**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 19-1260 & 19-2505

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FRANCISCO ALBERTO CALERO,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA
Respondent

_____

On Petition for Review of an Order of the
Board of Immigration Appeals
(Agency No. A042-600-923)
Immigration Judge: Honorable Mirlande Tadal

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Submitted Pursuant to Third Circuit LAR 34.1(a)
October 1, 2019

Before: GREENAWAY, JR., RESTREPO and FUENTES, Circuit Judges

(Opinion filed October 3, 2019)

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OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Francisco Calero failed to persuade the Board of Immigration Appeals ("BIA"), in two separate proceedings, that he had acquired derivative United States citizenship as a result of his mother's naturalization in 1997. As Calero has offered no basis to disturb either decision of the BIA, we will deny his consolidated petitions for review.

I.

Calero is a citizen of the Dominican Republic. He entered the United States in 1991 at age 12, and adjusted status to that of a lawful permanent resident. Years later, Calero was convicted of drug offenses in both Virginia and New Jersey.

Based on Calero's criminal convictions, the Department of Homeland Security ("DHS") issued a Notice to Appear charging him with removability under certain provisions of the Immigration and Nationality Act: 8 U.S.C. §§ 1227(a)(2)(B)(i) (providing for removability based on drug convictions), and 1227(a)(2)(A)(iii) (providing for removability based on aggravated felonies).[1] Although at various hearings before the immigration judge ("IJ"), Calero refused to admit or deny the allegations in the Notice to Appear, the allegations were eventually sustained.

Calero, at the time represented by counsel, presented only one argument to defend against removal. He claimed entitlement to derivative citizenship based on his mother's 1997 naturalization, her purported legal custody of Calero when he was a child, and her purported separation from Calero's father (who by 2007 was himself a naturalized United

[1] Calero was also charged as removable under 8 U.S.C. § 1227(a)(2)(C) (providing for removability based on firearms convictions), but DHS later withdrew that charge.

States citizen).[2]

Applying Morgan v. Attorney General, 432 F.3d 226 (3d Cir. 2005), the IJ rejected Calero's theory of the case and denied his application for derivative citizenship. In Morgan, we explained that "a child born outside the United States automatically acquires United States citizenship if, while the child is under the age of eighteen, the parent with legal custody of the child is naturalized while that child's parents are legally separated." Id. at 228 (citing 8 U.S.C. § 1432(a)(3)).[3]

The IJ identified the only contested issue in Calero's case as whether he had "satisfied the requirements of [§ 1432(a)(3)]: that his mother had 'legal custody' of him *and* that there was a 'legal separation' of his parents at the time of his mother's naturalization." Relevant to that issue, the IJ acknowledged Calero's March 25, 2018 affidavit signed by seven individuals who apparently were neighbors of Calero's mother in the Dominican Republic. The neighbors averred that Calero's mother was, to their knowledge, "an adult, single, person" before her death in 2008; they "did not know of her getting married nor that she lived in union . . . with any person [sic]."[4]

The IJ was not persuaded by the affidavit. The IJ relied instead on DHS's records

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[2] Both parents had died by the time of Calero's removal hearing.

[3] Section 1432 was repealed by the Child Citizenship Act of 2000, which eliminated the need for aliens in Calero's position—with only one naturalized parent during their minority-age years—to show that their parents had legally separated. The Child Citizenship Act, however, "does not apply retroactively to persons, like [Calero], who turned eighteen before Congress passed" that law. Morgan, 432 F.3d at 230 n.1.

[4] Calero did not testify at the merits hearing, other than to say that he did not fear returning to the Dominican Republic.

of the Form N-400 Application for Naturalization ("N-400") that had been submitted by each of Calero's parents during their respective naturalization proceedings. The N-400s indicated that Calero's parents were "married"—both in 1997 (when Calero's mother naturalized) and in 2007 (when Calero's father naturalized)—and that they lived at the same address. Separate from the N-400s, the IJ observed that Calero "has not submitted any evidence demonstrating that his mother had legal custody of him." The IJ thus denied Calero's application for derivative citizenship and ordered him removed to the Dominican Republic. Calero appealed.

In a January 2019 decision, the BIA adopted and affirmed the opinion of the IJ. The BIA noted that Calero had failed to challenge the IJ's aggravated felony and other conviction-related removability determinations. The BIA observed as well that Calero's appellate brief did not "meaningfully address or rebut the [IJ's] decision." The BIA acknowledged a newly presented July 28, 2018 affidavit signed by seven more individuals who apparently also were neighbors of Calero's mother in the Dominican Republic. These neighbors collectively averred that Calero's parents "were married and together since the [year] of 1978 until the year of 1995, [when] they decided to separate, a situation that lasted until the day of their death [sic]." The BIA treated the new submission as a motion to remand, and denied it because the evidence was merely cumulative, and because it could have (and thus should have) been obtained in advance of the merits hearing.

Calero then filed in this Court a pro se petition for review of the BIA's January 2019 decision. That petition for review was docketed at C.A. No. 19-1260.

