No. 08-

IN THE
Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the penalty of life time banishment for conviction of an aggravated felony may be imposed upon a lawful permanent resident under Section 101(a)(43)(M)(i) of the Immigration & Nationality Act of 1952 as amended (the "Act"), 8 U.S.C. § 1101(a)(43)(M)(i) when he was not convicted of the required loss?

Whether the rule of lenity or narrow construction should be applied to resolve an ambiguity in a deportation statute created by both the dissenting opinion below and well-reasoned decisions from other Circuits including the Circuit where the alien's conviction occurred?

TABLE OF CONTENTS

Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Cited Authorities

United States Constitution, Statutes and Other Authorities:

Cited Authorities

Cited Authorities

OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 523 F.3d 387 (3d Cir. May 2, 2008) and appears in Appendix A to this Petition at App. 1a-42a. The decisions of the Board of Immigration Appeals ("BIA" or the "Board") and the Immigration Judge are not officially reported and appear in Appendix A to this Petition at App. 44a-51a and App. 52a-61a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 2008, and a timely petition for rehearing with a suggestion for rehearing *en banc* was denied on July 17, 2008. (App. 62a-63a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1227(a)(2)(A)(iii)

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

8 U.S.C. § 11001(a)(43)(M)(i)

> The term "aggravated felony" means—an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.

PRELMINARY STATEMENT

At issue in this case is the proper application of the categorical approach in determining whether an alien has been convicted of an offense in which the loss exceeds $10,000. The decision below by a deeply divided panel of the Third Circuit radically departs from the controlling categorical approach in aggravated felony determinations under the Act and literally permits an alien to be deported based upon conduct for which he was not convicted, contrary to the principles established by this Court in *Shepard v. United States*, 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990) limiting consideration under sentencing enhancements to what was clearly established in the adjudication of guilt. Furthermore, the decision below reaches this result by jettisoning the categorical approach based upon a misreading of the plain language of the Act requiring a person to have been convicted of the aggravated felony at issue, a result fundamentally at odds with recent decisions of this Court applying the categorical approach. *See*, *e.g.*, *United States v. Gino Rodriquez*, 128 S. Ct. 1783 (May 19, 2008) and *Begay v. United States*, 128 S. Ct. 1581 (April 16, 2008). In this connection, moreover, the decision below runs directly counter to the structure of the aggravated felony definitions enacted by Congress and creates an entirely new standard of "tethering" loss to conviction, a novel approach entirely divorced from the statutory language, which requires the alien to have been convicted of the loss.

The decision below creates a widening split among the Circuits on this issue. Indeed, as the decision itself expressly acknowledged, under controlling precedent in the Second Circuit, where Mr. Nijhawan's conviction occurred, he was not convicted of an aggravated felony. *See Dulal-Whiteway v. Department of Homeland Security*, 501 F.3d 116 (2d Cir. 2007). Similarly, the recent Ninth Circuit decision in *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir., July 1, 2008) would preclude treatment of the Petitioner's conviction as an aggravated felony under Section 101(a)(43)(M)(i) of the Act, as would the Eleventh Circuit decision in *Obasohan v. U.S. Att'y Gen*, 479 F.3d 785, 788 (11ith Cir. 2007), while the decisions of the Fifth Circuit in *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008) and the First Circuit in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006) agree with the panel majority below.

This pronounced split among the Circuits not only creates divergent rules on imposing the harsh penalty of deportation, but also undermines the constitutional requirement of a uniform rule for naturalization mandated by U.S. Const. Art. I, § 8, Cl. 4. Thus a permanent resident convicted of an aggravated felony on or after November 29, 1990 can never establish good moral character for naturalization. *See* 8 U.S.C. § 1101(f)(8). Yet, under the Circuit split, aliens with convictions such as that at issue here would be eligible for naturalization in the Second, Ninth and Eleventh Circuits but not in the First, Third and Fifth, creating precisely the non-uniform rules on naturalization that the Framers sought to avoid. Finally, this recognized Circuit split on an aggravated felony definition is certainly on par with Circuit splits over the meaning of

aggravated felony that led to the grant of certiorari in *Lopez v. Gonzales*, 549 U.S. 47 (2006) and *Leocal v. Ashcroft*, 543 U.S. 1 (2004),

In addition, the decision below overlooks the longstanding rule of lenity or narrow construction dating back to *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) and most recently reaffirmed by this Court in *Leocal*, 543 U.S at 12 n.8 by which any ambiguity in a deportation provision is to be resolved in the alien's favor given the harsh consequences of removal. Both the persuasive dissent below and well-reasoned decisions of other Circuits agreeing with the dissent make abundantly clear that at the very least such an ambiguity exists. The error in not applying this rule is underscored by the fact that, while the dissent below, following the plain language of the Act, establishes clear rules for the prompt resolution of aggravated felony issues in the Immigration Courts, the majority decision writes a prescription for chaos. Already overburdened Immigration Judges will effectively be forced to retry criminal cases in order to render the factual determinations required under the majority opinion, leaving future appellate panels, already beset with bulging immigration dockets, to define and refine the undefined "tethering" standard set by the decision below but not adopted by Congress.

STATEMENT OF THE CASE

Mr. Nijhawan has lived in this country for over two decades raising a family and working as an accountant with his sole criminal record the conviction involved in this case.

A. *Mr. Nijhawan's Life In The United States*

Mr. Nijhawan was born in India on January 12, 1959 and immigrated to this country as a permanent resident in 1985. He studied accounting and became a licensed CPA. His wife earned a masters degree in nutrition and home economics and has been enrolled in a special education teaching certificate program. The couple has two United States citizen sons, both born in this country. His friends have described him as generous and family oriented.

B. *The Criminal Case*

The criminal conviction underlying removal proceedings arose from Mr. Nijhawan's employment by Allied Deals, Inc. ("Allied"). Following indictment and a multi-defendant trial, a jury in the United States District Court for the Southern District of New York returned a guilty verdict convicting Mr. Nijhawan of Counts One and Thirty of the Indictment. Count One under 18 U.S.C. § 371 charged a conspiracy to violate 18 U.S.C. § 1344, 18 U.S.C. § 1341 and 18 U.S.C. § 1343. Count 30 alleged a conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). In charging the jury, the District Court repeatedly instructed that no finding of loss or amount laundered was necessary

for a guilty verdict. The government never requested a special verdict on amount of loss or amount laundered, while Mr. Nijhawan's request for such a verdict was refused. The jury returned only a general verdict of guilty. As the evidence below confirmed and the government conceded, Mr. Nijhawan himself received literally nothing from the loan schemes in which Allied was engaged.

Under the applicable regime for sentencing determinations established by the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") § 1B1.3, Application Notes 1-2, the District Court was required to fix the controlling guideline level by determining the amount of loss for all relevant conduct, not just that for which Mr. Nijhawan was himself convicted, and do so under a preponderance of the evidence standard. *United States v. Nathan*, 188 F.3d 190, 204 (3d Cir. 1999) (burden of proof for loss at sentencing is preponderance of the evidence). To resolve disputed issues at sentencing, including what was then a pending challenge to the Sentencing Guidelines themselves that would result in *Booker v. United States*, 543 U.S. 220 (2005), Mr. Nijhawan agreed with the government to a Sentencing Guidelines level of 38, based upon a total loss in excess of $100 million for sentencing purposes in order to obtain the right to seek a downward departure of up to 16 levels, putting his sentencing range at 41 to 51 months. In addition, he had to give up the right to appeal his conviction and sentence including raising any *Booker* issue on such an appeal.

At the same time, however, Mr. Nijhawan made clear, with both the government and District Court concurring, that this agreement for sentencing purposes should not be considered dispositive on any aggravated felony issue under the Act. At sentencing defense counsel advised the District Court that, despite the stipulation for sentencing purposes, Mr. Nijhawan was "looking to reserve on the issue of dollar amounts for another day," in what the District Court expressly recognized would be "another forum." Defense counsel urged that the total loss for sentencing purposes "overstates the seriousness relative to this defendant. And he would like to reserve the right to argue his responsibility for a total dollar figure in the event he finds himself before an immigration tribunal on that definition of so-called aggravated felony." Likewise, in fixing loss and ordering restitution for sentencing purposes in the amount of $683 million jointly and severally, the District Court held and the government *expressly* agreed that this was not a determination that Mr. Nijhawan had caused a loss in excess of $10,000:

> [DEFENSE COUNSEL]: . . . That's the entire scheme issue, joint and several liability, that any defendant could be held in effect responsible for all other defendants. *That's not a finding of over $10,000 specific to this defendant.*
>
> THE COURT: I think that's right. Do you agree with that [Assistant United States Attorney ("AUSA")]?
>
> [AUSA]: Yeah, I think it's right Your Honor, just the loss.

In passing sentence the District Court acknowledged that no finding for sentencing purposes constituted a finding that Mr. Nijhawan had caused a loss greater than $10,000. Furthermore, the District Court recognized this case to have been a "tragic affair" and observed that ". . . I don't believe I've encountered a defendant who's being sentenced who appears to me more equipped, I guess morally and in other ways, to conclude this sorry affair and to make the most of what lies ahead of [him]." Given the totality of all these circumstances, the District Court granted downward departure and sentenced Mr. Nijhawan to 41 months imprisonment, at the bottom of the applicable guideline.

C. *Administrative Proceedings*

Removal proceedings commenced against Mr. Nijhawan while he was serving his sentence at Allenwood Low Security Correctional Institution. The Department of Homeland Security charged him as removable under (1) 8 U.S.C. § 1101(a)(43)(D) for conviction of a money laundering offense in violation of 18 U.S.C. § 1956(h) in which the amount laundered exceeded $10,000 and (2) 8 U.S.C. § 1101(a)(43)(M)(i) for conviction of a crime involving fraud or deceit in which the loss to the victim or victims exceeded $10,000. The Immigration Judge sustained both charges in a series of decisions culminating in an order of removal entered February 22, 2006. (App. 52a—61a). On appeal, the Board handed down a single member non-precedent decision dated August 8, 2006 that rested removability

solely upon the Section 101(a)(43)(M)(i) charge.[1] (App. 44a—51a). On the issue of loss, the BIA recognized that loss was not established by the guilty verdict and, instead, decided to ". . . look beyond the finding of guilty to determine the amount of loss in this case." (App. 49a). Accordingly, the Board made its own independent factual finding of loss based upon what had happened at sentencing, upheld the Section 101(a)(43)(M)(i) charge on that basis and declined to reach the Section 101(a)(43)(D) charge. (App. 49a—51a).

D. *The Court of Appeals Decisions*

A timely petition for review was filed with the Third Circuit on August 31, 2006.[2] After briefing and oral argument on December 11, 2007, a divided panel of the Third Circuit issued majority and dissenting opinions now officially reported at 523 F.3d 387 (3d Cir., May 2, 2008). (App. 1a—43a). While expressly acknowledging contrary authority from other circuits including most recently *Dulal-Whiteway* from the Second Circuit, where Mr. Nijhawan's conviction had occurred, Judge Rendell's majority opinion for herself and District Judge

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1. Under 8 C.F.R. § 1003.1(g) only decisions so designated are considered precedential. *See*, *e.g.*, *Matter of Yanez*, Int. Dec. 3473 n.8 (BIA 2002) (en banc) holding that reliance cannot be placed upon non-precedent BIA decisions.

2. Following completion of Mr. Nijhawan's criminal sentence and his transfer to the custody of United States Immigration & Customs Enforcement, the Third Circuit issued a stay of removal on October 4, 2007 that was continued on October 22, 2007 pending disposition of the review petition and further order of the Court.

Irenas, sitting by designation, jettisoned the categorical approach for determining whether Mr. Nijhawan had been convicted of an offense that involves fraud or deceit in which the loss exceeded $10,000. (App. 9a). The majority reached this result by reading the "in which" language in Section 101(a)(43)(M)(i) as taking Mr. Nijhawan's case outside the categorical approach demanded by *Shepard* and *Taylor*, which require such determinations to be made in the adjudication of guilt. (App. 9a). In this connection, the majority viewed the loss requirement as the same kind of "qualifier" as those in other aggravated felony definitions that make an offense an aggravated felony only if the offense is one "for which" a sentence of one year or more has been imposed. Concluding that loss did not have to be established in the actual adjudication of guilt, the panel majority held instead that loss need only be sufficiently "tethered" to the conviction and then proceeded to hold that such necessary "tethering" had been shown here. (App. 16a—17a). Noting the conflict among the Circuits on the loss issue, with both the Second and Ninth Circuits in the opposite corner, the majority found support in the decision by the First Circuit in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006). The majority also expressed policy concerns that the Petitioner's position would result in far fewer deportations, while dismissing any concern that the rule adopted would result in insurmountable practical difficulties. (App. 6a, 9a)[3]

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3. The panel majority placed no reliance upon the recent decision by the Board in *Matter of Babaisakov*, 24 I & N Dec. 306 (BIA 2007) departing from the categorical approach with respect to loss under Section 101(a)(43)(M)(i), a decision that like the panel majority suffered from the same disregard for the plain language of the Act and the rule of lenity.

