

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 07 2009

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

BOUNRIT OUCH,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 04-71037

Agency No. A025-298-822

MEMORANDUM*

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

Submitted March 18, 2009**

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Bounrit Ouch, a native and citizen of Cambodia, petitions for review of the Board of Immigration Appeals' order summarily affirming an immigration judge's ("IJ") removal order. We have jurisdiction pursuant to 8 U.S.C. § 1252. We

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

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

review de novo whether an offense is an aggravated felony. *Penuliar v. Mukasey*, 528 F.3d 603, 608 (9th Cir. 2008). We grant the petition for review and remand.

Although Ouch's opening brief does not raise the issue of his removability, we retain discretion to review it "because the government briefed it, and thus suffers no prejudice from [the petitioner's] failure to properly raise the issue." *Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004).

The agency's decisions preceded our determination in *United States v. Vidal*, 504 F.3d 1072, 1086 (9th Cir. 2007) (en banc), that a conviction under Cal. Vehicle Code § 10851(a) is not categorically an aggravated felony. Moreover, the record of conviction in this case does not establish the factual predicate for Ouch's plea. *See Penuliar*, 528 F.3d at 612-14. We therefore grant the petition for review, vacate Ouch's removal order, and remand for further proceedings consistent with this disposition. *See Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079-80 (9th Cir. 2007). We need not address Ouch's remaining contentions.

Ouch's counsel is cautioned that his opening brief, which lacks record citations, does not meet this court's standards. *See generally* Fed. R. App. P. 28; 9th Cir. R. 28-2.8.

PETITION FOR REVIEW GRANTED; REMANDED.