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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JOSE MORALES GONZALEZ; ISABEL MORALES,</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>
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No. 05-76213

Agency Nos. A095-451-245
A095-449-250

MEMORANDUM*

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

Argued and Submitted October 21, 2008
Pasadena, California

Before: PREGERSON and N.R. SMITH, Circuit Judges, and COLLINS**,
District Judge.

Petitioners Jose Morales Gonzalez and Isabel Morales (“Petitioners”) seek
review of the Board of Immigration Appeals (“BIA”) decision dismissing their

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

** The Honorable Raner C. Collins, United States District Judge for the
District of Arizona, sitting by designation.

motion to reopen. We have jurisdiction pursuant to 8 U.S.C. § 1252, and we reverse.

We review denials of motions to reopen or reconsider under an abuse of discretion standard. *Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir. 2002) (citing *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996)). Reversal is only appropriate where the BIA's denial of the motion to reopen is "arbitrary, irrational, or contrary to law." *Id.* (citing *Ahwazi v. INS*, 751 F.2d 1120, 1122 (9th Cir. 1985)).

The BIA provided only one sentence of explanation in support of its denial of the motion to reopen: "[W]e do not find that the evidence submitted in support of the motion to reopen establishes prima facie eligibility for any relief from removal."

The BIA abused its discretion because it failed to provide "specific and cogent reasons for its decision." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005). The BIA failed to provide a reasoned explanation because it merely restated the standard of "prima facie eligibility" rather than explaining why Petitioners failed to meet that standard. *See also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (reversing the denial of a motion to reopen where the BIA "merely repeated petitioners' claims and summarily dismissed them").

In the last footnote of its brief and then at oral argument, the government contended that Petitioners are statutorily ineligible for relief because they did not leave the United States during their period of voluntary departure. Even assuming that the government did not waive this argument by failing to properly raise it,¹ the BIA did not mention the voluntary departure period as a ground for dismissing the Petitioners' motion to reopen in its per curiam order. "[T]his court cannot affirm the BIA on a ground upon which it did not rely." *Doissant v. Mukasey*, 538 F.3d 1167, 1170 (9th Cir. 2008) (quoting *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000) (alteration in original)); *see also Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (stating that "[i]n reviewing the decision of the BIA, we consider only the grounds relied upon by that agency.").²

Accordingly the petition for review is GRANTED and we REMAND to the BIA for further proceedings.

Petition GRANTED.

¹ *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 777 n.4 (9th Cir. 1996) (noting that "[t]he summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal").

² At oral argument the panel was made aware that Petitioners' eldest daughter is now a United States-citizen. This material change in circumstance may have created an avenue for relief that would allow Petitioners to remain in the United States with their three minor United States-citizen children.