Calero subsequently filed with the BIA a motion to reopen removal proceedings based on Pereira v. Sessions, 138 S. Ct. 2105, 2113-14 (2018) (holding that Notice to Appear served on alien did not trigger stop-time rule, for purposes of eligibility for cancellation of removal, because 8 U.S.C. § 1229(a) requires Notice to Appear to contain date and time of hearing), and on purportedly new evidence. The purportedly new evidence, however, consisted of the previously submitted July 28, 2018 affidavit of the neighbors and a substantively identical affidavit signed by different persons on March 5, 2019, plus 'good character' letters and various documents reflecting accomplishments in prison.[5]

In a June 2019 decision, the BIA denied Calero's motion to reopen. The BIA rejected Calero's Pereira argument because Calero had not applied (nor was he eligible) for cancellation of removal, and because Calero's apparent argument in favor of extending Pereira beyond its holding was foreclosed by BIA precedent.[6] Regarding Calero's "new" evidence, the BIA determined that the affidavits, specifically, "describe facts that predated [Calero's] previous hearing" and thus "do not describe 'new facts.'" The BIA determined further that Calero failed to show that the affidavits could not have been obtained and presented prior to the last hearing. Cutting to the heart of the matter, the BIA concluded that, regardless of the technical problems with the affidavits, they "do

[5] One of the letters was written by Calero's sister, who said nothing about her late parents' marital status or any child custody arrangement they may have had.

[6] The Pereira-extension argument was recently rejected by this Court as well. See generally Nkomo v. Att'y Gen., 930 F.3d 129 (3d Cir. 2019).

not show that [Calero] has acquired derivative United States citizenship, as they do not establish that his mother had acquired legal custody of [him] at the time of the purported separation [of his parents]."

Calero then filed in this Court a pro se petition for review of the BIA's June 2019 decision. That petition for review was docketed at C.A. No. 19-2505, and was consolidated, for purposes of disposition, with the petition for review docketed at C.A. No. 19-1260.

II.

C.A. No. 19-1260

Even liberally construing Calero's pro se brief, we conclude that almost all of the arguments raised therein are unexhausted, see Abdulrahman v. Ashcroft, 330 F.3d 587, 594-95 (3d Cir. 2003), or are irrelevant to the BIA decision under review; indeed, it is apparent that Calero has copied and pasted the majority of his argument section from a brief in a case that, unlike here, presents a question about a bond determination. To the extent, however, that Calero presents a coherent challenge to the agency's rejection of his derivative-citizenship claim, we must reject that challenge.[7]

As the IJ and BIA properly concluded, Calero submitted no evidence establishing

[7] We have jurisdiction to review Calero's nationality claim, 8 U.S.C. § 1252(b)(5)(A), and because the facts underlying the claim themselves are not genuinely in dispute (only the legal significance of those facts), cf. Joseph v. Att'y Gen., 421 F.3d 224, 229-30 (3d Cir. 2005), we can decide his claim as a matter of law. Furthermore, the Government rightly acknowledges that we have jurisdiction to review questions of law under 8 U.S.C. § 1252(a)(2)(D), notwithstanding Calero's status as an alien with criminal convictions, cf. 8 U.S.C. § 1252(a)(2)(C).

either his mother's sole "custody" while Calero was a minor, or her "legal separation" from Calero's father. Cf. Dessouki v. Att'y Gen., 915 F.3d 964, 967 (3d Cir. 2019) ("A legal separation 'occurs only upon a formal governmental action . . . under the laws of a state or nation having jurisdiction over the marriage.'") (quoting Morgan, 432 F.3d at 234). To the contrary, Calero—at the time proceeding pro se—conceded at a preliminary hearing that his parents had never even separated:

> DHS: Well, sir did – were your parents ever – were they married?
> CALERO: Yes.
> DHS: Did they ever divorce or separate?
> CALERO: No.

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Ultimately, it was Calero's burden to prove his eligibility for derivative citizenship, and the IJ and BIA did not err as a matter of law in concluding that he did not carry that burden.

The BIA, moreover, did not abuse its discretion in refusing to remand to the IJ based on the July 29, 2018 affidavit. The BIA properly determined that there was no good reason for belated production of the new affidavit. See Huang v. Att'y Gen., 620 F.3d 372, 389 (3d Cir. 2010) (providing that an alien seeking to reopen or remand proceedings based on new evidence "must show that the 'evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing'") (quoting 8 C.F.R. § 1003.2(c)(1)).

For those reasons, we will deny the petition for review at C.A. No. 19-1260.

C.A. No. 19-2505

Calero's brief in support of this petition for review should have raised challenges to the BIA's June 2019 decision denying remand. But instead it only raised, at best, challenges to the BIA's January 2019 decision. Accordingly, Calero has waived his right to challenge the June 2019 decision, see Garza v. Citigroup Inc., 881 F.3d 277, 284-85 (3d Cir. 2018), and his petition for review at C.A. No. 19-2505 will be denied.[8]

[8] Even assuming, arguendo, that we were to ignore Calero's deficient briefing, we would not be able to discern from independent examination of the record any meritorious issues pertaining to this petition for review. For instance, the BIA appears to have rightly determined that Calero's "new evidence" did not as a matter of law establish either his mother's sole "custody" while Calero was a minor, or her "legal separation" from Calero's father.