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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSE VIDAL TURCIOS, a/k/a Juan Torrez,

Petitioner,

v.

CHAD WOLF, Acting United States Secretary, Department of Homeland Security,

Respondent.

No. 18-9549
(DHS Homeland Security)

ORDER[*]

Before **LUCERO**, **MURPHY**, and **EID**, Circuit Judges.

Jose Vidal Turcios, also known as Juan Torrez, petitions for review of the Immigration and Customs Enforcement's (ICE) denial of his motion to reopen. Because we lack jurisdiction, the petition is DISMISSED.

[*] We automatically substitute Chad Wolf, the Acting Secretary of the Department of Homeland Security, as the Respondent in this action pursuant to 10th Cir. R. 43(c)(2).

I. Facts

Jose Turcios is a citizen and national of El Salvador who was accorded legal permanent resident (LPR) status in 1995. In February 1997, Turcios pleaded guilty to assault in the second degree in Colorado under the false name "Juan Torrez." ROP at 68. Turcios was sentenced to five years' imprisonment and transferred to the Immigration and Naturalization Service (INS)[1] for questioning as to his legal status. Throughout his INS interview, Turcios maintained his false identity as "Juan Torrez," claiming to be a citizen of Mexico who entered the country illegally by foot near San Ysidro, California in 1986. INS apparently performed a systems check in the Central Index System for "Juan Torrez," but the search yielded no results. *Id.* at 66. Accordingly, INS determined Turcios' Colorado conviction was an aggravated felony that rendered him eligible for expedited removal under 8 U.S.C. § 1228. INS served Turcios with a notice of intent to issue a final administrative removal order (NOI), which alleged that Turcios:

> (1) Was not a citizen or national of the United States;
> (2) Is a citizen and native of Mexico;
> (3) Had entered the United States illegally in San Ysidro, California in 1986;
> (4) Had entered without inspection or admission by a United States Immigration officer;
> (5) Was not lawfully admitted for permanent residence in the United States; and,

[1] The INS was originally the agency vested with the immigration enforcement power, but the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, abolished the INS, 6 U.S.C. § 291, and created ICE, *id.* § 271.

(6) Had been convicted in February 1997 of felony assault in the second degree.

Id. at 59, 61.

In June 1997, Turcios signed the NOI under his false identity, "Juan Torrez," indicating he had received the NOI and did not wish to contest its factual allegations. Specifically, he acknowledged: "I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges and my right to file a petition for review of the Final Review Order. I wish to be deported to ["Mexico" handwritten]." *Id.* at 65. Three days later, on June 4, 1997, Turcios was issued a final administrative removal order (FARO) under 8 U.S.C. § 1228(b). *See id.* at 22. Turcios waived the 14-day period of execution of the FARO and was removed to Mexico on August 1, 2000. *See id.* at 21, 26, 70.

The record does not reveal the exact date, but at some point between 2000 and 2005, Turcios illegally reentered the United States and resumed using his true identity, Jose Turcios. *See id.* at 13. In 2008, Turcios reapplied for his LPR card, at which time the United States Citizen and Immigration Service (USCIS) matched Turcios' fingerprints to those in their database for "Juan Torrez." *Id.* at 25–26. Further investigation revealed Turcios and "Torrez" were the same person.

As a result, USCIS concluded Turcios had "returned to the [United States] after being removed for conviction of an aggravated felony and would be exposed to prosecution for violation of 8 U.S.C. § 1326." *Id.* at 26 (§ 1326 allows for

imprisonment under Title 18 for illegal reentry after removal); *see also id.* at 43. A border patrol agent interviewed Turcios and confronted him with the "Torrez" findings. "Turcios then admitted that he had been deported under the name Torrez and admitted to the crime of assault in the 2nd degree." *Id.* at 41. After the interview, Turcios was held in Department of Homeland Security (DHS) custody pending removal, at which time he claimed to fear returning to El Salvador and was interviewed by an asylum officer to determine eligibility for withholding of removal.[2] *See* 8 C.F.R. § 1208.31(a); ROP at 41–42. The asylum officer determined Turcios established a credible fear of being returned to El Salvador, and, as a result, Turcios is now in withholding-only proceedings before an immigration judge in Los Angeles, California. *See* ROP at 44.

In November 2012, DHS served Turcios with a Notice of Intent to Reinstate Prior Order, *see* 8 U.S.C. § 1231(a)(5) (reinstating prior final removal orders without requiring new removal proceedings); 8 C.F.R. § 241.8; ROP at 43.

