BIA
A078 935 536

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of November, two thousand twenty-six.

PRESENT:

DENNY CHIN,
WILLIAM J. NARDINI,
SARAH A. L. MERRIAM,
Circuit Judges.

VICTOR RAUL ZHIRZHAN-CORONEL,
Petitioner,

v.

26-2833(L),[1]
25-133(Con)
NAC

TODD BLANCHE, UNITED STATES ATTORNEY GENERAL,
Respondent.

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[1] The lead case initially was docketed in CM/ECF under case number 19-803.

FOR PETITIONER:	Paul O'Dwyer, Law Office of Paul O'Dwyer, P.C., New York, NY.
FOR RESPONDENT:	Yaakov M. Roth, Acting Assistant Attorney General; Ethan P. Davis, Acting Assistant Attorney General; Lisa M. Arnold, Senior Litigation Counsel; Claire L. Workman, Senior Litigation Counsel; John F. Stanton, Trial Attorney, Office of Immigration Litigation, United States Department of Justice, Washington, DC.

UPON DUE CONSIDERATION of these petitions for review of a Board of Immigration Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the petitions for review are DENIED.

Petitioner Victor Raul Zhirzhan-Coronel, a native and citizen of Ecuador, seeks review of the March 8, 2019, and December 18, 2024, decisions of the BIA denying his motions to rescind his in absentia removal order and reconsider and reopen his removal proceedings. *In re Victor Raul Zhirzhan-Coronel,* No. A078 935 536 (B.I.A. Mar. 8, 2019 & Dec. 18, 2024). We assume the parties' familiarity with the underlying facts and procedural history.

I. Motion to Rescind, Docket No. 26-2833(L)

This petition challenges the BIA's March 2019 decision denying Zhirzhan-Coronel's second motion to rescind as number-barred. "When the BIA has

applied the correct law, we review the decision to deny a motion to reopen or a motion to rescind for abuse of discretion." *Maghradze v. Gonzales*, 462 F.3d 150, 152 (2d Cir. 2006).

"Any alien who, after written notice . . . , does not attend a [removal] proceeding . . . , shall be ordered removed in absentia if [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). An in absentia removal order "may be rescinded only--(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances . . . , or (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice . . . and the failure to appear was through no fault of the alien." 8 U.S.C. § 1229a(b)(5)(C); *see also* 8 C.F.R. § 1003.23(b)(4)(ii). "An alien may file only one motion [to rescind]." 8 C.F.R. § 1003.23(b)(4)(ii).

It is uncontested that, even though there is no time limit for filing a motion to rescind based on lack of notice, Petitioner's motion to rescind was number-barred because it was his second such motion. *See id.* § 1003.23(b)(4)(ii). Ineffective assistance of counsel may excuse the number bar. *See Rashid v.*

Mukasey, 533 F.3d 127, 130 (2d Cir. 2008). To prevail on such a claim, a movant "must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result of such deficient performance." *Paucar v. Garland*, 84 F.4th 71, 80 (2d Cir. 2023) (quotation marks omitted); *Rashid*, 533 F.3d at 131. Prejudice requires a "show[ing] that, but for counsel's unprofessional errors, there is a reasonable probability the [immigration judge ("IJ")] would have granted the relief . . . requested." *Paucar*, 84 F.4th at 80 (quotation marks omitted).

We find no error in the BIA's conclusion that Zhirzhan-Coronel failed to show prejudice because his motion did not articulate any relief from removal available to him in reopened proceedings before the IJ. He argues here that, although he is not eligible to adjust status, he was prejudiced by his former counsel's failure to properly detail his lack of notice claim in his first motion to rescind because, had his removal order been rescinded and his proceedings reopened, the Department of Homeland Security would likely have agreed to administrative closure to permit him to apply for a provisional waiver of the inadmissibility caused by his unlawful presence thereby permitting him to apply for an immigrant visa based on the approved I-130 alien relative petition filed by

his wife. As the Government argues, however, he did not raise this argument in this second motion to rescind and thus we do not consider it. *See Vera Punin v. Garland*, 108 F.4th 114, 124 (2d Cir. 2024) ("[W]hen an argument made to this Court cannot be closely matched up with a specific argument made to the BIA, it has not been properly exhausted and we cannot hear it."). Even if exhausted, Petitioner has not shown prejudice because, in denying his first motion to rescind, the BIA considered this argument about administrative closure and found it unavailing. *See Paucar*, 84 F.4th at 80-81 (recognizing that prejudice requires "a *prima facie* showing that, but for counsel's ineffectiveness, he would have been eligible for . . . relief, and could have made a strong showing in support of his application" (quotation marks omitted)).

