

No. 19-434

In the Supreme Court of the United States

FRANCISCO ROMERO, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

MEMORANDUM FOR THE RESPONDENT

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Petitioner contends (Pet. 12-13) that the court of appeals erroneously affirmed the Board of Immigration Appeals' decision denying his application for cancellation of removal on the ground that the proffered conviction records for his 1985 state controlled-substance offense were inconclusive as to whether that conviction constituted an aggravated felony under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(B). See Pet. App. 1a-4a, 5a-14a. For the reasons set forth below, the petition for a writ of certiorari in this case should be held pending the Court's disposition of the petition for a writ of certiorari in *Pereida v. Barr*, No. 19-438 (filed Sept. 30, 2019), which presents a substantially similar question, and then disposed of as appropriate in light of any further proceedings in that case.

1. Under the INA, the Attorney General has the discretion to cancel the removal of an alien who is inadmissible or deportable, but meets certain statutory criteria

for such relief. 8 U.S.C. 1229b. The Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, § 203, 111 Stat. 2196-2199, allows certain aliens to receive cancellation of removal under a somewhat more lenient standard than standard cancellation of removal, but is unavailable for any alien who has been convicted of an “aggravated felony” as defined by 8 U.S.C. 1101(a)(43). See 8 C.F.R. 1240.61(b), 1240.66(a). An alien seeking any form of relief from removal, including cancellation of removal, “has the burden of proof to establish” that he “satisfies the[se] applicable eligibility requirements.” 8 U.S.C. 1229a(c)(4)(A)(i); see 8 C.F.R. 1240.8(d).

Petitioner argues (Pet. 12-13) that an alien who has been convicted under a divisible state statute that includes some disqualifying offenses can nonetheless establish eligibility for relief if the submitted conviction documents are inconclusive as to whether he was convicted of one of those disqualifying offenses. Like most courts of appeals to have considered the question, the court of appeals correctly held that, when the record of conviction is inconclusive, an alien has not carried his burden of showing that he has not been convicted of a disqualifying offense for purposes of discretionary relief from removal. Pet. App. 2a-3a; see *Pereida v. Barr*, 916 F.3d 1128, 1132-1133 (8th Cir. 2019), petition for cert. pending, No. 19-438 (filed Sept. 30, 2019); *Gutierrez v. Sessions*, 887 F.3d 770, 779 (6th Cir. 2018), cert. denied, 139 S. Ct. 863 (2019); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 583-584 (10th Cir. 2017), cert. denied, 139 S. Ct. 865 (2019).

The en banc Ninth Circuit, however, recently reached a contrary conclusion. *Marinelarena*, 930 F.3d at 1042, 1048 (“If the record does *not* conclusively establish that

the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes.”). In addition, the First Circuit has held that where all existing conviction documents have been proffered, any remaining ambiguity regarding the offense of conviction should be resolved in favor of eligibility for relief. *Sauceda v. Lynch*, 819 F.3d 526, 531-532 (1st Cir. 2016).

2. In light of the conflict in the courts of appeals, petitioner argues (Pet. 9-12) that this Court’s review is warranted to consider “[w]hether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the [INA].” Pet. i. The government agrees that this question warrants review, and has urged the Court to grant certiorari in *Pereida v. Barr*, No. 19-438 (filed Sept. 30, 2019), to resolve that question. See U.S. Br. at 7-14, *Pereida*, *supra* (filed Nov. 12, 2019).

Petitioner acknowledges (Pet. 13-14) that this case is not a suitable vehicle in which to consider the question presented, because petitioner is currently seeking state post-conviction relief for his 1985 state controlled-substance conviction, which could affect his eligibility for relief from removal, and because, in any event, petitioner has a 1986 state controlled-substance conviction that neither the IJ nor Board has yet considered. Accordingly, petitioner argues that his petition should be held pending this Court’s consideration of the pending petition for a writ of certiorari in *Pereida*, *supra*. The government agrees. Because a decision by this Court in *Pereida* may affect the proper disposition of the petition for a writ of certiorari in this case, the petition in this case should be held pending the disposition in that

case, and then disposed of as appropriate in light of that disposition.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

NOVEMBER 2019

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.