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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUAN CARLOS GARCIA BENITEZ;
NORMA ANGELICA CORTES,

Petitioners,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 04-74146

Agency Nos. A96-072-558
A96-072-559

MEMORANDUM*

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

Submitted February 5, 2008**
Pasadena, California

Before: PREGERSON and WARDLAW, Circuit Judges, and LEIGHTON***,
District Judge

* 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).

*** The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

Pro se Petitioner Juan Carlos Garcia Benitez (“Garcia Benitez”) and his wife, Norma Angelica Cortes (“Cortes”), are natives and citizens of Mexico who seek review of the Board of Immigration Appeals’ order affirming, without opinion, an Immigration Judge’s (“IJ”) decision denying their applications for cancellation of removal. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review the agency’s continuous physical presence determinations for substantial evidence. *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006). We grant Garcia Benitez’s petition for review, and remand. We grant in part, deny in part, and remand Cortes’s petition for review.

Petitioners’ initial argument that the Board’s summary decision violated its own regulations is foreclosed by *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848-53 (9th Cir. 2003) (as amended). We turn to the merits of their claims.

With respect to Garcia Benitez, an intervening change in the law requires us to remand on the issue of continuous physical presence. In *Ibarra-Flores*, 439 F.3d at 619, we held that administrative voluntary departure under threat of deportation breaks the accrual of continuous physical presence only where the alien is informed of the terms of the departure and knowingly and voluntarily accepts the terms of departure. *See also Tapia v. Gonzales*, 430 F.3d 997, 1004 (9th Cir. 2005). The record is unclear as to whether Garcia Benitez was informed

of the terms of his departure or whether he accepted those terms voluntarily or knowingly. Moreover, the agency did not have the benefit of our decisions in *Ibarra-Flores* and *Tapia* at the time it addressed this issue.

The record is also unclear as to whether Cortes was informed of the terms of her departure or whether she accepted them voluntarily or knowingly. The IJ, however, alternatively denied her petition because she testified that she left the United States for fourteen months during the ten-year statutory period. To establish continuous presence, an alien must demonstrate that she did not depart from the United States during the ten-year statutory period “for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.” 8 U.S.C. § 1229b(d)(2). Accordingly, the IJ did not err in denying her petition on this ground.

The Board, however, *did* err in reducing her voluntary departure period from 60 days to 30 days. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 981 (9th Cir. 2006) (holding that “because the [Board of Immigration Appeals] issued a streamlined order, it was required to affirm the entirety of the IJ’s decision, including the length of the voluntary departure period.”). We remand for reinstatement of the IJ’s 60-day voluntary departure period.

In conclusion, we **GRANT** Garcia Benitez's petition for review and **REMAND** for further proceedings consistent with *Ibarra-Flores* and *Tapia*. We **GRANT in part, DENY in part, and REMAND** Cortes's petition for review for reinstatement of the 60-day voluntary departure period.