No.

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

MANUEL JESUS LOPEZ-ISLAVA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is not published in the *Federal Reporter* but is reprinted at 628 Fed. Appx. 552. The decision of the Board of Immigration Appeals (App., *infra*, 3a-11a) is not published in the *Administrative Decisions Under Immigration and Nationality Laws* but is available at 2014 WL 3817736. The decision of the immigration judge (App., *infra*, 12a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2016. On April 4, 2016, Justice Kenne-

dy extended the time within which to file a petition for a writ of certiorari to and including May 11, 2016. On April 26, 2016, Justice Kennedy further extended the time to June 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. See App., *infra*, 39a-42a.

STATEMENT

1. Respondent is a native and citizen of Mexico who was admitted to the United States in 1990 as a lawful permanent resident. App., *infra*, 4a. In 2011, respondent was convicted in Arizona state court of second-degree burglary. *Ibid.* The Department of Homeland Security (DHS) initiated a removal proceeding against respondent. *Id.* at 13a. DHS charged that, in addition to other grounds not relevant here, respondent is removable, and is ineligible for cancellation of removal, because his second-degree burglary conviction qualifies as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43). App., *infra*, 30a-34a; see 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3). As relevant here, DHS charged that the offense meets the portion of the definition stating that an "aggravated felony" includes any "crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(F) (footnote omitted). DHS maintained that burglary meets the definition of "crime of violence" in 18 U.S.C. 16(b) because burglary, "by its nature, involves a substantial risk that

physical force against the person or property of another may be used in the course of committing the offense," *ibid.*

An immigration judge sustained the pertinent charge of removability, denied respondent's motion to terminate the proceeding, and ordered him removed to Mexico, concluding in part that his burglary conviction qualifies as a "crime of violence" under 18 U.S.C. 16(b) and therefore as an "aggravated felony" under the INA. App., *infra*, 12a-38a; see *id.* at 30a-34a. The Board of Immigration Appeals (Board) dismissed respondent's appeal. *Id.* at 3a-11a. Like the immigration judge, the Board concluded that respondent's burglary conviction qualifies as a "crime of violence" under 18 U.S.C. 16(b) and therefore as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). App., *infra*, 9a-10a.

2. Respondent petitioned for judicial review of that decision, arguing that his burglary conviction does not qualify as an "aggravated felony" under the INA. While the case was pending in the Ninth Circuit, a divided panel of the Ninth Circuit held in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), that the definition of "crime of violence" in 18 U.S.C. 16(b), as incorporated into the INA's definition of "aggravated felony," is unconstitutionally vague. 803 F.3d at 1112-1120. The Ninth Circuit based that conclusion on this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which had held unconstitutionally vague part of the definition of the term "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

The Ninth Circuit granted respondent's petition for review in light of *Dimaya*'s conclusion that 18 U.S.C.

16(b) is unconstitutionally vague. App., *infra*, 1a-2a. Because the court was "bound by" *Dimaya*, it held that the Board's decision could not be sustained and remanded the case to the Board for further proceedings. *Id.* at 2a.

ARGUMENT

The decision below rested on the Ninth Circuit's holding in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), that 18 U.S.C. 16(b), as incorporated into the INA, see 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. App., *infra*, 2a. Contemporaneously with the filing of this petition, the Attorney General is filing a petition for a writ of certiorari in this Court seeking review of the Ninth Circuit's decision in *Dimaya*. This Court should accordingly hold this petition pending its final disposition of *Dimaya* and then dispose of the petition as appropriate in light of that disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's final disposition of the Attorney General's petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), and then disposed of as appropriate in light of that disposition.

Respectfully submitted.

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JUNE 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-71920

MANUEL JESUS LOPEZ-ISLAVA, AKA MANUEL JESUS ISLAVA-LOPAZ, AKA MANUEL DE JESUS LOPEZ, AKA MANUEL DEJESUS LOPEZ ISLAVA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, RESPONDENT

Submitted: Nov. 20, 2015[*]
Filed: Jan. 12, 2016

MEMORANDUM[***]

Before: W. FLETCHER, RAWLINSON, and PARKER,[**] Circuit Judges.

Petitioner Manuel Jesus Lopez-Islava (Lopez-Islava) petitions for review of a decision of the Board of Immigration Appeals (BIA) determining that

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[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[**] The Honorable Barrington D. Parker, Jr., Senior Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation

[***] This disposition is not appropriate for the publication and is not precedent except as provided by 9th Cir. R. 36-3.

Lopez-Islava's conviction for residential burglary under Arizona Revised Statute § 131507 was an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(F). Specifically, the BIA determined that Lopez-Islava's burglary offense constituted a crime of violence under 18 U.S.C. § 16(b).[1]

However, we conclude that our recent decision in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), controls the outcome of this case. In *Dimaya*, we adhered to the rationale articulated in *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 2558, 192 L. Ed. 2d 569 (2015), where the Court held that the residual clause defining a violent felony under the Armed Career Criminal Act of 1984 was unconstitutionally vague. We held that the similar "residual clause definition of a violent felony [under 18 U.S.C. § 16(b)] is unconstitutionally vague. . . . " *Dimaya*, 803 F.3d at 1111 (internal quotation marks omitted). We are bound by this precedent, which does not support the BIA's determination.

The petition for review is **GRANTED** and we **REMAND** to the BIA for further proceedings consistent with this disposition.

