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In this issue...

Proving the Fact of Conviction in Immigration Proceedings: A Precategorical Analysis

by Eric J. Drootman

For years now, the criminal grounds of removability have increasingly played a significant role in immigration proceedings. *See Padilla v. Kentucky*, 130 S.Ct. 1473, 1480 (2010) (chronicling the "steady expansion of deportable offenses"). With limited exception, *see Nijhawan v. Holder*, 557 U.S. 29 (2009); *Matter of Silva-Trevino*, 24 I&N Dec. 687, 690 (A.G. 2008), whether a criminal conviction triggers removability generally requires utilization of the familiar two-step categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008) (stating that the Board of Immigration Appeals has historically relied on an "analytical approach that is essentially identical to the 'categorical approach' adopted by the Supreme Court in both the sentencing and immigration contexts"). This article does not attempt to address the contours of the heavily litigated categorical approach. Rather, the focus here is on a less discussed, but equally important, component of immigration proceedings: proving the "fact of conviction." This precategorical inquiry finds guidance in the Immigration and Nationality Act, regulations, and case law. Establishing the bare fact of conviction is not restricted to *Shepard*-approved documents and, in fact, permits reliance on a wide range of evidence, including record of arrest and prosecution ("RAP") sheets, presentence reports, correspondence, and testimony. This article will review the current framework for establishing the fact of conviction, an issue that recently received increased attention with the Board's decision in *Matter of J.R. Velasquez*, 25 I&N Dec. 680 (BIA 2012).

Statutory and Regulatory Framework for Proving the Fact of Conviction

Prior to passage of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ("IMMACT 90"), neither the Act nor the regulations specifically addressed the type of evidence that could be relied on to prove the fact of conviction in immigration proceedings. *See, e.g.*,

Matter of Gutnick, 13 I&N Dec. 412, 416 (BIA 1969). Rather, whether evidence was sufficient to prove the fact of conviction turned on the accuracy of the documentation. *See id.* Consistent with the congressional objective of assisting the former Immigration and Naturalization Service ("INS") with the apprehension and removal of criminal aliens, *see Matter of Esqueda*, 20 I&N Dec. 850, 854 n.3 (BIA 1994), section 507 of IMMACT 90, 104 Stat. at 5050-51, required all States receiving grant money under the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, to provide the INS a certified record of conviction, without charge, within 30 days of an alien's criminal conviction. In turn, on July 21, 1993, the Department of Justice promulgated a regulation designed to "finalize[] the types of documents that are admissible in proceedings before an Immigration Judge to prove a criminal conviction." Executive Office for Immigration Review; Criminal Conviction Records, 58 Fed. Reg. 38,952, 38,952 (July 21, 1993) (Summary). This regulation, 8 C.F.R. § 3.41 (1994), provided as follows:

> In any proceeding before an Immigration Judge,
>
> (a) Any of the following documents or records shall be admissible as evidence in proving a criminal conviction:
>
> (1) A record of judgment and conviction;
>
> (2) A record of plea, verdict and sentence;
>
> (3) A docket entry from court records that indicates the existence of a conviction;
>
> (4) Minutes of a court proceeding or a transcript of a hearing that indicates the existence of a conviction;
>
> (5) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a state official associated with the state's repository of criminal justice records, that indicates the following: The charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence;
>
> (6) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
>
> (b) Any document or record of the types specified in paragraph (a) of this section may be submitted if it complies with the requirement of § 287.6(a) of this chapter, or a copy of any such document or record may be submitted if it is attested in writing by an immigration officer to be a true and correct copy of the original.
>
> (c) Any record of conviction or abstract that has been submitted by electronic means to the Service from a state or court shall be admissible as evidence to prove a criminal conviction if it:
>
> (1) Is certified by a state official associated with the state's repository of criminal justice records as an official record from its repository or by a court official from the court in which [the] conviction was entered as an official record from its repository. Such certification may be by means of a computer-generated signature and statement of authenticity; and,
>
> (2) Is certified in writing by a Service official as having been received electronically from the state's record repository or the court's record repository.
>
> (d) Any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.

Subsections (a) and (c) of 8 C.F.R. § 3.41 were subsequently incorporated into the Act pursuant to section 304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-592 ("IIRIRA") (codified at sections 240(c)(3)(B) and (C) of the Act, 8 U.S.C. §§ 1229a(c)(3)(B) and (C)). Consistent with the subsequent passage of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 8 C.F.R. § 3.41 was renumbered as 8 C.F.R. § 1003.41. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).[1] Nonetheless, the text of the regulation has remained unchanged since its promulgation in 1992.

Read plainly, the statutory and regulatory framework governing the admissibility of evidence to prove the fact of conviction is divided into two classes: (1) judicially created formal conviction documents (including documents received by the Department of Homeland Security ("DHS") electronically) and (2) a "catch all" category including evidence that does not comprise a formal record of conviction. These two categories are consecutively explored below.

Case Law Addressing Evidence Admissible To Prove the Fact of Conviction

Although the statutory and regulatory framework governing the admissibility of conviction documents has been on the books for years, there are only two published Board cases, *Matter of J.R. Velasquez*, 25 I&N Dec. 680 (BIA 2012); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996), as well as a smattering of circuit court decisions squarely addressing these provisions. Perhaps this is not surprising. The fact of conviction is often not a point of contention in immigration proceedings because it is resolved by the alien when pleading to the factual allegations in the Notice to Appear. An admission when pleading is sufficient to resolve the fact of conviction. *See Matter of Pichardo*, 21 I&N Dec. 330, 333 n.2 (BIA 1996) (stating that it is unnecessary to rely on a record of conviction if the respondent admits the relevant factual allegation or concedes removability); *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986) ("[W]hen an admission is made as a tactical decision by an attorney in a deportation proceeding, the admission is binding on his alien client and may be relied upon as evidence of deportability."). It is only where pleadings do not resolve the fact of conviction that proving the presence of a conviction and the evidence needed to meet the DHS's burden come into play.[2] *See Matter of J.R. Velasquez*, 25 I&N Dec. at 684-85 n.7 ("Had the respondent formally admitted the existence of his convictions during his removal hearings, the DHS would thereby have met its burden of proof without having to adduce independent documentary evidence.").

