United States Court of Appeals
For the Eighth Circuit

No. 22-1366

Alejandro Islas-Saldana

Petitioner

v.

Merrick B. Garland, Attorney General of the United States

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

Submitted: October 18, 2022
Filed: February 7, 2023

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

LOKEN, Circuit Judge.

Alejandro Islas-Saldana petitions for review of an order of the Board of Immigration Appeals ("BIA") denying his motion to reconsider the denial of an administrative closure of his removal proceedings. Concluding the BIA did not abuse its broad discretion to deny motions to reconsider, we deny the petition for review.

I.

In 2012, the Department of Homeland Security ("DHS") initiated removal proceedings against Mr. Islas-Saldana, a native and citizen of Mexico who unlawfully entered the United States in 2003. Islas-Saldana conceded the charges, sought cancellation of removal, and petitioned the United States Citizenship and Immigration Services ("USCIS") for a "U visa." A U visa is a nonimmigrant classification granted to crime victims who cooperate with law enforcement in investigating or prosecuting qualifying crimes in this country. See 8 U.S.C. § 1101(a)(15)(U); J.M.O. v. United States, 3 F.4th 1061, 1062 (8th Cir. 2021). Islas-Saldana's petition is based on a 2008 armed robbery in Minneapolis.

In 2013, the Immigration Judge ("IJ") granted Islas-Saldana's motion for a temporary administrative closure while USCIS processed his U visa application. The IJ recalendered removal proceedings in 2015 after USCIS denied the U visa application for failure to submit a proper U Nonimmigrant Status Certification. At a March 2018 hearing, Islas-Saldana advised that a new U visa petition would be filed. The IJ scheduled the cancellation of removal hearing for September 20, 2018, commenting, "even if a U VISA gets filed again with USCIS, it is not a situation where a case has to be administratively closed for [Islas-Saldana] to pursue that type of relief." Islas-Saldana filed a U visa application with USCIS on April 30, 2018. He did not file a motion for administrative closure. The IJ conducted the hearing on September 20 and denied cancellation of removal. The IJ's decision noted the first U visa application, the grant of administrative closure, and recalendaring.

Islas-Saldana appealed the IJ's order to the BIA. His Brief in Support argued the cancellation of removal issue at length. It also noted that the first U visa petition was not denied on the merits, and that he filed a new U visa petition in 2018 that "has a high chance of success." Islas-Saldana urged the BIA to grant administrative closure "pending adjudication" of that petition. In June 2021, the BIA dismissed the

appeal, upholding the IJ's denial of cancellation of removal. It denied administrative closure because "we lack authority to grant administrative closure in this situation," citing Matter of Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018).

In July 2021, Islas-Saldana timely filed the motion here at issue, seeking "reconsideration of his request for administrative closure" because Matter of Castro-Tum was overruled by the Attorney General in Matter of Cruz-Valdez, 28 I. & N. Dec. 326 (A.G. 2021). Islas-Saldana argued he "is not considered a priority for removal" pursuant to a May 2021 DHS Prosecutorial Discretion Memorandum. He urged the BIA to "remand to the IJ for administrative closure pending adjudication of his U Visa petition." The BIA denied the motion. It acknowledged Matter of Cruz-Valdez granted administrative closure authority the BIA previously found lacking and "instructed us to apply the standard for administrative choice set out in Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012)." After reciting the relevant factors to be weighed in applying Avetisyan, the BIA denied administrative closure because (i) prosecutorial discretion is within the exclusive purview of DHS, which opposes administrative closure; (ii) Islas-Saldana "may continue to pursue a U-visa directly with USCIS, independently of these proceedings;" (iii) he is not currently eligible for any relief that can be granted by an IJ or the BIA; and (iv) his potential for future relief is speculative "and would require administrative closure for too protracted and indefinite a time to warrant administrative closure."

II.

"A motion to reconsider addresses the merits of the BIA's initial decision." Rodriguez de Henriquez v. Barr, 942 F.3d 444, 447 (8th Cir. 2019). It must "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); see Martinez v. Lynch, 785 F.3d 1262, 1266 (8th Cir. 2015). By contrast, a motion to reopen must be based on new material evidence that "was not available and could not have been discovered or presented at

the former hearing." 8 C.F.R. § 1003.2(c)(1). Motions to reconsider, like motions to reopen, are "disfavored because they undermine the government's legitimate interest in finality, which is heightened in removal proceedings where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." Martinez, 785 F.3d at 1264–65 (cleaned up), quoting INS v. Doherty, 502 U.S. 314, 323 (1992). The timely filing of a motion to reopen or reconsider does not toll the time for appeal of the underlying order. Mshihiri v. Holder, 753 F.3d 785, 788 (8th Cir. 2014). Thus, the merits of the BIA's denial of cancellation of removal are not before us.

