IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 31, 2018
Lyle W. Cayce
Clerk

No. 17-60438
Summary Calendar

RUBEN OVALLES,

Petitioner

v.

JEFFERSON B. SESSIONS, III, U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A040 070 535

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Ruben Ovalles, a native and citizen of the Dominican Republic, seeks review of the decision of the Board and Immigration Appeals (BIA) dismissing his second motion to reopen the proceedings based on equitable tolling of the 90-day deadline established by 8 U.S.C. § 1227(c)(7). Ovalles was ordered removed from the United States in 2004 pursuant to 8 U.S.C. § 1227(a)(2)(B)(i),

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

based on his Ohio conviction for attempted possession of drugs. The BIA found that Ovalles's drug conviction was also an aggravated felony for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii), which rendered Ovalles ineligible for cancellation of removal.

In 2007, Ovalles moved to reopen his immigration proceedings based on *Lopez v. Gonzales*, 549 U.S. 47, 55-58 (2006), under which his conviction for attempted possession of drugs was not an aggravated felony. The BIA noted that the motion to reopen was untimely, but it dismissed the appeal based on the departure bar set forth in 8 C.F.R. § 1003.2(d). We affirmed. *Ovalles v. Holder*, 577 F.3d 288, 296-99 (5th Cir. 2009).

Ovalles filed a second motion to reopen in March 2017, arguing that under *Garcia-Carias v. Holder*, 697 F.3d 257, 263 (5th Cir. 2012), and *Lugo-Resendez v. Lynch*, 831 F.3d 337, 339 (5th Cir. 2016), the departure bar did not apply to a statutory motion to reopen and that he was entitled to equitable tolling. The BIA denied the motion as untimely and as number-barred, finding that under *Lugo-Resendez*, Ovalles had not shown the requisite due diligence to warrant equitable tolling, given that he waited approximately eight months after *Lugo-Resendez* was decided to seek relief. Nor had he demonstrated an exceptional situation that warranted sua sponte reopening.

Ovalles argues that the BIA abused its discretion in failing to apply equitable tolling because circuit precedent prevented him from bringing a statutory motion to reopen the proceedings seeking equitable tolling any sooner. He contends that the BIA erred in harshly determining that he had not exercised due diligence in obtaining relief and in failing to consider his individual facts and circumstances.

We have jurisdiction to review the denial of a motion to reopen seeking equitable tolling of the 90-day deadline to file the motion. *Mata v. Lynch*, 135 S. Ct. 2150, 2154-55 (2015); *Penalva v. Sessions*, 884 F.3d 521, 523

(5th Cir. 2018). The Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(C), however, strips us of jurisdiction to review the denial of such a motion if the alien is removable because he committed, among other offenses, an offense covered in 8 U.S.C. §§ 1227(a)(2)(A)(iii) or (B). *Penalva*, 884 F.3d at 523. Section 1252(a)((2)(C)'s jurisdictional stripping provision, however, "does not extend to constitutional claims or questions of law raised upon a petition for review." *Penalva*, 884 F.3d at 523-24 (quoting 8 U.S.C. § 1252(a)(2)(D)). We review de novo whether we have jurisdiction. *Id.* At 523.

Regardless of *Lopez*'s holding, because Ovalles was determined to be removable under § 1227(a)(2)(B)(i), we lack jurisdiction to review his claims other than for questions of law or constitutional claims. *See Penalva*, 884 F.3d at 523; § 1252(a)(2)(C). Whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question. *Penalva*, 884 F.3d at 526.

Ovalles contends that he has argued both that the BIA applied the wrong legal standard for tolling and that it incorrectly decided the reasonable diligence question. According to Ovalles, the diligence issue he argues is a mixed question of law and fact reviewable as a legal question. Given that the basis of the BIA's denial of Ovalles's request for equitable tolling was his failure to show diligence, Ovalles has raised an unreviewable fact question, and his arguments amount to no more than his disagreement with the application of the equitable tolling standard. *See Penalva*, 884 F.3d at 524-26; *cf. Diaz v. Sessions*, 894 F.3d 222, 226-27 (5th Cir. 2018). Ovalles correctly acknowledges that *Lugo-Resendez* set forth the legal standard to evaluate whether an alien is entitled to equitable tolling of the statutory deadline to file a motion to reopen proceedings. *See Diaz*, 894 F.3d at 226. Nothing in the record indicates that the BIA applied an incorrect standard. *See Lugo-Resendez*, 831 F.3d at 344-45.

In light of the foregoing, Ovalles's petition is DISMISSED for lack of jurisdiction.