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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JOUTJE PANTOUW; ELLY LAE WORANG,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p style="text-align: center;">Respondent.</p>

No. 05-72379

Agency Nos. A079-609-520
A079-609-521

MEMORANDUM*

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

Submitted April 13, 2009**

Before: GRABER, GOULD, and BEA, Circuit Judges.

Joutje Pantouw and his wife, natives and citizens of Indonesia, petition for review of a Board of Immigration Appeals' ("BIA") order denying their motion to reopen and motion to reconsider. Our jurisdiction is governed by 8 U.S.C. § 1252.

* 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).

Reviewing for abuse of discretion, *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), we dismiss in part, deny in part, and grant in part the petition for review.

To the extent Pantouw challenges the BIA's underlying decision dismissing his appeal from an immigration judge's ("IJ") denial of his application for asylum or withholding of removal, and to the extent Pantouw raises due process or separation of powers claims related to this decision, we lack jurisdiction because this petition is not timely as to that decision. *See Stone v. INS*, 514 U.S. 386, 405 (1995).

The BIA properly construed Pantouw's motion as both a motion to reopen and a motion to reconsider. *See* 8 C.F.R. §§ 1003.2(b)(1), (c)(1) (a motion to reconsider specifies errors of fact or law in the prior decision while a motion to reopen states new facts to be proven at a hearing). The BIA did not abuse its discretion in denying Pantouw's motion to reopen because he failed to offer any new or previously unavailable evidence. *See* 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. §§ 1003.2(a), (c).

In his motion to reconsider, Pantouw argued the BIA erred in concluding that disfavored group analysis did not apply to his withholding of removal claim. In light of the court's recent decision in *Wakkary v. Holder*, 558 F.3d 1049 (9th

Cir. 2009), we reverse the BIA's denial of reconsideration and remand for further proceedings. *See INS v. Ventura*, 537 U.S. 12, 16-18 (2002) (per curiam).

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