NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAIME AMADOR LOPEZ RUIZ, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 20-71716 Agency No. A079-523-707 MEMORANDUM[*]

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

Submitted December 7, 2022[**]
Pasadena, California

Before: BERZON, R. NELSON, and BADE, Circuit Judges.

Petitioner Jaime Amador Lopez Ruiz (Lopez) seeks review of the Board of Immigration Appeals' (BIA) denial of his motion to reopen removal proceedings pursuant to 8 C.F.R. § 1003.2(a). We have jurisdiction over Lopez's appeal under 8 U.S.C. § 1252(a)(1). However, unless grounded in a legal or constitutional error,

[*] 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).

we lack jurisdiction to review the BIA's refusal to sua sponte reopen a removal proceeding. *See Lona v. Barr*, 958 F.3d 1225, 1227 (9th Cir. 2020).

To the extent we have jurisdiction, "[w]e review a BIA ruling on a motion to reopen for an abuse of discretion, and will reverse the denial of a motion to reopen only if the Board acted arbitrarily, irrationally, or contrary to law." *Martinez-Hernandez v. Holder*, 778 F.3d 1086, 1088 (9th Cir. 2015) (citation omitted). We review due process claims de novo. *Mukulumbutu v. Barr*, 977 F.3d 924, 925 (9th Cir. 2020). We deny the petition in part and dismiss it in part.

1. Lopez seeks equitable tolling of the time and number restrictions in 8 C.F.R § 1003.2(c)(2), which would otherwise bar his motion to reopen. He argues that attorney Terrence McGuire provided ineffective assistance of counsel warranting equitable tolling, because McGuire told him that he had no other choice but to accept voluntary departure, failed to communicate with him, and failed to give him proper legal advice. But Lopez did not demonstrate the requisite due diligence to prevail in his request for equitable tolling. *See Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). Lopez says that McGuire filed his application for cancellation of removal, and McGuire appeared on his behalf at an August 2003 hearing at which his application was denied and he was offered voluntary departure. But McGuire was no longer representing Lopez when Lopez appealed that decision to the BIA, which remanded to the immigration judge (IJ) for a new

decision. On remand, Lopez submitted a brief signed by attorney Vital D'Carpio. The outcome was the same: The IJ denied his application and granted Lopez voluntary departure.

Lopez claims that he did not learn of his ineffective assistance of counsel claim against McGuire until meeting with his current counsel in connection with the instant motion, filed in 2020. As Lopez acknowledges, we have held that the limitation period for a motion to reopen may be tolled until the petitioner meets with new counsel to discuss his file. *Id*. at 899. But Lopez worked with new counsel, D'Carpio, in 2005, and he does not claim that D'Carpio provided ineffective assistance or failed to identify any errors made by McGuire. Lopez does not provide any other explanation for the 15-year delay in discovering his purported ineffective assistance claim. *See Bonilla v. Lynch*, 840 F.3d 575, 583 (9th Cir. 2016) (holding petitioner failed to make reasonable efforts to pursue relief when he waited six years to take any further action related to his ineffective assistance claim).

Lopez also does not indicate how any errors attributable to McGuire may have prejudiced his case. *See Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004). For example, Lopez claims McGuire told him that he had no choice beside voluntary departure, but evidently, he did. Instead of accepting voluntary departure, Lopez appealed to the BIA, which won him a remand for a

new decision. Lopez does not articulate how any harm McGuire may have caused survived remand. Therefore, we hold that the BIA did not abuse its discretion when it concluded that Lopez did not act with due diligence with respect to his ineffective assistance of counsel claim.

2. Lopez also argues that the BIA erred by declining to exercise its discretion to reopen his case sua sponte. Lopez does not claim that the BIA committed a legal or constitutional error, such as by finding that it lacked the authority to reopen his case. *See Bonilla*, 840 F.3d at 588 (We have "jurisdiction to review [BIA] decisions denying sua sponte reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error.") Rather, he argues that the BIA has the power to reopen a case sua sponte in exceptional circumstances, that such circumstances exist here, and that if the BIA does not exercise its power, there will be a gross miscarriage of justice. But we have held repeatedly that we do not have jurisdiction to review BIA decisions not to reopen a case sua sponte because of exceptional circumstances. *See, e.g.*, *id.* at 585–86 ("[W]e ordinarily lack jurisdiction to review a [BIA] decision denying sua sponte reopening, as the breadth and generality of the 'truly exceptional situations' locution . . . provides no judicially manageable standard with which to do so." (citations omitted)). Because the BIA made no legal or constitutional errors to form the basis for declining to exercise its sua sponte authority, we lack

jurisdiction to review the decision.

PETITION DENIED IN PART, DISMISSED IN PART.