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Conceptualizing Cancellation of Removal Criminal Bars

by Jeremiah J. Farrelly

The Immigration and Naturalization Act and the relevant regulations establish that an alien in immigration proceedings bears the burden of proving his or her eligibility for all forms of relief from removal. Over the last decade, however, the circuit courts have developed different approaches with regard to how this burden of proof applies in the context of the bars to cancellation of removal based on a criminal conviction. On its face, the disagreement revolves around how shifting the ultimate burden of proof affects the burden of producing criminal records.[1] However, although it has not been clearly articulated and requires some conjecture, one might also view the conflicting opinions among the courts that have spoken on the issue as part of a broader disagreement as to congressional intent. Specifically, in deciding whether an alien has been convicted of an offense that disqualifies him or her from cancellation of removal, the courts have considered whether Congress intended that terms of art should be applied in a uniform manner across the immigration laws or, on the other hand, that all aspects of the relief phase of removal proceedings should be meaningfully distinct from the removability phase.

When the case law is viewed through this broader lens, it can be organized into several differing approaches. The initial perspective on this issue arose in the Second Circuit and older decisions of the Ninth Circuit, which held that Supreme Court precedent establishes that a conviction for a disqualifying offense is always assessed the same way, regardless of which section of the Act a court happens to be considering. The Fourth and Tenth Circuits, and the new Ninth Circuit decisions perceive the issue differently, holding that Congress clearly placed the burden on the alien to prove each and every element of his or her cancellation case—including proving that any convictions do not trigger a bar—without reference to the standards and burden allocations that may be applicable in other contexts. The Board has a similar view, holding that aliens must affirmatively prove that they have not been convicted of a disqualifying offense and are thus not ineligible for

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relief. The Board further held that because aliens seeking relief have the burden to produce corroborating evidence, they must comply with all requests by Immigration Judges for additional documentation relating to prior convictions.

This article will begin by introducing the applicable statutory and regulatory rules that govern the burdens of proof in the cancellation of removal context. It will then summarize the major cases in the field, defining the approaches taken on the issue and reviewing a third possible approach hinted at in dicta and in a minority opinion. The article will conclude by providing a circuit-by-circuit summary of the applicable standards presently in place.

Applicable Legal Standards

Section 240A of the Act provides that Immigration Judges may, as a matter of discretion, cancel the removal of certain lawful permanent residents and other longtime alien residents if they meet certain eligibility requirements. Among other things, to be eligible for cancellation of removal, a lawful permanent resident ("LPR") cannot have "been convicted of any aggravated felony," and aliens without status cannot have "been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3)" of the Act. Sections 240A(a)(3), (b)(1)(C) of the Act, 8 U.S.C. §§ 1229b(a)(3), (b)(1)(C).

In regard to a determination whether a particular alien is eligible for cancellation of removal, or for any other relief from removal, 8 C.F.R. § 1240.8(d) (2012) states that the alien bears

> the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

In 2005, Congress expressly allocated the burden of establishing eligibility for relief from removal to the alien. *See* REAL ID Act of 2005, Div. B, Pub. L. No. 109-13, 119 Stat. 231, 302 ("REAL ID Act"). Section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A), now states:

> An alien applying for relief or protection from removal has the burden of proof to establish that the alien—
>
> (i) satisfies the applicable eligibility requirements; and
>
> (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

The Approaches

The tension between the two ways of conceptualizing criminal bars to cancellation of removal has generally played itself out in the context of applying the *Taylor-Shepard* approach to determining whether a conviction is for an aggravated felony or a crime involving moral turpitude ("CIMT").[2] The Second Circuit and early opinions of the Ninth Circuit have taken what will be called the "definitional approach" in this article, with a panel of the Fifth Circuit indicating in an unpublished decision that it also favors this first approach. Taking what will be termed the "distributive approach" are the Tenth Circuit and a new case from the Ninth Circuit. The Fourth Circuit has nominally aligned itself with the distributive approach, but it raises interesting questions in dicta about the limits placed on the analysis made in the definitional approach and impliedly applied in the distributive approach. This criticism points out the potential for a third approach to the analysis, which is strongly advocated in a partial dissent in the Ninth Circuit. These three approaches, along with the Board's view, will be discussed below, in turn.

The Definitional Approach

The first approach for determining eligibility for cancellation of removal concludes that the criminal bars incorporate the terms of art from the relevant grounds of removability intact and unaltered. The cases that initially developed this "definitional approach" in the Second and Ninth Circuits have all dealt with the aggravated felony bar to cancellation of removal. In that context, the courts found that there is a single definition of what it means to have been convicted of an aggravated felony

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in immigration law and a single test for applying that definition: the familiar *Taylor-Shepard* procedure. This definitional approach is—by definition—a closed universe that exists independent of any burden considerations. A crime either meets the definition of an aggravated felony for all possible purposes based on the record of conviction or it does not. If it does not, then the alien cannot be disqualified from cancellation of removal for having been convicted of an aggravated felony.

The definitional approach made its first appearance in *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), *overruled by Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). In that pre-REAL ID Act case, an LPR was convicted of violating a California drug transportation statute and was sentenced to 3 years in prison. He conceded removability under section 237(a)(2)(B)(i) of the Act and sought cancellation of removal. The Government contended that the respondent was ineligible for any relief from removal because he had not met his burden to disprove that he had committed an aggravated felony based on an incomplete record of conviction.

The Ninth Circuit found that the respondent was charged with the burden of establishing his eligibility for relief pursuant to 8 C.F.R. § 1240.8(d) and had to "demonstrate by a preponderance of the evidence that his [controlled substance] conviction did not also qualify as an aggravated felony." *Sandoval-Lua*, 499 F.3d at 1127. Because the presence of an aggravated felony conviction is detected through application of the *Taylor-Shepard* approach, the Ninth Circuit began by applying the categorical approach to the statute of conviction. Finding that the statute was categorically overbroad, the Ninth Circuit moved on to the modified categorical approach. The court defined its task as follows:

> [W]e must determine whether the judicially noticeable documents establish that Lua's conviction necessarily was for all of the elements constituting an aggravated felony . . . . If the record of conviction does not so establish, [his controlled substance] conviction cannot amount to the generic offense, and [he] has carried his burden.

