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The Burden of Proof and Relief from Removability: Who Benefits From the Ambiguity in an Inconclusive Record of Conviction?

by Joshua Lunsford

Perhaps one of the most discussed—if not the most controversial—areas of immigration law (that is, from a legal perspective) is the criminal-related grounds for inadmissibility and removability. For the last 5 years, the columns of this newsletter have been consumed by discussions concerning the inner-workings of the mystifying creature that we like to call the "modified categorical approach," the ongoing—and often bemusing—efforts to define statutory terms like "conviction" or "fraud," and the myriad other issues that inevitably become relevant when immigration consequences or benefits are contingent on whether an underlying conviction is for any one of the generic offenses set forth by the Act.[1]

After numerous remands, reconsiderations, rehearings, en banc decisions, and the occasional writ granted by the Supreme Court, immigration scholars have exhausted countless hours trying to define the exact parameters for when immigration consequences attach to criminal convictions. *See, e.g.*, *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008), *rev'g* 503 F.3d 997 (9th Cir. 2007), *abrogated by Nijhawan v. Holder*, 557 U.S. 29 (2008), *as recognized in* 593 F.3d 979 (9th Cir. 2009), *reh'g en banc denied*, 615 F.3d 1043 (9th Cir. 2010), *and cert. granted in part*, 131 S. Ct. 2900 (2011). Yet again, however, the journey to understanding these consequences has led us down a road that is relatively bare in comparison to those related areas that unmistakably reflect the well-documented travels of the Federal courts.

The present path that immigration courts, the Board, and circuit courts are trying to pave revolves around an issue that has been a lynchpin of American jurisprudence for centuries: the burden of proof.

In immigration proceedings, the initial burden is generally on the Government to prove that an alien is removable from the United States

by clear and convincing evidence, with the exception of arriving aliens and aliens who are present without inspection. Section 240(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3)(A). The burden then shifts to the alien to demonstrate that "he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion." 8 C.F.R. § 1240.8(d); *see also* section 240(c)(4)(A)(i) of the Act (stating that "[a]n alien . . . has the burden of proof to establish that the alien . . . satisfies the applicable eligibility requirements [for the relief sought]"). Moreover, "[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. § 1240.8(d).

Consider, for instance, an alien applying for cancellation of removal for certain permanent residents under section 240A(a) of the Act. Assume that the alien was convicted under a statute that is "divisible" for purposes of defining the offense as an aggravated felony. *See* section 240A(a)(3) of the Act (stating that "[t]he Attorney General may cancel removal in the case of an alien who . . . has not been convicted of any aggravated felony"). That is, in addition to proscribing conduct that falls within the applicable aggravated felony definition, the statute also applies to conduct that does not conform to the generic definition. In other words, the offense proscribed by the statute of conviction does not categorically constitute an aggravated felony. Further assume that an examination of the record of conviction is without avail, because the conviction documents fail to limit the alien's conduct to that which either does or does not constitute an aggravated felony. Thus, even after applying the modified categorical approach, it is *not clear* whether or not the alien was convicted of an offense that constitutes an aggravated felony—that is to say, the record of conviction is "inconclusive."

Under 8 C.F.R. § 1240.8(d), an applicant for relief under section 240A(a) has the burden to demonstrate, inter alia, that he or she was not convicted of an aggravated felony. *See* section 240A(a)(3) of the Act. However, as earlier columns have reported, it is not clear what happens when an alien proffers an inconclusive record of conviction. *See* Edward R. Grant, *Super Circuit?: Random Musings on 2011's Top Twenty*, Immigration Law Advisor, Vol. 5, No. 10, at 1, 16-17 (Nov.-Dec. 2011); Edward R. Grant, *Fruit or Vegetable? Supreme Court To Decide if Tax Fraud is "Fraud" Under Section 101(a)(43)(M)(i) of the Act*, Immigration Law Advisor, Vol. 5, No. 5, at 1, 2 (May-June 2011); Edward R. Grant, *Circuit Bracketology: Lots of Upsets, But No Clear Favorites*, Immigration Law Advisor, Vol. 5, No. 2, at 6, 7 (Feb. 2011). Has the burden been satisfied, in that the inconclusive record of conviction demonstrates that the alien was not convicted—in the categorical sense—of a relief-barring offense? Or does the ambiguity render an alien's proof insufficient, in that the record of conviction does not necessarily prove that the applicant was *not* convicted of such an offense?

Inconclusive Record Okay

The Ninth Circuit was the first circuit court to address this issue. In *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9th Cir. 2007), an applicant for cancellation of removal argued that an inconclusive record of conviction was sufficient to satisfy his burden of proving that he was not convicted of an aggravated felony. The court began its discussion by emphasizing that the question whether a conviction is for a generic offense—for example, an aggravated felony—is the same for purposes of removability and relief, because each inquiry requires adherence to the Supreme Court's mandate in *Taylor v. United States*, 495 U.S. 575, 599-602 (1990), that a predicate conviction must *necessarily rest* on facts that constitute a generic offense. *Sandoval-Lua*, 499 F.3d at 1131. Based on its understanding of *Taylor*, the Ninth Circuit stated that there are only two conclusions one can reach after considering an alien's conviction documents: "either the record of conviction shows that the predicate conviction was for the generic crime or it fails to show the conviction was for the generic crime." *Id*. Because the alien's record of conviction was inconclusive—that is, the conviction documents failed to demonstrate that his offense was for the generic crime—the Ninth Circuit held that the alien had met his burden by "affirmatively prov[ing] . . . that he was not *necessarily convicted* of any aggravated felony." *Id*. at 1130 (emphasis added) (internal quotation marks omitted).

