FILED
United States Court of Appeals
Tenth Circuit

April 7, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JORGE EDUARDO ARAIZA,

Petitioner,

v.

WILLIAM BARR, United States Attorney General,

Respondent.

No. 19-9568
(Petition for Review)

ORDER

Before **MATHESON** and **BACHARACH**, Circuit Judges.[*]

This matter is before us on *Petitioner's Petition for Rehearing* ("Petition") and Respondent's response. Upon careful consideration, the Petition is granted in part to the extent of the modifications in the attached revised Order and Judgment. In all other respects, the Petition is denied. Our January 22, 2020 Order and Judgment is withdrawn

[*] The late Honorable Monroe G. McKay participated in this appeal originally but passed away on March 28, 2020. He did not participate in the disposition of *Petitioner's Petition for Rehearing*. "The practice of this Court permits the remaining two panel judges if in agreement to act as a quorum in resolving the appeal." *United States v. Wiles*, 106 F.3d 1516, 1516 n.* (10th Cir.1997); *see also* 28 U.S.C. § 46(d) (noting circuit court may adopt procedures permitting disposition of an appeal where remaining quorum of panel agrees on the disposition). The remaining panel members have acted as a quorum in agreement with respect to the petition for rehearing.

and replaced by the attached revised Order and Judgment.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

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ORDER AND JUDGMENT*

Before **MATHESON** and **BACHARACH**, Circuit Judges.[1]

The Board of Immigration Appeals ("BIA") dismissed Jorge Eduardo Araiza's appeal of an immigration judge's denial of his request for a continuance and dismissal of his application for cancellation of removal. Mr. Araiza petitions this court for review.

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* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] The late Honorable Monroe G. McKay participated in this appeal originally but passed away on March 28, 2020. He did not participate in the issuance of this revised Order and Judgment. "The practice of this Court permits the remaining two panel judges if in agreement to act as a quorum in resolving the appeal." *United States v. Wiles*, 106 F.3d 1516, 1516 n.* (10th Cir.1997); *see also* 28 U.S.C. § 46(d) (noting circuit court may adopt procedures permitting disposition of an appeal where remaining quorum of panel agrees on the disposition). The remaining panel members have acted as a quorum in agreement with respect to this revised Order and Judgment.

He argues the BIA abused its discretion. Exercising jurisdiction under 8 U.S.C. § 1252(a), we deny Mr. Araiza's petition.

I. BACKGROUND

1. Initiation of Removal Proceedings

Mr. Araiza, a Mexican citizen, entered the United States in 2000 without being lawfully admitted and was later convicted of various crimes. The Department of Homeland Security ("DHS") detained Mr. Araiza due to these convictions. DHS served Mr. Araiza with a notice to appear ("NTA") charging him as removable under 8 U.S.C. § 1182(a)(6)(A)(i) of the Immigration and Nationality Act ("Act").

Removal proceedings began in September 2011. When neither Mr. Araiza nor his counsel, Kent Felty, appeared at the August 2012 hearing, the immigration judge ("IJ") entered an in absentia removal order. Mr. Araiza, through Mr. Felty, filed a notice of appeal to reopen, requested and received a continuance, and moved to appoint new counsel. His new attorneys, Amado Cruz and Byung Kim, requested suspension of the IJ's in absentia removal order because Mr. Felty had provided ineffective assistance of counsel. The BIA agreed, vacated the removal order, and remanded.

2. Post-Remand Proceedings

a. *Pre-merits hearing*

In December 2013, Mr. Araiza appeared at his next hearing with another new attorney, Jonathon Shaw, who asked for and received a continuance to review the NTA. After this review, Mr. Araiza submitted pleadings admitting the NTA's allegations and

conceding removability. In March 2014, the IJ found Mr. Araiza removable. Mr. Araiza then applied for cancellation of removal.

In a September 2016 hearing, the IJ scheduled the merits hearing on cancellation for January 30, 2018.[2] The IJ expressed concern about the absence of documents supporting Mr. Araiza's cancellation of removal application, such as a "detailed criminal history chart," and requested them by December 30, 2017. ROA at 64-65.