We review denials of motions to reopen or reconsider for abuse of the BIA's broad discretion. Mohamed v. Barr, 983 F.3d 1018, 1022 (8th Cir. 2020). Discretion is abused only where the BIA "gives no rational explanation for its decision, departs from its established policies without explanation, relies on impermissible factors or legal error, or ignores or distorts the record evidence." Rodriguez de Henriquez, 942 F.3d at 447 (quotation omitted).

Administrative closure is a docket management tool that has been used by immigration judges and the BIA for decades to pause removal proceedings, "for example . . . while [USCIS] adjudicates a noncitizen's pending visa petition [or to allow] government counsel to request that certain low-priority cases be removed from immigration judges' active calendar or the Board's docket." Matter of Cruz-Valdez, 28 I. & N. Dec. at 327. In Hernandez v. Holder, 606 F.3d 900 (8th Cir. 2010), we held that we lacked jurisdiction to review the denial of a motion for administrative closure because there was no meaningful standard by which to review that decision. But in Avetisyan, the BIA held that IJs and the BIA, in exercising independent judgment whether administrative closure is appropriate, must:

> weigh all relevant factors presented in the case, including but not limited to: (1) the reason administrative closure is sought; (2) the basis for any

> opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings . . . when the case is recalendared before the [IJ] or the appeal is reinstated before the [BIA].

25 I. & N. Dec. at 696. In Gonzalez-Vega v. Lynch, we held that "Avetisyan supplied a usable standard for reviewing denials of motions for administrative closure." 839 F.3d 738, 741 (8th Cir. 2016). In that case, we upheld the BIA's adoption of the IJ's reasoning in denying administrative closure because it was "clear from the record that the IJ had the appropriate considerations in mind and committed no clear error of judgment in weighing them." Id. However, we remanded to the BIA to clarify whether it had considered Gonzalez-Vega's separate request that the BIA exercise its independent authority to grant administrative closure. Id. at 742.

Here, Islas-Saldana moved for reconsideration, arguing an intervening BIA decision -- Matter of Cruz-Valdez -- granted administrative closure authority the BIA previously found lacking and instructed the Board to apply the administrative closure standard set out in Avetisyan. The BIA agreed. This established the error of law in the previous order that a motion for reconsideration requires. See 8 C.F.R. § 1003.2(b). Because the BIA did not consider the merits of administrative closure in its prior order, it was now required to exercise its independent authority to grant administrative closure by applying the relevant Avetisyan factors. Islas-Saldana argues the BIA abused it discretion when it denied his motion to reconsider "without analyzing the elements under Matter of Avetisyan." We disagree.

The BIA's opinion first listed all the above-quoted Avetisyan factors. It then identified those factors that warranted denial of administrative closure. First, although Islas-Saldana claimed he was of low removal priority, prosecutorial

discretion is within the exclusive jurisdiction of DHS, which opposed his request for administrative closure. Second, Islas-Saldana does not need administrative closure to pursue his pending U visa petition. See 8 C.F.R. § 214.14(c)(1)(ii). Third, Islas-Saldana is not currently eligible for any relief under the immigration laws. Finally, his potential U visa eligibility is "merely speculative" and would require administrative closure "for too protracted and indefinite a time."[1]

As in Gonzalez-Vega, we conclude it is "clear from the record that the [BIA] had the appropriate [Avetisyan] considerations in mind and committed no clear error of judgment in weighing them." 839 F.3d at 741. Islas-Saldana argues the BIA did not analyze all the Avetisyan factors. But we do not require the Board "to recite the considerations mechanically when applying them to the facts." Id. The BIA "announce[d] its decision in terms sufficient to enable us to perceive that it has heard and thought and not merely reacted." Caballero-Martinez v. Barr, 920 F.3d 543, 551 (8th Cir. 2019) (cleaned up). The BIA did not abuse its broad discretion in denying the motion to reconsider.

We deny the petition for review.

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[1]We note that Islas-Saldana's U visa process is still pending some 14 years after the armed robbery on which it is based. He is largely responsible for the prior delays, including his failure to move for administrative closure prior to the September 2018 cancellation of removal hearing, making this case factually distinguishable from Quecheluno v. Garland, 9 F.4th 585, 589 (8th Cir. 2021). That opinion suggests some tension between evolving BIA standards for granting motions to reconsider the denial of administrative closure, and motions to reopen and remand for a continuance. We need not address this issue.