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Measuring the Risk of Physical Force in Evaluating Crimes of Violence Under 18 U.S.C. § 16(b)

by Benjamin Crouse

Introduction

In a work dedicated to understanding risk and decision-making in a democratic society, the National Academy of Sciences noted that judges are among those societal actors who must cope with "complex and controversial" risk assessments. Paul C. Stern & Harvey V. Fineberg, Editors, Committee on Risk Characterization, National Research Council, *Understanding Risk: Informing Decisions in a Democratic Society* 1-2 (1996), <http://www.nap.edu/catalog/5138.html>. In the immigration context, adjudicators are specifically required to engage in such a risk assessment in cases involving potential "crimes of violence" under 18 U.S.C. § 16(b).

Under 18 U.S.C. § 16, a "crime of violence" is defined as

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

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

(Emphasis added.)

If physical force is an element of the offense, it is a crime of violence under § 16(a). However, if physical force is not an element and the offense is a felony, it may still be a crime of violence under § 16(b). That is, if the offense "by its nature . . . involves a *substantial risk* that physical force . . . may be used," it is a crime of violence. 18 U.S.C. § 16(b). Thus, a § 16(b) analysis requires an assessment of the risk that physical force may be used in the commission of an offense. A review of relevant case law indicates that

adjudicators have struggled in evaluating the nature of a particular crime and determining the likelihood that force would be used in commission of the crime.

This article first explains how the Federal courts have interpreted the phrase “physical force,” which lies at the heart of a § 16(b) analysis. Next, it briefly describes the categorical approach and the hypothetical models that frame the risk analysis of a court. Then, it discusses a number of statutory elements that courts have considered to predict the risk that physical force will be used. The article also explains how statistical evidence has been employed to quantify risk in a similar context and how such evidence may be used in a § 16(b) analysis.

Physical Force

In creating a statutory framework for determining whether an offense is one involving violence, Congress has used the term “physical force” in various contexts. For example, it has mandated enhanced penalties for “crime[s] of violence” and “violent felonies,” both of which are defined by the use, attempted use, or threatened use of physical force. See 18 U.S.C. §§ 16, 921(a)(33)(A)(ii), 924(e)(2)(B)(i); U.S.S.G. §§ 2L1.2(b)(1) cmt. n.1(B)(iii), 4B1.2(a) cmt. n.1.

In *Johnson v. United States*, 130 S. Ct. 1265 (2010), the Supreme Court attempted to define the term “physical force” in the context of a violent felony under the Armed Career Criminal Act (“ACCA”). 18 U.S.C. § 924(e)(2)(B)(i). Interpreting § 924(e)(2)(B)(i), the Court cited case law analyzing “physical force” in the context of § 16(b). *Id.* at 1270-71. The Court was careful to note that its holding applied specifically to § 924(e)(2)(B) and cautioned against cross-referencing. *Id.* at 1273. Courts and the Board, however, frequently cross-reference other statutory schemes in order to discern the meaning of a particular term. See, e.g., *United States v. Duval*, 496 F.3d 64, 84-85 (1st Cir. 2007) (determining whether the term “offensive contact” in Maine’s assault and battery statute constitutes a violent felony for purposes of the ACCA); *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1197-98 (11th Cir. 2007) (stating that there is no meaningful distinction between the definition of a “crime of violence” under U.S.S.G. § 2L1.2(b)(1), the definition of a “crime of violence” under U.S.S.G. § 4B1.2(a), or the definition of a “crime of domestic violence” under 18 U.S.C. § 922(g)(9)); *Matter of Velazquez*, 25 I&N Dec. 278, 281-82 (BIA 2010)

(citing *Johnson* in a § 16(a) case). *But see Singh v. Ashcroft*, 386 F.3d 1228, 1233 n.8 (9th Cir. 2004) (cautioning that the “same or similar words may have different meanings when used in different statutes motivated by different legislative purposes”).

In *Johnson*, 130 S. Ct. at 1271, the Supreme Court defined physical force as “violent force—that is, force capable of causing physical pain or injury to another person.” This definition specifically excludes offenses based on mere offensive touching. See *id.* at 1277 (Alito, J., dissenting) (noting that almost half the States have statutes reaching violent force and force that is not violent but is offensive under the majority’s definition). See Edward R. Grant, *Dynes and Newtons: “Crime of Violence” Standards in the Wake of Johnson v. United States*, Immigration Law Advisor, Vol. 4, No. 3 (2010).

Finally, the language in the *Johnson* opinion calls into question whether “physical force” includes drugging, poisoning, or infecting with a disease. Before *Johnson*, several courts had reached the conclusion that it does not. See *United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1193-95 (10th Cir. 2008); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006); cf. *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195-96 (2d Cir. 2003) (citing a conviction for drugging another person as an example of prosecution for an offense that did not involve the “use” of physical force in a § 16(a) analysis). *But see Vargas-Sarmiento v. U.S. Dep’t of Justice*, 448 F.3d 159 174-75 (2d Cir. 2006) (stating that intentionally poisoning the food of an unwitting victim is a crime of violence under § 16(b) because the killer uses the “physical force exerted by a poison on a human body” to commit the crime).

Risk Analysis and the Categorical Approach

The risk analysis anticipated in § 16(b) is an abstract but categorical examination of the “the elements and the nature of the offense of conviction.” See *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). “That is, analysis under § 16(b) requires first that the offense be a felony; and, if it is, that the ‘nature of the crime—as elucidated by the generic elements of the offense—is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another’ irrespective of whether that risk develops or harms actually occurs.” *Matter of Alcantar*, 20 I&N

Dec. 801, 812-13 (BIA 1994) (quoting *United States v. Marzullo*, 780 F. Supp. 658, 662 (W.D. Mo. 1991)). The Supreme Court discussed such an approach toward burglary in *Leocal*, 543 U.S. at 10. Burglary, it reasoned, “by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.” *Id.*

Applying this analysis, courts evaluate the likelihood of an actor intentionally using physical force against a victim. *Id.* Adjudicators must look at the likelihood that the offense in question “naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing an offense.” *Id.* In other words, § 16(b) requires a mens rea higher than “accidental or negligent conduct.” *Id.* at 11.

Soliciting or assisting another’s use of physical force may “involve” the risk that such force will be used. *See, e.g., Prakash v. Holder*, 579 F.3d 1033, 1036-37 (9th Cir. 2009) (soliciting another to commit rape and assault); *Ng v. Att’y Gen. of U.S.*, 436 F.3d 392, 396-97 (3d Cir. 2006) (soliciting another to commit murder); *Nguyen v. Ashcroft*, 366 F.3d 386, 389-91 (5th Cir. 2004) (using a vehicle to facilitate the discharge of a firearm).

An offense may encompass facts not included in statutory elements, which are often relevant to the risk that an actor will use physical force against another. For example, when a statute criminalizes sexual contact with a minor, it may be relevant whether such contact was consensual and between teenagers who were both 15 years or older and less than 3 years apart in age. *See Xiong v. INS*, 173 F.3d 601, 603, 606 (7th Cir. 1999).