Id. at 1131. The alien necessarily would have carried his burden because the record of conviction is "a self-sufficient body of the only evidence that can be considered on the issue." *Id.*

Based on this self-sufficient—albeit incomplete and ambiguous—body of evidence, it could not be said that the alien had been convicted of an aggravated felony. Therefore, he could not be disqualified from cancellation of removal based on a conviction for an aggravated felony. The definitional approach had been born.

In *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), the Second Circuit was presented with a similar case where an alien admitted committing a controlled substance violation but disputed that the offense qualified as an aggravated felony, both for purposes of removability and ineligibility for relief. The Second Circuit applied the *Taylor-Shepard* approach to the aggravated felony charge of removability and found that the statute at issue was categorically overbroad in that it punished serious criminal acts along with minimal criminal conduct. The court further concluded that the record of conviction did not contain sufficient information about the quantity of marijuana involved in the alien's criminal act to demonstrate that it would have been a felony under the Controlled Substances Act. Accordingly, the controlled substance conviction did not qualify as a conviction for an aggravated felony under the Second Circuit's interpretation of the aggravated felony standard in the drug offense context.

The *Martinez* court then turned to the Government's argument that because the alien bore the burden of proving his eligibility for cancellation of removal, he had to demonstrate that he had not *committed* an aggravated felony by proving that only a minimal quantity of marijuana was involved in the criminal acts that gave rise to his conviction. The court emphatically rejected such a standard, finding that the *Taylor-Shepard* approach, with its associated limitations, is the sole basis for determining whether an alien has committed an aggravated felony. Thus, the Second Circuit adopted an approach in line with *Sandoval-Lua*.

Because *Sandoval-Lua* dealt with pre-REAL ID Act burden and corroboration standards, it remained an open question in the Ninth Circuit whether the REAL ID Act would have changed the outcome. In 2009, the Board appeared to predict that the Ninth Circuit would find that the REAL ID Act would do exactly that in *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009).

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The Ninth Circuit initially disagreed with the Board in *Rosas-Castaneda v. Holder*, 630 F.3d 881 (9th Cir. 2011), *amended and superseded on denial of reh'g en banc*, 655 F.3d 875 (9th Cir. 2011). However, it later overruled *Rosas-Castaneda* and *Sandoval-Lua* en banc in *Young v. Holder*, 697 F.3d at 990.

In an unpublished decision, a panel of the Fifth Circuit has also indicated support for the definitional approach. In *Davila v. Holder*, 381 F. App'x 413 (5th Cir. 2010), the Fifth Circuit found that an ambiguous record of conviction was insufficient to demonstrate that the alien had been convicted of an aggravated felony in the cancellation of removal context. This outcome simply could not have occurred under the distributive approach, as discussed below. Thus, at least one panel of the Fifth Circuit has placed itself on the side of the definitional approach.

The Distributive Approach

As may be recalled from some past class, the distributive law of elementary algebra states that the same product results when multiplication is performed on a set of numbers as when it is performed on members of the set individually. Stated differently, a multiplier may be distributed through to the individual elements of a set. In effect, the Tenth Circuit, and the Ninth Circuit in *Young*, have held that the alien's burden in a cancellation case similarly distributes through to each and every element of each and every statutory prerequisite for cancellation. Thus, because the burden is on the alien to affirmatively prove his overall case for cancellation of removal, he must also affirmatively prove that any convictions do not *actually* render him ineligible for cancellation of removal, not merely that they do not *necessarily* render him ineligible.

In *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009), the alien conceded the charge of removability relating to an entry without inspection and applied for cancellation of removal. The Government countered that he had been convicted of a CIMT—third degree assault under Colorado law—and was ineligible for cancellation. Both the alien and the Government conceded that because of a faulty translation, the record of conviction was ambiguous as to whether he pled guilty to knowingly or recklessly causing bodily injury. Thus, the only issue was whether he gained the benefit of the ambiguous record.

The Tenth Circuit read the burden-shifting provision of 8 C.F.R. § 1240.8(d) as establishing that aliens have the burden "to prove the absence of any impediment to discretionary relief," not merely to prove that they were "not necessarily 'convicted of any aggravated felony'" as the *Sandoval-Lua* court had held. *Garcia*, 584 F.3d at 1290 (quoting *Sandoval-Lua*, 499 F.3d at 1130) (internal quotation marks omitted). That the alien was not at fault for the ambiguity in the record of conviction did not sway the court. Accordingly, because he did not affirmatively establish by a preponderance of the evidence that he had not committed a CIMT, the alien was found ineligible for cancellation of removal based on his failure to meet his burden of proof.

In its en banc decision in *Young*, the Ninth Circuit's majority opinion adopted this approach by fusing together parts of two dissents. There, in a REAL ID Act case, the alien was convicted of a controlled substance offense in California. Based on a record of conviction that was ambiguous as to the section of the California statute under which he had been convicted, the Immigration Judge found that the respondent was convicted of an aggravated felony for purposes of both establishing removability and disqualifying him from cancellation of removal.

The Ninth Circuit did not address the alien's arguments on the aggravated felony removability finding because he did not administratively exhaust his claim on that point. However, the two-judge majority opinion did adopt the distributive approach and found that he could not establish that he had not been convicted of an aggravated felony merely by producing an ambiguous record of conviction, because an alien ultimately bears the risk of nonpersuasion as to whether he or she has been convicted of a disqualifying crime. However, the Ninth Circuit was very clear in establishing that the entire analysis is ultimately governed by the *Taylor-Shepard* approach, and only that approach.

