

# UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## Ochoa v. Holder

633 F.3d 623 (8th Cir. 2010) · No. No. 07-3715 · Decided August 27, 2010

### SUMMARY

The Eighth Circuit denied Ana Rosa Ochoa’s petition for rehearing by the panel after dismissing her petition for review of the Board of Immigration Appeals’ action on her motion to reopen. Judge Colloton dissented, arguing that the panel incorrectly characterized the BIA’s action as a refusal to reopen the case sua sponte and that the government failed to defend that characterization.

### CASE DETAILS

|                    |                                                                                                                                                                                                                                                   |
|--------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT              | United States Court of Appeals for the Eighth Circuit                                                                                                                                                                                             |
| JURISDICTION       | Federal                                                                                                                                                                                                                                           |
| DECIDED            | August 27, 2010                                                                                                                                                                                                                                   |
| DOCKET             | No. 07-3715                                                                                                                                                                                                                                       |
| DISPOSITION        | other                                                                                                                                                                                                                                             |
| PROCEDURAL POSTURE | The court denied the petitioner's petition for rehearing by the panel following dismissal of her petition for review of the Board of Immigration Appeals' treatment of her motion to reopen.                                                      |
| STANDARD OF REVIEW | The dissent states that the government had acknowledged that the BIA's decision was reviewable for abuse of discretion; the majority's prior disposition treated the sua sponte reopening determination as committed to agency discretion by law. |
| PRECEDENTIAL VALUE | Published order denying panel rehearing; the accompanying dissent is not binding.                                                                                                                                                                 |
| PARTIES            | Ana Rosa Ochoa v. Eric H. Holder, Jr., United States Attorney General                                                                                                                                                                             |

### TOPICS

removal proceedings

immigration

appellate procedure

judicial review of agency action

administrative law

### PRACTICE AREAS

Immigration law

Administrative law

Appellate procedure

## QUESTIONS PRESENTED

1. Whether the panel correctly characterized the BIA's action on Ochoa's motion to reopen as a refusal to reopen sua sponte rather than a denial of a timely party-filed motion to reopen.
2. Whether rehearing by the panel should be granted in light of the government's failure to defend the key premise of the panel's prior decision.

## KEY QUOTATIONS

*“The petition for rehearing by the panel filed by petitioner is denied.”* (633 F.3d at 624)

## FACTUAL BACKGROUND

Ana Rosa Ochoa filed a motion to reopen her immigration case with the Board of Immigration Appeals. The dispute concerned whether the BIA denied a timely motion to reopen filed by Ochoa or merely refused to exercise its discretionary authority to reopen the case sua sponte.

## PROCEDURAL HISTORY

The panel previously dismissed Ochoa's petition for review, concluding that the Board of Immigration Appeals had only declined to exercise its sua sponte authority to reopen the case and that the decision was committed to agency discretion by law. Ochoa sought panel rehearing, arguing that the Board had instead denied a timely motion to reopen filed by a party. The panel denied rehearing; Judge Colloton dissented from that denial.

## DISPOSITION

other

## CASES CITED

- Ochoa v. Holder, 604 F.3d 546 (8th Cir. 2010)
- Tamenut v. Mukasey, 521 F.3d 1000 (8th Cir. 2008) (en banc)

## OPINION

### PER CURIAM.

633 F.3d 623 (2010) Ana Rosa OCHOA, Petitioner v. Eric H. HOLDER, Jr., United States Attorney General, Respondent. No. 07-3715. United States Court of Appeals, Eighth Circuit. August 27, 2010. ORDER The petition for rehearing by the panel filed by petitioner is denied. \*624 COLLOTON, Circuit Judge, dissenting from denial of rehearing by the panel.

The panel majority concluded that the BIA's only action on Ana Ochoa's motion to reopen was a refusal to exercise its discretionary authority to reopen the case sua sponte. Ochoa v. Holder, 604 F.3d 546, 550 (8th Cir.2010).

Therefore, the panel concluded that the BIA's decision was committed to agency discretion by law, and dismissed the petition for review. *Id.*; see *Tamenut v. Mukasey*, 521 F.3d 1000,1005 (8th Cir.2008) (en banc). The lead argument in Ochoa's petition for rehearing is that the panel erred by mischaracterizing the BIA's action on Ochoa's motion to reopen as a refusal to act sua sponte, rather than as a denial of a timely motion to reopen filed by a party.

The government utterly fails to address this argument. Its response to the petition for rehearing states only that "[t]o the extent that the panel determined that Ochoa filed a motion to reopen requesting that the Board reopen sua sponte, the panel accurately applied this Court's wellsettled precedent" of *Tamenut*. This statement of the obvious is not responsive to Ochoa's contention.

The question is whether the panel correctly determined that the BIA's only action was a refusal to reopen sua sponte. Because the government acknowledged in its brief on appeal that the BIA's decision is reviewable for abuse of discretion, and then declined in its response to the petition for rehearing to defend the key premise of the panel's decision, I would grant the petition for rehearing by the panel.

See 604 F.3d at 550-52 (dissenting opinion).