When a statute is divisible, the modified categorical approach is permitted to determine which statutory phrase was the basis for the conviction. When the modified categorical approach is not helpful, courts consider “only the minimum criminal conduct necessary to sustain a conviction under a given statute.” *Chery v. Ashcroft*, 347 F.3d 404, 407 (2d Cir. 2003) (quoting *Dalton v. Ashcroft*, 257 F.3d 300 (2d Cir. 2001)) (internal quotation marks omitted).

There may be factors relevant to the § 16(b) risk analysis that cannot be determined by the categorical or modified categorical approach. In certain instances, some courts permit an adjudicator to go beyond the modified categorical approach to determine

whether an alien’s conduct involved a substantial risk of physical force. *See Xiong v. INS*, 173 F.3d at 605-06. This approach is permitted when “it [i]s otherwise impossible to determine the proper classification of the offense . . . and . . . the deviation d[oes] not require a hearing to resolve contested factual issues.” *Id.* at 605 (quoting *United States v. Shannon*, 110 F.3d 382, 384 (7th Cir. 1997)) (internal quotation marks omitted). In *Xiong*, the Seventh Circuit used this approach to inquire whether a substantial risk of physical force was inherent in a violation of section 948.02(2) of the Wisconsin Statutes, which makes it a felony for someone to have “sexual contact or sexual intercourse with a person who has not attained the age of 16 years.”

If a court considers only the “minimum conduct” necessary to satisfy a statute’s elements, its hypothetical model may include only the conduct that is least likely to result in the use of physical force. *See United States v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010) (examining the “least egregious” conduct); *Chery*, 347 F.3d 404 at 407. Using a “minimum conduct” approach, the Second Circuit found that a battery statute did not require physical force because a defendant “could be convicted” of a variety of nonforceful acts, including slipping a tranquilizer in another’s drink. *Chrzanoski*, 327 F.3d at 195-96 (analyzing § 16(a)).

But even under the minimum conduct approach, a court need not account for all conduct for which there is a “theoretical possibility” that the State would punish under its statute. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Instead, there must be a “realistic probability” that a State would apply its laws to such conduct. *Id.*; *see also James v. United States*, 550 U.S. 192, 208 (2007) (applying the categorical approach in a sentencing case examining whether the “ordinary case” encompassed an offense’s statutory elements).

Other courts have looked to “ordinary conduct contemplated by the statute” and may end up with a generic offense that carries an amount of risk greater than what would be found using the “minimum conduct” approach. The First Circuit used such an approach, although it stated that it was applying *Chery*’s “minimum conduct” approach. *See Aguiar v. Gonzales*, 438 F.3d 86, 89 n.5 (1st Cir. 2006). The court concluded that “sexual conduct between someone at least eighteen and someone between fourteen and sixteen” involved the risk of using physical force, without limiting its analysis to a factually

consensual contact. *Id.* at 89 n.5, 91 (“In framing the question for us to consider, Aguiar argues that we must examine . . . ‘factually consensual’ [sexual behavior with a minor] However, Aguiar has presented no reason for us to assume that the ordinary conduct contemplated by the statute is factually consensual sexual conduct between teenagers.”).

Similarly, the Sixth Circuit stated that “[t]he proper inquiry is one that contemplates the risk associated with the proscribed conduct in the mainstream of prosecutions brought under the statute.” *Van Don Nguyen v. Holder*, 571 F.3d 524, 530 (6th Cir. 2009). Although the court did not explain how it determined what conduct fell within the “mainstream of prosecutions,” it declined both parties’ invitations to examine the extremes of California’s broad “grand theft” statute—whether the high risk of property damage when breaking into a locked car, or the less risky theft of agricultural products. *See id.*

Quantifying a “Substantial Risk” Required Under § 16(b)

The text of § 16(b) does not make plain how likely the use of force must be to make an offense a crime of violence. The language requires a “substantial risk” that physical force “may be used.” In general, the word “substantial” connotes a risk that is considerable, or more than minor. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 196-97 (2002) (turning to two dictionaries to interpret “substantially impairs” within the Americans with Disabilities Act). But the text of the statute provides no further definitions or examples.

The legislative history of § 16(b) suggests that Congress anticipated this provision to include offenses such as burglary. In fact, the Senate Report accompanying the original legislation specifically cited common law burglary as a § 16(b) offense. S. Rep. No. 98-225, at 307 (1983); *see also Matter of Palacios*, 22 I&N Dec. 434, 448-49 (BIA 1998) (Rosenberg, dissenting) (citing this legislative history). Indeed, the Supreme Court, in *Leocal*, cited burglary as the “classic example” of a § 16(b) offense. *See Leocal*, 543 U.S. at 10.

Assuming, then, that a “substantial risk” of the use of physical force is inherent in burglary, the offense itself creates a challenging standard to apply. First, courts are free to draw their own conclusions as to the probability

of a person using physical force in committing a burglary. In fact, much of this is contingent on modeling the hypothetical: if burglary’s risk is equal to the minimum conduct necessary to satisfy its elements, one could imagine very little risk in walking in an unlocked and unoccupied home. *See Chery*, 347 F.3d at 408 (comparing burglary through an open door with sexual assault of a consenting minor). Second, as *Chery* illustrates, it is difficult, or at least uncomfortable, to analogize burglary with some of the offenses alleged to constitute crimes of violence.

Statistical Evidence of Risk

The Supreme Court has suggested that statistical evidence may be useful in the risk analysis of a generic offense. In *Chambers v. United States*, 129 S. Ct. 687, 692-93 & app. B (2009), the Court relied in part on statistical evidence to conclude that an offense did not “involve[] conduct that presents a serious potential risk of physical injury to another” under 18 U.S.C. § 924(e)(2)(B)(ii). The offense at issue in that case was “failure to report for imprisonment” under Illinois law. *Id.* at 690. The Court relied on statistics generated by the United States Sentencing Commission regarding Federal convictions against individuals who failed to report for imprisonment. *See id.* at 692. The statistical evidence suggested that failures to report were rarely associated with violence and that when offenders were later apprehended, they were rarely armed. *Id.*

As the above case illustrates, the word “risk” suggests a quantifiable probability that is measurable by statistical analysis. Such an approach is appealing to judges who are uncomfortable with the common-sense inferences and hypothetical modeling of the traditional approach. For instance, the Seventh Circuit remarked in the *Chambers* opinion below, “[I]t is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury” *United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007).

Measuring the Risk in the Underlying Offense

Once a court has identified the generic offense, the next step is to measure the risk of use of physical force. Relevant case law does not reveal a uniform doctrine for measuring the risk that an offender would use physical force. It is possible, however, to identify a number of factors

that courts have associated with the risk that force would be used. These factors arise from common inferences that courts have drawn and relied upon regarding the use of force. They include factors such as the lack of consent for sexual contact, the status of the victim as a minor, the status of the victim as a law enforcement officer, and the actor's use of a weapon.

Lack of actual consent for sexual contact is perhaps the factor that courts have most strongly associated with the risk of use of physical force. Indeed, as the court wrote, “[T]he non-consent of the victim is a touchstone for determining whether a crime ‘involves a substantial risk that physical force against the person . . . may be used’” *Sutherland v. Reno*, 228 F.3d 171, 177 (2d Cir. 2000). The rationale is that physical force may become necessary for an actor “to overcome the victim’s lack of consent and accomplish the [act].” *Id.* at 176.

In fact, the association between lack of consent and violence is so great that courts generally find a substantial risk of the use of force regardless of the possible reasons that consent was missing. See *Zaidi v. Ashcroft*, 374 F.3d 357, 361 (5th Cir. 2004) (involving sexual touching where the victims did not give consent because they were passed out or partially awake). For example, a victim whose consent was obtained through deceit could learn what was going on and resist, reasoned the Sixth Circuit. *Patel v. Ashcroft*, 401 F.3d 400, 411 (6th Cir. 2005) (citing *United States v. Mack*, 53 F.3d 126, 128 (6th Cir. 1995)); see also *Chery*, 347 F.3d at 408-09.

Offenses involving minors as victims are also associated with the use of physical force. Courts have reasoned that minors tend to be smaller and weaker than adults and have less experience and fewer resources to deter the use of physical force. *Chery*, 347 F.3d at 408-09 (citing *United States v. Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996)). From there, many courts reason that children’s weakness, inexperience, and lack of social standing make them more vulnerable and therefore more likely to be victims of physical violence. *Aguiar*, 438 F.3d at 90; *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993). See generally *Ramsey v. INS*, 55 F.3d 580, 583 (11th Cir. 1995).

Under this reasoning, some courts conclude that sexual contact with minors is associated with a risk of the use of physical force. *Aguiar*, 438 F.3d at 90; *Chery*, 347 F.3d at 408-09; *Velazquez-Overa*, 100 F.3d at 422 (adding

that sexual crimes “typically occur within close quarters”); *Reyes-Castro*, 13 F.3d at 379; *United States v. Rodriguez*, 979 F.2d 138, 141 (8th Cir. 1992). Other courts are not persuaded, however, that sexual contact with minors automatically creates a substantial risk of violence. See *Valencia v. Gonzales*, 439 F.3d 1046, 1050-51 (9th Cir. 2006); *Xiong*, 173 F.3d at 605. Older teenagers, like 17-year-olds, the argument goes, may not be able to give *legal* consent, but their *actual* consent may dramatically reduce the probability of an actor using violence. *Valencia*, 439 F.3d at 1051.

And finally, at least one court has turned this reasoning on its head, implying that child victims are more likely than adults to be deceived and therefore acquiesce to an adult actor’s criminal behavior. *Dickson v. Ashcroft*, 346 F.3d 44, 51-52 (2d Cir. 2003). As a result, the *Dickson* court concluded that unlawful imprisonment is a crime of violence only when perpetrated against wiser adults. *Id.* at 52.

At least one court has suggested another factor that is associated with the risk of using physical force: the victim’s status as a police officer. See *Blake v. Gonzales*, 481 F.3d 152, 161-62 (2d Cir. 2007) (citing *Canada v. Gonzales*, 448 F.3d 560, 568 (2d Cir. 2006)). In *Blake*, the court examined the offense of intentional nonconsensual touching of a police officer “acting in the course of his or her duties.” *Id.* at 162. A police officer would be likely to make a “forceful response” to the act, presumably escalating the confrontation to a violent level. *Id.*

Finally, courts have associated an actor’s use of a weapon with a risk that physical force would be used. For example, intentionally discharging a firearm into an occupied building creates a such a risk. *Quezada-Luna v. Gonzales*, 439 F.3d 403, 406-07 (7th Cir. 2006). Similarly, the Fifth Circuit concluded that using a vehicle to facilitate the intentional discharge of a firearm created a substantial risk that physical force would be used. *Nguyen*, 366 F.3d at 389-91.

Additionally, both the Fifth and Ninth Circuits have considered nonconsensual touching to create a substantial risk of violence when the actor was armed with a deadly weapon. *United States v. Heron-Salinas*, 566 F.3d 898, 899 (9th Cir. 2009); *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 465-66 (5th Cir. 2006). In *Larin-Ulloa*, the Fifth Circuit concluded that a rude or insolent touching with

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR JANUARY 2011

by John Guendelsberger

The United States courts of appeals issued 310 decisions in January 2011 in cases appealed from the Board. The courts affirmed the Board in 270 cases and reversed or remanded in 40, for an overall reversal rate of 12.9%. The Ninth Circuit issued 57% of the decisions and 82% of the reversals. There were no reversals from the Fifth, Sixth, Seventh, and Eighth Circuits.

The chart below shows the results from each circuit for January 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	3	1	25.0
Second	55	54	1	1.8
Third	17	16	1	5.9
Fourth	9	7	2	22.2
Fifth	17	17	0	0.0
Sixth	9	9	0	0.0
Seventh	3	3	0	0.0
Eighth	1	1	0	0.0
Ninth	178	145	33	18.5
Tenth	4	3	1	25.0
Eleventh	13	12	1	7.7
All	310	270	40	12.9

The 310 decisions included 163 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 81 direct appeals from denials of other forms of relief from removal or from findings of removal; and 66 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	163	152	11	6.7
Other Relief	81	62	19	23.5
Motions	66	56	10	15.2

Of the 19 reversals in the “other relief” category, 16 were from the Ninth Circuit. Several of these cases addressed application of the categorical or modified categorical approach to various offenses charged as grounds for removal or invoked as bars to cancellation or other relief from removal. Four cases were remanded to impute a parent’s lawful permanent residence to a child in considering eligibility for cancellation of removal under *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009). Another three cases reversed aggravated felony determinations based on pre-November 18, 1998, offenses under *Ledezma-Galicia v. Holder*, Nos. 03-73648, 04-35048, 2010 WL 5174979 (9th Cir. Dec. 22, 2010). The Third Circuit remanded to further address whether a “disorderly person” offense was a crime of moral turpitude. The Fourth Circuit found there was no “conviction” under the statutory definition where there was no record of a finding of guilt. The Second Circuit reversed a denial of a continuance to apply for adjustment of status.

The 11 reversals in motions cases included 6 motions to reopen or reconsider for issues regarding ineffective assistance of counsel related to *Lozada* compliance, equitable tolling, or due diligence. Other reversals involved motions to reopen to apply for asylum based on changed country conditions and a motion to rescind an in absentia removal order based on exceptional circumstances.

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Circuit Bracketology: Lots of Upsets, But No Clear Favorites

by Edward R. Grant

For those to whom “court” conjures up visions of arenas jam-packed from December through March with rabid students, no experience is more bruising than the last few minutes of a close Big East contest. Bodies fly, free throws abound, and well-tailored coaches work the refs like trial lawyers badgering a witness.

