No. 19-632

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

ARACELY MARINELARENA

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

Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, a non-lawful permanent resident alien who has been convicted of certain offenses, including "a violation of * * * any law or regulation * * * relating to a controlled substance," is statutorily ineligible for discretionary cancellation of removal. 8 U.S.C. 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i); see 8 U.S.C. 1229b(b)(1)(C). In determining an alien's eligibility for cancellation of removal or any other "relief or protection from removal," the alien bears the burden of proof to establish that he "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i). The question presented is:

Whether an alien satisfies her burden of proof where the record establishes that she has been convicted under a statute defining multiple crimes, at least some of which would constitute disqualifying offenses, but it is inconclusive as to which crime formed the basis of the alien's conviction.

RELATED PROCEEDING

United States Court of Appeals (9th Cir.):

Marinelarena v. *Barr*, No. 14-72003 (July 18, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation: Page

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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-51a) is reported at 930 F.3d 1039. An earlier opinion of the court of appeals (App., *infra*, 52a-78a) is reported at 869 F.3d 780. The decisions of the Board of Immigration Appeals (App., *infra*, 79a-82a) and the immigration judge (App., *infra*, 83a-86a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2019. On October 7, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 15, 2019. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the appendix to this petition. App., *infra*, 87a-119a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General has the discretion to cancel the removal of an alien who is inadmissible or deportable, but meets certain statutory criteria for such relief. 8 U.S.C. 1229b. To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must: (1) have been "physically present in the United States for a continuous period" of at least ten years; (2) have been "a person of good moral character" during that period; (3) have "not been convicted" of any of the disqualifying offenses described in Sections 1182(a)(2), 1227(a)(2), or 1227(a)(3) of the INA; and (4) establish that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(A)-(D). The disqualifying offenses for non-lawful permanent resident aliens include "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i).

An alien seeking cancellation of removal, or any other form of relief from removal, "has the burden of

proof to establish" that he "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i); see 8 C.F.R. 1240.8(d). Accordingly, when the evidence indicates that the alien "may" have been convicted of a disqualifying offense, governing regulations provide that "the alien shall have the burden of proving by a preponderance of the evidence" that he has not been convicted of such a crime. 8 C.F.R. 1240.8(d).

2. a. Respondent, a native and citizen of Mexico, unlawfully entered the United States sometime in August 1992. App., *infra*, 52a-53a; Administrative Record (A.R.) 333. After several criminal convictions, she left the United States, reentering in March 2000 on a non-immigrant visitor's visa with an authorized period of admission extending through September 15, 2000. App., *infra*, 84a-85a; A.R. 314-330. Respondent remained in the United States after that date, however, and on December 20, 2006, she was charged with one count of conspiring to sell and transport a controlled substance, in violation of Cal. Penal Code § 182(a)(1) (West Supp. 2006) and Cal. Health & Safety Code § 11352 (West Supp. 2006). App., *infra*, 85a; A.R. 136-144 (complaint). Among the overt acts alleged in furtherance of the conspiracy was the defendants' transportation of three bags of heroin. App., *infra*, 27a, 53a; A.R. 136-138. The complaint also charged respondent with one count of selling, transporting, or offering to sell heroin, in violation of Cal. Health & Safety Code § 11352 (West Supp. 2006). App., *infra,* 27a; A.R. 139. Respondent pleaded guilty to the conspiracy count, and was sentenced to 136 days of imprisonment and three years of probation. App., *infra*, 53a-54a.

Two days later, the Department of Homeland Security (DHS) served respondent with a Notice to Appear,

charging her with removability as an alien who remained in the United States longer than permitted, in violation of 8 U.S.C. 1227(a)(1)(B). App., *infra*, 54a; A.R. 414-415. Respondent conceded removability, but filed an application for cancellation of removal under 8 U.S.C. 1229b(b). App., *infra*, 54a; A.R. 332-339. In light of the application and respondent's prior convictions, the immigration judge (IJ) asked respondent to submit documentation supporting her eligibility for relief, *i.e.*, conviction records establishing that she had not been convicted of a disqualifying offense. App., *infra*, 27a-28a. Over the next three years, the IJ repeatedly reiterated that request and granted respondent continuances to collect such documentation. *Ibid.* Respondent eventually submitted the complaint relating to the 2006 conviction, but she never submitted any other documentation of that conviction, such as the judgment, plea agreement, or plea colloquy. *Id.* at 28a, 54a n.1.

b. In an oral ruling, the IJ denied respondent's application for cancellation of removal. App., *infra*, 83a-86a. The IJ reasoned that the state-law criminal complaint against respondent indicated that she had been convicted of a conspiracy to distribute heroin, a disqualifying offense for cancellation of removal. *Id.* at 85a. He therefore concluded that respondent had "failed to meet her burden of proof that she is eligible for cancellation of removal." *Ibid.*

c. The Board of Immigration Appeals dismissed respondent's administrative appeal. App., *infra*, 79a-82a. Respondent argued that, although she had admitted being convicted of conspiring to commit a felony under Cal. Penal Code § 182(a)(1) (West Supp. 2006), the IJ had erred in determining that the conviction was specifically for conspiring to sell and transport heroin. App.,

infra, 80a. The Board observed, however, that respondent had the burden to establish statutory eligibility for cancellation of removal, including the absence of any disqualifying criminal convictions. *Ibid.* And it determined that respondent had failed to carry her burden, because she did not submit "any evidence establishing that her conspiracy conviction was not for a disqualifying controlled substance offense." *Id.* at 81a.

3. A divided panel of the Ninth Circuit denied respondent's petition for review. App., *infra*, 52a-72a. Applying the categorical approach, see *Descamps* v. *United States*, 570 U.S. 254, 263-264 (2013), the panel majority first reasoned that California's general conspiracy statute, Cal. Penal Code § 182(a)(1) (West Supp. 2006), is overbroad, because it punishes a broader range of conduct than conspiracies to violate laws "relating to a controlled substance," 8 U.S.C. 1227(a)(2)(B)(i). App., *infra*, 58a. The panel determined, however, that Section 182(a)(1) is divisible as to the object offense of the conspiracy, and that Cal. Health & Safety Code § 11352 (West Supp. 2006)—the object offense in respondent's case—is divisible as to the controlled substance involved. App., *infra*, 58a-61a. The panel therefore turned to the modified categorical approach. Applying that approach, the panel majority concluded that the record was inconclusive as to the controlled substance involved in respondent's offense. *Id.* at 61a-62a. Relying on the Ninth Circuit's prior decision in *Young* v. *Holder*, 697 F.3d 976 (2012) (en banc), the panel majority reasoned that, because respondent bore the burden of proving her eligibility for relief from removal, her failure to prove that her conviction was not for conspiracy related to a federally controlled substance rendered her ineligible for cancellation of removal. App., *infra*, 62a-63a.

Judge Tashima dissented. App., *infra*, 72a-78a. In his view, "the ambiguity in the record as to [respondent's] offense of conviction means that [respondent] has *not* committed an offense disqualifying her from relief" under this Court's decision in *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013). App., *infra*, 72a. He would therefore have granted the petition for review. *Id.* at 78a.

4. By a vote of 8-3, the en banc Ninth Circuit vacated the panel's decision and granted the petition for review. App., *infra*, 1a-26a.

a. The en banc majority agreed with the panel that Cal. Penal Code § 182(a)(1) (West Supp. 2006) was overbroad, and it "assume[d] for purposes of this appeal that it is divisible." App., *infra*, 8a; see *id.* at 8a-9a. The majority further held that applying the modified categorical approach, although the criminal complaint against respondent referenced heroin as the specific controlled substance involved in the conspiracy, that document alone was "insufficient to prove a conviction related to a particular controlled substance." *Id.* at 9a. Without the judgment or any document related to respondent's guilty plea, the en banc majority reasoned, "the record [wa]s inconclusive as to whether [her] plea included the sole heroin allegation in the complaint, which was not necessary to conviction for the conspiracy offense." *Id.* at 10a.

The en banc majority acknowledged that in *Young* v. *Holder*, *supra*, the en banc court of appeals "had held that when the record of conviction is ambiguous after analyzing the [conviction] documents, a petitioner is ineligible for cancellation of removal because she has not met her burden of showing that she was not convicted of a disqualifying federal offense." App., *infra*, 10a (cit-

ing *Young*, 697 F.3d at 990). But it concluded that subsequent decisions from this Court "ha[d] brought into question the foundation of this conclusion." *Id.* at 10a-11a. Specifically, the en banc majority concluded that this Court's decision in *Moncrieffe* "dictates that an ambiguous record of conviction does *not* demonstrate a disqualifying offense." *Id.* at 11a n.6.

According to the en banc majority, under *Moncrieffe*, "[i]f the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes." App., *infra*, 14a. The en banc majority rejected the distinction between removability, at issue in *Moncrieffe*, and cancellation of removal, at issue in this case. *Ibid.* And it determined that the statutory burden of proof, which Congress placed on the alien seeking relief from removal, was irrelevant to resolving whether an ambiguous record of conviction demonstrates that an alien has been convicted of a disqualifying offense. *Id.* at 15a-17a.

The en banc majority reasoned that "whether the record of conviction necessarily established the elements of the disqualifying federal offense 'is a legal question with a yes or no answer.'" App., *infra*, 17a (citation omitted). "To the extent that there may be a predicate factual question," the majority added, "it would be whether all relevant and available documents have been produced." *Ibid.* That question "implicates a possible burden of *production*," which the majority concluded that it "need not and [would] not address here." *Ibid.* The majority held that "it was error for the [Board] to deem [respondent] ineligible to apply for cancellation because her record of conviction [wa]s ambiguous." *Id.* at 23a. And it remanded to the Board to

consider "which party bears the burden of production" for conviction documents and "when that burden is satisfied." *Id.* at 24a.

b. Judge Ikuta, joined by Judges Graber and Rawlinson, dissented. App., *infra*, 26a-51a. Judge Ikuta explained that, "[b]ecause Congress placed the burden of proof on the alien to establish eligibility for cancellation of removal, aliens seeking relief from removal must show that they were not convicted of a state offense that would disqualify them from cancellation of removal and will lose if they cannot do so because the record is inconclusive." *Id.* at 31a (citation omitted). She reasoned that the majority's contrary conclusion conflated the threshold factual question under the modified categorical approach (what "crime * * * a defendant was convicted of") with the subsequent legal question (whether that crime is a "categorical match" to a disqualifying federal offense). *Id.* at 37a-38a. And she stated that, because respondent had "failed to produce any document of conviction" that could answer the threshold factual inquiry, the court could not conclude whether respondent had been convicted of a disqualifying or nondisqualifying offense. *Id.* at 39a-40a. Judge Ikuta thus concluded that respondent had not carried her burden of demonstrating eligibility for cancellation of removal. *Id.* at 40a.

ARGUMENT

This case concerns whether an alien has satisfied her burden of proving her eligibility for cancellation of removal when she has been convicted under a divisible statute that includes some disqualifying offenses, but the record fails to establish that the offense that formed the basis of the alien's conviction was not one of those

disqualifying offenses. The majority of courts of appeals to have considered that question have correctly held that, when the record of conviction is inconclusive, the alien has not carried her burden of proving that she has not been convicted of a disqualifying offense for purposes of such relief from removal. See *Pereida* v. *Barr*, 916 F.3d 1128, 1132-1133 (8th Cir. 2019), petition for cert. pending, No. 19-438 (filed Sept. 30, 2019); *Gutierrez* v. *Sessions*, 887 F.3d 770, 779 (6th Cir. 2018), cert. denied, 139 S. Ct. 863 (2019); *Lucio-Rayos* v. *Sessions*, 875 F.3d 573, 583-584 (10th Cir. 2017), cert. denied, 139 S. Ct. 865 (2019); *Salem* v. *Holder*, 647 F.3d 111, 116 (4th Cir. 2011), cert. denied, 565 U.S. 1110 (2012).

In this case, however, the en banc Ninth Circuit reached a contrary conclusion. See Pet. App. 14a ("If the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes."). In addition, the First Circuit has held that where all existing conviction documents have been proffered, any remaining ambiguity regarding the offense of conviction should be resolved in favor of eligibility for relief. *Sauceda* v. *Lynch*, 819 F.3d 526, 531-532 (2016).

In response to the pending petition for a writ of certiorari in *Pereida* v. *Barr*, No. 19-438 (filed Sept. 30, 2019), the government has explained that this Court's review is warranted to resolve the circuit conflict on that important legal question and to further the uniform administration of the federal immigration laws. See U.S. Br. at 7-15, *Pereida*, *supra* (filed Nov. 12, 2019). The government has further agreed that *Pereida* provides a suitable vehicle for the Court to resolve that question. *Id.* at 14. Accordingly, the government has urged

the Court to grant certiorari in *Pereida*. *Id.* at 15. Because this Court's disposition of *Pereida* may affect the proper disposition of this case, the petition in this case should be held pending the disposition in *Pereida*, and then disposed of as appropriate in light of that disposition.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's consideration of the petition for a writ of certiorari in *Pereida* v. *Barr*, No. 19-438 (filed Sept. 30, 2019), and any further proceedings in this Court, and then disposed of as appropriate in light of the Court's disposition of that case.

Respectfully submitted.

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NOVEMBER 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-72003
Agency No. A095-731-273

ARACELY MARINELARENA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
RESPONDENT

Argued and Submitted En Banc: Sept. 27, 2018
Pasadena, California
Filed: July 18, 2019

On Petition for Review of an Order of the
Board of Immigration Appeals

OPINION

Before: SIDNEY R. THOMAS, Chief Judge, and A. WALLACE TASHIMA, SUSAN P. GRABER, WILLIAM A. FLETCHER, MARSHA S. BERZON, JOHNNIE B. RAWLINSON, JAY S. BYBEE, MILAN D. SMITH, JR., SANDRA S. IKUTA, PAUL J. WATFORD, and MICHELLE T. FRIEDLAND, Circuit Judges.

Opinion by Judge TASHIMA; Dissent by Judge IKUTA

TASHIMA, Circuit Judge:

We must decide whether, in the context of eligibility for cancellation of removal under 8 U.S.C. § 1229b(b), a record that is ambiguous as to whether a state law conviction constitutes a predicate offense that would bar a petitioner from relief actually does bar relief. We hold that it does not.

Petitioner Aracely Marinelarena ("Marinelarena"), a noncitizen who last entered the United States in 2000, conceded that she was removable, but petitioned for cancellation of removal under 8 U.S.C. § 1229b(b). The immigration judge ("IJ") denied her relief, and the Board of Immigration Appeals ("BIA") affirmed, holding that Marinelarena had failed to demonstrate that her prior conviction was *not* for a disqualifying federal offense and, therefore, had not met her burden of showing that she was eligible for cancellation of removal. Marinelarena petitioned for review of the BIA's final decision. We grant her petition, reverse the BIA's determination, and remand to the agency.

We hold that the statute under which Marinelarena was convicted was overbroad at the time of her conviction. We further hold, overruling our previous decision in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), that, under *Moncrieffe v. Holder*, 569 U.S. 184 (2013), an ambiguous record of conviction does not demonstrate that a petitioner was convicted of a disqualifying federal offense. We do not reach the issue of whether there is a separate burden of production in the cancellation of removal context and, if so, who bears it, and remand to the BIA to consider this issue in the first instance.

FACTUAL AND PROCEDURAL BACKGROUND

Marinelarena, a native and citizen of Mexico, first entered the United States in 1992. After living in the United States for a number of years, she returned to Mexico briefly in 1999, but re-entered the United States in 2000 following inspection and admission. Marinelarena has lived in the United States since and has two children who are United States citizens.

In 2000, on a plea of nolo contendere, Marinelarena was convicted of a misdemeanor under California Penal Code § 529 for false personation of another. In 2006, she was charged with one count of conspiracy to commit a felony in violation of California Penal Code § 182(a)(1),[1] namely conspiring to sell and transport a controlled substance in violation of California Health and Safety Code § 11352.[2] The complaint listed a number of overt acts

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[1] California Penal Code § 182(a)(1) applies when "two or more persons conspire: (1) To commit any crime."

[2] California Health and Safety Code § 11352 provides:

> (a) Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

in support, only one of which referenced a specific controlled substance, heroin. Marinelarena pleaded guilty and was convicted of violating California Penal Code § 182(a)(1) on March 26, 2007. She was fined, sentenced to three years of probation, and 136 days in county jail. Following her conviction, Marinelarena filed separate petitions in state court under California Penal Code § 1203.4 to expunge her false personation and conspiracy convictions. In 2009, California courts granted both of Marinelarena's petitions, vacating her § 529 and § 182(a)(1) convictions.

