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United States Court of Appeals
Tenth Circuit

October 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARIA SOLEDAD MARTINEZ-TAPIA,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 20-9610
(Petition for Review)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **KELLY** and **HOLMES**, Circuit Judges.

After an Immigration Judge (IJ) denied Maria Soledad Martinez-Tapia's application for cancellation of removal, she filed a motion to reopen her removal proceedings to pursue a different form of relief. The IJ denied the motion to reopen. While her appeal of that order was pending before the Board of Immigration Appeals (BIA), she filed a motion to remand to the IJ to revisit the issue of her eligibility for cancellation based on our decision in *Martinez-Perez v. Barr*, 947 F.3d 1273 (10th Cir.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

2020). The BIA denied her motion to remand and affirmed the IJ's denial of reopening. Ms. Martinez-Tapia petitions for review of the denial of her motion to remand. Exercising jurisdiction under 8 U.S.C. § 1252, we deny the petition.

I. Background

Petitioner is a native and citizen of Mexico who entered the United States illegally in 1993. In 2011, the Department of Homeland Security initiated removal proceedings against her. In May 2013, Petitioner conceded removability and applied for cancellation of removal under 8 U.S.C. § 1229b(b)(1). As pertinent here, the Attorney General may grant cancellation of removal to a noncitizen who "establishes that removal would result in exceptional and extremely unusual hardship to [her] . . . child, who is a citizen of the United States." *Id.* § 1229b(b)(1)(D). A "child" is "an unmarried person under twenty-one years of age." Petitioner's qualifying relative was her then-sixteen-year-old daughter.

The merits hearing was initially scheduled for November 2014, but Petitioner moved for a continuance to accommodate a change in counsel. After the Immigration Court re-set the hearing several more times for unknown reasons, the hearing was held in February 2018—about one month before the daughter's twenty-first birthday.

In June 2019, the IJ denied Petitioner's application. The IJ explained that she "would have granted" it after the hearing because Petitioner's daughter was a qualifying relative at that time and Petitioner met the other statutory requirements for cancellation. R. at 210; *see also* R. at 213 (indicating that the IJ "intended to grant" Petitioner's application). But the IJ was unable to issue a decision granting relief when the

evidentiary record closed because the annual cap on cancellation grants had already been reached,[1] and by the time a decision could be issued, Petitioner's daughter had "aged out." R. at 214. The IJ concluded she "must deny" the application because Petitioner's lack of a qualifying child at the time of the decision meant she was ineligible for relief. *Id.* In so concluding, the IJ relied on *In re Isidro-Zamorano*, 25 I. & N. Dec. 829 (B.I.A. 2012), in which the BIA held that a cancellation applicant who had a qualifying child when the application was filed but whose child had aged out before it was adjudicated lacked a qualifying relative and was therefore ineligible for cancellation. *Id.* at 831-32; *see also* 8 U.S.C. § 1229b(e)(1) ("The awarding of [cancellation of removal] shall be determined according to the date the order granting such relief becomes final."). The IJ found that, unlike in *Isidro-Zamorano,* where there had "been no undue or unfair delay in the course of [the] proceedings," 25 I. & N. Dec. at 832, the delays that pushed the adjudication of Petitioner's application past her daughter's twenty-first birthday were "out of [her] control," R. at 210 n.1. Despite finding Petitioner's case "clearly distinct from" *Isidro-Zamorano*, however, the IJ denied relief due to the lack of any "clear support under the law to find" Petitioner eligible for cancellation when her application was adjudicated. R. at 210 n.1. We reject any

[1] *See* 8 U.S.C. § 1229b(e)(1) (providing that "the Attorney General may not cancel the removal and adjust the status . . . of a total of more than 4,000 aliens in any fiscal year . . . regardless of when an alien applied for such cancellation and adjustment"); 8 C.F.R. § 1240.21(c)(1) (providing that the Immigration Court and BIA may grant applications for cancellation of removal "that meet the statutory requirements for such relief and warrant a favorable exercise of discretion until the annual numerical limitation has been reached in that fiscal year").

suggestion that the IJ's decision constitutes a "reserved grant" of her cancellation application when space became available. Pet'r's Opening Br. at 2, 13.