Formal Conviction Records

As explained in *Matter of J.R. Velasquez*, the Board's most recent and comprehensive decision discussing evidence admissible to prove the presence of a conviction, section 240(c)(3)(B) and 8 C.F.R. § 1003.41(a) describe the first category—formal conviction documents—and make clear that judgments, plea agreements, verdicts, docket and minute orders, abstracts, and other judicially created documents will always be admissible to prove the fact of conviction. 25 I&N Dec. at 683 (stating that the documents described in section 240(c)(3)(B) of the Act are "categorically admissible in removal proceedings"). Importantly, to be "categorically admissible" these documents must be (1) certified by the criminal court or (2) "authenticated either through 8 C.F.R. § 287.6(a)—which calls for the submission of 'a copy attested by the official having legal custody of the [original] record or by an authorized deputy'—or through the submission of a written attestation by an immigration officer that the proffered document is 'a true and correct copy of the original.'" *Id.* (alteration in original) (quoting 8 C.F.R. § 1003.41(b)).

In addition, section 240(c)(3)(C) of the Act and 8 C.F.R. § 1003.41(c) clarify that a formal conviction record submitted electronically from criminal courts to the DHS is "conclusively admissible as evidence of a criminal conviction in removal proceedings," *id.* at 684, "if (1) an appropriate State official certifies its authenticity, and (2) a DHS official certifies in writing that the document was received electronically from the State's or court's repository of records." *Id.* at 682 (citing section 240(c)(3)(C) of the Act and 8 C.F.R. § 1003.41(c)).

In *Matter of J.R. Velasquez*, the Board was faced, inter alia, with an electronic record of conviction that failed to comply with the two-step authentication requirement set forth in 240(c)(3)(C) of the Act and 8 C.F.R. § 1003.41(c). Relying on precedent from the United States Court of Appeals for the Ninth Circuit, *Iran v. INS*, 656 F.2d 469, 472 n.8 (9th Cir. 1981); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196 (9th Cir. 2006), the Board held that the two-step process of authentication for electronic documents set forth at section 240(c)(3)(C) of the Act and 8 C.F.R. § 1003.41(c) is a nonmandatory "safe harbor" method, and "Immigration Judges may admit documents that are authenticated in other ways if they are found to be reliable." *Matter of J.R. Velasquez*, 25 I&N Dec. at 684. Thus, while an electronic document that is authenticated in strict compliance with 240(c)(3)(C) of the Act and 8 C.F.R. § 1003.41(c) *must* be admitted, where DHS uses a different form of authentication, "such as a written attestation of a DHS official who made the copy or received it electronically

continued on page 11

AILA InfoNet Doc. No. 12040199. (Posted 4/1/12)

CIRCUIT COURT DECISIONS FOR FEBRUARY 2012

by John Guendelsberger

The United States courts of appeals issued 198 decisions in February 2012 in cases appealed from the Board. The courts affirmed the Board in 185 cases and reversed or remanded in 13, for an overall reversal rate of 6.6%, compared to last month's 10.9%. There were no reversals from the First, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits.

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

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	4	0	0.0
Second	74	72	2	2.7
Third	20	17	3	15.0
Fourth	8	8	0	0.0
Fifth	6	6	0	0.0
Sixth	8	7	1	12.5
Seventh	5	5	0	0.0
Eighth	3	3	0	0.0
Ninth	55	48	7	12.7
Tenth	0	0	0	0.0
Eleventh	15	15	0	0.0
All	198	185	13	6.6

The 198 decisions included 109 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 47 direct appeals from denials of other forms of relief from removal or from findings of removal; and 42 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	109	106	3	2.8
Other Relief	47	40	7	14.9
Motions	42	39	3	7.1

The three reversals or remands in asylum cases involved past persecution, nexus (particular social group), and a frivolousness finding. The seven reversals or remands in the "other relief" category addressed a good moral character determination, removal for false representation of citizenship, a section 237(a)(1)(H) waiver, crime involving moral turpitude, and three *Judulang* remands of section 212(c) denials for lack of comparable grounds. The three reversals in motions cases involved ineffective assistance of counsel (two cases) and changed country conditions.

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

Circuit	Total	Affirmed	Reversed	% Reversed
Tenth	6	5	1	16.7
Third	40	34	6	15.0
Ninth	127	108	19	15.0
Fourth	22	19	3	13.6
Fifth	15	13	2	13.3
Sixth	17	15	2	11.8
Second	139	135	4	2.9
Eighth	5	5	0	0.0
Seventh	6	6	0	0.0
First	8	8	0	0.0
Eleventh	33	33	0	0.0
All	418	381	37	8.9

Last year's reversal rate at this point (January and February 2011) was 12.6%, with 538 total decisions and 68 reversals.

The numbers by type of case on appeal for the first 2 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	230	221	9	3.9
Other Relief	86	67	19	22.1
Motions	102	93	9	8.8

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

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RECENT COURT OPINIONS

First Circuit:

Jabri v. Holder, No. 10-1616, 2012 WL 883271 (1st Cir. Mar. 16, 2012): The First Circuit vacated the decision of the Immigration Judge (affirmed by the Board) denying asylum to the petitioner, a native and citizen of Jordan. The petitioner's claim was predicated on his claimed conversion from Islam to Christianity in late 2008 (while under investigation for fraudulent use of a credit card). The Immigration Judge's denial was based on an adverse credibility finding. Noting that the case was governed by the REAL ID Act, the court rejected the petitioner's argument that the inconsistencies relied on by the Immigration Judge did not go to the heart of the claim. However, the court reached a different conclusion from the Immigration Judge as to credibility. Stating that the Immigration Judge did not rely on a single inconsistency, but rather "on all of them in the aggregate," the court examined the three primary inconsistencies cited by the Immigration Judge and concluded that two were not direct inconsistencies. The court noted that the petitioner had presented supporting evidence in the form of affidavits from family and friends, as well as from a pastor and church administrator. The court also observed that if the petitioner was found credible as to his conversion to Christianity, the record contained consistent testimony regarding his influential grandfather's threats to have Jordanian officials punish the petitioner for apostasy, which under Jordanian law is legal and approved. The case was therefore remanded for a determination whether any remaining inconsistencies, considered along with the supporting evidence cited by the court, were sufficient to support an adverse credibility finding. Observing that under the REAL ID Act, any remaining inconsistencies must be considered in light of the totality of the circumstances, the court noted that a new evidentiary hearing might be necessary.

