NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IVAN BAYONA GUZMAN; MARIA LUISA SANCHEZ NAVARRETE, Petitioners, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 21-70682 Agency Nos. A206-204-383 A206-204-403 MEMORANDUM*

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

Submitted November 18, 2022**
San Francisco, California

Before: LINN,*** RAWLINSON, and HURWITZ, Circuit Judges.

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* 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 Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

Ivan Bayona Guzman and his spouse Maria Luisa Sanchez Navarrete, natives and citizens of Mexico, petition for review of a decision of the Board of Immigration Appeals ("BIA") denying their motion to reopen claiming ineffective assistance of counsel because they had failed to show prejudice. We deny the petition in part and dismiss it in part.

1. Because the government assumes arguendo that the motion to reopen was timely filed, petitioners met the procedural requirements of *In re Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988), and counsel failed to perform competently, the only issue on review is whether the BIA erred in finding that petitioners failed to establish prejudice. We conclude it did not.

a. The Immigration Judge ("IJ") found that petitioners failed to establish the good moral character required for cancellation of removal, *see* 8 U.S.C. § 1229b(b)(1)(B), because they provided false testimony during the removal hearing. In denying their motion to reopen, the BIA emphasized that petitioners "did not submit affidavits or any other evidence explaining the discrepancies in their testimony" or "make any argument about how, if they had been more prepared, they would have testified differently." Although petitioners "need not explain exactly what evidence [they] would have presented in support of [their] application[s]," *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008) (cleaned up), they must do more than "simply maintain that they *could* demonstrate a valid . . . claim

if their case were remanded," *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999). The record also supports the BIA's determination that present counsel made the same arguments in connection with the motion to reopen that allegedly deficient prior counsel made on appeal. Petitioners thus failed to demonstrate that the performance of counsel who had previously represented them in proceedings before the agency "was so inadequate that it may have affected the outcome of the proceedings." *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (cleaned up).

b. As to the alleged ineffective assistance by the lawyer who represented petitioners in their petition for review of the BIA's denial of cancellation of removal, petitioners failed to establish "plausible grounds for relief," *Morales Apolinar*, 514 F.3d at 899 (cleaned up), because this Court lacks jurisdiction to review the agency's decision denying cancellation. *See* 8 U.S.C. § 1252(a)(2)(B)(i); *Patel v. Garland*, 142 S. Ct. 1614, 1622–26 (2022). We only have jurisdiction over petitions for review challenging the denial of cancellation of removal if they present "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). Petitioners do not raise such questions, merely disputing the IJ's factual finding that they provided false testimony.

2. We generally lack jurisdiction to review the BIA's decision not to reopen proceedings *sua sponte*. *See Menendez-Gonzales v. Barr*, 929 F.3d 1113, 1116 (9th Cir. 2019). Although we may do so when the agency relies on an erroneous

constitutional or legal premise, *id.* at 1116–17, the IJ articulated and applied the correct standard. He correctly stated that petitioners' good moral character is a statutory requirement for cancellation of removal, *see* 8 U.S.C. § 1229b(b)(1)(B), testimony before him can be considered on the issue, *see In re Ortega-Cabrera*, 23 I. & N. Dec. 793, 796 (BIA 2005); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1162 (9th Cir. 2009), and 8 U.S.C. § 1101(f)(6) allows a finding of a lack of good moral character for providing false testimony for the purpose of obtaining immigration benefits. Petitioners' quarrel is with the IJ's factual findings, not his legal premises. We therefore cannot review the BIA's decision not to *sua sponte* reopen.

PETITION FOR REVIEW DENIED IN PART AND DISMISSED IN PART.