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[1] 18 U.S.C. § 16(b) defines a crime of violence as a felony offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 20530

File No. A092 446 307—Tucson, AZ

IN RE MANUEL JESUS LOPEZ-ISLAVA A.K.A. MANUEL DEJESUS LOPEZ ISLAVA A.K.A. MANUEL DE JESUS LOPEZ A.K.A. MANUEL JESUS ISLAVA-LOPEZ

Date: [June 6, 2014]

IN REMOVAL PROCEEDINGS

APPEAL:

ON BEHALF OF RESPONDENT:
Benjamin Todd Wiesinger, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(G) of the Act

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(G) of the Act

APPLICATION:
Termination

The respondent, a native and citizen of Mexico, and a lawful permanent resident since July 2, 1990, has filed a timely appeal of an Immigration Judge's January 29, 2014, decision. The respondent's appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The record reflects that on August 2, 2011, pursuant to a plea agreement, the respondent was convicted in the Superior Court of Arizona, Maricopa County, Arizona, for the offense of Burglary in the Second Degree, a class 3 felony, in violation of ARIZ. REV. STATS. §§ 13-1501, 1507, 1507A, 610, 701,702, and 801, and was sentenced to a term of imprisonment of 5 years with the Arizona Department of Corrections (Exh. 7). The Immigration Judge determined that

this offense qualifies as an aggravated felony under section 101(a)(43)(F) of the Act, *i.e.*, a crime of violence under 18 U.S.C. § 16 for which the term of imprisonment was at least 1 year, and subjects the respondent to removal on that basis. The respondent argues on appeal that the Immigration Judge erred in his finding of removability. However, we are not persuaded by the respondent's appellate arguments to disturb the Immigration Judge's determination that his 2011 Arizona Second Degree Burglary conviction is an aggravated felony crime of violence.

An offense may qualify as an aggravated felony under section 101(a)(43)(F) only if it is a crime of violence as defined by 18 U.S.C. § 16:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Under Arizona law, "[a] person commits burglary in the second-degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." ARIZ. REV. STATS. § 13-1507(A). On its face, the Arizona statute appears to be indistinguishable from the generic contemporary definition of burglary adopted by the United States Supreme Court in *Taylor v. United States*, 495 U.S. 575, 599 (1990) (setting out the elements for a generic burglary offense under the Armed Career Criminal Act ("ACCA")). However, the re-

spondent argues on appeal that the United States Court of Appeals for the Ninth Circuit, the jurisdiction wherein this case arises, in *United States v. Bonat*, 106 F.3d 1472 (9th Cir. 1997), observed that Arizona's courts had broadened the definition of burglary from the generic definition that is mirrored in the statutory language. *See id.* at 1475. Nevertheless, we agree with the Immigration Judge (I.J. at 10) that this judicial expansion of the generic definition of burglary does not alter the conclusion that the respondent's 2011 Arizona Second Degree Burglary conviction qualifies as a crime of violence for immigration purposes.

As noted by the Immigration Judge (I.J. at 10), the court in *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011), considered "in a similar context . . . a burglary-related offense can constitute a crime of violence without necessarily meeting any of the other various generic aggravated felony definitions." *See id.* at 1113. The *Lopez-Cardona* court noted that "certain crimes can be categorically crimes of violence under one of the relevant sections but not the other because the term 'crime of violence' is defined differently in different statutes." *Id.* (citing *United States v. Gomez-Leon*, 545 F.3d 777, 786 (9th Cir. 2008) ("Confusingly, the phrase 'crime of violence' is used to identify predicate offenses in a wide variety of contexts, but there are at least four different ways to determine whether an offense constitutes a 'crime of violence.' *See* 18 U.S.C. § 16; U.S.S.G. § 2L1.2 cmt. 1(B)(iii); U.S.S.G. § 4B1.2. What may be a predicate offense under one approach is not necessarily a predicate offense under another approach (footnotes omitted)".). We note, further, under the Armed Career Criminal

Act ("ACCA"),[1] 18 U.S.C. § 924(e), the term "crime of violence" is used to increase the sentences of certain federal defendants who have three prior convictions "for a violent felony," including "burglary, arson, or extortion." Thus, the *Lopez-Cardona* court distinguished its findings from its earlier decision in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011),[2] which had applied the modified categorical approach, in a federal Sentencing Guidelines ease, to find that a California conviction for residential burglary under CAL. PENAL CODE § 459 was for a crime of violence because the record of conviction described every element of the generic definition of "burglary of a

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[1] The ACCA defines a "violent felony" to mean any felony, whether state or federal, that "has as an element the use, attempted use, or threatened use of physical force against the person of another," or that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B).

[2] The court in *United States v. Aguila-Montes de Oca*, was asked to determine whether the offense of burglary under CAL. PENAL CODE § 459 is a crime of violence as that term is defined in the United States Sentencing Guidelines Manual. The United States Sentencing Guidelines Manual defines a crime of violence as including "burglary of a dwelling." *See* U.S.S.G. § 2L1.2, cmt. n.1(B)(iii). The United States Supreme Court abrogated the court's decision in *Descamps v. U.S.* 133 S. Ct. 2276 (2013), on the basis that the sentencing court may not apply the modified categorical approach to determine whether a prior offense was a violent felony under the Armed Career Criminal Act ("ACCA") when the crime of which the defendant was convicted has a single, indivisible set of elements. *See id.* at 2282.

dwelling," including unlawful or unprivileged entry, which is required under the Sentencing Guidelines.

However, as noted herein, a crime of violence may be defined for immigration purposes, as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *See* 18 U.S.C § 16(b). Because the analysis required under the United States Sentencing Guidelines and the ACCA, as was considered by the Supreme Court in *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), differs from the analysis required for determining whether a crime constitutes a crime of violence for immigration purposes, we agree with the Immigration Judge (I.J. at 10) that whether or not the respondent's 2011 Arizona Second Degree Burglary conviction constitutes "a *generic* theft or burglary offense has no bearing on whether it constitutes a[n aggravated felony] 'crime of violence' [under the Act]."

In a similar context, the court addressed the California residential burglary statute in *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990), and found a conviction thereunder to be for a crime of violence under 18 U.S.C § 16(b).[3] *See id.* at 571-72. As explained by the court in *United States v. Becker*, "[a]ny time a

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[3] "Although *Becker* involved a sentencing enhancement under the [U.S. Sentencing] Guidelines, at the time the relevant Guidelines section defined 'crime of violence' by reference to 18 U.S.C. § 16." *See Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) (citing *United States v. Becket*, *supra*, at 569; *also James v. United States*, 550 U.S. 192, 208 (2007)).

burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." *Id*; *see also United States v. M.C.E.*, 232 F.3d 1252, 1256 (9th Cir. 2000) (residential burglary is a crime of violence under 18 U.S.C. § 5032, which is "virtually identical" to 18 U.S.C. § 16, because of the substantial risk that physical force may be used in committing the offense); *see also James v. United States*, 550 U.S. 192 (2007).

Thus, the narrow question presented here is whether a person who commits the offense of residential burglary in Arizona necessarily disregards the substantial risk that, in the course of committing that offense, he will have to use physical force against the person or property of another. We note, moreover, that the relevant question is not whether ARIZ. REV. STATS. § 13-1507(A) can sometimes be violated without physical force being used against the person or property of another; rather, the proper inquiry is whether the conduct encompassed by the elements of the offense presents a substantial risk of the use of physical force in the ordinary case. Cf. *James v. United States*, *supra*, at 197. As the Supreme Court has observed, burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime, a risk which is clearly magnified when, as here, the structure entered with the intent of committing larceny or any felony, is a dwelling. *See* ARIZ. REV. STATS. § 13-1501(11) ("Residential struc-

ture" means any structure, movable or immovable, permanent or temporary, that is adapted for both human residence and lodging whether occupied or not.); *see also Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (holding that burglary is a "classic example" of a crime of violence because, "by its nature," it "involves a substantial risk that the burglar will use force against a victim in completing the crime").

Consequently, we concur with the Immigration Judge (I.J. at 9-11) that, as a substantial risk of the use of physical force is inherent in the offense committed by the respondent (residential burglary), and, as he was sentenced to 5 years imprisonment, he therefore has been convicted of a "crime of violence" under 18 U.S.C. § 16(b), and an aggravated felony under Ninth Circuit law. *See United States v. Becker*, *supra*, at 571-73. Therefore, we agree with the Immigration Judge and find that the respondent's 2011 conviction for the offense of second degree residential burglary in violation of ARIZ. REV. STATS. § 13-1507(A), constitutes a conviction for a "crime of violence" within the meaning of 18 U.S.C. § 16(b), and, correspondingly, is an aggravated felony under section 101(a)(43)(F) of the Act, subjecting the respondent to removal on that basis.

As a lawful permanent resident convicted of an aggravated felony, and having expressed no fear of persecution or torture if returned to Mexico, the respondent is ineligible for most forms of relief from removal, including cancellation of removal, asylum, waiver of inadmissibility, and voluntary departure. Furthermore, the respondent on appeal has neither expressed nor demonstrated eligibility for any other form of re-

lief from removal. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d).

Accordingly, we will enter the following order.

ORDER: The appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
300 WEST CONGRESS STREET, SUITE 300
TUCSON, ARIZONA 85701

File No. A092-446-307

IN THE MATTER OF LOPEZ-ILSAVA, MANUEL JESUS,
RESPONDENT

Date: [Jan. 29, 2014]

IN REMOVAL PROCEEDINGS

CHARGE:

Section 237(a)(2)(A)(ii) of the Act, in that, at any time after admission, the respondent was convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.

Section 237(a)(2)(A)(iii) of the Act, in that, at any time after admission, the respondent was convicted of an aggravated felony as that term is defined under section 101(a)(43)(F)—a crime of violence for which the term of imprisonment was at least one year.

Section 237(a)(2)(B)(i) of the Act, in that the respondent, after being admitted to the United States, was

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 102 of the Controlled Substances Act), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

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DECISION AND ORDER OF THE IMMIGRATION COURT

I. RELEVANT FACTS

On October 7, 2011, the Department of Homeland Security ("the Department") issued a Notice to Appear, charging the respondent as removable under the Immigration and Nationality Act ("the Act") for having been convicted of two or more crimes involving moral turpitude, an aggravated felony, and a crime relating to controlled substances. [Ex. 1, 1A, 1B]; *see also* INA §§ 237(a)(2)(A)(ii), 237(a)(2)(A)(iii), 237(a)(2)(B)(i). In

support of these charges, the Department alleges the following: (1) the respondent is not a citizen or national of the United States; (2) is a native and citizen of Mexico; (3) whose status was adjusted to that of a lawful permanent resident on July 2, 1990; (4) was convicted of second-degree burglary in violation of ARIZ. REV. STAT. § 13-1507(A)(1) and sentenced to five years in prison; (5) was convicted of possession or use of marijuana in violation of ARIZ. REV. STAT. § 13-3405 and sentenced to Community Supervision with the Adult Probation Department; (6) was convicted of taking the identity of another in violation of ARIZ. REV. STAT. § 13-2008 and sentenced to Community Supervision with the Adult Probation Department; (7) allegation seven was withdrawn; (8) was convicted of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs in violation of ARIZ. REV. STAT. § 28-1383(A)(1) and sentenced to probation for three years; and (9) these crimes did not arise out of a single scheme of misconduct. [Exs. 1, 1A, 1B]. The respondent, through counsel, admitted allegations one through three, denied the remaining allegations, and denied the charges. [Ex. 6].

The following is a list of documents that have been formally admitted as an exhibit in the Record of Proceeding and considered by the Court in making the present decision: Exhibit 1 is the Notice to Appear; Exhibits 1A and 1B are Forms 1-261, alleging additional charges of removability; Exhibit 2 is proof of service of the motion for a continuance; Exhibit 3 is an order granting the motion for a continuance; Exhibit 4 is an order granting the motion for a continuance; Exhibit 5 is the Depart-

ment's proposed exhibits; Exhibit 6 is the respondent's written pleadings; Exhibit 7 is a sentencing order, plea agreement, and indictment from the Superior Court of Arizona, Maricopa County; Exhibit 8 is the respondent's motion to terminate; Exhibit 9 is the Department's opposition to the motion to terminate; and Exhibit 10 is the respondent's reply to the opposition.

II. PROVING EXISTENCE OF CRIMINAL CONVICTIONS

Pursuant to section 240(c)(3) of the Act, the Department has the burden to prove by clear and convincing evidence that the respondent is removable as charged. Where removability hinges on the existence of criminal convictions, this includes the burden of providing clear and convincing evidence of the fact of conviction. *See* INA § 240(c)(3)(A). To meet this burden, section 240(c)(3)(B) of the Act and 8 C.F.R. § 1003.41 set forth a non-exhaustive list of documents that are admissible as proof of a criminal conviction.

