



# Immigration Law Advisor

July - August 2014 A Legal Publication of the Executive Office for Immigration Review Vol. 8 No. 6

## In this issue...

Page 1: Feature Article:

*The Circuit Split on the  
Finality Rule*

Page 5: Federal Court Activity

Page 11: BIA Precedent Decisions

Page 15: Regulatory Update

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## The Circuit Split on the Finality Rule

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### Introduction

In 1996, Congress enacted section 322(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 to 3009-629 (enacted Sept. 30, 1996) (“IIRIRA”), which provided the first statutory definition of a “conviction” for immigration purposes. *Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1289 (9th Cir. 2004) (citing section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A), which defines the term “conviction”). Prior to the enactment of section 101(a)(48)(A) of the Act, the term “conviction” was defined through Federal judicial and administrative case law. *See id.* at 1287–89. A circuit split has emerged regarding whether “finality”—that is, the exhaustion or waiver of direct appeals as of right—is required before a “formal judgment of guilt” qualifies as a “conviction” under section 101(a)(48)(A).

This article first gives a historical perspective on the law regarding the finality of convictions leading up to the enactment of section 101(a)(48)(A) of the Act. It then explores the clearest contemporary circuit split on this issue between the United States Courts of Appeals for the Third and Ninth Circuits. The Third Circuit has held that a “formal judgment of guilt” must be “final” before it qualifies as a “conviction” under section 101(a)(48)(A). *Orabi v. Att’y Gen. of U.S.*, 738 F.3d 535 (3d Cir. 2014). The Ninth Circuit, on the other hand, has held that a “formal judgment of guilt” requires no finality to qualify as a “conviction” under the Act. In support of their respective positions, both circuits cite the jurisprudence of their sister circuits. After discussing the reasoning of these two circuits, the article examines the reasoning of the other circuits and analyzes the Third and Ninth Circuits’ interpretations of the case law.

## Concept of a “Conviction” Before IIRIRA

Nearly 60 years ago, the Supreme Court stated in a brief per curiam order that “[o]n the record here we are unable to say that the conviction has attained such *finality* as to support an order of deportation within the contemplation of . . . the Immigration and Nationality Act.” *Pino v. Landon*, 349 U.S. 901, 901 (1955) (per curiam) (emphasis added). In doing so, the Court reversed the judgment of the First Circuit in *Pino v. Nicholls*, 215 F.2d 237 (1st Cir. 1954). In that decision, the First Circuit held that an alien who had been found guilty by a Massachusetts court, sentenced, and placed on probation following suspension of his sentence had been “convicted” of a crime involving moral turpitude, even though his sentence was revoked after termination of probation and his case was placed “on file” with the State court. *See id.* at 244–45.

In 1957, the Board of Immigration Appeals declined to draw any conclusions from the Supreme Court’s decision in *Pino* regarding the “finality” of a criminal judgment. *See Matter of O-*, 7 I&N Dec. 539, 544 (BIA 1957). Given the “short and summary” nature of the Court’s order, the Board stated that it did not presume to know what factors influenced the Court’s decision. *Id.* Notwithstanding *Pino*, the Board found that a “conviction” under the Act encompassed the straightforward imposition of punishment after a finding of guilt. The Board also identified two other situations that would ordinarily be considered “convictions” for immigration purposes: (1) a court imposes a punishment, but stays the execution of that penalty; and (2) a court does not impose any punishment and stays the imposition of sentence. In such cases, the Board stated that an immigration adjudicator must categorize the actions of a court as either: (1) suspending a criminal sentence, or (2) delaying the imposition of sentence until the prosecuting attorney requests that a sentence be imposed. The Board held that the latter—including an actual postponement for sentencing during which time a case is pending—did not qualify as a “conviction” for immigration purposes because such convictions are not sufficiently final. *Matter of O-* did not address the types of charges of deportability under the Act that required “final” convictions.

In the wake of *Pino*, the circuits that considered the issue of “finality” in the immigration context concluded that a “conviction” required a sentence and the

exhaustion of direct appeal as of right. *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (finding a conviction to be final for immigration purposes because all direct appeals were exhausted, despite a pending coram nobis motion); *Morales-Alvarado v. INS*, 655 F.2d 172, 175 (9th Cir. 1981) (concluding that once an alien has been convicted by a court of competent jurisdiction and exhausted the direct appeals to which he is entitled, his conviction is final for the purpose of the immigration laws, even if the alien seeks *discretionary* review from a State’s highest court) (citing *Pino*, 349 U.S. 901); *Hernandez-Almanza v. INS*, 547 F.2d 100, 103 (9th Cir. 1976) (finding that a conviction was final for immigration purposes when the petitioner failed to pursue a direct appeal, despite a later collateral attack); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 570 (6th Cir. 1975) (finding that a motion to withdraw a guilty plea does not disrupt the finality of a conviction for immigration purposes once sentencing is imposed since the plea waived all direct appeals) (citing *Pino*); *Will v. INS*, 447 F.2d 529, 532 (7th Cir. 1971) (holding that as long as a direct appeal is pending, it is sufficient to negate a conviction’s finality for deportation purposes) (citing same).

