

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 25-3170

WALTER SANTIAGO REYES-AYALA; A.J. R.G.; VANESSA DEL ROSARIO GARMENDIA-
FLORES,
Petitioners

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA

On Petition for Review of an Order of the Board of Immigration Appeals
Immigration Judge Dara F. Reid, Nos. A220-453-324, A220-453-322 & A220-453-323

Before: SHWARTZ, CHUNG, and FISHER, Circuit Judges
Submitted: Oct. 1, 2026; Filed: Oct. 5, 2026

NONPRECEDENTIAL OPINION*

SHWARTZ, Circuit Judge.

Petitioners Walter Santiago Reyes-Ayala, A.J. R.G., and Vanessa Del Rosari Garmendia-Flores petition for review of a decision of the Board of Immigration Appeals (“BIA”) denying their motion to reopen removal proceedings. Because the BIA correctly concluded that Petitioners’ motion was number-barred, untimely, and not subject to equitable tolling, we will deny the petition.

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

Petitioners¹ are natives of El Salvador who entered the United States without authorization and were served with Notices to Appear before an Immigration Judge (“IJ”). Petitioners applied for asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”) based on gang harassment, threats, and violence directed at them and their families. The IJ entered a final administrative order of removal and denied their applications. The BIA affirmed and dismissed the appeal in August 2024.

In January 2025, Petitioners moved to reopen removal proceedings. They explained that they only learned of the BIA’s decision after contacting their counsel’s office to inquire about their case and, as a result, missed the deadline to file a petition for review.² The BIA denied the motion in March 2025 because Petitioners’ counsel neither submitted his own affidavit nor explained “what specific steps [he] actually took to determine whether” he received the email notifying him of the BIA decision or when exactly he and his clients “first became aware” of the decision.³ A.R. 125. Petitioners filed a second motion to reopen nearly five months later. This time, Petitioners’ counsel

¹ Reyes-Ayala and Garmendia-Flores are life partners and Petitioner A.J. R.G. is their minor child.

² Petitioners’ counsel explained that he did not inform his clients of the decision sooner because he did “not believe he ever saw [the] email” from the BIA’s electronic record system, though he acknowledged that “if there was a legal error made,” he was open to filing a disciplinary complaint against himself, as he did “in another case where [he] forwarded the email to the wrong email address.” A.R. 130-31.

³ The BIA explained that “it is the responsibility of any attorney appearing before the Board to review all documents served” through the electronic record system. A.R. 125.

acknowledged that he timely received the BIA’s decision but he failed to forward it to the assigned legal assistant who would have shared it with his clients.⁴ Petitioners’ counsel maintained that his clients “did not learn of the error until the end of January 2025” and that his clients “remained diligent” after their first motion to reopen was denied.⁵ A.R. 68. Nothing in the record explains what this diligence entailed.

The BIA denied Petitioners’ second motion to reopen as “both untimely and number-barred,” concluding that Petitioners failed to establish that the motion was subject to “equitable tolling” because Petitioners did not explain “why they waited nearly [five] months after their first motion to reopen was denied before filing the [second] motion,” and thus failed to show that “they acted with reasonable diligence.” A.R. 3-4. The BIA also concluded that Petitioners failed to show that “they were prejudiced by their counsel’s conduct” because they could have requested that this Court accept “a petition for review beyond the 30 day deadline.” A.R. 4.⁶

Petitioners filed a petition for review.

⁴ In an affirmation sent to the bar’s disciplinary committee, Petitioners’ counsel attested that he discovered this mistake “after the denial” of his clients’ first motion to reopen, but he did not specify exactly when he made this finding. A.R. 71-72. Petitioners’ counsel accepted responsibility for this “error” and argued to the BIA that it amounted to the “exceptional circumstance” of “ineffective assistance of counsel,” which “prejudiced” his clients. A.R. 66-67 (quotation marks and citation omitted).

⁵ Likewise, Garmendia-Flores submitted an affidavit attesting that she “did not find out about the decision until [she] stopped at [her] attorney[’]s office” to “check the status of [her] case in early January 2025,” and that she “remained diligent” thereafter. A.R. 69.

⁶ The BIA also declined to exercise its discretion to reopen removal proceedings sua sponte. Petitioners do not seek review of this ruling.

