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A Split Among the Circuits: Taking Opposing Sides on *Silva-Trevino*

by Bria DeSalvo

The Attorney General's goal in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), was to standardize the patchwork of approaches to the crime involving moral turpitude ("CIMT") analysis across the nation. But early this year the United States Court of Appeals for the Fourth Circuit joined the Third and Eleventh Circuits in abandoning critical parts of the decision. In *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012), the Fourth Circuit rejected the use of *Silva-Trevino*'s third step in the CIMT analysis, which allows consideration of evidence outside the record of conviction. Practically, the circuits' elimination of the third step means that adjudicators of cases arising out of the Third, Fourth, and Eleventh Circuits can no longer look to police reports or other documents outside the record of conviction to determine whether an alien's conviction is for a CIMT.

In contrast, the Eighth Circuit, after seeming to signal that it would also retreat from *Silva-Trevino*, held in *Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012), that the framework was reasonable and deserving of deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the happenstance of geography that the Attorney General desired to minimize continues its reign unchecked with potentially severe consequences for respondents applying for relief or contesting removability. This article will examine which of the holdings in *Silva-Trevino* fell under the Fourth Circuit's knife, highlight those that survived, and consider how *Prudencio* and *Bobadilla* compare to other circuit court decisions considering *Silva-Trevino*.

Silva-Trevino

In a push for uniformity, the Attorney General offered a standard definition of a CIMT—the crime must involve both reprehensible conduct and some form of scienter, either specific intent, deliberateness, willfulness,

or recklessness. *See Silva-Trevino*, 24 I&N Dec. at 689 n.1. In addition to the definition, the opinion intended to establish a uniform procedure for adjudicators to follow in making the CIMT determination, thereby ensuring fairness and accuracy, while avoiding the perception that removability or eligibility for relief is determined by the happenstance of geography. *See id.* at 694-95.

The Attorney General found two sources of ambiguity in section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), which allowed the agency to exercise its duty to provide an authoritative interpretation of the statute. Section 212(a)(2)(A)(i)(I) provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible."

First, the Attorney General noted that the statute is silent as to which method should be employed to make the CIMT determination. The use of the term "convicted" seemingly points to a categorical approach, while the words "committing" and "acts" invite a more circumstance-specific inquiry. Second, the term "involving" seems to allow for inquiry into the facts of a crime.

The Attorney General's framework begins with the categorical approach, borrowed from Supreme Court cases dealing with sentencing: *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). The first step allows the adjudicator to examine only the statute of conviction. Before *Silva-Trevino*, adjudicators selected the appropriate standard under the applicable circuit law to determine whether, under the statute, the crime was categorically a CIMT. The various standards in use in different circuits included the "least culpable conduct," the "minimum criminal conduct necessary to sustain a conviction," and the "general nature" of the crime. *Id.* at 693-94 (citing *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006); *Partyka v. Att'y Gen. of U.S.*, 417 F.3d 408, 411 (3d. Cir. 2005); *Marciano v. INS*, 450 F.2d 1022, 1025 (8th Cir. 1971)). The Board of Immigration Appeals also had its own test: whether moral turpitude "necessarily inheres" in a conviction under a given statute. *Id.* In an attempt to unify the many standards, the Attorney General held that adjudicators should consider whether there is a "realistic probability, not a theoretical possibility" that the statute could reach nonturpitudinous conduct. *Id.* at 690 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (internal quotation marks omitted)).

Assuming that the statute has a realistic probability of encompassing nonturpitudinous conduct, the adjudicator then proceeds to step two, the modified categorical approach, in which he or she examines the record of conviction to determine whether the offense was a CIMT. *Id.* The formal record of conviction includes such documents as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.*

Finally, if the record of conviction is inconclusive, *Silva-Trevino* permits adjudicators to consider evidence beyond the formal record of conviction "to the extent they deem it necessary and appropriate." *Id.* This third step allows adjudicators to consider documents such as police reports to determine whether the conduct and circumstances indicate that the crime involved moral turpitude, rather than limiting the analysis to the formal record of conviction.

The Fourth Circuit: The Third Circuit To Reject the Third Step

In *Prudencio*, the Fourth Circuit rejected the third step of the *Silva-Trevino* analysis, thus eliminating the practice of looking to documents beyond the record of conviction to make the CIMT determination. 669 F.3d at 484. The petitioner, a lawful permanent resident, was charged under section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien convicted of a CIMT within 5 years of admission. *Id.* at 475. The petitioner was initially charged with having carnal knowledge of a 13-year-old child, without the use of force, in violation of section 18.2-63 of the Virginia Code. *Id.* at 476. However, he pled guilty to contributing to the delinquency of a minor under section 18.2-371 of the Virginia Code, which has two subparts. The first provides that any person over 18 who "willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected . . . shall be guilty of a Class 1 misdemeanor." The second subsection prohibits "consensual sexual intercourse with a child 15 or older."

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Under step one of the *Silva-Trevino* framework, the Immigration Judge determined that the conviction was not categorically for a CIMT because the first subsection could encompass conduct that was not turpitudinous. The Immigration Judge then applied the modified categorical approach, but the record of conviction did not resolve the question. Finally, the Immigration Judge moved to the third step, considering a police report indicating that the petitioner had sexual relations with a 13-year-old girl when he was over 18. The dissent further notes that the victim was infected with a sexually transmitted disease as a result of the petitioner's actions. The Immigration Judge concluded that the conviction was for a CIMT, sustained the charge of removability, and entered an order of removal. *Prudencio*, 669 F.3d at 477.

The Fourth Circuit determined that section 212(a)(2)(A)(i)(I) of the Act was not ambiguous or silent and refused to accord *Chevron* deference to the Attorney General's interpretation of the statute in *Silva-Trevino*. First, the court found that any ambiguity introduced by the terms "committing" or "acts" did not make the part of the statute referring to convictions ambiguous. *Id.* at 481. In contrast to the Attorney General's focus on the ambiguity of the statute as a whole, the Fourth Circuit considered each phrase separately, finding no ambiguity in the phrase "convicted of" because "conviction" has the same meaning in the immigration context as it does in the criminal context. Additionally, the court found that "involving" was not ambiguous when viewed as part of the term of art "crime involving moral turpitude," because that term has been in use for over 100 years and even predated the Act. *Id.*

The Fourth Circuit rejected the Government's argument that the Supreme Court's reasoning in *Nijhawan v. Holder*, 557 U.S. 29 (2009), supported the use of the third step in the CIMT analysis. In *Nijhawan*, the Supreme Court held that an adjudicator could look beyond the record of conviction to determine whether the alien was convicted of an offense involving fraud or deceit in which the loss to the victim exceeds $10,000. The Government argued that *Nijhawan* allows for a circumstance-specific inquiry when considering statutory criteria that are not typically elements of criminal offenses. However, the Fourth Circuit interpreted *Nijhawan* more narrowly, reasoning that the specific loss amount needs no interpretation and invites a circumstance-specific inquiry on its face, while CIMT is a term of art with a long history of judicial interpretation. *Prudencio*, 669 F.3d at 483. Whether a loss exceeds $10,000 is one "threshold fact," while the third step of the Attorney General's framework involves consideration of all the underlying circumstances of the offense. *Id.*

The Fourth Circuit buttressed the legal reasoning with policy and practical considerations that undermine the third step. For example, the third step allows Immigration Judges to rely on "documents of questionable veracity" as proof of conduct. *Id.* at 483. These documents contain unsworn witness statements and initial impressions from early in the investigation, and they cannot take into account later events such as witness recantations, amendments, or corrections. *Id.* at 483-84. The Fourth Circuit cautioned that considering only facts alleged, not facts proved, has inherent risks, even in the context of civil, rather than criminal, proceedings. *Id.* at 483. Finally, prosecutors have the ability to develop a complete record of conviction that will resolve the CIMT question at the second step if they want to ensure a certain outcome in the immigration context. *Id.*

The Fourth Circuit then applied the holding to the petitioner, finding that neither the statute under which he was convicted nor the record of conviction established that his conviction was for a CIMT. The record of conviction contained only one document, a felony arrest warrant listing the original charge under the carnal knowledge statute. *Id.* at 485. However, the court found this warrant to be irrelevant because the petitioner pled guilty to a different charge. The court therefore vacated the order of removal against the petitioner, finding that the Government had not established that his conviction was for a CIMT. *Id.* at 486.

Most significantly, the Fourth Circuit did not disturb the "realistic probability" standard, which serves as the gateway to the second step. Additionally, the Fourth Circuit left intact the definition of a CIMT from *Silva-Trevino*. It therefore remains necessary under Fourth Circuit law to show both reprehensible conduct and some degree of scienter to establish that an offense is a CIMT.

How Does the Fourth Circuit Compare to Other Circuits That Have Retreated From *Silva-Trevino*?

The Third Circuit: The Most Significant Blow

In *Jean-Louis v. Attorney General of the United States*, 582 F.3d 462 (3d Cir. 2009), the Third Circuit

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dealt the most significant blow to *Silva-Trevino* because it eliminated the third step and rejected the "realistic probability standard." The petitioner in *Jean-Louis* was convicted under a statute that criminalized the assault of a child under 12 but did not specify a mental state. *Id.* at 464-65.

The Third Circuit selected the "least culpable conduct" standard for the categorical approach, holding that "the possibility of conviction for nonturpitudinous conduct, however remote, is sufficient to avoid removal." *Id.* at 471. The court then found that the child assault statute could reach conduct involving accidental harm to a victim, even when the offender did not know the victim was under 12. Therefore, the categorical inquiry did not resolve the CIMT question. In rejecting the "realistic probability" test, the Third Circuit noted the practical challenge that respondents face in proving that someone has previously been convicted of nonturpitudinous conduct under a particular statute. *Id.* at 482.

The Third Circuit also rejected the third step, referring to it as a novel approach and indicating that the court would give it no deference. *Id.* at 470. The court found that the CIMT provisions spoke with the requisite clarity, noting that the term "conviction" has been defined by Congress in section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48). *Id.* at 473-75. The court distinguished the phrase "convicted of" from the language dealing with admissions. Finally, it determined that the term "involving" was not ambiguous in the context of a CIMT.

The Third Circuit cited policy reasons for eliminating the third step, observing that "*Silva-Trevino* sets no limitations on the kinds of evidence adjudicators may consider" and noting that simplicity and efficiency are just as important in immigration proceedings as in sentencing. *Id.* at 472, 478. *Jean-Louis* dealt the most significant blow to *Silva-Trevino*, concluding that the methodology adopted by the Attorney General "is contrary to Congress's intent, and would overturn nearly a century of jurisprudence." *Id.* at 482.

The Eleventh Circuit: A Middle Ground

The reasoning in *Prudencio* most closely resembles the Eleventh Circuit's holding in *Fajardo v. U.S. Attorney General*, 659 F.3d 1303 (11th Cir. 2011), which strikes a middle ground between the Third and the Seventh Circuit's holdings on either end of the spectrum. In *Fajardo*, the Eleventh Circuit found that section 212(a)(2)(A)(i)(I) of the Act was not ambiguous, so the Attorney General's construction was not entitled to *Chevron* deference. *Id.* at 1310. However, the Eleventh Circuit, like the Fourth in *Prudencio*, chose not to disturb the "realistic probability" standard for the categorical approach.

In *Fajardo*, the petitioner was convicted of false imprisonment, misdemeanor assault, and misdemeanor battery, all stemming from one altercation. *Id.* at 1305. Although the petitioner's false imprisonment offense was not categorically a CIMT, the Immigration Judge considered the petitioner's other two crimes under step three to find that false imprisonment was a CIMT.

The Eleventh Circuit rejected the use of the third step and distinguished *Nijhawan* in the process. However the court did not refer to the many policy arguments against the third step found in other opinions. Instead, it simply found that the statute was clear. Therefore the court concluded that it did not owe *Chevron* deference to the Attorney General's construction.

The Eighth Circuit: From Retreat to Chevron *Deference*

The Eighth Circuit initially seemed to signal its rejection of the third step in one sentence in *Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010), a case somewhat unlike the cases of its sister circuits in that the petitioner argued that the Board must use the third step. The petitioner argued that documents outside the record of conviction established that his offense, misuse of a social security number under 42 U.S.C. § 408(a)(7)(B), was not a CIMT. *Id.* at 901. The record of conviction indicated that the petitioner, with intent to deceive, used a social security number not assigned to him to get an airport identification badge. The Board upheld the Immigration Judge's finding that this was a CIMT, concluding the analysis at step two. However, the petitioner argued that the Board must apply *Silva-Trevino*'s third step to reach evidence showing that he posed no security risk and establishing that his offense was not a CIMT. The court rejected his argument that the Board must reach the third step, cited *Jean-Louis*, and stated, "We are bound by our circuit's precedent, and to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law." *Id.* at 902.

However, in May the Eighth Circuit indicated that this statement in *Guardado-Garcia* was "wrong as a

matter of federal administrative law" and not necessary to the decision. *Bobadilla v. Holder*, 679 F.3d 1052, 1057 (8th Cir. 2012). The court further concluded that the *Silva-Trevino* "methodology is a reasonable interpretation of the statute," which should be accorded deference. *Id.* The petitioner in *Bobadilla* was convicted of giving a false name to a peace officer under section 609.506, Subdivision 1 of the Minnesota Statutes, which required an "intent to obstruct justice." The Immigration Judge held that the offense was categorically a CIMT and the Board affirmed this finding. The Eighth Circuit disagreed, finding the intent lacking and noting that not every intentional act making a government official's task more difficult is inherently base, vile, or depraved. Thus, holding that the term CIMT was ambiguous "[w]ithout question," the Eighth Circuit affirmed the use of both the third step and the realistic probability standard. *Id.* at 1054.

The Seventh Circuit: A Springboard for Silva-Trevino

In *Silva-Trevino*, the Attorney General relied heavily on the Seventh Circuit's reasoning in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), although he ultimately reached a different result. In *Ali*, the Seventh Circuit gave adjudicators free reign to consider all relevant evidence, rejecting the idea that the adjudicator must first attempt to resolve the CIMT question under step one or two. In effect, although the Attorney General's "necessary and appropriate" language postdates *Ali*, the Seventh Circuit determined that it is always appropriate to consider evidence beyond the record of conviction.

The petitioner in *Ali* was seeking a waiver pursuant to section 212(h) of the Act, which would waive his aggravated felony conviction so that he could adjust status. *Id.* at 739. This waiver would not be available to him if his aggravated felony was also a CIMT. The petitioner was convicted of conspiracy "to commit any offense against the United States, or to defraud the United States" under 18 U.S.C. § 371. *Id.* The Board looked beyond the record of conviction to a presentence report, which described the petitioner's participation in a conspiracy to sell firearms without a license. The Board reasoned that this offense was a type of fraud, which has long been considered a CIMT. *Id.* at 740.

The Seventh Circuit found that section 212(a)(2)(A)(i)(I) of the Act supported the use of evidence beyond the record of conviction because moral turpitude is not an element of any crime. Therefore the CIMT determination was unlikely to be resolved by the record of conviction. *Id.* at 741-42. The court found that the justifications for the more limited approach of *Taylor* and *Shepard* do not apply in the immigration context. *Id.* at 741. *Shepard* was premised on Sixth Amendment protections that are not applicable outside of criminal proceedings. *Taylor* was meant to simplify sentencing so that judges would not have to spend time and resources on a retrial of a prior offense. However, the Seventh Circuit concluded that even if abandoning the categorical approach is more time or resource intensive, the Attorney General should decide how to use the time and resources of his agency. *Id.*

Practical Effects of the Elimination of the Third Step in the Third, Fourth, and Eleventh Circuits

One of the most significant changes brought about by the elimination of the third step under *Silva-Trevino* is that adjudicators can no longer rely on police reports when determining whether a conviction is for a CIMT. Warrants or other documents containing initial unproven charges are similarly out of bounds if an alien pled down to a reduced charge. The impact may be somewhat muted in the context of discretionary forms of relief, because adjudicators are not prohibited from considering information beyond the record of conviction in that context.

Another practical effect of the elimination of the third step is the increased responsibility that falls to criminal prosecutors who want to ensure certain immigration consequences. Developing a complete record of conviction takes on a much greater importance. Prosecutors will strive to include more facts related to the conduct of the defendant in the plea colloquy or written plea agreement, while defense attorneys will try for a clean or inconclusive record of conviction. The added significance of the language and level of detail in the record of conviction will certainly increase the value of the proffer language as a bargaining chip in criminal court. Alien defendants will likely accept more severe sentences in exchange for proffer language that does not settle the CIMT question.

Conclusion

The Seventh Circuit's decision in *Ali* and the Third Circuit's in *Jean-Louis* currently mark opposite ends of the

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CIRCUIT COURT DECISIONS FOR SEPTEMBER 2012

by John Guendelsberger

The United States courts of appeals issued 212 decisions in September 2012 in cases appealed from the Board. The courts affirmed the Board in 194 cases and reversed or remanded in 18, for an overall reversal rate of 8.5%, compared to last month's 6.7%. There were no reversals from the First, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

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

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	52	49	3	5.8
Third	16	13	3	18.8
Fourth	6	6	0	0.0
Fifth	14	12	2	14.3
Sixth	4	4	0	0.0
Seventh	0	0	0	0.0
Eighth	4	4	0	0.0
Ninth	102	92	10	9.8
Tenth	4	4	0	0.0
Eleventh	7	7	0	0.0
All	212	194	18	8.5

The 212 decisions included 89 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 44 direct appeals from denials of other forms of relief from removal or from findings of removal; and 79 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	89	79	10	11.2
Other Relief	44	39	5	11.4
Motions	79	76	3	3.8

The 10 reversals or remands in asylum cases involved credibility (2 cases); nexus (3 cases); past persecution (3 cases); well-founded fear (1 case); and the Convention Against Torture (1 case). The five 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, whether misprision of a felony was a crime involving moral turpitude, whether a continuance should have been afforded to obtain counsel, whether the circumstances of a search called for suppression of evidence, and whether a section 212(h) waiver was available to an alien who attained permanent resident status through adjustment. The three motions to reopen involved the departure bar (two cases) and changed country conditions.

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

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	790	666	124	15.7
First	37	33	4	10.8
Fifth	99	90	9	9.1
Eighth	34	31	3	8.8
Third	179	165	14	7.8
Eleventh	110	102	8	7.3
Tenth	28	26	2	7.1
Seventh	28	26	2	7.1
Sixth	79	74	5	6.3
Fourth	99	94	5	5.1
Second	667	636	31	4.6
All	2150	1943	207	9.6

Last year's reversal rate at this point (January through September 2011) was 13.1% with 2611 total decisions and 342 reversals.