Mayorga-Vidal v. Holder, No. 09-1208, 2012 WL 883193 (1st Cir. Mar. 16, 2012): The First Circuit denied the petition for review of an Immigration Judge's decision (affirmed by the Board) denying the petitioner's application for asylum, withholding of removal, and Convention Against Torture protection from El Salvador. The petitioner had claimed eligibility for asylum based on his membership in a particular social group, which he defined as "young Salvadoran men who have already resisted gang recruitment and whose parents are unavailable to protect them." The court noted that it had "on many occasions" rejected similar social group formulations and that most of the characteristics proposed fell squarely under the Board's precedent decisions. However, the court discussed the main additional characteristic of the unavailability of parental protection but upheld as reasonable the Immigration Judge's conclusion that the proposed group was "too broad and encompasses too large a percentage of the population." Support for this conclusion was found not only in the evidence of record, but also in the petitioner's own statement in his appeal brief that his situation is "far from unique" because El Salvador is "swarming with unsupervised, uncared-for young people." In considering the proposed group to be "loose and open-ended in nature," the court focused on the subjective nature of the "lacking in parental supervision" element. The court noted that the petitioner's own facts—his parents, although absent, left him in the care of his aunt and thus seemingly provided him with substitute parental care—were illustrative of the difficulties in objectively distinguishing "between vulnerable youths lacking in supervision and those not." Additionally, the court was not persuaded by the petitioner's claim that his resistance to gang recruitment constituted a political opinion, finding no error in the Immigration Judge's reasoning that the gang's recruitment efforts "did not arise out of a 'political animus'" and that the petitioner presented no evidence that he ever expressed an anti-gang opinion to the gang members. Moreover, there was nothing to support a finding that the gang imputed a political opinion to the petitioner based on his refusal to join.

Second Circuit:

Mei Juan Zheng v. Holder, No. 10-3838-ag, 2012 WL 603635 (2d Cir. Feb. 27, 2012): The Second Circuit ruled on two issues concerning frivolousness findings in asylum cases. At a January 2001 hearing before an Immigration Judge, the petitioner withdrew her asylum application (claiming that she had suffered a forcible abortion in China), with prejudice, and later filed a new application claiming fear of (1) loan sharks from whom she had borrowed money to come to the U.S. and (2) torture at the hands of the Chinese authorities for having entered the U.S. illegally. At a 2003 merits hearing, the petitioner testified that the story concerning the forced abortion was false and that she had been told to use this story by smugglers. In his decision, the Immigration Judge acknowledged the existence of favorable factors but concluded that he lacked the discretion to refrain from

making a frivolousness finding. The Board affirmed on appeal. In a 2008 decision, the circuit court found that the petitioner's asylum application contained deliberately fabricated material elements and that she had received the requisite warnings. However, the court remanded to the Board to consider two questions: (1) whether an Immigration Judge's authority to enter a frivolousness finding is limited to cases where the Immigration Judge makes a final determination on the application in question; and (2) whether an Immigration Judge retains discretion to refrain from making a frivolousness finding even if the statutory and regulatory conditions for frivolousness have been met. In an unpublished decision dated August 30, 2010, the Board relied on its recent precedent decision in *Matter of X-M-C-*, 25 I&N Dec. 322 (BIA 2010), to conclude that an Immigration Judge may make a frivolousness finding on any filed application, whether or not it was subsequently withdrawn. The Board additionally held that an Immigration Judge lacks discretion to refrain from entering a frivolousness finding. This conclusion was based on the use of the word "shall," in section 208(d) of the Act and the lack of any language in the statute or implementing regulation relating to discretion. On appeal, the court upheld the first of the Board's holdings. Noting that the statutory language on the issue was ambiguous, the court found no basis for finding the Board's interpretation of section 208(d)(6) in *Matter of X-M-C-* to be unreasonable and therefore accorded it *Chevron* deference. Regarding the issue of Immigration Judge discretion, the court noted that the Board's August 2010 decision stated that an adverse credibility finding does not necessitate an inquiry as to whether the application is frivolous. Particularly where such an inquiry is not requested by either party, the Immigration Judge may determine, based on the circumstances of the particular case, whether a frivolousness inquiry is warranted. The Board concluded that once such an inquiry is begun, an Immigration Judge lacks discretion to refrain from entering a frivolousness finding where a material misstatement occurred after proper warnings. However, the court found it unnecessary to rule on the reasonableness of this last conclusion. Rather, the court concluded that in spite of the petitioner's admissions, the frivolousness inquiry "did not begin until the Immigration Judge started his analysis." The court held that nothing in the record established that the Immigration Judge understood that he could have chosen not to start down the path of such analysis in the first place. Therefore, the court vacated the Board's decision and remanded for further proceedings.

Eighth Circuit:

Omondi v. Holder, No. 11-2253, 2012 WL 851111 (8th Cir. Mar. 15, 2012): The Eighth Circuit rejected a challenge to an Immigration Judge's denial of asylum in a pre-REAL ID Act case because of the petitioner's failure to sufficiently corroborate his claim. The Immigration Judge had initially denied the asylum claim based on an adverse credibility finding, which the Board reversed on appeal. On remand, the Immigration Judge found the petitioner credible, noting that he had consistently described "in graphic detail his experience of detention, starvation and physical abuse" at a Kenyan police station. While the Immigration Judge found that the petitioner sufficiently corroborated his membership in the particular social group of "homosexual men in Kenya," he did not do so as to his detention at the police station, where he "was allegedly beaten, whipped, starved, and forced to perform sexual intercourse publicly." The Board affirmed. The court disagreed with the petitioner's claim that he was not required to corroborate credible testimony, noting that even prior to the REAL ID Act, reasonably available corroboration could be required under the Board precedent decision in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). The court upheld the Immigration Judge's conclusion that the need for such corroboration was reasonable where an affidavit from the petitioner's then-boyfriend (who according to the petitioner suffered the same experiences at the police station) failed to mention any abuse by the police. The court further upheld the Immigration Judge's conclusion that such evidence was reasonably available. Nevertheless, the court remanded because it was not apparent from the Board's decision if the petitioner's claim of deficiencies in the transcript (including 236 instances of use of the word "indiscernible") was addressed on appeal.

