[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-15159
Non-Argument Calendar

Agency No. A208-998-294

ERICK EFRAIN LEMUS-PORTILLO,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

(July 24, 2020)

Before BRANCH, GRANT and BLACK, Circuit Judges.

PER CURIAM:

Erick Efrain Lemus-Portillo seeks review of the Board of Immigration Appeals' (BIA) order denying his motion to reopen his immigration proceedings after being ordered removed *in absentia*. The government has moved for summary

denial of Lemus-Portillo's petition for review and to stay the briefing schedule. On appeal, Lemus-Portillo argues the Immigration Judge (IJ) and BIA[1] should have granted his motion to reopen because he demonstrated exceptional circumstances excusing his failure to appear at his removal proceeding. He also argues that, regardless of whether he met the statutory criteria for the rescission of his removal order, the IJ and BIA should have exercised their power to reopen the removal proceedings *sua sponte*.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).[2]

As an initial matter, we lack jurisdiction to review the IJ's and BIA's refusal to exercise their *sua sponte* authority to reopen Lemus-Portillo's removal proceedings. *See Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1292–93 (11th Cir. 2008)

[1] When the BIA issues a decision, we review only that decision, except to the extent that the BIA expressly adopts the IJ's decision. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001) 1284. Because the BIA here expressly agreed with several of the IJ's findings, we review the IJ's decision to the extent that it did so.

[2] We are bound by cases decided by the former Fifth Circuit before October 1, 1981. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

(explaining that neither the regulation granting the BIA discretion to reopen proceedings *sua sponte*, 8 C.F.R. § 1003.2(a), nor the statute from which that regulation derives, 8 U.S.C. § 1103(g)(2), provide any "meaningful standard against which to judge the agency's exercise of discretion"). Lemus-Portillo argues that the Supreme Court's 2010 decision in *Kucana v. Holder*, 558 U.S. 223 (2010), stands for the broad proposition that federal courts retain jurisdiction to review denials of motions to reopen regardless of the fact that the relief requested is discretionary. But our Court has not read *Kucana*'s holding so broadly, and we have reaffirmed *Lenis*'s holding in the years since *Kucana* was decided. *See Butka v. U.S. Att'y Gen.*, 827 F.3d 1278, 1286 (11th Cir. 2016). Accordingly, we DISMISS Lemus-Portillo's petition as to his challenges relating to the IJ's denial of *sua sponte* reopening.[3]

As to Lemus-Portillo's statutory motion to reopen, an *in absentia* removal order may be rescinded if the alien "demonstrates that the failure to appear was because of exceptional circumstances." INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i). Exceptional circumstances refers to circumstances "such as

[3] This Court acknowledged in *Lenis* that we might retain jurisdiction over "constitutional claims related to the BIA's decision not to exercise its *sua sponte* power." *Id.* at 1294 n.7. To the extent that any arguments made in Lemus-Portillo's response to the government's motion for summary denial could be construed as raising a constitutional due-process challenge to the BIA's refusal to exercise its *sua sponte* power, and assuming we would have jurisdiction over such a claim, we decline to consider those arguments because Lemus-Portillo abandoned them by failing to raise them in his opening brief. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004).

battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances[] beyond the control of the alien." INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1).

Here, there is no substantial question that the BIA did not abuse its discretion by concluding that Lemus-Portillo did not establish the exceptional circumstances required to warrant statutory reopening.[4] *See Groendyke Transp., Inc.*, 406 F.2d at 1162. Lemus-Portillo has never argued that he did not have adequate notice of his June 5, 2018 master calendar hearing in Atlanta, Georiga. Instead, he argues the IJ's two-month delay in ruling on his motions to substitute counsel and for change of venue constitute exceptional circumstances that explain his failure to appear at that hearing. The record indicates that the IJ granted the motion for substitution of counsel but denied the motion to transfer venue on the ground that Lemus-Portillo failed to submit a properly completed change of address form showing that he now resided in Boston, Massachusetts. The IJ entered its order on May 29, 2018, and

[4] We review the BIA's decision on a discretionary motion to reopen under a deferential abuse-of-discretion standard "regardless of the underlying basis of the alien's request." *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1302 (11th Cir. 2001) (quotation marks omitted). Judicial review of the denial of a motion to reopen is limited to determining "whether there has been an exercise of administrative discretion and whether the matter of exercise has been arbitrary or capricious." *Garcia-Mir v. Smith*, 766 F.2d 1478, 1490 (11th Cir. 1985) (quotation marks omitted).

Lemus-Portillo asserts he did not receive notice of the IJ's ruling until the day of the hearing, which, he says, is why he did not appear.

To the extent that the IJ's two-month delay in issuing a decision on Lemus-Portillo's motions can be said to be a "circumstance" beyond his control, it was not an "exceptional" circumstance under INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1). And, more to the point, it cannot reasonably be said to have caused his "failure to appear" in any meaningful sense. INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i). As both the IJ and the BIA pointed out, the inescapable fact here is that Lemus-Portillo was duly notified of the June 5 hearing in Atlanta, and, as of the date of the hearing, had not been granted a change of venue. Under those circumstances—and regardless of the IJ's delay in ruling on the motion to transfer venue or the correctness of that ruling—Lemus-Portillo remained obligated to appear at the original hearing. *See Matter of Rivera*, 19 I & N. Dec. 688, 689–90 (BIA 1988) ("The respondent was properly notified of the time and date of his deportation hearing. Having received notice of the hearing, the respondent or his counsel was required to attend, or show reasonable cause for the failure to attend. The fact that the respondent requested a change of venue did not relieve him of his obligation to appear at the hearing, prepared to go forward with the case." (citations omitted)).

As there is no substantial question as to the outcome of the case and the government's position is correct as a matter of law, we GRANT the government's

motion for summary denial as to Lemus-Portillo's challenge to the denial of his statutory motion to reopen. *See Groendyke Transp., Inc.*, 406 F.2d at 1162. We DISMISS for lack of jurisdiction the portion of Lemus-Portillo's petition challenging the denial of his motion to reopen *sua sponte*. *See id.* We DENY the government's motion to stay the briefing schedule as moot.