The numbers by type of case on appeal for the first 9 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1044	940	104	10.0
Other Relief	400	332	68	17.0
Motions	706	671	35	5.0

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RECENT COURT OPINIONS

First Circuit:

Escobar v. Holder, No. 11-2086, 2012 WL 5193223 (1st Cir. Oct. 22, 2012): The First Circuit denied a petition for review of an Immigration Judge's denial of asylum from Guatemala, which the Board had affirmed. The petitioner claimed to fear persecution on account of both his political opinion and membership in a particular social group comprised of "Guatemalan nationals repatriated from the United States." The court reviewed the petitioner's credible testimony. It agreed with the Immigration Judge that the petitioner and his parents had suffered several times in the 1980s from the general conditions of civil war that existed at the time, but that the petitioner had not established that he or his family members were specifically singled out on any occasion on account of a protected ground. The court also agreed with the Immigration Judge that the petitioner had failed to establish an objective basis for his continued fear of the guerrillas in light of the peace accord that group entered into with the Guatemalan Government in 1996. Regarding the social group claim, the court noted that it had held in *Sicaju-Diaz v. Holder*, 663 F.3d 1 (1st Cir. 2011), that those fearing harm from criminals on account of their perceived wealth have not established a well-founded fear of persecution on account of their membership in a particular social group. The court was not persuaded by the petitioner's argument that the proposed group is distinguishable from that in *Sicaju-Diaz* on account of its inclusion of the immutable characteristic of repatriation from the U.S.

Campbell v. Holder, No. 11-2398, 2012 WL 5077154 (1st Cir. Oct. 19, 2012): The First Circuit reversed a decision of the Board upholding an Immigration Judge's order of removal and denial of cancellation of removal. The petitioner was convicted after entering a plea of nolo contendere to one count of risk of injury to a minor, a class C felony under section 53-21(a)(1) of the Connecticut General Statutes. Pursuant to a plea agreement, the petitioner was sentenced to 5 years' imprisonment, with the sentence fully suspended, and 5 years of probation. The petitioner was subsequently placed into removal proceedings and was charged as an alien convicted of child abuse, neglect, or abandonment under section 237(a)(2)(E) of the Act and as an alien convicted of an aggravated felony under sections 101(a)(43)(A) (sexual abuse of a minor) and (F) (crime of violence). The Immigration Judge sustained removability on all three charges and denied cancellation based on the aggravated felonies. The court found that the statutory language of the Connecticut law encompassed offenses that did not constitute sexual abuse, so it applied a modified categorical approach. Although the statutory language was divisible, the court held that each divisible part could encompass behavior other than sexual abuse, noting examples of acts other than sexual abuse that could endanger a child's "health" (allowing a child to play with a loaded gun) or "morals" (Fagin's indoctrination of Oliver Twist into a life of crime). Because the Board's decision was based solely on the Immigration Judge's finding that the petitioner had been convicted of a crime involving sexual abuse of a minor and had not addressed the rulings on the crime of violence and child abuse charges, the court remanded to the Board for consideration of those issues.

Seventh Circuit:

Cruz-Mayaho v. Holder, Nos. 10-1634, 11-2914, 11-3512; 2012 WL 4901108 (7th Cir. Oct. 17, 2012): The Seventh Circuit denied the consolidated petitions for review of the Board's decisions affirming the Immigration Judge's denial of the petitioner's application for cancellation of removal, as well as his subsequent motions to reopen and to reconsider. The petitioner had initially entered the U.S. without inspection in 1989 and was placed into removal proceedings in 2005. His application for cancellation of removal was denied by the Immigration Judge, and the Board affirmed without opinion in July 2008. The petitioner then filed a series of motions to reopen or to reconsider, which were denied by the Board as untimely, numerically barred, unsupported by evidence, or insufficient to establish eligibility for the requested relief. The court consolidated the petitions for review and found first that it lacks jurisdiction to review decisions on cancellation of removal applications except in cases involving constitutional claims and questions of law. The court continued that it also generally lacks jurisdiction over motions to reopen or reconsider where it has no jurisdiction over the underlying order. Noting that after the Supreme Court's decision in *Kucana v. Holder*, 558 U.S. 233 (2010), it delineated certain circumstances under which this general rule would not apply, the court found none of those circumstances in this case. Addressing the issue of timeliness, the court agreed with the Board's repeated assertion that the petitioner's 90-day period to file a motion to reopen commenced on the date the Board dismissed his appeal from the Immigration Judge's decision on his application for cancellation of removal, not the later date on which it denied his motion to reconsider. The court thus rejected the petitioner's contention that his motion for reconsideration forestalled the running of the

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90-day clock, noting that such a reading of the law would render the statutory time limits meaningless, because it would allow individuals "to file one motion to reconsider after another, while they collect new evidence to be used in a motion to reopen." The court also affirmed the Board's reasoning in denying the petitioner's motion to reopen to apply for asylum, including the finding that he did not meet his burden of proof by presenting evidence of generally worsening conditions in Mexico, without establishing how such conditions specifically impacted him. Finally, the court rejected the petitioner's due process claims, finding that there was no evidence of an improper motive by the Board directed against the petitioner and that its decision did not lack a rational basis.

Ninth Circuit:

