FILED
United States Court of Appeals
Tenth Circuit

October 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARTHA JIMENEZ-CASTRO,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9571
(Petition for Review)

ORDER AND JUDGMENT*

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

Petitioner Martha Jimenez-Castro petitions for review of an order of the Board of Immigration Appeals (BIA), concluding that her prior conviction for attempted public assistance fraud under Utah Code Ann. § 76-8-1203 constitutes an aggravated felony under the Immigration and Nationality Act (INA), making her ineligible for cancellation of removal. Exercising jurisdiction under 8 U.S.C. § 1252, we deny her petition.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I. Background

Ms. Jimenez is a native and citizen of Mexico. On December 16, 2008, having previously entered the United States without authorization, she pled no contest and was convicted pursuant to a plea agreement of third degree felony attempted public assistance fraud, in violation of Utah Code Ann. § 76-8-1203. In a statement supporting her plea agreement, she admitted obtaining $12,144.80 in benefits. She was given a suspended sentence for an indeterminate prison term, placed on probation for 36 months, and ordered to pay $12,144.80 in restitution.

In February 2016, the Department of Homeland Security commenced removal proceedings against Ms. Jimenez. She conceded service of the notice to appear before an Immigration Judge (IJ). She then filed a motion in the Utah court, on March 30, 2016, representing that she had completed payment of restitution the previous day, and asking the court to reduce the degree of her 2008 conviction pursuant to Utah Code Ann. § 76-3-402(2) & (3) (2016). The court granted her motion the same day, reducing her conviction by two degrees, to a misdemeanor.

In the removal proceedings, Ms. Jimenez conceded removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b)(1)(D), on grounds that her removal would cause "exceptional and extremely unusual hardship" to her U.S. citizen children. The IJ concluded she was ineligible for cancellation because her 2008 conviction meets the definition of being "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" making it an "aggravated felony" under the INA, 8 U.S.C. § 1101(a)(43)(M)(i). Ms. Jimenez

appealed to the BIA, which agreed that her 2008 conviction is an aggravated felony and makes her ineligible for cancellation of removal. This appeal followed.

II. Discussion

A. Legal Standards

Because a single member of the BIA issued a brief order affirming the IJ's decision, we review the BIA's decision as the final order under review, but "may consult the IJ's opinion to the extent that the BIA relied upon or incorporated it." *Hamilton v. Holder*, 584 F.3d 1284, 1286 (10th Cir. 2009) (internal quotation marks omitted). "We do not have jurisdiction to review the BIA's discretionary determinations under § 1229b regarding applications for cancellation of removal . . . but we do have jurisdiction to review questions of law arising in removal proceedings." *Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1161 (10th Cir. 2021). The BIA's findings of fact are reviewed under a substantial-evidence standard and are "conclusive unless the record demonstrates that any reasonable adjudicator would be compelled to conclude to the contrary." *Takwi v. Garland*, 22 F.4th 1180, 1184 (10th Cir. 2022) (internal quotation marks omitted). "We review de novo the BIA's conclusions on questions of law, including whether a particular state conviction results in ineligibility for discretionary relief." *Zarate-Alvarez*, 994 F.3d at 1161.

B. Ms. Jimenez's Prior Conviction Constitutes an "Aggravated Felony"

Ms. Jimenez argues the BIA and the IJ wrongly concluded that her 2008 Utah conviction makes her ineligible for cancellation of removal. We are unpersuaded.

Ms. Jimenez "bears the burden of proving [her] eligibility for cancellation of removal." *Hamilton*, 584 F.3d at 1286; 8 U.S.C. § 1229a(c)(4)(A). Among other requirements, she must show that she "has not been convicted" of certain disqualifying criminal offenses. *Pereida v. Wilkinson*, 141 S. Ct. 754, 759 (2021). As relevant here, commission of "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is defined as an "aggravated felony," 8 U.S.C. § 1101(a)(43)(M)(i), which makes an applicant ineligible for either cancellation of removal or voluntary departure, *see* 8 U.S.C. § 1229b(b)(1)(C); § 1227(a)(2)(A)(iii); § 1229c(b)(1)(C). Thus, "[t]he INA . . . prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case." *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013).

