No. 06-906

In the Supreme Court of the United States

CARLOS PRADILLA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erroneously failed to employ the "categorical" approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), in deciding whether petitioner was convicted of violating a law "relating to a controlled substance," 8 U.S.C. 1182(a)(2)(A)(i)(II), such that he was ineligible for a discretionary waiver of inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. 1182(h).

2. Whether, in cases in which *Taylor*'s "categorical" approach is employed, the government must establish that the alien's conviction is a basis for removability by proof beyond a reasonable doubt or by clear and convincing evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulation, and rule: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter* but is reprinted at 187 Fed. Appx. 959. The order of the district court (Pet. App. 8-9) and the report and recommendation of the magistrate judge (Pet. App. 10-40) are unreported. The decision of the Board of Immigration Appeals (Pet. App. 5-7) is not published in the *Administrative Decisions Under Immigration & Nationality Laws* but is available at 2004 WL 1167271. The decision of the immigration judge (Pet. App. 41-62) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2006. A petition for rehearing was denied on October 5, 2006 (Pet. App. 63-64). The petition for a writ

of certiorari was filed on January 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Section 245 of the Immigration and Nationality Act (INA), an alien is eligible to adjust his status to that of a lawful permanent resident if three requirements are satisfied: (1) the alien must make an application for such adjustment; (2) the alien must be eligible to receive an immigrant visa and "admissible to the United States for permanent residence"; and (3) an immigrant visa must be immediately available to the alien at the time his application is filed. 8 U.S.C. 1255(a). An alien requesting adjustment of status assimilates himself to the position of an alien outside the United States seeking entry as an immigrant, and thus the question of admissibility is evaluated as of the date of the application for adjustment of status. Pet. App. 30 (citing cases).

Under Section 212(a) of the INA, 8 U.S.C. 1182(a), several classes of aliens are ineligible for admission to the United States. One such class is those who have been convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1182(a)(2)(A)(i)(II). An alien is also ineligible for admission under Section 212(a) if consular or immigration officials know or have reason to believe that the alien "is or has been an illicit trafficker in any controlled substance"; "is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled * * * substance"; or "endeavored to do so." 8 U.S.C. 1182(a)(2)(C)(i).

Under Section 212(h) of the INA, a discretionary waiver of inadmissibility is available to certain classes of inadmissible aliens, including aliens convicted of violating a law relating to a controlled substance "insofar as [the conviction] relates to a single offense of simple possession of 30 grams or less of marijuana." 8 U.S.C. 1182(h). An alien convicted of violating a law "relating to a controlled substance" that does not relate to a single marijuana offense of that type, however, is not eligible for a discretionary waiver of inadmissibility under Section 212(h). Nor is an alien who has been an "illicit trafficker" (or aider or abettor or co-conspirator of an "illicit trafficker") in a controlled substance.

2. Petitioner is a native and citizen of Colombia. In February 1981, he entered the United States at Miami, Florida, on a tourist visa. Between February and November 1981, he traveled from Miami to Los Angeles, California, on three occasions. Pet. App. 11-12, 42, 47.

In July 1982, a grand jury in the Central District of California returned a 35-count indictment against petitioner and 21 others. Pet. Mot. for T.R.O. & Prelim. Inj. Exh. I, Indictment (Indictment). Count One of the indictment charged a conspiracy in violation of 18 U.S.C. 371, which makes it a crime to "conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner of for any purpose." Indictment 2-18. In particular, Count One charged that petitioner and others conspired (a) to fail to file currency transaction reports for transactions involving $10,000 or more, (b) to cause financial institutions to fail to file currency transaction reports for such transactions, (c) to use facilities in interstate commerce with the intent to distribute the proceeds of narcotics trafficking, and (d) to defraud the Internal

Revenue Service. *Id.* at 2-4. In describing the means by which the objects of the conspiracy were accomplished, Count One alleged that the defendants collectively "provided a money laundering service involving currency deposits and wire transfers for major narcotics traffickers who derived large quantities of United States currency from sales of cocaine" (*id.* at 4-5) and that petitioner individually "collected and transferred, and caused the collection and transfer, of currency to [other] defendants" (*id.* at 7). The indictment also charged petitioner with two counts of conspiracy to possess with intent to distribute and to distribute cocaine, in violation of 21 U.S.C. 846 (Counts Two and Three), and one count of aiding and abetting possession with intent to distribute cocaine, in violation of 21 U.S.C. 841 and 18 U.S.C. 2 (Count Four). Indictment 19-27.

