UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4710
Summary Calendar

PATRICK ISI IKHIFA,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION, SERVICE,

Respondent.

Appeal For Review Of An Order Of
The Board of Immigration Appeals
(A27 899 062)

(March 18, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

I.

BACKGROUND

Patrick Isi Ikhifa is a Nigerian national who entered this country in January 1984 on a visa issued in Logos, Nigeria. Upon his arrival, Ikhifa enrolled as a non-degree student at Southern

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

University and Louisiana State University. In 1986, Ikhifa received a residency scholarship to Loyola University in New Orleans to pursue an MBA degree. In June of 1986 Ikhifa married Pamela Hollins, an American citizen.

Ikhifa was convicted in the United States District Court on October 19, 1988 of willful possession and use of a false immigration document and an altered passport, in violation of 18 U.S.C. § 1546 (a); willful use of an altered passport, in violation of 18 U.S.C. § 1543; and two counts of knowingly and willfully obtaining by fraud and false statements guaranteed student loans, in violation of 20 U.S.C. § 1097 (a).

On October 20, 1988, the INS initiated deportation proceedings against Ikhifa by issuing an Order to Show Cause (OSC) why he should not be deported. The OSC charged Ikhifa deportable under section 241 (a) (5) of the Immigration and Nationality Act (Act); 8 U.S.C. § 1251 (a) (5).[1] After being found deportable as charged, Ikhifa requested relief from deportation, and the proceedings were continued.

At the reconvened hearing on April 10, 1989, Ikhifa sought relief from deportation by submitting applications for adjustment of status, asylum, withholding of deportation, and voluntary departure. At this time in the proceedings, Ikhifa moved for a

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[1] Section 241 (a) (5) of the Act, 8 U.S.C. 1251 (a) (5) provides in relevant part:

> "[a]ny alien in the United States shall, upon order of the Attorney General, be deported who... (5) ... has been convicted under section 1546 of Title 18 ...."

continuance on the ground that his wife's I-130 immediate relative visa petition,[2] the approval of which was a prerequisite to obtaining adjustment of status relief, was then pending with the INS. In response, the INS submitted for the record a copy of a Notice of Intent to Deny (the I-130 petition) which it had issued on February 16, 1989. Because he was without authority to grant an adjustment of status without an approved I-130 petition, the Immigration Judge (IJ) denied Ikhifa's motion for continuance, proceeded to hear his other claims for relief, and issued a decision denying the requested relief from deportation.

With respect to his asylum claim, the IJ found that there was no evidence that Ikhifa or any member of his family had been persecuted within the meaning of the Act.[3] Therefore, the IJ denied Ikhifa's applications for asylum and withholding of

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[2] The status of an alien may be adjusted on the basis of a marriage if the alien establishes by clear and convincing evidence that the marriage was entered into in good faith; and in accordance with the laws of where the marriage took place; and the marriage was not entered into for the purpose of procuring the alien's entry as an immigrant and no fee or other consideration was given. 8 U.S.C. § 1255 (e) (3).

[3] "The Attorney General shall establish a procedure for an alien physically present in the United States ..., to apply for asylum, and the alien may be granted asylum ..., if the Attorney General determines that such alien is a refugee...." 8 U.S.C. § 1158 (a).

The term "refugee" means (A) any person who is outside any country of such person's nationality, ... and is unable or unwilling to avail himself... of the protection of , that country because of persecution or a well-founded fear of persecution account of race, religion, nationality, membership in a particular social group, or political opinion.... 8 U.S.C. § 1101 (a)(42) (A).

deportation due to his failure to meet his burden of proof for either form of relief. Because of his criminal conviction under 18 U.S.C. § 1546, the IJ denied Ikhifa's application for voluntary departure as well. Accordingly, the IJ ordered Ikhifa deported to the United Kingdom, or in the alternative, to Nigeria.

Ikhifa appealed the IJ's decision to the Board of Immigration Appeals (Board) on April 17, 1989. The Board upheld the IJ's order and dismissed the appeal on June 17, 1992. In dismissing Ikhifa's appeal, the Board upheld the IJ's denial of a continuance of the deportation proceedings stating that Ikhifa failed to establish that a denial of continuance would cause him any prejudice or materially affect the outcome of his proceedings. The Board further noted that the granting of a continuance pending the outcome of a visa petition is within the ultimate discretion of the IJ, and concluded that there is no abuse of discretion where the only record evidence is the intended denial of that petition.

