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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BALTAZAR CARDENAS-MENDOZA,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 05-73614

Agency No. A090-642-090

MEMORANDUM\*

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

Argued and Submitted October 16, 2007  
Resubmitted March 18, 2009

Before: CUDAHY \*\*, REINHARDT and PAEZ, Circuit Judges.

Petitioner, Baltazar Cardenas-Mendoza (“Cardenas-Mendoza”), seeks review of the decision by the Board of Immigration Appeals (“BIA”) that he is

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

\*\* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

statutorily ineligible for relief from removal under former INA § 212(c), 8 U.S.C. § 1182(c), and INA § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H). The BIA, adopting the decision of the Immigration Judge (“IJ”), held that Cardenas-Mendoza, who in 1988 pleaded guilty to misdemeanor possession of drug paraphernalia with intent to use, *see* Wash. Rev. Code § 69.50.102(a)(9); Wash. Rev. Code § 69.50.412, was not entitled to adjust to lawful permanent resident (“LPR”) status in August 1989 under the amnesty provisions of the Immigration Reform and Control Act, codified at INA § 245A, 8 U.S.C. § 1255a. We deny the petition for review.

First, the IJ and BIA had jurisdiction to review the 1989 legalization determination, pursuant to those provisions governing termination and rescission of status. *See* 8 C.F.R. § 245a.3(n) (1989); INA § 246(a), 8 U.S.C. § 1256(a). The IJ’s removal order was “sufficient to rescind [Cardenas-Mendoza’s] status,” INA § 246(a), notwithstanding the five-year statute of limitations. *See Monet v. I.N.S.*, 791 F.2d 752, 754 (9th Cir. 1986).

Second, Cardenas-Mendoza failed to exhaust before the BIA his arguments that (1) the drug paraphernalia statute did not “relat[e] to a controlled substance” under the categorical approach set out in *Taylor v. United States*, 495 U.S. 575 (1990); (2) the law was unclear at the time of his adjustment; and (3) *Luu-Le v. I.N.S.*, 224 F.3d 911 (9th Cir. 2000) should not have been retroactively applied to

his case. We therefore lack jurisdiction to review these issues in the first instance. 8 U.S.C. § 1252(d)(1); *Vargas v. INS*, 831 F.2d 906, 907-08 (9th Cir. 1987).

Finally, we agree with Cardenas-Mendoza that the BIA's reliance on *Matter of Koloamatangi*, 23 I. & N. Dec. 548 (BIA 2003), was misplaced, as there is no basis in the record for finding that Cardenas-Mendoza obtained his permanent resident status through fraud or misrepresentation.<sup>1</sup> Because we uphold the BIA's determination that Cardenas-Mendoza never lawfully adjusted status in 1989, however, the BIA's erroneous reliance on fraud as an additional basis for denying relief was harmless.

**PETITION DENIED.**

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<sup>1</sup> Cardenas-Mendoza also argues that he is eligible for a fraud waiver. *See* INA § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H). Because we conclude that there was no showing of fraud, such a waiver would be unnecessary.