For those who play in a different type of court, the early 2011 immigration decisions of the Federal courts of appeals have been no less harrowing. Upsets abound, with rules being redrawn on such fundamental questions as what constitutes a “conviction” and who bears the ultimate burden of proof in establishing a criminal alien’s eligibility for relief. The “departure bar” took another hit, as did the Board’s recent decision to treat “admitted” and “adjusted” lawful permanent residents equally under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

Thus, as with the forthcoming 68-team NCAA tournament, there are plenty of contenders, but no dominant favorite for the most influential decision among the bunch. All we can do is report the proceedings and leave the handicapping to the discerning reader. But lest you instinctively plump for the “home team,” i.e., the decisions from your own circuit, keep in mind that just as the NCAA bracketology (as of press time) will send Duke to the Southwest Region and San Diego State to the East, circuit precedents have a way of slipping their geographic boundaries and taking root elsewhere.

Not in Our House: Ninth Circuit Thumps *Almanza*

The world of the modified categorical approach is an untidy place. The Board, attempting to impose some sense of order, ruled in *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), that an alien convicted under a “divisible” statute must prove, if he wishes to establish eligibility for discretionary relief such as adjustment of status, that his conviction was not under that portion of the criminal statute which prohibits an offense that constitutes a ground of inadmissibility, such as a controlled substance offense or a crime involving moral turpitude. If the record of conviction remains ambiguous, the alien has not met the burden. *Id.* at 775. Two recent Ninth Circuit decisions, while not directly addressing *Almanza*, squarely hold that an alien *does* meet his burden of proof “when he submits an inconclusive record of conviction.” *Young v. Holder*, No. 07-70949, 2011 WL 257898, at *3 (9th Cir. Jan. 28, 2011); *see also Rosas-Castaneda v. Holder*, 630 F.3d 881, 888-89 (9th Cir. 2011) (citing *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), which held that an alien meets the burden to establish eligibility for cancellation of removal by producing an inconclusive record of conviction).

Almanza distinguished *Sandoval-Lua* on grounds that the REAL ID Act’s burden of proof requirements, as set forth in revised section 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4), did not apply to the earlier case, and because the alien in *Sandoval-Lua* had not specifically been requested by the Immigration Judge to produce a more conclusive portion of the record of conviction. *Rosas-Castaneda* shredded that defense with sleight of hand worthy of the “Princeton (now Georgetown and Northwestern) Offense,” concluding that the enhanced burden of proof requirements in section 240(c)(4) “merely codif[e]d” the existing regulatory scheme and thus “did not work any change in that law that affects *Sandoval-Lua*’s logic, holding, or applicability.” *Rosas-Castaneda*, 630 F.3d at 886; *see also* 8 C.F.R. § 1240.8(d). Furthermore, section 240(c)(4)(B) of the Act gives the Immigration Judge the authority “to request corroboration of only *testimonial* evidence, and conspicuously excludes the authority to require an alien to corroborate ‘other evidence in the record.’” *Rosas-Castaneda*, 630 F.3d at 887 (citing section 240(c)(4)(B) of the Act). The court concluded that because the record of the petitioner’s conviction for violating section 13-3405(A)(4) of the Arizona Revised Statutes did not exclude the possibility that his offense was in the nature of solicitation to transport, import, or sell marijuana, which is not an aggravated felony, the petitioner met his burden of establishing that he was not convicted of an aggravated felony and was therefore eligible for cancellation of removal.

Thus, while neither *Rosas-Castaneda* nor *Young* explicitly addresses *Matter of Almanza*, there seems no escaping the final score: *Sandoval-Lua* remains the standard, in the Ninth Circuit’s house, for criminal aliens to establish eligibility for discretionary relief.

Bracket-Busters: Fourth Circuit Puts Conviction and Gang-Violence Issues Back in the Mix

When you put “Fourth Circuit” and “hoops” into the word-association algorithm, out pops Duke or North Carolina—usually. But in this case, think “George Mason” and “2006”—because the Fourth Circuit recently busted the brackets with two decisions upsetting conventional notions of what constitutes a conviction and whether those fleeing gang violence can constitute a particular social group for purposes of asylum. *Crespin-Valladares v. Holder*, No. 09-1423, 2011 WL 546531 (4th

Cir. Feb. 16, 2011); *Crespo v. Holder*, No. 09-2214, 2011 WL 73616 (4th Cir. Jan. 11, 2011).

That a “deferred adjudication” constitutes a “conviction” for immigration purposes appeared as settled as the basketball dominance of the Atlantic Coast Conference. See section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A); *De Vega v. Gonzales*, 503 F.3d 45 (1st Cir. 2007) (holding that under Massachusetts law, a continuation based on admission of facts sufficient for a finding of guilt and conditioned on payment of restitution equals a conviction); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001) (holding that an Arizona set-aside provision does not alter the status of a conviction for immigration purposes); *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (holding that a Texas deferred adjudication is a conviction). But *Crespo v. Holder* unsettles the picture. In Virginia, a first offender may plead *not* guilty, after which a judge may find sufficient facts to justify a finding of guilt, and then, without entering a judgment of guilt, defer further proceedings until the successful completion of probation. See Va. Code Ann. § 18.2-251 (West 2011). The Fourth Circuit determined that the “finding of facts sufficient to justify a finding of guilt” does not equate to a “finding of guilt,” or any of the other conditions set forth in section 101(a)(48)(A)(i) of the Act. *Crespo*, 2011 WL 73616, at *3. Thus, while a defendant’s *admission* of sufficient facts to warrant a finding of guilt meets the definition, a judge’s *finding* of such facts does not. *Id.*; cf. *Mejia-Rodriguez v. U.S. Dept of Homeland Sec.*, 629 F.3d 1223 (11th Cir. 2011) (holding that a defendant’s plea of guilty with a sentence to time served constitutes a conviction).

Perhaps of greater significance is the Fourth Circuit’s holding, in *Crespin-Valladares*, 2011 WL 546531, at *2, that “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” constitute a particular social group. The petitioner, in 2004, witnessed the murder of his cousin by members of the MS-13 gang; after a second slaying weeks later, he and his uncle went to a police station and identified two of the men who had murdered his cousin. Gang members then started to harass and threaten the petitioner and his uncle, repeatedly vowing to kill the uncle if he testified at the trial. The uncle did, the gang members were convicted, and the police protection afforded to him for the duration of the trial was lifted. The petitioner was also threatened, twice by notes and once verbally.

The Board reversed an Immigration Judge’s grant of asylum, concluding that the social group consisting of those who opposed gang violence was not cognizable under the Act and that Crespin lacked a well-founded fear of persecution because the threats were not imminent and created only a generalized fear of harm. Rejecting a motion for reconsideration, the Board stated that Salvadoran authorities were not “unable or unwilling” to control the gangs, citing the successful prosecution and other official efforts to suppress gang violence.

