

DEC 20 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR MARTINEZ,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 05-73975

Agency No. A30-700-636

MEMORANDUM*

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

Argued and Submitted December 6, 2007
Pasadena, California

Before: SILVERMAN, WARDLAW, and IKUTA, Circuit Judges.

The BIA erred in holding that Martinez's second degree burglary conviction under California Penal Code § 459 constituted an aggravated felony under 8 U.S.C.

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

§ 1101(a)(43)(G).¹ A conviction under section 459 is not an aggravated felony under the categorical approach. *United States v. Velasco-Medina*, 305 F.3d 839, 851 (9th Cir. 2002). Nor did the government carry its burden of establishing Martinez's conviction was an aggravated felony under the modified categorical approach. The record contains only the charging document and an abstract of judgment reflecting Martinez's guilty plea, which are insufficient to prove that Martinez pleaded guilty to all the required elements for generic burglary. *See Shepard v. United States*, 544 U.S. 13, 26 (2005); *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007) (en banc). Because the BIA erred in determining Martinez was an aggravated felon, we remand to the BIA for further proceedings. *See INS v. Ventura*, 537 U.S. 12, 16 (2002).

PETITION FOR REVIEW GRANTED.

¹ Our August 16, 2004 order does not preclude Martinez's challenge to this BIA determination because Martinez has shown a change in controlling law. *See Nunes v. Aschroft*, 375 F.3d 805, 807 (9th Cir. 2004).