12-1372-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RODERICK LANFERMAN,
Petitioner,

v.

ERIC H. HOLDER, Attorney General of the United States,
Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Amicus Curiae, American Immigration Lawyers Association ("AILA"), certifies that Amicus Curiae is an association of lawyers practicing immigration law. AILA has no corporate parents, affiliates and/or publicly held companies that own 10% or more of its stock.

Table of Contents

Table of Authorities

Federal Cases

Federal Rules

Federal Statutes

Administrative Case Law

State Case Law

State Statutes

PRELIMINARY STATEMENT

The American Immigration Lawyers Association is appearing as *amicus curiae* pursuant to Fed. R. App. 29 to urge the Court to overturn of the Board of Immigration Appeal's holding in Matter of Lanferman, 25 I. & N. Dec. 721 (BIA 2012) that renders the categorical approach obsolete and now applies the modified categorical approach in virtually all cases.[1] The Board's decision contains an arbitrary and capricious departure from both this Court and the Board's precedent decisions regarding the categorical approach.[2]

Mr. Lanferman was convicted of an offense of menacing in the second degree in violation of New York Penal Law § 120.14 and contends that his conviction does not render him removable as a firearms offense pursuant to INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).[3] In Lanferman v. Bd. of Immigration Appeals, 576 F.3d 84, 90 (2d Cir. 2009), this Court remanded for the Board to consider which of the following three approaches the Board should utilize in determining when to use the modified categorical approach:

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[1] No party's counsel authored this brief in whole or in part and no party or party's counsel, nor any person besides *Amicus* and counsel, made a monetary contribution intended to fund preparing or submitting this brief. Fed.R. App. P. 29(c)(5).

[2] AILA concurs in the arguments set forth in the amicus brief filed by the Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild.

[3] The full text of New York Penal Law §§ 120.14 and 10.00(12) are contained in the Special Appendix.

> (1) where the alternative means of committing a violation are enumerated as discrete alternatives, either by use of disjunctives or subsections, (hereafter "the first approach")
>
> (2) where either the above approach permits divisibility or the statute of conviction or removability provision "'invite[s] inquiry into the facts underlying the conviction at issue,'" when, for example, "'it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue,'" and
>
> (3) in "all statutes of conviction ... regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." (hereafter "the third approach").

On remand, the Board adopted the third approach. AILA takes the position that the Board erred in not adopting the first approach.[4] This is the approach that has traditionally been taken in immigration cases involving criminal removability grounds. The Board's decision does not provide any analysis with regards to Mr. Lanferman's case to justify rejecting this approach. Instead, the Board justifies not utilizing the first approach by looking to obscure situations that are not applicable to Mr. Lanferman's case.

AILA further takes the position that the Board has erred in adopting the third approach. The Board's decision incorrectly concluded that it should apply the "broadest test" based upon a misplaced belief that the categorical approach does not need to be applied with the same rigor in the immigration context as the

[4] AILA takes no position on the merits of Mr. Lanferman's claims nor do we take a position on what result the categorical analysis, as articulated in this brief, would reach.

criminal arena. The Board has failed to cite any of its own case law that actually supports the use of the third approach. The Board's adoption of the third approach is arbitrary and capricious because the decision is inconsistent with many of the Board's precedent decisions on the categorical approach.

STATEMENT OF INTEREST

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts and Board of Immigration Appeals), as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

As one of the preeminent organizations in the immigration litigation field, AILA has a significant interest in the application of the application of the categorical and modified categorical approach. AILA has been granted leave to

appear as *amicus curiae* in cases involving the application of the categorical and modified categorical approach, such as: (1) Delgado v. Holder, 648 F.3d 1095 (9th Cir. 2011); (2) Estrada-Espinoza v. Mukasey, 546 F.3d 1147 (9th Cir. 2008); (3) Navarro-Lopez v. Gonzales, 503 F.3d 1063 (9th Cir. 2007); (4) Kawashima v. Holder, 615 F.3d 1043 (9th Cir. 2010); and (5) Nijhawan v. Holder, 557 U.S. 29 (2009).

STANDARD OF REVIEW

This case involves whether a state conviction for menacing is removable as a fire arms offense. This Court reviews *de novo* the Board's interpretation of criminal statutes over which it has no special expertise. Jobson v. Ashcroft, 326 F.3d 367, 372 (2d Cir. 2003). Moreover, this Court's prior decision in this matter indicated that the Board's interpretation of criminal statutes is not entitled to deference. 576 F.3d at 88.

