

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2983

DEVON HARDING,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

On Petition for Review of a Final Order of the
Board of Immigration Appeals
BIA No. A70-841-310
(U.S. Immigration Judge: Honorable Daniel A. Meisner)

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 10, 2007
Before: SCIRICA, *Chief Judge*, RENDELL and FUENTES, *Circuit Judges*.

(Filed October 26, 2007)

OPINION OF THE COURT

SCIRICA, *Chief Judge*.

Devon Harding petitions for review of the Board of Immigration Appeals' final order of removal dated May 10, 2006. He asks us to vacate and reverse the Board's order. We will deny Harding's petition and affirm the Board's order.

I.

Harding, a native and citizen of Jamaica, entered the United States in June 1991. In March 1995, following his marriage to a U.S. citizen, Harding's status was conditionally adjusted from non-immigrant visitor for pleasure to permanent resident. Harding was divorced in 2001 and his permanent resident status was subsequently terminated in June 2002. The Immigration and Naturalization Service served Harding with a Notice to Appear charging that he was subject to removal under § 237(a)(1)(D)(i) of the INA, 8 U.S.C. §1227(a)(1)(D)(i).

Harding appeared before an Immigration Judge (IJ) on September 19, 2002, and was advised that he had until October 17, 2002 to file a cancellation application for relief. When Harding next appeared before the IJ, on March 10, 2003, it became evident that Harding's prior counsel had failed to timely file a cancellation application for relief, and had done so only ten days before the March hearing. At the March 10 hearing, Harding withdrew his application for relief and the IJ granted him 120 days to voluntarily depart the country by July 8, 2003. Harding did not leave the United States as ordered and an alternative order of removal was imposed.

More than two years later, on October 11, 2005, Harding, represented by new counsel, filed a motion to reopen with the IJ. Harding contends his prior counsel provided ineffective assistance by not explaining the voluntary departure procedure. Harding said he sought new counsel after hearing accounts of other immigration cases

that seemed similar to his. On November 28, 2005 the IJ denied Harding’s motion to reopen, for failure to file within the ninety day deadline that would be necessary to qualify for equitable tolling. The IJ found Harding failed to demonstrate he was defrauded by prior counsel and failed to demonstrate he used due diligence in his attempts to investigate and bring his ineffective assistance claim before the court. Harding timely appealed the IJ’s decision to the Board on December 21, 2005. On May 10, 2006, the Board affirmed without opinion. This appeal followed.

II.

We review a final order of the Board denying a motion to reopen for abuse of discretion. *INS v. Doherty*, 502 U.S. 314, 323-24 (1992). This standard is “highly deferential” and the Board’s decision will not be disturbed unless it is determined to be “arbitrary, irrational, or contrary to law.” *Guo v. Ashcroft*, 386 F.3d 556, 562 (3d Cir. 2004) (quoting *Tipu v. INS*, 20 F.3d 580, 582 (3d Cir. 1994)). The Board’s findings of fact may not be disturbed if supported by substantial evidence. *Dia v. Ashcroft*, 353 F.3d 228, 247 (3d Cir. 2003) (*en banc*). Finally, with regard for questions of law, we review the Board's legal conclusions *de novo*. *Smriko v. Ashcroft*, 387 F.3d 279, 282 (3d Cir. 2004).

III.

A.

Harding contends he was the victim of ineffective assistance of counsel because

his prior attorney failed to timely file his cancellation application, advised him to withdraw that application and take voluntary departure, and then failed to explain what voluntary departure entailed. The government contends the Board acted within its discretion in denying as untimely Harding's motion to reopen.

A motion to reopen must be filed within ninety days after the date on which a final administrative decision is rendered. 8 U.S.C. § 1229a(c)(7)(C)(i). Here the petitioner did not file his motion to reopen until more than two years after the final decision in his case, far exceeding the statutory deadline. In *Borges*, which involved a 180 day time limitation to file a motion to reopen under 8 U.S.C. § 1229a(b)(5)(C)(I), we held that time limit may be subject to equitable tolling where fraud is alleged. *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir 2005). Subsequently, we extended equitable tolling to the ninety day time limitation in 8 U.S.C. § 1229a(c)(7) on claims where fraud is alleged. *Mahmood v. Gonzales*, 427 F.3d 248, 251 n.7 (3d Cir. 2005). But we have recognized that equitable tolling is an extraordinary remedy which should be granted only sparingly and in "exceptional circumstances." *Hedges v. United States*, 404 F.3d 744, 751 (3d Cir. 2005); *Borges*, 402 F.3d at 407.