The Board's Approach

In *Matter of Almanza*, 24 I&N Dec. 771, the Board found that the REAL ID Act establishes two things: first, it shifts the burden of proof to aliens to affirmatively prove that they have not been convicted of a covered crime and are thus are not ineligible for relief; second, it establishes that aliens must comply with all requests by Immigration Judges for additional documentation relating to prior convictions.

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The respondent in *Almanza* entered a no contest plea to a vehicular theft charge under *People v. West*, 477 P.2d 409 (Cal. 1970), under which a defendant may accept legal culpability without admitting specific facts or guilt. The Immigration Judge had requested that the respondent provide additional evidence, such as a plea colloquy, to determine whether the offense qualified as a CIMT. The respondent did not submit any additional evidence, so the Immigration Judge found him ineligible for cancellation of removal because he had not met his burden to demonstrate that he was not ineligible for cancellation.

The Board affirmed the Immigration Judge's holding. Even though a *West* plea, by itself, cannot be used to establish the presence of a CIMT and removability at the first instance, the Board found the fact that the respondent was seeking relief to be a distinguishing factor. Because the REAL ID Act amendments to the Act unambiguously placed the burden of proof on the alien when making an application for relief, the Board held that the respondent bore the burden to establish that he had not committed a theft offense for purposes of applying the CIMT standard. Thus, because the respondent had failed to comply with an express request to supplement his conviction record with additional documentation and the record remained ambiguous, the Board dismissed the appeal.

A Third Potential Approach?

In *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1000 (2012), the Fourth Circuit made its first foray into the discussion on the effect of the REAL ID Act amendments to the Act in the context of cancellation of removal. In that case, an LPR was convicted of petit larceny with a recidivism enhancement under Virginia law. In removal proceedings, he was charged with having been convicted of an aggravated felony and two or more CIMTs. The alien conceded removability on the CIMT ground and applied for cancellation. In assessing whether the respondent was also convicted of an aggravated felony for purposes of finding him removable, the Immigration Judge applied the *Taylor-Shepard* approach and found the statute of conviction to be divisible. The Immigration Judge further found that the record of conviction submitted by the Government was insufficient to identify the conduct to which the respondent pled guilty and concluded that the aggravated felony charge of removability had not been sustained.

The case then turned to whether the respondent had met his burden to prove that he had not been convicted of an aggravated felony for purposes of establishing his eligibility for cancellation of removal. The Immigration Judge found that the respondent had not met his burden and the Board upheld that holding.

The Fourth Circuit agreed with the Board and adopted the distributive approach. It began by citing the language from 8 C.F.R. § 1240.8(d) and noting that the REAL ID Act "affirmed the vitality of th[e] burden-shifting framework" contained in the regulation. *Salem*, 647 F.3d at 115. The court then cited *Garcia* with favor and held that its allocation of the burden of production to the alien in the relief phase more closely tracks the statutory language than does the interpretation of the Act used in the definitional approach cases. Thus, the *Salem* court held that where "the relevant evidence of conviction is in equipoise, a petitioner has not satisfied his statutory burden to prove eligibility for relief from removal." *Id.* at 120. Because the alien had only submitted records establishing the bare fact of his conviction and the records were inconclusive as to whether he was convicted of an aggravated felony, the court found that he had failed to satisfy his burden.

On its ultimate holding, *Salem* appears to be completely in line with the other distributive approach cases. However, while neither the Tenth Circuit nor the Board opinions on point necessarily called the applicability of the established aggravated felony or CIMT standards to the relief phase into question, *Salem* analyzed, in dicta, whether courts should be limited to the *Taylor-Shepard* approach when considering applications for relief.

In this analysis, the Fourth Circuit began by noting that the decisions in *Taylor* and *Shepard* pertain to Sixth Amendment issues in nonimmigration cases but that they have only been expressly applied in the context of relief from removal by the Second and Ninth Circuits. The court then stated that in adopting such a standard in this context, the Second Circuit and pre-*Young* Ninth Circuit opinions "elide the clear statutory language of the [Act] establishing the noncitizen's burden in relief-from-removal proceedings." *Salem*, 647 F.3d at 119. The court directly questioned whether applying the limits of the *Taylor-Shepard* approach in this context is appropriate "given the uniqueness of the [Act's] burden-shifting regime" and the fact that aliens in this situation are "not in the dock facing

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CIRCUIT COURT DECISIONS FOR OCTOBER 2012

by John Guendelsberger

The United States courts of appeals issued 217 decisions in October 2012 in cases appealed from the Board. The courts affirmed the Board in 202 cases and reversed or remanded in 15, for an overall reversal rate of 6.9%, compared to last month's 8.5%. There were no reversals from the Fourth, Fifth, Sixth, Eigth, and Eleventh Circuits.

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

Circuit	Total	Affirmed	Reversed	% Reversed
First	5	4	1	20.0
Second	14	13	1	7.1
Third	22	21	1	4.5
Fourth	14	14	0	0.0
Fifth	15	15	0	0.0
Sixth	6	6	0	0.0
Seventh	8	7	1	12.5
Eighth	8	8	0	0.0
Ninth	106	96	10	9.4
Tenth	7	6	1	14.3
Eleventh	12	12	0	0.0
All	217	202	15	6.9

The 217 decisions included 96 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 51 direct appeals from denials of other forms of relief from removal or from findings of removal; and 70 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	96	92	4	4.2
Other Relief	51	44	7	13.7
Motions	70	66	4	5.7

The four reversals or remands in asylum cases involved nexus, well-founded fear, "disfavored group" analysis, and the Convention Against Torture. Four of the seven reversals in the "other relief" category addressed application of the modified categorical approach in determining whether an offense was an aggravated felony for sexual abuse of a minor, a crime of violence, or a crime involving moral turpitude. The other three cases involved suspension of deportation, NACARA eligibility, and a section 212(h) waiver. The four motions to reopen included ineffective assistance of counsel and three in absentia orders of removal, two involving the exceptional circumstances exception and one involving proper notice.

