[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11035
Non-Argument Calendar

Agency No. A070-702-984

AIDA NDIAYE,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(September 18, 2019)

Before MARCUS, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

Aida Ndiaye, proceeding with counsel, seeks review of the Board of Immigration Appeals ("BIA") denial of her motion to reopen her removal proceedings. In particular, Ndiaye argues that the BIA acted arbitrarily and capriciously in denying her motion to reopen because it disregarded the law applicable at the time of her removal proceedings—specifically, former Immigration and Nationality Act § 242B(c)(3), 8 U.S.C. § 1252b(3)(3).

We review the BIA's denial of a motion to reopen for an abuse of discretion. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1302 (11th Cir. 2001). Under this "very deferential" standard of review, *id.*, we examine whether the discretion exercised was arbitrary or capricious, *Zhang v. U.S. Att'y Gen.*, 572 F.3d 1316, 1319 (11th Cir. 2009) (per curiam). We have specifically determined that the BIA's denial of a motion to reopen on the merits is proper for any of at least three independent reasons: (1) failure to prove a *prima facie* case; (2) failure to introduce material evidence that was previously unavailable; and (3) a determination that, even though the alien was statutorily eligible for relief, she did not warrant a favorable exercise of discretion. *Al Najjar*, 257 F.3d at 1302.

A motion to reopen may be granted if there is new evidence that is material and was not available and could not have been discovered or presented at the removal hearing. *See* 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3). An alien who attempts to show that new evidence is material bears a "heavy burden" and must

present evidence that demonstrates that, if the proceedings were reopened, "the new evidence offered would likely change the result in the case." *Ali v. U.S. Att'y Gen.*, 443 F.3d 804, 813 (11th Cir. 2009) (per curiam) (quoting another source).

A party may file only one motion to reopen her removal proceedings, and that motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material." INA § 240(c)(7)(A), (B), 8 U.S.C. § 1229a(c)(7)(A), (B). Generally, a "motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal," or before September 30, 1996, the date of INA § 240(c)(7)'s codification, subject to certain exceptions, INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i). Temporal and numerical limitations do not apply where: (1) the alien seeks asylum or withholding of removal based on changed country conditions; (2) the rule for battered spouses, children, or parents applies; (3) the motion was jointly filed by the alien and the government; or (4) the government seeks termination of asylum. INA § 240(c)(7)(C), 8 U.S.C. § 1229a(c)(7)(C); *see also* 8 C.F.R. § 1003.2(3). The temporal and numerical restrictions also do not apply where the alien seeks rescission of a removal order entered *in absentia*, which she may do within 180 days of the removal order. *See Avila-Santoyo v. U.S. Att'y. Gen.*, 713 F.3d 1357, 1362 (11th Cir. 2013) (per curiam) (citing 8 C.F.R. § 1003.2(c)(3)(i)).

The BIA did not abuse its discretion in denying Ndiaye's motion to reopen as time- and number-barred: This was Ndiaye's third motion to reopen her 1999 *in absentia* removal order; she filed it more than 90 days after the removal order; and she did not demonstrate that any of the applicable statutory exceptions to the time and number limitations applied. Ndiaye contends that she has new evidence—that she is eligible for an adjustment of status because her son turned 21 and successfully filed a visa petition on her behalf—but it does not relate to any of the enumerated exceptions to the time and number bars. *See* INA § 240(c)(7)(C), 8 U.S.C. § 1229a(c)(7)(C). Moreover, and in any event, the BIA already determined that Ndiaye's approved visa petition did not warrant relief when it assessed her second motion to reopen her proceedings.

Additionally, Ndiaye's argument that an older version of the INA should apply to her is unavailing, as the rules on which she relies were not in effect at the time her removal proceedings began in 1997. At that time, INA § 240(c)(7)(A) was in effect and limited aliens to "fil[ing] one motion to reopen proceedings." 8 U.S.C. § 1229a(c)(7)(A). Moreover, even if her proceedings had begun before INA § 240(c)(7)'s codification, Congress had adopted regulatory provisions in 1990 "that allow[ed] one motion to reopen," *Avila-Santoyo*, 713 F.3d at 1362, and the BIA would not have abused its discretion in denying her third motion.

PETITION DENIED.