Despite the fact that the law is well settled that the Board is not entitled to deference over criminal statutes, the Board's decision makes the unusual claim that its decision should be entitled to deference. The Board claims that pursuant to Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), its decision should be entitled to deference because it has concluded that "the categorical approach, including the modified categorical approach, need not apply to the same extent in immigration proceedings as it does in the criminal context."

25 I. & N. Dec. at 729, n.7. The Board's flawed rationalizations to protect its decision from being overturned should not be accepted by this Court.

The Supreme Court stated in Brand X that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982. This matter involves the interpretation of criminal law statutes, so that the Board cannot create deference by couching its decision in terms that the review of criminal law is somehow within the agency's purview. Nowhere in the Board's discussion of Brand X does it cite to a provision of the INA that would result in the invocation of Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Since the Board's utilization of the categorical and modified categorical approach does not correspond to an INA provision, the Court cannot apply Chevron. There is nothing for the Court to consider under Chevron step one or Chevron step two.

Assuming *arguendo* that the Court accepts the Board's justifications for invoking Brand X, the Board's reasoning would still have to be "permissible" for the Court to afford the Board deference under Chevron step two. All of the arguments presented in the instant brief are intertwined with the issue of deference because the arguments are based upon the Board's failure to consider the statute

Mr. Lanferman was convicted of, the past decisions of this Court and the Board, as well as the fact that the Board has engaged in reasoning that is arbitrary and capricious. Thus, the Board is not entitled to deference for all of the reasons stated in the argument section.

ARGUMENT

I. THE BOARD ERRED IN NOT ADOPTING THE FIRST APPROACH BECAUSE THE BOARD CONSIDERED IRRELEVANT HYPOTHETICAL SITUATIONS AND FAILED TO CONSIDER THE ACTUAL STATUTE MR. LANFERMAN WAS CONVICTED UNDER AND THE HISTORY OF THE CATEGORICAL APPROACH.

The Board's rejection of the first approach makes no effort to address the circumstances of Mr. Lanferman's case. 25 I. & N. Dec. at 725-26. The Board's rejection of the first approach does not explain why the first approach should not be utilized to evaluate the statute that Mr. Lanferman was convicted of, NY Penal Law § 120.14, nor even mention it. 25 I. & N. Dec. at 725-26.

The Board's rejection of the first approach is based upon the possibility that other cases may exist with circumstances where the first approach may not be well suited. 25 I. & N. Dec. at 725-26. Without any citation to law, the Board states that "the structural design of a criminal statute is frequently of limited relevance to how the statute is interpreted by the courts charge with its application and thus, is at best, just a starting point from which a full explication of the statute may be developed." 25 I. & N. Dec. at 725. However, the Supreme Court has repeatedly

held that it is a canon of statutory construction that "as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); see also Teamsters v. Daniel, 439 U. S. 551, 558 (1979); Santa Fe Industries, Inc. v. Green, 430 U. S. 462, 472 (1977); Piper v. Chris-Craft Industries, Inc., 430 U. S. 1, 24 (1977); Ernst & Ernst v. Hochfelder, 425 U. S. 185, 197 (1976). Supreme Court precedent required the Board to look to the language of NY Penal Law § 120.14 to determine if it is divisible based upon its language and structure before considering other options. Not only did the Board not begin with the text and structure of NY Penal Law § 120.14, the Board failed to identify any factors outside the language of the statute (i.e., common law) that would justify not utilizing the categorical approach.

The only justification that the Board can provide for its conclusion that statutes containing discrete subsections or provisions phrased in the disjunctive "fail to fully describe the category of divisible statutes" is found in a footnote. 25 I. & N. Dec. at 725-26, n. 3. Within that footnote the Board identifies four situations where the Board claims an adjudicator "must look beyond the statutory language to other parts of the law of the prosecuting jurisdiction." 25 I. & N. Dec. at 725-26, n.3. As a threshold matter, the Board fails to address why it cannot continue to apply the categorical approach where it has traditionally applied the

categorical approach and create an exception to traditional rule where it applies the modified categorical approach in these cases with statutes that do not contain discrete subsections or provisions phrased in the disjunctive. The Board's focus on these types of statutes renders its decision nothing more than "an advisory opinion on an abstract and hypothetical set of facts." William Z. Salcer, Etc. v. Envicon Equities, 744 F. 2d 935, 939 (2d Cir. 1984).

