[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10184
Non-Argument Calendar

Agency No. A020-630-106

ERNESTO GIL-ALMIROLA,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

(September 20, 2018)

Before TJOFLAT, NEWSOM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Ernesto Gil-Almirola, a native of Cuba, petitions for review of the Board of Immigration Appeals's order denying his motion to reopen his removal proceedings. In his petition, Gil-Almirola asserts that the BIA failed to give reasoned consideration to his claims for statutory reopening with equitable tolling under the Immigration and Nationality Act; in particular, he argues (1) that the BIA made "a conclusory ruling on tolling without any meaningful analysis" and (2) that it "failed to apply the proper standard … by failing to address either of the two elements of equitable tolling." After careful review, we agree with his first contention and thus grant his petition, vacate the BIA's decision, and remand for further proceedings consistent with this opinion.[1]

I

In 2002, an immigration judge entered a removal order against Gil-Almirola, then a lawful permanent resident, for committing an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)—here, a "crime of violence … for which the term of imprisonment [is] at least one year." Specifically, Gil-Almirola was convicted of battery against a law enforcement officer, Fla. Stat. § 784.07(2)(b), and resisting an officer with violence, Fla. Stat. § 843.01. He did not immediately appeal this decision.

[1] Because we agree with Gil-Almirola that the BIA has failed to provide an adequate basis for its decision, we decline to speculate whether it "appl[ied] the proper standard for equitable tolling."

Gil-Almirola first filed a motion to reopen in 2016, arguing that his Florida convictions no longer qualified as crimes of violence after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that the Armed Career Criminal Act's residual clause was unconstitutionally vague), and *Welch v. United States*, 136 S. Ct. 1257 (2016) (holding that *Johnson* applies retroactively). The IJ denied his motion, concluding that Gil-Almirola's conviction for resisting an officer with violence qualified as a "crime of violence" under *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012).

Gil-Almirola then filed a motion for reconsideration before the IJ, arguing for the first time that, after *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015), and *Lanier v. United States Attorney General*, 631 F.3d 1363 (11th Cir. 2011), he was nevertheless eligible to seek adjustment of his status under 8 U.S.C. § 1182(h) even if he had been convicted of a crime of violence. The IJ denied his motion, in part because he had not raised this argument in his motion to reopen. The IJ further observed that Gil-Almirola had "not exercised due diligence in pursuing his rights for purposes of equitable tolling," as he waited more than a year after *Matter of J-H-J-* to file his first motion to reopen.

In May 2017, the BIA affirmed, stating that a motion to reconsider "is not a proper vehicle for requesting relief" on the basis of new evidence. Additionally, it construed Gil-Almirola's motion to reconsider as a second motion to reopen "[t]o

the extent [that he] … sought reopening to apply for adjustment of status." Accordingly, the BIA held that Gil-Almirola's claim was "both number-barred and time-barred," concluding that there was "insufficient evidence of due diligence to warrant equitable tolling or *sua sponte* reopening," especially because *Lanier* preceded his motion to reopen by six years. Finally, the BIA stated that even if the motion to reconsider was a "proper and timely vehicle" to seek adjustment of his status, it "would have been denied" because it was not "accompanied by completed applications for such relief … and all supporting documentation, as required by 8 C.F.R. § 1003.23(b)(3)."

This petition concerns Gil-Almirola's separate August 2017 motion to reopen with the BIA. Now represented by new counsel, Gil-Almirola sought equitable tolling under 8 U.S.C. § 1229a(c)(7) and separately petitioned the Board to reopen *sua sponte*. As to the time bar to relief under § 1182(h), he again relied on *Matter of J-H-J-* and *Lanier* and argued that a change in controlling law was "an extraordinary circumstance that stood in the way of an earlier motion to reopen." Moreover, he argued that "ineffective assistance of prior counsel" provided a basis for "equitable tolling of the number-bar" and thus provided him the opportunity to file a second motion to reopen.[2]

[2] Specifically, Gil-Almirola asserted that prior counsel (1) improperly failed to seek § 1182(h) relief in the first motion to reopen, (2) "fail[ed] to attach a proposed, completed waiver application," and (3) prejudiced Gil-Almirola "by failing to preserve the issue of whether

The BIA disagreed and declined to toll either the time-bar or number-bar. It first rejected Gil-Almirola's motion as "untimely," noting that he did not file "the instant motion to reopen" until 15 years after his 2002 final order of removal. The BIA concluded its discussion of his statutory-reopening claim by observing that it "perceive[d] no basis to equitably toll the time bar in this matter." The BIA separately ruled that "*sua sponte* reopening is not warranted," "even assuming both that *Matter of J-H-J-* represents a fundamental change in the law" and that Gil-Almirola diligently filed "following that change." In further support of its decision not to reopen *sua sponte*, it explained that Gil-Almirola's "lengthy, serious criminal history" outweighed "the positive equities presented." This petition followed.

