

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

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

**December 12, 2022**

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

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MIGUEL ANGEL CONDE-SANCHEZ,

Petitioner,

v.

MERRICK B. GARLAND,  
United States Attorney General,

Respondent.

No. 21-9603  
(Petition for Review)

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**ORDER AND JUDGMENT\***

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

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Miguel Angel Conde-Sanchez, a native and citizen of Mexico, seeks review of a Board of Immigration Appeals' (BIA) decision that affirmed the denial of his application for cancellation of removal and request for voluntary departure. Because this court lacks jurisdiction, we dismiss Conde-Sanchez's petition.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

## BACKGROUND

Conde-Sanchez unlawfully entered the United States in 2003, when he was twelve years old. He attended school in this country and worked in a variety of jobs in Colorado. He is married to a U.S. citizen and has two daughters, both of whom are U.S. citizens.

Conde-Sanchez has twice been arrested for alcohol-related offenses. First, in 2013, he was arrested for vehicular assault and “driving while ability impaired.” R., Vol. I at 132. He was sentenced to ninety-one days in jail. Next, in 2019, he was arrested for driving under the influence and driving with a revoked license.

In 2020, while the 2019 charges were still pending, the Border Patrol arrested Conde-Sanchez at a vehicle checkpoint in New Mexico. He had driven from Colorado without a license and was accompanied by three individuals who had illegally entered the country through El Paso, Texas. When questioned by a Border Patrol agent, Conde-Sanchez falsely claimed to be a U.S. citizen.

The Department of Homeland Security charged Conde-Sanchez as a noncitizen present in the U.S. without having been admitted or paroled. He appeared before an IJ, conceded removability, and requested an opportunity to apply for cancellation of removal.

Conde-Sanchez submitted his application and the IJ held another hearing. Both Conde-Sanchez and his wife testified. Conde-Sanchez claimed his removal would pose a hardship on his wife and his two daughters, Natalia (four years old) and Evelyn (ten months old). He explained that he shared custody of Natalia with another woman and

that Natalia's mother would not let Natalia visit him in Mexico. He further testified that he pays child support for Natalia and is the sole source of financial support for his wife and Evelyn, who would remain in the U.S. if he were removed.

Conde-Sanchez's wife testified that she worked as a detention officer but quit because of a difficult pregnancy. She claimed she could not return to work because of a herniated disc. She also testified that she suffered emotional trauma as a child when her father was deported, and she feared that Conde-Sanchez's removal would emotionally harm Evelyn because she would lose contact with both Conde-Sanchez and Natalia. Conde-Sanchez's wife also feared being unable to keep the family's house.

At the conclusion of the hearing, the IJ denied Conde-Sanchez's application for cancellation of removal and denied his request for voluntary departure. First, the IJ found Conde-Sanchez's testimony concerning his arrests not credible, given contradictory testimony from his wife and his inability to recall certain details of the events. Next, the IJ determined that he did not qualify for cancellation of removal because he lacked good moral character, as demonstrated by his arrests, and he failed to show that his wife and daughters would suffer an exceptional and extremely unusual hardship upon his removal.

The BIA, through a three-member panel, dismissed Conde-Sanchez's appeal. Regarding cancellation, the BIA affirmed the IJ's determination that Conde-Sanchez failed to show removal would create an exceptional and extremely unusual hardship. The BIA explained that (1) his daughters had no health problems and there was no evidence his wife's mental and physical health issues were serious; and (2) he failed to show "that the emotional and financial hardship to his wife and children would be substantially

different from other similarly situated individuals whose family member is removed from the United States,” *id.* at 3 (internal quotation marks omitted).

As for voluntary departure, the BIA affirmed the IJ’s denial of relief, given Conde-Sanchez’s arrests and convictions, his lie to a Border Patrol agent about being a citizen, his transportation of individuals unlawfully present in the U.S., and his failure to file tax returns for any year other than 2016. Although the BIA acknowledged there were positive factors in Conde-Sanchez’s case (his U.S. citizen wife and daughters, his wife’s medical issues, his seventeen-year presence in the U.S., and his employment history), the BIA found that the negative factors weighed more heavily and “that a favorable exercise of discretion would not be in the best interest of the United States,” *id.*

## **DISCUSSION**

### **I. Standards of Review**

When a three-member panel reviews the IJ’s decision, “the BIA[’s] opinion completely super[s]edes the IJ[’s] decision for purposes of our review.” *Unreroro v. Gonzales*, 443 F.3d 1197, 1203 (10th Cir. 2006).<sup>1</sup> We review the BIA’s legal decisions *de novo* and its findings of fact under a substantial-evidence standard. *Gutierrez-Orozco v. Lynch*, 810 F.3d 1243, 1245 (10th Cir. 2016). Under that standard, its “findings [are] conclusive unless any reasonable adjudicator would be compelled to reach a contrary

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<sup>1</sup> “[W]hen 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.” *Id.* at 1204.

conclusion.” *Aguilar v. Garland*, 29 F.4th 1208, 1211 (10th Cir. 2022) (internal quotation marks omitted).

