

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**August 10, 2021**

**Christopher M. Wolpert**  
**Clerk of Court**

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FIDEL LUNA-MORENO,

Petitioner,

v.

MERRICK B. GARLAND,  
United States Attorney General,\*

Respondent.

No. 20-9646  
(Petition for Review)

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**ORDER AND JUDGMENT\*\***

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Before **McHUGH, BALDOCK**, and **MORITZ**, Circuit Judges.

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Fidel Luna-Moreno, a native and citizen of Mexico, unsuccessfully sought cancellation of removal. The immigration judge concluded that he failed to show his removal would create an “exceptional and extremely unusual hardship” for his

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\* On March 11, 2021, Merrick B. Garland became Attorney General of the United States. Consequently, his name has been substituted for William P. Barr as Respondent, per Fed. R. App. P. 43(c)(2).

\*\* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

United States-citizen children, as required by 8 U.S.C. § 1229b(b)(1)(D), and the Board of Immigration Appeals (Board) affirmed. Mr. Luna-Moreno now petitions for review of the Board’s decision, raising a single argument in his opening brief. We dismiss the petition for lack of jurisdiction, however, because he did not first present that argument to the Board.

Under 8 U.S.C. § 1252(a)(2)(B)(i), this court lacks “jurisdiction to review the discretionary aspects of a decision concerning cancellation of removal” including “the determination of whether the petitioner’s removal from the United States would result in exceptional and extremely unusual hardship to a qualifying relative.” *Galeano-Romero v. Barr*, 968 F.3d 1176, 1181 (10th Cir. 2020) (internal quotation marks omitted). Nevertheless, under § 1252(a)(2)(D), we retain jurisdiction to review “constitutional claims” and “questions of law.”

Attempting to avoid the § 1252(a)(2)(B)(i) jurisdictional bar, Mr. Luna-Moreno argues that, as a matter of law, the Board should in *every* cancellation case evaluate *every* hardship factor that it has considered in its precedential decisions. He asserts that this argument addresses the proper legal framework for assessing hardship claims, and thus it qualifies as a “question of law” we have jurisdiction to review.<sup>1</sup>

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<sup>1</sup> In his reply brief, Mr. Luna-Moreno argues for the first time that this court should overrule *Galeano-Romero* and review the Board’s hardship determination under *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020). But “[t]he general rule in this circuit is that a party waives issues and arguments raised for the first time in a reply brief.” *Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) (internal quotation marks omitted). “We see no reason to depart from that rule here.” *Id.*

In making this argument, however, he ignores another jurisdictional hurdle—the requirement that he exhaust his arguments before bringing them to this court. *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 (recognizing when a petitioner “fail[s] to present [an] argument to the [immigration judge] or Board, it is unexhausted, and we lack jurisdiction to consider it”). Mr. Luna-Moreno did not argue before the Board that the agency must, in every cancellation case, consider every hardship factor that the Board’s precedential decisions have identified. Rather, he challenged the immigration judge’s factual findings and argued that she had incorrectly applied the Board’s precedent. Exhaustion requires “an alien [to] present the *same specific legal theory* to the [Board] before he or she may advance it in court.” *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010). Because Mr. Luna-Moreno did not present his current argument to the Board, we lack jurisdiction to consider it.

The petition for review is dismissed for lack of jurisdiction.

Entered for the Court

Carolyn B. McHugh  
Circuit Judge