In regards to the present case, the Department has submitted the plea transcripts, plea agreements, sentencing orders, and charging documents from several different cases. [*See* Exs. 5, 7]. The conviction documents clearly reflect that the respondent was convicted of the offenses of "second-degree burglary," "possession or use of marijuana," and "taking the identity of another" on August 2, 2011 by the Superior Court of Arizona in Maricopa County. [Exs. 5, Tab C; 7]. The "second-degree burglary" conviction was obtained in violation of ARIZ. REV. STAT. § 13-1507(A)—in that the respondent, entered and remained unlawfully in a residential structure with

the intent to commit a theft therein. [Exs. 5, Tab C at 14; 7]. The "possession or use of marijuana" conviction was obtained in violation of ARIZ. REV. STAT. § 13-3405—in that the respondent possessed a baggie containing marijuana having a weight of less than two pounds. [Exs. 5, Tab C at 14; 7]. The "taking the identity of another" conviction was obtained in violation of ARIZ. REV. STAT. § 13-2008—in that the respondent knowing took and possessed personal identifying information of another with the intent to use the identity for an unlawful purpose. [Exs. 5, Tab C at 16; 7]. Finally, the sentencing order and plea transcript reflect that the respondent was convicted of "aggravated driving under the influence" in violation of ARIZ. REV. STAT. § 28-1381(A)(1) and § 28-1383(A)(1)—in that the respondent was driving under the influence of alcohol with a suspended license. [Ex. 5, Tabs B at 17, M].

Accordingly, the Court finds that the Department has proved the existence of the respondent's four criminal convictions by clear and convincing evidence, and thus allegations four, five, six, and eight are hereby sustained.

III. REMOVABILITY

a. TWO CRIMES INVOLVING MORAL TURPITUDE

The Department's first charge of removability hinges on whether the respondent has been convicted of two or more crimes involving moral turpitude ("CIMT") not arising out of a single scheme of criminal misconduct. [Ex. 1].

To determine whether an alien has been convicted of a CIMT, the Court employs an element-based inquiry that compares the elements of the underlying statute to those of the generic CIMT definition at issue. *Taylor v. United States*, 495 U.S. 575, 602 (1990). This is done by examining the statute of conviction "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). Occasionally, however, the Court is permitted to go "beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction" to determine what elements formed the basis of the underlying conviction. *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). These are known as the "categorical" and "modified categorical" approaches, respectively.

There are three possible scenarios that arise when applying this inquiry. First, if the elements of the statute are the same as, or narrower than, those of the generic offense, the offense is said to "categorical[ly]" constitute the generic offense. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Second, if the statute has alternative elements, some—but not all—of which encompass the elements of the generic offense, the statute is said to be "divisible" and the Court can examine the underlying record of conviction to determine which elements (generic or nongeneric) formed the basis of the conviction. *See id.* at 2279. Third, if "the statute of conviction has an overbroad or missing element . . . , [an alien] convicted under that statute

is *never* convicted of the generic crime." *Id.* at 2280 (emphasis added). This is so because the modified categorical approach cannot be employed to ascertain whether the offense was committed in such a way so as to satisfy the "missing element" or otherwise limit the overbroad element to conduct that does, in fact, satisfy the generic crime. *See id.* at 2292-93 (explaining that the modified categorical approach can be used "*only* to determine which alternative element in a divisible statute formed the basis of the [underlying] conviction" (emphasis added)). For example, the statute at issue in *Descamps*, Cal. Penal Code § 459, was of this third variety, because it was missing the element of breaking and entering which is present in generic burglary. *Id.* at 2282. Thus, the Court held that using the modified categorical approach for sentencing enhancement purposes was inappropriate. *Id.* at 2293.

The term "moral turpitude" is one that has been the subject of debate among the Board of Immigration Appeals ("the Board") and the circuit courts, including the Ninth Circuit, for many years. *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1191 (BIA 1999) (stating that moral turpitude is "a 'nebulous concept' with ample room for differing definitions of the term"). Generally, "[m]oral turpitude refers . . . to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999). For a number of years, the Board acknowledged that a CIMT often did incorporate, but need not require, the

presence of an "evil intent." *See Matter of Torres-Varela*, 23 I&N Dec. 78, 83-43 (BIA 2001) (collecting cases). However, with the issuance of *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 & n.5 (A.G. 2008), as the Ninth Circuit has acknowledged, "the presence of scienter [has been interpreted] to be an essential element of a crime involving moral turpitude." *Marmolego-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). Thus, a CIMT offense includes two generic elements: (1) scienter; and (2) reprehensible conduct. *Matter of Silva-Trevino*, 24 I&N Dec. at 706 & n.5.

i. Taking the Identity of Another

The first allegation in support of the Department's charge of removability under section 237(a)(2)(A)(ii) of the Act is that the respondent's conviction for an taking the identity of another under ARIZ. REV. STAT. § 13-2008 was a CIMT. [Ex. 1].

The respondent's statute of conviction, in pertinent part, provides that

> [a] person commits taking the identity of another if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information . . . of another person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity[.]

ARIZ. REV. STAT. § 13-2008(A).

Both the Board and the Ninth Circuit have found that crimes involving fraud are morally tupitudinous in nature. *See*, *e.g.*, *Blanco v. Mukasey*, 518 F.3d 714, 719-20 (9th Cir. 2008); *Carty v. Ashcroft*, 395 F.3d 1081, 1083 (9th Cir. 2005) (stating that there are essenially two types of crimes involving moral turpitude: "those involving fraud and those involving grave acts of baseness or depravity"); *Matter of Adetiba*, 20 I&N Dec. 506, 507-08 (BIA 1992); *see also Jordan v. DeGeorge*, 341 U.S. 223, 227 (1951) (stating that "[w]ithout exception . . . a crime in which fraud is an ingredient involves moral turpitude"). As such, the Ninth Circuit has explained that "[a] crime involves fraudulent conduct, and thus is a crime involving moral turpitude, if intent to defraud is either [1] 'explicit in the statutory definition' of the crime or [2] 'implicit in [its] nature[.]'" *Blanco*, 518 F.3d at 719 (quoting *Goldeshtein v. INS*, 8 F.3d 645, 648 (9th Cir. 1993)). Further, intent to defraud is "implicit" in the nature of a crime if it involves making a false representation to obtain something of value. *Tijani v. Holder*, 628 F.3d 1071, 1079 (9th Cir. 2010).

