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A Preclusive Effect: Issue Preclusion in Immigration Practice

by Greg Pennington

Issue preclusion is the foundational principle applied to determine whether a court should entertain an issue that was previously raised in another tribunal. A corollary doctrine is that of claim preclusion. While some might think of these doctrines as only civil procedure lore, it is possible that issue preclusion, in particular, may be raised in an immigration proceeding.

There is nothing in the language of the Immigration and Nationality Act regarding issue or claim preclusion. "But the absence of discussion cannot be viewed as dispositive. Congress is expected to legislate against the backdrop of well-established common law principles. An accepted common law doctrine should be implied in a statutory scheme, despite the absence of express authorization, if application of the doctrine is consistent with the structure and purpose of that scheme." *Duvall v. Att'y Gen. of U.S.*, 436 F.3d 382, 387 (3d Cir. 2006) (citations omitted). Because the immigration courts and the Board of Immigration Appeals are administrative bodies with adjudicative functions, they, like Article III courts, should also apply the doctrine of issue preclusion. *Id.* (citing *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966)). This article will discuss the factors that courts consider when determining whether an issue is precluded and will shed light on the potential relevance of each in the context of immigration proceedings. First, however, we must start with the most elementary question—what is issue preclusion?

Differences Between Issue Preclusion and Claim Preclusion

The concept of issue preclusion was originally referred to as collateral estoppel. *See Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008). Similarly, claim preclusion was referred to by its Latin name, res judicata. *See Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). Res judicata and collateral estoppel are two distinct doctrines that still confuse even the most seasoned lawyers. *Id.* at 650–51. Because of that confusion,

this article will avoid using the terms res judicata and collateral estoppel and will, for the most part, proceed with the terms claim preclusion and issue preclusion.[1] To further limit its focus, the article will only briefly discuss claim preclusion.

The doctrine of claim preclusion can be summed up thus: "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Importantly, claim preclusion bars litigation of a claim that *could* have been raised in a prior proceeding. The premise is based on the old adage that a plaintiff should not get "two bites at the apple." If a plaintiff litigates on a transaction or occurrence, it is assumed that all possible claims associated with that transaction or occurrence have been raised. If not, the plaintiff is foreclosed from doing so later. The intricacies of claim preclusion are beyond the scope of this article.[2]

Issue preclusion is much narrower than its claim preclusion cousin because it deals only with issues that were *actually* litigated in a prior action in which a proper judgment was rendered. It prevents "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. at 892. Issue preclusion is based on the principle that courts should honor a prior court decision on a matter that has been litigated. 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4416 (2d ed. Westlaw 2014). Unlike claim preclusion, issue preclusion applies even if the subject matter of the later suit has no relationship to the subject matter of the prior suit. But both doctrines ensure the conclusive resolution of disputes, protect the parties from the expense and vexation of multiple lawsuits, conserve judicial resources, and promote reliance on the judicial system by minimizing the risk of inconsistent decisions. *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

Determination of a Precluded Issue

Federal courts have discussed issue preclusion at length over the years. Although the analysis of the circuit courts varies, they agree on certain bedrock considerations. While some courts outline up to six factors for determining whether an issue is precluded, others reach only three, which include whether "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision."[3] *Amrollah v. Napolitano*, 710 F.3d 568, 571 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) (en banc)) (internal quotation marks omitted). However, "relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings." *Id*. at 572 (quoting *Pace*, 403 F.3d at 290) (internal quotation marks omitted). Further, an issue is not precluded if there has been a significant change in the legal landscape since the prior judgment. *See, e.g.*, *Montana v. United States*, 440 U.S. at 155.

The Board has also spoken on issue preclusion, generally referring to the issue as collateral estoppel. *See, e.g.*, *Matter of C-C-I-*, 26 I&N Dec. 375, 385–86 (BIA 2014); *Matter of J-*, 6 I&N Dec. 496, 497–98 (BIA 1955). The Board has opined that "the point or question to be determined in the second action must be the same as that litigated in the original action and it must have been a fact which was essential to the first decision. If there is any uncertainty as to the precise question determined in the first suit and the uncertainty is not removed by extrinsic evidence, no estoppel is created." *Matter of Marinho*, 10 I&N Dec. 214, 221 (BIA 1962, 1963) (citation omitted); *see also Matter of Fedorenko*, 19 I&N Dec. 57, 61 (BIA 1984) ("In order for collateral estoppel to be invoked in a given case, there must have been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect and the parties must have had a full and fair opportunity to litigate the issues in the prior suit." (footnote omitted)).

The Board has further held that claim and issue preclusion are flexible doctrines. Accordingly, they may be modified or rejected when their application "would contravene an overriding public policy or result in manifest injustice." *Matter of Barragan-Garibay*, 15 I&N Dec. 77, 79 (BIA 1974) (quoting *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971)) (internal quotation marks omitted). Some circuits have agreed that issue preclusion is flexible in the administrative context.[4] *See Duvall v. Att'y Gen. of U.S.*, 436 F.3d at 390 ("Courts and commentators have consistently recognized that collateral estoppel was borne of equity and is therefore 'flexible,' bending to satisfy its underlying purpose in light of the nature of the proceedings."); *Artukovic v. INS*, 693 F.2d 894, 898 (9th Cir. 1982) ("[I]n the administrative law context, the principles of collateral estoppel and *res*

judicata are applied flexibly."); *see also Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 229 n.3 (4th Cir. 2006) (Shedd, J., dissenting) (finding that collateral estoppel is related to res judicata, which the court has held to be flexible in the administrative arena). Given the variations between tests and exceptions to the rule between circuits, it is important to look to the controlling Federal law.

