FILED
United States Court of Appeals
Tenth Circuit

November 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALONSO CHAVEZ LOYA,

Petitioner,

v.

MERRICK B. GARLAND,
Attorney General,

Respondent.

No. 23-9508
(Petition for Review)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **KELLY**, and **McHUGH**, Circuit Judges.

Petitioner Alonso Chavez Loya, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' (BIA) decision denying his motion to reopen. We dismiss the petition for lack of jurisdiction.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

Petitioner entered the United States illegally in 1999.[1] In 2012, he was arrested and charged in the United States District Court for the District of Wyoming with misusing the social security number and birth certificate of a deceased person to obtain a United States passport. In 2013, Petitioner pled guilty to misuse of a social security number in violation of 42 U.S.C. § 408(a)(8) and served approximately 70 days in jail.

As a result of his arrest and conviction, Petitioner came to the attention of immigration officials and was placed in removal proceedings. In July 2013—after removal proceedings had begun—Petitioner married Carisa Mary Hensley, a United States citizen. In 2017, he filed an application for cancellation of removal based on the alleged hardship that removal would cause his wife.

In 2018, Petitioner filed supplemental documentary evidence in support of his application. To demonstrate good moral character, he submitted several letters from acquaintances and relatives. To show his continuous physical presence in the United States, he offered tax returns, insurance policies, and utility bills. On the issue of hardship, he submitted Ms. Hensley's medical records, which showed that in December 2015—approximately one month after back surgery—she reported that "[h]er back pain is completely resolved [and] [h]er left radiculopathy is resolved,"

[1] Petitioner entered the United States with his father when he was 14 years old.

but still suffered from "left leg pain . . . that interfere[s] with her activities of daily living." R., Vol. II at 462.

In early February 2019, Petitioner again supplemented his application with additional documentary evidence that included Ms. Hensley's medical records from 2016 and 2017, showing that she was treated for pain in her feet and back, and letters of support from several acquaintances.

There were two witnesses at the merits hearing on February 13, 2019—Petitioner and Ms. Hensley. Petitioner admitted that he attempted to obtain a United States passport using the name, social security number, and birth certificate of a deceased person. He further acknowledged that he misrepresented himself as a United States citizen on the application form. Petitioner also testified that shortly after his marriage to Ms. Hensley, he received an approved immediate relative petition filed on his behalf by Ms. Hensley; however, he did not explain why he declined to pursue adjustment of status based on the approved visa.

According to Petitioner, he established a construction company in 2012, and was under contract to build approximately ten homes by February 2020. He testified that Ms. Hensley worked full-time as a municipal treasurer but did not know how much money she made. Mortgage payments on the home owned by the couple were $3,400 a month.

He also testified to his wife's medical ailments and explained that she was unable "to walk for very long" and "gets tired easily." R., Vol. I at 190. He added that he could not work in construction in Mexico because he would not "know how to

do anything there," *id*. at 192, and his wife would not go with him to Mexico or be able to visit because she "always has to be at work," *id*. at 193.

Ms. Hensley testified that she: (1) makes about $50,000 a year and receives health and retirement benefits through her employer; (2) could not afford the monthly mortgage payments on her own; and (3) faced some type of financial exposure on Petitioner's contracts to build the ten homes. She further explained that she: (1) has difficulty walking; (2) takes medication for her back and knee ailments; (3) attends physical therapy twice a week; and (4) relies on Petitioner to keep her active and maintain a healthy diet.

In March 2019, the immigration judge (IJ) issued a written decision finding Petitioner removable as charged and denying his application for cancellation on both discretionary and statutory grounds. The IJ made this determination after "[giv]ing thorough consideration to all evidence submitted, regardless of whether that evidence is specifically named in [the] decision." *Id*. at 112. The IJ concluded that Petitioner was statutorily ineligible for relief because he could not show the requisite continuous physical presence and good moral character. As to denial as a matter of discretion, the IJ noted that although Petitioner was a caring spouse and respected in his community, these positive factors did not outweigh the conduct underlying his criminal conviction.

Petitioner appealed to the BIA and later filed a motion to administratively close the proceedings on the grounds that he was thinking about requesting an

adjustment of status through consular processing based on the visa petition filed by Ms. Hensley on his behalf and approved in 2014.

On November 18, 2021, the BIA dismissed the administrative appeal. Although the BIA declined to affirm on the grounds that Petitioner failed to show the requisite physical presence or good moral character, the agency agreed with the IJ that Petitioner's positive equities, including his long-time presence in the United States, his work history, and the potential hardship to his wife if he was removed, were outweighed by his criminal conduct. Therefore, the agency affirmed the IJ's denial of the application for cancellation of removal as a matter of discretion. The BIA also denied Petitioner's motion to administratively close the case. Petitioner did not file a petition for review.

On January 10, 2022, Petitioner filed a motion to reopen and reconsider the BIA's decision. As grounds, Petitioner submitted new evidence that he argued weighed in favor of granting his application as a matter of discretion, including: (1) correspondence from the Internal Revenue Service (IRS) showing that as of December 2021, Petitioner owed $339,917.67 in taxes; (2) a four-sentence unsworn letter from Ms. Hensley stating that she had been unemployed since January 2021 due to her back and knee ailments, diabetes, and digestive problems, and was totally dependent on Petitioner for money and her medical needs; and (3) a medical bill issued to Ms. Hensley for unspecified medical care in November 2021. According to Petitioner, the IJ erred when he failed to consider: (1) the length of his marriage to his wife; (2) his wife's health issues; (3) his long-term presence in this country;

(4) the fact that his conviction occurred several years before the IJ's decision and he has no other criminal convictions; and (5) his employment history.

The BIA denied the motion to reconsider as untimely because it was filed more than 30 days after the BIA issued its decision.[2] *See* 8 U.S.C. § 1229a(c)(6)(A)-(B); 8 C.F.R. § 1003.2(b)(2). Turning to the request to reopen, the BIA listed the previous equities that it considered in dismissing Petitioner's appeal from the IJ's decision, including "his long-term residence in this country, business and property ownership, numerous letters of support, family ties, and hardship his wife will suffer following his departure." R., Vol. I at 4. The BIA noted that Petitioner failed to "present any new, material evidence bearing on the discretionary denial of his application . . . aside from proof that he has continued to make payments towards his large tax debt," and concluded that the "new evidence of hardship to his spouse . . .

[2] Petitioner does not address the untimeliness of the motion for reconsideration; instead, he seeks to appeal the IJ's decision. *See, e.g.*, Pet'r Opening Br. at 9 ("[Petitioner] is not asking this Court to reweigh the final discretionary decision, rather he is asking if the agency complied with the law when it denied his application on discretion"); *id*. at 31 (faulting the IJ for not considering certain discretionary factors weighing in his favor); *id*. at 33 (asking this court to review his "concerns regarding the IJ's discretionary denial because there is no indication that the IJ examined the totality of the circumstances or balanced favorable and adverse factors"). But Petitioner's failure to file a petition for review of the BIA's decision within 30 days of the BIA's decision issued on November 18, 2021, means that we lack jurisdiction to consider the issue. *See* 8 U.S.C. § 1252(b)(1) ("The petition for review must be filed not later than 30 days after the date of the final order of removal."). Further, "[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." 8 U.S.C. § 1252(d)(1); *see also Stone v. INS*, 514 U.S. 386, 405 (1995) (holding that the time limits for filing a petition for review are mandatory and jurisdictional).

taken together with the evidence presented below," failed to demonstrate "that the outcome of the case would likely change." *Id*. This petition for review followed.

LEGAL FRAMEWORK

The purpose of a motion to reopen is to present new material facts and evidence that were previously undiscoverable and unavailable at the former hearing that may, among other things, demonstrate that the noncitizen is eligible for relief from removal. *See* 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(1). "And not just any new facts will do. The new facts . . . must demonstrate that if the proceedings before the IJ were reopened . . . the new evidence offered would likely change the result in the case." *Maatougui v. Holder*, 738 F.3d 1230, 1240 (10th Cir. 2013) (brackets and internal quotation marks omitted).

"There are at least three independent grounds on which the BIA may deny a motion to reopen." *INS v. Abudu*, 485 U.S. 94, 104 (1988). "First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. . . . Second, the BIA may hold that the movant has not introduced previously unavailable material evidence." *Id*. "Third, in cases in which the ultimate grant of relief is discretionary . . . the BIA may leap ahead . . . over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief." *Id*. at 105.

The Attorney General may, in his discretion, cancel the removal and adjust the status of a noncitizen who is inadmissible or removable from the United States

if the noncitizen satisfies certain statutory requirements. *See* 8 U.S.C. § 1229b(b)(1)(A)-(D). In addition to demonstrating statutory eligibility, the applicant also bears the burden of establishing that he merits a favorable exercise of discretion under § 1229b(b)(1). *See* 8 C.F.R. § 1240.8(d).