In reversing, the Fourth Circuit first noted that the Board had misconstrued the definition of the social group at issue, leaving out the critical element of *family members* of those who testify against gangs. The “family” component adds an element of immutability and particularity absent from the broader group of those who oppose gangs. *Crespin-Valladares*, 2011 WL 546531, at *6. Furthermore, the family unit possesses “particular and well-defined boundaries,” at least as distinct as the proposed group of “former gang members” recognized last year by the Sixth Circuit. *Id.* (quoting *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (BIA 2008)); see also *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010). Finally—and this point will undoubtedly reverberate far beyond the traditional ACC confines of College Park, Charlottesville, and Tobacco Road—the family unit has “social visibility,” particularly in circumstances where the family has engaged in a public act such as testifying against a relative’s murderers. *Crespin-Valladares*, 2011 WL 546531, at *6. The Board’s ruling to the contrary was “manifestly contrary to law,” as was the Board’s conclusion that Crespin lacked an “objectively reasonable” basis for fearing persecution by the gangs. *Id.* at *7. The issue was not, as the Board stated, the fact that the criminal activities of MS-13 affect the population as a whole; the issue was the sequence of targeted and persistent threats against the family. The targeted death threats were, as a matter of law, sufficient to meet Crespin’s burden to establish a well-founded fear. *Id.* at *8.

Finally, the court concluded that the Immigration Judge’s determination that Crespin’s family ties were “a central reason” for the threats against him was a finding of fact; the Board thus erred in substituting its own view of the evidence to conclude that the requisite nexus between the gang’s threats and Crespin’s claimed social group was absent. The court rejected the Government’s argument that the Board was simply applying the legal standard

for nexus to a set of undisputed facts. “The Government is wrong. The BIA disagreed with the IJ not because it rejected the IJ’s legal interpretation of undisputed facts; rather, the BIA took a contrary view of the gang members’ motivations—a classic factual question.” *Id.* The court noted that the supplementary information to the 2002 “standard of review” regulations clarified that Board review of whether harm was inflicted “on account of” a protected ground would not be limited by the “clear error” standard; however, it concluded that in this case, the Board was limited to clear error review because the “nexus finding centered on its factual assessment of what happened to Crespin.” *Id.* at *8 n.7.

Reverberate as it might, the impact of *Crespin-Valladares* should not be overstated. A month earlier, a different Fourth Circuit panel rejected a petitioner’s claim that the group of “young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs” is a cognizable particular social group. *Lizama v. Holder*, 629 F.3d 440, 442 (4th Cir. 2011). Applying the Board’s “reasonable interpretation” of what constitutes a cognizable social group, the court concluded that characteristics such as “Americanized” are not immutable, but rather, acquired traits, and that factors such as wealth and gang opposition are too amorphous to define a group with sufficient particularity. *Id.* at 447. The attempt to narrow the group by the criterion of “those with criminal histories” is of no help, for it too is highly amorphous. *Lizama* illustrates that the fundamentals of the Board’s interpretation of the term “particular social group” will hold—although both *Lizama* and *Crespin* passed on the question whether “social visibility” is an appropriate criterion. *Crespin* illustrates, however, that the Board’s interpretation cannot be applied mechanically to all claims based on gang violence (or, it could be added, to analogous claims); nor can the facts of a case presenting potential points of distinction from the “standard” gang-related claim be recast in order to fit within the confines of existing precedent.

On the Bubble: Are “Adjusted” Lawful Permanent Residents Exempt From Section 212(h) Restrictions?

The Board, in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), sought to clarify the question raised by the Fifth Circuit’s decision in *Martinez v. Muklasey*, 519 F.3d 532 (5th Cir. 2008): for purposes of establishing eligibility for a waiver under section 212(h) of the Act,

should an alien who has previously obtained lawful permanent residence through adjustment of status be treated as “an alien who has been previously admitted to the United States as an alien lawfully admitted for permanent residence”? The consequences of the answer are significant: if, as the Board held in *Koljenovic*, the “adjusted” lawful permanent resident (“LPR”) should be so treated, then an “adjusted” LPR without 7 years of continuous residence, or with a conviction for an aggravated felony, would not be eligible for a section 212(h) waiver; if not, then these conditions would not apply, and the alien (provided he or she is eligible for a new immigrant visa) may again apply for adjustment of status in conjunction with a section 212(h) waiver. See section 212(h) of the Act; *Matter of Koljenovic*, 25 I&N Dec. at 224. The recent decision of the Eleventh Circuit to reject *Koljenovic*—without even reaching the Board’s detailed rationale—clearly places the Board’s resolution “on the bubble,” awaiting further rulings from other circuits. *Lanier v. U.S. Att’y Gen.*, No. 09-15300, 2011 WL 338787 (11th Cir. Feb. 4, 2011).

To set the stage, *Martinez* held that an alien who was previously admitted in nonimmigrant status, and who later adjusted to LPR status, could not be classified as having been “previously admitted . . . as an alien lawfully admitted for permanent residence.” The sole “admission,” the Fifth Circuit held, was the petitioner’s initial admission as a nonimmigrant; his subsequent adjustment did not constitute a “lawful admission” to permanent residence. *Martinez*, 519 F.3d at 546. Responding, the Board concluded in *Koljenovic* that even if the Fifth Circuit were correct in the case of an alien initially admitted in a lawful status, it would be absurd to extend the rule to the case of an alien whose initial entry was *illegal*, and thus whose sole “admission” took place when he or she adjusted to LPR status under section 245 of the Act, 8 U.S.C. § 1255.

Congress presumably did not intend for an alien who entered the United States illegally and was afforded the privilege of adjustment of status to be able to avoid the restrictions contained in section 212(h) of the Act, when those very restrictions would apply if the alien had gone through consular processing to be admitted as a lawful permanent resident.

Matter of Koljenovic, 25 I&N Dec. at 222-23. The Board concluded that the overall structure of the

Act, including its definition of “admission” in section 101(a)(13), 8 U.S.C. § 1101(a)(13), its provision for adjustment of status for those “admissible” to the United States in section 245(a), and its attempt to synchronize the eligibility requirements for section 212(h) waivers and cancellation of removal under section 240A(a), 8 U.S.C. § 1229b(a), required treating “adjusted” LPRs as having been “previously admitted” in that status. Two days after *Koljenovic* was published, the Ninth Circuit added a further wrinkle: an alien who obtained admission by falsely representing himself to be an LPR would be treated, for purposes of section 212(h), as an alien “previously admitted . . . as an alien lawfully admitted for permanent residence.” *Hing Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010). The court held that, under the literal language of section 212(h), and of section 101(a)(13)(A), what counted was the procedural form, and not the substantive legality of the petitioner’s admission.

Lanier, relying in equal parts on *Martinez* and *Hing Sum*, concluded that since the plain language of section 212(h) refers only to aliens who have been “previously admitted” as LPRs, *no* alien who obtained such status solely through adjustment—even if the alien entered illegally and thus has *never* been “admitted”—is subject to the continuous residence and “no aggravated felony” provisos of section 212(h). Since the term “admitted” is plain and unambiguous—and defined in section 101(a)(13)(A) solely in reference to a “lawful entry into the United States”—the court concluded that it owed no deference to the Board’s rationale in *Koljenovic* that an illegal alien’s subsequent adjustment ought to be treated as the functional equivalent of an admission—and emphasized the point by relegating its dismissal of *Koljenovic* to a footnote.