Controlling Supreme Court cases direct us to use two different methods to resolve the two separate parts of the inquiry into whether a prior offense is one which "[1] involves fraud or deceit [2] in which the loss to the victim or victims exceeds $10,000" under § 1101(a)(43)(M)(i).

First, under *Kawashima v. Holder*, 565 U.S. 478 (2012), to determine whether a prior offense "involve[s] fraud or deceit, within the meaning of [§ 1101(a)(43)(M)(i)], we employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime." *Id.* at 483. "If the elements of the offens[e] establish that [a petitioner] committed crimes involving fraud or deceit, then the first requirement of [§ 1101(a)(43)(M)(i)] is satisfied." *Id.* The definition "is not limited to offenses that

include fraud or deceit as formal elements," but "refers more broadly to offenses with elements that necessarily entail fraudulent or deceitful conduct." *Id.* at 483–84.[1]

Second, under *Nijhawan v. Holder*, 557 U.S. 29 (2009), when deciding whether the loss to the victim or victims exceeds $10,000, "the categorical approach [is] not appropriate." *Hamilton*, 584 F.3d at 1287 (applying *Nijhawan*, 557 U.S. at 36). This is because the $10,000 loss clause in § 1101(a)(43)(M)(i) "does not refer to an element of the fraud or deceit crime," but instead to "the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion." *Nijhawan*, 557 U.S. at 32. We therefore use a circumstance-specific approach. *Id.* at 36; *Hamilton*, 584 F.3d at 1287. Using that approach, it is "permissible . . . to rely upon sentencing-related material to determine the amount of the loss." *Hamilton*, 584 F.3d at 1287 (affirming the BIA's reliance on presentence investigation report to determine disputed amount of loss).

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[1] Under the categorical approach applied to § 1101(a)(43)(M)(i), "no identification of generic offense elements [is] necessary." *Shular v. United States*, 140 S. Ct. 779, 783 (2020). As explained in *Shular*, for some statutes the categorical approach "requires the court to come up with a 'generic' version of a crime—that is, the elements of the offense as commonly understood." *Id.* But other statutes, including § 1101(a)(43)(M)(i), "ask the court to determine not whether the prior conviction was for a certain offense, but whether the conviction meets some other criterion." *Id.*

Where Ms. Jimenez asks us to analyze whether Utah Code Ann. § 76-8-1203 "*has the same elements as* the federal fraud statute," Aplt. Br. at 5 (emphasis added), or to "compar[e] the elements of the [state] statute" with *the elements of the generic crime*," *id.* at 16 (emphasis added; internal quotation marks omitted), her argument invites an incorrect methodology. The relevant analysis under § 1101(a)(43)(M)(i) is whether the elements of the statute of conviction "necessarily entail fraudulent or deceitful conduct." *See Kawashima*, 565 U.S. at 484; *see also Shular*, 140 S. Ct. at 783 ("we simply as[k] whether the prior convictions before us met that measure").

Ms. Jimenez was convicted of attempted public assistance fraud under Utah Code Ann. § 76-8-1203. She does not dispute that conviction under this statute "involves fraud or deceit," under the categorical approach of *Kawashima*. *See* Aplt. Br. at 21 n.9; R. at 2. Absent such argument, we see no error of law in the BIA's conclusion that her conviction under § 76-8-1203 is an offense that "involves fraud or deceit" given that § 76-8-1203(2), (3), and (4) all involve such conduct.[2]

As to whether Ms. Jimenez's conviction resulted in "loss to the victim or victims [that] exceeds $10,000," the BIA applied the circumstance-specific approach under *Nijhawan*, and found the monetary threshold met based on the amount admitted in Ms. Jimenez's plea statement.[3] Ms. Jimenez does not argue this was factually incorrect or point to any portion of the record demonstrating an amount of loss less than $10,000. We conclude the BIA applied the correct legal standard and that its finding is supported by substantial evidence, and therefore affirm its conclusion that the $10,000 monetary threshold was satisfied.