[2] Under the statutory and regulatory scheme created by Congress after the adoption of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), aliens who have previously been removed and are subject to 8 U.S.C. § 1231(a)(5) are precluded from seeking asylum relief. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006) (noting § 1231(a)(5) "generally forecloses discretionary relief" excepting withholding of removal). However, the regulations leave available a withholding-only proceeding before an Immigration Judge (IJ), if the asylum officer determines the alien expresses a reasonable fear of being returned to his or her home country. 8 C.F.R. § 1208.31(e); *see also R-S-C v. Sessions*, 869 F.3d 1176, 1178–79 (10th Cir. 2017) (explaining the background and structure of withholding-only proceedings for aliens with previous removals).

On September 20, 2017, Turcios filed a motion to reopen and rescind his prior FARO. *See* ROP at 2–18. The filing was more than 20 years after the initial FARO, 17 years after his removal, and five years after the reinstatement order. In his motion, Turcios argued: (1) as a matter of law, he should never have been subject to the FARO because he was, at all times, an LPR ineligible for expedited removal; and (2) his second-degree felony conviction is not an aggravated felony and could not serve as grounds for removal.[3] *See id.* at 12.

ICE responded in a letter dated July 18, 2018, stating:

> Our office is in receipt of your September 20, 2017, request for Enforcement and Removal Operations to reopen and rescind the administrative removal order regarding Mr. Jose Vidal Turcios. After a thorough review of your request and all available information, our office respectfully declines to reopen and rescind the administrative removal order. Thank you for the opportunity to assist you in this matter.

Id. at 1.

This petition for review followed. On August 20, 2018, we issued an order to show cause why the case should not be dismissed for lack of jurisdiction. Both parties responded to the show-cause order, and we now consider whether we have jurisdiction.

[3] Turcios has since abandoned this argument. Initially, he contended this court's decision in *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008) (concluding the Colorado statute under which he was convicted was not a crime of violence) obviated the grounds for his removal. However, as Turcios now concedes, that case was overturned by this court in *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017) and *United States v. McCranie*, 889 F.3d 677, 679 (10th Cir. 2018) in the light of *United States v. Castleman*, 572 U.S. 157 (2014). *See* Pet'r Br. at 16 n.4; Resp. Br. at 27–28.

II. Legal Framework

Generally, removal orders are entered pursuant to 8 U.S.C. § 1229a, which provides for removal proceedings before an IJ. *See Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1270 (10th Cir. 2018). Expedited removal under 8 U.S.C. § 1228(b) is reserved for the removal of non-permanent resident aliens who have committed a crime specified by statute. 8 U.S.C. § 1228(a)(1) ("The Attorney General shall provide for the availability of special removal proceedings . . . for aliens convicted of any criminal offense covered in § 1227(a)(2)(A)(iii), (B), (C), or (D)."). If an alien has been convicted of a crime satisfying § 1227(a)(2)(A)(iii), the agency "may . . . issue an order of removal" using the expedited procedure if the alien "was not lawfully admitted for permanent residence." *Id.* § 1228(b)(1), (2)(A). Put simply, "special" expedited removal proceedings may only be instituted against non-LPR aliens. And, more importantly, the "expedited" part of the process means the removal happens entirely within the agency; the alien is not entitled to removal proceedings before an IJ. Turcios was determined removable under § 1228(b) because he used a false identity and claimed to be a non-LPR alien who had entered illegally and been convicted of an aggravated felony. *See id.* §§ 1227(a)(2)(A)(iii), 1228(b)(2)(A).

Congress also included a number of safeguard provisions in § 1228(b) to ensure aliens subject to expedited removal have opportunities to challenge the agency's action. In the NOI issued to the alien to initiate the proceeding, the alien must be given notice of the charges and the opportunity to inspect the agency's

evidence or rebut the charges. *See id.* § 1228(b)(4)(A), (C). And, the alien must have 14 days from the issuance of the FARO under § 1228 to petition for judicial review under 8 U.S.C. § 1252, if he or she so chooses. *See id.* § 1228(b)(3). This 14-day period to petition the appropriate Circuit Court of Appeals for judicial review under § 1252 is the only statutory mechanism by which to challenge a FARO outside of the § 1228(b)(4)(C) opportunity to rebut the charges in the NOI.

