FILED
United States Court of Appeals
Tenth Circuit

July 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NELSON JOSE SANCHEZ-LOPEZ,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9566
(Petition for Review)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **PHILLIPS** and **McHUGH**, Circuit Judges.

Petitioner Nelson Jose Sanchez-Lopez, a native and citizen of El Salvador, petitions for review of a Board of Immigration Appeals (BIA) order affirming the Immigration Judge's (IJ) decision denying his "Motion to Reopen an In Absentia Order" (Motion to Reopen). Exercising jurisdiction under 8 U.S.C. § 1252, we deny the petition.

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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 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. Background

Petitioner entered the United States illegally on June 23, 2014, when he was sixteen years old. The Department of Homeland Security (DHS) personally served him with a Notice to Appear (NTA) on June 25, 2014, which charged him with being subject to removal as a noncitizen present in the United States without being admitted or paroled. On July 23, 2014, DHS commenced removal proceedings against Petitioner by filing the NTA with the immigration court. On July 30, 2014, the court mailed Petitioner a Notice of Hearing informing him of a hearing on August 7, 2014. The notice was sent to the address listed on Petitioner's NTA.

Petitioner did not appear at the hearing. The court found that DHS had met its burden and ordered Petitioner removed in absentia. On August 4, 2020, Petitioner was detained by DHS due to the outstanding in absentia removal order.

A. *Motion to Reopen*

On August 7, 2020, Petitioner filed his Motion to Reopen. DHS opposed the motion. In his motion, Petitioner presented a number of alternative bases to support reopening his removal proceedings and rescinding the in absentia order.[1] He argued: (1) he did not receive the Notice of Hearing, (2) exceptional circumstances caused his failure to appear, (3) the statutory time bar should be equitably tolled, and (4) the

[1] The Immigration and Nationality Act provides two bases to rescind an in absentia removal order: 1) if the noncitizen demonstrates that the failure to appear was because of exceptional circumstances, which must be raised in a motion to reopen filed within 180 days of the date of the removal order; or 2) if the noncitizen did not receive notice, which may be raised in a motion to reopen filed at any time. *See* 8 U.S.C. § 1229a(b)(5)(C)(i), (ii).

court should reopen his case sua sponte. An IJ considered the Motion to Reopen and denied it.

B. *IJ Decision*

The IJ first explained there is a presumption of receipt when a notice is sent by regular mail to the address Petitioner specified and Petitioner had failed to submit evidence to rebut the presumption because he submitted no affidavits or evidence corroborating his counsel's assertions. The IJ further explained that Petitioner's status as a minor did not preclude proper service of the NTA or the Notice of Hearing because the BIA has held that service is effective on a minor who is at least fourteen years old at the time of service even though notice was not also served on an adult with responsibility for the minor.

The IJ next rejected Petitioner's argument that his status as a minor and abandonment by his mother constituted exceptional circumstances that caused his failure to appear. Because service on him was effective even though he was a minor and he failed to submit any evidence of the alleged abandonment, the IJ found he had failed to demonstrate exceptional circumstances. The IJ also concluded Petitioner was not entitled to equitable tolling because he provided no explanation for his six-year period of inaction, nor had he provided any evidence that he had acted with due diligence.

Finally, the IJ declined to sua sponte reopen Petitioner's in absentia removal proceedings, noting that sua sponte reopening was only appropriate in exceptional

situations and concluding Petitioner had not demonstrated any exceptional situation that would warrant sua sponte reopening.

C. *BIA Decision*

On appeal to the BIA, Petitioner argued that he presented exceptional circumstances to either permit the IJ to rescind the in absentia order or to sua sponte reopen his removal proceedings. He asserted he was only sixteen at the time he entered the country, his mother abandoned him, and he did not receive the Notice of Hearing. But he did not address any of the reasoning from the IJ's decision. The BIA adopted and affirmed the IJ's decision, noting that Petitioner had reiterated the arguments he made to the IJ but had "not address[ed] why his [Motion to Reopen] was not accompanied by any supporting evidence or affidavits regarding his counsel's contentions." R. at 4.

The BIA next discussed several arguments that Petitioner raised for the first time on appeal. Petitioner argued he was entitled to have his proceedings reopened because his due process rights were violated when the NTA failed to provide him with an adequate opportunity to secure counsel. *See* R. at 21 (citing 8 U.S.C. § 1229(b)(1)[2]). As part of this argument, Petitioner asserted that the NTA was not effective because it did not include a date and time for the hearing, so the Notice of

[2] Section 1229(b)(1) states: "In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear."

