

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

August 19, 2010

Lyle W. Cayce
Clerk

No. 09-60655

Summary Calendar

KAYODE RUFUS FAJEMISIN,

Petitioner

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A096 537 977

Before KING, GARZA, and STEWART, Circuit Judges.

PER CURIAM:*

Kayode Rufus Fajemisin, a native and citizen of Nigeria, filed a petition for review of the Board of Immigration Appeals' ("BIA") July 31, 2009 decision dismissing his appeal of the immigration judge's ("IJ") denial of his request for a continuance. As the respondent argues, Fajemisin did not file a separate petition for review of the BIA's denial of his motion to reconsider. *See Guevara v. Gonzales*, 450 F.3d 173, 176 (5th Cir. 2006); *Stone v. INS*, 514 U.S. 386,

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

394–95 (1995). Accordingly, this court lacks jurisdiction to review the BIA’s denial of that motion.

Fajemisin challenges the IJ’s denial of a continuance, arguing that he appeared before the IJ in good faith requesting a continuance to seek adjustment of status, which would be available to him following the adjudication of his spouse’s second I-130 immigrant visa petition. He contends that because his spouse was not precluded from filing a second I-130 petition, his spouse should have been afforded a reasonable opportunity to have the petition adjudicated. Fajemisin argues that, in light of the factors identified by the BIA in *In re Hashmi*, 24 I. & N. Dec. 785, 790–91 (BIA 2009), the IJ’s denial of a continuance cannot be supported.

The grant of a motion to continue lies within the sound discretion of the IJ, who may grant the motion for good cause shown. *Witter v. INS*, 113 F.3d 549, 555 (5th Cir. 1997). We review for an abuse of discretion. *See id.* “Neither the BIA nor the IJ abuses its discretion ‘so long as [the decision] is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so aberrational that is it arbitrary rather than the result of any perceptible rational approach.’” *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 801 (5th Cir. 2007) (citing *Osuchukwu v. INS*, 744 F.2d 1136, 1142 (5th Cir. 1984)).

When assessing whether a continuance should be granted to await the final adjudication of a pending visa petition, “the focus of the inquiry is the apparent ultimate likelihood of success on the adjustment application,” and “it is useful for the Immigration Judge to evaluate the viability of the underlying I-130.” *Hashmi*, 24 I. & N. Dec. at 790–91; *see Hing Chuen Wu v. Holder*, 571 F.3d 467, 469–70 (5th Cir. 2009) (noting that in *Hashmi*, the BIA “recognized that an IJ cannot rely solely on timing concerns and provided its first detailed guidance of how an IJ should analyze a motion for continuance when a prima facie approvable I-130 petition is pending”). As the BIA observed in *Hashmi*, “[if] other visa petitions filed on the respondent’s behalf have been denied, those

petitions and the USCIS's determinations could also be presented and considered. These prior filings or other evidence of potential fraud or dilatory tactics may impact the viability of the visa petition underlying the motion." *Hashmi*, 24 I. & N. Dec. at 792. The IJ's oral decision reveals that the denial of a continuance was based on the IJ's assessment of the viability of the then-pending I-130 petition, which was considered in light of the Government's denial of the earlier-filed I-130 petition. The Government's denial of the first I-130 petition on grounds of marriage fraud was, therefore, evidence that the pending I-130 petition was not likely to be approved. *See id.*

Fajemisin has shown no abuse of discretion in the BIA's dismissal of his appeal of the IJ's denial of a continuance. *See Witter*, 113 F.3d at 555. The petition for review is DENIED.