FILED
United States Court of Appeals
Tenth Circuit

August 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LUIS MIGUEL SILVA MARMOLEJO,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 20-9611
(Petition for Review)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **KELLY**, and **HOLMES**, Circuit Judges.

Luis Miguel Silva Marmolejo, a Mexican national, petitions for review of a Board of Immigration Appeals' (BIA) decision affirming an immigration judge's (IJ) denial of cancellation of removal. To the extent we have jurisdiction under 8 U.S.C. § 1252(a), we deny the petition for review. Otherwise, we dismiss the petition for lack of jurisdiction.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

In 2010, the government charged Marmolejo with entering the United States without being admitted or paroled. *See* 8 U.S.C. § 1182(a)(6)(A)(i). He conceded the charge but applied for cancellation of removal, which is a form of discretionary relief. To be eligible, he had to show, among other things, that he was "of good moral character during" the ten years preceding his application, *id.* § 1229b(b)(1)(B). A person who gives false testimony during that time to obtain immigration benefits cannot be found to be "of good moral character." *Id.* § 1101(f)(6).

At a hearing before an IJ, Marmolejo signed an amended application for cancellation of removal, affirming under oath that its contents were true and correct to the best of his knowledge. The application indicated that he initially entered the United States in 1998 and returned to Mexico only twice—once in April 2000 through June 2000, and a second time in December 2000 through January 2001. On direct examination, he confirmed these dates and explained that he returned to Mexico in April because his mother was ill. He testified that he expected to be there for only one week, but he ended up staying until June because he was unable to come back to the United States, although he could not remember why. He also testified that he had no contact with immigration officials at the border in 2000.

On cross-examination, however, Marmolejo admitted this testimony was untruthful. At first, he maintained that he had returned to Mexico only in April and December of 2000 and that he had no contact with immigration officials in the year 2000. He also maintained that he could not remember what prevented him from

reentering the United States between April and June, when he expected to be gone for only one week. But when the government presented photos of him after he was apprehended by immigration officials along the border some ten times between April 2000 and January 2001, Marmolejo conceded each time that, in fact, he had attempted to reenter the United States and that he had been repeatedly removed by immigration officials. He recalled some details of those apprehensions, including that he was caught on or near a train three times and several times while walking. He also testified that between June and December 2000, when he originally testified that he was in the U.S., he actually was living in Mexico on the streets or in a church. The government reminded him of his previous testimony in which he stated that he had reentered the United States in June 2000 and stayed until December of that year and asked him if that testimony was "a lie." Admin. R., vol. 1 at 158. Marmolejo replied, "Well, yes, in a way, it's just that I don't remember. I tried to come many times and I couldn't." *Id.* The government pressed him on this point and asked if he was admitting that he was untruthful in testifying that he was in the United States from June until December 2000. Marmolejo replied, "Yes." *Id.* at 159.

The IJ pretermitted the application for cancellation of removal and ordered Marmolejo removed to Mexico, ruling he was ineligible for cancellation of removal because he failed to establish good moral character. The IJ explained that 8 U.S.C. § 1101(f)(6) precludes a finding of good moral character for anyone who falsely testifies under oath to obtain immigration benefits. The IJ recited Marmolejo's testimony on direct examination and noted that he repeatedly denied encountering

immigration officials despite having several opportunities to correct his testimony. The IJ also noted that after he was confronted with the government's rebuttal evidence, he attempted to clarify his testimony by saying he was simply outside of the United States and could not reenter. But the IJ found that his initial testimony could not be attributed to faulty memory and instead that Marmolejo had given false testimony under oath to obtain immigration benefits.

The BIA affirmed, ruling that none of the IJ's findings were clearly erroneous, including that Marmolejo lacked good moral character, and thus Marmolejo was ineligible for cancellation of removal. Although Marmolejo submitted new evidence with his appeal—an affidavit in which he attempted to explain his testimony—and requested a remand, the BIA denied a remand and refused to consider the affidavit. The BIA reasoned that its appellate review was limited to the record before the IJ and a remand was unwarranted because the affidavit was unlikely to change the outcome of the case. Accordingly, the BIA dismissed the appeal.