We generally have jurisdiction to review the denial of a motion to reopen. *See, e.g.*, *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361 (10th Cir. 2004). However, we lack jurisdiction to review the BIA's denials of motions to reopen where this court otherwise lacks jurisdiction over the underlying order. *See Alzainati v. Holder*, 568 F.3d 844, 849 (10th Cir. 2009) ("Because § 1252(a)(2)(B)(i) precludes our review of an 'exceptional and extremely unusual hardship' determination under § 129b(b)(1)(D), it also precludes our jurisdiction to review the BIA's denial of a motion to reopen because the alien still has failed to show the requisite hardship."). In other words, when the BIA makes a discretionary decision to deny relief under one of the enumerated provisions in 8 U.S.C. § 1252(a)(2)(B)(i), and later denies a motion to reopen because the alien has still not shown that relief is warranted, we lack jurisdiction to review its decision. *See Alzainati*, 568 F.3d at 849.[3]

The only exception to this jurisdictional bar is for "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). For example, "[i]f the BIA decides, in an exercise of agency discretion, an alien has not produced sufficient evidence to warrant a finding of exceptional and extremely unusual hardship, we cannot review

[3] Section 1252(a)(2)(B)(i) provides: "[N]o court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 1229b[.]"

that decision." *Alzainati*, 568 F.3d at 850; *see also Galeano-Romero v. Barr*, 968 F.3d 1176, 1182 n.8 (10th Cir. 2020) (holding petitioner's argument that the agency "improperly discount[ed] the hardship [the noncitizen's] wife would suffer upon his removal . . . boils down to a contention that the [agency] improperly weighed [the evidence.]"). By contrast, "if . . . the BIA refuses, contrary to established procedures, to consider new and pertinent evidence, due process rights are implicated [and] we exercise limited jurisdiction to review the propriety of the BIA's failure to consider the evidence." *Alzainati*, 568 F.3d at 850.

DISCUSSION

For his first contention of error, Petitioner argues that the agency failed to meaningfully consider the evidence he submitted in support of the motion to reopen because it did not expressly identify each piece of evidence. This contention lacks record support. Recall that Petitioner submitted three pieces of evidence with his motion to reopen: (1) correspondence from the IRS showing that Petitioner owed more than $300,000 in taxes; (2) a four-sentence unsworn letter from his wife stating that she had been unemployed since January 2021, and that she was totally dependent on Petitioner for money and her medical needs; and (3) a bill for inpatient medical services in November 2021, which contained no information about the nature of the services. Petitioner concedes that the BIA mentioned that he had been paying back taxes and that this evidence is irrelevant to whether he merits a favorable exercise of discretion.

Therefore, we examine the unsworn letter and medical bill, which the BIA described as the "new evidence of hardship to [Petitioner's] spouse." R., Vol. I at 4. This description is sufficient for this court to understand the basis for the BIA's decision—namely, that it considered the medical bill and four-sentence letter. *See Maatougui*, 738 F.3d at 1242-43 "The BIA is not required to write an exegesis on every contention. What is required is that it consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." (brackets and internal quotation marks omitted)); *see also Alzainati*, 568 F.3d at 852 (holding that "the length of a decision is [not] determinative of its adequacy, *much less of constitutional adequacy*" (emphasis added)).

Next, Petitioner maintains that "had the [BIA] actually considered [his] new evidence, it would have determined that the outcome of this case is likely to change." Pet'r Opening Br. at 26. But this is nothing more than a challenge to the BIA's balancing of the equities, which we have no jurisdiction to review. *See Galeano-Romero*, 968 F.3d at 1184-85 (holding that a noncitizen does not raise a colorable legal question "by arguing that the evidence was incorrectly weighed, insufficiently considered, or supports a different outcome" (internal quotation marks omitted)).

Last, Petitioner maintains that it is unclear whether the BIA denied his motion to reopen as a matter of discretion because he failed to provide materially and previously unavailable evidence or because he failed to demonstrate his

prima facie eligibility for cancellation of removal. This argument lacks merit because "in cases in which the ultimate grant of relief is discretionary, . . . the BIA may leap ahead . . . over the two threshold concerns . . . and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief." *Abudu*, 485 U.S. at 105.

CONCLUSION

The petition for review is dismissed for lack of jurisdiction.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge