NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

ARACELY IRAHETA-DE PEREZ, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 17-73147 Agency No. A094-803-552 MEMORANDUM[*]

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

Submitted November 15, 2022[**]
San Francisco, California

Before: RAWLINSON and HURWITZ, Circuit Judges, and CARDONE,[***] 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 Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

Aracely Iraheta-De Perez (Iraheta-De Perez), a native and citizen of El Salvador, petitions for review of a decision from the Board of Immigration Appeals (BIA) denying her motion to reopen or reconsider the BIA's prior dismissal of her appeal from the order of an Immigration Judge (IJ) denying asylum, withholding of removal, and protection under the Convention Against Torture (CAT).[1]

We have jurisdiction to review the denial of a motion to reconsider or reopen under 8 U.S.C. § 1252(a)(1). We review the denial of a motion to reconsider or to reopen for an abuse of discretion. *See Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020) (reconsideration); *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010) (reopening). We review "purely legal questions" de novo, and review factual findings for substantial evidence. *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016), *as amended*; *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 800 (9th Cir. 2022).

1. We are not persuaded by Iraheta-De Perez's argument that the IJ lacked jurisdiction. A Notice To Appear that omits the date and time of removal

[1] Iraheta-De Perez arguably waived review of the BIA's denial of her motion to reopen or reconsider by failing to address the denial in her Opening Brief. However, we exercise our discretion to review the denial. *See Mamouzian v. Ashcroft*, 390 F.3d 1129, 1136 n.4 (9th Cir. 2004).

proceedings "does not deprive the immigration court of subject matter jurisdiction" when a subsequent Notice of Hearing provides the omitted information. *United States v Bastide-Hernandez*, 39 F.4th 1187, 1188, 1193 (9th Cir. 2022) (en banc).

2. "When the BIA denies *sua sponte* reopening or reconsideration as a matter of discretion, we lack jurisdiction to review that decision, although we retain jurisdiction to review the denial of sua sponte reopening for legal or constitutional error. . . ." *Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) (citation and internal quotation marks omitted). In this case, because the denial of *sua sponte* reconsideration or reopening was discretionary and not on any legal or constitutional basis, we lack jurisdiction to review that denial. *See id.*

3. The BIA did not abuse its discretion by denying the motion as untimely. A motion to reconsider "must be filed within thirty days of the date of entry of the [removal] order." *Goulart v. Garland*, 18 F.4th 653, 654 (9th Cir. 2021) (citation omitted). A petitioner may file a motion to reopen within ninety days of the final removal order. *See Agonafer v. Sessions*, 859 F.3d 1198, 1203 (9th Cir. 2017). The BIA's decision was entered on November 4, 2013, and Iraheta-De Perez filed her motion to reconsider or reopen on May 4, 2017. Therefore, the BIA did not abuse its discretion by denying the motion as untimely. *See Singh v. Gonzales*, 491 F.3d 1090, 1097 (9th Cir. 2007).

4. The BIA determined that Iraheta-De Perez failed to establish changed circumstances to excuse the untimely filing of the motion. One of the ways to excuse untimeliness on the basis of changed circumstances is to produce previously unavailable evidence of changed country conditions. *See Agonafer*, 859 F.3d at 1203-04.

The BIA determined that the affidavits submitted by Iraheta-De Perez did not reflect a material change in country conditions. The affidavits discussed threats from gang members; that evidence was not "qualitatively different" from evidence offered by Iraheta-De Perez in support of her initial application for relief. *Id*. at 1204.

The BIA also determined that Iraheta-De Perez "has not established that the harm she fears would be on account of one of the protected grounds." Iraheta-De Perez stated that she was a member of "the group of women having to walk the gang-blockaded streets of El Salvador." However, Iraheta-De Perez failed to present evidence that her membership in the proffered group bore a nexus to the harm she fears. *See id*. The BIA's determination that Iraheta-De Perez failed to establish changed circumstances was supported by substantial evidence. *See Najmabadi*, 597 F.3d at 992.

PETITION DENIED in part and DISMISSED in part.