

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

MARCOS POLO SALAZAR-REYES,

Petitioner,

v.

ERIC H. HOLDER JR., Attorney General,

Respondent.

No. 05-72126

Agency No. A070-208-444

MEMORANDUM*

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

Argued and Submitted December 8, 2008
Pasadena, California

Before: FARRIS, GRABER,** and WARDLAW, Circuit Judges.

Marcos Polo Salazar-Reyes petitions for review of the Board of Immigration Appeal's ("BIA") affirmance of an immigration judge's ("IJ") decision sustaining his removability due to a 2004 theft conviction and pretermittting his application

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Judge Susan P. Graber was drawn to replace Judge William W Schwarzer. She has read the briefs, reviewed the record, and listened to the recording of oral argument held on December 8, 2008.

for adjustment of status. We have jurisdiction under 8 U.S.C. § 1252, and we grant in part and deny in part the petition for review and remand for further consistent proceedings.

Under 8 C.F.R. § 204.2(h)(2), an approved visa petition that is subsequently approved again “shall be regarded as a reaffirmation or reinstatement of the validity of the original petition, except . . . when an immigrant visa has been issued to the beneficiary as a result of the petition approval.” The BIA reasonably interpreted this provision as preventing Salazar-Reyes from reusing his approved visa petition to apply for adjustment of status, and we defer to the BIA’s precedential, reasonable interpretations of the immigration statutes and regulations. *See Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011–13 (9th Cir. 2006); *see also Lal v. INS*, 255 F.3d 998, 1004 (9th Cir. 2001). Accordingly, the BIA properly affirmed the IJ’s conclusion that Salazar-Reyes was ineligible for adjustment of status.

However, because the BIA dismissed Salazar-Reyes’s appeal before we issued our decision in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), Salazar-Reyes was precluded from arguing that *Cuevas-Gaspar* compels the imputation of 8 U.S.C. § 1229b(a)(1)’s requirement of at least five years of lawful permanent residence. “We do not require an alien to exhaust administrative

remedies on legal issues based on events that occur *after* briefing to the BIA has been completed.” *Alcaraz v. INS*, 384 F.3d 1150, 1158 (9th Cir. 2004). We therefore remand to the BIA to allow it to consider in the first instance Salazar-Reyes’s eligibility for cancellation of removal in light of *Cuevas-Gaspar* and our recent decision in *Mercado-Zazueta v. Holder*, No. 07-71428 (9th Cir. 2009). *See INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

PETITION GRANTED in part; DENIED in part; and REMANDED for further proceedings consistent with this memorandum disposition.