FILED
United States Court of Appeals
Tenth Circuit

September 9, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OSCAR BARRAZA-NAVARRETE,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,*

Respondent.

No. 20-9605
(Petition for Review)

ORDER AND JUDGMENT**

Before **MATHESON**, **BRISCOE**, and **CARSON**, Circuit Judges.

Oscar Barraza-Navarrete petitions for review of the denial of his motion to reopen by the Board of Immigration Appeals (BIA). Because we lack jurisdiction to consider either of his propositions of error, we dismiss the petition for review. We also deny Barraza-Navarrete's motion to remand to the BIA.

---

* On March 11, 2021, Merrick B. Garland became Attorney General of the United States. Consequently, his name has been substituted for Robert M. Wilkinson 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. Background

Barraza-Navarrete is a native and citizen of Mexico. He entered the United States without inspection in 2006. The Department of Homeland Security issued a notice to appear (NTA) in 2011, but the NTA did not specify a date and time for Barraza-Navarrete's removal hearing. *See* Admin. R. at 352. In response to the NTA, Barraza-Navarrete sought asylum, withholding of removal, and protection under the Convention Against Torture (CAT). In May 2018, an Immigration Judge (IJ) denied relief on those grounds and ordered him removed.

A. Appeal to BIA

Barraza-Navarrete appealed to the BIA. In addition to challenging the IJ's removal order, he cited *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and argued (1) the IJ never had jurisdiction over his case because the NTA failed to specify the date and time of his removal hearing, and (2) he was eligible for cancellation of removal because the defective NTA did not trigger the stop-time rule to end his period of continuous presence in the United States, *see id.* at 2110 (holding an NTA that does not include the time or place of the removal hearing does not trigger the stop-time rule).[1]

The BIA dismissed Barraza-Navarrete's appeal in May 2020. It agreed with the IJ that he had not established eligibility for asylum, withholding of removal, or

[1] Under the stop-time rule, "any period of . . . continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under [8 U.S.C. §] 1229(a)." 8 U.S.C. § 1229b(d)(1)(A).

CAT protection. The BIA construed Barraza-Navarrete's filing as also raising "an appellate claim that these removal proceedings should be terminated or remanded to consider an application for cancellation of removal." Admin. R. at 129. It rejected his claim that the IJ lacked jurisdiction, citing *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1018 (10th Cir. 2019) (declining to read *Pereira* as an implicit pronouncement on an IJ's jurisdiction). As relevant to the current petition for review, the BIA also held that a remand was not warranted to permit Barraza-Navarrete to apply for cancellation of removal. While his appeal to the BIA was pending, this court had decided in *Banuelos v. Barr* that "the stop-time rule" for cancellation of removal "is triggered by one complete notice to appear rather than a combination of documents." 953 F.3d 1176, 1178 (10th Cir. 2020), *cert. denied*, No. 20-356, 2021 WL 1725170 (U.S. May 3, 2021). The BIA acknowledged that, under *Banuelos*, Barraza-Navarrete may now be able to satisfy the requisite ten years of continuous presence necessary for cancellation. But it denied a remand because he had "not presented an Application for Cancellation of Removal and . . . all supporting documentation. Moreover, he ha[d] not made a prima facie showing that his removal will result in exceptional and extremely unusual hardship to a qualifying relative." Admin. R. at 131 (citations omitted). The BIA cited two cases as to the standards it was applying. It relied on *Matter of Coelho*, 20 I. & N. Dec. 464, 470-73 (B.I.A. 1992), for the proposition that "motions to remand are subject to the same substantive requirements as motions to reopen," Admin. R. at 131. And it cited *INS v. Abudu*, 485 U.S. 94, 104-06 (1988), for its holding as to Barraza-Navarrete's failure to make

a prima facie showing as to exceptional and extremely unusual hardship (EEUH). Additionally, earlier in its decision, the BIA specifically stated that, pursuant to *Coelho*, "a party who seeks a remand to pursue relief bears a 'heavy burden.'" Admin. R. at 130.

