

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 16 2021

FOR THE NINTH CIRCUIT

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

RAMON PEREZ PACHECO,

No. 20-73133

Petitioner,

Agency No. A092-201-687

v.

MEMORANDUM*

MERRICK B. GARLAND, Attorney
General,

Respondent.

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

Submitted November 8, 2021**

Before: CANBY, TASHIMA, and MILLER, Circuit Judges.

Ramon Perez Pacheco, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals’ (“BIA”) order denying his motion to reopen and reconsider. We have jurisdiction under 8 U.S.C. § 1252. We review de novo questions of law, including claims of due process violations in immigration

* 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).

proceedings. *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004). We review for abuse of discretion the denial of a motion to reopen or reconsider. *Mohammed v. Gonzales*, 400 F.3d 785, 791 (9th Cir. 2005). We deny the petition for review.

Perez Pacheco's contention that the lack of time, date, and place in his Notice to Appear deprived the immigration court of jurisdiction is foreclosed by this court's decision in *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020) ("the lack of time, date, and place in the NTA sent to [petitioner] did not deprive the immigration court of jurisdiction over her case"). His related contention that his right to due process was violated by finding him removable without jurisdiction fails. *See Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (requiring error to prevail on a due process claim).

The BIA did not abuse its discretion in denying the motion to reopen removal proceedings to pursue claims for asylum, withholding of removal, and relief under the Convention Against Torture, where Perez Pacheco's evidence of phone threats was not previously unavailable and did not establish prima facie eligibility for relief. *See* 8 C.F.R. § 1003.2(c)(1); *see also Bhasin v. Gonzales*, 423 F.3d 977, 984 (9th Cir. 2005) (new evidence in support of a motion to reopen must have been unavailable at the time of the hearing and must establish prima facie eligibility for the relief sought).

The BIA also did not abuse its discretion in denying Perez Pacheco's motion

to reopen removal proceedings to reassess his eligibility for cancellation of removal, where the non-cumulative evidence of exceptional and extremely unusual hardship to his U.S. citizen children was insufficient to establish prima facie eligibility for relief. *See Garcia v. Holder*, 621 F.3d 906, 912 (9th Cir. 2010) (providing that a motion to reopen will not be granted absent a showing of prima facie eligibility for relief based on demonstrating a reasonable likelihood that the statutory requirements for relief have been satisfied); *see also Fernandez v. Gonzales*, 439 F.3d 592, 603 (9th Cir. 2006) (court has jurisdiction to review the agency's decision where "the evidence submitted addresses a hardship ground so distinct from that considered previously as to make the motion to reopen a request for new relief").

Perez Pacheco does not raise, and therefore waives, any challenge to the BIA's determination that his motion to reconsider was untimely and did not identify an error of fact or law. *See Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1079-80 (9th Cir. 2013) (issues not specifically raised and argued in an opening brief are waived).

We do not consider the materials Perez Pacheco references in his opening brief that are not part of the administrative record. *See Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (court's review is limited to the administrative record).

The temporary stay of removal remains in place until issuance of the mandate.

PETITION FOR REVIEW DENIED.