In 1988, the Board recognized the need for a revised, uniform definition of a “conviction” for immigration purposes, observing that its jurisprudence up to that point—which looked, in part, to State law to determine whether convictions were final—allowed for “anomalous and unfair results” between aliens. *Matter of Ozkok*, 19 I&N Dec. 546, 550 (BIA 1988). Varying State criminal procedures that “ameliorat[ed]” the consequences of a conviction contributed to the difficulty in determining which State court judgments met the immigration law standards. *Id.* Such procedures include, inter alia, State provisions for annulling or setting aside the conviction, permitting plea withdrawals, sealing records after completion of a sentence or probation, and deferring adjudication of guilt with dismissal of proceedings following probation.

To increase national uniformity, the Board eliminated the requirement that an Immigration Judge look to the effect of State law to determine what constituted a conviction for immigration purposes. Instead, it held that a conviction would be found where a formal judgment of guilt had been entered by the court. However, the Board noted that where adjudication of guilt was withheld, “further examination of the specific procedure used and the state authority under which the

court acted will be necessary.” *Id.* at 551. The Board identified three elements that established a “conviction” in such settings:

(1) a judge or jury has found the alien guilty or he has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilty;

(2) the judge has ordered some form of punishment, penalty, or restraint on the person’s liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver’s license, deprivation of nonessential activities or privileges, or community service); and

(3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court’s order, *without availability of further proceedings regarding the person’s guilt or innocence of the original charge.*

*Id.* at 551–52 (emphasis added). A footnote at the end of the third element states, “It is well established that a conviction does not attain a sufficient degree of *finality* for immigration purposes until *direct appellate review of the conviction has been exhausted or waived.*” *Id.* at 552 n.7 (emphases added).

In 1996, Congress codified portions of *Matter of Ozkok*’s holding, defining a “conviction” for immigration purposes as

a formal judgment of guilt of the alien entered by a court, or, if adjudication of guilt is withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Section 101(a)(48)(A) of the Act.

Section 101(a)(48)(A) adopted language from the first two elements of *Matter of Ozkok*’s definition of a “conviction” verbatim, but it omitted the parenthetical from *Ozkok*’s second element. Compare *Matter of Ozkok*, 19 I&N Dec. at 551, with section 101(a)(48)(A)(i)–(ii) of the Act. More significantly, section 101(a)(48)(A) omitted language from the third element set forth in *Matter of Ozkok* and footnote 7, both of which outlined the “finality requirement.” *Planes v. Holder*, 686 F.3d 1033, 1040 (9th Cir. 2012) (Reinhardt, J., dissenting from the denial of rehearing en banc). Compare 19 I&N Dec. at 552 & n.7, with section 101(a)(48)(A)(i)–(ii) of the Act.

A review of the legislative history surrounding section 101(a)(48)(A) indicates that “[t]his new provision, by removing the third prong of *Ozkok*, [was intended to clarify] Congressional intent that even in cases where adjudication is ‘deferred,’ the original finding or confession of guilt is sufficient to establish a ‘conviction’ for purposes of the immigration laws.” H.R. Rep. No. 104-828, at 224 (1996) (Conf. Rep.). However, the legislative history is silent with regard to why Congress omitted the language of footnote 7 in *Matter of Ozkok*—relating to the principle of finality—from section 101(a)(48)(A).

This silence has prompted a split between the circuits. It is unclear where most circuits stand on this issue. However, the Ninth Circuit has clearly determined that Congress intended section 101(a)(48)(A) of the Act to eliminate the finality requirement altogether, while the Third Circuit has held that the finality rule survived the enactment of section 101(a)(48)(A) of the Act, at least with regard to a “formal judgment of guilt” that is subject to direct appeal as of right.

### The Split Between the Ninth and Third Circuits

#### *The Ninth Circuit*

The Ninth Circuit held that a formal judgment of guilt constitutes a “conviction” under section

101(a)(48)(A) of the Act, even if all direct appeals have not been exhausted or waived. *Planes v. Holder*, 652 F.3d 991, 996 (2011), *reh'g denied*, 686 F.3d 1033 (9th Cir. 2012).

