No. 12-332

In the Supreme Court of the United States

JERMIA CHAIDY, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that 8 U.S.C. 1252(d)(1), which requires an alien to "exhaust[] all administrative remedies available to the alien as of right," barred consideration of a legal issue that the alien did not present to the Board of Immigration Appeals and that the Board did not *sua sponte* decide on the merits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the *Federal Reporter* but is reprinted in 458 Fed. Appx. 506. The opinions of the Board of Immigration Appeals (Pet. App. 16a-22a) and the immigration judge (Pet. App. 23a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2012. A petition for rehearing was denied on June 15, 2012 (Pet. App. 58a-59a). The petition for a writ of certiorari was filed on September 13, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, legal immigration to the United States is generally controlled by consular officers abroad who issue immigrant visas under the authority of the Secretary of State. See 8 U.S.C. 1154(b), 1201(a). Congress has, however, authorized the Attorney General to permit some qualifying aliens already in the United States to obtain the status of lawful permanent resident without having to depart the country. See 8 U.S.C. 1255(a); *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988), cert. denied, 491 U.S. 904 (1989). Such adjustment of status is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

The relevant statutory provision, 8 U.S.C. 1255(a), places limits on the Attorney General's authority to adjust an alien's status. An alien does not qualify unless he files an application and an "immigrant visa" is "immediately available to him." In addition, with certain exceptions not relevant here, an alien does not qualify unless he has been "inspected and admitted or paroled into the United States"—that is, has previously presented himself to authorities at the border and been permitted to enter the country legally. *Ibid.*; see 8 U.S.C. 1255 (Note).

2. a. Petitioner is a native and citizen of Indonesia. Pet. App. 2a, 24a. In 2002, while living in the United States, he married a United States citizen. *Id.* at 3a-4a. In 2004 and 2005, he filed applications with the Department of Homeland Security (DHS) to adjust his status to lawful permanent resident. Administrative Record (A.R.) 512-519, 521-525; see 8 C.F.R. 245.2. A DHS component denied those applications on

the ground that petitioner failed to provide proof that he had been "inspected and admitted or paroled into the United States." 8 U.S.C. 1255(a); see A.R. 512-519, 521-525; Pet. App. 4a-6a.

In 2008, DHS initiated removal proceedings against petitioner by filing and serving a Notice to Appear before an immigration court. See Pet. App. 2a, 25a. DHS charged him with being removable under 8 U.S.C. 1182(a)(6)(A)(i), as an alien who is present in the United States without having been admitted or paroled, and under 8 U.S.C. 1182(a)(7)(A)(i)(I), as an alien who is not in possession of a valid entry document. A.R. 781.

Before the immigration judge (IJ), petitioner admitted that he is an alien, denied the charges of removability, and applied for adjustment of status or, in the alternative, cancellation of removal. A.R. 151-160. Following a full evidentiary hearing, the IJ determined that petitioner was removable as charged, denied his applications, and ordered him removed to Indonesia. Pet. App. 23a-57a.

It is not clear what standard of proof the IJ applied to petitioner's adjustment-of-status application. The IJ stated variously that petitioner was required to "demonstrate by clear and convincing evidence that he was lawfully admitted into the United States pursuant to a prior admission"; "must prove that he * * * is clearly and beyond a doubt entitled to be admitted to the United States"; "shall have the burden of establishing that he is eligible" for relief from removal; and "shall have the burden of proving by a preponderance of the evidence" that any "grounds for mandatory denial of an application for relief" do not apply. Pet. App. 30a.

