IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5026
Summary Calendar

FAHIM KHALID,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A41 690 238)

(January 5, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

PER CURIAM:

Petitioner-Appellant Fahim Khalid raises a number of legal challenges to the order of the Board of Immigration Appeals finding him deportable. Some of the arguments are waived because Khalid failed to present them in the administrative proceedings. Others are ill-founded. There is no error.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Khalid's wife filed a petition for his permanent residence on April 10, 1989, six months after their marriage in Pakistan. Khalid entered the United States as a spouse of a naturalized American citizen on November 4, 1989. His marriage was annulled on February 13, 1990 by a judgment entered in Ohio, which stated that the marriage was procured by fraud. On August 1, 1991, he filed an application for waiver of the requirement to file a joint petition for removal of conditions on his admissibility. Immigration and Nationality Act § 216(c)(4); 8 U.S.C. § 1186(a)(c)(4).[1]

The request for waiver was denied on June 4, 1992. The Attorney General's designee informed Khalid that he had not proved he entered the marriage in good faith and concluded that under § 216(c)(4) of the Act, Khalid was ineligible for a waiver. At about the same time, INS filed an order to show cause, charging him with deportability pursuant to section 241(a)(1)(D)(i) of the Act, 8

---

[1] 8 U.S.C. § 1186(a)(c)(4) states in pertinent part:

> **(4) Hardship waiver**
>
> The Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that-- . . .
>
> > **(B)** the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1) . . .

U.S.C. § 1251(a)(1)(D)(i),[2] because after being admitted as an alien lawfully admitted for permanent residence on a conditional basis, his status had been terminated pursuant to sections 216(b) or (c) of the Act.

After an initial appearance on the order to show cause and one continuance, a hearing was held in early 1993, and the IJ ruled against petitioner. The IJ found that Khalid was deportable, because the condition on which he had been admitted as a lawful resident alien, i.e., his marriage to an American citizen, had terminated. The IJ also found that Khalid's application for a

---

[2] 8 U.S.C. § 1251(a)(1)(D)(i) and (ii) states in pertinent part:

> **(a) Classes of deportable aliens**
>
> Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens: . . .
>
> **(D) Termination of conditional permanent residence**
>
> **(i) In general**
>
> Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.
>
> **(ii) Exception**
>
> Clause (i) shall not apply in the case described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

waiver of the condition that he file a joint petition had properly been denied. The IJ was not satisfied that petitioner had shown he entered the marriage in good faith, which was the ground on which he asserted the right to seek a waiver. Balancing the equities of the discretionary waiver decision, the IJ also found, inter alia, that Khalid had previously lied on a visa application to the U.S. and would not suffer hardship by being deported.

The BIA affirmed the decision on the basis stated by the IJ. Khalid filed no brief before the BIA.

In this court, Khalid raises several legal challenges to the deportation order. As far as the record shows, some of these were not presented in the administrative proceedings and are therefore waived for failure to exhaust administrative remedies. Yakhpua v. INS, 770 F.2d 1317, 1320 (5th Cir. 1985). To the extent he contests the finding of deportability, that issue was not raised below and is waived. Thus, he did not assert in the administrative proceedings that section 1251(a)(1)(D)(i) does not apply to him because he had sought a waiver of the condition of admissibility, thus bringing him within section 1251(a)(1)(D)(ii). Further, Khalid did not allege during the administrative proceedings that INS failed to act on his petition for waiver within two years, rendering that denial untimely.[3]

---

[3] § 1186a(b) states in pertinent part:

(b) Termination of status in finding that qualifying marriage improper

(1) In general

Khalid did assert that he was wrongly denied a waiver of the condition of his admissibility, because he entered the marriage in good faith. The gist of Khalid's argument, stated best in his reply brief, is that, by engaging in a trial de novo of the application for a waiver under section 216(c)(4), the immigration judge somehow failed to "review" the Attorney General's decision denying that relief. This contention is difficult to understand. If Khalid is contending that the IJ incorrectly broadened the scope of his "review" powers by conducting a de novo determination of waiver, we do not understand how that proceeding hurt Khalid. If anything, it gave him another administrative bite at the apple. On the other hand, if Khalid is suggesting that he did not have an adequate notice of the scope of the hearing and was therefore unprepared to submit evidence, the record simply fails to

---

> In the case of an alien with permanent resident status on a conditional basis under subsection (1), if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that-- . . .
>
> **(A)** the qualifying marriage-- . . .
>
> **(ii)** has been judicially annulled or terminated, other than through the death of a spouse; . . .
>
> the Attorney General shall so notify the parties involved and, subject to paragraph (2), shall terminate the permanent resident status of the alien (or aliens) involved as of the date of the determination.

(emphasis added).

substantiate his claim. Nowhere in the administrative record did his attorney at that time suggest that such a problem existed.

Khalid's related contention, that the burden of proof was on the government, cannot be correct. Inasmuch as Khalid was petitioning for a waiver, he, as petitioner, must bear the burden of demonstrating his entitlement to relief, as is the case with other forms of relief under the Act. See, e.g., Estrada-Posadas v. INS, 924 F.2d 916, 918 (9th Cir. 1991). Section 216(c)(4) provides for a waiver only "if the alien demonstrates that" he entered the marriage in good faith, see n.1 supra. Thus, even if Khalid satisfied the legal prerequisites for seeking such a waiver--a proposition that is highly dubious--the BIA did not err in affirming the IJ's decision that he failed to qualify for it.

The decision of the Board of Immigration Appeals is **AFFIRMED** and the petition for review is **DISMISSED**.