Mills Legal Clinic
Stanford Law School
Immigrants' Rights Clinic

IDP IMMIGRANT DEFENSE PROJECT

PRACTICE ADVISORY

CRIMINAL BARS TO RELIEF AND BURDEN OF PROOF CONSIDERATIONS:
Model Briefing for Defending Eligibility for LPR Cancellation of Removal Where the Record of Conviction Is Inconclusive*

May 4, 2012

In an application for relief from removal, the noncitizen has the burden to prove that he is eligible for relief. INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A). For a lawful permanent resident (LPR) applicant for the relief of cancellation of removal, this means that he must show that he "has not been convicted of any aggravated felony," among other requirements. INA § 240A(a), 8 U.S.C. § 1229b(a). Government attorneys around the country are currently relying on *Matter of Almanza-Arenas*, 24 I. & N. Dec. 771 (B.I.A. 2009), and recent adverse circuit precedent, *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011) and *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009), to argue that an LPR fails to meet his burden when the record of conviction is inconclusive (i.e., when it does not conclusively show that the LPR either was convicted of an aggravated felony or was not). This issue is now increasingly being litigated in the federal courts of appeals, *see, e.g.*, *Young v. Holder*, 653 F.3d 897 (9th Cir. 2011) (granting rehearing en banc), and there is a possibility that the Supreme Court will take up the issue as part of its consideration of *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011), *petition for cert. granted*, 80 U.S.L.W. 3367, 3559, 3562 (U.S. Apr. 2, 2012) (No. 11-702).

This advisory provides suggestions for responding to the government's arguments regarding the proper allocation and interpretation of burdens of proof at cancellation in order to persuade adjudicators that an LPR meets his burden when he shows that the evidence does not establish that his conviction falls within the relevant criminal ground bar. Throughout the model brief are circuit-specific notes for how to adapt the arguments for cases in different circuits, depending on whether the circuit has addressed the issues. Although this advisory focuses on the aggravated felony bar to cancellation of removal for lawful permanent residents, portions of the advisory may also be helpful in analyzing other criminal bars faced by noncitizens applying for other forms of relief from removal.

This practice advisory is divided into the following sections:

- Background regarding burdens of proof in adjudication of eligibility for relief in immigration court
- Overview and explanation of arguments that can be made for a favorable interpretation of the burden of proof provisions applicable at cancellation of removal
- Additional resources
- Appendix A: Model brief language presenting sample arguments, with notes suggesting adaptations for use within specific circuits that have decided some of the issues in question

* This practice advisory was prepared on behalf of the Immigrant Defense Project by Kathryn Austin, Rebecca Kline, Sue Wang, Alison Kamhi, and Jayashri Srikantiah of the Immigrants' Rights Clinic at Stanford Law School. Portions of the model briefing accompanying this advisory were used in, and benefited from the work of the drafters of, the supplemental briefing submitted in January 2012 on rehearing en banc in *Young v. Holder*, 653 F.3d 897 (9th Cir. 2011), *supp. briefing filed*, (9th Cir. 2012) (No. 07-70949). The authors also wish to acknowledge the helpful input of Dan Kesselbrenner of the National Immigration Project and Kathy Brady of the Immigrant Legal Resource Center.

In 2005, Congress enacted the REAL ID Act, which, in part, codified the pre-existing regulation at 8 C.F.R. § 1240.8(d) in 8 U.S.C. § 1229a(c)(4)(A). This statute places the burden on the noncitizen to prove eligibility for relief from removal:

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

8 U.S.C. § 1229a(c)(4)(A).

In *Almanza-Arenas*, the Board of Immigration Appeals (BIA) held that an undocumented noncitizen did not satisfy his burden of proving that he was eligible for the relief of cancellation of removal under 8 U.S.C. § 1229b(b) because he did not prove that his conviction was not a crime involving moral turpitude (CIMT). The BIA concluded that, in relying on an "inconclusive" record of conviction (one that neither conclusively established that the conviction was for a CIMT nor conclusively established that it was for a conviction falling outside the definition of a CIMT), the noncitizen had not carried his burden of proof. According to the BIA, this was so in part because the noncitizen failed to comply with an immigration judge's order that he produce additional, more conclusive documents from the record of conviction. The government is now citing *Almanza-Arenas*[1]—and relying on the adverse precedents from the Fourth and Tenth Circuits—to argue that a noncitizen fails to meet his burden of proving eligibility for relief on an inconclusive record.[2]

The focus of this practice advisory is on how the REAL ID Act burden of proof provision applies to the similar aggravated felony bar for LPRs applying for cancellation of removal under 8 U.S.C. § 1229b(a).[3] One of the requirements for relief eligibility under this provision is that the LPR "has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). The longstanding regulation governing burdens of proof for relief eligibility specifies that "[i]f the evidence indicates that one or more of the grounds for

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[1] Regarding whether *Almanza-Arenas* should receive deference as an agency decision pursuant to *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), practitioners in circuits with favorable decisions pre-dating *Almanza-Arenas* should argue that the BIA's contrary position did not supplant controlling judicial precedent; *Almanza-Arenas* nowhere cited *Brand X*. *See generally Almanza-Arenas*, 24 I. & N. Dec. 771 (B.I.A. 2009).

[2] In circuits that have not yet decided the issue, practitioners can cite favorable circuit court decisions from other circuits to preserve the argument. Although the immigration judge is bound to apply *Almanza-Arenas*, the circuit court can choose to reverse *Almanza-Arenas* for all removal proceedings within that circuit. *See, e.g.*, *Matter of Singh*, 25 I & N Dec. 670, 679 (B.I.A. 2012) (confirming that where a circuit court reverses the BIA, the circuit's decision is binding on immigration judges within that circuit).

[3] To determine whether a conviction is an aggravated felony, the categorical approach applies such that the immigration judge is only permitted to consider the elements of the statute of conviction, or, if the statute covers conduct outside the aggravated felony definition, a limited set of documents that comprise the "record of conviction" in order to determine -- under the modified categorical approach -- whether or not a conviction falls within a divisible portion of the statute that does constitute an aggravated felony. Note that the Fourth Circuit has questioned the application of the modified categorical approach in the context of cancellation of removal, and practitioners in this circuit will likely have to directly address this issue. *See Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011). For more information about the categorical and modified categorical approaches, see IDP Practice Advisory, *Recent Developments in the Categorical Approach*, *available at* http://immigrantdefenseproject.org/wp-content/uploads/2011/02/Appendix-L.pdf. Practitioners may want to consult *Matter of Lanferman*, 25 I. & N. Dec. 721 (B.I.A. 2012), for the BIA's most recent interpretation of which situations involve a criminal statute that is divisible and allow the courts to look to the record of conviction to determine whether the conviction is an aggravated felony.

mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. § 1240.8(d).

Under the rules of evidence, the burden of proof encompasses two distinct concepts: the burden of production (i.e., the obligation to come forward with evidence), and the burden of persuasion (i.e., the duty to convince the factfinder who should prevail on the evidence). The government may argue that the noncitizen bears the burden of producing conviction records pertaining to any potentially disqualifying aggravated felony convictions. While no court has conclusively addressed the burden of production issue, at least one court of appeals has attempted in dicta to place the burden of production on the noncitizen. *See Vasquez-Martinez v. Holder*, 564 F.3d 712, 716 (5th Cir. 2009). Part I of the attached model brief argues that the government—and not the noncitizen—bears the burden of producing documents from the record of conviction to show that the aggravated felony bar to relief applies.

Once conviction records have been admitted into evidence—and regardless of whether the noncitizen was required to supplement them (see below)—the government may argue that the noncitizen fails to meet his burden of proof on an inconclusive record (i.e., one that does not conclusively demonstrate an aggravated felony conviction). Courts diverge on how the noncitizen can meet this burden of persuasion—namely, of persuading the immigration judge that the aggravated felony bar does not apply—placed on him by 8 U.S.C. § 1229a(c)(4)(A) and 8 C.F.R. § 1240.8(d). When the record of conviction does not conclusively show that the conviction is for an offense that falls outside of the definition of an aggravated felony, the BIA and some federal circuit courts of appeals have held that the noncitizen does not satisfy his burden of persuasion. *See Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009); *Matter of Almanza-Arenas*, 24 I. & N. Dec. 771 (B.I.A. 2009). By contrast, other circuit courts have held that the noncitizen has proven by a preponderance of the evidence that he has not been convicted of an aggravated felony if his record of conviction does not conclusively show that his conviction is for an aggravated felony. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 886 (9th Cir. 2011), *reh'g denied*; *Thomas v. Att'y Gen. of U.S.*, 625 F.3d 134, 148 (3d Cir. 2010); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1132-33 (9th Cir. 2007); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006); *see also Omari v. Gonzales*, 419 F.3d 303, 309 (5th Cir. 2005). The attached model brief, in Part II, offers arguments to support the latter position—that a noncitizen meets his burden of persuasion when the record of conviction fails to show that the noncitizen has conclusively been convicted of an aggravated felony.

Even after the record of conviction is admitted into evidence, the BIA in *Matter of Almanza-Arenas* has interpreted the burden of proof provisions to place a duty on noncitizens to supplement the record of conviction upon an immigration judge's request, or risk failing to carry the burden of persuasion. 24 I. & N. Dec. at 776. The Ninth Circuit has rejected this approach, *Rosas-Castaneda*, 655 F.3d at 885 (holding that 8 U.S.C. § 1229a(c)(4)(B) does not require the noncitizen to supplement the record of conviction in order to meet his burden of proof), although an en banc panel of the Ninth Circuit is currently reconsidering the issue. *See Young*, 653 F.3d at 898 (granting rehearing en banc). Part III of the attached model brief rebuts the argument that the noncitizen must suffer a penalty if he does not produce documents to supplement the record of conviction before the court.

Overview of Model Brief Arguments for Favorable Interpretation of Burden of Proof

The purpose of the attached model brief (see Appendix A) is to provide sample arguments for favorable interpretations of the burden of proof provisions at cancellation of removal. These arguments primarily are targeted at courts in circuits that have not yet addressed the issue, but we have also included circuit-specific language for practitioners addressing the burden of proof issues within circuits that have already considered any of these issues.

The sample arguments in support of a favorable interpretation of the noncitizen's burden of proof at cancellation of removal are as follows:

- The government bears an initial burden of production: it is the government's responsibility to produce the record of conviction from which the immigration judge will determine cancellation eligibility. This argument is supported by the governing statute and regulations, by Congress's conception of removal proceedings as a single proceeding in which the government typically produces criminal records, and by established precedent allocating the burden of production to the party with superior access to the relevant evidence (here, the government, in comparison to detained and/or *pro se* noncitizens). [See Part I.]

- The noncitizen satisfies her burden of persuasion to establish eligibility for relief if the record of conviction does not conclusively show that the noncitizen has been convicted of an aggravated felony. Under the modified categorical approach, a noncitizen has been convicted of an aggravated felony *only if* the conviction record conclusively shows that he has been found guilty of all elements of an aggravated felony. If the record of conviction does not so establish, the noncitizen has satisfied his burden of persuasion of proving that he has not been convicted of an aggravated felony. [See Part II.]

- After the government produces criminal records purporting to indicate an aggravated felony conviction, the immigration judge cannot require the noncitizen to supplement the record of conviction, because to do so would be contrary to the plain language of statutory 8 U.S.C. § 1229a(c)(4)(B), which permits the immigration judge to require corroboration only of "otherwise credible testimony." This issue has nothing to do with credible testimony because the record of conviction is neither testimony nor of questionable credibility. Failure by the noncitizen to provide additional documents from the record of conviction does not mean that the noncitizen has failed to satisfy his burden of proof, especially given the lesser access that detained and/or *pro se* noncitizens have to such documentation. [See Part III.]

Additional Resources

Aggravated Felonies and Categorical Approach Resources

Immigrant Defense Project, *Practice Advisory: Recent Developments in the Categorical Approach: Tips for Criminal Defense Lawyers Representing Immigrant Clients* (2011), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2011/02/Appendix-L.pdf.

Immigrant Defense Project and National Immigration Project, *Practice Advisory: The Impact of* Nijhawan v. Holder *on Application of the Categorical Approach to Aggravated Felony Determinations* (2009), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2011/02/Nijhawan.pdf.

National Immigration Project, *Practice Advisory: The Burden of Proof to Overcome the Aggravated Felony Bar to Cancellation of Removal* (2007), *available at* http://www.nationalimmigrationproject.org/legalresources/cd_pa_Burden%20of%20Proof%20Re%20AgFel%20Cancellation%20Bar%20-%20March%202007.pdf.

Immigrant Legal Resource Center, *Burden of Proof Victory in the Ninth Circuit: Government Bears the Burden of Producing Documents to Prove That a Conviction Under a Divisible Statute Is a Bar to Relief such as Cancellation; The Ninth Circuit Will Not Follow the* Matter of Almanza-Arenas *Rule Even in Applications for Relief Filed After REAL ID* (2011), *available at* http://www.ilrc.org/files/documents/burden_of_proof_victory_rosas_castanedas.pdf.

Immigrant Legal Resource Center, *The Categorical Approach in the Ninth Circuit and* United States v. Aguila-Montes de Oca *(9th Cir. August 2011) (en banc)* (2011), *available at* http://www.ilrc.org/files/documents/cat_approach.pdf.

Selected Resources Regarding Detention Conditions

Amnesty International, *Jailed Without Justice: Immigration Detention in the USA* (2008), *available at* www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

Detention and Deportation Working Group, *Briefing Materials Submitted to the United Nations Special Rapporteur on the Human Rights of Migrants* (2007), *available at* http://www.aclu.org/files/pdfs/humanrights/detention_deportation_briefing.pdf.

Geoffrey Hereen, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 Harv. C.R.-C.L. L. Rev. 601 (2010).

Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* (2011), *available at* http://www.hrw.org/reports/2011/06/14/costly-move-0.

Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (2009), *available at* www.hrw.org/sites/default/files/reports/us1209web.pdf.

International Human Rights Clinic, Seattle University School of Law & OneAmerica, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington* (2008), *available at* www.weareoneamerica.org/sites/default/files/OneAmerica_ Detention_Report.pdf.

Nina Rabin, *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*, 23 Geo. Immigr. L.J. 695 (2009).

Karen Tumlin & Linton Joaquin, National Immigration Law Center & Ranjana Natarajan, ACLU of Southern California, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers* (2009), *available at* www.nilc.org/document.html?id=9.

APPENDIX A – MODEL BRIEF

Instructions for reading and using the model brief: Parts I through III can be used together or separately, in any combination that is applicable to the issues before the court in a given case. Note that in the model brief, alternative language is proposed for courts within certain circuits, based on how the various circuit courts have ruled on individual issues. Instructions regarding how to present the circuit-specific arguments are noted in *italicized language* in text boxes within the model brief, and alternative language is denoted by {the bracketed text} within the text boxes. Note that the model brief uses "Mr. X" throughout as a placeholder for the client's name.

I. The Governing Statute and Regulations Require DHS to Produce Evidence Indicating that the Aggravated Felony Bar to Cancellation of Removal Applies to Mr. X.

The immigration statute and regulations read as a whole require the Department of Homeland Security (DHS) to bear the burden of producing evidence showing that Mr. X is subject to the aggravated felony bar to cancellation. First, section 1229a was enacted against the backdrop of 8 C.F.R. § 1240.8(d), which presumes that the government has already submitted "evidence indicat[ing]" that a noncitizen may have been convicted of an aggravated felony before the noncitizen's burden to show that the cancellation bar does not apply is triggered. Second, the government's burden to produce records "indicating" the existence of an aggravated felony conviction at cancellation accords with the statutory framework established by Congress, in which the government is designated to produce records relating to convictions with immigration consequences. Third, the statutory and regulatory placement of the burden of production on the government is consistent with established precedent allocating the burden of production to the party with superior access to records (here, the government).

A. The Governing Statute, 8 U.S.C. Section 1229a, Codified Longstanding Regulatory Requirements that DHS Produce Evidence that "Indicates" that a Ground for Mandatory Denial of Cancellation May Apply.

DHS bears the burden of producing conviction records to show that the aggravated felony bar to eligibility for cancellation of removal may apply, as indicated by the statutory text of

section 1229a(c)(4) and the regulation it codified. The language of the cancellation eligibility statute requires that a noncitizen "has *not* been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3) (emphasis added). That language contemplates some initial showing that an aggravated felony conviction may, in fact, exist before the noncitizen's burden of proving that negative is triggered. This initial showing before the noncitizen's burden of persuasion is triggered is precisely what the applicable regulation presumes by speaking of the noncitizen's burden only after there is "evidence indicat[ing] that" such a "ground[] for mandatory denial . . . may apply." 8 C.F.R. § 1240.8(d).[4] In fact, section 1229a(c)(4), as amended by the REAL ID Act, was enacted against the backdrop of this regulation, which was referenced in REAL ID's legislative history. *See* H.R. Rep. No. 109-72, at 169 (2005) (Conf. Rep.).

That the government bears the burden of production for cancellation accords with the statutory expectation that the government is generally expected to produce criminal records

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Fifth Circuit and Eighth Circuit practitioners should insert the following language to respond to the government's citation of Vasquez-Martinez v. Holder, 564 F.3d 712 (5th Cir. 2009) *or* Sanchez v. Holder, 614 F.3d 760 (8th Cir. 2010), *respectively.*

Fifth Circuit Rebuttal*: Vasquez-Martinez v. Holder*, 564 F.3d 712 (5th Cir. 2009), did not hold to the contrary. In *Vasquez-Martinez*, the issue before the court was whether to uphold the BIA's "*legal* conclusion that the crime for which [the noncitizen] was convicted 'may' have been an aggravated felony," *id.* at 716-17, and not whether the noncitizen had met his burden of proof. Although the court suggested in dicta that it did not interpret either 8 U.S.C. § 1229a(c)(4)(A) or 8 C.F.R. § 1240.8(d) to require the government to produce evidence that the noncitizen is ineligible for discretionary relief, *Vasquez-Martinez*, 564 F.3d at 716, this reasoning was not necessary to the court's ultimate holding, as the government had already produced the record of conviction at the removal stage. *Id.* at 714. Accordingly, *Vasquez-Martinez* does not preclude this court from concluding that the government bears the burden of producing evidence "indicating" the applicability of the aggravated felony bar to eligibility for cancellation of removal.

Eighth Circuit Rebuttal*:* The Eighth Circuit did not hold to the contrary. In *Sanchez v. Holder*, the government had already produced the record of conviction, so the issue of production was not before the Court. 614 F.3d at 762.

showing removability before the submission of a noncitizen's application for cancellation. *See infra*, Point I.B. Under the statute, cancellation determinations occur only after an immigration judge finds that a noncitizen is removable. 8 U.S.C. § 1229b(a) ("The Attorney General may *cancel removal* . . . of *an alien who is inadmissible or deportable* . . . ." (emphasis added)). If the government believes that a noncitizen has been convicted of an aggravated felony or other removable offense, it is reasonable to expect that the government will have already produced conviction records relevant to "indicate" such a conviction prior to any application for cancellation. Although the Board of Immigration Appeals (BIA) and courts have found that the government is not required to charge a conviction as a ground of removability in order to raise the conviction as a bar to cancellation eligibility, *see Matter of Jurado*, 24 I & N Dec. 29 (B.I.A. 2006); *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006), if the statute and regulations were read to result in the burden of production being placed on the noncitizen whenever the government for whatever reason chooses not to charge an aggravated felony conviction at the removability stage, cancellation eligibility would "arbitrar[ily]" "hang[] on the fortuity of an individual [DHS] official's decision" to charge or not to charge an aggravated felony at removability. *See Judulang v. Holder*, __U.S.__, 132 S.Ct. 476, 486 (U.S. 2011).

The requirement that the government bear the burden of production with respect to bars to eligibility like the aggravated felony bar is consistent with procedures for determining eligibility for other forms of relief from removal under the Immigration and Nationality Act (INA). In the asylum context, for instance, where applicants for relief must prove that they are eligible "refugees," defined at 8 U.S.C. § 1101(a)(42), but where relief is barred for persecutors, the government must make a showing that the asylum-seeker was a persecutor before an immigration judge even considers whether the persecutor bar precludes relief. *Id.* As in the

cancellation context, the persecutor bar is listed together with other eligibility requirements in the statutory text, but because it is a bar to eligibility, the government bears the burden of producing evidence that the bar applies. *See, e.g.*, *Matter of Acosta*, 19 I. & N. Dec. 211, 219 n.4 (B.I.A. 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987) ("This provision is one of exclusion, not one of inclusion, and thus requires an alien to prove he did not participate in persecution *only if the evidence raises that issue*." (emphasis added)).

For bars like the aggravated felony bar to cancellation or the persecutor bar to asylum and withholding of removal, the applicable regulations place the burden of production on the government to show that the "evidence indicates" the bar applies. 8 C.F.R. § 1240.8(d) (cancellation of removal); *id.* § 208.13(c)(2)(ii) (asylum); *id.* § 1208.16(d)(2) (withholding of removal). Courts interpreting this very language in the context of asylum applications have concluded that "the INS [DHS's predecessor agency] bears the initial burden of producing evidence that indicates that the [mandatory] bar applies . . . ." *Abdille v. Ashcroft*, 242 F.3d 477, 491 n.12 (3d Cir. 2001); *see also Ghashghaee v. INS*, 70 F. App'x. 936, 937 (9th Cir. 2003); *Matter of Acosta*, 19 I. & N. Dec. at 219 n.4 (finding that the persecutor bar "requires an alien to prove he did not participate in persecution only if the evidence raises that issue").[5] This conclusion applies with equal force to 8 C.F.R. § 1240.8(d) in the cancellation context, in light of

[5] The Immigration and Naturalization Service (INS), the agency predecessor to DHS, rejected an interpretation of an earlier asylum regulation that would allow the burden to shift on the basis of a "scintilla of evidence," or a "mere allegation," concluding that:

> The correct standard . . . requires a balancing of factors by the adjudicator who must determine whether evidence presented to him *reasonably indicates* the presence of a basis for a mandatory denial before requiring the applicant to meet the burden of refuting it.

Comments to Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11300-01 (proposed April 6, 1988) (codified at 8 C.F.R. pts. 3, 208, 236, 242, and 253) (emphasis added). 8 C.F.R. § 208.14(b) was the predecessor regulation to current 8 C.F.R. § 201.13(c)(1)(ii).

its similar wording. *See, e.g.*, *Xu Sheng Gao v. U.S. Att'y Gen.*, 500 F.3d 93, 103 n.4 (2d Cir. 2007) (applying 8 C.F.R. § 1240.8(d) to an asylum application and noting its similarity in language and analysis to 8 C.F.R. § 1208.13(c)(2)(ii)). Consistent with judicial interpretations of the cancellation and similar regulations, the government must produce conviction records that indicate the applicability of the aggravated felony bar before the burden shifts to the noncitizen to prove that the bar does not apply.

B. The Government's Statutory and Regulatory Obligation to Produce Records "Indicating" an Aggravated Felony Conviction is Consistent with Congress's Statutory Scheme Governing Removal Proceedings.

The government's burden of production in the cancellation context reflects Congress's overall scheme for removal proceedings, in which the burden of producing records to indicate the existence of a conviction generally rests on the government. In section 1229a, Congress established a single removal proceeding to encompass not only a determination of eligibility for cancellation of removal but also a prior determination of whether a noncitizen is removable in the first place. *See* 8 U.S.C. § 1229a (describing rules for "[a]pplications for relief from removal" alongside provisions describing "proceedings for deciding the inadmissibility or deportability of an alien"). The plain language of that section repeatedly assigns the role of producing criminal records to the government, and not to the noncitizen. For example, section 1229a(c)(3)(B) lists the documents the *government* must produce to demonstrate the existence of a conviction. Section 1229a(c)(3)(C) similarly envisions that the government is the entity both obtaining and submitting criminal history documents to the immigration court. *Id.* ("In *any* proceeding under this chapter, any record of conviction . . . that has been submitted by electronic means *to the Service* . . . shall be admissible as evidence to prove a criminal conviction if . . . [the transmitting agency and Service certify the record]." (emphasis added)).

By contrast, section 1229a nowhere requires the noncitizen to produce criminal records. *See id.* § 1229a(c)(2)-(4) (governing the noncitizen's burdens of proof). In fact, section 1229a(c)(4)(B) directs an applicant for cancellation of removal simply to "comply with the applicable requirements . . . as provided by law *or by regulation or in the instructions for the application form* [to submit information or documentation]," *id.* § 1229a(c)(4)(B) (emphasis added), and neither the regulations nor the instructions place a burden of production upon the noncitizen. The regulations allocate the burden of producing "evidence indicat[ing]" an aggravated felony conviction to the government, *see supra* Part I.A., and the form instructions do not require the noncitizen to submit criminal conviction documents. *See* Application for Cancellation of Removal for Certain Permanent Residents, Form EOIR-42A, *available at* http://www.justice.gov/eoir/eoirforms/instru42a.htm. The absence of any such requirement in the instructions is particularly revealing given the instructions' extensive listing of other documents that the noncitizen is required to submit, none of which relate to criminal convictions. *Id*. Consistent with Congress's overall statutory scheme for removal proceedings, then, the statute and regulations governing cancellation place the burden of producing criminal records on the government.

C. The Statute and Regulation Properly Place the Burden of Production on the Government, as the Party With Superior Access to Records, instead of on Mr. X.

The statutory and regulatory framework governing cancellation recognize that the government is far better positioned to produce criminal records than noncitizens in removal proceedings, 58% of whom are unrepresented and around 50% of whom are detained.[6] This

[6] *See* Executive Office of Immigration Review, *FY 2010 Statistical Year Book Figure* O-1 (2011), *available at* www.justice.gov/eoir/statspub/fy10syb.pdf; Amnesty Int'l, *Jailed Without Justice:*

conclusion is consistent with longstanding evidentiary rules, which place the burden of production on the party with the greater access to records. *See Matter of Vivas*, 16 I. & N. Dec. 68 (B.I.A. 1977) ("The rule that we are enunciating for this situation is not new to either criminal or civil proceedings. The burden of going forward with evidence can be placed on a party not bearing the burden of proof when the facts are within his particular knowledge or control."); *see also* 2 *McCormick on Evidence* § 337, at 475 (6th ed. 2006). Here, that party is the government, given its extensive access to state criminal records, as compared to the limited (or nonexistent) ability of cancellation applicants to access such records. Interpreting the governing regulations to mean otherwise would raise serious fairness and Due Process concerns. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Landon v. Plasencia*, 459 U.S. 21, 37 (1982). Requiring noncitizens to produce criminal records would place an insurmountable burden on cancellation applicants because detained and unrepresented noncitizens face enormous practical difficulties in requesting and receiving documents, and noncitizens often cannot discern how, where, and from whom to request conviction records.

1. The Government Should Produce Documents Because of the Practical Difficulties Unrepresented and Detained Noncitizens Face in Obtaining and Retaining Criminal Records.

The government is in a far superior position than the typical noncitizen in removal proceedings—who may be detained, unrepresented by counsel, or both—to obtain the criminal records relevant to establishing a disqualifying aggravated felony conviction. Detained noncitizens, 84% of whom are not represented by counsel, do not have reliable access to telephones, often are prohibited from using the internet, and suffer extremely restricted or

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Immigration Detention in the USA 30 (2008), *available at* www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

nonexistent access to stamps and envelopes.[7] Without access to these means of communication, detainees cannot actually make the requests for their criminal records.

