



# Immigration Law Advisor

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## Statutory Interplay: The Immigration Consequences of a Burglary Conviction

by Lindsay M. Vick

Over the past several decades, the consequences of burglary convictions in immigration proceedings have become more varied as State courts have applied burglary statutes to an increasing range of criminal conduct. The differing treatment of burglary convictions in immigration proceedings is likely a direct result of States broadening their burglary statutes and expanding the elements of burglary. Long gone are the days when burglary was narrowly defined under State law as the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. See *Taylor v. United States*, 495 U.S. 575, 592–93 (1990); see also 3 Wayne R. LaFare, *Substantive Criminal Law* § 21.1 (2d ed. 2014). Instead, modern burglary statutes inflate the scope of almost every element of common law burglary, thereby increasing the criminal conduct to which burglary statutes may apply.

This article will explore how modern burglary statutes are interpreted in the immigration context and will include a discussion of how a burglary conviction might be treated as either a crime involving moral turpitude ("CIMT") or an aggravated felony. To begin, the article will explore the historical definition of burglary by tracking the development of its elements from the common law to current State and Federal definitions of the crime. The article will then examine the treatment of State residential, commercial, and vehicular burglary statutes in immigration proceedings.

### The Expanding Definition of Burglary in State and Federal Court

As previously mentioned, burglary was defined at common law as the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. See *Taylor v. United States*, 495 U.S. at 580 n.3, 592–93. However, common law burglary has evolved far from its roots into a flexible offense covering a greater scope of conduct. See Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long*:

*The Evolution of Burglary in the Shadow of the Common Law*, 45 Ind. L. Rev. 629, 630 (2012). By the end of the nineteenth century, the core elements of common law burglary—nighttime, entry, breaking, and the structure entered—contrasted greatly with the elements found in State penal codes. *See id.* at 635. These variations have only continued in recent decades.

For example, just a handful of contemporary State burglary statutes require a “breaking.” *See* LaFave, *supra*. Instead, the majority of States now require that the entry be unlawful, unauthorized, or without consent. *Id.* Likewise, some modern burglary statutes have expanded the entry element so as to implicate a burglar who either enters or remains on the premises unlawfully. *See* LaFave, *supra*. Only a few States require that the burglary be committed at night or retain the nighttime element as part of a higher degree of the crime. *Id.* Further, a majority of States have discarded the “intent to commit a felony” element and have replaced it with the intent to commit any offense. *Id.* Finally, most contemporary burglary statutes expand the “dwelling” element to include buildings or other structures. *Id.*

In order to achieve some degree of uniformity with respect to the Federal sentencing guidelines, the United States Supreme Court set forth a generic definition of burglary in the context of the sentence enhancement provisions of 18 U.S.C. § 924(e) in *Taylor v. United States*, 495 U.S. at 598. The Court based this definition on its analysis of the statute’s legislative history and its construction of modern State criminal statutes. *Id.* at 593–98. According to the Court, “the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Id.* at 598. This current generic formulation of burglary is therefore broader than the common law definition in that it (1) does not require a “breaking,” as long as the entry is unlawful or unprivileged; (2) implicates an offender who “remain[ed]” in the building; (3) covers any “building” or “structure”; (4) expands the intent requirement to implicate an intent to commit any “crime”; and (5) does not require that the offense occur at night.

### **Immigration Consequences**

An alien convicted of burglary may be removable

or inadmissible in immigration proceedings based on multiple grounds. Namely, a burglary offense may constitute a CIMT that renders the individual inadmissible pursuant to section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), or deportable pursuant to section 237(a)(2)(A)(i) or (ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i) or (ii). Further, a burglary offense may render the alien removable pursuant to section 237(a)(2)(A)(iii) for a conviction of an aggravated felony crime of violence or a burglary offense under section 101(a)(43)(F) or (G) of the Act, 8 U.S.C. § 1101(a)(43)(F) or (G). When analyzing the offense under these provisions of the Act, courts have focused their analysis on the nature of the building or structure that the offender entered. Accordingly, varying immigration consequences apply depending on whether the individual entered a residential building, a commercial building, or a vehicle.

### *Residential Burglary*

#### **Residential Burglary as a CIMT**

The Board has historically treated residential burglary as a CIMT. *See, e.g., Matter of M-*, 2 I&N Dec. 721 (BIA, A.G. 1946) (holding that a burglary offense may be deemed to involve moral turpitude only if it is accompanied by the intent to commit a morally turpitudinous act).<sup>1</sup> Board decisions prior to 1996 held that a burglary offense is morally turpitudinous only if accompanied by the intent to commit a CIMT, most often larceny. *See, e.g., Matter of Frentescu*, 18 I&N Dec. 244, 245 (BIA 1982); *Matter of De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981); *Matter of Leyva*, 16 I&N Dec. 118, 120 (BIA 1977); *Matter of L-*, 6 I&N Dec. 666, 669 (BIA 1955); *Matter of Z-*, 5 I&N Dec. 383, 385–86 (BIA 1953); *Matter of M-*, 2 I&N Dec. at 721; *Matter of R-*, 1 I&N Dec. 540 (BIA 1943).

More recently, the Board adopted a different approach in *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009), indicating that residential burglary involving an occupied dwelling is categorically a CIMT. The Board examined the statutory elements of the crime and concluded that there was no realistic probability that the Florida burglary statute at issue would be applied to reach conduct that did not involve moral turpitude. *Id.* at 758–59. In this regard, the Board found that “moral turpitude is inherent in the act of burglary of an occupied

dwelling itself” and that entering the dwelling of another “with the intent to commit *any crime* therein is a [CIMT].” *Id.* at 759; *cf. Matter of Frentescu*, 18 I&N Dec. at 247 (finding that even though the alien was convicted of the CIMT of residential burglary, the offense was not a “particularly serious crime” for purposes of asylum and withholding of deportation).

The Board distinguished the burglary offense in *Matter of Louissaint* from that involved in *Matter of M-*, 2 I&N Dec. 721, where it had held that a burglary offense is a CIMT only if the crime accompanying the breaking and entering is morally turpitudinous. 24 I&N Dec. at 755–56. In particular, the Board noted that *Matter of M-* involved third-degree burglary of a building—presumably nonresidential—while *Matter of Louissaint* involved an occupied dwelling. *Id.* Therefore the Board concluded that burglary of an occupied dwelling involves “‘reprehensible conduct’ committed ‘with some form of scienter’ as required by *Matter of Silva-Trevino*.” *Id.* at 758 (quoting *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 & n.5 (A.G. 2008)).

