

AUG 31 2010

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>EDGAR ZARATE, a.k.a. Edgar Argenis Zarate,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p style="text-align: center;">Respondent.</p>

No. 08-72383

Agency No. A096-358-033

MEMORANDUM*

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

Submitted August 10, 2010**

Before: LEAVY, HAWKINS, and IKUTA, Circuit Judges.

Edgar Zarate, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' order dismissing his appeal from an immigration judge's ("IJ") order denying his motion to terminate proceedings. We review de

* 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).

novo claims of constitutional violations, *Colmenar v. INS*, 210 F.3d 967, 970 (9th Cir. 2000), and we dismiss in part and deny in part the petition for review.

In his opening brief, Zarate contends that his conviction under California Health and Safety Code § 11352(a) does not fall under section 102 of the Controlled Substances Act, and therefore does not make him removable under 8 U.S.C. § 1227(a)(2)(B)(i). We lack jurisdiction, however, to review this contention because Zarate did not exhaust it before the agency. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004).

We reject Zarate's contention that his due process rights were violated when the IJ had an off-the-record discussion as to whether his conviction constitutes an aggravated felony because the IJ did not find him removable under that ground. *See Colmenar*, 210 F.3d at 972 (requiring a showing prejudice to prevail in a due process claim).

PETITION FOR REVIEW DISMISSED in part; DENIED in part.