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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEONARDO MORENO GUTIERREZ
and ANDREA MORENO,

Petitioners,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 08-70163

Agency Nos. A79-535-424
A79-535-425

MEMORANDUM *

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

Submitted April 15, 2008 **

Before: B. FLETCHER, FISHER and PAEZ, Circuit Judges.

Petitioners seek review of the Board of Immigration Appeals' ("BIA") denial of their motion to reopen proceedings in order to present new evidence and to apply for protection under the Convention Against Torture following the denial of their 2005 application for cancellation of removal.

* 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).

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A review of the record reveals that petitioners presented the BIA with evidence of the birth of their daughter, but did not allege any hardship particular to the new child. This court lacks jurisdiction to consider the BIA's determination that the evidence would not alter its prior discretionary determination that petitioners failed to establish the requisite hardship. *See* 8 U.S.C. § 1252(a)(2)(B)(i); *Fernandez v. Gonzales*, 439 F.3d 592, 601 (9th Cir. 2006). Accordingly, respondent's motion to dismiss is granted in part.

Petitioners also submitted an unsworn declaration of the harm they feared they would face upon return to Mexico. Because petitioners' motion was not supported by affidavits or other evidentiary material, the BIA acted within its discretion in denying the motion to reopen on this basis. *See* 8 C.F.R. § 1003.2(c); *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003) (holding that a motion to reopen must establish a prima facie case demonstrating "a reasonable likelihood that the statutory requirements for relief have been satisfied"). Accordingly, respondent's motion to dismiss, construed as a motion for summary disposition of the petition for review, is granted in part.

The temporary stay of removal confirmed by Ninth Circuit General Order 6.4(c) shall continue in effect until issuance of the mandate.

All other pending motions are denied as moot.

PETITION FOR REVIEW DISMISSED in part; DENIED in part.