Issue Was Actually Litigated and Adjudicated

To be precluded, an issue must have been actually litigated and adjudicated. In order for an issue to be "actually litigated," there must have been a fair opportunity to litigate in the first proceeding. *Ramsay v. U.S. INS*, 14 F.3d 206, 210 (4th Cir. 1994). An issue can also be "actually litigated" by a stipulation between the parties where they intend for the stipulation to be binding in future litigation. *See, e.g.*, *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 146–47 (2d Cir. 2005). However, "[w]hen an issue is merely assumed, it does not meet the actual litigation requirement for collateral estoppel." *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1203 (11th Cir. 2011); *see also Fields v. Apfel*, 234 F.3d 379, 383 (8th Cir. 2000) (finding no issue preclusion with respect to whether a particular method for calculating disability benefits applied because its applicability had not been placed at issue in the prior case but had merely been assumed by the court and both parties).

An example of a case where an issue was "actually litigated" in the context of immigration proceedings is *Ramsay v. U.S. INS*, 14 F.3d 206. The alien there sought review of the Board's finding that he was subject to deportation after the former Immigration and Naturalization Service ("INS") denied his application for adjustment of status. *Id.* at 208–10. Prior to being placed in deportation proceedings, the alien asked a Federal district court for a declaratory judgment stating that he was eligible for adjustment of status. *Id.* at 209. The district court denied declaratory relief, specifically finding that the alien claimed to be a United States citizen to obtain admission at the Canadian border and, consequently, had not been inspected. At his subsequent deportation proceeding, the alien again attempted to raise the issue of his inspection, claiming that he did not get a full and fair opportunity to litigate the issue. However, the Immigration Judge denied his application, relying in part on the district court order. Because the district court reviewed the adjustment application de novo and made an explicit finding that the alien had not been inspected, the Fourth Circuit found that he received a full and fair opportunity to litigate the issue and was therefore precluded from raising the issue in the immigration proceeding. *Id.* at 210–11; *see also Howard v. INS*, 930 F.2d 432, 435–36 (5th Cir. 1991) (finding that when the issue of a defendant's alienage was "necessarily fully litigated" in a criminal case, it triggered the doctrine of collateral estoppel in later deportation proceedings, as well as in a later criminal case).

An issue must also have been "adjudicated" to be subject to issue preclusion. "The requirement that the issue have been actually decided is generally satisfied if the parties to the original action disputed the issue and the trier of fact decided it." *In re Freeman*, 30 F.3d 1459, 1466 (Fed. Cir. 1994); *see also Matter of Grandi*, 13 I&N Dec. 798 (BIA 1971) (holding that the applicant was estopped in exclusion proceedings from contending that he was brought to the United States against his will where, in criminal proceedings for attempted smuggling of heroin into the United States, the court considered the same contention and found that the applicant came to the United States voluntarily); *Matter of Z-*, 5 I&N Dec. 708, 709–11 (BIA 1954). However, if an Immigration Judge terminates a proceeding *without prejudice*, a later proceeding is not barred. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (finding that dismissal or termination of proceedings without prejudice is not an adjudication of the merits of the case and thus does not invoke res judicata principles). Similarly, if a criminal charge was dismissed, there is no adjudication of the underlying facts sought to be precluded. *United States v. Rivero*, 532 F.2d 450, 457 (5th Cir. 1976) ("[T]he dismissal of the indictment, with or without prejudice, does not amount to the determination of any of the intrinsic underlying facts.").

In the context of adjustment of status, the Sixth Circuit considered whether an Immigration Judge's initial determination that a respondent entered into a bona fide marriage for the purpose of obtaining conditional permanent resident status qualified as an adjudication for the purpose of issue preclusion. *Bilali v. Gonzales*, 502 F.3d 470, 472 (6th Cir. 2007). The Immigration Judge granted the respondent's application for adjustment of status based on his marriage to a United States citizen, according him conditional permanent resident status. However, the Government subsequently terminated the respondent's status because of his failure to answer

questions at his interview to remove the conditions of his status. *Id.* at 473. Despite the alien's argument that the Immigration Judge's preliminary determination precluded the Government from terminating his status, the Sixth Circuit found that the Immigration Judge's decision was not a final judgment. *Id.* at 475. Rather, it was a preliminary determination that the marriage was bona fide, which was subject to a later decision whether to remove the conditions attached to the status.

Previous Determination Was Necessary to the Decision

An issue is not precluded unless the prior determination was necessary to the decision. This requirement, rooted in principles of fairness, is read into the doctrine because parties should only be estopped on matters they actually consider important, and not on incidental issues. *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1183 (3d Cir. 1972); *see also Matter of Fedorenko*, 19 I&N Dec. 57 (holding that a prior denaturalization judgment conclusively establishes the facts on which an alien's deportability and eligibility for relief from deportation are to be determined); *Matter of C-*, 8 I&N Dec. 577 (BIA 1960) (holding that under the doctrine of collateral estoppel, the finding that the respondent had been a member of the Communist Party was essential to the court's denaturalization suit and was therefore conclusive in the subsequent deportation proceeding).

In certain circumstances, courts have found that an issue was *inherently* necessary to the prior court's decision. For example, in *Amrollah v. Napolitano*, an Immigration Judge granted the respondent's application for asylum, finding that he was not inadmissible as an alien who supported a terrorist organization pursuant to section 212(a)(3)(B)(i) of the Act, 8 U.S.C. § 1182(a)(3)(B)(i). 710 F.3d at 570. The Fifth Circuit held that the Immigration Judge's decision precluded the Government from later denying the respondent's application for adjustment of status based on the same terrorist-related grounds. *Id.* at 572. The court agreed with the respondent that the "grant of asylum necessarily included a determination that he did not provide material support to a terrorist organization or member of such organization." *Id.* Because the Immigration Judge's finding that the respondent did not provide terrorist support was necessary to the order granting asylum, the issue was precluded from subsequent consideration.

Consider, on the other hand, a factual finding made during the removal stage of an immigration proceeding regarding the date of entry of an alien charged with being unlawfully present in the United States in violation of section 212(a)(6)(A)(i) of the Act. During the removal stage of an immigration hearing, the only issues necessary to a decision regarding the charge is whether the alien is, in fact, an alien and whether he or she entered the United States in violation of law. The alien's date of entry is not necessary to this inquiry. Therefore, the initial finding regarding the alien's entry date would not be binding in a later consideration of eligibility for relief. *See Santana-Albarran v. Ashcroft*, 393 F.3d 699, 704 (6th Cir. 2005).

Other Relevant Considerations

Same Facts

Changes in facts or the presentation of new evidence essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues. *See Oyeniran v. Holder*, 672 F.3d 800, 806–07 (9th Cir. 2012). However, "a party cannot circumvent the doctrine's preclusive effect merely by presenting additional evidence that was available to it at the time of the first action."[5] *Latin Am. Music Co. Inc. v. Media Power Grp., Inc.*, 705 F.3d 34, 42 (1st Cir. 2013). Typically, testimony of additional witnesses does not present different facts or changed circumstances if it could have been admitted at the first trial. *See Jones v. United States*, 466 F.2d 131, 136 (10th Cir. 1972) (concluding that the litigants could not present evidence that, if properly submitted, could have been admitted at the first trial). In effect, to allow additional witnesses would provide "a second opportunity in which to litigate the matter, with the benefit of hindsight, [which] would contravene the very principles upon which collateral estoppel is based and should not be allowed." *Id.* Thus, the facts offered must be new, not available at the prior proceeding, and essential to the judgment. Otherwise, they will not render collateral estoppel inapplicable.

The question of issue preclusion might arise regarding prior findings of fact made by an Immigration Judge or the Board. In *Oyeniran v. Holder*, an alien was granted deferral of removal under the Convention Against Torture in a 2005 proceeding during which the alien and an expert witness testified regarding the treatment of religious minorities in Nigeria. 672 F.3d

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CIRCUIT COURT DECISIONS FOR DECEMBER 2014 AND CALENDAR YEAR 2014 TOTALS

by John Guendelsberger

The United States courts of appeals issued 171 decisions in December 2014 in cases appealed from the Board. The courts affirmed the Board in 143 cases and reversed or remanded in 30, for an overall reversal rate of 17.5%, compared to last month's 19.5%. There were no reversals from the First, Sixth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for December 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	0	0	0	0.0
Second	28	25	3	10.7
Third	5	3	2	40.0
Fourth	10	9	1	10.0
Fifth	7	5	2	28.6
Sixth	3	3	0	0.0
Seventh	6	6	0	0.0
Eighth	3	3	0	0.0
Ninth	97	76	21	21.6
Tenth	5	5	0	0.0
Eleventh	7	6	1	14.3
All	171	141	30	17.5

The 171 decisions included 114 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 27 direct appeals from denials of other forms of relief from removal or from findings of removal; and 30 appeals from denials of motions to reopen or reconsider. Reversals or remands within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	114	92	22	19.3
Other Relief	27	20	7	25.9
Motions	30	29	1	3.3

The 22 reversals or remands in asylum cases involved particular social group (11 cases); level of harm for past persecution (6 cases); credibility (2 cases); well-founded fear (2 cases); and the 1-year filing deadline for asylum eligibility.

The seven reversals or remands in the "other relief" category addressed application of the categorical approach (three cases), eligibility for adjustment of status, continuous physical presence for cancellation of removal eligibility, validity of a concession of removability, and aggregation of prison sentences in determining eligibility for withholding of removal. The single remand pertaining to a motion to reopen involved changed country conditions for asylum eligibility.

The chart below shows the combined numbers for calendar year 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	974	752	222	22.8
Seventh	51	41	10	19.6
First	43	36	7	16.3
Third	116	98	18	15.5
Fourth	106	93	13	12.3
Second	406	357	49	12.1
Sixth	85	79	6	7.1
Fifth	169	159	10	5.9
Tenth	54	51	3	5.6
Eleventh	107	101	6	5.6
Eighth	61	60	1	1.6
All	2172	1827	345	15.9

Last year's reversal or remand rate (calendar year 2013) was 10.9%, with 2408 total decisions and 263 reversals.

The numbers by type of case on appeal for calendar year 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1192	969	223	18.7
Other Relief	475	392	83	17.5
Motions	505	466	39	7.7

As the chart below indicates, over the last 9 calendar years we have seen a steady downward trend in the total number of circuit court decisions each year. This trend continued in 2014. The increase in the number and percentage of reversals or remands in 2014 appears to reflect remands to apply intervening developments in the case law in two areas: (1) Board and circuit court law clarifying the definition of a "particular social group" for asylum and (2) Supreme Court and circuit court decisions clarifying the application of the categorical approach to criminal grounds of removal.

	2006	2007	2008	2009	2010	2011	2012	2013	2014
Total Cases	5398	4932	4510	4829	4050	3123	2711	2408	2172
Reversals	944	753	568	540	466	399	253	263	345
% Reversals	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9	15.9

The reversal/remand rates by circuit for the last 9 calendar years are shown in the following chart.

