[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-11994

Non-Argument Calendar

SARA CONSUELO ORDONEZ-VASQUEZ,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A087-865-479

Before NEWSOM, GRANT, and MARCUS, Circuit Judges.

PER CURIAM:

Sara Consuelo Ordoñez-Vasquez petitions for review of the Board of Immigration Appeals' ("BIA") denial of her motion to reconsider its dismissal of her appeal before the agency. Ordoñez's immigration proceedings began in February 2015, when she was directed to appear in immigration court. In August 2018, she moved the immigration court to terminate her proceedings on the ground that the court lacked jurisdiction over her case because her Notice to Appear ("NTA") was defective; in October 2018, the immigration judge ("IJ") denied that motion; and, thereafter, in February 2019, the IJ denied Ordoñez's application for asylum, withholding of removal and relief under the Convention Against Torture. Ordoñez then appealed the IJ's decisions to the BIA, and in her briefing, she challenged the merits of the IJ's denial of her applications for relief and reiterated that her defective NTA necessitated the termination of her proceedings. In addition, for the first time, she argued in the alternative that the BIA should remand to the IJ to consider her new claim that her NTA violated a "claim-processing" rule -- that is, a rule that "seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

On March 8, 2024, the BIA dismissed Ordoñez's appeal, first rejecting her argument that the IJ lacked jurisdiction over her

removal proceedings. As for her new argument that her NTA amounted to a claim-processing violation, the BIA found her objection to be untimely because she did not raise it prior to the close of her pleadings before the IJ. Ordoñez moved for reconsideration on April 3, 2024, arguing only that her objection to the NTA's claim-processing violation was timely. On May 22, 2024, the BIA denied Ordoñez's motion to reconsider, reasoning that, since "the defects in [Ordoñez's] Notice to Appear were apparent given the plain language requirements of the INA, nothing prevented [her] from such raising (sic) arguments and objecting in a timely manner." On June 18, 2024, Ordoñez timely appealed to this Court from the BIA's denial of her motion for reconsideration.

In her petition in this Court, Ordoñez argues that the BIA abused its discretion in denying her motion because a test used by the Seventh Circuit in *Arreola-Ochoa v. Garland*, 34 F.4th 603, 609 (7th Cir. 2022), to evaluate the timeliness of an objection to a deficient NTA is superior to the test relied upon by the BIA, and her objection was timely under the Seventh Circuit's test. After careful review, we deny the petition.

I.

We review the BIA's denial of a motion to reconsider for abuse of discretion, although, "[t]o the extent that the BIA's decisions were based on a legal determination, our review is *de novo*." *Scheerer v. U.S. Att'y Gen.*, 513 F.3d 1244, 1252 (11th Cir. 2008). When reviewing for abuse of discretion, we consider only whether the BIA exercised its discretion arbitrarily or capriciously. *Ferreira*

v. U.S. Att'y Gen., 714 F.3d 1240, 1243 (11th Cir. 2013). "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." *Id.* In deciding whether to uphold a BIA decision, we are limited to the grounds upon which the BIA relied and do not consider issues it did not reach. *See Ponce Flores v. U.S. Att'y Gen.*, 64 F.4th 1208, 1222 n.7 (11th Cir. 2023).

Under the Immigration and Nationality Act ("INA"), a motion to reconsider "shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority." 8 U.S.C. § 1229a(c)(6)(C). A petition for review of a final order of removal must be filed within 30 days after the date of the final order of removal.[1] *Id.* § 1252(b)(1). This deadline is mandatory and jurisdictional and is not subject to equitable tolling. *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1272 n.3 (11th Cir. 2005). This deadline also is not tolled by the filing of a motion to reconsider. *See id.* Thus, where a party timely petitions for review of the BIA's denial of a motion to reconsider but does so more than 30 days after the BIA dismissed the party's appeal of an IJ's removal order, we retain jurisdiction only over the BIA's order denying the motion to reconsider. *See id.* at 1272 & n.3.

