FILED
United States Court of Appeals
Tenth Circuit

September 15, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TELESFORO TERAN-TRINIDAD,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9568
(Petition for Review)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Telesforo Teran-Trinidad petitions for review of the Board of Immigration Appeals' (BIA) decision denying his motion to reopen. Exercising jurisdiction pursuant to 8 U.S.C. § 1252, we deny the petition.

I. Background

Petitioner is a native and citizen of Mexico who has been living in this country illegally. He came to the attention of immigration officials when he was arrested for

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this petition for review. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

driving under the influence. After the Department of Homeland Security (DHS) issued a notice to appear, he appeared before an immigration judge (IJ). He conceded he was removable as charged but sought cancellation of removal. The IJ denied the application for cancellation of removal, determining that Petitioner failed to establish his removal would result in exceptional and extremely unusual hardship to a qualifying relative (his two children who are United States citizens).

Petitioner appealed the IJ's decision. The BIA upheld the decision, explaining that "the [IJ] correctly concluded that [Petitioner's] children did not have any serious health issues or any compelling special needs in school which would result in harm rising to the level of exceptional and extremely unusual hardship." R. at 75 (internal quotation marks omitted). Petitioner initially sought review of that decision in this court, but then he subsequently moved to voluntarily dismiss that petition, and this court granted the motion.

While his appeal was still pending, Petitioner filed a motion to reopen with the BIA, asserting that he received ineffective assistance from his prior counsel regarding his application for cancellation of removal. The DHS opposed the motion. The BIA denied the motion to reopen on a procedural ground, holding that Petitioner failed to demonstrate compliance with the requirements set forth in *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (B.I.A. 1988). But the BIA also denied the motion on an alternative basis, reaching the merits and concluding Petitioner had not demonstrated his prior counsel rendered ineffective assistance.

II. Discussion

We review the denial of a motion to reopen based on ineffective assistance of counsel for abuse of discretion. *Molina v. Holder*, 763 F.3d 1259, 1263 (10th Cir. 2014). "The [BIA] abuses its discretion when it fails to provide a rational explanation, inexplicably deviates from established policies, lacks any reasoning, or contains only conclusory explanations." *Id.* "In contrast, the [BIA] does not abuse its discretion when its rationale is clear, there is no departure from established policies, and its statements are a correct interpretation of the law." *Id.* (internal quotation marks omitted).

Petitioner argues (1) "[he] fully complied with the *Lozada* requirements to assert a claim of ineffective assistance of counsel against his previous counsel;" and (2) "[p]revious counsels' errors prejudiced the outcome of the case, resulting in a frustration of due process of law." Pet'r's Br. at 12. The Government does not respond to Petitioner's first argument. Instead, it explains that this court "need not reach" the first issue because the BIA's "determination that Petitioner did not demonstrate that his prior counsel rendered ineffective assistance is independently dispositive." Gov't Resp. Br. at 18 n.4. We agree with the Government, so we will focus our discussion on the second issue.

"[A]lthough there is no right to appointed counsel in deportation proceedings, a petitioner can state a Fifth Amendment violation if he proves that retained counsel was ineffective and, as a result, the petitioner was denied a fundamentally fair proceeding." *Veloz-Luvevano v. Lynch*, 799 F.3d 1308, 1312 (10th Cir. 2015)

(internal quotation marks and ellipsis omitted). To prevail on a claim of ineffective assistance of counsel, a petitioner must show that his counsel rendered ineffective legal representation and that "the ineffectiveness caused enough prejudice to make the proceedings fundamentally unfair." *Mena-Flores v. Holder*, 776 F.3d 1152, 1169 (10th Cir. 2015). "The ineffectiveness prong requires egregious circumstances, and the prejudice prong requires a reasonable likelihood that the outcome would have been different but for counsel's deficient performance." *Id.* (footnote and internal quotation marks omitted). "An attorney's objectively reasonable tactical decisions do not qualify as ineffective assistance." *Id.*

As is relevant here, to demonstrate eligibility for cancellation of removal, an applicant must "establish[] that [his] removal would result in exceptional and extremely unusual hardship to [his] . . . child, who is a citizen of the United States." 8 U.S.C. § 1229b(b)(1)(D). To prove "exceptional and extremely unusual hardship," an applicant must "establish that his qualifying relatives would suffer hardship that is substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here." *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 65 (B.I.A. 2001) (en banc). The BIA has given an example of a "strong applicant" as someone who "ha[s] a qualifying child with very serious health issues, or compelling special needs in school." *Id.* at 63.

