# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
**FILED**
November 6, 2023
Lyle W. Cayce
Clerk

No. 22-60573

JACKSON PETER CHIWANGA,

*Petitioner*,

*versus*

MERRICK GARLAND, *U.S. Attorney General*,

*Respondent*.

Appeal from the Board of Immigration Appeals
Agency No. A095 555 938

Before GRAVES, HIGGINSON, and HO, *Circuit Judges*.

PER CURIAM:[*]

Jackson Peter Chiwanga, a native and citizen of Tanzania, was ordered removed based on an Oklahoma conviction for domestic assault and battery by strangulation. Chiwanga petitions for review of the decision of the Board of Immigration Appeals upholding the denial of his application for cancellation of removal, asylum, withholding of removal, and protection under the Convention Against Torture. We deny the petition for review.

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

We review only the BIA's decision unless the Immigration Judge's decision impacted the BIA. *Munoz-De Zelaya v. Garland*, 80 F.4th 689, 693 (5th Cir. 2023). Though we typically uphold the BIA's decision only based on its stated rationale, affirmance of the BIA otherwise "may be warranted where there is no realistic possibility" that it would have reached a different conclusion. *Luna-Garcia v. Barr*, 932 F.3d 285, 291 (5th Cir. 2019) (internal quotations omitted). We review legal questions de novo, but we review factual determinations under the substantial-evidence standard. *Munoz-De Zelaya*, 80 F.4th at 693.

Chiwanga contends that his offense did not constitute an aggravated felony and that he was therefore not removable. He also argues that the BIA erred by failing to consider this argument. On appeal to the BIA, however, Chiwanga did not challenge the Immigration Judge's conclusion that his counsel conceded that Chiwanga had committed an aggravated felony. The BIA concluded that Chiwanga forfeited the issue, at least with respect to cancellation.[1] Chiwanga therefore failed to exhaust his aggravated-felony argument, and it is not properly before this court. 8 U.S.C. § 1252(d)(1). Chiwanga argues that we should overlook the concession on due-process grounds, citing this court's decision in *Mai v. Gonzales*, 473 F.3d 162 (5th Cir. 2006). But Chiwanga did not make this argument to the BIA either. It is therefore also unexhausted. 8 U.S.C. § 1252(d)(1).

Alternatively, even if Chiwanga had properly presented the aggravated-felony issue, his offense nevertheless constituted an aggravated felony.

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[1] Chiwanga argues that the BIA failed to address removability and instead only specifically addressed cancellation. Even if the BIA erred by not specifically discussing removability, any such error was harmless. As with the IJ's conclusion that Chiwanga's counsel conceded cancellation, Chiwanga also failed to challenge the IJ's conclusion that his counsel conceded removability. In any event, as discussed in this opinion, Chiwanga was removable based on his commission of an aggravated felony.

8 U.S.C. § 1101(a)(43)(F) (defining an "aggravated felony" as "a crime of violence" under 18 U.S.C. § 16 with a penalty of at least one year in prison); 18 U.S.C. § 16(a) (defining a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). As Chiwanga notes, we have held that the related Oklahoma offense of domestic assault and battery does not count as a crime of violence since its elements only require the "slightest touching" to support a conviction. *United States v. Miranda-Ortegon*, 670 F.3d 661, 663 (5th Cir. 2012) (quoting *Steele v. State*, 778 P.2d 929, 931 (Okla. Crim. App. 1989)). But the conviction at issue in this case is for domestic assault and battery by strangulation. OKLA. STAT. tit. 21, § 644(J). To be convicted of this offense, an individual must act with "intent to cause great bodily harm," and the assault and battery must take place "by strangulation or attempted strangulation." *Id.* By definition, this offense requires intent to cause "[s]erious and severe bodily injury," which "must be of a greater degree than a mere battery." *Oliver v. State*, 516 P.3d 699, 708 (Okla. Crim. App. 2022) (internal quotations omitted). Chiwanga's offense therefore requires the use (or attempted or threatened use) of physical force such that the offense qualifies as an aggravated felony. 18 U.S.C. § 16(a). *See also Johnson v. United States*, 559 U.S. 133, 140 (2010). Chiwanga was thus both removable and ineligible for cancellation. 8 U.S.C. § 1227(a)(2)(A)(iii) (removability); *id.* § 1229b(a)(3) (cancellation).[2]

[2] Chiwanga argues that we should look to Oklahoma's classification of his offense to determine whether it constituted an aggravated felony. However, while we look to state law to understand the elements of a state offense, whether Chiwanga's offense required "physical force" under 18 U.S.C. § 16(a) such that it constituted an aggravated felony is a federal-law question. *Cf. Johnson*, 559 U.S. at 138 ("The meaning of 'physical force' in [18 U.S.C.] § 924(e)(2)(B)(i) is a question of federal law, not state law.").

Chiwanga's other arguments also lack merit. Chiwanga asserts that the BIA erred by upholding the IJ's conclusion that Chiwanga failed to meet the one-year deadline for applying for asylum. However, Chiwanga did not challenge that conclusion on appeal to the BIA. It is therefore unexhausted. 8 U.S.C. § 1252(d)(1).

That leaves Chiwanga's arguments regarding credibility and corroboration. According to Chiwanga, the IJ failed to expressly make an adverse credibility finding, failed to provide him with notice and an opportunity to provide corroborating evidence to support his testimony, and failed to make a finding regarding whether corroborative evidence was reasonably available. However, even if the BIA erred by considering the IJ to have made an adverse credibility finding, any such error was harmless. In addition, we have already held that IJs are not required to provide advance notice of necessary specific corroborating evidence or to grant a continuance to provide an applicant with additional time to obtain the necessary evidence. *Avelar-Oliva v. Barr*, 954 F.3d 757, 771 (5th Cir. 2020). And, as the BIA noted, the IJ clearly discussed Chiwanga's ability to obtain evidence to corroborate his testimony, concluding that Chiwanga could have reasonably obtained corroborating evidence but failed to do so.

Chiwanga's arguments are all unexhausted or lack merit. We therefore deny Chiwanga's petition for review.