## II. Cancellation of Removal

The Attorney General may cancel an alien’s removal and adjust his status to that of a lawfully admitted permanent resident if the alien: (A) has been physically and continuously present in the United States for ten years; (B) has been a person of good moral character during that period; (C) has not been convicted of certain criminal offenses; 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).

Conde-Sanchez argues the IJ failed to conduct “any meaningful analysis” in finding that he lacked good moral character. Pet’r’s Br. at 12. But the BIA did not rely on the IJ’s analysis of Conde-Sanchez’s moral character in concluding that he failed to qualify for cancellation. Rather, the BIA relied solely on § 1229b(b)(1)’s unusual-hardship prong, and we focus on the BIA’s decision, *see Uanreroro*, 443 F.3d at 1203.

To the extent Conde-Sanchez suggests that the BIA’s hardship analysis was the product of an improper credibility determination made by the IJ, he is mistaken. The BIA mentioned Conde-Sanchez’s credibility only in the context of voluntary departure, finding that he failed to adequately brief whether he credibly explained to the IJ “the

presence of the individuals in his vehicle.” R., Vol. I at 3 n.3. Conde-Sanchez’s credibility played no role in the BIA’s hardship analysis.<sup>2</sup>

Finally, Conde-Sanchez contends that “[t]he level of hardship presented here is sufficient to be considered exceptional and extremely unusual.” Pet’r’s Br. at 27. He recounts his evidence and asserts that, when properly weighed, it qualifies him for cancellation of removal. We lack jurisdiction, however, “to review the discretionary aspects of a decision concerning cancellation of removal under § 1229b(b)(1), . . . includ[ing] any underlying factual determinations as well as 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). Although the jurisdictional bar can be avoided for questions of law and constitutional issues, *see* 8 U.S.C. § 1252(a)(2)(D), Conde-Sanchez does not attempt to raise any. “The failure to raise an issue in an opening brief waives that issue.” *Singh v. Cordle*, 936 F.3d 1022, 1041 n.6 (10th Cir. 2019) (brackets and internal quotation marks omitted). Also, this court has held that “[a] petition for review does not raise a question of law by disputing the [BIA’s] appraisal of the degree of hardship likely to [a qualifying relative].” *Galeano-Romero*,

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<sup>2</sup> Moreover, as the BIA noted, Conde-Sanchez failed to provide a specific argument about his credibility involving the individuals in the vehicle with him. Subject to exceptions not applicable here, we lack jurisdiction to consider arguments that a petitioner did not first exhaust before the BIA. *Martinez-Perez v. Barr*, 947 F.3d 1273, 1282 (10th Cir. 2020).

968 F.3d at 1182 (internal quotation marks omitted). And “[a]n alien does not present a colorable constitutional claim capable of avoiding the jurisdictional bar by arguing that the evidence was incorrectly weighed, insufficiently considered, or supports a different outcome.” *Id.* at 1184-85 (internal quotation marks omitted).

### III. Voluntary Departure

Conde-Sanchez argues he should have been granted voluntary departure because he met the eligibility requirements and “there are positive discretionary factors in [his] case including the long length of [his] residence and hardship to his” daughters and wife. Pet’r’s Br. at 28.<sup>3</sup> The BIA affirmed the IJ’s decision to deny post-conclusion voluntary departure “as a matter of discretion because the negative factors in the record outweigh[ed] the positive ones.” *R.*, Vol. I at 3.

“No court shall have jurisdiction over an appeal from [the] denial of a request for an order of voluntary departure” at the conclusion of removal proceedings. 8 U.S.C. § 1229c(f). “The agency’s decision not to grant voluntary departure is discretionary and outside our jurisdiction in the absence of a constitutional or legal question, and this court takes a restrictive view of what constitutes a constitutional claim or question of law.” *Gutierrez-Orozco*, 810 F.3d at 1247 (citation, ellipsis, and internal quotation marks)

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<sup>3</sup> At the conclusion of removal proceedings, the IJ has discretion to grant voluntary departure to an alien if: (A) the alien has been physically present in the United States for at least one year; (B) the alien has been a person of good moral character for at least the preceding five years; (C) the alien is not deportable as an aggravated felon or national security risk; and (D) the alien has shown that he or she can depart the United States and intends to do so. 8 U.S.C. § 1229c(b)(1).

omitted). Conde-Sanchez “neither counters the agency’s jurisdictional argument nor presents a constitutional claim or question of law at issue.” *Id.*

**CONCLUSION**

We dismiss Conde-Sanchez’s petition for lack of jurisdiction. Petitioner’s Motion to Proceed on Appeal Without Prepayment of Costs and Fees is granted.

Entered for the Court

Timothy M. Tymkovich  
Circuit Judge