Judge Stapleton's dissent began by noting that the Third Circuit in line with *Shepard* and *Taylor* as well as other Courts of Appeals had presumptively applied the categorical and modified categorical approach to aggravated felony determinations. (App. 28a—29a). This approach, the dissent recognized, begins with what has become known as the "formal categorical approach" involving a comparison between the statute of conviction and the removal provision and if that does not provide an answer, moves to what all Courts of Appeals describe as a "modified categorical approach." (App. 28a—29a). In line with *Shepard* and *Taylor*, the dissent concluded, the modified categorical approach limits analysis to the record of conviction "in order to determine the facts upon which [an alien's] prior conviction actually and necessarily rested." (App. 28a). Such an approach, the dissent concluded, rested squarely upon the plain statutory language, just as with the sentence enhancement provisions in both *Shepard* and *Taylor*, all of which require the person at issue to have been *convicted* of the offense: "The plain language of the [Act], like [the sentence enhancement] mandates that the alien was 'convicted' of the prior offense designated in the [Act] as an 'aggravated felony.' It is not sufficient for the BIA to independently conclude that the alien 'has committed' the prior offense." (App. 29a).

The dissent concluded that the approach adopted by the Second, Ninth and the Eleventh Circuits represented the better approach in contrast to that followed by the First Circuit in *Conteh*. The dissent took issue with *Conteh* as holding that the "conviction requirement applies to the loss inquiry in some respects but does not apply to it in other respects. Certainly no such line appears in [Section 101(a)(43)(M)(i)]." (App. 31a n15). Likewise, the dissent

pointed out the flaw in *Conteh*'s reliance upon restitution orders, which were based upon a preponderance of the evidence and rather than the clear and convincing standard required for removal orders. (App. 31a n.15). The dissent also recognized that the modified categorical approach rested upon fairness concerns and the practical difficulties in having the Immigration Courts retry criminal cases, noting that ". . . if the loss requirement is not subject to the conviction requirement, why limit the evidentiary net to the prior record of conviction at all? Absent the conviction requirement, the standards become arbitrary." (App. 31a). The dissent held that there was simply no textual support for the panel majority's "tethered" test and found that this new test was not defined here beyond holding it satisfied:

> The holding provides no guidance to the Immigration Judges who will apply [the Act]. Under the standard the Court adopts, for example, would a future IJ be permitted to conclude (under its clear and convincing evidence standard) that the $10,000 loss is established, and is "tethered" to the alien's conviction, by looking to facts in a pre-sentence investigation report . . . or to facts in a police report, or to select evidence presented in the criminal trial, or to new testimony or documents introduced at the removal hearing? The task of defining the "tethered" inquiry will fall to future panels of this court, and with the loss element divorced from the conviction requirement, the task will not be an easy one.

(App. 31a n.15).

Furthermore, the dissent recognized that this case would be the first time an alien would be deported in the Third Circuit for an offense not determined to be an aggravated felony in the adjudication of guilt. (App. 37a). Addressing the conviction record in Mr. Nijhawan's criminal case, the dissent pointed out that the jury was not charged to find any loss and that despite the allegations in the indictment, the "jury's verdict does not establish that petitioner was convicted by it of conspiracy to commit fraud occasioning any particular amount of loss." (App. 35a-36a). With respect to the restitution order, the dissent held that the order suffered from the same deficiency as in *Dulal-Whiteway* since such orders are based upon a preponderance of the evidence and, under the Sentencing Guidelines, encompass all "relevant conduct," not just that for which the defendant was actually convicted. (App. 35a—36a). Similarly, the dissent rejected reliance upon the sentencing stipulation for much the same reasons because

> [t]he stipulation with respect to the application of the Sentencing Guidelines is not the equivalent of a plea or plea agreement admitting to an element of the offense of conviction. This stipulation came both after petitioner's conviction and in the context of a sentencing regime that requires consideration of losses from relevant as well as convicted conduct.

(App. 36a). While acknowledging that retention of the convicted conduct requirement would produce fewer deportations, the dissent nevertheless held its construction of the Act appeared to be consistent with

Congressional intent reflected in the plain language of the Act and was subject to correction by the legislature. (App. 36a-37a).

Mr. Nijhawan filed a timely petition for rehearing with a suggestion for rehearing *en banc*, which was denied on July 17, 2008 over the dissent of Judge Ambro, who would have granted rehearing. (App. 62a—63a). By order dated July 31, 2008, the Court granted the Petitioner's motion to stay the mandate.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the decision below not only conflicts with this Court's precedent on statutory construction but also creates a split among the circuits. *See*, *e.g.*, *Lugar v. Edmonson* Oil Co., 457 U.S. 922, 926 (1982) (certiorari granted where opinion below "appears to be inconsistent with prior decisions of this Court."); Supreme Court Rule 10 (conflict among the circuits a basis for certiorari).

A. *A Recognized Circuit Split Exists*

The Third Circuit decision directly conflicts with controlling precedent in the Second Circuit, where Mr. Nijhawan's conviction occurred, as the decision below expressly recognizes. Thus *Dulal-Whiteway*, 501 F.3d at 128 persuasively holds, rejecting reliance upon a sentencing determination and restitution order to establish removability under 8 U.S.C. § 1101(a)(43)(M)(i) that "[f]or conviction following a trial, the BIA may rely only upon facts actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish

the elements of the offense, as indicated by a charging document or jury instructions." *See also Gertsenshteyn v. United States* Department of Justice, 2008 U.S. App. LEXIS 20331 (2d Cir. Sept. 25, 2008), which reaffirms the categorical approach employed in *Dulal-Whiteway*. Similarly, *Obasohan v. U.S. Att'y Gen*, 479 F.3d 785, 788 (11ith Cir. 2007) rejects reliance upon sentencing determinations as does *Kawashima*[4], which requires loss to be an element of the offense. By contrast the majority opinions in *Conteh* and *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008), albeit handed down over strong dissents, allow sentencing determinations to establish loss and thus fall in line with the Third Circuit.

In short, there is a clear circuit split over the controlling rule for imposing what this Court has repeatedly recognized to be a harsh punishment. *See e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("[d]eportation is always a harsh measure"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (deportation is a "drastic measure" where the "stakes are considerable for the individual"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living"). Indeed, the severity of harm from deportation rests upon concerns that literally date back to the founding era with no less an authority than James Madison

4. In the Seventh Circuit, *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008) appears to hold that loss under Section 101(a)(43)(M)(i) must be an element of the offense. *But see Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), which departs from the categorical approach on whether an offense constitutes a crime involving moral turpitude.

expressly acknowledging the draconian character of deportation ". . . [I]f a banishment of this sort be not a punishment and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." James Madison, "Report on the Alien and Sedition Acts," *Writings* at 623 (Library of America 1999, Jack N. Rakove, ed.). Furthermore, such a split encourages undesirable forum shopping, especially since the government has the ultimate power to transfer aliens facing removal to detention centers in circuits where the law favors the government and yields such anomalies as this case, where the issue is literally a matter of a few miles between the Second Circuit, where the conviction occurred, and the Third Circuit, where removal proceedings were held. *See*, *e.g.*, *Rosendo-Ramirez v. INS*, 32 F.3d 1085 (7th Cir. 1994), which notes the government's upper hand on forum choice.[5] In this connection, the circuit split in this case contravenes the Founders' intent embodied in U.S. Const. Art. I, § 8, Cl. 4 to establish a uniform rule of naturalization, for aliens in the Second, Ninth and Eleventh Circuits would encounter different rules for determining whether the aggravated felony bar to good moral character existed than would aliens in the First, Third, and Fifth. *See*, *e.g.*, *Graham v. Richardson*, 403 U.S. 365, 382

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5. This would be especially true for aliens subject to mandatory detention under 8 U.S.C. § 1226(c), as would be the case for all aliens facing removal for conviction of an aggravated felony who had been imprisoned after mandatory detention became effective. *See Demore v. Kim*, 538 U.S. 510 (2003); *Kyei v. INS*, 65 F.3d 279, 284 (2d Cir. 1994) (Court expresses concern about apparent government policy to deny change of venue to alien's residence where alien no longer detained in remote detention facility).

(1971) (holding cited clause imposes an "explicit constitutional requirement" on naturalization eligibility). Finally, this recognized Circuit split is certainly as pronounced as those in *Lopez* and *Leocal*, where certiorari was granted.

B. *The Decision Below Contravenes Plain Statutory Language*

The decision below contravenes the plain language of the Act in tossing aside the categorical approach. As this Court recently reiterated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 128 S. Ct. 815, 818 (2007), this approach has been the uniformly controlling method for determining whether a particular offense falls within a removable category and under what has been referred to as the "modified categorical approach," which permits reference to materials beyond the statute but limits consideration, at most, to what was necessarily established in the adjudication of guilt. *See Shepard v. United States*, 544 U.S. 13, 21-22 (2005) (reversing the First Circuit on the issue of whether the defendant had been convicted of burglary of a building, rejecting that court's reliance upon the fact that the defendant at his federal sentencing had not "seriously questioned" police report findings that he broken into a building, and holding that the categorical approach allows offenses to fall within a particular category, based only upon ". . . conclusive records *made or used in adjudicating guilt*.") (emphasis supplied).

In jettisoning this controlling approach, the majority below relied entirely on the "in which" language in Section 101(a)(43)(M)(i) and ignored the plain language

of the Act as a whole and read the statutory language contrary to its plain meaning and precise English. That flawed approach contravenes this Court's precedent on statutory construction. *See*, *e.g.*, *Lopez v. Gonzales*, 549 U.S. 1 (2006); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (plain meaning controls in construction of the Act). As Judge Stapleton's dissent forcefully recognized, (App. 33a) the plain statutory language requires that an alien have been *convicted* of an aggravated felony not that he subsequently be found to have committed one[6]. Thus 8 U.S.C. § 1227(a)(2)(A)(iii) expressly provides that only ". . . an alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis supplied)[7]. *See also Dulal-Whiteway*, *Obasohan*, 479 F.3d at 788 (plain language of Act requires conviction of aggravated felony); *Conteh*, 461 F.3d at 66 (Hug, J., dissenting) (aggravated felony requires conviction). In short, by requiring conviction, Congress has imposed the requirement of proof beyond a reasonable doubt, which effectively answers the argument by the majority below that the dissent would

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6. Ironically, the majority begins with the line that Mr. Nijhawan appeals from a determination by the Board that "he had *committed* an aggravated felony. . . ." (App. 2a) (emphasis supplied).

7. Congress certainly knew how to attach adverse immigration consequences to committed criminal conduct but did not do so here. *Compare*, *e.g.*, 8 U.S.C. § 1101(a)(13)(C)(v)(returning permanent resident alien who has committed specified offenses deemed applicant for admission); 8 U.S.C. § 1182(a)(2) (alien who admits commission of crime involving moral turpitude is inadmissible); 8 U.S.C. § 1182(a)(2)(D) (alien who has engaged in prostitution within specified period is inadmissible).

improperly raise the burden of proof. 523 F.3d at 399. *See also Gertsenshteyn*, 2008 U.S. App. LEXIS 20331 at 22 (the Act "premises removability not on what an alien has done, or may have done, or is likely to do in the future (tempting as it may be to consider those factors), but on what he or she has been *formally convicted* of in a court of law.") (emphasis in original).

Furthermore, the plain language of the Act defines aggravated felony here in such a way as to leave no doubt that the *entire* definition must be satisfied by conviction. Thus Section 101(a)(43)(M)(i) expressly provides that "aggravated felony" includes "an offense *that* . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. . . ." (emphasis supplied). *See*, *e.g.*, William Strunk and E.B. White, *The Elements of Style* at 59 (4th Ed. 2000) (relative pronoun "that" introduces restrictive clause). Given the use of the relative pronoun "that" to introduce a restrictive clause, ("involves fraud or deceit in which the loss . . . exceeds $10,000"), the plain meaning of this provision is that not only fraud or deceit but also a loss greater than $10,000 must be established by conviction. While the decision below places dispositive weight on the "in which" language to reject the categorical approach, the majority's approach rips this phrase out of the larger context of a restrictive clause beginning with the word "that" contrary to the plain language of the statute, thereby rendering "that" a nullity and violating the settled rule that every word in a statute must be given meaning. *See*, *e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Furthermore, the "in which" language reinforces the conclusion that the loss must be inside or embodied in the conviction itself, for that would be the plain meaning of "in," especially as used in a restrictive clause beginning with "that." This reading of the statute would be consistent with the admittedly sparse legislative history of Section 101(a)(43)(M)(i), which was included in the Act as part of the Immigration and Nationality Technical Corrections Act of 1994 ("INCTA"), Pub. L. No. 103-416, 108 Stat. 4305. *See* 140 Cong. Rec. H11293 (daily ed. October 7, 1994) (aggravated felony definition expanded to include only "specified" white collar crimes) (emphasis supplied). By contrast, when Congress actually intended to use a qualifier following conviction, where the categorical approach would have no application, the legislature employed the "for which" language in such provisions as Section 101(a)(43(G) (a theft offense "for which the term of imprisonment [is] at least one year"). Significantly, Congress did not provide comparable language in Section 101(a)(43)(M)(i) that an alien be convicted of an offense involving fraud or deceit for which restitution in an amount exceeding $10,000 was ordered at sentencing or an offense for which a loss exceeding $10,000 was found to be "tethered" at sentencing, to borrow the word employed by the panel majority. In any event, the absence of "for which" here would seem to represent a classic example of the controlling principle of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Cardoza-Fonseca*, 480 U.S. 432.

