[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12212
Non-Argument Calendar

Agency No. A089-023-133

BARTOLO JEOVANI LOPEZ DE LEON,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

(June 11, 2021)

Before JORDAN, GRANT and MARCUS, Circuit Judges.

PER CURIAM:

Bartolo Lopez De Leon ("Lopez"), a native and citizen of Guatemala, seeks review of the Board of Immigration Appeals' ("BIA") final order denying his third motion to reopen proceedings to rescind his 2008 in absentia removal order. Lopez

filed two earlier motions to reopen, one in 2010 and one in 2011. On appeal, Lopez argues that: (1) the BIA abused its discretion in denying his latest motion to reopen because it failed to give reasoned consideration to his claims or clearly say why it rejected them; and (2) we have jurisdiction to review the BIA's decision not to sua sponte reopen his removal proceedings, and the BIA abused its discretion by failing to do so. After thorough review, we deny the petition in part, and dismiss it in part.

We review the denial of a motion to reopen an immigration proceeding for abuse of discretion, asking only whether the BIA exercised its discretion arbitrarily or capriciously. Jiang v. U.S. Att'y Gen., 568 F.3d 1252, 1256 (11th Cir. 2009). "The BIA abuses its discretion when it misapplies the law in reaching its decision," or it fails to follow its own precedents "without providing a reasoned explanation for doing so." Ferreira v. U.S. Att'y Gen., 714 F.3d 1240, 1243 (11th Cir. 2013). The appellant bears a heavy burden in proving arbitrariness or capriciousness because motions to reopen in the context of removal proceedings are particularly disfavored. Zhang v. U.S. Att'y Gen., 572 F.3d 1316, 1319 (11th Cir. 2009).

We review our own jurisdiction de novo. Jeune v. U.S. Att'y. Gen., 810 F.3d 792, 799 (11th Cir. 2016). We also review de novo any legal errors, including whether the agency failed to give an issue reasoned consideration. Id. The BIA does not give an issue reasoned consideration when it misstates the contents of the record, inadequately explains its rejection of logical conclusions, or provides unreasonable

justifications for its decision that do not respond to any arguments in the record. Id. at 803. Reasoned-consideration review does not ask whether the agency's findings have evidentiary support, but whether a decision is "so fundamentally incomplete," in light of the facts and claims presented in the case, "that a review of legal and factual determinations would be quixotic." Indrawati v. U.S. Att'y Gen., 779 F.3d 1284, 1302 (11th Cir. 2015). Central to a showing of reasoned consideration is whether the reasoning of the agency is logical and can be reviewed for error. Bing Quan Lin v. U.S. Att'y Gen., 881 F.3d 860, 874 (11th Cir. 2018). Notably, the BIA need not address every claim in order to show that it gave reasoned consideration to an issue, and it sufficiently addresses the crux of a motion when it acknowledges the facts of a case and offers reasonable grounds rejecting its central claims. Id. at 875.

First, we are unpersuaded by Lopez's claim that the BIA abused its discretion by denying his motion to reopen proceedings to rescind his in absentia removal order. To initiate removal proceedings, the Immigration and Nationality Act ("INA") provides that delivery of written notice to appear is required in person or, if not practicable, through service by mail to the alien or his counsel of record, if any. 8 U.S.C. § 1229(a)(1). Notice is sufficient if it is sent to the most recent address provided by the alien. Id. § 1229a(b)(5)(A). We've recognized that a mailing to an alien's last known address is sufficient to satisfy the agency's duty to provide notice. United States v. Zelaya, 293 F.3d 1294, 1298 (11th Cir. 2002). The BIA applies

some presumption of receipt when notice is sent by regular mail, which is weaker than the presumption applied to certified mail, and requires the alien to present sufficient evidence to overcome the presumption. Matter of M-R-A-, 24 I.&N. Dec. 665, 673 (BIA 2008). The IJ shall order removed in absentia an alien, who, after written notice has been provided to the alien or the alien's counsel of record, does not attend a removal proceeding, if the Department of Homeland Security ("DHS") establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable. 8 U.S.C. § 1229a(b)(5)(A).

