisdiction (28 U.S.C. §§ 2241, 1361 and 1651) over final orders of removal in nearly all cases. Pursuant to the Act, pending habeas cases were to be transferred to the court of appeals for the district where the petition was pending, and converted into petitions for review. Consequently, the Second Circuit converted Amunikoro's habeas petition into a petition for review and then transferred it to this court based on venue concerns. *Amunikoro v. Sec'y of DHS*, No. 05-2127 (2d Cir. Dec. 20, 2005) (per curiam).

II.

Amunikoro makes a number of arguments in support of his petition for review. Each is considered separately.

A. The IJ committed legal error in denying relief under former INA § 212(c).^{1, 2}

¹Where the BIA affirms the IJ's decision without opinion, we review the decision of the IJ as if it were the decision of the BIA. *Zhang v. Gonzales*, 405 F.3d 150, 155 (3d Cir. 2005).

²As we held in our March 1, 2005 order dismissing Amunikoro's first petition for review, we have no jurisdiction to review final orders of removal based upon a criminal conviction. However, we do have limited jurisdiction to review "constitutional claims or questions of law raised upon a petition for review." REAL ID Act, § 106(a)(1)(A)(iii), *codified at* 8 U.S.C. § 1252(a)(2)(D); *Singh v. Gonzales*, 432 F.3d 533, 537 (3d Cir. 2006). Accordingly, in examining Amunikoro's claim, "we are limited to pure questions (continued...)"

Former INA § 212(c), codified at 8 U.S.C. § 1182(c), provided, in relevant part:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General [despite being otherwise excludable]. . . .

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”). AEDPA § 404(d) excluded those aliens convicted of two qualifying crimes of moral turpitude³ from eligibility for § 212(c) relief. AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214 (1996). Thereafter, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), effective April 1, 1997, which, *inter alia*, repealed § 212(c) in its entirety and replaced it with INA § 240A, codified at 8 U.S.C. § 1229b. That section of IIRIRA refers to “cancellation of removal.” *See* IIRIRA, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009 (1996).

However, in *INS v. St. Cyr*, 533 U.S. 289, 326, the Supreme Court held that discretionary relief under former § 212(c) “remains available for aliens . . . whose

²(...continued)
of law, and to issues of application of law to fact, where the facts are undisputed and not the subject of challenge.” *Francois v. Gonzales*, 448 F.3d 645, 648 (3d Cir. 2006) (citation omitted). We review legal decisions *de novo*, with appropriate deference to the agency. *Id.* (citation omitted).

³Under § 440(c) of AEDPA, an alien who had two or more convictions for crimes of moral turpitude within five years of entry where a sentence of one year or more may be or could have been imposed was not eligible for § 212(c) relief. This provision did not render Amunikoro ineligible, however, because his two convictions for crimes of moral turpitude were not within five years of his entry into the United States.

convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.” As we noted in *Ponnapula v. Ashcroft*, 373 F.3d 480, 483 (3d Cir. 2004):

[T]he Court concluded that the retroactive application of IIRIRA § 304(b) would have an impermissible retroactive effect on aliens . . . who had pleaded guilty prior to the repeal of § 212(c). The Court highlighted the *quid pro quo* of the criminal plea agreement, and reasoned that because aliens . . . almost certainly relied upon the likelihood of receiving discretionary relief in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect.

Here, the IJ noted that Amunikoro’s September 1995 conviction was eligible for consideration for a § 212(c) waiver. However, the IJ held that Amunikoro’s March 1997 conviction was not eligible for waiver under *St. Cyr* because Amunikoro pled guilty after the effective date of AEDPA – April 24, 1996, and after IIRIRA was enacted. Amunikoro could not have reasonably relied on § 212(c) and, therefore, could only apply for cancellation of removal under INA § 240A.

