**NOT FOR PUBLICATION**

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| CLAUDIA CERVANTES ORTIZ,<br><br>Petitioner,<br><br>v.<br><br>MERRICK B. GARLAND, Attorney General,<br><br>Respondent. | No. 20-71706<br><br>Agency No. A075-738-889<br><br>MEMORANDUM* |

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

Submitted November 16, 2022**
San Francisco, California

Before: S.R. THOMAS and BENNETT, Circuit Judges, and LASNIK,*** District Judge.

Petitioner Claudia Cervantes Ortiz petitions for review of an order by the Board of Immigration Appeals ("BIA") denying her motion to reopen her

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* 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).

*** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

proceedings for cancellation of removal. We have jurisdiction under 8 U.S.C. § 1252 and deny the petition in part and dismiss it in part.

Petitioner is a native and citizen of Mexico. In 2019, she filed a motion asking the BIA to reopen her 2004 cancellation of removal proceedings. This was her second motion to reopen; she filed her first in 2006.[1] The 2019 motion is based on two claims: ineffective assistance by her former counsel and prima facie eligibility for adjustment of status under two pending petitions with U.S. Citizenship and Immigration Services.

An alien may file one motion to reopen and must file it within ninety days of the final administrative decision. 8 U.S.C. § 1229a. The time and number limitations for moving to reopen based on ineffective assistance of counsel can be equitably tolled "as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). The BIA declined to equitably toll the limitations because the Petitioner "ha[d] not demonstrated due diligence in raising her ineffective assistance of counsel claim so as to warrant equitable tolling." The BIA also did "not find exceptional circumstances that would warrant sua sponte reopening pursuant to [its] limited discretionary sua sponte authority." Petitioner challenges both decisions.

[1] The BIA denied her motion as insufficient to establish prima facie eligibility for relief, and we denied her petition for review. *Ortiz Pioquinto v. Gonzales*, 187 F. App'x 778, 779 (9th Cir. 2006).

1. Petitioner claims that the BIA erred in denying her motion to reopen and by declining to equitably toll the time and number limitations for her second motion to reopen. We review these decisions for abuse of discretion. *See Valeriano v. Gonzales*, 474 F.3d 669, 672 (9th Cir. 2007) (motion to reopen), *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1222–26 (9th Cir. 2002) (equitable tolling). Under this standard, we must uphold the BIA's decisions unless we find that it acted arbitrarily, irrationally, or contrary to law. *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124 (9th Cir. 2000).

To assess whether a petitioner alleging ineffective assistance of counsel in a motion to reopen exercised due diligence, we consider three issues: (1) "if (and when) a reasonable person in petitioner's position would suspect the specific fraud or error underlying her motion to reopen"; (2) "whether petitioner took reasonable steps to investigate the suspected fraud or error, or, if petitioner [was] ignorant of counsel's shortcomings, whether petitioner made reasonable efforts to pursue relief"; and (3) "when the tolling period should end; that is, when petitioner definitively learn[ed] of the harm resulting from counsel's deficiency, or obtain[ed] 'vital information bearing on the existence of his claim.'" *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) (citations omitted). Our "review of petitioner's diligence must be fact-intensive and case-specific, assessing the reasonableness of petitioner's actions in the context of his or her particular circumstances." *Id.*

The BIA acted within its discretion in declining to equitably toll the limitations on Petitioner's untimely and number-barred motion to reopen because she did not make "reasonable efforts to pursue relief." *Id.* Petitioner's alleged ineffective assistance "occurred over a decade ago." She fails to explain why she waited thirteen years before filing the motion to reopen and took no intervening steps to protect her rights. She allegedly became suspicious of her prior counsel's motivations when watching a news segment on deceptive immigration attorneys but made no efforts to obtain new counsel until "[o]ne day," a cousin advised her to do so and recommended the cousin's attorney. The BIA did not abuse its discretion in finding that this did not constitute due diligence. *See Singh v. Gonzales*, 491 F.3d 1091, 1096–97 (9th Cir. 2007) (affirming finding of no due diligence where petitioner took no steps to protect his rights until six months after he first became suspicious of his counsel's assistance).

2. Petitioner also challenges the BIA's refusal to exercise its sua sponte authority under 8 C.F.R. § 1003.2(a) to reopen her proceedings. Petitioner repeats an argument from her motion to reopen that she is prima facie eligible for adjustment of status due to pending petitions with U.S. Citizenship and Immigration Services. We have jurisdiction to review the BIA's refusal only if it was based on a legal or constitutional error. *Bonilla v. Lynch*, 840 F.3d 575, 584 (9th Cir. 2016). Here, Petitioner alleges no such error; she simply disagrees with

the BIA's assessment that the facts of her case did not constitute "exceptional circumstances that would warrant sua sponte reopening pursuant to [its] limited discretionary sua sponte authority." Therefore, we lack jurisdiction to consider this claim.

**PETITION DISMISSED IN PART AND DENIED IN PART.**