In the

United States Court of Appeals

For the Seventh Circuit

No. 21-1642

FRANCISCO CRUZ-VELASCO,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General
of the United States,

Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals.
No. A205-154-344.

ARGUED SEPTEMBER 8, 2022 — DECIDED JANUARY 24, 2023

Before WOOD, ST. EVE, and JACKSON-AKIWUMI, *Circuit Judges*.

WOOD, *Circuit Judge*. Francisco Cruz-Velasco, a native and citizen of Mexico, is seeking cancellation of removal under 8 U.S.C. § 1229b(b). To succeed, he must prove that he has been a person of good moral character during the ten years preceding the date of his application. But after two convictions for driving while intoxicated, Cruz-Velasco faces an

uphill battle. An immigration judge held that his criminal convictions demonstrated a lack of good moral character and ordered his removal; the Board of Immigration Appeals affirmed. Cruz-Velasco filed a motion to reopen his application, but the Board denied his request. He now challenges the Board's denial of his motion to reopen. Finding no reversible error, we deny his petition for review.

I

A

Cruz-Velasco first entered the United States without inspection in 1999. He has remained continuously present in the country ever since, raising his two American-born sons as a single father after the premature death of his partner. (Although he made two brief trips to Mexico, they did not cause a break in his continuous physical presence.)

In 2013, Cruz-Velasco was charged with reckless driving, endangering safety, and operating a vehicle while intoxicated. The charges related to his unfortunate decision to have alcoholic drinks (quantity unknown) at a birthday party and then to drive home with his nine- and eleven-year-old sons in the car. He was convicted of these offenses in 2014 and sentenced to serve ten days in jail. But that was the least of his problems. In the wake of his arrest, immigration officers sought his removal on the ground that he was unlawfully present in the United States without admission or parole. Cruz-Velasco conceded his removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b). In 2016, while in removal proceedings, Cruz-Velasco was charged again with operating a vehicle while intoxicated. He was convicted in 2018 and sentenced to serve another ten days in jail.

B

Cruz-Velasco appeared at his removal hearing in July 2018. To establish eligibility for cancellation of removal, he had to prove (among other things) that (a) he had been physically present in the United States for at least ten consecutive years immediately preceding the date of his application, (b) he had been a person of "good moral character" during that period, and (c) his removal would cause "exceptional and extremely unusual hardship" to his U.S.-citizen sons. 8 U.S.C. § 1229b(b). At the hearing, Cruz-Velasco established that he had been present in the United States since 2008; addressed the hardship his sons would suffer if he were removed; explained the circumstances surrounding each of his criminal offenses; and testified that he had entirely stopped drinking after his 2016 arrest and had completed the court-ordered substance abuse program.

The immigration judge (IJ) found these arguments wanting, held that he was statutorily ineligible for cancellation of removal, and ordered his removal. First, the IJ concluded that Cruz-Velasco had failed to establish that his sons would suffer hardship beyond what is predictable as a result of a parent's removal. Next, the judge held that his two criminal convictions for operating while intoxicated demonstrated a lack of good moral character. Noting the seriousness of his first offense, the IJ stressed Cruz-Velasco's failure to learn from his mistake, as shown by his arrest for operating while intoxicated only three years later. In the judge's view, Cruz-Velasco's rehabilitation was insufficient to outweigh the effect of these two convictions.

Cruz-Velasco appealed to the Board of Immigration Appeals. While the appeal was pending, the Attorney General

ruled that two or more convictions for driving under the influence in the relevant period raise a presumption that a noncitizen lacks good moral character. *Matter of Castillo-Perez*, 27 I.&N. Dec. 664, 669–71, 673 (A.G. 2019). Moreover, the ruling stated, that presumption cannot be overcome solely by evidence showing rehabilitation. *Id.* at 671. Relying on *Matter of Castillo-Perez*, the Board affirmed the IJ's decision and held that Cruz-Velasco's rehabilitation efforts were not enough to overcome his presumed lack of good moral character.

Amid the 2020 COVID-19 pandemic, Cruz-Velasco filed a motion to reopen his cancellation-of-removal application. He submitted new evidence showing that he had been diagnosed with diabetes and that this condition increased his risk of dying from COVID-19 in Mexico. He also reiterated that he had the requisite moral character because he had abstained from drinking alcohol since his 2016 arrest.

The Board denied Cruz-Velasco's motion, finding that the COVID-19 pandemic did not meaningfully distinguish his situation from that of other noncitizens seeking cancellation of removal. It also confirmed that his evidence of rehabilitation did not overcome his presumed lack of good moral character resulting from his criminal convictions. Finally, the Board specifically noted that it was not willing to invoke its *sua sponte* reopening authority to grant relief. Notably, however, the Board failed to address Cruz-Velasco's argument concerning his higher-than-normal risk of dying as a result of his diabetes.

Cruz-Velasco timely filed the present petition for review, arguing that the Board erred in denying his motion to reopen. The government concedes that the Board failed to address Cruz-Velasco's diabetes claim. Even so, the government

argues that this omission is immaterial because Cruz-Velasco's lack of good moral character constitutes an adequate and independent basis for denying reopening. We agree with the latter proposition and thus address only Cruz-Velasco's contentions that the Board erred in determining that he failed to establish good moral character and in refusing to exercise its *sua sponte* authority to reopen.

II

A

Before delving into the merits of Cruz-Velasco's moral character, we must add a word about our jurisdiction. Whether we have authority to review the Board's denial of a motion to reopen depends on our authority to review the Board's underlying decision ordering Cruz-Velasco's removal. See *Sanchez v. Sessions*, 894 F.3d 858, 862 (7th Cir. 2018) (citing *Cruz-Mayaho v. Holder*, 698 F.3d 574, 576 (7th Cir. 2012) ("[W]here we lack the power to review the Board's underlying order … we ordinarily lack the authority to review the denial of a request to reconsider or reopen that order.")).

We lack jurisdiction to review "any judgment regarding the granting of relief" under the cancellation-of-removal provisions in section 1229b. 8 U.S.C. § 1252(a)(2)(B)(i). But we retain jurisdiction to review constitutional claims and questions of law. *Id.* § 1252(a)(2)(D). Further, we have held that the Board's "application of law to undisputed facts" itself raises a question of law that falls within our jurisdiction. *Arreola-Ochoa v. Garland*, 34 F.4th 603, 610 (7th Cir. 2022) (quoting *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020)).

Cruz-Velasco claims that the Board erred in failing to consider the fact that he has abstained from drinking alcohol

since 2016. Because no one disputes the length of Cruz-Velasco's sobriety or any other evidence concerning his rehabilitation, we have jurisdiction to decide whether the Board reasonably applied the good-moral-character standard to those undisputed facts. See *id.* (asserting jurisdiction to review the Board's application of the hardship standard to undisputed facts). The government challenges that point, however, based on the Supreme Court's recent decision in *Patel v. Garland*, 142 S. Ct. 1614 (2022).

Patel addressed the question whether section 1252(a)(2)(B)(i) precludes federal courts from reviewing a determination that a petitioner's testimony is not credible. 142 S. Ct. at 1621–22. The Supreme Court held that "[f]ederal courts lack jurisdiction to review *facts* found as part of discretionary-relief proceedings under § 1255 and the other provisions enumerated in § 1252(a)(2)(B)(i)." *Id.* at 1627 (emphasis added). Relying on *Patel*, the government contends that we cannot apply the mixed-questions framework in the context of section 1252(a)(2)(B)(i). But the government reads *Patel* too broadly.

The *Patel* Court explicitly clarified that it was dealing only with "judicial review of factfinding," not the application of a legal standard to *undisputed* facts under section 1252(a)(2)(D). *Id.* at 1618, 1623. To illustrate this point, let's assume that the IJ had deemed Cruz-Velasco's testimony not credible and had ruled that he lacked good moral character because he had not remained sober. Section 1252(a)(2)(B)(i) would have precluded us from reviewing that underlying factual finding. But here, no one questions the IJ's findings of fact; the length of Cruz-Velasco's sobriety is undisputed. We are asked only to decide whether the Board erred in determining that Cruz-Velasco's rehabilitation failed as a matter of law to satisfy the

good-moral-character standard. *Guerrero-Lasprilla* and *Arreola-Ochoa* hold that this situation is covered by section 1252(a)(2)(D), and nothing in *Patel* requires a different result.

Because we have jurisdiction over the Board's underlying determination of good moral character, we also have jurisdiction over the Board's denial of Cruz-Velasco's motion to reopen. On to the merits.

B

We review the Board's denial of a motion to reopen for abuse of discretion. *Victor v. Holder*, 616 F.3d 705, 708 (7th Cir. 2010) (citing *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010)). Relief is appropriate only if the decision "was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group." *Id.* (quoting *Achacoso-Sanchez v. I.N.S.*, 779 F.2d 1260, 1265 (7th Cir. 1985)).

Applying this highly deferential standard, we see no reason for disturbing the Board's good-moral-character determination. Cruz-Velasco drove drunk while his two young sons were in the car. The Board was entitled to label this as a serious offense. Despite its gravity, Cruz-Velasco was again arrested for driving while intoxicated only three years later. The Board's position that these convictions reflected a lack of good moral character did not amount to an abuse of discretion.

Moreover, the Board did not (as Cruz-Velasco contends) fail to consider the significance of his long period of sobriety. To the contrary, the Board specifically recognized that Cruz-Velasco "completed each obligation ordered by the criminal court; stopped drinking; and continued to work, pay taxes,

and help support his sons and granddaughter." At that point, the Board relied on *Matter of Castillo-Perez* to hold that Cruz-Velasco's rehabilitation did not overcome the presumed lack of good moral character. Its decision to weigh the evidence consistently with the Attorney General's opinion lay comfortably within its discretion.

Furthermore, even assuming that the Board had ignored *Matter of Castillo-Perez*, it was entitled to assign "substantial weight to a single incident of drunk driving [had] the facts persuade[d] it to do so." See *Meza v. Garland*, 5 F.4th 732, 736–37 (7th Cir. 2021). It follows that the Board had some leeway to hold that Cruz-Velasco lacks good moral character based exclusively on his first offense for driving under the influence with his children in the car. The Board also reasonably could have thought that Cruz-Velasco's second offense bolstered that conclusion.

In his reply brief, Cruz-Velasco claimed that the Board erred in retroactively applying *Matter of Castillo-Perez* to his criminal convictions. But Cruz-Velasco waived this claim by raising it for the first time in his reply brief. See *United States v. Cruse*, 805 F.3d 795, 818 n.7 (7th Cir. 2015).

III

Finally, we address the Board's decision not to exercise its *sua sponte* authority to reopen Cruz-Velasco's case. "The Board may at any time reopen or reconsider a case in which it has rendered a decision on its own motion …." 8 C.F.R. § 1003.2(a) (2020). "[T]he merits of the Board's decision not to reopen a case *sua sponte* are unreviewable" unless it was tainted by a legal error. *Fuller v. Whitaker*, 914 F.3d 514, 519 (7th Cir. 2019).

Without much explanation, Cruz-Velasco argues that the Board erred in relying on *Matter of H-Y-Z-*, 28 I.&N. Dec. 156 (B.I.A. 2020), when it refused to exercise its *sua sponte* authority. The Board cited that case for the following proposition: new grounds for relief that accrue while the person remains illegally in the country do not demonstrate the kind of exceptional situation required for *sua sponte* reopening. That is, even if Cruz-Velasco had met the statutory criteria—which he did not—the Board was still entitled to refuse to exercise its *sua sponte* authority. It relied on *Matter of H-Y-Z-* only to explain the applicable legal framework; the facts were otherwise beside the point. Given the exceptionally broad discretion that the Board enjoys with respect to its *sua sponte* authority, we see nothing objectionable—and certainly no legal error—here.

What Cruz-Velasco really wants is plenary review of the merits of the Board's decision to reopen. We lack the authority to do so, however, absent extraordinary circumstances.

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We DENY the petition for review.