At some point in 1982, petitioner returned to Colombia. On December 3, 1985, he again entered the United States at Miami, as a B-2 nonimmigrant visitor authorized to stay in the country until June 2, 1986. He remained in the United States beyond that date, however. In February 1991, he was arrested on a warrant. Pet. App. 11, 14, 42, 48.

In May 1991, petitioner pleaded guilty to Count One of the indictment. Pet. Mot. for T.R.O. & Prelim. Inj. Exh. I, Plea Tr. (Plea Tr.). At the plea proceeding, the district court asked the prosecutor what the evidence would show if the case were to go to trial. *Id.* at 5. In response, the prosecutor stated that the evidence would show that "other members of the conspiracy had access to large amounts of currency, which was derived from the sale of cocaine"; that petitioner "would take, deliver or transfer currency at the direction of others in the conspiracy to financial institutions"; and that, "[p]rior to

the delivery of the money to the banks, certain co-conspirators of [petitioner] had made an illegal agreement with the financial institutions to fail to file the necessary reports with the Department of Treasury." *Id.* at 6. The prosecutor added that petitioner "knew that the money was being transported for this purpose and knew that it was against the law." *Ibid.* The district court then asked petitioner whether he agreed with the facts that the prosecutor had stated. *Ibid.* Petitioner answered "[y]es." *Ibid.*

The district court sentenced petitioner to three years of probation and a fine of $1000. Pet. App. 14, 48.

3. a. In June 1992, the Immigration and Naturalization Service (INS) instituted deportation proceedings against petitioner. Pet. App. 15, 43.* It initially alleged that petitioner was deportable on three grounds: (1) that he had been convicted of a crime relating to a controlled substance (see 8 U.S.C. 1227(a)(2)(B)(i)); (2) that he was excludable at the time of entry as an alien that a consular or immigration official knew or had reason to know had been an illicit trafficker in a controlled substance (see 8 U.S.C. 1182(a)(2)(C)(i), 1227(a)(1)(A)); and (3) that he was present in the United States in violation of law because he had remained in the country beyond the time authorized (see 8 U.S.C. 1227(a)(1)(B)). Pet. App. 15-16, 43. The INS subsequently withdrew the first and second charges of deportability. *Id.* at 16. Petitioner conceded that he was deportable but applied for suspension of deportation under former Section 244(a)(1) of the INA (see 8 U.S.C.

* The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

1254(a)(1) (1994)). Pet. App. 16, 43. Later, after the Department of Labor granted his application for a labor certification, petitioner filed an application for adjustment of status. *Id.* at 16, 44. He also filed an application for a waiver of inadmissibility under Section 212(h) of the INA. *Id.* at 17, 46.

b. The immigration judge (IJ) ruled that petitioner was deportable on all three of the grounds initially alleged by the INS; denied his applications for suspension of deportation, waiver of inadmissibility, and adjustment of status; and ordered him deported to Colombia. Pet. App. 41-62. The IJ held that petitioner was ineligible for suspension of deportation because he could not satisfy the statutory requirement of continuous physical presence in the United States for seven years. *Id.* at 49-52; see 8 U.S.C. 1254(a)(1) (1994). The IJ held that petitioner was ineligible for a waiver of inadmissibility on two independent grounds: he had been convicted of a violation of a law "relating to a controlled substance" (and he was therefore inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(II)); and there was reason to believe that he was an "illicit trafficker" in a controlled substance or a co-conspirator of an "illicit trafficker" (and he was therefore inadmissible under 8 U.S.C. 1182(a)(2)(C)(i)). Pet. App. 52-59. With respect to the former ground, the IJ reasoned that petitioner's "conviction for conspiracy" was "based on an underlying charge of traveling in interstate and foreign commerce with the intent to distribute, and thereafter distributing, the proceeds of unlawful narcotics and controlled substances activities." *Id.* at 55-56. With respect to the latter ground, the IJ reasoned that, even though petitioner's "conviction does not include a finding of illicit trafficking in drugs," the indictment and guilty plea

