

JUL 25 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>GABRIEL FELIX-FERNANDEZ,</p> <p>Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p>Respondent.</p>

No. 10-71305

Agency No. A079-528-975

MEMORANDUM*

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

Submitted July 12, 2011**

Before: SCHROEDER, ALARCÓN, and LEAVY, Circuit Judges.

Gabriel Felix-Fernandez, 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. Our jurisdiction is governed by 8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to

* 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).

reopen, *Iturribarria v. INS*, 321 F.3d 889, 894 (9th Cir. 2003), and we deny in part and dismiss in part the petition for review.

The BIA did not abuse its discretion in denying Felix-Fernandez's motion to reopen as untimely because the motion was filed more than three years after the agency's final order of removal, *see* 8 C.F.R. § 1003.2(c)(2), and Felix-Fernandez did not show that he acted with the due diligence required for equitable tolling of the filing deadline, *see Iturribarria*, 321 F.3d at 897.

We lack jurisdiction to consider the BIA's discretionary decision not to sua sponte reopen or reconsider pursuant to 8 C.F.R. § 1003.2(a). *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823-24 (9th Cir. 2011); *see also Matter of G-D-*, 22 I. & N. Dec. 1132, 1135 (BIA 1999) (BIA's consideration of whether a fundamental change in the law warrants reopening involves an exercise of its sua sponte authority).

PETITION FOR REVIEW DENIED in part; DISMISSED in part.