In any event, however, the IJ concluded that petitioner was ineligible for adjustment of status because the evidence did not "demonstrate that [petitioner] was lawfully admitted into the United States." Pet. App. 30a; see *id.* at 53a. As the IJ explained, petitioner contended that he obtained an Indonesian passport and a visa, flew to Los Angeles with his mother, was legally admitted to the United States, studied at a community college near Boston, and then moved to New York and had his immigration papers stolen on the subway. *Id.* at 33a-48a; see *id.* at 2a-3a. But petitioner was unable to proffer documents meaningfully corroborating that account, see *id.* at 33a, 53a-54a; see also *id.* at 5a-6a, and therefore primarily relied on his own testimony and that of his parents. The IJ found the testimony contradictory in numerous respects, see, *e.g.*, *id.* at 35a, 43a, 45a-46a, 54a; see also *id.* at 5a, and ultimately concluded that it was not credible, see *id.* at 55a (explaining that "[t]he only person who credibly testified in the Court's view" was petitioner's wife, who met him when he was already in the United States and had no knowledge of how he entered); see also *ibid.* (stating that "the Court believes to some extent that the [petitioner] might have intentionally proffered testimony that was not true," but "cannot prove that the statement was * * * a lie").

Petitioner appealed to the Board of Immigration Appeals (Board or BIA), which upheld the IJ's decision and dismissed the appeal. Pet. App. 16a-19a, 22a; see *id.* at 19a-21a. With respect to the application for adjustment of status, the Board understood petitioner to be arguing that he "necessarily satisfied his burden" of "show[ing] by clear and convincing evidence that he was inspected and admitted into the United

States" because he introduced evidence as to which the IJ did not make "an adverse credibility finding." *Id.* at 17a. The Board noted that even "credible evidence does not necessarily satisfy the * * * burden of proof"; identified a number of inconsistencies and weaknesses in petitioner's proof; and "agree[d]" with the IJ that petitioner "has not satisfied his burden of showing by clear and convincing evidence that he was inspected and admitted into the United States." *Id.* at 17a-18a; see *id.* at 18a (stating that "the evidence submitted is insufficient to demonstrate that [petitioner] was lawfully inspected and admitted"). Petitioner did not ask the Board to reconsider its decision. See Pet. C.A. Reply Br. 8.

b. The Sixth Circuit denied a petition for review in an unpublished opinion. Pet. App. 1a-15a. First, the court rejected petitioner's argument that the Board applied too stringent a standard of proof when deciding whether he had established his eligibility for adjustment of status. The court found "at least some ambiguity" in the statutory provisions and regulations relevant to the standard-of-proof question. *Id.* at 7a-9a; see *id.* at 9a (stating that petitioner's preferred preponderance-of-the-evidence standard "strikes us as likely incorrect"). But the court found itself "unable" to resolve that ambiguity, because petitioner had "failed to raise the argument before the BIA"—and thus failed to satisfy the exhaustion requirement set forth in 8 U.S.C. 1252(d)(1), which provides that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." Pet. App. 9a-10a; see *id.* at 10a (explaining that exhaustion is required "in order to give the Board the chance to

consider the argument and assemble a record"). The court rejected petitioner's argument that he had no reason to raise the issue before the Board; in the court's view, the IJ's opinion gave petitioner "a sound basis" for "challeng[ing] the burden of proof" issue, since the IJ's decision refers to three different "burdens" and "it is unclear from the IJ's opinion how he allocated" them. *Id.* at 9a.

Second, the court of appeals held that "substantial evidence" supported the conclusion that petitioner's "testimony and evidence did not prove his lawful admission into the United States." Pet. App. 10a, 12a-13a. The court explained that the IJ "disbelieved [petitioner's] testimony and found him lacking in credibility," since the testimony was full of gaps and "directly conflicted" with other witnesses' testimony in certain respects. *Id.* at 10a-14a (citing 8 U.S.C. 1229a(c)(4)). The court also noted that petitioner "failed to produce documentary evidence of his lawful entry." *Id.* at 13a. Accordingly, the court held, the Board did not err in denying petitioner a presumption of credibility or in remarking on the absence of any corroboration for various aspects of his story. *Id.* at 10a-11a, 14a.

ARGUMENT

Petitioner asserts (Pet. 5-7) that the courts of appeals are split on whether the exhaustion requirement set forth in 8 U.S.C. 1252(d)(1) applies when an alien fails to present a legal issue to the Board, but the Board nevertheless addresses that issue *sua sponte* and decides it on the merits. The unpublished decision of the Sixth Circuit does not implicate any such conflict, however. Moreover, a different resolution of

the exhaustion issue in this case would not aid petitioner. Accordingly, further review is not warranted.