Garfias-Rodriguez v. Holder, No. 09-72603, 2012 WL 5077137 (9th Cir. Oct. 19, 2012): The Ninth Circuit denied the petition for review of the Board's decision finding the petitioner ineligible for adjustment of status under section 245(i) of the Act. In 2004, the petitioner was charged in removal proceedings with inadmissibility under section 212(a)(9)(C)(i) of the Act as an alien who had reentered without permission after a prior unlawful stay in the U.S. of more than 1 year. The petitioner conceded the charge and sought to apply for adjustment of status under section 245(i) of the Act. The Immigration Judge found him ineligible based on his inadmissibility under section 212(a)(9)(C)(i). The Ninth Circuit had held in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), that aliens who are inadmissible under that section remain eligible for adjustment of status under section 245(i). However, the following year the Board issued a precedent decision, *Matter of Briones*, 24 I&N 355 (BIA 2007), which held to the contrary. The court thus addressed two issues: (1) whether it had to defer to the agency interpretation and overrule *Acosta*; and (2) if so, whether *Briones* could be applied retroactively to the petitioner. The court decided these questions by issuing five different opinions (a majority, a concurrence, two dissents, and an opinion of the chief judge claiming to be "disagreeing with everyone"). As to the first issue, the court applied the Supreme Court's holding in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), according deference to reasonable agency interpretations of ambiguous statutes even when they conflict with prior Federal court holdings. Those circumstances existed in this case, where the Board's statutory interpretation in *Briones* conflicted with the circuit's earlier holding in *Acosta*. The court noted that in 2010 the Board held in *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010), that in light of *Brand X*, it would apply its holding in *Briones* in cases arising in the Ninth Circuit, in spite of the contrary holding in *Acosta*. The court observed that it had previously found the statute in question to be ambiguous, having noted in *Acosta* that the statutory language does not clearly indicate "whether the inadmissibility provision [section 212(a)(9)(C)(i)(I)] or the penalty-fee adjustment of status provision [section 245(i)] should take preference." The court noted that it had not accorded deference in *Acosta* to the agency interpretation because, at the time, its opinion had only been expressed in the form of a guidance memo, whereas the Board's subsequent issuance of a formal decision in *Briones* is entitled to greater deference. Finding the Board's holding in that case to be reasonable, the majority accorded it *Chevron* deference, an outcome in which the various opinions appear to concur. Addressing the second issue, the majority determined that *Briones* should apply retroactively, because at the time the petitioner filed his adjustment application in 2002, the circuit had not yet ruled that section 212(a)(9)(C)(i) would not bar his adjustment under section 245(i). Thus, the petitioner could cite no reliance interest at the time of his filing. Lastly, the majority agreed with several of its sister circuits that it lacked equitable authority to stay the automatic termination of the petitioner's grant of voluntary departure upon his filing of a petition for review.

Ridore v. Holder, No. 08-71379, 2012 WL 4513230 (9th Cir. Oct. 3, 2012): The Ninth Circuit adopted the rationale employed by the Third Circuit in *Kaplun v. Attorney General of the U.S.*, 602 F.3d 260 (3d Cir. 2010), in ruling that in deciding a claim for protection under the Convention Against Torture, the determination of what is likely to happen to the applicant if returned to his or her home country is a *factual* one, which must be reviewed by the Board under a "clearly erroneous" standard. The petitioner, a lawful permanent resident from Haiti, was found removable based on multiple criminal convictions. The Immigration Judge granted his applications for both cancellation of removal and for CAT protection. The Board reversed both grants on appeal. The petitioner's CAT claim was that he would face prolonged imprisonment upon return to Haiti under conditions so harsh as to constitute torture. He presented expert testimony supportive of this view. The Immigration Judge found that the expert's testimony and other evidence of record established that conditions in Haitian prisons had recently worsened significantly, thus

making the facts distinguishable from those in *Matter of J-E*, 23 I&N Dec. 291 (BIA 2002) (en banc). In that case, the Board held that the evidence presented regarding prison conditions in Haiti was insufficient to establish that they met the definition of torture for CAT purposes. Here the circuit court identified two key questions: (1) whether conditions have significantly worsened since *Matter of J-E-* and (2) whether the petitioner has shown individual circumstances sufficient to establish the likelihood that he would face "torture." The court noted that in its decision, the Board did not mention the standard of review it was applying. In reversing, the Board relied on its decision in *Matter of J-E-*, acknowledging the subsequent worsening of conditions in Haiti but concluding that such fact did "not undermine the rationale of [its] decision." According to the court, the Board's decision did not specifically analyze the evidence presented by the expert witness upon which the Immigration Judge relied in reaching the factual determination regarding changed conditions. The court concluded that "[t]he net effect of the BIA's approach, therefore, was to apply an overall de novo review," which the court pointed out conflicted with the view of the Third Circuit in *Kaplun* that such factual findings must be reviewed using a "clearly erroneous" standard. Regarding the second question, the court concluded that the Board's reliance on its holding in *Matter of J-E-* that the existence of isolated acts of torture in Haitian prisons is insufficient to meet the petitioner's burden of proof did not address the Immigration Judge's findings regarding the petitioner's individual circumstances. The court cited to the expert's testimony that because, unlike the respondent in *Matter of J-E-*, the petitioner here had no family in Haiti, he would suffer a very prolonged detention under "life-threatening conditions" and that his imprisonment would amount to "almost 'a death warrant.'" Again, the court ruled that such factual findings needed to be reviewed under a "clearly erroneous" standard. Accordingly, the petition for review was granted and the record was remanded for the Board to review the Immigration Judge's decision again under the correct standard of review.

BIA PRECEDENT DECISIONS

In *Matter of Y-N-P-*, 26 I&N Dec. 10 (BIA 2012), the Board held that an applicant for special rule cancellation of removal under section 240A(b)(2) of the Act is ineligible for a section 212(h) waiver of inadmissibility to overcome the section 240A(b)(2)(A)(iv) bar resulting from inadmissibility for criminal activity under section 212(a)(2) of the Act.

The respondent conceded her inadmissibility under sections 212(a)(2)(A)(i)(I) and (6)(A)(i) and applied for special rule cancellation of removal in conjunction with a section 212(h) waiver, which the Immigration Judge denied. Pointing out that she was charged as an arriving alien, the respondent argued that she was an applicant for admission pursuant to section 235(a)(1) and is thus eligible for a section 212(h) waiver. The Board, noting the distinction between a section 235(a)(1) "applicant for admission" and "applying . . . for admission to the United States" as contemplated by section 212(h), rejected her argument for four reasons: (1) an "applicant for admission" under section 235(a)(1) is merely entitled to a removal hearing under section 240 of the Act; (2) an applicant for admission must have a basis, such as a necessary entry document, for being admitted; (3) if applicants for admission were able to apply for a section 212(h) waiver in conjunction with special rule cancellation of removal, the incongruous result would be that aliens who entered the United States unlawfully could concurrently apply for relief, while aliens who entered lawfully could not; and (4) section 212(h), which allows a qualifying alien with some basis for admission to waive an enumerated ground of inadmissibility, does not provide an independent basis for aliens to be admitted to the United States.