In a concurring opinion, one Board Member observed the possibility that *Matter of Silva-Trevino* may not withstand review in the courts of appeals but noted that residential burglary should nevertheless be considered categorically a CIMT. *Id.* at 760 (Pauley, concurring). Five circuit courts have since rejected *Matter of Silva-Trevino*’s analytic framework because it allows the Immigration Judge to look beyond the record of conviction as a third step of the modified categorical approach. *See Silva-Trevino v. Holder*, 742 F.3d 197, 200–01 (5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199, 1209 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1310 (11th Cir. 2011); *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462, 473 (3d Cir. 2009). These decisions do not, however, impact the Board’s holding in *Matter of Louissaint* that residential burglary constitutes a categorical CIMT. Further, no circuit courts have specifically rejected the Board’s holding in *Matter of Louissaint*. *But cf. Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1018 (9th Cir. 2005) (following the Board’s reasoning in *Matter of M-* and finding that the act of entering a residence is not itself morally turpitudinous, but rather it is the nature of the accompanying crime that renders residential burglary a CIMT).

## Residential Burglary as an Aggravated Felony

Additionally, an individual convicted of residential burglary may be removable as having been convicted of an aggravated felony. *See* sections 101(a)(43)(F), (G) of the Act. In 1994, Congress made a burglary conviction carrying at least a 5-year term of imprisonment an aggravated felony. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320. The associated term of imprisonment for burglary as an aggravated felony was later reduced to at least 1 year. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., § 321(a)(3), 110 Stat. 3009-546, 3009-627 (codified as section 101(a)(43)(G) of the Act, which provides that “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year” constitutes an aggravated felony that renders an individual removable). The Board has adopted *Taylor*’s generic definition of burglary for the purpose of determining whether a State crime constitutes a burglary offense under the Act. *See Matter of Perez*, 22 I&N Dec. 1325, 1327 (BIA 2000). Additionally, three circuit courts have applied the *Taylor* definition of burglary upon making that determination.<sup>2</sup> *See, e.g., Sareang Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (vehicular burglary); *Lopez-Elias v. Reno*, 209 F.3d 788, 792 (5th Cir. 2000) (same); *Solorzano-Patlan v. INS*, 207 F.3d 869, 874–75 (7th Cir. 2000) (same).

Notably, in *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013), the Supreme Court analyzed whether the burglary offense defined in section 459 of the California Penal Code falls within the generic definition of burglary provided in *Taylor v. United States*. The Court found that section 459 defines burglary more broadly than the generic definition of the offense and contains a single, indivisible set of elements. *Id.* at 2285–86. Based on its holding that courts are not permitted to apply the modified categorical approach in these circumstances, the Supreme Court found that California’s burglary offense in section 459 does not correspond to the generic crime of burglary. *Id.* at 2286. Adjudicators should thus carefully consider the Supreme Court’s analysis in *Descamps* when determining whether a State burglary offense falls within *Taylor*’s generic definition of burglary for purposes of section 101(a)(43)(G) of the Act.

Despite the inclusion of burglary in the aggravated felony definition at section 101(a)(43)(G) of the Act,

however, courts often analyze burglary convictions under the crime of violence definition at section 101(a)(43)(F), particularly where the elements of an alien's State burglary conviction do not correspond with the elements of "generic burglary." See *Taylor v. United States*, 495 U.S. at 599–600. Section 101(a)(43)(F) incorporates the crime of violence definition set forth in 18 U.S.C. § 16 (2012), which provides that "crime of violence" means

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The discrete definition of the term "crime of violence" under the Act has allowed some State burglary crimes to be treated as aggravated felonies, even when they do not qualify as burglary offenses under the Act. For example, the Fourth, Fifth, and Ninth Circuits have held that residential burglary is categorically a crime of violence pursuant to 18 U.S.C. § 16(b) and therefore an aggravated felony under section 101(a)(43)(F) of the Act.<sup>3</sup> See, e.g., *United States v. Avila*, 770 F.3d 1100, 1105 (4th Cir. 2014); *United States v. Ramos-Medina*, 706 F.3d 932, 936–37 (9th Cir. 2013); *Kwong v. Holder*, 671 F.3d 872, 877–88 (9th Cir. 2011); *United States v. Echeverria-Gomez*, 627 F.3d 971, 976 (5th Cir. 2010); *United States v. Guardardo*, 40 F.3d 102, 103–04 (5th Cir. 1994). These courts reasoned that in the ordinary case where a burglar enters a dwelling with intent to commit a felony or larceny, there is always a substantial risk that the burglar will use force against an occupant to accomplish his criminal task.<sup>4</sup> See *Avila*, 770 F.3d at 1106; *Ramos-Medina*, 706 F.3d at 937; *Echeverria-Gomez*, 627 F.3d at 977; *Guardardo*, 40 F.3d at 104.

#### *Commercial or Nonresidential Burglary*

The Board generally treats commercial burglary, or burglary of a building or structure that is not necessarily a dwelling, as a CIMT when the crime the offender intended to commit involves moral turpitude. In these cases the Board has looked to the record of conviction to determine whether the intended crime was morally

turpitudinous.<sup>5</sup> See, e.g., *Matter of De La Nues*, 18 I&N Dec. at 141, 145 (stating that burglary of a store with intent to commit theft or larceny was a CIMT based on the applicant's admission of the underlying criminal intent); *Matter of M-*, 2 I&N Dec. at 724–25 (holding that burglary of a building was not a CIMT where the record of conviction did not indicate the accompanying crime); *Matter of V-T-*, 2 I&N Dec. 213, 214 (BIA 1944) (holding that burglary of a store was a CIMT where the information charged the respondent with entering with intent to commit larceny).

In contrast, the Ninth Circuit addressed the question whether a conviction for commercial burglary under California law was for a CIMT and held that it was not. See *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1109 (9th Cir. 2011). The court found that a burglary conviction under section 459 of the California Penal Code requires three elements: (1) entering (lawful or unlawful); (2) a commercial building; (3) with the intent to commit larceny or any felony. *Id.* at 1107. The offense was not categorically a CIMT because the statute did not punish conduct that was necessarily "morally reprehensible" or that was "base, vile, or depraved." *Id.* at 1108 (internal quotation marks omitted). Applying the modified categorical approach, the Ninth Circuit found that the record of conviction did not reveal any additional elements to which the alien pled guilty, so his conviction was not for a CIMT. *Id.* at 1110. However, the court noted that if the conviction required proof of *theft* or *unlawful* entry into a *residence*, then his offense would have qualified as a CIMT. *Id.* at 1107.

It is important to note that *Hernandez-Cruz* was decided prior to *Descamps v. United States*, 133 S. Ct. 2276. As previously discussed, the Supreme Court concluded in *Descamps* that the crime defined in section 459 of the California Penal Code is broader than the generic definition of burglary, so the modified categorical approach cannot be applied to determine whether a conviction under the statute is for a burglary offense. *Id.* at 2286–87. The Third, Eighth, and Ninth Circuits have since applied the Supreme Court's reasoning in *Descamps* in the context of the CIMT analysis. See *supra* note 5. Thus, adjudicators should consider the *Descamps* analysis when determining whether a State commercial burglary statute defines a CIMT or an aggravated felony that renders the respondent removable.

