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United States Court of Appeals
Tenth Circuit

October 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSE LEON-NICOLAS,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 20-9628
(Petition for Review)

ORDER AND JUDGMENT*

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

Petitioner Jose Leon-Nicolas is a native and citizen of Guatemala who entered the United States without inspection. An immigration judge (IJ) found him removable and that he had abandoned his applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). The IJ also denied a motion to reopen, and the Board of Immigration Appeals (BIA) dismissed his appeal from that order. Mr. Leon-Nicolas now petitions for review of the BIA's

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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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

decision regarding his motion to reopen. We have jurisdiction under 8 U.S.C. § 1252(a)(1), and we deny the petition.

A. BACKGROUND & PROCEDURAL HISTORY

Mr. Leon-Nicolas entered the United States without inspection sometime in 2013. The government commenced removal proceedings against him in November 2018. Mr. Leon-Nicolas then applied for asylum, withholding of removal, and CAT protection. At a March 2019 master calendar hearing, the IJ told Mr. Leon-Nicolas that he needed to complete biometrics and that failure to do so could result in abandonment of his application. R. at 96; see also id. at 160 (explaining the biometrics process).

Just days before his asylum hearing set for February 4, 2020, Mr. Leon-Nicolas filed an emergency motion to continue, stating that his "[c]ounsel's staff failed to comply with [his] biometrics appointment request." R. at 156. The IJ denied a continuance and convened the hearing as scheduled. Mr. Leon-Nicolas acknowledged that he had not completed the biometrics requirement, and his attorney took responsibility for this lapse. The IJ deemed Mr. Leon-Nicolas to have abandoned his applications for relief. See 8 C.F.R. § 1003.47(d).

Mr. Leon-Nicolas soon hired a new attorney and filed a motion to reopen, claiming ineffective assistance of former counsel. See R. at 120–26. The motion included a letter from former counsel to Mr. Leon-Nicolas that, although not admitting misconduct, stated she would refund her fee within two weeks. See R. at 133–36.

The IJ evaluated the motion to reopen under Matter of Lozada, which held that ineffective assistance of counsel might justify reopening "if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case," and the movant shows "he was prejudiced by his representative's performance." 19 I. & N. Dec. 637, 638 (B.I.A. 1988).[1] In order for an ineffective assistance of counsel claim to be considered on its merits, Lozada provides that a movant must submit: (1) an affidavit from the movant "attesting to the relevant facts," such as "a statement that sets forth in detail" what the former attorney agreed but failed to do; (2) the former attorney's response to the movant's accusations, if available; and (3) a statement "whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." Id. at 639. The third requirement demands the movant "adequately" or "reasonably" explain any decision not to file a bar complaint. Matter of Rivera-Claros, 21 I. & N. Dec. 599, 605 (B.I.A. 1996).

In Mr. Leon-Nicolas's case, the IJ found the first and second Lozada requirements satisfied. As for the third requirement, Mr. Leon-Nicolas admitted he had not filed a bar complaint against former counsel because "the ordinary purposes for a complaint were already fulfilled" by her admission of error on the record. R. at

[1] Lozada was vacated by Attorney General Michael Mukasey in 2009, see Matter of Compean, 24 I. & N. Dec. 710 (A.G. 2009). But it was then essentially reinstated by Attorney General Eric Holder, see Matter of Compean, 25 I. & N. Dec. 1 (A.G. 2009). Therefore, it is the appropriate standard for assessing motions to reopen for ineffective assistance of counsel. Id. at 3.

100. The IJ deemed this explanation inadequate and denied the motion to reopen on that basis. R. at 100. The IJ also found that Mr. Leon-Nicolas had failed to establish prejudice from counsel's alleged misconduct because he had been told and understood completing biometrics was his responsibility. R. at 99.

Mr. Leon-Nicolas appealed to the BIA. In a single-member summary disposition, the BIA adopted and affirmed the IJ's decision. R. at 3. The BIA also added a third reason why denial of the motion to reopen was proper: Mr. Leon-Nicolas did not demonstrate prima facie eligibility for asylum, withholding of removal, or CAT protection. R. at 3–4. Mr. Leon-Nicolas timely filed a petition for review with this court.

B. DISCUSSION

"We review BIA decisions on motions to reopen . . . for an abuse of discretion." Berdiev v. Garland, — F.4th — , Nos. 20-9542, 20-9602, 2021 WL 4269558, at *3 (10th Cir. Sept. 21, 2021). We will find an abuse of discretion when the BIA "provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." Id. (quoting Qiu v. Sessions, 870 F.3d 1200, 1202 (10th Cir. 2017)). A single-member BIA order "constitutes the final order of removal" we review, but we may consult the IJ's decision where, as here, "the BIA incorporates by reference the IJ's rationale or repeats a condensed version of its reasons while also relying on the IJ's more complete discussion." Uanreroro v. Gonzales, 443 F.3d 1197, 1204 (10th Cir. 2006).

In most circumstances, including those present here, an alien may file a motion to reopen removal proceedings. 8 U.S.C. § 1229a(c)(7)(A). "A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material." 8 C.F.R. § 1003.23(b)(3). Such a motion "will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." Id.

