CONFLICTS OF LAW: "SHOULD'VE THOUGHT ABOUT IT BEFORE YOU SAID GOODBYE"

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INTRODUCTION AND OVERVIEW OF CONFLICTS OF LAW

The question of what source of law a court should look to in a case is a complex one in this country, with its multitude of federal and state courts. This legal subject, sometimes called "choice of law," has perplexed courts, litigators, and law students alike since the case *Erie Railroad Co. v. Tompkins.*[1] Today, the doctrine is additionally complicated by an increasingly global marketplace, in which transactions must be parsed according to the laws of different nations and a growing body of international law.

In an immigration case, a court will rarely engage in the kind of complicated choice of law analysis that it might in a case involving a contract dispute or tort action with multi-state parties. The governing law in an immigration case will almost always be federal immigration law, and although the federal circuits disagree about many issues of immigration law, it will generally be clear which circuit law controls a case. There are some exceptions to this general rule that we address in the first section of this article. For instance, choice of law questions might arise in a case where a respondent in deportation proceedings has moved, during the course of the case, from one federal circuit to another. However, for the most part the "choice of law" questions that arise in immigration cases come in the context of what is often called "forum shopping"—the analysis, before a case has commenced, of what forum is best for the issues at stake in the prospective adjudication.

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[1] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The "Erie Doctrine" holds that a federal court deciding a case based on "diversity jurisdiction" must apply state substantive law.

Forum shopping is generally frowned upon as a legal tactic. But we think that immigrants are right to consider this question.[2] Immigrants in legal proceedings not only risk their pocketbooks, but their very right to remain in the country where they have built lives and families. Moreover, American immigration law has grown disturbingly inconsistent, so that forum matters a great deal more than it should. Different circuits have very different rules about basic issues, such as whether or not an immigrant can adjust status to become a lawful permanent resident, what types of convictions will subject an immigrant to mandatory deportation, and which immigrants must remain detained during the course of removal proceedings. In the second section of this article, we describe some of the principal areas in which there are circuit splits, and suggest which circuits might be preferable forums in particular types of cases.

CHOICE OF LAW QUESTIONS IN PENDING REMOVAL LITIGATION

There are limited situations in which a court will have to decide in an immigration case whether to apply its own law or the law of a different circuit. One of these situations arises in a case where a removal hearing is conducted by videoconferencing. In this situation, the Office of the Chief Immigration Judge (OCIJ) considers the case to be held in the circuit in which the case is docketed.[3] Thus, in a case where the judge is appearing by video from a remote location, and the respondent, his attorney, and the government attorney are all located in the court where the case was docketed, the hearing location will be considered to be the location where the parties, and not the judge, are located.

However, there may be less clarity about what law to apply in a case where the respondent is appearing by video from a remote location in one circuit, and the judge and attorneys are located in a court in a different circuit, or where the attorneys, judge, and respondent are evenly distributed between two locations. The advent of video technology and a widely dispersed immigration detention system raise the specter of unusual variations and thorny choice of law problems.

Another situation in which a court might be faced in an immigration case with a choice of law issue, is where the respondent moves from one circuit to another after legal rulings have already been made in a case. This might occur because the respondent has been granted a change of venue. In one case, a respondent won a habeas petition allowing him to be released from custody after his deportation case had already wound its way up to and back from the Third Circuit Court of Appeals. Although he had been detained at the York detention facility in Pennsylvania, he was originally from Illinois, and after his release the immigration court *sua sponte* transferred venue to the Chicago Immigration Court. After the transfer, the Government argued that it should no longer be bound by a prior legal ruling in the case that the respondent was entitled to seek withholding of removal, since that decision was based on a Third Circuit decision, *Alaka v. United States Attorney General*,[4] which is not the law in the Seventh Circuit. The Government even went so far as to take the respondent back into custody, although the federal judge in Pennsylvania immediately ordered that he again be released.

In a case like this, there is a doctrine of civil procedure that should resolve the problem. The "law of the case" doctrine holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."[5] The OCIJ and at least one federal court have held that this doctrine applies to immigration adjudications.[6] The rationale of the doctrine seems particularly rele-

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[2] The government also engages in its own forum shopping. For example, it has lately been relocating detainees from other districts to detention facilities in Texas (within the rarely pro-immigrant Fifth Circuit), even after they have obtained attorneys.

[3] OCIJ, *Interim Operating Policies and Procedures Memorandum No. 04-06: Hearings Conducted through Telephone and Video Conference* (Aug. 14, 2004). *See also Matter of Anslemo*, 20 I&N Dec. 25, 31 (BIA 1989) (explaining that the Board historically follows a court's precedent in cases arising in that circuit).

[4] *Alaka v. United States Attorney General*, 456 F.3d 88 (3d Cir. 2006).

[5] *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

[6] *See* OCIJ, *Operating Policy and Procedure Memorandum 01-02—Changes of Venue* at 2 (January 14, 2002) ("the law of the case doctrine is consistent with all existing immigration laws and regulations" and it "shall apply" where there has been a change in venue.); *Zhang v. Gonzales*, 434 F.3d 993, 998 (7th Cir. 2006).

vant to the situation of a relocated respondent; it protects parties "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[7]

Choice of Law When Detained Client Is Moved to Another Venue

If a client has been arrested and is being detained by ICE and is at risk of being moved to another jurisdiction where case law is less favorable, the first thing to do is file a habeas petition before the client is moved. As long as the petitioner is in custody at the time the petition is filed, transfer to another jurisdiction or removal from the United States does not make the case moot and the court continues to have jurisdiction.[8] If the client is able to secure an order for release, or at least an order prohibiting transfer to another jurisdiction, then the removal proceedings should be held in the home forum, and the law of that jurisdiction should apply.

After the client has been moved to another jurisdiction, the case is more difficult. Generally, the proper venue for a habeas petition is the jurisdiction where the petitioner is confined (the "district of confinement" rule).[9] However, generally there is no absolute requirement that a habeas petition must be filed in the jurisdiction where the petitioner is confined.[10] If the district court has jurisdiction over the petitioner's custodian, for example by virtue of its long-arm jurisdiction, then the case can go forward.[11] Venue in habeas petitions is ordinarily governed by traditional venue considerations, which include: (1) where the material events occurred; (2) where records and witnesses pertinent to the claim are likely to be found; and (3) the convenience of the forum to the respondent and the petitioner.[12] In a recent case, a district court allowed a detained petitioner to file her habeas lawsuit in the Southern District of New York against the Attorney General, even though the petitioner was being held in New Jersey.[13] If a detained petitioner in removal proceedings is able to secure his or her release and return to his or her home, then he or she can seek a change of venue for the removal proceedings back to the home forum.

Ethical Issues

If removal proceedings are not already pending against a client and the client is not detained, then an attorney has the luxury of advising the client about what circuits view the client's legal question most favorably. In advising a client and handling a case involving choice of forum issues, there are two general ethical principles to keep in mind: (1) the lawyer has a duty to accurately advise the client on what the law is; and (2) the lawyer has a duty to be truthful to the agency or tribunal. The relevant Rules of Professional Conduct are the following:

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[7] *Montana v. U.S.*, 440 U.S. 147, 153-54 (1979).

[8] *See, e.g., Zegarra-Gomez v. INS*, 314 F.3d 1124, 1125, 1127 (9th Cir. 2003) (subsequent removal from the United States does not moot the case if there are "collateral consequences" that create legal disadvantages; since the "inability to return is a concrete disadvantage imposed as a matter of law, the fact of his deportation did not render the pending habeas petition moot"); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (where petitioner was in custody at the time the petition was filed, his release from prison did not moot the case because he could still suffer "serious disabilities because of the law's complexities"); *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (petitioner who was incarcerated at the time the petition was filed satisfied the "in custody" requirement; even though he departs from the United States, court continues to have jurisdiction because he is affected by the legal implications of the decision).

[9] *See In the Matter of Jackson*, 15 Mich. 417, 439–40 (1867), *cited with approval Braden v. 30th Jud. Cir. of Ky.*, 410 U.S. 484, 495 (1978).

[10] *But see Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006).

[11] *Braden*, 410 U.S. at 495 ("So long as the custodian can be reached by service of process, the court can is-sue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction").

