

SEP 23 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>MARIANA SUSAN THEODORA KONG,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>ERIC H. HOLDER, Attorney General,</p> <p style="text-align: center;">Respondent.</p>
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No. 08-72107

Agency No. A075-649-385

MEMORANDUM*

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

Submitted September 13, 2010**

Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

Mariana Susan Theodora Kong, a native and citizen of Indonesia, petitions for review of the Board of Immigration Appeals' order denying her motion to reopen proceedings based on ineffective assistance of counsel. We have jurisdiction under 8 U.S.C. § 1252. We review for abuse of discretion the denial of

* 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).

a motion to reopen. *See Hernandez v. Mukasey*, 524 F.3d 1014, 1017 (9th Cir. 2008). We deny in part and dismiss in part the petition for review.

The BIA did not abuse its discretion in denying Kong's motion as untimely, as it was filed almost five years after the BIA's final order in her case, *see* 8 C.F.R. § 1003.2(c)(2), and she failed to establish a basis for equitable tolling, *see Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003); *see also Hernandez*, 524 F.3d at 1020 (knowing reliance upon a non-attorney cannot form the basis for a claim of ineffective assistance of counsel).

We lack jurisdiction to review the BIA's decision not to invoke its sua sponte authority to reopen proceedings. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

PETITION FOR REVIEW DENIED in part; DISMISSED in part.