At the theoretical level, *Lanier* illustrates an enduring difference between the Board’s and the Federal courts’ approach to statutory interpretation. While both profess fealty to “plain language,” the Board is more likely to view a segment of statutory language in the context of the Act as a whole; the Board, understandably, seeks to make the constituent parts of the Act work together as a whole. *Koljenovic* explicitly adopted this approach to defend its “filling of the gap” between the explicit definition of “admission” in section 101(a)(13)(A) and the historical understanding of adjustment of status as a matter of administrative grace that works in lieu of the “normal” channels of consular processing and lawful

entry. The Eleventh Circuit, not bound by such concerns, looked strictly at the petitioner’s eligibility in light of the phrase “previously admitted”—and in so doing, effectively ignored the Board’s holdings, reiterated just this month, that “adjustment” constitutes a form of “admission.” *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), *overruling in part Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005). In so doing, the court held that “admission” can only mean what Congress explicitly said it meant in section 101(a)(13)(A)—and nothing more.

Ironically, it was a decision of the Eleventh Circuit that first impelled Congress to add to section 212(h) the provisions at issue in *Lanier*, *Koljenovic*, and *Martinez*. *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1996); *Matter of Yeung*, 21 I&N Dec. 610, 611 (BIA 1996, 1997). It now appears up to Congress to determine whether the Board or the Eleventh and Fifth Circuits have more accurately interpreted its intent in enacting these provisions.

Jump Ball: Wither the Departure Bar?

These pages have chronicled the Federal courts’ erosion of the “departure bar” to filing motions before the Board and the Immigration Courts. *See* Edward R. Grant, *The 2010 Top Twenty: Few Easy Choices*, Immigration Law Advisor, Vol. 4, No. 10 at 1, 16-17 (Nov./Dec. 2010); Edward R. Grant, *The Right To File a Motion To Reopen: An Intended Consequence of IIRIRA?*, Immigration Law Advisor, Vol. 4, No. 1, at 5 (Jan. 2010); 8 C.F.R. §§ 1003.2(d), 1003.23(b) (“departure bar” regulations). “Erosion” is chosen deliberately, for much like the assaults of storm and tide on a seaside cliff, each decision limiting the application of these regulations leaves its own unique imprint and its own degree of uncertainty about the future: (1) unconditional invalidation of the regulation, *see William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); (2) affirmation of the regulations as both mandatory and jurisdictional, *see Toora v. Holder*, 603 F.3d 282 (5th Cir. 2010) (rejecting the Board’s limited exception to the departure bar set forth in *Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009)), and *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009) (adopting the position of the dissent in *William*, over a dissent adopting the majority opinion in *William*); (3) affirmation of the departure bar as applied to a late motion to reopen requiring sua sponte authority to grant, *see Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); (4) invalidation of the departure bar in a case of involuntary removal while a motion is pending, *see Coyt*

v. Holder, 593 F.3d 902 (9th Cir. 2010), and *Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009); and (5) invalidation of the departure bar as a jurisdictional rule, while leaving open the possibility that it can be used as a basis to deny a motion in discretion, see *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010). The latest entry, from the Sixth Circuit, fits best with *Marin-Rodriguez* but leaves open perhaps wider potential than did the Seventh Circuit for future application of the bar. *Pruidze v. Holder*, No. 09-3836, 2011 WL 320726 (6th Cir. Feb. 3, 2011).

Pruidze follows *Marin-Rodriguez* in declaring that the Board’s standard characterization of the departure bar as “jurisdictional” is an improper attempt to contract its own jurisdiction. *Id.* at *4-5 (citing *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009)). However, it also indicates that the bar may properly be viewed as a “mandatory” or “claims-processing” rule that, in practice, could have similar, but not identical, effect.

No doubt, the [Board] is not required—by statute or by this decision—to grant Pruidze’s motion to reopen. But it is required—by both—to consider it. When the Board reconsiders Pruidze’s motion to reopen, it has authority to determine whether the motion is untimely and, if so, whether the departure bar limits the Board’s ability to grant Pruidze relief. If, on the other hand, the Board finds that Pruidze’s motion is not time-barred, it may wish to consider whether the departure bar is a mandatory rule. These are all things the Board *may* do, but because we review what the Board *did* do—improperly deny Pruidze’s motion on the invalid ground that it does not have jurisdiction over motions to reopen filed by aliens abroad—they are questions for another day.

Id. at *5 (citations omitted).

The previously alluded to uncertainty is fully encapsulated here. The Sixth Circuit has already determined that the departure bar cannot be applied to an alien involuntarily removed. See *Madrigal*, 572 F.3d 239. The rationale there, and in other cases, is the

recently discovered “right” to file a motion to reopen guaranteed by section 240(c)(7) of the Act, 8 U.S.C. § 1229a(c)(7). Would not the same right cover those who file a *timely* motion to reopen from overseas or across the border? And would the “right” also extend to those who filed an otherwise untimely motion to reopen but claim the exception for asylum-based motions premised on a change in country conditions?

These, indeed, are questions for another day. But with at least five different slants on the departure bar now in play, cases presenting this issue may soon resemble the game of basketball before 1937—when a jump ball occurred after every made basket.

In Tribute

We are blessed, all of us, by the growth in our ranks and the opportunities it presents to work with new colleagues—not to mention the benefits of having more hands on deck. But this comes at some cost, chiefly in the diminution of “institutional memory” and, more poignantly, a lack of recognition of those who went before us and “built the house” that we are privileged to occupy.

We lost one such soul this past month, former Board Member Fred W. Vacca, who passed at the untimely age of 68. Fred retired from the Board in 2000, after 23 years of service, 19 of those years as a Board Member. Yes, he was that good, ascending from staff attorney to chief attorney examiner in just 2 years and then, in 1981, being appointed to the Board by Attorney General William French Smith.

Fred was the consummate Board Member—scholarly, collegial, and efficient in shepherding through what was then, and still remains, a challenging case load. He was responsible for many legal precedents and Board procedures that we rely upon without a thought to their origins. Before coming to the Board, he served with distinction in the U.S. Navy, and later in the Naval Reserves. He nurtured countless careers at the Board, chiefly, but not limited to, those of Board Members appointed in his wake. He was a union steward and later a lead negotiator for management—and earned a reputation for fairness and equity in both roles. And he spent many a lunch hour with his devoted “investment club”—born of his own desire to help colleagues thrust into the brave new world of FERS in the early 1980s.

We wish comfort and peace for Fred's beloved wife Patricia, the entire Vacca family, and those in EOIR who knew and admired Fred for all that he did for this place.

Edward R. Grant has been a Board Member of the Board of Immigration Appeals since January 1998.

RECENT COURT OPINIONS

First Circuit:

Morgan Morgan v. Holder, No. 09-2632, 2011 WL 477722 (1st Cir. Feb. 11, 2011): The First Circuit denied the petition for review filed by an Egyptian Coptic Christian from the Board's affirmance of the Immigration Judge's denial of asylum. The court found that the alien's past treatment (i.e., being taunted, cut by a bottle, detained overnight, and subjected to threats) was "disagreeable, but not shocking" and that it did not rise to the level of persecution. The court further found that evidence of more recent threats against the petitioner's relatives "failed to tip the balance." The court next concluded that the petitioner failed to establish that the nongovernment actors he feared were individuals whom the Egyptian Government was unwilling or unable to control. Lastly, the court held that the petitioner did not prove a nexus between his being targeted and his Christian faith, finding such claims of nexus to be speculative. The court noted that its finding was in no way a judgment regarding the petitioner's credibility, because "[t]reating an alien's factual testimony as credible does not entail acceptance of his conclusions as to causation." The petitioner had also challenged the Board's denial of a motion to remand, which was supported by (1) a recent decision of the same Immigration Judge granting asylum to another Coptic Christian from Egypt; and (2) recent country condition materials. The court found the former unpersuasive, noting that "[a]sylum cases, virtually by definition, call for individualized determinations," and concluded that the latter failed to establish a noticeable change in country conditions.

