

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-74582

FRANCISCO JAVIER CASTRUITA-GOMEZ,
A91-510-225,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

Petition for Review of the Board of Immigration Appeals in file A91-510-225

**BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT,
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL
LAWYERS GUILD, IMMIGRANT LEGAL RESOURCE CENTER,
U.C. DAVIS IMMIGRATION LAW CLINIC, AND IMMIGRATION
JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF
LAW IN SUPPORT OF PETITIONER AND REVERSAL OF THE
DECISION OF THE BOARD OF IMMIGRATION APPEALS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* submit the following corporate disclosure statements:

Immigrant Defense Project states that its parent corporation is the Fund for the City of New York (FCNY), a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of FCNY's stock.

National Immigration Project of the National Lawyers Guild states that it does not have a parent corporation. It is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of its stock.

Immigrant Legal Resource Center states that it does not have a parent corporation. It is a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of its stock.

U.C. Davis Immigration Law Clinic states that it does not have a parent corporation. It does not issue stock, and as such, no publicly held corporation owns 10% or more of its stock.

Immigration Justice Clinic of the Benjamin N. Cardozo School of Law states that its parent corporation is Yeshiva University, a nonprofit corporation operating under § 501(c)(3) of the Internal Revenue Code that does not issue stock. As it has no stock, no publicly held corporation owns 10% or more of Yeshiva University's stock.

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Immigrant Defense Project, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center, U.C. Davis Immigration Law Clinic, and Immigration Justice Clinic of the Benjamin N. Cardozo School of Law submit this brief as *amici curiae* in support of Petitioner Francisco Javier Castruita-Gomez.

PRELIMINARY STATEMENT

Amici offer this brief to supplement the arguments set forth by Petitioner with a discussion of significant legal and practical concerns arising from former Attorney General Mukasey’s erroneous decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008), regarding the method used to determine whether a given criminal conviction is a “crime involving moral turpitude” (“CIMT”). *Amici* urge this Court to reject the Government’s request to remand Mr. Castruita-Gomez’s case to allow the Board of Immigration Appeals (BIA) to apply *Silva-Trevino* and its unprecedented, fact-intensive framework for CIMT determinations because the decision represents a patent misreading of the Immigration and Nationality Act (“INA”). In the alternative, *amici* urge the Court to decline

to apply this arbitrary and abrupt departure from well-settled law retroactively.¹

Even supposing *arguendo* that this Court would ordinarily defer to the agency on the issue of the nature of the analysis of a criminal conviction for immigration purposes—which it would not—*Silva-Trevino* patently misinterprets clear statutory language and creates an analytic framework that raises serious constitutional questions of due process, fairness, and uniformity by requiring immigration officials to make *de novo* findings of fact regarding the circumstances underlying often decades-old criminal convictions. Numerous courts have reaffirmed the necessity of the traditional categorical analysis since *Silva-Trevino* and no federal court has endorsed it. *Amici* therefore urge this Court to decline the Government’s invitation to remand to the agency for application of the *Silva-Trevino* framework and ask that the Court instead reaffirm the importance of the categorical approach for moral turpitude determinations.

INTEREST OF AMICI

Amici are non-profit organizations with extensive experience in the interrelationship of criminal and immigration law. *Amici* include

¹ In addition, *amici* support Petitioner’s arguments (Pet’r Reply Br. at 13–25) that this court should reject *Silva-Trevino* or, at minimum, refuse to apply it retroactively.

organizations involved in counseling and representing immigrants in removal proceedings, counseling immigrants and their attorneys in the criminal justice system and training others for such representation and counseling. The United States Supreme Court and Courts of Appeals, including this Court, have accepted and relied on briefs prepared by *amici* in numerous significant immigration-related cases.

This case is of critical interest to *amici*. As explained below, the analysis used to assess the immigration consequences of convictions is an essential part of the due process foundation of the immigration and removal systems. *Amici* have a strong interest in assuring that the rules governing classification of criminal convictions are fair, predictable and in accord with longstanding precedent on which immigrants, their lawyers and the courts have relied for nearly a century.

STATUTORY ADDENDUM

Pursuant to Circuit Rule 28-2.7, an addendum containing relevant statutes and regulations is appended to this brief.

ARGUMENT

I. ***SILVA-TREVINO* IS INCONSISTENT WITH THE UNAMBIGUOUS LANGUAGE OF THE INA AS CONFIRMED IN A CENTURY OF FEDERAL PRECEDENT**

The Government urges the Court to remand Petitioner’s case to consider the effect of Petitioner’s uncounseled concession of removability under the Attorney General’s decision in *Silva-Trevino* (Gov’t Br. at 13–16). This Court does not, however, owe deference to the agency’s view of the method by which this Court determines the nature of a given state or federal criminal conviction as a predicate to determining whether it triggers the immigration consequences attaching to a “crime involving moral turpitude.” *See, e.g., Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009) (en banc) (holding that the BIA is required at the threshold to examine the elements of the statute of conviction and “in certain cases, to examine the record of conviction” and noting that no deference is afforded to the BIA’s analysis of the nature of the criminal offense). For that reason alone, the Government’s request to remand Petitioner’s case to the BIA to apply *Silva-Trevino* must fail.