[12] *Id.* at 493-494.

[13] *See Farez-Espinoza v. Chertoff*, No. 08 Civ. 11060, 2009 WL 195937 (S.D.N.Y. Jan. 28, 2009). *But see, Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006) (the proper respondent is the "direct custodian," *i.e.*, the warden of the prison).

RPC 2.1 - Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

RPC 3.3 - Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Most but not all rules regarding what law should be applied are based on the place of the client's residence.[14] A lawyer can (and under Rule 2.1 may be obligated to) give advice to a client concerning conflicts of law. And just as corporations can make decisions about where to locate on the basis of conflicts of law (*e.g.*, environmental regulations or tax considerations), so also it is permissible for individuals to take up residence on the basis conflict of law considerations. An attorney advising the individual should just keep in mind the two principles mentioned above: (1) the duty to provide accurate advice to the client; and (2) the duty to be truthful to the tribunal.

Background Regarding Particular Issues

Brand X

A conflict of law question arises when the agency, the Board of Immigration Appeals, interprets the law differently than the federal circuit courts. Prior to the recent Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Service (Brand X)*,[15] the agency was obliged to follow circuit precedent in cases originating within that circuit, recognizing that the federal courts were the reviewing courts and their interpretations would necessarily trump agency interpretations.[16] However, following *Brand X,* the BIA and circuit courts have upset this well-settled principle of stare decisis based on a new approach to the application of *Chevron* deference. This major change has called into question the precedential value of circuit court opinions in the immigration context.

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[14] *See, e.g.* 8 CFR §103.2(a)(6) (except as otherwise provided, an application is to be filed with the USCIS office "with jurisdiction over the application or petition and the place of residence of the applicant or petitioner as indicated in the instructions with the respective form"); 8 CFR §212.2(g) (application for I-212 waiver is filed with either (1) the district director with jurisdiction over the place where the removal hearing was held; or (2) the district director with jurisdiction over the applicant's most recent proceeding).

[15] *National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967, 982 (2005).

[16] *Singh v. Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995).

The U.S. Supreme Court's seminal decision in *Chevron* announced the two step rule as to when federal circuit courts should defer to an agency's construction of a statute.[17] First, at Step One, courts should determine if Congress "has spoken to the precise issue at question."[18] If the statute unambiguously forecloses an agency interpretation, federal courts do not need to defer to that interpretation. In *Chevron*, the Supreme Court directed courts to use the traditional tools of statutory interpretation to determine whether the statute at issue is ambiguous; the Supreme Court looked at the text, legislative history and canons of construction to determine whether the statute at issue is ambiguous.[19] If the court determines that Congress has not spoken to the precise issue at question, then in Step Two the court needs to resolve whether the agency interpretation is a reasonable interpretation. If the interpretation is reasonable, courts should defer to the agency.

While in *Chevron* the Supreme Court decided whether the federal courts should defer to already announced agency opinions, in *Brand X*, the Supreme Court addressed the status of judicial interpretations of a statute that comes before the official agency interpretation. *Brand X* instructed that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[20] Therefore, deference to the later agency decision may be appropriate if the prior judicial decision rested upon resolving an ambiguity in the statute. "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[21]

Brand X is being applied so that an agency decision can effectively overturn a prior court interpretation of the statute. Essentially, where the statute is ambiguous federal courts issue provisional opinions. If the agency later issues a conflicting decision, it may trump the federal court opinion unless the court found that the statute unambiguously foreclosed the agency decision.[22] In his dissent, Justice Scalia referred to the "breathtaking novelty" of the *Brand X* decision complaining that it "allows judicial decisions [to be] subject to reversal by Executive officers."[23] He called into question the constitutionality of this result because "Article III courts do not sit to render decisions that can be reversed or ignored by Executive officers."[24] Unless or until the Supreme Court clarifies its opinion, *Brand X* upsets the hierarchy of our federal court system by shifting final say from the federal courts to executive officers.

Circuit courts have begun to apply *Brand X*, overturning their own precedents if a published BIA decision is contrary to a prior federal court opinion. For example, in *Duran Gonzales*, [25] the Ninth Circuit recently followed *Brand X* and overruled its own precedent because the BIA issued a contrary precedent decision after the circuit court decision. The Ninth Circuit overruled its precedent decision, *Perez Gonzalez v. Ashcroft*,[26] because the BIA had, in issued a contrary decision, *Matter of Torres Garcia*.[27] The Court reasoned that *Brand X* required it to review *Perez Gonzalez* in light of *Torres Garcia*.[28] Because the Court found that *Perez Gonzalez* was based on finding of statutory ambiguity and that the BIA's rationale was reasonable, it found that it must defer to the BIA's interpretation. In addition, the Second, Sixth and Seventh Circuits have all followed *Brand X* and found

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[17] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[18] *Id.* at 843.

[19] *Id.* at 850–51.

[20] 545 U.S. at 982.

[21] *Id.* at 982–3.

[22] *Id.*

[23] *Id.* at 1016.

[24] *Id.* at 1017.

[25] *Duran Gonzales v. DHS*, 508 F.3d 1227, 1241–42 (9th Cir. 2007).

[26] *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004)

[27] *Matter of Torres Garcia*, 23 I&N Dec. 866 (BIA 2006).

[28] *Duran Gonzales*, 508 F.3d at 1235.

recent BIA decisions trumped prior federal court precedent.[29] Since *Duran Gonzales*, the Board of Immigration Appeals has asserted its own power to decide cases in derogation of prior circuit precedent. Viewing prior circuit precedent as provisional, the Board has issued decisions rejecting judicial interpretations of statute—which have governed questions of law for many years—as no longer binding on the Board.[30]

Criminal Issues

Practitioners representing noncitizens in removal proceedings may want to challenge the underlying charges of inadmissibility or deportability. Such a challenge may focus on issues such as the divisibility of statutes, lack of evidence against a noncitizen, or a particular provision of federal immigration law. As applied to removal proceedings, nowhere else but in the criminal context do these considerations become paramount. As the administrative and judicial precedents have continually demonstrated, approaches and methodologies to contesting criminal charges of deportability have become increasingly complex and muddled. Challenging deportability based on the incongruity between a particular provision of federal immigration law and the state law under which the respondent was convicted, therefore, becomes paramount.

The Categorical Approach

In analyzing whether a particular criminal statute meets the contours of a particular federal immigration provision, courts have universally used the "categorical" approach.[22] The categorical approach focuses on comparing the particular federal immigration provision, whether a ground of deportability or a more specific subsection such as an "aggravated felony" definition, with the underlying state or federal criminal statute at issue. Importantly, courts are not to look to the actual, underlying facts of the case but rather to the statute of conviction, itself. The Supreme Court has affirmed the categorical approach as applied in the immigration context.[23] It can be understood, therefore, that the categorical approach is best described as a "neutral" comparison of the generic elements of the criminal statute with the elements of the definition of moral turpitude, aggravated felony, controlled substance violation, crime of violence, theft offenses, or other criminal ground of removability.[24]

To consider the underlying facts of a case in an immigration proceeding would, therefore, necessarily violate the well-established axiom that immigration proceedings are designed to be "streamlined" proceedings, in which the guilt or innocence of an alien are not relitigated.[25] Thus, the categorical approach establishes a structure for which a given criminal statute is analyzed to determine whether it may support a particular ground of removability. However, there are times where the "categorical approach," may not be the end of the inquiry.

The Modified Categorical Approach

If a particular criminal statute includes multiple subsections or provisions, the statute may be regarded as being "divisible." A divisible statute includes some subsections which may involve, for example moral turpitude, and other subsections which do not.[26] Courts have developed the "modified" categorical approach,

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[29] *Delgado v. Mukasey*, 516 F.3d 65 (2d Cir. 2008); *Zhang v. Mukasey*, 543 F.3d 851 (6th Cir. 2008); *Ali v. Mukasey*, 521 F.3d 737, 742-43 (7th Cir. 2008).

[30] *See e.g., In re Sawyers*, A44-852-478, 2007 WL 4711443 (Dec. 26, 2007, BIA) (unpublished) (citing *Duran* to decide case in derogation of contrary Ninth Circuit precedent); *Hernandez Barron*, A75-178-354, 2007 WL 4818603 (December 31, 2007, BIA) (unpublished) (same).