For three out of the four situations the Board conveniently cites to criminal law without citing to the corresponding immigration case law. For these three examples, there actually is corresponding immigration case law that applies the categorical approach. Because the Board has not disclosed the existence of these immigration cases, the Board has not explained why it cannot continue to utilize the categorical approach in these situations.

The first example that the Board provides is that "many statutes delineate crimes by using general terms – such as "controlled substance" or "deadly weapon" – which can only be understood by looking to other definitional statutes, or perhaps case law. 25 I. & N. Dec. at 725-26, n.3. However, the Board's decision fails to discuss that there are categorical approach cases that address the definition of "controlled substance." Gousse v. Ashcroft, 339 F.3d 91, 95-101 (2d Cir. 2003); Alsol v. Mukasey, 548 F. 3d 207, 215-17 (2d Cir. 2008); Martinez v. Mukasey, 551 F.3d 113,118-22 (2d Cir. 2008).

Mr. Lanferman's case appears to be the only precedent decision that involves a determination as to whether a "deadly weapon" constitutes a firearms offense. However, based upon Gousee, Alsol, and Martinez, there does not appear to be any reason why under the categorical approach there would normally be any impediment to the Board looking to the definition provision of a statute.[5] As for the situation where the definition is contained in case law, this Court has applied the categorical approach where "recklessness" was defined by case law. Jobson v. Ashcroft, 326 F.3d 367, 373 (2d Cir. 2003) (looking to NY case law to conclude that recklessness could be committed without risk of physical force).

The second example that the Board provides is that "courts sometimes put judicial 'glosses' on statutory terms, changing their meaning in subtle (or not subtle) ways. 25 I. & N. Dec. 725, n.3. For this proposition, the Board cites People v. Mansfield, 245 Cal. Rptr. 800, 882 (Cal. Ct. App. 1988), which held that although section 242 of the California Penal Code defines "battery" to require "force or violence" against another, "[t]he word 'violence' has no real

[5] While AILA takes no position on the merits of Mr. Lanferman's case, this Court noted in Lanferman that based upon NY case law "identity" of a "dangerous instrument," or a "deadly weapon" is not an element of Section 120.14(1). 576 F.3d at 95, n.7 citing People v. Kaid, 43 A.D.3d 1077, 842 N.Y.S.2d 55, 60 (2007); People v. Bartkow, 96 N.Y.2d 770, 772, 725 N.Y.S.2d 589, 749 N.E.2d 158 (2001). The applicability of Kaid and Barkow to Mr. Lanferman's case continues to be unresolved.

significance." The Board's Lanferman decision fails to mention that in Matter of Sanudo, 23 I. & N. Dec. 968 (BIA 2006), the Board utilized the categorical approach to conclude that section 242 is not a crime of violence.[6]

The third example that the Board provides is that there are jurisdictions where the "criminal statutes do not define offense elements at all, but instead leave that task to the courts." 25 I. & N. Dec. at 725, n.3. One of the cases that the Board cites for this proposition is Zimmerman v. Commonwealth, 585 S.E.2d 538, 539 (Va 2003), which held that in Virginia the common law definition of assault is used. 25 I. & N. Dec. at 725, n.3. The Board's Lanferman decision fails to discuss that in Matter of Velasquez, 25 I. & N. Dec. 278, 283 (BIA 2010), the Board utilized the categorical approach to conclude that Virginia's common law offense of assault is not a crime of violence.[7]

Another case that the Board cites for this proposition is State v. Byrd, 887 P.2d 396, 399 (Wash. 1995), which held that Washington utilizes the common law definition of assault. The Board's Lanferman decision fails to discuss that in Matter of Velasquez-Herrera, 24 I. & N. Dec. 503, 515-16 (BIA 2008), the Board

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[6] However, the Board utilized the modified categorical approach to conclude that section 242 was a crime of domestic violence. A Ninth Circuit case, Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir 2006), utilized the categorical approach to conclude that section 242 was not a crime of domestic violence. Board member Roger A. Pauley, who wrote the Board's Lanferman opinion, was on the panel that decided Matter of Sanudo.