The remote location of many immigration detention centers and DHS's practice of transferring detainees between facilities make it even more difficult for detainees to obtain and retain the relevant criminal records. DHS may initiate removal proceedings anywhere in the country, *see* 8 C.F.R. § 1003.14, regardless of where the noncitizen resides (or where his criminal records are located). Detainees are rarely able to obtain transfers of venue to facilities close to family and criminal records because the immigration court will only transfer venue if the noncitizen demonstrates good cause, *see* 8 C.F.R. § 1003.20(b), a standard that in practice is difficult for noncitizens to meet.

Even beyond the location of initial detention, noncitizens are transferred frequently between detention centers, further limiting their ability to access and receive records. In 2009, 52% of detainees were transferred at least once, and between 1998 and 2010, 46% of all detainees were moved multiple times.[8] If a detained noncitizen is one of the lucky few who is actually able to request copies of his conviction records to be sent by mail, he will not receive the documents if he is transferred because they will be sent to his prior address.[9] Even if the detained noncitizen actually receives the records while detained at his first facility, such

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[7] *See* Amnesty Int'l, *supra* note 6, at 30, 35; Int'l Human Rights Clinic, Seattle Univ. Sch. of Law & OneAmerica, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington* 38-39, 60 (2008), *available at* www.weareoneamerica.org/sites/default/files/OneAmerica_Detention_Report.pdf.

[8] *See* Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States* 14, 17 (2011), *available at* http://www.hrw.org/reports/2011/06/14/costly-move-0.

[9] *See* Human Rights Watch, *Locked Up Far Away: The Transfer of Noncitizens to Remote Detention Centers in the United States* 43, 68-69 (2009), *available at* www.hrw.org/sites/default/files/reports/us1209web.pdf.

documents are frequently lost during transfers to a new facility because they are misplaced, stored off-site, or even destroyed.[10]

The practical difficulties faced by detained and unrepresented noncitizens in requesting and receiving their criminal records underscores the stark imbalance between the ability of such detainees and the government to produce conviction records relevant to cancellation eligibility.

2. The Government Should Produce Documents Because Unrepresented and Detained Cancellation Applicants Often Cannot Discern Where, How, and From Whom to Request Records.

Unlike the DHS, which as a law enforcement agency commands virtually automatic access to criminal court records, detained or unrepresented noncitizens must navigate complicated procedural requirements that vary by jurisdiction in order to obtain their records. Even if an unrepresented and detained noncitizen is able to master the intricacies of the categorical and modified categorical approaches sufficiently to determine which documents are part of the record of conviction, *see, e.g.*, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007), he might not be able to communicate his records request if he is among the 83% to 89% of noncitizens in removal proceedings who are not fluent in English.[11] Even English-speaking detainees face virtually insurmountable barriers to requesting documents because they might not be able to locate the correct records department, request form, accepted means of payment, or case information.

To start the process of requesting records, a noncitizen must know the particular names of the criminal court documents he wishes to request and information about the documents themselves because some criminal courts will not respond to records requests unless they specify

[10] *See* Karen Tumlin and Linton Joaquin, Nat'l Immigration Law Cent., and Ranjana Natarajan, ACLU of S. Cal., *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers* 41-42, 70 (2009), *available at* www.nilc.org/document.html?id=9.
[11] *See Statistical Yearbook*, *supra* note 6, F-1.

the exact document name, internal court index number, filing date, and names of the parties. *See, e.g.*, Monroe County Clerk, *Court and Land Records*, http://www.monroecounty.gov/clerk-records.php (last visited Apr. 30, 2012). Jurisdictions also vary regarding the proper department one must contact for a records request and the procedure necessary to make that request. *Compare* Superior Court of California, San Mateo County, *Records Management*, http://www.sanmateocourt.org/court_divisions/records_management/request_by_mail.php (last visited Apr. 30, 2012) (requiring one to contact the Superior Court by mail for a records request), *with* Monroe County Clerk, *Court and Land Records*, (requiring one to contact the County Clerk by mail, phone, or fax for a records request).

Even if a detained or unrepresented individual is able to properly identify both the necessary records and where he must send his request, he may not be able to pay for the records. Records departments often charge for the time it takes to search for the record, *see e.g.*, Superior Court of California, Santa Clara County, *Criminal Case Records*, http://www.scscourt.org/self_help/criminal/viewing_crim_records.shtml (last visited Apr. 30, 2012) (charging $15 for each search lasting longer than 10 minutes), for each page copied, and surcharges of $25 or more for certified copies. *See id*. Many state courts accept only checks or credit cards, *see id.* (accepting payments made by check only), and reject requests submitted with alternate forms of payment such as cash or money order. *See id*. Detained noncitizens may lack access to the money, or form of payment, required and thus may be wholly unable to request records.

For the substantial number of mentally or physically ill noncitizens in removal proceedings, the procedural barriers to requesting and receiving records are likely insurmountable. At one detention facility, around 20% of detainees reported mental health

problems, and 75% reported physical conditions that required medical attention.[12] Interruptions in, delays of, or outright denials of pharmacological and medical treatment often result in the deterioration of detainees' health, rendering the detained noncitizens incapable of performing even the most basic tasks in their removal defense, much less the complicated ones associated with requesting state court criminal records.

Because of the overwhelming contrast between the government and cancellation applicants in their respective ability to obtain and retain conviction records, it makes sense for Congress to have placed the burden of producing such records on the government, consistent with the requirements of the governing statute and regulations. *See* 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d).

II. Even if the Government Has Met Its Burden of Production, Mr. X Should Prevail Because He Meets His Burden of Persuasion on a Record That Fails Conclusively to Demonstrate an Aggravated Felony Conviction.

Even if the government has met its burden of producing proof of a conviction, Mr. X should prevail because the government's evidence does not conclusively show that he has been "convicted" of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3). To determine whether a "conviction" exists under the INA, immigration judges must decide whether the conviction records establish that the noncitizen necessarily has been found guilty of the elements of an aggravated felony. *See Shepard v. United States*, 544 U.S. 13, 23-24 (2005); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-87 (2007) (acknowledging the proper application in the immigration context of the approach described in *Shepard* and its predecessor, *Taylor v. United States*, 495 U.S. 575 (1990)); *Carachuri-Rosendo v. Holder*, __U.S.__, 130 S. Ct. 2577, 2586-88 (2010) (rejecting a conduct-based determination). When the conviction records do not

[12] *See* Int'l Human Rights Clinic, *supra* note 7, at 45, 48.

conclusively establish an aggravated felony conviction under this "categorical approach," a noncitizen successfully carries his burden of proving that he has not been convicted of a disqualifying aggravated felony. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 886 (9th Cir. 2011), *reh'g denied*; *Thomas v. Att'y Gen. of U.S.*, 625 F.3d 134, 148 (3d Cir. 2010); *Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006).