In July 2017, the IJ granted attorney Cristina Uribe-Reyes's motion to replace Mr. Shaw as Mr. Araiza's counsel. On November 22, 2017, the IJ granted Ms. Uribe-Reyes's November 1, 2017 motion to withdraw and declared the merits hearing would still go forward on January 30, 2018.

b. *Merits hearing*

At the January 30, 2018 merits hearing, new counsel John Ritten explained he first spoke with Mr. Araiza two weeks prior and was retained on January 29. Although Mr. Ritten had "absolutely no hardship evidence" to support Mr. Araiza's cancellation of removal application, he thought Mr. Araiza was prima facie eligible and requested a continuance to gather documents. *Id.* at 70.

The IJ made two rulings that underly the petition here. First, the IJ denied the continuance request, explaining the "case has been pending for so long" it appeared "more dilatory . . . [than] for good cause." *Id.* at 86. Given the January 2018 merits

[2] The IJ initially scheduled the merits hearing for December 2016, rescheduled to January 2019, and finally rescheduled to January 30, 2018.

hearing and December 2017 deadline were set in September 2016, the IJ stated Mr. Araiza had "plenty of time to prepare." *Id.* at 85. The IJ noted Mr. Araiza received notice that the merits hearing would proceed despite Ms. Uribe-Reyes's recent withdrawal.[3]

Second, the IJ also dismissed the application for cancellation. She determined that, by failing to present supporting documentation during the three years his application was pending, Mr. Araiza had abandoned his application.

3. BIA Decision

Mr. Araiza timely appealed to the BIA and made two arguments. First, he argued that the IJ abused her discretion in denying his continuance for lack of good cause because lawyer turnover and immigration court scheduling issues impeded his preparation of evidence, and because Ms. Uribe-Reyes's withdrawal gave him a narrow window of 39 days to find counsel before his December 31, 2017 deadline to provide documentation. Second, he argued the IJ's "denial of the continuance actually prejudiced and harmed and materially affected the outcome of the case," because the continuance's denial left him "unable to show that he met the basic requirements for cancellation of removal and the IJ found that because of this [he] had abandoned his application for cancellation of removal." *Id.* at 20.

[3] The IJ further explained that Mr. Araiza could either "have been prepared for his hearing" or "earlier filed a request for a continuance," instead of "wait[ing] until the very last possible minute and under the expectation that a continuance would be granted." ROA at 86.

The BIA affirmed the IJ. First, the BIA agreed "[t]he number of prior continuances and length of time the respondent has been in proceedings are appropriate considerations when assessing whether to continue the hearing," and determined that "[u]nder the circumstances of this case," the IJ properly denied the continuance. *Id.* at 3. It further agreed that Mr. Araiza's "decision to replace his counsel immediately before the merits hearing did not constitute good cause for an additional continuance." *Id.*

Second, the BIA determined Mr. Araiza was "not absolve[d] [of] the responsibility to file his application for cancellation within the time limit set by the [IJ] at the prior hearing. *See* 8 C.F.R. § 1003.31(c)[.]" *Id.* at 3-4.[4]

Mr. Araiza timely petitioned for review in this court under 8 U.S.C. § 1252(b)(1).

II. **DISCUSSION**

A. ***Standard of Review***

"We review the BIA's legal determinations de novo and its findings of fact under the substantial evidence standard." *Ramirez-Coria v. Holder*, 761 F.3d 1158, 1161 (10th Cir. 2014) (quotations omitted). When, as here, a single BIA member issues a brief order affirming the IJ, "we may consult the IJ's opinion to the extent that the BIA relied upon or incorporated it," including "the IJ's more complete explanation of [the] same grounds"

[4] Mr. Araiza points out that the BIA's statement is inaccurate. Aplt. Br. at 25. In its response to the petition for rehearing, the Government agrees. Doc. 10729339 at 6-7. In fact, Mr. Araiza properly filed his application for cancellation of removal on May 22, 2014. App. at 57-60. The BIA's misstatement did not materially affect the case's outcome and we deem it harmless error. *See Nazaraghaie v. INS*, 102 F.3d 460, 465 (10th Cir. 1996).

for the BIA's decision. *Sidabutar v. Gonzales*, 503 F.3d 1116, 1123 (10th Cir. 2007) (quotations omitted).

