United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 13, 2021
Lyle W. Cayce
Clerk

No. 20-60233
Summary Calendar

MARCOS ROBERTO DA COSTA,

Petitioner,

versus

MERRICK GARLAND, *U.S. Attorney General*,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A077 698 415

Before BARKSDALE, COSTA, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Marcos Roberto Da Costa, a native and citizen of Brazil, petitions for review of the Board of Immigration Appeals' (BIA) affirming the denial of his motion to reopen proceedings and rescind the *in absentia* order of removal entered by the immigration judge (IJ).

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

In considering the BIA's decision (and the IJ's decision, to the extent it influenced the BIA), legal conclusions are reviewed *de novo*, giving deference to the BIA's interpretation of any ambiguous immigration statutes. *See Orellano-Monson v. Holder*, 685 F.3d 511, 517–18 (5th Cir. 2012).

In March 2000, the Immigration and Naturalization Service served Da Costa with a putative notice to appear (NTA), asserting he was removable because he was present without admission or parole. The NTA directed Da Costa to appear at a removal hearing in Harlingen, Texas, date and time to be determined. In April 2000, the immigration court mailed Da Costa a notice of hearing, setting his proceedings for 9:00 a.m. on 31 May 2000. Da Costa did not appear at the hearing and was ordered removed *in absentia*.

In February 2019, Da Costa moved to reopen proceedings and to rescind the *in absentia* order of removal in the light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). He contended he was eligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(b) because: under *Pereira*, the NTA was insufficient to trigger the so-called "stop-time" rule; and, as a result, he had established more than ten years of continuous physical presence in the United States. The IJ assumed the filing deadline for the motion to reopen was equitably tolled, but denied the motion on the basis that, *inter alia*, Da Costa's continuous physical presence ended when the immigration court mailed him the notice of hearing. The BIA agreed, concluding the notice of hearing cured the defective NTA by providing the date and time of Da Costa's hearing.

Cancellation of removal is available under § 1229b(b)(1) to certain nonpermanent residents who, *inter alia*, have been continuously present in the United States for at least ten years. The period of physical presence is deemed to end when the alien is served with a proper NTA under 8 U.S.C. § 1229(a). *See* 8 U.S.C. § 1229b(d)(1)(A).

After briefing in this court was complete, the Supreme Court held "the statute allows the government to invoke the stop-time rule only if it furnishes the alien with a single compliant document explaining what it intends to do and when". *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021). The Court noted § 1229(a) requires the document to specify "the nature of the proceedings against the alien, the legal authority for the proceedings, the charges against the alien, the fact that the alien may be represented by counsel, the time and place at which the proceedings will be held, and the consequences of failing to appear". *Id.* at 1479; *see also* 8 U.S.C. § 1229(a)(1)(A)–(G) (listing specifications required in written notice for removal proceedings).

Da Costa's NTA did not contain the information required to trigger the stop-time rule. *See Niz-Chavez*, 141 S. Ct. at 1478–79, 1485; *see also* § 1229(a)(1)(A)–(G). Neither did the subsequent notice of hearing. As a result, the Government has not furnished Da Costa with the "single compliant document" required by statute. *Niz-Chavez*, 141 S. Ct. at 1485. Therefore, this part of Da Costa's petition for review is granted and this matter is remanded to the BIA for further consideration in the light of *Niz-Chavez*. *See Yanez-Pena v. Garland*, No. 19-1208, 2021 WL 1725146 (U.S. 3 May 2021) (remanding for consideration under *Niz-Chavez*).

Da Costa also contends, for the first time that, pursuant to *Pereira*, the IJ lacked "jurisdiction" to order him removed *in absentia*. Our court lacks jurisdiction to consider unexhausted assertions raised for the first time on appeal. *See Omari v. Holder*, 562 F.3d 314, 319 (5th Cir. 2009) ("[P]arties must fairly present an issue to the BIA to satisfy [8 U.S.C.] § 1252(d)'s exhaustion requirement".).

DISMISSED IN PART; GRANTED IN PART.