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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GUMERSINDO ALMANZA MENDEZ, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 21-70573 Agency No. A200-157-531 MEMORANDUM*

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

Submitted December 5, 2024**
Pasadena, California

Before: BEA, OWENS, and KOH, Circuit Judges.

Gumersindo Almanza Mendez petitions for review of a Board of Immigration Appeals ("BIA") decision affirming an Immigration Judge ("IJ") order denying his motion to reopen and rescind an in absentia removal order. We have jurisdiction under 8 U.S.C. § 1252(a)(1). We review the BIA's denial of a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

motion to reopen for abuse of discretion. *Singh v. Garland*, 117 F.4th 1145, 1150 (9th Cir. 2024). We review de novo claims of due process violations, including ineffective assistance of counsel claims. *Olea-Serefina v. Garland*, 34 F.4th 856, 866 (9th Cir. 2022); *Mohammed v. Gonzales*, 400 F.3d 785, 791-92 (9th Cir. 2005).

1. Almanza Mendez first argues that, due to ineffective assistance of his former counsel, he received inadequate notice of the August 28, 2014 hearing during which he was ordered removed in absentia. He argues that, because of this inadequate notice, he is entitled to recission of the removal order under 8 U.S.C. § 1229a(b)(5)(C)(ii).[1] However, the BIA properly determined that Almanza Mendez has failed to establish an ineffective assistance of counsel claim, and the BIA did not otherwise abuse its discretion in denying Almanza Mendez's request to reopen proceedings and rescind the removal order.

As an initial matter, the record shows that, at a prior hearing on June 12, 2014, Almanza Mendez was personally served with a hearing notice that reflected the August 28, 2014 hearing date, time, location, and consequences of failing to

[1] Despite references to "exceptional circumstances" in his briefing, we understand Almanza Mendez to ground this challenge only in the notice provision of 8 U.S.C. § 1229a(b)(5)(C)(ii). Indeed, because Almanza Mendez failed to file his motion to reopen and rescind within 180 days of the entry of the in absentia removal order, any argument that "exceptional circumstances" exist that merit reopening and recission under 8 U.S.C. § 1229a(b)(5)(C)(i) would be time barred.

attend in accordance with the statutory requirements of 8 U.S.C. § 1229(a)(2). Moreover, Almanza Mendez concedes that both he and his former counsel were present when the August 28, 2014 hearing was scheduled in open court. This actual notice is sufficient to meet both statutory and constitutional due process requirements. *See Campos-Chavez v. Garland*, 144 S. Ct. 1637, 1644-47, 1649 (2024); *Garcia v. INS*, 222 F.3d 1208, 1209 (9th Cir. 2000) (per curiam); *Khan v. Ashcroft*, 374 F.3d 825, 828-29 (9th Cir. 2004); *Hamazaspyan v. Holder*, 590 F.3d 744, 748-49 (9th Cir. 2009).

Nonetheless, Almanza Mendez argues that the hearing notice he received was inadequate because his former counsel stated that he would send Almanza Mendez notification by mail of Almanza Mendez's next hearing date, but failed to do so. However, the BIA did not err in concluding that Almanza Mendez has failed to establish an ineffective assistance of counsel claim.

As an initial matter, Almanza Mendez has failed to substantially comply with the procedural requirements for asserting an ineffective assistance of counsel claim as set forth in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). *See Singh*, 117 F.4th at 1151-52 (explaining that substantial compliance with the *Lozada* factors bears on the viability of ineffective assistance of counsel as an independent basis for recission of an in absentia removal order).