But even supposing *arguendo* that this were an issue on which the Court would ordinarily defer to the agency’s view, *Silva-Trevino*’s novel

approach to CIMT determinations does not warrant deference. As the Third Circuit held in *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462, 473 (3d Cir. 2009), *petition for reh’g denied* (Apr. 5, 2010), the Attorney General’s decision, which reverses nearly a century of firmly established agency and judicial precedent, “is bottomed on an impermissible reading of the statute, which . . . speaks with the requisite clarity.” Among other flaws, *Silva-Trevino* fails to accord proper significance to the INA’s requirement that a respondent be “convicted” of a CIMT, 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A); fails to recognize that the term “crime involving moral turpitude” is a unitary term of art with a well-established meaning dating back over a century; and fails to recognize clear indications of congressional intent, reflected in an overwhelming consensus of circuit case-law decided over decades, to prohibit the sort of conduct-based inquiry that the *Silva-Trevino* decision allows.

A. *Silva-Trevino* Ignores the Statutory Requirement of a “Conviction” of a Removable Offense

The INA provides that a lawful permanent resident like Petitioner “who . . . is *convicted* of a crime involving moral turpitude committed within five years . . . after the date of admission . . . is deportable,” and further provides that a noncitizen “who at any time after admission is *convicted* of two or more crimes involving moral turpitude, not arising out of a single

scheme of criminal misconduct . . . is deportable.” 8 U.S.C. §

1227(a)(2)(A)(i)-(ii) (emphasis added).

Silva-Trevino’s most fundamental flaw is ignoring Congress’ clear mandate to determine removability under this ground by analyzing the nature of a noncitizen’s “conviction” rather than his or her conduct. “For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a ‘conviction’ for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*.” *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008) (deferring to the Ninth Circuit’s application of the categorical approach to the “crime of domestic violence” ground of removability). This long history confirms that the term “convicted” prohibits courts from considering the underlying facts or conduct when assessing whether a conviction constitutes a CIMT. *See Jean-Louis*, 582 F.3d at 473 n.13.

The statute elsewhere 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 attempt or conspiracy to commit such a crime” is

inadmissible. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). This language, which is not applicable in the case at bar, distinguishes between, and disjunctively lists, convictions and admissions as bases for removal.

Pointing to these provisions, the Attorney General suggests that “the text actually cuts in different directions.” 24 I. & N. Dec. at 693. In contrast to the “conviction” language, the decision asserts that the reference to “aliens who admit ‘committing’ certain ‘acts’ seem[s] to call for, or at least allow, inquiry into the particularized facts of the crime.” *Id.* But the language relating to “admissions,” “commissions,” and “acts” only reinforces the long-held principle that where Congress does predicate immigration consequences on “convictions,” as in the provision at 8 U.S.C. § 1227(a)(2)(A)(i) that affects Petitioner, it seeks to confine courts’ review to the individual’s conviction, not his or her conduct or separate admissions. *See, e.g., Velazquez-Herrera*, 24 I. & N. Dec. at 513. Indeed, where a person has been convicted, courts may not use admissions to find the individual removable based on an offense for which he was not convicted. *See, e.g., Matter of Seda*, 17 I. & N. Dec. 550, 554 (BIA 1980) (holding that “where a plea of guilty results in something less than a conviction, . . . the plea, without more, is not tantamount to an admission of commission of the crime for immigration purposes”); *Matter of Winter*, 12 I. & N. Dec. 638,

642 (BIA 1968) (“Where, as here, an alien has been the subject of court proceedings on criminal charges and the ultimate disposition of those charges by the court falls short of a conviction . . . the ‘admission’ provisions cannot be called into play to give the intermediate step of pleading a stronger effect than the ultimate disposition could have under the immigration laws.”).

Moreover, even with regard to determinations of inadmissibility based on admissions, the inquiry must remain focused on the nature of the criminal statute a respondent admits to violating. The BIA’s longstanding interpretations of the admission requirements confirm this reading of the statute. *See, e.g., Matter of K-*, 7 I. & N. Dec. 594 (BIA 1957) (holding that an individual must be provided with the precise definition of the crime in issue before making the alleged admission); *Matter of E-N-*, 7 I. & N. Dec. 153 (BIA 1956) (holding that an individual must admit all of the elements of the crime in issue). These requirements make clear that even in this context, the inquiry remains focused on the intrinsic nature of an offense proscribed by a particular statute rather than on a noncitizen’s particular conduct. Thus, the language relating to “admissions,” “commissions” and “acts” does not alter the requirements surrounding “convictions.” *See Jean-Louis*, 582 F.3d at 476–77.

B. *Silva-Trevino* Assigns Unjustified Significance to the Word “Involving” and the Fact that Turpitude is not an Element of Criminal Offenses

The former Attorney General also attempts to support his opinion by pointing to statutory language within the term “crime involving moral turpitude,” explaining that “use of the word ‘involving’” indicates that courts must look into the facts of the actual conduct, since “moral turpitude is not an element of an offense” and “[t]o limit the information available to immigration judges in such cases means that they will be unable to determine whether an alien’s crime actually ‘involv[ed]’ moral turpitude.” 24 I. & N. Dec. at 693, 699 (second alteration in original).

This dissection of the phrase “crime involving moral turpitude” inexplicably ignores the patent truth that the phrase is a unitary term of art with “deep roots” in a century-old history. *See Jordan v. De George*, 341 U.S. 223, 227 (1951); *Jean-Louis*, 582 F.3d at 477. As early as 1914, it was clear that the question of whether an offense is a CIMT required an examination of whether the *statutorily proscribed elements* involved moral turpitude. *United States ex rel. Mylius v. Uhl*, 210 F. 860 (2d Cir. 1914); *see also Jean-Louis*, 582 F.3d at 447 (explaining that “crime involving moral turpitude” is a term of art).

Further, subsequent to the issuance of *Silva-Trevino*, the Supreme Court made clear in *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009), that neither the use of the word “involving” in the generic definition, nor the fact that a generic definition is not itself an element of a criminal offense, justifies departing from the categorical approach. First, the Court held that the use of the word “involving” does not invite an inquiry into the specific facts underlying a conviction.² *See Nijhawan*, 129 S. Ct. at 2298 (holding that the phrase “involving fraud or deceit” in the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(M)(i) refers to offenses having fraud or deceit as an element); *id.* at 2300 (noting that a statute using the ambiguous phrase “involves conduct” refers to a generically defined crime and not to the particular circumstances of its commission (citing *James v. United States*, 550 U.S. 192, 202 (2007))).

² While *Nijhawan* held that the portion of the aggravated felony definition requiring that a fraud or deceit crime requiring a loss to the victim of over \$10,000 called for a “circumstance-specific” inquiry not limited to the elements of the statute of conviction, it did so because the statute in issue—in particular, the phrase “*in which* the loss to the victim or victims”—plainly invited such an inquiry. 129 S.Ct. at 2301 (“The words ‘in which’ (which modify “offense”) can refer to the conduct involved ‘*in*’ the commission of the offense of conviction, rather than to the elements *of* the offense.”). The CIMT grounds of removability contain no such language. *See Jean-Louis*, 582 F.3d at 480 (“*Nijhawan* . . . [does] not support abandoning our established methodology [for CIMTs].” *Jean-Louis*, 582 F.3d at 480 (citing *Nijhawan v. Att’y Gen. of U.S.*, 523 F.3d 387, 391–92 (3d. Cir. 2008), *aff’d sub nom. Nijhawan v. Holder*, 129 S. Ct. 2294 (2009))).

Second, *Nijhawan* and other Supreme Court precedent directly conflicts with the Attorney General’s assertion that the fact that “‘moral turpitude’ is not an element of any criminal offense” justifies departure from the categorical approach, *Silva-Trevino*, 24 I. & N. Dec. at 701. The *Nijhawan* Court reiterated that the categorical approach applies to the inquiry into whether a given state or federal offense is a “violent felony” under the Armed Career Criminal Act (“ACCA”), which is defined in part to include “‘crime[s]’ that ‘*involv[e] conduct* that presents a serious potential risk of physical injury to another.’” *Nijhawan*, 129 S. Ct. at 2300 (quoting 18 U.S.C. §§ 924(e)(2)(B)(i)–(ii)) (emphasis in *Nijhawan*). The fact that few if any criminal statutes contain an element of “conduct that presents a serious potential risk of physical injury to another” has posed no obstacle to the application of the categorical approach in the ACCA context, as *Nijhawan* confirmed; the reviewing court simply considers whether the statutory elements inherently give rise to such a risk. *See, e.g., James*, 550 U.S. at 202 (holding that under 18 U.S.C. § 924(e)(2)(B)(ii) “we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender”). Similarly, although criminal statutes do not typically contain an element of “turpitude,” courts for decades have

considered whether the statute’s elements proscribe conduct that is “inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general,” *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) (en banc), and is accompanied with a scienter of at least recklessness, *see Marmolejo-Campos*, 558 F.3d at 910 (citing *Silva-Trevino*, 24 I. & N. Dec. at 688, 706). The CIMT inquiry thus requires that a court examine “the elements of the offense” of conviction, not the particular circumstances of the offense.³ *Nijhawan*, 129 S. Ct. at 2301.

³ *Silva-Trevino* also points to the language in the deportability provisions that make the conviction-based deportability consequences relating to crimes involving moral turpitude hinge on the immigrant’s “date of admission,” 24 I. & N. Dec. at 700, a fact not ordinarily reflected in the record of conviction. But this is a spurious reason to depart from the categorical approach in the CIMT context. Most conviction-related grounds require the conviction to have occurred “after admission,” *see* 8 U.S.C. § 1227(a)(2)(A)(iii), (B), (C), (E), so this issue of the fact of an earlier admission is not unique to convictions for crimes involving moral turpitude; nonetheless the decision is careful to state that its analysis does not apply to other categories of removability. Many aggravated felony provisions, moreover, contain analogous limiting provisions, such as the “theft” aggravated felony category that requires a one-year sentence to have been imposed. *See* 8 U.S.C. § 1101(a)(43)(G). This does not change the fact that courts must apply a categorical and modified categorical approach to the determination of whether the person was convicted of a “theft” aggravated felony. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187–89 (2007).