In *Pereira v. Sessions*, the Supreme Court held that a putative NTA that is deficient under 8 U.S.C. § 1229(a)(1) for not including the time and place of the removal hearing is not an NTA for

[1] Relevant here, an order of removal made by an IJ becomes final upon the dismissal of an appeal by the BIA. 8 C.F.R. § 1241.1(a).

purposes of the stop-time rule in the cancellation of removal statute. 585 U.S. 198, 201–02 (2018) (citing 8 U.S.C. § 1229b(d)(1)); *see also Niz-Chavez v. Garland*, 593 U.S. 155, 158–72 (2021) (concluding that an NTA is a single document that contains all the information required by 8 U.S.C. § 1229(a)(1), and thus rejecting the government's argument that a later notice of hearing that supplies the information omitted in the original purported NTA cures the defect). This is the rule that deems a noncitizen's period of continuous presence in the United States to end when the noncitizen is served with an NTA. *Pereira*, 585 U.S. at 201.

Based on *Pereira*, we've rejected the claim that the issuance of a deficient NTA deprived the agency of jurisdiction over a noncitizen's removal proceedings. *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1157 (11th Cir. 2019). We held that § 1229(a) and its accompanying regulation, 8 C.F.R. § 1003.14, are claim-processing rules and not jurisdictional rules. *Id.* at 1154, 1157. Claim-processing rules, as we've explained, "seek[] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 1157 (quotations omitted). We since have emphasized that the issue of "whether [a petitioner] is entitled to a remand because his defective notice to appear violated the agency's claim-processing rules is a separate issue from whether the immigration court lacked jurisdiction over his removal proceedings." *Farah v. U.S. Att'y Gen.*, 12 F.4th 1312, 1322 (11th Cir. 2021).

Because an objection to a deficient NTA is a claim-processing objection, it can be forfeited "if the party asserting the rule waits too long to raise the point." *See Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1360–61 (11th Cir. 2013) (quotations omitted) (holding that the 90-day deadline for filing a motion to reopen was a claim-processing, rather than jurisdictional, rule) (citing *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) ("[A] claim-processing rule . . . , even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.")); *see also United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (*en banc*) (noting that "forfeiture is the failure to make the timely assertion of a right" (quotations omitted)). In *Kontrick*, the Supreme Court determined that a party who raised a claim-processing objection to bankruptcy proceedings "after the party ha[d] litigated and lost the case on the merits" waited too long and therefore forfeited the objection.[2] 540 U.S. at 456, 460.

In *Matter of Fernandes*, the BIA agreed that § 1229(a) is a claim-processing rule. 28 I&N Dec. 605, 612–13 (BIA 2022) (persuasive authority). However, the BIA rejected the argument that

[2] Specifically, Kontrick challenged the timeliness of the opposing party's claim against him for the first time in a motion to reconsider -- after he had already engaged with the substance of the claim in his trial proceedings before the bankruptcy court, which granted summary judgment in favor of Kontrick's opposing party as to that claim. 540 U.S. at 450. The Supreme Court said: "No reasonable construction of complaint-processing rules . . . would allow a litigant situated as Kontrick is to defeat a claim, as filed too late, after the party has litigated and lost the case on the merits." *Id.* at 460.

the only appropriate remedy was to terminate proceedings. *Id.* at 613–16. It reasoned that, although the IJ could not ignore or overlook a violation of section 1229(a), "the nature of the violation informs the nature of the remedy." *Id.* at 615–16. Consequently, the BIA held that the IJ must determine, in his or her discretion, what remedy is appropriate to promote the rule's underlying purpose. *Id.* at 613. It noted that requiring immediate termination for a violation of section 1229(a) would essentially turn the time-and-place requirement into a jurisdictional requirement. *Id.* at 614. The BIA said that the government should be permitted to remedy the noncompliant NTA. *Id.* at 616. The BIA added that "[t]he precise contours of permissible remedies are not before us at this time" and that the government "may decide it is best to request dismissal without prejudice and file a new notice to appear." *Id.* Nonetheless, the BIA vacated the IJ's decision so that "any actions and decisions that took place following the respondent's timely objection regarding the deficiency of the notice to appear [c]ould be carefully considered anew." *Id.*

Notably, in *Matter of Fernandes*, the BIA agreed with Fernandes that his objection to the adequacy of his NTA was timely because he raised it before the closing of pleadings. *Id.* at 610. Indeed, Fernandes filed his written objection before any pleadings to the allegations or charge in his NTA were taken, and at the following hearing, "expressly declined to concede proper service of the notice to appear and requested an opportunity to submit a motion to dismiss because the notice to appear did not specify the date and time of the initial hearing." *Id.* at 606. Thus, the BIA held that it

would "generally consider an objection to a noncompliant notice to appear to be timely if it is raised prior to the closing of pleadings before the Immigration Judge." *Id.* at 610–11.

