

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12577
Non-Argument Calendar

Agency No. A099-314-862

BOYD CAMPBELL,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

(July 19, 2021)

Before MARTIN, JORDAN, and GRANT, Circuit Judges.

PER CURIAM:

Boyd Campbell, a citizen and native of Jamaica, seeks review of the Board of Immigration Appeals' ("BIA") order denying his second motion to reopen his

removal proceedings. He argues the BIA abused its discretion by finding that his motion was both number and time barred and asserts he should be entitled to equitable tolling due to ineffective assistance of counsel. He also argues the BIA erred in finding that he was not prejudiced. After careful consideration, we conclude we must deny Campbell's petition.

I

Campbell entered the United States on a temporary visa in 1996. He overstayed his visa and, in 2003, was arrested for drug trafficking. Campbell ultimately received a sentence of time served and supervised release. The government originally applied for an S-1 visa on Campbell's behalf, which would have allowed him to stay in the United States. However, the application was withdrawn after Campbell was arrested in 2010 for attempted solicitation.¹

In 2011, Campbell was arrested and taken into custody by Immigration and Customs Enforcement ("ICE"). He was placed in removal proceedings, with ICE alleging that he was removable for (1) overstaying his visa; (2) having been convicted of an aggravated felony (trafficking controlled substances); and (3) possession of marijuana. Campbell conceded removability on all grounds.

¹ Campbell challenged the withdrawal of the S-1 visa application, arguing it was in breach of his agreement with the government. The district court that sentenced Campbell rejected this argument, because it found the plea agreement contained no promises to provide or support a visa application.

Campbell thereafter filed a pro se application for asylum and withholding of removal, asserting that he would face grave danger if deported to Jamaica after his work with the United States government. Campbell then retained his first attorney, Latangie Williams, to represent him in removal proceedings.

At a hearing before the Immigration Judge (“IJ”), Williams withdrew Campbell’s application for asylum, statutory withholding of removal, and relief under the Convention Against Torture (“CAT”), based on her assessment that Campbell could not make the showings required for relief. The IJ accepted the withdrawal and ordered Campbell removed to Jamaica in 2011. Williams subsequently filed two requests for deferred action with ICE, which were denied in 2011 and 2012, respectively.

In 2015, Campbell retained a second attorney, Ming Lin, who filed a successful application for a temporary stay of removal. In 2017, Lin filed a motion to reopen removal proceedings so that Campbell could seek CAT protection. Lin provided evidence of Campbell’s previous work with the federal government, Campbell’s fear of being killed by a gang member now residing in Jamaica if deported, and argued that the Jamaican authorities would not be able to protect Campbell if he were deported. Lin also included a 2012 letter from the Jamaican Consul in which it said Campbell would be in danger if deported because he had testified during the trial of Jamaican drug traffickers. The IJ denied the motion to

reopen on the merits, finding that the evidence provided was insufficient to support CAT relief. The BIA affirmed on appeal, reasoning that to show entitlement to CAT relief, Campbell had to show both a credible threat of harm from his co-defendants and the Jamaican government's acquiescence in the torture. The BIA said Campbell failed to show the latter.

On December 23, 2019, Campbell filed a second motion to reopen, this time represented by a third attorney, Gregory Copeland. This second motion to reopen was filed eight years after the August 30, 2011 order of removal, well past the 90-day statutory period for filing a motion to reopen.² Campbell argued, however, that he was entitled to equitable tolling, which typically requires the noncitizen to show that: (1) he has been pursuing his rights diligently; and (2) some extraordinary circumstance stood in his way. Lin v. U.S. Att'y Gen., 881 F.3d 860, 872 (11th Cir. 2018). Specifically, Campbell argued he was entitled to such tolling because both of his previous attorneys, Williams and Lin, provided ineffective assistance of counsel.³

² See 8 U.S.C § 1229a(c)(7)(C)(i); see also Avila-Santoyo v. U.S. Att'y Gen., 713 F.3d 1357, 1359–65 (11th Cir. 2013) (en banc) (per curiam) (holding that the time bar on motions to reopen is a non-jurisdictional claim-processing rule and is subject to equitable tolling).

³ A noncitizen may move to reopen his removal order based on ineffective assistance of counsel. Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2005) (per curiam). We also have suggested that ineffective assistance of counsel may serve as a basis for equitable tolling. Ruiz-Turcios v. U.S. Att'y Gen., 717 F.3d 847, 851 (11th Cir. 2013).