A request to reopen or reconsider any case in which a decision has been made by the BIA must be made in the form of a written motion to the BIA. 8 C.F.R. § 1003.2(a). Similarly, a motion to reopen or motion to reconsider a decision of the BIA pertaining to proceedings before IJ shall be filed directly with the BIA. Id. § 1003.2(g)(2)(i). The BIA also can entertain motions to reopen in absentia removal orders, as suggested by the motion-to-reopen regulation's cross-reference to 8 C.F.R. § 1003.23(b)(4)(ii), which governs motions to reopen in absentia removal orders before an IJ. Id. § 1003.2(c). Before January 15, 2021, the regulations provided that a motion to reopen an IJ's decision filed pending an appeal "may be deemed a motion to remand for further proceedings" and the motion "may be consolidated with, and considered by the Board in connection with, the appeal to the Board." Id. § 1003.2(c)(4) (2020).

If an alien is ordered removed in absentia, the order may be rescinded upon a motion to reopen filed within 180 days after the date of the order of removal, if the alien establishes that the failure to appear was due to exceptional circumstances, or upon a motion to reopen filed at any time, if the alien demonstrates he did not receive notice. 8 U.S.C. § 1229a(b)(5)(C). An alien is limited to filing one motion to reopen removal proceedings seeking to rescind an in absentia removal order. 8 C.F.R. § 1003.23(b)(4)(ii). The 180-day deadline for a motion to reopen an in absentia order is not jurisdictional and is subject to equitable tolling. Avila-Santoyo v. U.S. Att'y Gen., 713 F.3d 1357, 1362 n.4 (11th Cir. 2013) (en banc). We've suggested, without deciding, that the numerical limitation on motions to reopen also may be equitably tolled if an alien shows that (1) he has been pursuing his rights diligently and (2) some extraordinary circumstance stood in his way. Ruiz-Turcios v. U.S. Att'y Gen., 717 F.3d 847, 850–51 (11th Cir. 2013). While the facts underlying a petitioner's ineffective assistance of counsel claim may serve both as a basis for equitable tolling and for the merits of his motion to reopen, the standards for establishing equitable tolling and ineffective assistance of counsel are distinct. Id. at 851.

In a direct criminal appeal of an illegal reentry conviction, we agreed with the BIA's conclusion that the defendant was not entitled to equitable tolling of the deadline to file a motion to reopen when that motion was filed three years after the issuance of the case that allegedly made her no longer removable. United States v.

Watkins, 880 F.3d 1221, 1226 & n.2 (11th Cir. 2018). We noted that waiting over three years to seek reopening "after the means to challenge [the BIA's] order became available does not demonstrate diligence" and that the defendant had not even tried to explain the delay. Id. at 1226 n.2.

To succeed on the merits of a motion to reopen his removal order based on ineffective assistance of counsel, an alien must establish that counsel's performance was deficient to the point that it so impinged upon the fundamental fairness of the hearing that the alien was unable to reasonably present his case. Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1274 (11th Cir. 2005). In Matter of Lozada, the BIA held that a motion to reconsider must satisfy three procedural requirements in order to raise a claim of ineffective assistance of counsel. 19 I. & N. Dec. 637, 639 (BIA 1988). First, the motion must be supported by an affidavit detailing the agreement with counsel and describing the ways in which counsel's performance was defective. Id. Second, counsel must be informed of the ineffective assistance claim and given an opportunity to respond. Id. Third, the motion should either reflect that a complaint was filed with the appropriate disciplinary bodies or explain why a complaint was not filed. Id. In addition to substantial compliance with any procedural requirements set forth by the BIA, a petitioner who claims ineffective assistance of counsel must demonstrate prejudice as well as deficient performance of counsel. Dakane, 399 F.3d at 1274.

To demonstrate prejudice, the petitioner must show that the performance of counsel was "so inadequate that there is a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different." Sow v. U.S. Att'y Gen., 949 F.3d 1312, 1318 (11th Cir. 2020) (quotations omitted). An applicant can establish prejudice by making a prima facie showing that he would have been eligible for the relief sought. Dakane, 399 F.3d at 1274–75.