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# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR OCTOBER 2014

by John Guendelsberger

The United States courts of appeals issued 220 decisions in October 2014 in cases appealed from the Board. The courts affirmed the Board in 179 cases and reversed or remanded in 41, for an overall reversal rate of 18.6%, compared to last month's 13.8%. There were no reversals from the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits.

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

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	0	1	100.0
Second	62	57	5	8.1
Third	6	5	1	16.7
Fourth	11	9	2	18.2
Fifth	10	10	0	0.0
Sixth	2	2	0	0.0
Seventh	4	3	1	25.0
Eighth	6	6	0	0.0
Ninth	109	78	31	28.4
Tenth	2	2	0	0.0
Eleventh	7	7	0	0.0
All	220	179	41	18.6

The 220 decisions included 126 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 50 direct appeals from denials of other forms of relief from removal or from findings of removal; and 44 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	126	96	30	23.8
Other Relief	50	44	6	12.0
Motions	44	39	5	11.4

The 30 reversals or remands in asylum cases involved particular social group (16 cases), nexus (5 cases), credibility (4 cases), protection under the Convention Against Torture (2 cases), level of harm for

past persecution, corroboration, and the 1-year filing requirement for asylum applications.

The six reversals or remands in the "other relief" category addressed cancellation of removal (two cases), crimes involving moral turpitude, the 30-gram exception for a single possession offense, adjustment of status, and the application of the categorical approach.

The five motions cases involved changed country conditions (three cases), ineffective assistance of counsel, and an asylum eligibility issue not fully addressed in the agency decision.

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

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	44	34	10	22.7
Ninth	814	631	183	22.5
First	42	35	7	16.7
Third	103	87	16	15.5
Second	348	307	41	11.8
Fourth	89	79	10	11.2
Sixth	77	71	6	7.8
Tenth	46	43	3	6.5
Eleventh	93	88	5	5.4
Fifth	156	149	7	4.5
Eighth	56	55	1	1.8
All	1868	1579	289	15.5

Last year's reversal rate at this point (January through October 2013) was 11.3%, with 1983 total decisions and 225 reversals.

The numbers by type of case on appeal for the first 10 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1001	819	182	18.2
Other Relief	415	343	72	17.3
Motions	452	417	35	7.7

# CIRCUIT COURT DECISIONS FOR NOVEMBER 2014

*by John Guendelsberger*

The United States courts of appeals issued 133 decisions in November 2014 in cases appealed from the Board. The courts affirmed the Board in 107 cases and reversed or remanded in 26, for an overall reversal rate of 19.5%, compared to last month's 18.6%. There were no reversals from the First, Third, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	1	0	0.0
Second	30	25	5	16.7
Third	8	8	0	0.0
Fourth	7	5	2	28.6
Fifth	6	5	1	16.7
Sixth	5	5	0	0.0
Seventh	1	1	0	0.0
Eighth	2	2	0	0.0
Ninth	63	45	18	28.6
Tenth	3	3	0	0.0
Eleventh	7	7	0	0.0
All	133	107	26	19.5

The 133 decisions included 77 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 33 direct appeals from denials of other forms of relief from removal or from findings of removal; and 23 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	77	58	19	24.7
Other Relief	33	29	4	12.1
Motions	23	20	3	13.0

The 19 reversals or remands in asylum cases involved particular social group (5 cases), credibility (4 cases), nexus (2 cases), corroboration (2 cases), level of harm for past persecution (2 cases), material support bar (2 cases), protection under the Convention Against Torture, and initial fact finding by the Board.

The four reversals or remands in the "other relief" category addressed application of the categorical approach (two cases) and eligibility for adjustment of status (two cases). The three motions cases involved notice for an in absentia order of removal, reasonable cause for failure to appear, and adjustment of status eligibility.

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

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	877	676	201	22.9
Seventh	45	35	10	22.2
First	43	36	7	16.3
Third	111	95	16	14.4
Fourth	96	84	12	12.5
Second	378	332	46	12.2
Sixth	82	76	6	7.3
Tenth	49	46	3	6.1
Eleventh	100	95	5	5.0
Fifth	162	154	8	4.9
Eighth	58	57	1	1.7
All	2001	1686	315	15.7

Last year's reversal rate at this point (January through November 2013) was 11.2%, with 2166 total decisions and 243 reversals.

The numbers by type of case on appeal for the first 11 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1078	877	201	18.6
Other Relief	448	372	76	17.0
Motions	475	437	38	8.0

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

## RECENT COURT OPINIONS

### ***Second Circuit:***

*Meng v. Holder*, 770 F.3d 1071 (2d Cir. 2014): The Second Circuit denied a petition for review challenging the Board's affirmance of the Immigration Judge's denial of asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The court found no error in the Board's determination that the petitioner was ineligible for asylum as a persecutor of others under section 208(b)(2)(A)(i) of the Act. The court recited its four-part test from *Balachova v. Mukasey*, 547 F.3d 374, 384–85 (2d Cir. 2008): (1) the alien must have been involved in acts of persecution; (2) a nexus must be shown between the persecution and a statutory ground; (3) if the alien did not herself "incite, order, or actively carry out" the persecution, then his or her conduct "must have assisted the persecution"; and (4) the alien must have had sufficient knowledge that his or her actions may assist in persecution. This test was satisfied by the actions of the petitioner who, while serving as a public security officer in China for more than 20 years, reported women who were pregnant in violation of China's family planning policy. The petitioner knew that her actions could result in such women being subjected to persecution in the form of forced abortions or sterilizations. The court disagreed with the petitioner's argument that her actions were passive and tangential and thus insufficient to constitute assistance in persecution. To the contrary, the court found that the petitioner's conduct was active and "integral to the effectuation of the persecution" because by reporting pregnant women, she set the scheme in motion. The court further upheld the Board's finding that the petitioner had not met her burden for CAT protection.

