

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 1 2023

FOR THE NINTH CIRCUIT

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

ANTONIO FLORES BUSTOS,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 22-1760

Agency No.
A098-345-069

MEMORANDUM*

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

Argued and Submitted August 23, 2023
Seattle, Washington

Before: HAWKINS, GRABER, and McKEOWN, Circuit Judges.

Antonio Flores Bustos (“Flores”), a native and citizen of Mexico, appeals from the Board of Immigration Appeals’ (“BIA”) decision denying his motion to reopen and terminate removal proceedings based on ineffective assistance of counsel. We review for abuse of discretion the BIA’s denial of a motion to reopen. *Avagyan v. Holder*, 646 F.3d 672, 674 (9th Cir. 2011). We have jurisdiction under

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

8 U.S.C. § 1252, and we deny the petition in part and dismiss in part.

The BIA did not abuse its discretion by determining that Flores’s motion to reopen was untimely and that equitable tolling was unavailable because Flores did not exercise the requisite due diligence. Noncitizens seeking to reopen their removal proceedings must file a motion to reopen within 90 days of their final administrative order of removal. *Bonilla v. Lynch*, 840 F.3d 575, 582 (9th Cir. 2016). Flores did not file a motion to reopen for more than twelve years after his final order of removal. We articulated three considerations for assessing whether a noncitizen exercised due diligence in *Avagyan v. Holder*, and the pertinent question is whether Flores “made reasonable efforts to pursue relief until [he] learned of [his] counsel’s ineffectiveness.” 646 F.3d at 682. The BIA did not err by determining that Flores did not provide any evidence of diligence in pursuing relief between his 2010 order of removal and his 2022 public defender meeting, including after he was deported and re-entered the United States twice. Thus, in the context of his “particular circumstances,” Flores has not “demonstrate[d] the diligence necessary for equitable tolling.” *Bonilla*, 840 F.3d at 583 (citations omitted).

Our jurisdiction over BIA decisions denying sua sponte reopening is limited to “reviewing the reasoning behind the decisions for legal or constitutional error.” *Id.* at 588. We have jurisdiction to review Flores’s argument that the BIA applied

the wrong legal standard in deciding not to reopen his removal proceedings sua sponte, and we conclude that the BIA did not ignore or misapply Ninth Circuit case law. We lack jurisdiction over Flores’s argument that the BIA’s decision “rested on an important unsupported factual assumption.”

Finally, we cannot consider Flores’s argument that his final order of removal was issued in error because he was not convicted of a crime involving moral turpitude. The BIA’s decision was silent on this issue, and we “cannot affirm the BIA on a ground upon which it did not rely.” *Doissaint v. Mukasey*, 538 F.3d 1167, 1170 (9th Cir. 2008) (citation omitted).

PETITON FOR REVIEW DENIED IN PART, DISMISSED IN PART.