B. Motion to Reconsider and Remand

Barraza-Navarrete then filed a motion to reconsider in which he also made another request for a remand to the IJ. He stated that his motion was based on *Banuelos*, which he characterized as a change in the law that would allow him to apply for relief—cancellation of removal—that was previously foreclosed based upon the agency's erroneous interpretation of the stop-time rule. He argued that under *Banuelos* he would have become eligible to apply for cancellation of removal in 2016, ten years after his entry in 2006.

Barraza-Navarrete attached an application for cancellation of removal and addressed the BIA's stated ground for previously denying a remand, arguing that he was prima facie eligible for cancellation of removal. He contended his removal would result in EEUH to his two United States citizen children whether they remained in the United States with their mother or accompanied him to Mexico. As relevant to his petition for review, he claimed that his wife and daughters could not survive financially in the United States without his business income. While stating he was still collecting evidence to support his application, Barraza-Navarrete asserted that the evidence he submitted with his motions was sufficient to show his prima facie eligibility for cancellation of removal. He did not argue that, in its

previous order denying a remand for consideration of cancellation of removal, the BIA had applied the wrong standard in concluding he failed to make a prima facie showing that his removal will result in EEUH to a qualifying relative.

C. BIA's Denial of Reconsideration and Reopening

The BIA denied Barraza-Navarrete's motion to reconsider, holding he did not establish any legal or factual error in its prior decision. As to his failure to make a prima facie showing in his appeal filing, the BIA again cited *Abudu* and concluded "he ha[d] not established actual error in our prior holdings concerning his claims to cancellation [of] removal as they were presented at the time of our decision." Admin. R. at 3.

Based upon his submission of a cancellation application and new evidence, the BIA construed Barraza-Navarrete's motion as also seeking reopening rather than a remand.[2] It held reopening was not warranted because Barraza-Navarrete still had not made a prima facie showing that his removal would result in EEUH. The BIA again cited *Abudu*, as well as this court's decision in *Maatougui v. Holder*, 738 F.3d 1230, 1240 (10th Cir. 2013) (holding that to merit reopening the alien must submit new evidence that "'would likely change the result in the case'" (quoting *Coelho*, 20 I. & N. Dec. at 473)). As relevant to the petition for review, the BIA addressed Barraza-Navarrete's claim that his family could not survive financially in the United States without the income from his business. It concluded, "While we recognize that

[2] We will accordingly hereafter refer to Barraza-Navarrete's motion as seeking reconsideration and reopening rather than a remand.

the respondent's removal to Mexico will result in financial and emotional hardship, there is a lack of indicia that his children's mother, a Mexican national residing in Colorado, is unable to reasonably provide for their needs in this country." Admin. R. at 4. Following this statement, the BIA cited *Matter of Calderon-Hernandez*, 25 I. & N. Dec. 885, 886 (B.I.A. 2012), which it described as "holding that, absent evidence to the contrary, it is reasonable to assume that, upon an alien's removal from the United States, his children will be cared for and supported by the parent who remains here," Admin. R. at 4. The BIA ultimately concluded that Barraza-Navarrete had not made a prima facie showing that his children will suffer hardship that is substantially beyond what would ordinarily be expected upon a parent's removal; rather, the hardship he presented was consistent with other cases in which an alien with United States citizen children is removed.

II. Discussion

The Attorney General may cancel an alien's removal and grant lawful status if the alien satisfies the four requirements in 8 U.S.C. § 1229b(b)(1)(A)-(D). In denying reopening, the BIA found that Barraza-Navarrete failed to make a prima facie showing that he could satisfy the fourth requirement: "that removal would result in exceptional and extremely unusual hardship to [his] . . . child, who is a citizen of the United States." § 1229b(b)(1)(D).

Barraza-Navarrete petitions for review of the BIA's refusal to reopen his case, asserting two propositions of error.[3] He first argues that the BIA applied the wrong legal standard in determining that he failed to make a prima facie showing of eligibility for cancellation of removal. Second, Barraza-Navarrete argues the BIA misconstrued one of its published decisions as establishing a presumption that United States citizen children will not suffer the requisite level of hardship for cancellation of removal as long as they remain in the United States with one of their parents.

