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

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESUS CASTENEDA-RIVERA,

Petitioner,

v.

ERIC H. HOLDER Jr., Attorney General,

Respondent.

No. 07-73379

Agency No. A077-125-430

MEMORANDUM*

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

Submitted May 25, 2010**

Before: CANBY, THOMAS, and W. FLETCHER, Circuit Judges.

Jesus Casteneda-Rivera, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order denying his motion to reopen

* 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).

to apply for adjustment of status. Our jurisdiction is governed by 8 U.S.C. § 1252. We deny in part, dismiss in part and grant in part the petition for review.

The BIA did not abuse its discretion in denying Casteneda-Rivera's motion as untimely where the motion was filed more than five months after the BIA's final administrative order. *See* 8 C.F.R. § 1003.2(c)(2); *see Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004) (holding that BIA denials of motions to reopen are reviewed for abuse of discretion), *amended by* 404 F.3d 1105 (9th Cir. 2005).

We lack jurisdiction to review Casteneda-Rivera's equitable tolling contention because he failed to exhaust this claim before the agency. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004).

We agree with Casteneda-Rivera that at the time of this court's March 13, 2008, order, his voluntary departure period had not expired. We therefore vacate the order to the extent that it denied his motion to stay his voluntary departure period, and we remand for the BIA to address in the first instance whether *Dada v. Mukasey*, – U.S. –, 128 S. Ct. 2307 (2008), applies to the circumstances of this case. *See Nevarez Nevarez v. Holder*, 572 F.3d 605, 608-10 (9th Cir. 2009) (remanding for the BIA to address in the first instance whether *Dada* applies retroactively to aliens whose voluntary departure had been automatically stayed during the pendency of their motions to reopen).

Each party shall bear its own costs for this petition for review.

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