United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 17, 2022
Lyle W. Cayce
Clerk

No. 20-60925
Summary Calendar

REVECA MORALES CASTILLO,

Petitioner,

versus

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

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
Agency No. A201 427 267

Before SOUTHWICK, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:*

Reveca Morales Castillo, a native and citizen of Nicaragua, petitions for review of the Board of Immigration Appeals' (BIA) order affirming the immigration judge's denial of her motion to reopen in absentia removal

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

proceedings. She also petitions for review from the BIA's denial of her subsequent motion to reconsider.

Morales Castillo contends that the BIA erred as a matter of law in denying her motion to reopen because despite citing "numerous substantially identical cases [where] the BIA found . . . exceptional circumstances," the BIA refused to find exceptional circumstances in her case. She also contends that the BIA's deviation from its prior decisions violated 8 C.F.R. § 1003.1(g) and deprived her of equal treatment under the law without a rational basis.

This court reviews the BIA's factual findings for substantial evidence, and it will not disturb such findings unless the evidence compels a contrary conclusion. *Orellana-Monson v. Holder*, 685 F.3d 511, 517–18 (5th Cir. 2012). The BIA's legal conclusions and its consideration of constitutional claims are reviewed de novo. *Mai v. Gonzales*, 473 F.3d 162, 164 (5th Cir. 2006). "The BIA's denial of a motion to reopen is reviewed for an abuse of discretion." *Magdaleno de Morales v. I.N.S.*, 116 F.3d 145, 147 (5th Cir. 1997).

In the affidavit presented with her motion to reopen, Morales Castillo states that the immigration judge (IJ) told her at her first hearing that her case would be transferred upon her release from immigration custody. Morales Castillo further states that when she was released from immigration detention, she asked her deportation officer about her upcoming master hearing before the IJ, which was scheduled to take place in El Paso, Texas. According to Morales Castillo, the officer explained that her case would be transferred to Omaha, Nebraska, where she planned temporarily to reside, and her hearings would take place there.

After moving to Omaha, Morales Castillo received a notice that her master hearing had been rescheduled to May 14, 2019, but it still listed the immigration court in El Paso as the place for the hearing. Morales Castillo asserts that when she reported to Immigration and Customs Enforcement

(ICE) in Omaha and inquired about the notice, an ICE officer said, "[t]hose court dates are no longer the same," and advised that she would get a new court date with an immigration court in Omaha. Morales Castillo further asserts that she asked again if she needed to travel to El Paso for the scheduled hearing and was told by the ICE officer, "NO, wait for [a new] court date by mail and be present on that date." Morales Castillo contends that she relied on that information and did not attend the scheduled hearing. With this background in mind, we turn to the merits of Morales Castillo's petition.

"[A] motion to reopen deportation proceedings to rescind a properly entered *in absentia* order of deportation must satisfy the exceptional circumstances standard." *de Morales*, 116 F.3d at 147. Pursuant to 8 U.S.C. § 1229a(e)(1), "exceptional circumstances" means "beyond the control of the alien." In *de Morales*, this court held that the circumstances surrounding the mechanical failure of the petitioners' car on the way to their hearing before the IJ were not exceptional and, thus, did not excuse their failure to appear. *Id.* at 146–49. The court emphasized the fact that after the petitioners' car broke down, "they did not call the IJ to explain their predicament." *Id.* at 149.

Like the petitioners in *de Morales*, there is no indication that Morales Castillo attempted to contact the immigration court to clarify any confusion she may have had regarding the location of her hearing or to confirm that the information she had received from the ICE officer was correct. Instead, she relied on the statements from the ICE officer and others even though they were contrary to a Notice of Hearing—mailed to her home in Omaha, Nebraska by the immigration court—that listed El Paso, Texas, as the place for her hearing and included a toll free number for her to call for information regarding the status of her case. *See id.* (explaining that the statutory scheme of the Immigration and Nationality Act "contemplates that aliens subject to

deportation proceedings will make reasonable efforts to attempt to avoid the entrance of *in absentia* orders").

Accordingly, even assuming Morales Castillo's reliance on the ICE officer's statement was reasonable, the BIA did not abuse its discretion in ruling that Morales Castillo failed to show exceptional circumstances as defined in § 1229a(e)(1). Her voluntary decision to follow the advice of an ICE officer and others, rather than contact the immigration court, was not a circumstance beyond her control. *See id.* Because the BIA did not abuse its discretion in finding that exceptional circumstances did not exist, this court need not consider Morales Castillo's arguments related to the BIA's consideration of *Matter of J-G-*, 26 I. & N. Dec. 161 (BIA 2013), and its alternative ruling that she had failed to demonstrate changed country conditions in Nicaragua.

Morales Castillo next refers this court to its decision in *Galvez-Vergara v. Gonzales*, 484 F.3d 798 (5th Cir. 2007), and several unpublished BIA decisions where exceptional circumstances were found, to contend that the BIA's failure to reopen her case amounts to disparate treatment in violation of her equal protection rights. But her contention is unavailing. As this court has explained, "a party who wishes to make out an [e]qual [p]rotection claim must prove the existence of purposeful discrimination motivating the state action which caused the complained-of injury." *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997) (internal quotation marks and citations omitted). Here, Morales Castillo did not even attempt to prove the existence of purposeful discrimination motivating the BIA's denial of her motion to reopen.

Morales Castillo's assertion that the BIA's refusal to exercise its discretion to reopen the removal proceedings sua sponte violated her right to procedural due process is likewise unavailing. This court "has repeatedly

held that discretionary relief from removal . . . is not a liberty or property right that requires due process protection." *Ahmed v. Gonzales*, 447 F.3d 433, 440 (5th Cir. 2006) (collecting cases).

With respect to her motion to reconsider, the BIA found that Morales Castillo had not identified a change in the law that would warrant reconsideration of its previous order, nor had she raised any new legal arguments in support of the motion. Instead, she "simply renew[ed] her request for recission of the in absentia removal order." Though Morales Castillo disagrees with this assessment, a review of her motion reveals that she did not identify any misapplication of the law. The BIA was not persuaded that reversal of the IJ's decision was warranted based on those cases, and Morales Castillo failed to "identify a change in the law, a misapplication of the law, or an aspect of the case that the BIA overlooked" that would warrant reconsideration of the BIA's previous order. *Zhao v. Gonzales*, 404 F.3d 295, 301 (5th Cir. 2005).

Morales Castillo's complaint about the "lack of factual analysis" in the BIA's order denying her motion to reconsider is inconsequential. A motion to reconsider does not require the BIA to reexamine the facts presented in the initial motion to reopen; instead, the petitioner "shall specify the errors of law or fact in the previous order." § 1229a(c)(6)(C); *see also* § 1003.2(b)(1). Morales Castillo did not, however, specify any factual error.

Finally, Morales Castillo contends that reconsideration was warranted because the IJ and the BIA failed to apply "the totality of circumstances" standard in resolving whether exceptional circumstances existed. As the Government points out, however, Morales Castillo did not raise this argument in her motion to reconsider. Because Morales Castillo failed to make a concrete statement before the BIA regarding her claim that the BIA

failed to consider the totality of the circumstances when it denied her motion to reopen, the issue is unexhausted, and this court lacks jurisdiction to consider it. *See Roy v. Ashcroft*, 389 F.3d 132, 137 (5th Cir. 2004). Accordingly, this portion of the petition for review is dismissed.

Based on the foregoing, Morales Castillo's petition is DENIED in part and DISMISSED in part.