Petitioner did not appeal the IJ's denial of her cancellation application to the BIA or file a petition for review of that order in this court. Instead, she filed a motion to reopen with the IJ, seeking to apply for adjustment of status under 8 U.S.C. § 1255(a). The IJ denied the motion to reopen, concluding Petitioner was not eligible for adjustment of status.[2] She appealed that order to the BIA.

While the appeal was pending, we decided *Martinez-Perez v. Barr*, 947 F.3d 1273 (10th Cir. 2020). The petitioner in *Martinez-Perez* had a qualifying daughter when he filed his cancellation application, but she aged out before the hearing some six years later. The IJ denied his application and the BIA dismissed his appeal, concluding it lacked jurisdiction to grant relief because it was bound by *Isidro-Zamorano* to deny cancellation when the applicant did not have a qualifying relative at the time of the hearing. *See id.* at 1281, 1284. The BIA did not address the petitioner's argument that his right to procedural due process was violated because improper administrative delay deprived him of a qualifying relative. In reversing the BIA's jurisdictional determination, we held that *Isidro-Zamorano* "left open the possibility that, given a different set of facts, the BIA may interpret § 1229b(b)(1)(D) . . . in a way that would not penalize [the applicant] for the

[2] In a supplemental brief, Petitioner also argued she was eligible for cancellation because her daughter was a qualifying child at the time of the hearing. The IJ did not address the arguments in the supplemental brief.

Immigration Court's delay." *Id.* at 1281-82. We thus concluded the BIA erred in failing to exercise its interpretive authority, and we remanded for consideration of the petitioner's due process argument. *Id.* at 1282.

Soon after we decided *Martinez-Perez*, Petitioner filed what she captioned as a motion to remand in her reopening appeal, asking the BIA to remand her case to the IJ to revisit the issue of her eligibility for cancellation of removal in light of *Martinez-Perez*. The BIA denied the motion to remand. It found that the administrative delays in her case were not improper and that she contributed to the delay in the proceedings. It thus held that Petitioner failed to establish that her lack of a qualifying relative when her application was adjudicated was the result of undue administrative delay. In the same order, the BIA affirmed the IJ's denial of Petitioner's motion to reopen and dismissed the appeal. Petitioner is not seeking review of the portion of the order denying the motion to reopen, but rather review of the portion of the order denying her motion to remand. Pet'r's Opening Br. at 19.

II. Analysis

A. We Lack Jurisdiction to Review the Previous Order Denying Petitioner's Application for Cancellation of Removal

In her briefing, Petitioner indicates that her "request for a remand is the issue being litigated in this petition for review." Pet'r's Opening Br. at 3. Yet the relief she requests effectively asks us to reverse the IJ's earlier decision—she asks us to (1) hold that she met the cancellation requirements at the time of the hearing; (2) hold that her daughter aging out after the hearing but before the IJ could issue a decision

granting relief "did not render her statutorily ineligible for cancellation," and (3) "remand her proceedings to the agency for the issuance of a grant of cancellation of removal." *Id.* at 53-54. But Petitioner did not appeal the IJ's cancellation decision to the BIA, let alone file a petition for review in this court. Pet'r's Opening Br. at 2. Accordingly, we do not have jurisdiction to review the IJ's decision that Petitioner was ineligible for cancellation because she did not have a qualifying relative when her application was adjudicated.[3]

B. The Motion for Remand Was a Motion to Reconsider the Previous Ineligibility Determination

Remand is available in two contexts before the BIA—when a noncitizen seeks reconsideration of a decision or when she seeks reopening of the proceedings. Although these motions are often treated interchangeably, a request for reconsideration is based on "errors of fact or law in the prior [] decision," 8 C.F.R. § 1003.2(b)(1), whereas a request to reopen proceedings seeks an opportunity to submit an application for relief based on new facts, *id.* § 1003.2(c)(1). Reopening is unavailable unless the "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.*

[3] Because we do not have jurisdiction to review the IJ's denial of Petitioner's application for cancellation, we do not consider her arguments that the IJ should have followed the agency's procedure for reserving grants subject to the cap, then releasing decisions when space becomes available. *See* Pet'r's Opening Br. at 12-13, 31-32, 41-43, 48-49; Reply Br. at 3-4.

