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United States Court of Appeals
Tenth Circuit

October 19, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARMANDO PEREZ-LANDEROS,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 20-9648
(Petition for Review)

ORDER AND JUDGMENT*

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

Armando Perez-Landeros, a native and citizen of Mexico, seeks review of a Board of Immigration Appeals' (BIA) decision dismissing his appeal from an Immigration Judge's (IJ) order denying reopening. Exercising jurisdiction under 8 U.S.C. § 1252(a)(5), we deny the petition.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

BACKGROUND

Perez-Landeros claims he unlawfully entered the U.S. as early as 1990, but immigration records show that he unlawfully entered the country in March 1997. Four months later, the former Immigration and Naturalization Service apprehended him and served him with a notice to appear (NTA), alleging he was present in the country without admission or parole. The NTA directed him to appear before an IJ at a date and time "to be set." R., Vol. III at 1101. A subsequent notice of hearing (NOH) supplied the date and time information.

On July 25, 1997, Perez-Landeros appeared before an IJ, who ordered him removed to Mexico. Six days later, he was physically removed to Mexico.

There, Perez-Landeros got married and started a family. In November 2001, he and his family illegally entered the U.S. and remained here. Perez-Landeros and his wife now have several U.S.-citizen children, one of whom suffers from cerebral palsy.

In August 2019, Perez-Landeros, through counsel, filed a motion in the immigration court to reopen his removal proceedings. He argued he had been present in the U.S. for ten years and was eligible for cancellation of removal.[1] He relied on *Pereira*

[1] "The Attorney General may cancel the removal of an nonpermanent resident alien who "(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application," "(B) has been a person of good moral character during such period," "(C) has not been convicted of [certain] offense[s]," and "(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1).

v. Sessions, 138 S. Ct. 2105 (2018),[2] and asserted that (1) his NTA's missing date and time information deprived the IJ of jurisdiction to remove him in 1997, and (2) he qualified for equitable tolling of the 90-day period in which to seek reopening because he diligently filed his motion after his counsel obtained "the facts and evidence in the case" through Freedom of Information Act (FOIA) requests. R., Vol. II at 579.

An IJ denied the motion. The IJ ruled that the motion to reopen was untimely, as it was not filed within 90 days of the 1997 removal order's entry. The IJ declined to equitably toll the filing based on *Pereira*, because that case "did not materially change [Perez-Landeros's] eligibility for" cancellation of removal and because he inadequately explained his nearly 14-month delay in moving to reopen after *Pereira*'s issuance. *Id.*, Vol. I at 34.

The BIA adopted and affirmed the IJ's decision.

DISCUSSION

I. Standards of Review

We review for abuse of discretion the denial of a motion to reopen. *Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017). An abuse of discretion occurs when the agency makes a legal error, provides no rational explanation or reasoning, "inexplicably departs from established policies," offers "only summary or conclusory statements," or makes a factual finding unsupported by substantial evidence. *Id.* (internal quotation marks omitted). "[M]otions to reopen immigration cases are plainly disfavored, and

[2] In *Pereira*, the Supreme Court held that an NTA omitting the time or place of the removal proceeding does not trigger the stop-time rule ending the alien's period of continuous presence for purposes of cancellation of removal. 138 S. Ct. at 2110.

[Perez-Landeros] bears a heavy burden to show" an abuse of discretion. *Maatougui v. Holder*, 738 F.3d 1230, 1239 (10th Cir. 2013) (brackets and internal quotation marks omitted).

Where the BIA has summarily affirmed or adopted an IJ's decision, we review the "[IJ's] analysis as if it were the BIA's." *Wiransane v. Ashcroft*, 366 F.3d 889, 897 (10th Cir. 2004) (internal quotation marks omitted).

II. Equitable Tolling

A motion to reopen must be filed within 90 days of the alien's removal order unless the filing period is equitably tolled. *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1270 (10th Cir. 2018). To receive the benefit of equitable tolling, the applicant must show that he exercised due diligence in pursuing the case during the period sought to be tolled and that an exceptional circumstance prevented timely filing. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014); *Mahamat v. Gonzales*, 430 F.3d 1281, 1283 (10th Cir. 2005).

Perez-Landeros argues that his filing deadline should "be equitably tolled because of the significant, intervening change in law that invalidated his previous [NTA] and rendered him eligible for reopening." Pet'r's Opening Br. at 14. He is of course referring to *Pereira*.