C. *Silva-Trevino* Ignores Decades of Federal Court Consensus on Congress’s Clear Intent to Require a Categorical Approach

The Attorney General’s radical abandonment of the categorical approach in the CIMT context is premised on an asserted need to create a “uniform” methodology in the face of what is claimed to be divergent federal circuit case law. 24 I. & N. Dec. at 688. But as the Third Circuit found, “[t]he ambiguity that the Attorney General perceives in the INA is an ambiguity of his own making, not grounded in the text of the statute, and certainly not grounded in the BIA’s own rulings or the jurisprudence of courts of appeals going back for over a century.” *Jean-Louis*, 582 F.3d at 473. In fact, courts have uniformly applied the categorical and modified categorical approach to the CIMT inquiry for nearly a century. *See, e.g., Uhl*, 210 F. at 862–63; *see also Wala v. Mukasey*, 511 F.3d 102, 107–08 (2d Cir. 2007) (applying the categorical and modified categorical approach to determine whether person was convicted of a CIMT); *Vuksanovic v. U.S. Att’y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (same); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006) (same); *Jaadan v. Gonzales*, 211 F.App’x 422, 427 (6th Cir. 2006) (same); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017–20 (9th Cir. 2005) (same); *Partyka v. Att’y Gen. of the U.S.*, 417 F.3d 408, 411–12 (3d Cir. 2005) (same); *Padilla v. Gonzales*, 397

F.3d 1016, 1019 (7th Cir. 2005) (same); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003) (same); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999) (same). The Attorney General asserts that the underlying analyses in these decisions adopting the categorical and modified categorical approach vary to significant degrees. 24 I. & N. Dec. at 693–95. However, while the cases sometimes use different terms to describe the approach, the essential analysis is uniform—courts each begin with an analysis of the statute of conviction, and if the statute criminalizes different sets of offenses, some of which are crimes involving moral turpitude and some of which are not, courts may inquire into the record of conviction only to determine the provision of the statute under which the person was convicted and whether that statutory provision would constitute a CIMT.⁴

The Seventh Circuit’s decision in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), with which *amici* take issue for the reasons discussed by the

⁴ Notably, many of the foundational agency cases defining the “reviewable record of conviction” and the concept of “divisible statutes” did so in the context of determining, under that approach, whether a particular conviction involved moral turpitude. See, e.g., *Matter of R-*, 4 I. & N. Dec. 176, 179 (BIA 1950); *Matter of T-*, 3 I. & N. Dec. 641, 642–43 (BIA 1949); *Matter of D-S-*, 3 I. & N. Dec. 502, 504 (BIA 1949); *Matter of P-*, 3 I. & N. Dec. 290, 296–97 (BIA 1948); *Matter of P-*, 1 I. & N. Dec. 48 (BIA 1947); *Matter of R-*, 2 I. & N. Dec. 819 (BIA 1947); *Matter of M-*, 2 I. & N. Dec. 721, 724 (BIA 1946); *Matter of M-*, 2 I. & N. Dec. 525, 526 (BIA 1946); *Matter of E-*, 2 I. & N. Dec. 328, 335 (BIA 1945); *Matter of P-*, 2 I. & N. Dec. 117 (BIA 1944); *Matter of T-*, 2 I. & N. Dec. 22 (BIA 1944).

Third Circuit, *see Jean-Louis*, 582 F.3d at 478–80, marks the only significant departure from the principles of the categorical and modified categorical approach during its nearly 100-year-old history. The viability of the *Ali* decision is questionable given conflicting prior decisions of the Seventh Circuit applying the categorical approach to the CIMT inquiry. *See, e.g., Hashish v. Gonzales*, 442 F.3d 572, 576 (7th Cir. 2006); *Padilla*, 397 F.3d at 1019; *Mei v. Ashcroft*, 393 F.3d 737, 741 (7th Cir. 2004); *see also Wade v. Hewlett-Packard Development Co. LP Short Term Disability Plan*, 493 F.3d 533, 542 (5th Cir. 2007) (“[I]f two panel decisions conflict, the earlier one controls.”). Considering *Ali* in this light, the Attorney General’s opinion in *Silva-Trevino* has *no* support among any controlling federal court decisions. In any event, it is an aberration even within the Seventh Circuit.

Furthermore, one year and a half after the issuance of *Silva-Trevino*—and thousands of petitions for review later—no circuit court has endorsed its radical framework. Recently, this Court specifically reaffirmed the categorical and modified categorical approach. *Tijani v. Holder*, --- F.3d ---, 2010 WL 816973, at *3 (9th Cir. Mar. 11, 2010) (reiterating that to determine whether a conviction is a CIMT “this court applies the [categorical] approach . . . we do not consider the particular facts of the convictions”) (citation omitted); *Nunez v. Holder*, --- F.3d ---, 2010 WL

446485, at *3 (9th Cir. Feb. 10, 2010); *see also Marmolejo-Campos*, 558 F.3d at 907 & n.6 (noting *Silva-Trevino*'s tension with prior circuit precedent and nevertheless requiring immigration adjudicators "to interpret the statute under which the petitioner was convicted and, in certain cases, to examine the record of conviction" to decide the question of moral turpitude).⁵

Other circuits have also continued to apply the traditional categorical approach notwithstanding *Silva-Trevino*. *See, e.g., Ahmed v. Holder*, 324 F.App'x 82, 84 (2d Cir. 2009) (applying the "modified categorical approach applicable in this Circuit"); *Serrato-Soto v. Holder*, 570 F.3d 686, 689 (6th Cir. 2009) (employing the "'categorical approach,' whereby we consider not whether the actual conduct constitutes a crime involving moral turpitude, but 'whether the full range of conduct encompassed by the statute constitutes a crime involving moral turpitude'").⁶ Even when courts have cited *Silva-*

⁵ Although this Court has not squarely ruled on the validity of *Silva-Trevino*'s step-three factual inquiry, it has already staked out a position contrary to *Silva*'s step-one "realistic probability" requirement, 24 I. & N. Dec. at 697–98, which is based on an interpretation of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) that this Court has eschewed in *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007).