Meanwhile, on March 28, 2007, following her conspiracy conviction, the Department of Homeland Security served Marinelarena with a notice to appear for removal proceedings. The notice charged her with removability as an alien who had remained in the United States longer than permitted, in violation of 8 U.S.C. § 1227(a)(1)(B). Marinelarena conceded removability, but applied for cancellation of removal under 8 U.S.C. § 1229b(b).

At a removal hearing in 2011, the IJ noted that Marinelarena's conspiracy conviction had been expunged under California Penal Code § 1203.4, but stated that such an expungement would not eliminate the conviction for immigration purposes, unless the dismissal had been on constitutional grounds. The IJ continued the hearing, instructing Marinelarena to submit any documents or briefing as to why she remained eligible. Accordingly, she submitted a brief arguing that she remained eligible for cancellation of removal despite her § 182(a)(1) conviction. She argued that, because the conviction documents in the record did not identify that the crime of conviction rested on a specific controlled substance, her conviction did not constitute a controlled substance

offense as defined by the Controlled Substances Act ("CSA"), 21 U.S.C. § 802.

The IJ rendered an oral decision in 2012, holding that Marinelarena had failed to demonstrate eligibility for cancellation of removal and ordering her removed to Mexico. The IJ determined that although her conviction under § 529 for false personation had been expunged, that expungement did not disqualify it for immigration purposes and the conviction constituted a crime involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(i). The IJ also found that, "more importantly," her crime "for conspiracy to distribute heroin"—as the IJ construed the criminal complaint—would also bar her from relief. Consequently, the IJ denied her relief.

On appeal, the BIA also held that Marinelarena had the burden of establishing that her conspiracy conviction was not a disqualifying offense, and that she had not met that burden. The BIA explained that California Health and Safety Code § 11352 is broader than the CSA with respect to the substances covered, 21 U.S.C. § 802, but divisible, and that Marinelarena had failed to submit any evidence showing that she was *not* convicted of a disqualifying controlled substance offense. Therefore, the BIA ruled, Marinelarena had not established that she was eligible for cancellation of removal. The BIA did not discuss her conviction under California Penal Code § 529, nor did it discuss the expungement of either conviction.

Marinelarena timely petitioned for review. A three-judge panel, in a split decision, denied in part and dismissed in part the petition. *Marinelarena v. Sessions*,

869 F.3d 780, 792 (9th Cir. 2017). We then granted rehearing en banc. *Marinelarena v. Sessions*, 886 F.3d 737 (9th Cir. 2018).[3]

STANDARD OF REVIEW

We review questions of law de novo. *Coronado v. Holder*, 759 F.3d 977, 982 (9th Cir. 2014).

DISCUSSION

I. Conviction for a Controlled Substance Offense

To be eligible for cancellation of removal under 8 U.S.C. § 1229b(b), Marinelarena must meet four requirements,[4] including, as relevant here, that she has not been convicted of a "controlled substance" offense, 8 U.S.C. § 1182(a)(2)(A)(i)(II). Thus, the central question on appeal is whether Marinelarena's California-state-law conviction for conspiracy to sell and transport a controlled substance constitutes a controlled substance offense under federal law for the purposes of § 1229b(b).

In order to determine whether a state conviction constitutes a predicate offense for immigration purposes, this court employs the now-familiar three-step process derived from *Taylor v. United States*, 495 U.S. 575

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[3] The order granting rehearing en banc effectively vacated the three-judge panel opinion. *Id.* ("The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.").

[4] To be eligible for cancellation of removal, a petitioner must show that: (A) she "has been physically present in the United States" for at least ten years; (B) she "has been a person of good moral character during such period"; (C) she "has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3)"; and (D) "removal would result in exceptional and extremely unusual hardship" to her family members who are United States citizens, in this case her two children. 8 U.S.C. § 1229b(b)(1)(A)-(D).

(1990). *See Medina-Lara v. Holder*, 771 F.3d 1106, 1111-12 (9th Cir. 2014). "First, we ask whether the state law is a categorical match with a federal [controlled substance] offense[,] . . . look[ing] only to the 'statutory definitions' of the corresponding offenses." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1038 (9th Cir. 2017) (en banc) (quoting *Taylor*, 495 U.S. at 600), *cert. denied*, 138 S. Ct. 523 (2017). "If a state law 'proscribes the same amount of or less conduct than' that qualifying as a federal drug trafficking offense, then the two offenses are a categorical match." *Id.* (quoting *United States v. Hernandez*, 769 F.3d 1059, 1062 (9th Cir. 2014) (per curiam)); *see also Descamps v. United States*, 570 U.S. 254, 257 (2013) (holding that a state offense and a federal offense are a categorical match if "the [state] statute's elements are the same as, or narrower than, those of the generic [federal] offense").

If not—*i.e.*, if the state statute criminalizes a broader range of conduct than does the federal offense—we continue to the second step: asking whether the statute of conviction is "divisible." *Id.* A state offense is "divisible" if it has "'multiple, alternative elements, and so effectively creates several different crimes.'" *Almanza-Arenas v. Lynch*, 815 F.3d 469, 476 (9th Cir. 2016) (en banc) (quoting *Descamps*, 570 U.S. at 264). "Alternatively, if [the offense] has a 'single, indivisible set of elements' with different means of committing one crime, then it is indivisible and we end our inquiry, concluding that there is no categorical match." *Id.* at 476-77 (quoting *Descamps*, 570 U.S. at 265).

If the statute is both overbroad and divisible, we continue to the third step and apply the "modified categorical approach." *Martinez-Lopez*, 864 F.3d at 1039. "At

this step, we examine judicially noticeable documents of conviction 'to determine which statutory phrase was the basis for the conviction.'" *Id.* (quoting *Descamps*, 570 U.S. at 263). When doing so, we can consider only a restricted set of materials, including "the charging document, the terms of a plea agreement," the "transcript of [the plea] colloquy," and "comparable judicial record[s]." *Shepard v. United States*, 544 U.S. 13, 26 (2005) (plurality opinion); *see also Lopez-Valencia v. Lynch*, 798 F.3d 863, 868 (9th Cir. 2015). In examining these documents, our focus is on whether petitioner was "necessarily" convicted of a state-law crime with the same "basic elements" as the generic federal crime, not on the underlying facts of the conviction. *Descamps*, 570 U.S. at 260-61, 263.

We agree with Marinelarena that California Penal Code § 182(a)(1) is overbroad, and we assume for purposes of this appeal that it is divisible. Therefore, we apply the modified categorical approach.

A. Categorical Approach

First, we consider whether Marinelarena's conspiracy conviction is a categorical match to the relevant generic federal offense. California Penal Code § 182(a)(1) punishes a broader range of conduct than either 8 U.S.C. § 1182(a)(2)(A)(i)(II) or § 1227(a)(2)(B)(I). A defendant could be convicted under § 182(a)(1) for any criminal conspiracy, whether or not it relates to a controlled substance. A conviction under § 182(a)(1), therefore, cannot count as a controlled substance offense under the categorical approach. *See, e.g.*, *United States v. Trent*, 767 F.3d 1046, 1052 (10th Cir. 2014) (holding that a conspiracy conviction under Okla. Stat. Ann. tit. 21, § 421(A) —a statute textually similar to California Penal Code

§ 182(a)(1)—is not a serious drug offense under the categorical approach because "the statute could be violated in many ways that have nothing to do with drugs"), *abrogated on other grounds by Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016).

B. Divisibility

Having determined that § 182(a)(1) is not a categorical match, we normally next turn to the question of divisibility. However, for our purposes, it is sufficient to assume that § 182(a)(1) is divisible both as to the predicate crime underlying the conspiracy (here, § 11352) and as to the controlled substance element of § 11352, for, as explained below, it would make no difference in the outcome of this case if it were not.

C. Modified Categorical Approach

1. Analyzing the Shepard *Documents*

We proceed to step three, the modified categorical approach, and "examine judicially noticeable documents of conviction" to determine the basis for petitioner's conviction. *Martinez-Lopez*, 864 F.3d at 1039. Here, the only judicially noticeable document in the record relating to Marinelarena's criminal offense is the criminal complaint, which identifies the target offense of the conspiracy as selling and transporting a controlled substance in violation of California Health and Safety Code § 11352. The complaint identifies sixteen overt acts, only one of which references a specific controlled substance, heroin. But a complaint alone is insufficient to prove a conviction related to a particular controlled substance, s*ee Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003) (noting that where a defendant enters a guilty plea, "charging papers alone are never sufficient"

to establish the elements of conviction (quoting *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002))), and the record contains no plea agreement, plea colloquy, or judgment to establish the elements on which Marinelarena's conviction under § 182(a)(1) rested.

Therefore, even though heroin is a controlled substance under federal law, *see* 21 U.S.C. § 802(6) (defining "controlled substance" by reference to statutory schedules, including Schedule I); 21 U.S.C. § 812, Schedule I (b)(10) (listing heroin on Schedule I), the record is inconclusive as to whether Marinelarena's plea included the sole heroin allegation in the complaint, which was not necessary to conviction for the conspiracy offense. Because Marinelarena's guilty plea could have rested on an overt act that did not relate to heroin, we cannot assume her conviction was predicated on an act involving a federal controlled substance. Thus, the record of her conviction is ambiguous as to whether Marinelarena's conviction related to a federal controlled substance.

Here, the BIA found that, considering the complaint, Marinelarena had failed to carry her burden of establishing that she was not convicted of a disqualifying controlled substance offense. Previously, we had held that when the record of conviction is ambiguous after analyzing the *Shepard* documents, a petitioner is ineligible for cancellation of removal because she has not met her burden of showing that she was not convicted of a disqualifying federal offense.[5] *See Young*, 697 F.3d at 990. Subsequent Supreme Court decisions, however, have brought

[5] This presumption, that the burden rested on the petitioner, may be why the BIA did not inquire as to whether other *Shepard* documents were available to clarify Marinelarena's record of conviction.

into question the foundation of this conclusion. *See Moncrieffe v. Holder*, 569 U.S. 184, 189-90 (2013); *Descamps*, 570 U.S. at 263-64. We therefore granted rehearing en banc to reconsider our earlier decision.

2. Ambiguous Record of Conviction

In *Young*, we held en banc that a petitioner cannot establish her eligibility for cancellation of removal by showing that the record of conviction is inconclusive as to whether she was convicted of a disqualifying offense. 697 F.3d at 988-89. Thus, under *Young*, Marinelarena must prove that she was *not* convicted of a controlled substance offense in order to establish her eligibility for cancellation of removal.

Marinelarena contends, however, that *Young* is incompatible with the Supreme Court's subsequent decision in *Moncrieffe*. We agree, and so hold. Under *Moncrieffe*, ambiguity in the record as to a petitioner's offense of conviction means that the petitioner has *not* been convicted of an offense disqualifying her from relief.[6]

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[6] The Circuits are split on this issue. The First Circuit reached the same conclusion as we do in *Sauceda v. Lynch*, 819 F.3d 526, 533-34 (1st Cir. 2016), holding that *Moncrieffe* dictates that an ambiguous record of conviction does *not* demonstrate a disqualifying offense in both the removal and cancellation of removal contexts. The Second Circuit has reached a similar conclusion, though prior to *Moncrieffe*. *See Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (holding that the BIA "erred by placing the burden on [the petitioner] to show that his conduct was the equivalent of a federal misdemeanor").

The Tenth, Sixth, and Eighth Circuits, however, reached the opposite conclusion, holding that *Moncrieffe* does not extend to cancellation of removal. *See Lucio-Rayos v. Sessions*, 875 F.3d 573, 582 (10th Cir. 2017), *cert. denied sub nom. Lucio-Rayos v. Whitaker*,

In *Moncrieffe*, the Supreme Court explained the framework for applying the categorical approach to determine whether a noncitizen has committed an aggravated felony, as defined by the Immigration and Nationality Act ("INA"). 569 U.S. at 191. In cases applying the categorical approach, courts compare the elements of a noncitizen's offense of conviction to those of a generic federal offense that would disqualify her from relief. *See Descamps*, 570 U.S. at 260. The Court in *Moncrieffe* reiterated that, under the categorical approach, courts should "look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding

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139 S. Ct. 865 (2019); *Gutierrez v. Sessions*, 887 F.3d 770, 776 (6th Cir. 2018), *cert. denied sub nom. Gutierrez v. Whitaker*, 139 S. Ct. 863 (2019); *Pereida v. Barr*, 916 F.3d 1128, 1132-33 (8th Cir. 2019). But the Tenth Circuit's decision relied heavily on our panel majority opinion in *Marinelarena*, which has now been effectively vacated, *see* footnote 3, *supra*, and the Sixth Circuit's rested on the same reasoning, *see Lucio-Rayos*, 875 F.3d at 582-83; *Gutierrez*, 887 F.3d at 776-77. The Eighth Circuit's decision, considered the question in a single paragraph, citing to the Tenth Circuit's decision in *Lucio-Reyes* as support and without any consideration of the potential effect of *Moncrieffe*. *See Pereida*, 916 F.3d at 1133. We decline to follow the Tenth, Sixth, and Eighth Circuits for the reasons discussed *infra*.

The Seventh Circuit has nodded toward the issue in dicta, but has not squarely addressed it, *see Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014), and the question remains open in the Fifth Circuit. *See Le v. Lynch*, 819 F.3d 98, 107 n.5 (5th Cir. 2016) (expressly reserving the question); *Gomez-Perez v. Lynch*, 829 F.3d 323, 326 n.1 (5th Cir. 2016) (noting the question remains open). Similarly, the Eleventh Circuit has not reached a conclusion on this issue. *See Francisco v. U.S. Attorney Gen.*, 884 F.3d 1120, 1134 n.37 (11th Cir. 2018).

aggravated felony." *Moncrieffe*, 569 U.S. at 190 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). "[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'*necessarily*" *involved* . . . facts equating to [the] generic [federal offense].'" *Id.* (alterations in original) (emphasis added) (quoting *Shepard*, 544 U.S. at 24). "Whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'" *Id.* (quoting *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939)).

The Court in *Moncrieffe* further stated that, if a statute contains multiple, alternative versions of a crime (that is, if the statute is divisible), "a court may determine which *particular* offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or "'some comparable judicial record" of the factual basis for the plea.'" *Id.* at 191 (emphasis added) (quoting *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009)). The Court labeled this inquiry *as a whole* the "categorical approach," as opposed to distinguishing between the categorical and modified categorical approaches. *Id.* at 192.

Most important for this case is the Court's response in *Moncrieffe* to the government's argument that the petitioner had committed a "felony punishable under the [CSA]," which qualifies as an aggravated felony that would allow the petitioner to be deported. *Id.* at 188. The Court disagreed with that argument. *Id.* at 190. The record established that Moncrieffe had been convicted under a state statute proscribing conduct that constitutes an offense under the CSA, but the record

was ambiguous as to whether the CSA would "'necessarily' prescribe *felony* punishment for that conduct." *Id.* at 192 (emphasis added). The Court held that "[a]mbiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA." *Id.* at 194-95. "Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony" allowing him to be deported. *Id.* at 195.

This mode of analysis is clearly irreconcilable with *Young*. *Young* holds that ambiguity in the record as to which elements underlay the petitioner's conviction means that, for purposes of cancellation of removal, she has failed to prove that she was not convicted of the disqualifying offense contained in a divisible statute. 697 F.3d at 988-89. *Moncrieffe* holds the opposite: If the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes. 569 U.S. at 194-95.

That *Moncrieffe* involved the question of whether the petitioner was *removable*, not whether the petitioner was eligible for *cancellation* of removal, does not change our analysis. The Supreme Court explicitly explained in *Moncrieffe* that the categorical "*analysis is the same* in both [the removal and cancellation of removal] contexts." *Id.* at 191 n.4 (emphasis added). Moreover, any such distinction would have led to an exceedingly odd result in *Moncrieffe* itself—Moncrieffe would have been not removable as an aggravated felon, as the Court held, yet, based on the same conviction, would be ineligible for asylum or cancellation of removal, also alluded to in the

opinion. *Id.* at 187. Therefore, the question in both contexts is whether the conviction "necessarily" involved elements that correspond to a federal offense. *Id.* at 194.[7]

The government argues that, despite the Supreme Court's statement to the contrary, *Moncrieffe*'s analysis does not extend to the cancellation of removal context because the statutory burdens of proof differ. In the removal context, the government bears the burden of "establishing by clear and convincing evidence" that a noncitizen is deportable, 8 U.S.C. § 1229a(c)(3)(A). But, the government argues, the petitioner bears the burden of demonstrating that she is eligible for cancellation of removal under 8 U.S.C. § 1229a(c)(4). While this may be true, that distinction has no bearing on the conclusion reached in *Moncrieffe*, because the key question in the categorical approach—like the modified categorical approach—addresses a question of law: What do the uncontested documents in the record establish about the elements of the crime of conviction with the requisite certainty? That legal query requires no factual finding and is therefore unaffected by statutory "burdens of proof."