There are two regulatory provisions allowing for reopening of previous decisions by the agency: 8 C.F.R. §§ 1003.2 and 103.5. The provisions have some overlap; for example, each requires that motions to reopen or reconsider demonstrate new facts supported by accompanying documentation or evidence. *See* 8 C.F.R. §§ 1003.2(c)(1), 103.5(a)(2). The distinction lies in the entity having jurisdiction over the motion. Under § 1003.2, a party may move in writing for the Board of Immigration Appeals (BIA) to reopen or reconsider any previous "decision . . . made by the [BIA]." *Id.* § 1003.2(a). The decision to grant such a motion is at the discretion of the BIA. *See id.*; *cf. Kucana v. Holder*, 558 U.S. 233 (2010). By contrast, § 103.5 creates a mechanism to reopen a decision made by the agency but not by the BIA. *See* 8 C.F.R. § 103.5(a)(1).

Section 1003.2 is housed within the INA's accompanying regulations in the subsection related to the powers of the BIA. It is found in "Chapter 5–Executive Office of Immigration Review, Department of Justice." And Part 1003 in particular pertains to the general provisions for the structure and procedure of the Executive Office of Immigration Review, the sub-agency responsible for immigration judges,

the BIA, and traditional removal proceedings. Conversely, § 103.5, housed within Part 103 "Immigration Benefits; Biometric Requirements; Availability of Records," is found within the subpart of Part 103 labeled "Applying for Benefits, Surety Bonds, and Fees." Part 103 is a subsection of "Chapter 1–Department of Homeland Security," in the subchapter on immigration regulations.

In sum, § 1003.2 allows for reopening of BIA matters, but not of other agency actions like ICE or USCIS decisions. Administrative removals pursuant to § 1228 happen entirely within ICE. Section 103.5 is the only provision that allows for reopening of a proceeding conducted by someone *other* than the BIA. It is for this reason that Turcios filed his motion pursuant to § 103.5: the BIA never played a role in his initial § 1228 removal, because statutorily that removal was limited to the INS/ICE's determination, so a motion to reopen under § 1003.2 is inapposite.

We now hold the DHS letter is a reviewable final agency action. However, we lack jurisdiction to review Turcios' petition as we have no jurisdiction to review underlying removal orders once they have been reinstated.

III. Finality

The government never explicitly argues to this court why ICE's denial letter is not a final judgment from which appellate jurisdiction may properly lie. Rather, the government simply "assum[ed] without conceding" that it was final. Resp. Br. at 2, 18, 27. Because we have a duty to ascertain our own jurisdiction, we must determine whether Turcios petitions from a final judgment. We conclude the ICE denial letter is a final agency action from which an appeal may be taken.

In *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015), this court concluded reinstatement orders do not become final until all proceedings, including withholding-only proceedings, are completed. *See id.* at 1186. There, Luna-Garcia petitioned for review of the government's reinstatement of her prior removal order while her withholding-only proceedings remained pending before an IJ. *See id.* at 1183. The government moved to dismiss the petition for lack of jurisdiction, "arguing that the ongoing reasonable fear proceedings render[ed] the reinstated removal order nonfinal." *Id.* The panel agreed, and granted the government's motion to dismiss, in part because the governing regulations do not permit the government to *execute* a reinstated removal order until the reasonable fear and withholding of removal proceedings are complete. *See id*. at 1183 (citing 8 C.F.R. §§ 208.1(a), 208.5(a) (together providing that an alien shall not be removed before a decision is rendered on his or her application for withholding of removal)).

However, *Luna-Garcia* is distinguishable from the instant case, given Turcios does not petition directly from the reinstatement of his removal order, but rather from the denial of his motion to reopen the underlying 1997 FARO. Nor does Turcios challenge the *reinstatement* order in any way; his motion to reopen is limited to the underlying removal order. The Supreme Court instructs that for agency action to be "final," it must "mark the 'consummation' of the agency's decisionmaking process," and determine "rights or obligations" or engender "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). ICE can take no further administrative action on Turcios' motion to reopen; the denial letter is an administratively final decision.

Moreover, whatever decision the IJ may ultimately make regarding Turcios' eligibility for discretionary withholding of removal from the reinstatement order, that decision will have no bearing on ICE's denial of Turcios' motion to reopen the underlying FARO. The awarding of discretionary relief from removal and this appeal from ICE's denial of Turcios' motion to reopen his FARO are like parallel lines: they never intersect or affect one another in any way but continue on their own trajectory. The determination to award discretionary relief is unrelated to the underlying FARO or reinstatement itself. As we explained in *Luna-Garcia*, "[i]f the alien obtains relief in the reasonable fear proceedings, the reinstated removal order is not vacated or withdrawn; only its execution is withheld." 777 F.3d at 1183 (citing *Matter of I-S & C-S*, 24 I. & N. Dec. 432, 433–34 (BIA 2008)). Similarly, if the IJ were to award discretionary relief to Turcios, that would not change the nature of his underlying FARO or somehow render him eligible to reopen and rescind it. We are satisfied any pending proceedings before the IJ have no bearing on the validity of ICE's denial of Turcios' motion to reopen his FARO.