Amunikoro argues that the IJ’s holding with respect to his March 1997 conviction was legal error because that conviction occurred prior to the effective date of IIRIRA. DHS concedes that the IJ erred in finding Amunikoro ineligible for § 212(c) relief because IIRIRA was not in effect at the time when Amunikoro pled guilty in March of 1997. DHS’s Br. at 12 (citing 8 C.F.R. § 1212.3(h)(2), the regulation implementing *St.*

Cyr and providing that “an eligible alien may apply for relief under former section 212(c) of the Act, as amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, with respect to a conviction if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made on or after April 24, 1996, and before April 1, 1997.”).

However, DHS argues that the error does not make Amunikoro eligible for a § 212(c) waiver because the IJ ruled in the alternative that Amunikoro was not “lawfully admitted for permanent residence” as required under § 212(c). The IJ found that Amunikoro was never lawfully admitted as a permanent resident because his convictions made him ineligible for permanent resident status, and, therefore Amunikoro never “lawfully” obtained the privilege of permanent residency and could not meet that threshold requirement for relief under § 212(c).

Inexplicably, Amunikoro does not address the IJ’s alternative holding in his brief. Accordingly, he has waived any challenge he may have otherwise had to that ruling. *See, e.g., Laborers’ Int’l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994). Moreover, even if he had preserved the claim, we do not believe he could have established that the IJ’s alternative holding was legal error.

“The term ‘lawfully admitted for permanent residence’ means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”

INS § 101(a)(20); 8 U.S.C. § 1101(a)(20). In *In re Koloamantangi*, 23 I&N Dec. 548 (BIA 2003), the Board held that an alien who was ineligible at the time he applied for adjustment of status was never a lawful permanent resident even though procedurally he may have been erroneously granted that status. *See also Biggs v. INS*, 55 F.3d 1398, 1401 (9th Cir. 1995); *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986). Accordingly, the IJ did not err in holding that Amunikoro was ineligible for § 212(c) relief.

B. The IJ committed legal error in denying relief under INA § 240A(a).

INA § 240A provides:

- (a) Cancellation of removal for certain permanent residents
The Attorney General may cancel removal in the case of an alien if the alien –
 - (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
 - (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
 - (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a). INA § 240A has “special rules relating to continuous residence or physical presence.” INA § 240A(d)(1) provides, in relevant part:

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title. . . .

8 U.S.C. § 1229b(d)(1).

The IJ found that Amunikoro’s 1995 conviction for attempted forgery involving a

credit card was a crime of moral turpitude that “cut off” the accrual of his period of permanent residency; thus Amunikoro was ineligible for § 240A relief. In arguing that this was error, Amunikoro claims that INA § 240A(d)(1) refers only to INA § 240A(a)(2) – physical presence, not § 240A(a)(1) – lawful permanent residence.

However, we need not address that argument because the IJ’s alternative holding that Amunikoro was ineligible for § 212 relief because he could not establish that he was lawfully admitted for permanent residence applies with equal force to his application for relief under § 240A. Amunikoro simply can not establish that he was “lawfully admitted for permanent residence.” Therefore, the IJ did not err in denying his claim for relief under § 240A.

C. The IJ committed legal error in denying relief under INA § 212(h).

Pursuant to INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B), the Attorney General may grant a waiver of inadmissibility to an alien who: (1) is the spouse, parent, or child of a citizen or an alien lawfully admitted; (2) establishes to the satisfaction of the Attorney General that the alien’s denial of admission would result in extreme hardship to the citizen or lawful resident; (3) has not been convicted of an aggravated felony; and (4) has lawfully resided continuously in the United States for at least seven years immediately preceding the removal proceedings.

The IJ denied Amunikoro’s application for a § 212(h) waiver because, *inter alia*, Amunikoro failed to demonstrate the “extreme hardship” required for such a waiver.

