FILED
United States Court of Appeals
Tenth Circuit

June 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANGEL JAZIEL GUTIERREZ TORRES, a/k/a Anjel Jaziel Gutierrez, a/k/a Anjel Gutierrez,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, United States Attorney General,

Respondent.

No. 17-9555
(Petition for Review)

ORDER AND JUDGMENT*

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

Angel Jaziel Gutierrez Torres, a native and citizen of Mexico, first entered the United States in either 2001 or 2002, when he was fourteen or fifteen years old. In April 2012 the United States Department of Homeland Security charged him with removability under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act,

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

codified at 8 U.S.C. § 1182. Through counsel, Mr. Gutierrez[1] admitted the factual allegations, conceded the charge of removability, and applied for Deferred Action for Childhood Arrivals ("DACA"). Mr. Gutierrez's DACA application was denied, however, and it is not before us on appeal. Some time later, he applied for cancellation of removal. That too was unsuccessful. After his cancellation application was denied by an immigration judge, Mr. Gutierrez appealed to the Board of Immigration Appeals ("BIA"), which in turn dismissed his appeal and ordered Mr. Gutierrez removed from the United States to Mexico. Mr. Gutierrez now petitions this court for review of the BIA's decision. Exercising jurisdiction under 8 U.S.C. § 1252(a), we deny the petition for review.

To qualify for cancellation of removal, Mr. Gutierrez must establish, among other things, that he has been physically present in the United States for a continuous period of not less than ten years. 8 U.S.C. § 1229b(b)(1)(A). Both the immigration judge ("IJ") and the BIA determined that Mr. Gutierrez did not meet that requirement, and thus he was statutorily ineligible for cancellation of removal. Mr. Gutierrez does not challenge that finding on appeal.

He argues instead that (1) the IJ abused his discretion by denying Mr. Gutierrez's requests for a continuance and (2) he was deprived of due process under the Fifth Amendment. Both arguments are without merit.

[1] In the proceedings below, counsel for Petitioner tended to refer to his client as Mr. Gutierrez. We follow that convention here.

I. CONTINUANCE

An IJ "may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29. We review for an abuse of discretion. *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011). "Only if the decision was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis, will we grant the petition for review." *Luevano v. Holder*, 660 F.3d 1207, 1213 (10th Cir. 2011) (quotation omitted).

Mr. Gutierrez filed his application for cancellation of removal in August 2015. At that time, Mr. Gutierrez indicated through his counsel, Cynthia Gordon, Esq., that he was "ready for a merits hearing." A.R. at 128. After the government submitted evidence suggesting Mr. Gutierrez may not be able to prove continuous physical presence, the IJ asked whether Mr. Gutierrez would like a continuance to review the evidence. Ms. Gordon declined and again requested that the matter be scheduled for a merits hearing. The IJ scheduled a merits hearing for January 2016 and advised Mr. Gutierrez to be prepared to address his continuous physical presence in the United States at that time. That hearing was eventually pushed back to January 2017.

In December 2016 Mr. Gutierrez retained new counsel: Ricardo Figueroa, Esq., who continues to represent Mr. Gutierrez before this court. Mr. Gutierrez through his new counsel moved to continue the January 2017 hearing until June or July, but the IJ denied the motion. Mr. Figueroa appeared telephonically at the January 2017 merits hearing and informed the IJ that he had not yet reviewed his client's file, for he had received it from Ms. Gordon only the day before. The IJ

denied Mr. Gutierrez's repeated requests for a continuance, and so Mr. Figueroa presented his case over the phone. And after hearing Mr. Gutierrez's testimony about his prior counsel, the IJ reconsidered his rulings. Finding there was in fact good cause for a continuance, the IJ continued the cancellation-of-removal merits hearing until February 2017.

Mr. Figueroa appeared at the February 2017 merits hearing, this time in person. He hoped to elicit testimony from Mr. Gutierrez's wife, Marilily Gutierrez. But Ms. Gutierrez unexpectedly did not appear in court that day, so Mr. Gutierrez once again moved for a continuance.[2] The IJ denied the motion for lack of good cause, and the merits hearing proceeded as scheduled. At the conclusion of that hearing, the IJ denied Mr. Gutierrez's application for cancellation of removal, based in part on his finding that Mr. Gutierrez did not establish continuous physical presence for a period of ten years.

