IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40410
Summary Calendar

ANDRES FORTOLIS-MENDEZ,
ANDRES FORTOLIS-FERNANDEZ, JR., and
CRISTINA FERNANDEZ-DE FORTOLIS,

Petitioners,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration of Appeals
(A20 686 408, A29 946 718, A29 946 719)

(November 11, 1994)

Before Judges KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

This petition requires us to consider whether the Board of Immigration Appeals (the "Board") erred in refusing to reopen deportation proceedings against a family of Mexican citizens. Petitioners Andres Fortolis-Mendez; his wife, Cristina Fernandez-De

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Fortolis; and their oldest son[1], Andres Fortolis-Fernandez Jr., (the "Fortolises") moved to reopen deportation proceedings to substantiate their claim that they would suffer extreme hardship if deported, and that therefore their orders of deportation should be suspended. The Board determined that reopening was not warranted and denied their motion. We detect no abuse of discretion in the Board's decision. We therefore deny the petition.

I

Deportation proceedings were begun against the Fortolises March 6, 1991. An accredited representative of the Diocesan Migrant and Refugee Service represented them at the deportation hearings. On June 4, 1991, an immigration judge found Andres Fortolis-Mendez deportable for entry without inspection and his wife and son deportable for remaining in the United States for a longer time than authorized. He further found that they would not suffer extreme hardship if deported. Accordingly, he denied their

[1]The Fortolises have a younger son who is a citizen of the United States and therefore is not a party to this proceeding.

application for suspension under 8 U.S.C. § 1254(a)(1),[2] but granted them voluntary departure.

The Fortolises appealed to the Board, which dismissed their appeal, and we dismissed their petition for review that followed. See Fortolis-Mendez v. I.N.S., No. 92-5052 (5th Cir. December 9, 1993) (unpublished opinion).

While their earlier petition was pending before us, the Fortolises also filed a motion with the Board to reopen the proceedings in order to introduce additional evidence of extreme hardship in support of their application for suspension.[3] This new evidence, the Fortolises argue, would tend to establish that their son would suffer extreme hardship if separated from Texas schools and placed in Mexican schools; that the wife's parents, lawfully

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[2]Under § 1254(a)(1), an alien who is deportable (other than for committing criminal offenses, failing to register or falsifying documents, or for security purposes) may obtain a suspension of his deportation if, in the opinion of the Attorney General, deporting him would "result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." He must also have been physically present in the United States for at least seven years before applying for suspension, and must have exhibited good moral character. Those requirements are not in dispute here: the sole issue is whether deporting the Fortolises would result in the required extreme hardship.

[3]The additional evidence consisted of a report from a psychologist concerning the son's distress at his impending deportation, affidavits from his schoolteachers, an affidavit from the son, together with a letter he had written to the President, and various school records, certificates and awards. It also included an affidavit from the wife's father, tax returns, various documents containing employment information, and a mortgage and deed to a house the Fortolises purchased in June 1992, while their appeal was pending before the Board.

resident in the United States, are elderly and in poor health and would suffer extreme hardship if the family is deported; and that additional equities in the case, including part-time employment for the wife, a better job for the husband, and the purchase of a home, all weigh in favor of suspending the order of deportation.

The Board determined that the additional evidence would not likely change the result in the case and accordingly denied the motion. It gave little weight to the additional equities because they arose after the entry of a final order of deportation. It also concluded that the information was substantially cumulative of previous evidence and, in any event, was insufficient to establish the requisite extreme hardship. This petition for review followed.

II

The Fortolises raise essentially two challenges to the Board's refusal to reopen their proceedings. First, they argue that the Board failed to explain adequately its decision, and, second, they argue that the Board erred when it denied their motion to reopen. As a general matter, motions to reopen are disfavored and are to be denied unless the movant produces material evidence that permits the movant to establish a prima facie case for relief, and that was not available and could not have been discovered or presented at the former hearing. See 8 C.F.R. § 3.2; I.N.S. v. Abudu, 485 U.S. 94, 104-05, 108 S.Ct. 904, 912 (1988).

The Fortolises' first argument, that the Board failed to explain satisfactorily why it declined to reopen the proceedings,

plainly lacks merit.[4] We recognized, in reviewing the Board's dismissal of the Fortolises' earlier appeal, that the Board need not give an elaborate account of its rationale or respond to every argument and piece of evidence. Fortolis-Mendez v. I.N.S., No. 92-5052 (5th Cir. December 9, 1993) (unpublished opinion). A decision is sufficiently explained if it affords a basis for meaningful review. We have upheld Board decisions, for instance, that merely state that the Board had "considered all the factors presented, both individually and collectively." See, e.g., Hernandez-Cordero v. I.N.S., 819 F.2d 558, 563 (5th Cir. 1987) (en banc). Here, the Board's decision is more elaborate: it indicates that the Board considered the arguments and evidence submitted, recites in some detail the substance of the evidence, and concludes that the new evidence did not suggest that, were the proceeding to be reopened, the result would be different. Accordingly, we find the Board's explanation sufficient.

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[4]They base their argument on a recent unpublished case from another circuit, Contreras-Canche v. INS, No. 93-9553, 1994 WL 325417 (10th Cir. July 7, 1994). As an unpublished opinion from another circuit, Contreras-Canche does not bind us. We nonetheless find the cases materially different. In Contreras-Canche, the Tenth Circuit reversed and remanded a denial of a motion to reopen based on its conclusion that the Board had not considered new evidence, but had denied relief merely on the basis that the petitioner had managed to prolong his deportation proceedings long enough to remain in the United States for more than seven years. In this case, however, the Board specifically stated that it had considered the arguments and the evidence, and, after reciting in some detail the substance of the evidence, concluded that, were the proceeding reopened, the new evidence probably would not change the result.

We consider, then, whether the Board erred in denying the Fortolises' motion to reopen. The Fortolises argue that the opinion of their psychologist and the school teacher was new material evidence that would establish extreme hardship, and that the Board disregarded it. The Board's decision, however, indicates that it considered the record and the evidence, and the Fortolises point to nothing--other than the Board's adverse decision--to support their assertion.

Our review in this case is constrained: absent finding an abuse of discretion in the Board's decision, we will deny the petition for review. Pritchett v. I.N.S., 993 F.2d 80, 83 (5th Cir.), cert. denied, __ U.S. __, 114 S.Ct. 345 (1993). An abuse of discretion is not present unless the decision is "capricious, racially invidious, utterly without foundation in the evidence, or otherwise so aberrational that it is arbitrary rather than the result of any perceptible rational approach." Id. Similarly, we generally defer to the Board's assessment of extreme hardship: to establish an abuse of discretion, the Fortolises' evidence must show that their hardship "is uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship is extreme." Hernandez-Cordero, 819 F.2d at 563.

We find that the Fortolises' evidence does not rise to so compelling a level. Instead, we agree with the Board's

determination that the new evidence elaborates upon their earlier claims but does not elevate them to the point of extreme hardship. Accordingly, we find no abuse of discretion.

III

Having found that the Board did not abuse its discretion in denying the motion to reopen their deportation proceedings by Andres Fortolis-Mendez, Cristina Fernandez-De Fortolis, and Andres Fortolis-Fernandez, Jr., we DENY their petition.

D E N I E D.