Next, we look to the structure of the regulation. Section 103.5(a)(6) states "[a]ppeal to the [Administrative Appeals Unit (AAU)] from Service decision made as a result of a motion. A field office decision made as a result of a motion may be applied to the AAU *only if the original decision was appealable* to the AAU." (emphasis added). A decision would have been directly appealable to the AAU under § 103.3.

Section 103.3 contains the appropriate procedures for "[d]enials, appeals, and precedent decisions" under that section of the regulatory scheme. It makes clear "[c]ertain unfavorable decisions on applications, petitions, and other types of cases may be appealed" either to the BIA *or* to the AAU. Section 103.3 described the AAU as "the appellate body which considers cases under the appellate jurisdiction of the Associate Commissioner." 8 C.F.R. § 103.3(a)(1)(iv).

The BIA has appellate jurisdiction over:

> (1) decisions from IJs in exclusion cases, deportation cases (except voluntary departure), in rescission of adjustment of status, asylum proceedings, temporary protected status cases where alien was statutorily ineligible, and custody of aliens subject to FAROs; and,
> (2) decisions involving administrative fines and penalties, petitions filed in accordance with INA § 204, decisions of adjudicating officials in disciplinary proceedings involving practitioners and recognized organizations, and applications for the exercise of discretionary authority in INA § 212(d)(3).

Id. § 1003.1(b)(1)-(14).

The AAU has appellate jurisdiction over:[4]

> (1) denial of employment-based visa petitions, *see* 8 C.F.R. § 204.5(n)(2);
> (2) withdrawal of temporary protected status on non-ineligibility grounds, *see id.* § 244.14(b)(3), (c);
> (3) denial of adjustment to lawful resident status for certain nationals, *see id.* § 245a.4(b)(16);
> (4) denial of application for temporary residence, *see id.* §§ 245a.2(p), 210.2;
> (5) termination of temporary resident status, *see id.* § 210.4(d)(3)(i);
> (6) special immigrant status for juvenile alien court-dependent, *see id.* § 204.11(e);

[4] The regulations note the appellate jurisdiction for the AAU should be available at § 103.1(f), but no such sub-section (f) was ever promulgated; the list here is from a canvass of the regulations themselves. *See, e.g.*, 8 C.F.R. § 103.3(a)(1)(ii) (stating appellate authority of AAU is designated at § 103.1(f)(3)).

(7) denial of application for adjustment to LPR status based on bona fide marriage, *see id.* § 245.1(c)(8)(viii).

Turcios moved to reopen a FARO, not a benefit decision. His motion cannot be characterized as anything approaching the categories described under the AAU's purview. The AAU would never have had jurisdiction over his original 1997 FARO. Because an appeal to the AAU from a denial of a motion to reopen may be taken only where the original decision of the agency was appealable to the AAU, we conclude Turcios could not have appealed the ICE denial to the AAU.

The regulations also state that where the BIA has jurisdiction, it should hear appeals from denials under § 103.5. *See id.* §§ 103.3, 103.5. Section 103.5(a) notes that motions to reopen should be referred to the "official having jurisdiction" in all cases "[e]xcept where the Board has jurisdiction." *Id.* § 103.5(a)(1)(i). As an attempt to reopen the 1997 FARO, that would seem to fall under the Board's jurisdiction over removals. However, the BIA never played any part in Turcios' 1997 removal in the first instance. FAROs issued where the alien conceded removability as part of an expedited removal proceeding are never conducted under the purvey of an IJ. *See* 8 U.S.C. § 1228(b). Because the alien concedes all the facts and allegations in the NOI during an expedited removal, the removal procedure takes place entirely within the agency.

Broadly, the BIA cannot take appeals from cases that were not originally conducted before an IJ. *See* 8 C.F.R. § 1003.1(b). The INA does not contemplate that aliens lie about their identity and eligibility for expedited removal under

§ 1228(b). We have not found a case where a denial of a motion to reopen a FARO under § 103.5 was appealable from the agency to the BIA.

There is an earlier line of cases suggesting that where the BIA denies a motion to reopen, such a denial is a "final removal order" subject to review by the Courts of Appeals. *See Giova v. Rosenberg*, 379 U.S. 18 (1964); *see also Dastmalchi v. I.N.S.*, 660 F.2d 880 (3d Cir. 1981); *Luna-Benalcazar v. I.N.S.*, 414 F.2d 254 (6th Cir. 1969); *Schieber v. I.N.S.*, 347 F.2d 353 (9th Cir. 1965). Here, the denial of the motion to reopen was not by the BIA but by ICE, given the unique procedural posture of expedited removal under § 1228(b). However, because there was no administrative appeal to either the AAU or the BIA that could be taken from ICE's denial, nor is there any further action left for the agency to undertake with regards to this particular motion to reopen (including the pending withholding-only proceedings), we conclude ICE's denial letter was a final agency action in this posture.

IV. Reinstated Removal Orders Are Not Subject to Reopening

Turcios' FARO was reinstated in November 2012, a full five years before he filed his § 103.5 motion to reopen or rescind. *See* ROP at 2 (September 20, 2017). Once the reinstatement order is filed, we have jurisdiction to review the reinstatement order itself, but "[w]e do not, however, have jurisdiction to review the underlying deportation order." *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061, 1063 (10th Cir. 2004) (collecting cases holding same). And, although Turcios seeks to distinguish this limitation on the grounds that he alleges a "constitutional claim or question of

law" preserved for judicial review by 8 U.S.C. § 1252(a)(2)(D), we have similarly rejected that premise in the past.

The parties misunderstand 8 U.S.C. § 1231(a)(5)'s bar. Turcios contends it is inapplicable because ICE made no reference to it in their denial letter. *See* Pet'r. Br. at 21–22. And the government more or less agrees with his characterization by arguing for an exception to the *Chenery* doctrine in this instance. *See* Resp. Br. at 33–37. Both are incorrect because § 1231(a)(5) is jurisdictional. *See Garcia-Marrufo*, 376 F.3d at 1063–64 (collecting cases). "What an agency does or does not say in response to a motion cannot affect our jurisdiction." *Tapia-Lemos v. Holder*, 696 F.3d 687, 689 (7th Cir. 2012). The nature of the agency's denial below is inapposite; we have the special obligation to satisfy ourselves of our own jurisdiction. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

Congress stripped courts of jurisdiction to review or reopen a prior order of removal that has been reinstated. *See* 8 U.S.C. § 1231(a)(5). Turcios titled his motion: "Motion to Reopen and Rescind June 4, 1997 Administrative Removal Order." ROP at 11. That leaves little doubt in our minds he seeks to reopen the 23-year old FARO, not the 8-year old reinstatement order. Simply put, Turcios filed his motion to reopen the 1997 FARO nearly five years after it had been reinstated by the agency. Even if the agency chose to evaluate his motion on its merits, we have no statutory authority to entertain the propriety of his motion. *See Tapia-Lemos*, 696 F.3d at 689 ("What an agency does or does not say in response to a motion cannot affect our jurisdiction."). If Turcios had sought to challenge his 1997 FARO prior to

its reinstatement, the analysis might be different. And, had Turcios framed his challenge as being to the reinstatement order, not the 1997 FARO, we would have jurisdiction to entertain a challenge to the *reinstatement* order. But in this procedural posture, it is clear § 1231(a)(5) precludes us from reviewing a motion to reopen an underlying order of removal that has been reinstated by the agency.

Further, the fact that Turcios couches his claim as "constitutional" and a "question of law," pursuant to 8 U.S.C. § 1252(a)(2)(D), does not save him. Pet'r. Br. at 6, 14, 15, 20–21. In *Gonzalez-Alarcon*, we explained that § 1231(a)(5) precludes review or reopening of reinstated orders, but the statute expressly allows for § 1252(a)(2)(D) review of questions of law posed by the reinstatement order. *See* 884 F.3d at 1271. "However, an individual petition for review of a reinstatement order cannot challenge the original order of removal, 'including constitutional claims or questions of law,' because such a challenge will be time barred." *Id.* (citing *Cordova-Soto v. Holder*, 659 F.3d 1029, 1032 (10th Cir. 2011)). Here, Turcios challenges the legality of the underlying removal order, not the legality of the reinstatement order.

VI. CONCLUSION

Therefore, we DISMISS Turcios' petition for lack of jurisdiction.[5]

Entered for the Court

Allison H. Eid
Circuit Judge

[5] Both parties make a number of additional jurisdictional arguments, but because we conclude § 1231(a)(5) bars review of Turcios' claim, we need not address them here.