Addressing the respondent's interpretation of section 212(h) as being available to aliens applying for admission or those seeking adjustment of status under section 245, the Board acknowledged that section 240A(b) of the Act mentions both cancellation of removal and adjustment of status in its title. However, the Board concluded that the "adjustment of status" language does not suggest that an alien like the respondent can utilize a section 212(h) waiver to establish eligibility for cancellation of removal. First, the Board noted that the status of an alien who is granted special rule cancellation of removal is automatically adjusted to that of lawful permanent resident by operation of section 240A(b)(3), without the necessity of filing an adjustment application, establishing admissibility (as is required to adjust under section 245), or otherwise satisfying eligibility criteria beyond those set forth in section 240A(b)(2). Since Congress did not include a "cancellation of removal and adjustment of status proceeding" as one of the limited scenarios in which an alien may apply for section 212(h) relief, the Board concluded that the waiver provision reflects no congressional intent to permit an alien to apply for a waiver in conjunction with a special rule cancellation application. The Board also found its

interpretation to be consistent with 8 C.F.R. § 1245.1(f), which provides that an adjustment application is the sole method of requesting the exercise of discretion to waive inadmissibility with a section 212(h) waiver. Consequently, the Board concluded that the respondent was ineligible for a waiver and thus could not overcome the section 240A(b)(2)(A)(iv) statutory bar to special rule cancellation of removal.

Next, the Board examined the contrast between the requirement in section 240A(b)(2)(A)(iv) that an applicant for special rule cancellation of removal must establish that he or she "is not inadmissible or deportable" under certain enumerated sections of the Act, while an applicant for regular cancellation under section 240A(b)(1) must establish that he or she "has not been convicted of an offense" listed in section 240A(b)(1)(C). Considering the respondent's argument that she should be permitted to apply for a section 212(h) waiver in light of the ameliorative purpose of section 240A(b)(2), the Board noted that section 240A(b)(5) expressly authorizes an applicant for special rule cancellation who is deportable for a crime of domestic violence under section 237(a)(2)(E) to apply for a waiver if the applicant would otherwise be barred from cancellation by section 240A(b)(2)(A)(iv). The Board reasoned that Congress would have no need to specify that the bar can be overcome with a section 237(a)(7) waiver if it intended to make all waivers of inadmissibility and deportability available to special rule cancellation applicants merely by the use of the terms "inadmissible" and "deportable" in section 240A(b)(2)(A)(iv). Despite the lack of a clear explanation for the disparate language regarding the bars to relief in sections 240A(b)(1)(C) and 240A(b)(2)(A)(iv), the Board found it unlikely that Congress would have made the domestic violence waiver available to special rule cancellation applicants if other waivers of inadmissibility and deportability were already implicitly available pursuant to the language of 240A(b)(2)(A)(iv). Additionally, the Board observed that special rule cancellation applicants are afforded greater flexibility in satisfying the statutory requirements for relief than are regular cancellation applicants. Finally, although a section 212(h) waiver is not available to special rule cancellation applicants, a waiver may be granted to a "VAWA self-petitioner" under section 212(h)(1)(C).

The Board concluded that pursuant to the language of section 212(h), special rule cancellation applicants are proscribed from utilizing such a waiver, and the term "inadmissible" in section 240A(b)(2)(A)(iv) does not provide applicants eligibility to apply for a waiver of inadmissibility for which they are otherwise statutorily ineligible. Finding the respondent ineligible for a section 212(h) waiver of inadmissibility in conjunction with her application for special rule cancellation of removal, the Board dismissed her appeal.

In *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012), the Board held that the offense of "recklessly endangering another person with a substantial risk of imminent death" in violation of section 13-1201A of the Arizona Revised Statutes is categorically a crime involving moral turpitude ("CIMT"), even though Arizona defines recklessness to include a subjective ignorance of the risk resulting from voluntary intoxication.

The Immigration Judge denied the respondent's application for section 240A(b) cancellation of removal after finding that he had been convicted of a CIMT and was therefore statutorily ineligible. The respondent argued on appeal that that his conviction for endangerment was not for a CIMT because the offense requires a mens rea of mere recklessness, rather than specific intent, knowledge, or willfulness, and it does not require that a victim actually be killed or seriously injured.

Applying the *Matter of Silva-Trevino* framework, the Board observed that a violator can be convicted under the Arizona endangerment statute only if the prosecution establishes that he acted "recklessly." That term is defined under Arizona law variously as a conscious disregard of a substantial and unjustifiable risk constituting a gross deviation from the standard of conduct a reasonable person would observe under the circumstances, or as a subjective ignorance of risk resulting from voluntary intoxication. Reviewing its jurisprudence, the Board noted that it had held that recklessness is a culpable mental state for moral turpitude purposes where it entails a conscious disregard of a substantial and unjustifiable risk posed by one's conduct.

A survey of State statutes showed that 20 States have either expressly identified the unawareness of risk resulting from voluntary intoxication as a form of recklessness, or they have accomplished the same result by proscribing the use of voluntary intoxication as an affirmative defense. Additionally, the Board observed that a majority of cases subscribe to the view that if the sole reason a defendant does not realize the riskiness of his

conduct is because of his intoxication, he is guilty of the recklessness which the crime requires.

Analyzing the effects of voluntary intoxication, the Board noted that characterizing it as morally equivalent to recklessness embodies the sound principle that effectively *choosing* to become unaware of an obvious and unreasonable risk by deliberately impairing one's mind is a culpable act, akin to a conscious disregard of consequences. Further, it reasoned that because of the potential consequences of excessive drinking on the capacity to gauge the risks of one's conduct, recklessness arising from voluntary intoxication reflects a substantially higher degree of culpability than mere criminal negligence. Thus, the Board concluded that recklessness arising from voluntary intoxication is a culpable mental state that satisfies the corrupt scienter requirement of *Matter of Silva-Trevino*.

Turning to *Silva-Trevino*'s reprehensible conduct requirement, the Board determined that the conduct proscribed in section 13-1201A of the Arizona Revised Statutes—recklessly exposing another person to a "substantial risk of imminent death"—is morally turpitudinous because it is a base act that transgresses the socially accepted rules of morality and breaches the individual's duty to society. In the Board's view, a person who breaches the fundamental duty of taking reasonable care to avoid causing the death of another, by consciously disregarding a known risk of harm or deliberately impairing his own capacity for conscious judgment, has exhibited base contempt for the well-being of the community, which is the essence of moral turpitude. Addressing the respondent's view that the "risk of imminent death" clause of the Arizona statute does not define a categorical CIMT because the statute does not require that the victim actually be killed or injured, the Board pointed out that the actual infliction of harm is not determinative of the moral turpitude question. It clarified its position that an offense involving a mens rea of recklessness need not necessarily result in death or serious bodily injury to qualify as a turpitudinous crime, noting that a respondent's "good fortune" of not killing or injuring anyone does not mitigate the moral baseness of his offense.

