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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JAVIER CASTRO-GARCIA,</p> <p>Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER Jr., Attorney General,</p> <p>Respondent.</p>

No. 04-74190

Agency No. A077-197-301

MEMORANDUM*

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

Submitted October 13, 2009**

Before: B. FLETCHER, LEAVY, and RYMER, Circuit Judges.

Javier Castro-Garcia, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's ("IJ") decision denying his application for cancellation of

* 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).

removal. We have jurisdiction under 8 U.S.C. § 1252. We review de novo whether a state statutory crime constitutes a crime involving moral turpitude, *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1057 (9th Cir. 2006), and we grant the petition for review and remand.

The BIA concluded that Castro-Garcia was ineligible for cancellation of removal because his conviction under California Penal Code § 243(e) was a crime involving moral turpitude. Subsequent to the BIA's order, we held that a conviction under § 243(e) is not categorically a crime involving moral turpitude. *See id.* at 1061. Because “the government has not asked us to apply the modified categorical approach, we consider only whether the categorical approach is satisfied.” *See Latu v. Mukasey*, 547 F.3d 1070, 1076 (9th Cir. 2008) (internal quotation omitted).

We therefore grant the petition for review and remand for the BIA to address in the first instance the IJ's alternative finding that Castro-Garcia was ineligible for cancellation of removal because he was unable to demonstrate good moral character as a result of having been confined to a penal institution for an aggregate period of 180 days or more. *See INS v. Ventura*, 537 U.S. 12, 16-18 (2002) (per curiam).

PETITION FOR REVIEW GRANTED; REMANDED.