Two recent decisions by this Court, one handed down just before and the other just after the decision below, highlight the critical difference in application of the categorical approach. In *Begay v. United States*, 128 S. Ct. 1581 (U.S. April 16, 2008) the issue presented was whether the defendant's prior state driving under the influence convictions constituted violent felonies under the sentence enhancement provision in 18 U.S.C. § 924(e)(2)(B)(ii), which defines violent felony to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Even though this sentence enhancement specifically referred to "conduct," this Court nevertheless applied the categorical approach to resolution of the issue. 128 S. Ct. at 1587. *See also James v. United States*, 127 S. Ct. 1586, 1593 (U.S. 2007) (categorical approach used to determine whether state burglary statute falls within "conduct" clause cited above). By contrast, in *United States v. Rodriguez*, 128 S. Ct. 1783 (U.S. May 19, 2008), this Court rejected the categorical approach where the issue presented was the term of imprisonment. There the defendant faced a sentence enhancement under 18 U.S.C. § 924(e) for a previous conviction of a "serious drug offense," which was defined to require a maximum sentence of ten years and in holding that state sentencing enhancements could be considered to meet the 10 year requirement, the Court rejected application of the categorical approach. In short, this Court's precedent, in line with the dissent below and the plain language of the Act, recognizes a sharp distinction between applying the categorical approach to determine what was established by conviction and in abandoning the approach when the issue is the sentence imposed.

Furthermore, as both the dissent here and in *Conteh* persuasively recognize, allowance of restitution orders to establish loss would radically alter the burden of proof, for those orders are based on a preponderance of the evidence and not the clear and convincing standard required for removability, even assuming loss under Section 101(a)(43)(M)(i) were a factual matter. *See*, *e.g.*, *In re Braen*, 900 F.2d 621, 624 (3d Cir.), *cert. denied*, 498 U.S. 1066 (1990) (recognizing that "disparate burdens of proof foreclose application of the issue preclusion doctrine" and citing with approval the *Restatement (Second) of Judgment* comment that clear and convincing evidence is a sufficiently higher standard than preponderance so as to prevent a finding made by preponderance to effect collateral estoppel in a case where proof by clear and convincing evidence is required*); Matter of Carrubba*, 11 I & N Dec. 914 (BIA 1966) (recognizing that clear and convincing is a higher burden of proof than proof by preponderance). In short, the panel majority and not the dissent would radically alter the burden of proof for cases such as this.

In contrast to the panel majority, the dissent sensibly establishes a clear, bright line test grounded in the plain language of the statute, one easy to administer and apply, thus serving to promote the efficient administration of the already overburdened Immigration Courts[8]. The

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8. Some measure of this burden may be seen in the fact that for fiscal year 2007 Immigration Courts nationwide received 334,607 cases and that 278,137 of these were removal proceedings. U.S. Department of Justice: Executive Office for Judicial Review, *FY 2007 Statistical Yearbook* at B4 (April 2008). Similarly, for each year from 2003 to 2007, immigration appeals

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panel majority establishes an uncertain "tethering standard" with no statutory foundation, thus dropping the Immigration Courts into uncharted territory to retry criminal cases, with later appellate panels ultimately burdened to further define and refine a test that Congress itself has not adopted. *Compare Gertsenshteyn*, 2008 U.S. App. LEXIS 20331 at 12, which notes prior Board precedent, *Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 335 (BIA 1996), holding that when deportability is based upon conviction the categorical approach is the only "workable approach." Furthermore, as both *Dulal-Whiteway* and the dissent recognize, the Immigration Courts are ill equipped to shoulder this added burden. *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (declining to apply exclusionary rule in deportation cases because of the unfamiliarity of Immigration Judges and practitioners with criminal law principles).

To the extent that application of the plain language of the Act may arguably result in fewer deportations this is a policy matter for Congress to address, should such legislative action be deemed necessary in the first place, rather than for a Court of Appeals to create a "tethering test" not enacted by Congress. *See*, *e.g.*, *Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006) (even if result troubling court must give effect to plain language of the statute, with

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made up the vast majority of all agency appeals to the federal circuits. Admin. Office of U.S. Courts *Judicial Business 2007*, Table B-33, U.S. Courts of Appeals, Source of Appeals and Original Proceedings Commenced by Circuit for the 12-Month Periods Ending September 30, 2003 Through 2007 at 98.

correction to come from Congress). Furthermore, adherence to the plain language of the Act would simply underscore the government's need to act in a more coordinated fashion to secure removal of aliens by insisting upon loss amounts in plea agreements or in guilty verdicts, rather than leaving those issues to be sorted out in Immigration Court or burdening this Court and other Circuit courts with refining and applying non-statutory "tethering" tests. This would hardly seem to place an insurmountable burden upon the government, which has recently extolled just such coordinated efforts between criminal and immigration enforcement. *See* "85 Sentenced for criminal offenses in one day following a coordinated ICE operation in Iowa. *http://www.ice.gov/pi/news/newsreleases/articles/080520waterloo.htm*. (May 20, 2008).

C. *The Decision Below Overlooked Lenity*

The Court of Appeals also failed to apply the rule of lenity or narrow construction. This controlling rule of construction has both deep roots and modern relevance in immigration law going back to *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948) and requires deportation provisions to be narrowly construed so as to give the alien as much protection as possible. Thus in *Tan* this Court rejected an administrative interpretation of a deportation provision, despite recognizing logical support for that view and unanimously resolved the ambiguity in the alien's favor, holding with emphasis upon the severe penalty represented by deportation:

> We resolve the doubts in favor of that construction because deportation is a drastic

> measure and at times the equivalent of banishment or exile. (citation omitted). It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, *we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.*

(Emphasis supplied). *See also Leocal v. Ashcroft*, 543 U.S. 1, 12n.8 (2004) (recognizing rule as basis for decision); *INS v. St. Cyr*, 533 U.S. 201 (2001) (reaffirming rule); *Cardoza-Fonseca*, 480 U.S. at, 449 (recognizes the "special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien);3 C. Gordon, S. Mailman, S. Yale-Loehr, *Immigration Law and Procedure* § 71.01 [6] [b] (deportation statutes must be "strictly construed" and "must be limited to the narrowest compass reasonably extracted from their language"). The grounding of this rule in the harm to the alien has particular relevance here, for, as the Third Circuit recognized in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), deportation for conviction of an aggravated felony constitutes a sentence of life-time banishment. *See also Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (deportation a sanction which in severity surpasses all but the most Draconian).

Here both Judge Stapleton's dissent, the persuasive dissents in *Conteh* and *Arguelles-Olivares* and the decisions by the Second, Ninth and Eleventh Circuits validate Mr. Nijhawan's position. Accordingly, a clearer case for application of the rule of narrow construction or lenity could hardly be imagined despite regrettably immoderate language in the panel majority opinion (App. 9a) that no reasonable person could reach the result reached by Judge Stapleton. In the final analysis, given the numbers involved in the sentencing determination, the result reached by the panel majority would seem to provide a text book example of the sage observation by Justice Holmes dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904) that:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 2, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-3948

MANOJ NIJHAWAN,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

Petition for Review of an Order of the United States Department of Justice Board of Immigration Appeals (BIA No. A39 075 734) Immigration Judge: Walter A. Durling

Argued December 11, 2007

Before: RENDELL and STAPLETON, *Circuit Judges*, and IRENAS*, *District Judge.*

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* Honorable Joseph E. Irenas, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

Appendix A

(Filed May 2, 2008)

OPINION OF THE COURT

RENDELL, *Circuit Judge.*

Manoj Nijhawan appeals from the determination of the Board of Immigration Appeals ("BIA") that he had committed an aggravated felony and was thus removable under 8 U.S.C. § 1101(a)(43)(M)(i) because his conspiracy conviction constituted an offense involving fraud or deceit in which the loss to the victims exceeded $10,000. Nijhawan challenges both aspects of this finding, the "involving fraud" prong as well as the "loss" aspect. As to the latter, he contends that, in order to satisfy the qualifying language, the loss amount had to have been adjudicated as part of his conviction, and was not. We reject both challenges and will proceed to address each in turn.

The indictment involved a scheme by individuals who, it was alleged, set out to deprive their victims, major banks, of "hundreds of millions of dollars." A.R. 229. Through a series of misrepresentations, the banks were induced to make a number of loans to the defendants' companies, among them Allied Deals, Inc. Nijhawan, who was the Deputy General Manager of Allied Deals, Inc., was listed in Count 1, the overall conspiracy count that contained the general loss allegation as to the entire fraud scheme and involved conspiracy to commit bank fraud, mail fraud, and wire fraud in violation of 18 U.S.C. § 371, and in Count 30,

which alleged conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). The remaining counts were fraud counts implicating one or more of the other defendants in specific fraudulent loans ranging from $163,441 to $2,568,526. The case was tried before a jury, which convicted Nijhawan of all of the counts against him in the indictment. The jury was not asked to, nor did it, determine the amount of the loss attributable to any defendant.

Nijhawan entered into a stipulation for sentencing purposes in which he agreed that, "because the loss from the offense exceeds $100 million, the offense level is increased 26 levels." A.R. 264. In entering the judgment of conviction, the trial judge filled in the space for "loss" with the amount "$683,632,800.23." A.R. 281. The form footnoted the fact that "findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18." A.R. 281. Nijhawan was sentenced to 41 months of imprisonment and ordered to pay restitution in the amount of $683,632,800.23. No appeal was taken.

While Nijhawan was serving his sentence, he was charged with removability under 8 U.S.C. § 1101(a)(43)(D) for conviction of a money laundering offense under 18 U.S.C. § 1956 for which the amount laundered exceeded $10,000 and under 8 U.S.C. § 1101(a)(43)(M)(i) for conviction of a crime involving fraud or deceit in which loss to the victims exceeded $10,000. The IJ sustained both charges, relying primarily on the § 1101(a)(43)(D) charge, and entered an order of removal on February 22, 2006.

On appeal, the BIA rested its decision solely on the 8 U.S.C. § 1101(a)(43)(M)(i) charge. A.R. 2 ("We will affirm the decision of the Immigration Judge insofar as he found the respondent removable as an alien convicted of an aggravated felony as defined in sections 101(a)(43)(M)(i) and (U) of the Immigration and Nationality Act"). The BIA rejected Nijhawan's argument that fraud in the Immigration and Nationality Act ("INA") should be congruent with the common law meaning of the term. As to the loss determination, the BIA agreed that loss was not a necessary element of the offense for which he was convicted, noting that the loss requirement "was used as a qualifier, in a way similar to length of sentence provisions in other aggravated felony subsections." A.R. 4 (citing *Singh v. Ashcroft,* 383 F.3d 144, 161 (3d Cir.2004)). It reasoned that, although the jury had not found a specific dollar amount in rendering its guilty verdict, the IJ could properly find loss based on the stipulation of facts for sentencing and the judgment of conviction stating that the loss involved is $683,632,800.23, jointly and severally. A.R. 4-5. The BIA held that the stipulation, judgment of conviction, and restitution order were "sufficient to establish that the respondent's conviction renders him removable." A.R. 5.

Nijhawan timely filed a petition for review, appealing the BIA's decision.[1] On appeal, Nijhawan argues

1. After serving his sentence, Nijhawan risked being immediately removed from the United States by United States Immigration and Customs Enforcement. He, therefore, filed a motion for a stay of removal, which we granted pending the resolution of the present appeal.

(1) that his offense of conviction does not involve fraud or deceit as those terms are used in the INA; and (2) that his conviction did not establish that loss to his victims exceeded $10,000.

1. Did the offense "involve fraud"

Nijhawan was convicted of conspiracy to commit fraud in violation of 18 U.S.C. § 371. The INA provision under which Nijhawan was charged with removability provides:

> (43) The term "aggravated felony" means—
>
> . . .
>
> (M) an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.

8 U.S.C. § 1101(a)(43)(M)(i). Nijhawan contends that the "fraud" and "deceit" in this provision should be given their common law meaning, which requires actual reliance upon allegedly fraudulent statements made and harm from that reliance. Because actual reliance and harm from reliance are not necessary legal elements of the federal fraud statutes under which he was convicted, *Neder v. United States,* 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), his conviction, Nijhawan urges, was not an aggravated felony. We can easily dispense with this argument.

Appendix A

In *Valansi v. Ashcroft*, we examined the very section of the INA at issue here and interpreted the language broadly. 278 F.3d 203 (3d Cir.2002). We said:

> we determine whether the phrase "offense that-involves fraud or deceit" has a plain meaning. The word "involves" means "to have within or as part of itself" or "to require as a necessary accompaniment." *Webster's Third New International Dictionary* at 1191. Thus, an offense that "involves fraud or deceit" is most naturally interpreted as an offense that includes fraud or deceit as a necessary component or element. *It does not require, however, that the elements of the offense be coextensive with the crime of fraud.*

Id. at 209-10 (emphasis added); *see also Bobb v. Att'y Gen.*, 458 F.3d 213, 218 (3d Cir.2006) ("[W]e have held that subsection (M)(i) covers all offenses that have as an essential element an intent to defraud or deceive."); *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 222 (3d Cir.2004) ("Subsection (M)(i) has a general application-the gamut of state and federal crimes involving fraud and deceit causing losses over $10,000.").

