

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

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).