[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11131
Non-Argument Calendar

Agency No. A096-746-707

BETTY MUTWII,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(April 9, 2019)

Before MARCUS, ROSENBAUM, and GRANT, Circuit Judges.

PER CURIAM:

Betty Koki Mutwii, a native and citizen of Kenya, seeks review of an order from the Board of Immigration Appeals ("BIA") dismissing her appeal from the

denial of her application for cancellation of removal. Mutwii takes issue with the BIA's conclusion that she failed to show that her removal would cause "exceptional and extremely unusual hardship" to a qualified family member, as required to warrant cancellation of removal. We deny the petition in part and dismiss it in part.

I.

Mutwii was admitted to the United States in January 1998 as a nonimmigrant cultural exchange program participant. She was authorized to remain until April 24, 1998. In May 2011, after Mutwii was discovered to have entered into a fraudulent marriage in an attempt to obtain legal residency, the Department of Homeland Security issued a Notice to Appear charging her as removable for having overstayed her visa. Mutwii conceded removability and later applied for cancellation of removal, asserting that her removal to Kenya would cause "exceptional and extremely unusual hardship" to her then 12-year-old daughter, Cynthia.

At a hearing on her motion, Mutwii testified that if she were removed to Kenya, she would take Cynthia with her. According to Mutwii, her native tribe in Kenya would force Cynthia to undergo female genital mutilation ("FGM"), which, while officially illegal, was still practiced with impunity throughout Kenya.

The immigration judge ("IJ") found that Mutwii did not meet the statutory requirements for cancellation of removal. First, based primarily on her admittedly fraudulent marriage, the IJ found that Mutwii had not been a person of good moral character during her time in the United States. And second, the IJ concluded that Mutwii had not shown that her removal would cause Cynthia to suffer "exceptional and extremely unusual hardship," as required under 8 U.S.C. § 1229b(b)(1)(D). The IJ found that Cynthia would not have to undergo FGM if Mutwii were removed to Kenya, even if Mutwii chose not to leave her with relatives in the United States. The IJ explained that, according to documents submitted by Mutwii, the practice of FGM had been outlawed in Kenya, and although it still occurred, it had declined to under 30% in much of the country. The IJ further found that Mutwii could minimize the risk that Cynthia would be subjected to FGM by relocating to the Western Province, where the practice had dwindled to less than 1%. The IJ also found it significant that Mutwii's mother had been able to protect Mutwii and her sister from FGM when they were growing up in Kenya by sending them to boarding school.

The BIA dismissed Mutwii's appeal. The BIA acknowledged that Cynthia would be exposed to a heightened risk of sexual harassment or assault in Kenya, as compared to the United States, and that she might experience some economic hardship from the move due to general country conditions there. But it concluded

that the IJ's predictive finding that Cynthia would not have to undergo FGM was not clearly erroneous, and that Mutwii therefore had failed to show that her removal would cause the requisite degree of hardship to a qualifying relative. The BIA declined to reach the IJ's finding that Mutwii had not been of good moral character during her stay in the United States.

In her petition for review by this Court, Mutwii argues that the BIA violated her constitutional right to due process by (1) applying the wrong legal standard in reviewing the IJ's finding that Cynthia would not have to undergo FGM, and (2) concluding that she had not shown that Cynthia would suffer exceptional and extremely unusual hardship in Kenya, despite its recognition of the heightened risk of sexual harassment or assault there. She also argues that the BIA abused its discretion by dismissing her appeal.

II.

"We are obligated to inquire into our jurisdiction whenever it may be lacking." *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281, 1283 (11th Cir. 2007). We consider the question of our subject matter jurisdiction *de novo*. *Id.* We also review a petitioner's constitutional challenges and questions of law *de novo*. *Zhou Hua Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303, 1307 (11th Cir. 2013).

III.

Under the Immigration and Nationality Act, the Attorney General has the discretion to cancel the removal of an alien who has (1) been in this country continuously for at least 10 years, (2) "been a person of good moral character during such period," (3) not been convicted of certain crimes, and (4) shown "that removal would result in exceptional and extremely unusual hardship to" an immediate family member who is a United States citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1)(A)–(D). Our jurisdiction to review BIA orders denying this discretionary relief is limited to constitutional claims or questions of law. 8 U.S.C. § 1252(a)(2)(B) & (D); *Jimenez-Galicia v. U.S. Att'y Gen.*, 690 F.3d 1207, 1209 (11th Cir. 2012). A petitioner cannot create jurisdiction merely by phrasing her claims in constitutional terms; we have jurisdiction only over genuine, colorable claims of constitutional or legal error. *See Jimenez-Galicia*, 690 F.3d at 1209, 1210–11; *Arias*, 482 F.3d at 1284. A constitutional claim is colorable only if it has "some possible validity." *Arias*, 482 F.3d at 1284 n.2.

A.

We lack jurisdiction to consider Mutwii's challenge to the BIA's determination that she had not satisfied the statutory standard for "exceptional and extremely unusual hardship." Although Mutwii presents her argument as a due process claim, she argues in essence that the BIA's conclusion that she had not met

the statutory hardship requirement was not supported by the record.[1] Such "'garden variety abuse of discretion' arguments about how the BIA weighed the facts in the record" lie outside our jurisdiction. *Jimenez-Galicia*, 690 F.3d at 1210–11 (citation omitted); *see Alhuay v. U.S. Att'y Gen.*, 661 F.3d 534, 550 (11th Cir. 2011) (challenges to the BIA's determination that the hardship standard was not met are "not constitutional claims or questions of law because what constitutes an 'exceptional and extremely unusual hardship' is itself a discretionary determination"). We therefore dismiss Mutwii's petition in part.

B.

We have jurisdiction to review Mutwii's claim that the BIA applied the wrong legal standard in reviewing the IJ's predictive findings of fact, because that is a legal question. *Jeune v. U.S. Att'y Gen.*, 810 F.3d 792, 799 (11th Cir. 2016). But Mutwii's argument that the BIA should have reviewed the IJ's finding that Cynthia would not be subjected to FGM in Kenya *de novo* is foreclosed by our precedent. In *Zhou Hua Zhu v. U.S. Attorney General*, we held that an IJ's predictive finding—that is, a "finding regarding the likelihood of a future event"—is a factual finding that the BIA can review only for clear error. 703 F.3d at 1308,

[1] Even a genuine due process challenge to a denial of cancellation of removal would fail, in any event. This is because aliens have no "constitutionally protected interest in receiving discretionary relief from removal or deportation." *Mohammed v. Ashcroft*, 261 F.3d 1244, 1250 (11th Cir. 2001). And "'[w]here a constitutional claim has no merit,'" we lack jurisdiction. *Arias*, 482 F.3d at 1284 (quoting *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003)).

1309. We therefore deny Mutwii's petition to the extent that she claims that the BIA should have reviewed this finding *de novo*.

PETITION DISMISSED IN PART AND DENIED IN PART.