To support its holding, the BIA reasoned that "requiring respondents to raise an objection before the closing of pleadings would not force respondents (especially unrepresented respondents) to raise an objection at the initial appearance before an [IJ] and would allow them an adequate opportunity to obtain counsel." *Id.* at 610. However, "allowing . . . an objection at any point in the proceedings after the [NTA] has been served would affect [the Department of Homeland Security's ("DHS")] ability to timely remedy the noncompliant [NTA] and might force DHS to start proceedings anew, causing an undue delay and hindering the orderly progress of the proceedings." *Id.* Thus, the BIA opined that DHS should be afforded "an opportunity to remedy the noncompliant [NTA] before any substantive matters are discussed or determined, which would prevent an undue delay and promote the orderly progress of the proceedings." *Id.*

The BIA added that this rule was consistent with decisions of federal courts, like *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019) (persuasive authority), *overruled in part as recognized by Maniar v. Garland*, 998 F.3d 235, 242 n.2 (5th Cir. 2021), and with the Federal Rules of Civil Procedure, which require that certain defenses be raised in a responsive pleading or motion before pleading, such as Rule 12(b). *Id.* Following this reasoning, the BIA determined that, "[w]here pleadings are made in writing, the written pleading must

include any objection to the absence of time or place information, or the objection will be deemed waived." *Id.* at 611.

In *Leger v. U.S. Att'y Gen.*, we determined that an IJ and the BIA failed to address Leger's argument -- raised prior to his merits hearing before the IJ -- that his removal proceeding should be terminated in order to enforce § 1229(a)'s claim-processing rule, since his NTA was defective for failing to include the date and time of his removal hearing.[3] 101 F.4th 1298, 1308–10 (11th Cir. 2024). Importantly, in his appeal before the agency, "the BIA ruled that that Mr. Leger's 'motion to terminate proceedings based on an alleged lack of jurisdiction' was properly denied because a deficient notice to appear does not deprive an immigration judge of jurisdiction over a removal proceeding." *Id.* at 1309. We explained that, although the BIA correctly described the non-jurisdictional nature of § 1229(a)'s claim-processing requirements, the IJ and BIA still erred in dismissing Leger's motion to terminate on this basis, "because Mr. Leger never argued that the defective notice to appear deprived the immigration judge of jurisdiction. Instead, he recognized that § 1229(a) sets out a claims-processing rule and asked the immigration judge and the BIA to enforce it by terminating the removal proceeding." *Id.*

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[3] Leger raised his motion to terminate based on the NTA's claims-processing violation before he entered his pleadings -- Leger admitted some of the underlying facts alleged in his NTA and denied that he was removable as charged in the NTA only after the IJ denied his motion to terminate. *See Leger*, 101 F.4th at 1298.

In *Leger*, we vacated the BIA's decision that affirmed the IJ's termination of the Leger's asylee status and, "[t]o aid the BIA on remand, . . . offer[ed] the following thoughts." *Id.* at 1298–99, 1309–10. First, a sister circuit held that a noncitizen who raises a timely objection to a defective NTA need not show prejudice in order to be entitled to relief. *Id.* at 1309 (citing *De La Rosa v. Garland*, 2 F.4th 685, 688 (7th Cir. 2021) (persuasive authority)). Second, we noted the BIA's holdings that: (1) a showing of prejudice is not required to terminate removal proceedings on the basis of a defective NTA; (2) that motion is "timely if made 'prior to the closing of pleadings' before the immigration judge"; and (3) a defective NTA does not require termination of the proceeding and the IJ may allow the government to fix the defect. *Id.* (citing *Matter of Fernandes*, 28 I&N Dec. at 607–08, 611–13)).

Courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach. *INS v. Bagamasbad*, 429 U.S. 24, 25–26 (1976). Further, any arguments not raised before this Court when seeking review of the BIA's order are deemed abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005).

II.

