

SEP 01 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ISMAEL LOPEZ-GARCIA,

Defendant - Appellant.

No. 10-50054

D.C. No. 3:09-cr-01118-WQH-1

MEMORANDUM*

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

Argued and Submitted July 15, 2011
Pasadena, California

Before: RYMER, TALLMAN, and IKUTA, Circuit Judges.

Ismael Lopez-Garcia, a native and citizen of Mexico, appeals his conviction for being a removed alien found within the United States in violation of 8 U.S.C.

§ 1326. He argues that the removal order underlying his conviction was invalid.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Because Lopez-Garcia claimed that the proceeding that resulted in his prior expedited removal order was “fundamentally unfair,” he is entitled to “some meaningful review” of the proceeding before the order can be used to establish conclusively an element of his criminal offense. *United States v. Barajas-Alvarado*, No. 10-50134, --- F.3d ----, 2011 WL 3689244, at *7–8 (9th Cir. Aug. 24, 2011); *see also United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987). But even assuming defects in that proceeding violated his due process rights, Lopez-Garcia fails to “make a ‘plausible’ showing that the facts presented would cause the Attorney General to exercise discretion in his favor,” *United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998), and permit him to withdraw his application for admission, 8 U.S.C. § 1225(a)(4), where he deliberately presented false documents to inspection officers in an effort to gain admission to the United States, was neither a youth nor elderly, did not allege he was in poor health, and had not shown any humanitarian or public interest considerations weighing in his favor. *See Barajas-Alvarado*, 2011 WL 3689244, at *10–11. Because Lopez-Garcia has not shown prejudice, the proceeding resulting in the predicate expedited removal order was not fundamentally unfair, and the order could be used as a predicate to the § 1326 prosecution. *Id.* at 11.

AFFIRMED.