FILED
United States Court of Appeals
Tenth Circuit

September 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALFREDO BAHENA-BRITO,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 20-9631
(Petition for Review)

ORDER AND JUDGMENT*

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

Petitioner Alfredo Bahena-Brito, a native and citizen of Mexico, unsuccessfully sought cancellation of removal. The immigration judge (IJ) concluded that he failed to show his removal would create an "exceptional and extremely unusual hardship" for his United States-citizen daughter, as required by

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

8 U.S.C. § 1229b(b)(1)(D), and the Board of Immigration Appeals (Board) affirmed. We lack jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(i) to consider his challenge to the Board's discretionary hardship decision and dismiss the petition.

I

Petitioner has unlawfully resided in the United States since March 2000. He came to the attention of immigration authorities in April 2010, and was placed in removal proceedings in Chicago, Illinois.

In 2011, Petitioner sought cancellation of removal based on the alleged hardship his removal would cause to his then ten-year-old daughter, Maria. In 2014, Petitioner appeared for the merits hearing where he informed the IJ that he had recently moved to Utah but still wished to go forward with the hearing in Chicago. When the IJ cautioned him that he would likely be denied relief based on the scant evidence that accompanied his application, Petitioner moved to transfer the proceedings to Salt Lake City, Utah.

In 2017, shortly before the rescheduled merits hearing, Petitioner supplemented his application with additional documentary evidence. Included in the materials were two declarations from Maria. The first declaration explained the close relationship she had with her father and how he encouraged her in school. In the second declaration, Maria stated that she was an eleventh-grade honors student who planned to attend law school after she graduated from college. She also said that it would be difficult for her to attend high school in Mexico because of her limited Spanish-language skills.

Petitioner further supplemented his application with copies of Maria's scholastic awards for the 2015-16 academic year, proof that she had completed courses in apparel design and manufacturing, and a 2016 letter from Weber State University indicating that she had been accepted into a program where she could earn college credits during the Fall 2016 semester. Additionally, he included: (1) statements showing Maria was covered by his health insurance; (2) letters attesting to his character; (3) documents concerning his employment history; (4) evidence regarding his tax filings; and (5) information about country conditions in Mexico.

Two witnesses testified at the hearing—Petitioner and Maria. Petitioner testified that he is from Guerrero, Mexico. His wife, who came to the United States shortly after he arrived, does not have status to remain in this country. Petitioner did not know Maria's grade point average or if she was doing well in school, however, he was aware that she participated in her high school debate team.

Petitioner described Maria's Spanish-speaking ability as "around 30, 40 percent," and he said that she was able to read and write "a little" in Spanish. But Petitioner did not think Maria's Spanish was fluent enough for her to attend school in Mexico. Admin. R. at 113-14. In addition to her lack of Spanish-language skills, Petitioner testified that there were no high schools in Guerrero—only elementary schools. He seemed to acknowledge that there is at least one university in Guerrero, although it is not in the town where he planned to live if he returned to Mexico.

Petitioner further testified that he earns approximately $55,000 per year as a shift manager at a paper printing company. He did some research on the internet and talked to friends and determined that he could not obtain comparable employment in Mexico. The family's monthly expenses, including the mortgage on the home they bought two months before the hearing, are approximately $3,400.00, and if he returned to Mexico, his wife, who does not work, could not meet these obligations.

Maria testified that she maintained a 3.75 grade point average for which she earned a President's Education Award. She participated in debate and was enrolled in several honors and advanced placement courses and expected to earn six college credits by the end of her junior year. Her goal was to attend an Ivy League college or university and then pursue a law degree. Maria also testified that she intended to apply for scholarships once the application period was open. She reaffirmed her belief that she could not attend school in Mexico because she speaks only basic or conversational Spanish and her ability to read and write in Spanish is very limited. Maria said she would return to Mexico with her parents even if that meant forgoing college.

II

The IJ denied Petitioner's application. Although he found Petitioner satisfied the first three statutory requirements for cancellation of removal, he failed to establish the fourth requirement—that his removal would result in exceptional and extremely unusual hardship to Maria.

The IJ acknowledged that "[p]rospects for higher education in Mexico are bleak" and "[t]here is no doubt that Maria's educational horizons would narrow upon her departure to Mexico." *Id.* at 65. "However, this is not exceptional and extremely unusual hardship. The loss of some educational opportunities is an unfortunate result of removal." *Id.* He also rejected Petitioner's argument that Maria, who he acknowledged is a "gifted student," *id.* at 64, should be considered in the same manner as a student with special needs because "current case law simply does not support that argument," *id.* at 65.

