NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 24 2024

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

ANNA KHACHATRYAN; SUREN PETROSYAN; GOHAR PETROSYAN, Petitioners, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 23-2715 Agency Nos. A095-758-536 A095-758-537 A095-758-538 MEMORANDUM[*]

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

Submitted October 22, 2024[**]
San Francisco, California

Before: OWENS, SUNG, and SANCHEZ, Circuit Judges.

Anna Khachatryan and her two children, as derivative beneficiaries (collectively "Khachatryan"), petition for review of the Board of Immigration Appeals' ("BIA") denial of their motion to reopen. We review the BIA's denial of

[*] 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).

a motion to reopen for an abuse of discretion. *Urbina-Osejo v. I.N.S.*, 124 F.3d 1314, 1316 (9th Cir. 1997). "The BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to the law, and when it fails to provide a reasoned explanation for its actions." *Tadevosyan v. Holder*, 743 F.3d 1250, 1252-53 (9th Cir. 2014) (internal citations and quotation marks omitted). We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

1. A "motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. § 1229a(c)(7)(C)(i). The BIA's dismissal of Khachatryan's appeal on October 19, 2020, constituted the agency's final order of removal.[1] On June 13, 2022, Khachatryan moved to reopen the removal proceedings to apply for cancellation of removal under 8 U.S.C. § 1229b(b)(1), contending that the stop-time rule under 8 U.S.C. § 1229b(d)(1) did not apply because her Notice to Appear was incomplete under *Niz-Chavez v. Garland*, 593 U.S. 155 (2021), and *Pereira v. Sessions*, 585 U.S. 198 (2018).

The BIA did not abuse its discretion in finding that Khachatryan's motion to reopen was untimely. As the BIA explained, even with potential tolling of her motion based upon the Supreme Court's publication of *Niz-Chavez v. Garland* on April 29, 2021, the motion to reopen still falls well outside the 90-day deadline.

[1] We subsequently denied Khachatryan's petition for review of the agency's decision. *See Khachatryan et al. v. Garland*, 2022 WL 445525 (9th Cir. Feb. 14, 2022) (unpublished).

Khachatryan has not demonstrated that "despite all due diligence, [she was] unable to obtain vital information bearing on the existence of the claim" such that equitable tolling would apply. *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en banc) (internal quotation marks omitted).

Khachatryan argues that the deadline to file her motion to reopen should have been tolled until this court's mandate issued on May 10, 2022. She adds that the 90-day deadline is an "unjust requirement" because she would have to forfeit her right of appeal to this court to file a timely motion to reopen. Because Khachatryan never presented this argument to the BIA, she has likely failed to exhaust it. 8 U.S.C. § 1252(d)(1); *see Hernandez v. Garland*, 47 F.4th 908, 916 (9th Cir. 2022) (as amended). Even so, nothing prevented her from filing in tandem a timely motion to reopen before the BIA and a petition for review before this court. *See Stone v. I.N.S.*, 514 U.S. 386, 405-06 (1995) (holding that filing a motion to reopen does not toll the statutory time in which to seek review of the underlying final order of removal); *see also Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1258-59 (9th Cir. 1996) (discussing that the Supreme Court in *Stone* "expressly rejected our tolling rule and held that the finality of an underlying order was 'not affected by the subsequent filing of a motion to reconsider'"). Indeed, if the BIA grants a petitioner's motion to reopen, a petition to this court is likely

moot. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) ("The BIA's granting of the motion to reopen means there is no longer a final decision to review."). Thus, the BIA did not abuse its discretion in finding the motion to reopen untimely where it was filed nearly two years after the BIA's final order.

2. Furthermore, unless the BIA relied on an incorrect legal premise, we generally lack jurisdiction to review its decision not to invoke its sua sponte authority to reopen proceedings under 8 C.F.R. § 1003.2(a) (2020). *See Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1115-16 (9th Cir. 2019); *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (as amended). "In order for an individual to obtain sua sponte relief under 8 C.F.R. § 1003.2(a), the Board must be persuaded that the respondent's situation is truly exceptional." *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (internal citations and quotation marks omitted). The record does not indicate that the BIA failed to understand its authority or otherwise engaged in constitutional or legal error. *See id*. at 1234-35. Thus, we do not have jurisdiction to review that decision. *See id.* at 1238.[2]

PETITION DENIED.

[2] In light of our conclusion, we do not address Khachatryan's arguments concerning her eligibility for cancellation of removal.