[7] Board member Roger A. Pauley, who wrote the Board's Lanferman opinion, also authored Matter of Velasquez.

utilized the categorical approach to conclude that Washington's common law offense of assault is not a crime of child abuse.[8] Even if the Board had not utilized the categorical approach in these cases, they should have no impact upon Mr. Lanferman's case because New York does not utilize the common law definition of offenses. It borders on the absurd to suggest that because a minority of states utilize the common law definition for certain offenses that the majority of states that define their offenses by statute should have their statutes interpreted under the modified categorical approach.

The fourth example that the Board provides is that there are cases where elements can be found in mandatory sentencing guidelines, such as Matter of Martinez-Zapata, 24 I. & N. Dec. 424 (BIA 2007). This is such an obscure class of removable aliens that it does not justify applying the modified categorical approach to all classes of aliens subject to criminal removal grounds. Mr. Lanferman's case does not involve a sentence enhancement. Assuming *arguendo* that Matter of Martinez-Zapata was correctly decided, it should be an exception to the rule and not the rule.

[8] Board member Roger A. Pauley, who wrote the Board's Lanferman opinion, was on the panel that decided Matter of Velasquez-Herrera and delivered a concurring opinion, which did not object to the use of the categorical approach.

II. THE BOARD ERRED IN ADOPTING THE THIRD APPROACH.

A. THE BOARD'S DECISION INCORRECTLY CONCLUDED THAT IT SHOULD APPLY THE BROADEST TEST BASED UPON A MISPLACED BELIEF THAT THE CATEGORICAL APPROACH DOES NOT NEED TO BE APPLIED WITH THE SAME RIGOR IN THE IMMIGRATION CONTEXT AS THE CRIMINAL ARENA.

The Board justified its virtual elimination of the categorical approach on the premise that "the categorical approach itself need not be applied with the same rigor in the immigration context as in the criminal arena." 25 I. & N. Dec. at 728. This premise is undermined by the fact that the Supreme Court has utilized the categorical approach in a relatively recent immigration matter. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007) (utilizing the categorical approach to conclude that the generic term "theft offense" as used in the aggravated felony provision of the INA includes aiding and abetting theft).

The Board's belief that the categorical approach can be interpreted differently in immigration cases and criminal cases is not correct. Based upon the Board's premise, removal cases and prosecutions for reentry after deportation may utilize different tests, and ultimately, different interpretations of whether the same conviction is a removable offense. The Supreme Court in Clark v. Martinez, 543 U.S. 371, 378 (2005), held that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one."

The Board's decision relied upon Conteh v. Gonzales, 461 F.3d 45 (1st Cir. 2006), for this proposition that criminal and immigration cases should be decided differently.[9] 25 I. & N. Dec. at 728. To the extent that Conteh stands for the proposition that the same statute can be interpreted differently in the immigration context from the criminal context, it is inconsistent with Clark. Moreover, Conteh is not persuasive authority.

The First Circuit in Conteh based its conclusion to expand the use of the modified categorical approach in immigration cases is based upon the incorrect statement that "[t]he INA requires clear and convincing evidence of removability, see 8 U.S.C. § 1229a(c)(3)(A), but the unmodified categorical approach in effect requires proof beyond a reasonable doubt." The unmodified categorical approach does not require any proof because it involves a question of law that does not involve any fact finding. Martinez v. Mukasey, 551 F.3d 113, 117, 120-21 (2d Cir. 2008). The only evidentiary requirement that the Government must comply with to establish removability under the unmodified categorical approach is to submit a judgment of conviction.

[9] The Board also cited the Seventh Circuit's decision in Ali v. Mukasey, 521 F.3d 737 (7th Cir. 2008), for this proposition. The Seventh Circuit in Ali cited to Conteh for its justification to use the categorical approach with less rigor in the immigration than the criminal context. 521 F.3d at 741. Thus, if Conteh is not persuasive, then neither is Ali.

By comparison, under a modified categorical approach, the Government must obtain charging documents and plea minutes. Obtaining these documents is often burdensome and the Government's inability to obtain these documents when the modified categorical approach is required will result in termination of proceedings.

Conteh is also based upon the erroneous presumption that because Shepard v. United States, 544 U.S. 13 (2005) and Taylor v. United States, 495 U.S. 475 (1990), involve Sixth Amendment constitutional rights that have not been extended to immigration proceedings, the categorical approach should not be "applied woodenly to removal cases." 461 F.3d at 55. This premise is flawed because Taylor and Shephard did not create the categorical approach, they merely applied the categorical approach to the sentencing guidelines. This Court utilized the categorical approach in immigration matters before the Supreme Court's decisions in Taylor and Shepard. See United States ex rel. Mylius v. Uhl, 210 F. 860, 862 (2d Cir. 1914); United States ex rel. Guarino v. Uhl, 107 F.2d 399, 400 (2d Cir. 1939) (framing question as whether crime "necessarily" or "inherently" involves moral turpitude); United States ex rel. Zaffarano v. Corsi, 63 F.2d 757, 758 (2d Cir. 1933) (failing to find moral turpitude because "[u]nder this provision a man may be convicted for putting forth the mildest form of intentional resistance against an officer"); United States ex rel. Robinson v. Day, 51 F.2d 1022, 1022–23

(2d Cir. 1931) ("When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral."); Chiaramonte v. INS, 626 F.3d 1093(2d Cir. 1980).

The Board has also been utilizing the categorical approach since before the Supreme Court's decisions in Taylor and Shepard. See Matter of O-, 4 I. & N. Dec. 301, 304 (BIA 1951) ("Where a statute such as the one we are now considering is broad enough to include acts which do not involve moral turpitude, we must hold that a violation thereof does not involve moral turpitude . . . ."); Matter of Lopez, 13 I. & N. Dec. 725, 726 (BIA. 1971); Matter of Baker, 15 I. & N. Dec. 50, 51 (BIA 1974); Matter of Short, 20 I. & N. Dec. 136, 137–38 (BIA 1989).

Also, the Board's conclusion that the categorical approach should be treated with less rigor in immigration cases than criminal cases ignores the Board's decision in Matter of Velazquez Herrera, 24 I. & N. Dec. 503, 513 (BIA 2008), where the Board stated:

> In accordance with this longstanding body of circuit precedent, we have from our earliest days espoused the same principle, resulting in an analytical approach that is essentially identical to the categorical approach adopted by the Supreme Court in both the sentencing and immigration contexts.

The Board's reliance upon the Second Circuit's bifurcated approach is also misplaced. 25 I. & N. Dec. at 729 citing Martinez v. Mukasey, 551 F.3d 113, 118

(2d Cir. 2008).[10] First, it is not clear that the bifurcated approach continues to exist. The bifurcated approach was created before the Supreme Court's decision in Clark. Martinez v. Mukasey contains *dicta* that speculates that "[t]he outcome of such a categorical inquiry, moreover, may be different when defining aggravated felonies in the immigration context than in the sentencing context. 551 F.3d at 119. However, in a footnote, the Court in Martinez cited to Clark and commented that "[t]he bifurcated approach may not be without its problems." 551 F.3d at 119, n.5.

Most of all, the bifurcated approach was created to address a specific problem that no longer exists anymore: that the Second Circuit was utilizing a different definition for a drug trafficker in immigration and criminal proceedings.[11] In light of Lopez v. Gonzales, 127 S. Ct. 625 (2006), there is now only one

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[10] The Board cites to Martinez without addressing the fact that it is a categorical approach case that would likely be impacted by the adoption of the third approach.

[11][1] In Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994), the Second Circuit held that under the Controlled Substances Act any offense that is a felony under either Federal or state law qualifies as an aggravated felony. In Matter of L-G-, 21 I. & N. Dec. 89 (BIA 1995), the Board took a position contrary to the Second Circuit in Jenkins and concluded that it would only consider a Controlled Substance offense that would be a felony under federal law to be an aggravated felony. The Board concluded that it would not follow Jenkins outside of the Second Circuit. Out of the "interest of nationwide uniformity," in Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996), the Second Circuit adopted Matter of L-G- and abandoned Jenkins for immigration purposes only. In United States v. Polanco, 29 F.3d 35 (2d Cir. 1994) and United States v. Pornes-Garcia, 171 F.3d 142 (2d Cir. 1999), the Second Circuit formally adopted a separate interpretation of "drug trafficking crime" for criminal cases. This is sometimes referred to as the "bifurcated approach."

definition of drug trafficker and there are no other situations where the Second Circuit applies a bifurcated approach in immigration and criminal law. The circumstances that justified the Court to adopt the Board's position in Aguirre are not present in this case.

