

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 07 2009

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

OSWALDO ENRIQUE MORENO,

Petitioner,

v.

ERIC H. HOLDER JR., Attorney General,

Respondent.

No. 06-71799

Agency No. A 77-061-517

MEMORANDUM*

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

Submitted February 2, 2009**
Pasadena, California

Before: PREGERSON, GRABER, and WARDLAW, Circuit Judges.

Oswaldo Enrique Moreno petitions for review of the Board of Immigration Appeals' ("BIA") affirmance of an immigration judge's determination that he is removable, inadmissible, and ineligible for adjustment of status under 8 U.S.C. §

* 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).

1182(a)(2)(A)(i)(II). We have jurisdiction under 8 U.S.C. § 1252, and we grant the petition.

To trigger removability under 8 U.S.C. § 1227(a)(2)(B)(i), the statute of conviction must relate to controlled substances as listed in the federal schedules of the Controlled Substances Act (“CSA”). *Mielewczyk v. Holder*, No. 07-74246, slip op. at 10414–16 (9th Cir. 2009).¹ The BIA correctly determined that Moreno’s conviction for violating California Health and Safety Code § 11352(a) involved a law that relates to controlled substances. *Id.* at 10414–15.

However, Moreno’s conviction does not categorically constitute a removable or inadmissible offense under 8 U.S.C. §§ 1227(a)(2)(B)(i) or 1182(a)(2)(A)(i)(II), because California “defines controlled substance to include ‘numerous substances that are not similarly regulated by the CSA.’” *Id.* at 10415 (quoting *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007)). It is therefore necessary to employ the modified categorical approach to determine whether Moreno’s conviction involved a federally listed drug. *See id.* at 10415–16. The record of

¹ The language of § 1227(a)(2)(B)(i) is nearly identical to the language of § 1182(a)(2)(A)(i)(II), and therefore *Mielewczyk*’s analysis applies with equal force to § 1182(a)(2)(A)(i)(II). The only difference between the two provisions is § 1227(a)(2)(B)(i)’s exception for “a single offense involving possession for one’s own use of 30 grams or less of marijuana,” a distinction that is not relevant to Moreno’s petition.

conviction before us does not specify the controlled substance involved. Because Moreno's statute of conviction does not categorically define a controlled substance offense, *see id.* at 10414–16, we remand to the BIA with instructions to apply the modified categorical approach, in light of *Mielewczyk*, in determining whether Moreno is inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II).

PETITION GRANTED; REMANDED for further consistent proceedings.