Because ARIZ. REV. STAT. § 13-2008 does not explicitly require an intent to defraud, it is necessary to determine if such an intent is "implicit" in its nature. *See Blanco*, 518 F.3d at 719. Fraudulent conduct connotes something more than mere dishonesty; it requires one to attempt to induce another to act to his or her detriment. *See id.* For instance, in *Blanco*, the Ninth Circuit held that intent to defraud was not implicit in the offense of "false identification to a police officer." *Id.* at 719-20. Generally speaking, this offense prohibited one from

providing false information to a police officer for purposes of evading law enforcement efforts. *See* CAL. PENAL CODE § 148.9(a). As the court stated, intent to defraud is implicit in the nature of an offense only where one is prohibited from making a false statement to procure something *tangible*. *Blanco*, 518 F.3d at 719. Because a violation of "this statute only requires a showing that the individual knowingly misrepresented his or her identity to a peace officer, but does not require that the individual thereby knowingly attempted to obtain anything of value," the court held that fraud was not implicit in its nature. *Id.* at 719-20. Thus, as the Ninth Circuit stated, "[w]hen the only 'benefit' the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude." *Id.* (internal citations in original).

As noted above, a conviction for taking the identity of another can be obtained where one "knowingly . . . possesses or uses any personal identifying information [of another] . . . , with the intent to obtain or use the . . . identity *for any unlawful purpose*[.]" ARIZ. REV. STAT. § 13-2008(A) (emphasis added). For instance, in *State v. Delacruz*, a defendant used the name, birth date, and social security number of another to identify herself to a police officer during a traffic stop. *State v. Delacruz*, 2010 WL 1050308, ¶¶4-7 (Ariz. Ct. App. 2010). In other words, Arizona courts have extended ARIZ. REV. STAT. § 13-2008(A) to instances like *Blanco*—that is, where an individual makes a misrepresentation (representing themselves as another) to a police officer for an unlawful purpose (to impede the enforcement of law). *See Delacruz*, 2010 WL 1050308 at ¶¶4-7. Thus, there is a realistic

probability that ARIZ. REV. STAT. § 13-2008(A) extends to conduct that falls outside the confines of a CIMT. *See Blanco*, 518 F.3d at 719.

Moreover, a conviction under § 13-2008 can also be obtained where one "knowingly . . . possesses or uses any personal identifying information [of another] . . . , with the intent to . . . *cause loss to a person or entity*[.]" ARIZ. REV. STAT. § 13-2008(A) (emphasis added). Once again, the requirements for intent to defraud are that the respondent intends to obtain something tangible and that he must induce another to act in a way detrimental to him or herself. *See Blanco*, 518 F.3d at 719. But under the relevant Arizona statute, the respondent can cause financial loss to the victim, and obtain something tangible, without the victim, or another, acting in reliance on the respondent's misrepresentation in such a way that is detrimental to him or herself. *See*, *e.g.*, *State v. Whang*, 1 CA-CR. 12-0020, 2013 WL 325616, *4-5 (Ariz. Ct. App. Jan. 29, 2013) (Unpublished) (Defendant was convicted under § 13-2008(A) for causing financial loss to another without that person's knowledge based upon misrepresentation to the bank). As such, the respondent's conviction does not necessarily require an intent to defraud. *See Blanco*, 518 F.3d at 719. Therefore, the Department has failed to meet its burden of establishing that the respondent's conviction categorically rested on the elements of a CIMT. *See Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

Because the application of ARIZ. REV. STAT. § 13-2008(A) is broader than that required for a CIMT, resort to the modified categorical approach is not ap-

propriate. Thus, the Department has failed to meet its burden.

ii. Aggravated Driving Under the Influence

The second allegation in support of the Department's charge of removability under section 237(a)(2)(A)(ii) of the Act is that the respondent's conviction for an aggravated DUI under ARIZ. REV. STAT. § 28-1383(A)(1) is a CIMT. [Exs. 1, 1B].

The respondent's statute of conviction, in pertinent part, provides that

> [a] person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person . . . [c]ommits a [simple DUI offense] while the person's driver license or privilege to drive is suspended, canceled, revoked, or refused or while a restriction is placed on the person's driver license or privilege as a result of [prior DUI offenses].

ARIZ. REV. STAT. § 28-1383(A)(1).

Within the context of crimes involving moral turpitude, the Board and the Ninth Circuit have had numerous opportunities to explore the meaning of Arizona's "aggravated DUI" statute. First, in *Lopez-Meza*, the Board held that the offense proscribed under ARIZ. REV. STAT. § 28-1383(A)(1)—aggravated DUI—was categorically a CIMT. *Lopez-Meza*, 22 I&N Dec. at 1196-97. Unlike a simple DUI offense, which requires proof of nothing more than the act of driving or having physical control of a vehicle while intoxicated, the offense proscribed under § 28-1383(A)(1)

requires an "aggravating factor" that enhances the crime to the level of *malum in se*—that is, proof that the driver committed a DUI offense while he had knowledge that his license was either suspended, cancelled, revoked, or refused because of a prior DUI offense. *See id.* at 1194-96; *see also State v. Williams*, 698 P.2d 732, 734 (Ariz. 1985) (holding that there is an implied *mens rea* element of "knowing" to sustain a conviction under § 28-1383(A)(I)). However, in 2003, the Ninth Circuit added a distinction to the CIMT analysis under ARIZ. REV. STAT. § 28-1383. *See Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 119 (9th Cir. 2003) (decided under former § 28-692). Holding that § 28-1383(A)(1) is divisible, and a conviction under it is not categorically one that involves moral turpitude, the court focused on the fact that the statute proscribes the act of either "driving" or maintaining "physical control" of a vehicle while intoxicated. *Id.* at 1118-19; ARIZ. REV. STAT. § 28-1383(A). As the court pointed out, "[o]ne may be convicted under [this statute] . . . for sitting in one's own car in one's own driveway with the key in the ignition and a bottle of beer in one's hand." *Hernandez-Martinez*, 329 F.3d at 1118-19. Because having physical control over a vehicle while under the influence of alcohol is not the type of despicable conduct that rises to the level of being a CIMT, the court held that § 28-1383(A)(1) is divisible and thus cannot categorically constitute a CIMT.