In his motion to reopen, Petitioner asserted that his prior counsel was ineffective for failing to present evidence related to all of his sons' serious health issues. He identified a list of medical issues he alleged should have been addressed

by counsel but were not. Those issues included: both boys receive Medicaid and there is no equivalent system for their needs in Mexico; his son, Eduardo, has abnormal liver enzymes; both boys are obese; both boys have had recurring upper respiratory infections; both boys have skin issues; Eduardo has asthma; and Eduardo had surgery for removal of a lymphatic malformation and the mass can reappear and is being monitored. Petitioner also asserted that prior counsel failed to address the fact that Oscar has received speech therapy services since he was four years old. And Petitioner argued that but for the ineffectiveness of his prior counsel he would have been successful in obtaining cancellation of removal.

In denying the motion, the BIA explained: "Our review of the record shows that prior counsel submitted voluminous medical records for [Petitioner's] children before the [IJ], questioned [Petitioner] on his children's health conditions before the [IJ], and highlighted certain medical issues in their written briefing before the [IJ] and the [BIA]." R. at 4. The BIA further explained:

> In their responses to [Petitioner's] allegations of ineffective assistance, prior counsel each state that they chose to highlight medical conditions that they believed to be particularly serious and chose not to highlight other medical issues that they determined were not serious based on their review of the medical records provided by [Petitioner] and communications with him.

Id. It therefore concluded that "prior counsel's decision to focus attention on medical issues that they considered particularly serious was a reasonable tactical decision and not the type of egregious conduct that would have rendered [Petitioner's] removal proceedings fundamentally unfair." *Id.* (citing *Mena-Flores*, 776 F.3d at 1169).

In his opening brief, Petitioner disputes the BIA's characterization of the actions of his prior counsel, arguing "[i]t is not an 'objectively reasonable tactical decision' when an attorney negligently fails to meet an evidentiary burden on a client's behalf." Pet'r's Br. at 15. He asserts that prior counsel "failed to fully present, preserve, and argue [his] 'extreme hardship' prong for his defense to removal, resulting in his deportation order," *id.* at 16.

We disagree. Petitioner has not shown the BIA abused its discretion in denying his motion to reopen. He has failed to establish that his prior counsel's decision to focus on certain medical issues that counsel deemed particularly serious and to not address other medical issues it deemed less serious constituted such egregious conduct as to render the removal proceedings fundamentally unfair. Prior counsel submitted a written statement in advance of the hearing on the application for cancellation where counsel detailed Petitioner's sons' health issues including Eduardo's vision problems, a mass that Eduardo had in his abdomen that requires ongoing treatment, Oscar's speech problems, and Oscar's broken wrist that limits his range of motion. *See* R. at 47-49. Prior counsel argued that Petitioner's "children have suffered a host of medical issues and will suffer exceptional and extremely unusual hardship if [Petitioner] is removed." R. at 50. Consistent with the written statement, prior counsel also elicited testimony from Petitioner at the hearing where he described his sons' medical issues. *See* R. at 210-220. The record does not support Petitioner's claim that his counsel failed to fully present and preserve the

argument that his children would suffer an exceptional and extremely unusual hardship if he were removed.

Petitioner contends there was evidence in the record to demonstrate his sons had serious health issues, and it was his prior counsel's deficient performance that prejudiced him, not the lack of evidence. He gives as an example that "previous counsel never addressed [] Eduardo's 'altered liver transaminases.'" Reply Br. at 7 (quoting R. at 374).[1] But that is not entirely accurate. In prior counsel's response to Petitioner's claim of ineffective assistance, counsel explained there was only one test that showed Eduardo's liver enzymes were elevated and it showed up in tests that were taken when he was hospitalized with the mass in his stomach, which was the primary focus of counsel's hardship evidence. And counsel did mention in the written statement in advance of the hearing that "[t]he mass is painful and creates problems with digestion and *liver functions*." R. at 49 (emphasis added). But counsel also explained in her response that "[t]here was never any elevated test, related complication, related symptoms, concern or even mention of liver issues at any other point in Eduardo's life other than the one test." R. at 63 (emphasis omitted). Petitioner does not point to any other evidence showing how this one test

[1] Regarding the "[a]ltered liver transaminases," the medical summary recommends "a follow up visit," explains that "[t]hese may need to be repeated" and notes "[Eduardo] could have had a viral illness when these were checked[.]" R. at 374; *see also id.* at 387 (medical note explaining that parents were advised that Eduardo's "liver enzymes were a little elevated today, and to follow-up with their primary care provider for reevaluation next week").

demonstrated Eduardo had a serious health condition. He has therefore not shown counsel was ineffective for failing to further address this one test that showed elevated liver enzymes.[2]

Petitioner asserts that "[a]nother significant hardship that [his] former counsel failed to address, and preserve, is the fact that one of [his] sons has received speech therapy since [that son] was four years old." Pet'r's Br. at 8.[3] He contends the record shows his son received speech therapy through the time of the motion to reopen (which was filed in February 2021). *See* Reply Br. at 6. He further contends his own testimony at the October 2018 hearing that his son was no longer receiving speech therapy "is incompetent and not due conclusive weight." *Id.* at 7.

