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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MIGUEL MENDIOLA-MARTINEZ,

Defendant - Appellant.

No. 09-50242

D.C. No. 3:08-CR-01169-WQH

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted February 16, 2010**

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

Miguel Mendiola-Martinez appeals from his jury-trial conviction for being an illegal alien in possession of firearms, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Mendiola-Martinez contends that the district court erred by instructing the jury that filing an application for adjustment of immigration status does not make a defendant “legally present” for purposes of determining whether he violated 18 U.S.C. § 922(g)(5)(A). This contention fails because Mendiola-Martinez’s pending I-485 application for adjustment of status does not affect his removability, and Mendiola-Martinez points to no statute that renders his presence lawful based upon his application for adjustment of status. *See United States v. Latu*, 479 F.3d 1153, 1155, 1159 (9th Cir. 2007); *see also United States v. Smith*, 561 F.3d 934, 938-39 (9th Cir. 2009) (holding that the sufficiency of a jury instruction is subject to harmless error review).

AFFIRMED.