An analysis of *Moncrieffe* and subsequent Supreme Court cases demonstrates that the categorical approach, and by extension the modified categorical approach, poses a fundamentally legal question. The categorical

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[7] As the First Circuit explained in *Sauceda*, "[t]his conclusion follows from the fact that the underlying statutory language is the same in both" the removability and cancellation of removability contexts. 819 F.3d at 534. Thus, "'[c]onviction' is 'the relevant statutory hook,'" and has a "formal, legal definition governed by the presumption explained [in *Moncrieffe*]." *Id.* (quoting *Moncrieffe*, 569 U.S. at 191).

approach involves an "abstract" inquiry, focused on whether a petitioner was "necessarily" convicted of a disqualifying offense. *Moncrieffe*, 569 U.S. at 190-91. The Supreme Court has repeatedly explained that Congress intended to limit the assessment "'to a legal analysis of the statutory offense,' and to disallow '[examination] of the facts underlying the crime.'" *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) (alteration in original) (quoting Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1688, 1690 (2011)). Thus, when applying the categorical approach, "[a]n alien's actual conduct is irrelevant to the inquiry," because we must "'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute." *Id.* (quoting *Moncrieffe*, 569 U.S. at 190-91). Hence, the categorical approach mandates a legal inquiry, not a determination of a question of fact to which the burden of proof concept applies.

The same reasoning pertains to the modified categorical approach. The modified categorical approach is merely a "version of [the categorical] approach," *Mellouli*, 135 S. Ct. at 1986 n.4, that "serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps*, 570 U.S. at 260. Thus, using the modified categorical approach, "a court may determine which particular offense the noncitizen was convicted of by examining" certain *Shepard* documents; "[o]ff limits to the adjudicator, however, *is any inquiry into the particular facts of the case*." *Mellouli*, 135 S. Ct. at 1986 n.4 (emphasis added); *see*

also Descamps, 570 U.S. at 278 ("The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one.").

As a result, whether the record of conviction necessarily established the elements of the disqualifying federal offense "is a legal question with a yes or no answer." *Almanza-Arenas*, 815 F.3d at 489 (Watford, J., concurring). And, as a pure question of law, it is unaffected by statutory burdens of proof. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring) ("[T]he evidentiary standard of proof applies to questions of fact and not to questions of law.").

The dissent contends that the *Shepard* inquiry is "factual" in nature followed by a separate legal inquiry: "[i]f the court can determine the version of the offense, the court then proceeds to the legal inquiry." Dissent Op. 43, 44. But the Supreme Court has been clear that the *Shepard* inquiry is not an "evidence-based one;" instead, determining the version of the offense—the "elements-based inquiry"—is the legal inquiry. *Descamps*, 570 U.S. at 266-67.

To the extent that there may be a predicate factual question, it would be whether all relevant and available documents have been produced. But this question implicates a possible burden of *production*, which we need not and do not address here, not the burden of proof. Once all relevant and available *Shepard* documents have been produced, nothing remains inconclusive—the documents either show that the petitioner was convicted of a disqualifying offense under the categorical approach, or they do not. What the documents show is thus a purely legal question, to which the burden of proof is irrelevant.

This conclusion does not in any respect "entirely negate" the statutory burden of proof nor does it "presuppose eligibility," as the government argues. A petitioner still bears the burden of proof for all factual inquiries; under 8 U.S.C. § 1229a(c)(4), Marinelarena still bears the burden of showing that she has been physically present in the United States for ten or more continuous years, has been a person of good moral character, and that her citizen children would suffer "exceptional and extremely unusual hardship" on her removal, as those are questions of fact. 8 U.S.C. § 1229b(b)(1); *see also Moncrieffe*, 569 U.S. at 204 ("[H]aving been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the *other* eligibility criteria." (emphasis added)). In short, because the categorical and modified categorical approaches "answer[] the purely 'legal question of what a conviction *necessarily* established,'" the burden of proof "does not come into play." *Sauceda*, 819 F.3d at 534 (quoting *Mellouli*, 135 S. Ct. at 1987).

The government and dissent both contend, however, that *Moncrieffe*'s analysis is limited to the categorical approach and therefore has no bearing on the application of the modified categorical approach in this case. *See* Dissent Op. 48. But this argument also fails. The purported distinction overstates the difference between the categorical and modified categorical approaches. As the Supreme Court has noted, the modified categorical approach is "*a tool for implementing the categorical approach*" that allows a court "to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction." *Descamps*, 570 U.S. at 262 (emphasis added).

Accordingly, the dissent's protestations that *Moncrieffe* is irrelevant to this case because *Moncrieffe* involved only the categorical approach, Dissent Op. 48-50, fall flat; as *Descamps*, *Mellouli*, and *Moncrieffe* itself demonstrate, the modified categorical approach is part and parcel of the categorical approach. To attempt to clinically separate any discussion of the two phases as unrelated ignores that the modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's." *Descamps*, 570 U.S. at 263. The categorical approach is merely the "mechanism for making that comparison." *Id.*

Thus, in *Moncrieffe*, the Court outlined *both* what we have called the "categorical" step of the analysis *and* the "modified categorical" step of the analysis, and then labeled the inquiry *as a whole* "the categorical approach." *Moncrieffe*, 569 U.S. at 191-92 (outlining the categorical and modified categorical analysis and stating that "[t]his categorical approach has a long pedigree in our Nation's immigration law"). That is because the relevant inquiry in both categorical and modified categorical cases is the same: A court must compare the elements of the offense of which the noncitizen was convicted to the elements of a generic federal offense disqualifying her from relief, and then determine what facts are *necessarily* established by that conviction. The only difference between the two approaches is that, in modified categorical cases, a statute lists "multiple, alternative versions of [a] crime," *Descamps*, 570 U.S. at 262, so the court must look to the record of conviction to determine "which particular offense the noncitizen was convicted

of." *Moncrieffe*, 569 U.S. at 191. Once that determination is made, the relevant question is the same as that in categorical cases: A court must ask what the noncitizen's conviction *necessarily* involved, "not what acts [the noncitizen] committed." *Id.*[8]

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[8] The dissent argues that we are misreading the paragraph in *Moncrieffe* from which this quote, and several other relevant quotes, originate. Dissent Op. 50-52. The relevant paragraph reads:

> This categorical approach has a long pedigree in our Nation's immigration law. See Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. Rev. 1669, 1688-1702, 1749-1752 (2011) (tracing judicial decisions back to 1913). The reason is that the INA asks what offense the noncitizen was "convicted" of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed. "[C]onviction" is "the relevant statutory hook." *Carachuri-Rosendo v. Holder*, 560 U.S. —, —, 130 S. Ct. 2577, 2588, 177 L. Ed. 2d 68 (2010); *see United States ex rel. Mylius v. Uhl*, 210 F. 860, 862 (C.A.2 1914).

569 U.S. at 191. The dissent reads this paragraph as merely explaining that the categorical approach applies in the immigration context. Dissent Op. 51. The dissent is correct that this section makes clear that the categorical approach applies in the immigration context; the first sentence says as much. *Moncrieffe*, 569 U.S. at 191. But the debate in *Moncrieffe* was not over *whether* the categorical approach applied in the immigration context, but rather over *how* it is to be applied. *See, e.g.*, *id.* at 195 (explaining the government's argument that only the elements of the offense, and not related sentencing factors, are considered in the categorical approach). In light of that, the rest of the paragraph and the citations therein serve to elucidate the precedent and rationales the Court uses to define the contours of that application.

The first law review article cited itself describes the "century of precedent that fleshes out the contours and rationales for [the categorical] approach." Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration*

In *Mathis*, the Supreme Court reaffirmed that the categorical and modified categorical approaches are two aspects of the same analysis. The Court stated that, "when a statute sets out a single (or 'indivisible') set of elements to define a single crime," a court should "line[]

Law, 86 N.Y.U.L. Rev. 1669, 1689 (2011). In particular, the section cited to by the Court focuses on the cases' uniform refusal to consider underlying facts of conviction and their acceptance of an abstract, elements-based inquiry. *See, e.g.*, *id.* at 1694 (describing a Second Circuit case in which the court noted that immigration officials could examine a record of conviction "only to determine 'the specific criminal charge of which the alien is found guilty and for which he is sentenced.' In other words, '[i]f an indictment contains several counts, one charging a crime involving moral turpitude and others not, the record of conviction would, of course, have to show conviction and sentence on the first count to justify deportation'" (alteration in original) (footnote omitted) (quoting *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 759 (2d Cir. 1933))). As this discussion shows, throughout its long history the categorical approach has been considered a legal, elements-based approach.

This conclusion is buoyed by the fact that *Carachuri-Rosendo*, to which the Court also cites in the paragraph, rejected broadening the categorical approach to include a "hypothetical approach" wherein "all 'conduct punishable as a felony' [would be treated] as the equivalent of a 'conviction' of a felony" for immigration purposes. *Carachuri-Rosendo*, 560 U.S. at 575. And the final citation in the paragraph is to a 1914 case, *United States ex rel. Mylius v. Uhl*, where the court queried, "[d]oes the publication of a defamatory libel necessarily involve moral turpitude?" and answered, "[i]t is not enough that the evidence shows that the immigrant has committed such a crime, the record must show that he was convicted of the crime." 210 F. 860, 862 (2d Cir. 1914).

Still, the dissent argues that this context is irrelevant, because it "sheds no light on the question relevant here: who bears the burden of proving what the petitioner was convicted of." Dissent Op. 51-52 n.16. But what this context illuminates is the fact that it is the burden of proof that is irrelevant, because the categorical approach is and has been a fundamentally abstract, legal inquiry.

up that crime's elements alongside those of the generic offense and see[] if they match." 136 S. Ct. at 2248. "Some statutes, however, have a more complicated (sometimes called 'divisible') structure, making the comparison of elements harder." *Id.* at 2249. Cases involving such statutes apply the modified categorical approach. Under this approach, "a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* "The court can then compare that crime, *as the categorical approach commands*, with the relevant generic offense." *Id.* (emphasis added). The Supreme Court has similarly disregarded a distinction between the two approaches in other cases. *See Taylor*, 495 U.S. at 600-02 (referring to both methods as the "categorical approach"); *Duenas-Alvarez*, 549 U.S. at 187 (same, but noting that "some courts refer to this step of the *Taylor* inquiry as a 'modified categorical approach'").

In other words, whether a case applies what we have called the "categorical" or the "modified categorical" approach, the "analysis is the same." *Moncrieffe*, 569 U.S. at 191 n.4[9]: The court asks whether the noncitizen was

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[9] The dissent also attempts to dismiss footnote 4 from the aforementioned *Moncrieffe* paragraph, *see Moncrieffe*, 569 U.S. at 191 n.4 (explaining that the "analysis is the same in both [the removal and cancellation of removal] contexts"), as explaining merely that the categorical approach applies the same way in both the cancellation and removal contexts. Dissent Op. 52. We do not disagree with the dissent on this point; the categorical approach does apply the same way in the removal and cancellation of removal contexts—in both cases, the court looks to whether the petitioner was "necessarily" convicted of a disqualifying federal offense. *Moncrieffe*, 569 U.S.

necessarily convicted of an offense disqualifying her from relief. If the record of conviction is ambiguous on this point then her "conviction did not '*necessarily*' involve facts that correspond to" a disqualifying offense. *Moncrieffe*, 569 U.S. at 194-95 (emphasis added). Thus, under the modified categorical approach, it was error for the BIA to deem Marinelarena ineligible to apply for cancellation because her record of conviction is ambiguous.[10]

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at 194. That is why *Carachuri-Rosendo*'s rationale translates seamlessly to *Moncrieffe*. *See* Dissent Op. 52-54; *Moncrieffe*, 569 U.S. at 191, 195, 196, 197, 198, 199, 200, 201, 204, 205, 206 (citing to *Carachuri-Rosendo* when explaining why the court must reject the government's attempt to inject a "hypothetical" element into the categorical approach). Where we part ways with the dissent is in our view that the categorical approach encompasses the modified categorical approach.

In the same vein, the dissent rightly notes that *Moncrieffe* did not cite *Carachuri-Rosendo* to make a point about the burden of proof in immigration cases. Dissent Op. 53. But that is because the burden of proof does not affect the application of the categorical, and by extension modified categorical, approach. There was no point to make. The question in *Moncrieffe*, the question in *Carachuri-Rosendo*, and the question here is whether the noncitizen has necessarily been "*convicted* of any aggravated felony." Dissent Op. 52. The burden of proof is irrelevant; if the statute is indivisible, or the *Shepard* documents ambiguous, the noncitizen has not necessarily been convicted of a disqualifying offense. *Moncrieffe*, 569 U.S. at 197-98.

[10] The dissent argues that our ruling will incentivize petitioners to conceal their convictions. Dissent Op. 32, 56. This is a red herring and any danger is vastly overblown. In practice, the government always investigates and determines whether a noncitizen has convictions that may be grounds for removal or bars to relief. *See, e.g.*, 8 C.F.R. § 1003.47(c), (d) (requiring noncitizens to file identifying documentation and provide biometrics); *id.* § 1003.47(e) (requiring DHS to "initiate all relevant identity, law enforcement, or security investigations or examinations concerning the alien or beneficiaries

The BIA did not address, however, the question of whether all the relevant *Shepard* documents had been produced. Neither the government nor Marinelarena provided the plea agreement or plea colloquy. Because this appeal was focused on whether, when *Shepard* documents are inconclusive, an ambiguous record necessarily qualifies as a federal offense, not whether Marinelarena or the government failed to produce all required Shepard documents, we do not reach the issue of which party bears the burden of production nor the issue of when that burden is satisfied. We thus remand to the BIA to consider in the first instance the placement and scope of the burden of production for *Shepard* documents as it applies in cancellation of removal.[11] *See INS*

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promptly . . . . and to advise the immigration judge of the results in a timely manner"). The only relevant documents—*Shepard* documents—are public records, which a private citizen or noncitizen could not possibly destroy. And they would be nearly impossible for a noncitizen to conceal. And assuming the documents exist, the government is well, and better, placed to obtain them. See Immigrant Defense Project Amicus Br. at 18-24. The likelihood that a petitioner would obtain relief because the government cannot locate an existing document because the petitioner actively conceals it is therefore so low as to be nonexistent.

But more importantly, even if a noncitizen is not barred from relief because of a disqualifying conviction, the decision whether to then grant the noncitizen relief is still discretionary. Obfuscation or concealment by a noncitizen could and likely would be considered by an IJ to be grounds to deny that discretionary relief. *See Moncrieffe*, 569 U.S. at 204. Noncitizens therefore have an overarching incentive to comply with the government's procedures.

[11] The dissent argues that we err in remanding to the BIA because, the dissent contends, the law is clear that the burden of production is on the petitioner. *See* Dissent Op. 36-37, 37 n.4. Although we express no opinion as to the applicable burden of production, the question or answer as to which party bears it is not as cut-and-dried

v. Ventura, 537 U.S. 12, 16 (2002) (per curiam) (holding that, where the BIA has not yet considered an issue, courts should remand to allow the BIA to consider the issue in the first instance).

II. Expungement

Because we hold that on the present record Marinelarena's conviction is not a controlled substance offense that would bar her from cancellation of removal, we need not and do not reach the issue of expungement.

CONCLUSION

The record of Marinelarena's conviction is ambiguous as to whether she was convicted of conspiring to sell and transport a controlled substance as defined under federal law. Therefore, because the record of conviction did not show that Marinelarena's state-law conviction was "necessarily" for an offense corresponding to a federal controlled substance offense, she is not barred from relief under 8 U.S.C. § 1229b(b).