⁶ Although the Sixth Circuit in *Kellermann v. Holder*, 592 F.3d 700, 704 (6th Cir. 2010), appears to accept *Silva-Trevino* and purports to disagree with the Third Circuit's decision in *Jean-Louis*, 582 F.3d at 462, *Kellermann* merely applies the familiar second-stage modified categorical analysis, and

Trevino, they have declined to apply its unprecedented three-step analysis. See, e.g., *Uppal v. Holder*, 576 F.3d 1014, 1017 (9th Cir. 2009); *Serrato-Soto*, 570 F.3d at 689, 690; *Marmolejo-Campos*, 558 F.3d at 907; *Tejwani v. Att’y Gen. of U.S.*, Nos. 07-1828 & 07-4132, 2009 WL 3387961, at *3 (3d Cir. 2009); *Destin v. U.S. Att’y. Gen.*, 345 F.App’x 485, 487 (11th Cir. 2009). These intervening decisions make increasingly obvious *Silva-Trevino*’s incompatibility with the INA and further demonstrate why this Court should again reaffirm its commitment to the categorical approach.⁷

does not in fact address the validity of the novel step-three inquiry that *Jean-Louis* rejected. *Kellerman*, 592 F.3d at 704.

⁷ As the Third Circuit noted in *Jean-Louis*, the Attorney General’s refusal to notify Mr. Silva-Trevino’s counsel or any other stakeholders of the issues under review pursuant to his certification, and his concomitant failure to invite or allow any briefing, also serve to reduce the deference due the decision. *Jean-Louis*, 582 F.3d at 470 n.11. Three undersigned *amici*, with other organizations, protested the unusually secretive process in a brief submitted in support of Mr. Silva-Trevino’s motion for reconsideration. See *id.* (citing Br. of *Amici Curiae* American Immigration Lawyers Ass’n, Florence Immigrant and Refugee Rights Project, Immigrant Defense Project, Immigrant Legal Resource Ctr., Nat’l Immigration Project of the Nat’l Lawyers Guild, Nat’l Immigrant Justice Ctr., Refugio del Rio Grande, Inc., and Washington Defenders Ass’n Immigration Project in Support of Reconsideration, filed Dec. 5, 2008, available at http://www.immigrantdefenseproject.org/docs/08_SilvaTrevinoAmicusBrief.pdf). The motion to reconsider was summarily denied in a five-sentence decision issued two days before the Attorney General left office. *Matter of Silva-Trevino*, Order No. 3034-2009 (A.G. Jan. 15, 2009). The decision’s only response to the serious procedural due process concerns raised by *amici* was the Attorney General’s assertion that “there is no entitlement to briefing when a matter is certified for Attorney General review.” *Id.*

II. IN PRACTICE, *SILVA-TREVINO* IMPOSES AN UNWORKABLE SCHEME RAISING SERIOUS CONSTITUTIONAL CONCERNS FOR MORAL TURPITUDE DETERMINATIONS IN IMMIGRATION COURTS AND NON-ADVERSARIAL AGENCY ADJUDICATIONS.

The *Silva-Trevino* framework requires often ill-equipped immigrants to relitigate the facts underlying convictions in fora that lack adequate procedural safeguards, violating fundamental constitutional principles of fairness, due process and uniformity. This Court should therefore reject *Silva-Trevino* and deny the Government’s request to remand Petitioner’s case to the BIA for the purpose of applying its novel framework.

A. Forcing Respondents in Removal Proceedings—Often Detained and Unrepresented—to Relitigate the Facts of Old Convictions is Impracticable and Offends Notions of Fairness and Due Process.

The categorical analysis has long operated as a fair and predictable process for making CIMT determinations by inquiring into the elements of a criminal statute, informed when necessary by reference to “a narrow, specified set of documents that are part of the record of conviction.”

Nicanor-Romero v. Mukasey, 523 F.3d 992, 1007 (9th Cir. 2008) (quoting *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004)). In contrast, *Silva-Trevino* imposes an unworkable system in which respondents face a grave

deprivation of liberty—which the Supreme Court has described as the “loss ‘of all that makes life worth living,’” *Knauer v. United States*, 328 U.S. 654, 659 (1946) (citation omitted) and as a “harsh” and “drastic measure,” *Padilla v. Kentucky*, --- U.S. ---, 2010 WL 1222274, at *2 (Mar. 31, 2010) (internal quotation and citation omitted)—without the procedural protections necessary to ensure a fair hearing. *Silva-Trevino* places on respondents, many of whom are *pro se* and detained, the unrealistic burden of litigating complex factual issues related to events which often occurred years or even decades in the past.

The categorical inquiry is a straightforward legal determination that immigration judges routinely make on behalf of *pro se* respondents. However, under the *Silva-Trevino* framework the court must rely upon the factual record created by the parties. Unrepresented respondents, lacking an adequate understanding of the legal standards at issue in their cases, are unable to develop an appropriate factual record. Over sixty percent of respondents in immigration court appear *pro se*. EXEC. OFFICE FOR IMMIGR. REV., FY 2009 STATISTICAL YEARBOOK, at G1 fig.9 (2010), *available at* <http://www.justice.gov/eoir/statspub/fy09syb.pdf>. Fully half of all respondents were in detention in 2009, *id.* at O1 fig.23; in fiscal year 2007 (the most recent year with publicly available data), eighty-four percent of

detained respondents were unrepresented. NINA SIULC ET AL., IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM 1 (May 2008), *available at* http://www.vera.org/download?file=1780/LOP%2BEvaluation_May2008_final.pdf. Detained *pro se* respondents are routinely transferred far from the locus of their crime and place of residence to detention facilities in remote locations,⁸ severely restricting their ability to investigate and produce the evidence required under *Silva-Trevino*'s new framework. *Cf. Smith v. Hooy*, 393 U.S. 374, 380 (1969) (“Confined in a prison, perhaps far from the place where the offense . . . allegedly took place, [a prisoner’s] ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired.”).

