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Fraud or Deceit Offenses: Calculating "Loss to the Victim or Victims" after *Nijhawan v. Holder*

by Christine Han

Section 101(a)(43)(M) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M), includes within the definition of an "aggravated felony":

> An offense that –
>
> (i) involves fraud or deceit in which the loss to the victims or victims exceeds $10,000; or
> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (related to tax evasion) in which the revenue loss to the Government exceeds $10,000.

The decision of the United States Supreme Court in *Nijhawan v. Holder*, 557 U.S. 29 (2009), clarified that, in assessing whether a State or Federal offense would constitute an aggravated felony under this section of the Act, a departure from the categorical approach was appropriate to determine whether the $10,000 threshold amount had been met. *Id.* at 38–40.

This article explores the pre-*Nijhawan* landscape and the "circumstance-specific approach" taken in *Nijhawan* that addressed the range of documents an adjudicator could consider in determining the loss amount to the victim(s) under section 101(a)(43)(M)(i) of the Act.[1] The article then examines circuit courts decisions since *Nijhawan* assessing whether the $10,000 threshold has been met under section 101(a)(43)(M)(i) or provisions with similar loss amount thresholds, such as section 101(a)(43)(D) of the Act. These cases may provide guidance to adjudicators addressing similar circumstances. Interestingly, at least two circuit courts have affirmed findings of a loss amount greater than the amount reflected in charging documents, illustrating that different approaches may lead to unexpected results.

Background

Prior to *Nijhawan*, adjudicators applied the two-step *Taylor-Shepard* categorical framework to evaluate whether an alien has been convicted of an aggravated felony under section 101(a)(43)(M) of the Act. *See generally Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990). Because the statute of conviction may not specify a loss element to the victim, the "modified categorical approach" was applied to determine the loss amount under section 101(a)(43)(M). However, the application of the "modified categorical approach" differed between circuits with regard to which documents the adjudicator could consider.

The Second Circuit applied the strictest application, finding that the adjudicator could only consider the statute of conviction and indictment. *See Sui v. INS*, 250 F.3d 105 (2d Cir. 2001). The Third, Ninth, and Eleventh Circuits applied a broader application, finding that the restitution order and sentencing documents could be considered. *See Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007); *Alaka v. Att'y Gen. of U.S*, 456 F.3d 88 (3d Cir. 2006); *Ferreira v. Ashcroft*, 390 F.3d 1091 (9th Cir. 2004). The First Circuit held that a presentence investigation report ("PSR") could not be considered but that the indictment, final judgment, and restitution order could be considered. *See Conteh v. Gonzales*, 461 F.3d 45, 55 (1st Cir. 2006). Finally, the Fifth Circuit applied the broadest application, which permitted consideration of the indictment, PSR, and judgment of conviction. *See James v. Gonzalez*, 464 F.3d 505 (5th Cir. 2006).

Nijhawan and the "Circumstance-Specific Approach"

In *Nijhawan*, the petitioner was found guilty by a jury of conspiring to commit fraud offenses and money laundering under Federal law. *See Nijhawan*, 557 U.S. at 32. However, because none of the statutes of conviction included a loss element, the jury did not make a finding about the amount of loss to the victim. At sentencing, the petitioner had stipulated that the loss exceeded $100 million, and the court ordered a restitution amount of $683 million. *Id.* at 29. In his immigration proceedings before the agency and the Federal courts, the petitioner argued that because the criminal statutes did not include a loss amount as an element, none of his offenses could categorially constitute an aggravated felony under section 101(a)(43)(M)(i). *Id*. at 35–36. In the alternative, the petitioner argued that even if the "modified categorical approach" did apply, only limited evidence should be considered. *Id.* at 41.

In its decision, the Supreme Court found that the categorical approach should be applied to determine whether a conviction falls within a statutory description of a fraud or deceit crime. *See id.* at 33–34. Regarding the $10,000 loss provision, however, the Court called for a "circumstance-specific approach," reasoning that, prior to an immigration proceeding, a criminal defendant would have had the opportunity to contest the loss amount. *Id*. at 38–39. Thus, to establish removability, the Government had the burden to prove the loss amount through clear and convincing evidence. *Id*. at 42–43. Such evidence could consist of sentencing-related material and a restitution order. In considering the record of conviction, the Court also specified a "tethering requirement," holding that the loss must be "tied to the specific counts covered by the conviction" and cannot be based on acquitted or dismissed counts, or general conduct. *See id.* at 42 (citing *Alaka*, 456 F.3d at 107).

Opinions After *Nijhawan*

After *Nijhawan*, many circuit courts have grappled with how to interpret the tethering requirement as they confront various types of documents that may be used to establish whether the $10,000 threshold amount has been met. The cases and analyses coming from the circuits provide useful guidance to adjudicators as they confront similar documents when determining whether the loss amount threshold under section 101(a)(43)(M) has been met. These different evidentiary standards have also been applied to other statutes with a similar loss amount threshold, such as the aggravated felony relating to money laundering that is defined in section 101(a)(43)(D) of the Act.

First Circuit – *Campbell v. Holder*, 698 F.3d 29 (1st Cir. 2012). Some circuits have noted that the approach adopted in *Nijhawan* does not extend to all types of aggravated felonies. For example, the First Circuit reversed the determination that the petitioner had been convicted of the aggravated felony offense of "sexual abuse of a minor," holding that such a determination must be made categorically and cannot be arrived at by applying a "circumstance-specific" approach. The First Circuit noted that the Court in *Nijhawan* reasoned that some

subparagraphs of the aggravated felony definition "invite inquiry" into the specific circumstances surrounding a crime, while those subparagraphs that refer to a "generic crime" are determined categorically. *Id.* at 34 n.4.