"provide a basis for concluding that [petitioner] had been a conspirator with others in the illicit trafficking of a controlled substance," and thus there was "reason to believe [that petitioner] was either an illicit drug trafficker[] or involved in a conspiracy therewith." *Id.* at 58-59. Finally, the IJ held that petitioner was ineligible to adjust his status because he was ineligible for a waiver of inadmissibility and therefore could not satisfy the statutory requirement that he be admissible to the United States. *Id.* at 60.

c. Petitioner appealed to the Board of Immigration Appeals (BIA), which sustained the appeal in part and dismissed it in part. Pet. App. 5-7. The BIA held that the IJ erred in finding petitioner deportable on the grounds that had been withdrawn by the INS. *Id.* at 6. But it held that the IJ correctly found petitioner ineligible for a waiver of inadmissibility, because he had been convicted of an offense relating to controlled substances, and correctly found petitioner ineligible for suspension of deportation, because he was not continuously present in the United States for seven years. *Id.* at 6-7. The BIA did not reach the question whether petitioner was ineligible for a waiver of inadmissibility on the independent ground that there was reason to believe that he was an illicit trafficker in a controlled substance. *Ibid.*

4. Petitioner challenged the agency's decision in a petition for a writ of habeas corpus. The district court referred the petition to a magistrate judge for a report and recommendation.

a. The magistrate judge recommended that the petition be denied. Pet. App. 10-40. As relevant here, the magistrate judge concluded that the agency had correctly ruled that petitioner was ineligible for a waiver of inadmissibility, both because he had been convicted of a

violation of a law "relating to a controlled substance" and because there was reason to believe that he was an "illicit trafficker" in a controlled substance (or at least an aider and abettor or co-conspirator of an "illicit trafficker"). *Id.* at 25-37. With respect to the former ground, the magistrate judge reasoned that "[t]he allegations in Count I [of the indictment] demonstrate that the petitioner's conspiracy conviction is so closely related to the underlying drug offenses * * * as to be a conviction 'relating to' a controlled substance." *Id.* at 33-34. With respect to the latter ground, the magistrate judge reasoned that it was permissible to consider "not only the petitioner's conviction but 'credible evidence' that the petitioner has trafficked in drugs"; that "[s]uch evidence could include the other counts in the indictment and the petitioner's plea colloquy"; and that, "[o]n those bases," there was "reason to believe" that "the petitioner had been an illicit drug trafficker or at the very least a knowing assistor or conspirator in the illicit trafficking of drugs." *Id.* at 36 (quoting *Castano* v. *INS*, 956 F.2d 236, 238 (11th Cir. 1992)).

b. The district court overruled petitioner's objection to the magistrate judge's report and recommendation, adopted the report and recommendation, and entered an order denying the petition for a writ of habeas corpus. Pet. App. 8-9.

5. The court of appeals converted petitioner's habeas corpus petition into a petition for review and denied the petition in an unpublished per curiam opinion. Pet. App. 1-4; see REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106(a), 119 Stat. 311 (to be codified at 8 U.S.C. 1252(a)(5)) (providing that "a petition for review filed with an appropriate court of appeals * * * shall be the sole and exclusive means for judicial review

of an order of removal"). The court stated that "the petition is without merit for reasons fully discussed at oral argument." Pet. App. 4.