Here, the record reveals that the BIA gave reasoned consideration to its decision to deny Lopez's present motion to reopen. The BIA specifically articulated, with citations to the statute, the regulations, its precedent, and our caselaw, that Lopez' motion was number-barred, that he failed to rebut the presumption of delivery to establish that he lacked notice, and that equitable tolling was not warranted, all of which were issues Lopez raised on appeal to the BIA. As for Lopez's ineffective-assistance-of-counsel claim, the BIA resolved it by providing an analysis of the required prejudice showing. The BIA also specifically detailed the procedural posture and acknowledged the facts of Lopez's claims, including that the notice to appear had been sent to his old address and that Lopez previously had been represented by Fabian Sosa and William Castillo, whom Lopez claimed were actually notaries posing as lawyers. While Lopez says the BIA failed to mention aspects of his motion, including that it was based on Matter of Lozada, the BIA need not address every claim in order to show that it gave reasoned consideration to an

issue. Bing Quan Lin, 881 F.3d at 875. Accordingly, the BIA did not misstate the contents of the record nor provide unreasonable justifications for its decision that did not respond to any arguments in the record. Jeune, 810 F.3d at 799.

As for the merits of the BIA's decision, the BIA did not abuse its discretion in finding that Lopez's instant motion to reopen was number-barred and that equitable tolling was not warranted. For starters, the instant motion was not Lopez's first. A motion was filed on Lopez's behalf in 2010; the 2010 motion was labeled a motion to reopen for exceptional circumstances and cited the 180-day time limit that governs motions to reopen in absentia removal orders for exceptional circumstances. Based on this language, the IJ, not surprisingly, construed the 2010 motion as a motion to reopen Lopez's 2008 in absentia removal order, cited the regulation that applies to these motions (8 C.F.R. § 1003.23(b)(4)(ii)), and found that the motion was untimely and offered no exceptional circumstances for Lopez's failure to appear. The BIA, in turn, affirmed the IJ's denial of the 2010 motion since Lopez had not established that his failure to appear was an exceptional circumstance or that he lacked notice. Lopez says that the 2010 motion should have been construed as a request to reopen under the IJ's sua sponte authority, but the motion made no mention of this authority, instead citing the basis and time limit for a motion to reopen an in absentia removal order. On this record, the BIA did not abuse its discretion in concluding that the 2010 motion to reopen triggered the number bar.

Moreover, even if the 2010 motion did not count against the number bar, the BIA did not abuse its discretion in finding that Lopez's next motion to reopen, filed in 2011, counted against the number bar. As the record reveals, while Lopez was appealing the IJ's decision denying the 2010 motion to reopen, the 2011 motion was filed. And under the regulations, the BIA had jurisdiction over the 2011 motion to reopen once Lopez appealed the IJ's decision denying the 2010 motion to reopen. See 8 C.F.R. § 1003.2(c)(3) (cross-referencing § 1003.23(b)(4)(ii)). Further, under the regulations in force at the time, the BIA had discretion to construe a motion to reopen during the pendency of an appeal to the BIA as a motion to remand or to consolidate and consider the motion with the appeal to the BIA. Id. § 1003.2(c)(4) (2012). The BIA chose to do the latter. As a result, at least one (if not both) of Lopez's prior motions to reopen qualified under the number bar, and the BIA did not abuse its discretion in finding that his 2019 motion to reopen was number-barred.[1]

In any event, even if Lopez's previous motions to reopen did not count towards the number bar or qualified for equitable tolling, the BIA did not abuse its discretion in finding that Lopez did not rebut the presumption of delivery by regular

[1] Lopez argues in the alternative that the BIA did not have jurisdiction to entertain his third motion to reopen -- the 2019 motion underlying this appeal -- and should have returned the record of proceedings to the IJ in order for Lopez to properly seek recission of his in absentia removal order. But because the BIA had already made a decision in his case by rendering a decision on his prior counsel's 2010 and 2011 motions to reopen and reconsider, Lopez was required to file his 2019 motion to reopen with the BIA. 8 C.F.R. § 1003.2(a), (g)(2)(i). Thus, the BIA had jurisdiction to entertain the 2019 motion.

mail of the notice to appear. DHS sent Lopez the notice to appear by regular mail to the address Lopez admits he listed on his 2007 asylum application. Lopez says he later relocated and received the notice to appear after the hearing had passed, but he offers nothing to suggest that he updated his address with the immigration court at any time. Based on this information, the BIA concluded that Lopez failed to rebut the presumption of delivery, and the record supports this conclusion -- there is no indication that the notice to appear or the IJ's decision were returned to the agency undelivered from the address Lopez admitted had been his previous residence. Thus, the BIA did not abuse its discretion in finding that Lopez failed to establish that he lacked notice in order to sustain his motion to reopen his in absentia removal order. 8 U.S.C. § 1229a(b)(5)(A); Matter of M-R-A-, 24 I.&N. Dec. at 673.

