

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 18 2022

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

FILIBERTO MORENO-BELTRAN,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 21-70809

Agency No. A092-442-050

MEMORANDUM*

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

Submitted November 14, 2022**
Phoenix, Arizona

Before: BYBEE and OWENS, Circuit Judges, and RAKOFF, *** District Judge.

Petitioner Filberto Moreno-Beltran, a native and citizen of Mexico, seeks review of the Board of Immigration Appeals' (BIA) March 10, 2021 refusal to

* 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 Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

accept his appeal by certification and denial of his motion to reconsider and reopen its decision. We dismiss in part and deny in part the petition for review.

We lack jurisdiction to review the BIA's discretionary determination to decline Petitioner's appeal by certification. We have determined that the "decision of whether to certify a claim under 8 C.F.R. § 1003.1(c) is committed to agency discretion." *Idrees v. Barr*, 923 F.3d 539, 543 (9th Cir. 2019). As a final agency action committed to agency discretion, we lack jurisdiction to review the BIA's decision of whether to certify the appeal absent a question of constitutional or legal error. *Id.* at 542–43, 543 n.3 (holding that because the petitioner's challenge to the BIA's and IJ's refusal to certify his claim did not "rest on any constitutional or legal error," his petition "is not subject to judicial review"). Because Petitioner does not assert any legal error or constitutional claim on appeal, but merely disagrees with the BIA's exercise of its discretion, we dismiss this part of the petition.

Petitioner also argues that the BIA abused its discretion in denying his motion to reconsider and reopen the BIA's prior decision. We have jurisdiction to review this claim under 8 U.S.C. § 1252, and we deny this part of the petition. The BIA's denial of Petitioner's motion to reconsider and reopen was not "arbitrary, irrational, or contrary to law." *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016)

(citation omitted). To prevail on a motion for reconsideration, a non-citizen must “contest[] the correctness of the original decision based on the previous factual record” and “specify the factual and legal issues raised on appeal that were decided in error or overlooked in [the BIA’s] initial decision or must show how a change in law materially affects [the BIA’s] prior decision.” *Matter of O-S-G-*, 24 I. & N. Dec. 56, 57–58 (BIA 2006). “[A] motion to reopen may be granted only upon a proffer of new evidence that is material and was not available and could not have been discovered or presented at the former hearing.” *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (internal quotation marks and citation omitted). Motions to reopen are generally disfavored because they threaten finality, and they are particularly disfavored in the deportation context because of the potential that frivolous motions may be made to delay deportation. *See INS v. Doherty*, 502 U.S. 314, 323 (1992).

Petitioner’s explanation for delay and disagreement with the BIA’s decision do not constitute errors of fact or law by the BIA. Nor does the affidavit provided by Petitioner’s counsel present new evidence that was unavailable at the time Petitioner initially submitted his Motion for Late Filing of Appeal. Indeed, the BIA explicitly considered Petitioner’s arguments related to mail-carrier error and COVID-19 disruptions and determined that, despite those disruptions, Petitioner’s

counsel was not diligent when he “waited . . . approximately 167 days to re-file his appeal.” The BIA’s reasoned evaluation of Petitioner’s arguments for reconsideration and reopening do not evince arbitrary or irrational decision making, and Petitioner fails to identify any legal error committed by the agency. As such, the BIA did not abuse its discretion in denying Petitioner’s motion to reconsider and reopen.

PETITION DISMISSED IN PART AND DENIED IN PART.