### ***Third Circuit:***

*Guzman v. Att'y Gen. of U.S.*, 770 F.3d 1077 (3d Cir. 2014): The Third Circuit upheld the Board's ruling that the stop-time rule of section 240A(d)(1) of the Act was not impermissibly retroactive in its application to the petitioner's 1995 controlled substance offense. Although the petitioner had accrued only 1 year of lawful residence in the U.S. at the time he committed the crime, he argued that, if not for the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), he could have delayed his proceedings until he had accrued the 7 years of residence necessary to be eligible for a waiver under former section 212(c) of the Act. The court distinguished the facts of the petitioner's case from those in *INS v. St. Cyr*, 533 U.S. 289 (2001), and

*Sinotes-Cruz v. Gonzales*, 468 F.3d 1190 (9th Cir. 2006), noting that the petitioners in those cases were eligible for relief at the time of IIRIRA's passage. Therefore, retroactive application of the new law would have improperly taken away a right that had already vested. In contrast, the court observed that the petitioner's 1995 offense rendered him deportable under then-existing law. Additionally, the petitioner was not eligible for relief from deportation at the time that IIRIRA was enacted because he had not accrued the requisite 7 years of residence required under former section 212(c) of the Act. The court found that the petitioner's stated "ability" to delay proceedings or evade authority until he had accrued the 7 years of residence amounted to "a hope and speculation." Further, the court was not persuaded by the petitioner's remaining arguments that the Board's decision was arbitrary and capricious under the Supreme Court's decision in *Judulang v. Holder*, 132 S. Ct. 476 (2011), or that the Board should have allowed the petitioner to apply for a section 212(c) waiver and cancellation of removal concurrently.

### ***Fourth Circuit:***

*Jaghooori v. Holder*, 772 F.3d 764 (4th Cir. 2014): The Fourth Circuit granted a petition for review challenging the Board's retroactive application of the stop-time rule of section 240A(d)(1) of the Act, which was enacted by the IIRIRA. The petitioner became a lawful permanent resident ("LPR") in April 1989. In April 1995, he pled guilty to misdemeanor credit card theft, which did not render him deportable. The Immigration Judge granted the petitioner's application for withholding of removal to Afghanistan but ruled that the petitioner was not eligible for cancellation of removal pursuant to section 240A(a) of the Act because his 1995 credit card theft offense cut short his continuous residence pursuant to the stop-time rule. The court observed that the retroactivity of a statute is "a question of Congressional intent." Under the first step of the *Landsgraf* test, the court found that Congress had not expressly and unambiguously spoken to the question of the stop-time rule's reach. The court therefore proceeded to step two of *Landsgraf*, which asks whether the new statute "attaches new legal consequences to events completed before its enactment." The court found that the facts of the petitioner's case were "remarkably similar" to those in the Seventh Circuit's decision in *Jeddy v. Holder*, 768 F.3d 595 (7th Cir. 2014). Each petitioner had been placed in removal proceedings 20 years after acquiring LPR status and more than a decade after accruing the requisite 7 years of continuous residence. The court then agreed with its sister circuit that retroactive application of

the stop-time rule would impermissibly attach “a new and serious consequence” to pre-IIRIRA criminal conduct. It also distinguished the petitioner’s case from those that the Government cited by noting that the petitioners in those cases (1) were convicted of crimes that made them immediately deportable and (2) had not accrued 7 years of continuous residence by IIRIRA’s effective date. The panel therefore granted the petition and remanded. The decision contained a dissenting opinion.

#### ***Ninth Circuit:***

*Singh v. Holder*, 771 F.3d 647 (9th Cir. 2014): The Ninth Circuit granted a petition for review challenging the Board’s determination that it lacked jurisdiction to reopen removal proceedings to allow the petitioner to pursue an application for adjustment of status before the United States Citizenship and Immigration Services (“USCIS”). The Board relied on *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009), where it held that it generally has no jurisdiction to reopen the proceedings of aliens with final orders of removal who wish to pursue applications for relief over which the Board and the Immigration Judges lack jurisdiction. It also addressed the Ninth Circuit’s decision in *Kalilu v. Mukasey*, 548 F.3d 1215 (9th Cir. 2008), which held that the Board has jurisdiction to reopen proceedings “to provide time for USCIS to adjudicate” an adjustment of status application. The Board responded that where it lacks jurisdiction over the underlying application for relief, the motion to reopen becomes, in effect, a motion to stay removal, over which it has no jurisdiction under the applicable regulation. The court declined to accord deference to *Matter of Yauri*, noting that it is bound to follow an agency’s reasonable interpretation of its own regulations where it is not “contrary to the plain language of the regulation.” However, according to the court, the language of 8 C.F.R. § 1003.2(a) plainly and unambiguously states that the Board may reopen *any case* in which it has rendered a decision. Relying on the regulatory language and its decision in *Kalilu*, the court found that the Board has jurisdiction over the motion to reopen and remanded for the Board to exercise its discretion (while expressing no opinion as to how such discretion should be exercised).

*Almanza-Arenas v. Holder*, 771 F.3d 1184 (9th Cir. 2014): The Ninth Circuit granted a petition for review of the Board’s precedent decision in *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), which held that the petitioner’s conviction for the offense of vehicle theft under section

10851(a) of the California Vehicle Code was categorically for a crime involving moral turpitude (“CMT”). Applying *Descamps v. United States*, 133 S. Ct. 2276 (2013), the court first compared the generic CMT offense with the State statute of conviction to determine if the latter is overly broad. The court previously held in *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009), that a generic CMT offense requires a permanent taking of a vehicle. Noting that section 10851(a) allows for a conviction where the vehicle is taken “with intent either to *permanently or temporarily* deprive the owner” of title or possession, the court concluded that the statutory crime is broader than the generic offense and is therefore not categorically a CMT. The court next determined that the California statute is not divisible under its holding in *Rendon v. Holder*, 764 F.3d 1077, 1084–85 (9th Cir. 2014), observing that the permanent and temporary taking of a vehicle are simply two different ways to commit the same crime because the statute does not contain alternative elements for each type of taking. Finding that the modified categorical approach was therefore inapplicable, the court nevertheless assumed, *arguendo*, that the statute was divisible and applied a modified categorical analysis. It concluded that the evidence of record did not establish that the petitioner had been convicted of a CMT. Additionally, the court noted the Board’s holding that the petitioner was ineligible for cancellation of removal where the record of conviction was inconclusive. However, the court found that this conclusion, which it had also reached in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), was irreconcilable with the Supreme Court’s subsequent holding in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). The court therefore remanded the record for further proceedings. The panel decision contained a concurring opinion.

*Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014): The Ninth Circuit denied a petition for review challenging the Board’s decision in *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012), which held that the petitioner’s conviction for felony endangerment under section 13-1201 of the Arizona Revised Statutes was categorically for a CMT. Reviewing the elements of the Arizona statute, the court concluded that the Board correctly identified the crime’s three elements—“the perpetrator must (1) act recklessly so as to (2) put another person in substantial, actual risk of (3) imminent death.” The court next examined the Board’s CMT analysis, finding it reasonable and thus entitled to deference. The court noted that “both the



actus reus and mens rea must be considered in concert,” with greater resulting harm required as the level of intent decreases. Although the offense in question requires reckless conduct, the court agreed with the Board that this level of harm met the standard of “base, vile, and depraved” conduct necessary for a CIMT finding. The court disagreed with the petitioner’s argument that reckless crimes in Arizona cannot constitute CIMTs because Arizona has interpreted recklessness to include intoxication to the point of being unaware of the risk. According to the court, the definition of recklessness it previously provided in *Uppal v. Holder*, 605 F.3d 712, 718 (9th Cir. 2010), namely, “actual knowledge of a factor indicating risk of harm and conscious disregard of it,” covers recklessness resulting from voluntary intoxication. The court also noted that the risk of intoxication is sufficiently well known in our society that one’s decision to become excessively intoxicated serves as “a proxy for conscious disregard of the risk itself.”

