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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MACHEL ERNEST NASUBO, aka
Machel Arnest Nasubo,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney
General,**

Respondent.

No. 07-74025

Agency No. A046-444-952

MEMORANDUM*

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

Argued February 10, 2009
Submission withdrawn February 17, 2009
Resubmitted June 18, 2009
Pasadena, California

Before: KLEINFELD, BEA and IKUTA, Circuit Judges.

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

** Eric H. Holder is substituted for his predecessor, Michael B. Mukasey, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

We deny Machel Ernest Nasubo’s petition for review of the BIA decision dismissing his appeal and ordering him removed to Kenya.

As applied to the facts of this case, 8 U.S.C. § 1227(a)(2)(E)(i) is not void for vagueness because the phrase “crime of . . . child neglect” is defined “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Kolender v. Lawson, 461 U.S. 352, 357 (1983); Rojas-Garcia v. Ashcroft, 339 F.3d 814, 822–23 (9th Cir. 2003).

We lack jurisdiction to consider Nasubo’s argument that he no longer has a “conviction” for child neglect within the meaning of 8 U.S.C. §§ 1101(a)(48)(A), 1227(a)(2)(E)(i), because Nasubo has not exhausted this claim. Barron v. Ashcroft, 358 F.3d 674, 678–79 (9th Cir. 2004). We cannot consider the state court order vacating Nasubo’s conviction *nunc pro tunc* because it is not part of the administrative record, and we cannot expand the administrative record on appeal. 8 U.S.C. § 1252(a)(1), (b)(4); see Fisher v. INS, 79 F.3d 955, 963–64 (9th Cir. 1996) (en banc) (holding that it would “not create a new administrative record on appeal by reviewing evidence that the Board did not consider”). Because the

documents vacating Nasubo's conviction are new evidence, the proper recourse for introducing them is a motion to reopen so that the agency may consider Nasubo's request in the first instance. 8 C.F.R. § 1003.2(a), (c)(1); see 8 U.S.C. § 1229a(a)(3), (c)(7); INS v. Ventura, 537 U.S. 12, 16–17 (2002) (per curiam); see also Socop-Gonzalez v. INS, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) (holding that motions to reopen are subject to equitable tolling).

PETITION DENIED.