ARGUMENT

1. Petitioner contends (Pet. 9-21) that the "categorical" approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), must be employed in deciding whether an alien has been convicted of violating a law "relating to a controlled substance," 8 U.S.C. 1182(a)(2)(A)(i)(II), such that the alien is ineligible for a discretionary waiver of inadmissibility under Section 212(h) of the INA, 8 U.S.C. 1182(h), and that the court of appeals did not employ that approach here. As explained below, it is not clear that *Taylor*'s "categorical" approach applies in this context; the agency and lower courts in any event applied it; they applied it correctly; there is no circuit conflict on the issue; and petitioner would not be entitled to relief even if his contention had merit. Further review is therefore unwarranted.

a. As this Court recently explained in *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815 (2007), "[i]n determining whether a conviction * * * falls within the scope of a listed offense" that "subjects certain aliens to removal from the United States," the courts "uniformly have applied the ['categorical'] approach this Court set forth in *Taylor*." *Id.* at 818. *Taylor* held that, when a court "seeks to determine whether a particular prior conviction" satisfies the applicable federal definition, "it should normally look not to the facts of the particular prior case, but rather to the * * * statute defining the crime of conviction." *Ibid.* (citing *Taylor*, 495 U.S. at 599-600). When the criminal statute "include[s] both a * * * listed crime and * * * one or more nonlisted

crimes," however, *Taylor* permits a court "to go beyond the mere fact of conviction" and determine whether the defendant was convicted of a listed or a nonlisted crime. *Id*. at 818-819 (quoting *Taylor*, 495 U.S. at 602). As the Court observed in *Duenas-Alvarez*, "some courts refer to this [second] step of the *Taylor* inquiry as a 'modified categorical approach.'" *Id*. at 819. In determining whether a defendant was convicted of a listed crime at the "modified categorical" step of the *Taylor* inquiry, courts are permitted to examine "the indictment or information and jury instructions" (if the defendant was convicted after a trial), *ibid*. (quoting *Taylor*, 495 U.S. at 602), and the "charging document," "plea agreement," "transcript of colloquy between judge and defendant," or "some comparable judicial record" of that information (if the defendant was convicted by guilty plea), *ibid*. (quoting *Shepard* v. *United States*, 544 U.S. 13, 26 (2005)). See also 8 U.S.C. 1229a(c)(3)(B) (listing "documents or records" constituting "proof of a criminal conviction").

Taylor was a criminal case, in which the prior convictions resulted in a higher sentence, see 18 U.S.C. 924(e), and there is reason to question whether its "categorical" approach must be applied, at least in the same way, in the deportation context. Recognizing that the *Taylor* methodology is informed, in part, by "constitutional concerns * * * emanat[ing] from the Sixth Amendment," at least one court of appeals has declined to "transplant the categorical approach root and branch—without any modification whatever—into the civil removal context." *Conteh* v. *Gonzales*, 461 F.3d 45, 55 (1st Cir. 2006), petition for cert. pending, No. 06-9829 (filed Jan. 8, 2007). Another court has indicated that "a departure from the formal categorical approach seems warranted" at least

in cases where "the terms of the statute invite inquiry into the facts underlying the conviction at issue." *Singh* v. *Ashcroft*, 383 F.3d 144, 161 (3d Cir. 2004) (Becker, J.). The BIA agrees. See *In re Gertsenshteyn*, 24 I. & N. Dec. 111, 112 (2007) (whether an offense relating to transportation for the purposes of prostitution was "committed for commercial advantage," such that it is an "aggravated felony" under 8 U.S.C. 1101(a)(43)(K)(ii), "may be proved by any evidence, including evidence outside the record of conviction").

Moreover, although petitioner may be correct that some version of "the 'categorical' or 'modified categorical' approach must be used in determining whether a crime committed by an alien is a deportable offense" (Pet. 8), this case does not present the question whether the crime of which petitioner was convicted is "a deportable offense." Petitioner was found to be deportable, not because of his conspiracy conviction, but because he had remained in the country beyond the time authorized. Pet. App. 5-7. Indeed, petitioner conceded that he was deportable on that ground. *Id.* at 16, 43. The issue in this case is whether petitioner's prior conviction renders him ineligible for a discretionary waiver of inadmissibility, not whether it renders him deportable. And it is not clear that *any* version of the "categorical" approach must be employed in deciding that issue.