Silva-Trevino further offends due process by requiring many respondents to establish facts underlying old convictions long after memories have faded and witnesses and other evidence are no longer available. As the Supreme Court has explained, the Sixth Amendment right to a speedy trial is rooted in concerns of fairness. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972) (stating that “the inability of a defendant adequately to

⁸ *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, HUGE INCREASES IN TRANSFERS OF ICE DETAINEES (2009), <http://trac.syr.edu/immigration/reports/220/>.

prepare his case [as a result of long delays] skews the fairness of the entire system”). Although this right does not apply in civil removal proceedings, the underlying fairness concerns also sound in Fifth Amendment due process.

B. Abandoning the Categorical Approach for CIMT Determinations Made by DHS Officers in Non-Adversarial Immigration Adjudications Outside of Immigration Courts Creates Additional Due Process Violations.

The due process defects that arise from abandoning the categorical approach to CIMT determinations are compounded in non-adversarial proceedings outside of the immigration courtroom.⁹ According to the American Bar Association (“ABA”), “low-level immigration officers . . . make countless assessments of the impact of noncitizens’ criminal convictions each year.” ABA, RESOLUTION 113: PRESERVING THE CATEGORICAL APPROACH IN IMMIGRATION ADJUDICATIONS 2 (Aug. 4, 2009), *available at* http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Thirteen.doc. Many of the determinations made by immigration officers require a determination of whether an individual has been convicted of a CIMT. *See, e.g.*, 8 U.S.C. § 1226(c)(1) (requiring mandatory detention of persons inadmissible or deportable

⁹ Attorney General decisions such as *Silva-Trevino* constitute binding precedent in all DHS immigration adjudications. 8 C.F.R. § 1003.1(g).

because of conviction for, *inter alia*, CIMTs); 8 C.F.R. § 1003.19(h)(2)(i) (depriving immigration judges of jurisdiction to review DHS’ bond determinations for certain classes of aliens, *e.g.*, arriving aliens). In addition, domestic violence victims seeking relief under the Violence Against Women Act—who often face imminent peril if not granted relief—must establish “good moral character” before an immigration officer, requiring a determination that they have not been convicted of a CIMT. 8 U.S.C. §§ 1101(f)(3), 1154(a)(1)(A)(iii)(II)(bb), (a)(1)(A)(iv); 8 C.F.R. § 204.2(c)(2)(v). The categorical approach is critical to the fair operation of these non-adversarial administrative processes, where CIMT determinations are of necessity made quickly and with even less opportunity for the immigrant to contest government reliance on purported facts not established by the criminal conviction itself. Its abandonment in these contexts amplifies the unfairness of the new framework articulated in *Silva-Trevino*.

III. THE DECISION IMPERMISSIBLY APPLIES A DRAMATIC AND ENTIRELY NEW RULE RETROACTIVELY TO NONCITIZENS, WHO PLED GUILTY PRIOR TO ITS ISSUANCE, IN REASONABLE RELIANCE UPON LONG SETTLED PRECEDENT.

Even assuming *arguendo* that *Silva-Trevino* were correct, which it is not, the agency’s retroactive application of the new rule to Petitioner is an abuse of discretion and a violation of due process. Although “rulemaking is

generally a better, fairer, and more effective method” of announcing a new administrative rule, *Community Tel. of S. Calif. v. Gottfried*, 459 U.S. 498, 511 (1983), agencies may and do announce new rules through adjudication, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202 (1947). However, there are limits on an agency’s power to apply such new rules retroactively. *Bell Aerospace*, 416 U.S. at 295, *Chenery Corp.*, 332 U.S. at 202; *cf. INS v. St. Cyr*, 533 U.S. 289, 315–16 (2001) (discussing generally presumption against retroactivity).

As the Supreme Court has explained, retroactivity analysis turns on “familiar considerations of fair notice, reasonable reliance, and settled expectations.” *St. Cyr*, 533 U.S. at 321. When a “substantial” “adverse consequence” results from reliance on a prior decision or “some new liability . . . [is] imposed on an individual for past actions which were taken in good-faith reliance on” such prior decision, it offends due process and is an abuse of discretion to retroactively apply a new rule announced through an agency adjudication. *Bell Aerospace*, 416 U.S. at 295; *see also Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984) (recognizing the principle that “an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests”).

As Petitioner notes, Petr’s Reply Br. at 14, this Circuit, like many others, applies a five-factor test to determine when a new rule announced in an agency adjudication can be applied retroactively. The factors are:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule represents an abrupt departure from well-settled practice or merely attempts to fill a void in an unsettled area of law,
- (3) the extent to which the party against whom the new rule is applied relied on the former rule,
- (4) the degree of burden which a retroactive order imposes on a party, and
- (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007) (quoting *Montgomery Ward & Co. Inc. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982) (adopting the test of the D.C. Circuit in *Retail, Wholesale and Dep’t Store Union, AFL-CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972))).