The BIA denied Campbell's second motion to reopen. It found the second motion was both time and number barred and that Campbell failed to meet the requirements for equitable tolling. Namely, the BIA found Campbell failed to perfect the requirements for asserting an ineffectiveness claim against his second attorney and therefore was not entitled to equitable tolling of the time between the first motion to reopen in 2017 and the second in 2019. The BIA also found Campbell failed to show prejudice or entitlement to CAT relief on the merits.

Campbell petitioned this Court to review the BIA's denial of the second motion to reopen.

II

We review the BIA's denial of a motion to reopen for abuse of discretion. Ali v. U.S. Att'y Gen., 443 F.3d 804, 808 (11th Cir. 2006) (per curiam). This review is limited to determining whether the BIA's exercise of its discretion was arbitrary or capricious. Id. An agency action is arbitrary and capricious where:

(1) the agency relied on factors which Congress has not intended it to consider, (2) the agency failed to consider an important aspect of the problem, (3) the agency explained its decision in a way that runs counter to the evidence, or (4) the action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Mendoza v. Sec'y, Dep't of Homeland Sec., 851 F.3d 1348, 1353 (11th Cir. 2017) (per curiam) (quotation marks omitted).

III

For Campbell to be entitled to equitable tolling for ineffectiveness assistance of counsel, he must show prejudice and compliance with the procedural requirements of Matter of Lozada, 19 I. & N. Dec. 637 (BIA 1988), overruled on other grounds by Matter of Compean, 24 I. & N. Dec. 710, 710 (BIA 2009), as to both of his previous attorneys, Williams and Lin.⁴ See Dakane, 399 F.3d at 1274.

Lozada requires

(1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

Id. (quoting Lozada, 19 I. & N. Dec. at 639).

⁴ Campbell argues for the first time in reply that he need not comply with the Lozada requirements as to his second attorney, because as long as he shows his first attorney was ineffective, he should be entitled to equitable tolling. However, arguments raised for the first time in reply are deemed abandoned. Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 682–83 (11th Cir. 2014). We therefore assume he must perfect as to both.

We have also suggested the one-motion rule, see 8 U.S.C. § 1229a(c)(7)(A), is a “non-jurisdictional claim processing rule subjected to equitable tolling.” Ruiz-Turcios, 717 F.3d at 850 (leaving to the BIA to address the issue in the first instance). Because this point is not disputed by the parties, we assume without deciding that the second motion is subject to equitable tolling, because Campbell's petition would be denied regardless.

Here, the BIA found that Campbell perfected the Lozada requirements as to his first attorney but not his second. Campbell met all three Lozada requirements as to his first attorney, Williams, by: (1) providing an affidavit detailing the deficiencies in representation; (2) emailing Williams about the deficiencies and giving her an opportunity to respond; and (3) filing a bar complaint against Williams. As to his second attorney, Lin, Campbell provided an affidavit regarding the deficiencies in representation. But he did not file a bar complaint against Lin and has not explained why he has not done so, as required by the third Lozada factor. And it does not appear that Campbell provided Lin notice and an opportunity to respond to any charges of ineffective assistance, as required by the second Lozada factor. Instead, the record reflects that Campbell merely emailed his second counsel to ask whether he had alleged ineffective assistance of counsel against the first counsel, and not to alert the second counsel that he too faced a claim of ineffectiveness.⁵ Of course, we have suggested that substantial, rather than exact, compliance with the procedural requirements of Lozada is sufficient. See Point du Jour v. U.S. Att’y Gen., 960 F.3d 1348, 1350 (11th Cir. 2020), cert.

⁵ Along with the petition, Campbell moved to correct the administrative record to include the unobscured email exchange between his current counsel and Lin. Because we conclude his petition fails regardless, Campbell’s motion to correct the record and the government’s motion to strike are **DENIED** as moot.

denied sub nom. Sylvestre Esteeven Point du Jour v. Garland, 141 S. Ct. 1692 (2021). But Campbell's compliance has been neither exact nor substantial.

On this record, the BIA did not abuse its discretion in denying the second motion to reopen, as Campbell failed to meet the requirements for equitable tolling. As such, we need not consider the remaining arguments regarding prejudice.

PETITION DENIED.