Ninth Circuit:

Oyeniran v. Holder, Nos. 09-73638, 10-70689, 2012 WL 695646 (9th Cir. Mar. 6, 2012): The Ninth Circuit reversed the Board's decision affirming an Immigration Judge's denial of deferral of removal under the Convention Against Torture ("CAT"). The petitioner, a native and citizen of Nigeria, had been granted CAT deferral by an Immigration Judge in 2005. In those proceedings, the Immigration Judge had found credible the petitioner's claim, which was based on the activities of his father, an archbishop and outspoken critic of both the Nigerian Government and Islamic extremist groups trying to implement Shari'a law. Based on the petitioner's credible testimony of violent attacks by Muslim extremists in

2003 and 2004 against his father and a sibling and of threats leveled by the attackers against all of his father's children, the Immigration Judge determined that the petitioner had met his burden of proof. The Board affirmed the Immigration Judge's holdings on appeal. In 2007, the petitioner returned to Nigeria for a month to visit his mother in the hospital after she suffered a severe stroke. The petitioner spent his entire visit at the hospital, and efforts were made to keep his visit quiet. Upon his return to the U.S., he was again placed in removal proceedings. He again applied for CAT deferral, but this time was found not credible by the Immigration Judge. On appeal, the Board reversed the Immigration Judge's adverse credibility finding, but upheld the denial of CAT protection. The Board dismissed the petitioner's claim of res judicata as to the prior grant, holding that the CAT claim had been properly considered de novo. The denial was based on the Board's determinations that (1) the 2003 and 2004 incidents did not amount to torture and (2) the attacks were not sufficiently linked to the Nigerian Government. The Board subsequently denied a motion to reopen filed in December 2009 based on a May 28, 2008, arrest warrant issued in Nigeria against the petitioner, holding that the warrant was available at the time of his hearing and that the new evidence would not change the result. On appeal, the court noted that collateral estoppel applies where four conditions are met: (1) the issue was identical in both proceedings; (2) the issue was actually litigated and decided previously; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits. The court found that these conditions were met here and that, as a result, the Government was barred from relitigating not only the facts of the 2003 and 2004 incidents, but also the findings that such facts constituted torture under the CAT; that the motive behind the attacks was to punish or intimidate the father's political activities; that such past attacks threaten the petitioner's own safety based on the family relationship and culture of Nigeria; and that the Nigerian Government was involved in or acquiesced to the attacks. The court therefore remanded the record, instructing that the Board could consider post-2005 facts on remand, but that any new evidence must be considered in light of the prior findings on past events. The court also reversed the Board's denial of the motion to reopen, finding the petitioner's delay in offering the 2008 arrest warrant to be excusable because he was in immigration detention from 2007 to 2010. Additionally, the court found that the arrest warrant constituted "significant, dramatic, and compelling" evidence. *Rohit v. Holder*, No. 10-70091, 2012 WL 639296 (9th Cir. Feb. 29, 2012): The Ninth Circuit denied the petition for review of the Board's decision (on remand from the circuit court) holding disorderly conduct involving prostitution to be a crime involving moral turpitude ("CIMT"). The petitioner had been convicted under section 647(b) of the California Penal Code, which covers an individual "who solicits or who agrees to engage in or who engages in any act of prostitution." Since the Board's decision in this case was unpublished, the court determined that it was not entitled to *Chevron* deference. Although the Government argued that the Board's reasoning flowed naturally from two precedent decisions, *Matter of W-*, 4 I&N Dec. 401 (BIA 1951) (holding that prostitution involves moral turpitude), and *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965) (holding that renting a room with knowledge that it will be used for prostitution involved moral turpitude), the court held that because the Board has never found in a published decision that solicitation of prostitution is a crime involving moral turpitude, no *Chevron* deference is warranted. The court then agreed with the Board, concluding that the offense is categorically a CIMT. Noting that the general definition of a CIMT (encompassing crimes that are "base, vile, or depraved") is often too general to be of assistance, the court compared the crime in question with those that have previously been found to constitute CIMTs. The court determined that soliciting prostitution was "not significantly less 'base, vile and depraved' than engaging in an act of prostitution" (which was found to be a CIMT in *Matter of W-*). The court also found solicitation to be closely analogous to the renting of a room, which was considered a CIMT in *Lambert*. The court was not persuaded by the petitioner's argument that solicitation is distinguishable from prostitution because the latter often involves repeated acts. This argument was rejected for several reasons, including lack of authority and because a crime that does not involve moral turpitude cannot become one through repetition. The court also held that a crime does not have to meet the Federal definition of prostitution in order to constitute a CIMT.

BIA PRECEDENT DECISIONS

In *Matter of Ilic*, 25 I&N Dec. 717 (BIA 2012), the Board held that an alien can independently apply for adjustment of status under section 245(i) of the Act as a derivatively grandfathered alien if the principal beneficiary of the qualifying visa petition satisfies the

requirements for grandfathering, including the physical presence requirement of section 245(i)(1)(C) of the Act.

The respondent's wife is the beneficiary of an approved I-130 Petition for Alien Relative filed in December 1999 by her sister. The respondent is the beneficiary of an approved I-140 employment-based visa petition, with an April 22, 2004, priority date. During his removal proceedings, the respondent applied for adjustment of status under section 245(i) of the Act as a derivative grandfathered alien based on the I-130 filed on behalf of his wife. The Immigration Judge granted the application and the Department of Homeland Security appealed.

The Board observed that section 245(i) contemplates two categories of grandfathered aliens, the first being principal grandfathered aliens, who are beneficiaries of visa petitions or labor certifications filed on or before April 30, 2001, which were properly filed and approvable when filed. If the principal grandfathered alien is the beneficiary of a visa petition or labor certification filed after January 14, 1998, he or she must have been physically present in the United States on December 21, 2000, to be eligible for section 245(i) adjustment of status. The second category, derivative grandfathered aliens, includes spouses and children of principal grandfathered aliens if eligible for a visa under section 203(d) of the Act. The derivatives do not need to show physical presence if the qualifying visa petition was filed after January 14, 1998, since they may be following to join the principal grandfathered alien.

The DHS argued that the respondent had transformed from the derivative grandfathered alien to the principal grandfathered alien because he was the principal adjustment applicant, based on the approved I-140. Consequently, the DHS contended, the respondent was ineligible to adjust his status because he could not independently satisfy the physical presence requirement.

The Board noted that the regulations define "principal alien" as "an alien from whom another alien derives a privilege or status under the law or regulations." Interpreting the term "principal alien who is a grandfathered alien" in the context of 8 C.F.R. § 1245.10(a)(1)(ii), the Board understood the reference to be to the principal beneficiary of the qualifying visa petition. Here the Board found the principal grandfathered alien to be the respondent's wife, to whom he was married in 1999 when the I-130 visa petition was filed on her behalf. For the wife to be grandfathered, the Board reasoned, she must satisfy the section 245(i) requirements, including the timely and proper filing of an approvable visa petition and the requisite physical presence.

