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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATY BELINDA LOPEZ-LOPEZ;
RENESSMI BELINDA BRAUL-LOPEZ,

Petitioners,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 22-863

Agency Nos.
A208-537-555
A208-537-556

MEMORANDUM*

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

Argued and Submitted October 6, 2023
San Francisco, California

Before: W. FLETCHER, TALLMAN, and LEE, Circuit Judges.

After entering the United States, Petitioners Paty Belinda Lopez-Lopez and her minor daughter sought asylum, withholding of removal, and protection under the Convention Against Torture (“CAT”). An Immigration Judge (“IJ”) denied their

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

claims, and they filed a timely notice of appeal to the Board of Immigration Appeals (“BIA”). The BIA rejected the filing for failure to include the required fee and gave Lopez-Lopez 15 days to re-file the appeal.

According to a sworn declaration from Lopez-Lopez’s counsel submitted with a motion for leave to file a late appeal, counsel did not receive notice from the BIA that the appeal had been rejected. After counsel was made aware of the rejection, Lopez-Lopez re-filed her appeal one day past the 15-day deadline, arguing that the untimeliness should be excused by the lack of notice. The BIA dismissed her appeal and denied her motion for reconsideration, writing that although Lopez-Lopez argued “that [her] attorney never received notice that the [notice of appeal] had been rejected,” she had “not offered any support for this contention.” Lopez-Lopez petitioned for our review.

We grant the petition and remand for reconsideration. The BIA abuses its discretion when it fails to consider relevant evidence in denying a motion for reconsideration. *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006). The agency erred in concluding that Lopez-Lopez had not offered any support for the claim that her counsel did not receive notice that her notice of appeal was rejected. Counsel’s sworn declaration that he had not received notice was in the record before the BIA when it denied the motion for reconsideration, and the agency was required

to consider that evidence. *See Ontiveros-Lopez v. I.N.S.*, 213 F.3d 1121, 1125 (9th Cir. 2000).

In addition, while this petition was pending before our court, the BIA overturned its longstanding rule that the notice of appeal deadline is jurisdictional and held that the deadline is subject to equitable tolling if a non-citizen establishes that she “has been pursuing [her] rights diligently” and that “some extraordinary circumstance prevented timely filing.” *In re Morales-Morales*, 28 I. & N. Dec. 714, 716–17 (BIA 2023). The BIA has not yet considered whether Lopez-Lopez’s 15-day deadline to perfect her appeal should be equitably tolled by one day in light of the evidence that her counsel did not receive notice that her appeal was rejected. We therefore remand for the agency to consider equitable tolling in the first instance.

PETITION GRANTED and REMANDED.