II

Marmolejo now contends the BIA erred in: (1) affirming the IJ's finding that he lacked good moral character; and (2) failing to consider his affidavit.[1]

[1] Marmolejo also contends he satisfied the continuous presence requirement of 8 U.S.C. § 1229b(b)(1)(A) because his defective notice to appear did not trigger the stop-time rule of § 1229b(d)(1). The IJ ruled against him on this issue, but the BIA expressly ruled in his favor, stating, "contrary to the Immigration Judge's finding, the [government's] service of the [notice to appear] . . . did not trigger the stop-time rule for purposes of cancellation of removal." Admin. R., vol. 1 at 4. "Nonetheless," the BIA continued, "even assuming [Marmolejo] accrued the requisite period of continuous physical presence, he has not otherwise demonstrated his eligibility for

We review the BIA's decision as the final order of removal, though "when seeking to understand the grounds provided by the BIA, we are not precluded from consulting the IJ's more complete explanation of those same grounds." *Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). We review "the BIA's legal determinations de novo," but "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Xue v. Lynch*, 846 F.3d 1099, 1104 (10th Cir. 2017) (internal quotation marks omitted). Our jurisdiction is limited to reviewing constitutional claims and questions of law. *See* 8 U.S.C. § 1252(a)(2)(D); *Galeano-Romero v. Barr*, 968 F.3d 1176, 1182 (10th Cir. 2020). We do not have jurisdiction to review "the discretionary aspects of a decision concerning cancellation of removal[,] . . . includ[ing] any underlying factual determinations . . . ." *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009).

A. Lack of Good Moral Character

Marmolejo first contests the IJ's finding that he lacked good moral character. To the extent he asks us to reweigh the evidence and "find that [he] did not have the subjective intent to give false testimony," Pet'r's Br. at 17, we have no jurisdiction to do so. *See Arambula-Medina*, 572 F.3d at 828.[2]

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cancellation of removal" because he failed to establish good moral character. *Id.* Thus, Marmolejo's failure to show good moral character was dispositive.

[2] For the first time in his reply brief, Marmolejo contends we have jurisdiction to review the IJ's lack-of-good-moral-character finding because it is a mandatory bar to his eligibility for cancellation of removal. "[W]e generally do not consider issues

Marmolejo also argues, however, that he did not give "false testimony" within the meaning of 8 U.S.C. § 1101(f)(6) because the inaccuracies in his testimony were not "for the purpose of obtaining any benefits under" the immigration laws. Citing *Kungys v. United States*, 485 U.S. 759 (1988), he contends that misrepresentations made for other reasons, such as fear, do not show lack of good moral character. He says he testified falsely, not with the intent to gain any benefit under the immigration laws, but because he was fearful of the government's lawyer. We are not persuaded.

Section 1101(f)(6) states, "No person shall be regarded as, or found to be, a person of good moral character who . . . has given false testimony for the purpose of obtaining any benefits under" the immigration laws. This provision does not cover willful misrepresentations based on fear, but "it denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits." *Kungys*, 485 U.S. at 780. Absent some explanation for a false statement, an IJ may infer an intent to obtain immigration benefits. *See Matter of Gomez-Beltran*, 26 I. & N. Dec. 765, 769-70 (B.I.A. 2016). And the IJ here rejected Marmolejo's explanation that he did not remember being in Mexico from

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raised for the first time in a reply brief, except when those issues relate to jurisdictional requirements." *Sadeghi v. INS*, 40 F.3d 1139, 1143 (10th Cir. 1994) (citation omitted). To the extent this argument bears on our jurisdiction, we will consider it. But it is unavailing because, while good moral character is a prerequisite for a discretionary grant of cancellation of removal, *see* 8 U.S.C. § 1229b(b)(1)(B), the IJ's finding that Marmolejo failed to establish good moral character underlays the denial of discretionary relief, which is beyond the scope of our review, *see Arambula-Medina*, 572 F.3d at 828.

