

AUG 30 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| <p>ALBERTO MAGANA-RODRIGUEZ,</p> <p>Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p>Respondent.</p> |
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No. 06-72872

Agency No. A028-811-611

MEMORANDUM*

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

Submitted August 10, 2010 **

Before: O’SCANNLAIN, HAWKINS, and IKUTA, Circuit Judges.

Alberto Magana-Rodriguez, 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 decision denying his application for adjustment of

* 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).

status. We have jurisdiction under 8 U.S.C. § 1252. We grant the petition for review and remand.

The BIA denied Magana-Rodriguez’s application for adjustment of status, concluding that his guilty plea and compliance with certain elements of a diversion program constituted a “conviction” for the purposes of 8 U.S.C. § 1101(a)(48), and therefore a controlled substance violation. The BIA, however, did not have the benefit of our intervening decision in *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010), which held that Congress had intentionally omitted certain types of sanctions from consideration as “punishment, penalty, or restraint on . . . liberty” under 8 U.S.C. § 1101(a)(48)(A)(ii). We therefore remand for the BIA to reconsider its denial of Magana-Rodriguez’s application for adjustment of status in light of *Retuta*.

PETITION FOR REVIEW GRANTED; REMANDED.