

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

F I L E D

December 15, 2009

No. 08-60586
Summary Calendar

Charles R. Fulbruge III
Clerk

BARRINGTON BERTON MORGAN-WHITE,

Petitioner

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A90 395 622

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Barrington Berton Morgan-White petitions this court for review of the decision of the Board of Immigration Appeals dismissing his appeal and affirming the immigration judge's order that Morgan-White is ineligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(a) because he committed an aggravated felony. In August 2007, Morgan-White was convicted for possession of less than one gram of cocaine in violation of Texas law. Though

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Morgan-White was convicted in 2006 for attempted possession of a controlled substance, a misdemeanor, he was not prosecuted under the Texas recidivist statute.¹

Morgan-White contends the Board improperly characterized his 2007 Texas conviction for cocaine possession as an aggravated felony punishable under the Controlled Substances Act² because he was neither prosecuted nor convicted under a relevant federal or state recidivist offender statute. He argues the Board should not have followed the hypothetical approach used by this court in *United States v. Sanchez-Villalobos*³ because that case is inconsistent with prior precedent of this court. Morgan-White also argues that the Board's analysis in *In re Carachuri-Rosendo*⁴ is entitled to some deference and that the rule of lenity should be applied in favor of Morgan-White. Morgan-White's arguments are foreclosed by our decision in *Carachuri-Rosendo v. Holder*⁵ and accordingly, Morgan-White's petition for review is DENIED.

¹T EX. PEN. CODE §§ 12.42 & 12.43.

² 21 U.S.C. § 844(a).

³ 412 F.3d 572 (5th Cir. 2005).

⁴ 24 I. & N. Dec. 382 (BIA 2007).

⁵ 570 F.3d 263 (5th Cir. 2009), *petition for cert. filed* (July 15, 2009) (No. 09-60).