The respondent also argued that section 13-1201A of the Arizona Revised Statutes criminalizes conduct that is not reprehensible, such as discharging firearms in public, obstructing public highways, and throwing water balloons at passing cars. The Board rejected the argument, observing that such conduct cannot be prosecuted as "endangerment" unless the accused recklessly disregarded a substantial risk that the conduct would cause imminent death and the conduct did, in fact, create a substantial risk of imminent death to an actual person. Concluding that the statute does not criminalize the creation of mere hypothetical dangers, the Board held that "recklessly endangering another person with a substantial risk of imminent death" is a categorical CIMT because it necessarily involves reprehensible conduct committed with a corrupt scienter. The appeal was dismissed.

In *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012), the Board addressed the question whether the DHS had demonstrated that the respondent, a Sri Lankan native and citizen who had suffered past persecution, could avoid future persecution by relocating to another party of the country, and that under the circumstances, it would be reasonable to expect him to do so pursuant to 8 C.F.R. § 1208.13(b)(1)(i)(B).

Examining the controlling regulations, the Board pointed out that when an applicant meets the definition of a "refugee," Immigration Judges should deny asylum as a matter of discretion if the DHS rebuts a presumption that the applicant has a well-founded fear of persecution based on the original claim. The DHS can rebut the presumption by establishing with a preponderance of the evidence that either (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in his country of nationality, as prescribed in 8 C.F.R. § 1208.13(b)(1)(i)(A), or (2) that the applicant could avoid future persecution by relocating to another part of his country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all circumstances, it would be reasonable to expect the applicant to do so, pursuant to 8 C.F.R. § 1208.13(b)(1)(i)(B). If the DHS rebuts the presumption, a refugee may still be granted asylum in the exercise of discretion if he or she demonstrates either "compelling reasons for being unwilling or unable to return" to the country of nationality, 8 C.F.R. § 1208.13(b)(1)(iii)(A), or " a reasonable possibility that he or she may suffer other serious harm upon removal to that country," 8 C.F.R. § 1208.13(b)(1)(iii)(B).

The relocation inquiry is bifurcated into determining: (1) whether the applicant could avoid future persecution by relocating, and (2) whether, under

all the circumstances, it would be reasonable to expect the applicant to relocate. The Board explained that the inquiry focuses on the applicant's ability to relocate safely in his or her home country. Such safe internal relocation requires the existence of an area of the country where the applicant has no well-founded fear of persecution. Since the purpose of the relocation rule is not to require an applicant to "stay one step ahead of persecution in the proposed area," that location must present circumstances that are substantially better than those where the well-founded fear of persecution based on the original claim arose. In circumstances where an applicant like the respondent satisfies the definition of a "refugee" because he has suffered past persecution, the Board advised that the DHS must demonstrate that there is a specific area of the country where the respondent's persecution risk falls below the well-founded fear threshold. If evidence such as country reports, Department of State bulletins, or reputable news sources indicates that the area may not be practically, safely, and legally accessible, pursuant to 8 C.F.R. § 1208.13(b)(1)(ii) the DHS also would bear the burden to show by a preponderance of the evidence that the area is or could be made accessible to the applicant. Since in this case the Immigration Judge's factual and legal findings were insufficient in light of this framework, the Board remanded the record so the Immigration Judge could make findings of fact and law as to whether the risk of persecution to the respondent in the Hatton area of Sri Lanka, or another proposed area, falls below the well-founded fear threshold and whether such area is practically, safely, and legally accessible to the respondent.

The Board pointed out that if the Immigration Judge finds that the respondent can internally relocate, he or she must determine next whether, under all the circumstances, such relocation would be reasonable. The reasonableness inquiry is guided by 8 C.F.R. § 1208.13(b)(3), which articulates a nonexhaustive list of factors to consider. According to the regulation, even if an applicant is able to relocate safely, it may nonetheless be unreasonable to expect him to do so. Observing that the regulations also set forth the relevant burdens of proof, the Board explained that when an applicant has established past persecution, the DHS must establish that under all circumstances it would be reasonable for the applicant to relocate in order to rebut the presumption that internal relocation would not be reasonable. Conversely, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored. With this guidance, the Board remanded the record to the Immigration Judge.

In *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012), involving a DHS appeal from an Immigration Judge's decision redetermining the respondent's custody status, the Board considered whether a respondent who had been convicted of possessing marijuana and drug paraphernalia in violation of sections 13-3405(A)(1) and 13-3415(A) of the Arizona Revised Statutes was subject to mandatory detention pursuant to section 236(c)(1)(B) of the Act. It held that the phrase "a single offense involving possession for one's own use of thirty grams or less of marijuana," as used in section 237(a)(2)(B)(i), calls for a circumstance-specific inquiry into the character of the alien's unlawful conduct on a single occasion, rather than a categorical inquiry into the elements of a single statutory crime. The Board also held that an alien convicted of more than one statutory crime may be covered by the "thirty grams or less" exception for a single offense if all of the alien's crimes were closely related or connected with a single incident where the alien possessed 30 grams or less of marijuana for personal use and none of the crimes was inherently more serious than simple possession. It concluded that the respondent was not subject to mandatory detention.

Parsing the "single offense" language of section 237(a)(2)(B)(i), the Board observed that in *Nijhawan v. Holder*, 557 U.S. 29, 33-34 (2009), the Supreme Court stated that the term "offense" may refer to a generic crime or to the specific acts in which an offender engaged on a specific occasion. To determine which approach is more appropriate when applied to section 237(a)(2)(B)(i), the Board looked to *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 124 (BIA 2009), where it examined the term "offense" as used in section 212(h) of the Act. In that case, it concluded that "offense" was best understood in the section 212(h) context as referring to the specific unlawful acts rendering the alien inadmissible, rather than to any generic crime. The Board held in *Matter of Martinez Espinoza* that an alien convicted of possessing drug paraphernalia in the form of a marijuana pipe could qualify for a section 212(h) waiver if his criminal conduct was so closely related to the simple possession of a minimal quantity of marijuana that it merited the same degree of forbearance as the simple possession offense itself.

