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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEJANDRO PONCE ALVAREZ, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 22-1354 Agency No. A090-795-091 MEMORANDUM[*]

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

Submitted November 17, 2023[**]
Pasadena, California

Before: BYBEE, FISHER,[***] and LEE, Circuit Judges.

Petitioner Alejandro Ponce Alvarez, a Mexican national, seeks review of the Board of Immigration Appeals' ("BIA's" or "Board's") denial of his motion to

[*] 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 D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

reopen an immigration judge's ("IJ's") order of removal. The Board held that Petitioner's motion was untimely and successive, since it was his second such motion and filed almost two years after the order issued. Petitioner now asserts that the deadline to file his motion was equitably tolled and that counsels' ineffective assistance ("IAC") entitles him to a remand to the IJ for a new hearing. We have jurisdiction under 8 U.S.C. § 1252(a)(1); review the BIA's "factual findings for substantial evidence and legal questions de novo," *Guerra v. Barr*, 974 F.3d 909, 911 (9th Cir. 2020) (citation omitted); and deny the petition.

"An alien may file one motion to reopen proceedings" and must do so "within 90 days of the date of entry of [the] final administrative order of removal." 8 U.S.C. § 1229a(c)(7). Here, the relevant order—the dismissal of Petitioner's appeal by the BIA—was entered on November 17, 2016. Petitioner had until February 15, 2017 to move to reopen. He instead took until October 30, 2018—nearly two years after entry of the order. That October motion to reopen, which is the subject of this petition, was Petitioner's second.

Petitioner does not deny that his motion was late and successive. On the contrary, he observes that we have found these limits are not jurisdictional and so may be equitably tolled. *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). "[E]quitable tolling of deadlines and numerical limits on motions to reopen or reconsider" may be had "during periods when a petitioner is prevented from filing

because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Id.* Moreover, the fraud or error must have kept him from "obtain[ing] vital information bearing on the existence of the claim." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) (citation omitted).

Determining whether a petitioner has acted with diligence requires a "fact-intensive and case-specific" inquiry attuned to each petitioner's "particular circumstances." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011). To that end, we ask three questions: "First, . . . [whether] (and when) a reasonable person in petitioner's position would suspect the specific fraud or error underlying her motion to reopen"; "[s]econd, . . . whether petitioner took reasonable steps to investigate the suspected fraud or error, or, if petitioner is ignorant of counsel's shortcomings, whether petitioner made reasonable efforts to pursue relief"; and "[t]hird, . . . when the tolling period should end." *Id.* Tolling ends "when petitioner definitively learns of the harm resulting from counsel's deficiency" or obtains the above-mentioned "vital information." *Id.* (citation omitted). This generally "occurs when the alien obtains a complete record of his immigration proceedings and is able to review that information with competent counsel." *Id.*

The parties focus their arguments on *Avagyan*'s third element: when the tolling period should end. Here, Petitioner received a complete record of his

immigration proceedings on May 7, 2018. At that time, he was represented by his current counsel, whom he does not accuse of incompetence. Since Petitioner was by then in possession of his file, the BIA determined he had "definitively learned of . . . [the] deficient representation" by his previous advisors "and had the chance to review [the file] with [competent] counsel." Hence, the Board held the tolling period ended on May 7, making Petitioner's October 30 motion to reopen 86 days late. Finding that his lateness "d[id] not constitute due diligence," the BIA denied Petitioner's motion to reopen.

In his petition for review, Petitioner contends that the Board misread *Avagyan* and that the date on which "petitioner definitively learns of the harm resulting from counsel's deficiency" is not *necessarily* when equitable tolling ends. Specifically, he asserts that, in this case, tolling ran until August 1, 2018—the date he received a letter from the City of Nogales Police Department in Arizona indicating that the Department had no criminal record on him. Petitioner submits that this letter was "vital information" within the meaning of *Avagyan*, meaning that tolling extended until its receipt.

As noted, *Avagyan* starts the clock "when petitioner definitively learns of the harm resulting from counsel's deficiency, or obtains vital information bearing on the existence of his claim"—conditions met "when the alien obtains a complete record of his immigration proceedings and is able to review that information with

competent counsel." Petitioner received and was able to review his record on May 7, so his tolling period lapsed at that point. Moreover, even under the rule that Petitioner proposes, it is unclear that the Nogales letter was "vital" to stating a claim for his prior counsel's IAC, which he was well capable of doing upon receipt of his file.

Since the Nogales letter was not "vital information," Petitioner's tolling period lapsed when he received (and with competent counsel, was able to review) his complete record on May 7—not on August 1, as he argues. The Board thus correctly determined that his motion to reopen was 86 days late. Accordingly, we deny the petition.

DENIED.