

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 23 2011

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

JESUS CASTENEDA-RIVERA,

Petitioner,

v.

ERIC H. HOLDER JR., Attorney General

Respondent.

No. 07-73379

Agency No. A077-125-430

ORDER

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

The government's petition for panel rehearing is granted.

The memorandum disposition filed on June 8, 2010, is withdrawn. A new memorandum disposition will be filed concurrently with this order.

Any petition for rehearing of the new memorandum disposition must be filed within 45 days.

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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).

proceedings to apply for adjustment of status. Our jurisdiction is governed by 8 U.S.C. § 1252. We deny in part and dismiss 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 the determination in this court's March 13, 2008, order that at the time that Casteneda-Rivera filed his motion to stay his voluntary departure period, his voluntary departure period had expired. Casteneda-Rivera's motion to reopen did not stay his period of voluntary departure because the motion was untimely. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1280 (9th Cir. 2005) (concluding that the BIA abuses its discretion "when it dismisses a motion to reopen, *timely* filed by an alien during his voluntary period, because the alien subsequently fails to depart prior to the end of the period while awaiting the BIA's decision) (emphasis added); *see also Barroso v. Gonzales*, 429 F.3d 1195, 1205 (9th Cir.

2005) (“the *timely* filing of a motion to reopen. . . automatically tolls the voluntary departure period”) (emphasis added).

PETITION FOR REVIEW DENIED in part; DISMISSED in part.