As to economic hardship, the IJ found that although it does not appear that Petitioner "could support his family from Mexico in the manner [to] which they are accustomed . . . the loss of economic opportunity and earning power is [also] an unfortunate," but not exceptional or extremely unusual hardship. *Id.* "The [Petitioner] has enjoyed many years of well[-]compensated work in the United States. He has purchased his own home. The Court has considered these impacts and finds the[y] are not exceptional or extremely unusual." *Id.*

After "[c]onsidering these factors in the aggregate," the IJ determined "the hardship to [Maria] does not rise to the level required by law." *Id.* "Maria has no medical conditions. She is in good health and is one year short of graduat[ing] [from high school]. Her father's removal will certainly be a hardship on her, especially if she accompanies him to Mexico. However, it does not rise to the level of exceptional and extremely unusual." *Id.*

The Board affirmed. It concluded that "general economic detriment, which is likely to occur in cases involving removal to a comparatively poor country, such as Mexico, is not exceptional and extremely unusual hardship." *Id.* at 4. It also rejected Petitioner's argument that "the [educational] hardship [to Maria] is similar to someone who is mentally or educationally challenged." *Id.* "[F]ewer educational opportunities, while unfortunate, is not an uncommon result of removal." *Id.* Although the Board was "sympathetic" to Maria's situation, it determined that "the record does not contain sufficient testimony or evidence to establish hardship . . . beyond that which would normally accompany removal from the United States." *Id.*

Last, the Board found no merit in Petitioner's argument that the IJ failed to consider the evidence in the aggregate, noting the IJ "specifically stated that he was considering the hardship factors in the aggregate and addressed the educational and financial impact on [Maria] in the event she accompanied her father to Mexico." *Id.*

III

Cancellation of removal is a form of discretionary relief that requires a noncitizen to show, among other things, that his "removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child, who is a citizen of the United States." § 1229b(b)(1)(D). However, we lack "jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 1229b." § 1252(a)(2)(B)(i).

"We have construed the term 'judgment' . . . as referring to the discretionary aspects of a decision concerning cancellation of removal," which "includes any

underlying factual determinations, as well as the determination of whether the petitioner's removal . . . would result in exceptional and extremely unusual hardship to a qualifying relative." *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009) (citation and internal quotation marks omitted); *see also Alzainati v. Holder*, 568 F.3d 844, 850 (10th Cir. 2009) ("If the [Board] decides, in an exercise of agency discretion, [that] an alien has not produced sufficient evidence to warrant a finding of exceptional and extremely unusual hardship, we cannot review that decision.").

We do, however, have jurisdiction to review "constitutional claims" and "questions of law." 8 U.S.C. § 1252(a)(2)(D). But "[a]n alien does not present a colorable constitutional claim capable of avoiding the jurisdictional bar by arguing that the evidence was incorrectly weighed, insufficiently considered, or supports a different outcome." *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th Cir. 2007). Nor does an alien's disagreement with the agency's discretionary weighing of the evidence raise a legal question. Rather, "[a] petitioner can raise a 'question of law' . . . in two ways: (1) by advancing a statutory-construction argument, or (2) by disputing 'the application of a legal standard to undisputed or established facts.'" *Galeano-Romero v. Barr*, 968 F.3d 1176, 1182 (10th Cir. 2020) (brackets, citation, and internal quotation marks omitted).

To avoid the jurisdictional bar, Petitioner attempts to raise questions of law and constitutional claims, and failing all else, he urges us to overrule *Galeano-Romero* and adopt the Sixth Circuit's reasoning in *Singh v. Rosen*, 984 F.3d 1142,

1154 (6th Cir. 2021), which held that an alien's challenge to a hardship determination involves a mixed question of law and fact and is therefore reviewable under § 1252(a)(2)(D). These arguments are unavailing.

Petitioner does not raise any questions of law. For example, he does not challenge the Board's reading of § 1252(a)(2)(D); instead, he argues that the Board misapplied its controlling precedent, which is not a question of law. *Arambula-Medina*, 572 F.3d 828-29 (concluding the alien's claim that the agency failed to correctly apply its controlling precedent was merely a disagreement with the weighing of the hardship evidence).

Moreover, the agency unquestionably applied the correct legal standard—whether Petitioner's removal would cause exceptional and extremely unusual hardship to Maria. And his argument that "the legal standard applied to an exceptional and gifted child should not be the same as [the legal standard] applied to [an] average student/child," Pet'r Br. at 15, is not supported by any legal authority.

We are also unpersuaded by Petitioner's contention that the Board required him to show that Maria will experience a total loss of educational opportunities to satisfy the exceptional and extremely unusual hardship standard. Neither the IJ nor the Board imposed such a requirement. Nor did the Board engage in impermissible fact-finding when it determined that Maria "speaks Spanish." Admin. R. at 3. The Board's citation to the IJ's decision and hearing testimony demonstrates that it was aware that Maria was not a fluent Spanish speaker.

Petitioner also fails to raise a constitutional claim. Here, he argues that the Board changed the facts when it determined that Maria would experience the loss of some educational opportunities, when in fact, she would experience the *complete* loss of such opportunities. We acknowledge that "an allegation of wholesale failure to consider evidence implicates due process." *Alzainati*, 568 F.3d at 851 (internal quotation marks omitted). But no such failure occurred here. The IJ recognized that Maria's educational opportunities were "bleak," Admin. R. at 65, and denied the application only after "consider[ing] all admitted exhibits and evidence," *id.* at 61.

Last, "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Xue v. Lynch*, 846 F.3d 1099, 1104 (10th Cir. 2017) (internal quotation marks omitted).

IV

The petition for review is dismissed for lack of jurisdiction.

Entered for the Court

Nancy L. Moritz
Circuit Judge