We apply an abuse of discretion standard when reviewing the BIA's decision to affirm an IJ's denial of a continuance request[5] or to affirm an IJ's dismissal of an application for cancellation of removal.[6] "The BIA abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Rodas-Orellana v. Holder*, 780 F.3d 982, 990 (10th Cir. 2015) (quotations omitted). But "[t]here is no abuse of discretion when the BIA's rationale is clear, there is no departure from established policies, and its statements are a correct interpretation of the law, even when the BIA's decision is succinct." *Id.* (quotations omitted).

B. ***Legal Background***

1. **Continuance**

"An [IJ] may grant a motion for continuance only 'for good cause shown,' within [the judge's] sound discretion." *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (BIA 2006) (quoting 8 C.F.R. § 1003.29). As "a substantive requirement," 8 C.F.R. § 1003.29

[5] *See Luevano v. Holder*, 660 F.3d 1207, 1213 (10th Cir. 2011) (applying abuse of discretion standard to BIA's affirmance of IJ's discretionary denial of petitioner's continuance request under 8 C.F.R. § 1003.29).

[6] *See Ramirez-Coria*, 761 F.3d at 1162 (applying abuse of discretion standard to BIA's affirmance of IJ's discretionary determination that petitioner failed to show good cause and dismissal of petitioner's cancellation of removal application).

"prohibits [IJs] from granting continuances for any reason or no reason at all." *Matter of L-A-B-R-*, 27 I. & N. Dec. 405, 405 (AG 2018).

To show good cause for a continuance "to obtain and present additional evidence," the petitioner must show due diligence. *Matter of Sibrun*, 18 I. & N. Dec. 354, 356 (BIA 1983); *see also Matter of Hashmi*, 24 I. & N. Dec. 785, 788 (BIA 2009) (explaining this is a "high standard"). That is, the petitioner "must make a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, noncumulative, and significantly favorable." *Sibrun*, 18 I. & N. Dec. at 356.

2. **Application for Cancellation of Removal**

Cancellation of removal allows noncitizens to avoid removal under certain circumstances. "An alien seeking relief from removal bears the burden of establishing he satisfies the eligibility requirements and 'merits a favorable exercise of discretion.'" *Gutierrez-Orozco v. Lynch*, 810 F.3d 1243, 1246 (10th Cir. 2016) (quoting 8 U.S.C. § 1229a(c)(4)(A)); *see Lucio-Rayos v. Sessions*, 875 F.3d 573, 581 (10th Cir. 2017) ("Congress has placed the burden of proving eligibility for relief from removal squarely on the alien . . . ."). Title 8 U.S.C. § 1229b(b)(1)(A) to (D) list the cancellation of removal eligibility requirements.[7]

[7] *See* 8 U.S.C. § 1229b(b)(1)(A)-(D) (requiring (A) ten years of continuous physical presence; (B) good moral character; (C) that petitioner has not been convicted of certain listed offenses; and (D) that removal would cause exceptional and extremely unusual hardship to petitioner's U.S. citizen or permanent resident spouse, parent, or child).

An IJ "may set and extend time limits for the filing of applications and related documents and responses." 8 C.F.R. § 1003.31(c). "If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived." *Id.*

C. ***Analysis***

The BIA did not abuse its discretion in affirming the IJ's (1) denial of Mr. Araiza's continuance request and (2) dismissal of his application for cancellation of removal. Because the BIA affirmed the IJ in a brief order, we consult the IJ's more complete explanation. *See Sidabutar*, 503 F.3d at 1123.