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

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	896	762	134	15.0
First	42	37	5	11.9
Tenth	35	32	3	8.6
Seventh	36	33	3	8.3
Fifth	114	105	9	7.9
Third	201	186	15	7.5
Eighth	42	39	3	7.1
Eleventh	122	114	8	6.6
Sixth	85	80	5	5.9
Second	681	649	32	4.7
Fourth	113	108	5	4.4
All	2367	2145	222	9.4

Last year's reversal rate at this point (January through October 2011) was 13.2% with 2795 total decisions and 386 reversals.

The numbers by type of case on appeal for the first 10 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1140	1032	108	9.5
Other Relief	451	376	75	16.6
Motions	776	737	39	5.0

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CIRCUIT COURT DECISIONS FOR NOVEMBER 2012

by John Guendelsberger

The United States courts of appeals issued 172 decisions in November 2012 in cases appealed from the Board. The courts affirmed the Board in 202 cases and reversed or remanded in 19, for an overall reversal rate of 11.0%, compared to last month's 6.9%. There were no reversals from the First, Second, Third, Seventh, Tenth, and Eleventh Circuits.

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

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	4	0	0.0
Second	2	2	0	0.0
Third	15	15	0	0.0
Fourth	12	11	1	8.3
Fifth	13	12	1	7.7
Sixth	10	9	1	10.0
Seventh	6	6	0	0.0
Eighth	6	5	1	16.7
Ninth	91	76	15	16.5
Tenth	6	6	0	0.0
Eleventh	7	7	0	0.0
All	172	153	19	11.0

The 172 decisions included 71 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 41 direct appeals from denials of other forms of relief from removal or from findings of removal; and 60 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	71	62	9	12.7
Other Relief	41	35	6	14.6
Motions	60	56	4	6.7

The nine reversals or remands in asylum cases involved credibility, nexus, past persecution, well-founded fear, and "other resistance" to family planning laws. Cases in the "other relief" category addressed section 212(c) and 212(h) waivers, abandonment of applications for relief, voluntary departure advisals, competency of the respondent, and determination of the length of sentence imposed for criminal conviction. The four motions to reopen included an in absentia order of removal involving proper notice, changed country conditions, prima facie eligibility for adjustment of status, and jurisdiction to consider a motion filed after removal.

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

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	987	838	149	15.1
First	46	41	5	10.9
Eighth	48	44	4	8.3
Fifth	127	117	10	7.9
Tenth	41	38	3	7.3
Seventh	42	39	3	7.1
Third	216	201	15	6.9
Sixth	95	89	6	6.3
Eleventh	129	121	8	6.2
Fourth	125	119	6	4.8
Second	683	651	32	4.7
All	2539	2298	241	9.5

Last year's reversal rate at this point (January through November 2011) was 12.9% with 3001 total decisions and 386 reversals.

The numbers by type of case on appeal for the first 11 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1211	1094	117	9.7
Other Relief	492	411	81	16.5
Motions	836	793	43	5.1

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

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RECENT COURT OPINIONS

First Circuit:

Tay-Chan v. Holder, No. 11-1548, 2012 WL 5458439 (1st Cir. Nov. 9, 2012): The First Circuit denied a petition for review challenging an Immigration Judge's denial of withholding of removal to Guatemala. The petitioner based his claim for relief on events that occurred over a 17-year period. In 1986, his uncle was kidnapped and was never heard from again; the petitioner could only speculate that it might have been by "guerrillas." In 1995 or 1996, the petitioner himself was shot in what he described as an "act of random violence." He did not know his assailant; there were no witnesses and no arrest was made. In 2003, the petitioner's brother was shot and killed for refusing to pay a "tribute" to a gang. He added that "[o]ne or two" cousins also died under similar circumstances. The petitioner left Guatemala shortly after this last event. He claimed that he would suffer persecution there as a member of a particular social group consisting of "victims of gang threats and possible extortion." The Immigration Judge found that the petitioner had not suffered past persecution because he could not establish an identity or motive for his shooting, and he remained in Guatemala for another 7 or 8 years following the incident without suffering additional harm. The Immigration Judge also noted a lack of evidence of motive for some of the family's mistreatment. On appeal, the Board agreed and held that the purported social group was overly broad, was not defined with sufficient particularity, and lacked the requisite social visibility. The circuit court was not persuaded by the petitioner's claim that the various incidents established a "pattern" of persecution directly relating to him. The court applied its holding in *Ruiz v. Mukasey*, 526 F.3d 31, 38 (1st Cir. 2008), to find that it is not enough "to show that multiple members of a single family had negative experiences" without demonstrating "at the very least" that such experiences rose to the level of persecution and were causally linked to family membership. As to future persecution, the court noted that it had previously accepted the Board's precedent decisions interpreting "particular social group" and found that the Board reasonably concluded that the proposed group in this case was overly broad. The court also declined to reconsider its acceptance of the Board's "social visibility" requirement in light of the Supreme Court's decision in *Judulang v. Holder*, 132 S. Ct. 476 (2011).