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as the dissent suggests. *See* 8 C.F.R. § 1240.8(d) ("*If the evidence indicates* that one or more of the grounds for 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." (emphasis added)). *Compare* Pet. Suppl. En Banc Br. at 22-26 (arguing the burden of production is not on the petitioner), *with* Resp. Suppl. En Banc Br. at 15-20 (arguing the reverse). Moreover, as the discussion in footnote 10, *supra*, of the carefully laid out procedures in 8 C.F.R. § 1003.47 indicates, the government appears to be well positioned to address this burden. In any event, the government counsels us that "[t]his argument was never presented to the agency, however, and thus is not properly before the court," Resp. Suppl. En Banc Br. at 15, and we agree.

Accordingly, the petition for review is **GRANTED**, the BIA's decision is **REVERSED**, and the matter is **REMANDED** to the agency for further proceedings consistent with this opinion.

IKUTA, Circuit Judge, with whom GRABER and RAWLINSON, Circuit Judges, join, dissenting:

The majority today creates a new rule that, when an alien has a prior conviction under a state statute that includes "multiple, alternative versions of the crime," *Descamps v. United States*, 570 U.S. 254, 262 (2013), and there is insufficient evidence in the record to prove which of those alternative versions the alien was convicted of, we must assume as a matter of law that the alien's conviction does not disqualify the alien from receiving immigration relief. Because this new rule is invented out of whole cloth, will give aliens a perverse incentive to withhold and conceal evidence, and is contrary to the Immigration and Naturalization Act (INA) and Supreme Court decisions, I dissent.

I

The Department of Homeland Security (DHS) determined that Aracely Marinelarena was removable as an alien who had remained in the United States longer than permitted, in violation of 8 U.S.C. § 1227(a)(1)(B). Therefore, the DHS initiated removal proceedings by issuing a Notice to Appear. Marinelarena conceded that she is removable. She then sought relief from removal by submitting an application for cancellation of removal.

In her application for cancellation of removal, Marinelarena stated: "Convicted 12/28/2006, Charges, Conspiracy to commit a crime, sale, transportation or offer to sell controlled substances, Sentence, three months in a

State prison. This sentence is subject to a Motion."[1] Marinelarena also submitted a two-count criminal complaint filed against her in 2006. Count 1 charged her with conspiracy to sell and transport a controlled substance, in violation of California Penal Code section 182(a)(1) (Conspiracy) and California Health and Safety Code section 11352 (Offense Involving Controlled Substances Formerly Classified as Narcotics). In connection with this conspiracy charge, the indictment alleged sixteen overt acts, one of which referred to transportation of three bags containing heroin. Count 2 charged her with the sale, transport, or offer to sell a controlled substance (heroin), in violation of California Health and Safety Code section 11352. Marinelarena also submitted documents filed with the state trial court in support of her motion for dismissal under California Penal Code section 1203.4, including an affidavit in which she declared that she pleaded guilty only to Count 1.

Over the next two years, Marinelarena appeared with counsel before the immigration judge (IJ) at four different hearings. At the first hearing in 2009, Marinelarena's counsel acknowledged that Marinelarena had a conviction relating to transportation of narcotic substances. Given the government's contention that such

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[1] The "motion" referred to in the application is a motion filed under section 1203.4 of the California Penal Code to dismiss Marinelarena's conspiracy conviction. Although her state conviction was dismissed under section 1203.4 on April 15, 2009, this dismissal has no effect on removability. *See Reyes v. Lynch*, 834 F.3d 1104, 1107-08 (9th Cir. 2016) (holding that a "conviction" under the INA includes state convictions that have been expunged on rehabilitative grounds).

a conviction would disqualify Marinelarena from cancellation of removal, the IJ asked Marinelarena's counsel for further information and briefing on the issue. At a 2011 hearing, the IJ reiterated his request for briefing and documentation regarding the conviction.

At the final hearing in 2012, Marinelarena's counsel acknowledged that she still could not produce additional documentation regarding Marinelarena's conviction for conspiracy to distribute narcotics. The IJ pretermitted Marinelarena's application for cancellation of removal, but informed her counsel that if Marinelarena could obtain evidence that the conviction was not a controlled substance violation, she could move to reopen the proceedings and submit that evidence.

In his oral ruling, the IJ held that because Marinelarena had failed to produce documents showing that her state conviction was not for a disqualifying controlled substance offense, she failed to prove that she was eligible for cancellation of removal. Among other reasons, the IJ held that a conviction for conspiracy to distribute heroin made her ineligible for cancellation pursuant to § 1227(a)(2)(B).

On appeal to the Board of Immigration Appeals (BIA), Marinelarena argued that the IJ erred in determining that her prior state conviction was for a disqualifying offense. The BIA affirmed. It stated that Marinelarena had the burden of establishing eligibility for cancellation of removal. According to the BIA, Marinelarena conceded that she had been convicted of conspiracy to violate section 11352 of the California Health and Safety Code and at least some ways of committing that offense were disqualifying controlled substance offenses. Marine-

larena had the burden of proving she had not been convicted of a disqualifying controlled substance offense, and had not carried that burden because she "had not submitted any evidence establishing that her conspiracy conviction was not for a disqualifying controlled substance offense." Therefore, the BIA held, Marinelarena was not eligible for cancellation of removal.

II

Congress decreed that "[a]n alien applying for relief or protection from removal has the burden of proof." 8 U.S.C. § 1229a(c)(4)(A); *see also* 8 C.F.R. § 1240.8(d) (providing that the alien "shall have the burden of establishing that he or she is eligible for any requested benefit or privilege").[2] To demonstrate eligibility for cancellation of removal (the benefit that Marinelarena seeks) the alien must show that the alien "has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). And if the evidence suggests that a ground "for 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) (emphases added); *cf. Nguyen v. Sessions*, 901 F.3d 1093, 1096 (9th Cir. 2018) ("[W]hen a noncitizen is placed in removal proceedings, the burden

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[2] Congress has taken great care in allocating the burden of proof in various immigration contexts. For instance, Congress provided in 8 U.S.C. § 1229a(c)(2) that "the alien has the burden of establishing" *either* (a) entitlement to admission "clearly and beyond doubt" *and* the absence of a reason for inadmissibility *or* (b) "by clear and convincing evidence," lawful presence in the United States pursuant to an earlier admission. Under 8 U.S.C. § 1229a(c)(3)(A), by contrast, the government "has the burden of establishing by clear and convincing evidence" the deportability of an alien who has been lawfully admitted to the United States.

of proof shifts depending on whether he is subject to inadmissibility or removability. An 'applicant for admission' bears the burden of proving he is not inadmissible under 8 U.S.C. § 1182. . . . ").

The alien's burden of proof incorporates the burden of persuasion. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (holding that this is the default rule); *cf.* 8 U.S.C. § 1229a(c)(4)(B) (in considering an application for relief from removal, an immigration judge will determine, among other things, whether the testimony is persuasive, and sufficient to demonstrate that the alien has satisfied the alien's burden of proof). The burden of persuasion determines which party loses if the record is inconclusive. *See Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 198-200 (2014); *see also Overman v. Loesser*, 205 F.2d 521, 523 (9th Cir. 1953) (holding that the party who bears the burden runs "the risk of non-persuasion"). As the Supreme Court has expressed it, "if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

The alien's burden of proof also incorporates the burden of production. In order to show eligibility for relief under the INA, "[t]he applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form." 8 U.S.C. § 1229a(c)(4)(B). An alien applying for cancellation of removal must complete Form EOIR-42B, which requires the applicant to answer the questions within the form "fully and accurately," including answering whether the

alien has been "convicted . . . for an act involving a felony." EOIR-42B.[3] If the alien answers affirmatively, EOIR-42B states that the alien is "required to submit documentation of any such occurrences." *Id.*[4]

Because Congress placed the burden of proof on the alien to establish eligibility for cancellation of removal, aliens seeking relief from removal must show that they were not convicted of a state offense that would disqualify them from cancellation of removal, 8 U.S.C. § 1229b(b)(1)(C), and will lose if they cannot do so because the record is inconclusive. The majority of our sister circuits agree with this principle. Most recently, the Eighth Circuit addressed this issue in *Pereida v. Barr*, 916 F.3d 1128 (8th Cir. 2019), and held that where the modified categorical approach applies because a state offense is divisible, and the available documents provide "no indication of the subsection of the statute under which [the alien] was convicted," the alien failed to carry his burden of proving eligibility for discretionary relief, *id.* at 1132-33. In reaching this conclusion, *Pereida* relied on the Third and Tenth Circuits, as well as on its own Eighth Circuit precedent, for the principle that "an inconclusive record is insufficient to satisfy a noncitizen's burden of proving eligibility for discretionary relief." *Id.* at 1133.[5]

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[3] https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir42b.pdf.

[4] Because the statute makes clear that an alien seeking relief from removal bears the burden of production, 8 U.S.C. § 1229a(c)(4), 8 C.F.R. § 1240.8(d), the majority errs in remanding this matter to the BIA to determine who has the burden of producing *Shepard* documents in a cancellation of removal hearing. Maj. Op. 30.

[5] *See, e.g.*, *Syblis v. Att'y Gen. of U.S.*, 763 F.3d 348, 357 (3d Cir. 2014) ("[A]n inconclusive record of conviction does not satisfy [an alien's] burden of demonstrating eligibility for relief from removal.");

The Fourth, Sixth, and Seventh Circuits also expound this rule.[6] Only the First Circuit has rejected this approach. *Sauceda v. Lynch*, 819 F.3d 526, 533-34 (1st Cir. 2016).[7]

In sum, this case raises a single question of law: When an alien seeks cancellation of removal and it is unclear from the record whether the alien has a disqualifying criminal conviction, does the alien win or lose? The majority opinion ignores the congressional command in the controlling statute concerning allocation of

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Lucio-Rayos v. Sessions, 875 F.3d 573, 583-84 (10th Cir. 2017) (holding that the alien bears the burden of proving that a prior conviction was not a crime involving moral turpitude, which would make the alien ineligible for cancellation of removal), *cert. denied sub. nom. Lucio-Rayos v. Whitaker*, 139 S. Ct. 865 (2019).

[6] *See, e.g.*, *Salem v. Holder*, 647 F.3d 111, 116-20 (4th Cir. 2011) ("Presentation of an inconclusive record of conviction is insufficient to meet an alien's burden of demonstrating eligibility. . . . "); *Gutierrez v. Sessions*, 887 F.3d 770, 779 (6th Cir. 2018) ("[W]here a petitioner for relief under the INA was convicted under an overbroad and divisible statute, and the record of conviction is inconclusive as to whether the state offense matched the generic definition of a federal statute, the petitioner fails to meet her burden."), *cert. denied sub nom. Gutierrez v. Whitaker*, 139 S. Ct. 863 (2019); *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014) (agreeing with the Fourth and Tenth Circuit that "if the analysis has run its course and the answer is still unclear, the alien loses by default"). The majority quibbles that some of these opinions merely "nodded" to this issue, Maj. Op. 18 n.6, but other circuits likewise read the Third, Fourth, Fifth, Seventh, and Tenth Circuits as rejecting the majority's side of the circuit split. *See, e.g.*, *Francisco v. U.S. Att'y Gen.*, 884 F.3d 1120, 1134 n.37 (11th Cir. 2018).

[7] While the majority also points to the Second Circuit's opinion in *Martinez v. Mukasey*, Maj. Op. 17 n.6, that case is inapposite, because it did not consider or apply the modified categorical approach. *See* 551 F.3d 113, 118 n.4 (2d Cir. 2008).

the burden of proof in that circumstance by misreading *Moncrieffe v. Holder*, 569 U.S. 184 (2013), and by conflating a threshold question of fact (does the record demonstrate clearly that the alien does or does not have a disqualifying criminal conviction?) with the resulting question of law.

III

To determine Marinelarena's eligibility for cancellation of removal, we must consider two different legal frameworks: the Supreme Court's categorical approach for determining whether the elements of a prior state offense are the same as or narrower than those of the disqualifying federal offense, and the INA's statutory and regulatory framework for determining whether an alien qualifies for relief from removal.

A

The categorical approach is a procedure for determining whether the "state offense is comparable to an offense listed in the INA." *Moncrieffe*, 569 U.S. at 190. "Under this approach we look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). Here, the federal aggravated felony is defined to include a "controlled substance offense," meaning a violation of any law relating to a controlled substance, as listed on one of several federal drug lists.[8]

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[8] More specifically, a federal controlled substance offense includes the elements of violating (or conspiring to violate) a law relating to a

To determine whether Marinelarena was convicted of a state offense that qualifies as a federal controlled substance offense, we begin by looking at the state statute as a whole. If the state statute criminalizes the same or less conduct than the federal controlled substance offense, then the conviction is a categorical match to the disqualifying federal offense. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). If the state statute criminalizes more conduct than the federal controlled substance offense, then the state statute is not a categorical match. *Id.* As the Supreme Court has emphasized, this is a legal question. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

Marinelarena was convicted of violating section 182(a)(1) of the California Penal Code and section 11352 of the California Health and Safety Code. Section 182(a)(1) criminalizes conspiring "[t]o commit any crime." Cal. Penal Code § 182(a)(1). This statute criminalizes more conduct than the federal controlled substances offense, because "conspiracy" applies to any criminal conspiracy, whether or not it relates to a controlled substance offense. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II); *id.* § 1227(a)(2)(B)(i). We have previously determined that section 11352 of the California Health and Safety Code "criminalizes a broader range of activity and a greater

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controlled substance, defined in the Controlled Substances Act (CSA), 21 U.S.C. § 802(6), to mean "a drug or other substance, or immediate precursor, included in" one of several federal lists of drugs. A conviction for a state offense that is a categorical match to a federal controlled substance offense would make Marinelarena ineligible for cancellation of removal. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II); *id.* § 1227(a)(2)(B)(i).

variety of controlled substances than does federal law,"[9] and therefore is not a categorical match for the federal controlled substance offense. *United States v. Martinez-Lopez*, 864 F.3d 1034, 1037-38 (9th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 523 (2017). Accordingly, neither statute, taken as a whole, is a categorical match for the generic federal controlled substance offense.

This conclusion does not the end the inquiry, however, because a state criminal statute may include multiple, alternative versions of the crime. *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009); *see also Moncrieffe*, 569 U.S. at 191 (stating that "our cases have addressed state statutes that contain several different crimes, each described separately"). A state statute that includes such multiple, alternative versions of the crime is referred to as "divisible." *Descamps*, 570 U.S. at 257.

Both state statutes at issue here are divisible. Under section 182, a defendant cannot be convicted for conspiring to commit a crime generally, but only of conspiring to commit a specific state offense. *People v. Horn*, 12 Cal. 3d 290, 297 (1974); *see People v. Beardslee*, 53 Cal. 3d 68, 92 (1991) (explaining that if there are several acts on which separate criminal offenses could be found, the jury must agree on the act forming the basis for the conviction). The jury must agree unanimously on the offense that was the object of the conspiracy. *Id.* Sec-

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[9] Section 11352 of the California Health and Safety Code provides that "every person who transports [for sale], imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport [various listed controlled substances] . . . shall be punished by imprisonment."

tion 11352 is likewise divisible. A jury must agree unanimously on the activity involved and the controlled substance at issue. *See Martinez-Lopez*, 864 F.3d at 1042-43. Each activity and each controlled substance constitutes a separate crime. *Id.* at 1043. The jury must agree unanimously on whether the defendant sold a controlled substance or transported it for sale and must also agree unanimously on the specific controlled substance. *See id.*

Some of the alternative versions of the offense criminalized by section 11352 match the federal controlled substance offense in this case. But some of the versions, such as transporting apomorphine for sale, are not categorical matches to the federal generic offense.[10] When, as here, a state statute is divisible, and only some of the alternative versions of the offense are categorical matches to the federal generic offense, a court may consider certain types of evidence to determine which version of the offense the alien was actually convicted of. This step in

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[10] For instance, selling heroin, one version of the offense criminalized by section 11352, is a categorical match to a federal controlled substance offense. *See Mielewczyk v. Holder*, 575 F.3d 992, 996 (9th Cir. 2009) (holding that a conviction for the transportation of heroin "under California Health and Safety Code section 11352(a) is a 'violation of . . . [a] law or regulation of a State . . . relating to a controlled substance (as defined in section 802 of Title 21)'"). But transporting apomorphine for sale is not. *See Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) ("[T]he possession of apomorphine is specifically excluded from Schedule II of the CSA, but California's Schedule II specifically includes it." (citation omitted)), *abrogation recognized by Villavicencio v. Sessions*, 904 F.3d 658, 665 (9th Cir. 2018); *compare* Cal. Health & Safety Code § 11055(b)(1)(G) (2002) (classifying apomorphine as a Schedule II drug), *with* 21 U.S.C. § 802(6), *and* 21 C.F.R. §§ 1308.11-.15 (excluding apomorphine as a federally proscribed substance).

the procedure is sometimes referred to as the modified categorical approach. *Descamps*, 570 U.S. at 257. It involves two distinct inquiries, one factual and one legal.

