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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BALDEMAR PEDROZA ESTRADA, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 21-70377 Agency No. A205-418-973 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted November 17, 2022[**]
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and SESSIONS,[***] District Judge.

Baldemar Pedroza Estrada, a citizen of Mexico, petitions for review of the order of the Board of Immigration Appeals (BIA) denying his motion to reopen.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

For the following reasons, we hold that we have jurisdiction and grant the petition for review.

Pedroza Estrada originally sought cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1) on the basis that his removal to Mexico would result in "exceptional and extremely unusual hardship" to his two minor children, both United States citizens, because Pedroza Estrada is the children's sole financial provider. The immigration judge (IJ) found that Pedroza Estrada's children would experience only ordinary economic and emotional hardships from Pedroza Estrada's removal, and accordingly denied Pedroza Estrada's application. The BIA dismissed his appeal.

Pedroza Estrada timely filed a motion to reopen with the BIA based on materially changed circumstances affecting his eligibility for cancellation of removal, submitting newly developed mental health conditions in his minor children including that his minor child J. had begun struggling with suicidal thoughts. Pedroza Estrada argued that his removal would cause exceptional and extremely unusual hardship by exacerbating J.'s condition and increasing J.'s risk of suicide. The BIA denied the motion.

1. Pedroza Estrada first argues that his underlying removal order is void because his Notice to Appear (NTA) lacked the date and time of his hearing. Pedroza Estrada never raised these deficiencies in his NTA before the agency and

has appealed only the BIA's denial of his motion to reopen rather than the underlying removal order. Nonetheless, he argues that the deficiencies go to a question of subject matter jurisdiction that cannot be waived. This argument is foreclosed by our en banc holding in *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1188 (9th Cir. 2022), that "failure of an NTA to include time and date information does not deprive the immigration court of subject matter jurisdiction."

2. The government argues that we lack jurisdiction to review the BIA's denial of Pedroza Estrada's motion to reopen because it relates to an application for cancellation of removal. While we ordinarily have jurisdiction to review the BIA's denial of a motion to reopen under 8 U.S.C. § 1252(a)(1), *Mata v. Lynch*, 576 U.S. 143, 147 (2015), pursuant to 8 U.S.C. § 1252(a)(2)(B), we lack jurisdiction to review a "judgment regarding the granting of relief" under cancellation of removal. The statutory bar in 8 U.S.C. § 1252(a)(2)(B) does not apply, however, to a denial of a motion to reopen where the evidence submitted to the BIA in connection with the motion "addresses a hardship ground so distinct from that considered previously as to make the motion to reopen a request for new relief, rather than for reconsideration of a prior denial." *Fernandez v. Gonzales*, 439 F.3d 592, 602–03 (9th Cir. 2006).

We have jurisdiction because Pedroza Estrada seeks to reopen his case on the basis of non-cumulative evidence of a new hardship that is different in kind from

the evidence presented at the original hearing. *See Garcia v. Holder*, 621 F.3d 906, 911–12 (9th Cir. 2010). Whereas the original application asserted that the children would suffer extreme and unusual hardship from the removal of their financial provider and included no evidence of any mental health problems for either child, the motion to reopen includes specific evidence of newly developed mental health conditions. The agency's recognition in the original denial that the children would suffer ordinary emotional hardship from parental separation does not indicate that any claim was previously made or adjudicated for extreme and unusual hardship on the basis of the mental health conditions presented in the motion to reopen.

3. We review the denial of a motion to reopen for abuse of discretion. *Avagyan v. Holder*, 646 F.3d 672, 674 (9th Cir. 2011). The BIA may not make credibility determinations on motions to reopen, and thus the specific "facts presented in affidavits supporting a motion to reopen must be accepted as true unless inherently unbelievable." *Bhasin v. Gonzales*, 423 F.3d 977, 986–87 (9th Cir. 2005) (citing *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991)); *see also Silva v. Garland*, 993 F.3d 705, 718 (9th Cir. 2021). The BIA abuses its discretion when it fails to "weigh all relevant evidence, including affidavits or declarations." *See Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1078–79 (9th Cir. 2010).

Here, the BIA abused its discretion in its denial of Pedroza Estrada's motion to

reopen. The BIA's decision misstates the record and fails entirely to mention evidence—Pedroza Estrada's declaration—that was both highly probative and which it was required to accept as true unless inherently unbelievable. *See Bhasin*, 423 F.3d at 986; *Cole v. Holder*, 659 F.3d 762, 772 (9th Cir. 2011). Despite the account in Pedroza Estrada's declaration of a months-long period during which J. "kept" talking of suicide and Pedroza Estrada "spent lots of time" talking with J. trying to provide encouragement to go on, the BIA's decision reports finding only one "mention that respondent's son mentioned one incident" of suicidal thoughts in February 2020. This statement is a reference only to the psychological evaluation, which itself contains more than a single mention of suicidal thoughts.

Pedroza Estrada's motion focused primarily on the hardship that Pedroza Estrada's removal would present for J. due to J.'s recent history of suicidal ideation and related diagnosis of severe depression. Yet the BIA concluded that Pedroza Estrada did not demonstrate a likelihood of prevailing on his new claim for cancellation of removal by setting aside J.'s risk of suicide as related to a single isolated incident and evaluating instead whether the children's generalized mental health problems relating to their parent's removal would suffice to show the requisite hardship. The BIA's failure to properly consider all evidence presented about J.'s specific vulnerability, including the facts presented in Pedroza Estrada's declaration, was an abuse of discretion. *See Bhasin*, 423 F.3d at 989; *Cole*, 659

F.3d at 772. On this record, Pedroza Estrada has established prima facie eligibility for cancellation of removal. *See Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003) (holding petitioner need not conclusively establish eligibility for relief in order to prevail on a motion to reopen).

This matter is remanded to the BIA for further proceedings consistent with this disposition.

PETITION GRANTED AND REMANDED.