1. With the exception of the Eleventh Circuit, the courts of appeals that have addressed the question—including the Sixth Circuit, which decided the case at hand—have uniformly held that the statutory exhaustion requirement is satisfied when the Board decides on the merits an issue that a party failed to bring to its attention. Compare *Khalili* v. *Holder*, 557 F.3d 429, 433-435 (6th Cir. 2009) ("Because the BIA waived the exhaustion requirement here and addressed the merits of the issue of the immigration judge's determination * * * , we have jurisdiction to consider [the] claim."), with *Amaya-Artunduaga* v. *United States Attorney Gen.*, 463 F.3d 1247, 1250-1251 (11th Cir. 2006) (per curiam) (stating that the "goals of exhaustion are better served by our declining to review claims a petitioner, without excuse or exception, failed to present before the BIA, even if the BIA addressed the underlying issue *sua sponte*"); see also, *e.g.*, *Lin* v. *Attorney Gen.*, 543 F.3d 114, 125-126 (3d Cir. 2008) (excusing failure to present an issue to the Board because the Board considered the issue *sua sponte* and issued a "discernible substantive discussion on the merits" (citation omitted)); *Liu* v. *Mukasey*, 264 Fed. Appx. 530, 533-534 (7th Cir. 2008) (finding that exhaustion requirement does not bar consideration of claim not raised before the BIA "[w]here, as here, the BIA applied its expertise and exercised its discretion to make a substantive ruling" and thus decided to overlook the "procedural defect"); *Pasha* v. *Gonzales*, 433 F.3d 530, 532-534 (7th Cir. 2005) (explaining that the exhaustion requirement was waived where the Board ruled on the merits of an

issue, and assuming that summary affirmance issued under particular conditions must have decided the merits of "the main issue presented to the immigration judge"); *Zine* v. *Mukasey*, 517 F.3d 535, 540-541 (8th Cir. 2008) (holding that exhaustion requirement was no bar when the Board reached out to decide an issue forfeited by "oversight" and "specifically affirm[ed]" the relevant portion of the IJ's decision); *Abebe* v. *Gonzales*, 432 F.3d 1037, 1041 (9th Cir. 2005) (declining to find claim barred where "the BIA elected to consider both of Petitioners' grounds for asylum" on their "substantive merits" and "adopted the IJ's decision in full").[1]

The rationale for recognizing such an exception to the exhaustion requirement is that the Board is empowered to "exhaust[] [an] issue as far as the agency is concerned" if it "deems [that] issue sufficiently presented to consider it on the merits," regardless of whether a party has actually made any argument to the Board relating to the issue. *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1119-1120 (10th Cir. 2007); see *id.* at 1120 ("Where the BIA determines an issue administratively-ripe to warrant its appellate review, we will not second-guess that determination."). In that circumstance, "[t]he BIA has * * * had an opportunity to apply its experience and expertise" and to correct the agency's own errors, and the administrative record is deemed "adequate" for review by the court

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[1] Cf. *Singh* v. *Gonzales*, 413 F.3d 156, 160 n.3 (1st Cir. 2005) (finding exhaustion where "Singh raised [his] challenges before the BIA (albeit in a perfunctory manner)"); *Johnson* v. *Ashcroft*, 378 F.3d 164, 170 n.7 (2d Cir. 2004) (finding exhaustion where "[t]he substance of Petitioner's argument * * * was clearly raised before both the IJ and the BIA").

of appeals. *Lin*, 543 F.3d at 125; see, *e.g.*, *Liu*, 264 Fed. Appx. at 533-534.

This case does not fall within the scope of that asserted exception, and therefore does not implicate the disagreement between the Eleventh Circuit and its sister courts of appeals. Petitioner contends (Pet. 4-5) that the Board *sua sponte* decided which standard of proof should apply to his application for adjustment of status. But the Board did not consider the standard-of-proof issue on the merits—it did not enter the "thicket" of provisions that are relevant to that question, Pet. App. 7a, or make a substantive choice between a clear-and-convincing evidence standard and a preponderance standard. Rather, the Board simply read the IJ's decision as applying the more demanding standard, and assumed that standard when assessing whether the evidence was sufficient to demonstrate that petitioner was eligible for adjustment of status under Section 1255(a).