For the reasons stated by the Petitioner, *see* Pet’r Reply Br. at 14–18, the application of *Silva-Trevino* to those who are charged with removability on the basis of offenses of which they were convicted prior to the Attorney General’s decision is impermissible under this standard. *Amici*, as organizations that counsel and assist immigrants accused and convicted of crimes, offer their experience and expertise to further inform the Court’s consideration of the application of several of these factors to Petitioner’s case.

A. The New Rule Announced in the *Silva-Trevino* Decision is an Abrupt Departure from an Extremely Well-Settled Prior Rule of Law.

As this Court explained in *Pfaff v. United States Department of Housing and Urban Development*, 88 F.3d 739, 748 n.4 (9th Cir. 1996):

The disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency's authority. While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable per se, this problem grows more acute the further the new rule deviates from the one before it. Adjudication is best suited to incremental developments to the law, rather than great leaps forward.

It is difficult to overstate the extent to which *Silva-Trevino* represents a dramatic and abrupt change of agency interpretation. The rule it replaced, requiring the use of traditional categorical analysis, has been a fundamental tenet of immigration law for over a century. *See supra* Point I. *Amici*, as authors of widely consulted reference materials regarding the intersection of immigration and criminal law, had long and unequivocally advised criminal defense counsel and immigrant defendants that they could rely on application of the categorical approach in accepting or rejecting plea bargains and crafting criminal dispositions. *See, e.g.*, IMMIGRANT LEGAL RESOURCE CTR., DEFENDING IMMIGRANTS IN THE NINTH CIRCUIT: IMPACT OF CRIMES UNDER CALIFORNIA AND OTHER STATE LAWS ch.4 § 4.9 (10TH ED. 2008) (“[T]o determine whether a given crime involves moral turpitude, one

looks not at the conduct of the defendant in question, but rather at the crime as defined.”); DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIME § 6:2 (Rel. 12, June 2008) (authored in part by *amicus* National Immigration Project) (“In determining whether a crime is turpitudinous by nature, the BIA considers whether the offense at its minimum necessarily involves moral turpitude. . . . [T]he Board bases its determination on the elements of the offense for which the noncitizen was convicted”); MANUEL D. VARGAS, REPRESENTING IMMIGRANT DEFENDANTS IN NEW YORK G-15 (4th ed. 2006) (authored by *amicus* Immigrant Defense Project) (“It is the inherent nature of the crime as defined by statute and interpreted by the courts as limited and described by the record of conviction and not the particular facts and circumstances of your client’s case that determines whether it is a [CIMT]”) (internal quotation marks and citation omitted). As set forth *supra* Point I, this decision was a wholly unforeseeable about-face for an agency that has reaffirmed this basic principle of law innumerable times. This factor cuts sharply in favor of prohibiting retroactive application of the new CIMT analysis announced in this decision.

B. Noncitizen Criminal Defendants Reasonably Relied on the pre-*Silva* Categorical Analysis for CIMTs

The potential for reasonable reliance on prior law is often at the heart of judicial unease with retroactive application of new rules. *See, e.g., St. Cyr*, 533 U.S. at 321; *Heckler*, 467 U.S. 51, 60 n.12; *Bell Aerospace Co.*, 416 U.S. at 295. The rule of law upended by *Silva-Trevino* was one on which immigrant defendants accused of crimes routinely relied up until the moment the Attorney General’s decision became known.

The ability to accurately predict the immigration consequences of a guilty plea “has never been more important” to noncitizens. *Padilla*, 2010 WL 1222274 at *5. As the Supreme Court recently recognized, removal “is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* (footnote omitted). As a result, “there can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.” *St. Cyr*, 533 U.S. at 322. Indeed, “[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.” *Padilla*, 2010 WL 1222274 at *10; *St. Cyr*, 533 U.S. at 323 n.48 (citing ABA Standards for Criminal Justice) and explaining that “if a defendant will face deportation as the result

of a conviction defense counsel should fully advise the defendant of these consequences” (internal quotation marks omitted)); *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974) (“Where his client is an alien, counsel . . . has the obligation of advising him of his particular position as a consequence of his plea.”); *see also* KESSELBRENNER & ROSENBERG, *supra*, at § 4:19.

These professional norms are so entrenched that the Supreme Court has recently made clear that the Sixth Amendment requires that a non-citizen criminal defendant be made aware of the immigration consequences of a guilty plea. *Padilla*, 2010 WL 1222274, at *7. As noted above, many *amici* on this brief provide advice about immigration consequences on which thousands of immigrant defendants have relied¹⁰ and therefore know from first-hand experience that thousands of defendants have pleaded guilty in specific reliance on advice that their plea will not subject them to removal. Where a litigant has waived constitutional rights by entering into a *quid pro quo* criminal plea agreement in return for settled expectations as to immigration consequences, the reliance interest is especially strong. *St. Cyr*,

¹⁰ *See, e.g.*, National Immigration Project of the National Lawyers Guild, Criminal & Deportation Defense, <http://www.nationalimmigrationproject.org/CrimPage/CrimPage.html>; Immigrant Defense Project, <http://www.immigrantdefenseproject.org>; Defending Immigrant Partnership, <http://defendingimmigrants.org/>; Immigrant Legal Resource Center, Criminal and Immigration Law: Defending Immigrants’ Rights, <http://www.ilrc.org/criminal.php> (all last visited Apr. 5, 2010).