Second Circuit:

Mei Fun Wong v. Holder, No. 08-5328-ag, 2011 WL 293762 (2d Cir. Feb. 01, 2011): The Second Circuit denied in part and granted in part a petition for review of the Board's precedent decision in *Matter of M-F-W-*

& L-G-. The court found that its published decision in *Xia Fan Huang v. Holder*, 591 F.3d 124 (2d Cir. 2010), precluded the petitioner's argument that involuntary insertion of an intrauterine device ("IUD") was legally equivalent to sterilization and thus warranted refugee status per se. Furthermore, the court gave *Chevron* deference to the Board's conclusion that involuntary IUD insertion does not constitute persecution unless accompanied by "aggravating circumstances." However, the court concluded that in denying the petitioner's claim, the Board failed to adequately articulate the standards that it applied to determine that neither aggravated circumstances nor nexus were established in this case. The court therefore remanded the record for clarification of these standards. It further instructed the Board to reconcile its reasoning with an unpublished decision in which it had found an applicant who had guarded women scheduled for forcible IUD insertions ineligible for asylum as a persecutor of others.

Beekhan v. Holder, No. 09-3129-ag, 2011 WL 677346 (2d Cir. Feb. 25, 2011): The Second Circuit denied a petition for review from a decision of ICE reinstating the petitioner's 1997 exclusion order. The petitioner had been physically removed from the U.S. pursuant to that order in January 1997 and illegally returned 1 month later. On appeal, the petitioner argued that ICE failed to consider her request to vacate the reinstated order, which was accompanied by an affidavit claiming that he had returned to the U.S. using a passport of another that she had purchased from a smuggler. The court rejected the petitioner's argument that this manner of return did not constitute an illegal reentry.

Third Circuit:

Long Hao Li v. Att'y Gen. of U.S., No. 09-4116, 2011 WL 294037 (3d Cir. Feb. 01, 2011): The Third Circuit denied a petition for review of the Board's order reversing an Immigration Judge's grant of withholding of removal from China. The petitioner's claim was based on his fear of arrest and imprisonment for violating Chinese law in harboring, transporting, and otherwise assisting North Korean refugees who were illegally in China. The Board found that the petitioner failed to establish that he would face persecution on account of his political opinion, concluding instead that he faced legitimate criminal prosecution. The Board further held that the petitioner failed to show a clear probability of persecution, because he did not demonstrate that the Chinese Government was aware of his smuggling activities or that it still maintained an interest in persecuting him for such involvement. The

court found that the evidence offered by the petitioner did not compel a result contrary to that reached by the Board.

Fourth Circuit:

Crespin-Valladares v. Holder, No. 09-1423, 2011 WL 546531 (4th Cir. Feb. 16, 2011): The Fourth Circuit granted the petition of a family from El Salvador challenging the Board's reversal of an Immigration Judge's asylum grant. The court found that the petitioners' proposed particular social group (i.e., "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses") satisfied the criteria laid out by the Board in *Matter of Acosta* and *Matter of Mogharrabi* (both of which the court found to be entitled to *Chevron* deference). In reaching this conclusion, the court focused on the "family members" element of the definition, noting that "kinship ties" had long been considered to be immutable by the Board (in *Matter of Acosta*, *Matter of C-A-*, and *Matter of H-*) and by all circuits that have considered the issue. The court thus found that the Board had committed legal error stemming from its failure to analyze the group proposed by the petitioners and instead considered the group consisting of the prosecutorial witnesses themselves (as opposed to their family members). The court found the particular uncle-nephew relationship presented to be sufficiently well-defined as to constitute a "discrete class," as required under *Matter of S-E-G-*. It further found family groups to possess the requisite social visibility. The court additionally found error in the Board's conclusion that the petitioners had established only a generalized fear of harm, where the record contained un rebutted evidence of death threats against them, "combined with MS-13's penchant for extracting vengeance against cooperating witnesses." The court further found that the Board had applied the wrong standard of review (de novo rather than clear error) in reviewing the issues of nexus and the Salvadoran Government's ability/willingness to control the feared group (i.e., the MS-13). The record was therefore remanded for further proceedings.

Fifth Circuit:

Cabral v. Holder, No. 09-60386, 2011 WL 311008 (5th Cir. Feb. 02, 2011): The Board dismissed the petitioner's appeal from an Immigration Judge's removal order finding him ineligible for a section 212(h) waiver based on his convictions for two crimes involving moral turpitude. The Fifth Circuit denied the petition for review, rejecting the petitioner's claim that the Board abused its discretion in refusing to hold the appeal in abeyance while he pursued

motions to vacate his convictions in the New York State courts. The court held that the decision to grant such an abeyance lies within the sound discretion of the Board and found nothing improper in its denial of the request. The court further found no merit to the petitioner's argument that a lawful permanent resident inside the U.S. may file a section 212(h) waiver alone, without a concurrently filed application for adjustment of status.

Ninth Circuit:

Lopez-Birrueta v. Holder, No. 10-70128, 2011 WL 489693 (9th Cir. Feb. 14, 2011): The Ninth Circuit reversed an Immigration Judge's decision (affirmed by the Board) denying special rule VAWA cancellation of removal to a petitioner whose two children were beaten by their father, with whom she was cohabiting at the time. The Immigration Judge held that the regular beatings did not satisfy the statutory requirement that the petitioner must show that her children were "battered." The court disagreed, finding that the Immigration Judge had committed legal error in (1) applying an overly strict interpretation of the regulatory definition of a "battery"; (2) looking to the State law definition of an "injury" (as one that required professional medical treatment), which seemed contrary to Congress's interest in establishing uniformity in the area of immigration law and its remedial purpose in enacting the VAWA; and (3) considering the irrelevant fact that the children have since reconciled with their now-reformed father. The record was remanded for further consideration of the petitioners' application.

Hernandez-Mancilla v. Holder, No. 06-73086, 2011 WL 451943 (9th Cir. Feb. 10, 2011): The court affirmed the Board's decision holding that the petitioners were ineligible for cancellation of removal under section 240A(b) because they lacked the requisite 10 years of continuous physical presence in the U.S. The petitioners, who were Mexican nationals, had retained an immigration service, which filed asylum applications on their behalf. As a result, removal proceedings were initiated some 42 days before they accrued the required 10 years. The petitioners requested equitable tolling, arguing that if not for the alleged fraud of the agency, they would have accrued the required period of physical presence. Rejecting this argument, the court held that a plea for equity cannot be based on circumstances external to the immigration procedures themselves and noted that the "unfairness" the petitioners claimed caused them to be placed into removal proceedings did not taint the fairness of the hearing.

