NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4109

MARIA PUJOLS;
ROBINSON MATOS;
LISSETTE MATOS;
ERLIN CACERES MATOS,
Petitioners

v.

JOHN ASHCROFT,
Attorney General of the United States,
Respondent

On Petition for Review of Orders of the
Immigration and Naturalization Service
Board of Immigration Appeals
(BIA Nos. A43-447-939, A44-406-972;
A44-406-973 and A44-406-974

Submitted Pursuant to Third Circuit LAR 34.1(a)
October 3, 2003

Before: RENDELL, WEIS and GARTH, Circuit Judges

(Filed: October 6, 2003)

OPINION OF THE COURT

RENDELL, Circuit Judge.

Maria Pujols and her three children (collectively, "Petitioners"), natives and citizens of the Dominican Republic, challenge final orders of removal issued by the Board of Immigration Appeals ("BIA") on October 9, 2002. As Petitioners were placed into removal proceedings after April 1, 1997, our jurisdiction to entertain their petition arises under § 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252 (2002). We will deny the petition for review.

We will recite only those facts relevant to the issues before us, as we write exclusively for the parties. Petitioners' removal was precipitated by a determination by the Attorney General that Pujols had committed marriage fraud, and that she therefore could not retain her status as a conditional permanent resident of the United States. See 8 U.S.C. § 1186a. Because her children's designation as conditional permanent residents was predicated on Pujols's status as such, the Attorney General's finding rendered all four Petitioners removable. See 8 U.S.C. § 1227(a)(1)(D)(I). Thus, the Immigration and Naturalization Service ("INS") placed Petitioners in removal proceedings on March 8, 1999.

At their hearing before an Immigration Judge ("IJ") on November 29, 1999, testimony was presented by Pujols, her husband, and Special Agent Larry Reed of the INS. Upon considering the witnesses' testimony and the documentary evidence presented by Petitioners, the IJ concluded that Pujols had committed marriage fraud, and that Petitioners were removable for having their status as conditional permanent residents terminated. The IJ denied voluntary departure to Pujols, but granted voluntary departure to her children. Pursuant to its streamlining regulations, 8 C.F.R. § 3.1(e)(4) (2002), the BIA summarily affirmed the IJ's decision without issuing an opinion. Petitioners filed this timely appeal.

On appeal, Petitioners raise three issues: (1) whether the IJ's decision was supported by substantial evidence, (2) whether Petitioners' due process rights were violated during the hearing before the IJ, and (3) whether the BIA abused its discretion in applying the streamlining regulations to Petitioners' case. We address each of these issues in turn.

First, Petitioners argue that the IJ erred in determining that Pujols had entered into a sham marriage, and that Petitioners were therefore removable because they were stripped of their status as conditional permanent residents. As the BIA issued a summary affirmance, we will review the decision of the IJ. See Gao v. Ashcroft, 299 F.3d 266, 271 (3d Cir. 2002) (stating that a court of appeals must review the decision of the IJ where the BIA does not issue its own opinion); see also Carriche v. Ashcroft, 335 F.3d 1009, 1014 (9th Cir. 2003) (noting that when the BIA applies its streamlining procedures, the IJ's decision is reviewable as the final agency action); Albathani v. INS, 318 F.3d 365, 373 (1st Cir. 2003) (same). In doing so, we apply the substantial evidence standard, which allows us to grant the petition and vacate the IJ's determination only if the evidence is "so compelling that no reasonable factfinder could fail to find" in Petitioners' favor. INS v.

Elias-Zacarias, 502 U.S. 478, 484 (1992).

The central issue in the removal proceeding was whether, at the time of their marriage, Pujols and her husband "intended to establish a life together." In re Laureano, 19 I. & N. Dec. 1, 2-3 (B.I.A. 1983). Petitioners expend much energy pointing out, quite correctly, that Pujols's eventual separation from her husband does not defeat her claim that the couple entered into their marriage for legitimate reasons. See, e.g., In re Boromand, 17 I. & N. Dec. 450, 454 (B.I.A. 1980). But even if we credit this argument, and even though some of the evidence adduced at the hearing did support Petitioners' claims that Pujols had married in good faith, we find that the IJ's determination to the contrary was nonetheless based on substantial evidence.

The IJ did not base her decision solely on the fact that Pujols and her husband were separated, although it is one factor that may properly be considered in determining the parties' intent. See In re McKee, 17 I. & N. Dec. 332, 334 (B.I.A. 1980). Instead, the IJ explicitly indicated that other factors informed her decision. One factor was her rejection of the testimony of Pujols's husband. The IJ noted the fundamental inconsistencies regarding whether the couple was still married, when the marriage took place, how often the couple saw each other since their separation, and whether he knew which of Pujols's children was the oldest. Other factors included a tax return where Pujols's husband indicated that he was "single" after the two were married, Pujols's nervous demeanor while her husband testified, and conflicting statements by Pujols's husband regarding monies paid to him in connection with the marriage. Additionally, Agent Reed testified that his investigation had revealed that the couple married for immigration purposes only – a fact that Pujols's husband apparently admitted to Agent Reed during the investigation.

