

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 TO 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 30th day of March, two thousand twenty-one.

PRESENT:

DEBRA ANN LIVINGSTON,
Chief Judge,
PIERRE N. LEVAL,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

SERGIO BOLIVAR PUCHI-MUNOZ,
Petitioner,

v.

MERRICK B. GARLAND, UNITED
STATES ATTORNEY GENERAL,
*Respondent.*¹

18-2417
NAC

FOR PETITIONER: Perham Makabi, Kew Gardens, NY.

FOR RESPONDENT: Brian M. Boynton, Acting
Assistant Attorney General;

¹ The Clerk of Court is respectfully directed to amend the caption as set forth above.

1 Bernard A. Joseph, Senior
2 Litigation Counsel; Enitan O.
3 Otunla, Trial Attorney, Office of
4 Immigration Litigation, United
5 States Department of Justice,
6 Washington, DC.
7

8 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED,
9 AND DECREED that this petition for review of a decision of
10 the Board of Immigration Appeals ("BIA") is DENIED.

11 Petitioner Sergio Bolivar Puchi-Munoz, a native and
12 citizen of Ecuador, seeks review of a July 16, 2018, decision
13 of the BIA denying his motion to reopen his removal
14 proceedings. *In re Sergio Bolivar Puchi-Munoz*, No. A089 709
15 246 (B.I.A. Jul. 16, 2018). We assume the parties'
16 familiarity with the underlying facts and procedural history.

17 We have reviewed the BIA's denial of the motion to reopen
18 for abuse of discretion. See *Jian Hui Shao v. Mukasey*, 546
19 F.3d 138, 168-69 (2d Cir. 2008). Puchi-Munoz moved to reopen
20 his removal proceedings to apply for cancellation of removal,
21 asserting that his prior counsel was ineffective in not filing
22 an application for that relief. It is undisputed that Puchi-
23 Munoz's motion was untimely because he filed it almost two
24 years after the BIA's 2015 decision affirming his removal
25 order. See 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R.
26 § 1003.2(c)(2). While ineffective assistance of counsel can

1 excuse an untimely filing, see *Rashid v. Mukasey*, 533 F.3d
2 127, 130-31 (2d Cir. 2008), the BIA may deny even a timely
3 motion if a noncitizen fails to establish prima facie
4 eligibility for the relief sought, see *INS v. Abudu*, 485 U.S.
5 94, 104-05 (1988); *Poradisova v. Gonzales*, 420 F.3d 70, 78
6 (2d Cir. 2005) (concluding that the prima facie standard
7 requires an applicant to show "'a realistic chance' that he
8 will be able to establish eligibility" for relief (quoting
9 *Jian Lian Guo v. Ashcroft*, 386 F.3d 556, 563-64 (3d Cir.
10 2004))). The BIA did not abuse its discretion because it
11 reasonably concluded that Puchi-Munoz did not have a
12 realistic chance of establishing his prima facie eligibility
13 for cancellation.

14 A nonpermanent resident, like Puchi-Munoz, may have his
15 removal cancelled if he (1) "has been physically present in
16 the United States for a continuous period of not less than 10
17 years," (2) "has been a person of good moral character during
18 such period," (3) has not been convicted of certain offenses,
19 and (4) demonstrates that his "removal would result in
20 exceptional and extremely unusual hardship" to a qualifying
21 relative (here, his U.S. citizen daughter). 8 U.S.C.
22 § 1229b(b)(1). The BIA denied reopening based on its

1 determination that Puchi-Munoz would not be able to show the
2 requisite hardship. Hardship is a high standard that requires
3 a showing that the "qualifying relatives would suffer
4 hardship that is substantially different from, or beyond,
5 that which would normally be expected from the deportation of
6 an alien with close family members." *In re Monreal-Aguinaga*,
7 23 I. & N. Dec. 56, 65 (BIA 2001). The agency considers,
8 among other evidence, "the ages, health, and circumstances"
9 of qualifying relatives, including whether they "are solely
10 dependent upon [the applicant] for support" or have "very
11 serious health issues." *Id.* at 63. "A lower standard of
12 living or adverse country conditions in the country of return
13 are factors to consider only insofar as they may affect a
14 qualifying relative, but generally will be insufficient in
15 themselves to support a finding of exceptional and extremely
16 unusual hardship." *Id.* at 63-64.