b. Even assuming that the "categorical" approach employed in *Taylor* must also be employed in deciding whether an alien is ineligible for a discretionary waiver of inadmissibility by virtue of having been convicted of violating a law "relating to a controlled substance," no error occurred here, because no different approach was employed. Petitioner pleaded guilty to violating the

general conspiracy statute, 18 U.S.C. 371, which reaches both conduct that is related to a controlled substance and conduct that is not. Under the "modified categorical" approach, therefore, it was appropriate to consult the indictment and the transcript of the plea colloquy in deciding whether the conduct of which petitioner was convicted was related to a controlled substance. *Duenas-Alvarez*, 127 S. Ct. at 819; *Shepard*, 544 U.S. at 26. In deciding that it was, the IJ relied exclusively on those documents, Pet. App. 47-48, 54-56, and the BIA "agree[d] with the [IJ]," *id.* at 6. Likewise, in recommending that the district court deny petitioner's petition for a writ of habeas corpus challenging the agency's decision, the magistrate judge relied exclusively on the same documents, *id.* at 12-15, 31-34, and the district court adopted the magistrate judge's recommendation.

After converting the petition for a writ of habeas corpus into a petition for review, the court of appeals rejected all of petitioner's contentions without explanation. Pet. App. 4. There is no basis to conclude, however, that it relied on anything other than the indictment and plea colloquy in rejecting petitioner's contention that he had not been convicted of violating a law "relating to a controlled substance." Indeed, as far as that contention is concerned, there is no indication that the agency had any evidence before it other than the indictment, plea agreement, transcript of plea colloquy, and judgment of conviction, see *id.* at 42, all of which could permissibly be considered under the "modified categorical" approach described in *Taylor*. And since, on petition for review of a removal order, a court of appeals' review of the agency's decision is limited to the evidence in the administrative record, 8 U.S.C. 1252(b)(4)(A), there does not appear to be any basis for the court of

appeals to have decided the case other than in accordance with *Taylor*.

Petitioner claims that "[t]he IJ based his conclusion that [petitioner's] crime was related to a controlled substance on the fact that 'Count 3' of the Indictment—a Count for which [petitioner] was charged but *never convicted*—alleged that he was involved in drug trafficking activities." Pet. 6 (citing Pet. App. 54). The IJ's reference to "Count Three," however, was clearly a reference to the third object of the conspiracy charged in Count One, as the language immediately following the reference makes clear. Compare Pet. App. 54 (IJ decision) ("[Petitioner] was charged in Count Three of the Indictment with traveling in interstate and foreign commerce with the intent to distribute, and thereafter distributing, the proceeds of unlawful narcotics and controlled substances activities.") with Indictment 4 (Count One, Object Three) (petitioner conspired to "travel in interstate and foreign commerce * * * with intent to distribute the proceeds of an unlawful activity, namely narcotics and controlled substances"). Petitioner also claims that the magistrate judge "based [his] holding on 'other counts of the indictment,' though [petitioner] was *never convicted* of any other charges." Pet. 7 (citing Pet. App. 34). What the magistrate judge in fact said, however, is that "[t]he allegations in Count I demonstrate that the petitioner's conspiracy conviction is so closely related to the underlying drug offenses contained in the other counts of the indictment as to be a conviction 'relating to' a controlled substance." Pet. App. 33-34. Contrary to petitioner's assertion, therefore, the IJ and magistrate judge did not "determine[]"—much less "expressly determine[]"—that petitioner's "offense related to controlled substances on the basis of drug charges against

[him] that were dismissed without ever having gone to trial." Pet. 23. The IJ and magistrate judge relied only on the charge (Count One) to which petitioner pleaded guilty. Pet. App. 31-34, 54-56.

c. Contrary to petitioner's contention, there is also no basis to conclude that the agency or courts below applied *Taylor* incorrectly. See Pet. 18 ("Had [the court of appeals] applied the categorical or modified categorical approach, it could only have reached the decision that [petitioner] was not convicted of an offense relating to a controlled substance."). Petitioner pleaded guilty to Count One of the indictment. Pet. App. 14-15, 48. That count charged him and others with conspiracy to commit four offenses against the United States, one of which was "travel[ing] in interstate and foreign commerce," "us[ing] any facility in interstate and foreign commerce," and "caus[ing] such travel and use," with the "intent to distribute the proceeds of an unlawful activity, namely narcotics and controlled substances." Indictment 4. As means of accomplishing the objects of the conspiracy, Count One alleged that petitioner and others "provided a money laundering service involving currency deposits and wire transfers for major narcotics traffickers who derived large quantities of United States currency from sales of cocaine" and that petitioner personally "collected and transferred, and caused the collection and transfer, of currency" to others. *Id.* at 4-5, 7. At the plea proceeding, in response to the district court's request for a description of what the evidence would show if the case were to go to trial, the prosecutor said that "members of the conspiracy had access to large amounts of currency, which was derived from the sale of cocaine"; that petitioner "would take, deliver or transfer currency * * * to financial institutions"; that "an ille-