The record does not support Petitioner's assertion about his son's speech therapy. First, his prior counsel did elicit testimony about Petitioner's son, Oscar, receiving speech therapy starting in kindergarten. *See* R. at 218-19. And prior counsel submitted evidence to support Petitioner's testimony, which shows Oscar was certified to receive speech therapy when he was four years and eleven months

---

[2] Petitioner asserts that "[t]his is just one example of many that previous counsel failed to present to the IJ and BIA on [Petitioner's] behalf, causing prejudice to the removal defense." Reply Br. at 7. But he does not go on to identify any of the other examples or explain how they caused him prejudice. *See id.*

[3] Petitioner also contends that his son "continued to receive Individualized Educational Plan (IEP) services from his school for his disability." Pet'r's Br. at 8. For support, he cites to a January 2021 letter he attached to his motion to reopen that contains one sentence from one of Oscar's teachers. *See id.* at 8 n.19 (citing R. at 52). That letter states: "Oscar needs special assistance now and will need special assistance in the future so he can continue to improve at school." R. at 52. This vague statement does not support Petitioner's contention.

old. *See* R. at 347. The evidence also shows the speech therapy was scheduled to end in February 2017, *see* R. at 344, which is consistent with Petitioner's own testimony at the October 2018 hearing that his son was no longer receiving speech therapy services, *see* R. at 219. It is unclear why Petitioner would ask this court not to credit his own testimony about his son, and we see no legal basis not to credit it, especially since it is consistent with the record evidence. Prior counsel also elicited testimony from Petitioner that Oscar is behind in school because he still has problems with his speech. *See* R. at 219-20. But Petitioner has not cited to any record evidence to support his claim that Oscar's speech therapy continued through the time of the motion to reopen in February 2021.[4] He has therefore failed to show that his prior counsel did not adequately present this issue.

Finally, Petitioner argues that "[p]revious counsel also failed to tie the boys' hardships to the conditions on the ground in Mexico, [and] whether they could access any of the constant medical care they need in Mexico." Pet'r's Br. at 8. Petitioner argues that "[b]ased on this failure by previous counsel, [he] could not have succeeded" on his application for cancellation of removal, so "its absence is prima facie evidence of ineffective assistance of counsel." Reply Br. at 8-9.

[4] Petitioner states "[t]he Government concedes that one of [his] sons receives ongoing speech therapy assistance," Reply Br. at 6 (citing Gov't Resp. Br. at 9-11), but this statement is unfounded. There is nothing on those pages of the Government's brief, or anywhere else in the Government's brief, where the Government concedes Petitioner's son is receiving ongoing speech therapy assistance.

The BIA has explained that when an applicant for cancellation of removal is basing a claim of "exceptional and extremely unusual hardship" on the health of a qualifying relative, "an applicant needs to establish that the relative has a serious medical condition *and*, if he or she is accompanying the applicant to the country of removal, that adequate medical care for the claimed condition is not reasonably available in that country." *Matter of J-J-G-*, 27 I. & N. Dec. 808, 811 (B.I.A. 2020) (emphasis added and footnote omitted). But Petitioner has not demonstrated a prima facie case of ineffective assistance of counsel because he cannot show any prejudice from counsel's failure to submit evidence on the lack of adequate medical care in Mexico. *See Mena-Flores*, 776 F.3d at 1169 (explaining that "the prejudice prong requires a reasonable likelihood that the outcome would have been different but for counsel's deficient performance" (internal quotation marks omitted)). The IJ concluded Petitioner had not demonstrated his sons had any serious health conditions that would support a claim of exceptional and extremely unusual hardship and the BIA upheld that conclusion. Because Petitioner's application for cancellation of removal failed to establish his sons suffered from any serious health conditions, he cannot show the outcome would have been different but for prior counsel's failure to submit evidence about the lack of adequate medical care in Mexico. *Cf. Matter of J-J-G-*, 27 I. & N. Dec. at 811 (explaining that "an applicant [for cancellation of removal] needs to establish that the [qualifying] relative has a serious medical condition *and* . . . that adequate medical care for the claimed condition is not reasonably available in that country" (emphasis added)).

Petitioner has not shown the BIA abused its discretion in denying his motion to reopen. The BIA correctly applied the law regarding ineffective assistance of counsel, it did not depart from established policies, and its decision contained more than conclusory statements.

III. Conclusion

For the foregoing reasons, we deny the petition for review.

Entered for the Court

Nancy L. Moritz
Circuit Judge