Because Ms. Jimenez's 2008 conviction meets both requirements of § 1101(a)(43)(M)(i), it constitutes an aggravated felony. This makes her ineligible for either cancellation of removal or voluntary departure, "no matter how compelling [her] case." *See Moncrieffe*, 569 U.S. at 187; § 1229b(a)(3); § 1229c(b)(1)(C).

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[2] Each of § 76-8-1203(2), (3), and (4) (2008) make it a crime to "intentionally, knowingly, or recklessly fai[l] to disclose" either "a material fact required to be disclosed under [§ 76-8-1203(1)]" or a change in such a fact.

[3] Ms. Jimenez does not argue that reliance on her plea statement differs under the circumstance-specific approach from reliance on other "sentencing-related material," including the presentence report in *Hamilton*. *See* 584 F.3d at 1287–1288.

Ms. Jimenez's arguments to the contrary are unpersuasive. She argues that because *third degree* public assistance fraud corresponds to obtaining benefits with a value "less than $5,000" under Utah Code Ann. § 76-8-1206(1)(b), her conviction does not meet the $10,000 threshold of § 1101(a)(43)(M)(i), and that the IJ and the BIA committed error by looking beyond the Utah statutes to determine the amount of loss based on the record of her own conviction. Relatedly, she argues the BIA and IJ erred by failing to address whether § 76-8-1206—which sets degrees of conviction based on the value of benefits obtained—is divisible under the categorical approach. These arguments would incorrectly apply a categorical approach to the amount of loss, rather than looking at "the specific circumstances surrounding [her] commission of [the] crime." *Nijhawan*, 557 U.S. at 40. As in *Hamilton*, "[t]he holding in *Nijhawan* forecloses [Ms. Jimenez's] argument[s] in favor of the categorical or modified categorical approach." *Hamilton*, 584 F.3d at 1287.

C. We Do Not Resolve Ms. Jimenez's Unexhausted Argument Regarding Reduction of Her Conviction

Ms. Jimenez also argues the Utah court's reduction of her 2008 conviction to a misdemeanor in 2016 means it is not an aggravated felony. But as she acknowledges, she did not exhaust this argument by raising it with the BIA before presenting it in this appeal, and we generally will not consider issues not presented to the BIA. *See Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) ("It is a fundamental principle of administrative law that an agency must have the opportunity to rule on a challenger's arguments before the challenger may bring those arguments

to court."), *abrogated on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411, 413 (2023). We therefore must first decide whether it is appropriate to take up and resolve her unexhausted argument.

1. Exhaustion Under § 1252(d)(1) and *Santos-Zacaria*

Under the INA, "[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). We have previously held this exhaustion requirement means a petitioner must "present the *same specific legal theory* to the BIA before he or she may advance it in court." *Garcia-Carbajal*, 625 F.3d at 1237.

Our cases have also previously described this exhaustion requirement as "jurisdictional." *See, e.g.*, *Robles-Garcia v. Barr*, 944 F.3d 1280, 1283 (10th Cir. 2019), *abrogated by Santos-Zacaria*, 598 U.S. at 413, 415 n.2. However, after the parties filed their opening briefs in this case, the Supreme Court decided *Santos-Zacaria*, holding that § 1252(d)(1) "is not jurisdictional." 598 U.S. at 413. We ordered supplemental briefing on the impact of *Santos-Zacaria* on this case.

In its supplemental brief, the government argues *Santos-Zacaria* has no impact on resolving this case because exhaustion under § 1252(d)(1) remains mandatory, even if not jurisdictional. Further, the government argues that this court's decisions recognizing exceptions to the exhaustion requirement of § 1252(d)(1), *see Robles-Garcia*, 944 F.3d at 1284 & n.3, are now abrogated by *Santos-Zacaria*, especially when read in combination with *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1621 (2021) and *Ross v. Blake*, 578 U.S. 632, 639 (2016). *See*

Aplee. Suppl. Br. at 6 (arguing "such an exception is in conflict with . . . Supreme Court precedent rejecting court-created exceptions to statutory exhaustion requirements"); *see also Palomar-Santiago*, 141 S. Ct. at 1621 ("When Congress uses 'mandatory language' in an administrative exhaustion provision, 'a court may not excuse a failure to exhaust.'" (quoting *Ross*, 578 U.S. at 639)).