Other circuits have followed our lead. *See Conteh v. Gonzales*, 461 F.3d 45, 59 (1st Cir.2006) ("We agree with the Third Circuit. . . . An offense with a scienter element of either intent to defraud or intent to deceive categorically qualifies as an offense involving fraud or deceit."); *James v. Gonzales*, 464 F.3d 505, 508 (5th

Cir.2006) (noting that "[w]e recognize that '[w]hether an offense "involves" fraud is a broader question than whether it constitutes fraud' " and concluding that "[t]he plain language of § 1344 . . . provides that a violation of either subsection necessarily entails fraud or deceit").

Here, the criminal statutes under which Nijhawan was convicted require that fraud or false or fraudulent pretenses be employed (mail fraud, wire fraud, and bank fraud). They therefore "involve" fraud or deceit for the purposes of the INA. Clearly, Nijhawan's arguments to the contrary are foreclosed by our precedent.

2. Was Nijhawan convicted of a fraud "in which the loss to the victims exceeded $10,000"?

[2] Nijhawan was convicted of conspiracy to commit fraud and therefore is subject to removal under 8 U.S.C. § 1101(a)(43)(U), which provides that "an attempt or conspiracy to commit" another aggravated felony constitutes an aggravated felony. The precise aggravated felony provision at issue here defines an aggravated felony as an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i).

As we have noted above, the "involves fraud" language of this provision permits the range of actual offenses to be broader than common law fraud. The issue remains, however, whether the language "in which the loss to the victim or victims exceeds $10,000" requires that a jury have actually convicted defendant of a loss

in excess of $10,000, as Nijhawan contends, or permits resort to the prior criminal record in order to determine what loss was in fact occasioned by or attributable to the offense of conviction.

We conclude that the language of § 101(a)(43)(M)(i) does not require a jury to have determined that there was a loss in excess of $10,000. To read the "in which" language as requiring that what follows must have been proven as an element of the crime would bring about an absurd result. Clearly, the phrase is, as the BIA found, qualifying and does not constitute a provable element. For example, what if the language were "in which the victims were elderly" or "in which three or more banks suffered losses"? Would the facts of these qualifying phrases have to have been proven as part of the offense? We suggest not.

To hold to the contrary would essentially gut every deportability standard containing the "in which" or other analogous qualifying language,[2] for we cannot imagine

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2. 8 U.S.C. § 1101(a)(43)(M)(ii) (conviction for an offense "that is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000"); *see also id.* § 1101(a)(43)(D) ("an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000").

As we noted in *Singh,* analogous provisions include all subsections that limit convictions to those "for which the term

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previous convictions in which an aspect of the crime that is not an element has been proven by the jury. To hold to the contrary would impose a totally impractical standard.

Notwithstanding our belief that reasonable minds could not differ on this issue, we acknowledge that other courts of appeals, and, indeed, Judge Stapleton, have reached a contrary conclusion. They have done so based upon the very argument that Nijhawan makes here, namely that the *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and *Shepard v. United States,* 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), line of cases require it. We suggest that this reasoning is flawed. The "in which" qualifying language renders the analysis under § 10 1(a)(43)(M)(i) different from the approach in *Taylor* and *Shepard.* In fact, we have already so stated.

In *Singh v. Ashcroft,* Judge Becker explored the contours of the applicability of the *Taylor-Shepard* approach to the concept of "aggravated felony" in the INA. 383 F.3d 144 (3d Cir.2004). Both *Taylor* and

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of imprisonment is at least one year." *Id.* §§ 1101(a)(43)(F), (G), (J), (P), (R), & (S). Also relevant are subsections that exempt from the definition of aggravated felony "the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter." *Id.* §§ 1101(a)(43)(N) & (P).

Shepard involved the question of which court documents or records can be consulted to determine whether a prior conviction qualifies for a sentencing enhancement in a subsequent criminal proceeding.[3] These cases set forth what have become known as the "categorical" and "modified categorical" approaches to determining the crime of which the defendant was previously convicted. The categorical approach looks at the statute of conviction, comparing elements of the offense to the requirements of the enhancing provision. When the formal categorical approach of *Taylor* does not yield an answer, two different types of inquiry may be called into

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3. In *Taylor v. United States,* the Supreme Court held that an enhancement for a prior conviction for "burglary" under § 924(e) required that either the statutory definition substantially correspond to "generic" burglary or the record demonstrate that the jury necessarily found all of the elements of generic burglary in order to convict the defendant. 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

In *Shepard v. United States,* the issue was whether the defendant's prior plea of guilty to burglary, under a statute that included generic burglary as well as nongeneric burglary such as burglary of a boat or motor vehicle, was a conviction for the violent felony of generic burglary under the Armed Career Criminal Act. 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). The Supreme Court rejected the notion that police reports or complaint applications could be used to show that the defendant had necessarily pled to the qualifying type of burglary, ruling instead that the sentencing court must look only at the "statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16, 125 S.Ct. 1254.

play. Judge Becker reviewed our jurisprudence and reasoned as follows regarding the precise issue before us:

> Our jurisprudence in the aggravated felony area—twelve cases in all—is not a seamless web. In order to resolve the appeal we have found it necessary to analyze and synthesize this body of case law, and we do so at length. . . . As will appear, a pattern emerges, causing us to conclude that, while the formal categorical approach of *Taylor* presumptively applies in assessing whether an alien has been convicted of an aggravated felony, in some cases the language of the particular subsection of 8 U.S.C. § 1101(a)(43) at issue will *invite inquiry into the underlying facts of the case, and in some cases the disjunctive phrasing of the statute of conviction will similarly invite inquiry into the specifics of the conviction.*

Singh, 383 F.3d at 148 (emphasis added). Judge Becker thus correctly drew the crucial distinction between deportability language that, on the one hand, calls *Taylor* and *Shepard* into play, inviting inquiry into the specifics of the conviction, and, on the other, is essentially qualifying language not demanding a categorical analysis, but requiring, instead, inquiry into the underlying facts. Cases in which a court has recourse to the modified categorical approach generally involve "divisible" statutes, where the prior criminal offense,

by statute, includes a wide range of activity but the requisite enhancing provision-such as violent felony or aggravated felony-requires one or more particular elements that may or may not have been found as part of the conviction. The modified categorical approach entails scrutiny of the nature of the conviction itself and those elements that the jury necessarily found through an examination of judicial record evidence. If the jury did not necessarily find that element, the "conviction" will not fit within the enhanced category. *Taylor-Shepard* is thus implicated.

On the other hand, the instant enhancing provision is different. The language does not state "convicted of a $10,000 fraud." Rather, it reads, "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). As Judge Becker specifically stated, the provision before us here invites inquiry into "the underlying facts of the case." There is no issue here regarding which crime was committed by the petitioner under a divisible statute, in which event we would be limited to an examination of the "specifics of the conviction" and would employ the modified categorical approach of *Taylor* and *Shepard.*

Addressing the analysis required under the very provision at issue here, Judge Becker made clear that:

> [A] departure from the formal categorical approach seems warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue.

Appendix A

The qualifier "in which the loss to the victim or victims exceeds $10,000" in 8 U.S.C. § 1101(a)(43)(M)(i) is the prototypical example—it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue. This principle explains our holdings in *Nugent* and *Munroe.* Another example would be an enumerating statute specifying crimes "committed within the last two years." Such a statute could not be read to cover only crimes which have "within the last two years" as an element; instead a court would read "within the last two years" as a limiting provision on crimes that would otherwise qualify.

In contrast, cases interpreting relatively unitary categorical concepts-like "forgery" (*Drakes*), "burglary" (*Taylor* itself) or "crime of violence" (*Francis* and *Bovkun*)—do not look to underlying facts because the enumerating statute does not invite any such inquiry. Likewise, the hypothetical federal felony trilogy (*Steele, Gerber*, and *Wilson*) asks only whether the elements of a federal criminal statute can be satisfied by reference to the actual statute of conviction; this presents no invitation to depart from *Taylor*'s formal categorical approach and examine the underlying facts.

383 F.3d at 161 (emphasis added). Accordingly, our Court's precedent directs us to "examine the facts at issue," because the amount of loss is a "qualifier," not an element.[4]

Our case law has consistently treated the amount of loss as a qualifier rather than an element of the crime. In 2003 in *Munroe v. Ashcroft*, we did not require that the defendant have specifically pled guilty to a loss amount. 353 F.3d 225 (3d Cir.2003). To the contrary, we stated that "the indictment alleged that the loss exceeded this amount, and Munroe does not claim that when he pled guilty, he admitted to only a lesser loss. Nor is there any suggestion that the Superior Court ever found that the amount of the loss was less than $10,000." *Id.* at 227. For the purposes of § 101(a)(43)(M)(i), we looked to the indictment, which contained an averment as to loss in excess of $10,000, rather than an amended restitution order, which reduced defendant's restitution to $9,999.[5] However, we

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4. Our Court's view regarding the meaning of, and inquiry permitted by, 8 U.S.C. § 1101(a)(43) has been referenced approvingly by other courts. *See, e.g., James v. Gonzales,* 464 F.3d 505, 510 n. 26 (5th Cir.2006); *Conteh v. Gonzales,* 461 F.3d 45, 55 (1st Cir.2006). We have also applied its rationale in interpreting other provisions of the INA. *See Joseph v. Att'y Gen.,* 465 F.3d 123, 127 (3d Cir.2006); *Knapik v. Ashcroft,* 384 F.3d 84, 92 n. 8 (3d Cir.2004).

5. The dissent states that the holding in *Munroe* was based on a loss amount "admitted in the plea agreement." This is

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decided that the amount of loss in a restitution order, which by its nature is neither found by a jury nor specifically pled to by a defendant, could be considered. *Id.* at 227 ("[T]he amount of restitution ordered as a result of a conviction may be helpful to a court's inquiry into the amount of loss to the victim if the plea agreement or indictment is unclear as to the loss suffered.").

Nijhawan contends that more recent authority, namely, our opinion in *Alaka v. Attorney General,* 456 F.3d 88 (3d Cir.2006), contradicts *Singh* and *Munroe* and requires conviction of the requisite amount of loss. In *Alaka,* the total loss averred in the indictment as to the overall scheme exceeded $10,000. However, Alaka pled guilty only to a single count in a plea agreement that referenced a loss to the victim of $4,716.68. *Id.* at 92. The other counts against Alaka were dismissed. We concluded that Alaka's offense did not qualify for treatment as an aggravated felony. *Id.* at 108.

Nijhawan urges that *Alaka* stands for the proposition that the loss amount is an element to which

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incorrect as the district court's opinion in that case makes clear. *Munroe v. Ashcroft,* No. Civ. A. 02-2256, 2003 WL 21048961 (E.D.Pa. Jan. 16, 2003) ("In this case, the indictment stated that the fraud involved caused a loss to the victim in excess of $10,000.00. There is no evidence that the defendant pled guilty to any facts other than as alleged in the indictment."). The holdings of both our court and the district court relied on the amount alleged in the indictment and found by the sentencing court, not an amount in the plea agreement.

the defendant must plead, or of which the defendant must be convicted. We disagree. To the contrary, *Alaka* stands for the unremarkable proposition that one who has admitted to a loss of less than $10,000 as part of a guilty plea cannot later be said to have been convicted of an offense involving fraud in which the loss to the victim exceeds $10,000. Where there is a plea agreement that sets forth the loss it is to that agreement we must look to determine the loss. *Alaka* does not require that the defendant plead to a specific loss amount; it requires only that, if he has, that amount is controlling. *Alaka* does not limit the inquiry if no loss is stated in a plea agreement or submitted to a jury. In fact, in *Alaka* we concluded that "the IJ properly considered the factual finding in the sentencing report." *Id.* at 105, 106. *Alaka* requires only that we "focus narrowly on the loss amounts that are particularly tethered to the convicted counts." *Id.* at 107 (quoting *Knutsen v. Gonzales,* 429 F.3d 733, 739-40 (7th Cir.2005)).

The only real issue in the case before us is whether the "tether" of a loss in excess of $10,000 to Count 1, the count of conviction, is sufficiently strong. We have not previously opined as to the nature of the nexus required, or the breadth of the inquiry into the facts as authorized by *Singh,* and, here, we need only determine whether the record is sufficiently clear that the loss resulting from the convicted conduct exceeds $10,000.

Here, Count 1 of the indictment charged a conspiracy, alleging that defendants "engaged in a fraudulent scheme to obtain millions of dollars in loans"

from the victim banks and setting forth the scheme and roles of the co-conspirators. Nijhawan was convicted of Count 1, but the jury did not, and was not asked to, determine the amount of loss to the victims. However, in a stipulation for the purposes of sentencing on Count 1, Nijhawan agreed that the loss exceeded $100 million. And, in entering the judgment of conviction, the District Court made a finding of "Total Loss" in the amount of $683,632,800.23. As in *Munroe,* here we have no argument, let alone anything in the record, that Nijhawan was convicted of an offense involving less than $10,000. This is not a case where the jury's findings contradict the restitution order or loss was calculated on the basis of uncharged or unconvicted conduct. All the documents and admissions support a finding that the loss amounted to hundreds of millions of dollars.