The Board had no reason to do otherwise, because petitioner's brief did not raise any argument concerning the applicable standard of proof—even though, as the court of appeals pointed out, petitioner had every incentive to attempt to obtain clarification of the IJ's ambiguous statements in that regard. Pet. App. 9a-10a, 29a-30a; Pet. BIA Br. 2-25. Indeed, it appears that the Board mentioned the standard at all only because the issue petitioner *did* raise—whether his evidence was entitled to a presumption of credibility, and the consequences of such a presumption—is naturally framed by a mention of the quantum of evidence sufficient to allow him to prevail. That kind of passing statement, which does not endorse the correctness of any particular resolution of a complex issue, cannot be

read as an affirmative choice by the Board to apply its expertise and take up an otherwise forfeited argument. See *Sidabutar*, 503 F.3d at 1119-1120.

Accordingly, the result in this case would not have been different by reference to precedent in various courts of appeals holding the exhaustion requirement inapplicable when the Board *sua sponte* addresses an issue's merits. That is acutely pointed up by the fact that the Sixth Circuit *itself* is one of those very courts. Petitioner cited the key Sixth Circuit precedent on that point in his appellate brief, see Pet. C.A. Br. 13, 17 (citing *Khalili*), and there is no reason to think that the court overlooked it or decided to flout it—especially since the court has reaffirmed it in a number of recent cases. See *Mbodj* v. *Holder*, 394 Fed. Appx. 239, 244 (6th Cir. 2010) ("[I]f the BIA sua sponte raises and rules on the merits of an issue, * * * the petitioner is deemed to have exhausted his administrative remedies and not to have forfeited the issue."); *Ly* v. *Holder*, 327 Fed. Appx. 616, 620 (6th Cir. 2009) (same); see also *Moltan Co.* v. *Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published decision of another panel."). Rather, the Sixth Circuit apparently did not believe that the Board had *sua sponte* considered the merits of the standard-of-proof issue—or that the principle petitioner identifies had any application whatever in the case at hand. But even if the panel's unpublished decision in this case conflicted with controlling circuit precedent, that intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Review is also unwarranted because the standard-of-proof issue—and, therefore, the exhaustion

issue—is immaterial to the resolution of petitioner's case. Even if the Board erred in applying a clear-and-convincing-evidence standard, that error was harmless, because petitioner's evidence was not sufficient under a preponderance standard either. See *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (stating that remand to the agency is not required when it "would be an idle and useless formality"); *Yuan* v. *Attorney Gen.*, 642 F.3d 420, 426-427 (3d Cir. 2011) (collecting cases applying harmless error analysis to Board decisions).

That conclusion follows inexorably from the Sixth Circuit's discussion of the evidence before the Board. Pet. App. 10a, 12a. As the court noted, petitioner presented no documentary evidence showing that he entered the country lawfully. See *id.* at 13a; see also *id.* at 5a-6a, 11a, 14a (discussing documents showing petitioner's mere presence in the United States, which the IJ "largely discounted"). The only evidence supporting petitioner's contention that he had been "inspected and admitted or paroled into the United States," 8 U.S.C. 1255(a), was his own testimony, which the IJ found "lacking in credibility" and "strongly implied * * * was dishonest," Pet. App. 12a; see *id.* at 14a, and the testimony of his parents, which "directly conflicted" with his own account "in crucial ways" and thus "detracted from" his position, *id.* at 12a-14a. The Board was therefore correct to conclude that "the evidence submitted is insufficient to demonstrate that [petitioner] was lawfully inspected and admitted to the United States," *id.* at 18a—and application of a less demanding standard of proof would not have changed that conclusion.

For that reason, a different resolution of the exhaustion issue could not lead to a different outcome for petitioner. This case would therefore be a poor vehicle for consideration of that issue even if the issue otherwise warranted review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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