FILED
United States Court of Appeals
Tenth Circuit

May 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAVIER A. ZAMUDIO ARRAYGA,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9549
(Petition for Review)

ORDER AND JUDGMENT[*]

Before **MORITZ**, **EID**, and **ROSSMAN**, Circuit Judges.

Javier Zamudio Arrayga challenged an order of removal entered by an immigration judge (IJ). The Bureau of Immigration Appeals (BIA) dismissed his appeal. Proceeding pro se,[1] he now petitions for review of the BIA's decision. Exercising jurisdiction under 8 U.S.C. § 1252(a)(1), we deny the petition for review.

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[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this petition for review. *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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[1] Because Mr. Zamudio Arrayga proceeds pro se, we construe his arguments liberally. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

BACKGROUND

Mr. Zamudio Arrayga is a 37-year-old native and citizen of Mexico. He came to the United States as an infant in 1986 and became a lawful permanent resident in 1996. In 2018, Mr. Zamudio Arrayga pleaded guilty in California to distribution of a controlled substance in violation of Cal. Health & Safety Code §§ 11351 and 11352(a). The felony complaint and plea agreement in his case specified the controlled substance was cocaine. He received a sentence of 364 days' imprisonment in county jail and five years' probation.

In February 2022, the Department of Homeland Security filed a Notice to Appear (NTA) alleging Mr. Zamudio Arrayga was removable under 8 U.S.C. § 1227. The NTA alleged removability on three grounds: (1) conviction of an aggravated felony, *see* § 1227(a)(2)(A)(iii); (2) conviction of a state controlled-substance offense, *see* § 1227(a)(2)(B)(i); and (3) conviction of two or more crimes involving moral turpitude, *see* § 1227(a)(2)(A)(ii).

On February 15, 2022, Mr. Zamudio Arrayga appeared pro se before an IJ in Denver, Colorado. He declined the IJ's offer of time to find legal representation and indicated he would represent himself. He admitted the allegations in the NTA. He further stated he had no fear of being harmed if he returned to Mexico. Mr. Zamudio Arrayga expressed a desire to leave the country voluntarily, but the IJ continued the hearing to review whether his California criminal convictions qualified under federal law to sustain his removal.

On February 17, after the IJ stated she was inclined to sustain the charge of removability, Mr. Zamudio Arrayga expressed reservations about his earlier decisions to concede removability and to represent himself: "I really would like to retract my plea if possible so I can have more time so I can talk to somebody, or I just want to know the process." R. at 113. He explained that, having had more time to think about everything, he was overwhelmed when he first admitted the allegations in the NTA and wanted the opportunity to speak with a lawyer and better understand the process he was facing. Although she acknowledged Mr. Zamudio Arrayga was presenting "a very different attitude than just two days ago," *id.*, the IJ declined to allow Mr. Zamudio Arrayga to retract his admissions to the charge of removability. She specifically asked him "what [he would] like to retract," *id.* at 114, and found he had no persuasive answer. That is, Mr. Zamudio Arrayga was not claiming to be a U.S. citizen nor was he denying the fact of his conviction of the state charges described in the NTA. The IJ also found no basis to allow Mr. Zamudio Arrayga to withdraw his admission that he had no fear of harm if he returned to Mexico.

The IJ nonetheless did continue the case until February 23. She told Mr. Zamudio Arrayga that she "[would] not be giving [him] any more continuances." *Id.* at 121. At the February 23 hearing, Mr. Zamudio Arrayga requested an additional continuance and indicated he was still looking for counsel. According to Mr. Zamudio Arrayga, his state public defender in California misled him when advising him to plead guilty in his criminal case, and he wanted more time to contest the removal charge.

The IJ denied the requested continuance and sustained the charge of removability on the first two bases alleged (conviction of an aggravated felony and conviction of a state controlled-substance offense). The IJ did not rule on the third basis (conviction of two or more crimes involving moral turpitude). Mr. Zamudio Arrayga appealed to the BIA, which dismissed his appeal and affirmed the IJ's order. He then timely petitioned for review in this court.

