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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>ONOFRE ANTONIO REYES- ARGUERA,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER Jr., Attorney General,</p> <p style="text-align: center;">Respondent.</p>
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No. 06-73101

Agency No. A070-963-445

MEMORANDUM*

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

Submitted June 16, 2009**

Before: PAEZ, TALLMAN, and N.R. SMITH, Circuit Judges.

Onofre Antonio Reyes-Arguera, a native and citizen of El Salvador, petitions pro se for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's ("IJ") decision denying his

* 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).

application for cancellation of removal. We have jurisdiction under 8 U.S.C. § 1252. We review de novo legal and constitutional issues, *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003), and we grant in part and deny in part the petition for review.

Contrary to the government's contention, Reyes-Arguera's claims were exhausted because the BIA's opinion cited *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), and did not express disagreement with any part of the IJ's decision. *See Abebe v. Gonzales*, 432 F.3d 1037, 1040-41 (9th Cir. 2005) (en banc). Moreover, we exercise our discretion to review these claims. *See Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004) (court has discretion to consider a claim not raised in petitioner's opening brief if government brief addressed the claim).

The IJ erroneously concluded that Reyes-Arguera had been convicted under California Penal Code section 273.5(a), where the record establishes that he was convicted under California Penal Code section 243(e). A conviction under section 243(e) is not categorically a crime involving moral turpitude. *See Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1061 (9th Cir. 2006). We therefore remand for the agency to consider whether Reyes-Arguera is able to meet his burden of establishing eligibility for relief. *See Sandoval-Lua v. Gonzales*, 499

F.3d 1121, 1130 (9th Cir. 2007) (alien seeking to establish that criminal convictions do not bar relief may do so by pointing to inconclusive conviction records).

Reyes-Arguera's equal protection challenge based on the Nicaraguan Adjustment and Central American Relief Act is foreclosed by *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 603 (9th Cir. 2002).

Each party shall bear its own costs for this petition for review.

PETITION FOR REVIEW GRANTED in part; DENIED in part; REMANDED.