Second Circuit – *Ljutica v. Holder*, 588 F.3d 119 (2d Cir. 2009) (challenge to denial of citizenship). The plaintiff sought review of the denial of his application for citizenship based on statutory ineligibility. The plaintiff had pled guilty to Federal charges of attempted bank fraud. Based on this conviction, the district court affirmed the Government's denial of citizenship, finding that the plaintiff has been convicted of an aggravated felony as defined in sections 101(a)(43)(M)(i) and (U) of the Act.

The plaintiff argued that application of section 101(a)(43)(M)(i) did not bar his eligibility for citizenship because he was caught before he withdrew money and the bank therefore did not suffer an actual loss. The Second Circuit applied the reasoning in *Matter of Onyido*, 22 I&N Dec. 552, 554 (BIA 1999), concluding that because the alien was convicted of attempted bank fraud, the intended loss is the only amount that matters and the actual loss is irrelevant. The count of the indictment to which the alien pled guilty stated that he initiated a fraudulent wire transfer of $475,025.25. This charge was repeated in the plea agreement, which also stipulated a loss figure of $475,025.25, corresponding to the amount the alien would have realized had the scheme been successful. Based on the charge, plea agreement, and plea colloquy, the court held that the amount the alien intended to obtain through his fraud was above the threshold in section 101(a)(43)(M)(i).

Pierre v. Holder, 588 F.3d 767 (2d Cir. 2009). The petitioner pled guilty to Federal charges of bank fraud and aggravated identity theft in connection with an attempt to obtain a $500,000 mortgage. The Immigration Judge found the petitioner removable pursuant to sections 101(a)(43)(M)(i) and (U) of the Act based on the indictment's allegation that the "intended loss or potential loss was in . . . excess of $10,000." *Id.* at 771.

Before the Board, the petitioner argued that she was not removable under 101(a)(43)(M)(i) because the bank did not sustain any actual loss. Although the Board agreed that section 101(a)(43)(M)(i) requires actual loss, it invoked Rule 31(c) of the Federal Rules of Criminal Procedure to conclude that section 101(a)(43)(U) applied as a necessarily included lesser offense of section 101(a)(43)(M). Thus, the Board affirmed the decision of removability.

The court explained that in section 239(a)(1) of the Act, 8 U.S.C. § 1229(a)(1), Congress specified that the alien must be given written notice of "[t]he acts or conduct alleged to be in violation of law" and "[t]he charges against the alien and the statutory provisions alleged to have been violated." *Id.* at 776. Because removal proceedings are civil and not criminal in nature, the court found no basis to rely on the Federal Rules of Criminal Procedure to conclude that section 101(a)(43)(M)(i) necessarily includes a charge under section 101(a)(43)(U), especially where doing so would relieve the Government of its notice obligations under section 239(a)(1) of the Act. Therefore, because a potential loss alone cannot satisfy the requirements of section 101(a)(43)(M), and because the petitioner's offense did not cause an actual loss to the bank in excess of $10,000, the court vacated the removal order.

Ingleton v. Holder, 529 F. App'x 41 (2d Cir. 2013). The petitioner pled guilty to a State charge of insurance fraud, which specified a loss threshold of $50,000. The Immigration Judge found the petitioner removable for an aggravated felony under section 101(a)(43)(M)(i) of the Act and the Board sua sponte invoked a charge of removability under section 101(a)(43)(U) (addressing an attempt or conspiracy to commit an aggravated felony).

The court found that the Board did not err in invoking section 101(a)(43)(U) sua sponte where the petitioner's conviction necessarily made him removable under either section 101(a)(43)(M)(i) or (U). Distinguishing the petitioner's case from *Pierre v. Holder*, in which the Federal statute for bank fraud did not include a monetary threshold, the court reasoned that because the petitioner's statute of conviction included a $50,000 monetary threshold, the petitioner could not argue that his conviction failed to satisfy the $10,000 intended loss threshold under section 101(a)(43)(U).

The text of the article resumes on page 11. The chart on the following page summarizes the circuit court cases discussed in this article.

Post-*Nijhawan* Circuit Court Holdings

Circuit	Case	Holding	Record of Conviction Documents	Section(s) of the Act at Issue
1st Cir.	*Campbell v. Holder*, 698 F.3d 29 (1st Cir. 2012)	Aggravated felony offense of "sexual abuse of a minor" must be determined categorically, not through a circumstance-specific examination.	Plea colloquy and "record as a whole"	101(a)(43)(A)
2d Cir.	*Ljutica v. Holder*, 588 F.3d 119 (2d Cir. 2009)	An actual monetary loss is not required to support a 101(a)(43)(U) charge alleging an attempt or conspiracy to commit fraud as defined in 101(a)(43)(M)(i).	Charging document, plea agreement, plea colloquy	101(a)(43)(M)(i); 101(a)(43)(U)
2d Cir.	*Pierre v. Holder*, 588 F.3d 767 (2d Cir. 2009)	A potential loss alone cannot satisfy the requirements of 101(a)(43)(M)(i), which requires an actual loss.	Indictment	101(a)(43)(M)(i); 101(a)(43)(U)
2d Cir.	*Ingleton v. Holder*, 529 F. App'x 41 (2d Cir. 2013)	The Board did not err in sua sponte invoking 101(a)(43)(U) where the petitioner's conviction necessarily made him removable under either 101(a)(43)(M)(i) or (U).	Indictment	101(a)(43)(M)(i); 101(a)(43)(U)
3d Cir.	*Solimene v. Att'y Gen. of U.S.*, 607 F. App'x 150 (3d Cir. 2015)	In a money laundering case, a forfeiture order specifying an amount "traceable to" the laundering supported the charge of removability.	Indictment, fine, forfeiture order	101(a)(43)(D)
3d Cir.	*Singh v. Att'y Gen. of U.S.*, 677 F.3d 503 (3d Cir. 2012)	Although a restitution order specified an actual loss amount, sufficient conflicting evidence existed to justify looking past the restitution order.	Plea agreement, restitution order, "conflicting evidence"	101(a)(43)(M)(i)
5th Cir.	*United States v. Mendoza*, 783 F.3d 278 (5th Cir. 2015)	Money laundering as described in 101(a)(43)(D) requires a circumstance-specific approach; an unrebutted presentence investigation report (PSR) may establish the $10,000 threshold.	Presentence investigation report (PSR)	101(a)(43)(D)
6th Cir.	*Kellermann v. Holder*, 592 F.3d 700 (6th Cir. 2010)	A loss amount depends on particular circumstances and does not need to be an element of the crime requiring a jury finding.	Indictment	101(a)(43)(M)(i)
7th Cir.	*Clarke v. United States* 703 F.3d 1098 (7th Cir. 2013)	The court observed that a plea to a count specifying a loss amount under $10,000 does not preclude a finding of a greater loss to the victim. (Note: the case was before the court as a motion for post-conviction relief).	Indictment, restitution order	101(a)(43)(M)(i)
8th Cir.	*Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009)	Investigative costs that were directly related to the charged offense may satisfy the $10,000 threshold.	Plea agreement, PSR, restitution order	101(a)(43)(M)(i)
9th Cir.	*Fuentes v. Lynch*, 788 F.3d 1177 (9th Cir. 2015)	Allegations in the charging document that need not have been proven did not establish the amount of loss, but the PSR was properly consulted to establish loss.	Indictment, PSR, plea agreement, judgment	101(a)(43)(D)
10th Cir.	*Hamilton v. Holder*, 584 F.3d 1284 (10th Cir. 2009)	A PSR that indicated a loss greater than the amount of restitution ordered was properly considered in removal proceedings. The court noted that a criminal defendant has the opportunity to challenge the contents of a PSR.	PSR, restitution order	101(a)(43)(M)(i)