[22] *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002) (following long-standing approach towards applying the categorical approach in immigration proceedings); *see also, Singh v. Ashcroft*, 383 F.3d 144, 163 (3d Cir. 2004) (discussing the benefits of applying the categorical approach to removal hearings); *Dickson v. Ashcroft*, 346 F.3d 44, 48–49 (2d Cir. 2003) (applying the categorical approach to immigration proceedings to ascertain the nature of a conviction); *Matter of Vargas-Sarmiento*, 23 I&N Dec. 651, 652–54 (BIA 2004); *Matter of Sweetser*, 22 I&N Dec. 709, 715 (BIA 1999); *Matter of Alcantar*, 20 I&N Dec. 801, 812–13 (1994).

[23] *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (referencing the "categorical" and "modified categorical" approaches in the immigration context).

[24] *See, e.g., United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004); *James v. United States*, 127 S. Ct. 1586, 1594 (2007).

[25] *Matter of Madrigal*, 21 I&N Dec. 323 (BIA 1996); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996); *Matter of Pichardo-Sufren*, 21 I&N Dec. 330 (BIA 1996).

[26] *See, e.g., Matter of Short*, 20 I&N Dec. 136 (1989).

which allows for a limited review of the record of conviction to determine under which particular subsection the noncitizen was convicted.

Under the modified categorical approach, courts consider only whether the government has produced "judicially noticeable" documents that would allow the court to find that, although some offenses under a particular criminal statute do not meet the definition of a particular ground of removability (*e.g.*, a "crime involving moral turpitude"), the specific offense of which the noncitizen was convicted falls within this category nonetheless. Thus, the purpose of the "modified categorical approach" is "to make the requisite determination respecting the nature of a prior conviction without resorting to the type of mini-trials [the court] deems to be wholly inappropriate in this context."[27] Accordingly, in keeping with this purpose under the "modified categorical approach," a reviewing court's inquiry is "generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[28] Ordinarily, courts have concluded that police reports are not part of the record of conviction.[29] In addition, some courts have found that a pre-sentence report is not to be regarded as part of the record of conviction.[30]

The categorical and modified categorical approaches also serve to determine the parameters of the "conviction" which forms the basis for the removal charge—"*convicted*...of a crime involving moral turpitude" or "*convicted* of an aggravated felony..."

Beyond the Record of Conviction: The Evidential Inquiry

Despite these well-oiled approaches developed by the courts for analyzing whether a particular criminal statute meets a particular immigration provision, there has recently been a push to develop a *new* approach which, in limited circumstances, allows adjudicators to look beyond the record of conviction to the underlying, actual facts.[31]

In *Matter of Gertsenshteyn*, the Board of Immigration Appeals concluded that, in certain instances, a statute may invite inquiry into the underlying conduct to support a charge of removability. In that case, the BIA determined that the particular ground of removal under §101(a)(43)(K)(ii) of the Act permits an inquiry into the underlying facts of a criminal conviction insofar as the statute has a specific *qualifier* that the offense be "committed for commercial advantage." The BIA found that where Congress specifically directs that the underlying conduct should be considered it does so explicitly with terms such as "commission."[32] Because the underlying ground of removal under §101(a)(43)(K)(ii) included the *qualifier* the phrase "if committed for commercial advantage," and specifically referenced a violation of 18 USC §2422(a) (relating to transportation for the purposes of prostitution) which did not itself include "commercial advantage" as an element of the offense, the BIA found that it could look beyond the record of conviction to consider a variety of evidence in order to make the ground of removability effective. Otherwise, the BIA concluded, the provision at §101(a)(43)(K) requiring that the offense be "committed for commercial advantage" would be rendered mere surplusage. Hence, the BIA concluded that it could review a pre-sentence investigation report, admissions made by the non-citizen, and any other relevant and material evidence.

As a result of the BIA's decision in *Matter of Gertsenshteyn*, a walk along a slippery slope has begun which may permit an examination of actual underlying facts and conduct to find whether a particular criminal statute meets a ground of removal. Subsequently, the BIA expanded its approach in *Matter of Gertsenshteyn*,

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[27] *See Tokatly v. Ashcroft*, 371 F.3d 613, 621 (9th Cir. 2004).

[28] *Shepard v. United States*, 125 S. Ct. 1254, 1257 (2005); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153 (9th Cir. 2003); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (summarizing documents that may be used under the modified categorical approach); *United States v. Franklin*, 235 F.3d 1165, 1168–73 (9th Cir. 2000) (same); an information and a guilty plea, considered together, are generally sufficient. *United States v. Bonat*, 106 F.3d 1472, 1477 (9th Cir. 1997).

[29] *See, e.g.*, 8 CFR §1003.41 (2003) (listing permissible documents to be considered).

[30] *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003).

[31] *See Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007).

[32] *See, e.g.*, §101(a)(43)(K)(ii), 8 USC §1101(a)(43)(K)(ii).

not surprisingly, to reach other conduct by examining the underlying, actual facts of the offense, and departing from the categorical and modified categorical approaches.[33]

In *Matter of Babaisakov*, the BIA determined that a single ground for removal may require proof of a conviction tied to the statutory elements of a criminal offense, as well as proof of an additional fact or facts that are not tied to the statutory elements of any such offense. In that case, the BIA examined removability under §101(a)(43)(M)(i) of the Act, which defines the term "aggravated felony" to mean "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," depends on proof of both a conviction having an element of fraud or deceit, and what the BIA terms a "nonelement fact" of a loss exceeding $10,000 tied to the underlying conviction. The BIA concluded, therefore, that the existence of the "nonelement fact" in the statute of removal permits the court to look to evidence beyond the limited "record of conviction" that may be considered by courts employing the "categorical approach," the "modified categorical approach," or a comparable "divisibility analysis," although the record of conviction may also be a suitable source of proof, depending on the circumstances. In *Babaisakov*, the BIA expanded upon its holding in *Gertsenshteyn*, to find that an Immigration Judge erred in declining to consider a presentence investigation report as proof of victim loss. The BIA went on to find that the presentence report could be a permissible document to consult in assessing a "nonelement fact." The BIA further held that an Immigration Judge may consider any evidence, otherwise admissible in removal proceedings, including witness testimony, bearing on the loss to the victim in an aggravated felony case involving section 101(a)(43)(M)(i) of the Act.

The BIA's approach in ascertaining the loss to the victim is problematic and troubling inasmuch as statutory threshold of $10,000 can be an element of the criminal statute. Moreover, information concerning the loss to a victim is usually presented in the "sentencing," context rather than the actual conviction context, during the course of criminal proceedings. Finally, the amount of the loss may oftentimes be not be conclusively proven "beyond a reasonable doubt," but demonstrated by a "preponderance of the evidence" standard.[34] Hence, the BIA's conclusion necessarily changes the $10,000 loss requirement from a statutory component of the removal ground, to a non-statutory ground; this is not a result that Congress can be said to have intended.

Courts at the federal circuit level have generally held that proof of loss must be derived from the same types of evidence (such as the charging instrument or plea agreements) that are typically consulted under the "modified categorical approach" by a court seeking to identify the elements of an offense defined by an overbroad statute.[35] Recently, however, the Third Circuit followed the BIA in holding that the loss amount contained in §101(a)(43)(M)(i) of the Act is not an element of the crime and that the categorical approach does not apply in determining whether the loss provision is satisfied.[36] The Third Circuit held that an Immigration Judge may look to the underlying facts of the case to determine the loss amount. The Supreme Court has recently granted certiorari and is reviewing this issue.

The attorney general recently issued a decision in which he determined that additional evidence, deemed necessary to resolve the question of whether a criminal offense involves moral turpitude, may be considered beyond the categorical and modified categorical approaches.[37] In *Matter of Silva-Trevino*, the noncitizen was convicted under a Texas state statute which criminalizes acts of "indecency with a child." The attorney general, in an attempt to create uniformity between BIA decisions and federal precedents, sought to establish a concrete methodology to assess whether a particular offense is a crime involving moral turpitude.

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[33] *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007).

