[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-10049

Non-Argument Calendar

EDUARDO FERNANDO BRACAMONTE VERASTEGUI,
JENNY G. BERMUDEZ AVILES,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A201-076-327

Before JORDAN, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Eduardo Bracamonte Verastegui and Jenny Bermudez Aviles, who are husband and wife and citizens of Bolivia, petition for review of the Board of Immigration Appeals' order denying their motion to *sua sponte* reopen removal proceedings and stay removal. Upon review of the record and the parties' briefs, we dismiss the petition for lack of jurisdiction.

In October of 2013, an immigration judge denied the applications of Mr. Bracamonte Verastegui and Ms. Bermudez Aviles for cancellation of removal under § 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). They appealed the decision to the BIA and following the denial of that appeal, filed various motions to reopen and for reconsideration of the BIA's decision. Mr. Bracamonte Verastegui and Ms. Bermudez Aviles now appeal the BIA's December 17, 2021 decision, denying their fifth motion to reopen or reconsider.

Mr. Bracamonte Verastegui and Ms. Bermudez Aviles have previously petitioned this Court for review of the BIA's denials of their motions to reopen or reconsider. Each time we have dismissed the petition for lack of jurisdiction. *See Bracamonte-Verastegui v. U.S. Att'y Gen.*, No. 14-14293, slip. op. (11th Cir. May 13, 2015) (unpublished); *Bracamonte-Verastegui v. U.S. Att'y Gen.*, No. 16-10339, slip op. (11th Cir. Feb. 3, 2017) (unpublished);

Bracamonte-Verastegui v. U.S. Att'y Gen., No. 18-11859, slip. op. (11th Cir. Feb. 14, 2019) (unpublished). Following review of the petition in this case, we come to the same conclusion.

The Immigration and Nationality Act allows a petitioner to file one "statutory" motion to reopen removal proceedings. *See* 8 U.S.C. § 1229a(c)(7)(A). While this Court has jurisdiction to review the BIA's denial of such motions, *see Butka v. U.S. Att'y Gen.*, 827 F.3d 1278, 1283 (11th Cir. 2016), the current motion was filed pursuant to the BIA's *sua sponte* authority to reopen removal proceedings. And we have "squarely held" that we "lack[ ] jurisdiction to review a BIA decision denying a petitioner's motion for *sua sponte* reopening." *Butka*, 827 F.3d at 1283. *See also Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1292 (11th Cir. 2008) (holding this Court lacks jurisdiction "to review the BIA's denial of a motion to reopen the underlying immigration proceedings based on its *sua sponte* authority"); *Butalova v. U.S. Att'y Gen.*, 768 F.3d 1179, 1182 (11th Cir. 2014) ("We lack jurisdiction to review any BIA decision the [Immigration and Nationality Act] makes discretionary.").

We note, of course, that this jurisdictional bar does not extend to petitions that raise colorable constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D). *See also Butalova*, 768 F.3d at 1183 ("Notwithstanding the jurisdiction-stripping provisions of INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii), we retain jurisdiction to review constitutional challenges and questions of law."). A constitutional claim is "colorable" when it has "some

possible validity." *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281, 1284 n.2 (11th Cir. 2007).

Mr. Bracamonte Verastegui and Ms. Bermudez Aviles state in their petition that they requested relief from removal "based on the exceptional and extremely unusual hardship that would" inflict on their United States citizen son, Andrew. *See* Appellants' Br. at 12. They contend that the immigration judge "failed to carefully examine the evidence in the record" and that they were denied due process. *Id.* at 22. Although Mr. Bracamonte Verastegui and Ms. Bermudez Aviles again—as in their previous petitions—"cloak their argument in due process language, they are [still] simply challenging the BIA's discretionary hardship determination." *Bracamonte-Verastegui v. U.S. Att'y Gen.*, No. 14-14293, slip op. at 3 (11th Cir. May 13, 2015) (unpublished); *Bracamonte-Verastegui v. U.S. Att'y Gen.*, No. 16-10339, slip op. at 3 (11th Cir. Feb. 3, 2017) (unpublished).

We explained in the prior petitions—in 2015, 2017, and 2019—that "the BIA's hardship determination involved a form of discretionary relief which we cannot review." *Bracamonte-Verastegui v. U.S. Att'y Gen.*, No. 18-11859, slip. op. at 2 (11th Cir. Feb. 14, 2019) (unpublished). We find no reason to conclude differently today. *See Butalova*, 768 F.3d at 1183 ("[A]n argument that the BIA abused its discretion by failing to weigh an alien's factual scenario presents a 'garden-variety abuse of discretion argument—which can be made by virtually every alien subject to a final removal order—[and] does not amount to a legal question under §

1252(a)(2)(D).'") (quoting *Alvarez Acosta v. U.S. Att'y Gen.*, 524 F.3d 1191, 1196-97 (11th Cir. 2008)). Thus, we lack jurisdiction to review the BIA's discretionary decision not to *sua sponte* reopen proceedings.

Mr. Bracamonte Verastegui and Ms. Bermudez Aviles also argue that their rights were violated because a three-member panel did not review the immigration judge's decision. As we explained before when presented with this same issue earlier, "[t]his argument also cannot form the basis of a constitutional claim, as there is 'no constitutionally protected interest in purely discretionary forms of relief.'" *Bracamonte-Verastegui v. U.S. Att'y Gen.*, No. 14-14293, slip op. at 3 (11th Cir. May 13, 2015) (unpublished) (quoting *Schreerer v. U.S. Att'y Gen.*, 513 F.3d 1244, 1253 (11th Cir. 2014)). *See also* 8 C.F.R. § 1003.1(e)(6) (permitting but not requiring the assignment of three-member BIA panels under certain circumstances.). We therefore also lack jurisdiction to review this claim.

In the alternative, Mr. Bracamonte Verastegui and Ms. Bermudez Aviles request that we remand the matter for administrative closure because their case is "low priority." However, they did not raise this argument in their motion to the BIA for *sua sponte* reopening and stay of removal. This Court has "held that failure to raise an issue to the BIA constitutes a failure to exhaust." *Bing Quan Lin v. U.S. Att'y Gen.*, 881 F.3d 860, 867 (11th Cir. 2018). And because "failure to exhaust is jurisdictional," "we lack jurisdiction to consider claims that have not been raised before the BIA." *Id.*

(quoting *Sundar v. I.N.S.*, 328 F.3d 1320, 1323 (11th Cir. 2003)). Thus, we cannot consider the request that the matter be remanded for administrative closure.

For the foregoing reasons, we dismiss the petition.

PETITION DISMISSED.