The text of the article is continued on page 11.

CIRCUIT COURT DECISIONS FOR JUNE 2015

by John Guendelsberger

The United States courts of appeals issued 145 decisions in June 2015 in cases appealed from the Board. The courts affirmed the Board in 126 cases and reversed or remanded in 19, for an overall reversal rate of 13.1%, compared to last month's 14.6%. There were no reversals from the Second, Fifth, Sixth, and Eighth Circuits.

The chart below shows the results from each circuit for June 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	2	1	33.3
Second	24	24	0	0.0
Third	9	8	1	11.1
Fourth	15	13	2	13.3
Fifth	13	13	0	0.0
Sixth	5	5	0	0.0
Seventh	3	1	2	66.7
Eighth	1	1	0	0.0
Ninth	60	51	9	15.0
Tenth	6	4	2	33.3
Eleventh	6	4	2	33.3
All	145	126	19	13.1

The 145 decisions included 72 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 37 direct appeals from denials of other forms of relief from removal or from findings of removal; and 36 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	72	66	6	8.3
Other Relief	37	28	9	24.3
Motions	36	32	4	11.1

The six reversals or remands in asylum cases involved credibility (two cases), level of harm for past persecution, well-founded fear, likelihood standard for withholding of removal, and protection under the Convention Against Torture.

The nine reversals or remands in the "other relief" category addressed divisibility in applying the categorical approach (four cases); various offenses including drug paraphernalia and simple drug possession in light of recent Supreme Court determinations in *Mellouli* and *Moncrieffe*; crimes involving moral turpitude; a good faith marriage determination; a continuance for adjustment of status; and eligibility for special rule cancellation.

The four motions cases involved rescission of an in absentia order of removal for lack of notice, the departure bar, a motion to reopen to further consider application of the particular social group definition, and a motion to reconsider whether appeal to the Board had been waived.

The chart below shows the combined numbers for January through June 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	19	13	6	31.6
First	8	6	2	25.0
Ninth	413	330	83	20.1
Tenth	33	27	6	18.2
Eleventh	32	27	5	15.6
Third	54	49	5	9.3
Fourth	58	53	5	8.6
Sixth	37	34	3	8.1
Second	106	98	8	7.5
Fifth	61	59	2	3.3
Eighth	21	21	0	0.0
All	842	717	125	14.8

Last year's reversal rate at this point (January through June 2014) was 14.3%, with 1190 total decisions and 170 reversals or remands.

The numbers by type of case on appeal for the first 6 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	421	351	70	16.6
Other Relief	230	194	36	15.7
Motions	191	172	19	9.9

CIRCUIT COURT DECISIONS FOR JULY 2015

by John Guendelsberger

The United States courts of appeals issued 194 decisions in July 2015 in cases appealed from the Board. The courts affirmed the Board in 167 cases and reversed or remanded in 27, for an overall reversal rate of 13.9%, compared to last month's 13.1%. There were no reversals from the Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for July 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	3	1	25.0
Second	53	48	5	9.4
Third	14	13	1	7.1
Fourth	6	6	0	0.0
Fifth	7	7	0	0.0
Sixth	3	3	0	0.0
Seventh	3	3	0	0.0
Eighth	4	3	1	25.0
Ninth	84	65	19	22.6
Tenth	5	5	0	0.0
Eleventh	11	11	0	0.0
All	194	167	27	13.9

The 194 decisions included 106 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 45 direct appeals from denials of other forms of relief from removal or from findings of removal; and 43 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	106	90	16	15.1
Other Relief	45	37	8	17.8
Motions	43	40	3	7.0

The 16 reversals or remands in asylum cases involved credibility (6 cases), particular social group (5 cases), level of harm for past persecution, nexus, corroboration, pattern and practice of persecution, and requirement for initial consideration of unaccompanied minor's application by U.S. Citizenship and Immigration Services.

The eight reversals or remands in the "other relief" category addressed the categorical approach (four cases), cancellation of removal, adjustment of status, voluntary departure, and admissibility of a returning lawful permanent resident.

The three motions cases involved the modified categorical approach, derivative citizenship, and portability of labor certification.

