

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 12 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE LUIS SALAZAR-LOPEZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 16-74014

Agency No. A205-989-983

MEMORANDUM*

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

Submitted November 14, 2022**
Pasadena, California

Before: NGUYEN and FORREST, Circuit Judges, and FITZWATER,** District
Judge.

* 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).

*** The Honorable Sidney A. Fitzwater, United States District Judge for
the Northern District of Texas, sitting by designation.

Petitioner Jose Luis Salazar-Lopez, a citizen of Mexico, seeks review of the Board of Immigration Appeals' (BIA) decision denying his motion to reopen his immigration proceedings based on ineffective assistance of counsel. We have jurisdiction under 8 U.S.C. § 1252(a), and we deny the petition.

We review the agency's denial of a motion to reopen for abuse of discretion. *Cui v. Garland*, 13 F.4th 991, 995 (9th Cir. 2021). The agency abuses its discretion when its "decision is 'arbitrary, irrational or contrary to law.'" *Id.* at 995–96 (quoting *Azanor v. Ashcroft*, 364 F.3d 1013, 1018 (9th Cir. 2004)). We review legal questions de novo. *Kwong v. Holder*, 671 F.3d 872, 880 (9th Cir. 2011). To establish ineffective assistance of counsel in an immigration proceeding, a petitioner must show (1) that "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case," and (2) prejudice. *Lin v. Ashcroft*, 377 F.3d 1014, 1023–24 (9th Cir. 2004) (quoting *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985)). "Our 'scrutiny of counsel's performance must be highly deferential.'" *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101 (9th Cir. 2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). "Where, as here, the Board summarily affirms the IJ's decision, this Court reviews the IJ's decision as the final agency action." *Villavicencio-Rojas v. Lynch*, 811 F.3d 1216, 1218 (9th Cir. 2016).

Salazar-Lopez argues that the agency erred in denying his motion to reopen on the basis that he failed to comply with *In re Lozada*'s procedural requirements. *See* 19 I. & N. Dec. 637 (B.I.A. 1988). Even assuming this was error, Salazar-Lopez has not established that the agency erred in denying his motion on the independent basis that he failed to establish that his counsel was ineffective.¹

Salazar-Lopez argues that his counsel was ineffective for not helping him apply for asylum, withholding of removal, or relief under the Convention Against Torture. This argument fails. An asylum application would have been time-barred. *See* 8 U.S.C. § 1158(a)(2)(B). Moreover, Salazar-Lopez admitted that he discussed his fear of returning to Mexico with attorney Malek and that she advised him he probably would not qualify for relief given that he could relocate within Mexico to avoid future harm from his ex-wife's family. *See Torres-Chavez*, 567 F.3d at 1101 (explaining that counsel's performance is not deficient where she makes tactical decisions that fall within "the wide range of reasonable representation"). Further, attorney Malek informed Salazar-Lopez that he was free to seek another lawyer who may have assessed his claim differently.

¹Salazar-Lopez also argues that the agency erred by improperly giving substantial weight to attorney Malek's letter response to Salazar-Lopez's state bar complaint. We reject this argument because the IJ's decision was primarily based on Salazar-Lopez's own declaration.

Salazar-Lopez's argument that attorney Malek was ineffective for failing to challenge the constitutionality of his initial encounter with immigration officials also fails. Salazar-Lopez conceded that he did not raise to his counsel any concerns regarding his encounter with immigration officials, and that he was not "very good at communicating" with his counsel.

Lastly, the agency did not err in rejecting Salazar-Lopez's argument that his counsel was deficient for failing to challenge service of his notice to appear (NTA). Salazar-Lopez notes that the government failed to check the box on his notice confirming that he was timely given a list of free legal service providers. Failure to challenge the NTA on this ground falls within "the wide range of reasonable representation," particularly where the record indicates that this list was provided to Salazar-Lopez. *Torres-Chavez*, 567 F.3d at 1101.

PETITION DENIED.