

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 29 2024

FOR THE NINTH CIRCUIT

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

MARIA GUADALUPE LOPEZ-GARCIA,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 23-2757

Agency No.
A208-577-994

MEMORANDUM*

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

Submitted October 25, 2024**
Phoenix, Arizona

Before: M. SMITH, BADE, and FORREST, Circuit Judges.

Petitioner-Appellant Maria Guadalupe Lopez-Garcia, a native and citizen of Mexico, was ordered removed for being present in the United States without being admitted or paroled. A year after her removal proceedings became final, Lopez-

* 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).

Garcia moved to reopen. She had filed an application for a U-visa in the interim, and she sought administrative closure of her removal proceedings during the pendency of her visa adjudication. The Board of Immigration Appeals (BIA) denied Lopez-Garcia's motion to reopen as both untimely and unmeritorious. We have jurisdiction under 8 U.S.C. § 1252. We review the BIA's decision to deny a motion to reopen for abuse of discretion, *see INS v. Abudu*, 485 U.S. 94, 105 (1988), and we dismiss the petition.

Lopez-Garcia concedes that she did not file her motion to reopen within the 90-day statutory deadline. *See* 8 U.S.C. § 1229a(c)(7)(C)(i). She nonetheless asked the agency to consider her motion based on equitable tolling, the BIA's discretionary authority to reopen proceedings *sua sponte* under 8 C.F.R. § 1003.2(a), or as a matter of prosecutorial discretion. Lopez-Garcia waived her equitable tolling and prosecutorial discretion arguments on appeal, so we address only whether the agency erred in declining to grant *sua sponte* reopening.

Although “this court has jurisdiction to review Board decisions denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error,” *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016), the BIA's refusal to *sua sponte* reopen Lopez-Garcia's removal proceedings was not based on any reviewable legal reasoning. Lopez-Garcia contends that the BIA's denial was premised on a faulty—and reviewable—

decision on the merits of her motion, but the BIA reached the merits as an *alternative* holding, independent from its decision not to grant sua sponte reopening. Because Lopez-Garcia has not shown that her untimely filing is excused, we do not consider the merits of her motion. *See Lona v. Barr*, 958 F.3d 1225, 1235 (9th Cir. 2020).

PETITION DISMISSED.