Noting that derivative beneficiaries are only entitled to the status available to the principal alien under section 203(d) of the Act, the Board observed that if the respondent's wife was in the United States on December 21, 2000, she would qualify as a principal grandfathered alien for purposes of section 245(i) eligibility and the respondent would qualify as a derivative grandfathered alien who could adjust based on his Form I-140. Since the record was unclear as to the wife's presence on December 21, 2000, the Board remanded the record for additional fact-finding.

In *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), the respondent had been convicted of menacing in the second degree in violation of section 120.14 of the New York Penal Law, and the Board had dismissed his appeal of an Immigration Judge's decision finding him removable under section 237(c) of the Act and denying in the exercise of discretion his application for section 240A(a) cancellation of removal. The Second Circuit remanded the case with instructions to decide whether section 120.14 is divisible under the modified categorical approach. The Board held that a criminal statute is divisible, irrespective of its structure, if based on the elements of the offense, some but not all violations give rise to grounds for removal or ineligibility for relief.

The Board noted that the question of divisibility of a criminal statute arises when applying the categorical approach to determine whether an offense proscribed in the statute falls within a ground of removability. Reviewing the background of the concept of divisibility, the Board observed that the categorical approach limits the inquiry to what crime the offender was convicted of, rather than to the underlying conduct, to avoid ad hoc trials on whether his conduct was more or less culpable than required for his conviction. However, where a statute is divisible, the modified categorical approach permits consideration of documents that are part of the record of conviction to determine the type of violation of which the defendant was convicted. The Board pointed out that in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the Supreme Court identified the threshold inquiry as determining whether the full range of conduct proscribed

in a criminal statute in its actual application engenders a "realistic probability" that the statute would be employed to prosecute the conduct at issue. While observing the lack of uniformity in the circuit courts' applications of the modified categorical approach, the Board observed that all agree its functional purpose is to determine when conviction documents of record can be considered to ascertain whether an alien has been convicted of a crime rendering him inadmissible under section 212 of the Act or removable under section 237 of the Act.

On remand, the Second Circuit identified three analytical approaches that the Board should consider to determine whether a statute is divisible. The first would find a statute divisible "where the alternative means of committing a violation are enumerated as discrete alternatives, either by use of disjunctives or subsections." The Board rejected this approach as "unnecessarily formulaic and confining," noting that the structural design of a statute is often of limited relevance to the judicial interpretation of the statute. Further, the Board found that such statutes do not fully describe the category of divisible statutes because of jurisdictional variations in criminal laws.

The Second Circuit's next proposed approach would recognize divisibility "where the statute of conviction is phrased in the disjunctive or divided into subsections, or where the immigration statute invites inquiry into the facts of the underlying conviction at issue," a methodology employed by the Third Circuit in *Singh v. Ashcroft*, 383 F.3d 144, 148 (3d Cir. 2004). The Board observed that the Third Circuit identified as an example of a statute inviting further factual inquiry the qualifier in section 101(a)(43)(M)(i) of the Act "in which the loss to the victim or victims exceeds $10,000," and reasoned that rather than a divisibility analysis, the issue in the "invites inquiry" prong is whether the categorical approach applies at all when a ground of removability contains an aspect that must be established but which is not an element of the statute of conviction. Noting that the Supreme Court held in *Nijhawan v. Holder*, 557 U.S. 29 (2009), that non-element aspects of a removability ground, such as the $10,000 loss provision, are subject to a circumstance-specific inquiry not limited by the confines of the modified categorical approach, the Board found that the validity of the Third Circuit's approach was questionable. The Board concluded that the "invites inquiry" formulation was not useful and declined to adopt this approach.

The third framework proposed by the Second Circuit would permit divisibility in "all statutes of conviction . . . regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." The Board adopted this broad framework as consistent with its longstanding practice of applying divisibility analysis to statutes regardless of their structure and with the view shared by some circuit courts that the categorical approach need not be applied as rigorously in the immigration context as in the criminal arena.

Applying this divisibility approach to the statute at issue, the Board determined that section 120.14 of the New York Penal Law was not purely a firearms statute under section 237(a)(2)(C) of the Act, because only the first of three subsections may involve firearms. Parsing the statute, the Board concluded that subsection (1), of which the respondent was convicted, was also divisible, since it contains some elements that would be satisfied with conduct that would render the respondent removable and some that would not. Relying on the charging document and the plea colloquy, which were properly cognizable under the modified categorical approach, the Board found that the respondent had been convicted of placing his victim in reasonable fear of injury or death by pulling out a gun and pointing it at her, and he was therefore removable under section 237(a)(2)(C) of the Act for a firearms conviction based on his conviction for menacing under section 120.14(1) of the New York Penal Law. The appeal was dismissed.

In *Matter of Lemus*, 25 I&N Dec. 734 (BIA 2012), the Board clarified and reaffirmed its precedent decision *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007) ("*Lemus I*"), holding that an alien who is inadmissible under section 212(a)(9)(B)(i)(II) of the Act is ineligible for adjustment of status pursuant to section 245(i) of the Act, absent a waiver of inadmissibility.

The respondent entered the United States without inspection, remained for about 2 years before departing, reentered without inspection, and was in the country without lawful status through the commencement of removal proceedings. Conceding that he was removable under section 212(a)(6)(A)(i) of the Act for being present without having been admitted or paroled, the respondent applied for section 245(i) adjustment of status. The Immigration Judge denied the application, finding that because of the respondent's unlawful presence in the

United States for longer than 1 year, he was inadmissible under section 212(a)(9)(B)(i)(II) of the Act and therefore could not establish the he was "admissible to the United States for permanent residence," as required by section 245(i)(2((A). On appeal in *Lemus I*, the Board found applicable much of its reasoning in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), a decision issued on the same day, wherein it concluded that the unambiguous admissibility requirement of section 245(i)(2)(A) nonetheless could not be applied to preclude aliens who were inadmissible under section 212(a)(6)(A)(i) of the Act from adjusting their status because that interpretation would render the language of section 245(i) contradictory to the point of absurdity. In *Matter of Briones*, the Board pointed out that this exception applied only to section 212(a)(6)(A)(i).

When deciding *Lemus I*, the Board determined that the reasoning in *Matter of Briones* applied to aliens, like this respondent, who were inadmissible under section 212(a)(9)(B)(i)(II) of the Act, noting that such aliens necessarily could not satisfy the unambiguous admissibility requirement without a waiver. The Board further found important the fact that where Congress had extended eligibility for adjustment of status to classes of aliens unlawfully present in the United States, it did so unambiguously; however, Congress did not expressly provide an exception to the section 212(a)(9)(B)(i)(II) inadmissibility ground for section 245(i) applicants. Based on this legislative pattern, the Board concluded that Congress contemplated that inadmissibility under section 212(a)(9)(B) of the Act would bar adjustment of status in any form absent a waiver; that Congress knew how to create such waivers when it so desired; and that the absence of a waiver for section 245(i) adjustment applicants was therefore a deliberate omission. The Board observed that since Congress had created a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, it stands to reason that this waiver is the exclusive means by which an adjustment applicant can overcome inadmissibility under section 212(a)(9)(B).