Circuit	2006	2007	2008	2009	2010	2011	2012	2013	2014
First	7.1	3.8	4.2	5.6	8.6	19.0	10.4	10.5	16.3
Second	22.6	18.0	11.8	5.5	4.9	4.9	4.8	7.8	12.1
Third	15.8	10.0	9.0	16.4	10.7	11.3	6.7	8.5	15.5
Fourth	5.2	7.2	2.8	3.3	5.2	5.2	4.6	2.9	12.3
Fifth	5.9	8.7	3.1	4.0	13.5	2.9	7.5	1.9	5.9
Sixth	13.0	13.6	12.0	8.6	8.7	6.8	6.6	3.1	7.1
Seventh	24.8	29.2	17.1	14.3	21.0	19.4	8.5	25.7	19.6
Eighth	11.3	15.9	8.2	7.7	8.1	7.5	7.5	6.3	1.6
Ninth	18.1	16.4	16.2	17.2	15.9	18.6	14.4	13.9	22.8
Tenth	18.0	7.0	5.5	1.8	4.9	9.5	6.3	11.4	5.6
Eleventh	8.6	10.9	8.9	7.1	6.5	6.8	5.8	16.3	5.6
All	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9	15.9

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RECENT COURT OPINIONS

Second Circuit:

Pan v. Holder, No. 13-203-ag, 2015 WL 304199 (2d Cir. Jan. 26, 2015): The Second Circuit granted a petition for review of the Board's decision denying asylum from the Kyrgyz Republic. The petitioner credibly testified that he was beaten three times over a 4-year period and required 2 weeks of hospitalization following the last incident. He further testified that he did not call the police because doing so would have been futile and might, instead, have made his situation worse. The petitioner's aunt, who had been granted asylum in the U.S. on a similar claim, credibly testified that, "as usual," the Kyrgyz police were unresponsive to her following two similar incidents she suffered there in 2001 and 2004. Both the Immigration Judge and the Board concluded that the petitioner had not met his burden of establishing eligibility for asylum. The circuit court disagreed. In response to the Immigration Judge's conclusion that the petitioner was the victim of "hate crimes," which the Immigration Judge defined as "a criminal act that is not a sufficient basis to find persecution," the court held that "hatred of a group that manifests itself in violent crimes against members of that group would seem to be at the core of persecution." Addressing the Board's finding that the harm suffered by the petitioner did not rise to the level of persecution, the court considered it comparable to that which the Board found to be persecution in *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998), as did the Second Circuit in *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332 (2d Cir. 2006). The Board had given no explanation for its departure from its own precedent in this case. The court also addressed the findings of both the Immigration Judge and Board that the petitioner had not established that the Kyrgyz Government was unable or unwilling to provide protection, in part because the petitioner did not report his 2005 attack to the police. The court found sufficient evidence of record to support the petitioner's contention, including his own credible testimony that the police were corrupt, which was corroborated by the State Department's 2009 country report on human rights practices included in the record. Additionally, the court found that the Immigration Judge should have considered as evidence in support of the petitioner's "unwilling or unable" claim his aunt's credible testimony regarding police inaction in response to her own attack. The court vacated the denial of asylum and withholding of removal and remanded for further proceedings.

Husic v. Holder, No. 14-607, 2015 WL 106359 (2d Cir. Jan. 8, 2015): The petitioner entered the United States as a visitor and subsequently adjusted his status to that of a lawful permanent resident ("LPR"). Years later, he pled guilty to second degree attempted possession of weapon under section 265.03 of the New York Penal Law and was sentenced to 3 years of imprisonment. The Immigration Judge determined that the respondent was not eligible for adjustment of status with a waiver of inadmissibility under section 212(h) of the Act because he was convicted

of an aggravated felony after he was "previously admitted to the United States as an alien lawfully admitted for permanent residence." The petitioner argued that the aggravated felony bar in section 212(h) did not apply to him because he was admitted to the country as a visitor, and not as an LPR. He thus attained his status through adjustment of status while in the United States, rather than when he was admitted into the country. The court found that the statute's language unambiguously requires the alien to be admitted into the United States as an LPR, rather than becoming an LPR while in the country through adjustment of status. Accordingly, it joined the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits in concluding that the Board's interpretation was not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court vacated the petitioner's removal order and remanded the record to permit him to apply for a waiver of inadmissibility under section 212(h) of the Act.

Fourth Circuit:

Castillo v. Holder, No. 14-1085, 2015 WL 161952 (4th Cir. Jan. 14, 2015): The petitioner was convicted of unauthorized use of a motor vehicle in violation of section 18.2-102 of the Virginia Code. The Immigration Judge found that this crime was an aggravated felony "theft offense" under section 101(a)(43)(G) of the Act. The Board upheld the decision, concluding that the statutory elements of the Virginia offense "essentially mirror[ed]" those in its previously adopted definition of a "theft offense." The court examined the definition provided in *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000), noting that the Board construed the term to include the deprivation of ownership rights or benefits that are "less than total or permanent" but not lesser takings that equate to "glorified borrowing." The court then reviewed Virginia court decisions and found that Virginia law permits a conviction for unauthorized use of a motorized vehicle when an owner authorizes an individual to use a vehicle for a stated purpose, but the individual uses it for a different purpose, even if within the time frame and other specifications of the authorized use. Concluding that State courts have applied the statute to situations involving the type of "glorified borrowing" that the Board previously found was outside of the theft definition, the court vacated the petitioner's removal order.

Prasad v. Holder, No. 14-1034, 2015 WL 136620 (4th Cir. Jan. 12, 2015): The petitioner sought to adjust his status to that of an LPR under section 245(i) of the Act, but because of the ineffective assistance of his prior attorney, he filed his labor certification application more than 2 months after the April 30, 2001, statutory deadline. The petitioner conceded his late filing but argued that the filing deadline found in section 245(i) of the Act is a statute of limitations and is thus subject to equitable tolling. The Fourth Circuit first distinguished a statute of repose, which puts an end date on substantive liability, from a statute of limitations, which is purely procedural. The court then agreed with the Ninth Circuit that the April 30, 2001, deadline has "all the hallmarks" of a statute of repose. Specifically, Congress set a specific calendar date, as opposed to "a variable deadline pegged to some other event" and included that date in the list of statutory conditions for eligibility for adjustment of status. The court therefore concluded that, despite evidence that the petitioner would suffer hardship on account of his prior counsel's ineffective assistance, he was ineligible to adjust his status pursuant to section 245(i) of the Act. The petition for review was denied in part and dismissed in part.