On the record before us, Ordoñez could be raising two possible arguments: (1) that the immigration court lacked jurisdiction over her removal proceedings because of her deficient NTA; and (2) that she is entitled to a remand because her defective NTA violated the agency's claim-processing rules. *See Farah*, 12 F.4th at

1322 (noting that the issue of "whether [a petitioner] is entitled to a remand because his defective notice to appear violated the agency's claim-processing rules is a separate issue from whether the immigration court lacked jurisdiction over his removal proceedings"). However, we've held that when a party timely petitions for review of the BIA's denial of a motion to reconsider more than 30 days after the BIA dismissed the party's appeal of an IJ's removal order -- as happened here -- we retain jurisdiction only over the BIA's order denying the motion to reconsider. *Dakane*, 399 F.3d at 1272 n.3.[4] This means that we do not have jurisdiction over the argument the BIA did *not* address in its denial of reconsideration -- that is, Ordoñez's argument, raised in her motion to terminate before the IJ, that the immigration court lacked jurisdiction over her removal proceedings due to her deficient NTA. *See id.*[5]

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[4] The Supreme Court recently granted *certiorari* to consider whether the 30-day deadline found in 8 U.S.C. § 1252(b)(1) -- for a noncitizen to file a petition for review of a removal order -- is jurisdictional. *Riley v. Garland*, 145 S. Ct. 435, No. 23-1270 (2024). But, as we've made clear, "grants of certiorari do not themselves change the law, and must not be used by courts as a basis to grant relief that would otherwise be denied." *In re Bradford*, 830 F.3d 1273, 1275 (11th Cir. 2016) (quotations and alteration omitted). Accordingly, "[u]ntil the Supreme Court issues a decision that actually changes the law, we are duty-bound to apply this Court's precedent." *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1284 (11th Cir. 2015).

[5] Because the jurisdictional issue Ordoñez raised before the IJ is distinct from the claims-processing issue she raised before the BIA and is foreclosed by binding authority, we need not address Ordoñez's various arguments as to why her jurisdictional objection before the IJ should be considered timely. This includes, for example, her claims that: (1) DHS knowingly caused her to enter

Instead, our review is limited to the BIA's determination in its denial of Ordoñez's motion for reconsideration that Ordoñez failed to timely raise her objection to her defective NTA on claim-processing grounds. Ordoñez does not focus on this argument in her petition in this Court (and instead focuses on the other argument concerning the timeliness of her jurisdictional objection before the IJ), and she likely has abandoned this argument. *Sepulveda*, 401 F.3d at 1228 n.2. But even if we were to assume that she sufficiently preserved it on appeal, the claim lacks merit. As the record reflects, Ordoñez did not object to her NTA on claim-processing grounds until her appeal before BIA, after she had *already* litigated her case before the IJ and lost on the merits. Thus, based on the claim-processing principles expressly embraced by the Supreme Court in *Kontrick* -- that a party who raised a claim-processing objection "after the party ha[d] litigated and lost the case on the merits" waited too long and therefore forfeited the objection -- we cannot say that the BIA's determination that she forfeited her claim-processing objection was erroneous. 540 U.S. at 460.

Thus, because the BIA did not misapply the law in finding that Ordoñez's claim-processing objection was untimely, it did not abuse its discretion in dismissing Ordoñez's motion to reconsider. *See Ferreira*, 714 F.3d at 1243. Nor is there any reason for us to adopt

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a plea at an unfavorable point in her proceedings; (2) the merits of her case had not been discussed when she raised this objection; or (3) the agency was responsible for the delays in adjudicating her applications for relief. *Perez-Sanchez*, 935 F.3d at 1157; *Bagamasbad*, 429 U.S. at 25–26.

the Seventh Circuit's test for timeliness in *Arreola-Ochoa*, as Ordoñez requests. As we've reiterated, Ordoñez's claim-processing objection was raised for the first time after her case had been litigated and clearly untimely, so we do not have occasion to decide the precise contours of how courts should evaluate the timeliness of claim-processing objections to NTAs when they are raised during active litigation. *Kontrick*, 540 U.S. at 460; *Bagamasbad*, 429 U.S. at 25–26.

Finally, because the BIA correctly determined that Ordoñez did not timely assert her claim-processing objection to her NTA, we need not reach her argument that termination was and remains the only appropriate remedy here. Accordingly, we deny Ordoñez's petition for review.

PETITION DENIED.