In its remand order, the Seventh Circuit declined to join the Third and Tenth Circuits in according deference to *Lemus I*. The Seventh Circuit found that the Board had given short shrift to significant differences between section 212(a)(9)(B)(i)(II), the inadmissibility ground at issue in *Lemus I*, and section 212(a)(9)(C)(i)(I) of the Act, which was addressed in *Matter of Briones*. The court pointed out that section 212(a)(9)(C)(i)(I) applies to recidivist immigration violators while 212(a)(9)(B)(i)(II) applies to "less culpable" aliens who have accrued a year or more of unlawful presence and then seek admission within 10 years of their departure. In its order, the Seventh Circuit stated that section 212(a)(9)(B)(i)(II) is more closely related to section 212(a)(6)(A)(i) of the Act, which pertains to first-time unlawful entrants, than to 212(a)(9)(C)(i)(I). Since the Seventh Circuit's decision cast doubt on the validity of *Lemus I*, the Board took the opportunity to clarify its decision.

First, the Board examined through statutory construction the interplay between sections 212(a)(9)(B) and 245(i) of the Act. Since section 245(i) applicants must prove they are "admissible to the United States for permanent residence," the Board concluded that a literal interpretation of this language would require any alien who is inadmissible under section 212(a)(9)(B)(i)(II) of the Act to obtain a waiver under section 212(a)(9)(B)(v), a result that comports with legislative intent.

Next, the Board explained that section 212(a)(9)(B)(i)(II) is not coterminus with section 212(a)(6)(A)(i) of the Act, since section 212(a)(9)(B)(i)(II) involves conduct unrelated to "entry without inspection" or any other condition waived by section 245(i). The Board pointed out that an alien need never have entered the United States without inspection to be inadmissible under section 212(a)(9)(B)(i)(II). Additionally, in the context of section 245(i), all aliens who have "entered without inspection" are by definition physically present in the United States, while section 212(a)(9)(B)(i)(II) applies to many aliens who are not physically present here, because an alien who is inadmissible under that section has at some point departed from the United States. Since 212(a)(9)(B)(i)(II) contemplates that many aliens covered therein will be outside the United States and seeking admission from another country, the Board found it implausible that Congress considered such aliens when making section 245(i) adjustment available to those who are physically present in the United States after entering without inspection. The Board concluded that the class of aliens covered by section 212(a)(9)(B)(i)(II) does not correspond with any of the classes section 245(i) was designed to benefit.

Revisiting the relationship between sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I), the Board clarified its language in *Lemus I* suggesting an

equivalency between the provisions and explained that while differences exist, differential treatment under section 245(i) is not justified. The Board noted that section 212(a)(9)(C)(i)(I) is limited to recidivist offenders, while the focus of section 212(a)(9)(B)(i)(II) is on those who departed the United States after accumulating a period of unlawful residence and then seek admission. Noting the Seventh Circuit's observation that aliens covered by 212(a)(9)(B)(i)(II) are "willing to play by the rules" by "seeking admission" rather than reentering unlawfully, the Board pointed out the flaw in court's assumptions about the meaning of those terms. Explaining that the Act defines the concept of "applicant for admission" so broadly as to include not only those expressly seeking permission to enter, but also those present in this country without having formally requested or received permission to enter and those in some circumstances who have been brought in against their will, the Board pointed out that an alien "again seeking admission" after departure as contemplated by section 212(a)(9)(B)(i)(II) is not absolved of all culpability or necessarily less culpable than an alien covered by section 212(a)(9)(C)(i)(I). In fact, the Board observed, some aliens will have reentered the United States unlawfully, thereby becoming an "applicant for admission" by operation of law, while seeking "admission" through adjustment of status.

The Board concluded that while sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) are substantially different, neither provision covers "entry without inspection" or other conduct section 245(i) was designed to ameliorate. Thus it reasoned that applying the section 245(i)(2)(A) admissibility requirement to aliens inadmissible under section 212(a)(9)(B)(i)(II) of the Act does not contravene the purpose of adjustment under section 245(i) or lead to an absurd result. Noting that aliens who are inadmissible under section 212(a)(9)(B)(i)(II) can overcome their inadmissibility by obtaining a section 212(a)(9)(B)(v) waiver, and therefore possibly qualify for adjustment of status, the Board found that such aliens are ineligible for section 245(i) adjustment of status absent a waiver.

Turning to the respondent's situation, the Board reiterated that it found him to be inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Notwithstanding, the Board considered it prudent to remand the case to the Immigration Judge for further consideration of the respondent's inadmissibility, because with the passage of time, he may now have accrued the requisite 10-year period for applying for admission after departure from the United States. Remand was also deemed appropriate to allow the Immigration Judge to consider in the first instance whether, as asserted by the Department of Homeland Security, the respondent is inadmissible under section 212(a)(9)(C)(i)(I) of the Act as well.

Proving the Fact of Conviction *continued*

from the court clerk," *id.* at 685, the document *may* be admitted so long as the record satisfies the standard two-prong test governing the admissibility of evidence in immigration proceedings. *Id.* at 683 ("[T]he test for admission of evidence in immigration proceedings is simply 'whether the evidence is probative and its admission is fundamentally fair.'" (quoting *Matter of D-R-*, 25 I&N Dec. at 445, 458 (BIA 2011))). Because the electronic document submitted in that case was not authenticated by any means, the Board concluded that it could not be relied on by the DHS to prove the fact of conviction.

In sum, *Matter of J.R. Velasquez* teaches that best way for the DHS to prove the fact of conviction is by submitting a formal record of conviction—either received in paper format or electronically—that is properly authenticated in conformity with the regulatory and statutory framework. By complying with these requirements, admissibility of evidence to prove the fact of conviction is guaranteed (i.e., conclusive). However, even if the DHS fails to comply with the specific "safe-harbor" authentication requirements set forth in the Act and regulations, an Immigration Judge has discretion to admit a formal record of conviction to prove the fact of conviction so long as it has been authenticated under any permissible method.