Omargharib v. Holder, No. 13-2229, 2014 WL 7272786 (4th Cir. Dec. 23, 2014): The petitioner was convicted of grand larceny in violation of section 18.2-95 of the Virginia Code. Applying the modified categorical approach, the Board found that the petitioner's violation was a "theft offense" and thus an aggravated felony under section 101(a)(43)(G) of the Act. The court agreed with the Board that the elements of section 18.2-95 do not categorically match the definition of a "theft offense" in the Act. However, the court disagreed with the Board that the petitioner's conviction could be analyzed using the modified categorical approach, rejecting the Board's conclusion that the Virginia statute is divisible since "state courts have defined it to include either theft *or* fraud." The court noted its earlier decision, *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013), in which it held that the use of the word "or" in the definition of a crime does not automatically render the statute divisible. Moreover, pursuant to *Descamps v. United States*, 133 S. Ct. 2276 (2013), a crime is divisible only if it includes multiple alternative *elements*, as opposed to multiple alternative *means*. The court found that the word "or" in section 18.2-95 creates two alternative *means* of committing the same crime, "wrongfully" and "fraudulently," rather than providing alternative elements. Therefore, the Virginia larceny statute is not divisible and only the categorical

approach applies. Based on its analysis of Virginia law, the court concluded that the petitioner's conviction for grand larceny was not for a "theft offense" under the Act and reversed the Board's order. The court's panel decision included a concurring opinion.

Eighth Circuit:

Bin Jing Chen v. Holder, No. 13-3495, 2015 WL 177048 (8th Cir. Jan. 15, 2015): The petitioner requested relief in the form of asylum, withholding of removal, protection under the Convention Against Torture, and cancellation of removal. The petitioner claimed that she suffered persecution in China on account of her Christianity. The Immigration Judge and the Board found the petitioner not credible and thus concluded that she had not sufficiently demonstrated changed circumstances to qualify for an exception to the 1-year filing deadline for asylum. The court found that it lacked jurisdiction to review the determination that the application was untimely. The court also upheld the Board's conclusion that even if she was credible, the petitioner had not met her burden of proof with regard to her claims for withholding of removal and protection under the Convention Against Torture. The court noted the petitioner's testimony that her mother, who practices Christianity in China, had not been arrested or harmed since the petitioner left the country and the fact that the petitioner's children had visited China for extended periods of time without incident. The record also contained country conditions evidence indicating that unsanctioned Christian groups are tolerated in some parts of China. Regarding cancellation of removal, the court noted that its review is limited to constitutional claims and questions of law. According to the court, the petitioner's argument that the Board did not properly weigh the impact of her husband's possible removal was a challenge to the Board's discretionary determination, rather than its application of the law. The court therefore concluded that it lacked jurisdiction to review such an argument and denied the petition for review.

Mayemba v. Holder, Nos. 13-1558, 13-2469, 2015 WL 149279 (8th Cir. Jan. 13, 2015): The Board found the petitioner removable pursuant to section 237(a)(3)(D) of the Act based on his claim of United States citizenship in an employment verification form (Form I-9). The petitioner argued that a representation in a Form I-9 cannot be the basis of false claim to citizenship and, alternatively, that his disjunctive representation to being a "citizen or national" was not a false claim of United States citizenship. The court found that the first argument was indistinguishable from that made in *Downs v. Holder*, 758 F.3d 994, 997 (8th Cir. 2014), where the court concluded that the Form I-9 is admissible in removal proceedings. The court agreed with the petitioner's second argument, holding that checking the disjunctive "citizen or national" box alone cannot support a false claim to citizenship. However, the Board's holding was supported by additional evidence, which included the petitioner's claim of United States citizenship in a college application, as well as his testimony that he knew he was not a citizen, who is a person born in the United States, but did not know the definition of a national. Concluding that substantial evidence supported the Board's conclusion that the petitioner failed to meet his burden of showing that he did not make a false claim of United States citizenship, the court denied the petition for review.

BIA PRECEDENT DECISIONS

In *Matter of O. A. Hernandez*, 26 I&N Dec. 464 (BIA 2015), the Board determined that the offense of "deadly conduct" in violation of section 22.05(a) of the Texas Penal Code is categorically a crime involving moral turpitude ("CIMT"). The respondent was convicted under section 22.05(a), which punishes a person who "recklessly engages in conduct that places another in imminent danger of serious bodily injury." Conducting a categorical CIMT analysis of section 22.05(a) in accordance with step one of the framework outlined in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Board noted that recklessness is a culpable mental state when it involves a conscious disregard of a substantial and unjustifiable risk posed by one's conduct. Texas law provides that a person engages in reckless conduct if he or she is "aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." The Board thus concluded that "recklessness" under Texas law qualifies as a form of "scienter" sufficient to meet the definition of a CIMT provided in *Matter of Silva-Trevino*.

Next, the Board determined that placing another in "imminent danger of serious bodily harm" in violation of section 22.05(a) is "reprehensible conduct" as contemplated by *Matter of Silva-Trevino*. Referring to its reasoning in *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012), *aff'd*, 771 F.3d 1140 (9th Cir. 2014), the Board pointed out that while recklessly endangering another with a substantial risk of imminent death is a base act that is antithetical to socially acceptable rules of morality,

neither death nor serious bodily injury of a victim is required for the crime to be turpitudinous. Determining that all of the potential harm engendered by the reckless conduct penalized in section 22.05(a) is sufficiently grave to make it reprehensible, the Board concluded that the offense of deadly conduct in violation of the Texas statute is categorically a CIMT.

