

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 26 2010

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

FLAVIO ESCOBEDO GOMEZ,

Petitioner,

v.

ERIC H. HOLDER Jr., Attorney General,

Respondent.

No. 07-73368

Agency No. A079-264-217

MEMORANDUM*

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

Submitted February 16, 2010**

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

Flavio Escobedo Gomez, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order denying his motion to reopen based on ineffective assistance of counsel. We have jurisdiction under 8 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1252. We review for abuse of discretion the denial of a motion to reopen, *Iturribarria v. INS*, 321 F.3d 889, 894 (9th Cir. 2003), and we review de novo due process claims, *Ram v. INS*, 243 F.3d 510, 516 (9th Cir. 2001). We deny the petition for review.

The BIA did not abuse its discretion in denying Escobedo Gomez's second motion to reopen as untimely and numerically barred because it was filed over a year after the BIA's August 2, 2005, final order, *see* 8 C.F.R. § 1003.2(c)(2), and equitable tolling is unavailable to Escobedo Gomez where he did not establish prejudice from the alleged ineffective assistance of counsel, *see Iturribarria*, 321 F.3d at 897, 899; *see also Lara Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004), *amended by* 404 F.3d 1105 (9th Cir. 2005) (order) (counsel's "unfortunate immigration-law advice" was not ineffective assistance because it did not "pertain to the actual substance of the hearing" or "call the hearing's fairness into question").

PETITION FOR REVIEW DENIED.