

OCT 20 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>ALFREDO ROLANDO FAJARDO-ALVAREZ,</p> <p>Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER Jr., Attorney General,</p> <p>Respondent.</p>
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No. 04-75891

Agency No. A076-638-137

MEMORANDUM *

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

Argued and Submitted October 8, 2009
Portland, Oregon

Before: O’SANNLAIN and N.R. SMITH, Circuit Judges, and WHYTE, **
District Judge.

Alfredo Rolando Fajardo-Alvarez, a native and citizen of Guatemala,
petitions for review of the Board of Immigration Appeals’ (“BIA”) order affirming

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

** The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

the Immigration Judge's ("IJ") denial of his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT").

As a general rule, we lack jurisdiction to review a final order of removal again an alien who has committed a controlled substance offense. *See* 8 U.S.C. § 1252(a)(2)(C). However, the BIA did not find Fajardo-Alvarez removable for having been convicted of a controlled substance offense. Instead, the BIA found him ineligible for asylum, withholding of removal, and CAT on the merits. Because the BIA did not order Fajardo-Alvarez removed based upon his offense and made a determination on the merits, we have jurisdiction to review the decision. *See Unuakhaulu v. Gonzales*, 416 F.3d 931, 936-37 (9th Cir. 2005).

However, we lack jurisdiction to consider this petition on the merits. Fajardo-Alvarez failed to exhaust the critical issue of credibility in his appeal to the BIA, notwithstanding the IJ's clear and unambiguous findings regarding adverse credibility. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004). We therefore have no basis to consider Fajardo-Alvarez's claims for asylum, withholding of removal, or CAT. *See Zara v. Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004) (holding that petitioner's failure to exhaust the adverse credibility finding precluded this court from having jurisdiction to consider her claims of asylum, withholding of removal, and CAT).

PETITION DENIED.