We need not decide whether any of the "facts" here, standing alone, would suffice as a "tether," as we conclude that, taken together, the indictment, judgment of conviction, and stipulation provide clear and convincing evidence that the requisite loss was tied to Nijhawan's offense of conviction.

We note that we are not the only court of appeals to have viewed the inquiry into the record of conviction to permit examination of loss not specifically admitted in the plea colloquy or agreement or found by a jury as part of the conviction.[6] The Court of Appeals for the First

6. Other courts permit a broader inquiry and have allowed loss amount to be established by reference to conduct that (Cont'd)

Circuit also has indicated that a court should look to loss occasioned by the conviction, rather than loss as an element found by the jury or explicitly incorporated in the plea agreement. *Conteh v. Gonzales,* 461 F.3d 45 (1st Cir.2006). Exercising care in interpreting the "loss exceeds" language in § 1101(a)(43)(M)(i), the court recognized that "the distinction between *conviction for* and *commission of* an aggravated felony is an important one; because the BIA may not adjudicate guilt or mete out criminal punishment, it must base removal orders on convictions, not on conduct alone." *Id.* at 56. Thus, the court found it improper for the BIA to rely on a narrative statement in the PSI report, but did approve the BIA's reliance on the indictment, which alleged specific losses exceeding $10,000, and the final judgment, which included a finding of loss and restitution order. *Id.* at 59 (*quoting Shepard,* 544 U.S. at 21, 125 S.Ct. 1254). As here, an indictment and judgment, indicating loss and restitution, were available and were a sufficiently reliable indication of the loss of which the petitioner had been convicted.

In *Knutsen v. Gonzales,* a case upon which we relied in *Alaka,* the Court of Appeals for the Seventh Circuit

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formed part of the same conspiracy as the convicted conduct, a broader inquiry than that we have here. *See Khalayleh v. INS,* 287 F.3d 978 (10th Cir.2002) (where alien pleaded guilty to one count of the indictment which listed a check in the amount of $9,308 but agreed to pay restitution as determined by the sentencing court, the loss from the total scheme to defraud involving other checks could be counted); *see also James,* 464 F.3d at 511-12 (following *Khalayleh*).

similarly reasoned that "consistent with the statute . . . the court should focus narrowly on the loss amounts that *are particularly tethered to convicted counts* alone." 429 F.3d 733, 739-40 (7th Cir.2005) (emphasis added). In that case, the petitioner had pled guilty to one count of a multi-count indictment, which listed a loss amount less than $10,000; for the purposes of the Sentencing Guidelines, however, he entered into a stipulation with the government in which he acknowledged that "the total loss from the offense of conviction and relevant conduct exceeded $20,000." *Id.* at 736. Because the stipulation included relevant conduct and was not limited to the loss connected to or caused by the offense of conviction, the court found that the IJ erred by relying on it, but did not require the plea colloquy to have included the specific loss. *Id.* at 739. The loss was not sufficiently "tethered" to the offense of conviction so as to constitute clear and convincing evidence that the petitioner had been convicted of an aggravated felony under § 1101(a)(43)(M)(i).

The decision of the Court of Appeals for the Eleventh Circuit in *Obasohan v. Attorney General* further substantiates our interpretation of this provision. 479 F.3d 785 (11th Cir.2007). In that case, the petitioner had been ordered to pay restitution, due to fraudulent charges on other credit cards that were not the subject of the indictment or the plea agreement. *Id.* at 789-90. The court found it particularly significant that the petitioner objected to the PSI's assertion of loss due to additional conduct and "therefore did not admit, adopt, or assent to the factual findings that

formed the basis of the restitution order." *Id.* at 790. Given that the restitution order was based entirely on other unconvicted conduct, was not admitted by the petitioner, and was the only evidence that such loss had occurred, the IJ could not find loss by clear and convincing evidence. *Id.* at 790 (gathering cases and citing *Knutsen*, *Munroe*, and *Conteh* with approval). A restitution order could be evidence of the loss amount, but only if it was "based on the conspiracy charge to which Obasohan pled guilty, [ ]or on the overt acts to which Obasohan admitted by pleading guilty," not "on *additional* conduct that was alleged only in the PSI." *Id.* at 789-90.

We should note that neither we nor these other courts have abandoned the *Taylor-Shepard* approach. Indeed, we still resort to it at the initial phase of our analysis because § 101(a)(43)(M)(i) instructs us to decide whether the alien has been convicted of a crime involving fraud or deceit. Employing the formal categorical approach and looking to the statute of conviction, we determined that Nijhawan's conviction involved fraud or deceit and thus was a proper predicate offense within the "aggravated felony" definition. Once this conclusion is reached, our case law then requires an "inquiry into the underlying facts of the case" to ascertain whether the "in which" qualifying loss provision is satisfied.

Nijhawan urges that we should depart from our case law and follow those courts of appeals that have interpreted the loss requirement in INA

§ 101(a)(43)(M)(i) in a more restrictive way. In particular, he urges that we should adopt the reasoning of the Court of Appeals for the Second Circuit, which has set forth a rule that the loss requirement must be established by "facts actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish the elements of the offense, as indicated by a charging document or jury instructions." *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 131 (2d Cir.2007).[7] There, the court determined that, because restitution was not necessarily found by the jury, a restitution order was insufficient to establish that the fraud conviction was one "in which the loss to the victims exceeds $10,000." *Id.* at 130. The Court of Appeals for the Ninth Circuit also applied the "modified categorical" approach to the loss requirement in *Li v. Ashcroft* and found that it was improper to rely on the charging document, which described specific loss amounts, and the judgment of conviction for those counts, because it had "in the record no jury instructions, verdict form, or other comparable document suggesting that the jury actually was called on to decide, for example, that Petitioner's false claims were for a particular amount." 389 F.3d 892, 898 (9th Cir.2004) (expressing no opinion however "as to whether a defendant's admission of a specific sentencing fact would suffice"). As we noted above, we conclude that this treatment of the qualifying language as setting

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7. In the case of pleas of guilty, the dissent's rule restricts inquiry to "facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, or plea colloquy transcript." 501 F.3d at 131.

forth an element of the offense is uncalled for and makes little sense. While our dissenting colleague urges that express conviction of the loss amount will lend certainty and ease to the analysis, we do not think this justifies our embracing an interpretation of the language that will render the provision toothless.

Moreover, our case law clearly rejects the restrictive interpretation of INA § 101(a)(43)(M)(i)'s loss requirement adopted by the Second Circuit in *Dulal-Whiteway* and the Ninth Circuit in *Li. Munroe, Singh*, and *Alaka* make clear that the loss amount need not be found specifically by the jury or set forth in the plea agreement or colloquy.[8] Rather, as we have said, the loss requirement invites further inquiry into the facts underlying the conviction, and that inquiry is satisfied if the amount of loss is sufficiently tethered to the fraud conviction.

Had our prior precedent not compelled our conclusion, we still would firmly disagree with the restrictive interpretation. For, our decision actually fosters the principles the Second Circuit identified in *Dulal-Whiteway* and best comports with the text and purpose of the INA's aggravated felony provision. In *Dulal-Whiteway,* the Second Circuit noted that the words of the INA provision render deportable one who has been convicted of an aggravated felony, not one who

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8. In order to reach a contrary result, the dissent labels salient portions of our prior precedent "dicta." *See* dissenting op., n. 9 & 11.

has committed an aggravated felony. *Id.* at 132. We do not disagree with this and, much like the Court of Appeals for the First Circuit in *Conteh,* we endorse careful consideration of the record to determine whether it is sufficiently clear that the loss connected to the crime of conviction exceeded $10,000. As Judge Becker noted in *Singh,* the specific words "in which the loss to the victims exceeds $10,000" suggest just such an inquiry into the facts underlying the conviction. The requirement that we set forth today that the loss amount be sufficiently tied or tethered to the offense of conviction both responds to the Second Circuit's concern that a restitution order based upon conduct of which the defendant was not convicted should not be relied on, and does not arbitrarily cabin the inquiry.[9]

The difficulty in saying that the court will limit inquiry to the precise "record of conviction" used in the

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9. The dissent posits that our opinion permits consideration of loss caused by "relevant conduct" rather than the conduct of conviction. This is not correct. By requiring that loss be tethered to the convicted conduct, we are excluding consideration of relevant conduct, as did the Court of Appeals for the Seventh Circuit in *Knutsen* and the Court of Appeals for the Eleventh Circuit in *Obasohan.* In fact, we use the word "relevant" only in discussing these courts' opinions.

Furthermore, there is no conduct in this case other than that underlying the conviction. The dissent incorrectly states that the conduct in Nijhawan's sentencing stipulation pertinent to the Guidelines enhancement and the restitution order includes relevant, as well as convicted conduct, as in *Obasohan.* It does not. In fact, this very clearly distinguishes *Obasahan* and *Knutsen,* cases with which we agree.

Armed Career Criminal context for purposes of determining loss under § 101(a)(43)(M)(i) is made manifest in the decisions of the Court of Appeals for the Ninth Circuit. That court appears to adopt the requirement that the petitioner had to have been convicted of the loss, but then looks beyond what the jury found in order to determine loss amount. For example, in *Ferreira v. Ashcroft*, the court cited our decision in *Munroe* with approval and reasoned that there was no rule prohibiting immigration judges from looking to a restitution order to determine loss amount. 390 F.3d 1091 (9th Cir.2004) (relying on *Munroe* and *Chang v. INS,* 307 F.3d 1185 (9th Cir.2002)). Although the court has insisted that it is using the modified categorical approach, it has actually engaged in a broader inquiry.

Our holding today is consistent with the different evidentiary standards used in criminal, sentencing, and immigration proceedings, respectively. In *Dulal,* the Court of Appeals for the Second Circuit criticized the approach we endorse because, it believed, it "would permit the government to order an alien removed in the absence of the clear, unequivocal and convincing evidence required by [immigration] law." 501 F.3d at 132. However, its holding raises the standard of proof to beyond a reasonable doubt while our holding actually adheres to the "clear and convincing" standard. *Accord Conteh,* 461 F.3d at 56 (rejecting "the implicit proposition that the INA's use of the word "convicted" in 8 U.S.C. § 1227(a)(2)(A)(iii) elevates the government's burden in aggravated felony cases from clear and convincing

evidence to proof beyond a reasonable doubt (that is, proof that facts were necessarily found by a criminal jury or admitted by the alien qua criminal defendant)").

Most fraud statutes, including the federal statutes at issue here, do not contain loss as an element or require that a jury find loss or a defendant plea to a specific loss amount. As we noted above, insistence on loss as part of the conduct would render § 1101(a)(43)(M)(i) largely inoperative, for rarely will a defendant be convicted of a fraud offense with loss as an element found by the jury or explicitly admitted to in a guilty plea. Under the rule adopted in *Dulal-Whiteway* which the dissent embraces, a finding beyond a reasonable doubt would be required, not merely the allegation of a specific loss amount in a criminal indictment.[10] A jury would have to be charged as to loss amount and make a specific and additional finding.[11]

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10. In fact, *Li*, upon which the dissent relies, did not consider the charging document which listed specific loss amounts and the judgment of conviction on those counts to be sufficient to prove the loss amount precisely because the jury was not required to find a loss amount to a guilty verdict. 389 F.3d at 898. Here the prosecutor did in fact include the loss amount in the criminal indictment.

11. It would necessarily be the prosecutor who would request this charge, for, if the rule espoused in *Dulal-Whiteway* applies, defense counsel would be content *not* to have the loss found by the jury. We must wonder why the prosecutor would ever ask the jury to find a fact not relevant to the conviction.

Unlike the Second Circuit, we find no " 'daunting' practical difficulties" associated with looking to a wider array of records that possess a high indicia of reliability. It is well within the competence of a court to examine the record for clear and convincing evidence of loss caused by the conduct of conviction. Indeed, we believe there are far greater practical difficulties inherent in attempting to bend the "modified categorical approach" of *Taylor* and *Shepard* to apply to a finding of the requisite minimum loss caused by fraud or deceit, which is rarely found by a jury or explicitly included in the plea agreement, because it is a qualifier, not an element of the offense. Moreover, we should not raise an aspect of an immigration statute to the level of an element of a criminal offense, as the dissent urges, merely because requiring that it be a part of the conviction eases a court's decision-making process.

Accordingly, because the petitioner was previously convicted of conspiracy to commit "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," he committed an aggravated felony, and we will deny his petition for review.

STAPLETON, Circuit Judge, dissenting:

I agree with the Court that Nijhawan's conviction for conspiracy to commit bank fraud, mail fraud and wire fraud constituted a conviction for conspiracy to commit an offense "that involves fraud or deceit" as defined by the INA. I therefore join Section 1 of the Court's opinion. I disagree, however, with the Court's conclusion that prior decisions of this Court compel the approach to the § 1101(a)(43)(M)(i) loss element that the Court adopts, and I believe that our Court should retain the INA's conviction requirement for that element. I would therefore grant the petition for review.

Under the Immigration and Naturalization Act ("INA"), "[a]ny alien who is *convicted* of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (emphasis added). The term "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43) to include, *inter alia,* "an attempt or conspiracy to commit" "an offense that-(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *Id.* at §§ 1101(a)(43)(M)(i), 1101(a)(43)(U). Therefore, under the plain language of the INA, petitioner is removable only if he was "convicted" of a conspiracy to commit "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *Id.*

Several Courts of Appeals, including ours, presumptively apply some variant of the "categorical approach" first articulated by the Supreme Court in

Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and further explained in *Shepard v. United States,* 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), to determine whether an alien's prior conviction qualifies as an "aggravated felony." Courts of Appeals have diverged, however, regarding how a reviewing court should determine whether an alien's prior conviction satisfies the $10,000 loss requirement of § 1101(a)(43)(M)(i). Although all Courts of Appeals permit the reviewing court to look beyond *Taylor's* "formal" version of the categorical approach—a simple comparison of the elements of the prior statute of conviction to the INA definition—and allow recourse to the "record of conviction" to some degree, courts disagree regarding the precise nature of that further inquiry. The Courts of Appeals for the Second and Ninth Circuits, and, as I read its precedent, the Eleventh Circuit, have adopted a "modified categorical approach" in which the reviewing court looks to the record of conviction in order to determine the facts upon which the petitioner's prior conviction actually and necessarily rested.[12] In contrast, the Court of Appeals for the First Circuit allows a broader inquiry under which immigration courts may scrutinize other facts, gleaned from the alien's record of conviction, to independently determine, by clear and convincing evidence, whether the crime resulted in a loss greater than $10,000.[13] I find

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12. *Dulal-Whiteway v. U.S. Dep't of Homeland Security,* 501 F.3d 116, 128 (2nd Cir.2007); *Li v. Ashcroft,* 389 F.3d 892, 895-98 (9th Cir.2004); *Obasohan v. Attorney General,* 479 F.3d 785, 788-89 (11th Cir.2007).

13. *See Conteh v. Gonzales,* 461 F.3d 45 (1st Cir.2006).

the approach of the Courts of Appeals for the Second and Ninth Circuits to be the better reasoned approach.

The Supreme Court articulated the *Taylor-Shepard* categorical approach when reviewing 18 U.S.C. § 924(e), which provides for a sentencing enhancement if a defendant has been convicted of certain enumerated prior offenses. The Courts of Appeals have transplanted that categorical approach into the INA because of obvious similarities between the two inquiries. The plain language of the INA, like § 924(e), mandates that the alien was " *convicted* " of the prior offense designated in the INA as an "aggravated felony." It is not sufficient for the BIA to independently conclude that the alien "has committed" that prior offense. Therefore, the INA, like § 924(e), requires a comparison of the *prior conviction* to the generic definition of the pertinent aggravated felony-in this case, §§ 1101(a)(43)(M)(i) and (U).

The rationale is not just a textual one, however. Courts have adopted categorical approaches for the INA also because the INA inquiry involves the same sorts of practical difficulties and fairness concerns underlying the Supreme Court's decisions in *Taylor* and *Shepard.* As the Second Circuit explained, "the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions." *Dulal-Whiteway,* 501 F.3d at 132. *See also id.* ("we decline the invitation to piece together an underlying attempt conviction by weighing evidence and drawing conclusions in a manner appropriate only for a criminal jury") (quoting *Sui v. I.N.S.,* 250 F.3d 105,

119 (2nd Cir.2001)); *Shepard,* 544 U.S. at 23, 125 S.Ct. 1254 (a purpose of the categorical approach is the "avoidance of collateral trials"). As the Second Circuit also recognized, the categorical approach promotes basic precepts of fairness. *Id.* at 133 (" '[I]f the guilty plea to a lesser, [non-removable] offense was the result of a plea bargain, it would seem unfair to [order removal] as if the defendant had pleaded guilty to [a removable offense].' [*Taylor,* 495 U.S.] at 601-02 [110 S.Ct. 2143]. By permitting the BIA to remove only those aliens who have actually or necessarily pleaded to the elements of a removable offense, our holding promotes the fair exercise of the removal power").[14] In sum, I agree with the Court of Appeals for the Second Circuit that the same practical and fairness difficulties identified by *Taylor* and *Shepard* would attend an interpretation of the INA that allowed immigration courts to reopen the factual record of prior criminal convictions and

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14. The Court of Appeals for First Circuit found such fairness concerns less than compelling because *Shepard* had emphasized that, in the context of sentencing enhancements under § 924(e), those concerns also raise Sixth Amendment problems, and such constitutional concerns are inapplicable in civil removal proceedings. *Conteh,* 461 F.3d at 55. However, *Taylor* and *Shepard* were rooted in basic notions of fairness that extend beyond the protections of the Sixth Amendment, and we, like the Second Circuit, began to adopt categorical approaches for the INA before *Shepard* articulated its Sixth Amendment rationale. *Dulal-Whiteway,* 501 F.3d at 132-33. *See Shepard,* 544 U.S. at 20, 125 S.Ct. 1254 ("certainly, 'the practical difficulties and potential unfairness of a factual approach are daunting,' no less in pleaded than in litigated cases") (internal citation omitted).

undertake new factual findings, utilizing a different standard of proof, to determine whether a required element (a $10,000 loss) was met. Indeed, if the loss requirement is not subject to the conviction requirement, why limit the evidentiary net to the prior record of conviction at all? Absent the conviction requirement, the standards become arbitrary.[15]

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15. The Court concludes that the loss must merely be found by the Immigration Judge and BIA under their "clear and convincing evidence" standard and be "tethered" to the conviction. The Court does not define the "tethered" test further but merely holds that it is satisfied by the facts of this case. The holding provides no guidance to the Immigration Judges who will apply Sections 1227(a)(2)(A)(iii) and 1101(a)(43)(M)(i). Under the standard the Court adopts, for example, would a future IJ be permitted to conclude (under its clear and convincing evidence standard) that the $10,000 loss is established, and is "tethered" to the alien's conviction, by looking to facts in a pre-sentence investigation report ("PSI"), or to facts in a police report, or to select evidence presented in the criminal trial, or to new testimony or documents introduced at the removal hearing? The task of defining the "tethered" inquiry will fall to future panels of this Court, and with the loss element divorced from the conviction requirement, the task will not be an easy one.

The First Circuit, the only other court to have deviated from the modified categorical approach, sought to provide answers to these questions in *Conteh*, but that opinion demonstrates the analytical difficulty of defining the loss inquiry once it is divorced from the conviction requirement. *Conteh* made two fundamental rulings regarding the loss inquiry. *Conteh* first ruled, as does the Court today, that the INA does not require a convicted loss but rather merely a determination by the IJ, under its ordinary clear

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and convincing evidence standard, that the loss requirement is satisfied. *Conteh*, 461 F.3d at 55-56. This ruling allowed it to conclude that the IJ did not err by relying on a restitution order, which could have included "relevant" but un-convicted conduct and facts found by a mere preponderance of the evidence. *Id.* at 59. *Conteh* next, however, joined every Court of Appeals to have addressed this issue by ruling that the inquiry is limited to the "record of conviction." *Id.* at 57. In reaching this latter ruling the Court "emphasize[d] that the difference between [its] approach and that of the Ninth Circuit [which the Second Circuit subsequently joined] is only a matter of degree," *id.* at 56, and it agreed that "because the BIA may not adjudicate guilt or mete out criminal punishment, it must base removal orders on convictions, not on conduct alone." *Id.* Based on this second ruling, the Court concluded that the IJ *did* err by looking to a PSI and to testimony presented in the removal hearing: the Court reasoned that restitution orders (memorialized in the final judgment) were part of the "record of conviction," but that the other two types of evidence were not. *Id.* at 57-59. The Court allowed recourse to restitution orders by ruling, as does the Court today, that the alien need not have been actually convicted of a loss; however, the Court rejected the IJ's other two sources of evidence because they fell outside of the "record of conviction" as that Court defined it, a limit which must derive from the conviction requirement. In other words, the Court found that the INA's conviction requirement applies to the loss inquiry in some respects but does not apply to it in other respects. Certainly no such line appears in § 1101(a)(43)(M)(i). I also note that allowing unqualified reliance upon restitution orders would allow future IJs to look to facts a prior sentencing court may have found by a mere preponderance of the evidence and to elevate those facts to the higher "clear and convincing evidence" standard, without the benefit of having the underlying evidence before it.

Because of the plain language of the INA, as well as the practical and fairness concerns that I have discussed, I am wary of permitting immigration courts to undertake *de novo* factual inquiries, under the "clear and convincing evidence" standard, into facts merely "relevant to," or "tethered to," an alien's prior conviction. I would permit immigration courts to look to the record of conviction, but only to establish "that a prior conviction 'necessarily' involved ([or] a prior plea necessarily admitted) facts equating to [the generic offense in the INA statute]." *Shepard,* 544 U.S. at 24, 125 S.Ct. 1254. *See also Dulal-Whiteway,* 501 F.3d at 128 ("while the issue of statute divisibility and reliance upon the record of conviction are theoretically separable, in practice they demand a single inquiry: has an alien been actually and necessarily convicted of a removable offense?"); *Li,* 389 F.3d at 895-98. The "necessarily" pleaded or convicted requirement explains and defines the "record of conviction" inquiry: once the court determines that the statute of conviction proscribes both conduct that would constitute an "aggravated felony" and conduct that would not, the court consults the record of conviction to determine the type of conduct the conviction necessarily includes. *Dulal-Whiteway,* 501 F.3d at 131; *Li,* 389 F.3d at 895-96.

In this case, loss was not an element of the crime of conviction. The conspiracy count of the indictment did assert a fraudulent scheme to obtain "hundreds of millions of dollars" in loans from major banks, but the Court in petitioner's criminal trial instructed the jury that it need not find any loss in order to convict. A.R. at

150, 156, 158. We thus know that despite the averment of the indictment, the jury's verdict does not establish that petitioner was convicted by it of conspiracy to commit fraud occasioning any particular amount of loss. The BIA and our Court acknowledge as much. As a result, they point not to the indictment and verdict to support their conclusion, but rather the record of the subsequent sentencing proceedings. Specifically, they focus attention on (1) the sentencing judge's order that all defendants be jointly and severally liable for restitution in excess of $10,000; and (2) the petitioner's stipulation with the government that a correct application of the U.S. Sentencing Guideline to petitioner's convictions on Counts 1 (conspiracy to commit fraud) and 30 (conspiracy to commit money laundering) produced a base offense level of 38, an offense level including an enhancement "[b]ecause the loss from the offense exceeds $100,000,000." A.R. at 264. Neither portion of the sentencing record, however, establishes that petitioner has been "convicted" of causing a $10,000 loss.

With respect to the sentencing judge's restitution order, I agree with the Second and Eleventh Circuits that it does not support a conclusion of removability. As the *Dulal-Whiteway* Court put it in the context of a guilty plea case:

> The restitution set by a judge is based on a loss amount established by a preponderance of the evidence and need not be tied to the facts admitted by defendant's plea. . . .

> In other words, the amount of the restitution is not constrained by facts upon which the plea "necessarily" rested.

Dulal-Whiteway, 501 F.3d at 130. *See also Obasohan v. Attorney General,* 479 F.3d 785 (11th Cir.2007) ("[W]hile a sentencing court in the criminal context may order restitution not only for *convicted* conduct but also for a broad range of *relevant* conduct, the plain language of the INA requires that an alien have been *convicted of* an aggravated felony to be removable."). I also agree with those courts that a contrary conclusion would put one facing removal and lifetime exclusion in a difficult and unfair position.

> We note that if the immigration court were authorized to base a finding of an aggravated felony on conduct and victim losses that were not charged, proven or admitted, it would be impossible for a criminal defendant to evaluate the immigration consequences of a guilty plea at the time of entering that plea, because those consequences would be known only at the time of sentencing. Where loss amounts are charged and proven or admitted, however . . . no such concern arises.

Obasohan, 479 at 791, n. 12.

For much the same reasons, I would reach the same conclusion with respect to the propriety of the BIA

consulting the sentencing stipulation of the parties in this case. The stipulation with respect to the application of the Sentencing Guidelines in this case is not the equivalent of a plea or plea agreement admitting to an element of the offense of conviction. This stipulation came both after petitioner's conviction and in the context of a sentencing regime that requires consideration of losses from relevant as well as convicted conduct.[16]

It is true, as the Court stresses, that retention of the convicted conduct requirement will result in the BIA being able to remove fewer aliens on the ground that they have been convicted of an aggravated felony. I do not find that problematic because that appears consistent with the Congressional intent reflected in 8 U.S.C. § 1227(a)(2)(A)(iii). If there is a problem, however, I would reserve it for legislative correction. Furthermore, the modified categorical approach does not, as the Court suggests, elevate the government's burden of proof in immigration cases from "clear and convincing evidence" to "beyond a reasonable doubt."

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16. The Court suggests that neither petitioner's sentencing stipulation nor the sentencing court's restitution order involved consideration of relevant conduct. It fails to explain, however, how it knows this to be true. The stipulation was solely for the purpose of a guideline regime that requires consideration of losses from relevant as well as convicted conduct and, there being no limitation to the later, the stipulation clearly applied to both. *See* U.S.S.G. § 1B1.3, Application Notes 1-2. The restitution regime, like the Guidelines, also allows the Court to consider losses from relevant conduct, and nothing I have found in the record suggests that petitioner's sentencing court focused on the distinction.