*Ibarra-Hernandez v. Holder*, 770 F.3d 1280 (9th Cir. 2014): The Ninth Circuit denied a petition for review challenging the Board’s determination that the petitioner was ineligible for cancellation of removal because she was convicted of a CIMT. The court disagreed with the Board’s finding that taking the identity of another in violation of section 13-2008(A) of the Arizona Revised Statutes is categorically a CIMT. Noting that the statute criminalizes the use of the identity of both real and fictitious persons for “any unlawful purpose” or to cause loss to a person, the court concluded that the offense of using the name “Mickey Mouse” for the unlawful purpose of obtaining employment would not constitute a CIMT. The court then addressed the Board’s alternative holding that the petitioner’s offense is a CIMT under the modified categorical approach. Because the Board relied on a plea transcript, which indicated that the petitioner admitted to taking the social security number of a real person without his consent to obtain employment, the court found that the petitioner’s offense was “a form of theft involving fraud.” It therefore held that the petitioner’s crime involved moral turpitude.

## BIA PRECEDENT DECISIONS

The Board addressed the adjudication of applications for recognition by organizations under 8 C.F.R. § 1292.2(a) in *Matter of St.*

*Francis Cabrini Immigration Law Center*, 26 I&N Dec. 445 (BIA 2014); *Matter of Ayuda*, 26 I&N Dec. 449 (BIA 2014); and *Matter of United Farm Workers Foundation*, 26 I&N Dec. 454 (BIA 2014). The applicant in *Matter of St. Francis Cabrini Immigration Law Center* indicated that it was not affiliated with any religious organization and that it had a pending application for tax exempt status as a nonprofit organization. Following an investigation, the DHS notified the Board that the applicant was affiliated with Global Management Enterprises, LLC, a for-profit corporation that also provides immigration services and with which it shared the same corporate officers and physical location. The DHS recommended denying the application because the applicant had not established nonprofit status.

Noting that the purpose of the recognition and accreditation program is to provide competent and affordable immigration legal services through reputable nonprofit organizations, the Board pointed out that nonprofit status is not just a requirement for recognition, it is also a safeguard for those who would otherwise lack access to legal representation. The Board explained that, in addition to proof of nonprofit status, an organization that is physically colocated or financially associated with, or otherwise attached to, a for-profit venture must show that it is motivated by a charitable purpose, rather than a pecuniary interest. Since the applicant was both physically colocated and financially associated with a for-profit venture, the Board required detailed and persuasive information that it operated solely and entirely in the spirit of 8 C.F.R. § 1292.2. Observing that a clear potential for a conflict of interest existed between the for-profit corporation and the applicant, the Board noted that the applicant had not provided an explanation of its operating procedures or distinguished itself from the for-profit entity. Since the applicant had also not provided the requisite evidence of its nonprofit status, the Board disapproved its application for recognition.

In *Matter of Ayuda*, the applicant was a nonprofit organization that supplied immigration and family law assistance to low-income immigrants. The organization applied for partial accreditation for one representative. Its application included a list of fees, which ranged from a few dollars for ministerial services to over \$1,000 for complex litigation, raising the question whether the fees are “nominal,” as required under 8 C.F.R. § 1292.2(a)(1).

Previously, in *Matter of American Paralegal Academy, Inc.*, 19 I&N Dec. 386 (BIA 1986), the Board determined that “nominal charges” are not defined in terms of specific dollar amounts. Instead, the Board analyzes each application for recognition on its own facts, relying on the information provided by the applicant organization and its local DHS office. Acknowledging that fees often depend on wide-ranging factors including geography, client demographics, availability of services, and local overhead costs for service providers, the Board nonetheless identified certain guidelines. For example, a nominal charge can never be the actual dollar value of the service—it must be substantially less. Additionally, while fees may be calculated to offset some of the organization’s operational costs, the fee schedule must be oriented to accommodate the client’s ability to pay, in furtherance of the goal of providing competent low-cost legal services. The Board also explained that the organization must charge nominal fees to all its clients, including those with greater means. Stating that each application should include the organization’s budget, sources of funding or financial support, list of fees, and an explanation for how the fees are determined, the Board noted that an application with vague or incomplete information about fees, budget, or funding would not be approved.

As guidance, the Board explained that its analysis of what constitutes “nominal” charges includes consideration of the following: (1) type of clerical services offered; (2) type and scope of legal representation; (3) manner of delivery of legal services; (4) fees for each visit, consultation, clerical item, or service; (5) actual costs to provide such services in a particular geographical area; and (6) circumstances under which the organization will waive fees for clients who are unable to pay, adjust fees based on the client’s income, and assess fees on an individual or family basis. Applying those factors to the application, the Board determined that the organization imposed nominal charges for its immigration legal services and approved its application for recognition.

In *Matter of United Farm Workers Foundation*, the Board held that a recognized organization need not submit multiple accreditation applications for a representative to practice at more than one of its branch locations. The organization, which has several approved branch locations, submitted duplicate applications for partial accreditation of a representative who would provide legal services from five different offices. Revisiting *Matter of EAC, Inc.*,

24 I&N Dec. 563 (BIA 2008), which held that organizations must submit separate accreditation applications for each branch, the Board reasoned that the requirement placed an undue burden on the limited resources of organizations that provided much-needed low-cost and no-cost legal services. Concluding that a “per branch” application requirement was impractical, repetitive, and offered no meaningful benefit to the public, the Board modified *Matter of EAC, Inc.* and held that the practice of requiring multiple applications for the same representative would be discontinued. Consequently, once a representative is accredited at one location, a recognized organization may place or relocate the accredited representative at any location within its network of recognized branches. The Board approved the application for partial accreditation.

In *Matter of Velasquez-Cruz*, 26 I&N Dec. 458 (BIA 2014), the Board held that an alien’s departure from the United States following a criminal conviction for illegal entry under section 275(a)(1) of the Act interrupts the 10-year period of continuous physical presence required for cancellation of removal under section 240A(b)(1) of the Act. The respondent pled guilty to illegal entry under section 275(a)(1) of the Act twice in 1 week, having been apprehended when she reentered the country immediately after her first conviction. After serving 30 days of confinement following the second conviction, she left the United States, but reentered again 2 months later without being admitted or paroled. The respondent was placed in removal proceedings, during which she conceded removability under section 212(a)(6)(A)(i) of the Act and sought cancellation of removal under section 240A(b)(1). The Immigration Judge found that her two convictions under section 275(a)(1) and subsequent departures constituted a sufficiently formal, documented process to interrupt her accrual of continuous physical presence, and he denied the application.