Ikhifa appeals the order of deportation entered by the Immigration Judge and affirmed by the Board of Immigration Appeals. Ikhifa contends that the IJ abused his discretion in denying a continuance to his deportation proceedings and denying his application for asylum and that such denials denied him due process. Because we find Ikhifa's due process challenge to the deportation proceedings without merit, we AFFIRM.

II.

ANALYSIS

A. Denial of a Continuance to The Deportation Proceedings.

The first issue raised by Ikhifa is that the IJ abused his discretion by denying his motion for continuance pending the INS's adjudication of the visa petition filed on his behalf. He argues that he is entitled to a continuance of his deportation proceedings pending approval of the I-130 immediate relative visa petition, which his spouse filed on his behalf and which was pending at the time of his deportation hearing. In support of his argument, Ikhifa relies primarily upon the decisions of Matter of Garcia, 16 I&N Dec. 653, 654 (BIA 1978), and Matter of Arthur, Interim Decision 3173 (BIA 1992).

This Circuit has held that "[t]he grant of a continuance rests in the sound discretion of the immigration judge, who may grant an adjournment of a deportation hearing only for ‹good cause’." Patel v. United States Immigration and Naturalization Service, 803 F.2d 804, 806 (5th Cir. 1986) (citing 8 C.F.R. § 242.13); Howard v. Immigration and Naturalization Service, 930 F.2d 432, 436 (5th Cir. 1991) (quoting and following Patel). The administrative decision to grant or deny a continuance is reviewed by this Circuit under the abuse of discretion standard. Howard, 930 F.2d at 436.

The cases cited by Ikhifa involve motions to reopen for consideration of applications for adjustment of status based upon unadjudicated visa petitions, not a motion for continuance as is

presented here. Therefore, we find Ikhifa's reliance on these cases inapposite.

In the instant case, at the initial hearing the only record information that the immigration judge possessed regarding Ikhifa's eligibility for an immigrant visa is the INS's intent to deny the visa petition. Accordingly, we find no abuse of discretion in the IJ's decision not to continue the deportation proceedings.

Ikhifa further argues that "discretion should as a general rule, be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of a deportation hearing." Garcia, 16 I&N at 657. He asserts that there is substantial reason to believe that his wife's visa petition appeal will be approved. Furthermore, Ikhifa contends that he has easily met the threshold requirement of "prima facie eligibility" by having been married for several years before being placed in deportation hearings.

We find Ikhifa's argument unpersuasive.

As the IJ and the Board correctly noted, at the time of the deportation hearing Ikhifa did not have an approved visa petition, which is a prerequisite for adjustment of status relief.[4] In fact,

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[4] The status of an alien...may be adjusted by the Attorney General, in his discretion and under such regulations...if

(1) the alien makes an application for such adjustment;
(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and
(3) an immigrant visa is immediately available to him at the time his application is filed.

at the time of the hearing the record reflects that the INS intended to deny the pending visa petition. Because petitioner was not the beneficiary of an approved relative visa petition at the time of his application, he did not satisfy the statutory requirements for adjustment of status relief. Therefore, Ikhifa's argument that he has met the threshold requirement establishing "prima facie eligibility" for relief is without merit. Ikhifa did not satisfy the statutory requirements and is, therefore, precluded from adjustment of status relief.

In Matter of Sibrun, 18 I&N Dec. 356, 357 (BIA 1983), the Board stated that "an immigration judge's decision denying [a] motion for continuance will not be reversed unless the alien establishes that th[e] denial caused him actual prejudice and harm and materially affected the outcome of his case." Furthermore, the government violates procedural due process "only if its actions substantially prejudice the complaining party." Calderon-Ontiveros v. Immigration & Naturalization Service, 809 F.2d 1050, 1052 (5th Cir. 1986) (citing Ka Fung Chan v. Immigration & Naturalization Service, 634 F.2d 248, 258 (5th Cir. 1981)).

Ikhifa failed to demonstrate that the IJ's decision to deny his continuance motion caused him substantial prejudice. He did not establish that the visa petition filed on his behalf was ultimately approved or that if an additional continuance had been granted the outcome of his case would have differed. In fact, Ikhifa acknowledged in his brief to this Court that the INS denied

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8 U.S.C. § 1255 (a).

the visa petition in June, 1992, and that his wife appealed the denial to the Board.

B. Denial of Application For Asylum.

The final issue raised by Ikhifa on appeal is that the IJ acted improperly in denying his asylum application. Although Ikhifa cites no authority, he argues that the IJ's finding that his lack of a well-founded fear of persecution if deported is so deficient in its analysis and lack of sufficient evidence that it amounts to an error in law.

