NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY GARCIA-LOPEZ, Petitioner, v. MERRICK B. GARLAND, U.S. Attorney General, Respondent.	No. 21-345 Agency No. A088-915-392 MEMORANDUM[*]

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

Submitted March 15, 2023[**]
Pasadena, California

Before: LEE, BRESS, MENDOZA, Circuit Judges.

Johnny Garcia-Lopez (Garcia), a native and citizen of Guatemala, petitions for review of a decision of the Board of Immigration Appeals (BIA) denying a motion to reopen his immigration proceedings. We review the BIA's denial of a motion to reopen for abuse of discretion and purely legal questions de novo. *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016). We have

[*] 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).

jurisdiction under 8 U.S.C. § 1252. We deny in part and dismiss in part the petition for review.

1. The BIA did not abuse its discretion in denying Garcia's motion to reopen. The Immigration and Nationality Act (INA) allows an alien to file a single motion to reopen within 90 days of a final administrative order of removal. 8 U.S.C. § 1229(a)(7). However, Garcia filed his motion to reopen outside of that 90-day period. Therefore, the BIA properly deemed his motion untimely and permissibly denied it on that ground. *See Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801 (9th Cir. 2022) (holding the BIA did not abuse its discretion in refusing to allow an untimely motion to reopen).

2. Equitable tolling of the 90-day deadline is available "when 'some extraordinary circumstance stood in [the petitioner's] way and prevented timely filing,' and he acted with 'due diligence' in pursuing his rights." *Hernandez-Ortiz*, 32 F.4th at 801 (quoting *Lona v. Barr*, 958 F.3d 1225, 1230–32 (9th Cir. 2020)). Because Garcia did not argue equitable tolling before the BIA, we lack jurisdiction to consider it now. *See* 8 U.S.C. § 1252(d)(1); *see also Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1183 (9th Cir. 2001) (en banc) ("[I]f [an alien] failed to exhaust his administrative remedies with respect to equitable tolling, we lack jurisdiction under the INA to consider the issue on appeal."), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582, 599 (9th Cir. 2020) (en banc).

Garcia argues that although he did not use the phrase "equitable tolling"

in his motion to reopen, the BIA should have still treated him as having raised the argument. While Garcia is not required to use particular phrasing, his motion to reopen neither acknowledges its untimeliness, provides an explanation for the delay, nor explains how Garcia acted with due diligence. The BIA thus did not err in treating Garcia as not having sufficiently presented an equitable tolling argument.

Socop-Gonzalez is not to the contrary. *See id.* In that case, we held that an alien who raised equitable estoppel rather than equitable tolling in his briefs before the agency had exhausted administrative remedies. *Id.* at 1186. We did so because (1) the alien's was mistake understandable in light of murky case law surrounding the two equitable doctrines, and (2) the BIA had thoroughly addressed equitable considerations in its decision, so that the concerns underlying the exhaustion requirement had been satisfied. *Id.* at 1186–87. Neither of those circumstances is present here.

PETITION DENIED IN PART AND DISMISSED IN PART.