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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN HERNANDEZ-BAEZ;
ANTONIA HERNANDEZ,

Petitioners,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 06-75482

Agency Nos. A075-511-987
A075-502-550

MEMORANDUM*

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

Submitted April 13, 2009**

Before: GRABER, GOULD, and BEA, Circuit Judges.

Martin Hernandez-Baez and Antonia Hernandez, spouses and natives and citizens of Mexico, petition for review of the Board of Immigration Appeals' ("BIA") order denying their motion to reopen. Our jurisdiction is governed by 8

* 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).

U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen, and we review de novo due process claims. *Mohammed v. Gonzales*, 400 F.3d 785, 791-92 (9th Cir. 2005). We deny in part and dismiss in part the petition for review.

The BIA did not abuse its discretion in denying as untimely and numerically barred Petitioners' motion to reopen because the successive motion was filed more than two years after the BIA's February 17, 2004 order dismissing Petitioners' underlying appeal, and Petitioners failed to demonstrate they qualified for an exception to the time limit or for equitable tolling. *See* 8 C.F.R. §§ 1003.2(c)(2)-(3); *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). It follows that Petitioners have not shown a due process violation. *See Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2006) (requiring error for a due process violation).

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

PETITION FOR REVIEW DENIED in part; DISMISSED in part.