The respondent sought cancellation of removal under section 240A(b)(1) of the Act. Since his offense is a CIMT for which a sentence of 1 year could have been imposed, the Board concluded that he was convicted of an offense "described under" section 237(a)(2) of the Act and was therefore ineligible for relief under section 240A(b)(1)(C), even if the crime could qualify for the petty offense exception under section 212(a)(2). The Board dismissed the respondent's appeal.

In *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015), the Board held that a statutory rape offense that may include a 16- or 17-year-old victim is categorically "sexual abuse of a minor" under section 101(a)(43)(A) of the Act only if the statute requires a meaningful age differential between the victim and the perpetrator. The offense of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code, which requires that the minor victim be "more than three years younger" than the perpetrator, categorically constitutes "sexual abuse of a minor" and is thus an aggravated felony under section 101(a)(43)(A).

The respondent was convicted of violating section 261.5(c) of the California Penal Code, the elements of which are (1) unlawful sexual intercourse (2) with a minor under 18 years old (3) who is more than 3 years younger than the perpetrator. Clarifying the definition of "sexual abuse of a minor" established in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), and *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), the Board explained that the issue here was whether a violation of a statute like section 261.5(c), which involves unlawful sexual intercourse with a minor under the age of consent, constitutes "sexual abuse of a minor."

Following *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Board announced in *Matter of Chairez*, 26 I&N Dec. 349, 354 (BIA 2014), that it would follow the law of each circuit to determine whether a statute is divisible. In the Sixth Circuit, in whose jurisdiction this case arose, there is no additional case law explaining the divisibility analysis set forth in *Descamps.* Accordingly, in this case, the Board applied *Descamps* and concluded that section 261.5(c) is not divisible as to sexual abuse of a minor and therefore must be analyzed under the categorical approach. Thus, the Board explained that it could not look at any of the facts that form the basis of the conviction, including the ages of the victim and the offender, even if they are a matter of record and not in dispute.

The respondent argued that according to the Ninth Circuit, a violation of section 261.5(c) is categorically not "sexual abuse of a minor" under the Act because a statutory rape statute cannot define a "sexual abuse of a minor" offense unless it excludes 16- or 17-year-olds as victims and requires at least a 4-year age differential between the victim and perpetrator. However, the Board found that it is not bound by the Ninth Circuit law in the Sixth Circuit and held that a violation of section 261.5(c) is categorically "sexual abuse of a minor" outside of the Ninth Circuit.

The Board reasoned that inherent in statutory rape is the notion that a person less than a certain age is legally incapable of giving consent and thus statutory rape involves a sexual act committed "against" another. The Board acknowledged there is not a consensus among States as to the age of consent. It noted, however, that multiple State statutes included 16- and 17-year-olds as victims of statutory rape at the time that section 101(a)(43)(A) was enacted and opined that Congress did not intend to exclude these State offenses from the definition of an aggravated felony.

Recognizing the need for a distinction between sexual offenses involving older adolescents and those involving younger children when assessing whether consensual intercourse between peers is "abusive," the Board concluded that a statute defining "sexual abuse of a minor" must prohibit conduct that constitutes "sexual abuse" in its common usage. In that regard, the Board instructed that a violation of a statute that contemplates a 16- or 17-year-old victim and presumes a lack of consent categorically constitutes "sexual abuse of a minor" only if a meaningful age differential between the victim and perpetrator is required for conviction. According to the Board, an age differential of "more than three years" is sufficient. The Board clarified that this holding does not apply to other types of sexual crimes and cautioned that statutes implicating section 101(a)(43)(A) must be evaluated individually on a case-by-case basis.

Concluding that the crime of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code categorically constitutes "sexual abuse of a minor" and is an aggravated felony under the Act, the Board determined that the respondent is removable and dismissed his appeal.

REGULATORY UPDATE

80 Fed. Reg. 893 (January 7, 2015)

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2550–14; DHS Docket No. USCIS–2007–0028]

RIN 1615–ZB36

Extension of the Designation of El Salvador for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.
SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of El Salvador for Temporary Protected Status (TPS) for 18 months from March 10, 2015, through September 9, 2016.

The extension allows currently eligible TPS beneficiaries to retain TPS through September 9, 2016, so long as they otherwise continue to meet the eligibility requirements for TPS. The Secretary has determined that an extension is warranted because the conditions in El Salvador that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001, and El Salvador remains unable, temporarily, to handle adequately the return of its nationals.

Through this Notice, DHS also sets forth procedures necessary for nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) to re-register for TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Reregistration is limited to persons who have previously registered for TPS under the designation of El Salvador and whose applications have been granted. Certain nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) At least one of the late initial filing criteria; and, (2) all TPS eligibility criteria (including continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001).

For individuals who have already been granted TPS under the El Salvador designation, the 60-day re-registration period runs from January 7, 2015 through March 9, 2015. USCIS will issue new EADs with a September 9, 2016 expiration date to eligible El Salvador TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS reregistration applications, DHS recognizes that not all re-registrants will receive new EADs before their current EADs expire on March 9, 2015. Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of El Salvador for 6 months, through September 9, 2015, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I–9) and the E-Verify processes.
DATES: The 18-month extension of the TPS designation of El Salvador is effective March 10, 2015, and will remain in effect through September 9, 2016. The 60-day re-registration period runs from January 7, 2015 through March 9, 2015. (Note: It is important for re-registrants to timely re-register during this 60-day reregistration period and not to wait until their EADs expire.)

80 Fed. Reg. 245 (January 5, 2015)

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2548–14; DHS Docket No. USCIS–2013–0001]

RIN 1615–ZB35

Extension and Redesignation of the Syrian Arab Republic for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of the Syrian Arab Republic (Syria) for Temporary Protected Status (TPS) for 18 months, from April 1, 2015 through September 30, 2016, and redesignating Syria for TPS for 18 months, effective April 1, 2015 through September 30, 2016.

