

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17754
Non-Argument Calendar

Agency No. A205-682-864

AGNALDO DA SILVA ALVES,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(November 28, 2017)

Before TJOFLAT, MARTIN, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Agnaldo da Silva Alves, proceeding *pro se*, petitions for review of the Board of Immigration Appeals’s (“BIA”) denial of his motion to reopen removal

proceedings under its *sua sponte* authority. Alves claims there was substantial documentary evidence in the record regarding his son's medical condition that established the level of hardship necessary to cancel his removal. The government has moved to dismiss the petition for lack of subject matter jurisdiction.

We review *de novo* whether we have subject matter jurisdiction. *Chao Lin v. U.S. Att'y Gen.*, 677 F.3d 1043, 1045 (11th Cir. 2012). The BIA has the authority to reopen removal proceedings *sua sponte* at any time.¹ 8 C.F.R. § 1003.2(a). We lack jurisdiction to review the denial of a motion to reopen based solely on the BIA's *sua sponte* authority. *Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1292–93 (11th Cir. 2008).

In *Lenis*, we concluded that the BIA's decision about whether to reopen proceedings *sua sponte* was committed to agency discretion by law, and the regulation authorizing *sua sponte* reopening lacked a meaningful standard against which to judge the agency's exercise of discretion. *Id.* at 1293–94. Accordingly, we concluded that we lacked jurisdiction to review such decisions. *Id.* at 1294. We noted, however, that we may have jurisdiction to review constitutional claims related to the BIA's exercise of its *sua sponte* authority. *Id.* at 1294 n.7.

¹ The BIA also has statutory authority to reopen proceedings, but is inapposite here. An alien is permitted to file one motion to reopen removal proceedings, and that motion must be filed within 90 days of the BIA's final order of removal. 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). Here, Alves did not file his motion within 90 days of the final order of removal and he presents no reason why the time limit should be excused. Therefore, only the BIA's *sua sponte* authority could apply.

A constitutional claim does not exist merely because a petitioner says it does. For example, a petitioner cannot create jurisdiction by disguising an abuse-of-discretion argument as a constitutional claim. *Arias v. U.S. Att’y Gen.*, 482 F.3d 1281, 1284 (11th Cir. 2007). The failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest and cannot establish a due process violation. *Scheerer v. U.S. Att’y Gen.*, 513 F.3d 1244, 1253 (11th Cir. 2008).

Such is the case here. Alves presents his claim as a due process violation, but in reality he merely petitions this Court to reweigh the discretionary hardship factors that the BIA already considered. Because there is no colorable constitutional violation, we are bound by *Lenis* and may go no further. We lack jurisdiction to entertain the petition and we grant the government’s motion to dismiss for lack of subject matter jurisdiction.

MOTION GRANTED, PETITION DISMISSED.