Here, Petitioner requested remand not so she could pursue a new factual ground for relief under the cancellation statute or to introduce previously unavailable, material evidence. Rather, she sought remand so the IJ could reevaluate the prior decision denying cancellation based on what Petitioner characterized as an intervening change in the law. Thus, her motion to remand was really a motion seeking reconsideration by the IJ of the previous ineligibility determination.[4] *See Sosa-Valenzuela v. Holder*, 692 F.3d 1103, 1110 (10th Cir. 2012).

C. The BIA Did Not Abuse Its Discretion in Denying the Motion to Reconsider

Generally, we have jurisdiction to review the BIA's denial of a motion to reconsider, and we apply an abuse of discretion standard in doing so. *Rodas-Orellana*, 780 F.3d at 990, 993 n.11. But when we lack jurisdiction to review the underlying order, we are precluded from reviewing an order denying a motion to reconsider to the extent that it directly attacked the previous order. *See Infanzon v. Ashcroft*, 386 F.3d 1359, 1361 (10th Cir. 2004). We have held, however, that this rule does not strip us of jurisdiction to review the denial of a motion for reconsideration where the only reason for lack of jurisdiction over the underlying order is the failure to file a timely petition for review, not a statutory bar. *See Alzainati v. Holder*, 568 F.3d 844, 848 n.4 (10th Cir. 2009).

[4] We note that, construed as a motion for reconsideration of the June 21, 2019 removal order, Petitioner's February 10, 2020 motion was untimely. *See* 8 U.S.C. § 1229a(c)(6)(B) (providing that a motion to reconsider must be filed within 30 days of the final order of removal); 8 C.F.R. § 1003.2(b)(2) (same). But the BIA did not deny the motion based on untimeliness.

Here, Petitioner's motion to reconsider challenged the underlying ineligibility determination directly based on arguments she could have raised before the IJ denied her application for cancellation—she could have argued at the hearing and in her application that the IJ had the discretion under *Isidro-Zamorano* to fix her daughter's age at a date before the adjudication of her application. Under *Infanzon*, we are precluded from reviewing those arguments because they directly attack the IJ's decision. But Petitioner's motion to reconsider also cited *Martinez-Perez*, which was decided after the IJ issued the removal order and clarified that under § 1229b(b)(1)(D) and *Isidro-Zamorano*, the agency had the discretion to do just that. We are aware of no authority precluding our review of the BIA's denial of a motion to reconsider under these circumstances, but our review is limited to the BIA's decision that *Martinez-Perez* does not warrant reconsideration of her eligibility for cancellation.

"The BIA abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Rodas-Orellana*, 780 F.3d at 990 (internal quotation marks omitted). It also abuses its discretion when it makes a legal error. *Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017).

We find no abuse of discretion here. The BIA articulated the correct legal standard. It recognized that *Isidro-Zamorano* remained "controlling precedent" and acknowledged that, based on our holding in *Martinez-Perez*, it had jurisdiction when applying *Isidro-Zamorano* to "interpret . . . § 1229b(b)(1)(D) in a way that would not penalize [Petitioner] for" undue administrative delays in her proceeding. R. at 17.

Contrary to Petitioner's contention, the BIA did not apply a categorical rule that any delay attributable to the cap and Immigration Court backlog is insufficient to excuse a cancellation applicant's lack of a qualifying relative when her application is adjudicated. Rather, the BIA considered the reasons for delay in Petitioner's case and determined that her circumstances did not warrant fixing her daughter's age at a time prior to the IJ's adjudication of her application. True, the BIA found the significant delays due to the cap and agency backlog were not improper, but it did not hold that such delays are never improper. Instead, it concluded that because Petitioner contributed to the delay, she failed to show that her lack of a qualifying relative when her application as adjudicated was the result of undue administrative delay.

Our holding in *Martinez-Perez* that the agency *may* fix the age of a cancellation applicant's child at a time before the application is adjudicated does not mean that the agency is *required* to do so. And Petitioner's disagreement with the result of the BIA's application of *Martinez-Perez* to her situation does not establish that the BIA abused its discretion. We recognize that congestion in the Immigration Court and the statutory cap on grants of removal makes this a frustrating endeavor. But the BIA applied the right standard, did not depart from established policies, and gave rational reasons for its decision. We thus find no abuse of discretion in its denial of Petitioner's motion to reconsider. *See Rodas-Orellana*, 780 F.3d at 990.

III. Conclusion

We deny the petition for review.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge