IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60292
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
June 28, 2019
Lyle W. Cayce
Clerk

NORIS ELISABETH RUBIO AMAYA,

Petitioner

v.

WILLIAM P. BARR, U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A075 295 627

Before REAVLEY, JONES, and HIGGINSON, Circuit Judges.

PER CURIAM:[*]

Noris Elisabeth Rubio Amaya, a native and citizen of El Salvador, entered the United States without inspection, and after failing to appear at her 1997 hearing, the immigration judge (IJ) entered an order of removal in absentia. In 2017, she filed a motion to reopen the in absentia removal proceedings, alleging that she had not appeared and had not filed a timely motion to reopen because of the erroneous advice of counsel. The IJ concluded

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

that Rubio Amaya's motion was untimely and that she was not entitled to equitable tolling because, by waiting more than 20 years to seek the advice of new counsel, she had not diligently pursued her rights. The Board of Immigration Appeals (BIA) agreed and dismissed her appeal. Rubio Amaya now petitions this court for review of the BIA's decision.

In this appeal, Rubio-Amaya challenges the BIA's rejection of her argument that the relevant time for determining whether she acted with reasonable diligence began once she discovered a basis for filing a motion to reopen the removal proceedings. According to Rubio-Amaya, the critical factor for evaluating due diligence is "knowledge of the possibility and a basis for reopening and failing to act diligently within a reasonable period from that point." Actual discovery, she contends, "is not simple awareness of the existence of a removal order but – materially – knowing there is a possibility to reopen the case and there is a basis for doing so."

In our review of the denial of a motion to reopen, we apply a "highly deferential abuse-of-discretion standard, regardless of the basis of the alien's request for relief." *Gomez-Palacios v. Holder*, 560 F.3d 354, 358 (5th Cir. 2009). A motion to reopen must be filed "within 90 days of the date of entry of a final administrative order of removal," subject to exceptions not relevant here. 8 U.S.C. § 1229a(c)(7)(C)(i).

Motions to reopen under § 1229a are subject to equitable tolling. *Lugo–Resendez v. Lynch*, 831 F.3d 337, 343-44 (5th Cir. 2016). "[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 344 (internal quotation marks and citations omitted).

Rubio Amaya's reliance on *Gonzalez-Cantu v. Sessions*, 866 F.3d 302, 305 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 677 (2018), and *Lugo–Resendez*, 831 F.3d at 343-44, is misplaced. In *Lugo-Resendez*, we declined to decide whether equitable tolling was warranted. 831 F.3d at 344. Our decision in *Gonzalez-Cantu*, 866 F.3d at 305, turned on the petitioner's failure to provide facts supporting her theory of relief. Rubio Amaya cites no other authority to support her position that diligence is evaluated from the time of actual discovery of a basis for challenging a removal order. As the BIA found, Rubio Amaya failed to provide any explanation for the 20-year delay in pursuing her rights. The BIA did not abuse its discretion in determining that Rubio Amaya's motion to reopen was untimely. *See Gonzalez-Cantu*, 866 F.3d at 305; *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009).

Accordingly, the petition for review is DENIED.