Nor can we say that the BIA abused its discretion in finding that Lopez was not prejudiced by ineffective assistance of counsel or in finding that equitable tolling was not warranted. Among other things, Lopez never has claimed he was lawfully admitted nor has he attempted to make a prima facie showing that he would have been eligible for any form of relief. Thus, Lopez has not demonstrated any prejudice from his counsel's alleged misconduct -- that is, "that there is a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different," Sow, 949 F.3d at 1318, which is the standard we apply to ineffective assistance of counsel claims, see Dakane, 399 F.3d at 1274–75.

To the extent Lopez argues he qualified for equitably tolling of the number bar, he did not make the requisite showing that (1) he had been pursuing his rights diligently and (2) some extraordinary circumstance stood in his way. Ruiz-Turcios, 717 F.3d at 850–51. Notably, Lopez did not file his present motion to reopen until about six years after our law changed in his favor -- to recognize that time and number limits on motions to reopen were not mandatory and jurisdictional, Avila-Santoyo, 713 F.3d at 1359–65 -- and Lopez did not present any extraordinary circumstances to explain the six-year delay. We've held that a three-year delay, without explanation, after the means to challenge the BIA's order became available did not demonstrate due diligence. Watkins, 880 F.3d at 1226 n.2. Thus, under our case law, Lopez's six-year delay did not demonstrate the due diligence required to establish that equitable tolling of the number bar was warranted. For all of these reasons, we deny Lopez's petition for review as to his 2019 motion to reopen.

As for Lopez's challenge to the BIA's decision not to sua sponte reopen his removal proceedings, we lack jurisdiction. The BIA may sua sponte reopen proceedings at any time. 8 C.F.R. § 1003.2(a). However, the BIA has discretion to deny a motion under § 1003.2(a), even if the moving party has met its prima facie burden to reopen. Id. Although decisions not to reopen under § 1003.2(a) are reviewed for abuse of discretion, the decision to reopen sua sponte is "committed to agency discretion by law," and this discretion is so wide and standardless that it is

non-reviewable. Lenis v. U.S. Att'y Gen., 525 F.3d 1291, 1294 (11th Cir. 2008). We've nevertheless recognized that constitutional issues may present a possible exception to our lack of jurisdiction to review the BIA's refusal to sua sponte reopen proceedings. Butka v. U.S. Att'y Gen., 827 F.3d 1278, 1286 n.7 (11th Cir. 2016).

In Bing Quan Lin, we held that, while we did not have jurisdiction to review the BIA's refusal to sua sponte reopen, we did have jurisdiction to review the BIA's nondiscretionary grounds of its decision and the legal reasoning behind them. So, in that case, we exercised jurisdiction over the petitioner's "claims challenging the adequacy and substance of the IJ's and the BIA's holdings that [the petitioner's] motion to reopen was time-barred, number-barred, and lacked any new and previously unavailable evidence," but held that we lacked jurisdiction to review "the BIA's decision declining to reopen Lin's removal order sua sponte." Bing Quan Lin, 881 F.3d at 871–872.

Here, we lack jurisdiction over the BIA's denial of Lopez's sua sponte motion to reopen. Lopez argues that Bing Quan Lin created an exception to our usual lack of jurisdiction, allowing us to review a reasoned consideration claim concerning a BIA's decision not to sua sponte reopen proceedings, but this argument is without merit. We squarely held in Bing Quan Lin that we only have jurisdiction to review the nondiscretionary grounds of the BIA's decision, even if the BIA also declined to reopen proceedings sua sponte. Id. ("To reiterate, the claims properly before this

Court are [the petitioner]'s challenges to the nondiscretionary grounds of decision and the sufficiency of the decision offered by the BIA in denying [the] motion to reopen."). Further, Lopez did not raise any constitutional claims in challenging the BIA's decision not to sua sponte reopen his removal order. Accordingly, the BIA's sua sponte decision is not reviewable, we lack jurisdiction over it, and we dismiss this portion of Lopez's petition for review. Butka, 827 F.3d at 1286 n.7.

PETITION DENIED IN PART AND DISMISSED IN PART.