Petitioner's failure to show prejudice was dispositive of his second motion to rescind because prejudice was required to show ineffective assistance of counsel so as to excuse the number bar on that motion. *See* 8 C.F.R. § 1003.23(b)(4)(ii); *Paucar*, 84 F.4th at 80-81; *Cekic v. INS*, 435 F.3d 167, 170-71 (2d Cir. 2006). Thus, we do not reach the BIA's alternative findings that he failed to exercise due diligence or show that he had not received notice of his hearing so as to warrant rescission of his in absentia removal order. *See INS v. Bagamasbad*, 429 U.S. 24, 25

(1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

II. Motion to Reconsider and Reopen, Docket No. 25-133(Con)

We have "long reviewed the denial of a motion to reopen immigration proceedings, including under the doctrine of equitable tolling[,] under the familiar abuse of discretion standard, which is highly deferential." *Ramsay v. Bondi*, 171 F.4th 218, 220 (2d Cir. 2026) (quotation marks and ellipsis omitted). It is uncontested that Petitioner's 2019 motion to reopen was untimely because it was filed almost 18 years after his removal order became final in 2001. *See* 8 U.S.C. § 1229a(c)(7)(C)(i) (requiring that a motion to reopen be filed within 90 days of a final administrative order of removal).[2] A motion to reopen to apply for cancellation of removal does not fall into a statutory or regulatory exception to the 90-day deadline. *See* 8 U.S.C. § 1229a(c)(7)(C) (listing exceptions); 8 C.F.R. § 1003.2(c)(3) (same); *see Matter of Yauri*, 25 I. & N. Dec. 103, 105 (B.I.A. 2009) ("[U]ntimely motions to reopen to pursue an application for adjustment of status

[2] Although Petitioner's motion was titled a motion to reconsider, it did not allege any error in the prior decision but rather explicitly sought reopening to apply for cancellation of removal. *See Ke Zhen Zhao v. U.S. Dep't of Just.*, 265 F.3d 83, 90 (2d Cir. 2001).

. . . do not fall within any of the statutory or regulatory exceptions to the time limits for motions to reopen . . . and will ordinarily be denied.").

Equitable tolling may excuse the time limitation for a motion to reopen but only applies where a movant demonstrates that he "exercise[d] due diligence in vindicating his rights," *Jin Bo Zhao v. INS*, 452 F.3d 154, 157 (2d Cir. 2006) (quotation marks omitted), and "that some extraordinary circumstance stood in [his] way," *Doe v. United States*, 76 F.4th 64, 71 (2d Cir. 2023) (quotation marks omitted). As the BIA noted, Petitioner was not wrongly prevented from applying for cancellation of removal in his underlying proceedings or in a timely motion to reopen—as would be required to demonstrate that equitable tolling was warranted—because he did not become eligible for that relief until years after his removal proceedings concluded. Although Petitioner continued to accrue physical presence in the United States after service of the notice to appear because the notice omitted a hearing date, *Niz-Chavez v. Garland*, 593 U.S. 155, 170 (2021), he entered the United States in 2000 and would not have accrued the required ten years of presence before his removal order in 2001 or before the time to seek reopening expired, *see* 8 U.S.C. § 1229b(b)(1)(A).

The only remaining basis for reopening was the BIA's discretionary

authority to reopen under 8 C.F.R. § 1003.2(a). We lack jurisdiction to review that decision, *Li Chen v. Garland*, 43 F.4th 244, 249 (2d Cir. 2022), except that we may remand if the BIA misperceived the law and denied sua sponte reopening based on an erroneous determination that a petitioner was not eligible for the relief sought, i.e., that relief on "reopening would necessarily fail," *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009).

Petitioner argues that the BIA failed to consider "factually and legally identical" cases in which it granted reopening, 25-133 Pet'r's Br. 15, but we are unpersuaded. We have noted that "application of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious," *Ke Zhen Zhao*, 265 F.3d at 95 (citing *Vargas v. INS*, 938 F.2d 358, 362 (2d Cir. 1991)), but we have questioned whether this rationale applies to unpublished BIA decisions, such as those relied on here, *see Douglas v. INS*, 28 F.3d 241, 245 (2d Cir. 1994) (noting that "*Vargas* did not explicitly consider the issue of the precedential value of unpublished BIA decisions, and its reliance on those decisions is in tension with 8 C.F.R. § 3.1(g)" and "hold[ing] that such decisions should not be relied upon as binding precedent in unrelated matters"); *see also Paucar*, 84 F.4th at 84 n.8. Moreover, contrary to Petitioner's contention,

the BIA did not ignore factually and legally identical cases: some cases he cited were reopened on direct appeal; others did not involve number-barred motions and referenced individualized facts; and one movant had satisfied the ten-year physical presence requirement for cancellation at the time of his underlying removal hearing before the IJ. Further, as with equitable tolling, becoming potentially eligible for relief from removal years after being ordered removed is not an exceptional circumstance warranting sua sponte reopening. *See In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997).

For the foregoing reasons, the petitions for review are DENIED. All pending motions and applications are DENIED and stays VACATED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court