It merely requires the government to prove, by clear and convincing evidence, that the alien was actually "convicted" of the asserted "aggravated felony." *See Obasohan v. Attorney General,* 479 F.3d 785, 790 (11th Cir.2007) ("There was no basis in this record from which the IJ could have found by 'clear, unequivocal and convincing' evidence that the restitution order was based on convicted or admitted conduct.").

This Court has never before found an alien deportable for conduct the alien was neither convicted of nor pled guilty to; the Court's approach, therefore, will significantly expand the reach of the INA's "aggravated felony" provisions in this Circuit. As the Court emphasizes, in *Singh v. Ashcroft,* 383 F.3d 144 (3d Cir.2004), we reviewed our "aggravated felony" jurisprudence and concluded that we had failed to follow the "formal" categorical approach in three cases, all of which applied § 1101(a)(43)(M)(i).[17] That provision, the Court stated, "begs an adjudicator to examine the facts at issue." *Id.* at 161. *Singh* did not explain precisely which facts were "at issue." However, it suggested a "further inquiry" much like the one I would adopt. *Singh* was decided prior to the Supreme Court's opinion in *Shepard,* and the Court reviewed our prior case law only to determine when we had applied the "formal"

17. *Singh* itself merely held that, when applying a different "aggravated felony" definition, "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), this Court *should* follow the strict categorical approach. *Singh,* 383 F.3d at 163-64.

version of the categorical approach described in *Taylor*. As the *Singh* Court explained,

> "[u]nder that approach, an adjudicator 'must look only to the statutory definitions of the prior offenses,' and may not 'consider other evidence concerning the defendant's prior crimes,' including, 'the particular facts underlying [a] conviction."

Singh, 383 F.3d at 148 (quoting *Taylor*, 495 U.S. at 600, 110 S.Ct. 2143). That "formal" approach is essentially the first step of the two-step inquiry of the Courts of Appeals for the Second and Ninth Circuits. The *Singh* Court concluded that "a departure from the formal categorical approach seems warranted when the terms of the [INA's definition of an "aggravated felony"] invite inquiry into the *facts underlying the conviction*," *Singh*, 383 F.3d at 148 (emphasis added), and that § 1101(a)(43)(M)(i) is such a statute. *Singh* did not, however, suggest divorcing the § 1101(a)(43)(M)(i) "qualifier" from the INA's conviction requirement entirely.[18] The Supreme Court offered further guidance

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18. *Singh* recognized that either (1) a statute of conviction containing a disjunctive element under which one part of the disjunctive would render the alien removable and one would not, a statute it termed "divisible," or (2) an element of the "generic" definition of the prior offense designated by the INA as an "aggravated felony," might force an IJ to look beyond the "formal" categorical approach. However, I do not read *Singh* to say that the former situation invokes *Taylor* and *Shepard*, while

(Cont'd)

on the categorical approach in *Shepard,* less than a year after we decided *Singh. Shepard* reemphasized that the inquiry is not limited to a formal comparison of statutory elements but rather should focus on identifying the facts upon which the prior conviction "necessarily" rested.[19]

(Cont'd)

the latter authorizes the IJ to undertake a broad factual inquiry. *Singh* simply recognized that both are instances where the statute of conviction sweeps more broadly than the INA's definition. A statute of conviction containing a disjunctive element under which one part of the disjunctive would render the alien removable and one would not is "divisible," and similarly a statute of conviction containing no loss element is "divisible" under § 1101(a)(43)(M)(i) into (1) convictions for aggravated felonies where the loss is more than $10,000 and (2) other convictions where it is less than $10,000. In either instance, the nature of the inquiry does not change. The Second Circuit properly interpreted *Singh* in this manner. *Dulal-Whiteway,* 501 F.3d at 127-28.

19. *Shepard* held that a guilty plea constitutes a "conviction," and that a reviewing court may look to a "transcript of plea colloquy or [the] written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea," to determine precisely what conduct the defendant pled guilty to. *Shepard,* 544 U.S. at 20, 125 S.Ct. 1254. In so doing the Court reemphasized that, when the conviction resulted from a jury verdict, the Court is not limited to a comparison of the statutory elements-the "formal" version of the categorical approach upon which *Taylor* had largely focused—but also may undertake an analogous inquiry, looking to "charging documents[ ] and jury instructions to determine whether an earlier conviction after trial was for [the generic enumerated offense]." *Shepard,* 544 U.S. at 16, 125

(Cont'd)

Singh's conclusion that § 1101(a)(43)(M)(i) invites further inquiry beyond the formal approach in order to determine "the facts underlying the conviction" is entirely consistent with *Shepard's* admonition to focus on the facts "a prior conviction 'necessarily' involved." *Shepard,* 544 U.S. at 24, 125 S.Ct. 1254. And, those inquiries are essentially the "modified" or second step of the categorical approach of the Courts of Appeals for the Second and Ninth Circuits.

Our opinion in *Munroe v. Ashcroft,* 353 F.3d 225, 227 (3d Cir.2003), also did not abandon the INA's conviction requirement for the § 1101(a)(43)(M)(i) loss element. In *Munroe,* we merely held that an immigration court should not rely on the restitution order to establish the loss when the convicting court's original restitution order had been based on the convicted loss, but the court subsequently reduced the restitution from just above, to just below, $10,000 only to affect subsequent deportation proceedings. *Munroe,* 353 F.3d at 227. We emphasized that the alien had pled guilty to two counts in the indictment, each of which specified a precise loss amount, and we concluded:

> "We agree . . . that the amount of loss involved in that conviction was greater than $10,000. The indictment alleged that the loss exceeded

(Cont'd)

S.Ct. 1254. In either instance, the inquiry is to determine whether the conviction "had 'necessarily' rested on the fact identifying the [prior crime] as [the enumerated offense]." *Id.* at 21, 125 S.Ct. 1254.

> this amount, and Munroe does not claim that, when he pled guilty, he admitted to a lesser loss."

Id. This holding is based on a convicted loss amount (admitted in the plea agreement) and is therefore entirely consistent with cases such as *Shepard* and *Dulal-Whiteway*.[20]

Our opinion in *Alaka v. Attorney General,* 456 F.3d 88 (3d Cir.2006), is also consistent with this approach.[21] *Alaka* stated that "the formal categorical approach properly may be abandoned . . . when the terms of the statute on which removal is based invite inquiry into the facts of the underlying conviction," *id.,* and that (M)(i) "invites further inquiry." *Id.* However, much like *Singh, Alaka* stated that the "further inquiry" is to

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20. Although the *Munroe* Court opined that, in different circumstances, the amount of restitution ordered "may be helpful" to determine the loss amount, *id.,* I do not find that *dicta* controlling in this case. The Court's holding was that the restitution order should *not* have been relied upon in that case. I interpret the Court's statement as merely declining to adopt any broad-based rule regarding restitution orders and instead limiting the Court's holding to the (somewhat unusual) facts of that case.

21. As the Court emphasizes, *Alaka* simply held that, if an alien pleads guilty to one count in an indictment, he or she cannot be deported for conduct alleged in a different, unpled and unconvicted count of the indictment. *Id.* at 106. However, *Alaka's* reasoning supports the approach I would adopt.

identify "the facts underlying the conviction," *id.*, and the Court further explained that "[a] focus on the conduct that resulted in a conviction is thus our analytical starting point." *Id.* at 107. Indeed, *Alaka* expressly rejects reliance upon "relevant" but unconvicted losses calculated for sentencing purposes; to do so, the Court explained, "would divorce the $10,000 loss requirement from the conviction requirement . . . because relevant conduct for sentencing purposes need not be admitted, charged in the indictment or proven to a jury." *Id.* at 108 (internal quotation marks and citations omitted). That is precisely what the Court's approach does: the Court finds that the § 1227 conviction requirement applies to the "fraud or deceit" component of § 1101(a)(43)(M)(i), but that the loss element is merely a "qualifier" not subject to that conviction requirement, thus divorcing the two.[22]

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22. Although *Alaka* did state that the IJ could consider factual findings in the sentencing report, *id.* at 105, I would not rely on that *dicta* because to do so here would be contrary to *Alaka's* clear rationale. *Alaka* does not explain precisely when a court may look to facts found in a sentencing report, but the Court's holding did not rely on any such facts: the Court emphasized that, "as was the case with *Knutsen* and *Chang*, *Alaka* unmistakably pled guilty to one count, and the plea agreement plainly documented that loss at less than $10,000." *Alaka*, 456 F.3d at 108.

Alaka's reference to the sentence may have been a recognition that, for "aggravated felonies" other than the one at issue in this case, the INA expressly directs courts to look to the sentence, and therefore a *per se* rule that courts can never

(Cont'd)

Because I would join those Courts of Appeals which require that removability under § 1227 and § 1101(a)(43)(M)(i) be predicated on convicted conduct, and because the record does not demonstrate that petitioner was actually and necessarily convicted of any particular loss, I would grant the petition for review.

(Cont'd)

look to facts found in a sentencing report is certainly not appropriate. *See Singh,* 383 F.3d at 162 (8 U.S.C. § 1101(a)(43)(G) directs courts to look to the sentence actually imposed because that definition states "a theft offense . . . for which the term of imprisonment *[imposed is] at least one year,*" whereas other § 1101(a)(43) definitions include the qualifier "for which a sentence of one year imprisonment or more *may be imposed*") (bracketed text in original; emphasis added).

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED AUGUST 8, 2006

Decision of Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A39 075 734 - York

In re: MANOJ *NIJHAWAN*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Thomas E. Moseley, Esquire

CHARGE:

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

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

Appendix B

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

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

APPLICATION: Termination

The respondent has appealed the February 22, 2006, decision of an Immigration Judge which found him removable as an alien convicted of aggravated felonies, and ordered him removed to India. The Department of Homeland Security (DHS) has not responded. We will affirm the decision of the Immigration Judge insofar as he found the respondent removable as an alien convicted of an aggravated felony as defined in sections 101(a)(43)(M)(i) and (U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i), (U). The request for oral argument is denied.

On August 25, 2004, the respondent was found guilty in the United States District Court, Southern District of New York, for conspiracy to commit bank fraud, mail fraud, and wire fraud, in violation of 18 U.S.C. § 371, and for conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). He was sentenced to 41 months of incarceration, and ordered to pay $683,632,800.23 in restitution, jointly and severally.

Appendix B

The respondent was charged with removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who committed an aggravated felony as defined in sections 101(a)(43)(D), (M)(i), and (U) of the Act.[1]

The respondent made a motion to terminate the proceedings before the Immigration Judge, and argued that his convictions were not aggravated felonies for various reasons. The DHS opposed the motion in a detailed response. In an interim order dated February 8, 2006, the Immigration Judge denied the motion to terminate and found that DHS met its burden to show removability. He incorporated this decision into an order dated February 22, 2006, noted that the respondent was not seeking any form of relief from removal, and ordered him removed to India. The respondent has filed this appeal, which largely reiterates the arguments he presented below. We will affirm the Immigration Judge's decision insofar as he found the respondent removable as an alien convicted of an aggravated felony under sections 101(a)(43)(M)(i) and (U) of the Act.

Section 101(a)(43)(M)(i) defines an aggravated felony as an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." Subsection (U) defines an aggravated felony as "an attempt or conspiracy to commit an offense described in this paragraph." These charges were premised on

1. The respondent was also charged with removability for a conviction for a crime involving moral turpitude. This charge was not sustained.

the respondent's conviction under 18 U.S.C. § 371, for conspiracy to commit bank fraud, mail fraud, and wire fraud, in violation of 18 U.S.C. §§ 1344, 1341, 1343.

On appeal, the respondent argues that his conspiracy crime can only be an aggravated felony if the underlying crimes have the elements of common law fraud. We disagree, and point out that section 101(a)(43)(M)(i) of the Act only requires that the offense "involves" fraud or deceit. *See Valansi v. Ashcroft*, 278 F.3d 203, 209-210 (3d Cir. 2002) (section 101(a)(43)(M) does not require that the elements of the underlying criminal offense be coexistive with the crime of fraud; the word "involves" expands the scope of the ground to include offenses that have, at least as one element, fraud or deceit). The respondent's conviction clearly fits this ground. For example, the respondent was charged with conspiracy to violate 18 U.S.C. § 1344. This crime punishes one who "knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." Both sections of this crime clearly involve "fraud," and we have no hesitation finding that it falls under section 101(a)(43)(M)(i) of the Act. *See also Alaka v. Attorney General*, __ F.3d __, 2006 WL 1994500, *13 (3d Cir. July 18, 2006).

Appendix B

We next determine whether the respondent's crime involved a loss to the victim which exceeded $10,000. The respondent argues that his crime cannot be an aggravated felony because there is no element in the underlying fraud crimes which requires a specific monetary loss. We agree with the respondent's contention that the $10,000 loss threshold is not a necessary element of the offense in this case, as no loss of any kind is required to sustain a conviction under the federal criminal statutes at issue. However, the $10,000 loss threshold need not be an element of the statutory offense in order for the conviction to constitute an aggravated felony under section 101(a)(43)(M)(i) of the Act. Its employment within the aggravated felony section of the Act signals that it was not to be an element of the crime. Instead, it is used as a qualifier, in a way similar to length of sentence provisions in other aggravated felony subsections of section 101(a)(43) of the Act, such as the 1-year sentence requirement found in subsections 101(a)(43)(F), (G), and (J). *See Singh v. Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004) (observing that an enumerating statute specifying that a crime be committed "within the last two years" "could not be read to cover only crimes which have 'within the last two years' as an element; instead, a court would read 'within the last two years' as a limiting provision on crimes that would otherwise qualify"). Furthermore, Congress could not reasonably have intended it to be an element of the crime, given the breadth of the federal and state fraud statutes. To read the $10,000 loss requirement as a necessary element of the crime would virtually negate the fraud ground.