[34] *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004) (noting that all aspects of a removal charge predicated on the existence of a "conviction" be proved beyond a reasonable doubt during the criminal proceedings).

[35] *Dulal-Whiteway v. U.S. DHS*, 501 F.3d 116 (2d Cir. 2007) (holding that a loss of more than $10,000 may be shown only by information appearing in a record of conviction that would be permissible under *Taylor* and *Shepard*); *Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007) (holding that the modified categorical approach limits the scope of review to the record of conviction in relation to a loss exceeding $10,000 where there was no element of loss in the criminal statute); *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006) (requiring clear and convincing evidence derived solely from the criminal record of the aggravated felony charge, even if the criminal statute lacked a "loss" element).

[36] *Nijhawan v. Mukasey*, 523 F.3d 387 (3d Cir. 2008), cert. granted, 08-495, 2009 U.S. LEXIS 586 (2009).

[37] *Matter of Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008).

Under this new approach, the AG has stated that an Immigration Judge, in deciding whether a conviction is categorically a crime of moral turpitude must determine whether there is a "realistic probability, not a theoretical possibility," that the State or Federal criminal statute for which a noncitizen was convicted would be applied to reach conduct that does not involve moral turpitude.[38] To the extent that this review fails to answer the moral turpitude question, an Immigration Judge should proceed with a "modified categorical" inquiry. However, if the record of conviction is inconclusive, judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction.

This approach is troubling in that it vests new powers in an Immigration Judge to deem evidence beyond the record of conviction as probative in finding an offense to be a crime involving moral turpitude. Arguably, this might include a police report, presentence report, or even admissions by a noncitizen. Thus, practitioners need to be cautious when defending against a crime involving moral turpitude (CIMT) charge in that an Immigration Judge may, where the other tests have failed, turn to extra-record evidence to establish the charge. The attorney general's justification for this approach is based on the premise that the goal of the inquiry is to "discern the nature of the underlying conviction where a mere examination of the statute itself does not yield the necessary information." Thus, a noncitizen's criminal record, which includes a variety of facts and unproven information, may be relied upon by an immigration judge.

In light of these decisions, it appears that the BIA and Department of Homeland Security (DHS) will continue in their efforts to expand the scope of the inquiry into a noncitizen's criminal conduct by looking to facts outside the record of conviction. Such an approach might be applied in the context of analyzing potentially any ground of removability, including "aggravated felony" convictions, where the statute interprets an ambiguous provision or takes into consideration what the BIA terms a "non-element fact." Certainly, the erosion of the categorical and modified categorical approaches and the substitution with the *new* evidentiary inquiry approach is troubling. Practitioners should continue to argue that in the absence of express Congressional directive, courts should not look beyond the record of conviction and should focus on the co-extensiveness of the elements of the ground of removal and the criminal statute. By turning to the underlying facts of a case, a noncitizen's due process rights are arguably violated insofar as Congress has not specified a conviction should be analyzed in such a broad and sweeping manner.

Reinstatement of Orders of Removal

Practitioners who represent noncitizens before the U.S. Citizenship and Immigration Services or before the Immigration Courts and Board of Immigration Appeals may begin their strategy by focusing on the ultimate question of available relief to the noncitizen. For example, a practitioner may ask if a noncitizen qualifies for adjustment of status through a spouse, an employer, or other relative. Perhaps, a noncitizen who is before an Immigration Judge may seek to qualify for cancellation of removal for nonpermanent residents, voluntary departure, or other relief. However, these applications, and any other efforts for relief may be hampered when a noncitizen has a prior order of deportation, exclusion, or removal from the United States. Hence, a practitioner must begin with a thorough examination of a noncitizen's background. A noncitizen with a prior order of deportation, exclusion, or removal may present a case with a "ticking time bomb."

Reinstatement's Historical Background

Section 241(a)(5), as enacted by the Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA),[31] replaced former section 242(f) of the Act. Previously, a noncitizen who had been ordered excluded or deported from the United States, could be removed under the prior order only in the context of deportation proceedings, and after having been charged with deportability under §242(f) of the Act.[32] Hence, a noncitizen who had previously been deported from the United States and subsequently returned could only be

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[38] *Gonzales v. Duenas-Alvarez*, 549 U.S. 183,(2007).

[31] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

[32] *See* §242(f), 8 USC §1252(f).

"reinstated" in the context of a deportation hearing under §242 of the Act.[33] The only significant difference from §242(f) proceedings focused on the issue of deportability. Specifically, the former regulations stated that deportability shall be determined and limited solely "to a determination of the identity of the respondent...; whether the respondent was previously deported as a member of any of the classes previously described..., and whether the Respondent ha[d] unlawfully reentered the United States."[34]

Moreover, no preclusion from relief from deportation was specified by the regulations or any other applicable, express statutory provision of the Act. Simply put, nothing contained in the INA prevented an alien from applying for relief from deportation while under §242(f) proceedings. Thus, after the issuance of a new charging document or Order to Show Case (Form I-221), an alien remained eligible to apply for any appropriate relief from deportation for which he was eligible.[35] Supporting this interpretation, and what should serve as guidance as to the interpretation of this section of the Act, previous law did not provide for relief from deportation under §242(f) of the Act. In 1962, Title 8, CFR §242.23 provided, in pertinent part, that "[t]he procedures contained in §242.17 [that included the procedures for applying for relief from deportation] shall not be available to a respondent who is prima facie deportable under the provisions of section 242(f) of the Act."[36] That provision was amended by Congress' express mandate, on September 29th, 1962, specifically deleting that preclusion.[37] Thus, relief was available in the context of deportation proceedings even where the government sought to reinstate removal under §242(f).

Section 241(a)(5): The Newly Minted Reinstatement

With passage of the IIRIRA, the landscape of the "reinstatement of removal" provision was dramatically altered. In this regard, Congress amended the provision to indicate that "the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry."[38] Section 241(a)(5) took effect on April 1, 1997. By its terms, §241(a)(5) provides that a noncitizen who illegally returns to the United States after having been removed under a prior order of deportation, exclusion, or removal is subject to removal under §241(a)(5) unless a statutory or judicial exemption applies. In this regard, noncitizens applying for adjustment of status under INA §245A (the legalization program) who were covered by certain class action lawsuits,[39] Nicaraguan and Cuban applicants for adjustment under §202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA),[40] Salvadoran, Guatemalan, and Eastern European applicants under NACARA §203,[41] and Haitian applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA),[42] are statutorily exempt under §241(a)(5) of the Act. In addition, some courts have determined that certain noncitizens who applied for discretionary relief prior to April 1, 1997 are not subject to §241(a)(5).[43]

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[33] *See* 8 CFR §242.23(b) (1996) (noting that proceedings under that section of the Act shall be conducted in general accordance with the regular rules governing deportation before an immigration judge).

[34] *See* 8 CFR §242.23(c) (1996).

[35] *See In Re Sanchez-Ruiz*, A34-506-375 (BIA July 7, 1995) (unpublished).

[36] *See* 8 USC §212.23 (1962).

[37] *See* 27 Fed. Reg. 9647 (1962).

[38] *See* §241(a)(5), as amended by the IIRIRA §305(a).

[39] *See* Legal Immigration Family Equity Act (LIFE Act), §1104(g), Pub. L. No. 106-555, 114 Stat. 2763 (2000). The relevant class action law suits include *Catholic Social Services, Inc. v. Meese, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *League of United Latin American Citizens v. INS, vacated sub nom. Reno v. Catholic Social Services, Inc.* 509 U.S. 43 (1993); and *Zambrano v. INS vacated sub nom. Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993).

[40] LIFE §1505(a)(1) codified in NACARA §202(a)(2), 8 CFR §241.8(d).

[41] LIFE §1505(c).

[42] LIFE §1505(b)(1) codified in HRIFA §902(a)(2), 8 CFR §241.8(d).