Ikhifa primarily bases his claim of well-founded fear of persecution upon the fact that his father was a member of a political party which was overthrown just prior to Ikhifa coming to the United States. Ikhifa alleges that because of this political affiliation his father has had real estate confiscated, foreign bank accounts frozen, travel abroad denied and is unemployed. Ikhifa suggests that he will be persecuted as a result of what happened to his father if he returned to Nigeria. Moreover, he fears being persecuted for refusing to go to compulsory service in the National Youth Service. Additionally, he asserts the fact that he received an education in the United States will prompt unwarranted inquiry into where he obtained the funding for his education, and strongly believes that he and his father is at risk if they are unable to explain how he financed his education.

The Attorney General has the discretion to grant asylum under section 208(a) of the Act, 8 U.S.C. § 1158(a), to an alien who is physically present in the United States if the alien meets the

statutory definition of a refugee contained in section 101 (a)(42)(A). An asylum determination involves proving statutory eligibility and persuading the exercise of discretion; and the alien bears the burden at both stages. Youssefinia v. Immigration & Naturalization Service, 784 F.2d 1254, 1260 (5th Cir. 1986). The "well-founded fear" standard contains both subjective and objective components. Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987). The subjective component requires genuine fear, while the objective component explores "whether a reasonable person in the applicant's circumstances would fear persecution." Rojas v. Immigration & Naturalization Service, 937 F.2d 186, 189 (5th Cir. 1991). The burden of proof in asylum cases is this: "[a]n alien possesses a ‹well-founded fear of persecution’ if a reasonable person in her circumstances would fear persecution" if deported. Campos-Guardado v. Immigration & Naturalization Service, 809 F.2d 285, 291 (5th Cir. 1987), cert. denied, 484 U.S. 826 (1987).

A denial of discretionary relief such as asylum cannot be disturbed on appeal by this court "absent a showing that such action was arbitrary, capricious or an abuse of discretion." Youssefinia, 784 F.2d at 1260; Zamora-Morel v. Immigration & Naturalization Service, 905 F.2d 833, 838 (5th Cir. 1990) (quoting Young v. INS, 759 F.2d 450, 455 n. 6 (5th Cir. 1985), cert. denied, 474 U.S. 996 (1985)).

We agree with the IJ's findings in denying Ikhifa's asylum application. Ikhifa has not demonstrated either a well-founded

fear of persecution argument or that he will be persecuted if he is returned to Nigeria. Although the father had been detained and questioned, it does not appear that he has incurred harm in any manner or form, and if Ikhifa's father and brothers are able to live in Nigeria, there is no reason why Ikhifa will be harmed if he returned. Moreover, Ikhifa could obtain letters from LSU and Loyola in order to explain how he financed his education. On the issue of avoiding compulsory military service, any trouble Ikhifa would incur would be "prosecutory" rather than "persecutory."[5]

Though Ikhifa argues that the IJ did not properly weigh the evidence that his father had been denied economic opportunities since the coup, and that his own economic opportunities will be similarly limited, the record reflects otherwise. Ikhifa's father has an automobile; his brothers and sisters are able to get an education and find employment; and his father and family are able to live without employment. Economic detriment due to a change in political fortune is alone insufficient to establish a well-founded fear of persecution. Youssefinia, 784 F.2d at 1262. Therefore, we affirm the holding of the IJ that Ikhifa did not meet his burden of proof of demonstrating eligibility for asylum in the United States.

Ikhifa's argument regarding his fear of persecution based on his religion is raised for the first time before this Court, and

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[5] In considering Ikhifa's fear of retribution for avoiding compulsory military service, the IJ stated that Ikhifa did not explain why he should be exempt from this compulsory service; and that in the absence of any exemption, Ikhifa was required to comply. Accordingly, the IJ concluded that any punishment would be prosecutorial in nature rather than persecutorial within the meaning of the Act.

was not presented either in his asylum application, at his deportation hearing, or on appeal to the Board.

The general rule is that "[t]his Court lacks jurisdiction to address new allegations of error by petitioner not raised initially at the administrative level." United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952); Campos-Guardo v. Immigration & Nationalization Service, 809 F.2d 285, 291 (5th Cir.1987), cert. denied, 484 U.S. 826 (1987). This failure to exhaust [his] administrative remedies precludes our considering the issue on appeal. Id.

III.

CONCLUSION

For the foregoing reasons we hold that the Immigration Judge did not abuse his discretion in denying both Ikhifa's motion for continuance and his application for asylum.

We AFFIRM.