

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 23, 2026

Christopher M. Wolpert
Clerk of Court

LIZ MARILEN MORENO; G.M.S.,
a minor,

Petitioners,

v.

TODD BLANCHE, United States Attorney
General, *

Respondent.

No. 25-9581
(Petition for Review)

ORDER AND JUDGMENT**

Before **TYMKOVICH**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

Liz Marilen Moreno, proceeding pro se for herself and her minor daughter, petitions for review of a final decision of the Board of Immigration Appeals (BIA) denying her second motion to reopen removal proceedings and ordering her and her

* Todd Blanche is now the Attorney General of the United States and has been substituted as Respondent. *See* Fed. R. App. P. 43(c)(2).

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

daughter's removal from the United States. We have jurisdiction under 8 U.S.C. § 1252 and affirm.

I.

Ms. Moreno and her daughter are natives and citizens of Peru. They entered the United States on January 31, 2023, and the Department of Homeland Security (DHS) commenced removal proceedings the next day. They admitted to facts that make them subject to removal but applied for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

At a hearing before an Immigration Judge (IJ) Ms. Moreno, proceeding pro se, testified that she was afraid to return to Peru due to a conflict in which she had loaned money to another woman who then refused to repay her, after which the other woman's adult sons threatened to kill Ms. Moreno and her daughter, and one of them raped Ms. Moreno and threatened to harm her daughter if she contacted authorities. Ms. Moreno reported the unpaid loan to police but not the rape. The police told her there was nothing they could do and she left Peru two months later.¹

The IJ denied Ms. Moreno's application for relief. She found Ms. Moreno's rape was a sufficiently severe harm to support a claim of persecution, but that the man who raped her "was entirely motivated by criminal and pecuniary incentives."

¹ Ms. Moreno also testified that her daughter's father, who is a police officer, had been verbally and emotionally abusive prior to the couple's separation in 2020. This additional testimony does not change our analysis of her petition.

R. at 338.² Because the harmful actions against Ms. Moreno were not taken “on account of race, religion, nationality, membership in a particular social group, or political opinion,” the IJ found her ineligible for asylum. R at 337 (quoting 8 U.S.C. § 1101(a)(42)). In addition, given that Ms. Moreno had not reported the rape to police or other authorities, the IJ found she had not shown the Peruvian government was unable or unwilling to protect her.

After receiving the IJ’s decision, Ms. Moreno hired a lawyer, Ms. Arroyo, who filed a notice of appeal to the BIA. However, after the BIA denied Ms. Arroyo’s request for an extension of time, she never filed an opening brief. The BIA then affirmed the IJ’s decision. Its opinion acknowledged Ms. Moreno’s argument, in her notice of appeal, that the IJ had not adequately developed the record regarding her membership in a particular social group as a basis for seeking asylum. But it ruled there was no need to resolve that issue, because it affirmed the IJ’s separate and dispositive ruling that Ms. Moreno had not shown the Peruvian government was unable or unwilling to protect her.

More than 90 days after the BIA’s decision, Ms. Moreno (still represented by Ms. Arroyo) filed a motion to reopen the proceedings. She acknowledged this motion was untimely but argued for equitable tolling and asked the BIA to grant *sua sponte* reopening on grounds that she had received ineffective assistance from a lawyer who she had consulted with prior to her hearing before the IJ. The BIA

² The IJ found the threats to Ms. Moreno’s daughter were not sufficiently severe on their own to show persecution separate from the harms to Ms. Moreno.

denied this request. Based on Ms. Moreno's testimony before the IJ, it found the lawyer had declined to represent her and so she never had an attorney-client relationship to support her claim of ineffective assistance of counsel.

Almost a year later, Ms. Moreno filed a second motion to reopen with the BIA. This motion was filed by Mr. Zavala, another lawyer who worked with the same firm as Ms. Arroyo. It argued for reopening on grounds that Ms. Arroyo had provided ineffective assistance by failing to timely file an opening brief with the BIA. The BIA denied this motion as both untimely and "number-barred" under the rule that allows applicants to file only one motion to reopen, within 90 days of the BIA's final decision. R. at 3 (applying 8 C.F.R. § 1003.2(c)(2)). The BIA rejected Ms. Moreno's requests for equitable tolling or *sua sponte* reopening. It reasoned that even assuming she had received ineffective assistance of counsel, she had not diligently pursued her claims during the time between June or August 2024, when she learned of the alleged ineffective assistance, and August 1, 2025, when she filed the second motion to reopen.

II.

Ms. Moreno's petition challenges the BIA's order denying her second motion to reopen. She argues the BIA should have granted reopening, based on her attorneys' "evident pattern of misconduct" and because "repeated errors by different

attorneys from the same law firm represent a serious due process violation.”³

Opening Br. at 5.

A.

“We review the BIA’s denial of [a] motion to reopen for an abuse of discretion.” *Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017). “The BIA abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements.” *Id.* (internal quotation marks omitted). Here, Ms. Moreno does not dispute that her second motion to reopen was subject to denial as untimely and under the rule limiting applicants to only one motion to reopen. *See* 8 C.F.R. § 1003.2(c)(2). We see no abuse of discretion in the BIA’s application of those requirements.