[43] *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277 (11th Cir. 2004) (although these decisions pre-dated the Supreme Court's decision in *Fernandez-Vargas*, these decisions should be unaffected). *See also Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-90 (10th Cir.

continued

Once a noncitizen is identified by DHS as a potential candidate for "reinstatement" under §241(a)(5), a DHS officer issues a Notice of Intent to Reinstate (Form I-871). This notice contains the factual allegations against the individual, including alienage, the date of the prior order, and the date of illegally reentry. The notice further indicates that there is no right to a hearing before an immigration judge, but the individual can make an oral or written statement to an immigration officer. The notice contains a space for the individual to sign to acknowledge receipt of the notice and to indicate whether they wish to make a statement to contest the determination. The regulations provide "[i]f the alien wishes to make a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination."[44] In addition, if a noncitizen's identity is dispute (*i.e.*, whether the noncitizen was in fact previously subject to a prior order), DHS must make a fingerprint comparison; in the absence of a fingerprint comparison, the regulations prohibit the reinstatement of the removal order.

Recently, the Supreme Court addressed the reinstatement provision under §241(a)(5). In *Fernandez-Vargas v. Gonzales*,[45] the Supreme Court held that §241(a)(5) may be applied to an individual who (1) reentered the United States before April 1, 1997 and (2) did not take any affirmative steps to legalize her unlawful status in the United States before that date. The petitioner in *Fernandez-Vargas* was first deported in 1981 and reentered illegally shortly thereafter. Although he fathered a U.S. citizen son in 1989, before April 1, 1997, he did not marry the child's U.S. citizen mother or take affirmative steps to regularize his status such as filing an application for adjustment of status and/or file a application to waive his prior deportation order until March 2001, long after April 1, 1997. Specifically, the Supreme Court determined that, "Fernandez-Vargas has no retroactivity claim based on a new disability consequent to a completed act ...."[46] The Court found that relevant "the conduct of remaining in the country after entry that is the predicate action" triggering §241(a)(5)'s application, not the person's illegal reentry. The Court concluded that §241(a)(5) does not penalize the illegal reentry itself, rather creates a procedure to "stop an indefinitely continuing [immigration] violation." Thus, because the Petitioner continued his illegal presence after new §241(a)(5) became effective, his conduct was not completed prior to the change in law, and thus there was no impermissible retroactive effect.

Significantly, the Supreme Court in *Fernandez-Vargas* Court expressly declined to determine whether the reinstatement provision can be applied retroactively to a noncitizen who took affirmative steps to legalize their status. Hence, a noncitizen who filed an application for adjustment of status, an immigrant visa petition[47] or labor certification application, asylum application, or other benefits-application, may argue that the act of taking action to legalize their status before the change in law may be sufficient to demonstrate an impermissible retroactive effect.[48] Practitioners should argue that noncitizens who took some affirmative "steps" or "actions" to legalize their status prior to the change in the law (*i.e.*, April 1, 1997) would be impermissibly affected by the reinstatement of a prior removal order. As the Supreme Court's decision expressly left open this question, all relief in the reinstatement of removal context is not foreclosed. Nevertheless, practitioners should be cautioned when encountering a noncitizen who has a prior order of deportation, removal, or exclusion, and should take special care when dealing with such cases.

2007) (finding that it would be fundamentally unfair to apply the reinstatement provision to an individual who had applied for lawful residence status prior to April 1, 1997).

[44] *See* 8 CFR §241.8(a)(3).

[45] *Fernandez-Vargas v. Gonzales*, 547 U.S. 30, 126 S. Ct. 2422 (2006).

[46] 126 S. Ct. at 2432.

[47] Courts have also been divided on whether the filing of immigrant visa petition prior to April 1, 1997 was sufficient to invoke retroactivity concerns. *Compare Lopez-Flores v. DHS*, 376 F.3d 793 (8th Cir. 2004) (holding that §241(a)(5) cannot be applied retroactively when I-140 petition filed before April 1, 1997) *with Labojewski v. Gonzales*, 407 F.3d 814, 822 (7th Cir. 2005) (holding that the filing of an I-130 petition before April 1, 1997 is insufficient to render §241(a)(5) impermissibly retroactive).

[48] *See* ; *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277 (11th Cir. 2004). *But see, Silva Rosa v. Gonzales*, 490 F.3d 403 (5th Cir. 2007) (§241(a)(5) can be applied to a person who filed an I-130 petition but not an adjustment application before April 1, 1997).

Conflicts of Law on Particular Issues

Detention Issues

The INA requires the Government to hold certain persons in detention during the course of removal proceedings.[49] The Supreme Court has held that this mandatory detention provision does not generally violate a detainee's right to due process.[50] However, the Court made clear that its decision was based on the premise that removal hearings will generally be promptly completed.[51]

Prolonged Detention

Three circuits have held that where a removal case is unreasonably delayed, a detainee cannot be subjected to mandatory detention.

Sixth Circuit

Ly v. Hansen, 351 F.3d 263, 268, 271-72 (6th Cir. 2003) (detention of petitioner from Vietnam for one and one-half years, when there was no likelihood of removal, was unreasonable and violated his substantive due process rights)

Ninth Circuit

Casas-Castrillon v. DHS, 535 F.3d 942, 947-948 (9th Cir. 2008) (when detention becomes unreasonably prolonged, the authority for detention shifts from the mandatory detention provision (§236(c)) to the discretionary detention provision (§236(a)), which entitles an immigrant to an individualized bond determination; it appears that under the *Casas-Castrillon* ruling, an alien will typically be considered to be subject to discretionary §236(a) detention during any period of time when he or she has a pending petition for review and has been granted a stay of removal by a circuit court)

Post-Final Order Detention

INA §241 pertains to the detention of aliens who have already been ordered removed. The Supreme Court has interpreted this provision to authorize post-final order detention only for a reasonable removal period.[52] Consistent with this interpretation, applicable regulations require a "post-order custody review" after the elapse of a ninety-day removal period.[53] It is notable, however, that one court has held that even during this removal period, detention may be unconstitutional, if the Government is not actually making any effort to deport the individual.[54]

The "When Released" Issue

Another issue that has been the subject of recent litigation is *who* should be subject to mandatory detention. In *Matter of Kotliar*,[55] the Board held that an alien need not even be charged with a mandatory detention ground to be subject to mandatory detention. In *Matter of Saysana*,[56] the Board held that irrespective of the statutory requirement that an alien be taken into custody "when released," an alien can be subject to mandatory detention long after the alien is released from criminal custody if he is subsequently arrested, even if the subsequent charges against him are dismissed. To date, *Kotliar* remains unscathed, but one District Court has already specifically disagreed with *Saysana*, and most courts to consider the issue have held that a person who is convicted and then released from custody without being detained by ICE is not subject to mandatory detention if ICE later arrests the person while he is at large in the community.

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[49] INA §236(c).

[50] *Demore v. Kim*, 538 U.S. 510, 513 (2003).

[51] *Id.* at 529.

[52] *See Zadvydas v. Davis*, U.S. 678, 689 (2001).

[53] *See* 8 CFR §241.4.

[54] *See Cesar v. Achim*, 542 F. Supp. 2d 897, 905 (E.D. Wis. 2008).

[55] *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).

[56] *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008).

Oscar v. Gillen, No. Civ.A.08-11413-JLT, 2009 WL 243009, *2 (D. Mass. Feb 3, 2009) (explicitly rejecting *Saysana*, and awarding EAJA fees because the government's position based on *Saysana* was not substantially justified)

Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004) ("Congress intended mandatory detention to apply only to those aliens taken into immigration custody immediately after their release from state custody")

Alwaday v. Beebe, 43 F. Supp. 2d 1130, 1133 (D. Or.1999) (INA §236(c) does not apply where the petitioner was not incarcerated for his criminal conviction and "his 'release,' if any, occurred no later than 1991"; §236(c) applies where "the Attorney General take[s] custody of certain criminal aliens 'when the alien is released'")

Velasquez v. Reno, 37 F. Supp. 2d 663, 670–673 (D.N.J. 1999) (mandatory detention under INA §236(c) cannot be applied to individuals who were released before the statute took effect)

Grodzki v. Reno, 950 F. Supp. 339, 342–43 (N.D. Ga.1996) (the "upon release" language implies that immigration detention must commence within a reasonable time after release from incarceration; mandatory detention not permitted where the petitioner had been released from incarceration eight years earlier)

Pastor-Camarena v. Smith, 977 F. Supp. 1415, 1417–18 (W.D. Wash. 1997) ("The plain meaning of this language is that it applies immediately after release from incarceration, not to aliens released many years earlier")

Montero v. Cobb, 937 F. Supp. 88, 92–95 (D. Mass. 1996) (refusing to apply predecessor statute, which requires mandatory detention "upon release of the alien from incarceration," to individual released before the statute took effect)

DeMelo v. Cobb, 936 F. Supp. 30, 36 (D. Mass.1996) (the language used in the statute "applies comfortably to taking an alien into custody immediately after the alien is released from incarceration on the underlying offense")

Permanent Bar Issues—INA §212(a)(9)(C) Cases

The Board has held that INA §245(i) cannot be used to avoid a finding of inadmissibility for "unlawful presence." In other words, even though a person may be eligible for adjustment of status under §245(i), the application will be denied if the applicant is inadmissible under INA §212(a)(9)(B) or §212(a)(9)(C).

