FILED

DEC 22 2008

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO JAVIER SANDOVAL-MACIAS, Petitioner, v. MICHAEL B. MUKASEY, Attorney General, Respondent.	No. 07-71354 Agency No. A090-514-757 MEMORANDUM*

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

Argued and Submitted December 9, 2008
Pasadena, California

Before: NOONAN and SILVERMAN, Circuit Judges, and CONLON,** District Judge.

Francisco Javier Sandoval-Macias, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his

---

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

** The Honorable Suzanne B. Conlon, United States District Judge for the Northern District of Illinois, sitting by designation.

appeal from an immigration judge's removal order. We have jurisdiction under 8 U.S.C. § 1252. *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1163 (9th Cir. 2006). Reviewing de novo, *id.*, we grant the petition for review.

The BIA's decision preceded this court's recent opinion in *United States v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008). The Attorney General acknowledges that, as in *Gomez-Leon*, the certified administrative record in Sandoval-Macias' case does not establish whether he was credited for his initial 180-day sentence, a condition of probation, in his subsequent 352-day sentence after a probation violation. This ambiguity results from Cal. Penal Code § 19.2, which restricts a trial court from sentencing a defendant to more than 365 days in jail as a term of probation absent a waiver by the defendant pursuant to *People v. Johnson*, 147 Cal. Rptr. 55 (Cal. Ct. App. 1978). *See Gomez-Leon*, 545 F.3d at 784-85. Under *Gomez-Leon*, the BIA should not have added Sandoval-Macias' sentences together to conclude that he is removable as an aggravated felon for committing "a crime of violence . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). The government has therefore not met its burden of demonstrating Sandoval-Macias' removability. *See Gomez-Leon*, 545 F.3d at 785.

In light of our disposition, we need not address Sandoval-Macias' remaining contentions.

We deny the Attorney General's motion to remand "to adduce further evidence." *See Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1133-35 (9th Cir. 2006) (en banc). We vacate Sandoval-Macias' removal order and remand for further proceedings consistent with this disposition. *See Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1080 (9th Cir. 2007).

PETITION FOR REVIEW GRANTED; REMANDED.