Third Circuit:

Gen Lin v. Att'y Gen. U.S., No. 12-1668, 2012 WL 5907497 (3d Cir. Nov. 27, 2012): The Third Circuit denied the petition for review of the Board's denial of a motion to reopen. An Immigration Judge had denied the petitioner's application for asylum from China based on an adverse credibility finding, as well as the petitioner's failure to file the asylum application within 1 year of entry. The Board affirmed. The petitioner filed a timely motion to reopen with the Board, claiming to have new evidence that he was wanted for arrest in China as a result of his practice of the Christian faith. The Board denied the motion based on the totality of the circumstances, which included the petitioner's failure to file a new asylum application, his reliance on authenticated documents, and the Immigration Judge's adverse credibility finding. The circuit court observed that the Board had relied on both substantive grounds (that the petitioner had not established prima facie eligibility for relief in light of the adverse credibility finding and lack of authentication of the newly offered documents,) and on procedural grounds (that he failed to file a new I-589, as required by 8 C.F.R. § 1003.2). The court noted that either ground could provide a sufficient basis for denying the motion. Turning to the substantive ground, the court stated that to establish a prima facie asylum claim, an applicant must provide objective evidence that, when considered with the evidence of record, shows a reasonable likelihood of eligibility for relief. The court further observed that 8 C.F.R. § 1287.6 requires authentication of official records, which includes a certification from a U.S. Foreign Service Officer. Although it agreed with the petitioner's argument that exceptions to the regulation may be made to allow authentication of documents through other means, the court found an exception unwarranted here because the petitioner had made no effort to establish the authenticity of his proffered documents through any means. Rather than relying solely on the regulation, the Board had considered, in light of the adverse credibility finding, the petitioner's failure to show how the documents had come into his possession and when and where the photographs of his religious activities were taken. Finally, the court addressed the procedural ground for denial, concluding that even if prima facie eligibility for relief had been found, the Board properly denied the motion based on the undisputed fact that the petitioner failed to file a new asylum application, as required by regulation.

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Seventh Circuit:

Ping Zheng v. Holder, No. 12-1698, 2012 WL 5909914 (7th Cir. Nov. 27, 2012): The Seventh Circuit denied the petition for review of the Board's denial of a motion to reopen. The petitioner had previously been denied asylum from China based on her practice of Falun Gong. She subsequently married and had two children in the U.S. She then filed a motion to reopen, seeking to file a new asylum application based on her fear of China's coercive population control policy. The Board denied the motion, concluding that the evidence provided was insufficient to establish a change in country conditions or circumstances "arising in the country of nationality" that would allow for filing beyond the 90-day statutory deadline for such motions. The Board relied in part on the May 2007 Country Profile of the Department of State, which found no evidence of the use of physical coercion to compel abortion or sterilization in the petitioner's native Fujian province. Although the Board considered an expert opinion offered by the petitioner, which found the 2007 Profile to be "'seriously deficient' in its methodology," it was not persuaded that the Profile was unreliable. The circuit court first referenced its prior holdings that marriage and the birth of two children alone will not warrant reopening, and it further noted that its review was limited to determining whether the Board abused its discretion in finding that the petitioner's evidence did not establish changed country conditions sufficient to warrant reopening. In finding no abuse of discretion, the court noted (1) that the Board neither rejected the evidence nor questioned the expert's credentials; (2) that the expert conceded that "widely different opinions exist" as to whether forced abortions or sterilizations still occur in China and that available evidence on the subject "is neither conclusive nor comprehensive"; and (3) that case law affords State Department reports "special weight," because such reports "are usually the best source of information on [country] conditions." The court also considered the petitioner's evidence that new regulations relating to the enforcement of coercive population control policies were published in a county of Fujian province in 2010 and that enforcement campaigns occurred there in 2009 and 2010. The court did not find that such evidence established changed country conditions, noting that the "one child policy" is 30 years old. Moreover, evidence of targeted, temporary campaigns was not inconsistent with evidence from the petitioner's prior hearing that enforcement was "uneven," so it did not establish that the policy is now enforced differently from when the petitioner was ordered removed. The court also found no error in the Board's determination that even if the petitioner had established changed country conditions, her evidence did not demonstrate that she would be subjected to sterilization. Responding to the petitioner's argument that the State Department Profile that the Board relied on in reaching this conclusion did not contain specific information regarding the petitioner's own home village, the court found no error in the Board's reliance on the report's more general evidence where the petitioner had not offered evidence sufficient to shift the burden of proof to the Government.

Eighth Circuit:

Garcia-Colindres v. Holder, No. 12-1117, 2012 WL 5970975 (8th Cir. Nov. 30, 2012): The Eighth Circuit denied the petition for review of the Board's decision affirming an Immigration Judge's denial of asylum from Guatemala. In 1993, police came to the petitioner's house looking for his teenage son, who they believed was harboring weapons for the guerrillas. Not finding the son at home, the police detained the petitioner for 8 hours, during which time he was beaten and burned with cigarettes. The son was never seen or heard from again. Two years later, a second son was found in a field with acid burns; he died soon thereafter. The petitioner, his wife, and their two youngest children left Guatemala for the U.S. The petitioner's daughter (who remained in Guatemala with her husband) attempted to obtain evidence for the petitioner to corroborate his asylum claim; in 2007, she was found dead from multiple gunshot wounds. The Immigration Judge found the petitioner credible but determined that (1) he had not suffered past persecution and (2) he could not establish a well-founded fear of future persecution because of changed country conditions in Guatemala. The Board affirmed. The circuit court agreed with the Immigration Judge that the harm suffered by the petitioner during his 8-hour detention was not severe enough to rise to the level of past persecution. The court continued that the petitioner could not rely on the tragic deaths of his children to establish past persecution because there was no evidence as to who was responsible for the deaths and disappearance and what the motives behind them were. Noting that persecution must be inflicted by the government of a country or groups that the government is unwilling or unable to control, the court affirmed the Immigration Judge's conclusion that the "unknown circumstances surrounding [the] deaths could not conclusively establish

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governmental involvement or indifference." Regarding a well-founded fear of future persecution, the court stated that in light of the unknown circumstances surrounding his children's deaths, the petitioner's future fear is based on "one eight-hour period of detention, committed approximately twenty years ago by a group that has since fallen from power." The court therefore agreed with the Board's finding that the petitioner was not eligible for asylum.

Abraham v. United States, No. 11-3284, 2012 WL 5519093 (8th Cir. Nov. 15, 2012): The Eighth Circuit affirmed the decision of the district court, which denied the petitioner's request to reconsider the denial of a motion to vacate his guilty plea to possession with intent to distribute cocaine. In his motion, the petitioner alleged that his counsel failed to adequately explain the immigration consequences of his plea. The petitioner relied on the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which was decided 4 months after the petitioner was sentenced. The circuit court discussed whether the Supreme Court's holding in *Padilla* constituted a new rule of constitutional law (which could not be applied retroactively), or a new application of an old rule (which would be retroactive). The court noted that the circuits are split on the issue and that the Supreme Court has granted certiorari in a Seventh Circuit case to resolve the dispute. The court found that the issue was not relevant here because under the facts, the petitioner could not establish prejudice. The record showed that the presentence report ("PSR") stated that the petitioner's offense rendered him deportable and that the DHS would lodge a detainer for his deportation. The record further established that the petitioner's attorney stated in open court at sentencing that he had received the PSR and discussed it with his client, a fact that the petitioner did not dispute on appeal. Because the petitioner did not move to withdraw his guilty plea after reading the PSR, the court found that he had not established a reasonable possibility that if his attorney had advised him that a guilty plea would "virtually ensure" deportation (as the petitioner argued his counsel was obligated to do), "the result of the proceeding would have been different."

Tenth Circuit:

Barrera-Quintero v. Holder, No. 11-9522, 2012 WL 5521836 (10th Cir. Nov. 15, 2012): The Tenth Circuit denied the petition for review of a decision of the Board affirming an Immigration Judge's determination that the petitioner was ineligible for cancellation of removal under section 240A(b)(1) of the Act. The petitioner entered the U.S. without inspection in 1990. In 2004, he was arrested in Utah for possessing a false social security card while attempting to obtain a driver's license. After pleading guilty to falsifying government records under section 76-8-511 of the Utah Code Annotated, the petitioner was placed into custody by the DHS and was given a Spanish-language form providing him with three options: removal proceedings before an Immigration Judge, an asylum hearing, or a waiver of his right to a hearing and return to his native Mexico. The petitioner chose the third option. He then returned to the U.S. without inspection approximately 2 months later. A little over 2 and a half years following his return, the petitioner was again arrested for attempting to obtain a driver's license using false documents. This time he was placed in removal proceedings, where he sought to apply for cancellation of removal. The Immigration Judge found him ineligible, agreeing with the DHS that the petitioner's 2004 departure broke his period of continuous physical presence in the U.S., thus leaving him short of the requisite 10 years immediately preceding his application. The Immigration Judge also held that both of the petitioner's convictions were for crimes involving moral turpitude. The petitioner argued that since his single absence from the U.S. in 2004 was under 90 days in duration, it did not break his period of continuous residence under section 240A(d)(2) of the Act. However, in *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002), the Board held that a departure compelled by threat of the institution of removal proceedings breaks the period of continuous residence, regardless of the duration of the absence. Applying the *Chevron* test, the court found that the statute was ambiguous and that the Board's interpretation in *Romalez* was reasonable. The court thus joined six other circuits in according *Chevron* deference to the *Romalez* holding. In addition, the court found that it lacked jurisdiction to consider the petitioner's argument that his 2004 departure was not voluntary, stating that it was a discretionary determination. The petitioner's claim that his due process rights were violated when the Immigration Judge allowed a DHS witness to testify telephonically, rather than in person, was also rejected for failure to show prejudice. Finally, since the petitioner lacked the requisite 10 years of continuous physical presence, the court held that it need not address the question whether he was statutorily barred from relief because his convictions were for crimes involving moral turpitude.

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BIA PRECEDENT DECISIONS

In *Matter of Sanchez-Herbert*, 26 I&N Dec. 43 (BIA 2012), the Board held that where an alien fails to appear for a hearing because he has departed the United States, termination of the proceedings is not appropriate if the alien received proper notice of the hearing and is removable as charged. The respondent, who had been charged as inadmissible under section 212(a)(6)(A)(i) of the Act, did not appear at a master calendar hearing, and his attorney sought termination of the proceedings because the respondent had voluntarily returned to Mexico. The Immigration Judge found that she lacked jurisdiction over the respondent because he was no longer in the United States and granted the motion to terminate.

Considering the DHS's appeal, the Board found that the respondent's departure did not divest the Immigration Judge of jurisdiction over the proceedings, pointing out that an alien need not be physically present in the United States for an Immigration Judge to retain jurisdiction and conduct an in absentia hearing. The Board noted that the purpose of in absentia proceedings is to determine whether the DHS can meet its burden of proving that an alien who did not appear received proper notice of the hearing and is removable as charged. If the DHS meets its burden, the Immigration Judge should issue a removal order; if the burden is not met, the Immigration Judge should terminate the proceedings. Acknowledging the Immigration Judge's observation that the practical result in this case is the respondent's departure from the United States irrespective of whether he was ordered to do so, the Board pointed out that allowing an alien who leaves the country while in proceedings to divest the Immigration Judge of jurisdiction, or to otherwise unilaterally compel termination of his proceedings, effectively allows the alien to dictate the outcome of the proceedings and avoid the consequences of a removal order. The Board found no basis for the Immigration Judge to terminate the proceedings, sustained the DHS's appeal, and remanded the record.

In *Matter of M-H-*, 26 I&N Dec. 46 (2012), the Board held that *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), which provides that an offense need not be an aggravated felony to be considered a particularly serious crime, should be applied to cases arising within the Third Circuit's jurisdiction. The respondent and the DHS both appealed an Immigration Judge's decision denying the respondent's applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Act but granting him withholding of removal under the Convention Against Torture. The Immigration Judge had found that the respondent's Pennsylvania conviction for corruption of minors was for a crime involving moral turpitude, and his conviction for indecent assault was for a crime of child abuse. The Immigration Judge rejected the DHS's argument that the respondent had been convicted of a particularly serious crime, because the law of the Third Circuit in *Alaka v. Attorney General of U.S.*, 456 F.3d 88 (3d Cir. 2006), was that an offense must be an aggravated felony to be deemed a particularly serious crime. However, the Immigration Judge denied the respondent's application for asylum in the exercise of discretion and his application for withholding of removal under the Act on its merits.

Noting that the Act provides that an alien convicted of a particularly serious crime is ineligible for asylum and withholding of removal under the Act, the Board pointed out that the Second, Fourth, Ninth, and Tenth Circuits had accorded deference to its holding in *Matter of N-A-M-* that an offense need not be an aggravated felony to qualify as a particularly serious crime. The Board observed that in *Matter of N-A-M-*, it had respectfully disagreed with the Third Circuit's contrary interpretation. Considering the totality of the Third Circuit's analysis in *Alaka v. Attorney General of U.S.*, the Board concluded that the court did not expressly determine that the statutory language in section 241(b)(3) was unambiguous and thus not subject to agency interpretation. Consequently, according to *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-85 (2005), the agency's interpretation of section 241(b)(3) is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the Board held that it will apply *Matter of N-A-M-* in the Third Circuit and remanded the case for the Immigration Judge to analyze whether either of the respondent's crimes is particularly serious.

In *Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012), the Board held that when the DHS paroles a returning lawful permanent resident for prosecution, it need not have all of the evidence to sustain its burden of proving that the alien is an applicant for admission

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pursuant to section 101(a)(13)(C) of the Act but may ordinarily rely on the results of a subsequent prosecution to meet that burden in later removal proceedings. Noting that *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011), established that the DHS bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as an applicant for admission, the Board addressed the time at which the determination must be made that an alien has committed an offense identified in section 212(a)(2) and thus is to be treated as an applicant for admission pursuant to section 101(a)(13)(C)(v) of the Act.

The Board considered the interplay between section 212(d)(5)(A), which allows the DHS to temporarily parole an alien applying for admission into the country and determine inadmissibility at a later date, and section 101(a)(13(C), which states that returning lawful permanent residents are presumptively not to be treated as seeking admission. It concluded that the provisions were not in conflict because the determinations under each statute are made at different times, and the DHS's authority to parole is not limited to applicants for admission. Noting that an application for admission is a continuing one, the Board pointed out that admissibility is authoritatively determined based on the law and facts existing at the time the application for admission is finally adjudicated in proceedings, including in the context of parole for the purpose of prosecution. Reviewing the history and nature of parole and the changes to treatment of returning lawful permanent residents under the IIRIRA, the Board concluded that nothing in section 101(a)(13)(C) suggests that Congress intended to eliminate the DHS's authority to parole a lawful permanent resident into the United States for prosecution. Additionally, it reasoned that turning admissibility questions into retrospective inquiries would effectively eliminate the DHS's ability to parole a lawful permanent resident for prosecution, a position that is contrary to longstanding precedent.

The Board held that in the context of the parole of a returning lawful permanent resident for purposes of prosecution of pending criminal charges, the DHS need not have all the relevant evidence at the time the lawful permanent resident first seeks to come back into the United States, and it may rely on the results of the prosecution for purposes of applying section 101(a)(13)(C) in any subsequent removal proceedings. It emphasized that nothing in its holding is intended to lessen the DHS's burden to prove by clear and convincing evidence at the time of the removal hearing that a returning lawful permanent resident charged with inadmissibility actually falls within one of the six enumerated provisions in section 101(a)(13)(C) so that he or she should be regarded as an applicant for admission. The record was remanded.

In *Matter of Sanchez-Lopez*, 26 I&N Dec. 71 (BIA 2012), the Board held that the offense of stalking in violation of section 646.9 of the California Penal Code is a "crime of stalking" as contemplated by section 237(a)(2)(E)(i) of the Act. Noting that Congress had not defined the term "crime of stalking" under section 237(a)(2)(E)(i), the Board conducted a State survey and discovered that as of the September 30, 1996, enactment of the IIRIRA, the United Sates and more than half of the States had enacted criminal stalking statutes. The statutes contained the common elements of (1) conduct engaged in on more than one occasion, (2) which was directed at a specific individual, (3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death.

Applying that definition, the Board concluded that section 646.9 of the California Penal Code describes a "crime of stalking" under section 237(a)(2)(E)(i) of the Act since it requires proof of each of those elements, and it found the respondent removable as charged. The Board also held that the respondent had not established prima facie eligibility for a waiver of removability under section 237(a)(7)(A). In addition, it concurred with the Immigration Judge that the respondent had not established that he merited section 240A(a) cancellation of removal in the exercise of discretion because of his extensive criminal history, his repeated violations of a restraining order, and his attempt to minimize his serious misconduct. Rejecting the respondent's remaining appellate arguments, the Board dismissed the appeal.

Conceptualizing Cancellation of Removal Criminal Bars *continued*

criminal sanctions" but are, instead, merely seeking "the government's largesse to avoid removal." *Id.*

The *Salem* court noted that "the Supreme Court has expressed some reservation about a wholesale adoption of the categorical approach in the immigration context" in *Nijhawan v. Holder*, 557 U.S. 29 (2009). 647 F.3d at 119. The court acknowledged that the Supreme

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Court indicated that the holding of *Nijhawan* was only applicable to a limited range of circumstances and, indeed, actually looked to the record of conviction for purposes of assessing eligibility for cancellation in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). *Id.* at 119 n.5. However, the Fourth Circuit ultimately found that because the alien in that case "made no attempt to offer additional evidence . . . beyond the record of conviction," it did not need to address the "proper scope and limit—if any—of a noncitizen's evidentiary presentation when seeking relief from removal." *Id.* at 119.

The case for this approach was also made in the concurring and dissenting opinion in *Young* penned by Ninth Circuit Judge Ikuta. 697 F.3d at 992. There, Judge Ikuta pointed out the problematic nature of forcing aliens to affirmatively demonstrate that they have not been convicted of any disqualifying crime but then applying the strict *Taylor-Shepard* evidentiary limitations in such a way that the alien cannot possibly meet his or her burden to clear up any ambiguities that may exist in certain records of conviction.