Matter of Torres Garcia, 23 I&N Dec. 866, 875 (BIA 2006) (INA §245(i) does not exempt INA §212(a)(9)(C)(i)(II))

Matter of Lemus-Loza, 24 I&N Dec. 373, 378-379 (BIA 2007) (INA §245(i) does not exempt inadmissibility under INA §212(a)(9)(B)(i)(II))

Matter of Briones, 24 I&N Dec. 355, 361-362 (BIA 2007) (INA §245(i) does not exempt inadmissibility under INA §212(a)(9)(C)(i)(I))

There is a conflict of law in the circuit courts concerning the interpretation of INA §245(i) and INA §212(a)(9)(C)(i)(I). Some circuits (Ninth and Tenth) hold that 245(i) trumps §212(a)(9)(C)(i)(I), while others (Fifth and Sixth) hold that §212(a)(9)(C)(i)(I) trumps §245(i).

Fifth Circuit

Mortera Cruz v. Gonzales, 409 F.3d 246 (5th Cir. 2005) (deferring to BIA's decision holding that §245(i) applicants are not exempt from inadmissibility under INA §212(a)(9)(C)(i)(I))

Sixth Circuit

Ramirez Canales v. Mukasey, 517 F.3d 904 (6th Cir. 2008) (deferring to BIA's conclusion in *Briones* that §245(i) applicants can be denied adjustment on the basis of §212(a)(9)(C)(i)(I))

Ninth Circuit

Perez Gonzalez v. Ashcroft, 379 F.3d 783, 793 (9th Cir. 2004), *overruled by Duran-Gonzales v. DHS* ("The statutory terms of INA §245(i) clearly extend adjustment of status to aliens living in this country

without legal status"; the Court held that INA §245(i) allows for adjustment of status for persons otherwise inadmissible under INA 212(a)(9)(C)(i)(II))

Duran Gonzales v. DHS, 508 F.3d 1227 (9th Cir. 2007) (*Brand X* requires review of *Perez Gonzalez* in light of *Torres Garcia*.; because the Court's decision in *Perez Gonzalez* was based on finding of statutory ambiguity and the BIA's statutory interpretation in *Torres-Garcia* is reasonable, the Court deferred to *Torres-Garcia* and overruled *Perez-Gonzalez*)

Acosta v. Gonzales, 439 F.3d 550 (9th Cir. 2006) (relying in part on the analysis in *Perez Gonzalez*, the court held that 245(i) applicants are exempt from ground of inadmissibility at §212(a)(9)(C)(i)(I))

Tenth Circuit

Berrum-Garcia v. Comfort, 390 F.3d 1158, 1167 (10th Cir. 2004) (a 245(i) applicant subject to inadmissibility under INA §212(a)(9)(C)(i)(II) is barred from adjusting status)

Padilla-Caldera v. Gonzales, 426 F.3d 1294 (10th Cir. 2005) (245(i) applicants are exempt from §212(a)(9)(C)(i)(I); because the LIFE Act "applies to status-violators who have been in the United States for an aggregate period of over one year," the petitioner was not barred from adjusting status under §245(i))

212(c) Waivers

Conviction After Jury Trial

Since the landmark decision of *INS v. St. Cyr*[57] and the promulgation of the regulations issued by the Executive Office of Immigration Review,[58] many issues remain regarding the availability of the waiver under INA §212(c). The regulations in response to the Supreme Court decisions take the position that an individual is eligible for 212(c) relief only if s/he entered a guilty plea prior to April 24, 1996.[59] Obviously, this was a great disappointment to many practitioners since this left out many individuals who were convicted by trial. The issue of trial vs. plea of guilty before the effective date has garnered litigation nationwide, and courts have not adopted a uniform rule.

First Circuit

Dias v. Immigration Naturalization Service, 311 F. 3d 456 (1st Cir. 2002) (212(c) waiver is not available to individuals who were convicted of an aggravated felony after trial; "alien criminal defendants who chose to go to trial, prior to the change wrought by AEDPA, were not relying on immigration law as it existed at the time in making that decision")

Second Circuit

Walcott v. Chertoff, 517 F.3d 149 (2d Cir. 2008) (requiring an individualized showing of reliance; "the proper inquiry is whether, prior to the ADEPA's passage, an alien reasonably and detrimentally conformed his conduct to the then-prevailing law by making choices intended to preserve or heighten his chances of receiving §212(c) relief"; in essence, the individual must prove that he elected to delay the filing of a 212(c) waiver in the hopes of improving his case by showing rehabilitation and increasing equities)

Third Circuit

Atkinson v. Attorney General, 479 F.3d 222 (3d Cir. 2007) (court adopts a categorical approach to reliance; instead of making an individual prove his reliance of availability of the 212(c) waiver in making a decision to go to trial, the court ruled that IIRIRA attached new legal consequences to individuals who had been convicted by trial prior to the passage of the law; the "BIA cannot preclude Atkinson from applying for a discretionary waiver under former section 212(c) because IIRIRA's repeal of that section cannot be applied retroactively")

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[57] 533 U.S. 289 (2001).

[58] 69 Fed. Reg. 57826 (Sept. 28, 2004).

[59] This is the effective date of the section 440(d) of Anti-terrorism and Effective Death Penalty Act of 1996 stripping away the 212(c) waiver for certain individuals.

Fourth Circuit

Mbea v. Gonzalez, 482 F.3d 276 (4th Cir. 2007) (ruling that "IIRIRA's repeal of §212(c) did not produce an impermissible retroactive effect as applied to an alien convicted after trial," relying on *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002))

Fifth Circuit

Carranza-De Salinas v. Gonzales, 477 F.3d 200 (5th Cir. 2007) (reversing the BIA and remanding the case for a determination of whether the alien detrimentally relied on the availability of 212(c), relying on *Restrepo v. McElroy*, 369 F.3d 627 (2nd Cir. 2004) (requiring proof of reasonable reliance))

Seventh Circuit

Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. 2003) (holding that there are no exceptions to the requirement that aliens must have pled guilty prior to the passage of AEDPA)

Ninth Circuit

Saravia-Paguada v. Gonzalez, 488 F.3d 1122 (9th Cir. 2007) (rejecting the availability of 212(c) for aliens who were convicted after a trial; "outside of the plea bargain context, however, we have declined to invalidate retroactive elimination of §212(c) relief")

Tenth Circuit

Hem v. Maurer, 458 F.3d 1185 (10th Cir. 2006) (rejecting the Second Circuit's requirement of proving actual reliance and adopting a rule of "objective reasonable reliance"; the court explains its reasons for adopting the "objective reasonable reliance" rule on three grounds:

First, this rule is more directly tied to the basic aim of retroactivity analysis: in determining whether it is appropriate to presume Congress concluded that the benefits of a new law did not warrant disturbance of interests existing under prior law, it make senses to look at the objective group-based interests that Congress could practically have assessed ex ante. Second, this rule is consistent with the Supreme Court's analysis in *Landgraf* and its progeny, none of which required actual reliance. Third, and more immediately pertinent here, the objective approach is consistent with the actual holding in *St. Cyr*—the Court's reliance-focused decision-which precluded retroactive application of IIRIRA's elimination of §212(c) eligibility to all aliens who reasonably could have relied on prior law when pleading guilty, rather than to just those aliens who actually did so rely.

The Court found that the respondent yielding his right to appeal due to the fear of losing 212(c) eligibility is in a class of persons who would suffer impermissible retroactive effect in violation of *Landgraf*.)