Each of these contentions raises an issue concerning this court's jurisdiction, and "[w]e have an independent duty to examine issues relating to our jurisdiction." *Sierra v. INS*, 258 F.3d 1213, 1216 (10th Cir. 2001). We hold that we lack jurisdiction to consider Barraza-Navarrete's first proposition because he failed to exhaust it in his motion to reconsider and reopen filed with the BIA. We lack jurisdiction to consider his second proposition because it does not raise a question of law under 8 U.S.C. § 1252(a)(2)(D).

A. Barraza-Navarrete Failed to Exhaust Before the BIA his Claim that it Applied the Wrong Standard for his Prima Facie Showing of Eligibility for Relief

1. Description of Claim

In his first proposition, Barraza-Navarrete argues the BIA applied the wrong legal standard in denying reopening on the ground that he failed to make a prima

[3] Barraza-Navarrete does not raise any claim of error in the BIA's denial of reconsideration.

facie showing of eligibility for cancellation of removal. He contends that the usual heavy burden on an alien seeking reopening, per *Abudu* and *Coelho*, did not apply because he was seeking relief that was previously unavailable to him based upon the agency's former misapplication of the stop-time rule. *See Pereira*, 138 S. Ct. at 2111 (noting the BIA's previous holding that an NTA that fails to specify the date and time of removal proceedings still triggers the stop-time rule); *Banuelos*, 953 F.3d at 1179-80 (noting the BIA's previous holding that an incomplete NTA combined with a later notice of hearing specifying the missing information triggers the stop-time rule).

The BIA held in *Coelho* that a moving party must meet "a heavy burden" by presenting new evidence that "would likely change the result in the case." 20 I. & N. Dec. at 473 (citing *Abudu*) (internal quotation marks omitted). Barraza-Navarrete contends that, in denying reopening, the BIA erred by not applying a lower, "reasonable likelihood of success on the merits" standard based on its decision in *In re L-O-G-*, 21 I. & N. Dec. 413, 420 (B.I.A. 1996), which stated:

> Where an alien is seeking previously unavailable relief and has not had an opportunity to present [his] application before the Immigration Judge, the Board will look to whether there is sufficient evidence proffered to indicate a reasonable likelihood of success on the merits, so as to make it worthwhile to develop the issues further at a full evidentiary hearing.

Barraza-Navarrete asks this court to hold that the BIA erred and direct the BIA to apply the "reasonable likelihood" standard from *L-O-G-* to his evidence of EEUH on remand.

2. Jurisdictional Analysis

"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." 8 U.S.C. § 1252(d)(1). This court "generally assert[s] jurisdiction only over those arguments that a petitioner properly presents to the BIA." *Sidabutar v. Gonzales*, 503 F.3d 1116, 1118 (10th Cir. 2007). "[Section] 1252(d)(1) requires exhaustion only of 'remedies available to the alien as of right.'" *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1094 (10th Cir. 2008). But this court has held that claims were unexhausted when they were not raised by the aliens in a motion to reopen or reconsider filed with the BIA. *See Sidabutar*, 503 F.3d at 1122 (concluding that claims challenging "the BIA's allegedly de novo fact finding" "should have been brought before the BIA in the first instance through a motion to reconsider or reopen").

The gist of Barraza-Navarrete's first proposition is that, in denying reopening based on his failure to make a prima facie showing of eligibility for cancellation of removal, the BIA erred by applying the heavy burden from *Abudu* and *Coelho* rather than the lower standard in *L-O-G-*. But the BIA had cited both *Abudu* and *Coelho* in its prior order denying Barraza-Navarrete a remand to consider cancellation of removal, after acknowledging that he may no longer be barred from that relief by the stop-time rule. In that earlier order, the BIA did not reference any other, lesser standard that Barraza-Navarrete had to satisfy in making a prima facie showing of EEUH. Thus, the BIA made the same alleged error in denying Barraza-Navarrete a

remand.[4] Yet when Barraza-Navarrete filed his motion to reconsider and reopen, he did not argue the BIA had applied the wrong prima facie standard in its prior order.

