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

NOT FOR PUBLICATION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

JESUS JAVIER DURAN-JURADO, aka
Jesus Javier Duran, aka Jesus Javier Chuy,

Petitioner,

v.

PETER D. KEISLER,** Acting Attorney
General,

Respondent.

No. 06-73258

Agency No. A39-810-293

MEMORANDUM*

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

Argued and Submitted August 14, 2007
San Francisco, California

Before: O'SCANNLAIN, HAWKINS, and WARDLAW, Circuit Judges.

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

** Peter D. Keisler is substituted for his predecessor, Alberto R. Gonzales, as Acting Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

Jesus Javier Duran-Jurado (“Duran”) petitions for review of the Board of Immigration Appeals’s (“BIA”) final order of removal, arguing that he cannot be removed because he is (or should be deemed) a United States citizen or, alternatively, that his case should be remanded to the BIA for it to consider his application for cancellation of removal—a form of relief for which he argues the Immigration Judge (“IJ”) improperly found him ineligible.

We deny in part and grant in part Duran’s petition for review. We conclude that the laws in place in 1986¹ (which required United States citizen parents to *petition* for citizenship of their foreign-born adopted children, but granted *automatic* citizenship to foreign-born adopted children upon naturalization of their foreign-born parents), as well as the Child Citizenship Act of 2000 (“CCA”) (which removed the petition requirement just mentioned, but was not made retroactive so as to confer automatic citizenship upon people like Duran who were over age 18 as of that law’s effective date), do not operate so as to violate the equal protection portion of the Fifth Amendment’s Due Process Clause. However, we also find Duran eligible for

¹ The 1986 naturalization laws are relevant because Duran claims he should have derived citizenship through his adoptive parents upon his entry into the United States in 1986. See Minasyan v. Gonzales, 401 F.3d 1069, 1075 (9th Cir. 2005) (“As with all forms of citizenship, derivative citizenship is determined under the law in effect at [the] time the critical events giving rise to eligibility occurred.”).

cancellation of removal, and thus remand for consideration of his application for this form of relief.

I

A naturalization scheme withstands equal protection scrutiny as long as there exists a “‘facially legitimate and bona fide reason’” for that scheme, Barthelemy v. Ashcroft, 329 F.3d 1062, 1065 (9th Cir. 2003) (quoting Fiallo v. Bell, 430 U.S. 787, 794 (1977))—a standard this court has equated with rational basis review, see Ablang v. Reno, 52 F.3d 801, 804 (9th Cir. 1995). A scheme survives rational basis review as long as it is “rationally related to a legitimate Government purpose,” Schweiker v. Wilson, 450 U.S. 221, 242 (1981), and thus the “burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” Heller v. Doe, 509 U.S. 312, 320 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)); see also id. at 319-20 (schemes subject to rational basis review are presumed constitutional).

As to the 1986 laws, that legislative scheme is rational because: (1) the government has a legitimate interest in notification of an alien’s naturalization; and (2) requiring a petition to be filed on behalf of those adopted children who would not *already* be disclosed to the government on their adoptive parents’ naturalization applications was a rational way to further that interest. As to the CCA’s non-

retroactivity, we find that legislative choice rational because: (1) Congress—which has “nearly plenary power to establish the qualifications for citizenship,” Barthelemy, 329 F.3d at 1065—has a legitimate interest in controlling the number of new citizens the nation accepts; and (2) correcting the perceived inequity *prospectively*, but not retrospectively, was a rational means of furthering that interest. We thus conclude that neither scheme violates the Equal Protection Clause and, therefore, that Duran remains removable because he is not (and should not be deemed) a United States citizen.

II

We nonetheless grant Duran’s petition for review because the IJ erroneously categorized his conviction for violating section 11352(a) of California’s Health and Safety Code as an aggravated felony under Taylor v. United States, 495 U.S. 575 (1990), and thus improperly found Duran ineligible for cancellation of removal.

We first note that Duran properly exhausted this issue by raising it in his notice of appeal to the BIA. See Ladha v. INS, 215 F.3d 889, 903 (9th Cir. 2000). When an issue has been properly exhausted but has not yet been passed upon by the BIA, we ordinarily remand to the BIA rather than resolve that issue ourselves. See, e.g., Montes-Lopez v. Gonzales, 486 F.3d 1163, 1165 (9th Cir. 2007). Here, however, the question Duran asks the panel to answer is purely one of law, does not involve agency discretion or expertise, and can be answered based upon a fully developed record

below; thus, conservation of judicial resources counsels in favor of the panel considering the issue at this stage. See Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1132-35 (9th Cir. 2006) (en banc).

We have previously held that a conviction under section 11352(a) is not categorically an “aggravated felony.” See United States v. Rivera-Sanchez, 247 F.3d 905, 909 (9th Cir. 2001) (en banc) (overruling United States v. Lomas, 30 F.3d 1191, 1194-95 (9th Cir. 1994)). Accordingly, the IJ correctly resorted to Taylor’s modified categorical approach. Id. at 908-09. Although an IJ conducting a modified categorical analysis is entitled to rely on a plea agreement to determine “whether there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive,” Ferreira v. Ashcroft, 390 F.3d 1091, 1095 (9th Cir. 2004); see also Shepard v. United States, 544 U.S. 13, 16 (2005), a plea agreement is *only* sufficient to carry the government’s burden under the modified categorical approach when that agreement “establish[es] *clearly and unequivocally* [that] the conviction was based on all of the elements of a qualifying predicate offense,” United States v. Navidad-Marcos, 367 F.3d 903, 908 (9th Cir. 2004) (emphasis added).

Here, Duran was charged with violating section 11352(a), which punishes those who transport, import, sell, furnish, and/or administer controlled substances (as well

as those who offer or attempt to do any of the aforementioned activities). And yet, in his plea agreement, Duran does not admit to *any* conduct violating section 11352(a); rather, he admits he “unlawfully possessed heroin and cocaine for sale with knowledge of their narcotic presence and narcotic nature”—conduct that comes closer to violating section 11351 of California’s Health and Safety Code than section 11352(a). Because the factual admissions in Duran’s plea agreement do not “confirm[] the factual basis for a valid plea” to violation of section 11352(a), the IJ was incorrect to rely upon it. See Shepard, 544 U.S. at 25.

Because no other acceptable piece of evidence in the record establishes the factual basis for Duran’s plea, see id. at 16 (explaining that courts conducting modified categorical analyses are permitted to consult *only* “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”), the government did not carry its burden of establishing “clearly and unequivocally” that Duran was convicted of an aggravated felony.” Accordingly, the IJ erred when he found Duran ineligible for cancellation of removal.

We thus remand to the BIA for consideration of Duran’s application for cancellation of removal, absent the aggravated felony determination.

DENIED IN PART, GRANTED AND REMANDED IN PART.