The Second Circuit, albeit in a much more limited fashion, has also provided insight regarding its treatment of an inconclusive record of conviction. In *Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008), the court, although not explicitly, appears to align its logic with a position analogous to that of the Ninth Circuit: an inconclusive record of conviction will suffice. As the court stated, an alien satisfies his burden to prove eligibility for

relief by demonstrating that "the minimum conduct for which he was convicted was not [a relief-barring offense.]" *Id*. Thus, an inconclusive record of conviction is likely sufficient because the ambiguity demonstrates that the minimum conduct for which the alien was convicted falls outside the definitional confines of the generic offense. *See id*. The Fourth Circuit has interpreted this decision in a similar fashion. *See Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011) (stating that "[b]oth the Second and Ninth Circuits have held that a noncitizen satisfies his burden of proving that he has not been convicted of [a relief-barring offense] . . . simply by proffering an inconclusive record of conviction").

No record? No problem!

The problem with *Sandoval-Lua* and *Martinez* (to the extent that the respective holdings are analogous) is that both decisions fail to address one critical question: what documents, if any, must an alien submit to demonstrate that his or her record of conviction is *truly* inconclusive? Does an alien satisfy this burden by submitting a *single document* that fails to demonstrate the conduct that formed the basis of his or her conviction? What if the only document submitted by the alien is not even proper for consideration under the modified categorical approach? *Cf. Garcia Tellez v. Holder*, No. 07-72366, 2011 WL 4542678 (9th Cir. Oct. 3, 2011).

To this same end, how does this "inconclusive" standard change, if at all, the role of an Immigration Judge? Is it permissible to inquire as to any additional conviction documents that may be available from the underlying proceeding before determining that an alien has satisfied his or her burden? Can an alien be *required* to produce additional documents?

Similar concerns have been echoed by the Board. In *Matter of Almanza-Arenas*, 24 I&N Dec. 771, 772-73 (BIA 2009), the Board affirmed an Immigration Judge's denial of an application for relief, finding that the alien failed to satisfy his burden of proof—namely, that he was not convicted of a crime involving moral turpitude. Although the Board acknowledged the Ninth Circuit's prior decision in *Sandoval-Lua*, it distinguished *Matter of Almanza-Arenas* in two important respects. *See id* at 775-76. First, it held that the passage of the REAL ID Act clarified that an alien is charged with the burden of proving eligibility for relief, ultimately rendering the analysis in *Sandoval-Lua* inapplicable to post-REAL ID Act cases. *See id*.; *see also* section 240(c)(4)(A)(i) of the Act. Lastly, the Board found that the alien had failed to meet his burden of proof because he did not comply with the Immigration Judge's request to supplement the record with additional conviction documents. *Matter of Almanza-Arenas*, 24 I&N Dec. at 775-76. As the Board warned, "[t]o hold otherwise would allow the respondent to pick and choose, to his advantage, the portions of evidence relevant to the determination of his eligibility for relief." *Id*. at 776.

The Ninth Circuit responded in *Rosas-Castaneda v. Holder*, 630 F.3d 881, 885-88 (9th Cir. 2011), *superseded by* 655 F.3d 875 (9th Cir. 2011), by rejecting both approaches adopted by the Board in *Matter of Almanza-Arenas*. First, the court held that because the passage of the REAL ID Act did nothing more than affirm the regulatory provision that was at issue in *Sandoval-Lua*, the analysis remains the same: an applicant for relief satisfies his or her burden by submitting an inconclusive record of conviction. *Id*. at 885-86. Second, the court held that an alien cannot be required to produce additional documents concerning the record of conviction, because the REAL ID Act only permits an Immigration Judge to require an alien to submit additional evidence when it is needed to supplement oral testimonial, not documentary evidence. *See id*. at 886-88.

Without the ability to request additional documentation, it is likely that the Board's fear, at least in cases arising in the Ninth Circuit, has come true: an alien has the ability to "pick and choose" the relevant documentary evidence submitted in an attempt to prove eligibility for relief. [2]

As the Ninth Circuit recognized, the relevant inquiry focuses on "whether the record contains judicially noticeable documents which satisfy [the alien's] burden of establishing by a preponderance of the evidence that his . . . conviction . . . does not constitute a conviction of an aggravated felony." *Id*. at 888 (quoting *Sandoval-Lua*, 499 F.3d at 1129) (internal quotation marks omitted). Taken at face value, the Ninth Circuit appears to boil the burden of proof down to two elements: (1) the alien must submit some variation of documents proper for consideration under the modified categorical approach; and (2) those documents must not limit the conduct for which the alien was convicted to a relief-barring offense. *See Rosas-*

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CIRCUIT COURT DECISIONS FOR JANUARY 2012

by John Guendelsberger

The United States courts of appeals issued 220 decisions in January 2012 in cases appealed from the Board. The courts affirmed the Board in 196 cases and reversed or remanded in 24, for an overall reversal rate of 10.9%. There were no reversals from the Fifth, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for January 2012 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	4	0	0.0
Second	65	63	2	3.1
Third	20	17	3	15.0
Fourth	14	11	3	21.4
Fifth	9	7	2	22.2
Sixth	9	8	1	11.1
Seventh	1	1	0	0.0
Eighth	2	2	0	0.0
Ninth	72	60	12	16.7
Tenth	6	5	1	16.7
Eleventh	18	18	0	0.0
All	220	196	24	10.9

The 220 decisions included 121 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 39 direct appeals from denials of other forms of relief from removal or from findings of removal; and 60 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	121	115	6	5.0
Other Relief	39	27	12	30.8
Motions	60	54	6	10.0

The six reversals or remands in asylum cases involved nexus (two cases), well-founded fear (two cases), and Convention Against Torture (two cases). The 12 reversals or remands in the "other relief" category included application of the modified categorical approach, crimes involving moral turpitude, the scope of the term "rape" in the aggravated felony definition, the meaning of "conviction," and a *Judulang* section 212(c) "statutory counterpart" remand. The six reversals in motions cases involved ineffective assistance of counsel, an in absentia order of removal based on lack of notice, a motion to reconsider an issue not addressed by the Board, the departure bar in 8 C.F.R. § 1003.2(d), and an appeal dismissed by the Board as untimely.

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RECENT COURT OPINIONS

Supreme Court:

Kawashima v. Holder, No. 10-577, 2012 WL 538277 (U.S. Feb. 21, 2012): The U.S. Supreme Court held (by a 6-3 margin) that a husband and wife, who were convicted under 26 U.S.C. § 7206(1) (willfully making and a subscribing a false tax return) and § 7206(2) (aiding and assisting in the preparation of false tax returns), respectively, were each convicted of aggravated felonies under section 101(a)(43)(M)(i) of the Act. Section 101(a)(43)(M) of the Act contains two clauses. The first clause describes offenses that involve "fraud or deceit in which the loss to the victim . . . exceeds $10,000." Clause (ii) relates to offenses described in 26 U.S.C. § 7201 "(relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." The issue raised was whether clause (ii) meant that the only tax crime falling under this section is 26 U.S.C. § 7201. The majority opinion (written by Justice Thomas) answered this question in the negative. The Court held that clause (i) clearly includes all crimes involving fraud or deceit where the loss to the victim exceeds $10,000. The Court found that this category was not limited to crimes containing the terms "fraud" or "deceit" as formal elements, but rather included the broader class of crimes containing "elements that necessarily entail fraudulent or deceitful conduct." The Court rejected the petitioners' argument that in reading the two clauses of section 101(a)(43)(M) together, it must be concluded

that clause (i) refers to general, nontax crimes involving fraud and deceit resulting in "actual losses to real [i.e., nongovernment] victims"; while clause (ii) covers tax crimes involving the loss of Government revenue. The Court concluded to the contrary that clause (ii) was more likely meant by Congress to demonstrate that tax evasion qualifies as an aggravated felony, and not to impliedly limit the scope of clause (i). The Court therefore rejected the petitioners' argument that the inclusion of tax crimes under clause (i) would render clause (ii) superfluous. Because the Court found the statute's language to be sufficiently clear, it found no need to invoke the rule of lenity, under which an ambiguous deportation statute is interpreted in the alien's favor. The dissenting opinion (written by Justice Ginsberg and joined by two others) expressed the belief that clause (i) was not meant to include tax crimes, opining that such a conclusion would render clause (ii) superfluous. The dissenters noted that because tax offenses span a wide range, it would be understandable that Congress would choose to single out tax evasion, which has historically been viewed by the courts as the most serious tax crime, for aggravated felony designation.

First Circuit:

Arevalo-Giron v. Holder, No. 10-2357, 2012 WL 266024 (1st Cir. Jan. 31, 2012): The First Circuit denied the petition for review from an Immigration Judge's decision (affirmed by the Board) denying asylum, withholding of removal, and relief under the Convention Against Torture ("CAT") from Guatemala. On appeal, the petitioner argued that she will suffer persecution if returned to Guatemala on account of her membership in one of two particular social groups: (1) single women perceived to have substantial economic resources or (2) former children of war. While expressing doubt that either proposed group is legally cognizable, the court held that it need not reach the question because the Immigration Judge properly determined that any potential hardship the petitioner might face would not be on account of her membership in either such group. The court agreed with the Immigration Judge's determination that the murder of the petitioner's father, the conscription of her brothers, and her own lack of education resulted from "Guatemala's horrific war" and not as a result of the petitioner's membership in a claimed social group. Dismissing the petitioner's claim that she would suffer future persecution at the hands of violent gangs on account of her membership in the proposed group of single women of perceived means, the court found that the evidence indicated that such gang violence is indiscriminate and motivated by greed. The court thus concluded that the record failed to establish that women, whether single or married, were more likely to be targeted for such violence than wealthy men.

Fourth Circuit:

Prudencio v. Holder, No. 10-2382, 2012 WL 256061 (4th Cir. Jan. 30, 2012): The Fourth Circuit vacated an Immigration Judge's decision (affirmed by the Board) ordering the petitioner removed for having been convicted of a crime of moral turpitude ("CIMT") within 5 years of his admission to the U.S. The petitioner had pled guilty to the crime of contributing to the delinquency of a minor, a misdemeanor, under section 18.2-371 of the Virginia Code. On appeal, the petitioner challenged the Immigration Judge's application of the three-step modified categorical approach established by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 867 (A.G. 2008). In that decision, the Attorney General added to the traditional two-step approach, applied by most circuits to determine crimes of moral turpitude, a third step, in which an Immigration Judge may consider evidence outside the record of conviction to the extent it is deemed "necessary and appropriate." The Immigration Judge had relied on this third step in the instant case to consider a police narrative stating that the petitioner had engaged in sexual relations with a 13-year-old girl when he was over the age of 18. The court disagreed with the Attorney General's opinion (as stated in *Silva-Trevino*) that the statutory language of the moral turpitude statute is ambiguous. The court noted that the Attorney General focused on the word "involving" in isolation, whereas the court deemed the phrase "crime involving moral turpitude" in its entirety to be a term of art in use for over 100 years and predating the Act. The court found support for this unitary understanding of the phrase in the syntax of another section of the Act, section 212(a)(2)(A)(i)(I). The court further determined that the criminal law meaning of the term "conviction" does not change when used in an immigration statute. Thus finding the statute to be unambiguous, the court declined to accord the Attorney General's interpretation of the statutory language *Chevron* deference. The court further disagreed with the DHS's argument that language in the Supreme Court decision in *Nijhawan v. Holder*, 557 U.S. 29 (2009), decided after *Silva-Trevino*, supports "an unrestricted circumstance-specific inquiry in the absence of express guidance from Congress." The court held that permitting such type of "unbridled evaluation" would pose "very real evidentiary concerns" by allowing an Immigration Judge "to rely on

documents of questionable veracity as 'proof' of an alien's conduct."

Turkson v. Holder, No. 10-1984, 2012 WL 234369 (4th Cir. Jan 26, 2012): The Fourth Circuit vacated a decision of the Board denying protection under Article III of the U.N. Convention Against Torture to a citizen of Ghana. The petitioner had been subjected to violence in Ghana while distributing political pamphlets there for a party in which his father held a leadership position. The petitioner was convicted of multiple crimes in the U.S., including a controlled substance aggravated felony which rendered him ineligible for asylum and withholding of removal. However, an Immigration Judge granted him deferral of removal under CAT. The Immigration Judge's specific findings included (1) that the petitioner and his witness were credible; (2) that the petitioner had suffered beatings at the hands of government officials in 1995 during interrogation regarding his political activities, which resulted in several serious injuries; and (3) that political violence continues at present in Ghana, where prison conditions remain "harsh" and rural conditions are "violent" and "brutal." The Immigration Judge therefore concluded that the petitioner had suffered torture before leaving Ghana in 1995; remained more likely than not to be detained by police upon return to Ghana; and based on the Immigration Judge's findings of "excessive force" by the police, would thus be more likely than not to suffer torture. The Board reviewed the question whether it was more likely than not that the petitioner would suffer torture in Ghana de novo and reversed. On appeal, the Fourth Circuit determined that the Board had applied the wrong legal standard in its review. Referencing the Third Circuit's decision in *Kaplun v. Attorney General of the U.S.*, 602 F.3d 260 (3d Cir. 2010), which addressed the same issue, the court held that the prediction of future harm consists of both factual and legal determinations. In this case, the Immigration Judge's pertinent factual determinations regarding the prediction of future harm were (1) that the petitioner had suffered brutal violence in Ghana on account of his political beliefs; (2) that political violence continues to occur there with Government sanction; (3) that police in Ghana employ brutal (and sometimes fatal) force; and (4) that if returned to Ghana, the petitioner would likely suffer violence, detention, and police brutality. The Immigration Judge then made the legal determination that the above facts satisfied the legal definition of torture under the CAT. The court held that the Board should have reviewed the factual findings of the Immigration Judge under the "clearly erroneous" standard and only have reviewed de novo the legal conclusion that the petitioner's prior experiences and anticipated treatment met the definition of torture. The court therefore reversed and remanded to the Board for further consideration.

Seventh Circuit:

Cece v. Holder, No. 11-1989, 2012 WL 383949 (7th Cir. Feb. 6, 2012): The Seventh Circuit denied a petition for review challenging the denial of asylum by an Immigration Judge (which was affirmed by the Board). The Immigration Judge had originally granted the petitioner's application for asylum from Albania in 2006, finding that she demonstrated a well-founded fear of persecution on account of her membership in a particular social group consisting of "young women who are targeted for prostitution by traffickers in Albania." The Immigration Judge further found that the Albanian Government was unable or unwilling to protect members of that group. On appeal, the Board reversed, holding (1) that the evidence did not establish that such a group was socially visible in Albania; (2) that group members did not share a common "narrowing characteristic other than their risk of being persecuted"; and (3) that the petitioner could avoid persecution by relocating to another part of the country. Deferring to the Board's decision, the Immigration Judge denied asylum on remand; the Board denied the petitioner's appeal from that decision. In affirming the Board, the Seventh Circuit stated that members of a particular social group "must share a common immutable or fundamental characteristic beyond the risk, past *or* present, of harm." Thus, even if the petitioner's proposed group fears forced prostitution, it cannot meet the social group definition where the sole shared characteristic is the fact of persecution or the facing of danger. The court additionally upheld the Immigration Judge's ruling that the petitioner had failed to establish a fear of future persecution (in spite of expert testimony to the contrary) where she had relocated to the capital and lived for a year without incident prior to departing Albania in 2002.

Chun Hua Zheng v. Holder, No. 11-2322, 2012 WL 273756 (7th Cir. Jan. 31, 2012): The Seventh Circuit denied the petition for review from the Board's decision denying the petitioner's application for withholding of removal to China. The court noted that the petitioner was properly barred from seeking asylum because of her failure to file an application within 1 year of her entry into this country. The court further found that the evidence of record was insufficient to overturn the conclusions of the Immigration Judge and the Board that the petitioner

had failed to meet her burden of proof regarding her withholding claim. The facts of the claim are that the petitioner, while visiting her pregnant cousin in Fujian Province, forcibly resisted efforts of Family Planning officers seeking to arrest the cousin, who was in violation of local rules prohibiting unmarried women from giving birth. The petitioner was beaten and bruised in the ensuing struggle, after which she was arrested and jailed for 3 days, where she was beaten twice more. The petitioner was released without charges, but she was required to report for unknown reasons. The petitioner did not seek medical attention for her injuries. After 3 weeks, the petitioner fled the country to the U.S. in 1999, where she subsequently married and gave birth to two children who presently reside in China with their grandparents. The court focused on whether the petitioner suffered persecution in China. It noted that case law regarding the severity of the beating is distinguishable from the facts of this case. The court also discussed the issue of motive in both the actions of the petitioner in resisting the officers, and of the officers in beating and arresting the petitioner. The court noted that the petitioner may have been motivated by a desire to protect her cousin rather than to resist the Government's coercive family planning policy and added that it is also a crime in the U.S. to violently resist arrest, even an unlawful one. Further, the court observed that the beating of the petitioner could have various motives, including the sadism or misogyny of the prison guards, an isolated incident of an out-of-control police officer, or anger at the petitioner's having fought with family planning officials. Noting the lack of sufficient country condition evidence establishing specifics on the enforcement of the family planning policies, including data regarding the frequency with which returnees are subjected to forcible sterilization based on overseas births, the court upheld the Board's decision. Citing the need for "evidence-based law," the court, in dicta, called on the Board to "assemble and collate" existing data and "offer an expert opinion" on the likelihood of persecution faced by women returning to China based on various fact patterns relating to family planning.

Ninth Circuit:

Tyson v. Holder, No. 08-70219, 2012 WL 248001 (9th Cir. Jan. 27, 2012): The Ninth Circuit reversed the Board's decision finding the petitioner ineligible to apply for a waiver under the former section 212(c) of the Act. The respondent, a citizen of Australia and lawful permanent resident ("LPR") of the U.S. since 1977, was arrested in 1980 while returning from a trip abroad with 64.5 grams of heroin in her possession. The petitioner entered into a stipulation with the Government as to the facts of the case, which were then submitted to the district court to determine guilt or innocence based on the stipulation. The district court found the petitioner guilty of importing heroin, but not guilty of the charge of intending to distribute. Upon return from a trip abroad 24 years later, the petitioner was placed into removal proceedings based on the 1980 drug conviction. Before the Immigration Judge, the petitioner sought to apply for a section 212(c) waiver, relying on the Supreme Court's holding in *INS v. St. Cyr*, 533 U.S. 289 (2001), that such relief remained available to aliens who, prior to the waiver's 1996 repeal by Congress, had entered into a plea bargain with the expectation that in doing so, they would remain eligible for such relief. The Immigration Judge rejected this argument, determining that *St. Cyr* would not apply to an alien who pled not guilty and proceeded to trial. The Board affirmed. However, on appeal the Ninth Circuit found the petitioner's stipulated facts trial similar to a guilty plea for purposes of applying *St. Cyr*. The court found that like a defendant who pleads guilty, a defendant in a stipulated facts trial (1) waives the constitutional right to trial by jury; (2) admits to the truth of certain facts which thus relieves the Government of its burden of proving such facts beyond a reasonable doubt; (3) waives the constitutional right to confront and cross-examine witnesses against her; and (4) waives the right to present evidence in her own behalf. Accordingly, the court held that barring the petitioner from section 212(c) relief would create an impermissible retroactive effect. The court therefore reversed and remanded with instructions to consider the merits of the petitioner's waiver application.

BIA PRECEDENT DECISIONS

In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), the Board considered whether it or an Immigration Judge has the authority to administratively close a case if either party objects. The Board recognized that administrative closure is a tool created for the convenience of the Immigration Courts and the Board to temporarily remove a case from a calendar or docket. Administrative closure may be appropriate pending an action or event that is relevant to immigration proceedings but beyond the control of the parties and that may not occur for a significant or indeterminate amount of time. Reviewing its jurisprudence on the issue of administrative closure, the Board noted that it had stated a general rule in

Matter of Gutierrez, 21 I&N Dec. 479 (BIA 1996), that opposition by either party precluded administrative closure. The Board recognized that the rule, interpreted as providing the Government with absolute veto power over administrative closure requests, was at odds with the delegated authority and responsibility of Immigration Judges and the Board to exercise independent judgment and discretion in adjudicating cases and to take any necessary and appropriate action to reach a disposition.

Additionally, the Board pointed out that the Second, Sixth, and Ninth Circuits had criticized its decision in *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), which included the Government's lack of opposition as a factor required for granting a motion to reopen to apply for adjustment of status based on a family-based petition. The courts objected to permitting the Government to unilaterally block such a motion, finding that it would interfere with the Board's exercise of its independent judgment and discretion. In response, the Board held in *Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009), that a motion to reopen under *Matter of Velarde* may not be denied based exclusively on opposition to the motion by the Department of Homeland Security ("DHS"). Subsequently, in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), and *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009), the Board addressed DHS opposition to a request for a continuance pending the adjudication of family-based and employment-based visa petitions and concluded that unsupported DHS opposition carries little weight and continuance requests should be evaluated according to the totality of the circumstances.

Extending that analysis to administrative closure, the Board held that neither Immigration Judges nor the Board may abdicate the responsibility to exercise independent judgment and discretion by permitting one party's opposition to act as an absolute bar when circumstances warrant administrative closure. The Board therefore concluded that Immigration Judges and the Board have the authority to administratively close proceedings under appropriate circumstances, even if a party opposes.

The Board identified factors that should be weighed when evaluating a request for administrative closure, including but not limited to : (1) the reason administrative closure is sought; (2) the basis for any opposition; (3) the likelihood the respondent will succeed on any pending petition, application, or other action outside of removal proceedings; (4) the anticipated duration of the closure; (5) any responsibilities of either party in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings when the case or appeal is recalendared. As examples of situations appropriate for administrative closure, the Board cited a case where an alien is the beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing an application for naturalization, or a case where an alien has properly appealed from the denial of a prima facie approvable visa petition but the appeal has not been forwarded to the Board for adjudication. The Board noted that it would be inappropriate for an Immigration Judge or the Board to administratively close proceedings if the request is based on a purely speculative event or action; an event or action that is certain to occur but not within a time frame that is reasonable under the circumstances; or an event or action that may or may not affect the course of an alien's immigration proceedings. Notwithstanding, the Board emphasized that each situation must be evaluated according to the totality of the circumstances. Overruling *Matter of Gutierrez* and related cases, the Board concluded that Immigration Judges and the Board may, in the exercise of independent judgment and discretion, administratively close proceedings under the appropriate circumstances even if one party opposes. Upholding the Immigration Judge, the Board agreed that administrative closure was appropriate in this case and dismissed the DHS's appeal.

In *Matter of Castro Rodriguez*, 25 I&N Dec. 698 (BIA 2012), the Board held that an alien convicted under a State law of possession of marijuana with intent to distribute bears the burden of showing that the offense is not an aggravated felony because it involved a "small amount of marihuana for no remuneration" within the meaning of 21 U.S.C. § 841(b)(4), which may be established with evidence outside of the record of conviction. The respondent had been convicted of a Virginia misdemeanor offense of possession with intent to give or distribute less than one-half ounce of marijuana, and he was fined and sentenced to 12 months' imprisonment. The Immigration Judge found that the respondent was removable under section 237(a)(2)(B)(i) of the Act, but his offense was not an illicit trafficking aggravated felony as defined in section 101(a)(43)(B) of the Act because the conviction involved a small amount of marijuana and no remuneration. Finding the respondent eligible for section 240A(a) cancellation of removal, the Immigration Judge granted his application in the exercise of discretion. The DHS appealed, arguing that the Immigration Judge improperly considered evidence outside the record of

conviction in reaching his conclusion, and even if the evidence was properly consulted, it did not establish that the respondent possessed a small amount of marijuana for no remuneration.

The Board identified its initial inquiry as whether an alien may present evidence outside the record of conviction to show that a conviction for possession of marijuana with intent to distribute was not for an aggravated felony because the offense involved a "small" amount and the alien intended its distribution to be "for no remuneration." If the answer was yes, the Board reasoned that it must next determine whether the Immigration Judge correctly found that the respondent made such a showing based on the facts of this case. Examining the first issue, the Board found it to be a question of law to be reviewed de novo. The Board concluded that the determination whether the amount of marijuana was "small" was a mixed question of law and fact subject to de novo review, but the issue whether the alien possessed the marijuana with the intent to give or distribute it for no remuneration was a question of fact to be reviewed for clear error.

The Board looked to its decision in *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008), which held that a State misdemeanor offense of conspiracy to distribute marijuana constitutes an aggravated felony under section 101(a)(43)(B) of the Act where its elements correspond to the elements of the Federal felony offense of conspiracy to distribute an indeterminate amount of marijuana, defined in 21 U.S.C. § 841(a)(1) and (b)(1)(D). The respondent in *Matter of Aruna* argued that his Maryland offense of marijuana distribution did not correspond to a Federal felony because 21 U.S.C. § 841(b)(4) provides that an offender who distributes a "small amount of marihuana for no remuneration" must be treated as if he committed simple possession, a Federal misdemeanor offense. Rejecting that argument, the Board reasoned that 21 U.S.C. § 841(b)(4) does not define "elements" of the "offense" of "misdemeanor marijuana distribution" but instead defines a "mitigating exception" to the otherwise applicable 5-year statutory maximum sentence.

The Board pointed out in *Matter of Aruna* that as with an affirmative offense, the defendant bears the burden to prove the additional facts that trigger this mitigating exception—the "smallness" of the amount of marijuana and the absence of remuneration. Concluding that the facts to be proved to support a reduced sentence do not constitute "elements" of the offense, as contemplated in a categorical analysis, the Board held in that case that the respondent's Maryland offense was a "drug trafficking crime," and an aggravated felony, because its elements corresponded to those of the Federal felony of conspiracy to distribute an indeterminate amount of marijuana.

Because the facts of the amount of marijuana and the absence of remuneration are not categorical elements of a drug trafficking offense, the Board reasoned that such an inquiry is "circumstance-specific." Turning to the case at hand, the Board agreed with the Immigration Judge that an alien may offer the "affirmative defense" of "a small amount of marihuana for no remuneration" when the law of the convicting jurisdiction does not have a "mitigating exception" comparable to 21 U.S.C. § 841(b)(4). Thus, the Board concluded that a respondent may attempt to prove by any probative evidence that he or she is not an aggravated felon under the Act because the underlying drug trafficking offense involved "a small amount of marihuana for no remuneration." Additionally, the Board held that it is a respondent's burden to prove by a preponderance of the evidence that the amount of marijuana was small and that no remuneration was involved.

The Board agreed with the Immigration Judge that the respondent's possession of less than 30 grams constituted possession of a "small" amount. However, since the burden of proving a lack of intent to distribute marijuana for remuneration falls to the respondent, the Board concluded that the record should be remanded for additional fact-finding on that issue.

In *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012), the Board held that an asylum applicant who had established past persecution but no longer had a well-founded fear of persecution may still warrant a discretionary grant of humanitarian asylum pursuant to 8 C.F.R. §1208.13(b)(1)(iii)(A) and (B), based either on "compelling reasons" stemming from the severity of the past persecution or on a "reasonable possibility" that the applicant may suffer "other serious harm" if removed to his or her country.

Initially the Immigration Judge found, and the Board affirmed, that the Albanian respondent had not suffered past persecution and, in any case, circumstances in Albania had changed to the extent that any well-founded fear was overcome. The Eighth Circuit disagreed, finding that the respondent had experienced severe mistreatment

amounting to persecution and remanding the case to the Board, which remanded it to the Immigration Judge. The Immigration Judge then found that the DHS had rebutted the presumption prescribed in 8 C.F.R. § 1208.13(b)(1) that the respondent had a well-founded fear of persecution if returned to Albania. Additionally, the Immigration Judge determined that the respondent had not shown an independent well-founded fear. On appeal, the Board affirmed the Immigration Judge's decision, and although the Immigration Judge had not addressed the respondent's request for humanitarian asylum, the Board found that such relief was not warranted. The Eighth Circuit upheld the determination that the rebuttable presumption of a well-founded fear of persecution had been overcome by the DHS, but it remanded the case again for clarification whether the Board had evaluated all relevant factors in resolving the humanitarian asylum claim.

The Board noted that under the regulatory framework, an alien who establishes past persecution but whose presumption of a well-founded fear has been rebutted and who has not demonstrated another basis for a well-founded fear of persecution may still have a path to a grant of asylum. Pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(A) and (B), such an alien's eligibility for a humanitarian grant of asylum should be considered if he or she can establish: (1) "compelling reasons" stemming from the severity of the past persecution for being unable or unwilling to return to his or her country; or (2) a "reasonable possibility" that he or she may suffer "other serious harm" if removed to his or her country. Further interpreting the regulation, the Board pointed out that the applicant bears the burden of proving that either form of humanitarian asylum is warranted in the exercise of discretion.

Reviewing its jurisprudence on humanitarian asylum, the Board noted a number of cases granting humanitarian asylum based on "compelling reasons" relating to the severity of the past persecution; however, §1208.13(b)(1)(iii)(B), the "other serious harm" provision, has garnered minimal attention from adjudicators since its 2001 enactment. The Board observed that adjudicators need not decide whether there are "compelling reasons" to grant humanitarian asylum before considering if "other serious harm" warrants such relief—an applicant who suffered past persecution may state if he or she seeks humanitarian asylum under either or both provisions, and if relief is denied under one, the adjudicator should also consider the other.

Noting that the "compelling reasons" provision requires a showing of "atrocious" past harm, the Board differentiated the "other serious harm" inquiry as "forward-looking," focusing on current conditions and the potential for new physical or psychological harm to the applicant. It explained that "other serious harm" must rise to the level of persecution, but unlike the "compelling reasons" provision, it may be unrelated to the past harm. The Board emphasized that no nexus between the "other serious harm" and a protected ground under the Act need be established.

As guidance for an analysis regarding "other serious harm," the Board instructed adjudicators to consider conditions in the country of return, such as civil strife, extreme economic deprivation beyond economic disadvantage, or situations that might cause the applicant severe mental or emotional harm or physical injury. The Board further advised that the "other serious harm" factors should be considered under the totality of the circumstances. The record was remanded for the Immigration Judge to conduct additional fact-finding, if necessary, and to consider whether the respondent has shown that he warrants humanitarian asylum in accordance with 8 C.F.R. § 1208.13(b)(1)(iii)(A) or (B).

REGULATORY UPDATE

77 Fed. Reg. 9590 (Feb. 17, 2012)
DEPARTMENT OF JUSTICE
8 CFR Part 1292

Recognition and Accreditation

ACTION: Notice of meeting.
SUMMARY: The Executive Office for Immigration Review (EOIR) is reviewing and considering amendments to the regulations governing the recognition of organizations and accreditation of representatives who appear before EOIR. EOIR seeks public comment on issues affecting these regulations and will host two open public meetings to discuss these regulations. The first meeting will be limited to a discussion of the recognition of organizations and the second will address accreditation of representatives.

DATES: Dates and Times: The first meeting will be held on Wednesday, March 14, 2012 at 1 p.m. The second meeting will be held on Wednesday, March 21, 2012 at 1 p.m.

Castaneda, 630 F.3d at 888; *cf. Garcia Tellez*, 2011 WL 4542678.

Applied to the facts of *Rosas-Castaneda*, it is easy to see the potential significance of this declaration. Because the Immigration Judge was not permitted to require the alien to produce additional documents, there were only two documents that could properly be considered in making the determination as to whether the alien met his burden of proof. *See Rosas-Castaneda*, 630 F.3d at 888-89. To little surprise, these two documents that the alien elected to submit were inconclusive. *See id*. Thus, the standard in the Ninth Circuit appears to be more akin to the following: *any* judicially noticeable document will satisfy the burden of proof so long as the document does not limit the alien's conduct to that which constitutes a disqualifying offense. *See id*.

This, of course, is not to suggest that a relief-seeking alien is at a complete windfall. Instead, "the result of [*Sandoval-Lua*] . . . is that the government has the burden of going forward to prove that" the conviction was for a relief-barring offense after an alien has provided *sufficient proof* (whatever that means) that the record of conviction is inconclusive. *Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 (9th Cir. 2010); *see also Rosas-Castaneda*, 655 F.3d at 886, *rev'g* 630 F.3d 881 (amending its prior decision "to permit the government to put forth reliable evidence to show that the petitioner was convicted of [a relief-barring offense]"). Thus, while an alien will still benefit from a *truly* inconclusive record, the Government can submit the complete record of conviction to prevent an alien from "picking and choosing" his or her way to relief. *See Esquivel-Garcia*, 593 F.3d at 1029; *Rosas-Castaneda*, 655 F.3d at 886; *cf. Young v. Holder*, 634 F.3d 1014, 1023 (9th Cir. 2011), *reh'g en banc granted*, 653 F.3d 897 (9th Cir. 2011) (finding that an alien's burden was met in regard to the inconclusiveness of the conviction documents, but not remanding to allow the government to submit more evidence).

Inconclusive Record Not Sufficient

The Tenth Circuit was the first to question the "conclusiveness" of an *inconclusive* record of conviction. *See Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009). In *Garcia*, the court held that, by allowing eligibility for relief to be established through an inconclusive record of conviction, *Sandoval-Lua* effectively nullifies the burden to proof. *Id*. Specifically, the court took exception to the fact that the ambiguity of an inconclusive record of conviction fails to prove that the alien was *not* convicted of a disqualifying offense. *See id*. In other words, to prevail in the Tenth Circuit, an alien must proffer a *Shepard* document that limits the convicted-of conduct to that which falls outside the definitional confines of a generic, relief-barring offense. *See id*.

The Fourth Circuit has also questioned the logic behind the approach of the Second and Ninth Circuits, but it did so by placing emphasis on the fact that an alien bears the burden of proving the inexistence of a potential relief-barring offense *by a preponderance of the evidence*. *Salem*, 647 F.3d at 116-17. As the court stated, this requires an alien to demonstrate that "it is more likely than not that he was not convicted of [a disqualifying offense.]" *Id*. at 116. To the Fourth Circuit, when an alien is convicted under a divisible statute and the record of conviction is inconclusive, "it is equally likely that he was convicted of [a disqualifying offense] as it is that he was not." *Id*. at 117. Thus, an inconclusive record of conviction fails to prove, by a preponderance of the evidence, that the alien was *not* convicted of a relief-barring offense. *See id*.

In an unpublished decision, the Eleventh Circuit adopted a position analogous to that of the Fourth and Tenth Circuits. *See Omoregbee v. U.S. v. Att'y Gen.*, 323 F. App'x 820, 824-27 (11th Cir. 2009). Although the court distinguished *Sandoval-Lua* on unrelated grounds, *see id*. at 826, it held that the alien did not satisfy his burden of proof because the record of conviction failed to rule out the possibility that he was convicted of an aggravated felony. *Id*. (stating that "the question is whether [the alien] has shown that the record of conviction demonstrates that his offense caused a loss of less than $10,000" and thus not is not an aggravated felony). In other words, like an alien in the Fourth and Tenth Circuits, one in the Eleventh Circuit probably has to provide conviction documents that conclusively demonstrate the conduct for which he or she was convicted, and that conduct must not amount to one of the generic crimes that are a bar to the relief sought. *See id*.

Like the Ninth Circuit's analysis, this approach is not free from practical limitations. Consider, for instance, an applicant for cancellation of removal who was convicted under a statute that punishes, in part, conduct that constitutes an aggravated felony. If all of the conviction

documents from the underlying proceeding only reflect the general offense or the relevant statute under which an alien was convicted—that is, it fails to rule out the possibility that the conviction was for conduct amounting to an aggravated felony—the alien would *never* be able to satisfy the burden of proof. It follows that, under the modified categorical approach, certain types of evidence cannot be considered, including, for instance, after-the-fact testimony by an alien concerning the nature of his or her conviction. *Cf. Martinez*, 551 F.3d at 121-22. Thus, in the event that an alien truly commits conduct that does not amount to a disqualifying offense, the alien would nevertheless be barred from relief because of a failure by the convicting court to make a notation on a *Shepard* document concerning the exact basis for the conviction, not because the alien was actually convicted of a relief-barring offense.

But is this really a *problem*? For those—like the Second and Ninth Circuits—who advocate for a position in which an inconclusive record of conviction is sufficient to carry the day, this type of situation is exactly what the categorical and modified categorical approaches were designed to prevent. *See, e.g.*, *Martinez*, 551 F.3d at 122 (stating that such an approach would require immigration courts and the Board "to look to 'the particular facts relating to [an alien's] crime' to determine if the [alien] committed an 'aggravated felony,' and that is precisely what we have instructed the agency not to do" (quoting *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 121 (2d Cir. 2007))). However, to those—like the Fourth and Tenth Circuits—who differ in opinion, "[t]he fact that [an alien] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief." *Garcia*, 584 F.3d at 1291; *see also Salem*, 647 F.3d at 120 (stating that "where, as here, the relevant evidence of conviction is in equipoise, a petitioner has not satisfied his statutory burden to prove eligibility for relief from removal").

Conclusion

As the Tenth Circuit explained, "[t]he point of contention is that each side claims the benefit of the record's ambiguity." *Garcia*, 584 F.3d at 1289. For those in the Ninth Circuit, and likely the Second Circuit as well, the ambiguity falls in favor of the alien, because an inconclusive record of conviction will likely suffice. However, in the Fourth and Tenth Circuits, and likely the Eleventh Circuit as well, the Government enjoys the benefit of the record's ambiguity, because an alien cannot prevail on his or her burden of proof with a record of conviction that fails to limit the conviction to conduct outside the definitional confines of a generic, relief-barring offense. And to those who are "inconclusive" about this issue: *good luck*—because five circuit courts, despite finding the language of 8 C.F.R. § 1240.8(d) and section 240(c)(4)(A) of the Act to be "clear," have failed to agree on one consistent understanding of how this burden applies when an alien proffers an inconclusive record of conviction in support of an application for relief.

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1. *See, e.g.*, Benjamin Crouse, *Measuring the Risk of Physical Force in Evaluating Crimes of Violence Under 18 U.S.C. § 16(b)*, Immigration Law Advisor, Vol. 5, No. 2 (Feb. 2011); Edward R. Grant, *Dynes and Newtons: "Crime of Violence" Standards in the Wake of* Johnson v. United States, Immigration Law Advisor, Vol. 4, No. 3 (Mar. 2010); Josh Adams, *Treatment of Criminal Convictions in the Immigration Context*, Immigration Law Advisor, Vol. 2, No. 10 (Oct. 2008); Edward R. Grant, *One Toke Over The Line: Immigration Consequences of Drug Offenses*, Immigration Law Advisor, Vol. 2, No. 4 (Apr. 2008); Edward R. Grant, *Crimes & Misdemeanors: Recent Trends on CIMTs, Aggravated Felonies, and Eligibility for Relief*, Immigration Law Advisor, Vol. 2, No. 3 (Mar. 2008); Stephen O'Connor, *Misdemeanor Assault, Battery, and Harassment as Crimes of Violence—A Circuit Court Split*, Immigration Law Advisor, Vol. 1, No. 2 (Feb. 2007); Ed Kelly, *Crimes and Misdemeanors: The Supreme Court's Decision in* Lopez v. Gonzales, Immigration Law Advisor, Vol. 1, No. 1 (Jan. 2007).

2. Although the Second Circuit appears to treat an inconclusive record of conviction in the same manner as the Ninth Circuit (that is, it satisfies the burden of proof), it has yet to provide any insight as to how an alien proves that his or her record of conviction is truly inconclusive.