Although *Pereira* prevented the triggering of 8 U.S.C. § 1229b(d)(1)'s stop-time rule due to Perez-Landeros's defective NTA,[3] his removal from the country on July 31, 1997, broke his continuous physical presence in the U.S. before he accumulated the requisite ten-year period, whether measured from 1990 or March 1997. *See* 8 U.S.C. § 1229b(d)(2) (stating that a nonpermanent resident alien's "depart[ure] from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days" generally means the alien "failed to maintain continuous physical presence in the United States"); *cf. Barrera-Quintero v. Holder*, 699 F.3d 1239, 1246 (10th Cir. 2012) ("concluding that [alien's 66-day voluntary] return to Mexico under threat of removal . . . broke his continuous physical presence in this country"). And "[w]hile [Perez-Landeros's NTA] was defective, that did not divest the Immigration Court of jurisdiction" and prevent it from lawfully removing him. *Martinez-Perez v. Barr*, 947 F.3d 1273, 1279 (10th Cir. 2020).

Nevertheless, Perez-Landeros asserts that "his reentry to the U.S. in 2001 restarted the [continuous-presence] clock counting his time." Pet'r's Reply Br. at 6.[4] Granted, the BIA has indicated that the continuous-presence clock operates differently depending on whether it was stopped under § 1229b(d)(1) by the service of an NTA (or the alien's

[3] The Supreme Court has also held that a defective NTA is not cured by a subsequent document informing the alien when and where to appear for removal proceedings. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480-86 (2021).

[4] Although we ordinarily do not consider arguments raised for the first time in a reply brief, *McKenzie v. U.S. Citizenship and Immigr. Servs.*, 761 F.3d 1149, 1154-55 (10th Cir. 2014), the government anticipated this argument and addressed it.

commission of a specified crime), or under § 1229b(d)(2) due to a break in presence. A stoppage under subsection (d)(1) "is not simply an interruptive event that resets the continuous physical presence clock, but is a terminating event, after which continuous physical presence can no longer accrue." *In re Mendoza-Sandino*, 22 I. & N. Dec. 1236, 1241 (B.I.A. 2000); *see also McBride v. INS*, 238 F.3d 371, 374 (5th Cir. 2001) (observing that the BIA has "interpreted § [1229b](d)(1) as providing that once continuous physical presence is interrupted by service of a notice of deportation proceedings, the . . . clock not only stops but never starts to run anew either"). Whereas a stoppage under subsection (d)(2) merely resets the clock, but does not cause it "to terminate forever." *See In re Nelson*, 25 I. & N. Dec. 410, 413 (B.I.A. 2011) (internal quotation marks omitted), *pet. for review denied*, *Nelson v. Att'y Gen.*, 685 F.3d 318 (3d Cir. 2012).

But we need not address the BIA's (d)(1) and (d)(2) interpretations and *Pereira*'s effect on those interpretations. Rather, as the government suggests, we can proceed directly to the due-diligence analysis, because even assuming that *Pereira* allows Perez-Landeros to restart the continuous-presence clock upon his 2001 reentry, he has not shown he diligently moved to reopen.[5]

The IJ determined that Perez-Landeros did not adequately explain why it took him nearly 14 months to file a *Pereira*-based motion to reopen. Indeed, Perez-Landeros

[5] We have jurisdiction to consider "claims of due diligence for equitable tolling purposes" so long as the claim involves "the application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020).

explained only that it took him "two to three months" to get responses to his FOIA requests. R., Vol. II at 579. But Perez-Landeros did not state when his counsel filed the requests or even when he retained counsel. Nor did he address whether FOIA-obtained information was critical to seeking reopening based on *Pereira*. He merely said that FOIA-obtained information "confirm[ed] . . . the facts discussed" in the motion, and he filed the motion "less than 90 days" later. *Id.* Moreover, despite the fact that the Supreme Court, in January 2018, granted certiorari to consider whether a defective NTA triggers the stop-time rule, *see Pereira v. Sessions*, 138 S. Ct. 735 (U.S. Jan. 12, 2018), Perez-Landeros did not indicate whether he took any steps to prepare a motion to reopen in the event the Supreme Court rendered a favorable decision. *See Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (indicating that due diligence includes an awareness of legal developments); *see also Herrera-Garcia v. Barr*, 918 F.3d 558, 563 (7th Cir. 2019) (concluding that alien's untimely *Pereira*-based motion for reconsideration was not entitled to equitable tolling because he "ignore[d] the fact that he could have raised the issue under consideration in *Pereira* with the IJ or the [BIA] earlier or at least requested a stay until [*Pereira*] was decided").

We conclude that the IJ did not abuse her discretion by declining to equitably toll Perez-Landeros's deadline for filing the motion to reopen, and the BIA did not err in adopting and affirming that decision.

CONCLUSION

We deny the petition for review.

Entered for the Court

Gregory A. Phillips
Circuit Judge