Hearing that was allegedly mailed to him effectively served as the NTA. The Notice of Hearing, however, provided less than the ten days for him to obtain counsel.

The BIA rejected this argument. It explained that Petitioner's initial hearing was scheduled more than ten days after service of the NTA, and it disagreed with Petitioner's contention that the NTA was not effective. Petitioner had cited to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), to support his argument, but the BIA explained that "the holding in *Pereira* is narrow, and discusses the sufficiency of an NTA as it relates solely to the stop-time rule found at . . . 8 U.S.C. § 1229b(b)." R. at 5 (citing *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443 (B.I.A. 2018)).[3]

Moreover, the BIA determined that Petitioner

> ha[d] not offered persuasive evidence to establish that the timing of the mailing of the [Notice of Hearing] violated a rule or regulation or otherwise prevented him from receiving notice in a manner to reasonably allow him to participate in the scheduled hearing such that his due process rights were violated.

R. at 5.[4]

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[3] Petitioner also argued that the waiver he signed on his NTA waiving his right to a 10-day period before appearing before an IJ was not properly explained to him. But the BIA determined that "where, as here, the plain language of the statute was satisfied and the case cited by the [Petitioner] is inapplicable, we need not address the [Petitioner's] arguments regarding whether his signature on the NTA was a knowing[] and voluntar[y] waiver of the 10-day requirement." R. at 5.

[4] Petitioner also asserted for the first time in his appeal brief to the BIA that he was entitled to reopening because he is a class member in *Mendez Rojas v. Wolf*, No. 16-cv-01024 (W.D. Wash. Nov. 4, 2020). The BIA rejected this assertion, and Petitioner does not challenge it in his opening brief. He has therefore waived review of this issue. *See Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) ("[T]he failure to raise an issue in an opening brief waives that issue." (internal quotation marks omitted)).

The BIA dismissed the appeal. Petitioner now seeks review of the BIA's decision.

II. Discussion

We normally review the BIA's decision on a motion to reopen for abuse of discretion. *See Gurung v. Ashcroft*, 371 F.3d 718, 720 (10th Cir. 2004). But our review in this case is hampered by Petitioner's brief, which is wholly inadequate. Given the inadequacies in Petitioner's brief, which we discuss further below, we are compelled to deny the petition for review.

In his opening brief, Petitioner indicates he has two issues to raise: (1) "Whether the IJ and BIA erred in denying the Motion to Reopen related to the notice, exceptional circumstances, and equitable tolling," Pet'r's Br. at 1; and (2) "Whether the IJ and/or BIA erred in denying the request for *sua sponte* reopening based on newly discovered evidence not available on [*sic*] the lower courts," *id.* at 2.

We start with the second issue, and we conclude Petitioner has waived any argument challenging the agency's denial of sua sponte reopening because he failed to adequately brief it. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) (explaining that "[i]ssues not raised in the opening brief are deemed abandoned or waived" and further explaining that "[t]his briefing-waiver rule applies equally to arguments that are inadequately presented in an opening brief such as those presented only in a perfunctory manner" (ellipsis, brackets, and internal quotation marks omitted)). Petitioner presents only a cursory argument in the "Summary of the Argument" section that "[t]he BIA and the IJ erred in denying exceptional

circumstances because in addition to the age of Petitioner at the time of entry, [and] abandonment of his mother, there is newly discovered evidence not available at the time of the IJ's decision." Pet'r's Br. at 6. And in the next sentence Petitioner states, "[t]he BIA and IJ erred in denying *sua sponte* reopening based on the foregoing listed above." *Id.* But nowhere in his "Argument" section or anywhere else in his brief does he address this issue. He never mentions or explains what newly discovered evidence supports sua sponte reopening nor does he otherwise explain how the IJ or BIA erred in denying sua sponte reopening. Accordingly, he has waived any review of this issue.

Petitioner's first issue also suffers from deficient briefing. In his "Summary of the Argument," he makes the conclusory assertion that "[t]he [IJ] and the BIA erred in finding the presumption of receipt when a notice is sent by regular mail." *Id.* at 5. But again, nowhere in his "Argument" section or anywhere else in his brief does he address this assertion or explain how the agency erred. He has therefore waived review of this argument due to inadequate briefing. *See Sawyers*, 962 F.3d at 1286.