Harding's ineffective assistance claims do not support his contention his former lawyer made a "material factual misrepresentation" or did so "with knowledge or belief of its falsity." *Valansi v. Ashcroft*, 278 F.3d 203, 209 (3d Cir. 2002). Harding contends that his lawyer actively misled him. Yet, he contends only his former counsel failed to

properly inform him of the details and consequences regarding his voluntary departure agreement. Harding offers nothing to support his claim that his prior attorney actively misled him, or that his prior counsel told him his application for relief had been timely submitted. Nor does he specify what misrepresentations his former counsel made, if any, when advising him to withdraw his application for relief and to apply for voluntary departure.

We agree with the government that Harding has not established ineffective assistance of counsel.¹ Harding has not shown that he merits equitable tolling based on alleged ineffective assistance of counsel.

B.

Furthermore, Harding failed to exercise the requisite due diligence during a period of over two years. Even when allegations of ineffective counsel would, if proven, justify equitable tolling, such relief is barred if the petitioner exhibited a lack of due diligence in asserting the claim. *Mahmood*, 427 F.3d at 252–253. A petitioner must demonstrate he or she “exercised reasonable diligence in investigating and bringing the claim. . . . Mere excusable neglect is not sufficient.” *Robinson v. Johnson*, 313 F.3d 128, 142 (3d Cir. 2002) (quoting *Miller v. New Jersey Department of Corrections*, 145 F.3d 616, 618–19). Equitable tolling in immigration appeals may apply where fraud or concealment of the

¹ We acknowledged, but did not adopt, a commentator’s proposed distinction between misfeasant ineffective assistance of counsel and nonfeasant ineffective assistance of counsel. *Bejar v. Ashcroft*, 324 F.3d 127, 131 n. 1 (3d Cir. 2003).

existence of a claim prevents the petitioner from timely filing a motion. *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000). But due diligence is not simply satisfied by merely contacting counsel. *See id.* at 134–135 (finding the petitioner did not establish due diligence where he made several unsuccessful attempts to contact counsel for information regarding his appeal and then made no further investigatory attempt for more than two years).

Harding contends he was first made aware his cancellation application was not timely filed during his March 10, 2003 hearing. There is no evidence Harding took any steps to redress this issue in the two preceding years until he retained new counsel. Harding’s new counsel requested tapes of Mr. Harding’s hearings on April 6, 2005. But before listening to the tapes, Harding’s new counsel informed him that his former attorney had given him incorrect advice. Harding does not account for the intervening time after his new counsel informed him of the possible fraud (sometime before April 6, 2005) before he filed the motion to reopen (October 11, 2005). Accordingly, Harding still failed to file the motion within ninety days of his new attorney alerting him of the alleged fraud. *See id.* at 134 (“[E]quitable tolling of a statute of limitations is permitted until the fraud or concealment is, or should have been, discovered by a reasonable person in the situation.”).

We agree with the IJ that Harding’s efforts do not constitute the requisite due diligence for equitable tolling. The Board’s decision to affirm the IJ’s ruling was reasonable and was not “arbitrary, irrational, or contrary to law.” *Guo*, 386 F.3d at 561.

C.

Harding also contends his due process rights were violated because the IJ erroneously interpreted the evidence of his claim. He does not contend he was denied notice, a reasonable opportunity to present evidence, disclosure of fact finding or an individualized determination based on the particular circumstances of his case. Rather, he contends the IJ's erroneous findings of fact deprived him of due process. We have held that traditional abuse of discretion challenges recast as constitutional due process claims are insufficient to give this Court jurisdiction under §1258(a)(2)(D). *Jarbough v. Attorney Gen. of the United States*, 483 F.3d 184, 189–190 (3d Cir. 2007). Accordingly, Harding has failed to state a colorable constitutional violation.

IV.

For these reasons, we will deny Harding's petition and affirm the Board's order.