First, as a factual matter, the court must consider "a limited class of documents [from the record of a prior conviction] to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249 (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). Of course, the crime that a defendant was convicted of is a matter of historical fact. The documents a court may consider in applying the modified categorical approach include the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16; *see also Moncrieffe*, 569 U.S. at 190-91. The court must examine these documents to establish which alternative version of the state offense the alien was convicted of.[11]

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[11] The majority opinion makes a critical error at this first step, *see* Maj. Op. 23, by failing to distinguish between "the *fact* that the defendant had been convicted of crimes falling within certain categories," which a court may consider, with the "facts *underlying* the prior convictions," which a court may not consider. *Taylor v. United States*, 495 U.S. 575, 600-01 (1990) (emphasis added). According to the majority opinion, "[w]hat the [*Shepard*] documents show is . . . a purely legal question" because the *Shepard* documents "either show that the petitioner was convicted of a disqualifying offense under the categorical approach, or they do not." Maj. Op. 23. But obviously, it is a matter of historical fact whether the petitioner was convicted of a specific offense; it is not a purely legal question like the meaning of a statute. And indeed, we often consider the facts in the record to determine the petitioner's actual crime of conviction. We may piece together the clues in the *Shepard* documents, such as putting the defendant's plea to Count 1 (as reported in the minute

If the court can determine the version of the offense, the court then proceeds to the legal inquiry. The court "compare[s] that crime, as the categorical approach commands, with the relevant generic offense" to determine whether they are a categorical match. *Mathis*, 136 S. Ct. at 2249. This second step of the modified categorical approach is identical to the above-described categorical approach: it is a purely legal inquiry that consists of comparing the applicable version of the state offense to the federal generic offense. *See id.* As in the categorical approach, a court does not consider the alien's underlying conduct. *Taylor v. United States*, 495 U.S. 575, 600 (1990) ("Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."). The question is not what the alien actually did, but under which provision of the state statute the alien was convicted.[12]

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order) together with the description of Count 1 set out in the indictment, in order to determine the offense of conviction. *See Ruiz-Vidal v. Lynch*, 803 F.3d 1049, 1052-55 (9th Cir. 2015). Similarly, "when a defendant references a specific count during his plea colloquy," a court "can also consider the drug listed in the charging document" to determine the offense of conviction. *Id.*; *see also United States v. Valdavinos-Torres*, 704 F.3d 679, 687-88 (9th Cir. 2012).

[12] The majority holds that, because "[t]he modified categorical approach is merely a 'version of [the categorical] approach,'" Maj. Op. 22 (quoting *Mellouli*, 135 S. Ct. at 1986 n.4), and has been described by the Court as "a tool for implementing the categorical approach," Maj. Op. 24 (emphasis omitted) (quoting *Descamps*, 570 U.S. at 262), the modified categorical approach is a "legal query [that] requires no factual finding and is therefore unaffected by statutory 'burdens of proof.'" Maj. Op. 21. The majority is correct that, at the second

Here, both sections 182(a)(1) and 11352 include multiple, alternative versions of a crime, some of which match the federal controlled substance offense and some of which do not. This means that a court must consider the judicially noticeable documents in the record to answer the historical, factual question: which alternative version of the state offense was Marinelarena convicted of?

The only judicially noticeable document in the record is the criminal complaint charging Marinelarena with (1) conspiracy to sell and transport a controlled substance and (2) selling, transporting, or offering to sell heroin. However, a criminal complaint, without more, is insufficient to establish which state crime a defendant was convicted of. *See United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007) (en banc) (holding that the complaint in that case "fails to establish the factual predicate for [the defendant's] plea of guilty"). Despite numerous opportunities to do so, Marinelarena failed to produce any document of conviction that could establish which alternative version of the offense she was convicted of. Here, because the record includes only the criminal complaint, the judicially noticeable documents do not allow a court to make the historical, factual determination as to which version Marinelarena was convicted of.

So where does that leave us? Simply said, we have reached the end of the categorical analysis. Because we

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step of the categorical approach, the inquiry is purely legal. Its mistake, however, is holding that the first step of the modified categorical approach, in which a court "examine[s] a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction," Maj. Op. 24 (quoting *Descamps*, 570 U.S. at 262), is also a pure question of law and can be conducted without reference to historical, factual records of conviction.

don't know the applicable version of the state offense, we cannot compare it with the federal controlled substance offense to determine whether they match. Therefore, we cannot determine whether Marinelarena's prior conviction was for a disqualifying or nondisqualifying offense. And contrary to the majority's view, we may not assume the answer to this factual question; there is no statutory or precedential basis for giving a legal answer to the factual question of what offense Marinelarena was actually convicted of.

B

While this ends our application of the categorical approach, it does not end the analysis. Rather, it is necessary to consider how this conclusion fits within the legal framework of the INA.

Under the INA, "[i]f the evidence indicates that one or more of the grounds for 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) (emphasis added). Although there are many alternative versions of the offense proscribed by section 11352, the record does not show which version Marinelarena was convicted of. Though Marinelarena could have been convicted of a state offense that did not disqualify her from relief, the IJ's determination that "one or more of the grounds for mandatory denial of the application for relief *may* apply," *id.* (emphasis added), was supported by substantial evidence. In short, because Marinelarena bears the burden of proof, and the record is inconclusive, she must lose. *Greenwich Collieries*, 512 U.S. at 272; *see also Lucio-Rayos*, 875 F.3d at 581. Thus, the BIA

did not err in holding that Marinelarena failed to prove her eligibility for cancellation of removal.

We considered a similar situation in *Young v. Holder*, where the alien "pleaded guilty to a conjunctively phrased indictment that alleged several theories of the crime, any one of which would have sustained a state conviction, but only some of which would constitute an aggravated felony" that would disqualify the alien from being eligible for cancellation of removal. 697 F.3d 976, 988 (9th Cir. 2012) (en banc). Because we could not "tell from the record of conviction whether [the alien] was convicted of selling cocaine, which is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B), or merely of solicitation, which is not, [the alien's] record of conviction is inconclusive." *Id.* Because the record was inconclusive, we held that the alien had not carried his burden of demonstrating eligibility for cancellation of removal. *Id.* at 989. *Young* was correctly decided, and it applies here.[13]

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[13] *Pereida* adopted an identical approach. *See Pereida*, 916 F.3d 1128. In *Pereida*, the Eighth Circuit considered whether an alien's conviction under a Nebraska statute constituted a crime involving moral turpitude. The court first determined that the Nebraska statute was not categorically a crime involving moral turpitude, because one of the alternative offenses criminalized by the statute did not involve fraud or deception. *Id.* at 1132. But, the Eighth Circuit explained, "[b]ecause this statute is divisible, the inquiry does not end here." *Id.* Applying the modified categorical approach, the Eighth Circuit noted that the available documents provided "no indication of the subsection of the statute under which [the alien] was convicted." *Id.* Because of the court's "inability to discern the particular crime for which [the alien] was convicted" from the alien's inconclusive record, *id.* at 1133, the Eighth Circuit held that the alien had not carried his burden to establish eligibility for cancellation of removal, and therefore denied the petition for relief.

IV

The majority relies almost exclusively on *Moncrieffe* in holding that, contrary to *Young*, we must conclude as a matter of law that when the evidence does not conclusively establish which alternative version of the state offense Marinelarena was convicted of, we must assume that the alien's conviction does not disqualify the alien from receiving immigration relief. This reliance is misplaced, however, because *Moncrieffe* was decided on the ground that the state offense was not a categorical match to a federal offense; in *Moncrieffe*, there was no question about which state offense the alien was convicted of. Indeed, *Moncrieffe* did not involve any use of the modified categorical approach. Thus, *Moncrieffe* did not address the situation in *Young*, let alone overrule it.

A

In *Moncrieffe*, the alien had been convicted under a Georgia statute for possession of marijuana with intent to distribute. 569 U.S. at 188-89 n.2. The question in that case was whether this state offense matched the federal generic offense of "drug trafficking crime," which was defined as possession of more than a small amount of marijuana with intent to distribute it for remuneration. *Id.*[14]

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[14] Specifically, *Moncrieffe* considered whether the alien had been convicted of an aggravated felony, which includes "a drug trafficking crime" as defined in 18 U.S.C. § 924(c). 569 U.S. at 188. Under § 924(c), a "drug trafficking crime" includes "any felony punishable under the Controlled Substances Act"; whereas a "felony" is an offense for which the "maximum term of imprisonment authorized" is "more than one year," *see* 18 U.S.C. § 3559(a)(5). In *Moncrieffe*, the relevant federal generic drug trafficking crime was the federal crime

The state crime of conviction in *Moncrieffe* made it a crime to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." Ga. Code Ann. § 16-13-30(j)(1); *Moncrieffe*, 569 U.S. at 192. Taken as a whole, the statute was not a categorical match for the federal drug trafficking crime, because it was possible to be convicted for possessing a small amount of marijuana for no remuneration. *Moncrieffe*, 569 U.S. at 192-94.

Nor was the state statute divisible in a relevant way. While the state statute listed different acts, it did not create separate versions of the offense based on the amount of marijuana or whether the distribution of marijuana was for remuneration. *See id.* at 194 (noting that the "fact of a conviction for possession with intent to distribute marijuana, standing alone, does not reveal whether either remuneration or more than a small amount of marijuana was involved").

Because the state statute was not divisible, and it criminalized conduct that under federal law "could correspond to either the CSA felony or the CSA misdemeanor," a conviction under that statute "did not 'necessarily' involve facts that correspond to an offense punishable as

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to "possess with intent to . . . distribute . . . a controlled substance," 21 U.S.C. § 841(a)(1), one of which is marijuana, *see id.* § 812(c). Not every violation of § 841(a) was a drug trafficking crime, however, because § 841(a)(1) was punishable as a misdemeanor if a person violated the statute "by distributing a small amount of marihuana for no remuneration." *Moncrieffe*, 569 U.S. at 193-94. Accordingly, *Moncrieffe* determined that the relevant federal drug trafficking crime in that case was possession with intent to distribute marijuana, involving more than "a small amount for no remuneration." *Id.*

a felony under the CSA." *Id.* at 194-95. Accordingly, the state statute was overbroad, and "[u]nder the categorical approach," the alien "was not convicted of an aggravated felony." *Id.* at 195.

Unlike our case, the record in *Moncrieffe* established the exact state offense the alien was convicted of. Because the Court did not need to consider which alternative version of the offense the alien was convicted of, it did not address the issue here: what to do when it is not clear what version of the state offense the alien was convicted of. Therefore, *Moncrieffe* does not control the analysis in our case.[15]

B

A brief digression is necessary here to address a passage and a footnote in *Moncrieffe* which have been the source of great confusion and error. In the section of the opinion addressing the categorical approach generally, *Moncrieffe* notes:

> This categorical approach has a long pedigree in our Nation's immigration law. *See* Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U.L. Rev.

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[15] The majority argues that *Moncrieffe* controls this analysis because the categorical and modified categorical approach address the same legal issue, Maj. Op. 24, whether the crime the alien was convicted of matches the generic federal offense (rather than whether the alien *committed* such a crime). This is correct at step two of the modified categorical approach—but only after the court has completed step one, and identified the version of the state offense the alien was convicted of. And *Moncrieffe* has nothing to say about how courts should identify the relevant version of the state offense of conviction when the record of conviction is ambiguous—the question presented in this case.

> 1669, 1688-1702, 1749-1752 (2011) (tracing judicial decisions back to 1913). The reason is that the INA asks what offense the noncitizen was "convicted" of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed. "[C]onviction" is "the relevant statutory hook." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010); *see United States ex rel. Mylius v. Uhl*, 210 F. 860, 862 (2d Cir. 1914).

569 U.S. at 191. In light of the context and citations, it is clear that this section merely reenforces the applicability of the categorical approach in the immigration context. Das recounts the deep roots of the categorical approach in immigration law to show that "[t]he basic structure of the immigration statute—predicating certain immigration penalties on convictions—has remained unchanged since courts first articulated categorical analysis in the early twentieth century." Alina Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U.L. Rev. 1669, 1701 (2011). In enacting the modern day Immigration and Nationality Act, Das argues, "Congress intended a categorical analysis to apply wherever it predicated immigration penalties on convictions." *Id.* at 1698. Citing Das's historical overview, *Moncrieffe* stated that "[t]he reason [why the categorical approach is applied 'in our Nation's immigration law'] is that the INA asks what offense the noncitizen was 'convicted' of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed. '[C]onviction' is 'the relevant statutory hook.'" 569 U.S. at 191 (quoting *Carachuri-Rosendo*, 560 U.S. at 580).[16]

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[16] The majority opinion reiterates at great length Das's point that "immigration adjudicators may not go behind the judgment and rec-

But neither Das's article, nor *Moncrieffe*'s reaffirmation of the categorical approach, addresses who bears the burden of proving the nature of the relevant conviction.

In the footnote immediately after this passage, *Moncrieffe* explains its citation to *Carachuri-Rosendo* by stating that the case "construed a different provision of the INA that concerns cancellation of removal, which also requires determining whether the noncitizen has been '*convicted* of any aggravated felony.' 8 U.S.C. § 1229b(a)(3) (emphasis added). Our analysis is the same in both contexts." *Id.* at 191 n.4. In context, the footnote explains why the cite to *Carachuri-Rosendo* (which involved cancellation of removal) is on point: because the categorical approach applies the same way in removal and relief-from-removal contexts, *Carachuri-Rosendo* supports *Moncrieffe*'s point that the categorical approach applies in the immigration context when the disposition of a petitioner's case depends on the nature of a prior conviction.

This interpretation is confirmed by a brief review of *Carachuri-Rosendo*. In *Carachuri-Rosendo*, an alien had committed two misdemeanor drug possession offenses in Texas. 560 U.S. at 566. As in our case, the alien conceded removability, but sought cancellation of removal. *Id.* The question for the Court was whether the alien's state crimes of conviction constituted an "aggravated felony" for purposes of immigration law,

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ord of conviction to assess the facts and circumstances of a noncitizen's particular offense," Das, *supra*, at 1696. Maj. Op. 25-27 n.8. This assertion, while correct, sheds no light on the question relevant here: who bears the burden of proving what the petitioner was convicted of.

which would make him ineligible for cancellation of removal. *Id.*

Carachuri-Rosendo applied a categorical approach to this problem. It first determined that the federal generic offense was simple possession of a controlled substance after a prior conviction (i.e., "recidivist simple possession") pursuant to 21 U.S.C. § 844(a), which was punishable as a felony. *Id.* at 567-68. Turning to the state crime of conviction, *Carachuri-Rosendo* determined that the alien had been convicted of a simple possession offense, not recidivist simple possession. *Id.* at 570. Because the state offense of conviction was not a categorical match to the federal generic offense, the conviction did not preclude cancellation of removal. *Id.* The Court rejected the government's argument that the alien was ineligible for cancellation of removal because the alien could have been convicted in state court of recidivist simple possession (due to a prior possession conviction). *Id.* As the Court made clear, the INA requires courts to consider only the conviction itself, not "what might have or could have been charged." *Id.* at 576.

Accordingly, *Carachuri-Rosendo* stands only for the proposition that where the state offense of conviction does not match the federal generic offense, the alien has not been convicted of a disqualifying federal generic offense. It does not address the question raised in this case, which is how to determine which version of the state offense the alien was actually convicted of. Moreover, there is no reason to think *Moncrieffe* cited *Carachuri-Rosendo* to make a point about the burden of proof in immigration cases, an issue raised neither in *Carachuri-Rosendo* nor *Moncrieffe*. *Moncrieffe*'s footnote 4 is best

understood as merely further bolstering the point that the categorical approach applies in immigration cases.[17]

C

Moncrieffe does not address the situation we addressed in *Young*, where the state statute of conviction was divisible, so that some of the versions of the state offense categorically qualified as a federal generic offense and others did not. In that situation, a court may consider evidence in the record to determine which version of the state crime the alien was convicted of. This question of what offense the alien was actually convicted of is a historical factual issue, not a legal issue.