A. The Court Must Apply a Categorical Approach to Determine Whether Mr. X Necessarily Was Convicted of an Aggravated Felony That Would Disqualify Him From Cancellation.

To determine whether Mr. X was "convicted" of a disqualifying aggravated felony under 8 U.S.C. § 1229(b)(a)(3), the Court must adopt a categorical approach, in accordance with "nearly a century" of immigration law. *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (B.I.A. 2008); *see, e.g.*, *Carachuri-Rosendo*, 130 S. Ct. at 2586-87; *Duenas-Alvarez*, 549 U.S. at 185-87; *Rosas-Castaneda*, 655 F.3d at 885; *Garcia v. Holder*, 584 F.3d 1288, 1289 (10th Cir. 2009); *Julce v. Mukasey*, 530 F.3d 30, 34 (1st Cir. 2008); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1124 (9th Cir. 2007); *Ablett v. Brownell*, 240 F.2d 625, 627 (D.C. Cir. 1957); *U.S. ex rel. Giglio v. Neelly*, 208 F.2d 337, 340-41 (7th Cir. 1953); *U.S. ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931); *U.S. ex rel. Mylius v. Uhl*, 210 F. 860, 862-63 (2d Cir. 1914).

Every circuit to address the matter has applied a categorical approach to determine whether a noncitizen has been convicted of an aggravated felony in the context of cancellation of removal. *See, e.g.*, *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006); *Martinez v. Mukasey*, 551 F.3d 113, 120 (2d Cir. 2008); *Thomas v. Att'y Gen. of U.S.*, 625 F.3d 134, 143 (3d Cir. 2010); *Aleman-Coreas v. Holder*, No. 11-1639, 2011 WL 6160401, at *1 (4th Cir. Dec. 13, 2011); *Nieto Hernandez v. Holder*, 592 F.3d 681, 686 (5th Cir. 2009); *Rashid v. Mukasey*, 531 F.3d 438, 447 (6th Cir. 2008); *Familia Rosario v. Holder*, 655 F.3d 739, 743 (7th Cir. 2011); *Olmsted v.*

Holder, 588 F.3d 556, 559 (8th Cir. 2009); *Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011); *Garcia v. Holder*, 440 F. App'x 660, 663 (10th Cir. Oct. 14, 2011); *Omoregbee v. U.S. Att'y Gen.*, 323 F. App'x 820, 824 (11th Cir. Apr. 21 2009). The circuit courts are also in consensus that the categorical rule applies more broadly in determining whether a conviction constitutes an "aggravated felony" for purposes of eligibility for immigration relief throughout the INA. *See, e.g.*, *Khodja v. Holder*, 666 F.3d 415, 420 (7th Cir. 2011) (waiver of inadmissibility pursuant to INA § 212(h)); *Singh v. Holder*, 568 F. 3d 525, 528 (5th Cir. 2009) (naturalization); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012 (9th Cir. 2009) (suspension of deportation and voluntary departure); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006) (asylum).

Under a categorical approach, an individual has been convicted of an "aggravated felony" *only* where a prior conviction demonstrates that he "necessarily" was found guilty of all the elements of that offense. *See Taylor*, 495 U.S. at 599; *see also Shepard*, 544 U.S. at 26; *Sandoval-Lua*, 499 F.2d at 1131-32. If the fact of a conviction alone is insufficient to establish the existence of an aggravated felony conviction, courts may consider evidence beyond the conviction statute only where such records demonstrate that an individual "necessarily" was convicted of a generic offense. *See Taylor*, 495 U.S. at 602. Under this standard, a noncitizen may be disqualified from cancellation because of an aggravated felony conviction only if a court finds that the conviction records conclusively demonstrate an aggravated felony conviction.

Fourth Circuit practitioners should insert the following paragraphs. Practitioners in other circuits may insert these paragraphs if the applicability of the modified categorical approach at cancellation appears to be in question.

Even after *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), the Court has continued to presume that the categorical rule applies to determine eligibility for cancellation. *See Aleman-Coreas v. Holder*, No. 11-1639, 2011 WL 6160401, at *1 (4th Cir. Dec. 13, 2011). Indeed, this Court has relied on *Salem* for the proposition that the noncitizen must produce "'evidence

encompassed *within the record of conviction*—such as a charging document, a plea agreement, or a plea colloquy transcript—[to] demonstrate[] that he pled guilty to . . . an offense falling outside the scope of the aggravated felony definition.'" *Id.* (quoting *Salem*, 647 F.3d at 119-20). The categorical approach must apply whenever a court is asked to determine whether a noncitizen was "convicted" of a certain offense or type of offense. *See Shepard*, 544 U.S. at 23. Such an approach is required by the statute's plain language. *See Carachuri-Rosendo*, 130 S. Ct. at 2586 ("The text . . . indicates that we are to look to the conviction itself as our starting place, not to what might have or could have been charged."). The categorical approach avoids the "practical implications" of "tak[ing] and weigh[ing] extraneous evidence, both in terms of fairness to the defendant and burden on the court." *Martinez*, 551 F.3d at 122 (internal citation and quotation marks omitted); *see also Taylor*, 495 U.S. at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting.").[13]

Without the categorical approach, immigration courts deciding eligibility for cancellation would encounter the "practical difficulties and potential unfairness" of engaging in mini-trials to determine "what [the defendant's] conduct was" after a criminal court has entered a conviction. *Taylor*, 495 U.S. at 601. Immigration courts would have to rely on evidence—including documents and witnesses—outside of the record of conviction to determine whether a noncitizen was actually convicted of an aggravated felony. This kind of broad-ranging fact-finding would result in unfair and inconsistent outcomes because such evidence does not convey what a jury was actually required to find (or what a defendant actually plead to) and defendants would be unable to rely on issues already adjudicated during the criminal process. *See Taylor*, 495 U.S. at 601-02; *see also Martinez*, 551 F.3d at 122 (reasoning, when holding that an inconclusive record of conviction should not bar eligibility for cancellation, that "the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions." (internal quotation marks and citation omitted)). The categorical approach ensures that questions of culpability are determined during prior criminal proceedings, when noncitizen defendants are entitled to counsel and any proceedings typically occur close to witnesses and evidence. *Compare, e.g.*, 8 U.S.C. §§ 1229a(b)(4)(A), 1229a(a)(1) (no right to appointed counsel or jury trial in removal proceedings).

[13] Congress is aware that such a categorical approach is required for determinations of whether a conviction was for an aggravated felony: In 2007, Congress introduced but declined to adopt an amendment that would have put an end to the application of the categorical approach in determinations of the existence of aggravated felony convictions. *See* Border Enforcement, Employment Verification, and Illegal Immigration Control Act, H.R. 4065, 110th Cong. § 202(a)(3)(iii) (2007) (proposing to redefine "aggravated felony" under 8 U.S.C. § 1101(a)(43) as an offense "described in [the INA] even if the statute setting forth the offense of conviction sets forth other offenses [that are not aggravated felonies], unless the alien affirmatively shows . . . that the particular *facts* underlying the offense do not satisfy the generic definition of that offense." (emphasis added)).