Petitioners fail to address most of these factors, and do not explain why the IJ was not justified in relying on them in reaching his decision. Instead, Petitioners attempt to support their claim by simply focusing on the portions of the evidence that were favorable to them. While we recognize that some evidence was adduced in support of Petitioners' claims, we are convinced that the IJ's decision was based on substantial evidence. Even if we were to decide that certain aspects of the IJ's credibility determinations seemed "troubling,"[1] our deferential standard of review compels us to reject Petitioners' first argument. See Abdulrahman v. Ashcroft, 330 F.3d 587, 598 (3d Cir. 2003).

Second, Petitioners contend that decisions made by the IJ regarding the testimony of witnesses at the hearing rendered the proceedings unfair and denied Petitioners due process. We review de novo whether Petitioners' due process rights were violated. Abdulrahman, 330 F.3d at 595-96. It is well-settled that "aliens facing removal are entitled to due process." Abdulai v. Ashcroft, 239 F.3d 542, 549 (3d Cir. 2001). We have further noted that "[i]n the context of an immigration hearing, due process requires

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[1]For example, the IJ's interpretation of Pujols's demeanor during her husband's testimony might be regarded as questionable. It might also seem troubling that the IJ assigned less weight to the sworn testimony of Pujols's husband than to his prior unsworn interview with Agent Reed. However, neither determination by the IJ was blatantly unreasonable, and her ultimate decision was based on evidence beyond these two factors.

that 'aliens threatened with deportation are provided the right to a full and fair hearing' that allows them 'a reasonable opportunity to present evidence' on their behalf." Abdulrahman, 330 F.3d at 596 (quoting Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001)).

Petitioners level two different due process claims. The first is based on Petitioners' assertion that the IJ refused to allow Pujols's mother-in-law to testify at the hearing. As Pujols lived with her husband and her mother-in-law upon entering this country, we agree that her mother-in-law would have very likely presented highly relevant testimony regarding the marital relationship between Pujols and her husband. Thus, a decision by the IJ to prevent such testimony could raise due process concerns. Petitioners, however, have failed to direct us to any portion of the administrative record indicating that an attempt to offer such testimony was foreclosed by the IJ, neither does our own review of the record reveal any evidence supporting this contention.[2] In the absence of such evidence, we cannot credit this claim.

Petitioners also complain about Agent Reed's testimony, alleging that their due process rights or their rights under the INA,[3] or both, were violated by Agent Reed's

[2]Although it is clear from the record that Pujols's mother-in-law did not actually testify at the hearing, the Government points out that the IJ did include her name on a list of witnesses listed to appear at the hearing. The record also indicates that she was present at the start of the hearing.

[3]Petitioners cite to the following INA provision: "[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . .

improper reliance on notes he made during his investigation related to this case, which had occurred several years before the hearing, and the IJ's allowing Agent Reed to testify via telephone. We are not convinced that either of these aspects of Agent Reed's testimony amounts to a due process violation. Petitioners received advance notice that Agent Reed would testify at the hearing. Although they did not obtain a copy of his investigation notes until the day of the hearing, they had a full opportunity to question him about his recollection of the case and about his use of the notes.[4] Petitioners object to the content of Agent Reed's testimony, which was unfavorable to them, but they fail to articulate how his testimony rendered the proceedings "unfair." Moreover, they are unable to cite to, and we are unable to find, any authority indicating that allowing a witness to testify over the telephone is disfavored at an immigration hearing,[5] let alone that it constitutes a due process violation. Therefore, we reject both of Petitioners' due process arguments, as they are not supported by the record or existing law.

." 8 U.S.C. § 1229a(b)(4)(B). It is unclear whether Petitioners are asserting a due process claim based on this statute, or whether they are claiming individual violations of their statutory and/or their due process rights. We conclude that their arguments fail, regardless of which rights they seek to invoke.

[4]On cross-examination, Agent Reed was steadfast in his insistence that he had an independent recollection of the facts to which he testified.

[5]Petitioners merely refer to a "statutory and regulatory procedural protection against being subjected to a telephonic evidentiary hearing." The cases that Petitioners do cite in support of this argument involve situations where <u>petitioners themselves</u> participate in or testify at hearings via telephone rather than in person, not where another witness offers testimony by telephone.

And finally, Petitioners' third argument addresses the application of the BIA's streamlining regulations, 8 C.F.R. § 3.1(e)(4)(I) (2002). Petitioners contend that the BIA abused its discretion when it affirmed the IJ's decision without issuing an opinion, because it thereby compounded the due process violations alleged in Petitioners' second argument. The Government argues that we are without authority to review the BIA's decision to invoke its streamlining regulations. In light of the narrow manner in which Petitioners have framed the issue before us in this case – focusing exclusively on their contention that the BIA was required to issue a full, reasoned opinion because of the IJ's alleged failure to preserve Petitioners' due process rights – we need not decide in the abstract whether we generally have jurisdiction to review the BIA's application of the streamlining provisions. Instead, we find that we can easily dispose of the claims articulated by Petitioners in this case, as they turn exclusively on our due process analysis set forth above. Because we found no merit to Petitioners' due process arguments after reviewing them de novo, we conclude that their attack on the BIA's decision to issue a summary affirmance must fail.[6]

Accordingly, we will DENY the petition for review of the BIA's decision.

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[6]Although Petitioners did, at our direction, file a response to the Government's jurisdictional argument, the response reinforces our view that this argument is tied to their due process claim and fails to present us with any basis for conducting a broader examination of this issue in the case before us.

TO THE CLERK OF COURT:

Please file the foregoing opinion.

/s/ Marjorie O. Rendell
Circuit Judge