In holding otherwise, the majority confuses the categorical approach in *Moncrieffe* with the historical factual question of what state statute the alien was convicted of. Thus, the majority states that *Moncrieffe*'s "mode of analysis is clearly irreconcilable with *Young*," Maj. Op. 19, because *Moncrieffe* held that "[i]f the record does *not* conclusively establish that the noncitizen

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[17] The majority interprets footnote 4 to mean that whenever there is ambiguity regarding the nature of the state offense, that offense is deemed not disqualifying, regardless whether the government is seeking removal or the alien is seeking relief from removal. Otherwise, the majority argues, there would be "an exceedingly odd result" because it is possible that the government could not prove the alien was removable, while at the same time the alien could not prove eligibility for asylum or cancellation of removal. Maj. Op. 20. This "odd" result, however, is compelled by the INA and its shifting burden of proof: the government bears the burden of proving "by clear and convincing evidence that the respondent is deportable as charged," 8 C.F.R. § 1240.8(a), while the alien "shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion," *id.* at § 1240.8(d); *see also* 8 U.S.C. § 1229a(c)(4).

was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes," Maj. Op. 20. But a reader will search in vain for any such ruling in *Moncrieffe*. *Moncrieffe* merely applied the familiar rule that a court may consider only the offense of conviction, not the facts underlying the conviction, in determining whether an alien was convicted of a disqualifying offense for purposes of the immigration statutes. 569 U.S. at 205-06. Because in *Moncrieffe* the alien was convicted of a state offense that was not divisible, the Court had no occasion to address a case where the record did not establish which *version* of a state offense the alien was convicted of.

In short, the majority misreads *Moncrieffe* by confusing a legal question (whether there is a categorical match) with a factual question (what was the alien convicted of in state court). When a state statute includes many alternative versions of an offense, a court must determine the historical, factual question of what the alien was convicted of based on the evidence in the record. Only then can we ask the legal question: whether that offense is a match for a disqualifying federal offense.

V

By confusing the legal and factual issues, the majority creates the new rule that, when an alien is convicted under a state statute that includes multiple, alternative versions of the offense, and there is insufficient evidence in the record to prove what version the alien was convicted of, we must assume as a matter of law that the alien was convicted of a version of the state offense that does not match the federal generic offense. This rule finds no support whatsoever in *Moncrieffe*. The majority opinion's rule is also directly contrary to *Young*,

which was not overruled by *Moncrieffe* because *Young* and *Moncrieffe* address entirely distinct issues. Moreover, the majority opinion conflicts with the majority of our sister circuits, and instead joins the single circuit that adopted the wrong approach. Most important, the new rule is contrary to the INA in that it overrides the statute and regulation putting the burden on the alien "to establish that the alien . . . satisfies the applicable eligibility requirements" for various forms of relief. 8 U.S.C. § 1229a(c)(4)(A). And because the INA imposes the burden of production on the alien, 8 U.S.C. § 1229a(c)(4), 8 C.F.R. § 1240.8(d), the majority's rule that the alien is entitled to relief whenever the record is ambiguous will encourage aliens to withhold and conceal evidence.[18]

Under the INA and our caselaw, if the state statute of conviction is divisible, and the alien was convicted of a specific alternative version of a state offense, then the

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[18] In this case, for instance, Marinelarena has declined to produce additional *Shepard* documents (despite urgings by the IJ to do so). Nor has she stated that her offense of conviction is *not* disqualifying. A fair inference, therefore, is that she is relying on a strategic absence of documentation to obtain immigration benefits. The majority provides no support for its claim that in practice the government can find and produce an alien's convictions to avoid abuses of the immigration system, Maj. Op. 29 n.10. In this very case, the government has been unable to produce additional *Shepard* documents. Given the government's backlog of over 5 million claims for immigration benefits, *see* U.S. Citizenship and Immigration Servs., Response to Representative Garcia's February 12, 2019 Letter at 3 (April 2019), and its systemic problems, *see* U.S. Citizenship & Immigration Servs., Annual Report 2018 at 19 (June 28, 2018) (noting substantial obstacles in implementing its immigration system database), enforcing the regulation's burden of production is critical for avoiding abuse and fraud.

alien seeking relief from removal has the burden of proving that the conviction does not disqualify the alien from that relief. Because the majority holds to the contrary, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-72003
Agency No. A095-731-273

ARACELY MARINELARENA, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL, RESPONDENT

Argued: Apr. 6, 2016
Resubmitted: Aug. 4, 2017
Pasadena, California
Filed: Aug. 23, 2017

On Petition for Review of an Order of the
Board of Immigration Appeals

OPINION

Before: A. WALLACE TASHIMA, BARRY G. SILVERMAN, and SUSAN P. GRABER, Circuit Judges.

Opinion by Judge GRABER; Dissent by Judge TASHIMA

GRABER, Circuit Judge:

Petitioner Aracely Marinelarena, a native and citizen of Mexico, stands convicted of conspiring to sell and transport a controlled substance in violation of California

Penal Code section 182(a)(1). After the federal government initiated removal proceedings, she conceded removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b). The immigration judge ("IJ") denied relief. The Board of Immigration Appeals ("BIA") held that Petitioner had fallen short of meeting her burden of proof, by failing to show that her conviction was *not* for a disqualifying controlled substance offense, and dismissed the appeal. We hold that the conspiracy statute under which Petitioner was convicted is overbroad but divisible, that Petitioner failed to carry her burden of proof to demonstrate that her conviction did not involve a federally controlled substance, and that she has failed to exhaust the argument that expungement of her conviction erases its immigration consequences. Accordingly, we deny the petition for review in part and dismiss it in part.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner first entered the United States in 1992 without admission or inspection. In 2000, she was convicted of false personation of a public officer, in violation of California Penal Code section 529. In 2006, the State of California filed a criminal complaint against Petitioner that charged her with one count of conspiring to commit a felony, in violation of California Penal Code section 182(a)(1). Specifically, it charged Petitioner with conspiring to sell and transport a controlled substance in violation of California Health and Safety Code section 11352. The criminal complaint alleged several overt acts in furtherance of the conspiracy, one of which—the transportation of three bags containing heroin—referred to a particular controlled substance. On March 26, 2007, pursuant to a plea of guilty, Petitioner was convicted of

violating California Penal Code section 182(a)(1). The state court sentenced her to 136 days' imprisonment and three years' probation.[1]

Two days later, the government served Petitioner with a notice to appear for removal proceedings. The notice charged Petitioner with removability as an alien who had remained in the United States longer than permitted, in violation of 8 U.S.C. § 1227(a)(1)(B). Petitioner conceded removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b). Around the same time, Petitioner filed separate motions in state court to vacate her false personation and conspiracy convictions under California Penal Code section 1203.4. In 2009, California courts granted Petitioner's motions and vacated those convictions.

At a removal hearing in 2011, Petitioner argued that her conspiracy conviction did not constitute a controlled substance offense as defined by the Controlled Substances Act, 21 U.S.C. § 802, because the conviction documents do not specify the controlled substance. Petitioner also argued that she was eligible for cancellation of removal because her convictions had been vacated.

In 2012, the IJ held that Petitioner had failed to meet her burden to demonstrate eligibility for cancellation of removal and ordered her removed to Mexico. The IJ reasoned that Petitioner had failed to show that she was

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[1] At her removal hearings, Petitioner submitted the complaint to the IJ and admitted that she was "convicted solely of Count 1 of the Complaint," which alleged that she had committed "the crime of CONSPIRACY TO COMMIT A CRIME, in violation of PENAL CODE SECTION 182(a)(1)," specifically, conspiring "to commit the crime of SELL AND TRANSPORT, in violation of Section 11352 of the HEALTH AND SAFETY Code."

eligible for relief despite her convictions for false personation and conspiracy to sell and transport a controlled substance. The IJ noted that Petitioner's false personation conviction under California Penal Code section 529 appeared to qualify as a crime involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(i). The IJ also noted that Petitioner's conspiracy conviction under California Penal Code section 182(a)(1) "for conspiracy to distribute heroin" barred her from relief because it was a disqualifying controlled substance offense. Lastly, although both convictions had been vacated, the IJ held that, because the convictions were not vacated on the merits, they remained valid for immigration purposes.

On appeal, the BIA held that Petitioner had failed to establish that her conspiracy conviction did *not* qualify as a controlled substance offense under 8 U.S.C. § 1182(a)(2)(A)(i)(II). The BIA explained that, although California Health and Safety Code section 11352 is broader than the Federal Controlled Substances Act, 21 U.S.C. § 802, because the state law covers more drugs than the federal definition, Petitioner submitted no evidence identifying the controlled substance and, therefore, did not meet her burden of proof. The BIA did not reach the IJ's additional ruling that Petitioner's false personation conviction was a crime involving moral turpitude. Nor did it reach the expungement question, because Petitioner did not raise it in her briefing to the BIA.

Petitioner timely petitions for review. We also granted a motion by a group of interested entities to file a joint amicus brief.

STANDARD OF REVIEW

We review de novo questions of law and constitutional claims. *Coronado v. Holder*, 759 F.3d 977, 982 (9th Cir. 2014).

DISCUSSION

A. *Controlled Substance Offense*

To be eligible for cancellation of removal under 8 U.S.C. § 1229b(b), a petitioner must meet the following requirements: (1) have been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of application; (2) have been a person of good moral character during that period; (3) not have been convicted of, as applicable here, a controlled substance offense; and (4) show that removal would cause "exceptional and extremely unusual hardship" to a family member who is a citizen of the United States or an alien lawfully admitted for permanent residence. Our analysis concerns the third requirement —that the petitioner not have been convicted of a controlled substance offense.

To determine whether a state conviction qualifies as an offense relating to a controlled substance as defined under federal law, we employ the categorical and modified categorical approaches set forth in *Taylor v. United States*, 495 U.S. 575 (1990). "First, we ask whether the state law is a categorical match with a federal [controlled substance] offense," looking "only to the 'statutory definitions' of the corresponding offenses." *United States v. Martinez-Lopez*, No. 14-50014, 2017 WL 3203552, at *3 (9th Cir. July 28, 2017) (en banc) (quoting *Taylor*, 495 U.S. at 600). "If a state law proscribes the same amount of

or less conduct than that qualifying as a federal [controlled substance] offense, then the two offenses are a categorical match." *Id.* (internal quotation marks omitted). That result would end our analysis.

But if the offenses are not a categorical match, we proceed to a second step, asking whether the overbroad portion of the statute of conviction is "divisible," meaning that it "sets out one or more elements of the offense in the alternative." *Id.* at *4 (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013)). We will "consult 'authoritative sources of state law' to determine whether a statute contains alternative elements defining multiple crimes or alternative means by which a defendant might commit the same crime." *Id.* (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016)). Elements are "those circumstances on which the jury must unanimously agree." *United States v. Vega-Ortiz*, 822 F.3d 1031, 1035 (9th Cir. 2016). If the statute is divisible, "then we may proceed to the third step in our analysis and apply the modified categorical approach." *Martinez-Lopez*, 2017 WL 3203552, at *4. Under the modified categorical approach, "we examine judicially noticeable documents of conviction 'to determine which statutory phrase was the basis for the conviction.'" *Id.* (quoting *Descamps*, 133 S. Ct. at 2285).

In short, only when a state statute is both overbroad and divisible do we employ the modified categorical approach. We do so by examining certain conviction-related documents, including "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *United*

States v. Leal-Vega, 680 F.3d 1160, 1168 (9th Cir. 2012) (internal quotation marks omitted).

We agree with Petitioner that California Penal Code section 182(a)(1) is overbroad, meaning that the categorical approach does not apply. But Petitioner also contends that the statute is indivisible, precluding the modified categorical approach, and therefore cannot qualify as a controlled substance offense. We disagree.

1. Categorical Approach

California Penal Code section 182(a)(1) punishes a broader range of conduct than either 8 U.S.C. § 1182(a)(2)(A)(i)(II) or § 1227(a)(2)(B)(i). A defendant could be convicted under section 182(a)(1) for *any* criminal conspiracy, whether or not it relates to a controlled substance. A conviction under section 182(a)(1), therefore, cannot count as a controlled substance offense under the categorical approach. *See, e.g.*, *United States v. Trent*, 767 F.3d 1046, 1052 (10th Cir. 2014) (holding that a conspiracy conviction under Okla. Stat. Ann. tit. 21, § 421(A)—a statute with text similar to the text of Cal. Penal Code § 182(a)(1)—is not a serious drug offense under the categorical approach because "the statute could be violated in many ways that have nothing to do with drugs"), *cert. denied*, 135 S. Ct. 1447 (2015), *abrogated on other grounds by Mathis*, 136 S. Ct. at 2251.

2. Divisibility

Section 182(a) criminalizes the act of "two or more persons [who] conspire: (1) To commit *any crime*." (Emphasis added.) Here, we must consider whether the

conspiracy statute is divisible as to the target crime.[2] Faced with a statute that incorporates "any" California crime by reference, we must "consult 'authoritative sources of state law' to determine whether [the] statute contains alternative elements defining multiple crimes or alternative means by which a defendant might commit the same crime." *Martinez-Lopez*, 2017 WL 3203552, at *4 (quoting *Mathis*, 136 S. Ct. at 2256). The key question is whether a jury must find the purported element specifically. Here, the California Supreme Court has supplied the answer.

California law requires jurors to agree unanimously on the object crime of the conspiracy. "*Under Penal Code section 182 the jury must also determine which felony defendants conspired to commit*, and if that felony is divided into degrees, which degree of the felony they conspired to commit." *People v. Horn*, 524 P.2d 1300, 1304 (Cal. 1974) (emphasis added); *see also People v. Smith*, 337 P.3d 1159, 1168 (Cal. 2014) ("A conviction of conspiracy requires proof that the defendant and another person had *the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense*, together with proof

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[2] *United States v. Garcia-Santana*, 774 F.3d 528 (9th Cir. 2014), does not affect our analysis of whether the conspiracy statute, California Penal Code section 182(a)(1), is divisible. *Garcia-Santana* held that Nevada's conspiracy statute, Nev. Rev. Stat. § 199.480, is overbroad because it does not contain, as an element, an overt act. *Garcia-Santana*, 774 F.3d at 534. In a footnote, the opinion conveys that the omission of an overt act requirement cannot be cured by resort to the modified categorical approach to show that an overt act was proved in a given case. *Id.* at 534 n.3. As we discuss below in text, an overt act *is* a requirement for a conspiracy conviction under California law.

of the commission of an overt act . . . in furtherance of the conspiracy." (emphasis added) (internal quotation marks omitted)).

Petitioner relies on a California Court of Appeal case, *People v. Vargas*, 110 Cal. Rptr. 2d 210 (Ct. App. 2001), to argue that section 182(a)(1) is indivisible. In *Vargas*, the court considered whether jurors must agree unanimously on all the object crimes of a multipurpose conspiracy, or if it is enough for the jurors to agree that crime, generally, was the object of the conspiracy. *Id.* at 244-47. The opinion has caused uncertainty as to the jury unanimity requirement for multipurpose conspiracy convictions in California. *See, e.g.*, *Trent*, 767 F.3d at 1061 (citing *Vargas* for the proposition that some jurisdictions "may" not require that "the jury agree unanimously on what crime the conspirators agreed to commit").

Whatever the California Court of Appeal intended to convey in *Vargas*, the California Supreme Court has never recognized a jury unanimity exception for multipurpose conspiracies. Our task, when answering a question of state law, is to follow the precedents of the state's highest court. *See United Bhd. of Carpenters & Joiners of Am. Local 586 v. NLRB*, 540 F.3d 957, 963 (9th Cir. 2008) ("In analyzing questions of state law, we are bound by the decisions of the state's highest court."); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) ("[F]ederal courts are bound by the pronouncements of the state's highest court on applicable state law. . . . In assessing how a state's highest court would resolve a state law question—absent controlling state authority—federal courts look to existing state law without predicting potential changes in that law." (in-

ternal quotation marks omitted)). Because the California Supreme Court requires that jurors agree on a specified object crime in order to convict a person of conspiracy, California Penal Code section 182(a)(1) is divisible.