Mr. Leon-Nicolas moves to reopen his case on the basis of ineffective assistance of counsel. The BIA has created three requirements necessary for a successful motion to reopen on this basis. Lozada, 19 I. & N. Dec. at 639. These threshold requirements precede the regulation-defined analysis and burdens described above. See id. Because the IJ found that Mr. Leon-Nicolas met the first two requirements, the question here is whether the agency abused its discretion in denying his motion to reopen for lack of compliance with Lozada's third, bar-complaint requirement.

Mr. Leon-Nicolas argues that this court should adopt a substantial-compliance standard that could allow him to succeed without fulfilling all three of the Lozada requirements. Aplt. Br. at 8–16. In his motion to reopen, Mr. Leon-Nicolas said he had "chosen not to file a bar complaint against former counsel" because former counsel admitted her mistake (in her filings, in open court, and directly to Mr. Leon-Nicolas) and she promised to refund her entire fee. R. at 125–26. This, Mr. Leon-

Nicolas claimed, "clearly meets the concerns of the [BIA] regarding baseless allegations and notice to the attorney of the standards of representation in immigration court." Id. at 126.

Mr. Leon-Nicolas's current counsel also provided an affidavit in support of the motion to reopen. He opined that "[s]hould [Mr. Leon-Nicolas] file a bar complaint, the [Utah] Office of Professional Conduct would not ask [former counsel] to do anything more than she has already done." R. at 139. He further explained that Mr. Leon-Nicolas's decision not to file a complaint was based on his advice, informed by reputational concerns and his belief that former counsel deserved a break under the circumstances. R. at 139–40.

We look, as we must, to the record and the agency's rationale for its decisions. Berdiev, 2021 WL 4269558, at *3. In doing so, we find the BIA's decision is not an abuse of discretion. The IJ found Mr. Leon-Nicolas's explanation inadequate and rejected his argument that a bar-complaint's primary purposes were already fulfilled. R. at 100. The IJ emphasized that "preventing collusion" and "policing immigration courts" were important reasons for the bar-complaint requirement. The IJ further noted that "in unpublished decisions, the Tenth Circuit has found that the purposes of a complaint laid out by the BIA, are . . . 'not served by the counsel's own view of the gravity of error.'" Id. (quoting Yero v. Gonzales, 236 F. App'x 451, 454 (10th Cir. 2007)). Affirming, adopting, and citing to this reasoning by the IJ, the BIA explained that "speculation by [Mr. Leon-Nicolas's current] counsel about the usefulness of filing a bar complaint is not a substitute for filing a bar complaint." R. at 3.

The BIA also noted that "the explanation and assertions of counsel regarding the usefulness of filing a bar complaint are not entitled to any evidentiary weight." R. at 3. Mr. Leon-Nicolas takes exception to this statement and claims that these parts of his attorney's affidavit "could have just as easily been part of the body of the motion to reopen in that they [comprised] simply legal arguments." Aplt. Br. at 21. Not only did the BIA consider counsel's assertions to the extent they had value, see R. at 3, but such explanations do not fulfill Lozada's bar-complaint requirement.

The agency provided explicit, rational reasons for finding that Mr. Leon-Nicolas did not provide an adequate explanation for failing to file a bar complaint. Specifically, the IJ and BIA concluded that, if accepted, Mr. Leon-Nicolas's and his counsel's assertions about the usefulness of filing a bar complaint would undermine Lozada's purposes of policing the bar and preventing collusion between aliens and attorneys. R. at 3, 100. This is a rational explanation consistent with the agency's prior statements on that topic, see, e.g., Rivera-Claros, 21 I. & N. Dec. at 603–07. Accordingly, we see no abuse of discretion. See Berdiev, 2021 WL 4269558, at *3.

This rationale is also consistent with BIA's subsequent, on-point decision in Matter of Melgar. See 28 I. & N. Dec. 169 (BIA 2020). In Melgar, the BIA clarified, "Lozada did not hold that any such explanation, however insufficient, would satisfy [the bar-complaint] requirement." Id. at 170. The petitioner in that case explained that he had not filed a bar complaint because his lawyer had taken responsibility for and admitted a clear error. Id. The BIA explained that the bar-complaint requirement could not be "so easily discharged, otherwise [its] purpose . . .

is rendered inconsequential." Id.; see also Lozada, 19 I. & N. Dec. at 639 (noting that this is a "high standard"). Therefore, the BIA denied petitioner's motion to reopen. Melgar dictates that when an attorney accepts responsibility for errors on behalf of a client, a bar complaint is still required to ensure effective policing of bar misconduct and prevent collusion between aliens and attorneys. 28 I. & N. Dec. at 170–71.

Finally, Mr. Leon-Nicolas briefly argues that "there is a glaring discrepancy" between immigration respondents and criminal defendants because, in the criminal context, "there is no demand that litigation against former counsel be commenced before [courts will] review[] a[n ineffective-assistance] claim." Aplt. Br. at 28–29. Mr. Leon-Nicolas claims that this violates immigration respondents' due process rights. Beyond merely noting the difference between the immigration and criminal contexts, Mr. Leon-Nicolas neither develops this argument nor grounds it in any case or law. He therefore waives the argument. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998).

The BIA did not abuse its discretion in denying Mr. Leon-Nicolas's motion to reopen based on his failure to fulfill Lozada's bar-complaint requirement. We therefore need not reach the agency's alternative conclusions concerning prejudice and prima facie evidence of merited relief. See Griffin v. Davies, 929 F.2d 550, 554 (10th Cir. 1991).

Accordingly, we DENY the petition for review.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge