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Circuit Court Modifications to the Modified Categorical Approach

by Daniel Cicchini and Joseph Hassell

Introduction

Many provisions of the Immigration and Nationality Act make an alien removable from the United States or ineligible for relief from removal if it is determined that he or she has committed or otherwise been convicted of certain criminal offenses. Sections 212(a)(2), 237(a)(2) of the Act. The challenge for an Immigration Judge lies in determining whether an alien's commission of, or conviction for, a State criminal offense corresponds to a ground of removability under the Act.

In *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), the Supreme Court established a framework that is now widely applied in the immigration context to determine whether a State criminal offense makes an alien removable under the Act. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). Under *Taylor*'s "categorical approach," an Immigration Judge must look to the text of the statute of conviction and determine whether the elements of the State offense correspond to the elements of the applicable Federal generic offense listed in the Act. If there is a match, the State crime can serve as the predicate for an alien's removal. However, when a statute of conviction is broader than an offense listed in the Act, an Immigration Judge may apply, pursuant to *Shepard*, the "modified categorical approach," which permits a limited examination of documents in the record of conviction to determine whether the alien was convicted of the elements of the generic offense listed in the Act.

Despite the seeming simplicity of the *Taylor-Shepard* framework, adjudicators have particularly struggled to apply the "modified categorical approach." This article explores the challenges facing adjudicators in five parts. First, the article provides a brief overview of the Supreme Court's decision in *Shepard*, which establishes the relevant legal framework. Second,

it provides an overview of the law in various circuit courts, addressing when it is appropriate to apply the modified categorical approach. Next, the article surveys case law from the Board of Immigration Appeals and the circuit courts, prescribing what evidence may or may not be considered under the modified categorical approach. Finally, it discusses burdens of proof and what evidence is sufficient to demonstrate that an alien was convicted of the elements of the Federal generic offense for purposes of both removability and relief. Where there is a circuit split, this article is not intended to advocate for any approach but rather to illuminate the current jurisprudence to assist adjudicators who grapple with these issues on a daily basis.

The *Taylor-Shepard* Framework

Taylor, 495 U.S. 575, is the foundational case which paved the way for *Shepard* and the challenges that adjudicators presently face in applying the "modified categorical approach." The issue in *Taylor* was whether a State burglary conviction can serve as a predicate offense for purposes of the Armed Career Criminal Act ("ACCA"), which provides a sentencing enhancement for any felon found to be in possession of a firearm who has previously been convicted of three or more listed crimes, including "burglary." *Id.* at 577. Rejecting the argument that Congress intended the word "burglary" to mean any crime labeled as such by a State, the Court adopted a uniform Federal generic definition of burglary. The Court then held that when the elements of a State burglary statute match the Federal generic definition of a crime listed in the ACCA or where the State statute is narrower than the generic definition, the State conviction can serve as a predicate offense. *Id.* at 599-600. However, the Court noted that a few States define burglary more broadly and held that in cases involving a conviction under a broad State statute, the "categorical approach" prohibits a sentencing court from reviewing the particular facts underlying the conviction. *Id.* But the Court left open the possibility that a lower court might examine certain judicial documents to determine whether the defendant was "necessarily convicted of the elements of the federal generic offense," despite being convicted under a broader State statute. *Id.* at 602.

Fifteen years later, in *Shepard*, 544 U.S. 13, the Court took up the issue left open in *Taylor*. In that case, Shepard was convicted under Federal law of being a felon in possession of a firearm. *Id.* at 16. The Government then sought to enhance his sentence under the ACCA based on his three prior State convictions, including a prior guilty plea to violating a Massachusetts "burglary" statute. *Id.* at 17. The Government conceded that the State definition of burglary was broader than the Federal generic definition of burglary under the ACCA because it covered breaking and entering into a fixed structure *or* a vehicle, such as a boat or car; whereas the Federal generic definition of burglary is limited to breaking and entering into a fixed structure. *Id.* at 18. Nonetheless, the Government offered a police report indicating that Shepard committed his offense by breaking into a building. *Id.* Accordingly, the Government argued that the police report demonstrated that Shepard pleaded guilty to committing the Federal generic offense of burglary and his conviction could therefore serve as a predicate offense under the ACCA. *Id.*

The Supreme Court disagreed, holding that when a defendant pleads guilty to a State crime that is broader than the Federal generic offense, a sentencing court is limited to only considering certain judicial records to determine whether the defendant necessarily admitted all of the elements of the generic offense. *Id.* at 26. Specifically, a sentencing court can examine "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant or to some comparable judicial record of this information." *Id.* The Court reiterated that *Taylor* prohibits a sentencing court from looking beyond these records into the factual basis for the conviction or from consulting evidence, such as police reports, which are less reliable than judicial records. *Id.* at 23.

Although *Taylor* and *Shepard* involved the interpretation of a Federal sentencing statute, the Supreme Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), recognized and sanctioned the lower courts' application of the *Taylor-Shepard* framework in the immigration context because the Act adopts a similar structure to many Federal sentencing laws by providing a list of generic offenses that make an alien removable. However, as discussed more fully below, in certain instances, the modified categorical approach applies differently in the immigration context than it does in the sentencing context. *See generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*,

86 N.Y.U. L. Rev. 1669 (2011) (discussing the history of the categorical approach in immigration law).

When To Apply the Modified Categorical Approach

Taylor makes clear that when the elements of a State crime match the elements of the Federal generic definition of an offense listed in the Act or where the State crime is narrower than the Federal generic offense, the State conviction can serve as a predicate offense for purposes of the immigration laws. Under *Shepard*, when a State crime is *broader* than a crime listed in the Act, the "modified categorical approach" may be applied. This raises the question: when is a State crime *broader* than one listed in the Act?

Divisible Statutes

Every circuit seems to agree that the modified categorical analysis can be applied when the State statute of conviction is "divisible." *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 926-27 (9th Cir. 2011) (en banc) (noting agreement). As discussed below, the circuits do not uniformly agree on when a statute is "divisible." However, they all agree that, at least, a statute is divisible where "the alternative means of committing a violation are enumerated as discrete alternatives, either by use of disjunctives or subsections." *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 90 (2d Cir. 2009). This situation can be represented graphically as follows:

Federal Generic Crime	Disjunctive State Statute	State Statute with Subsections
Burglary is the unlawful entry into a dwelling or other stationary structure (i.e., not a vehicle).	Burglary is the unlawful entry into a dwelling, structure, or vehicle.	Burglary is the unlawful entry into: (a) a dwelling; or (b) a vehicle

In the above examples, each of the State statutes contains a list of ways to commit a burglary, which are enumerated in disjunctive phrases or subsections; however, at least one of these phrases or subsections corresponds to the Federal generic crime, even if the others do not. In these circumstances, it would be appropriate for an adjudicator to apply the modified categorical approach to determine whether an alien was convicted under the statutory subsection or disjunctive phrase that satisfies the Federal generic crime.

"Missing Element" Statutes

Most circuits only allow the modified categorical approach to be applied to State statutes of conviction that are "divisible," but not to statutes that are "missing an element" of the Federal generic offense altogether. This appears to be the approach adopted by the First, Fifth, Seventh, and Eighth Circuits. *See Aguila-Montes de Oca*, 655 F.3d at 932 nn.9-11 (listing cases). For example, in *United States v. Gonzalez-Terrazas*, 529 F.3d 293 (5th Cir. 2008), the Fifth Circuit considered whether a conviction under California's "burglary" statute could serve as a predicate offense under the Federal sentencing laws. The court noted that the Federal generic definition of "burglary" requires the (1) *unlawful* (2) entry into (3) a dwelling or structure (4) with an intent to commit a felony, but it found that California's "burglary" statute was missing the element of *unlawful* entry—i.e., California simply defines burglary as the (1) *entry* into (2) a dwelling or structure (3) with intent to commit a felony. *Id.* at 296-97. The Government argued that although California's burglary statute was missing the *unlawful* entry element, under the modified categorical approach the sentencing court could consider the criminal complaint against Gonzales, which charged him with *unlawfully* entering an inhabited dwelling. *Id.* at 297. The Fifth Circuit rejected this argument and held that the modified categorical approach can only be applied to divisible statutes, not to statutes that are entirely missing an element of the Federal generic offense. *Id.*

In the Ninth Circuit, however, the modified categorical approach may be applied even where the statute of conviction is missing an element of the Federal generic offense. *Aguila-Montes de Oca*, 655 F.3d 915 (overruling, in part, *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc)). In *Aguila-Montes de Oca*, the Ninth Circuit addressed the same issue the Fifth Circuit faced in *Gonzales-Terrazas* but conversely held that an immigration court may apply the modified categorical analysis to determine whether a conviction under California's "burglary" statute can serve as a predicate offense under the Act, even though it is missing an element of the Federal generic offense of "burglary." *Id.* at 937-38. Therefore, in the Ninth Circuit, even if an Immigration Judge determines that a State offense is broader than a generic crime listed in the Act because it is missing an element, the Judge should go on to apply the modified categorical analysis.

Similarly, the Sixth Circuit applies the modified categorical analysis whenever the State statute of conviction is "ambiguous." In *United States v. Armstead*, 467 F.3d 943 (6th Cir. 2006), the Sixth Circuit confronted the issue whether a conviction under Tennessee's child abuse statute constitutes a "crime of violence" conviction for purposes of sentencing and immigration laws, which define a crime of violence as involving "either (1) the use, attempted use, or threatened use of physical force, or (2) conduct that otherwise presents a serious potential risk of physical injury." *Id.* at 948 (citation omitted). The court held that Tennessee's statute "does *not necessarily require* the use, attempted use, or threatened use of physical force, and, moreover, provides an insufficient basis upon which to determine whether a prior conviction . . . involves conduct that presents a serious potential risk of physical injury to another." *Id.* (emphasis added) (quoting *United States v. Bass*, 315 F.3d 561, 565 (6th Cir. 2002)) (internal quotation marks omitted). The court therefore concluded that the State statute was "ambiguous" and went on to apply the modified categorical approach, despite the fact that the statute was "missing an element." *Id.*

Divisible or Missing an Element?

In circuits that draw a distinction between "divisible" and "missing element" statutes, issues will likely arise when distinguishing between the two. This was the issue in *Lanferman*, 576 F.3d at 90. In that case, the Department of Homeland Security ("DHS") charged an alien with being removable under section 237(a)(2)(C) of the Act, which makes deportable, inter alia, any alien convicted of possessing or carrying a *firearm* in violation of any law. *Id.* at 86. The alien was convicted of violating New York Penal Law section 120.14(1), "menacing," which criminalizes, inter alia, "intentionally plac[ing] or attempt[ing] to place another person in reasonable fear of physical injury . . . or death by displaying a *deadly weapon* [or] dangerous instrument." *Id.* at 89. Although the statute does not define the term "*deadly weapon*," the statute could still be considered divisible because that term is broad enough to cover a "*firearm*." *Id.* The Second Circuit did not decide whether the statute should be classified as being "divisible" or as "missing an element" and instead remanded the case to the Board to consider the matter in the first instance. *Id.* at 92.

On remand, the Board defined a statute as divisible "if, based on the *elements* of the offense, some but not all violations of the statute give rise to grounds for removal or ineligibility for relief." *Matter of Lanferman*, 25 I&N Dec. 721, 724 (BIA 2012). Applying this definition, the Board found the statute at issue to be "divisible." According to the Board, although section 120.14(1) uses the term "deadly weapon," which may or may not involve the use of a firearm, some violations of the statute do involve the use of a firearm, therefore giving rise to removal under section 237(a)(2)(C) of the Act, which makes an alien deportable, inter alia, for possessing or carrying a firearm in violation of any law. *Id.* at 732. However, the Board declined to comment on the Ninth Circuit's decision in *Aguila-Montes de Oca*, 655 F.3d 915, and whether it would apply the modified categorical approach more broadly to include a statute that is altogether missing an element of the Federal generic offense. *Id.* at 729 n.8.

The Tenth Circuit's opinion in *Vargas v. Department of Homeland Security*, 451 F.3d 1105 (10th Cir. 2006), additionally presents an interesting twist on this issue: whether a State law is divisible or "missing an element" if it makes it a crime to violate other State laws. In that case, the DHS charged Vargas with being removable under section 237(a)(2)(A)(iii) of the Act as an alien who was convicted of an aggravated felony under section 101(a)(43)(A), sexual abuse of a minor, which includes the "employment, use, persuasion, inducement, enticement, or coercion of a child to engage in . . . sexually explicit conduct or . . . rape." *Id.* at 1108 (quoting 18 U.S.C. § 3509(a)(8)). Vargas had been convicted under a Colorado statute making it a crime for any person to "induce[], aid[], or encourage[] a child to violate any federal or state law, municipal or county ordinance, or court order." *Id.* at 1108-09. The Tenth Circuit held that because the statute covers inducing a child to violate *any* State law, including the State's sex crime and rape laws, the statute was broad enough that a violation thereof may serve as a predicate offense for purposes of section 237(a)(2)(A)(iii). *Id.* at 1109. Accordingly, the court applied the modified categorical analysis to determine if Vargas was convicted of inducing a minor to violate the State's sex crimes or rape laws. *Id.*

Finally, some circuits hold that when an alien is charged under section 237(a)(2)(E) of the Act, covering "crimes of domestic violence," the normal categorical analysis does not apply. *See Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010). As the Fifth Circuit explained, although the Federal generic definition of a "crime of domestic violence" requires that the victim and perpetrator be in a specified domestic relationship, most domestic violence

incidents are prosecuted under a State's general assault statute, which does not require this element. *Id.* at 272. Nonetheless, an Immigration Judge can apply the modified categorical approach to determine if the alien has the requisite domestic relationship with the victim, even if the alien was convicted under an assault statute.

These are only a few examples of the issues adjudicators are likely to encounter in this context. It is likely that, in "divisible only" circuits, an abundance of case law will develop around the issue of when a statute is divisible; in circuits that follow the Ninth Circuit's approach, the issue of when a court should apply the modified categorical approach will be less relevant. In these circuits, most issues will revolve around the next topic: what evidence a court can consider in applying the modified categorical approach.

What Evidence a Court May Consider

Evidence Permitted Under Shepard

Generally, in "divisible statute" jurisdictions, an Immigration Judge will apply the modified categorical approach to determine whether the alien was convicted under the section or disjunctive phrase of the State statute that matches the Federal generic crime. In "missing element" jurisdictions, an Immigration Judge must determine whether the nature of the alien's violation of the State statute of conviction corresponds to the Federal generic crime. In both instances, *Shepard* makes clear that an Immigration Judge is limited to examining certain judicial documents, including "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard*, 544 U.S. at 26. Therefore, when an Immigration Judge applies the modified categorical approach, he or she can generally only consider these judicial documents. It is inappropriate to consider other documents, such as police reports, unless one of the exceptions discussed below applies.

Exceptions to the Evidentiary Limitation in Shepard

Despite the seemingly clear list of permissible evidence under the rule in *Shepard*, the Attorney General, the circuit courts, and even the Supreme Court have recognized exceptions to *Shepard*'s evidentiary rule when analyzing certain unique provisions of the Act. Perhaps most significantly, the Attorney General held in *Matter of Silva-Trevino*, 24 I&N Dec. 687, 701 (A.G. 2008), that an Immigration Judge may *go beyond* the record of conviction in determining whether an alien has been convicted of a "crime involving moral turpitude." Nevertheless, some circuit courts have rejected the Attorney General's reasoning and have held that an Immigration Judge is limited to considering only the documents specified in *Shepard* in making the "crime involving moral turpitude" determination. *See Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009). *But see Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008) (deferring to the Attorney General's decision). However, in those circuits that have not rejected *Silva-Trevino*, *Shepard*'s evidentiary limitations do not apply to determining whether an alien was convicted of a "crime involving moral turpitude."

The Supreme Court carved out another exception to *Shepard* in *Nijhawan v. Holder*, 557 U.S. 29, 129 S. Ct. 2294 (2009). The Court considered how the *Taylor-Shepard* analysis should be applied to section 101(a)(43)(M)(i) of the Act, which makes deportable any alien convicted of an offense that "involves fraud or deceit in which the loss to the victim exceeds $10,000." The Court noted that this section is composed of two elements: (1) a fraud element; and (2) a loss component. *Nijhawan*, 129 S. Ct. at 2301. In determining if the alien was convicted of a crime involving "fraud," the Court held that an Immigration Judge must strictly apply the *Taylor-Shepard* framework. *Id.* The Court determined that the $10,000 loss component, on the other hand, is a *circumstance* surrounding the offense, not an *element* of the generic crime of fraud; therefore, the DHS is not limited to using only evidence that would be acceptable under the rule in *Shepard* to establish that the victim suffered a $10,000 loss. *Id.* at 2302-03. Accordingly, *Nijhawan* establishes that when a provision in the Act describes a "circumstance-specific offense," as opposed to a "generic offense," an Immigration Judge is not restricted by *Shepard* from going beyond the record of conviction to determine whether the alien's crime involved those circumstances.

The challenge for adjudicators now lies in determining when the *Nijhawan* exception to the *Shepard* rule applies. In *Nijhawan*, the Supreme Court indicated that this exception would additionally apply to other definitions of an "aggravated felony," such as those

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CIRCUIT COURT DECISIONS FOR MARCH 2012

by John Guendelsberger

The United States courts of appeals issued 249 decisions in March 2012 in cases appealed from the Board. The courts affirmed the Board in 211 cases and reversed or remanded in 38, for an overall reversal rate of 15.3%, compared to last month's 6.6%. There were no reversals from the Third, Sixth, and Tenth Circuits.

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

Circuit	Total	Affirmed	Reversed	% Reversed
First	7	5	2	28.6
Second	35	31	4	11.4
Third	23	23	0	0.0
Fourth	11	10	1	9.1
Fifth	12	10	2	16.7
Sixth	8	8	0	0.0
Seventh	5	4	1	20.0
Eighth	8	7	1	12.5
Ninth	127	101	26	20.5
Tenth	3	3	0	0.0
Eleventh	10	9	1	10.0
All	249	211	38	15.3

The 249 decisions included 133 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 46 direct appeals from denials of other forms of relief from removal or from findings of removal; and 70 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	133	109	24	18.0
Other Relief	46	39	7	15.2
Motions	70	63	7	10.0

The 24 reversals or remands in asylum cases involved credibility (8 cases); nexus (4 cases); and past persecution (5 cases). Several of the other cases were remanded to further consider an issue or evidence that was not fully addressed by either the Board or the Immigration Judge.

Five of the seven reversals or remands in the "other relief" category were from the Ninth Circuit. These included a section 212(c) *Judulang* remand, section 212(c) eligibility based on a pre-AEDPA conviction by jury, alienage issues (two cases), and cancellation of removal. The Fourth Circuit reversed on the availability of a section 212(h) waiver for an alien who adjusted to lawful permanent resident status after entry. The Fifth Circuit also issued a section 212(c) *Judulang* remand.

The seven reversals in motions cases, all from the Ninth Circuit, involved ineffective assistance of counsel (three cases), changed country conditions, exceptional circumstances for failure to appear, the departure bar, and a motion to reconsider the timeliness of an appeal to the Board.

The chart below shows the combined numbers for January through March 2012 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	254	209	45	17.7
Fifth	27	23	4	14.8
First	15	13	2	13.3
Fourth	33	29	4	12.1
Tenth	9	8	1	11.1
Third	63	57	6	9.5
Seventh	11	10	1	9.1
Sixth	25	23	2	8.0
Eighth	13	12	1	7.7
Second	174	166	8	4.6
Eleventh	43	42	1	2.3
All	667	592	75	11.2

Last year's reversal rate at this point (January through March 2011) was 11.6%, with 998 total decisions and 116 reversals.

The numbers by type of case on appeal for the first 3 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	363	330	33	9.1
Other Relief	132	106	26	19.7
Motions	172	156	16	9.3

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

First Circuit:

Restrepo v. Holder, No. 10-1750, 2012 WL 1220490 (1st Cir. Apr. 12, 2012): The court denied the petition for review of a decision denying the petitioner's application for cancellation of removal under section 240A(b) of the Act. The petitioner entered the U.S. in 1988. He married in 1990, and the couple had two children together but purportedly separated in 1995. They finalized their divorce in 1996, just after the approval of an I-130 petition filed by the petitioner's father on behalf of his unmarried son. The petitioner's wife immediately married a U.S. citizen, through whom she obtained lawful permanent resident ("LPR") status. The petitioner and his wife supposedly reconciled in 1999 and had a third child a year later, although the wife was still married to her second husband at the time. When the petitioner filed for adjustment of status in 2001 based on the approved "unmarried son" petition, he was denied when it was determined that he was still married to his wife at the time the petition was filed. The petitioner was placed in removal proceedings, conceded removability, and applied for cancellation of removal. The Immigration Judge denied relief, finding that the petitioner could not establish that he was a person of good moral character because his divorce was "a sham" to allow him to adjust status based on his father's petition. The Immigration Judge further held that the petitioner and his wife provided false testimony in his removal proceedings by continuing to claim that the divorce was legitimate. The Board affirmed, finding no clear error in the Immigration Judge's factual determinations. On review, the court found that the Immigration Judge's adverse credibility determination was supported by substantial evidence, rejecting the petitioner's argument that the Board should have applied the three-pronged test of *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998), relating to the deference it gives to adverse credibility findings based on discrepancies and omissions in an alien's testimony. While the court disagreed with the Government's contention that *Matter of A-S-* applies only in the asylum context, it nevertheless held that although the Board did not explicitly cite *A-S-*, its analysis clearly followed it. In response to the petitioner's argument that the Immigration Judge did not properly consider his explanations for the cited discrepancies, the court concluded that it was "certainly reasonable for the IJ and BIA to find these explanations inadequate."

Second Circuit:

Morris v. Holder, No. 10-4687-ag, 2012 WL 1383075 (2d Cir. Apr. 23, 2012): The court dismissed the petition for review of an Immigration Judge's order of removal finding that the petitioner's conviction for second degree assault under section 120.05(2) of the New York Penal Law was for a "crime of violence" under 18 U.S.C. § 16(b) and thus an aggravated felony under section 101(a)(43)(F) of the Act. On appeal the petitioner contested that holding and also argued that under the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the statutory amendments of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which expanded the definition of an aggravated felony, cannot be applied retroactively to his 1993 conviction. First, the court held that a violation of the State assault statute categorically constitutes a crime of violence, noting that the statute requires elements of (1) the intent to cause physical injury, (2) the injury itself, and (3) the use of a deadly weapon or dangerous instrument. The court rejected the petitioner's argument that the statute could hypothetically be violated without using physical force (for example, by poisoning), stating that the question whether a crime, by its nature, presents a substantial risk that a perpetrator may intentionally use physical force is not answered in the negative simply because a case can be imagined where a defendant's conduct does not create a probability that force will be used. In response to the petitioner's second argument, the court followed *Alvarado-Fonseca v. Holder*, 631 F.3d 385 (7th Cir. 2011), which relied on the Supreme Court's statement in *Padilla* that deportation "is not, in a strict sense, a criminal sanction" to conclude that *Padilla* provided insufficient guidance "to deviate from the long line [of] cases establishing that statutes retroactively setting criteria for deportation do not violate the *ex post facto* clause." The court dismissed the petition, finding that it lacked jurisdiction to further review the order of removal.

Higgins v. Holder, No. 11-924(ag), 2012 WL 1352584 (2d Cir. Apr. 19, 2012): The court dismissed the petition for review of a decision holding that the petitioner's conviction for witness tampering under section 53a-151 of the Connecticut General Statutes was for an aggravated felony offense relating to obstruction of justice under section 101(a)(43)(S) of the Act. The petitioner had been charged with sexually assaulting a minor, whom he later told to say that "nothing ever happened" if she talked to the police. The petitioner was acquitted of the sexual assault charge but convicted of one count of witness tampering. The petitioner's appeal of the conviction (which included the argument that his witness tampering conviction was inconsistent with his acquittal on the underlying sexual assault charge) was dismissed. Subsequently, the petitioner was admitted to the U.S. upon his return from a trip abroad and was charged with removability as an alien convicted of a crime involving moral turpitude. The petitioner conceded that he was removable as charged but denied that the offense was an aggravated felony. The Immigration Judge relied on *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999), to conclude that the conviction was one relating to obstruction of justice. Because obstruction of justice is an aggravated felony, the conviction rendered the petitioner ineligible for a waiver of removability. The court considered what deference to accord *Espinoza-Gonzalez*, noting that there was a circuit split on the issue—the Fifth and Ninth Circuits accorded deference, and the Third Circuit did not. The court noted that because the Board's interpretation of an "offense relating to obstruction of justice" was narrower than the Third Circuit's, any conviction meeting the Board's standard would meet the Third Circuit's. The Second Circuit held that the conviction satisfied both of these standards and found it unnecessary to decide whether deference was due to *Espinoza-Gonzalez*. The narrower standard set forth there requires a statute to contain both an actus reus and a mens rea element. The court held that the Connecticut statute "clearly includes the requisite actus reus" and cited the State Supreme Court's holding that the statute also contains an "implicit" intent requirement. The court rejected the petitioner's argument that the State statute, which criminalized only the act of inducing false testimony, failed to provide the safeguard found in the Federal statute allowing the affirmative defense of proving that the defendant's sole intention was to encourage truthful testimony. The court dismissed the petitioner's additional arguments as improper collateral attacks on his State conviction. Finding the offense to be an aggravated felony, the court dismissed the petition for lack of jurisdiction.

Third Circuit:

Singh v. Attorney General of U.S., No. 11-1988, 2012 WL 1255061 (3d Cir. Apr. 16, 2012): The court granted the petition for review of the Board's removal order based on the petitioner's conviction for knowingly making a false statement under penalty of perjury in a bankruptcy proceeding in violation of 18 U.S.C. § 152(3). The Board had determined that the crime constituted an offense involving fraud or deceit in which the loss to the victim exceeded $10,000, an aggravated felony under section 101(a)(43)(M)(i) of the Act. The petitioner owned a construction contracting firm that could bid on public works as a Minority Business Enterprise ("MBE"). The petitioner fronted for a non-MBE firm, obtaining government projects for work he falsely claimed his firm would perform. The petitioner would then pass on the payments (minus a kickback) to the non-MBE firm that actually performed the work. During the course of this scheme, the petitioner's firm declared bankruptcy. However, he informed his client, the Port Authority of New York and New Jersey, to directly pay the non-MBE firm, which he then asked to deposit the checks and hold the funds in order to hide them from his firm's creditors. The petitioner failed to disclose this revenue in his bankruptcy proceedings. However, the petitioner's contact in the non-MBE firm was a Port Authority informant, who actually transferred the funds in question (approximately $54,000) to the Port Authority. As a result of the Port Authority's investigation, the petitioner was charged with failing to disclose all of his firm's accounts receivable in bankruptcy proceedings in violation of 18 U.S.C. § 152(3). The petitioner pled guilty and agreed to pay $54,000 in restitution, which was transferred by the Port Authority to the bankruptcy trustee. Reviewing the Board's order, the circuit court held that the conviction was for an offense that categorically involved fraud or deceit. The court rejected the petitioner's argument that because the Second Circuit has equated 18 U.S.C. § 152(3) with a perjury statute, a violation of the statute could only be considered an aggravated felony under the perjury provision of section 101(a)(43)(S) of the Act, finding the decision was contrary to its own precedent decision in *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002). Focusing next on the loss requirement of section 101(a)(43)(M)(i), the court held that the loss to the victim in excess of $10,000 must be an "actual" loss, as

opposed to a "probable" or "intended" loss. Applying a "circumstance-specific" approach to determine the amount of the loss, the court noted that at the time of the commission of his crime, the money that the petitioner thought he was secreting was, in fact, in the possession of the Port Authority and thus beyond the petitioner's control. Finding the facts to be analogous to those in *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999), where the loss was only intended rather that actual, the court considered the petitioner's "agreement" to the transfer of funds in the Port Authority's possession as restitution to be a formality. The court also found no indication in the record of actual losses to the bankruptcy trustee resulting from time or money spent to access the $54,000. Finding that the petitioner was not removable, the court vacated the Board's decision.

Ninth Circuit:

Robles-Urrea v. Holder, Nos. 06-71935, 06-74826, 2012 WL 1382856 (9th Cir. Apr. 23, 2012): The court held that the crime of misprision of a felony is not categorically a crime involving moral turpitude ("CIMT"). The Immigration Judge determined that the petitioner's conviction for misprision of a felony was for a CIMT and consequently found him ineligible for cancellation of removal, since the conviction interrupted his accrual of the requisite 7 years of lawful residence under the "stop-time" rule. The Board dismissed his appeal, and during the pendency of the petition for review, the petitioner filed a motion to reconsider, claiming that the Board's decision conflicted with *Matter of Sloan*, 12 I&N Dec. 840 (BIA 1966). In response, the Board issued *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006), holding both that misprision of a felony is a CIMT and that the "stop-time" rule could be applied retroactively to crimes committed prior to the enactment of the IIRIRA (the criminal act in this case occurred between 1986-87). The petitioner also appealed from that decision, and the two appeals were consolidated by the circuit court. The Ninth Circuit observed that the Act does not define the term "crime involving moral turpitude," but it noted that the general definition accepted by courts and the Board includes (1) crimes involving fraud and (2) crimes involving "grave acts of baseness or depravity." The court noted that while the Board cited this definition in *Robles*, the decision did not explain to the court's satisfaction why the Board found misprision to be "inherently base, vile or depraved." The court disagreed with the Board's conclusion that "evil intent" is implied by the statute's requirement of an affirmative step to conceal a felony from the authorities. The court noted that misprision of a felony differs from other crimes of concealment that have been found to be CIMTs, in that "it requires not a specific *intent* to conceal or obstruct justice, but only *knowledge* of the felony." The court also stated that under the Board's holding, one concealing a crime might be guilty of a CIMT even where the offense did not involve moral turpitude. The court thus found "a realistic probability" that the statute in question would encompass behavior that is not morally turpitudinous. Although the court questioned whether the conviction might be a CIMT under the modified categorical approach, it nevertheless remanded, stating that the Board was entitled to conduct such an analysis in the first instance. The court noted that the Board could also consider on remand whether the petitioner was removable as an illicit trafficker, and if so, whether he would be entitled to any form of relief, adding that the Board may not need to decide whether the misprision conviction was for a CIMT.

Arbid v. Holder, No. 09-73211, 2012 WL 1089595 (9th Cir. Apr. 3, 2012): The court denied the petition for review of an Immigration Judge's order of removal, which was affirmed by the Board. The petitioner had been granted asylum based on torture suffered in the late 1990s in Lebanon. He was later convicted of mail fraud under 18 U.S.C. § 1341 and was placed in removal proceedings. The Immigration Judge found that the petitioner had been convicted of a particularly serious crime, which rendered him ineligible for asylum and withholding of removal. The Immigration Judge further found him unable to establish eligibility for CAT protection because of changed conditions in Lebanon. In an issue of first impression for the circuit, the court held that the applicable standard of review for "particularly serious crime" determinations is abuse of discretion. The court noted that under this standard, it may only reverse where the Board "acted 'arbitrarily, irrationally, or contrary to law.'" The court found that neither the Immigration Judge nor the Board abused its discretion, reasoning that the Immigration Judge properly reviewed the factors in *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982); reviewed the underlying facts of the conviction; and considered the "substantial" sentence and amount of restitution and the petitioner's lack of remorse in concluding that there was a "good likelihood" that the petitioner could repeat the criminal behavior. The court additionally found substantial evidence to support the Immigration Judge's

determination that changed conditions in Lebanon were sufficient to find it no longer likely that the petitioner would face torture there, as he had in the late 1990s by Syrian intelligence agents based on his anti-Syrian views. The court noted that since that time, "the Syrian military has withdrawn from Lebanon, an anti-Hezbollah majority has wrested control of the legislature, and the political leader [the petitioner] previously supported has returned from exile to help govern the state."

Eleventh Circuit:

Lyashchynska v. U.S. Attorney General, No. 11-10559, 2012 WL 1107991 (11th Cir. Apr. 4, 2012): The court affirmed the findings of the Board and the Immigration Judge in denying asylum from Ukraine. The Immigration Judge had made an adverse credibility finding, relying on an investigation report by the Department of State ("DOS"), which determined that the hospital records from Ukraine submitted by the petitioner as proof of her purported rape were fraudulent. The Immigration Judge found that the petitioner, after several continuances, was unable to provide corroboration sufficient to overcome the report's conclusions. The petitioner challenged the weight afforded by the Immigration Judge and the Board to the evidence of document authenticity and also argued that the DOS investigation failed to comply with the confidentiality requirements of 8 C.F.R. § 1208.6, which prohibits the disclosure of information contained in an asylum application without the applicant's written consent. The court found the first argument unpersuasive where the Immigration Judge twice adjourned the hearing after informing the petitioner in detail of his issues with the evidence presented and suggesting possible avenues to address these concerns. Finding the adverse credibility finding to be supported by specific, cogent reasons, the court also noted that although the petitioner had ample opportunity to rebut, he offered only "original" copies of the discredited hospital documents and a polygraph test, which was properly afforded less weight because he failed to establish the expertise or competence of the test's administrator or the circumstances under which it was conducted. In an issue of first impression for the circuit, the court further determined that the investigation did not breach the regulatory confidentiality requirements. Noting that the DOS investigator provided the petitioner's name to a hospital administrator to determine if she had been treated at the facility, the court rejected the argument that such action equated to disclosure to a government official, particularly in the absence of evidence "that hospitals are in the business of covering up government actions." The court further found that absent any indication that the DOS investigator was investigating an asylum claim, the simple disclosure of a name was not sufficient to breach confidentiality, because such a holding would render any investigation impossible.

BIA PRECEDENT DECISIONS

In *Matter of M-W-*, 25 I&N Dec. 748 (BIA 2012), the Board held that under the categorical approach, a conviction for murder in violation of a statute requiring a showing that the perpetrator acted with extreme recklessness or a malignant heart is for an aggravated felony, as defined in section 101(a)(43)(A) of the Act, notwithstanding that the requisite mental state may have resulted from voluntary intoxication and no intent to kill was established.

The respondent was a lawful permanent resident who was convicted of two counts of second-degree murder in violation of section 750.317 of the Michigan Compiled Laws, after killing an elderly couple in a traffic accident while driving under the influence of alcohol. He was sentenced to 8 to 20 years' imprisonment. The Immigration Judge found, in pertinent part, that the respondent was removable under section 237(a)(2)(A)(iii) of the Act for having been convicted of the aggravated felony of murder.

Noting that the respondent's crime was not premeditated or intentional and did not involve felony murder, the Board considered only whether a murder conviction requiring no specific intent to kill fell within the section 101(a)(43)(A) definition of an aggravated felony. Setting out the analytical framework, the Board observed that both the *Black's Law Dictionary* and Federal definitions of murder include "malice aforethought," which is the element that distinguishes murder from manslaughter and, under common law, meant that the perpetrator "intended to take a life" *or* "had a wicked, depraved, and malignant heart." The Federal murder statute includes both the specific intent to kill and "depraved heart" elements and contemplates that "malice aforethought" also includes extreme recklessness and wanton disregard for human life. Based on common law and Federal jurisprudence, the Board found that a murder

conviction clearly need not be limited to situations where the perpetrator acted with the "intent to kill."

Turning to "depraved heart" murder involving reckless conduct, the Board observed that it requires proof of conduct exhibiting more than gross negligence or ordinary recklessness. A depraved heart murder under Federal law was interpreted by one court as "reckless and wanton conduct" that "grossly deviated from a reasonable standard of care such that the [perpetrator] was aware of the serious risk of death." As the Board noted, "[a] person convicted of a depraved heart murder under Federal law disregards a '"very high degree" of risk that death or serious bodily injury will result from the defendant's conduct.'" Indiscriminate shooting into a crowd or an occupied building was identified as a classic example of a depraved heart murder, which involves conduct that is extremely reckless and carries a high likelihood of death or serious bodily injury, even if not directed at anyone in particular.

Continuing its analysis, the Board observed that while the mens rea standard for murder under Federal and common law would include extremely reckless behavior, the courts, including those in Michigan, generally have not accepted the proposition that defendants convicted of committing murder while driving under the influence could be too intoxicated to form the mens rea of recklessness. Moreover, the Model Penal Code has also rejected the defense that voluntary intoxication can prevent the ability to form a reckless state of mind. Relying on this body of law, the Board concluded in regard to unintentional killings that evidence of voluntary intoxication does not prevent a conclusion that the defendant had the capacity to act with a depraved heart or extreme indifference to human life.

Turning to the Michigan statute at issue, the Board noted that while "malice aforethought" was not a statutory term, controlling law dictated that every first- or second-degree murder conviction under section 750.371 includes "malice aforethought" as an element of proof. Michigan law defines malice as "'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" To establish malice under Michigan law, a showing of a specific intent to kill is not required. A murder conviction requires a showing of recklessness greater than that required for a manslaughter conviction, namely, an act performed in wanton and willful disregard of the risk that the "natural tendency" of the act was death or bodily injury. In Michigan, the Board pointed out, evidence of voluntary intoxication does not preclude proof that the defendant acted with extreme recklessness.

With this analytic framework in place, the Board concluded that the respondent was found to have killed a human being with malice aforethought, mirroring the generic elements of the crime of murder. The Board found that the respondent's voluntary intoxication was of no relevance to the fact that he was determined to have acted in wanton and willful disregard of the likelihood that the natural tendency of his actions was to cause death or great bodily harm. Since the mens rea in the generic definition of murder and under Michigan law is substantially the same, the Board concluded that the respondent's two convictions were for "murder" within the meaning of section 101(a)(43)(A) of the Act.

The Board found that the respondent's aggravated felony conviction, which also constitutes a conviction for a particularly serious crime, barred him from eligibility for asylum and withholding of removal under sections 208(b)(2)(B)(i) and 241(b)(3) of the Act. Considering the respondent's application for deferral of removal under the Convention Against Torture, the Board concurred with the Immigration Judge that the respondent had not satisfied his burden of proof for such relief and dismissed the appeal.

In *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012), the Board held that a refugee who has not adjusted to lawful permanent resident status may be placed in removal proceedings absent a prior determination by the Department of Homeland Security ("DHS") that the alien is inadmissible to the United States. In addition, the Board determined that because such an alien was "admitted" as a refugee, charges in the Notice to Appear must be under section 237 of the Act.

The respondent entered the United States as a refugee and unsuccessfully attempted to adjust his status in May 2006. In June 2009, the respondent was convicted of a Federal controlled substance trafficking offense and was sentenced to 24 months in prison. The DHS served him with a Notice to Appear in October 2010, charging that he is removable under section 237(a)(2)(A)(iii) for an aggravated felony drug-trafficking conviction, as defined in section 101(a)(43)(B) of the Act.

In January 2011, the DHS withdrew the deportation charge and lodged charges of inadmissibility under sections 212(a)(2)(A)(i)(I) and (II) of the Act based on the respondent's conviction for a crime involving moral turpitude and a controlled substance violation. Subsequently the DHS also charged the respondent as being inadmissible under section 212(a)(2)(C) of the Act as an alien known or reasonably believed to be a controlled substance trafficker. The Immigration Judge found the respondent removable on all charges, determined that he was statutorily ineligible for both a waiver under section 209(c) of the Act and adjustment of status, and denied his applications for asylum, withholding of removal, and protection under the Convention Against Torture.

On appeal, the respondent argued that pursuant to *Matter of Garcia-Alzugaray*, 19 I&N Dec. 407 (BIA 1986), the removal proceedings should be terminated because, as a refugee, he could not be placed in removal proceedings absent a determination by the DHS that he is inadmissible for adjustment of status purposes. He also contended that since the Notice to Appear alleged that he was "admitted" to the United States as a refugee, he was improperly charged as being inadmissible under section 212 of the Act.

Setting out the statutory framework, the Board noted that section 207(c)(1) of the Act permits the Attorney General to admit a refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible as an immigrant. Refugee status may be terminated under section 207(c)(4) if the Attorney General subsequently determines that at the time of admission, the alien was not a refugee as defined in the Act. Pursuant to section 209(a)(1), an alien whose refugee status has not been terminated and who has been physically present in the United States for at least 1 year shall return or be returned to the custody of the DHS for inspection and examination for admission as an immigrant. An alien found admissible shall be regarded as a lawful permanent resident as of the date of arrival in the United States, while an alien found inadmissible may renew the application for adjustment of status before an Immigration Judge during removal proceedings.

The Board rejected the respondent's argument that *Matter of Garcia-Alzugaray* requires the DHS to terminate his refugee status or find him inadmissible before placing him in removal proceedings. That case was decided under a previous regulatory scheme, which provided that after 1 year, refugees were to appear before an Immigration Judge for examination under oath to determine their eligibility for permanent residence. Because the regulations were subsequently amended to streamline the adjustment process, so that the decision to interview a refugee seeking permanent resident status is now discretionary for the DHS, the Board concluded that *Matter of Garcia-Alzugaray* did not control the outcome here. Additionally, the Board noted that neither section 209 of the Act nor the governing regulations at 8 C.F.R. §§ 209.1(d) and (e) expressly require termination of refugee status before an alien is placed in removal proceedings. In *Matter of Smriko*, 23 I&N Dec. 836, 837 (BIA 2005), the Board had determined that a lawful permanent resident could be placed in removal proceedings even though his refugee status had not been terminated, reasoning that the language of the Act and regulations reflected that Congress did not consider termination of refugee status to be a prerequisite for initiating removal proceedings. Noting that controlling circuit law deferred to that reasoning, the Board concluded that the respondent was properly placed in removal proceedings without the DHS's prior determination that he was inadmissible, and it dismissed his appeal regarding that issue.

Turning to the respondent's argument that he was improperly charged as being inadmissible under section 212 of the Act, the Board held that since he had been admitted to the United States as a refugee, he should have been charged only with grounds of deportability under section 237. The Board observed that section 237(a) of the Act refers to aliens who have been "admitted," which is defined under section 101(a)(13)(A) as "the lawful entry of an alien into the United States after inspection and authorization by an immigration officer." Examining other parts of the Act and the regulations, the Board determined that refugees are deemed "admitted" to the United States. Notwithstanding, the Board acknowledged the conditional nature of a refugee's status and recognized that the concept of "conditional admission" is ambiguous. If a refugee has not been "admitted" and has not been paroled, which under section 212(d)(5) of the Act is not regarded as an admission, the refugee's status is unclear. In light of the ambiguity in the relevant language, the Board expressed its belief that the Act is best interpreted

as recognizing that a "conditional admission" is a form of "admission" for purposes of section 237(a) of the Act.

The Board acknowledged that its construction effectively contemplates that a refugee who becomes a lawful permanent resident will have been "admitted" twice, first conditionally under section 207 of the Act and later upon reinspection and adjustment to lawful permanent resident status under section 209. Furthermore, after each admission the alien would be subject to charges under the section 237 deportability grounds rather than under the section 212(a) inadmissibility grounds. But the Board observed that the notion of multiple admissions triggering the application of deportability grounds after each admission is consistent with prior case law holding that aliens who enter the United States as nonimmigrants and later adjust to lawful permanent resident status have admissions both at the border on their nonimmigrant visas and again when adjusting. Thus, considering the language of the Act and the regulations, and the context and structure of the provisions at issue, the Board concluded that an alien admitted as a refugee has been "admitted" for purposes of section 101(a)(13)(A) of the Act and that the requirement that he or she must be reinspected for admission as a lawful permanent resident after 1 year does not undermine the initial admission as a refugee under section 207. Applying the rule to the respondent, the Board found that he was present in the United States pursuant to a prior admission as a refugee, so any charges in the Notice to Appear must be based on section 237 deportability grounds.

Although the Immigration Judge made an alternative finding that the respondent was deportable under section 237(a)(2)(A)(iii) on the basis of an aggravated felony drug-trafficking conviction, the Board found that since the deportability charge had been withdrawn when the Immigration Judge issued his decision, the alternative finding was hypothetical. Thus, the Board sustained the respondent's appeal as to the charging issue and remanded the case to provide the DHS an opportunity to amend the Notice to Appear and for the Immigration Judge to further address the respondent's removability and eligibility for relief.

In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the issue before the Board was whether the respondents, who left the United States temporarily under a grant of advance parole, effectuated a "departure" that rendered them inadmissible under section 212(a)(9)(B)(i)(II) of the Act for departing the United States after having been unlawfully present for 1 year or more and then seeking admission less than 10 years after their departure. The Board concluded that the respondents did not "depart" as contemplated by the Act and thus were not inadmissible under that provision.

The respondent, natives and citizens of India who had overstayed their original visas, were prima facie eligible for section 245(i) adjustment of status when they filed their applications. While awaiting the availability of visas, the respondents applied for advance parole under section 212(d)(5)(A) of the Act so that they could return to India to care for aging parents without their adjustment of status applications being deemed abandoned. After their requests for advance parole were granted, they traveled to India several times between 2004 and 2006, returning each time in accordance with the advance parole terms. In October 2007, the United States Citizenship and Immigration Services ("USCIS") denied the respondents' section 245(i) adjustment of status applications after determining that they were inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The male respondent moved to reopen his adjustment application, but the USCIS denied the request, concluding that *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007) ("*Lemus I*"), precluded the availability of section 245(i) adjustment to aliens like the respondents who were inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Removal proceedings were initiated charging the respondents with removability under section 212(a)(7)(A)(i)(I). The respondents conceded removability and renewed their adjustment applications before the Immigration Judge, who found them ineligible based on their inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The respondents appealed, arguing that their departures from the United States under advance parole were not the type of "departures" that the Act contemplated as creating inadmissibility under section 212(a)(9)(B)(i)(II). Examining the usage of the term "departure" under that provision, the Board noted that in *Lemus I*, it had stated that the term should be construed broadly. In *Lemus I*, and subsequently in *Matter of Lemus*, 25 I&N Dec. 734 (BIA 2012) ("*Lemus II*"),

the Board opined that a "departure" as used in section 212(a)(9)(B)(i)(II) should be construed to include "any departure," whether voluntary or under threat of removal, or outside the context of a removal proceeding. The language "any departure" was interpreted to include one pursuant to a grant of advance parole.

On further examination, considering congressional intent and reading section 212(a)(9)(B)(i)(II) in context, the Board reasoned that aliens like the respondents who left the United States and returned under a grant of advance parole were not covered by that provision. The Board observed that the purpose of section 212(a)(9)(B)(i)(II) was to make lawful admission more difficult for aliens who left the United States after violating the immigration laws and noted that the text of section 212(a)(9)(B)(i)(II) places aliens who are unlawfully present on notice of the consequences of departing. However, the Board recognized that an alien who has been granted advanced parole has an expectation of not being excluded as inadmissible upon return and of not being deemed to have abandoned a pending application for relief. Because of the qualitative difference between departure under a grant of advance parole and other departures, the Board concluded that Congress did not intend an alien to become inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and thus ineligible for section 245(i) adjustment of status, where: (1) the alien traveled abroad with prior approval granted after the alien demonstrated qualification for and worthiness of the benefit sought; (2) the alien's authorized return was presupposed; and (3) the alien requested the prior approval solely for the purpose of preserving eligibility for adjustment of status. Pointing out the paradox of applying section 212(a)(9)(B)(i)(II) to an alien who departed under a grant of advance parole, the Board observed that to do so would transform advance parole from a humanitarian benefit to a means of barring relief.

The Board held that an alien who has left and returned to the United States under a grant of advance parole has not made a "departure" as contemplated by section 212(a)(9)(B)(i)(II) of the Act. However, the Board cautioned that its holding was limited to a determination that an alien cannot become inadmissible under section 212(a)(9)(B)(i)(II) solely by traveling abroad pursuant to a grant of advance parole and that it does not preclude a trip under advance parole from being considered a "departure" for other purposes; nor does it call into question the applicability of any other inadmissibility ground.

REGULATORY UPDATE

77 Fed. Reg. 19,902 (April 2, 2012)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Parts 103 and 212

Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives

ACTION: Proposed rule.
SUMMARY: On January 9, 2012, U.S. Citizenship and Immigration Services (USCIS) announced its intention to change its current process for filing and adjudication of certain applications for waivers of inadmissibility filed in connection with an immediate relative immigrant visa application. USCIS now proposes to amend its regulations to allow certain immediate relatives of U.S. citizens who are physically present in the United States to request provisional unlawful presence waivers under the Immigration and Nationality Act of 1952, as amended (INA or Act), prior to departing from the United States for consular processing of their immigrant visa applications. Currently, such aliens must depart from the United States and request waivers of inadmissibility during the overseas immigrant visa process, often causing U.S. citizens to be separated for extended periods from their immediate relatives who are otherwise eligible for an immigrant visa and admission for lawful permanent residence. Under the proposal, USCIS would grant a provisional unlawful presence waiver that would become fully effective upon the alien's departure from the United States and the U.S. Department of State (DOS) consular officer's determination at the time of the immigrant visa interview that, in light of the approved provisional unlawful presence waiver and other evidence of record, the alien is otherwise admissible to the United States and eligible to receive an immigrant visa. USCIS does not envision issuing Notices to Appear (NTA) to initiate removal proceedings against aliens whose provisional waiver applications have been approved. However, if USCIS, for example, discovers acts, omissions, or post-approval activity that would meet the criteria for NTA issuance or determines that the provisional waiver was granted in error, USCIS may issue an NTA, consistent with USCIS's NTA issuance policy,

as well as reopen the provisional waiver approval and deny the waiver request. USCIS anticipates that the proposed changes will significantly reduce the length of time U.S. citizens are separated from their immediate relatives who are required to remain outside of the United States for immigrant visa processing and during adjudication of a waiver of inadmissibility for the unlawful presence. USCIS also believes that the proposed process, which reduces the degree of interchange between the DOS and USCIS, will create efficiencies for both the U.S. Government and most applicants. In addition to codifying the new process, USCIS proposes amendments clarifying other regulations.

Even after USCIS begins accepting provisional unlawful presence waiver applications, the filing or approval of a provisional unlawful presence waiver application will *not*: confer any legal status, protect against the accrual of additional unlawful presence, authorize an alien to enter the United States without securing a visa or other appropriate entry document, convey any interim benefits (e.g., employment authorization, parole, or advance parole), or protect an alien from being placed in removal proceedings or removed from the United States.

Do not send an application requesting a provisional waiver under the procedures under consideration in this proposed rule. Any provisional waiver application filed before the rule becomes final and effective will be rejected and the application package returned to the applicant, including any fees. USCIS will begin accepting provisional waiver applications only after a final rule is issued and the procedural change becomes effective.
DATES: Written comments should be submitted on or before June 1, 2012.

Circuit Court Modifications *continued*

in sections 101(a)(43)(K)(ii) and (P) of the Act, which describe both a generic offense and a circumstance-specific offense. *Id.* at 2300; *see also Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007) (finding that *Shepard* does not apply to the "commercial advantage" element in section 101(a)(43)(K)(ii)), *vacated*, 544 F.3d 137 (2d Cir. 2008).

Another difficult issue concerning the *Nijhawan* exception may arise under section 237(a)(2)(E)(i) of the Act, which makes deportable any alien convicted of a "crime of domestic violence," defined as any (1) "crime of violence" (2) that involves a specified domestic relationship between the victim and perpetrator. It seems clear, under this provision, that whether the alien pleaded guilty to a "crime of violence" must be analyzed under the *Taylor-Shepard* framework. However, it remains unclear as to whether the DHS is limited to only using evidence that is acceptable under *Shepard* in proving that the alien had the requisite *domestic relationship* with the victim. This issue is further complicated by the Supreme Court's recent decision in *United States v. Hayes*, 555 U.S. 415 (2009), which held that an individual can be convicted under the Federal Gun Control Act, which prohibits a person who has previously been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm, even if he or she was convicted under a State statute that does not list a "domestic relationship" as an element of the State offense.

The Fifth Circuit is the only circuit court to address this issue following the Supreme Court's decisions in *Nijhawan* and *Hayes*. In *Bianco v. Holder*, 624 F.3d at 272-73, the Fifth Circuit held that, in light of *Nijhawan* and because State "statutes specifically describing crimes of domestic violence are relatively scarce," a concern that motivated the Court's decision in *Hayes*, the DHS is *not* limited by *Shepard* and may prove the requisite domestic relationship by using "the kind of evidence generally admissible before an immigration judge."

Two other circuits have considered this issue, but both decisions predate the Supreme Court's decisions in *Nijhawan* and *Hayes*. For instance, in *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), the Seventh Circuit adopted the same approach as the Fifth Circuit and held that in applying section 237(a)(2)(E)(i) of the Act, an Immigration Judge should strictly apply a categorical analysis to determine whether an alien pleaded guilty to a "crime of violence." However, the court added that a judge could consider a police report submitted by the DHS, indicating that Flores was arrested for beating his wife. Conversely, the Ninth Circuit requires the DHS to prove the existence of a domestic relationship by use of the type of documents permitted under *Shepard*'s modified categorical approach. *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *see also Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1058 (9th Cir. 2006), *opinion amended and superseded on denial of reh'g by* 465 F.3d 386 (9th Cir 2006).

Further Considerations

Silva-Trevino, *Nijhawan*, and *Bianco* provide limited exceptions to the rule in *Shepard*. Even when these exceptions apply, adjudicators should consider three additional points. First, the categorical approach still applies for determining whether an alien was convicted of the "crime of violence" and "fraud" elements under sections 237(a)(2)(E)(i) and 101(a)(43)(M), respectively. Thus, an Immigration Judge should be cautious to separate the "crime of violence" and "fraud" analysis from the "domestic relationship" and "$10,000 loss" analysis. Second, as noted by the Fifth Circuit, the *Nijhawan* exception may not apply to section 237(a)(2)(E)(i) where an alien is convicted under a *general assault or battery statute* as a result of a plea bargain, when the purpose is to avoid a conviction under the State's domestic violence statute. *Bianco*, 624 F.3d at 273. Third, although the DHS is not limited to using evidence that would be acceptable under the rule established by *Shepard* to prove the requisite "domestic relationship" or the "$10,000 loss," an Immigration Judge must still ensure that the evidence offered is "the kind of evidence *generally admissible* before an immigration judge." *Id.* (emphasis added); *see also Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) (stating that evidence is admissible in removal proceedings if it is probative and its use is fundamentally fair).

Police Reports and Comparable Judicial Records

It seems clear that, notwithstanding the above exceptions, *Shepard* limits an Immigration Judge to considering only evidence that is part of the judicial record of conviction, including "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard*, 544 U.S. at 26. Further, the Supreme Court in *Shepard* explicitly rejected the Government's reliance on a police report and held that the modified categorical analysis must "be confined to records of the convicting court approaching the certainty of the record of conviction." *Id*. at 23. However, the Board and various circuit courts have recognized an exception to the *Shepard* rule with respect to certain police reports and have expanded it to include certain "comparable judicial records." Section 240(c)(3)(B) of the Act.

For instance, in *Matter of Milian*, 25 I&N Dec. 197 (BIA 2010), the Board held that although "a police report, standing alone, is not a part of the record of conviction, . . . the contents of police reports may be considered for the purpose of applying the modified categorical approach if they have been 'specifically incorporated into the guilty plea.'" *Id.* at 200-01 (citations omitted) (quoting *Parrilla v. Gonzales*, 404 F.3d 1038, 1044 (9th Cir. 2005)). Therefore, under *Milian*, an Immigration Judge can consider a police report if it serves as the factual basis of the alien's plea.

Another issue involves whether a "police report" can be considered a "charging document," which *Shepard does* consider to be a part of the record of conviction. The Third Circuit has addressed this issue in both *Garcia v. Attorney General of U.S.*, 462 F.3d 287, 292 (3d Cir. 2006), and *Thomas v. Attorney General of U.S.*, 625 F.3d 134, 146 (3d Cir. 2010). In both cases, the alien argued that the Immigration Judge erred by looking to the criminal complaint because it was, in essence, a police report, and in each case, the Third Circuit turned to State law to determine whether the "complaint" could be classified as a charging document. In *Garcia*, the court held that because a criminal case is commenced under Pennsylvania law by filing a criminal complaint and because the complaint "bears the imprimatur" of the district attorney, it can be examined under the modified categorical analysis, even if prepared by the police department. *Garcia*, 462 F.3d at 292. In *Thomas*, on the other hand, the court rejected the Board's holding that, under New York law, a police officer's written statement can serve as an "information" or "charging document," finding that nothing in the State's law supports that proposition. *Thomas*, 625 F.3d at 144. Therefore, in the Third Circuit, Immigration Judges may need to consult State law to determine if a complaint prepared by a police officer constitutes a "charging document" under the modified categorical analysis.

Finally, the circuit courts have also grappled with the issue of what types of documents fall within *Shepard*'s category of "comparable judicial records." Section 240(c)(3)(B) of the Act lists certain documents that "constitute proof of a conviction." However, it is not clear what, if any, relevance this list has to determining what documents are "comparable judicial records" for purposes of the modified categorical approach. For example, this section permits courts to rely on "official minutes of a court

proceeding." However, in *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), the Ninth Circuit grappled with the issue whether a sentencing court could rely on "minute orders" even though the Court in *Shepard* did not list "minute orders" as documents that could be considered in applying the modified categorical approach. The Ninth Circuit held that "minute orders," which are "prepared by a court official at the time the guilty plea is taken (or shortly afterward)" can be considered under the modified categorical approach. *Id.* at 702. Although *Snellenberger* was a criminal sentencing case, the Ninth Circuit has cited it in the immigration context, raising the question whether a California "abstract of judgment" meets the *Snellenberger* test and therefore may be relied on for purposes of determining whether an alien was convicted of an "aggravated felony." *See Ramirez-Villalpando v. Holder*, 645 F.3d 1035, 1041 (9th Cir. 2011). Similarly, the Fifth Circuit has held, in the immigration context, that an adjudicator, in determining whether a document may be considered, should focus on whether the document is "sufficiently conclusive and reliable to establish the facts to which the alien actually pleaded guilty." *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 464 (5th Cir. 2006). Yet, it remains to be seen whether all the documents listed in the section 240(c)(3)(B) of the Act meet this test.

Burdens of Proof and Sufficiency of the Evidence

The purpose of the modified categorical analysis is to determine whether an individual "necessarily" was convicted of the generically defined crime. *Shepard*, 544 U.S. at 21. To this end, *Shepard* allows an Immigration Judge to examine certain judicial documents for the purpose of determining whether they "narrow" an alien's conviction under an overbroad statute of conviction. *Id.* at 17. As discussed above, these documents include "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id*. at 26. It should be noted that when the documents offered include the plea agreement or transcript of a plea colloquy between the defendant and the State court, Immigration Judges are faced with few issues because these documents are contemporaneous with the actual plea. However, it is more difficult for an Immigration Judge to determine whether an alien was "necessarily" convicted of the generic crime or whether the record of conviction sufficiently "narrows" an alien's conviction under an overbroad State statute if the only evidence in the record is a record of judgment and the charging document. *See United States v. Sanchez-Garcia*, 642 F.3d 658, 662 (8th Cir. 2008). The reason, according to the Eighth Circuit, is that a charging document, similar to a police report, is merely an allegation and does not "necessarily" reflect the offense of which the alien was convicted. *Id.*

This raises two issues for Immigration Judges: (1) did the alien "necessarily" plead guilty to the allegations and charges listed in the charging document; and (2) do these allegations and charges sufficiently "narrow" the overbroad statute of conviction. Finally, if, after applying the modified categorical analysis, an Immigration Judge determines that the record of conviction does not establish whether the alien was convicted of the Federal generic crime listed in the Act—i.e., it is "inconclusive"—how should this finding affect the outcome of the case. These issues are addressed more fully below.

Connecting the Criminal Complaint to the Guilty Plea

In *Shepard*, the Court stated that an Immigration Judge can examine a charging document in conducting the modified categorical analysis. However, various circuits have recognized that "a charging document does not, standing alone, demonstrate that the crime charged and the crime of conviction are one and the same. Something else must connect the two, such as a *reference* to the charging document in the record of conviction." *Pagayon v. Holder*, 642 F.3d 1226, 1233 (9th Cir.) (emphasis added) (citing *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc)), *opinion withdrawn and reh'g en banc granted*, Nos. 07-74047, 07-75129, 2011 WL 6091276 (9th Cir. Dec. 8, 2011); *see also Sanchez-Garcia*, 642 F.3d at 662; *Thomas*, 625 F.3d at 146. The Ninth Circuit is the only circuit court that has examined this issue in depth.

In *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), the Ninth Circuit held that a charging document cannot be relied on when the alien pleads guilty to an offense different from the one listed in the charging document. In that case, Ruiz-Vidal pleaded guilty to one count of violating California Penal Code section 11377(a), which makes it a crime to possess any controlled substance listed in the California Health and Safety Code. *Id.* at 1075. The DHS charged him with being deportable under section 237(a)(2)(B)(i) as an alien convicted of a

law relating to a "controlled substance." *Id.* The generic definition of a "controlled substance" violation under the Act includes possessing any substance identified in the Federal Controlled Substance Act ("CSA"). *Id.* (citing 21 U.S.C. § 812). However, California's law is broader because it regulates substances that are not regulated by the CSA. *Id.* at 1078-79. Nonetheless, the DHS offered a copy of the charging document, which alleged that Ruiz-Vidal did "unlawfully possess a controlled substance in violation of section 11378(a) [a different section] to wit: Methamphetamine." *Id.* The DHS argued that because "Methamphetamine" is a controlled substance that is listed under the CSA, Ruiz-Vidal necessarily pleaded guilty to the generic definition of a "controlled substances violation." *Id.* The Ninth Circuit disagreed, holding that since Ruiz-Vidal pleaded guilty to an offense different from the one charged, the DHS could not rely on the charging document. *Ruiz-Vidal* at 1080.

Moreover, in *United States v. Vidal*, the Ninth Circuit held that "when the record of conviction comprises only the [charging document] and the judgment, the judgment must contain the critical phrase as charged in the [charging document]" for adjudicators to rely on the charging document in applying the modified categorical analysis. *Vidal*, 504 F.3d at 1087 (quoting *Li v. Ashcroft*, 389 F.3d 892, 898 (9th Cir. 2004) (internal quotation marks omitted). The court extended this holding to the immigration arena in *Penuliar v. Muksasey*, 523 F.3d 603, 613-14 (9th Cir. 2008).

The Ninth Circuit's rule in *Vidal* and *Penuliar* may nevertheless be limited to convictions in California. In *Vidal* the court found it significant that under California law "[a] court is not limited to accepting a guilty plea only to the offense charged but can accept a guilty plea to any reasonably related lesser offense" and a prosecutor does not have to amend the criminal complaint in order for a defendant to plead guilty to a different crime than one charged. *Vidal*, 504 F.3d at 1087-88 (quoting *People v. Tuggle*, 283 Cal. Rptr. 422, 426 n.10 (Cal Ct. App. 1991)) (internal quotation marks omitted). Accordingly, the Ninth Circuit held that where the judgment does not contain the language as "charged in" the charging document, a court cannot, as a matter of California law, conclude that the defendant "necessarily" pleaded guilty to those charges. *Id.* However, the rule in *Vidal* may be limited to criminal convictions in California courts because, as the court discussed, in other jurisdictions the law requires the Government to amend the charging document if the defendant pleads guilty to a different or lesser charge. This could explain the dearth of case law addressing this issue in other circuits. *But see Garcia*, 462 F.3d at 292 (stating that "Pennsylvania law does not require the subsequent filing of either an information or an indictment if a plea of guilty or nolo contendere is entered").

Whether the Complaint Narrows an Overbroad Statute of Conviction

Assuming that an Immigration Judge can rely on the criminal complaint, notwithstanding the above issues, he or she must still determine whether the complaint sufficiently "narrows" an overbroad statute of conviction. The circuit courts have adopted various conflicting approaches to resolve this issue.

The Third Circuit's Approach

In the Third Circuit, the allegations in a charging document do not narrow an overbroad State statute of conviction if the allegations can support a conviction under both the nongeneric and generic sections of the State statute. For instance, the alien in *Thomas v. Attorney General of U.S.*, 625 F.3d at 146, pleaded guilty to one count of violating section 221.40 of the New York Penal Code which criminalizes "selling, exchanging, giving or disposing of" marijuana to another person. *Id.* at 136-37. The DHS charged him with being removable under section 237(a)(2)(A)(iii) of the Act for having committed an "aggravated felony," defined as a "drug-trafficking crime." *Id.* (citing section 101(a)(43)(B)). Under Third Circuit law, "the generic definition of 'drug-trafficking crime' includes any federal drug felony including the offense of 'selling *or* exchanging marijuana.'" *Id.* at 143. Although the DHS acknowledged that section 221.40 of the New York Penal Code is disjunctive because it criminalizes "disposing and giving" in addition to "selling or exchanging marijuana," the DHS argued that the criminal complaint sufficiently established that Thomas pleaded guilty to the generic offense of "selling" marijuana. *Id.* The Third Circuit nevertheless disagreed, holding that the allegations in the charging document only state that "Thomas received money in exchange for marijuana [, which] provided a factual basis for Thomas to plead guilty to *each* of the alternative elements under § 221.40, *i.e.*, 'sell[ing], exchang[ing], giv[ing] or dispos[ing] of' the

marijuana to another person." *Id*. at 148 (alteration in original) (emphasis added) (quoting N.Y. Penal Law).

In contrast, in *Garcia v. Attorney General of U.S.*, 462 F.3d at 289, the Third Circuit found that an alien who was convicted under section 780-113 of the Pennsylvania Criminal Code, which criminalizes "manufacturing, delivering, or possessing with the intent to deliver a controlled substance," could be removed under section 237(a)(2)(A)(iii) of the Act based solely on the criminal complaint, alleging a violation of section 780-113. *Id.* The court held that the generic definition of a "drug trafficking crime" includes any State felony that contains a trafficking element, which is defined as "the unlawful trading or dealing of a controlled substance." *Id.* at 293. The court found that the Pennsylvania statute of conviction is disjunctive because "manufacturing" does not necessarily entail "dealing or trading." *Id.* The court therefore applied the modified categorical approach, sustaining the charge of removability because the charging document alleged that "the defendant unlawfully *sold and delivered* a controlled substance, to wit, marijuana to an undercover police officer, and [was found to be in *possession* of] an additional 38 packets of marijuana . . . in a quantity and under circumstances indicating intent to deliver." *Id.* at 293 (emphasis added). Based on this record, the court reasoned that it was "clear" from the complaint that the alien pleaded guilty to "possession and delivery" and not the "manufacturing" prong. *Id.*

In sum, the relevant inquiry in the Third Circuit is whether the allegations charged in the charging document can support a conviction under the nongeneric as well as the generic offenses listed in the statute of conviction. If so, the charging document is not sufficient to "narrow" an overbroad statute of conviction.

The Ninth Circuit's Approach

The Ninth Circuit, for the most part, has adopted the exact opposite rule from that of the Third Circuit. Indeed, in *Snellenberger*, 548 F.3d 699, the Ninth Circuit held that when an individual pleads guilty under a charging document that lists allegations conjunctively, he or she admits each of the allegations charged. In that case, Snellenberger was convicted of "burglary" under section 459 of the California Penal Code. *Id.* at 700-04. Based on this offense, the Government sought a sentencing enhancement under the Federal sentencing laws. *Id.* However, because "burglary" under California law includes burglaries of vehicles and the Federal generic definition of "burglary" does not, the Government relied on the charging document and abstract of judgment to establish that Snellenberger was convicted of generic burglary. *Id.* at 700-01. Specifically, the Government argued that because the charging document charged him with "enter[ing] an inhabited dwelling house and trailer coach and inhabited portion of a building," Snellenberger necessarily pleaded guilty to burglarizing a house, a trailer coach, *and* a building. *Id.* at 701 (alteration in original) (internal quotation mark omitted). The Ninth Circuit agreed with this reasoning and held that "[b]ecause the three noun phrases are connected by 'and' rather than 'or,' the charging document and minute order, if consulted, establish that Snellenberger committed burglary of a dwelling," which is covered by the Federal generic offense. *Id.* It should be noted that this rule is inconsistent with the Third Circuit's approach, which holds that when the factual allegations in the charging document could support a conviction under both the nongeneric and generic sections of the State statute, the alien did not "necessarily" plead guilty to the generic offense.

However, 3 years after *Snellenberger*, the Ninth Circuit seemingly reversed itself in *Young v. Holder*, 634 F.3d 1014, 1022, *reh'g en banc granted*, 653 F.3d 897 (9th Cir. 2011). Young pleaded guilty to violating section 11352(a) of the California Penal Code, which makes it a crime to "transport[], import[] . . . sell[], furnish[], administer[], *or* give[] away . . . any controlled substance." *Id*. at 1018. The DHS argued that Young was ineligible to seek cancellation of removal because his conviction was for a "drug trafficking" offense, which is an "aggravated felony." The DHS conceded that section 11352(a) is overly broad because it covers offenses, such as administering a controlled substance, which are not generic "trafficking" crimes. Nonetheless, the DHS argued that the criminal complaint showed that Young "necessarily" pleaded guilty to selling a controlled substance, which is a generic crime. Specifically, the DHS argued that although section 11352(a) lists the elements of the offense disjunctively—i.e., it makes it a crime to transport, import, sell, *or* administer a controlled substance—the criminal complaint charged Young in the conjunctive. In other words, he was charged with transporting, importing, selling, *and* administering a controlled substance. The DHS argued that when "Young pled guilty he admitted *every act* alleged in the information, and therefore the conviction necessarily was

for conduct constituting an illicit trafficking offense." *Young*, 634 F.3d at 1020. The Ninth Circuit rejected this argument, holding that when an alien pleads guilty to a charge that states an overly broad disjunctive statute in the conjunctive, the guilty plea does not establish that the petitioner committed all the acts prohibited by the statute. *Id.* at 1021.

Although *Young* is inconsistent with *Snellenberger*, the Ninth Circuit recently withdrew this decision and granted a rehearing of the case en banc. *See Young*, 653 F.3d 897 (withdrawing decision and ordering rehearing en banc). Therefore, under current law, in the Ninth Circuit, *Snellenberger* controls. *See id*. (stating that the three-judge panel opinion in *Young v. Holder* shall not be cited as precedent by or to any court of the Ninth Circuit).

Other Circuits

The Eighth and the Tenth Circuits follow the approach adopted by the Ninth Circuit in *Snellenberger*. Specifically, in *United States v. Garcia-Medina*, 497 F.3d 875 (8th Cir. 2007), the Eighth Circuit considered whether a violation of section 11352(a) of the California Health & Safety Code was a drug-trafficking offense for purposes of a sentencing enhancement for a conviction of illegal reentry. The Eighth Circuit acknowledged that the California statute was overly broad and the case involved a guilty plea. It therefore applied *Shepard*'s modified categorical approach. *Id.* at 877. Garcia-Medina conceded that he had pleaded guilty to two violations of section 11352. In particular, counts one and two of the subject complaint charged Garcia-Medina in the conjunctive, alleging that he "did unlawfully transport, import into the State of California, sell, furnish, administer, *and* give away, *and* offer to transport, import into the State of California, sell, furnish, administer, *and* give away, *and* attempt to import into the State of California *and* transport a controlled substance, to wit, HEROIN." *Id.* at 877-78 (emphases added). The Eighth Circuit held that Garcia-Medina's guilty pleas to both counts were sufficient to satisfy the Government's burden of proving that he had been previously convicted of a drug-trafficking offense, reasoning that in California, "a guilty plea admits every element of the offense charged, and that because the charge was written in the conjunctive, Garcia-Medina's plea effectively admitted guilt to the several listed offenses, many of which qualified as drug trafficking for purposes of the guideline enhancement." *United States v. Ojeda-Estrada*, 577 F.3d 871, 877 (8th Cir. 2009). The Eighth Circuit reaffirmed this approach in *Ojeda-Estrada*, holding that when an individual is "charged, and [pleads] guilty to all of the acts [listed in a charging document] in the conjunctive . . . [t]his . . . effectively narrows the overinclusive statute." *Id.*

Similarly, in *United States v. Torres-Romero*, 537 F.3d 1155, 1158-59 (10th Cir. 2008), the Tenth Circuit concluded that for purposes of the Federal sentencing laws, a defendant who pleaded guilty under a charging document that listed allegations in the conjunctive admitted to *all* of the allegations charged in that document. Interestingly, *Torres-Romero* involved a conviction under Colorado law, not California law, which indicates that other States may employ conjunctive charging documents. *Id.*

The Fifth Circuit seemingly disagrees with the Eighth, Ninth, and Tenth Circuits. In *United States v. Moreno-Florean*, 542 F.3d 445, 450-52 (5th Cir. 2008), the Fifth Circuit rejected the Government's argument seeking a sentence enhancement, reasoning that a guilty plea to a conjunctive charge under a disjunctively written California statute was not sufficient to establish that the defendant was convicted of the Federal generic offense. However, in an unpublished decision, the Fifth Circuit appeared to back away from its holding in *Moreno-Florean*. *United States v. Gondino-Madrigal*, 269 F. App'x 355 (5th Cir. 2008) (unpublished). In that case, the alien was charged with "sell[ing], furnish[ing], administer[ing], giv[ing] away *and* offer[ing] to sell, furnish, administer, *and* give away a controlled substance, to wit: METHAMPHETAMINE," in violation of California law. *Id.* at 358. After noting that the statute of conviction was disjunctive, the court nonetheless held that by pleading guilty to the offense in the conjunctive, the alien pleaded guilty to all of the allegations in the charging document. *Id.* Whether the Fifth Circuit overturns *Moreno-Florean* in a published decision, however, remains to be seen.

The Effect of an Inconclusive Record

Finally, if, after applying the modified categorical analysis, an Immigration Judge determines that the record of conviction does not establish whether the alien was convicted of the Federal generic crime listed in the Act—i.e., it is "inconclusive"—an Immigration Judge must determine how this finding affects the outcome of

the case. When the DHS seeks to remove an alien who has been admitted based on a criminal conviction under section 237(a)(2), the DHS bears the burden of proving by "clear and convincing evidence" that the crime makes the alien deportable. Section 240(c)(3) of the Act. Therefore, if the record is "inconclusive" the alien is not deportable as charged. However, issues arise when the alien bears the burden of proving admissibility or that a conviction is not a bar to relief from removal. In the interest of brevity, these issues are not discussed here. However, a detailed discussion can be found in Joshua Lunsford, *The Burden of Proof and Relief from Removability: Who Benefits From the Ambiguity in an Inconclusive Record of Conviction?*, Immigration Law Advisor, Vol. 6, No. 2, at 1-3, 11-12 (Feb. 2012).

Conclusion

Nearly 7 years have passed since the Supreme Court decided *United States v. Shepard*. In recent years, Immigration Judges, the circuit courts, and the Supreme Court have struggled to determine the contours of that framework and have made many modifications along the way.

First, the Supreme Court's decisions in *Taylor* and *Shepard* arose in the context of interpreting Federal sentencing laws. However, in *Nijhawan*, the Supreme Court recognized that because immigration law is different from Federal criminal sentencing law, Congress might not have intended, and constitutional concerns do not compel, the *Taylor-Shepard* approach to be strictly applied to all provisions of the Act. Therefore, after *Nijhawan*, the challenge for Immigration Judges lies in determining which provisions call for a modified categorical approach and which allow the judge to examine evidence outside the record of conviction. The circuit courts have adopted various conflicting approaches in answering this question and an adjudicator will have to possess a thorough understanding of the law in his or her circuit in order to properly apply the modified categorical approach.

Second, *Shepard* provides a list of documents for an Immigration Judge to consider in determining whether an alien necessarily pleaded guilty to a Federal generic offense, making him or her removable or ineligible for relief under the Act. However, the Court did not specify the *weight* or *hierarchy* that should be afforded to each of these documents. Therefore, Immigration Judges and the circuit courts have struggled with determining which documents or combination of documents are sufficient to demonstrate that an alien necessarily pleaded guilty to the Federal generic offense that makes him or her removable or ineligible for relief. In making this determination, the circuit courts have attempted to balance the three motivating concerns of the *Taylor-Shepard* framework: (1) uniformity in the application of Federal law, independent of idiosyncratic State interpretations of criminal law; (2) fairness to an alien by honoring the result of a plea bargain; and (3) efficiency—avoiding retrying the criminal case.

It seems that the first concern has become less relevant in applying the modified categorical approach because the circuit courts frequently look to State law in interpreting charging documents and records of judgments. The last two concerns have played a prominent role, however, especially with respect to the issue whether a plea to a conjunctively phrased charging document admits all of the facts alleged, an issue currently before the Ninth Circuit in *Young v. Holder*. How the circuit courts will strike this balance remains to be seen. However, it is all but certain that there will be more modifications to the modified categorical approach to come.

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