533 U.S. at 321–24. *Silva*'s shocking and unforeseen abandonment of this approach upsets this strong interest.

Because immigrant defendants like Petitioner routinely relied on the well-settled application of the categorical approach in disposing criminal cases, this factor weighs heavily against the retroactive application of *Silva-Trevino*.

C. The Retroactive Burden Imposed on Petitioner and Those Like Him is Severe.

Since removal is a monumental deprivation of liberty, “the equivalent of banishment or exile,” *Padilla*, 2010 WL 1222274, at *11 (internal quotations and citation omitted), this court has rightly declined to apply new adjudicative rules retroactively in the removal context where they represent an abrupt departure from settled practice. *See, e.g., Miguel-Miguel*, 500 F.3d at 952 (noting that “deportation alone is a substantial burden that weighs against retroactive application of an agency adjudication”); *Kankamalage v. INS*, 335 F.3d 858, 862–64 (9th Cir. 2003); *Ruangswang v. INS*, 591 F.2d 39, 46 (9th Cir. 1978). The retroactive consequences of *Silva-Trevino* are at least as serious as those that have impelled this Court to limit the retroactive effect of other immigration-related rules. In *Miguel-Miguel*, the court found that a new rule for determining whether certain drug crimes were “particularly serious” so as to bar persecution-based relief from

removal visited a heavy burden on a respondent who was, whether or not his crime was “particularly serious,” unarguably deportable from the United States as an aggravated felon. 500 F.3d at 952. Similarly, in *Kankamalage*, 335 F.3d at 863–64, the court found a new regulation that precluded individuals from seeking asylum on the basis of certain crimes should not be applied retroactively to a respondent who had conceded deportability on the basis of a robbery conviction. Here, in contrast, the retroactive application of *Silva-Trevino* necessarily serves to render deportable noncitizens who pleaded guilty to *non-deportable* offenses—often on the basis of specific and accurate immigration advice, *see* Point III.B *supra*. Whereas neither Mr. Miguel-Miguel nor Mr. Kankamalage could have had a reasonable expectation of avoiding a removal proceeding on the basis of his criminal conduct, thousands of non-citizens have relied on settled law in waiving fundamental rights and pleading guilty to offenses that they believed would not trigger removal. This Court found just such a burden to be too heavy in *Ruangswang*, where the respondent faced deportability under a new agency interpretation of regulations upon which she had justifiably relied to make business decisions that established her eligibility to adjust status to that of lawful permanent residence. 591 F.2d at 41–42. Determining the “adverse consequences [of] voluntary departure at best, and deportation at worst” to

be “substantial,” the court refused to allow the retroactive application of the agency interpretation. *Id.* at 44.

CONCLUSION

For the foregoing reasons this Court should grant the Petition for Review and reject the radical moral turpitude framework set forth in *Silva-Trevino*.

Respectfully Submitted,

Date: April 5, 2010
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On the Brief

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Constitution and Statutes

U.S. CONST., amend. VI

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

* * *

8 U.S.C. § 1101(a)(43)(M)(i)

§ 1101. Definitions

(a) As used in this Act—

...

(43) The term "aggravated felony" means—

...

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [sic] least one year;

...

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$ 10,000;

* * *

8 U.S.C. § 1101(f)(3)

§ 1101. Definitions

(f) For the purposes of this chapter--

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was--

...

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period

* * *

8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb), (iv)

§ 1154. Procedure for granting immigrant status

(a) Petitioning procedure

(iii)(I) An alien who is described in subclause (II) may file a petition with the Attorney General under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the Attorney General that--

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

(II) For purposes of subclause (I), an alien described in this subclause is an alien--

...

(bb) who is a person of good moral character;

...

(iv) An alien who is the child of a citizen of the United States, or who was a child of a United States citizen parent who within the past 2 years lost or renounced citizenship status related to an incident of domestic violence, and who is a person of good moral character, who is eligible to be classified as an immediate relative under section 1151(b)(2)(A)(i) of this title, and who resides, or has resided in the past, with the citizen parent may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Attorney General that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's citizen parent. For purposes of this clause, residence includes any period of visitation.

* * *

8 U.S.C. § 1182(a)(2)(A)(i)(I)

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

...

(2) Criminal and related grounds.

(A) Conviction of certain crimes.

(i) In general. Except as provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime

...

is inadmissible.

* * *

8 U.S.C. § 1226(c)(1)

§ 1226. Apprehension and detention of aliens

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

* * *

8 U.S.C. § 1227(a)(2)(A),(B),(C), (E)

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

...

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

...

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or

conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

...

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and [sic]

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection

order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term “protection order” means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

* * *

18 U.S.C. § 924(e)(2)(B)(i)–(ii)

§ 924. Penalties.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

...

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

* * *

Regulations

8 C.F.R. § 204.2(c)(2)(v)

§ 204.2 Petitions for relatives, widows and widowers, and abused spouses and children.

. . .

(c) Self-petition by spouse of abusive citizen or lawful permanent resident—

. . .

(2) Evidence for a spousal self-petition--

. . .

(v) Good moral character. Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service

will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

* * *

8 C.F.R. § 1003.1(g)

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

...

(g) Decisions as precedents. Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

* * *

8 C.F.R. § 1003.19(h)(2)(i)

§ 1003.19 Custody/bond.

(h)(1)(i) While the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104-208 remain in effect, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(2)(i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub. L. 104-208, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

- (A) Aliens in exclusion proceedings;
- (B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;
- (C) Aliens described in section 237(a)(4) of the Act;
- (D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules); and
- (E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub. L. 104-132).

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