Comparable Ground of Exclusion

The second major issue that threatens to reduce the availability of 212(c) for long term permanent residents who have been convicted of aggravated felonies is the lack of a comparable ground of exclusion. The BIA addressed this issue in 1991, when it held that an alien convicted of an aggravated felony drug trafficking offense is eligible for a 212(c) waiver since he could be found excludable for a drug offense.[60] The issue was revisited by the BIA in a case involving a firearms offense, which is not a ground of inadmissibility.[61] Although the offense was not waivable under 212(c), the BIA found a way to afford relief by allowing the individual to file an adjustment application to overcome this offense. With the passage of IIRIRA, Congress created new classes of aggravated felonies, including sexual abuse of minor, crimes of violence with a lower threshold of sentence, and so on. Subsequently, in *Matter of Blake*,[62] the BIA issued a decision that took a restrictive approach to availability of 212(c), holding that 212(c) is not available to waive a ground of deportation if there is no corresponding comparable ground of exclusion. Below is a summary of the positions taken by various circuits on *Matter of Blake*.

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[60] *See Matter of Meza*, 20 I&N Dec. 257 (BIA 1991).

[61] *See Matter of Gabryelsky*. 20 I&N Dec. 750 (BIA 1993).

[62] *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005).

First Circuit

Sena v. Gonzales, 428 F.3d 50 (1st Cir. 2005) (conviction for sexual abuse of minor); the First Circuit found no comparable ground of exclusion and dismissed the alien's due process argument that the expanded definition of "aggravated felony" should not be applied retroactively)

Kim v. Gonzales, 468 F.3d 58 (1st Cir. 2006) (although stating that the 212(c) waiver scheme is not a "rational construct", the court held that a person convicted of manslaughter is not eligible for 212(c) waiver because "crime of moral turpitude" is not a comparable category for an aggravated felony "crime of violence"; the court warned that "the machinery that we help administer is breaking down" and stated that "[t]he regime is badly in need of an overhaul")

Dalombo Fontes v. Gonzales, 483 F.3d 115 (1st Cir. 2007) (person convicted of sexual assault (aggravated felony crime of violence) is not eligible for 212(c) waiver because the conviction is not comparable to a "crime of moral turpitude")

Second Circuit

Blake v. Carbone, 489 F.3d 88 (2d Cir. 2007) (allowing a 212(c) waiver if the offense that renders a LPR deportable would also render him inadmissible; "our decision is simply confined to the equal protection principle articulated in *Francis* [532 F.2d 268 (2d Cir. 1976)]: if the petitioner's underlying aggravated felony offenses could form the basis of a ground of exclusion, they will be eligible for a §212(c) waiver")

Third Circuit

Caroleo v. Gonzales, 476 F.3d 158 (3d Cir. 2007) (crime of violence involving attempted murder does not have a statutory counterpart to a "crime involving moral turpitude", although the court had misgivings about the "illogic scheme" of the statute)

Fifth Circuit

Vo v. Gonzales, 482 F.3d 363 (5th Cir. 2007) (applicant disqualified from 212(c) relief on the basis that his conviction for unauthorized use of a vehicle under the aggravated felony conviction of a crime of violence had no comparable grounds of exclusion)

Seventh Circuit

Valere v. Gonzales, 473 F.3d 757 (7th Cir. 2007) (rejecting the alien's argument that expanded definition of an aggravated felony has impermissible retroactive effect, and holding that there are no comparable grounds of exclusion for the aggravated felony crime of sexual abuse of a minor)

Zamora-Mallari v. Mukasey, 514 F.3d 679 (7th Cir. 2008) (rejecting alien's argument that the Board's comparable ground test violates equal protection)

Eighth Circuit

Vue v. Gonzales, 496 F.3d 858 (8th Cir. 2007) (rejecting the alien's violation of Equal Protection argument due to his ineligibility for the 212(c) waiver as a result of his aggravated felony conviction for a crime of violence)

Ninth Circuit

Abebe v. Gonzales, --- F.3d ----, 2009 WL 50120 (9th Cir. 2009) (overruling the holding in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir.1981) and *Francis v. INS*, 532 F.2d 268, 273 (2d Cir.1976) that there is no rational basis for providing section 212(c) relief from inadmissibility, but not deportation, and holding that an alien deportable for having been convicted under the expanded definition of aggravated felony of sexual abuse of minor is not eligible for a 212(c) waiver)

Reinstatement of Prior Order of Removal

Retroactive Application of §241(a)(5)

The Supreme Court in *Fernandez-Vargas* Court expressly declined to determine whether the reinstatement provision can be applied retroactively to a noncitizen who took affirmative steps to legalize his or her status prior to April 1, 1997. Consequently, the issue concerning whether and under what circumstances §241(a)(5) can be applied retroactively is unresolved.

First Circuit

Arevalo v. Ashcroft, 344 F.3d 1 (1st Cir. 2003) (§241(a)(5) cannot be applied retroactively to a person who applied for adjustment of status prior to April 1, 1997)

Fifth Circuit

Silva-Rosa v. Gonzales, 490 F.3d 403 (5th Cir. 2007) (§241(a)(5) cannot be filed retroactively to a person who married a U.S. citizen and filed an I-130 petition but did not file an adjustment application before April 1, 1997)

Seventh Circuit

Labojewski v. Gonzales, 407 F.3d 814, 822 (7th Cir. 2005) (filing an I-130 petition before April 1, 1997 is insufficient to render §241(a)(5) impermissibly retroactive)

Faiz-Mohammed v. Ashcroft, 395 F.3d 799 (7th Cir. 2005) (§241(a)(5) cannot be applied retroactively to a person who applied for adjustment of status prior to April 1, 1997)

Eighth Circuit

Lopez-Flores v. DHS, 376 F.3d 793 (8th Cir. 2004) (§241(a)(5) cannot be applied retroactively when I-140 petition filed before April 1, 1997)

Tenth Circuit

Valdez-Sanchez v. Gonzales, 485 F.3d 1084 (10th Cir. 2007) (§241(a)(5) cannot be applied retroactively to a noncitizen who applied for lawful residency prior to April 1, 1997)

Eleventh Circuit

Sarmiento-Cisneros v. Ashcroft, 381 F.3d 1277 (11th Cir. 2004) (§241(a)(5) cannot be applied retroactively to a person who filed an application for adjustment of status prior to April 1, 1997)

Collateral Attack on Prior Order of Removal

An important question in reinstatement cases is how to collaterally attack a prior order of removal. Prior to the REAL ID Act, filing a habeas petition to challenge the prior order of removal was a possibility. After the REAL ID Act, however, habeas review is apparently no longer available for review of any removal orders. Thus, it is not clear how a person can obtain judicial review of an alleged unlawful prior order in the context of reinstatement. Different courts have resolved the issue in different ways. Some courts (Fifth, Third and Tenth Circuits) have found jurisdiction to review the prior order in certain circumstances. Other circuits (Ninth) have held that the court cannot review the prior order.