To be clear, strict compliance with *Lozada* is not always required, especially

when the record shows an obvious case of ineffectiveness of counsel. *See Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (collecting cases). Here, however, the sole evidence in the record supporting the ineffective assistance claim is Almanza Mendez's own affidavit supporting his motion to reopen and rescind. Absent additional evidence, Almanza Mendez's allegations are insufficient to establish that his former counsel clearly failed to perform with sufficient competence. *See Mohammed*, 400 F.3d at 793.[2]

2. Almanza Mendez also argues that he has a prima facie case of entitlement to asylum, withholding of removal, and protection under the Convention Against Torture, and that it violates due process to prevent him from having these claims adjudicated on the merits. However, Almanza Mendez's due process claim fails because he has established neither that (1) "the proceeding was 'so fundamentally unfair that the [noncitizen] was prevented from reasonably presenting his case,'" nor (2) "prejudice, 'which means that the outcome of the proceeding may have been affected by the alleged violation.'" *Ibarra-Flores v.*

[2] Additionally, Almanza Mendez argues that the hearing notice was inadequate because it was provided in English, rather than his best language, Spanish. However, because Almanza Mendez failed to raise this issue before the agency, we decline to address this argument based on a failure to exhaust administrative remedies. *See* 8 U.S.C. § 1252(d)(1); *Umana-Escobar v. Garland*, 69 F.4th 544, 550 (9th Cir. 2023).

Gonzales, 439 F.3d 614, 620-21 (9th Cir. 2006) (quoting *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000)).

First, the BIA correctly explained that prima facie eligibility of relief from removal is not grounds for recission under the notice provision of 8 U.S.C. § 1229a(b)(5)(C)(ii). Second, the BIA correctly explained that, in any event, Almanza Mendez had failed to make a prima facie case of eligibility for relief from removal because he failed to submit an asylum application or disclose the bases of his claimed eligibility for relief in his motion to reopen and rescind. *See* 8 C.F.R. § 1003.2(c)(1) ("A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation."). Almanza Mendez has failed to establish any agency error, much less error that was "so fundamentally unfair that [he] was prevented from reasonably presenting his case." *Ibarra-Flores*, 439 F.3d at 620 (quoting *Colmenar*, 210 F.3d at 971). Moreover, as Almanza Mendez failed to provide any detail explaining his alleged eligibility for relief from removal, he also failed to meet his burden of establishing prejudice. *See, e.g.*, *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011).

3. Finally, Almanza Mendez argues that it was a due process violation for the BIA to affirm the IJ's decision without addressing his request for the BIA to exercise its sua sponte authority to reopen the case in light of his contention that he

is entitled to relief from removal. *See* 8 C.F.R. § 1003.2(a) (granting the BIA authority to "at any time reopen or reconsider on its own motion any case in which it has rendered a decision"). Although the BIA did not specifically reference its authority to reopen proceedings sua sponte in its decision, it provided specific, cogent reasons as to why Almanza Mendez's claimed eligibility for relief from removal did not merit reopening proceedings. Ultimately, the BIA announced its decision with sufficient detail to show that the BIA adequately considered all the issues presented by Almanza Mendez and to enable appellate review. *See, e.g.*, *Najmabadi v. Holder*, 597 F.3d 983, 990 (9th Cir. 2010); *Lopez v. Ashcroft*, 366 F.3d 799, 807 n.6 (9th Cir. 2004). The BIA's reasoning thus meets due process requirements. Almanza Mendez has not established that the BIA's failure to reference his sua sponte reopening request explicitly was unfair or prevented him from reasonably presenting his case. *See Ibarra-Flores*, 439 F.3d at 620. Moreover, as discussed above, because Almanza Mendez failed to provide any documentation supporting his claimed eligibility for relief from removal, he also failed to establish prejudice.

To the extent Almanza Mendez challenges the merits of the BIA's decision not to reopen proceedings sua sponte, this Court has limited jurisdiction and may only review these decisions in "those situations where it is obvious that the agency has denied sua sponte relief not as a matter of discretion, but because it erroneously

believed that the law forbade it from exercising its discretion or that exercising its discretion would be futile." *Lona v. Barr*, 958 F.3d 1225, 1234 (9th Cir. 2020) (internal citations omitted). Here, for the reasons discussed above, the BIA did not obviously premise its decision on any erroneous legal premise or an erroneous understanding that reopening would be futile.[3]

PETITION DENIED.

[3] The temporary stay of removal shall remain in effect until issuance of the mandate. The motion for stay of removal is otherwise denied.