Ms. Jimenez, in her supplemental brief, argues that the exhaustion requirement of § 1252(d)(1) remains "subject to several exceptions." Aplt. Suppl. Br. at 9. She also argues that the "issue exhaustion" requirement to exhaust a "specific legal theory" is "unwritten," *see id.* at 4–5, 7, and "not in the actual text" of § 1252(d)," *id.* at 5, so that—at least after *Santos-Zacaria*—we should distinguish between requiring exhaustion of specific issues from requiring exhaustion of remedies, *see id.* at 4–5.

2. Ms. Jimenez's Argument Regarding Reduction of Her Conviction Does Not Warrant an Exception to the Exhaustion Requirement

However, we need not decide whether any exceptions to exhaustion under § 1252(d)(1) might remain available in general, because Ms. Jimenez has not shown she meets the standard for the discretionary exception she seeks in this case. She claims her unexhausted argument should be considered as "a strictly legal question the proper resolution of which is *beyond doubt*," to avoid "manifest injustice." *See* Aplt. Br. at 42–43 (emphasis added) (citing *Daigle v. Shell Oil Co.*, 972 F.2d 1527,

1539 (10th Cir. 1992)).[4] But resolution of this argument in her favor is not "beyond doubt" and we see no manifest injustice that results from not resolving it.

Ms. Jimenez argues, relying on *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1128–29 (10th Cir. 2005), that the 2016 reduction of her 2008 conviction to a misdemeanor makes it not an "aggravated felony."

However, as the government argues, *Cruz-Garza* and related authorities distinguish between "'vacaturs because of post-conviction events' that still allow removal versus 'vacaturs on the basis of a procedural or substantive defect in the underlying proceedings' that do not." *Id.* at 1129 (brackets omitted; quoting *In re Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003), *reversed on other grounds sub nom.*

[4] Ms. Jimenez relies on *Daigle*, 972 F.2d at 1539. *Daigle* was not an immigration case applying § 1252(d)(1), but recognized discretionary exceptions to the "general waiver rule," including to avoid "manifest injustice." 972 F.2d at 1539. It is unclear these exceptions applied to the specific exhaustion requirement of § 1252(d)(1) even before *Santos-Zacaria*. But Ms. Jimenez has not shown reason to resolve her unexhausted argument, even under the discretionary exceptions she cites.

This court also previously recognized an exception to the exhaustion requirement of § 1252(d)(1) to prevent a "miscarriage of justice." *See Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1209 (10th Cir. 2007). Although she cites *Batrez Gradiz* in her supplemental brief, Ms. Jimenez's opening brief neither cited this authority nor argued a "miscarriage of justice" standard. To the extent, if any, that the "miscarriage of justice" standard of *Batrez Gradiz* and the "manifest injustice" standard of *Daigle* differ, she has waived any separate argument under *Batrez Gradiz*—even if it is still viable after *Santos-Zacaria*. *See Robert v. Austin*, 72 F.4th 1160, 1165 (10th Cir. 2023) ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue." (internal quotation marks omitted)). We resolve Ms. Jimenez's argument under the authority raised in her opening brief. As above, we do not answer whether any exceptions to § 1252(d)(1)'s exhaustion requirement may remain available in another case.

Pickering v. Gonzales, 465 F.3d 263, 270 (6th Cir. 2006)).[5] Under these authorities, an applicant generally remains removable (and here, ineligible for cancellation) "notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt *through a rehabilitative procedure*." *See Cruz-Garza*, 396 F.3d at 1128 (emphasis added; internal quotation marks omitted).

