

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 18 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CARLOS ANTONIO ROBLES-DIAZ,

Petitioner,

v.

PETER D. KEISLER, Acting Attorney
General,

Respondent.

No. 05-73379

Agency No. A72-989-246

MEMORANDUM*

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

Submitted March 12, 2007**

Before: KOZINSKI, LEAVY, and BYBEE, Circuit Judges.

Carlos Antonio Robles-Diaz, a native and citizen of El Salvador, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's decision to deny his motion to reopen

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

deportation proceedings. We have jurisdiction pursuant to 8 U.S.C. § 1252, and review the denial of a motion to reopen for abuse of discretion. *Konstantinova v. INS*, 195 F.3d 528, 529 (9th Cir. 1999). We grant the petition for review in part, dismiss it in part, and remand for further proceedings.

Robles-Diaz contends that the agency should have assessed his motion to reopen on the merits, because it was filed after the five-year bar to his adjustment of status contained in former § 242B(e)(1) of the Immigration and Nationality Act had expired. The BIA, in applying *Matter of M-S-*, 22 I. & N. Dec. 349 (BIA 1998) (en banc), to Robles-Diaz's case, did not address any effect this statutory provision may have on the subsequently enacted 90-day deadline for motions to reopen in 8 C.F.R. § 1003.23(b)(1). We therefore remand this aspect of the petition for review for the agency to consider the issue in the first instance. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

To the extent Robles-Diaz contends he received ineffective assistance of counsel, we lack jurisdiction to consider the claim because he failed to raise it before the BIA. *See Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124 (9th Cir. 2000) (requiring exhaustion of ineffective assistance of counsel claims).

PETITION FOR REVIEW GRANTED in part; DISMISSED in part; REMANDED.