On appeal, the Board noted that the provision in section 240A(d)(2), which states that a departure from the United States in excess of 90 days or for an aggregate period of 180 days constitutes a break in physical presence, is not the exclusive rule for determining whether a departure interrupts an alien’s continuous presence. Such presence also is broken where an individual agrees to voluntarily leave the United States in lieu of being placed in removal proceedings. *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002) (en banc). Further, pursuant to

*Matter of Avilez*, 23 I&N Dec. 799 (BIA 2005), continuous physical presence is interrupted when an immigration official refuses to admit an alien at the border and there is evidence that the alien (1) was formally excluded; (2) was subject to an order of expedited removal; (3) was offered and accepted the opportunity to withdraw an application for admission; or (4) was subjected to any formal, documented process and determined to be inadmissible.

Reviewing circuit court precedent, the Board observed that the Second Circuit in *Ascencio-Rodriguez v. Holder*, 595 F.3d 105 (2d Cir. 2010), held that an alien's departure following a conviction under section 275(a)(1) broke his continuous physical presence because he had been deemed inadmissible in a "formal, documented process." The court found that the alien's conviction was the "functional equivalent" of a finding of inadmissibility under section 212(a)(6)(A)(i) because the language of the two statutes is almost identical. Even though the alien never appeared before an Immigration Judge and was never expressly found inadmissible, the court reasoned that his conviction for illegal entry constituted an admission of facts that rendered him inadmissible.

*Zarate v. Holder*, 671 F.3d 1132 (9th Cir. 2012), concerned an alien who returned to Mexico after a Federal conviction for possession of fraudulent documents, which he presented in conjunction with a false claim to citizenship while attempting to enter the United States. The court held that his departure was sufficient to interrupt his continuous physical presence because his use of false identification, false claim of United States citizenship, arrest, guilty plea, conviction, 5 days of incarceration, and return to Mexico in immigration custody cumulatively amounted to more than a mere turnaround at the border.

The respondent attempted to distinguish her case from *Ascencio-Rodriguez* and *Zarate*, arguing that unlike those aliens, she was not apprehended as she was attempting to enter the country. The Board rejected that argument, finding that the circumstances of her apprehension did not mandate a different outcome. The respondent also contended that she was never subject to a finding of inadmissibility, nor had she received advisals about a hearing before an Immigration Judge. The Board was unconvinced, noting that in *Ascencio-Rodriguez* the Second Circuit had found that even though the alien was not given an opportunity to appear before an Immigration

Judge, his departure subsequent to a conviction for illegal entry was sufficiently similar to a formal removal proceeding to interrupt his accrual of continuous physical presence.

Concluding that each of the respondent's departures following her convictions for illegal entry under section 275(a)(1) of the Act was pursuant to a "formal, documented process" in which she admitted facts sufficient to establish her inadmissibility, the Board determined that each departure broke her continuous physical presence. Concurring with the Immigration Judge that the respondent had not satisfied her burden of establishing 10 years of continuous physical presence and thus was ineligible for cancellation of removal under section 240A(b)(1), the Board dismissed the appeal.

## REGULATORY UPDATE

**79 Fed. Reg. 69,502 (Nov. 21, 2014)**

### DEPARTMENT OF HOMELAND SECURITY

#### U.S. Citizenship and Immigration Services

**[CIS No. 2551-14; DHS Docket No. USCIS-2014-0011]**

**RIN 1615-ZB33**

#### Designation of Liberia 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) has designated Liberia for Temporary Protected Status (TPS) for a period of 18 months, effective November 21, 2014 through May 21, 2016. Under section 244(b)(1)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. 1254a(b)(1)(C), the Secretary is authorized to designate a foreign state (or any part thereof) for TPS upon finding that the foreign state is experiencing extraordinary and temporary conditions that prevent its nationals from returning in safety and that permitting such aliens to remain temporarily in the United States is not contrary to the national interest.

This designation allows eligible Liberian nationals (and aliens having no nationality who last habitually resided in Liberia) who have continuously resided in the United States since November 20, 2014 and been continuously physically present in the United States since November 21, 2014 to be granted TPS. This Notice also describes the other eligibility criteria applicants must meet.

Individuals who believe they may qualify for TPS under this designation may apply within the 180-day registration period that begins on November 21, 2014 and ends on May 20, 2015. They may also apply for Employment Authorization Documents (EADs) and for travel authorization. Through this Notice, DHS also sets forth the procedures for nationals of Liberia (or aliens having no nationality who last habitually resided in Liberia) to apply for TPS, EADs, and travel authorization with U.S. Citizenship and Immigration Services (USCIS).

Given the Ebola Virus Disease (EVD)-related basis for the designations of Liberia, Guinea, and Sierra Leone for TPS and ongoing efforts to prevent the spread of EVD, requests for advance travel authorization ("advance parole") for travel to one or more of these three countries will not be approved, as a matter of discretion, absent extraordinary circumstances. If you depart from the United States without obtaining advance parole or you do not comply with any conditions that may be placed on your advance parole document, you may not be permitted to re-enter the United States. TPS beneficiaries who are granted advance parole to travel to Liberia, Guinea or Sierra Leone are advised that they, like other aliens granted advance parole, are not guaranteed parole into the United States. A separate decision regarding your ability to enter will be made when you arrive at a port-of-entry upon your return. Individuals considering travel outside the United States should visit the Department of State's Web site for the most up-to-date information in Travel Alerts and Warnings and in the Ebola Fact Sheet for Travelers.

**DATES:** This designation of Liberia for TPS is effective on November 21, 2014 and will remain in effect through May 21, 2016. The 180-day registration period for eligible individuals to submit TPS applications begins November 21, 2014, and will remain in effect through May 20, 2015.

**79 Fed. Reg. 69,506 (Nov. 21, 2014)**

## **DEPARTMENT OF HOMELAND SECURITY**

### **U.S. Citizenship and Immigration Services**

**[CIS No. 2553-14; DHS Docket No. USCIS-2014-0009]**

**RIN 1615-ZB34**

### **Designation of Sierra Leone 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) has designated Sierra Leone for Temporary Protected Status (TPS) for a period of 18 months, effective November 21, 2014 through May 21, 2016. Under section 244(b)(1)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. 1254a(b)(1)(C), the Secretary is authorized to designate a foreign state (or any part thereof) for TPS upon finding that the foreign state is experiencing extraordinary and temporary conditions that prevent its nationals from returning in safety and that permitting such aliens to remain temporarily in the United States is not contrary to the national interest.

This designation allows eligible Sierra Leonean nationals (and aliens having no nationality who last habitually resided in Sierra Leone) who have continuously resided in the United States since November 20, 2014 and been continuously physically present in the United States since November 21, 2014 to be granted TPS. This Notice also describes the other eligibility criteria applicants must meet.

