

MAY 26 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FELICIANO ALFREDO MORAN-
COVARRUBIAS,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 05-72794
05-74649

Agency No. A079-629-493

MEMORANDUM*

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

Submitted May 12, 2009**

Before: PREGERSON, CANBY and BERZON, Circuit Judges.

In these consolidated petitions for review, Feliciano Alfredo Moran-Covarrubias, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's decision denying him cancellation of removal and the BIA's order denying

* 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).

his motion to reconsider. We have jurisdiction pursuant to 8 U.S.C. § 1252, and grant the petition for review.

After the agency's orders in this case, the BIA held in *Matter of Gonzalez-Silva*, 24 I. & N. Dec. 218 (BIA 2007), that "an alien whose conviction precedes the effective date for section 237(a)(2)(E) of the [Immigration and Nationality] Act has not been 'convicted under' section 237(a)(2)" for purposes of cancellation of removal. *Id.* at 220. We reject the government's contention that Moran-Covarrubias has waived challenge to this issue. *See Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) ("[W]e may review an issue . . . if the failure to raise the issue properly did not prejudice the defense of the opposing party.") (internal quotation and citation omitted).

As Moran-Covarrubias's conviction for violating Cal.Penal Code § 273.5 preceded the effective date for section 237(a)(2)(E) of the Immigration and Nationality Act, we grant the petition for review and remand for further proceedings.

In light of our disposition, we need not address Moran-Covarrubias's remaining contentions.

PETITION FOR REVIEW GRANTED; REMANDED.