B. Mr. X has Met His Burden Because the Record Fails to Conclusively Demonstrate an Aggravated Felony Conviction.

The record before the Court is inconclusive with respect to whether Mr. X has been convicted of an aggravated felony.

Here practitioners should insert a paragraph establishing that the record in the case before the Court is inconclusive.

Because there are no records showing that Mr. X necessarily was found guilty of all the elements of an aggravated felony, Mr. X meets his "burden of proof to establish" that he "has not been convicted of an[] aggravated felony." *See* 8 U.S.C. §§ 1229a(4)(A), 1229b(a)(3). Under the statutory framework, because the government bears the burden of production to indicate an aggravated felony conviction, *see supra* Part I, the noncitizen's burden is ultimately one of persuading the Court that the evidence produced by the government does not show that he has been convicted of an aggravated felony. The regulation, 8 C.F.R. § 1240.8(d), makes this requirement explicit by describing the standard of proof as one of "a preponderance of the evidence"—a standard relevant for a burden of persuasion, and not suggestive of any burden to produce further evidence. *See Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) ("A standard of proof, such as preponderance of the evidence, can apply only to a burden of persuasion, not to a burden of production.").

When the record does not prove that a noncitizen necessarily has been convicted of an aggravated felony, the noncitizen carries his burden of persuading the Court that he is not

disqualified on the basis of such a conviction. *See Sandoval-Lua*, 499 F.3d at 1132.[14]

First, Second, Third, Fifth, Sixth, and Ninth Circuit practitioners should insert the following cases as concluding citations, respectively.[15]

First Circuit: *See Berhe*, 464 F.3d at 86 (finding that on an inconclusive record of conviction, the BIA erred in concluding that the noncitizen had committed an aggravated felony and thus was ineligible for cancellation); *cf. Sandoval-Lua*, 499 F.3d at 1133 (Thomas, J., concurring) (citing *Berhe*).[16]

Second Circuit: *See Martinez*, 551 F.3d at 122.

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Eighth and Eleventh Circuit practitioners should be aware of Sanchez v. Holder, *614 F.3d 760 (8th Cir. 2010), and* Omoregbee v. U.S. Att'y Gen.*, 323 F. App'x. 820 (11th Cir. 2009), respectively, which discuss the burden of proof issue. If the government pushes for an expansive interpretation of* Sanchez *or* Omoregbee*, practitioners can insert the following language. With regards to Omoregbee, note that the U.S. Supreme Court directly addressed the "fraud involving $10,000" issue in* Nijhawan v. Holder*, 557 U.S. 29 (2009). For additional information, see National Immigration Project and IDP Practice Advisory entitled "The Impact of Nijhawan v. Holder on Application of the Categorical Approach to Aggravated Felony Determinations,"* available at *http://immigrantdefenseproject.org/wp-content/uploads/2011/02/Nijhawan.pdf.*

Contrary to the government's contention, **{*Eighth Circuit*: *Sanchez v. Holder*, 614 F.3d at 764} {*Eleventh Circuit:* *Omoregbee v. U.S. Att'y Gen.*, 323 F. App'x. at 827}**, does not hold that the noncitizen fails to sustain his burden of proof on an inconclusive record of conviction. Rather, the Court clarified that the noncitizen bears the burden of persuasion and ultimately concluded that the noncitizen failed to satisfy his burden because the record of conviction before the court conclusively proved that he was convicted of an aggravated felony.

[15] To the extent the government cites *National Cable and Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967 (2005), for the proposition that *Almanza-Arenas* governs even in circuits with prior favorable precedent, practitioners in the First, Second, Fifth, Sixth, and Ninth Circuits should argue that the BIA's contrary position did not supplant controlling judicial precedent; *Almanza-Arenas* nowhere invoked *Brand X*. *See generally Almanza-Arenas*, 24 I. & N. Dec. 771 (B.I.A. 2009); *see also Rosas-Castaneda,* 655 F.3d at 886 (discounting the BIA's interpretation and re-affirming its earlier decision in *Sandoval-Lua*).

[16]

First Circuit Rebuttal: Contrary to the government's assertion, *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), is inapposite because the issue before the Court was whether the possession of a small amount of marijuana was an aggravated felony, *see Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011), *petition for cert. granted*, (U.S. April 2, 2012) (No. 11-702) (granting certiorari on similar issue of whether a small amount of marijuana without remuneration is an aggravated felony), not whether a noncitizen could meet his burden on an inconclusive record. *Id*. 638 at 35.

Third Circuit: *See Thomas*, 625 F.3d at 148.

Sixth Circuit: *Cf. Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008) (concluding that a second drug conviction was not an aggravated felony barring cancellation eligibility because neither the statute nor the record of conviction referenced the prior drug conviction).[17]

Ninth Circuit: *See Young*, 634 F.3d at 1023; *Rosas-Castaneda*, 655 F.3d at 886; *Sandoval-Lua*, 499 F.3d at 1131-32.

Mr. X's burden, to show something "by a preponderance of the evidence," *see* 8 C.F.R. § 1240.8(d), "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (brackets in original) (internal citation and quotation marks omitted). To meet his burden of persuasion, the relevant "fact" of which Mr. X must persuade the Court based on the record of conviction is that he has not been convicted of an aggravated felony.[18] *See* 8 U.S.C. § 1229b(a)(3); 8 C.F.R. § 1240.8(d). Under a categorical approach, however, the Court can *only* conclude that a noncitizen has been convicted of an aggravated felony if the conviction record shows that the noncitizen necessarily has been found

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Sixth Circuit Rebuttal: Contrary to the government's assertion, *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011), *petition for cert. filed*, (U.S. July 18, 2011) (No. 11-79), does not hold that the noncitizen fails to sustain his burden of proof on an inconclusive record of conviction. Distinguishing the Second Circuit's holding in *Martinez*, 551 F.3d at 118, because the Michigan law at issue involved a much larger amount of marijuana, the Court found that the noncitizen's conviction was categorically an aggravated felony. *Garcia*, 638 F.3d at 518. Accordingly, *Garcia* does not preclude the Court from relying on *Rashid*, 531 F.3d at 448, to hold that a noncitizen has met his burden of persuasion when the record does not necessarily show that he has been convicted of an aggravated felony.

[18] The statutory burden "preponderance of the evidence" is a standard applied to factual inquiries. *See generally*, 2 *McCormick on Evidence* § 339, at 484 (6th ed. 2006). The applicability of the preponderance standard to inquiries under the categorical approach is thus limited to truly factual questions such as the fact of conviction, the identity of the person who suffered the conviction, and the authenticity of the *Shepard* documents offered.

guilty of all the elements of an aggravated felony. *See Shepard*, 544 U.S. at 23; *Taylor*, 495 U.S. at 602. Thus, Mr. X carries his burden of persuasion by demonstrating that the evidence does not establish the existence of an aggravated felony conviction.[19]

Practitioners in the First, Second, Third, Fifth, Seventh, and Ninth Circuits could add one of the following alternative concluding sentences to take advantage of favorable circuit law.