Individuals who believe they may qualify for TPS under this designation may apply within the 180-day registration period that begins on November 21, 2014 and ends on May 20, 2015. They may also apply for Employment Authorization Documents (EADs) and for travel authorization. Through this Notice, DHS also sets forth the procedures for nationals of Sierra Leone (or aliens having no nationality who last habitually resided in Sierra Leone) to apply for TPS, EADs, and travel authorization with U.S. Citizenship and Immigration Services (USCIS).



Given the Ebola Virus Disease (EVD)-related basis for the designations of Liberia, Guinea, and Sierra Leone for TPS and ongoing efforts to prevent the spread of EVD, requests for advance travel authorization (“advance parole”) for travel to one or more of these three countries will not be approved, as a matter of discretion, absent extraordinary circumstances. If you depart from the United States without obtaining advance parole or you do not comply with any conditions that may be placed on your advance parole document, you may not be permitted to re-enter the United States. TPS beneficiaries who are granted advance parole to travel to Liberia, Guinea or Sierra Leone are advised that they, like other aliens granted advance parole, are not guaranteed parole into the United States. A separate decision regarding your ability to enter will be made when you arrive at a port-of-entry upon your return. Individuals considering travel outside the United States should visit the Department of State’s Web site for the most up-to-date information in Travel Alerts and Warnings and in the Ebola Fact Sheet for Travelers.

**DATES:** This designation of Sierra Leone for TPS is effective on November 21, 2014 and will remain in effect through May 21, 2016. The 180-day registration period for eligible individuals to submit TPS applications begins November 21, 2014, and will remain in effect through May 20, 2015.

**79 Fed. Reg. 69,511 (Nov. 21, 2014)**

## **DEPARTMENT OF HOMELAND SECURITY**

### **U.S. Citizenship and Immigration Services**

[CIS No. 2551–14; DHS Docket No. USCIS–2014–0010]

**RIN 1615–ZB32**

### **Designation of Guinea 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) has designated Guinea for Temporary Protected Status (TPS) for a period of 18 months, effective November 21, 2014 through May 21, 2016. Under section 244(b)(1)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. 1254a(b)(1)(C), the

Secretary is authorized to designate a foreign state (or any part thereof) for TPS upon finding that the foreign state is experiencing extraordinary and temporary conditions that prevent its nationals from returning in safety and that permitting such aliens to remain temporarily in the United States is no contrary to the national interest.

This designation allows eligible Guinean nationals (and aliens having no nationality who last habitually resided in Guinea) who have continuously resided in the United States since November 20, 2014 and been continuously physically present in the United States since November 21, 2014 to be granted TPS. This Notice also describes the other eligibility criteria applicants must meet.

Individuals who believe they may qualify for TPS under this designation may apply within the 180-day registration period that begins on November 21, 2014 and ends on May 20, 2015. They may also apply for Employment Authorization Documents (EADs) and for travel authorization. Through this Notice, DHS also sets forth the procedures for nationals of Guinea (or aliens having no nationality who last habitually resided in Guinea) to apply for TPS, EADs, and travel authorization with U.S. Citizenship and Immigration Services (USCIS).

Given the Ebola Virus Disease (EVD)-related basis for the designations of Liberia, Guinea, and Sierra Leone for TPS and ongoing efforts to prevent the spread of EVD, requests for advance travel authorization (“advance parole”) for travel to one or more of these three countries will not be approved, as a matter of discretion, absent extraordinary circumstances. If you depart from the United States without obtaining advance parole or you do not comply with any conditions that may be placed on your advance parole document, you may not be permitted to re-enter the United States. TPS beneficiaries who are granted advance parole to travel to Liberia, Guinea or Sierra Leone are advised that they, like other aliens granted advance parole, are not guaranteed parole into the United States. A separate decision regarding your ability to enter will be made when you arrive at a port-of-entry upon your return. Individuals considering travel outside the United States should visit the Department of State’s Web site for the most up-to-date information in Travel Alerts and Warnings and in the Ebola Fact Sheet for Travelers.

**DATES:** This designation of Guinea for TPS is effective on November 21, 2014 and will remain in effect through May 21, 2016. The 180-day registration period for eligible individuals to submit TPS applications begins November 21, 2014, and will remain in effect through May 20, 2015.

DEPARTMENT OF STATE

[Public Notice: 8935]

**In the Matter of the Review of the Designation of Basque Fatherland and Liberty Also Known as Eta Also Known as Askatasuna Also Known as Batasuna Also Known as Ekin Also Known As Euskal Herritarrok Also Known Euzkadi Ta Akatasuna Also Known as Herri Batasuna Also Known as Jarrai-Haika-Segi Also Known as K.A.S. Also Known as Xaki as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in these matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (“INA”), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2008 decision to maintain the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. § 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

**John F. Kerry,**  
*Secretary of State.*

DEPARTMENT OF STATE

[Public Notice: 8936]

**In the Matter of the Review of the Designation of National Liberation Army Also Known as ELN Also Known as Ejercito de Liberacion Nacional as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in these matter [sic] pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (“INA”), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2008 decision to maintain the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

**John F. Kerry,**  
*Secretary of State.*

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**Statutory Interplay** *continued*

*Vehicular Burglary*

There appears to be consensus among the Board and the circuit courts that vehicular burglary does not come within the ambit of a burglary offense under section 101(a)(43)(G) of the Act because vehicular burglary does not involve a building or structure in accordance with the generic definition of burglary set forth in *Taylor*. See *Lopez-Elias v. Reno*, 209 F.3d 788, 792 (5th Cir. 2000); *Matter of Perez*, 22 I&N Dec. 1325. However, several circuits, including the Fifth and Seventh, have held that vehicular burglary presents a substantial risk of physical force against person or property that renders such an offense an aggravated felony crime of violence under the Act. *Solorzano-Patlan v. INS*, 207 F.3d at 875; *United States v. Ramos-Garcia*, 95 F.3d 369, 371 (5th Cir. 1996). In contrast, the Ninth Circuit has found that burglary of a vehicle is neither a burglary offense nor a crime of violence. *Sareang Ye v. INS*, 214 F.3d at 1134.