Applying those principles, this court has previously addressed the effect of reductions under the sub-parts of prior versions of § 76-3-402, in both *Cruz-Garza*, 396 F.3d at 1131, and *Esparza-Recendez v. Holder*, 526 F. App'x 886, 891 (10th Cir. 2013). Those decisions distinguish between, on the one hand, a reduction of conviction under § 76-3-402 that is based on "matters leading up to and encompassed within the judgment of conviction," *see Cruz-Garza*, 396 F.3d at 1131, and on the other hand, reductions under sub-parts of § 76-3-402 that "dea[l] specifically with probation compliance," *id.* at 1131 n.5. Applying that distinction, *Esparza-Recendez* concluded that the then-applicable version of § 76-3-402(2) provided for reductions "due to some post-conviction event, not due to some defect

[5] On appeal from *In re Pickering*, the Sixth Circuit affirmed the principle of law, holding "the BIA correctly interpreted the law by holding that, when a court vacates an alien's conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes." *Pickering v. Gonzalez*, 465 F.3d at 266. But in *Pickering* the government, which had the burden to show deportability, lacked clear and convincing evidence showing Mr. Pickering's conviction had been expunged for immigration purposes, rather than because of an underlying defect. *See id.* at 270.

in the underlying proceedings," with the consequence "that [those] convictions still served as disqualifying aggravated felonies." 526 F. App'x at 891.

Here Ms. Jimenez's conviction was reduced under the same provision considered in *Esparza-Recendez*, which applies only "after the defendant has been successfully discharged from probation." § 76-3-402(2)(a) (2016).[6] This suggests the conviction was reduced based on post-conviction rehabilitation, leaving its immigration consequences unchanged. *See Cruz-Garza*, 396 F.3d at 1129, 1131 n.5; *Esparza-Recendez*, 526 F. App'x at 891; *In re Pickering*, 23 I. & N. Dec. at 624.

Furthermore, "the INA's designation of 'aggravated felony' is not limited to only actual felony convictions," so "the fact that Utah classifie[s] [an] offense as a misdemeanor will not preclude us from deeming it to be an 'aggravated felony' under the INA." *Rangel-Perez v. Lynch*, 816 F.3d 591, 602 (10th Cir. 2016), *abrogated on other grounds by Esquivel-Quintana v. Sessions*, 581 U.S. 385, 395 (2017). Ms. Jimenez has not explained how Utah's reclassification of her conviction to a misdemeanor makes it no longer an "aggravated felony" under § 1101(a)(43)(M)(i).

For these reasons Ms. Jimenez's unexhausted argument regarding the reduction of her conviction, at the least, "do[es] not go unchallenged" or

[6] Section 76-3-402 was amended between the versions applicable in *Cruz-Garza* and *Esparza-Recendez*, and has been amended again since Ms. Jimenez's conviction was reduced. The amendments do not change our conclusion that the specific sub-part under which Ms. Jimenez's conviction was reduced, § 76-3-402(2) (2016), provided for post-conviction reduction based on rehabilitation, namely, successful discharge from probation.

"undoubtedly demonstrate[]" that she would prevail, so we see no manifest injustice in declining to further address or fully resolve it. *See Daigle*, 972 F.2d at 1540.

3. Claimed Ineffective Assistance of Counsel

Ms. Jimenez also asserts that her failure to present this argument to the BIA was a result of ineffective assistance of counsel. We have previously held that, "[b]ecause the [BIA] has created in [*In re Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988)] a mechanism for hearing due-process based claims of ineffective assistance of counsel, such claims must first be presented to the [BIA]." *Galvez Piñeda v. Gonzales*, 427 F.3d 833, 837 (10th Cir. 2005) (internal quotation marks omitted). "The appropriate method of presentation is a motion to reopen the case before the BIA." *Id.* To the extent Ms. Jimenez seeks an exception to the exhaustion requirement based on ineffective assistance of counsel, we will not consider that claim in the first instance in this appeal.[7] *See id.*

III. Conclusion

For the reasons explained above, we deny Ms. Jimenez's petition for review.

Entered for the Court

Bobby R. Baldock
Circuit Judge

[7] *Galvez Pineda* refers to a failure to exhaust as depriving this court of jurisdiction. *See* 427 F.3d at 837–38. *Santos-Zacaria* held that failure to exhaust is not jurisdictional, but we see no reason it changes the requirement for Ms. Jimenez to first raise her ineffective assistance claim to the BIA.