The extension allows currently eligible TPS beneficiaries to retain TPS through September 30, 2016, so long as they otherwise continue to meet the eligibility requirements for TPS. The redesignation of Syria allows additional individuals who have been continuously residing in the United States since January 5, 2015 to obtain TPS, if otherwise eligible. The Secretary has determined that an extension of the current designation and a redesignation of Syria for TPS are warranted because the ongoing armed conflict and other extraordinary and temporary conditions that prompted the 2013 TPS redesignation have not only persisted, but have deteriorated, and because the ongoing armed conflict in Syria and other extraordinary and temporary conditions would pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country.

Through this Notice, DHS also sets forth procedures necessary for nationals of Syria (or aliens having no nationality who last habitually resided in Syria) either to: (1) Re-register under the extension if they already have TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS); or, (2) submit an initial registration application under the redesignation and apply for an EAD.

For individuals who have already been granted TPS under the 2012 original Syria designation or under the 2013 Syria redesignation, the 60-day reregistration period runs from January 5, 2015 through March 6, 2015. USCIS will issue new EADs with a September 30, 2016 expiration date to eligible Syria TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the timeframes involved with processing TPS reregistration applications, DHS recognizes that not all re-registrants will receive new EADs before their current EADs expire on March 31, 2015. Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of Syria for 6 months, through September 30, 2015, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I–9) and E-Verify processes. Under the redesignation, individuals who currently do not have TPS (or an initial TPS application pending) may submit an initial application during the 180-day initial registration period that runs from January 5, 2015 through July 6, 2015. In addition to demonstrating continuous residence in the United States since January 5, 2015 and meeting other eligibility criteria, initial applicants for TPS under this redesignation must demonstrate that they have been continuously physically present in the United States since April 1, 2015, the effective date of this redesignation of Syria, before USCIS may grant them TPS.

TPS initial applications that were either filed during 2012 designation or during the 2013 Syria redesignation and remain pending on January 5, 2015 will be treated as initial applications under this 2015 redesignation. Individuals who have a pending initial Syria TPS application will not need to file a new Application for Temporary Protected Status (Form I–821). DHS provides additional instructions in this Notice for individuals whose TPS applications remain pending and who would like to obtain an EAD valid through September 30, 2016.

DATES: Extension of Designation of Syria for TPS: The 18-month extension of the TPS designation of Syria is effective April 1, 2015, and will remain in effect through September 30, 2016. The 60-day re-registration period runs from January 5, 2015 through March 6, 2015.

A Preclusive Effect *continued*

at 803–04. Years later, the alien went to Nigeria to see his ailing mother. *Id.* at 804–05. Upon his return, he was placed in proceedings again and was charged with being inadmissible to the United States. *Id.* at 805. This time, he was denied deferral of removal. The Ninth Circuit held that the Board "erred by rehashing the historical facts and its findings of law as applied to the 2003 and 2004 incidents of violence that formed the basis of its 2005 decision to grant deferral." *Id.* at 806. Thus, incidents prior to the 2005 grant of deferral were precluded from reconsideration because the same facts had been litigated and decided. However, incidents after 2005 could be litigated to determine whether deferral of removal was still appropriate. *Id.* at 807–08.

Same Legal Standard

Finally, the legal standard used to determine the previously litigated issue must also be used in a

subsequent proceeding. The legal standards applied need not be identical in their wording, but the same general legal rules must govern such that "the facts of both cases are indistinguishable as measured by those rules." *Suppan v. Dadonna*, 203 F.3d 228, 233 (3d Cir. 2000) (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4425, at 253 (2d ed. 1981)) (internal quotation mark omitted). Thus, minor differences in the applicable legal standard will not prohibit a court from finding that an issue is precluded.

For example, an acquittal of criminal charges does not preclude subsequent immigration litigation based on the same facts alleged in the criminal case because different burdens apply. The Board explained that an "acquittal [is] 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the accused.'" *Matter of Perez-Valle*, 17 I&N Dec. 581, 583 (BIA 1980) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) (quoting *Lewis v. Frick*, 233 U.S. 291 (1914))). Thus, an acquittal is not "a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based." *Id.* at 584 (quoting *Helvering*, 303 U.S. at 397) (internal quotation marks omitted). An alien who was acquitted "on a criminal charge alleging that the defendant procured and brought a woman to the United States for immoral purposes may nonetheless be found deportable based on the acts underlying that charge." *Id*. at 583. Similarly, an acquittal on the charge of being an alien found in the United States after deportation would not preclude litigation of the respondent's nationality status in removal proceedings.

On the other hand, the same legal standard applies in immigration proceedings and in actions in Federal court for a declaration of United States citizenship pursuant to the provisions of 28 U.S.C. § 2201. *See* section 360(a) of the Act, 8 U.S.C. § 1503(a). The petitioner in such an action bears the burden of proving by a preponderance of the evidence that he or she is a United States citizen. *See, e.g.*, *Sanchez-Martinez v. INS*, 714 F.2d 72, 73–74 (9th Cir. 1983); *De Vargas v. Brownell*, 251 F.2d 869, 870–71 (5th Cir. 1958). Likewise, "[i]n removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to come forward with evidence to substantiate his citizenship claim." *Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008). In order to rebut this presumption of alienage, a respondent must establish by a preponderance of the evidence that he or she is a United States citizen. *See Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (BIA 1969). The legal standard used to render a finding of alienage in the immigration proceeding would be the same as that employed in the declaratory action in Federal court—a preponderance of the evidence standard.[6] It would therefore appear that the issue of citizenship in the immigration proceeding would be precluded from being raised based on the previous Federal court determination.

