

OCT 15 2012

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>EDGAR RENE MAGANA-GARCIA,</p> <p>Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p>Respondent.</p>
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No. 11-70380

Agency No. A029-171-248

MEMORANDUM\*

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

Submitted October 9, 2012\*\*

Before: RAWLINSON, MURGUIA, and WATFORD, Circuit Judges.

Edgar Rene Magana-Garcia, a native and citizen of El Salvador, petitions for review of the Board of Immigration Appeals’ (“BIA”) order denying his motion to reopen proceedings. Our jurisdiction is governed by 8 U.S.C. § 1252. We review de novo claims of constitutional violations in immigration proceedings.

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\* 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).

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

The BIA denied Magana-Garcia's motion as untimely, and declined to exercise its sua sponte authority to reopen removal proceedings under 8 C.F.R. § 1003.2(a). We lack jurisdiction to review the BIA's discretionary decision whether to exercise its sua sponte authority. *See Mejia-Hernandez v. Holder*, 633 F.3d 818, 823-824 (9th Cir. 2011).

Magana-Garcia's equal protection challenge to the BIA's refusal to grant reopening is unavailing. *See Dillingham v. INS*, 267 F.3d 996, 1007 (9th Cir. 2001) ("In order to succeed on his [equal protection] challenge, the petitioner must establish that his treatment differed from that of similarly situated persons."), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011).

Magana-Garcia has waived any challenge to the BIA's determination that he is not entitled to equitable tolling for alleged ineffective assistance of counsel. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996) (issues not raised in the opening brief are waived).

**PETITION FOR REVIEW DISMISSED in part; DENIED in part.**