June through December 2000—which differs from his current explanation—stating, "While the Court appreciates that perhaps one stop [by immigration officials] may have been a slip of memory, a total of 10 stops over a 9 month time period and a duration of time living on the streets in Juarez, is not a slip of memory." Admin. R., vol. 1 at 165. The IJ clearly inferred, and specifically so found, that Marmolejo falsely testified with the subjective intent of obtaining immigration benefits. We have no jurisdiction to reweigh the evidence and make an alternative finding.

Marmolejo also argues that the BIA should have treated his false testimony as weighing against his credibility rather than establishing his lack of good moral character. Relying on *Yong Chen v. Holder*, 429 F. App'x 699, 704 (10th Cir. 2011), where we upheld an adverse credibility finding based in part on the inconsistency and implausibility of the alien's testimony, Marmolejo contends the inconsistences in his testimony may support an adverse credibility finding, but the IJ had no need to go further and find that his false testimony showed a lack of good moral character.

We lack jurisdiction to consider this argument because Marmolejo failed to exhaust it in the BIA. *See* 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right[.]"); *Galeano-Romero*, 968 F.3d at 1180 n.3 (concluding court lacked jurisdiction to consider unexhausted argument because it was not presented to the IJ or to the BIA). Although Marmolejo asked the BIA to remand his case to the IJ because his new affidavit was "essential to a credibility finding . . . and ultimately a good moral character finding," Admin. R., vol. 1 at 32, he did not cite *Yong Chen*

or argue that the IJ's evaluation of his testimony should be limited to assessing his credibility. "[A]n alien must present the *same specific legal theory* to the BIA before he or she may advance it in court." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010). Marmolejo's failure to exhaust this argument deprives us of jurisdiction to consider it.

B. New Evidence Before the BIA

Lastly, Marmolejo challenges the BIA's refusal to consider his new evidence—the affidavit in which he attempted to explain his testimony before the IJ. The BIA declined to consider the affidavit, reasoning that its review was constrained to the record before the IJ. *See* 8 C.F.R. § 1003.1(d)(3)(iv)(A) (explaining the BIA "will not engage in factfinding"). Indeed, the BIA "has procedural rules governing the introduction of evidence, and under those rules[, new evidence submitted on appeal to the BIA is] not timely submitted and [is] not an official part of the record." *Solomon v. Gonzales*, 454 F.3d 1160, 1164 (10th Cir. 2006), *superseded by statute on other grounds*, 8 U.S.C. § 1158(b)(1)(B)(ii). Thus, the BIA did not err in refusing to consider the affidavit. To the extent Marmolejo asks us to consider it, we decline to do so because our review is limited to "the administrative record on which the order of removal is based," 8 U.S.C. § 1252(b)(4)(A).[3]

[3] Marmolejo's opening brief does not adequately challenge the denial of his request for a remand. Although it cites the relevant standard of review and quotes cases discussing the BIA's authority to remand proceedings, Marmolejo's arguments do not contend the BIA erred in declining to remand the case to the IJ; rather, his arguments focus specifically on the BIA's refusal to accept and consider for itself the new evidence while on appeal. *See* Pet'r's Br. at 19 ("The Board should accept new

III

The petition for review is denied in part and dismissed in part.

Entered for the Court

Timothy M. Tymkovich
Chief Judge

evidence on appeal. . . ."); *id.* ("the Board should accept the evidence"). Thus, we need not consider the BIA's refusal to remand the case to the IJ. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (declining to consider inadequately presented issue). Even if the issue were adequately presented, however, there was no abuse of discretion. *See Galeano-Romero*, 968 F.3d at 1186. Motions for remand are governed by the same standards that apply to motions to reopen, *id.*, so Marmolejo had to show new facts that "would likely change the result in the case," *Maatougui v. Holder*, 738 F.3d 1230, 1240 (10th Cir. 2013) (internal quotation marks omitted). The BIA concluded he failed to carry his burden because the affidavit merely attempted to explain his testimony before the IJ. Marmolejo insists the affidavit demonstrates his fear during the hearing, but it confirms he gave false testimony, and thus, it was unlikely to change the outcome of the case.