Thus, while the *Salem* court stopped short of declaring the documentary limitations of the aggravated felony and CIMT standards inapplicable to assessing whether an applicant for cancellation was convicted of a disqualifying offense, the decision evinces a possible willingness to do so in the future. Further, four members of the Ninth Circuit have indicated that such an approach may be required by basic principles of fairness. Accordingly, while this approach has not been adopted by any court, it is not without some support.

The Overview

Despite the diverging standards that presently exist across the country as a whole, there is no dearth of binding precedents to cite on this issue anywhere in the United States. Thus, the following tour of the circuits will briefly discuss what particular standards likely constitute the preferred approach in any given location.

First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits

Currently, these circuits have not issued any published opinions speaking to this issue. Thus, the Board's approach in *Almanza* is the applicable rule, notwithstanding any unpublished opinions hinting to the contrary, such as the Fifth Circuit's in *Davila*, 381 F. App'x 413. Under this approach, criminal grounds of removability are treated the same as ever. That is to say that the Government must prove by clear and convincing evidence that the ground of deportability applies pursuant to the *Taylor-Shepard* categorical approach or the CIMT approach announced by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), as they have been adopted, modified, or rejected in any particular circuit.

Upon a finding of removability and the filing of an application for relief, the burdens of production and proof shift to the alien. This burden would be met where the record of conviction—consisting of judicially noticeable documents submitted by the Government and the respondent—is complete and conclusive as to the absence of a disqualifying criminal conviction.

If, however, the record of conviction is not complete or conclusive and the matter is governed by the REAL ID Act amendments to section 240(c)(4) of the Act, the Board encouraged Immigration Judges to request that the respondent supplement the record of conviction with additional documents, so that a conclusive determination may be made on the record. *Matter of Almanza*, 24 I&N Dec. at 775. Ultimately, however, any remaining ambiguity in the record inures to the detriment of the alien, who bears the burden of proof.

In a pre-REAL ID Act case, on the other hand, if the record of conviction is not complete or conclusive, the result does not appear to change. The only difference is that 8 C.F.R. § 1240.8(d) is the controlling standard and the respondent is charged with any failure to disprove the presence of any disqualifying criminal convictions by a preponderance of the evidence.

Second Circuit

Adjudicators applying the definitional approach of the Second Circuit seem to have the easiest task. In that circuit, the same standard employed to assess removability is applied to any possible aggravated felony or CIMT conviction to ascertain the alien's eligibility for relief. Thus, since removability could not be established on an ambiguous record of conviction, neither can disqualification for eligibility for relief. This is true irrespective of whether a case is governed by the REAL ID Act standards.

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Fourth and Tenth Circuits

In the Fourth and Tenth Circuits, the applicable rule—whether under *Salem* or *Garcia*, respectively—is effectively identical to the *Almanza* rule discussed above. There are two things that bear mentioning, however, with respect to the law in these circuits. First, the Tenth Circuit's decision in *Garcia* based its holding solely on the burden provision at 8 C.F.R. § 1240.8(d). 584 F.3d 1288. It did not speak to the modifications to the Act made by the REAL ID Act or whether they provide for courts to demand documentary corroboration of nontestimonial evidence, an element of *Almanza*. Thus, one might base decisions under *Garcia* on 8 C.F.R. § 1240.8(d) alone, and not section 240(c)(4) of the Act.

Second, the Fourth Circuit's dicta in *Salem* could be read to evince a willingness to eliminate the *Taylor-Shepard* approach's documentary restrictions altogether. 647 F.3d 111. Ultimately, however, even if *Salem* hints that the court may be willing to eventually open the door to any credible evidence the alien wishes to present, it has not done so yet, and a straightforward application of the distributive approach remains the most likely choice.

Ninth Circuit

In the Ninth Circuit, things have been rendered somewhat unclear by *Young*, 697 F.3d 976. In addition to the potential for future evolution of the Ninth Circuit's view on the matter—as pointed out in Judge Ikuta's opinion, the majority holding is only actually fully supported by two judges—the case is not exactly clear as to its intended effect.

In REAL ID Act cases, the *Rosas-Castaneda* rule has been abrogated by *Young* and the applicable standard is effectively identical to the Board's rule in *Matter of Almanza*. That said, *Young* also purports to overturn *Sandoval-Lua* to the extent that it conflicts with *Young*. However, since *Sandoval-Lua* is a pre-REAL ID Act case and *Young* expressly relies on the REAL ID Act's clear allocation of the burden of persuasion to the alien, it is at least arguable that *Sandoval-Lua* does not actually conflict with *Young*, or at least that any conflict is in dicta.

While it does not seem particularly likely that future panels of the Ninth Circuit will interpret *Young* as not overruling *Sandoval-Lua* based solely on 8 C.F.R. § 1240.8(d)—basically reading *Young* as adopting the same rule as the Tenth Circuit's in *Garcia*—questions regarding the continued viability of *Sandoval-Lua* in pre-REAL ID Act cases may be raised until the issue is conclusively settled.

Conclusion

The Board and three circuit courts have spoken to the scope of an alien's burden in establishing that his or her application for cancellation of removal is not barred by a specified criminal conviction. Three distinct views have been articulated on this issue. Thus, absent Congress settling the matter or a determination by the Supreme Court—its review of *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011), could potentially have some bearing on the question—this is likely to persist as an area of conceptual uncertainty, even though there is no lack of applicable precedent.

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1. The question whether an alien satisfies the burden to demonstrate eligibility for cancellation of removal by proffering an inconclusive record of conviction was discussed in a previous article. Joshua Lunsford, *The Burden of Proof and Relief from Removability: Who Benefits From the Ambiguity in an Inconclusive Record of Conviction*, Immigration Law Advisor, Vol. 6, No. 2 (Feb. 2012).
2. See *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), the two Supreme Court cases that gave rise to the categorical and modified categorical approaches, respectively.

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