Here the Board agreed with the Immigration Judge's conclusion that the *Martinez Espinoza* rationale applied in the section 237(a)(2)(B)(i) context. While the

respondent was convicted of separate generic offenses of possessing marijuana and possessing drug paraphernalia, the crimes amounted to a "single offense" because they were constituent parts of the single act of simple marijuana possession. The Board noted that the section 237(a)(2)(B)(i) exception is narrow and fact-specific, referring to the specific conduct of possession for one's own use, committed specifically as a "single offense," and involving the specific quantity of 30 grams or less of the specific substance of marijuana. It reasoned that a natural reading of the narrow language calls for a circumstance-specific inquiry into the nature of the actor's conduct, rather than a focus on the elements of a generic offense.

Additionally, the Board pointed out that the language of section 237(a)(2)(B)(i) does not limit its availability to aliens convicted of simple marijuana possession per se but instead makes the exception available to an alien whose conviction for a single offense "involved" the simple possession of 30 grams or less of marijuana. Noting that the Federal courts of appeals have construed the term "involving" broadly, to encompass any act or offense that is closely related or closely connected to its object of reference, the Board concluded that for purposes of section 237(a)(2)(B)(i), a crime "involves" possession of 30 grams or less of marijuana for personal use if the particular acts that led to the alien's conviction were closely related to such conduct. Thus, the exception would apply to drug paraphernalia possessed in conjunction with the offender's simple possession or ingestion of 30 grams or less of marijuana.

Clarifying that the possession of drug paraphernalia would not "involve" simple marijuana possession if the paraphernalia was associated with the manufacture, smuggling, or distribution of marijuana or with the possession of a different controlled substance, the Board explained that the inquiry in each case will be fact intensive. As examples, the Board cited possession of a marijuana pipe or rolling papers as possibly being covered by the section 237(a)(2)(B)(i) exception, while possession of a drug scale or a hypodermic syringe would not.

In this case the respondent pled guilty to possession of less than 10 grams of marijuana and possession of the plastic baggie in which it was contained. The Board concurred with the Immigration Judge that the respondent committed a "single offense involving possession for one's own use of thirty grams or less of marijuana" and thus was subject to the section 237(a)(2)(B)(i) exception.

Turning to the DHS's argument that the record contained no clear judicial finding that the respondent possessed the marijuana for personal use rather than for another purpose such as for sale, the Board pointed out that the question in a hearing on mandatory detention pursuant to *Matter of Joseph*, 22 I&N Dec. 799, 800 (BIA 1999), is whether the DHS is substantially unlikely to prove a charge justifying mandatory detention. Noting that the Immigration Judge issued his bond order after dismissing the section 237(a)(2)(B)(i) removal charge on the merits, the Board agreed with the Immigration Judge's determination that the DHS was substantially unlikely to prove that the respondent is deportable under that section. The Board concluded that the Immigration Judge had jurisdiction to redetermine the respondent's custody status and dismissed the DHS's appeal.

REGULATORY UPDATE

77 Fed. Reg. 60,741 (Oct. 4, 2012)
DEPARTMENT OF STATE
[Public Notice 8049]
In the Matter of the Designation of the Mujahadin-e Khalq, Also Known as MEK, Also Known as Mujahadin-e Khalq Organization, Also Known as MKO, Also Known as Muslim Iranian Students' Society, Also Known as National Council of Resistance, Also Known as NCR, Also Known as Organization of the People's Holy Warriors of Iran, Also Known as the National Liberation Army of Iran, Also Known as NLA, Also Known as People's Mujahadin Organization of Iran, Also Known as PMOI, Also Known as National Council of Resistance of Iran, Also Known as NCRI, Also Known as Sazeman-e Mujahadin-e Khalq-e Iran, as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

In consultation with the Attorney General and the Secretary of the Treasury, I hereby revoke the designation of the Mujahadin-e Khalq, and its aliases, as a Foreign Terrorist Organization pursuant to Section 219(a)(6)(A) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(6)(A)). This action takes effect September 28, 2012.

This determination shall be published in the Federal Register.

Dated: September 21, 2012.
Hillary Rodham Clinton,
Secretary of State.

AILA InfoNet Doc. No. 12110198. (Posted 11/1/12)

77 Fed. Reg. 61,046 (Oct. 15, 2012)
DEPARTMENT OF STATE
[Public Notice 8055]
The Review and Amendment of the Designation of Al-Qa'ida in the Arabian Peninsula, aka Al-Qa'ida of Jihad Organization in the Arabian Peninsula, aka Tanzim Qa'idat al-Jihad fi Jazirat al-Arab, aka Al-Qa'ida in Yemen, aka Al-Qa'ida in the South Arabian Peninsula as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, the Secretary of State concludes that the circumstances that were the basis for the 2004 designation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation, and that there is a sufficient factual basis to find that al-Qa'ida in the Arabian Peninsula, also known under the aliases listed above, uses or has used an additional alias, namely, Ansar al-Shari'a.

Therefore, the Secretary of State hereby determines that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained, and in addition, effective upon the date of publication in the Federal Register, the Secretary of State hereby amends the 2010 designation of al-Qa'ida in the Arabian Peninsula as a foreign terrorist organization, pursuant to § 219(b) of the INA (8 U.S.C. 1189(b)), to include the following new alias and other possible transliterations thereof: Ansar al-Shari'a.

Dated: September 17, 2012.
Hillary Rodham Clinton,
Secretary of State.

77 Fed. Reg. 64,409 (Oct. 22, 2012)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 217
RIN 1601–AA67
Designation of Taiwan for the Visa Waiver Program
AGENCY: Office of the Secretary, DHS.
ACTION: Final rule.
SUMMARY: Eligible citizens, nationals and passport holders from designated Visa Waiver Program countries may apply for admission to the United States at U.S. ports of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. On October 2, 2012, the Secretary of Homeland Security, in consultation with the Secretary of State and with reference to the Taiwan Relations Act of 1979, designated Taiwan for participation in the Visa Waiver Program. Accordingly, this rule updates the list of countries designated for participation in the Visa Waiver Program by adding Taiwan.
DATES: This final rule is effective on November 1, 2012.

A Split Among the Circuits *continued*

CIMT analysis spectrum. Between the three circuits that have rejected the third step and the two that upheld it fall a number of circuits that have declined to address the issue. Those on both sides of the debate will have their eye on the circuits that have not yet weighed in, and possibly the Supreme Court, to see whether the *Silva-Trevino* framework, which was intended to introduce uniformity, will become a historical footnote.

Bria DeSalvo is an Attorney Advisor at the Arlington Immigration Court.

AILA InfoNet Doc. No. 12110198. (Posted 11/1/12)