Similarly, he has waived any review of the IJ's rejection of his argument that he was entitled to equitable tolling for failing to file his Motion to Reopen within 180 days of the in absentia removal order. He mentions "equitable tolling" only in passing in his statement of issues, Pet'r's Br. at 1, and he does not present any argument specifically challenging this aspect of the agency's decision. Because this issue was insufficiently raised in his opening brief, he has waived it. *See Kabba v. Mukasey*, 530 F.3d 1239, 1248 (10th Cir. 2008) (finding an issue waived where the

petitioner only mentioned it in passing in his opening brief and did not present any argument to specifically challenge that aspect of the BIA's decision).

We next turn to Petitioner's due process argument. We note that the first part of the "Argument" section in his opening brief is a near verbatim copy of the first part of the "Argument" section from his brief to the BIA. *Compare* Pet'r's Br. at 7-11, *with* R. at 19-21. This portion of both briefs contains Petitioner's argument that his NTA was ineffective because it did not contain the date and time of the hearing, so the Notice of Hearing was effectively the NTA. But the Notice of Hearing was mailed less than ten days before the hearing date, so he asserts he did not have sufficient time to secure counsel, which violated his due process rights.

The BIA concluded the NTA was effective because *Pereira* did not apply to this situation, but only applied in cases involving the stop-time rule for cancellation of removal. Because the NTA was effective, the BIA found Petitioner had sufficient time to retain counsel prior to the hearing. And the BIA concluded Petitioner had not shown that the timing of the mailing of the Notice of Hearing violated any rule or regulation or otherwise prevented him from being able to reasonably participate in the hearing such that his due process rights were violated.

By simply repeating what he argued to the BIA *prior* to the BIA's disposition of his appeal, Petitioner fails to explain how the BIA erred or abused its discretion in resolving his argument. We are therefore left without a reasoned basis to disturb the BIA's decision. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366, 1369 (10th Cir. 2015) (stating that an appellant must "explain what was wrong with the

reasoning that the district court relied on in reaching its decision" and affirming the dismissal of a claim where appellant did not challenge the district court's reasoning).

Petitioner's argument on exceptional circumstances fares no better. Although his argument is not a verbatim copy of his brief to the BIA, he makes the same argument he made to the IJ and BIA about the exceptional circumstances he believes support his assertion that he did not receive proper notice—his age (16) and his abandonment by his mother. But he fails to address the IJ's determination that service on a minor who is at least fourteen years old at the time of service is effective even though notice was not also served on an adult with responsibility for the minor. And he likewise fails to address the IJ's determination that he "submitted no evidence or affidavits that pertain to his alleged abandonment by his mother in 2014 or at any other time." R. at 31. The BIA adopted and affirmed the IJ's decision, noting that Petitioner "d[id] not address why his motion was not accompanied by any supporting evidence or affidavits regarding his counsel's contentions." *Id.* at 4. We will not disturb the BIA's decision without any argument or explanation as to what was wrong with its reasoning. *See Nixon*, 784 F.3d at 1366, 1369.

Petitioner also introduces a new argument that was not presented to the IJ or BIA. He explains that his younger brother had an in absentia order rescinded in August 2020, "where it was determined[] the notices were sent to the wrong address," and "Petitioner believes this supports his claim that he never received the physical notices that were allegedly mailed to him." Pet'r's Br. at 11. Because this argument was not exhausted through presentation to the IJ or BIA, we decline to

consider it. *See* 8 U.S.C. § 1252(d)(1); *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) (declining to consider an argument not first presented to the BIA, noting "[i]t is a fundamental principle of administrative law that an agency must have an opportunity to rule on a challenger's arguments before the challenger may bring those arguments to court").[5]

III. Conclusion

Petitioner's inadequate briefing compels us to deny the petition for review.

Entered for the Court

Jerome A. Holmes
Chief Judge

[5] Petitioner points to no evidence in the record to support an argument that his Notice of Hearing was sent to the wrong address. Instead, he asserts that "[t]he notices were likely mailed at the same time by the same individual, who likely made the same mistake here as they did in failing to provide the notices to the proper address." Pet'r's Br. at 11. Even if this argument were exhausted, this conclusory assertion would not provide a basis to overturn the agency's decision.