

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 21 2021

FOR THE NINTH CIRCUIT

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

LINO BERNAL PENA,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 21-70532

Agency No. A090-184-297

MEMORANDUM*

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

Submitted December 14, 2021**

Before: WALLACE, CLIFTON, and HURWITZ, Circuit Judges.

Lino Bernal Pena, a native and citizen of Mexico, petitions pro se for review of the Board of Immigration Appeals' ("BIA") order summarily dismissing his appeal from an immigration judge's ("IJ") decision denying his application for asylum, withholding of removal, and relief under the Convention Against Torture.

* 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).

Our jurisdiction is governed by 8 U.S.C. § 1252. We review for abuse of discretion the BIA's decision to summarily dismiss an appeal. *Singh v. Gonzales*, 416 F.3d 1006, 1009 (9th Cir. 2005). We deny in part and dismiss in part the petition for review.

The BIA did not abuse its discretion in summarily dismissing Bernal Pena's appeal as untimely where it was filed past the deadline and Bernal Pena offered no explanation for the delay to the BIA. *See* 8 C.F.R. §§ 1003.1(d)(2)(i)(G), 1003.38(b)-(c). We lack jurisdiction to consider Bernal Pena's explanations for the delay raised in the opening brief that were not raised to the BIA. *See Barron v. Ashcroft*, 358 F.3d 674, 677-78 (9th Cir. 2004) (court lacks jurisdiction to review issues or claims not presented below).

To the extent Bernal Pena contends for the first time in his opening brief that the BIA erred by failing to exercise its discretion to accept his untimely appeal, we also lack jurisdiction to consider the contention. *See id.* We further lack jurisdiction to consider Bernal Pena's contentions as to the validity of his underlying criminal conviction, the ground of removability sustained by the IJ, receipt of the Notice to Appear, ineffective assistance of counsel before the IJ, and violations of his right to due process before the IJ. *See id.*

We do not consider newly raised assertions of fact and materials attached to Bernal Pena's opening brief that are not part of the administrative record, including

references to a motion to reopen filed with the BIA after the entry of the final order on review. *See Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc).

PETITION FOR REVIEW DENIED in part; DISMISSED in part.