It is not clear that the bifurcated approach would justify what the Board has done. Under this Court's bifurcated approach, the Court adopted the more strenuous rule in the criminal context in United States v. Pornes-Garcia, 171 F.3d 142 (2d Cir. 1999), and permitted the Board to utilize a less strenuous rule in the immigration context in Aguirre. Thus, this Court's case law on the bifurcated approach does not require that the Board utilize the broadest test.

The Board's Lanferman decision cites the Ninth Circuit's decision in United States v. Aguila-Montes de Oca, 665 F.3d 915 (9th Cir. 2011) (*en banc*) as supporting a broad approach to divisibility. 25 I. & N. Dec. at 729. However, Aguila-Montes de Oca does not support the expansive use of the modified categorical approach over the categorical approach that the Board's Lanferman decision calls for. Aguila-Montes de Oca applies to a limited set of cases "where the statute under which the defendant or alien was previously convicted is categorically broader than the generic offense." 655 F.3d at 940. Aguila-Montes de Oca is not a pure modified categorical approach case in that in order to make determinations under Aguila-Montes de Oca, the immigration court must engage in

fact finding. 655 F.3d at 940. Thus, Aguila-Montes de Oca is inconsistent with both the Supreme Court and this Court's refusal to permit the modified categorical approach to turn into fact finding. Dulal-Whiteway v. U.S. Dept. of Homeland Sec., 501 F.3d 116, 132 (2d Cir. 2007) ("We have emphasized that the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions"). It should be noted that in all other cases, the Ninth Circuit continues to utilize the categorical and modified categorical approaches as it always has. See Pagayon v. Holder, 675 F.3d 1182 (9th Cir. 2011) (Post-Aguila-Montes de Oca immigration case summarizing the categorical and modified categorical approach).

B. THE BOARD HAS FAILED TO CITE ANY OF ITS OWN CASE LAW THAT ACTUALLY SUPPORTS THE USE OF THE THIRD APPROACH.

The Board has adopted the third approach without citing to a single case where it has ever utilized the third approach. Furthermore, the Board has failed to cite to a single case from any court that has utilized the third approach. Instead, the Board states that it has "traditionally applied divisibility analysis to all manner of statutes, regardless of their structure." 25 I. & N. Dec. at 728. However, the Board is only able to cite two cases for this proposition: Matter of Sanudo, 23 I. & N. Dec. 968 (BIA 2006) and Matter of Babaisakov, 24 I. & N. Dec. 306 (BIA 2007). Neither case provides strong support for this proposition.

Matter of Sanudo involved a determination as to whether a one sentence California battery statute was either a crime of moral turpitude or a crime of domestic violence. With regards to moral turpitude, the Board utilized the categorical approach. 23 I. & N. Dec. at 972-73. With regard to domestic violence, the Board utilized the modified categorical approach based upon the Board's misreading of Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir 2006). 23 I. & N. Dec. at 973-75. In Ortega-Mendez, the Ninth Circuit utilized the categorical approach, but speculated *in dicta* that based upon Tokatly v. Ashcroft, 371 F.3d 613 (9th Cir. 2004), it might be possible to utilize the modified categorical approach to determine whether or not an offense constitutes a crime of domestic violence. 450 F.3d at 1021. In Tokatly, the Ninth Circuit merely restated the rule of Taylor v. United States, 495 U.S. 475 (1990), that the categorical rule should apply unless the statute is divisible. 371 F.3d at 620.

The Board's reliance upon Matter of Babaisakov is also misplaced. Matter of Babaisakov involved an aggravated felony as defined in INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), involving fraud where there is a loss to the victim of $10,000 or more. The Board in Matter of Babaisakov utilized the categorical approach with regards to the fraud element, but concluded it could look to evidence outside of the record for the loss element under "circumstance specific" analysis, so it is not a modified categorical approach case.