3. Modified Categorical Approach

Because California Penal Code section 182(a)(1) is both overbroad and divisible, we proceed to the modified categorical approach, in which we examine the specifics of Petitioner's conviction. The only document in the record relating to a controlled substance is the criminal complaint, which shows that the target offense of the conspiracy was a violation of California Health and Safety Code section 11352. That target offense adds an additional layer to our analysis, because California Health and Safety Code section 11352 is, with respect to the specific controlled substance, itself an overbroad but divisible statute to which the modified categorical approach applies. *Martinez-Lopez*, 2017 WL 3203552, at *4-7.

The criminal complaint identifies transportation of heroin in describing one of the overt acts alleged as part of the charged conspiracy; no other drug is mentioned in the criminal complaint. Heroin is a controlled substance under federal law. *See* 21 U.S.C. § 802(6) (defining "controlled substance" by reference to statutory schedule); 21 U.S.C. § 812, Schedule I (b)(10) (listing heroin on Schedule I). Even so, the record in this case is inconclusive. The conspiracy count to which Petitioner pleaded guilty does not identify the particular controlled substance except in the list of overt acts. But there is no plea agreement, plea colloquy, judgment, or other document in the record that reveals the factual basis for Petitioner's guilty plea. Because Petitioner's guilty plea *could* have rested on an overt act that did not

relate to heroin, we cannot conclusively connect the transportation of heroin with her conviction. *See Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003) (noting that "[c]harging papers alone are never sufficient" to establish the elements of conviction (internal quotation marks omitted)); *United States v. Velasco-Medina*, 305 F.3d 839, 852 (9th Cir. 2002) (noting that a charging document "contain[s] the elements of the crime the government *set[s] out to prove*; it [does] not establish the elements to which [the petitioner] admitted in his guilty plea").

On an inconclusive record, Petitioner is ineligible for relief because, with respect to eligibility for relief, she bears the burden of proof to show that her conviction did *not* relate to a federally controlled substance. "If the evidence indicates that one or more of the grounds for 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) (emphasis added). In *Young v. Holder*, 697 F.3d 976, 990 (9th Cir. 2012) (en banc), we held that a "petitioner cannot carry the burden of demonstrating eligibility for cancellation of removal by establishing an inconclusive record of conviction." Petitioner argues that we must overrule that aspect of *Young* because it is irreconcilable with a later United States Supreme Court case, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1687 (2013). We turn to that pivotal issue.

B. *Burden of Proof*

If *Young* remains good law, Petitioner is ineligible for cancellation of removal because the ambiguity in the record prevents her from proving that her conviction did *not* relate to a controlled substance as defined by federal

law. A three-judge panel may "reject [a] prior opinion of this court" if an intervening and inconsistent Supreme Court decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller*, 335 F.3d at 900. Petitioner and Amici contend that this standard is met because, under *Moncrieffe*, the inquiry under the categorical approach is whether "a conviction of the state offense *necessarily* involved [the] facts equating to the generic federal offense." 133 S. Ct. at 1684 (emphasis added) (internal quotation marks and brackets omitted). That inquiry, they assert, is purely a question of law—not fact—as to which the burden of proof is irrelevant. We disagree both as to the relevance of *Moncrieffe* and as to the nature of the inquiry in the present context.

In *Young*, the petitioner was removable and was found ineligible for cancellation of removal on account of his conviction for "sale/transportation/offer[ing] to sell" cocaine base, an aggravated felony. 697 F.3d at 980-81. The record of his conviction was inconclusive concerning the aggravated felony designation.[3] Because, in the REAL ID Act, Congress "place[d] the burden of demonstrating eligibility for cancellation of removal squarely on the noncitizen," *id.* at 988, we held that the petitioner had the burden to establish that he had *not* committed an aggravated felony, *id.* at 989; *see also* 8 U.S.C. § 1229a(c)(4) ("An alien applying for relief or protection from removal has the burden of proof. . . . "). The

[3] The petitioner had pleaded guilty to a charging document that alleged 14 different theories of how he could have committed the offense, some of which were aggravated felonies and some of which were not. *Young*, 697 F.3d at 990.

petitioner failed to satisfy his burden and, therefore, was ineligible for relief from removal because the record was inconclusive on this point. *Young*, 697 F.3d at 990.

In the later Supreme Court case, the petitioner had pleaded guilty to possession with intent to distribute marijuana in violation of a Georgia state law. *Moncrieffe*, 133 S. Ct. at 1683. The BIA found the petitioner *removable* for having committed a drug-trafficking crime that is punishable as a felony under the federal Controlled Substances Act, thus making it an aggravated felony. *Id.*; *see also Moncrieffe v. Holder*, 662 F.3d 387, 389-90 (5th Cir. 2011) (explaining the issue in the case as being whether the petitioner was *removable* as charged for having committed this crime). The Supreme Court asked and answered the question whether the petitioner's conviction could be considered *categorically* an aggravated felony when the Controlled Substances Act punishes the analogous offense as both a felony and a misdemeanor. 133 S. Ct. at 1684-85. The Court held that the petitioner was not removable because he had not been convicted of an aggravated felony; applying the categorical approach, the Controlled Substances Act did not "necessarily" punish as a felony all the conduct proscribed under the Georgia statute. *Id.* at 1686-87.

Moncrieffe differs from *Young* because, among other reasons, the two cases address entirely different legal issues. *Moncrieffe* addressed the question whether the petitioner was *removable*, a question as to which the *government* bears the burden of proof. *Young Sun Shin v. Mukasey*, 547 F.3d 1019, 1024 (9th Cir. 2008). By contrast, the relevant portion of *Young* addressed only the question whether the petitioner was eligible for

cancellation of removal. As to that question, the *noncitizen*, not the government, bears the burden of proof. 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d). Thus it is Congress, not the Supreme Court, that assigned the burden of proof to a noncitizen who seeks relief in the form of cancellation of removal. *See* 8 U.S.C. § 1229a(c)(4) ("An alien applying for relief or protection from removal has the burden of proof to establish that the alien" is eligible.). The *Moncrieffe* opinion does not cite that statute anywhere, and for good reason. As noted, the issue before the Court concerned removability, not relief from removal.

It is well established that the party who bears the burden of proof loses if the record is inconclusive on the crucial point. *See, e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (holding that, under the Individuals with Disabilities Education Act, whichever party seeks relief must carry the burden of persuasion, whether it be the parents or the school district); *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272-81 (1994) (holding that, under the Administrative Procedure Act, the burden of proof encompasses the burden of persuasion; when the evidence is evenly balanced, the party with the burden must lose). *Moncrieffe* did not cite, let alone overrule, those and similar cases recognizing the effect of the burden of proof when the relevant evidence is in equipoise. That is because, as discussed below, *Moncrieffe* is not about the burden of proof.

Under Supreme Court law, when evidence is in equipoise, the burden of persuasion determines the outcome. Nor is it problematic that the same inconclusive evidence

can result in a favorable decision on removability (*Moncrieffe*) yet an unfavorable decision on cancellation (*Young*). *See Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1164-65 (11th Cir. 2008) (noting that two factual findings were not inconsistent given that "it is logically possible for the losing side to have varied with, because it depended on, the burden of proof"); *cf. United States v. Meza-Soria*, 935 F.2d 166, 169 (9th Cir. 1991) (noting that "courts have made it quite clear that because different standards of proof are involved, acquittal in a criminal action does not bar a civil suit based on the same facts" (internal quotation marks and brackets omitted)). In *Young*, we joined the Fourth and Tenth Circuits in recognizing that, when the burden of persuasion rests on the noncitizen to show eligibility for cancellation of removal, an inconclusive record fails to satisfy that burden. 697 F.3d at 989 (citing *Salem v. Holder*, 647 F.3d 111, 115-16 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288, 1289-90 (10th Cir. 2009)); *see also Syblis v. Att'y Gen. of U.S.*, 763 F.3d 348, 356-57 (3d Cir. 2014) (reaching the same conclusion, post-*Moncrieffe*); *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014) (same). *But see Sauceda v. Lynch*, 819 F.3d 526, 531, 532 & n.10 (1st Cir. 2016) (rejecting *Young* and holding that *Moncrieffe* creates a presumption that a defendant committed the "least of the acts" that goes unrebutted when *Shepard* documents "shed no light on the nature of the offense or conviction," even in the cancellation-of-removal context).[4]

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[4] In *Le v. Lynch*, 819 F.3d 98, 108 (5th Cir. 2016), the court held that, "[n]otwithstanding the inconclusive evidence in the instant case, . . . the burden remains on [the petitioner] to prove eligibility for relief from removal." But there, the ambiguity did not

To be sure, *Moncrieffe* acknowledged that its analysis for determining whether a particular crime of conviction is *categorically* a crime involving moral turpitude "is the same in both" the removal and cancellation contexts. 133 S. Ct. at 1685 n.4 (citing *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), which considered whether the petitioner was eligible for cancellation of removal after having committed two simple possession offenses under Texas state law). And that is true, so far as the discussion in *Moncrieffe* goes: "[c]onviction is the relevant statutory hook" whether determining removability or eligibility for relief from removal. *Id.* at 1685 (internal quotation marks omitted). But *Moncrieffe* did not discuss the differences in the burden of proof in those two contexts; it had no reason to. To the contrary, the Court limited its rejection of the government's suggestion that a noncitizen should have an opportunity to disprove the misdemeanor version of the Georgia statute to the *categorical* context: "This solution is entirely inconsistent with both the INA's text [8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3)] and *the categorical approach*." *Moncrieffe*, 133 S. Ct. at 1690 (emphasis added). *Moncrieffe* therefore cannot be read to inform the relevant dispute in *Young*, which pertained only to the operation of the burden of proof when the *modified* categorical approach applies.[5]

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rest on a divisible statute, and the court declined to decide "whether *Moncrieffe* affected how courts should apply the modified categorical approach to determine whether a prior conviction disqualifies a noncitizen from relief from removal when the record of conviction is ambiguous as to whether the elements of the crime correspond to a disqualifying offense." *Id.* at 107 n.5.

[5] Amici also contend that *Young* is clearly irreconcilable with *Moncrieffe* because of the latter's statement that "[t]he categorical

For all these reasons, *Moncrieffe* and *Young* are not clearly irreconcilable.

We are equally unpersuaded by Petitioner and Amici's argument that the modified categorical approach involves only a legal inquiry and that the burden of proof is irrelevant after *Moncrieffe* and *Descamps*. As noted, *Moncrieffe* did not decide or even suggest anything about the burden of proof. *Descamps*, for its part, did not intimate that *every* inquiry under the modified categorical approach is a question of law; it simply held that the modified categorical approach was "a tool for implementing the categorical approach" and, therefore, could not be applied to indivisible statutes. 133 S. Ct. at 2284, 2286-87.

Although the modified categorical approach, like the categorical approach, involves some strictly legal issues—such as a statute's divisibility—the inquiry into which part of a divisible statute underlies the petitioner's crime of conviction is, if not factual, at least a mixed question of law and fact.[6] "[M]ixed questions of law and fact"

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approach was designed to avoid" inconsistent treatment of "two noncitizens . . . 'convicted of' the same offense." *Moncrieffe*, 133 S. Ct. at 1690. The Court made that comment in the context of applying the categorical approach, not the modified categorical approach. And Amici's proposed solution—overruling *Young* and allowing relief when the record of conviction is ambiguous—would not eliminate the prospect of inconsistent results: The opportunity for individuals, convicted of a given offense, to obtain relief would still vary depending on the record's clarity, as only the default rule would change. Such a rule therefore would not ameliorate Amici's concern about inconsistent treatment of similarly situated persons.

[6] At least one other circuit has held that the determination of the offense of conviction is a purely factual inquiry. *See Le*, 819 F.3d at 105 ("[T]he alien has the burden of proof to establish that he satisfies

are those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The modified categorical approach squarely fits within that definition. *See Descamps*, 133 S. Ct. at 2284-85 (explaining that, under the modified categorical approach, courts may review approved "extra-statutory materials . . . [to] discover which statutory phrase contained within a statute listing several different crimes[] covered a prior conviction." (internal quotation marks omitted)); *Taylor*, 495 U.S. at 600 (holding that, under the categorical approach, courts "look only to *the fact* that the defendant had been convicted of" certain crimes (emphasis added)); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than *the fact* of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)).

When reviewing mixed questions of law and fact, we regularly consider the burden of persuasion. *See, e.g.*, *Dorrance v. United States*, 809 F.3d 479, 484 (9th Cir. 2015) (stating that the question whether taxpayers had a cost basis in assets that they later sold, but for which they paid nothing, "is a mixed question of law and fact"

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the applicable eligibility requirements in order to prove that any grounds for denial do not apply. When an alien's prior conviction is at issue, the offense of conviction itself *is a factual determination, not a legal one*. However, determining whether that conviction is a particular type of generic offense is a legal question." (emphasis added) (citations omitted)).

as to which the taxpayers bear the burden of persuasion); *United States v. Arreguin*, 735 F.3d 1168, 1174 (9th Cir. 2013) (noting that "[t]he issue of whether a person has actual or apparent authority to consent to a search is a mixed question of law and fact" and that "the government has the burden of establishing the effectiveness of a third party's consent to a search"); *United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir. 1995) (stating that we review de novo the district court's rulings on the scope of the attorney-client privilege because they involve "mixed questions of law and fact" and that the burden of persuasion is on the party seeking to establish that the privilege applies); *United States v. Lingenfelter*, 997 F.2d 632, 636, 637 (9th Cir. 1993) (stating that whether police conduct amounts to a "search" within the meaning of the Fourth Amendment is "a mixed question of law and fact" and that the defendant bears the burden of demonstrating that he or she had a legitimate expectation of privacy in the place searched).

To summarize, *Moncrieffe* is about *removal*; by contrast, *Young* is about *cancellation* of removal. *Moncrieffe* discusses how the *categorical* approach works when defining a crime involving moral turpitude and says nothing at all about operation of the burden of proof, which was not an issue in that case. *Young* discusses the burden of proof when applying the *modified* categorical approach. Although *Descamps* makes clear that the modified categorical approach is "a tool for implementing the categorical approach," 133 S. Ct. at 2284, it is a tool that requires the consideration of factual documents within the context of the law and, by that process, makes the burden of proof relevant. Thus, neither *Moncrieffe* nor *Descamps* requires us to overrule *Young*. The decisions are not clearly irreconcilable.

C. *Expungement*

Finally, Petitioner argues that the expungement of her conspiracy conviction removes it from the definition of "conviction" under 8 U.S.C. § 1101(a)(48)(A).[7] Specifically, she challenges our deference to the BIA's interpretation of § 1101(a)(48)(A). *See Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (adopting the BIA's interpretation of § 1101(a)(48)(A) in *In re Roldan*, 22 I. & N. Dec. 512 (B.I.A. 1999) (en banc), as "preclud[ing] the recognition of subsequent state rehabilitative expungements of convictions").

Petitioner did not present that claim to the BIA, and it is not exhausted. We lack jurisdiction over an unexhausted claim. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (holding that 8 U.S.C. § 1252(d)(1) "mandates exhaustion and therefore generally bars us, for lack of subject-matter jurisdiction, from reaching the

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[7] Section 1101(a)(48)(A) provides:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

merits of a legal claim not presented in administrative proceedings below"). Accordingly, we must dismiss the expungement claim.[8]

Petition DENIED IN PART and DISMISSED IN PART.

TASHIMA, Circuit Judge, dissenting:

The majority holds that *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), remains good law because it is not clearly irreconcilable with *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). Maj. Op. at 19. Under *Young*, Marinelarena must prove that she was *not* convicted of a controlled substance offense in order to establish her eligibility for cancellation of removal. Because the record is ambiguous on this point, the majority reasons, Marinelarena cannot satisfy her burden of proof and is thus ineligible for relief. *Id.* at 13. I disagree with the majority's conclusion that *Moncrieffe* does not abrogate *Young*. Under *Moncrieffe*, the ambiguity in the record as to Marinelarena's offense of conviction means that she has *not* committed an offense disqualifying her from relief. I respectfully dissent.

