

FILED

OCT 2 2007

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

TOMAS GONZALEZ HERNANDEZ,

Petitioner,

v.

PETER D. KEISLER,** Acting Attorney
General,

Respondent.

No. 05-76096

Agency No. A96-067-331

MEMORANDUM*

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

Submitted September 24, 2007***

Before: CANBY, TASHIMA, and RAWLINSON, Circuit Judges.

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

** Peter D. Keisler is substituted for his predecessor, Alberto R. Gonzales, as Acting Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

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

Tomas Gonzalez Hernandez, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order denying his motion to reissue the BIA's August 2004 order dismissing his appeal from an immigration judge's decision denying his application for cancellation of removal. We have jurisdiction under 8 U.S.C. § 1252. Reviewing for abuse of discretion, *Iturribarria v. INS*, 321 F.3d 889, 894 (9th Cir. 2003), we deny the petition for review.

The BIA acted within its discretion in denying Gonzalez Hernandez's motion as untimely because it was filed over one year after the BIA's final removal order. *See* 8 U.S.C. § 1229a(c)(7)(C)(i) (requiring motion to reopen to be filed within ninety days of the final administrative removal). Gonzalez Hernandez did not show grounds for equitable tolling where he offered no evidence to rebut the transmittal letter attached to the August 2004 order, indicating that the order was mailed to his address of record. *See Iturribarria*, 321 F.3d at 897 (explaining that filing deadline may be equitably tolled "when a petitioner is prevented from filing because of deception, fraud, or error," as long as the petitioner acts with due diligence).

PETITION FOR REVIEW DENIED.