gal agreement" had been made with the financial institutions "to fail to file the necessary reports with the Department of Treasury"; and that petitioner "knew that the money was being transported for this purpose and knew that it was against the law." Plea Tr. 5-6. When the district court asked petitioner whether he agreed with the facts stated by the prosecutor, petitioner answered "[y]es." *Id.* at 6.

The conviction records that may permissibly be considered at the "modified categorical" step under this Court's decisions therefore establish that petitioner was convicted of violating a law "relating to a controlled substance," particularly since "[t]he phrase 'relating to' in this context has long been construed to have broad coverage." *In re Beltran*, 20 I. & N. Dec. 521, 526 (B.I.A. 1992). In any event, this Court ordinarily does not grant certiorari when the asserted error consists only of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

d. Petitioner contends (Pet. 12-18) that there is a circuit conflict on whether *Taylor*'s "categorical" approach should be employed in deciding whether an alien has been convicted of an offense "relating to a controlled substance." He contends that "[t]he Ninth Circuit applies the categorical and modified categorical approach" to that question, while "the First, Fifth, and Sixth Circuits analyze the relevant statutes and underlying facts on the basis of different criteria." Pet. 17. That is not correct. Like the decisions of the agency and courts below, the decisions on which petitioner relies (Pet. 13-16) *all* applied "the categorical and modified categorical approach." See *Medina* v. *Ashcroft*, 393 F.3d 1063, 1065-1066 (9th Cir. 2005) (explicitly applying "categorical" and "'modified' categorical" approach); *Peters* v.

Ashcroft, 383 F.3d 302, 306 (5th Cir. 2004) (relying on statute of conviction and judgment of conviction); *Urena-Ramirez* v. *Ashcroft*, 341 F.3d 51, 54 (1st Cir. 2003) (relying on statute of conviction and plea agreement); *Casteneda de Esper* v. *INS*, 557 F.2d 79, 80 (6th Cir. 1977) (no dispute as to offense of which alien was convicted).

Petitioner contends (Pet. 14-16) that, rather than employing *Taylor*'s "categorical" approach, the First, Fifth, and Sixth Circuits employ a "nexus" test (or something akin to one). That contention confuses apples and oranges. The "categorical" approach provides a methodology for determining the crime of which the alien was in fact convicted; the "nexus" test provides a methodology for determining whether the crime of which the alien was convicted "relat[es] to a controlled substance." Thus, in *Peters*, the Fifth Circuit first relied on the criminal statute and record of conviction to determine that the alien had been convicted of solicitation to transport marijuana for sale (383 F.3d at 306), and then it concluded that that offense "relat[es] to a controlled substance" because "there was a sufficient nexus between his solicitation conviction and drug-related laws" (*id*. at 309). Likewise, in *Urena-Ramirez*, the First Circuit first relied on the criminal statute and record of conviction to determine that the alien had been convicted of traveling in interstate commerce to promote a business enterprise involving cocaine (341 F.3d at 54), and then it concluded that that offense "relat[es] to a controlled substance" because "the Travel Act violation" was not "separate or distinct" from "the petitioner's involvement in the cocaine trade" (*ibid*.). Indeed, the Ninth Circuit employs the same two-step approach. See, *e.g.*, *Johnson* v. *INS*, 971 F.2d 340, 342-343 (1992) (rely-

ing on statute of conviction and information to determine that alien had been convicted of traveling in interstate commerce with intent to distribute narcotics proceeds and then concluding that that offense "relat[es] to a controlled substance" because it "direct[ly] involve[d] * * * a drug transaction"). Even if there *were* a circuit conflict, however, this case would not be an appropriate one for resolving it, because there is no reason to believe that the court below applied a standard other than the one that petitioner advocates. See pp. 11-14, *supra*.

e. If petitioner were correct in his contention that he was not ineligible for a discretionary waiver of inadmissibility on the ground that he had been convicted of violating a law "relating to a controlled substance," he would still be ineligible for a waiver of inadmissibility on an independent ground. A ruling in his favor would therefore have no effect on the outcome of the case.