17 The BIA reasoned that Puchi-Munoz's daughter's asthma
18 and other health conditions were not so serious that Puchi-
19 Munoz's removal would cause her to "suffer hardship that is
20 substantially different from, or beyond, that which would
21 normally be expected from the deportation of an alien with
22 close family members." *Id.* at 65. Puchi-Munoz submitted a

1 doctor's 2016 statement that his daughter has been diagnosed
2 with asthma in the past and uses a nebulizer. Although severe
3 or extreme asthma may support a cancellation claim, see *Mendez*
4 v. *Holder*, 566 F.3d 316, 318, 322-23 (2d Cir. 2009)
5 (concluding that daughter's asthma—which resulted in 25
6 attacks a year, requiring use of a home nebulizer and several
7 visits to the emergency room—could support a cancellation
8 claim), the doctor's statement does not include any further
9 details about the severity of Puchi-Munoz's daughter's asthma
10 or the frequency of attacks. Further, the medical records
11 did not confirm an asthma diagnosis or suggest that Puchi-
12 Munoz's daughter had breathing difficulties that were severe
13 or frequent. On this record, the BIA reasonably concluded
14 that Puchi-Munoz did not have "a realistic chance" of showing
15 the requisite hardship. *Poradisova*, 420 F.3d at 78 (internal
16 quotation marks omitted); cf. *Mendez*, 566 F.3d at 318, 322-
17 23.

18 Puchi-Munoz's other arguments on appeal are unavailing.
19 First, contrary to his argument that the BIA's decision was
20 "perfunctory," that decision provided the "certain minimum
21 level of analysis" required for meaningful judicial review,
22 *Poradisova*, 420 F.3d at 77. The BIA considered the evidence,

1 noting that Puchi-Munoz's daughter had been diagnosed with
2 asthma in the past, used a nebulizer and albuterol, and had
3 a number of medical visits and treatments since birth, but
4 reasonably concluded that that evidence would not satisfy the
5 requisite hardship standard. See *Wei Guang Wang v. BIA*, 437
6 F.3d 270, 275 (2d Cir. 2006) (concluding that BIA is not
7 required to "expressly parse or refute on the record each
8 individual argument or piece of evidence" (internal quotation
9 marks omitted)). Puchi-Munoz also contends that the BIA's
10 decision was perfunctory because it did not discuss his
11 arguments about the availability of adequate medical
12 treatment in Ecuador and the lower income he will earn in
13 Ecuador. But he did not submit any evidence to the BIA to
14 support these arguments. See *Jian Hui Shao*, 546 F.3d at 157-
15 58 ("[W]hen a petitioner bears the burden of proof, his
16 failure to adduce evidence can itself constitute the
17 'substantial evidence' necessary to support the agency's
18 challenged decision."); *id.* at 168 (explaining that movant
19 carries a "heavy burden" on reopening (quoting *Abudu*, 485
20 U.S. at 110)). Moreover, "[a] lower standard of living or
21 adverse country conditions in the country of return . . .
22 generally will be insufficient in themselves to support a

1 finding of exceptional and extremely unusual hardship."
2 *Monreal-Aguinaga*, 23 I. & N. Dec. at 63-64.

3 Second, the BIA was not required to explicitly rule on
4 whether Puchi-Munoz's prior counsel was ineffective because
5 its determination that he would not satisfy the hardship
6 standard was dispositive. See *Abudu*, 485 U.S. at 104-05. In
7 any event, the BIA's hardship determination effectively
8 resolved his ineffective assistance claim because such a
9 claim requires a showing of prejudice, which in turn requires
10 a showing of prima facie eligibility for the relief sought.
11 See *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994) ("In order
12 . . . to show that his attorney's failure . . . caused him
13 actual prejudice, he must make a prima facie showing that he
14 would have been eligible for the relief and that he could
15 have made a strong showing in support of his application.").

16 For the foregoing reasons, the petition for review is
17 DENIED. All pending motions and applications are DENIED and
18 stays VACATED.

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