FILED
United States Court of Appeals
Tenth Circuit

August 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LADISLAO SERGIO DOMINGUEZ OGAZ,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9584
(Petition for Review)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Mr. Ladislao Sergio Dominguez-Ogaz is a Mexican citizen who was allowed to remain in the United States until June 2003. He didn't leave, however, and the government began removal proceedings roughly six years later with a notice to appear. In those proceedings, Mr. Dominguez-Ogaz

---

* Oral argument would not help us decide the petition for review, so we have decided the petition based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

admitted that he was removable, but requested asylum, withholding of removal, and deferral of removal. The immigration judge rejected these requests, finding Mr. Dominguez-Ogaz ineligible for relief and ordering his removal. He appealed to the Board of Immigration Appeals, and the Board dismissed the appeal.

While that appeal was pending, Mr. Dominguez-Ogaz requested a remand so that he could seek cancellation of removal. Cancellation of removal requires at least ten years of continuous presence in the United States. 8 U.S.C. § 1229b(b)(1)(A). This period would ordinarily stop upon service of a valid notice to appear. 8 U.S.C. § 1229b(d)(1). But the Board assumed for the sake of argument that the notice to appear had been defective. That assumption led the Board to further assume that Mr. Dominguez-Ogaz had satisfied the requirement of continuous presence. Despite that assumption, the Board declined to remand on the ground that Mr. Dominguez-Ogaz had not shown sufficient hardship to a qualifying relative.

Over a year later, Mr. Dominguez-Ogaz unsuccessfully sought reopening of the removal proceedings, and he petitions for judicial review. We deny the petition.

Mr. Dominguez-Ogaz's threshold problem involves timeliness. He could have sought reopening within 90 days of the final removal order. 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(1). But he missed the

deadline by roughly eleven months, so the Board rejected the motion as untimely.

In challenging that decision, Mr. Dominguez-Ogaz argues that the Board should have explained why equitable tolling didn't apply. But the Board had no reason to do so because Mr. Dominguez-Ogaz hadn't urged equitable tolling. By failing to make this argument to the Board, Mr. Dominguez-Ogaz failed to exhaust his challenge to the explanation. *See* 8 U.S.C. § 1252(d)(1); *see also Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) (stating that exhaustion requires presentation of "the same legal theory" to the Board of Immigration Appeals).[1] Given this failure to exhaust the issue, we conclude that the Board didn't err in rejecting the motion as untimely.

Irrespective of timeliness, the Board could order reopening on its own. *Matter of J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997). The Board decided not to exercise this authority, and Mr. Dominguez-Ogaz alleges disregard of "fundamental changes in law brought about by *Pereira* and *Banuelos*." Petitioner's Opening Br. at 9. These opinions addressed the validity of a notice to appear for purposes of the requirement involving ten

[1] This exhaustion requirement entails a claim-processing rule rather than a jurisdictional requirement. *Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1114–16 (2023). But the government has invoked the exhaustion requirement, and the failure to satisfy this requirement prevents equitable tolling.

years' presence in the United States. *Pereira v. Sessions*, 138 S. Ct. 2105, 2113–14 (2018); *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1184 (10th Cir. 2020). But the Board had already assumed Mr. Dominguez-Ogaz's eligibility for cancellation of removal based on the need for continuous presence in the United States. For this assumption, the Board had relied on *Pereira* and *Banuelos*. Because *Pereira* and *Banuelos* didn't affect the Board's reason for declining to reopen the proceedings sua sponte, there was no need to discuss these opinions again. We thus reject Mr. Dominguez-Ogaz's challenge to the Board's explanation for the refusal to reopen the proceedings sua sponte.

Finally, Mr. Dominguez-Ogaz argues that the Board applied the wrong test when assessing hardship to his son. Even if the Board had erred, however, we couldn't grant the petition for judicial review because the motion to reopen was untimely.

We thus deny the petition for judicial review.

Entered for the Court

Robert E. Bacharach
Circuit Judge