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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>EMIGDIO DIEGO MARTINEZ- MARTINEZ,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>ERIC H. HOLDER JR., Attorney General,</p> <p style="text-align: center;">Respondent.</p>

No. 06-73003

Agency No. A073-955-559

MEMORANDUM*

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

Submitted December 8, 2008**
Pasadena, California

Before: FARRIS, GRABER,*** and WARDLAW, Circuit Judges.

Emigdio Diego Martinez-Martinez petitions for review of the Board of
Immigration Appeals' ("BIA") summary affirmance of an immigration judge's

* 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).

*** Judge Susan P. Graber was drawn to replace Judge William W
Schwarzer. She has read the briefs and reviewed the record.

(“IJ”) determination that he is ineligible for cancellation of removal as a nonpermanent resident under 8 U.S.C. § 1229b(b)(1). We have jurisdiction pursuant to 8 U.S.C. § 1252, and we deny the petition for review.

Martinez’s contention that the IJ erred in refusing to impute his father’s continuous physical presence to satisfy the requirement of 8 U.S.C. § 1229b(b)(1)(A) is foreclosed by our recent decision in *Ramos Barrios v. Holder*, No. 06-74983, slip op. at 6286–98 (9th Cir. May 27, 2009). Unlike the terms of art at issue in *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 1994), *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), and *Escobar v. Holder*, No. 07-72843 (9th Cir. May 27, 2009), “the definition of physical presence does not require a specific status, intent, or state of mind,” *Ramos Barrios*, No. 06-74983, slip op. at 6294 (internal quotation marks omitted); *see also id.* at 6292–95. Put simply, “[e]ither the petitioner has been continuously present in the United States . . . or the petitioner has not.” *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997). Thus, the IJ correctly determined that imputation of physical presence is not appropriate.

Nor did the BIA abuse its discretion in declining to discuss *In re Blancas-Lara*, 23 I. & N. Dec. 458 (BIA 2002), which is largely inapposite. Further, to the extent *Blancas-Lara* might be relevant, it is derivative of *Lepe-Guitron*, which the

IJ discussed at length. Accordingly, the BIA properly affirmed the decision of the IJ pursuant to *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994).

Finally, we reject Martinez's contention that allowing imputation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), while disallowing it under 8 U.S.C. § 1229b(b) violates the Equal Protection Clause. Section 212(c) pertains to lawful permanent residents, as does § 1229b(a), while § 1229b(b)(1) applies to nonpermanent residents. In light of the deferential, rational-basis review we afford to classifications in the immigration context, Martinez fails to articulate a colorable equal protection violation. *See Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1163–64 (9th Cir. 2002).

PETITION DENIED.