We do not have jurisdiction to review that decision. *See* INA § 242(a)(2)(B)(I) (“Notwithstanding any other provision of law . . . no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under [INA § 212(h)”). *See also Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003)

Amunikoro attempts to circumvent our holding in *Mendez-Moranchel* by arguing that the IJ here committed an error of law by applying a heightened “unusual and extreme hardship” standard to his application for relief. We disagree.

The IJ considered Amunikoro’s claim of hardship to his three children who are all United States citizens. The IJ could not conclude that the hardship that would result from Amunikoro’s removal “would reach the level of *extreme hardship* necessary to warrant a 212(h) waiver.” AR 80 (emphasis added). Such waivers are granted only when there is great actual or prospective injury beyond that which ordinarily results from deportation. *United States v. Arce-Hernandez*, 163 F.3d 559, 564 (9th Cir. 1998).

Here, the IJ considered testimony of Amunikoro as well as the mother of his three children and concluded that the hardship they spoke of did not rise to the level required for a 212(h) waiver. *See Arce-Hernandez*, at 564 (“The difficulties in having to move one’s family elsewhere and anticipated difficulties in finding work have been held to constitute the common results of deportation.”) (citation omitted). The record simply does not support Amunikoro’s argument that the IJ applied an incorrect legal standard in rejecting his claim for a hardship waiver.

D. Denial of due process.

Amunikoro contends that his removal proceeding was tantamount to a rescission of his lawful permanent resident status pursuant to INA § 246(a), 8 U.S.C. § 1256(a).⁴

He then argues that because he was not given formal notice of a rescission hearing, he was denied due process. It is a novel and clever argument that is without merit.

Amunikoro was not removed because of his failure to disclose his two convictions for crimes involving moral turpitude; he was removable because he was an arriving alien who had been convicted of a crime involving moral turpitude. The Notice of Appeal fully informed him of that.

Moreover, the charge of inadmissibility is independent of any claimed status as a lawful permanent resident. Amunikoro conceded inadmissibility based upon his two convictions, but sought discretionary relief. He therefore had the burden of establishing eligibility for the relief he was seeking. Accordingly, he had to establish that he was

⁴Which provides: “If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.”

“lawfully admitted for permanent residence.” *See* former INA § 212(c), 8 U.S.C. § 1182(c) (1995); INA § 240A(a), 8 U.S.C. § 1229(a). Having raised that issue, he cannot now claim that he was without notice when the IJ ruled that he was never lawfully admitted.

Amunikoro also contends the IJ should not have considered his fraud because the Notice to Appear did not inform him that he was to be removed based upon his fraud conviction. According to Amunikoro, this was a further denial of due process. That argument is also without merit. Given the discretionary relief Amunikoro requested, the IJ had to inquire into his lawful permanent resident status, and that opened the inquiry into his fraud conviction. Amunikoro can not now claim that he was “blindsided” when the IJ discussed his failure to disclose his convictions during his adjustment of status interviews.

III. CONCLUSION

For all of the above reasons, we will deny the petition for review.⁵

⁵As noted earlier, Amunikoro previously filed a petition for review that we dismissed for lack of jurisdiction. This petition, his second, is before us as a converted and transferred habeas petition, presumably restating the claims asserted in the dismissed petition. In *Mudric v. Attorney General of the United States*, 469 F.3d 94 (3d Cir. 2006), a case with a similar procedural posture, we commented:

“Bearing in mind the judicial review amendments of the REAL ID act were enacted to streamline what Congress saw as uncertain and piecemeal review of orders of removal, divided between the district courts (habeas courts) and courts

(continued...)

⁵(...continued)

of appeals (petitions for review), we look with disfavor on and do not condone what appears to be . . . an attempt to get more than one bite at the apple. Because of the finite number of cases transferred to us under the REAL ID Act, we do not consider whether this second Petition for Review is properly before us.

Id. at 100 n.5 (citation and internal quotations omitted). DHS has not argued that Amunikoro's second petition is not properly before us, and we will continue to follow the course set out in *Mudric*.