We also see no basis to reverse the BIA’s denial of equitable tolling. The BIA reasoned that where roughly a year had passed after the discovery of Ms. Arroyo’s alleged ineffectiveness before Ms. Moreno filed her second motion to reopen, she had not shown the kind of diligence required for equitable tolling. *See Mahamat v. Gonzales*, 430 F.3d 1281, 1283 (10th Cir. 2005). Ms. Moreno did not make any

³ Ms. Moreno filed her petition pro se, while acknowledging she received pro bono legal assistance. *See* Opening Br. at 3. Respondents argue this disentitles her to the liberal construction we ordinarily give to pro se parties’ filings. *See* Resp. Br. at 11–12 n.5. As it makes no difference to our analysis or disposition here, we give Ms. Moreno’s filings the same liberal construction we usually afford to pro se litigants. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

argument before the BIA to explain how she exercised sufficient diligence and also does not develop such an argument in her petition here.

B.

Turning to Ms. Moreno's claim that she was denied due process, we review this constitutional claim *de novo*. See *Lucio-Rayos v. Sessions*, 875 F.3d 573, 576 (10th Cir. 2017). Ineffective assistance of counsel can support a petitioner's claim that her removal proceedings did not provide due process. See *Mendiola v. Holder*, 585 F.3d 1303, 1309 n.6 (10th Cir. 2009), *overruled on other grounds by Contreras-Bocanegra v. Holder*, 678 F.3d 811, 819 (10th Cir. 2012) (en banc). However, to prevail on a due process claim, Ms. Moreno "must establish both that [she] was deprived of due process and that that deprivation prejudiced [her]." *Lucio-Rayos*, 875 F.3d at 576. The prejudice requirement means Ms. Moreno must show her rights "were violated in a manner so as potentially to affect the outcome of the proceedings." *Id.* at 577 (internal quotation marks omitted).

We are sympathetic to Ms. Moreno's justifiable frustration with her lawyers' failure to make timely filings on her behalf. But her argument does not support her request for a remand.

Initially, to the extent Ms. Moreno asks for relief based on Mr. Zavala's alleged ineffectiveness—*i.e.*, the apparent delay in filing the second motion to reopen and alleged failure to advise Ms. Moreno of a potential conflict of interest in his firm's continued representation—that is not a claim she has previously presented to the BIA. Her second motion to reopen, filed by Mr. Zavala, was based only on the

alleged ineffectiveness of Ms. Arroyo. It’s probably no surprise that Mr. Zavala didn’t argue he had been ineffective himself. But under the exhaustion requirement of 8 U.S.C. § 1252(d)(1), “an alien must present the *same specific legal theory* to the BIA before he or she may advance [that theory] in court.” *Miguel-Pena v. Garland*, 94 F.4th 1145, 1154 (10th Cir. 2024) (internal quotation marks omitted). Because Ms. Moreno has not argued to the BIA that Mr. Zavala was ineffective, we will not consider that claim for the first time here. *See id.*

As to Ms. Arroyo, even if we agree that she provided ineffective assistance, Ms. Moreno has not shown a likelihood that her errors affected the outcome of the removal proceedings. *See Lucio-Rayos*, 875 F.3d at 577. Ms. Moreno argues her lawyers’ combined shortcomings created a “confusing administrative record” in which “various issues” were not addressed. Opening Br. at 5. More specifically, she points out that by not filing an opening brief, Ms. Arroyo failed to argue that the Peruvian government was unwilling or unable to protect her. However, her petition does not cite evidence, or make an argument, to show Peru was, in fact, unwilling or unable to protect her. Nor does she make any other argument that shows a likelihood she and her daughter would ultimately have been granted relief if not for their lawyer’s mistakes. Without that showing, we see no basis to remand. *See Lucio-Rayos*, 875 F.3d at 577.⁴

⁴ Ms. Moreno argues there should be a “presumption of prejudice” based on a “complete denial of [her] ability to participate” in the removal proceedings. Opening Br. at 5 (internal quotation marks omitted). But her argument relies on *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000), which applies to criminal appeals, where

C.

Ms. Moreno also challenges the BIA’s denial of *sua sponte* reopening. But we lack jurisdiction to review the BIA’s determination that her case did not present the kind of extraordinary circumstances that would warrant sua sponte reopening, “because there are no standards by which to judge the agency’s exercise of discretion” on that decision. *Reyes-Vargas v. Barr*, 958 F.3d 1295, 1300 (10th Cir. 2020) (internal quotation marks omitted). And as indicated above, we see no error in the legal premises or rulings on which the BIA relied. *See id.* (holding the court retains jurisdiction to review “questions of law” underlying the BIA’s decision, such as whether the BIA relied on an “incorrect legal premise” or “misperceived the legal background” (internal quotation marks omitted)).

III.

We deny the petition for review. We grant Ms. Moreno’s motion to proceed without prepayment of costs or fees.

Entered for the Court

Gregory A. Phillips
Circuit Judge

defendants’ right to counsel arises from the Sixth Amendment and there is a “presumption that counsel’s assistance is essential,” *id.* at 483. Because there is no right to counsel or equivalent presumption in removal proceedings, Ms. Moreno must show she was denied due process. *See Mendiola*, 585 F.3d at 1309 n.6. She has not cited any authority applying *Flores-Oretega* or other criminal precedents in this context. And she has not carried her burden to show that her lawyers’ actions likely affected the outcome of the removal proceedings. *See Lucio-Rayos*, 875 F.3d at 576.