FOR PUBLICATION

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ond, the BIA held that even if Socop's motion to reopen were timely, the motion should be denied because Socop did not submit an approved visa petition and an application for adjustment of status at the time he filed his motion to reopen. After denying Socop's motion to reopen, the BIA also declined to exercise its sua sponte power to reopen, finding that Socop's case did not present "exceptional circumstances." See In re J-J-, 21 I. & N. Dec. 976 (1997) (establishing "exceptional circumstances" standard for sua sponte reopening).

Socop timely appealed the BIA's decision to this court. On appeal, Socop argues that the BIA should have equitably tolled the ninety-day filing period for motions to reopen. Specifically, Socop argues that the period from May 5 (when the BIA returned Socop's case to the Immigration Court) until

v. INS, 133 F.3d 1147, 1150 (9th Cir. 1997). We have jurisdiction to review the BIA's refusal to reopen deportation proceedings pursuant to the now-repealed INA § 106(a), 8 U.S.C. § 1105a(a), as amended by the transitional rules governing judicial review, which are codified at IIRIRA § 309(c)(4).**5** See Arrozal v. INS, 159 F.3d 429, 431-32 (9th Cir. 1998) (holding that court of appeals has jurisdiction to review denial of motion to reopen where underlying deportation order issued pursuant to INA § 241(a)(2)).

Before reaching the merits of this case, we must first address the INS's contention that we lack jurisdiction to consider Socop's equitable tolling argument because he failed to raise it before the BIA. The INS is correct that if Socop failed to exhaust his administrative remedies with respect to equitable tolling, we lack jurisdiction under the INA to consider the issue on appeal. See INA § 106(c), 8 U.S.C. § 1105a(c) (repealed 1996) (mandating exhaustion); Vargas v. INS, 831 F.2d 906, 907-08 (9th Cir. 1987) ("Failure to raise an issue in an appeal to the BIA constitutes a failure to exhaust remedies with respect to that question and deprives this court of jurisdiction to hear the matter.") (citations omitted).**6** We hold that even though Socop never specifically invoked the phrase "equitable tolling" in his briefs to the BIA, he sufficiently raised

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5 (7d86 006ry section governing judicial review of deportation and exclusion orders, INA § 106, 8 U.S.C. § 1105a, with a new section governing judicial review of "removal " orders, INA § 242, 8 U.S.C. § 1252. The new review provision does not apply to cases that are governed by the transitional rules; these cases continue to be governed by INA § 106, as amended by the transitional rules. See Avetova-Elisseva v. INS, 213 F.3d 1192, 1195 n.4 (9th Cir. 2000).

6 INA 106(c), 8 U.S.C. § 1105a(c), now repealed,7d86 es: "An order of deportation . . . shall not be reviewed by any court if the alien has not

tTw immigration laws and regulations . . . ." This exhaustion requirement applies to Socop because "[t]he transitional rules incorpor6 e 8 U.S.C. § 1105a(c) . . . ." Hose v. INS, 180 F.3d 992, 996 (9th Cir. 1999). The d), 8 U.S.C.
§ 1252(d).

the issue before the BIA to permit us to review the issue on appeal.

Socop submitted an opening and a reply brief to the BIA, as well as a personal declaration. In these documents, Socop set forth in detail the factual background of this case. Socop explained that he was in deportation proceedings, and that after marrying an American citizen, he sought advice from the INS on how to adjust his status. He explained that he received

it was argued before and decided by the court of appeals as an estoppel case. See Honda v. Clark, 386 U.S. 484 (1967). In Honda, the Supreme Court observed that"[b]oth as the case was treated by the lower courts and as it was largely argued here, the limitations issue has been thought to turn on whether the Government is estopped from asserting the 60-day time bar provided for actions of this kind." Honda, 386 U.S. at 486. This statement accurately reflects the appellate court proceedings in this case.**7** Although the tolling argument had not been properly raised before the court of appeals, the Supreme Court n TwHcesthioncluovi: "Quit theaCoued frony on a

III.

STANDARD OF REVIEW

We review for an abuse of discretion the BIA's denial of a motion to reopen.

IV.

DISCUSSION

A. Section 3.2 and Equitable Tolling

The INS faces an uphill battle in convincing us that the fil-

Lopez, 184 F.3d at 1100 (quoting Holmberg , 327 U.S. at 397) (emphasis added in Lopez).