Had Barraza-Navarrete raised this issue in his motion to reconsider and reopen, any error could have been corrected by the BIA in ruling on that motion. *Cf. Vicente Elias*, 532 F.3d at 1094 (holding "objections to . . . defects that the BIA could have remedied must be exhausted"). Instead, Barraza-Navarrete is asking this court to decide in the first instance whether the BIA applied the correct legal standard from its own caselaw when he had a remedy available to him as of right to raise this alleged error with the BIA. *See Sidabutar*, 503 F.3d at 1121 (noting the "exhaustion requirement permits the BIA the opportunity to apply its specialized knowledge and experience to the matter, and to resolve a controversy or correct its own errors before judicial intervention" (citation and internal quotation marks omitted)). We therefore lack jurisdiction to consider Barraza-Navarrete's first proposition, which he failed to exhaust before the BIA in his motion to reconsider and reopen. *See id.* at 1122.

B. Barraza-Navarrete's Claim that the BIA Misapplied its Own Caselaw Does not Raise a Question of Law Under § 1252(a)(2)(D)

1. Description of Claim

In denying reopening, the BIA addressed Barraza-Navarrete's claim that his United States citizen children would suffer EEUH if they remained with his wife in the United States upon his removal to Mexico. He contended his family would not be

[4] As noted by the BIA in its order denying a remand, "motions to remand are subject to the same substantive requirements as motions to reopen." Admin. R. at 131; *see also Coelho*, 20 I. & N. Dec. at 471.

able to survive financially without the income from his business in the United States. The BIA concluded, "While we recognize that the respondent's removal to Mexico will result in financial and emotional hardship, there is a lack of indicia that his children's mother, a Mexican national residing in Colorado, is unable to reasonably provide for their needs in this country." Admin. R. at 4. Immediately after this finding, the BIA cited *Matter of Calderon-Hernandez*, 25 I. & N. Dec. 885, 886 (B.I.A. 2012), which it described as "holding that, absent evidence to the contrary, it is reasonable to assume that, upon an alien's removal from the United States, his children will be cared for and supported by the parent who remains here," Admin. R. at 4.

Barraza-Navarrete argues the BIA misapplied the holding in *Calderon-Hernandez* as calling for a presumption that United States citizen children will not suffer EEUH if they stay in the United States with a remaining parent. He argues *Calderon-Hernandez* created no such presumption, as it only addressed the applicability of an evidentiary requirement regarding the care and support of children who will remain in the United States upon the alien's removal. *See* 25 I. & N. Dec. at 886-87 (holding an affidavit and other specific evidence was not required, and remanding to the IJ to consider alien's claim of extreme hardship to children who would remain in the United States with their other parent).

2. Jurisdictional Analysis

In his motion to reconsider and reopen, Barraza-Navarrete sought cancellation of removal under 8 U.S.C. § 1229b(b)(1). Pursuant to 8 U.S.C. § 1252(a)(2)(B)(i),

this court lacks jurisdiction to review discretionary judgments regarding cancellation of removal, including whether removal would result in EEUH to a qualifying relative. *See Alzainati v. Holder*, 568 F.3d 844, 848 (10th Cir. 2009). Section 1252(a)(2)(B)(i) also precludes us from "review[ing] the BIA's denial of a motion to reopen because the alien still has failed to show the requisite hardship." *Id.* at 849.

But 8 U.S.C. § 1252(a)(2)(D) preserves our jurisdiction to review "questions of law" even when our jurisdiction is otherwise precluded by § 1252(a)(2)(B)(i). *See Galeano-Romero v. Barr*, 968 F.3d 1176, 1182 (10th Cir. 2020). Barraza-Navarrete can raise a reviewable question of law "by disputing the application of a legal standard to undisputed or established facts." *Id.* (internal quotation marks omitted). The government argues that Barraza-Navarrete's second proposition does not present a question of law because, under *Galeano-Romero*, this court lacks jurisdiction to review the BIA's application of the EEUH standard. As we explained,

> [t]hat the Board has announced a standard to aid its hardship determination does not create jurisdiction for us to review the Board's *application* of that standard, provided that the Board acknowledges its standard and exercises its discretion within the bounds of its precedents' cabining of such discretion. Once the Board does that, the application of that standard is discretionary—*i.e.*, the determination of whether the requisite hardship exists is discretionary because there is no algorithm for determining when a hardship is exceptional and extremely unusual. If we concluded otherwise, our jurisdiction would extend to reviewing how the Board exercises its discretion, writing [§ 1252(a)(2)(B)] out of the statute.