In *Moncrieffe*, the Supreme Court explained the framework for applying the categorical approach to determine whether a noncitizen has committed an aggra-

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[8] Even if we agreed with Petitioner that this claim qualifies for an exception to the exhaustion requirement, we have rejected a similar argument on the merits. *See Reyes v. Lynch*, 834 F.3d 1104, 1108 (9th Cir. 2016) (holding that, even though a California court set aside a petitioner's earlier *nolo contendere* plea, a "state conviction expunged under state law is still a conviction for purposes of eligibility for cancellation of removal and adjustment of status," even when the petitioner was never incarcerated, because "the alien was punished or his liberty was restrained by the terms of his probation").

vated felony, as defined by the Immigration and Nationality Act. 133 S. Ct. at 1684-85. In cases applying the categorical approach, courts compare the elements of a noncitizen's offense of conviction to those of a generic federal offense that would disqualify her from relief. *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). The Court in *Moncrieffe* specified that, under the categorical approach, courts should "look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). "[A] state offense is a categorical match with a general federal offense only if a conviction of the state offense '*necessarily involved* . . . facts equating to [the] general [federal offense].'" *Id.* (emphasis added) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion)). "Whether the noncitizen's actual conduct involved such facts is 'quite irrelevant.'" *Id.* (quoting *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939)).

The Court further stated that, if a statute contains multiple, alternative versions of a crime (that is, if the modified categorical approach applies), "a court may determine which *particular* offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record of the factual basis for the plea.'" *Id.* (emphasis added) (quoting *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009)). The Court labeled this inquiry *as a whole* "the

categorical approach," as opposed to distinguishing between the categorical and modified categorical approaches. *Id.* at 1685.

In *Moncrieffe*, the government argued that the petitioner had committed a "felony punishable under the Controlled Substances Act" ("CSA"), which qualifies as an aggravated felony that would allow the petitioner to be deported. *Moncrieffe*, 133 S. Ct. at 1683. The Court disagreed. *Id.* at 1684. The record established that Moncrieffe had been convicted under a state statute proscribing conduct that constitutes an offense under the CSA, but the record was ambiguous as to whether the CSA would "'necessarily' prescribe *felony* punishment for that conduct." *Id.* at 1685 (emphasis added). The Supreme Court held that "[a]mbiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA." *Id.* at 1687. "Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony" allowing him to be deported. *Id.*

This analysis is clearly irreconcilable with *Young*. *Young* holds that ambiguity in the record as to whether the noncitizen committed an aggravated felony means that she was convicted of the offense for purposes of the immigration statutes. *Young*, 697 F.3d at 988-99. *Moncrieffe* holds the opposite: If the record does *not* conclusively establish that the noncitizen committed the offense, then she was *not* convicted of the offense for purposes of the immigration statutes. *Moncrieffe*, 133 S. Ct. at 1687.

The majority's arguments to the contrary are unpersuasive. The majority first contends that *Moncrieffe* does not control because it "addressed the question whether the petitioner was *removable*, a question as to which the *government* bears the burden of proof," while this case concerns cancellation of removal, for which an applicant bears the burden of proving eligibility. Maj. Op. at 16. But *Moncrieffe* itself explicitly forecloses this distinction, explaining that the categorical "*analysis is the same* in both [the removal and cancellation of removal] contexts." *Moncrieffe*, 133 S. Ct. at 1685 n.4 (emphasis added). Under *Moncrieffe*, the framework for applying the categorical and modified categorical approaches does *not* depend on which party bears the burden of proof in a particular kind of immigration proceeding.

The majority sidesteps this explicit instruction by arguing that *Moncrieffe* "limited" its holding "to the *categorical* context." Maj. Op. at 18-19. Per the majority, "*Moncrieffe* therefore cannot be read to inform the relevant dispute in *Young*, which pertained only to the operation of the burden of proof when the *modified* categorical approach applies." Maj. Op. at 19 (footnote omitted). This purported distinction overstates the difference between the categorical and modified categorical approaches. As the Supreme Court has noted, the modified categorical approach is "*a tool for implementing the categorical approach*" that allows a court "to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction." *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013).

Thus, in *Moncrieffe*, the Court outlined *both* what we have called the "categorical" step of the analysis *and* the "modified categorical" step of the analysis, and then labeled the inquiry *as a whole* "the categorical approach." *Moncrieffe*, 133 S. Ct. at 1684-85 (outlining the categorical and modified categorical analysis and stating that "[t]his categorical approach has a long pedigree in our Nation's immigration law"). That is because the relevant inquiry in both categorical and modified categorical cases is the same: A court must compare the elements of the offense of which the noncitizen was convicted to the elements of a generic federal offense disqualifying her from relief, and then determine what facts are *necessarily* established by that conviction. The only difference between the two approaches is that, in modified categorical cases, a statute lists "multiple, alternative versions of [a] crime," *Descamps*, 133 S. Ct. at 2284, so the court must look to the record of conviction to determine "which particular offense the noncitizen was convicted of." *Moncrieffe*, 133 S. Ct. at 1684. Once that determination is made, the relevant question is the same as that in categorical cases: A court must ask what the noncitizen's conviction *necessarily* involved, "not what acts [the noncitizen] committed." *Id.* at 1685.

In *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Supreme Court reaffirmed that the categorical and modified categorical approaches involve the same analysis. The Court stated that, "when a statute sets out a single (or 'indivisible') set of elements to define a single crime," a court should "line[] up that crime's elements alongside those of the generic offense and see[] if they match." *Id.* at 2248. "Some statutes, however, have a more complicated (sometimes called 'divisible') structure, making

the comparison of elements harder." *Id.* at 2249. Cases involving such statutes apply the modified categorical approach. Under this approach, "a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* "The court can then compare that crime, *as the categorical approach commands*, with the relevant generic offense." *Id.* (emphasis added).[1]

In other words, whether a case applies what we have called the "categorical" or the "modified categorical" approach, the analysis is the same: The court asks whether the noncitizen was *necessarily* convicted of an offense disqualifying her from relief. If the record of conviction is ambiguous on this point—as it is in this case—then her "conviction did not '*necessarily*' involve facts that correspond to" a disqualifying offense. *Moncrieffe*, 133 S. Ct.

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[1] The majority contends that "the inquiry into which part of a divisible statute underlies the petitioner's crime of conviction is, if not factual, at least a mixed question of law and fact" because the inquiry requires the court to examine certain documents in the record of conviction. Maj. Op. at 20. This argument misses the mark. The relevant point is that, under the modified categorical approach, the court looks at those documents only to determine which crime the petitioner was convicted of, and whether that crime's elements match those of a disqualifying generic offense. This is a purely legal inquiry. *See Descamps*, 133 S. Ct. at 2293 ("The modified approach does not authorize a sentencing court to substitute . . . a facts-based inquiry for an elements-based one.").

at 1687 (emphasis added). Thus, under the modified categorical approach, Marinelarena was not convicted of a controlled substance offense under federal law.[2]

I would grant the petition and respectfully dissent.

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[2] Although this is an open question in our circuit, another panel recently has characterized *Moncrieffe*, 133 S. Ct. at 1678, as "suggest[ing] an inconclusive record works to a petitioner's advantage, regardless of which party bears the burden of proof." *Lozano-Arredondo v. Sessions*, 2017 WL 3393454, at *4 (9th Cir. Aug. 8, 2017) (citing *Almanza-Arenas v. Lynch*, 815 F.3d 469, 488-89 (9th Cir. 2016) (en banc) (Watford, J., concurring in the judgment). In *Almanza-Arenas*, Judge Watford noted that "our decision in *Young* [is] fundamentally incompatible with the categorical approach, especially after *Descamps* and *Moncrieffe* clarified the elements-focused nature of the inquiry." *Almanza-Arenas*, 815 F.3d at 489.

APPENDIX C

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

File: A095 731 273—Los Angeles, CA

IN RE: ARACELY MARINELARENA

Date: [June 9, 2014]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Miguel Olano, Esquire

APPLICATION: Cancellation of removal under section 240A(b)

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's September 19, 2012, decision denying her application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The appeal will be dismissed.

The Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to

applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 8 C.F.R. § 1003.1(d)(3).

In her appellate brief, the respondent admits that she was convicted for conspiracy to commit a felony under California Penal Code § 182(a)(1), and she argues that the Immigration Judge incorrectly determined that her conviction was for conspiring to sell and transport a controlled substance, heroin, in violation of California Health and Safety Code § 11352 (Resp. Brief at 2-3; Exh. 6). The respondent further argues that she has satisfied the section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C), requirement for cancellation of removal.

The respondent has the burden of establishing cancellation of removal eligibility, and she has not established under section 240A(b)(1)(C) of the Act that she was not convicted of a disqualifying offense under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) (a violation of any law relating to a controlled substance as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)). *See Matter of Almanza-Arenas*, 24 I & N. Dec. 771 (BIA 2009) (holding that an alien seeking cancellation of removal is required to show that a conviction under a divisible statute was not for a disqualifying offense). The respondent does not dispute that she was convicted of conspiracy under Section 182(a)(1) of the California Penal Code. In Count 1 of a criminal complaint, the respondent was charged for conspiring to violate California Health and Safety Code § 11352 which is a divisible statute relating to controlled

substances (Exh. 6).[1,2] *See Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009). Thus, the respondent's burden for cancellation of removal is to establish that she was not convicted of conspiring to commit a disqualifying controlled substance offense. The respondent has not submitted any evidence establishing that her conspiracy conviction was not for a disqualifying controlled substance offense. Hence, the respondent the respondent has not established that she is eligible for cancellation of removal.

In addition, the Immigration Judge granted the respondent a 60-day voluntary departure period, conditioned upon posting of a $500.00 bond. Effective January 20, 2009, pursuant to 8 C.F.R. § 1240.26(c)(3)(ii), an alien granted voluntary departure shall, within 30 days of filing an appeal with the Board, submit sufficient proof that the required voluntary departure bond was posted with the Department of Homeland Security, and

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[1] The criminal complaint is evidence of the respondent's conviction. *See Shepard v. United States*, 125 S. Ct. 1254 (2005); *Parrilla v. Gonzales*, 414 F.3d 1038 (9th Cir. 2005).

[2] Providing that, except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

if the alien does not provide timely proof to the Board, the Board will not reinstate the period of voluntary departure in its final order. The record before the Board reflects that the respondent was provided written advisals regarding the need to submit proof of having posted the voluntary departure bond, but no evidence has been submitted to show that the respondent has paid that bond. Therefore, the voluntary departure period will not be reinstated, and the respondent shall be ordered removed from the United States on the charges contained in the Notice to Appear, pursuant to the Immigration Judge's alternate order.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed, and the respondent is ordered removed to Mexico, pursuant to the Immigration Judge's alternate order of removal.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File: A095-731-273

IN THE MATTER OF ARACELY MARINELARENA,
RESPONDENT

Sept. 19, 2012

IN REMOVAL PROCEEDINGS

CHARGE:

Section 237(a)(1)(B) of the Immigration and Nationality Act—alien who after admission as a nonimmigrant has remained in the United States for a time longer than permitted in violation of the Act.

APPLICATIONS:

Section 240A(b) of the Immigration and Nationality Act, cancellation of removal; Section 240B(b) of the Immigration and Nationality Act, voluntary departure.

ON BEHALF OF RESPONDENT:

YOLANDA FLORES-BURT

ON BEHALF OF DHS:

JULIA C. CHIMARUSTI

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

Introduction and Procedural Summary

The respondent is a 42-year-old native and citizen of Mexico. The Department of Homeland Security initiated removal proceedings against respondent by serving a Notice to Appear on March 28, 2007, charging that respondent is removable pursuant to the above-referenced section of the Immigration and Nationality Act. The Notice to Appear alleges that on March 15, 2000 at El Paso, Texas, the respondent entered as a non-immigrant on a B-2 visitor visa with permission to remain in the United States until September 15, 2000, and respondent remained longer than permitted.

The respondent admitted the allegations in the Notice to Appear and conceded the charge. Therefore, the court finds that removability has been established by clear, convincing, and unequivocal evidence and the respondent is removable as charged to the country of Mexico.

On February 2, 2008, the respondent filed an application for cancellation of removal for certain non-permanent residents. See Exhibit 2.

Legal Analysis and Findings

One of the requirements for cancellation of removal is that respondent establish that she has a good moral character and that she has not committed any crimes that fall under Section 212(a)(2) or Section 237(a)(2) or (a)(3).

The record before this Court indicates that on or about February 11, 1999, respondent was arrested for violation, among other code provisions, of Section 529 of the California Penal Code, which is a crime of false impersonation of a public official or other person. See Exhibit 4, Tab E, page 3.

On December 20, 2006, respondent was arrested for violation of Penal Code Section 182(a)(1), a felony, based on the conspiracy to sell and transport drug in violation of 11352 of the Health and Safety Code. The attachment that was incorporated into Count 1 indicates that the drug was heroin. See Exhibit 6, pages 1 through 3.

Although respondent presented evidence that the crime for violating Section 529 was expunged apparently pursuant to 1203.4 of the Penal Code of California, this expungement is not removed for a crime for Immigration purposes. Moreover, the Penal Code violation of Section 529 the Court finds is a CIMT which has a sentence of one year or more, according to the Code provision not exceeding one year, which means that she could have been sentenced to one year, and therefore that CIMT does not fall under the petty offense exception. More importantly, her crime for conspiracy to distribute heroin would bar her from relief of cancellation under Section 237(a)(2)(C).

Accordingly, the respondent has failed to meet her burden of proof that she is eligible for cancellation of removal.

Voluntary Departure

The respondent has met the requirement for voluntary departure.

Accordingly, the following orders are entered.

ORDER

IT IS HEREBY ORDERED that respondent's application for cancellation of removal is denied.

IT IS FURTHER ORDERED that respondent is granted voluntary departure at no expense to the Government in lieu of removal. Such departure will take place on or before November 19, 2012.

IT IS FURTHER ORDERED respondent shall post a voluntary departure bond in the amount of $500 within five business days of this decision.

IT IS FURTHER OREDERED if respondent fails to depart on or before October 19, 2012, then without further hearing the respondent would be ordered removed from the United States to the country of Mexico.

IT IS FURTHER ORDERED respondent's failure to depart pursuant to the voluntary departure order could result in respondent paying a fine in the amount of $1,000 to $5,000, and if the respondent failed to depart pursuant to an order of removal, he could be fined $500 for each day of non-compliance.

/s/ SEE LAST PAGE FOR SIGNATURE
ANTHONY T. GIATTINA
Immigration Judge

//s//

Immigration Judge ANTHONY T. GIATTINA

giattina on Dec. 13, 2012 at 11:58 PM GMT

APPENDIX E

1. 8 U.S.C. 1182(a)(2) provides:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

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

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

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or. has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

2. 8 U.S.C. 1227(a)(2) provides:

Deportable aliens

(a) Classes of deportable aliens

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

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

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

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

is deportable.

(ii) Multiple criminal convictions

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

(iii) Aggravated felony

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

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

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

(ii) Drug abusers and addicts

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

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, pos-

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

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) [now 50 U.S.C. 3801 et seq.] or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.) [now 50 U.S.C. 4301 et seq.]; or

(iv) a violation of section 1185 or 1328 of this title,

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.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons

for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

3. 8 U.S.C. 1229a provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records

and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with

the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

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.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which

corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart

under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

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[1] So in original.

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2]

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[1] So in original.

[2] So in original. A closing parenthesis probably should appear.

pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

4. 8 U.S.C. 1229b provides in pertinent part:

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.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

* * * * *

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the

alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who—

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

* * * * *

5. 8 C.F.R. 1240.8 provides:

Burdens of proof in removal proceedings.

(a) *Deportable aliens.* A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged.

(b) *Arriving aliens.* In proceedings commenced upon a respondent's arrival in the Untied States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(c) *Aliens present in the United States without being admitted or paroled.* In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(d) *Relief from removal.* The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for 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.

6. Cal. Health & Safety Code § 11352 (West Supp. 2006) provides:

Transportation, sale, giving away, etc., of designated controlled substances; punishment

(a) Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years.

7. Cal. Penal Code § 182 (West Supp. 2006) provides:

Definition; punishment; venue; evidence necessary to support conviction

(a) If two or more persons conspire:

(1) To commit any crime.

(2) Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

(3) Falsely to move or maintain any suit, action, or proceeding.

(4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises.

(5) To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

(6) To commit any crime against the person of the President or Vice President of the United States, the Governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in paragraph (6), they are guilty of a felony and are punishable by imprisonment in the state prison for five, seven, or nine years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony the defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit the felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of those felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in paragraph (4), they shall be punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both that imprisonment and fine.

When they conspire to do any of the other acts described in this section, they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison, or by a fine not exceeding ten thousand dollars ($10,000), or by both that imprisonment and fine. When they receive a felony conviction for conspiring to commit identity theft, as defined in Section 530.5, the court may impose a fine of up to twenty-five thousand dollars ($25,000).

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect the conspiracy shall be done.

(b) Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.