On appeal to the BIA, Mr. Gutierrez argued that the IJ should have granted a "brief short continuance" to determine why Ms. Gutierrez was absent. A.R. at 11. But the BIA agreed with the IJ's determination that there was no good cause shown. And it further held that the denial of the continuance was not prejudicial because Mr. Gutierrez "has not claimed or shown that his wife would have been able to testify as to his [continuous] physical presence," the "dispositive issue in this case." *Id.* at 4.

[2] Ms. Gutierrez lived in New York at the time, and the merits hearing was held in immigration court in Utah. Mr. Gutierrez explained later that his wife missed her flight due to health issues.

In his petition for review, Mr. Gutierrez does not challenge those BIA findings. Instead, he argues for the first time that the IJ abused his discretion in denying "a meaningful continuance" sufficient to allow Mr. Figueroa to prepare his case. Appellant's Br. at 8. His continuance argument before this court hinges entirely on the IJ's denials of continuances in January 2017, rather than the February 2017 denial that he appealed to the BIA. *See* Appellant's Br. at 10–11 (advancing five reasons why cause for a continuance existed, all of which relate to the rocky transition between Mr. Gutierrez's old and new counsel or the January 2017 hearing date). But the IJ eventually *did* continue the merits hearing to February 2017, and Mr. Gutierrez has not explained why that continuance did not allow sufficient time for his new counsel to prepare. And, in any event, this court sits in review of the BIA, not the IJ. Mr. Gutierrez cannot now challenge rulings of the IJ that he did not raise with the BIA. *See Rivera-Zurita v. I.N.S.*, 946 F.2d 118, 120 n.2 (10th Cir. 1991) ("Judicial review does not extend to points the alien could have made before the Board but did not."). We must therefore reject Mr. Gutierrez's argument that the IJ abused his discretion in denying a continuance.

II. DUE PROCESS

Mr. Gutierrez also argues that the repeated denials of continuances violated his Fifth Amendment right to counsel of choice in immigration hearings. We have jurisdiction to review genuine constitutional claims. *See* 8 U.S.C. § 1252(a)(2)(D); *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th Cir. 2007). Although Mr. Gutierrez asserts a due process violation, he has "no liberty or property interest in obtaining"

cancellation of removal, a "purely discretionary [form of] relief." *Salgado-Toribio v. Holder*, 713 F.3d 1267, 1271 (10th Cir. 2013) (quotation omitted). "Because aliens do not have a constitutional right to enter or remain in the United States, the only protections afforded are the minimal procedural due process rights for an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (quotation omitted). "Beyond this basic protection guaranteed by the Fifth Amendment, any alleged liberty interest must be created by statute or regulation." *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009) (quotation omitted).

Mr. Gutierrez points to no statute or regulation that creates a liberty interest.[3] He argues rather that he was deprived of due process because his new counsel "did not have the opportunity to review the file or any evidence against or in favor of Petitioner." Appellant's Br. at 12. The record reveals otherwise. Mr. Gutierrez's argument rests on the premise that Mr. Figueroa "had no reasonable opportunity to examine the evidence or to present new evidence" because he did not receive his predecessor's case file until the day before the January 2017 hearing. *Id.* As we have already observed, however, the IJ continued that hearing until February 2017. Mr.

[3] In a section of his petition summarizing his argument, Mr. Gutierrez states: "Having counsel simple [sic] appear on a case to make a record that an attorney was present is definitely now [sic] what Congress had in mind when that right was statutorily granted and the [sic] interpreted by the Courts of this Circuit." Appellant's Br. at 8. As best we can tell, Mr. Gutierrez is referring to 8 U.S.C. § 1362, which provides that "[i]n any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." Mr. Gutierrez's rights under § 1362 were not abridged. He was allowed the assistance of both Ms. Gordon and Mr. Figueroa, counsel that he himself chose.

Figueroa does not quibble with the adequacy of that extension: indeed, he represented to the IJ that "a month . . . would be sufficient," A.R. at 139, and a month he was given, *id.* at 219–20.

On this record, we have no cause to doubt that Mr. Gutierrez was afforded "an opportunity to be heard at a meaningful time and in a meaningful manner." *Salgado-Toribio*, 713 F.3d at 1271 (quotation omitted). We have no choice but to reject his due process argument.

III. CONCLUSION

For the above reasons, Mr. Gutierrez has failed to provide any argument to justify overturning the BIA's decision. His petition for review is DENIED.

Entered for the Court

Carolyn B. McHugh
Circuit Judge