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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>PATRICIO MENDEZ PONCE; et al.,</p> <p style="text-align: center;">Petitioners,</p> <p>v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p style="text-align: center;">Respondent.</p>
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No. 06-75800

Agency Nos. A075-726-838
A078-111-930

MEMORANDUM*

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

Submitted March 18, 2009**

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Patricio Mendez Ponce and Maria Luisa Torres, spouses and natives and citizens of Mexico, petition pro se for review of the Board of Immigration Appeals' ("BIA") order denying their motion to reopen. Our jurisdiction is

* 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).

governed by 8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen, *Singh v. Gonzales*, 416 F.3d 1006, 1009 (9th Cir. 2005), and we dismiss in part and deny in part the petition for review.

The cumulative evidence petitioners presented with their motion to reopen concerned the same basic hardship grounds previously considered by the agency. *See Fernandez v. Gonzales*, 439 F.3d 592, 602-03 (9th Cir. 2006). We therefore lack jurisdiction to review the BIA's determination that the evidence would not alter the agency's prior discretionary determination that petitioners failed to establish the requisite hardship for cancellation of removal. *See id.* at 600.

We lack jurisdiction to review the BIA's decision not to invoke its *sua sponte* authority to reopen removal proceedings. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

The BIA did not abuse its discretion in denying petitioners' motion to reopen as untimely and concluding that petitioners were not entitled to equitable tolling. Petitioners' motion was filed nearly one year after the BIA's prior order and petitioners did not demonstrate that they exercised due diligence in discovering former counsel's alleged errors. *See Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (equitable tolling available "when a petitioner is prevented from filing

because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error”).

PETITION FOR REVIEW DISMISSED in part; DENIED in part.