The INS argues that we wrongly decided both Varela and Lopez because Congress intended compliance with filing deadlines for motions to reopen to be a jurisdictional require-

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"within sixty days after the mailing to him of notice of such decision

maximum time period for the filing of such motions .. . ."
Immigration Act of 1990 § 545(d), 104 Stat. at 5066. The
Joint Explanatory Statement of the Committee Conference
accompanying the 1990 Act directed the Attorney General,

fied at 8 C.F.R. § 3.2 (applicable to BIA decisions) and 8 C.F.R. § 3.23 (applicable to IJ decisions). Even though the congressional mandate is more probative of congressional intent than the regulations promulgated by the Department of Justice pursuant to that mandate, the regulations also support the conclusion that the filing deadline for motions to reopen is amenable to equitable tolling. These regulations state that "a party may file only one motion to reopen deportation or exclusion proceedings . . . and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be

withholding of deportation based on changed country circumstances; (3) jointly filed by the alien and the INS; and (4) filed by the INS where the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum. 8 C.F.R. § 3.2(c)(3)(i-iv). As noted by the Second

480 n.12 (supporting application of equitable tolling by observing that the Social Security Administration's"regulations governing extensions of time for filing are based on considerations of ygnessle claimants"). "This kinsedfn-

ing could be applied to the time limits in both Irwin and Bowen, we reject the suggestion that equitable tolling can never apply to statutes specifying the time for review.

3. Agency Deference

The INS urges that we defer to the BIA's refusal to recognize an equitable tolling exception to the filing deadline for motions to reopen. We may only defer to agency decision-making, however, when congressional intent is unclear. Chevron, 467 U.S. at 842. After employing the "traditional tools of3n b

duct of a third party. Rather, the party invoking tolling need

statute of limitations has run . . . . [the] plaintiff who invokes

the proper venue only after the limitations period had run. Id. at 425. After deciding that equitable circumstances warranted

during "the period [he] seeks to have to have tolled") (citation and internal quotation marks omitted). Instead, we need only ask whether Socop filed within the limitations period after tolling is taken into account. Socop had until ninety days after July 7 to file a motion to reopen, or until October 5, 1997. Socop filed his motion to reopen on August 11, 1997, which is well before the October 5 cut-off. Therefore, Socop's motion to reopen was timely filed.

C. Remand to the BIA

For the reasons stated above, we grant Socop's petition for review, reverse the BIA's denial of Socop's motion to reopen, and remand to the BIA. One final comment is in order. We note that, in addition to holding that Socop's motion to reopen was untimely filed, the BIA also held in the alternative that Socop's motion to reopen should be denied because he did not submit an approved visa petition and an application for

But Socop did not move to reopen his deportation proceed-

pathetic, nothing, not even forty-four pages of energetic legal massage by the majority, can cure the jurisdictional defect in this case. Socop's petition for review challenging the BIA's denial of his motion to reopen should have been dismissed for lack of jurisdiction.

I

In April 1996, Socop filed a timely appeal with the BIA seeking review of the Immigration Judge's decision denying his request for asylum and withholding of deportation. Socop, indeed acting ollep1lor

At the en banc oral argument, however, Socop suddenly changed course. Socop now argues that the ninety-day period was equitably tolled. As we have repeatedly explained, equitable estoppel and equitable tolling are two distinct doctrines. See, e.g., Santa Maria v. Pacific Bell, 202 F.3d 1170, 1176 (9th Cir. 2000) (discussing differences between the two doctrines); Lehman v. United States, 154 F.3d 1010, 1015-17 (9th Cir. 1998) (same);

majority relies upon Honda v. Clark, 386 U.S. 484 (1967). In Honda, depositors of the Yokohama Specie Bank filed claims against the United States under the Trading with the Enemy Act. The Court of Appeals had held that the depositors' claims were time-barred. See Kondo v. Katzenbach , 356 F.2d 351, 359 (D.C. Cir. 1966). The Supreme Court reversed, concluding that the limitations period was equitably tolled. Honda, 386 U.S. at 486.

III

The majority next claims that we should assert jurisdiction to avoid "penaliz[ing] Socop for his lawyer's failure to seize on equitable tolling." Majority Opinion at 16513. In essence, the majority claims that we should excuse Socop's failure to raise equitable tolling because the doctrines of equitable estoppel and equitable tolling are easily confused with one another. While the subtleties between the doctrines may help explain Socop's lawyer's poor performance, it cannot cure the jurisdictional defect in this case. "Failure to raise an issue in an appeal to the BIA . . . deprives this court of jurisdiction to hear the matter." Vargas