Significant Change in the Legal Landscape

A significant change in the legal landscape may also prevent the application of issue preclusion. Such a change is best described as "a judicial declaration intervening between the two proceedings [that] . . . so change[s] the legal atmosphere as to render the rule of collateral estoppel inapplicable." *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26, 37 (2d Cir. 2005) (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 600 (1948)) (internal quotation marks omitted). This exception is a rare one. *See, e.g.*, *Apotex, Inc. v. FDA*, 393 F.3d 210, 218 (D.C. Cir. 2004). Only "in a small set of cases, a change in controlling legal principles may allow a party to relitigate a claim that would otherwise be barred." *Id*. Decisions that only "crystallize" an existing body of law do not constitute a shift in the legal landscape. *See, e.g.*, *Paulo v. Holder*, 669 F.3d 911, 919 (9th Cir. 2011) (quoting *Blake v. Carbone*, 489 F.3d 88, 98 (2d Cir. 2007)) (internal quotation marks omitted). Accordingly, although the exception is rarely used in practice, a change in law or its application could render issue preclusion inapplicable.

Catchall Flexibility Exception

As noted, the Board has held that issue preclusion is a flexible doctrine that should not be applied if the application "would contravene an overriding public policy or result in manifest injustice." *Matter of Barragan-Garibay*, 15 I&N Dec. at 79 (quoting *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d at 128) (internal quotation marks omitted). However, examples of this are rare, and after noting the exception in *Barragan-Garibay*, the Board determined that it did not apply. *Id*.

In *Duvall v. Attorney General of the U.S.*, the Immigration Judge terminated proceedings after the Government failed to establish alienage. 436 F.3d at 384. The alien was subsequently convicted twice of retail theft. *Id.* at 385. When placed in removal proceedings based on these crimes, she argued that the Government

was precluded from litigating her alienage. The Third Circuit called the Government's failure a "litigation error" and held that the Immigration Judge "merely terminated proceedings when the INS unexpectedly found itself unable to secure answers from Duvall regarding her birthplace or to introduce evidence—available but inadmissible under local procedural rules—that could have satisfied its burden of proof on the issue of alienage." *Id.* at 392. Accordingly, the court found that applying the doctrine rigidly would contravene the purpose of the immigration laws to remove criminal aliens in light of the petitioner's ongoing criminal conduct in that case. *Id.*

Conclusion

A body of law regarding issue preclusion has developed over many years, and it will continue to develop in the future. This article cannot provide answers to every question presented by this doctrine. But it serves as a refresher on what issue preclusion fundamentally entails and sheds some light on the situations in which it is most likely to arise.

[1] The American Law Institute recommends replacing the terms "res judicata" and "collateral estoppel" with the more descriptive English phrases "claim preclusion" and "issue preclusion" to avoid the confusion. *See, e.g.*, *Sterling v. United States*, 85 F.3d 1225, 1227 (7th Cir. 1996) (citing *Restatement (Second) of Judgments* (1980)). However, it is important to know the Latin terminology because older court decisions use the terms at length, and some courts still use them, often interchangeably and with regularity. *See, e.g.*, *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 309 n.11 (3d Cir. 2009) ("While it has been suggested that 'issue preclusion' has replaced the term 'collateral estoppel,' the latter term is still very much in use . . . . We think it would be more confusing to work around so well-worn a phrase, so we use it too." (citing *Taylor v. Sturgell*, 553 U.S. at 892 n.5)).

[2] Importantly, if a Notice to Appear is the subject of a final judgment on the merits, claim preclusion *could* bar the Government from initiating a second removal case on the basis of a charge that *could have been brought* in the first instance but was not. *Al Mutarreb v. Holder*, 561 F.3d 1023, 1031 (9th Cir. 2009). *But see Duhaney v. Att'y Gen. of U.S.*, 621 F.3d 340, 348 (3d Cir. 2010); *Channer v. DHS*, 527 F.3d 275, 282 (2d Cir. 2008).

[3] The Sixth Circuit provides the following test: (1) the issue in the subsequent litigation must be identical to that resolved in the earlier litigation; (2) the issue was actually litigated and decided in the prior action; (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation; (4) the party to be estopped was a party to the prior litigation (or in privity with such a party); and (5) the party to be estopped had a full and fair opportunity to litigate the issue. *Hammer v. INS*, 195 F.3d 836, 840 (6th Cir. 1999). The Ninth Circuit requires that (1) the issue at stake was identical in both proceedings, (2) the issue was actually litigated and decided in the prior proceedings, (3) there was a full and fair opportunity to litigate the issue, and (4) the issue was necessary to decide the merits. *See Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012) (citing *Montana v. United States*, 440 U.S. at 153–54).

[4] The Seventh Circuit has held that claim preclusion is also flexible in the administrative context. *Alvear-Velez v. Mukasey*, 540 F.3d 672, 677 (7th Cir. 2008) (holding that res judicata is to be applied flexibly to administrative decisions). Other courts have disagreed. *See Medina v. INS*, 993 F.2d 499, 503 (5th Cir. 1993) ("The INS reiterates the position adopted by the BIA that res judicata in administrative proceedings is a flexible doctrine (whatever that means) and is limited to factual findings. We find no viable support for that position.").

[5] The regulations relating to motions to reopen based on changed circumstances mirror this language. Pursuant to 8 C.F.R. § 1003.23(b)(3), "[a] motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."

[6] *Compare Matter of H-*, 7 I&N Dec. 407 (BIA 1957) (holding that a Federal court's dismissal of a declaratory judgment did not collaterally estop future litigation in immigration proceedings regarding expatriation (or deportability) because the legal standards were different), *with Matter of J-J-*, 9 I&N Dec. 320 (BIA 1961) (holding that declaratory action in Federal court regarding citizenship, which was dismissed with prejudice, served as a bar to a later assertion of citizenship in immigration proceedings, although not specifying whether it was issue or claim preclusion that served as the bar).

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