The chart below shows the combined numbers for January through July 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	22	16	6	27.3
First	12	9	3	25.0
Ninth	497	395	102	20.5
Tenth	38	32	6	15.8
Eleventh	43	38	5	11.6
Third	68	62	6	8.8
Second	159	146	13	8.2
Fourth	64	59	5	7.8
Sixth	40	37	3	7.5
Eighth	25	24	1	4.0
Fifth	68	66	2	2.9
All	1036	884	152	14.7

Last year's reversal rate at this point (January through July 2014) was 14.5%, with 1,389 total decisions and 202 reversals or remands.

The numbers by type of case on appeal for the first 7 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	527	441	86	16.3
Other Relief	275	231	44	16.0
Motions	234	212	22	9.4

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

RECENT COURT OPINIONS

Supreme Court:

Johnson v. United States, 135 S. Ct. 2551(2015): The Supreme Court held that imposing an increased sentence under the "residual clause" of section 924(e)(2)(B)(ii) of the Armed Career Criminal Act ("ACCA") violates due process because of the "unconstitutional vagueness" of the clause's requirements. The ACCA allows for a sentence to be increased for defendants with three prior convictions for a "violent felony." The ACCA's residual clause defines a "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." The district court had found that the petitioner's conviction for unlawful possession of a short-barreled shotgun fell within this definition.

The Court noted that *Taylor v. United States*, 495 U.S. 575, 600 (1990), requires use of the categorical approach to determine whether an offense is a violent felony, meaning that courts may not look to the facts of the underlying prior convictions in making this determination. The Supreme Court observed that the residual clause does not inquire whether the risk of physical injury is an element of the crime. Instead, it asks whether the crime involves conduct that presents too much risk of physical injury. The Court noted that the residual clause is preceded by specific crimes falling within the definition, including burglary and extortion. However, as defined by their elements, both of those crimes do not normally cause physical injury in and of themselves. Rather, the risk of injury may arise after the elements of the crime itself have been satisfied (for example, the burglar encountering a person after breaking in; or an extortion victim refusing a demand). From the inclusion of these two crimes, the Court concluded that the residual clause requires a court to go beyond determining whether the creation of the risk is an element of the actual crime. The Court concluded that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges."

The Court noted that it had interpreted the same clause in four prior decisions. Stating that "it has been said that the life of the law is experience," the Court explained that its "[n]ine years' experience trying to derive meaning from the residual clause has convinced us that we have embarked on a failed enterprise." Justice Scalia authored the majority opinion. Justices Kennedy and Thomas authored concurring opinions. Justice Alito filed a dissent.

First Circuit:

Mboowa v. Lynch, No. 13-1367, 2015 WL 4442290 (1st Cir. July 21, 2015): The First Circuit granted the petition for review from the Board's denial of asylum from Uganda. The Board affirmed the adverse credibility finding of the Immigration Judge, which was based on purported discrepancies between the petitioner's testimony and his written application for asylum. On appeal, the court found that two of the three most significant incidents that the Immigration Judge believed were omitted from the written asylum application (the petitioner's suffering a broken pelvis at the hands of the police and the beheading of his political activist cousin) were mentioned in the petitioner's handwritten asylum application, but were absent from the accompanying typed supplemental statement. Regarding the third inconsistency (the absence of any mention of the petitioner's purported 3-week hospital stay), the court concluded that the omission went to the heart of the asylum claim, since it involved the degree to which the petitioner was harmed on account of his political activities. However, the court observed that the claimed hospital stay was made "more plausible in light of [the petitioner's] consistent allegation of a broken hip, and it might now be understood as an additional detail, rather than an inconsistency." The court therefore remanded for reconsideration of the credibility determination. In dicta, the court commented on the Board's statement that the petitioner "also did not provide reasonably available corroboration to support his claims." The court clarified that while a complete lack of easily obtainable corroboration may support an adverse credibility determination, "any holding that an otherwise credible claim is doomed because the petitioner failed to provide corroborating evidence directly conflicts with the applicable regulations."

Hinds v. Lynch, 790 F.3d 259 (1st Cir. 2015): The First Circuit denied a petition for review challenging the Board's decision affirming a removal order based on an aggravated felony determination. The petitioner's only challenge rested on constitutional grounds. The petitioner cited to the Supreme Court's statement in *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010), that "deportation is an integral part . . . of the penalty that

may be imposed on noncitizen defendants who plead guilty to specified crimes." The petitioner argued that in describing deportation as a "penalty," the Supreme Court in *Padilla* dramatically altered the courts' long-held view that deportation is not punitive. He argued that the Fifth and Eighth Amendments "impose 'substantive limits' on the government's discretion to impose criminal penalties and punitive damages." He further argued that a punishment that is "grossly disproportionate to the gravity" of a crime committed by a defendant constitutes a violation of these constitutional limitations. In the petitioner's view, were the court to find his removal and bar to reentry to be disproportionate to the individual circumstances of his case, the Government should not be able to deport him "despite Congress's statutory mandate that he be removed."

The court was unpersuaded. It cited the Supreme Court's own conclusion (in a 1984 decision) that the use of such term is not dispositive, noting that "both civil and criminal sanctions may be labeled 'penalties.'" The court further noted that the Supreme Court in *Padilla* clarified that removal "is not, in a strict sense, a criminal sanction," and that in its recent decision in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), the Court referred to removal as "a consequence" of a conviction (as opposed to a penalty for criminal conduct). The First Circuit further cited the Supreme Court's discussion of *Padilla* in its subsequent decision in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), finding the Court's discussion there of *Padilla*'s extension of Sixth Amendment protection to a conviction's "non-criminal consequences" to be inconsistent with the petitioner's interpretation. As the court concluded that the Supreme Court's use of the term "penalty" did not make deportation a punishment for either the underlying criminal conviction or for any other reason, it recognized no need for the type of proportionality analysis cited by the petitioner.

Second Circuit:
Morales v. Lynch, 792 F.3d 256 (2d Cir. 2015): The Second Circuit granted the petition for review challenging on constitutional grounds the residence requirement for deriving citizenship through an unwed citizen father under former section 309(a) of the 1952 Immigration and Nationality Act, 8 U.S.C. § 1409(a) (1952). Under that statute, a child could derive citizenship through his/her unwed citizen father only if the latter has resided in the United States or an outlying territory for at least 10 years prior to the child's birth, with 5 of those years occurring after the father's 14th birthday. By comparison, an unwed citizen mother was only required to have resided in the United States for 1 year occurring at any time prior to the child's birth in order to transmit citizenship. Since the petitioner's father satisfied the residence requirement in effect at the time for unwed mothers but fell short of the more stringent requirement placed on unwed fathers, the petitioner argued that this gender-based distinction violated the Equal Protection Clause of the Fifth Amendment. The court found the Supreme Court's decision in *Fiallo v. Bell*, 430 U.S. 787 (1977) (allowing rational basis scrutiny to statutes applying differing standards to unwed mothers and fathers because of Congress' power over the admission of aliens), to be inapplicable to the petitioner, whose claim of citizenship from birth did not involve the admission of foreigners. The court therefore applied "intermediate, 'heightened' scrutiny" to the statute's unequal treatment based on gender. Under this test, the differing treatment based on gender could only be upheld by establishing "that it is substantially related to an actual and important governmental objective." The court was not persuaded that the gender-based distinction was substantially related to the two objectives presented by the Government: ensuring a sufficient connection between citizen children and the United States and preventing statelessness. In granting the petition, the court noted that it was not (as the Government contended) conferring citizenship, which the court lacks the authority to do, but instead confirming the petitioner's preexisting citizenship status by "[c]onforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection."

Third Circuit:
Paek v. Att'y Gen. of U.S., 793 F.3d 330 (3d Cir. 2015): The Third Circuit denied the petition for review challenging the Board's determination that the petitioner was ineligible for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The petitioner was admitted to the United States in 1991 as a conditional lawful permanent resident pursuant to section 216(a)(1) of the Act, 8 U.S.C. § 1186a(a)(1), based on his mother's marriage to a United States citizen. The conditional basis of the petitioner's permanent resident status was removed in 2000. The petitioner was subsequently convicted of an aggravated felony. In removal proceedings, he sought the relief of adjustment of status (based on his own marriage to a citizen), and a waiver under section 212(h) of the Act. The Immigration Judge found the petitioner ineligible for the waiver based on his being convicted of

an aggravated felony following his date of admission "as an alien lawfully admitted for permanent residence." The petitioner argued that his admission under section 216(a) constituted an admission in a status other than "an alien lawfully admitted for permanent residence." Applying the first step of its *Chevron* analysis, the court found the statutory language of sections 216 and 216A of the Act to be clear and unambiguous in referring to status granted under those sections as lawful admission for permanent residence. The court disagreed with the petitioner's argument that such interpretation would reduce to surplusage section 216(e) of the Act, which specifies that an alien admitted in conditional resident status "shall be considered as an alien lawfully admitted for permanent residence" in calculating eligibility for naturalization. The court noted that section 216(e) was intended simply to clarify that a conditional resident does not need to wait for the removal of the condition to begin accruing residence for naturalization purposes. The court found the petitioner's reliance on legislative history unavailing in light of the clarity of the statutory language itself. Having found it necessary to reach only the first step of its *Chevron* analysis, the court did not need to look to the reasonableness of the Board's interpretation. However, the court noted in dicta that the Board's holding in this case departed from its determination in two unpublished decisions that the aggravated felony bar did not apply to conditional residents.

Seventh Circuit:
Giri v. Lynch, 793 F.3d 797 (7th Cir. 2015): The Seventh Circuit denied the petition for review of the Board's decision affirming the denial of a continuance. Despite an order issued approximately 2 years earlier advising him of applicable deadlines, the petitioner had not timely completed fingerprinting or submitted supporting documents for an application for relief. The petitioner then sought a continuance at his merits hearing. The court concluded that it was neither a violation of due process nor an abuse of discretion for the Immigration Judge to deny a further continuance under the circumstances of the case.

Eighth Circuit:
Nanic v. Lynch, 793 F.3d 945 (8th Cir. 2015): The Eighth Circuit denied the petition for review challenging the denial of asylum and withholding of removal in the case of a petitioner from Bosnia. The court concluded that substantial evidence supported the determination that minor beatings and a brief detention did not rise to the level of past persecution. Substantial evidence also supported the determination that the petitioner did not have a well-founded fear of persecution in the future where members of the petitioner's family resided unharmed in Bosnia and the petitioner had visited the country several times since the end of the civil war.

Ninth Circuit:
Lopez-Valencia v. Lynch, No. 12-73210, 2015 WL 4879874 (9th Cir. Aug. 17, 2015): The Ninth Circuit granted a petition for review from the Board's determination that a theft offense under the California Penal Code constituted an aggravated felony theft offense under section 101(a)(43)(G) of the Act. The court reexamined the issue in light of the Supreme Court's decision in *Descamps v. United States*, 133 S.Ct. 2276 (2013), and the Ninth Circuit's subsequent decision in *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014).

Applying the first step of *Descamps*'s three-step test, the court noted that the parties agreed that the California theft statute is broader than its Federal generic equivalent. Specifically, the court noted that the California statute covered several types of theft (theft of labor, false credit reporting, and theft by false pretenses) that do not fall within the Federal generic definition of theft. Accordingly, the State statute was found to be overly broad, and thus a conviction thereunder did not necessarily qualify as an aggravated felony under the categorical approach.

Pursuant to *Descamps*, the court proceeded to the next step to determine if the statute of conviction is divisible. The court explained that the Supreme Court held in *Descamps* that in order for a statute to be divisible, it must contain "multiple, alternative elements," in effect creating several different crimes (as opposed to one crime that can be committed through several different means). To further illustrate, the court employed a hypothetical statute in which the crime could be committed using guns or axes. If the State statute requires all 12 jurors to either agree that a gun was used or that an axe was used, the statute contains alternate elements and is therefore divisible. However, if a jury can convict where some jurors find that an axe was used and others find that a gun was used, this constitutes different means of committing the same crime, and the statute is not divisible.

The court applied the above approach (which it had further clarified in *Rendon*) to the California theft statute. It found that the statute is indivisible because "the

jury need not unanimously agree on how the defendant committed theft." In other words, the court found that a conviction can occur under California law where six jurors believe that the defendant committed larceny (which the court noted is a form of theft falling within the Federal generic definition of the crime) and six jurors believe that the defendant committed theft of labor (which does not fall within the Federal definition). The court thus found that the analysis ended at step two because the modified categorical approach is only an appropriate third step under the *Descamps* analysis where a statute is divisible.

The court was not persuaded by the Government's argument for employing what the court termed a "fourth step," involving looking to the charging documents "to determine whether jury disagreement was likely in any given case." The record was remanded for the Board to consider the Immigration Judge's alternative finding of removability based on the petitioner's conviction for another crime.

BIA PRECEDENT DECISIONS

In *Matter of P. Singh*, 26 I&N Dec. 623 (BIA 2015), the Board held that the suspension of an attorney was proper. The attorney, who was accused of permitting his legal assistant to impersonate him in telephonic appearances before Immigration Judges on at least eight occasions, was suspended from practice before the Immigration Courts, the Board, and the Department of Homeland Security in person for 16 months and prohibited from appearing telephonically in the Immigration Courts for 7 years. The attorney was found to have violated 8 C.F.R. §§ 1003.102(m) (assisting and facilitating the unlawful practice of law), 1003.102(n) (engaging in conduct prejudicial to the administration of justice), and 1003.102(o) (failing to provide a client with competent representation). The Board agreed that the public interest was served by the suspension and that the discipline was reasonable and fair.

In *Matter of R. Huang*, 26 I&N Dec. 627 (BIA 2015), the Board held that a beneficiary of a visa petition who was adopted pursuant to a State court order entered when the beneficiary was more than 16 years old, but with an effective date prior to his or her 16th birthday, may qualify as an adopted child as defined in section 101(b)(1)(E)(i) of the Act, 8 U.S.C. § 1101(b)(1)(E)(i), if: (a) the adoption petition was filed before the beneficiary's 16th birthday, and (b) the State approving the adoption expressly permits an adoption decree to be dated retroactively. Revisiting *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), and *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982), the Board withdrew from those decisions to the extent that they narrowly interpreted section 101(b)(1)(E) to mean that a valid visa petition must be approved before the beneficiary turns 16. The appeal was sustained in part and the record was remanded to the District Director.

In *Matter of Ordaz*, 26 I&N Dec. 637 (BIA 2015), the Board held that the "stop-time rule" described in section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1), is not triggered by a notice to appear served on an alien if removal proceedings were never initiated pursuant to that charging document. Rejecting the Department of Homeland Security's argument that the stop-time rule is operative upon the service of "any" notice to appear, the Board reasoned that applying the rule when a notice to appear does not result in the commencement of removal proceedings would render an alien ineligible for relief even if the notice was invalid or insufficient to support a removal charge. Further, if removal proceedings never occurred, the alien would be deprived of the opportunity to contest, or have the DHS prove, the asserted allegations and charges. Moreover, such an interpretation would mean that an alien who had prevailed in challenging a notice to appear would nonetheless suffer the effects of the stop-time rule in any later proceedings.

Reviewing its prior jurisprudence on the issue of when a notice to appear triggers the stop-time rule, the Board concluded that interpreting section 240A(d)(1) as terminating an alien's period of continuous residence or physical presence as of the date a notice to appear is served, even if the notice does not specify the time and place of the hearing, is consistent with existing case law as long as removal proceedings are commenced on the basis of the notice. In this case, since the first notice to appear served on the petitioner did not lead to the initiation of removal proceedings, the Board concluded that his period of continuous physical presence for purposes of a section 240A(b)(1) application for cancellation of removal was not interrupted at that point. The appeal was sustained in part and the record was remanded.

In *Matter of D-C-M-P-*, 26 I&N Dec. 644 (BIA 2015), the Board held that neither an Immigration Judge nor the Board has jurisdiction to determine whether the DHS improvidently initiated asylum-only proceedings pursuant to a referral under the Visa Waiver Program. The Board also decided that an applicant for asylum cannot be deemed to have abandoned an application for failure to comply with the biometrics requirement if he or she did not receive proper notice of the requirements. In that regard, the Board instructed Immigration Judges to take the following steps on the record: (1) ensure that the DHS has advised the applicant of the need to provide biometrics and other biographical information and has furnished the appropriate instructions; (2) inform the applicant of the deadline for complying with those requirements, and (3) inform the applicant of the consequences for failure to comply. The Board emphasized that the imposed "deadline" related to the date that the applicant submitted the biometrics information to the DHS, rather than the date that the DHS completed its investigations, a process over which the applicant had no control. The appeal was dismissed as to the applicant's placement in asylum-only proceedings, but sustained as to the determination that he had abandoned his application for relief.

REGULATORY UPDATE

80 Fed. Reg. 43,338 (July 22, 2015)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Parts 103 and 212
[CIS No. 2557–14; DHS Docket No. USCIS–2012–0003]
RIN 1615–AC03

Expansion of Provisional Unlawful Presence Waivers of Inadmissibility

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

ACTION: Proposed rule.

SUMMARY: The Department of Homeland Security (DHS) proposes to expand eligibility for provisional waivers of certain grounds of inadmissibility based on the accrual of unlawful presence to all aliens who are statutorily eligible for a waiver of such grounds, are seeking such a waiver in connection with an immigrant visa application, and meet other conditions. The provisional waiver process currently allows certain aliens who are present in the United States to request from U.S. Citizenship and Immigration Services (USCIS) a provisional waiver of certain unlawful presence grounds of inadmissibility prior to departing from the United States for consular processing of their immigrant visas—rather than applying for a waiver abroad after the immigrant visa interview using the Form I–601, Waiver of Grounds of Inadmissibility (hereinafter "Form I–601 waiver process"). DHS proposes to expand its current provisional waiver process in two principal ways. First, DHS would eliminate current limitations on the provisional waiver process that restrict eligibility to certain immediate relatives of U.S. citizens. Under this proposed rule, the provisional waiver process would be made available to all aliens who are statutorily eligible for waivers of inadmissibility based on unlawful presence and meet certain other conditions. Second, in relation to the statutory requirement that the waiver applicant demonstrate that denial of the waiver would result in "extreme hardship" to certain family members, DHS proposes to expand the provisional waiver process by eliminating the current restriction that limits extreme hardship determinations only to aliens who can establish extreme hardship to U.S. citizen spouses or parents. Under this proposed rule, an applicant for a provisional waiver would be permitted to establish the eligibility requirement of showing extreme hardship to any qualifying relative (namely, U.S. citizen or lawful permanent resident spouses or parents). DHS is proposing to expand the provisional waiver process in the interests of encouraging eligible aliens to complete the visa process abroad, promoting family unity, and improving administrative efficiency.
DATES: Submit written comments on or before September 21, 2015. Comments on the information collection revisions in this rule, as described in the Paperwork Reduction Act section, will also be accepted until September 21, 2015.

Fraud or Deceit Offenses *continued*

Third Circuit – *Solimene v. Att'y Gen. of U.S*, 607 F. App'x 150 (3d Cir. 2015). The petitioner pled guilty to charges of embezzlement and conspiracy to commit money laundering and was fined $250,000 and $300,000 for these offenses. The petitioner was also issued a forfeiture order in which he agreed to forfeit "$7 million 'as property which constitutes or is derived from proceeds traceable to a violation of 18 U.S.C. § 1956.'" *Id.* at 151. The Immigration Judge found that

the petitioner's conviction was for an aggravated felony under section 101(a)(43)(D) for money laundering in which the amount of funds laundered exceeded $10,000. The Board affirmed, citing to the "circumstance-specific approach" in *Nijhawan*.

The court found section 101(a)(43)(D) to be no different from section 101(a)(43)(M) in determining whether the crime involved a $10,000 loss to the victim. The court explained that while the forfeiture order does not state $7 million to be the exact amount laundered, the phrase "traceable to" indicated "*some* nexus to the property 'involved in' the money laundering offense." *Id.* at 153 (quoting *United States v. Voigt*, 89 F.3d 1050, 1087 (3d Cir. 1996)). Finding that the petitioner had been convicted of an aggravated felony, the court denied the petition for review.

Singh v. Att'y Gen. of the U.S., 677 F.3d 503 (3d Cir. 2012). The petitioner pled guilty to a Federal charge of perjury in a bankruptcy proceeding. The Government argued that a restitution order of $54,000 was proof that the requisite actual loss occurred. The Immigration Judge found that the petitioner had committed an aggravated felony under section 101(a)(43)(M)(i) of the Act. The Board affirmed, finding that the restitution order provided clear and convincing evidence that the loss to the victim exceeded $10,000.

The court cited to *Nijhawan*, finding that even if the restitution order specified an actual loss amount, sufficient conflicting evidence justified looking past the restitution order. *See id.* at 515. Here, the sentencing court had issued a restitution order based on the agreement of parties, and the law governing restitution issued pursuant to a party agreement states that such orders are not limited to actual losses from the offense of conviction. *See id.* at 513–14. Although the petitioner subjectively believed that his criminal act would enable him to obtain $54,000, the amount was in the custody of a party beyond the petitioner's control. Therefore, the facts underlying the conviction showed that it was factually impossible for the victim to suffer any loss. Because the offense at no point resulted in any actual loss to any victim for any length of time, a factual inquiry of the circumstances showed the that loss amount did not meet the $10,000 threshold under section 101(a)(43)(M)(i). *See id.* at 517. Accordingly, the court vacated the removal order.

Fifth Circuit – *United States v. Mendoza*, 783 F.3d 278 (5th Cir. 2015) (criminal sentencing case). The defendant was convicted of conspiracy to launder monetary instruments. The district court found that the defendant had been convicted of an aggravated felony under section 101(a)(43)(D) for money laundering. On appeal, the defendant argued that the district court had erroneously relied on a PSR to determine whether his money laundering conviction involved an amount in excess of $10,000.

The court rejected the defendant's argument and applied the "circumstance-specific approach" of *Nijhawan*, explaining that section 101(a)(43)(M) had an identical $10,000 threshold requirement. The court found that the $10,000 threshold is a question of specific circumstances and that the PSR was sufficient to support the district court's determination regarding the amount of loss in the defendant's money laundering conviction.

Sixth Circuit – *Kellermann v. Holder*, 592 F.3d 700 (6th Cir. 2010). The petitioner was convicted of Federal charges of making false statements to a Federal agency and conspiracy to defraud the United States. The petitioner argued that his conviction was not for an aggravated felony because the amount of loss was not an element of the crime, and a jury therefore did not make a finding on the amount of loss. The court approved the Board's aggravated felony determination, explaining that the $10,000 threshold under section 101(a)(43)(M)(i) depends on the particular circumstances of the offense and need not be an element of the fraud or deceit crime.

Seventh Circuit – *Clarke v. United States*, 703 F.3d 1098 (7th Cir. 2013) (criminal case). The petitioner pled guilty to a Federal charge of wire fraud. The single count in the indictment charged her with a fraudulent act involving a loss to the victim of $8,000, and her sentencing document ordered restitution jointly and severally with her codefendant in the amount of $262,000. The petitioner moved to vacate her conviction on the ground that she had not been advised that she could be removed if she were convicted. The district court denied the petitioner's motion.