First Circuit: As the Court held in *Berhe v. Gonzales*, if the record of conviction under the modified categorical approach does not conclusively demonstrate an aggravated felony conviction, a noncitizen is eligible for cancellation of removal. 464 F.3d at 86. Absent any evidence conclusively proving that he was convicted of an aggravated felony, then, Mr. X has sustained his burden of demonstrating that he was not convicted of an aggravated felony.

Second Circuit: As the Court held in *Martinez v. Mukasey*, a noncitizen need only show under a categorical approach that "the minimum conduct for which he was convicted was not an aggravated felony" to sustain his burden that "he has not been convicted of an aggravated felony." 551 F.3d at 122. Absent any evidence conclusively proving that he was convicted of an aggravated felony, then, Mr. X has sustained his burden of establishing eligibility by showing that the minimum conduct for which he was convicted was not an aggravated felony.

Third Circuit: As the Court held in *Thomas v. Att'y Gen. of U.S.*, under a categorical approach, where the documents in the record of conviction "do not make it clear" that the noncitizen "actually pleaded guilty to" or was convicted of an aggravated felony, the "absence of judicial records to establish such a finding" require a Court to conclude that the noncitizen was not convicted of an aggravated felony. 625 F.3d at 148. Absent any evidence making clear that Mr. X pled to or was convicted of an aggravated felony, then, he has sustained his burden of demonstrating that he has not been convicted of an aggravated felony.

Fifth Circuit: As the Court held in *Omari v. Gonzales*, if the record of conviction is inconclusive, the Court "must conclude that the record does not suffice to establish that [the noncitizen] was convicted of an aggravated felony." 419 F.3d at 309. Absent any evidence making clear that Mr. X pled to or was convicted of an aggravated felony, then, he has sustained his burden of demonstrating that he has not been convicted of an aggravated felony.

Ninth Circuit: As the Ninth Circuit held in *Sandoval-Lua v. Gonzales*, if the record of conviction does not establish that a noncitizen's conviction "necessarily was for all of the elements constituting an aggravated felony," then the noncitizen's conviction "cannot amount to the generic offense, and [he] has carried his burden." 499 F.3d at 1131; *see also Young*,

[19] Contrary to the courts' understanding in *Salem*, 647 F.3d at 120, and *Garcia*, 584 F.3d at 1289, criminal records that fail to conclusively demonstrate an aggravated felony conviction are not "ambiguous." Such records simply fail to demonstrate that an aggravated felony exists; there is no ambiguity.

634 F.3d at 1023; *Rosas-Castaneda*, 655 F.3d at 886 (reaffirming the *Sandoval-Lua* conclusion). Absent any evidence proving that Mr. X's conviction was necessarily for all of the elements of an aggravated felony, Mr. X has sustained his burden of establishing eligibility by showing that he was not convicted of an aggravated felony.

Fourth and Tenth Circuit Practitioners: Although precedent in these circuits rejects the contention that a noncitizen can meet his burden of proof on an inconclusive record, practitioners are advised to use the following language to preserve the argument pending a favorable resolution by the Supreme Court. Space permitting, practitioners may also wish to make the longer version of the argument, detailed below. Even in the Fourth and Tenth Circuits, practitioners may still make the arguments in Part I, above, and Part III, below – namely that the government has an initial burden of production, and that the noncitizen should not be penalized for failing to supplement the record.

Mr. X wishes to preserve the argument that he has met his burden of establishing eligibility when the record of conviction before the Court does not conclusively prove that he was convicted of an aggravated felony. Here, **{**describe documents in the record of conviction and why they are inconclusive**}**. Absent any evidence conclusively proving that he was convicted of an aggravated felony, Mr. X respectfully submits that, contrary to **{*Fourth Circuit*: *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011)} {*Tenth Circuit*: *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009)}**, he has sustained his burden of demonstrating his eligibility for cancellation.

III. If the Record Is Inconclusive, the Noncitizen Should Not Be Penalized If He Does Not Supplement the Record.

Ninth Circuit practitioners should add the following language to begin:

As the Court held in *Rosas-Castaneda v. Holder*, the INA does not grant an IJ the authority to require a noncitizen to supplement the record of conviction. 655 F.3d at 884-85.

However, Ninth Circuit practitioners should be aware that the issue of whether a noncitizen can be penalized for failing to supplement the record was reheard by the en banc panel in Young v. Holder*, and a decision is currently pending. 653 F.3d at 897.*

A noncitizen cannot be penalized for failing to supplement the record of conviction after the government has met its initial burden of producing criminal records unless the record of conviction conclusively demonstrates the existence of an aggravated felony conviction. Nothing

in the statute or regulation requires a noncitizen to supplement the record of conviction.[20] The language of 8 U.S.C. § 1229a(c)(4)(B) permits an immigration judge to require supplementation by a noncitizen only to "corroborate otherwise credible testimony." *Id.* However, under *Shepard*, testimony is irrelevant to the existence of an aggravated felony conviction, and thus is never grounds for requiring a noncitizen to provide corroborating documents. 544 U.S. at 16 (limiting the evidence that "indicates" an aggravated felony to the "statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented").

The type of corroboration described in section 1229a(c)(4)(B) is relevant only to an immigration judge's determination of whether to grant relief in his discretion, a determination that typically relies on the testimony of witnesses and a detailed evidentiary showing. *See* H.R. Rep. No. 109-72, at 169 (indicating that this section was enacted to apply the same credibility and corroboration standards applied in discretionary grants of asylum to "other applications for relief or protection from removal"). The provision is inapplicable when, as in legal determinations of statutory eligibility for cancellation, the immigration judge does not consider testimony, but rather relies on an expressly defined and restricted set of criminal conviction records. *See Shepard*, 544 U.S. at 16; *see also Rosas-Castaneda*, 655 F.3d at 884-85 (concluding that REAL ID did not grant immigration judge power to compel noncitizen to produce supplemental criminal records because documents are not testimony).

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***Eighth Circuit Rebuttal*:** Contrary to the government's assertion, *Sanchez v. Holder*, 614 F.3d at 762, does not hold to the contrary. In *Sanchez*, the issue of the noncitizen's duty to supplement the record did not arise because the government had already produced the conviction record. *Id*.

Moreover, as the Ninth Circuit recognized in *Rosas-Castaneda*, the kinds of documents permissible to establish the existence of a conviction, *see Shepard*, 544 U.S. at 16, do not raise credibility concerns and do not require corroboration. *Rosas-Castaneda*, 655 F.3d at 884-85 ("'A judicially noticed fact must be one not subject to reasonable dispute.'"(quoting Fed. R. Evid. 201(b))); *see also Shepard*, 544 U.S. at 21 (characterizing admissible documents as "*conclusive* records made or used in adjudicating guilt" (emphasis added)). Thus, there is no statutory or regulatory requirement that the noncitizen supplement a record of conviction, and the Court should not require such supplementation here.