Because ARIZ. REV. STAT. § 28-1383(A)(1) has alternative elements, some (driving)—but not all (mere physical control)—of which encompass the elements of

the generic offense, the statute is said to be "divisible" and the Court can examine the underlying record of conviction to determine which elements (generic or non-generic) formed the basis of the conviction. *Descamps*, 133 S. Ct. at 2279. In this respect, the plea transcript submitted by the Department, reflects that the respondent admitted to "*driving a vehicle* . . . after having consumed alcohol[.]" [Ex. 5, Tab B at 17]. Based upon this factual basis, the court accepted the respondent's plea of guilty to the charge, [*Id.* at 18]. Clearly, the respondent has done more than simply admit to the generic statutory term of "driving under the influence," and has admitted to the specific element of "driving the vehicle". Therefore, the respondent's admittance to "driving the vehicle" has narrowed the basis of conviction to the specific element necessary for a CIMT.

Under the modified categorical approach the Department has met its burden of establishing that the respondent's conviction necessarily rested on the required element of actually *driving the vehicle*. Therefore, the Department has established that the respondent's conviction for an aggravated DUI under § 28-1383(A)(1) is a CIMT under section 237(a)(2)(A)(ii).

iii. Second-Degree Burglary

In terms of burglary convictions, both the Ninth Circuit and the Board have held that a burglary offense, on its face, is not a CIMT. *See*, *e.g.*, *Cuevas-Gespar v. Gonzales*, 430 F.3d 1013, 1017-19 (9th Cir. 2005), *abrogated on other grounds by Holder v. Mar-*

tinez Gutierrez, 132 S. Ct. 2011 (2012); *Matter of M-*, 2 I&N Dec. 721,723 (BIA 1946). It follows that "the act of entering is not itself base, vile or depraved, and that it is the particular crime that accompanies the act of entry that determines whether the offense is one involving moral turpitude." *Cuevas-Gespar*, 430 F.3d at 1019; *see also Marmolejo-Campos*, 558 F.3d at 933 (stating that "burglary offenses may or may not involve moral turpitude, the determinative factor being whether the crime intended to be committed at the time of entry . . . involves moral turpitude" (internal citations omitted)).

Under Arizona law, the crime of second-degree burglary is committed by one who "enter[s] or remain[s] unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." ARIZ. REV. STAT. § 13-1507(A). The Ninth Circuit has consistently held that a burglary conviction based on an underlying intent to commit a *theft* offense is a CIMT. *See*, *e.g.*, *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1107 (9th Cir. 2011) (stating that "[f]or example, had Hernandez-Cruz been convicted of a crime requiring proof that he had unlawfully entered a residence with intent to commit a theft or larceny therein, such a conviction would be a CIMT" (internal citations omitted)); *Cuevas-Gespar*, 430 F.3d at 1020 (stating that "[b]ecause the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny is a [CIMT]"). Because the statute has alternative elements ("theft or any felony"), of which some encompass the elements of the generic offense of CIMT, the

statute is said to be "divisible" and the Court can examine the underlying record of conviction to determine which elements (generic or non-generic) formed the basis of the conviction. *See id.* at 2279.

Specifically, the plea transcript provides a clear answer as to the substantive offense underlying the burglary conviction—as the factual basis given in support of his conviction was that the respondent, "with the intent to commit *theft*, entered and remained unlawfully in the residential structure[.]" [Ex. 5, Tab C at 14 (emphasis added)]. In this respect, the Ninth Circuit has determined that the underlying crime of *theft* is morally tupitudinous if it includes the intent to *permanently deprive* the victim of his or her property. *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159; *Matter of P-*, 2 I&N Dec. 887, 887 (BIA 1947) (holding that offenses such as joy riding are not CIMTs because they lack the intent to permanently deprive the owner of the vehicle); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Therefore, with respect to the crime of second-degree burglary as a CIMT, the focus is on the specific intent to commit theft after entry and whether or not a conviction for theft under the state statute categorically fits theft as a CIMT.

Under Arizona law, one way in which an individual can be convicted of a theft offense is if that person "controls property of another with the intent to deprive the other person of such property." ARIZ. REV. STAT. § 13-1802(A)(1). In contrast to the requirement

for theft as a CIMT, a person can be convicted of theft under Arizona law by depriving a person of their property *either temporarily or permanently*. ARIZ. REV. STAT. § 13-1801(A)(4). Therefore, an individual can be convicted of a theft offense under Arizona law without committing a CIMT. Because the statute is divisible, the Court can examine the underlying record of conviction to determine which elements (generic or non-generic) formed the basis of the conviction. *Descamps*, 133 S. Ct. at 2279.

Again, the only document to be considered is the plea transcript submitted by the Department, which reflects that the respondent admitted to entering and remaining unlawfully, "with the *intent to commit theft*." [Ex. 5, Tab C at 14] (emphasis added). This inquiry into the factual record reveals that the respondent merely admitted to having the *intent to commit theft* in the most generic sense. In other words, the respondent did not admit to a narrower basis of conviction, as he did not admit to intending to deprive the victim of property *either permanently or temporarily*. Therefore, the record of conviction is inconclusive as to whether the respondent's underlying intent to commit theft necessarily included the element of intent to permanently deprive, as necessary to constitute a CIMT. *See Castillo-Cruz*, 581 F.3d at 1159. As such, the government has failed to establish that the respondent's conviction necessarily included the elements of theft as a CIMT. *See Young*, 697 F.3d at 989.