In a footnote, the Board cites to two decisions, Matter of Pichardo, 21 I. & N. Dec. 330 (BIA 1996) and Matter of Madrigal, 21 I. & N. 323 (BIA 1996), that involved fire arms and the use of the modified categorical approach. 25 I. & N. Dec. at 728, n.6. However, both decisions indicated that the statutes in question were subdivided. Moreover, both decisions were *en banc* decisions and in neither decision did the Board indicate that its decision was an expansion of the modified categorical rule.

C. THE BOARD'S ADOPTION OF THE THIRD APPROACH IS ARBITRARY AND CAPRICIOUS BECAUSE THE DECISION IS INCONSISTENT WITH MANY OF THE BOARD'S PRECEDENT DECISIONS ON THE CATEGORICAL APPROACH.

The Board's conclusion that all statutes are divisible, regardless of structure, if based upon the elements some but not all violations of the statute give rise to grounds for removal or ineligibility for relief. The Board's decision demonstrates a dramatic departure from past precedent. Based upon the Board's decision, the modified categorical rule will apply in many instances where the categorical approach was previously used. If it is permitted to remain, many non-citizens who have taken plea agreements based upon the traditional application of the categorical approach will now find themselves removable when they were not at the time of their plea.

Under the Board's decision in Lanferman, the categorical approach cases that were discussed in Part I. supra, Matter of Sanudo, Matter of Velasquez, and Matter of Velasquez-Herrera, must now be decided under the modified categorical approach. Under the Board's decision in Lanferman, the case law where the Board has utilized the minimum conduct test to determine that an offense is categorically removable has been overturned and the modified categorical approach must now be used in these cases.[12] See Matter of T-, 2 I. & N. Dec. 22, (BIA 1944) ("As application of the rule must be uniform, the statute must be taken at its minimum unless its provisions are divisible, and if divisible - one or more of its provisions describing offenses involving moral turpitude, and others describing offenses not involving that element - the charge as shown by the record of conviction is controlling as to which provision of the statute is involved.") (citations omitted); Matter of Vargas-Sarmiento, 23 I. & N. Dec. 651, 652 (BIA 2004) ("Therefore, the court looks only to the generic elements of the statutory offense to determine whether the minimum criminal conduct required for a conviction under the statute violated a crime of violence.")

[12] This Court's categorical approach cases utilizing the minimum conduct test are also presumably overturned by the Board's decision in Lanferman because the modified categorical rule would now be applied to these cases. See e.g., Jobson v. Ashcroft, 326 F.3d 367, 372 (2d Cir. 2003), Chrzanoski v. Ashcroft, 327 F.3d 188, 195–96 (2d Cir. 2003); Dalton v. Ashcroft, 253 F.3d 200, 204-5 (2d Cir. 2001). Because upholding Lanferman would result in this Court's precedent decisions being overturned, this Court should not uphold the Board's decision in Lanferman without a hearing *en banc*

The Board's decision in Lanferman is inconsistent with these decisions and implicitly overturns them. A panel of three Board members cannot do this. The Board's failure to follow its own precedent is arbitrary and capricious. Zhao v. U.S. Dep't of Justice, 265 F.3d 83, 95 (2d Cir. 2001); Vargas v. INS, 938 F.2d 358, 362 (2d Cir. 1991).

CONCLUSION

Based upon the foregoing, AILA respectfully requests the Court to overturn the Board's decision in Matter of Lanferman and hold that the first approach is the approach that should be utilized in immigration cases.

Dated: New York, New York
August 13, 2012

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SPECIAL APPENDIX

New York Penal Law § 120.14 provides:

> A person is guilty of menacing in the second degree when:
>
> 1. He or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
>
> 2. He or she repeatedly follows a person or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place another person in reasonable fear of physical injury, serious physical injury or death; or
>
> 3. He or she commits the crime of menacing in the third degree in violation of that part of a duly served order of protection, or such order which the defendant has actual knowledge of because he or she was present in court when such order was issued, pursuant to article eight of the family court act, section 530.12 of the criminal procedure law, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, which directed the respondent or defendant to stay away from the person or persons on whose behalf the order was issued.

NY Penal Law § 10.00(12) provides:

> "Deadly weapon" means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, plastic knuckles, or metal knuckles.

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2012, a copy of the foregoing brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: New York, New York
August 13, 2012

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) (7) (B) because this brief contains 5,480 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) (7) (B) (iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements of Fed. R. App. P. 32(a) (6) because this brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2007**, in **Times New Roman 14 Point Font**.

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