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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEIDY AGUILAR-LOPEZ, et al., Petitioners, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 21-285 Agency Nos. A201-416-610 A201-416-609 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted March 09, 2023[**]
San Francisco, California

Before: FRIEDLAND and R. NELSON, Circuit Judges, and KATZMANN,[***] Judge.

Leidy Aguilar-Lopez ("Aguilar-Lopez") and her minor daughter

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

(collectively, "Petitioners"), both natives and citizens of Guatemala, petition for review of an order of the Board of Immigration Appeals ("BIA") adopting and upholding the decision by the Immigration Judge ("IJ") to deny their motion to reopen. Because we lack jurisdiction to review this decision, we dismiss the petition.

When the BIA adopts the decision of the IJ, we "review the IJ's decision as if it were that of the BIA." *Abebe v. Gonzales,* 432 F.3d 1037, 1039 (9th Cir. 2005) (en banc). Where the BIA cites the IJ's decision and also provides its own review of the evidence and law, we review both the IJ and the BIA's decisions. *Ali v. Holder*, 637 F.3d 1025, 1028 (9th Cir. 2011).

1. Aguilar-Lopez proceeded pro se before the IJ and submitted an application for asylum on October 25, 2019. On December 12, 2019, at an individual hearing that Aguilar-Lopez attended in person, the IJ denied asylum relief and ordered Petitioners removed. An interpreter was present at the proceedings before the IJ. After describing what an appeal is, the role of the BIA, and how the BIA would review the decision, the IJ asked Aguilar-Lopez about her intent to appeal, and Aguilar-Lopez reserved her right by replying "[y]es, I would like to appeal." The IJ then presented Aguilar-Lopez with a copy of the notice of appeal form containing instructions for the appeals procedure, explained that instructions were also on the form, and gave further oral instructions on how to

complete the form, such as completing the form in English, and that the content of the form is to explain "why [Aguilar-Lopez] disagree[s] with the [IJ]'s decision today." Aguilar-Lopez was also repeatedly told that she would need to mail the appeal form to the BIA by January 13, 2020, and that if the form was not filed with the BIA, the removal order would become final. The IJ also personally served Aguilar-Lopez with the removal order. Aguilar-Lopez, however, did not mail her notice of appeal form to the BIA, and the IJ's order became final after January 13, 2020. On February 7, 2020, Aguilar-Lopez filed a motion to reopen before the IJ, alleging that she failed to receive notice of her right to appeal, and that such lack of notice constituted "exceptional circumstances" that prevented a timely appeal.

2. Aguilar-Lopez now contends, as she did before the IJ and the BIA, that she has not received adequate notice on her right to appeal or the filing procedures for an appeal of the IJ's decision to the BIA, and therefore the lack of notice constitutes "exceptional circumstances" warranting a reopening of the proceedings. In support of her motion before the IJ, Aguilar-Lopez submitted a single translated document of her own statement that "[she] did not understand or fully comprehend the [IJ's] explanation regarding [her] right to file an appeal no later than 30 days following her decision." The IJ denied Aguilar-Lopez's motion, reasoning that Aguilar-Lopez did not identify any exceptional circumstances such as serious illness, and that the assertion of a failure to understand the court's explicit

explanation did not constitute such circumstances. The BIA dismissed the appeal and adopted the IJ's decision. The BIA additionally noted that the cases relied upon by Aguilar-Lopez were distinguishable as Aguilar-Lopez was present at the hearing and did not have an order of removal entered in absentia.

3. Based on this record, the correct characterization of Aguilar-Lopez's motion is a "motion to reopen sua sponte." *See Bonilla v. Lynch*, 840 F.3d 575, 584–85 (9th Cir. 2016). As we explained in *Bonilla*, when a motion seeks the exercise of the IJ's discretionary sua sponte power to reopen the proceedings citing "exceptional" circumstances, it is considered a motion to reopen sua sponte. *Id.* at 584–87; *see also Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1116 (9th Cir. 2019) ("In practice, the agency's decision to exercise its sua sponte authority is often not actually initiated by the agency on its own but is instead prompted, as here, by a party filing a *motion to reopen sua sponte*." (emphasis added)). This is distinct from a motion to reopen for adjustment of status, or a "motion to reopen for the purpose of acting on an application for relief," 8 C.F.R. §§ 1003.23(b)(3), 1003.2(c)(1) (2020),[1] that seeks to offer new facts and evidence that could not have been discovered or presented at the former hearing when such new facts support

[1] Section 1003.23 describes the procedures for a motion to reopen before the IJ, while Section 1003.2 concerns a motion to reopen before the BIA. The two sections are virtually identical in language and substance. *Compare* 8 C.F.R. § 1003.23(b)(3), *with* § 1003.2(c)(1).

the relief from deportation. *Bonilla*, 840 F.3d at 581–82; 8 U.S.C. § 1229a(c)(7)(B) ("[T]he motion to reopen shall state the *new* facts that will be proven at a hearing to be held if the motion is granted . . . . " (emphasis added)); 8 C.F.R. § 1003.2(c)(1) (2020); *see also Young Sun Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008) (citing 8 C.F.R. § 1003.2(c)(1)); *Doissant v. Mukasey*, 538 F.3d 1167, 1170 (9th Cir. 2008) ("[A] motion to reopen seeks to present new facts that would *entitle the alien to relief from deportation*." (emphasis added) (quoting *Mohammed v. Gonzales*, 400 F. 3d 785, 792 n.8 (9th Cir. 2005)).

Despite Aguilar-Lopez's claims otherwise, the issues raised by her motion are not those raised by a motion to reopen for the purpose of acting on an application for relief. The new facts alleged by Aguilar-Lopez are that she "diligently sought counsel" and offered an affidavit stating her failure to understand the oral instructions that were given. There were no new facts alleged by Aguilar-Lopez to support a reconsideration on the merits of her application for asylum. In this case, the substance of Aguilar-Lopez's motion is to seek the IJ's discretionary exercise of her sua sponte authority to reopen the case based on "exceptional circumstances."

4. We have consistently held that we do not have jurisdiction to review the agency's refusal to exercise its sua sponte authority to reopen or reconsider proceedings. *See, e.g.*, *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002);

Toufighi v. Mukasey, 538 F.3d 988, 993 n.8 (9th Cir. 2008); *Sharma v. Holder*, 633 F.3d 865, 874 (9th Cir. 2011). *Bonilla*, however, recognized a narrow exception to the jurisdictional bar, and the court may review the "legal premise" underlying the agency determinations and remand for the agency to exercise its authority "against the correct legal background." *Lona v. Barr*, 958 F.3d 1225, 1233–34 (9th Cir. 2020) (citing *Bonilla*, 840 F.3d at 588–89).

Aguilar-Lopez's motion to reopen sua sponte does not raise such constitutional or legal issues. Aguilar-Lopez does not cite any authority that suggests that the form and manner of the notice given to her was incorrect as a matter of law. She argues instead that she did not subjectively understand the instructions given, that because she submitted an affidavit stating as such, it must be construed as true, and further that accepting this fact alone warrants reopening. This proposition has little support in the caselaw;[2] but even assuming that the agencies must accept the affidavit as true in a request for sua sponte relief, nothing in the record suggests that the IJ and the BIA have neglected to do so. The IJ did

[2] Aguilar-Lopez cites *Limsico v. INS*, 951 F.2d 210 (9th Cir. 1991), to argue that because she submitted an affidavit, the IJ must accept as true that she did not comprehend the "court interpreter's explanation." But the holding in *Limsico* concerns how affidavits should be treated in determining whether a respondent has argued a *prima facie* case on motions to reopen for the purpose of acting on an application for relief and is not applicable to Aguilar-Lopez's motion which is simply a request to reopen sua sponte. *Cf. id.* at 213.

not refute that Aguilar-Lopez may have failed to "understand or fully comprehend." Instead, the IJ noted that such failure does not constitute exceptional circumstances warranting a reopening. In light of these facts, Aguilar-Lopez has not identified any incorrect legal premises relied on by the agencies here. Consequently, the only determination we are asked to review is whether the IJ correctly denied the sua sponte relief based on the discretionary factor of "exceptional circumstances," and we cannot exercise jurisdiction over this determination.[3]

PETITION FOR REVIEW DISMISSED.

[3] Aguilar-Lopez raises additional arguments about the agency's purported obligation to accept the affidavits as true and how this may overcome the presumption of receiving notice, citing inter alia, *Singh v. Gonzales*, 494 F.3d 1170 (9th Cir. 2007); *Sembiring v. Gonzales*, 499 F.3d 981 (9th Cir. 2007); *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002). These cases, however, concern the special statutory protections for removal orders in absentia as codified in 8 U.S.C. § 1229a(b)(5), and thus have little bearing to the case at bar, in which Aguilar-Lopez was physically present and received oral instructions as well as personal service of the removal order. Thus, the IJ's failure to consider these cases does not give rise to a legal issue that would vest jurisdiction in this court, and the BIA's brief mention of this issue does not lend itself to a colorable claim for jurisdiction. Likewise, Aguilar-Lopez's due process claims are nothing more than an argument that the BIA abused its discretion, a matter over which we have no jurisdiction. *Cf. Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (holding that simply recasting challenge against discretionary decision as due process challenge does not create colorable constitutional claim for jurisdiction).