In sum, because the Department failed to establish that the respondent's underlying intent was to perma-

nently deprive the victim, the Department has necessarily failed to establish that the respondent's conviction for second-degree burglary under § 13-1507 is a CIMT.

iv. Possession or Use of Marijuana

When assessing whether a conviction is a CIMT, the primary focus is on determining whether there was "evil intent" involved in the crime. *Matter of Abreu-Semino*, 12 I&N Dec. 775, 777 (BIA 1968). As the Board has previously held, "moral turpitude normally inheres in the intent." *Id.*; *See also Matter of R-*, 4 I&N Dec. 644, 647 (BIA 1952). In other words, crimes that do not involve "evil intent" cannot be CIMTs, regardless of the seriousness or consequences of the act. *Matter of Abreu-Semino*, 12 I&N Dec. at 777. For example, the Board found that where the statute of conviction was for possession and sale of LSD, but the element of intent is not included in the statute, a conviction under that statute is not a CIMT. *Id.*; *See also Matter of Khourn*, 21 I&N Dec. 1041, 1043 (BIA 1997) (distinguishing the statute in *Matter of Abreu-Semino* from one explicitly prohibiting possession *with intent* to distribute, which is a CIMT).

In comparison, the statute of conviction in the present case is quite similar to that in *Matter of Abreu-Semino*. Under ARIZ. REV. STAT. § 13-3405, a conviction can be had for the possession or sale of marijuana, and the element of intent is not mentioned anywhere in the statute. As such, intent, or "evil intent," is a missing element, and one can be convicted of possession of marijuana under § 13-3405 for possession, with-

out any intent to sell or otherwise distribute. *See Matter of Abreu-Semino*, 12 I&N Dec. at 777; *Matter of Khourn*, 21 I&N Dec. at 1043. Therefore, the Department has failed to establish that the respondent's conviction necessarily rested on this element of "evil intent," as required for a CIMT. *See Matter of Abreu-Semino*, 12 I&N at 777; *Young*, 697 F.3d at 989.

Based on this analysis, the Department has failed to establish that the respondent's conviction for possession or use of marijuana under ARIZ. REV. STAT. § 13-3405 was a CIMT.

b. AGGRAVATED FELONY—CRIME OF VIOLENCE

A criminal conviction renders an alien removable from the United States if, among other things, it constitutes an "aggravated felony." INA § 237(a)(2)(A)(iii). An aggravated felony, in turn, has been defined to include "a crime of violence . . . for which the term of imprisonment [was] at least one year." INA § 101(a)(43)(F). Accordingly, because a sentence of five years was imposed for the respondent's 2011 second degree burglary conviction, the respondent will be deemed to have been convicted of an aggravated felony, and thus will be subject to removability under section 237(a)(2)(A)(iii), if the conviction constitutes a "crime of violence." *See id.*; [Ex. 7].

To make this determination, the Court must apply the familiar categorical analysis set forth in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005). This approach requires the Court to "compare the elements of the statute of conviction . . . to the generic definition [of a

crime of violence], and decide whether the conduct proscribed by [the statute] is broader than, and so does not categorically fall within, this generic definition." *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (overruled on other grounds). This is done by examining the statute of conviction "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008); *see Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) ("The key . . . is elements, not facts."). In a narrow set of circumstances, however, the Court is permitted to go "beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction," such as jury instructions and the judgment of conviction, to determine what elements formed the basis of the underlying conviction. *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). This is known as the "modified categorical" approach.

The respondent argues that the Department's "withdrawal of the burglary charge of removability is essentially a concession" that the conviction does not satisfy the generic burglary definition. [Ex. 10 at 1-2]. From this premise, the respondent argues that the conviction cannot constitute a crime of violence. [*Id.*]. The Court disagrees. As the Ninth Circuit has decided in a similar context, a burglary-related offense can constitute a "crime of violence" without necessarily meeting any of the other various generic aggravated felony definitions. *See Lopez-Cardona v. Holder*, 662 F.3d 1110, 1113 (9th Cir. 2011). Thus, the

fact that the respondent's conviction does not constitute a generic theft or burglary offense has no bearing on whether it constitutes a "crime of violence." *See id.*

Under the generic definition, an offense will constitute a crime of violence under either of the following two circumstances: where it (1) has "as an element the use, attempted use, or threatened use of physical force against the person or property of another[;]" or (2) is "a felony and. . . . by its nature, involve a substantial risk that physical force against the person or property of another may be used in the course of" its commission. 18 U.S.C. §§ 16(a), (b).

In comparison, the respondent's statute of conviction provides that "[a] person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." ARIZ. REV. STAT. § 13-1507(A). As is clear from this definition, second degree burglary under Arizona law does not include "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). Thus, the determinative issue is whether such offense, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* at (b). And for the reasons that follow, the Court finds that it does.

In a related context, the Ninth Circuit has held that residential burglary under California law is a crime of violence within the meaning of 18 U.S.C. § 16(b).

United States v. Becker, 919 F.2d 568, 572 (9th Cir. 1990). As the court explained, burglary of an "inhabited structure," by its nature, involves a substantial risk that physical force may be used because

> any time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension.

Id. at 571; *see also Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) ("The classic example [of a crime of violence] is burglary . . . because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime."). Thus, at least for purposes of California law, residential burglary categorically constitutes a crime of violence. *See Becker*, 919 F.2d at 572; *Lopez-Cardona*, 662 F.3d at 1112.

The same logic applies for purposes of the present analysis. Similar to California law, Arizona defines the phrase "residential structure" to include "any structure . . . , permanent or temporary, that is adapted for both human residence and lodging[.]" ARIZ. REV. STAT. § 13-1501(11); *cf.* CAL. PENAL CODE § 459 (defining an "inhabited structure" as a structure "currently being used for dwelling purposes, whether occupied or not"). Thus, like burglary of an inhabited structure under California law, when an offender burglarizes a residential structure in Arizona there is a substantial risk that he "will encounter one of its law-

ful occupants[] and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." *See Becker*, 919 F.2d at 571; *see also United States v. M.C.E.*, 232 F.3d 1252, 1255 (9th Cir. 2000) (explaining that "courts . . . have come to the conclusion (unanimous, so far as we can tell) that residential burglary is indeed a crime of violence"). Accordingly, second degree burglary under Arizona law, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

In sum, and without resort to the modified categorical approach, the Court finds that the respondent was convicted of "a crime of violence . . . for which the term of imprisonment [was] at least one year." INA § 101(a)(43)(F). He is therefore removable for having been convicted of an aggravated felony.

