

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

JAN 31 2008

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

LUIS FELIPE CASAS-CASTRILLON,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney  
General,

Respondent.

No. 05-73553

Agency No. A92-925-346

MEMORANDUM\*

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

Argued and Submitted January 8, 2008  
Pasadena, California

Before: FARRIS, FISHER, and M. SMITH, Circuit Judges.

Luis Felipe Casas-Castrillon, a native and citizen of Columbia, petitions for review of the Board of Immigration Appeals' decision finding him removable for two convictions of crimes involving moral turpitude and ineligible for cancellation

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

of removal. 8 U.S.C. §§ 1227(a)(2)(A)(ii), 1229b(a). We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(1). We grant the petition and remand to the BIA for further proceedings.

Casas-Castrillon was granted temporary resident status in April 1989 and became a lawful permanent resident in September 1990. In 1993, he pled guilty to vehicle burglary in violation of Cal. Penal Code § 459. The administrative record contains a felony complaint and minute order evidencing the 1993 conviction. In 2000, Casas-Castrillon again pled guilty to vehicle burglary in violation of Section 459. There is a felony complaint and abstract of judgment evidencing the 2000 conviction in the record.

The BIA held that Casas-Castrillon's 1993 conviction stopped the accrual of the seven years of continuous residence required to be eligible for cancellation of removal. *See* 8 U.S.C. §§ 1229b(d)(1)(B), 1229b(a)(2). In so holding, the BIA found his convictions under Cal. Penal Code § 459 were crimes involving moral turpitude. Casas-Castrillon contends the BIA erred in concluding that his convictions involved moral turpitude and in retroactively applying the "stop-time" rule of § 1229b(d)(1)(B) to prevent him from fulfilling the continuous residence requirement of § 1229b(a)(2).

We review de novo “whether a state statutory crime constitutes a crime involving moral turpitude,” *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1067 (9th Cir. 2007) (en banc) (citation omitted), and whether application of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) is impermissibly retroactive. *See Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1194 (9th Cir. 2005).

## II

Although we have not, thus far, decided whether a violation of Cal. Penal Code § 459 is a crime involving moral turpitude,<sup>1</sup> we have held that residential burglary does not categorically involve moral turpitude. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) (interpreting Wash. Rev. Code § 9A.52.025(1)). The BIA’s order in this case was issued before *Cuevas-Gaspar* was decided and did not contain a reasoned analysis of the moral turpitude

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<sup>1</sup>In *Sareang Ye v. INS*, 214 F.3d 1128, 1135 n.5 (9th Cir. 2000), we described vehicle burglary as a crime of moral turpitude. This cursory statement, however, was not central to the holding and is distinguishable as nonbinding dicta. *See United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (Kozinski, J., concurring) (defining dictum as a statement incidental “to another legal issue that commands the panel’s full attention”).

question.<sup>2</sup> We therefore remand with instructions that the BIA reconsider whether a violation of Cal. Penal Code § 459 is a crime of moral turpitude under the categorical and modified categorical approaches established by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), and whether under the modified categorical approach the documentation for the conviction is legally sufficient to show that Casas-Castrillon pled guilty to a crime of moral turpitude. *See, e.g., Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1129-30 (9th Cir. 2007). *See also INS v. Ventura*, 537 U.S. 12, 17 (2002) (remand is appropriate where an agency can “make an initial determination.”); *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1081 (9th Cir. 2000) (“Appellate review is a particularly difficult process when there is nothing to review.”).

### III

We agree with Casas-Castrillon that application of § 1229b(d)(1)(B)’s stop-time rule to his 1993 conviction would be impermissibly retroactive. Enacted as part of IIRIRA, the stop-time rule took effect on April 1, 1997. The stop-time rule

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<sup>2</sup> It is unclear whether Casas-Castrillon’s moral turpitude claim was exhausted before the BIA under *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 (9th Cir. 2001) (en banc), but under the circumstances it is appropriate for the BIA to consider the issue on remand. Assuming that Casas-Castrillon did not adequately present the moral turpitude argument in his opening brief on appeal to this court, application of the waiver rule would result in manifest injustice. *See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003).

does not apply retroactively to the seven-year continuous residence requirement “for an alien who pled guilty before the enactment of IIRIRA and was eligible for discretionary relief at the time IIRIRA became effective.” *Sinotes-Cruz*, 468 F.3d at 1202-03. Casas-Castrillon met the seven-year continuous residence requirement and was eligible for cancellation of removal before IIRIRA was enacted. *Cf. Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1328 (9th Cir. 2006) (retroactive application of § 1229b(d)(1)(B) did not impair petitioner’s rights because petitioner was not eligible for discretionary relief at the time IIRIRA became effective). We therefore hold that the permanent stop-time rule of § 1229b(d)(1)(B) does not apply retroactively to stop Casas-Castrillon’s accrual of seven years of continuous residence under § 1229b(a)(2), and deny the government’s motion to remand the retroactivity question to the BIA. We do not otherwise determine Casas-Castrillon’s eligibility for cancellation of removal. We remand for further proceedings consistent with this disposition.

**PETITION FOR REVIEW GRANTED AND REMANDED.**