

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 16, 2021

Lyle W. Cayce
Clerk

No. 20-60162
Summary Calendar

FELIPE GONZALEZ-CASTELAN,

Petitioner,

versus

MERRICK GARLAND, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A201 074 795

Before KING, COSTA, and HO, *Circuit Judges.*

PER CURIAM:*

Felipe Gonzalez-Castelan, a native and citizen of Mexico, petitions for review of a decision of the Board of Immigration Appeals (BIA) dismissing his appeal from an order of the immigration judge (IJ) pretermining his application for cancellation of removal. He also argues that the IJ erred by

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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considering whether petitioner made a *prima facie* showing of physical presence.

This court reviews the BIA's decision and will consider the underlying decision of the IJ only if it influenced the determination of the BIA. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 348 (5th Cir. 2002). When, as here, the BIA affirms the decision of the IJ and relies on reasoning set forth in the IJ's decision, this court reviews the IJ's decision to the extent that it impacted the BIA's decision. *See Theodros v. Gonzales*, 490 F.3d 396, 400 (5th Cir. 2007).

First, as indicated in the BIA's opinion, Gonzalez-Castelan filed his application for cancellation of removal after the date specified by the IJ—despite an explicit warning regarding abandonment. At the next hearing, eleven days after that late filing, Gonzalez-Castelan's counsel made an oral motion for the IJ to accept the filing. He contends that the immigration judge abused his discretion by denying that post hoc motion for continuance and pretermittting the application.

This court has jurisdiction to review this denial. *Ahmed v. Gonzales*, 447 F.3d 433, 437 (5th Cir. 2006). The IJ has discretion to grant a continuance for good cause shown, and this court reviews the BIA's affirmance of that discretionary decision for an abuse of discretion. *Masih v. Mukasey*, 536 F.3d 370, 373 (5th Cir. 2008). An abuse of discretion exists where the decision is “utterly without foundation in the evidence, or otherwise so aberrational that it is arbitrary rather than the result of any perceptible rational approach.” *Cabral v. Holder*, 632 F.3d 886, 890 (5th Cir. 2011).

There was no abuse of discretion here. Agency regulation provides a clear rule about missing deadlines set by the IJ. *See* 8 C.F.R. § 1003.31(c) (“The immigration judge may set and extend time limits for the filing of

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applications . . . [and] if an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived.”). The BIA’s precedent has held parties to those deadlines. *See, e.g., Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992); *Matter of Islam*, 25 I&N Dec. 637, 642 (BIA 2011). The IJ set a filing date based on counsel’s request for two weeks, and the IJ made an explicit warning to counsel about abandonment. Gonzalez-Castelan missed that deadline by eight days. The IJ’s decision to pretermite the late application is not arbitrary—to the contrary, it was reasonably based on counsel’s own request.

Second, regarding petitioner’s argument that the IJ erred by considering whether petitioner made a *prima facie* showing of physical presence, this court does not have jurisdiction to review unexhausted issues.¹ *Omari v. Holder*, 562 F.3d 314, 318-19 (5th Cir. 2009). This issue was not properly exhausted. To exhaust claims, petitioners are required to first raise them before the BIA. *Id.* Here, on appeal to the BIA, petitioner’s brief makes no mention of continuous physical presence, and the BIA’s decision does not address this alleged issue with the IJ’s decision-making process.

The petition for review is DENIED.

¹ We decline to construe this claim as one regarding the IJ’s abuse of discretion in denying a motion for continuance for adjustment of status related to petitioner’s Form I-130 submitted in April 2018. We decline to do so because counsel did not offer the IJ such a motion.