Informal Conviction Records

From the standpoint of the DHS, it is obviously preferable to submit authenticated formal conviction records to prove the fact of conviction. As stated above, not only are such documents "conclusively" admissible, but the same set of documents are *Shepard*-approved conviction records that may be utilized to prove the nature of conviction under a modified categorical approach. *See, e.g.*, *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 921 (9th Cir. 2011) (en banc) ("[U]nder the modified categorical approach, a court may look only to:

(1) charging documents; (2) the terms of a written plea agreement; (3) transcripts of a plea colloquy between a judge and the defendant in which the factual basis for the plea was confirmed by the defendant; (4) jury instructions; (5) any explicit factual finding by the trial judge to which the defendant assented; and (6) some comparable judicial record of this information.").

But as the circuit courts have recognized, the limitations imposed by the *Taylor/Shepard* framework do "not apply when determining whether the government has satisfied its burden of proof as to the existence of a prior conviction." *United States v. Neri-Hernandes*, 504 F.3d 587, 591 (5th Cir. 2007); *see also, e.g.*, *United States v. Webster*, 636 F.3d 916, 919 (8th Cir. 2011) (holding that the categorical approach "does not apply to antecedent factual questions such as whether the defendant was convicted of a crime at all, or of which crime the defendant was convicted"); *United States v. Dean*, 604 F.3d 169, 175-76 (4th Cir. 2010) (stating that *Taylor* "concerned the 'substantive content of a prior conviction' rather than the existence of one" (quoting *United States v. Martinez-Melgar*, 591 F.3d 733, 739 (4th Cir. 2010))); *United States v. Felix*, 561 F.3d 1036, 1044-45 (9th Cir. 2009) (holding that proving the fact of conviction is not restricted by *Taylor* and *Shepard*).

The regulatory scheme governing the proof of the fact of conviction in immigration proceedings is in accord with the above-mentioned rejection of *Taylor* and *Shepard* by the circuit courts. To begin, 8 C.F.R. § 1003.41(d) is a "catch all" provision that provides that "[a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof." Although section 240(c)(3)(B) of the Act does not contain an analogous catch-all provision, 8 C.F.R. § 1003.41(d) has been upheld as a reasonable interpretation of the Act. *See Francis v. Gonzales*, 442 F.3d 131, 142 (2d Cir. 2006) (holding that 8 C.F.R § 1003.41(d) is reasonable because section 240(c)(3)(B) of the Act provides a "list of what documents constitute conclusive proof of conviction" and is not a "prohibition on admitting other types of documents"); *see also Matter of J.R. Velasquez*, 25 I&N Dec. at 686 n.8.

What type of evidence is admissible under 8 C.F.R. § 1003.41(d)? The regulatory history provides some, albeit minimal, guidance. During rulemaking, the Department of Justice specifically addressed then-proposed 8 C.F.R. § 1003.41(d) when responding to a commenter's suggestion that RAP sheets be specified as documents that must be admitted to prove the presence of a conviction:

> One commenter suggested that the rule be expanded to include admission of official criminal history records, or "rap sheets". While a "rap sheet" may contain some evidence of a criminal conviction, it might not include the essential aspects of a record of conviction. Therefore, while an official criminal history record, or "rap sheet" may be admissible under paragraph (d) of the rule as some evidence of a criminal conviction, it lacks the essential protections that an abstract of conviction contains.

58 Fed. Reg. at 38,953 (Supplementary Information).

Absent this commentary, there is little direction in the text or history of 8 C.F.R. § 1003.41(d) concerning the type of evidence that may come in under the catch-all provision to prove the fact of conviction in immigration proceedings. Thus, case law has been necessary to fill the void. In *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996)—the first published Board decision construing 8 C.F.R. § 1003.41—it was held, as a categorical matter, that police reports do not "fit any of the regulatory descriptions" set forth at 8 C.F.R. § 1003.41. *Id.* at 319. By contrast, the Second Circuit held that a Jamaican police report's reference to an alien's prior conviction was admissible in immigration proceedings.[3] *Francis*, 442 F.3d at 142. In resolving the admissibility of the Jamaican police report, the Second Circuit first recognized that neither 8 C.F.R. § 1003.41 nor the corresponding statutory provision, section 240(c)(3)(B) of the Act, specifies the admissibility of police reports or RAP sheets. Still, the *Francis* panel noted that 8 C.F.R. § 1003.41(d) is a catch-all provision that broadly states that "[a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof." *Id.* (quoting the regulation) (internal quotation marks omitted). Relying on the catch-all regulation and the regulatory history's discussion of RAP sheets—but without acknowledging the contrary holding in *Matter of Teixeira*—the court concluded the Jamaican police report was admissible for purposes of proving the "fact of conviction." Still, the Second Circuit noted that even though a police report is admissible under

8 C.F.R. § 1003.41(d), whether such a document is "sufficient" to prove the fact of conviction remained a separate question left to the province of the Immigration Judge. *Id.* at 142-43. In this regard, the court recognized that police reports "will usually fail to rise to the level of clear and convincing evidence," while noting that "a report from a foreign police department is even less reliable." *Id.* at 143. Consistent with these misgivings, and turning to the particulars of Francis' case, the Second Circuit concluded that because it was unclear whether the Jamaican police report's reference to a prior conviction was equivalent to a "conviction" for immigration purposes, this document was insufficient to prove the fact of conviction.

In addition to police reports, the courts have recognized various forms of evidence that may be admissible to prove the fact of conviction in immigration proceedings. *See, e.g.*, *Singh v. Holder*, 638 F.3d 1196, 1210 (9th Cir. 2011) (RAP sheets); *Barradas v. Holder*, 582 F.3d 754, 762-64 (7th Cir. 2009) (Forms I-213 (Record of Deportable/Inadmissible Alien)); *Conteh v. Gonzales*, 461 F.3d 45, 59 (1st Cir. 2006) (presentence reports); *Fequiere v. Ashcroft*, 279 F.3d 1325, 1327 (11th Cir. 2002) (testimony). Citing several of these cases in *Matter of J.R. Velasquez*, the Board agreed that even though the Act and regulations do not specify the documents that can prove the fact of conviction, the catch-all provision in 8 C.F.R § 1003.41(d) permits "unlisted documents to be admissible as evidence of a conviction in immigration proceedings." 25 I&N Dec. at 686. The Board then suggested that "an appellate court decision affirming or otherwise referencing a conviction" may likewise be used to prove the fact of conviction under 8 C.F.R § 1003.41(d). *Id.*

At first blush, the endorsement of "unlisted documents" in *Matter of J.R. Velasquez* may appear to be a modification to the type of evidence permissible to prove the fact of conviction. It is not. Prior to the promulgation of 8 C.F.R. § 1003.41, the courts and Board relied on an expansive range of documents to prove the fact of conviction. *See, e.g.*, *Glaros v. INS*, 416 F.2d 441, 443 (5th Cir. 1969) (upholding reliance on correspondence from a trial judge and prosecuting attorney to prove the fact of conviction); *Matter of B-*, 3 I&N Dec. 1, 3 (BIA 1947) (holding, in the context of an exclusion proceeding, that "it [wa]s proper to consider the communication from the Royal Canadian Mounted Police, and the [alien's] own testimony" in determining whether he was convicted).