In *Matter of Perez*, 22 I&N Dec. at 1327, the Board held that burglary of a vehicle under a Texas statute was not a “burglary offense” for purposes of section 101(a)(43)(G) of the Act because to come to such a conclusion would be inconsistent with the common

law, the generic definition of burglary set forth in *Taylor*, the Model Penal Code, and the laws of many States. Notably, the Board indicated that it was not determining the precise scope of a burglary offense within the meaning of section 101(a)(43)(G) of the Act. *Id.* Rather, it simply found that the term “burglary offense” did not include burglary of a vehicle. *Id.*

Similarly, the Fifth Circuit held in *Lopez-Elias v. Reno*, 209 F.3d at 792, that an alien’s conviction for burglary of a vehicle under the same Texas statute at issue in *Matter of Perez* was not a burglary conviction for purposes of section 101(a)(43)(G) of the Act. Citing *Taylor*, the court reasoned that because the alien was convicted of burglary of a vehicle, as opposed to a building, his crime did not qualify as a burglary offense under the Act. *Id.* However, the Fifth Circuit also noted that it had previously held that burglary of a vehicle constitutes a crime of violence under the Act. *Id.* at 792–93 (citing *United States v. Ramos-Garcia*, 95 F.3d 369; *United States v. Rodriguez-Guzman*, 56 F.3d 18 (5th Cir. 1995), *abrogated on other grounds by United States v. Charles*, 301 F.3d 309, 314 (5th Cir. 2002) (en banc)); *see also United States v. Guzman-Landeros*, 207 F.3d 1034 (8th Cir. 2000). For example, in *United States v. Rodriguez-Guzman*, 56 F.3d at 20, the court noted that a crime of violence as defined in 18 U.S.C. § 16(b) is broad in scope and includes offenses involving a substantial risk that physical force *may* be used against person *or property*. Thus, it concluded that because burglary of a vehicle often involves “the application of destructive physical force to the property of another,” it qualifies as a crime of violence as defined in 18 U.S.C. § 16(b) and is therefore an aggravated felony.<sup>6</sup> *Id.*

The Seventh Circuit came to a similar conclusion in *Solorzano-Patlan v. INS*, 207 F.3d at 875, when it held that an alien’s vehicular burglary conviction under an Illinois statute was not for a burglary offense under section 101(a)(43)(G) of the Act because it did not involve burglary of a “building or structure.” However, the court held that the offense might qualify as an aggravated felony crime of violence under section 101(a)(43)(F) because the statute encompassed conduct that both did and did not involve a substantial risk of the use of physical force. *Id.*

In contrast, in *Sareang Ye v. INS*, 214 F.3d at 1134, the Ninth Circuit held that an alien’s California vehicular burglary did not constitute either a burglary offense under section 101(a)(43)(G) of the Act or a crime of

violence under section 101(a)(43)(F). Agreeing with the Fifth and Seventh Circuits, the Ninth Circuit found that burglary of a vehicle, which does not involve a building or structure, does not constitute a burglary offense. *Id.* at 1132. However, the court found that vehicular burglary was not “violent in nature” given the low risk of violence against person or property presented by such an offense. *Id.* at 1134 (internal quotation marks omitted). Thus, the question remains whether more circuit courts will follow the path of the Fifth and Seventh Circuits or whether they will instead align with the Ninth Circuit in holding that vehicular burglary does not constitute a crime of violence.

## Conclusion

The State and Federal definitions of burglary have evolved from the common law definition of the offense. Accordingly, the offense of burglary often implicates a broader range of conduct in criminal proceedings than it once did. In the context of immigration proceedings, an individual’s conviction for the offense of burglary may render him or her removable, either as an alien convicted of a CIMT or an aggravated felony crime of violence or burglary offense. However, because the many State and Federal definitions of burglary differ, the immigration consequences will vary greatly depending on the specific elements of the statute under which an individual was convicted. Although the Board and the circuit courts appear to agree that residential burglary qualifies as a CIMT, many questions remain regarding the immigration consequences of State residential and commercial burglary offenses in light of the Supreme Court’s decision in *Descamps v. United States*. Further, while the Board and some courts agree that vehicular burglary is not an aggravated felony burglary offense, disagreement remains regarding whether it is categorically an aggravated felony crime of violence. Consequently, as the elements of burglary continue to evolve, so too will the immigration consequences associated with burglary convictions.

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<sup>1</sup> The concept of deportation of aliens convicted of CIMTs after entry into the United States was first introduced by the Immigration Act of 1917, ch. 29, § 19(a), 39 Stat. 874, 889 (repealed 1952). Notably, the dissenting Board Member in *Matter of M-* observed that for 29 years after the passage of the Immigration Act of 1917, the Board consistently held that the offense of third-degree burglary in New York involved moral turpitude. *Matter of M-*, 2 I&N Dec. at 728 (Charles, dissenting).

<sup>2</sup> The Board and the circuit courts apply a categorical or modified categorical approach, as set forth in *Taylor v. United States*, to determine whether a particular conviction falls within the ambit of a ground of removal in the Act. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185–87 (2007). Under the categorical approach, the court will look only to the elements of the statute of conviction and compare them with the elements of the generic offense under the Act. See *Taylor v. United States*, 495 U.S. at 600–02. Where a particular statute contains a divisible set of elements that do not criminalize a broader swath of conduct than the generic offense, the court will apply the modified categorical approach and will therefore look beyond the applicable statutes to the record of conviction to determine whether a conviction qualifies as a removable offense. See *id.*; see also *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (observing that a burglary statute that involves entry into a building or automobile would be divisible).

<sup>3</sup> The circuit courts have also generally held that residential burglary is a crime of violence under the modified categorical approach in cases involving the unlawful reentry sentencing guidelines. See *e.g.*, *United States v. Murillo-Lopez*, 444 F.3d 337, 339–40 (5th Cir. 2006). Under the unlawful reentry sentencing guidelines, an offense qualifies as a crime of violence if it falls within a categorical list of generic crimes, including “burglary of a dwelling,” or if it is an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S. Sentencing Guidelines

Manual § 2L1.2 cmt. n.1(B)(iii) (2014). Given the divisible nature of most State burglary statutes, which set out in the alternative numerous types of structures that may be burglarized, the circuit courts apply the modified categorical approach to determine whether a burglary offense qualifies as “burglary of a dwelling” under the sentencing guidelines. See, *e.g.*, *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1191–92 (9th Cir. 2011).

<sup>4</sup> In *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004), the Supreme Court intimated that burglary is a classic example of a crime of violence under 18 U.S.C. § 16(b) but did not specify whether it envisioned all types of burglary or just residential burglary in its example.

<sup>5</sup> The Third, Eighth, and Ninth Circuits have since applied the holding of *Descamps* in the context of a CIMT analysis. *Almanza-Arenas v. Holder*, 771 F.3d 1184, 1190–91 (9th Cir. 2014); *Avendano v. Holder*, 770 F.3d 731, 734 (8th Cir. 2014); *Mahn v. Att’y Gen. of U.S.*, 767 F.3d 170, 174 (3d Cir. 2014). Adjudicators should consider these cases before looking to the record of conviction for the purpose of making a CIMT determination.

<sup>6</sup> *Rodriguez-Guzman* also involved a conviction for burglary of a nonresidential building, which the Fifth Circuit likewise concluded qualified as an aggravated felony crime of violence under the Act.

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