Id. at 1183-84 (citations, brackets, and internal quotation marks omitted).

We held the court lacked jurisdiction to review the alien's claim in *Galeano-Romero* that the BIA erred by comparing the hardship his spouse would

suffer to the hardship suffered by military families upon a family member's deployment. *See id.* at 1182 n.8. We concluded that contention did not raise a question of law because the alien "point[ed] to no Board precedent that bars such a comparison." *Id.* It was instead an unreviewable challenge to the BIA's discretionary weighing of evidence on the EEUH issue. *See id.* We distinguished another case in which an alien argued the BIA had erroneously required him to have more than one child to qualify for hardship relief, holding that contention was reviewable as a question of law because the BIA "lack[s] discretion to impose additional qualifications for hardship beyond those set by § 1229b(b)(1)(D)," which requires a showing of EEUH to only "one qualifying relative," *id.* at 1184. We concluded that "[o]bviously, the Board would lack discretion to contravene statutory requirements." *Id.*

Here, the BIA cited *Calderon-Hernandez* after finding "there is a lack of indicia that [Barraza-Navarrete's] children's mother, a Mexican national residing in Colorado, is unable to reasonably provide for their needs in this country." Admin. R. at 4. Barraza-Navarrete argues the BIA misconstrued *Calderon-Hernandez* as providing for a presumption that United States citizen children will not suffer EEUH if they stay in the United States with a remaining parent. He characterizes the BIA's reliance on *Calderon-Hernandez* as "a legally erroneous presumption." Pet'r Br. at 7. But even if he is correct that *Calderon-Hernandez* did not create a presumption, that case did not preclude the BIA from applying such a presumption in its EEUH analysis. And Barraza-Navarrete "points to no Board precedent that bars such" a

presumption. *Galeano-Romero*, 968 F.3d at 1182 n.8. Thus, Barraza-Navarrete's contention regarding the BIA's application of *Calderon-Hernandez* fails to present an "argument that the Board ignored its precedent in reaching [its] conclusion" regarding his showing of EEUH. *Id.* Nor does he contend that the BIA imposed an extra-statutory qualification for hardship. *See id.* at 1184.

Barraza-Navarrete identifies no BIA precedent prohibiting the BIA from assuming, absent indicia to the contrary, that his wife is able to reasonably provide for their United States citizen children's financial needs in this country upon his removal. His argument is instead an unreviewable challenge to the BIA's discretionary weighing of evidence on the EEUH issue. We therefore lack jurisdiction under § 1252(a)(2)(B)(i) to consider Barraza-Navarrete's second proposition.

C. Motion to Remand to the BIA

Barraza-Navarrete moves this court to remand his case to the BIA in light of the Supreme Court's recent decision in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), which held, as we did in *Banuelos*, that the stop-time rule for cancellation of removal is triggered only by a single document containing all the statutory requirements for an NTA, *see id.* at 1480, 1486. Barraza-Navarrete argues that, now that the Supreme Court has definitively decided what is necessary to trigger the stop-time rule, his case should be remanded to the BIA in light of this new caselaw. But the BIA denied Barraza-Navarrete's motion to reconsider and reopen based upon his failure to make a prima facie showing of EEUH to his United States citizen

children, *see* § 1229b(b)(1)(D), rather than his insufficient continuous physical presence in the United States, *see* § 1229b(b)(1)(A). The Supreme Court's decision in *Niz-Chavez* is therefore irrelevant to the BIA's consideration of his case. Accordingly, we deny his motion to remand to the BIA.

III. Conclusion

Because we lack jurisdiction to consider the issues raised by Barraza-Navarrete, we dismiss his petition for review. We also deny his motion to remand to the BIA.

Entered for the Court

Joel M. Carson III
Circuit Judge