C. Offense Relating to a Controlled Substance

Section 237(a)(2)(B)(i) of the Act renders an alien removable from the United States if he or she has been convicted of any law or regulation of a State, the United States, or a foreign country "relating to" a controlled substance. However, an alien that otherwise falls within this provision is excepted from removability if his or her conviction was for "a single offense involving possession for one's own use of thirty grams or less of marijuana." INA § 237(a)(2)(B)(i). For the reasons that follow, the Court finds that the respondent is removable under this provision.

The first question is whether the respondent falls within the purview of section 237(a)(2)(B)(i), as having been convicted of a crime relating to a controlled substance. Under Arizona law a conviction for possession or use of marijuana, as a class six felony, can be obtained when the crime involves an amount less than two pounds and not possessed for sale. ARIZ. REV. STAT. § 13-3405(A)(1) & (B)(1). Furthermore, it has already been established that ARIZ. REV. STAT. § 13-3405 "is specifically aimed at the prohibition of a controlled substance." *Tucker v. Gonzales*, Fed. App'x. 523, 525 (9th Cir. 2006). Therefore, it is clear that the respondent's conviction under § 13-3405 was a violation of "a law or regulation of a State . . . relating to a controlled substance." *See Id.*

The only question that remains is whether the respondent qualifies for the exception to removability under section 237(a)(2)(B)(i). *See Matter of Davey*, 26 I&N Dec. 37, 39-40 (BIA 2012). As the Board has explained, this exception only applies to "a specific type of conduct (possession for one's own use) committed on a specific number of occasions (a "single" offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana)." *Id.* at 39 (explaining that this is a fact-specific inquiry).[1] Based on the

[1] Certain portions of the Act list "offenses using language that almost certainly does not refer to generic crimes but refers to specific circumstances." *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009). In these situations, to apply a categorical approach would leave the specific circumstances with little, if any, meaningful application. *Id.* Thus, the Court turns to the conviction documents to determine whether this exception applies.

language of ARIZ. REV. STAT. § 13-3405, it is not clear on the face of the conviction that the respondent falls outside of the exception under section 237(a)(2)(B)(i). A conviction under this statute can be obtained for the possession of any amount of marijuana less than two pounds, which of course includes an amount of less than thirty grams, as well as when the possession is only for personal use. *See Matter of Marquardt*, 778 P.2d 241, 246 (Ariz. 1989); ARIZ. REV. STAT. § 13-3405(A)(1) & (B)(1). In other words, if this is the respondent's first offense regarding a controlled substance, it is possible to be convicted under ARIZ. REV. STAT. § 13-3405 and still fall within the exception under section 237(a)(2)(B)(i). Accordingly, it is necessary to look into the record to determine whether any one of the elements for the exception has been violated in the present case.

"To prove a charge under section 237(a)(2)(B)(i), the government bears the burden of proving that the respondent's conviction does not fall within the "possession for personal use" exception." *Matter of Davey*, 26 I&N Dec. at 42 (citing *Matter of Moncada*, 24 I&N Dee. 62, 67 n.5 (BIA 2007)); *See also Young*, 697 F.3d at 989 ("In the removal context, the government has the burden to establish deportability"). Furthermore, in the context of establishing whether the government has met its burden under section 237(a)(2)(B)(i) of the Act, the Court may use a fact-specific approach, rather than being limited to only the elements of the conviction. *Davey*, 26 I&N Dec. at 39.

An inquiry into the plea transcript establishes that the respondent admitted the he "did possess an

amount of marijuana having a weight less than two pounds." [Ex. 5, Tab C at 14]. Based upon this factual basis, it is still unclear as to whether the respondent was in violation of any of the requirements for the exception under section 237(a)(2)(B)(i). First, there is no indication that the amount in possession was greater than the proscribed amount since the facts only establish that the respondent had some amount less than two pounds in his possession. Furthermore, there is no indication in the factual basis that the possession was for anything other than personal use. Finally, there is also no indication that this was the respondent's second conviction of a crime relating to a controlled substance.[2] Thus, the Department has failed to establish that the respondent falls outside of the exception to deportability under section 237(a)(2)(B)(i). *See Young*, 697 F.3d at 989.

In sum, while the evidence clearly establishes that the respondent was convicted of a crime relating to a controlled substance, the record is inconclusive as to whether the respondent falls within or outside the exception under section 237(a)(2)(B)(i). Thus, the Department has necessarily failed in its burden to establish removability under this section.

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[2] The Court does acknowledge that there are documents that suggest the respondent may have also been convicted of a crime regarding the possession of drug paraphernalia, however, the Department withdrew that allegation from the Notice to Appear. Accordingly, the Court will not consider that possible conviction, or evidence related thereto. *See* INA § 239(a)(1)(D); *Chowdhury v. INS*, 249 F.3d 970, 974-75 (9th Cir. 2001).

IV. RELIEF

Having been convicted of an aggravated felony, the respondent is statutorily ineligible for asylum, cancellation of removal, and post-conclusion voluntary departure. *See* INA §§ 208(b)(2)(B)(i), 240A(a)(3), 240B(b)(1)(C).

V. CONCLUSION

Accordingly, the following orders shall be entered:

ORDERS: **IT IS HEREBY ORDERED THAT** the Department's charge of removability under section 237(a)(2)(A)(ii) is **NOT SUSTAINED**.

IT IS FURTHER ORDERED THAT the Department's charge of removability under section 237(a)(2)(A)(iii) the Act insofar as it pertains to the aggravated felony definition under section 101(a)(43)(F) is **SUSTAINED**.

IT IS FURTHER ORDERED THAT the Department's charge of removability under section 237(a)(2)(B)(i) is **NOT SUSTAINED**

[1/29/14] /s/ SEAN H. KEENAN
Date **SEAN H. KEENAN**
U.S. Immigration Judge

APPENDIX D

1. U.S. Const. Amend V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

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[5] So in original. Probably should be preceded by "is".

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

* * * * *

3. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens.

(a) Classes of deportable aliens

* * * * *

(2) Criminal offenses

(A) General crimes

* * * * *

(iii) Aggravated felony

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

* * * * *

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

(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.

* * * * *

4. 8 U.S.C. 1229b(a) provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

5. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.