Appendix B

To determine whether the respondent's particular offense will sustain a ground of removability under the Act as an aggravated felony in this case, we look not only to the statutory provision under which an alien has been convicted, but also to the record of conviction - meaning the indictment, plea, verdict, and sentence - and to other documents admissible as evidence in proving a criminal conviction. *See Alaka v. Attorney General*, *supra*, at *13 (internal cites omitted);[2] *Singh v. Ashcroft*, *supra*, at 161 (noting that the qualifying requirement of section 101(a)(43)(M)(i) of the Act that "the loss to the victim or victims exceeds $10,000" is "the prototypical example" of a situation where a departure from the formal categorical approach is warranted in order to look at the facts underlying the conviction).

The respondent was convicted on Count 1 of his indictment, relating to the conspiracy charge, after a jury trial. Upon reviewing the transcript of the jury instructions, and the other conviction documents, it is not apparent that the jury explicitly found that the respondent's crime involved any specific monetary amount. *See Li v. Ashcroft*, 389 F.3d 892, 898-99 (9th Cir. 2004). We therefore will look beyond the finding of guilty to determine the amount of loss in this case. *Cf. Alaka v. Attorney General*, *supra*, *14 (holding that

2. We note that in *Alaka*, *supra*, the Court of Appeals cites to *Shepard v. United States*, 544 U.S. 13, 16 (2005). This undermines the respondent's argument on appeal that *Shepard* would cause the Court of Appeals to rethink any earlier holding indicating that any assessment of loss can go beyond the elements of the underlying crime.

where the plea agreement establishes the offense for which the respondent will be convicted, and it indicates a monetary amount, it is that agreement, and not the indictment or the sentence, that should be looked at in determining the intended loss).[3]

The respondent entered into a stipulation of facts before he was sentenced by the criminal judge. Within, he acknowledged that the loss from his crimes exceeded $100,000,000 (*see* August 18, 2004, Agreement, p. 3).[4] The stipulated facts were relied upon at sentencing, and the criminal judge imposed restitution, jointly and severally, in the amount of $683,632,800.23 (*see* Respondent's Brief in Support of Motion to Terminate, Exh. B, at pgs., 8, 16). The judgment of conviction also specifically states that the "loss" involved in the respondent's case is $683,632,800.23. *See* judgment, page 5. This evidence is sufficient to establish that the respondent's conviction renders him removable under the grounds at issue.[5] *Cf. Munroe v. Ashcroft*, 353

3. In *Alaka v. Attorney General*, *supra*, the respondent pled guilty to a charge which stated that the loss to the particular victim was just over $4,000. The Court of Appeals found that the Immigration Judge erred in relying on a sentencing document which found that the intended loss for the crime was $47,969.

4. Although admitted as evidence, the Immigration Judge failed to mark this document and others with exhibit numbers.

5. We note that the conspiracy charge implies that the underlying crimes might not have been completed, but the

(Cont'd)

F.3d 225, 227 (3d Cir. 2003). We therefore uphold the Immigration Judge's decision insofar as he found the respondent removable as an alien convicted of an aggravated felony under sections 101(a)(43)(M)(i) and (U) of the Act. We accordingly need not address whether the respondent is removable for an aggravated felony under section 101(a)(43)(D) of the Act. An appropriate order will be entered.

ORDER: The finding of the Immigration Judge that the respondent is removable under section 237(a)(2)(A)(iii) of the Act, through sections 101(a)(43)(M)(i) and (U) of the Act, is affirmed.

s/ Lauri S. Filppu
FOR THE BOARD

(Cont'd)

charging and sentencing documents indicate an actual loss to the victims in this case. In any event, we note that section 101(a)(43)(U) does not require that the victim suffer an actual loss which exceeds $10,000. *See Matter of Onyida*, 22 I&N Doc. 552 (BIA 1999).

APPENDIX C — ORDER OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT, ALLENWOOD, PENNSYLVANIA DATED MARCH 24, 2006

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
ALLENWOOD, PENNSYLVANIA

File No.: A 39-075-734
IN REMOVAL PROCEEDINGS

In the matter of:
NIJHAWAN, MANOJ

Respondent

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on February 22, 2006. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion of the case.

(✓) The respondent was ordered removed from the United States to India or in the alternative to _____.

* * *

Appendix C

Hearing conducted by: Video Conference

Appeal: RESERVED

APPEAL DUE BY: March 24, 2006

s/ Walter A. Durling
Walter A. Durling
Immigration Judge

APPENDIX D — ORAL DECISION OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES IMMIGRATION COURT, YORK, PENNSYLVANIA DATED FEBRUARY 22, 2006

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

February 22, 2006

File No.: A 39 075 734

IN REMOVAL PROCEEDINGS

In the Matter of

MANOJ NIJHAWAN

Respondent

CHARGE: 237 (a) (A) (ii), 237 (a) (A) (iii).

APPLICATION: Termination.

ON BEHALF OF RESPONDENT:
Thomas E. Moseley, Esquire

ON BEHALF OF DHS:
Maureen Gaffney
Assistant Chief Counsel

Appendix D

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 46-year-old married male alien, a native and citizen of India. He entered the United States as an immigrant in July of 1985. He was placed into removal proceedings on or about September 7, 2005, with the issuance of a Notice to Appear Form I-862. Respondent conceded allegations no. 1 through no. 5. He denied the grounds of removal as set forth against him and requested termination.

In an interlocutory ruling on motion to terminate, which is appended to the record and dated February 8, 2006, the Court determined the aggravated felony grounds of removal as charged against respondent, as set forth on the Notice to Appear, were valid and thus the Government has met its burden of proof by clear and convincing evidence. The reasons set forth for the Court's findings in this regard, or as set forth in the interlocutory ruling, will not be repeated here.

As respondent is not seeking any other relief to avoid removal, the following order is hereby entered.

ORDER

Respondent is hereby ordered removed from the United States to India pursuant to the grounds of removal as set forth in his Notice to Appear.

s/ Walter A. Durling
WALTER A. DURLING
Immigration Judge

APPENDIX E — INTERLOCUTORY RULING ON MOTION TO TERMINATE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES IMMIGRATION COURT, YORK PENNSYLVANIA DATED FEBRUARY 8, 2006

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

IN REMOVAL PROCEEDINGS

File # A 39 075 734

IN THE MATTER OF:

NIJHAWAN, Manoj

Respondent.

ON BEHALF OF RESPONDENT:
Thomas E. Moseley, Esq.

ON BEHALF OF DHS:
Jeffrey Bubier, Esq.

Appendix E

INTERLOCUTORY RULING ON MOTION TO TERMINATE

Respondent, through counsel, has submitted a pre-trial brief in support of his motion to terminate proceedings. The DHS has submitted, through its attorney, a brief in opposition to termination. Both briefs have been duly considered. Respectfully, the court disagrees with respondent and concurs with DHS counsel that respondent's conviction for conspiracy to money laundering was in an amount exceeding $10,000., the threshold amount set forth in the aggravated felony definitions at INA §§ 101(a)(43)(D). The court further agrees that respondent's conviction for conspiracy to commit bank, mail, and wire fraud, a violation of INA § 101(a)(43)(M)(i) and (U), is also an aggravated felony.

In this regard, it is first presumed that the indictment appended to the record at Tab F of DHS evidence is the same "superseding indictment" upon which respondent was found guilty by jury trial as reflected in the Judgment at Tab B of DHS evidence, and as further referenced in the post-trial "sentencing stipulation" appended to the record at Tab G. For purposes of examining this record to determine whether the government has met its burden of proof by clear and convincing evidence, INA § 240(o)(3)(A), respondent was convicted under Counts 1 and 30 of the indictment, with conspiracy to money laundering being the primary or more serious criminal scheme, and conspiracy to commit bank, mail, and wire fraud being the conduit upon which the illegal enterprise was based.

Importantly, it is divined that Count 30 (conspiracy to money laundering) is directly premised on Count 1 (conspiracy to commit bank fraud, mail fraud, and wire fraud). Both the district court's jury charge, Tab A, paragraphs 3018-3032 of respondent's evidence, and page 2 of Tab G[1] of DHS evidence, make this clear. For purposes of ascertaining the extent of respondent's conviction *vis-a-vis* INA § 101(a)(43)(D), the court must engage in a *modified* categorical approach. This is because, as respondent accurately points out in his brief, the federal money laundering statute does not delineate any specific monetary amount of proceeds upon which a conviction must be based. For that matter, neither does Title 18 U.S.C. § 371. Indeed, the district court's extensive jury charge mentions no specific monetary amount in order to adjudge guilt.

On the other hand, DHS counsel is quite correct in observing that 18 U.S.C. § 1956(h), the federal statute under which respondent was adjudged guilty, is "an offense described in section 1956 of Title 18 . . ." as set forth in INA § 101(a)(43)(D). Thus, since no specific monetary amount is required under section 1956 to obtain a conviction, the DHS must establish that the $10,000. threshold amount set forth in the aggravated felony provision has been met in this case. And the only way this court can make that assessment is to examine the entire criminal record, which in this case includes the indictment. This is where, as needed, a *modified* categorical approach may be undertaken. *Singh v.*

1. Specifically, under paragraph entitled "Offense Level", ¶ 2.

Ashcroft, 383 F.3d 144, 161 (3rd Cir. 2004). In this regard, unlike those instances where a defendant enters a guilty plea, which may or may not conform in all particular regards to the indictment,[2] it must be presumed, absent evidence to the contrary, that a jury's findings conform in all respects to the specific allegations set forth under those counts of the indictment upon which a finding of guilt is made. "Evidence to the contrary" is a burden, of course, which lies with the alien in the form of rebuttal evidence.

A review of the indictment, as DHS counsel aptly points out, Count 1, ¶ 36, does make reference to the following:

> "Since at least on or about 1998, through on or about May 14, 2002, Manoj Nijhawan . . . the defendants . . . and co-conspirators . . . engaged in a fraudulent scheme to obtain *hundreds of millions of dollars* in loans from numerous major banks . . . As part of the scheme, the defendants and their co-conspirators fraudulently induced the Victim Banks to issue a number of loans through an elaborate series of misrepresentations. . . ."

(Emphasis added).

The court concurs with DHS counsel in this particular regard that the indictment itself makes

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2. *Valansi v. Ashcroft*, 278 F.3d 203, 214 (3d Cir. 2002).

reference, *albeit* in general terms, to the amount of monies to which this respondent, through his co-conspiratorial endeavors, participated with several others in their unified fraudulent schemes to engage in money laundering. The term *hundreds of millions of dollars*, however, is sufficiently specific to denote an amount of U.S. currency for exceeding the threshold amount of $10,000. as set forth in INA § 101(a)(43)(D). Again, while no specific reference to amount of monies is enumerated in Count 30 as it relates to conspiracy to money laundering, that count is directly premised upon Count 1. That is, Count 30 is incorporated by reference in the indictment to the facts and allegations set forth in Count 1. When read together, the court is satisfied that the government has met its burden of proof as set forth above to establish a removable offense.

By the very same token, the DHS has met its burden of proof as pertaining to the grounds of removal at INA § 101(a)(43)(M)(i) and (U). Indeed, the only issue in this case as pertaining to the specific grounds of removal is the issue of the threshold monetary amounts set forth in the two substantive charges. The singular reference to "hundreds of millions of dollars" under Count 1 is clearly indicative of the vast amounts of ill gotten gains at the heart of respondent's criminal trial, and the repeated references in that count to fraud also brings the conviction well within the proscriptions of INA § 101(a)(43)(M)(i) as reflecting the loss or attempted loss. Since respondent's conviction entailed conspiracy under Count 1, INA § 101(a)(43)(U) was appropriately charged and has been sustained.

Appendix E

s/ Walter A. Durling
Walter A. Durling
Immigration Judge

February 8, 2006

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 17, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-3948

MANOJ NIJHAWAN,

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

Petition for Review of an Order of the United States Department of Justice Board of Immigration Appeals (BIA No. A39 075 734) Immigration Judge: Walter A. Durling

Appendix F

Present: SCIRICA, *Chief Judge*,
SLOVITER, McKEE, RENDELL, BARRY,
AMBRO, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, HARDIMAN,
STAPLETON,* *Circuit Judges*
and IRENAS,** *District Judge*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Petitioner having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED. Judge Ambro would have granted rehearing.

BY THE COURT:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: July 17, 2008

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* The vote of the Honorable Walter K. Stapleton, Senior Judge of the United States Court of Appeals for the Third Circuit, is limited to panel rehearing only.

** The vote of the Honorable Joseph E. Irenas, Senior Judge of the United States District Court for the District of New Jersey, is limited to panel rehearing only.