A noncitizen “may file one motion to reopen [removal] proceedings,” which must “be filed within 90 days of the date of entry of a final administrative order of removal.” 8 U.S.C. § 1229a(c)(7)(A), (C). While there is no dispute that Petitioners’ second motion to reopen is time- and number-barred, “[t]he time limit for filing a motion to reopen is subject to equitable tolling, and perhaps the numerical limit is as well.” Alzaarir v. Att’y Gen., 639 F.3d 86, 90 (3d Cir. 2011) (per curiam). “A petitioner is entitled to equitable tolling of the ninety-day deadline for a motion to reopen ‘only if he shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way” and prevented timely filing.’” Nkomo v. Att’y Gen., 986 F.3d 268, 272-73 (3d Cir. 2021) (quoting Holland v. Florida, 560 U.S. 631, 649 (2010)).

Extraordinary circumstances may include ineffective assistance of counsel. See Mahmood v. Gonzales, 427 F.3d 248, 252 (3d Cir. 2005).⁸ “The petitioner bears the

⁷ The BIA had jurisdiction under 8 C.F.R. § 1003.2. We have jurisdiction to review the BIA’s decision under 8 U.S.C. § 1252(a). “We review the BIA’s denial of a motion to reopen for abuse of discretion, and review its underlying factual findings related to the motion for substantial evidence.” Filja v. Gonzales, 447 F.3d 241, 251 (3d Cir. 2006). Under the abuse of discretion standard, “the BIA’s ultimate decision is entitled to broad deference, and will not be disturbed unless it is found to be arbitrary, irrational, or contrary to law.” Fei Yan Zhu v. Att’y Gen., 744 F.3d 268, 271 (3d Cir. 2014) (alteration, quotation marks, and citations omitted). Under the substantial evidence standard, we must “uphold the agency’s determination unless the evidence would compel any reasonable fact finder to reach a contrary result.” Sesay v. Att’y Gen., 787 F.3d 215, 220 (3d Cir. 2015) (citation omitted). We review questions of law de novo. Contreras v. Att’y Gen., 665 F.3d 578, 583 (3d Cir. 2012).

⁸ To demonstrate ineffective assistance of counsel in the immigration context, a noncitizen must satisfy “a two-part, error-and-prejudice test,” showing that “competent counsel would have acted otherwise” and that he or she “was prejudiced by counsel’s

burden of establishing both extraordinary circumstances and reasonable diligence,” Wallace v. Mahanoy, 2 F.4th 133, 143 (3d Cir. 2021), including that diligence was “exercised over the entire period for which tolling is desired,” Alzaarir, 639 F.3d at 90.

Here, substantial evidence supports the BIA’s conclusion that Petitioners failed to establish reasonable diligence because Petitioners do not explain why they waited nearly five months after their first motion to reopen was denied to file their second motion. Petitioners maintain that they did not file their first motion to reopen until January 2025 because that is when they first learned of the BIA’s decision, and that they did not file their second motion for an additional five months because they were not aware the initial delay was caused by their counsel’s error until July 2025.

However, even if Petitioners were diligent in moving to reopen shortly after belatedly receiving the BIA’s decision, they do not explain why they could not have discovered the reason for this delay, namely counsel’s error, sooner and thus have filed their second motion more promptly.⁹ Indeed, Petitioners do not explain what they did between the denial of their first motion to reopen and the filing of their second motion to reopen. Absent evidence that Petitioners exercised reasonable diligence during the multi-month period between their receipt of the BIA’s decision denying their first motion to reopen and their filing of their second motion to reopen, there was substantial evidence to

poor performance.” Fadiga v. Att’y Gen., 488 F.3d 142, 157 (3d Cir. 2007) (citations omitted).

⁹ To the contrary, as early as January 2025, Petitioners’ counsel was aware of a possible “legal error” because there was “another case where [he] forwarded the email to the wrong email address.” A.R. 130-31.

conclude that Petitioners were not entitled to equitable tolling. See Mahmood, 427 F.3d at 249, 252 (holding that a noncitizen was not entitled to equitable tolling where he offered no evidence of reasonable diligence during the period between his purportedly belated receipt of the IJ’s prior decision and his subsequent motion to reopen based on ineffective assistance of counsel).¹⁰

III

For the foregoing reasons, we will deny the petition for review.

¹⁰ The BIA also concluded that Petitioners did not show the exceptional circumstances of ineffective assistance of counsel because any ineffective assistance of counsel did not prevent Petitioners from requesting that this Court accept a late-filed petition for review as the deadline for such a filing is non-jurisdictional. Riley v. Bondi, 606 U.S. 259, 274 (2025).