

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-13574
Non-Argument Calendar

HAI SON XUAN PHAN,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A072-597-156

Before JILL PRYOR, BRANCH, and LUCK, Circuit Judges.

PER CURIAM:

Hai Son Xuan Phan petitions for review of a Board of Immigration Appeals order denying his motion to reopen his removal

proceedings under its sua sponte authority. After careful review, we dismiss the petition for lack of jurisdiction.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Phan is a native and citizen of Vietnam. He entered the United States as a refugee in 1991 and became a lawful permanent resident in 1992.

In 1994, Phan was convicted in Georgia state court of armed robbery and theft by receiving stolen property. Following his convictions, the Immigration and Naturalization Service charged Phan as removable because he had been convicted of two crimes involving moral turpitude and of a crime of violence for which a term of imprisonment of five years or more was imposed. In 1996, an immigration judge upheld the grounds of removability.

In 2024, Georgia granted Phan a pardon for his convictions. Phan then moved the immigration judge to reopen his case under the judge's sua sponte authority and dismiss the removal proceedings, arguing that he was no longer removable because he had received a "full and unconditional" pardon. Phan also noted that, since his conviction, he'd resided in the United States for thirty years, committed no additional criminal offenses, married a United States citizen, raised two children, and contributed to his community.

The immigration judge denied the motion, finding that Phan's "previous violent and serious felony criminal convictions

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outweigh[ed] the positive equities in this case,” and that he therefore did not demonstrate the “truly exceptional” circumstances required for sua sponte reopening. Phan appealed to the Board of Immigration Appeals, but the board affirmed the immigration judge.

Under its precedent, the board explained, vacating a conviction “only ha[s] effect for immigration purposes if it is based on a procedural or substantive defect in the underlying criminal proceedings, but not if it is based on rehabilitation or hardship in immigration proceedings.” Because Phan’s pardon was based on rehabilitation, the board concluded that he didn’t establish the exceptional circumstances warranting a sua sponte reopening.

STANDARD OF REVIEW

We review de novo whether we have jurisdiction to hear a petition for review “even if we must raise the issue sua sponte.” *Hayles v. U.S. Att’y Gen.*, 179 F.4th 872, 876 (11th Cir. 2026) (citation modified). We generally review for abuse of discretion the board’s denial of a motion to reopen removal proceedings. *See Butalova v. U.S. Att’y Gen.*, 768 F.3d 1179, 1182 (11th Cir. 2014).

DISCUSSION

Phan argues that the board incorrectly concluded that his pardon did not affect his removability. He points to the pardon provision in the Immigration and Nationality Act, which provides that removability “shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal

conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.” 8 U.S.C. § 1227(a)(2)(A)(vi). The board’s “incorrect decisional analysis,” Phan contends, “violated [his] right to due process” because it “denied him his right to be fairly heard.”

Under their “sua sponte” authority, an immigration judge or the board may reopen “any case” “at any time.” 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1). But we don’t have jurisdiction to review a denial of sua sponte reopening. See *Bing Quan Lin v. U.S. Att’y Gen.*, 881 F.3d 860, 871 (11th Cir. 2018), *overruled in part on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411, 419–23 & n.2 (2023); *Butka v. U.S. Att’y Gen.*, 827 F.3d 1278, 1283–86 (11th Cir. 2016); *Lenis v. U.S. Att’y Gen.*, 525 F.3d 1291, 1293–94 (11th Cir. 2008). That’s because the Administrative Procedure Act bars judicial review when “agency action is committed to agency discretion by law,” 5 U.S.C. § 701(a)(2), a “situation [that] occurs when the statute at issue does not provide a ‘meaningful standard against which to judge the agency’s exercise of discretion,’” *Butka*, 827 F.3d at 1283–84 (quoting *Lenis*, 525 F.3d at 1293).

Sua sponte reopening is such a situation because “neither the [Immigration and Nationality Act] nor [the Act’s regulations] provide[] any ‘standard to govern the . . . exercise of . . . discretion’ to sua sponte reopen immigration proceedings.” *Id.* at 1284 (quoting *Lenis*, 525 F.3d at 1293). We have therefore “held unambigu-

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ously” that we don’t have jurisdiction “to review [a] denial of a motion to sua sponte reopen proceedings, with the possible exception of constitutional issues.” *Id.* at 1285.

Phan responds that we do have jurisdiction here because his case presents a constitutional issue: the board violated his Fifth Amendment right to due process by denying him a fair hearing “when it applied an incorrect decisional analysis to [his] motion to [r]eopen.” We have suggested that we may have jurisdiction when an alien’s petition for review raises “constitutional claims related to the [board]’s decision not to exercise its sua sponte power.” *Lenis*, 525 F.3d at 1294 n.7; *see also Bing Quan Lin*, 881 F.3d at 871; *Butka*, 827 F.3d at 1284. But because “[a] petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb,” he “must allege at least a colorable constitutional violation” to invoke the possible exception. *Arias v. U.S. Att’y Gen.*, 482 F.3d 1281, 1284 & n.2 (11th Cir. 2007) (citation modified). His constitutional “claim must have some possible validity.” *Id.*

Phan’s petition does not allege a colorable constitutional claim. “To establish due process violations in removal proceedings, aliens must show that they were deprived of liberty without due process of law, and that the asserted errors caused them substantial prejudice.” *Scheerer v. U.S. Att’y Gen.*, 513 F.3d 1244, 1253 (11th Cir. 2008) (quoting *Lonyem v. U.S. Att’y Gen.*, 352 F.3d 1338, 1341–42 (11th Cir. 2003)). But the discretionary “decision to grant or deny a motion to reopen” does not violate an alien’s due process

right because “the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest.” *Id.* (citation modified). Phan’s argument—that the board deprived him of due process because it got the legal analysis wrong—is little more than a garden-variety abuse-of-discretion argument “cloak[ed] . . . in constitutional garb,” *Arias*, 482 F.3d at 1284 (citation modified), which is not enough to give us jurisdiction.

Because we don’t have jurisdiction to review the board’s refusal to sua sponte reopen Phan’s case, we dismiss his petition for review. See *Bing Quan Lin*, 881 F.3d at 871; *Butka*, 827 F.3d at 1283–86; *Lenis*, 525 F.3d at 1293–94.

PETITION DISMISSED.