DISCUSSION

Because the BIA decision was issued by a single board member, we review it "as the final agency determination and limit our review to issues specifically addressed therein." *Diallo v. Gonzales*, 447 F.3d 1274, 1279 (10th Cir. 2006). "However, we may consult the IJ's decision to give substance to the BIA's reasoning." *Jimenez v. Sessions*, 893 F.3d 704, 709 (10th Cir. 2018) (internal quotation marks and brackets omitted).

Mr. Zamudio Arrayga raises three issues in his petition for review:

> (1) whether the BIA appropriately sustained the IJ's denial of his request for a continuance to seek legal representation and to collaterally attack his state criminal conviction;
>
> (2) whether the BIA erred in rejecting his argument that the IJ did not sufficiently develop the record on whether his California convictions were grounds for removability; and

(3) whether the BIA abused its discretion in sustaining the finding of removability even though no Tenth Circuit case law exists on whether the California criminal statute at issue was divisible.

We consider each issue in turn and discern no error.

I. The IJ did not abuse her discretion when denying Mr. Zamudio Arrayga's request for a continuance to seek legal representation and to collaterally attack his state criminal conviction.

An IJ "may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29. We review the decision to deny a motion for continuance for abuse of discretion. *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011). "An abuse of discretion is defined in this circuit as a judicial action which is arbitrary, capricious, or whimsical." *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990). "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." *Jimenez-Guzman*, 642 F.3d at 1297 (internal quotation marks and brackets omitted).

The record shows the IJ continued the proceeding on February 15 and 17. Mr. Zamudio Arrayga has not shown the IJ acted arbitrarily, capriciously, or whimsically in concluding he had not shown good cause for a third continuance. Mr. Zamudio Arrayga's conviction for a drug-trafficking offense, an aggravated felony, meant he was not eligible for withholding of removal or asylum. *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i), 1231(b)(3)(B)(ii). And Mr. Zamudio Arrayga's admission that he did not "fear that [he] would be harmed, much less tortured, back

in Mexico by the government or with the government's acquiescence," R. at 106, rendered him ineligible for protection under the Convention Against Torture (CAT). *See* 8 C.F.R. § 1208.16(c)(2) (describing applicant's burden for entitlement for CAT protection); *id.* § 1208.18(a) (defining "torture" under the CAT).

This left only one potential avenue to defend against removal—a successful challenge to the California drug trafficking conviction underlying the removal charge. When the IJ denied Mr. Zamudio Arrayga's third request for a continuance, the prospect of Mr. Zamudio Arrayga successfully challenging the basis for his removal charge was wholly speculative both in terms of its likelihood of success and the amount of time it would take to advance it. Under the circumstances, we cannot say the IJ abused her discretion in declining to delay the removal proceedings again.[2]

Whether an IJ appropriately exercises her discretion to deny a continuance generally will be an inquiry tied to the specific facts of each case. But we have previously upheld an IJ's denial of continuance under very similar circumstances. *See Jimenez-Guzman*, 642 F.3d at 1297 ("Pending post-conviction motions or other collateral attacks do not negate the finality of a conviction for immigration purposes unless and until the conviction is overturned."); *id.* at 1298 (concluding no abuse of

[2] We note, though, that the time the IJ afforded to Mr. Zamudio Arrayga to secure counsel—only eight days between the February 15 and February 23 hearing—is considerably shorter than we have previously held to be within the IJ's discretion. *Cf. Jimenez-Guzman*, 642 F.3d at 1295–96 (describing multiple continuances over a period of several months). Our approval of the denial of the continuance here relates in no small part to the substance of Mr. Zamudio Arrayga's admissions and the specific basis for his request for a continuance (a not-yet-initiated collateral challenge to his state conviction).

discretion in denying continuance to await result of collateral motion attacking state conviction).