The broad class of documentation that comes within the scope of 8 C.F.R § 1003.41(d) is likewise in harmony with the case law that has developed in the sentencing realm. For instance, in the sentencing context courts have upheld the use of RAP sheets, presentence reports, and a variety of electronic records to prove the existence of criminal convictions. *See, e.g.*, *United States v. Carter*, 591 F.3d 656 (D.C. Cir. 2010) (State court computer records); *United States v. Alvarado-Martinez*, 556 F.3d 732, 735 (9th Cir. 2009) (RAP sheet); *Neri-Hernandes*, 504 F.3d at 591-92 (certificates of disposition); *United States v. Sanders*, 470 F. 3d 616, 622-24 (6th Cir. 2006) (indictment, guilty plea, and journal entry); *United States v. Zuniga-Chavez*, 464 F.3d 1199, 1203-04 (10th Cir. 2006) (docket sheet, abstract of judgment, and court case summaries); *United States v. Beasley*, 442 F.3d 386, 393-94 (6th Cir. 2006) (testimony coupled with a presentence report); *United States v. Romero-Rendón*, 220 F.3d 1159, 1164-65 (9th Cir. 2000) (presentence report).

Finally, it is noteworthy that the text of 8 C.F.R. § 1003.41(d) does not explicitly mandate that nonjudicially created documents be authenticated as a precondition to admissibility in immigration proceedings. Acknowledging this deficiency in *Matter J.R. Velasquez*, the Board scanned the regulatory history and concluded that, consistent with the "general authentication requirement," to be admissible under 8 C.F.R. § 1003.41(d), informal documents must nevertheless satisfy the standard two-prong test for admissibility governing immigration proceedings (i.e., probative value and fundamental fairness). 25 I&N Dec. at 685-86. To be sure, the Board's reading in an authentication requirement to 8 C.F.R. § 1003.41(d) is consistent with well-established principles governing the authentication of documents in immigration proceedings. *See Iran*, 656 F.2d at 472 & n.8.

The import of 8 C.F.R § 1003.41(d) is clear. The DHS may utilize nonjudicially created records to prove the fact of conviction so long as such documents satisfy the standard two-prong test for admissibility in immigration proceedings. Of course, the fact that a RAP sheet may be admissible to prove the fact of conviction only gets the DHS so far. As *Matter of J.R. Velasquez* recognized, it still must be established that the nonjudicially created document is sufficient to meet the requisite burden of proof. 25 I&N Dec. at 683 n.5. For instance, it will be

recalled that in *Francis*, even though the Second Circuit agreed that the Jamaican police report was admissible under 8 C.F.R. § 1003.41(d), the court concluded it was insufficient to meet the DHS's burden of proving that the respondent's foreign conviction actually qualified as a "conviction" for immigration purposes. 442 F.3d at 144.

This it not to say that 8 C.F.R. § 1003.41(d) does not benefit the DHS. Assuredly it does. For example, a presentence report that discloses the presence of a prior conviction that is categorically for a crime involving moral turpitude, aggravated felony, or controlled substance offense may be sufficient, standing alone, to meet the DHS's burden of proof under section 237(a)(2)(A)(i), (iii), or (B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i), (iii), or (B)(i). *See Conteh*, 461 F.3d at 56 ("[W]hen a statutory violation necessarily involves all the elements of an enumerated offense, proof of the fact of conviction suffices to discharge the government's burden."). Thus, even where the DHS is unable to obtain formal judicially created conviction records from a criminal court, the submission of informal criminal history documentation may at times be more than enough to resolve the removal charge.

Conclusion

With the criminal grounds of removability continuing to have serious importance in removal proceedings, proving the fact of an alien's conviction can have a significant bearing on the outcome of a case. The Act and regulations give credence to formal conviction documents, giving the DHS an incentive to utilize judicially created records to prove the bare fact of conviction. When the DHS relies on formal conviction records that are authenticated in accordance with the statutory and regulatory scheme, a "safe harbor" is triggered, rendering the documents conclusively admissible to prove the fact of conviction. However, the regulations contain a catch-all provision clarifying that the restrictions imposed by *Taylor/Shepard* do not prevent reliance on nonjudicially created documents to prove the fact of conviction. Rather, proving the fact of conviction is a wholly precategorical inquiry. The upshot of this approach for the DHS is a greater ability to prove the presence of a conviction even where judicially created conviction documents have been destroyed, are ambiguous, or are no longer reasonably obtainable. *See, e.g.*, Cal. Health & Safety Code § 11361.5 (West 2012) (providing for the permanent destruction of the record of a minor marijuana conviction after the passage of 2 years). While the catch-all provision does give the DHS the opportunity to submit a wide assortment of evidence, such evidence must comport with notions of fundamental fairness, and the case law makes clear that 8 C.F.R § 1003.41(d) is not a blank check that permits an end run around the requirement of authentication that has historically governed conviction records submitted in immigration proceedings.

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[1] For simplicity, all future references to this regulation herein are to the current version.

[2] This article does not purport to address the necessity of proving the fact of conviction where an alien is charged with criminal grounds of inadmissibility, *see* 8 C.F.R. § 1240.8(c) (providing that an alien charged with inadmissibility has the burden to establish that "he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged"), or in the context of an application for relief from removal. *See* 8 C.F.R § 1240.8(d) (placing the burden on the alien to prove eligibility for relief from removal). Notably, however, the provisions of the Act pertaining to proving the fact of conviction fall under the umbrella of section 240(c)(3) the Act, a paragraph titled "Burden on Service in Cases of *Deportable Aliens*." (Emphasis added.)

[3] Although *Matter of Teixeira* and *Francis* are facially conflicting, it appears that the police report in *Francis* contained a reference to a prior conviction, which rendered the document more analogous to a RAP sheet than the police report in *Matter of Teixeria*. This distinction between the two police reports perhaps permits the reconciliation of these precedents.

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