The court discussed the underlying conviction and found that the petitioner's plea to a single charge involving an $8,000 loss was "not inconsistent with her having committed an offense that resulted in a loss of more than $10,000." *Id.* at 1099. The court referenced

the indictment, finding that the loss to the victim was much greater than $10,000 because it was "an overarching fraudulent scheme that encompassed the individual counts in the indictment." *Id.* (quoting *Knutsen v. Gonzales*, 429 F.3d 733, 737 (7th Cir. 2005)).

Eighth Circuit – *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009). The petitioner pled guilty to a Federal charge of unauthorized access to a computer. He was ordered to pay $96,099.38 and $47,015 in restitution to two parties, and the latter amount included $29,800 that the party spent to assess the damage caused by his unauthorized access to its computer network. The petitioner was ordered removed by the Immigration Judge as an alien convicted of an aggravated felony under section 101(a)(43)(M)(i) because the total losses to the victims, including the amounts specified for restitution, exceeded $10,000.

The Board remanded for further proceedings, stating that section 101(a)(43)(M)(i) required evidence of a connection between the loss suffered by the aggrieved party and the specific conduct underlying the conviction. The Board found that, rather than relying on the charge to which the petitioner pled guilty, the Immigration Judge mistakenly relied on a restitution order, which, by agreement, included losses that were not tied to the petitioner's criminal actions.

On remand, the Immigration Judge again found that the total loss to a victim exceeded $10,000 and ordered the petitioner's removal. The Immigration Judge found that the investigative costs in the amount of $29,800 were properly considered a loss to the victim. The Board affirmed this finding, reasoning that because the investigative costs alone were more than $10,000 and were incurred because of the petitioner's unauthorized computer use, his conviction was for an aggravated felony under section 101(a)(43)(M)(i).

The petitioner argued to the Eighth Circuit that the investigative costs incurred were related, at least in part, to dismissed counts, rather than the count to which he pled guilty. The court found that the petitioner's argument contradicted his concession during sentencing that the investigative costs were directly related to the specific count of his conviction. Thus, the court found irrelevant the fact that the plea agreement, the PSR, and the restitution order included additional losses that were not tethered to the underlying conviction. The court concluded that the petitioner had committed an aggravated felony under section 101(a)(43)(M)(i).

Ninth Circuit – *Fuentes v. Lynch*, 788 F.3d 1177 (9th Cir. 2015). The petitioner was convicted of conspiracy to commit money laundering. Count 1 of the petitioner's indictment incorporated by reference the remaining substantive counts of money laundering, including counts 17 through 21, which alleged a total wire transfer amount of $25,000. The PSR cited the plea agreement in which the parties agreed that the defendant laundered more than $70,000. The Immigration Judge found that the petitioner had been convicted of an aggravated felony because he had conspired to launder money totaling more than $10,000. The Board affirmed, relying on the indictment, the PSR, and the judgment indicating that the petitioner pled guilty to count one.

Citing to *Nijhawan,* the court found that the Board erred in relying on the indictment and judgment as support for a finding that the petitioner conspired to launder more than $10,000. Although counts 17 through 21 were incorporated by reference as overt acts into count 1, the court found that the overt acts in counts 17 through 21 were "not admitted by a plea" because such overt acts need not have been proven for a conviction. *Id.* at 1182 (quoting *United States v. Cazares*, 121 F.3d 1241, 1247 (9th Cir. 1997)). Nonetheless, the court concluded that this error was harmless because the Board permissibly relied on the PSR to find that the petitioner conspired to launder more than $10,000.

Tenth Circuit – *Hamilton v. Holder*, 584 F.3d 1284 (10th Cir. 2009). The petitioner was convicted of a Federal charge of conspiracy to commit mail fraud. The petitioner and his coconspirator had been involved in a scheme to burn the coconspirator's automobile to collect insurance proceeds. The petitioner argued that his offense did not constitute an aggravated felony under section 101(a)(43)(M)(i) because the restitution order contained in the judgment of conviction stated that the loss to the victim was $9,900. *Id.* at 1285. The Immigration Judge considered information in the PSR and found that the reported insurance claim for the vehicle was $22,240. The Immigration Judge accordingly concluded that the petitioner had been convicted of an aggravated felony under section 101(a)(43)(M)(i). The Board affirmed the Immigration Judge's decision, noting that restitution orders are not necessarily determinative of loss amounts.

Before the Tenth Circuit, the petitioner argued that the Board was limited in the types of evidence it could consider. However, citing to *Nijhawan* for the proposition that the petitioner "could have contested the amount of loss by objecting to the contents of his PSR during his criminal sentencing," the court found that the Immigration Judge's consideration of the petitioner's PSR was proper for purposes of calculating the loss amount to the victim under section 101(a)(43)(M)(i). *Id.* at 1287–88.

Conclusion

Since the Supreme Court's holding in *Nijhawan,* circuit court cases addressing the $10,000 threshold under section 101(a)(43)(M)(i) of the Act and similar statutes have considered a variety of documents to establish the loss amount to the victim(s). The reasoning used in the decisions discussed in this article is often grounded in the principle that an alien would have had the opportunity to contest certain factual findings during criminal proceedings, and therefore information contained in documents such as the PSR may be fair game in immigration proceedings. As courts continue to consider different documents that can be used to establish whether the $10,000 threshold has been met under section 101(a)(43)(M)(i) of the Act, case law continues to develop and so does our understanding of the evidentiary standard that is the circumstance-specific approach.

Christine Han is an Attorney Advisor at the San Juan Immigration Court.

1. An earlier article provided a survey of circuit court decisions prior to *Nijhawan*. *See* Ellen Liebowitz, *Calculating "Loss to the Victim or Victims" under Section 101(a)(43)(M)(i) of the Immigration and Nationality Act: Survey of Circuit Court Decisions*, Immigration Law Advisor, Vol. 1, No. 4 (Apr. 2007).