Mr. Zamudio Arrayga also argues the denial of his request for a continuance implicated his right to counsel under the Sixth Amendment. To be sure, "[i]mmigration law can be complex, and it is a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). But "no [S]ixth [A]mendment right to counsel in a deportation proceeding exists," *Michelson v. I.N.S.*, 897 F.2d 465, 467 (10th Cir. 1990). Liberally construing this argument more broadly as a due-process challenge to the denial of a continuance, we agree with the BIA that Mr. Zamudio Arrayga failed to show the requisite prejudice to sustain this challenge. *See* R. at 3; *Matter of Santos*, 19 I. & N. Dec. 105, 105 (BIA 1984) ("An alien must demonstrate that he has been prejudiced by a violation of a procedural rule or regulation before his deportation proceeding will be invalidated.").

To establish prejudice from a denial of a continuance, the noncitizen "must specifically articulate the particular facts involved or evidence which he would have presented, and otherwise fully explain how denial of his motion fundamentally changed the result reached." *Matter of Sibrun*, 18 I. & N. Dec. 354, 357 (BIA 1983). Mr. Zamudio Arrayga did not make such a showing here. He describes no additional facts or evidence he could have presented had he been allowed more time nor does he explain how that information would change the result the IJ reached.

II. The BIA did not err in concluding the IJ sufficiently developed the record on whether Mr. Zamudio Arrayga's California convictions were grounds for removability.

Regarding the second and third issues, "[w]e consider any legal questions de novo, and we review the agency's findings of fact under the substantial evidence standard. Under that test, our duty is to guarantee that factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole." *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). Having done so, we discern no error.

"When the Government alleges that a state conviction qualifies as an 'aggravated felony' . . . we generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the [Immigration and Naturalization Act]." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). When using the categorical approach, we "look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Id.* (internal quotation marks omitted). However, where the state statute of conviction is divisible, courts use the modified categorical approach. The modified categorical approach allows courts to consider a limited set of judicial records to determine whether the state conviction triggers removal. *See id.* at 191. A state statute is divisible if it "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Mathis v. United States*, 579 U.S. 500, 505 (2016).

In this case, the IJ adopted the reasoning of a Ninth Circuit case to conclude that Mr. Zamudio Arrayga's statute of conviction—Cal. Health & Safety Code § 11352—was divisible. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1037 (9th Cir. 2017) (en banc). In *Martinez-Lopez,* the Ninth Circuit applied the United States Supreme Court's instructions in *Mathis* to analyze the divisibility of § 11352. *See* 864 F.3d at 1038–39. Looking to decisions from the California Supreme Court, *see In re Adams*, 536 P.2d 473, 477 (Cal. 1977); *see also People v. Jones*, 278 P.3d 821, 827 (Cal. 2012), the Ninth Circuit concluded § 11352 included alternative elements defining multiple crimes rather than alternative means by which defendants might commit the same crime, *see* 864 F.3d at 1040–41.

So, applying *Martinez-Lopez* and using the modified categorical approach, the IJ considered the criminal complaint and plea agreement in Mr. Zamudio Arrayga's case and found his state conviction was for distributing cocaine. Cocaine is a controlled substance under federal law, *see* 21 U.S.C.§ 812(c), Schedule II(a)(4), and trafficking is an aggravated felony, *see* 8 U.S.C. § 1101(a)(43)(B).

III. The BIA did not err in relying on Ninth Circuit case law to conclude Mr. Zamudio Arrayga's California criminal statute of conviction was divisible.

Mr. Zamudio Arrayga argues the IJ erred in relying on *Martinez-Lopez* rather than Tenth Circuit case law. But he points to no countervailing Tenth Circuit law regarding the divisibility of his California statute of conviction, nor are we aware of any. The IJ nonetheless correctly acknowledged that she was "certainly not bound by the Ninth Circuit's decision," and that she was considering *Martinez-Lopez* only as

persuasive authority. R. at 39. It was not error for her to do so under the circumstances here. *See United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir. 1986) (noting that "we often rely upon the analysis and decisions of other circuit courts of appeals" even though "we are not bound by" those decisions). Mr. Zamudio Arrayga has offered no reason to doubt the legal conclusion in *Martinez-Lopez* that his California statute of conviction was divisible, nor does he dispute that his conviction for distributing cocaine rendered him removable. Accordingly, we will not disturb the BIA's conclusions on these issues.

CONCLUSION

We deny the petition for review.

Entered for the Court

Veronica S. Rossman
Circuit Judge