Third Circuit

Debeato v. AG, 505 F.3d 231, 234-35 (3d Cir. 2007) ("we conclude that the REAL ID Act, specifically [§242(a)(2)(D)], permits us to exercise jurisdiction over legal and constitutional challenges to final orders of removal, including those final orders that the Attorney General has reinstated")

Fifth Circuit

Ramirez-Molina v. Ziglar, 436 F.3d 508 (5th Cir. 2006) ("Because [§241(a)(5)] limits judicial review, [§242(a)(2)(D)] prevents its operation in cases ... in which the validity of an underlying order is questioned on constitutional or legal grounds")

Ninth Circuit

Martinez-Merino v. Keisler, 504 F.3d 1068, 1071 (9th Cir. 2007) (court has no jurisdiction to review collateral attack on prior order of removal)

Tenth Circuit

Lorenzo v. Mukasey, 508 F.3d 1278, 1281 (10th Cir. 2007) (holding that a court can review, under §242(a)(2)(D), legal and constitutional questions regarding the prior order, but that where the prior order was an expedited order of removal under §235(b)(1), review is limited by §242(e))

Visa Waiver Program and Adjustment of Status

Most published cases involve the relationship between INA §217(b) ("no-contest clause") and INA §245(a) (adjustment of status)

Sixth Circuit

Lacey v. Gonzales, 499 F.3d 514 (6th Cir. 2007) (petitioner married within 90 days of entry, but did not file adjustment application until after 90 days; because petitioner remained in the US after 90 days, he was not entitled to removal proceedings even though he filed an application for adjustment of status)

Seventh Circuit

Bayo v. Chertoff, 535 F.3d 749 (7th Cir. 2008), *rhrg en banc granted and opinion vacated* (Jan 30, 2009) (vacating order of removal and remanding to DHS for determination of whether petitioner's waiver of right to contest removability was knowing and intelligent)

Ninth Circuit

Handa v. Clark, 401 F.3d 1129 (9th Cir. 2005) (because petitioner overstayed the 90 day visa waiver period, he had no right to immigration court removal proceeding; the regulation, 8 CFR §217.4(b)(1), which provides for immediate removal without judicial review is not unreasonable because of the no-contest clause in INA §217(b))

Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) (the visa waiver no-contest clause does not preclude applicants from seeking to adjust status; once the adjustment application is filed, an applicant has the benefits of procedural safeguards; although the petitioner filed for adjustment of status within 90 days of her entry, the Court did not base its rationale on this factor)

Momeni v. Chertoff, 521 F.3d 1094 (9th Cir. 2008) (*Freeman* should be applied narrowly, only when a person who entered on a visa waiver has married and sought adjustment of status within 90 days of entry; court held that because adjustment applicant married and sought adjustment of status 90 days after entry, he was not entitled to review of the denial or review of removal order)

Tenth Circuit

Ferry v. Gonzales, 457 F.3d 1117 (10th Cir. 2006) (petitioner not entitled to review of denial of adjustment application because of visa waiver overstay; petitioner had filed for adjustment of status more than 90 days after entry)

Schmitt v. Maurer, 451 F.3d 1092 (10th Cir. 2006) (petitioner could not contest an order of removal on the basis of adjustment of status application; petitioner overstayed visa prior to filing for adjustment of status)

IAC Issues

The Attorney General in *Matter of Compean*,[63] has recently overruled *Matter of Lozada*,[64] and held that there are no Due Process concerns that arise with respect to ineffective assistance of counsel ("IAC") claims in removal proceedings. In an apparent attempt to insulate Board IAC decisions from judicial review, the Attorney General stated that the Board can reopen removal proceedings on the basis of IAC only as a matter of discretion. To date no court has ruled on the validity of *Compean*, and whether *Compean* will be upheld in the courts is uncertain. It appears likely that courts will split. Some courts (Fourth) have held that there are no Due Process concerns implicated in IAC cases; other circuits (Third, Ninth) have held that IAC violates the respondent's right to Due Process; and other circuits have left the issue open, the Second and Fifth suggesting that the Due Process clause might be relevant, and the Seventh suggesting that the Due Process Clause might not be relevant.

Second Circuit

Aris v. Mukasey, 517 F.3d 595, 596, 600-601 (2d Cir. 2008) (not reaching the issue of whether IAC constitutes a violation of due process, but noting: "given the disturbing pattern of ineffectiveness evidenced in

[63] *Matter of Compean*, 24 I&N Dec. 710 (AG 2009).

[64] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

the record in this case (and, with alarming frequency, in other immigration cases before us), we reiterate that due process concerns may arise when retained counsel provides representation in an immigration proceeding that falls so far short of professional duties as to 'impinge[ ] upon the fundamental fairness of the hearing'")

Third Circuit

Fadiga v. Attorney General, 488 F.3d 142, 155 (3rd Cir. 2007) ("A claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment—*i.e.*, as a violation of that amendment's guarantee of due process"; prior counsel committed IAC by failing to review asylum application, which was prepared by a law student and contained inconsistencies, and by failing to advise about the need for obtaining corroborating evidence)

Fourth Circuit

Afanwi v. Mukasey, 526 F.3d 788, 796 (4th Cir. 2008) ("the BIA does not have jurisdiction over an ineffective assistance claim arising out of an alien's counsel's failure to file a timely petition for review with the court of appeals")

Fifth Circuit

Mai v. Gonzales, 473 F.3d 162, 165 (5th Cir. 2006) ("this court has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment"; the court points out that "the BIA itself has determined that ineffective assistance of counsel is a valid ground for reopening a deportation case" and holds that the Board abused its discretion in finding that there was no IAC)

Goonsuwan v. Ashcroft, 252 F.3d 383, 385, n. 2, 391 (5th Cir. 2001) (stating in dicta that "[the] right to due process is violated when 'the representation afforded them was so deficient as to impinge upon the fundamental fairness of the hearing,' ... and that, as a result, the alien suffered substantial prejudice"; the court dismissed the petitioner's IAC claim for failure to exhaust administrative remedies but noted that the petitioner could file a motion to reopen to the BIA)

Sixth Circuit

Sene v. Gonzales, 453 F.3d 383, 386 (6th Cir. 2006) (Clay, J., dissenting from denial of rehearing en banc) (Sixth Circuit recognizes that IAC can constitute a violation of due process; dissenters argue that prior counsel's failure to submit corroborating evidence of asylum claim constitutes IAC violative of due process)

Denko v. INS, 351 F.3d 717, 724 (6th Cir. 2003) (petitioner can succeed on due process IAC claim "if he meets his burden of showing more than mere[ ] ineffective assistance of counsel, but assistance which is so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause")

Seventh Circuit

Stroe v. INS, 256 F.3d 498, 499 (7th Cir. 2001) (noting that the existence and scope of a right to effective assistance of counsel has been "[e]xpressly left open")

Jezierski v. Mukasey, 543 F.3d 886, 890 (7th Cir. 2008) ("The complexity of the issues, or perhaps other conditions, in a particular removal proceeding might be so great that forcing the alien to proceed without the assistance of a competent lawyer would deny him due process of law by preventing him from reasonably presenting his case")

Eighth Circuit

Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) ("there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding"; "To the extent Rafiyev's counsel was ineffective, the federal government was not accountable for her substandard performance; it is imputed to the client")

Ninth Circuit

Nehad v. Mukaey, 535 F.3d 962, 967 (9th Cir. 2008) ("counsel can ... be so ineffective as to deprive [respondents] of their Fifth Amendment right to due process of law"; summarizing Ninth Circuit law on IAC as follows: "Ineffective assistance of counsel amounts to a violation of due process if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case. ... To make out an ineffective assistance claim, an immigrant must show (1) that counsel's performance was deficient, and (2) that counsel's deficiency caused prejudice"; holding that counsel's threat to withdraw from the case unless the respondent accepted voluntary departure, where respondent had a claim for asylum, constituted IAC)

Hernandez-Gil v. Gonzales, 476 F.3d 803, 806 (9th Cir. 2007) (noting that the statutory right to counsel "stems from a constitutional guarantee of due process"; the court held that the IJ violated petitioner's statutory right to counsel by denying petitioner's request for a continuance)

Ray v. Gonzales, 439 F.3d 582, 587 (9th Cir. 2006) ("this Circuit has long recognized that an alien's due process right to obtain counsel in immigration matters also includes a right to competent representation from a retained attorney; ... we have held that an alien is denied due process when his attorney provides ineffective assistance"; holding that prior attorneys had committed IAC by failing to file a brief and failing to file a motion to reopen in a timely manner; "There is no question that these two attorneys have provided assistance so poor that Ray has been "prevented from reasonably presenting his case")

Rodriguez-Lariz v. INS, 282 F.3d 1218, 1226 (9th Cir.2002) ("Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case"; holding that petitioner's due process rights were violated where prior counsel failed to submit an application for suspension of deportation on time)

Castillo-Perez v. INS, 212 F.3d 518, 525-26 (9th Cir.2000) (holding that due process rights were violated where prior counsel failed to timely file an application for suspension of deportation)

Eleventh Circuit

Dakane v. Attorney General, 399 F.3d 1269, 1273 (11th Cir. 2005) (petitioner has "the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to effective assistance of counsel where counsel has been obtained"; finding no IAC even though prior counsel failed to file an appeal brief because even if appeal brief had been filed the result would be the same)