Eleventh Circuit:

Lanier v. U.S. Att’y Gen., No. 09-15300, 2011 WL 338787 (11th Cir. Feb. 4, 2011): The Eleventh Circuit granted the petition for review of a lawful permanent resident challenging an Immigration Judge’s determination that she was statutorily ineligible for a section 212(h) waiver because of her aggravated felony conviction. Following the holdings of the Fifth and Ninth Circuits, the court concluded that the statutory language of section 212(h) is unambiguous. It only bars from eligibility individuals who have “previously been admitted” to the U.S. as lawful permanent residents and who, since the date of admission, have been convicted of an aggravated felony. Therefore the bar does not apply to aliens, such as the petitioner, who adjusted their status in the U.S. and were therefore not previously *admitted* to the U.S. as lawful permanent residents. The matter was remanded to allow the petitioner to apply for the waiver before the Immigration Judge.

BIA PRECEDENT DECISIONS

In *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), the Board considered whether an alien is deportable if he commits a crime involving moral turpitude less than 5 years after adjusting status, but more than 5 years after an earlier nonimmigrant admission. The respondent, a native and citizen of the Palestinian Authority, was admitted as a nonimmigrant in 2001 and adjusted to lawful permanent resident status in 2006. In 2007 he committed indecent assault in Pennsylvania, a crime involving moral turpitude for which he was convicted in 2008. The DHS charged him with removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), and the Immigration Judge upheld the charge based on *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), over the respondent’s objection. In *Matter of Shanu*, the Board first held that the term “admission” used in section 237(a)(2)(A)(i) referred to adjustment of status as well as admission at the border. It further held that an alien’s conviction for a crime involving moral turpitude supported removal under that section so long as the crime was committed within 5 years after the date of *any* admission made by the alien.

The Board declined to disturb its practice of treating adjustment of status as an admission, finding that the arguments of the parties and amicus did not reflect a full appreciation for the troubling implications

of departing from that rule. However, the decision did reverse *Shanu* in part, holding that there can be *only one* “date of admission” under section 237(a)(2)(A)(i) (rather than multiple dates, as *Shanu* held). The Board reasoned that Congress had changed the statutory language to be more specific and narrow. Further, the decision concluded that the relevant “date of admission” under section 237(a)(2)(A)(i) is the date of the admission by virtue of which the alien was present in the U.S. when he committed his crime. Applying these standards to the respondent’s case, the Board concluded that the respondent is not deportable because when he committed his crime in 2007, he was in the U.S. by virtue of his nonimmigrant admission in 2001. The 5-year clock was not restarted by his adjustment of status in 2006, because that “admission” merely extended an existing period of presence, rather than commencing a new one.

The issue before the Board in *Matter of Nelson*, 25 I&N Dec. 410 (BIA 2011), was whether the respondent, who did not accrue the 7 years of continuous residence required for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), prior to the commission of his stop-time triggering criminal offense, could accrue the requisite period following his subsequent departure from and return to the United States. The respondent, a native and citizen of Jamaica, was admitted as a lawful permanent resident in 1994. In 1999, he was convicted of possession of marijuana. The respondent visited Canada in 2000 and returned to the United States after a few days. On November 26, 2008, he was served with a Notice to Appear. The Immigration Judge sustained the charge of removability under section 237(a)(2)(B)(i) of the Act and denied the respondent’s application for cancellation of removal. The Board applied *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000), to hold that the respondent’s period of residence in the United States after the commission of his triggering offense and subsequent return to this country could not be counted toward accrual of the required 7 years of continuous residence. Although the Board’s reasoning in *Matter of Mendoza-Sandino* was questioned by the concurring opinion of the Third Circuit in *Okeke v. Gonzales*, 407 F.3d 585 (3d Cir. 2005), the Board found that the court’s decision was not binding in this case. The facts were distinguishable, the three-opinion decision was fractured, and the Third Circuit had issued a more recent decision finding the Board’s precedent to be reasonable and entitled to deference. *Briseno-Flores v. Att’y Gen. of U.S.*, 492 F.3d 226, 231 (3d Cir. 2007).

In *Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011), the Board considered whether the respondent, who was convicted of statutory rape in violation of section 261.5(d) of the California Penal Code, was deportable as an alien convicted of a crime involving moral turpitude. The Ninth Circuit, in whose jurisdiction the case arose, held in *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007), that a violation of section 261.5(d) is not categorically a crime involving moral turpitude. However, the Attorney General determined in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), that intentional sexual conduct by an adult with a child involves moral turpitude where the perpetrator knew or should have known that the victim was under the age of 16. The Board found that since the term “crime involving moral turpitude” is ambiguous, the Attorney General’s interpretation in *Matter of Silva-Trevino* is binding and must be applied in lieu of *Quintero-Salazar*, to the extent they conflict, citing *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

The Board also considered the procedural aspect of *Silva-Trevino*, finding that the Ninth Circuit has not rejected the three-step analysis set forth in that decision. The Board held that in the absence of otherwise controlling authority, Immigration Judges and the Board are bound to apply all three steps of the procedural framework. Applying the framework to this case, the Board found that because section 261.5(d) of the California Penal Code does not require a perpetrator to have engaged in intentional sexual contact with someone he or she knew or should have known to be a child, there is a realistic probability it could be applied to conduct that does not involve moral turpitude. The Board then applied the second step and concluded that there were no documents in the record of conviction establishing the respondent’s knowledge of his victim’s age. Moving to the third step of the *Silva-Trevino* framework, the Board noted that the respondent testified that he knew his victim was 15 years old. Because the Immigration Judge had not made any factual findings regarding the respondent’s knowledge of the victim’s age, the Board remanded the case.

Measuring the Risk of Physical Force *continued*

a deadly weapon would create a substantial risk of the use of physical force. It reasoned that the provocative nature of such an act would risk escalating the confrontation to physical violence.

The Third Circuit took this reasoning one step further and concluded that possession of a loaded firearm with intent to use it against another involved a substantial risk of the use of force. *Henry v. ICE*, 493 F.3d 303, 307-10 (3d Cir. 2007). The court distinguished this case from an earlier decision holding that mere possession of a pipe-bomb did not create the requisite risk. *United States v. Hull*, 456 F.3d 133, 140 (3d Cir. 2006).

Conclusion

In the analysis of whether an offense “by its nature, involves a *substantial risk* that physical force against the person or property of another may be used in the course of committing the offense,” the Supreme Court has clarified that physical force is force capable of causing physical pain or injury to another person. Quantifying a “substantial risk” however, has proven more elusive. The Supreme Court has suggested that statistical evidence may be useful in the risk analysis of a generic offense, but this type of evidence is used in few cases. When measuring the risk that physical force will be used, courts have associated several risk factors with the use of physical force. Courts, however, regularly challenge the underlying inferences associated with these risk factors, creating a rich body of case law. Thus, the above risk factors cannot be applied mechanically, but instead they should guide those tasked with the complex risk assessment required by § 16(b).

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