The IJ found that, in addition to being ineligible for a waiver of inadmissibility by virtue of having been convicted of an offense "relating to a controlled substance," petitioner was ineligible for such a waiver under 8 U.S.C. 1182(a)(2)(C)(i), because the indictment and plea colloquy provided "reason to believe" that he was an "illicit trafficker in [a] controlled substance" or a co-conspirator of an "illicit trafficker." Pet. App. 56-59. Although the BIA did not reach that question, *id.* at 6-7, the magistrate judge did. He came to the same conclusion as the IJ, *id.* at 35-37, and the district court adopted his recommendation, *id.* at 8-9.

Because the court of appeals converted the habeas corpus petition into a petition for review, Pet. App. 1-4, it was reviewing the decision of the BIA rather than the district court. And because the BIA did not address the alternative ground for petitioner's ineligibility for a

waiver of inadmissibility, the court of appeals probably should be presumed not to have passed on it either. There is little doubt, however, that the IJ's finding was a permissible one, and that, particularly in light of the deferential standard of review, it would be upheld by the BIA and the court of appeals. See 8 C.F.R. 1003.1(d)(3)(i) (on appeal to the BIA, "[f]acts determined by the immigration judge * * * shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous"); 8 U.S.C. 1252(b)(4)(B) (on petition for review to the court of appeals, "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). Even if petitioner's guilty plea to Count One of the indictment did not establish that he was convicted of a crime "relating to a controlled substance," a grand jury found probable cause to believe (in Counts Two, Three, and Four) that he conspired to distribute cocaine and aided and abetted the distribution of cocaine. Indictment 19-27. In combination with petitioner's guilty plea to Count One, the grand jury's finding provided a solid basis for the IJ to find "reason to believe" that petitioner was an "illicit trafficker" in a controlled substance or a co-conspirator of an "illicit trafficker." See *Castano* v. *INS*, 956 F.2d 236, 238 (11th Cir. 1992) ("it is not necessary that an alien seeking admission have been convicted, or even arrested or investigated for drug trafficking in order to be inadmissible[;] the alien may be denied admission if officials 'know or have reason to believe' that the alien has trafficked in drugs").

2. Petitioner also urges the Court to grant certiorari to decide whether, when *Taylor*'s "categorical" approach applies, "the government's standard of proof in establishing the grounds for removability" (Pet. 21) is proof

beyond a reasonable doubt or clear and convincing evidence. Pet. 21-23. For two independent reasons, that question is not presented in this case.

First, petitioner's conspiracy conviction was not the ground for his removability, but rather a ground that rendered him ineligible for a waiver of inadmissibility. And on the question of admissibility, it is the alien, not the government, that bears the burden of proof. See 8 U.S.C. 1229a(c)(2)(A) ("the alien has the burden of establishing * * * that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under [8 U.S.C.] 1182"); 8 U.S.C. 1361 ("[w]henever any person * * * makes application for admission, * * * the burden of proof shall be upon such person to establish that he * * * is not inadmissible").

Second, the fact that *was* the ground for petitioner's removability—that he was present in the United States in violation of law by virtue of having remained in the country beyond the time authorized—was uncontested. See Pet. App. 16 (noting that petitioner "conceded his deportability"); *id.* at 43 (same); see also Pet. 5 n.3 (noting that petitioner "conceded that he was removable on the basis of his visa overstay"). The standard of proof by which the government must establish that fact, therefore, has no relevance in this case.

In any event, in light of the IJ's alternative ruling, petitioner would be removable and ineligible for a waiver of inadmissibility even if it were determined that his conspiracy conviction did not make him ineligible for a waiver. See pp. 17-18, *supra*. That is an additional reason why certiorari should be denied on this question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2007