

FEB 22 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>NGHI XUAN TRAN,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER Jr., Attorney General,</p> <p style="text-align: center;">Respondent.</p>

No. 07-73741

Agency No. A042-184-405

MEMORANDUM*

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

Submitted February 16, 2010**

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

Nghi Xuan Tran, a native and citizen of Vietnam, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's decision denying his special motion to seek § 212(c) relief.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We have jurisdiction under 8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen, *Avila-Sanchez v. Mukasey*, 509 F.3d 1037, 1039 (9th Cir. 2007), and we grant the petition for review and remand.

We remand to the BIA to explain its reasons for denying Tran’s special motion to seek § 212(c) relief filed pursuant to 8 C.F.R. § 1003.44(d). *See Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005). The BIA appears to have denied Tran’s motion because he chose not to file an application for a § 212(c) waiver at his hearing in 2003, but does not explain on what grounds this bars the subsequent filing of a special motion to seek such relief. *See* 8 C.F.R. § 1003.44(d) (“A motion under this section will not be granted with respect to any conviction where an alien has *previously been denied* section 212(c) relief by a immigration judge or by the Board *on discretionary* grounds.”) (emphasis added).

PETITION FOR REVIEW GRANTED; REMANDED.