1. **Denial of Continuance**

The IJ determined that Mr. Araiza did not diligently prepare his evidence to proceed with his cancellation of removal application during the several years his application was pending. *See Matter of Sibrun*, 18 I. & N. Dec. at 356-57 (requiring petitioner to make "reasonable showing," based upon "specific articulation of particularized facts and evidence," "that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed"). The IJ granted multiple prior continuances and set deadlines Mr. Araiza failed to meet. *See* 8 C.F.R. § 1003.31(c). The IJ therefore concluded that Mr. Araiza had failed to show good cause for a continuance.

The BIA's affirmance of the IJ's order was reasonable. Like the IJ, it noted the multiple postponements that extended the proceedings from September 2011 to the January 2018 merits hearing. Although Mr. Araiza argues that only two continuances

were granted at his request and that Ms. Uribe-Reyes's withdrawal delayed his preparation, the BIA agreed with the IJ that Mr. Araiza was on notice of his insufficient documentation for a significant amount of time and failed to show "good cause" for another continuance.[8] We see no abuse of discretion.[9]

2. **Dismissal of Application for Cancellation of Removal**

The IJ dismissed Mr. Araiza's application because he failed to meet his burden to show statutory eligibility for cancellation of removal. *See Gutierrez-Orozco*, 810 F.3d at 1246; *Lucio-Rayos*, 875 F.3d at 581. At the hearing, the IJ explained she lacked evidence of physical presence, criminal history or convicted records, or evidence of qualifying relatives, as required under 8 U.S.C. § 1229b(b)(1)(A) to (D). *See* ROA at 71-72. Mr. Araiza's counsel admitted he had "absolutely no hardship evidence." *Id.* at 70.

[8] Mr. Araiza contends the IJ improperly referenced cases that do not address the "good cause" standard: *INS v. Rios-Pineda*, 471 U.S. 444 (1985) and *INS v. Doherty*, 502 U.S. 314 (1992). But both cases addressed meritless attempts to delay proceedings. *See Doherty*, 502 U.S. at 323 ("[E]very delay works to the advantage of the deportable alien who wishes merely to remain in the United States."); *Rios-Pineda*, 471 U.S. at 448 (determining the petitioners "had delayed departure by frivolous appeals"). The IJ properly applied the good cause standard, and the BIA did not abuse its discretion in affirming the IJ's understanding of the standard as "a correct interpretation of the law." *Rodas-Orellana*, 780 F.3d at 990.

[9] *See, e.g.*, *Marrufo-Morales v. Lynch*, 627 F. App'x 727, 730 (10th Cir. 2015) (unpublished) (upholding BIA's affirmance of IJ's determination that petitioner failed to establish good cause for another continuance where petitioner failed to heed the IJ's warnings to submit supporting evidence for over 4.5 years and came to his merits hearing "unprepared to proceed on that application"). *See* 10th Cir. R. 32.1 ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

The BIA's affirmance of the IJ's dismissal of Mr. Araiza's application was reasonable. Once the IJ denied the continuance for lack of good cause, and his counsel said he had "absolutely no hardship evidence" to present at the hearing, *id.* at 70, Mr. Araiza could not establish statutory eligibility. The IJ dismissed his application, and the BIA determined it would "not disturb the [IJ's] decision." *Id.* at 4.[10] Again, we see no abuse of discretion.

III. **CONCLUSION**

We uphold the BIA's decision affirming the IJ's (1) denial of Mr. Araiza's request for a continuance to file documents supporting his cancellation of removal application and (2) dismissal of his application for cancellation of removal. We therefore deny the petition for review.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[10] Mr. Araiza's other arguments are unavailing. First, he argues the BIA misconstrued the record in stating that he failed "to file his application for cancellation," explaining he filed the application in March 2014. But the BIA's wording is consistent with regarding an application as including supporting documents, which Mr. Araiza's did not. Second, he argues the BIA incorrectly cited to *Matter of L-A-B-R-*, 27 I. & N. Dec. 405, which addresses "continuance requests . . . to pursue collateral relief," unlike Mr. Araiza's continuance request to obtain additional evidence for a cancellation of removal application. Although *Matter of L-A-B-R-* arises in a different procedural context, it generally addresses the good cause required for a continuance request, and the BIA reasonably relied on it.