II

Our review is limited to determining whether the BIA abused its discretion in denying Gil-Almirola's statutory-reopening claim.[3] *Zhang v. U.S. Att'y Gen.*, 572 F.3d 1316, 1319 (11th Cir. 2009). We must determine whether the BIA gave "reasoned consideration" to Gil-Almirola's claims, and we will remand if its explanation (or lack thereof) makes "meaningful review" impossible. *Jeune v.*

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resisting arrest with violence is an aggravated felony." In order to comply with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), Gil-Almirola offered a signed letter from prior counsel in which she explained her "strategic legal decision[s]" while acknowledging that she prejudiced Gil-Almirola by failing to attach the requisite documents.

[3] As Gil-Almirola acknowledges, we lack jurisdiction to review the BIA's decision not to reopen *sua sponte*. *See Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008).

U.S. Att'y Gen., 810 F.3d 792, 803 (11th Cir. 2016). The BIA's decision must demonstrate that it "considered the issues raised and announced its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Bing Quan Lin v. U.S. Att'y Gen.*, 881 F.3d 860, 874 (11th Cir. 2018) (quoting *Jeune* , 810 F.3d at 803). We review claims of legal error, including claims that the BIA did not provide reasoned consideration of its decision, *de novo*. *Id.* at 872.

III

Under the INA, an alien may file one statutory motion to reopen his removal proceedings, and the motion must be filed within 90 days of the date of entry of the administratively final order of removal. 8 U.S.C. § 1229a(c)(7)(A), (C). The 90-day deadline and the numerical limitation are subject to equitable tolling, but only if a petitioner has diligently pursued his rights and some "extraordinary circumstance stood in his way." *Lin*, 881 F.3d at 872. The BIA may in its discretion deny a motion to reopen if the petitioner (1) has failed to establish a prima facie case, (2) has failed to introduce "evidence that was material and … unavailable," or (3) is "not entitled to a favorable exercise of discretion." *Id.* at 873.

Here, the BIA concluded that Gil-Almirola's "motion [was] untimely." Its decision, however, while acknowledging Gil-Almirola's diligence argument in

passing, is entirely silent on his ineffective-assistance-of-counsel contentions.[4] Rather, it appears that the BIA's explanation for denying his statutory motion to reopen is limited to the single statement that it "perceive[d] no basis to equitably toll the time bar in this matter." Without more, we cannot conclude that the BIA gave "reasoned consideration" to Gil-Almirola's arguments. *See id.* at 869.

The BIA, to be sure, need not have addressed the "crux" of each claim. *Id.* at 875. But it is not clear whether the BIA considered *any* of Gil-Almirola's ineffective-assistance arguments, or whether any of those arguments constitutes an "extraordinary circumstance" that may justify tolling. Accordingly, we can only speculate whether the BIA "merely reacted" to rather than "heard and thought" about his claims. *Id.* at 874; *see also Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) (remanding because the BIA did not give "reasoned consideration" to petitioner's claims of persecution based on religion, in part because the decision did not acknowledge the claims).

That is not to say, of course, that Gil-Almirola's ineffective assistance claim necessarily has merit. And it may well be, as the government contends, that Gil-Almirola's diligence—or lack thereof—made equitable tolling inappropriate here. But as we read its order, the BIA did not rely on any supposed lack of diligence in

[4] The BIA's decision assumes, for the sake of argument, that *Matter of J-H-J-* "represents a fundamental change in law" and that Gil-Almirola exercised due diligence. It appears to do so, however, only to justify its decision not to reopen *sua sponte*, not to provide further justification for the statutory claim. *See* Certified Administrative R. at 4.

denying Gil-Almirola's second motion to reopen. "Our inquiry concerns process, not substance," *Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1302 (11th Cir. 2015), and we cannot substitute our own reason for the BIA's denial, *see Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) ("[W]e cannot accept appellate counsel's post hoc rationalizations for agency action; for an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself.") (citations omitted).

IV

For the foregoing reasons, Gil-Almirola's petition for review is **GRANTED**. In order to ensure that the BIA gave reasoned consideration to Gil-Almirola's claims, we **VACATE** its decision and **REMAND** for further proceedings.