

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 03 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVIS FITO BURGESS,

Petitioner,

v.

ERIC H. HOLDER, Jr. **, Attorney
General,

Respondent.

No. 06-70932

Agency No. A073-438-383

MEMORANDUM *

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

Argued and Submitted February 9, 2009
San Francisco, California

Before: D.W. NELSON, W. FLETCHER and TALLMAN, Circuit Judges.

Petitioner Davis Fito-Burgess (“Burgess”), a native and citizen of Samoa,
petitions for review of an order of administrative removal. Burgess was deemed

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** Eric Holder is substituted for his predecessor, Michael Mukasey, as
Attorney General. Fed. R. App. 43(c)(2).

removable as a non-permanent resident alien convicted of an aggravated felony under INA § 238(b), 8 U.S.C. § 1228(b). Burgess was served with a Notice of Intent to remove under INA § 238(b) by a Department of Homeland Security (“DHS”) officer who, according to Burgess, convinced him not to challenge the notice and concede deportability. Burgess signed a waiver conceding removability, and later requested withholding or deferral of removal, which were denied by an IJ and the BIA.

Burgess now claims that the government violated his due process rights by convincing him to sign a waiver, or, alternatively, by not maintaining a sufficient record of the expedited removal process such that he could challenge any constitutional violations that occurred. He argues that had he not signed the waiver but instead challenged his removability, he might have succeeded in convincing the deciding DHS officer to exercise discretion and move him from the § 238 process, where he could not raise his discretionary grounds for relief, to the INA § 240 process, where he could have done so.

To prevail on a due process challenge to deportation proceedings, Burgess must show both error and substantial prejudice. *Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000). To show substantial prejudice, Burgess must demonstrate that the alleged violation affected the outcome of the proceedings because he had

“plausible grounds” for relief from deportation that he was not able to pursue because of the violation. *Id.*; *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000).

Assuming, without deciding, that the DHS officer violated Burgess’s due process rights, Burgess has not demonstrated plausible grounds for relief and therefore has not demonstrated prejudice. He has presented no argument that he would have been able to rebut the charges contained in his Notice of Intent. 8 C.F.R. § 238.1(d)(2)(i). Moreover, even assuming that the Attorney General or the DHS deciding officer has discretion, absent a rebuttal of the grounds for administrative removal, to take a petitioner out of a § 238 proceeding and put him in a § 240 proceeding, Burgess has made no showing that there are “plausible grounds” to believe that he could have convinced the Attorney General to exercise such discretion.

Petition for review DENIED.