The alien in *Planes* pleaded guilty and was convicted of possessing 15 or more access devices. He subsequently appealed the sentence imposed for this conviction, but he “did not appeal the conviction itself.” *Id.* at 993. The Ninth Circuit remanded the alien’s challenge to his sentence to the district court for further proceedings. The alien was later placed into removal proceedings and found removable from the United States on account of his conviction, even though the district court had yet to issue a new decision regarding his sentence.

The alien appealed to the Board, arguing that the Immigration Judge erred in ordering him removed based on his conviction, which he claimed was not final for immigration purposes because he had not yet been resentenced. The Board disagreed, holding that his conviction constituted a “conviction” for immigration purposes under section 101(a)(48)(A), despite the fact that the district court was still considering modifications to his sentence.

The Ninth Circuit came to the same conclusion and dismissed the alien’s petition for review. Specifically, the court concluded that a plain reading of section 101(a)(48)(A) (defining a conviction as a “formal judgment of guilt of an alien entered by a court”) indicated that a “conviction” for immigration purposes “exists once the district court enters a judgment, notwithstanding the availability of an appeal as of right.” *Planes*, 652 F.3d at 995 (noting that “[a]s a general rule and as a matter of logic, a defendant cannot appeal a conviction until *after the entry of a judgment of guilt*” (emphasis added) (citing Fed. R. App. P. 4(b))).

The court rejected the alien’s argument, which urged the court to deviate from the plain language of the statute and hold that a “conviction” does not exist for immigration purposes until all direct appeals as of right have been waived or exhausted. The alien’s argument relied on case law supporting such a requirement that predated the enactment of section 101(a)(48)(A) of the Act. However, the court found these cases inapplicable “because they were decided before the enactment of this statutory definition of ‘conviction’ which *supplants* our prior judicially-created standards.” *Id.* (emphasis

added) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (discussing Congress’ authority to alter the interpretation of Federal statutes by passing new legislation)). Consequently, the Ninth Circuit concluded that it was bound by the subsequent enactment of section 101(a)(48)(A), and the court held that the plain language of that section “requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived.” *Id.* at 996.

In support of its holding, the Ninth Circuit cited post-IIRIRA precedential cases from the Second, Fifth, Seventh, and Tenth Circuits. *Id.* at 996–97. In a concurrence to the denial of rehearing *Planes* en banc, Judge Ikuta individually analyzed the holdings of these other circuits in-depth and found each to have determined that the waiver or exhaustion of all direct appeals as of right was not a prerequisite of a “conviction” under section 101(a)(48)(A) of the Act. *Planes*, 686 F.3d at 1034–35 (Ikuta, J., concurring) (collecting cases).

The judges who dissented from the denial of rehearing en banc in *Planes* argued that all of the cases cited by the majority were distinguishable and that the panel should have read footnote 7 of *Matter of Ozkok* into section 101(a)(48)(A) because IIRIRA’s legislative history lacks any express statement that Congress intentionally rejected the well-established rule regarding finality described in that footnote. *Id.* at 1039 & n.4 (Reinhardt, J., dissenting) (collecting cases). As the dissent noted, “[N]othing suggests that Congress intended to eliminate the longstanding finality rule that provided for exhaustion of direct appeals as of right before a conviction became final for immigration purposes.” *Id.* (citing *Matter of Ozkok*, 19 I&N Dec. at 552 n.7 (“It is well established that a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.”)).

The dissent conceded that finality is *not* required for convictions known as deferred adjudications—where there is no entitlement to an immediate direct appeal—because section 101(a)(48)(A) defines a deferred adjudication as a conviction using only the language from the first and second elements of *Matter of Ozkok*. Section 101(a)(48)(A) entirely *omits* language from *Ozkok*’s third element. According to the dissent, the omission of the third element reflects Congress’ intent to eliminate the

*continued on page 17*

# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR JUNE 2014

*by John Guendelsberger*

The United States courts of appeals issued 194 decisions in June 2014 in cases appealed from the Board. The courts affirmed the Board in 166 cases and reversed or remanded in 28, for an overall reversal rate of 14.4%, compared to last month's 15.3%. There were no reversals from the Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for June 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	0	2	100.0
Second	22	17	5	22.7
Third	9	7	3	22.2
Fourth	5	4	1	20.0
Fifth	20	20	0	0.0
Sixth	9	7	2	22.2
Seventh	2	2	0	0.0
Eighth	5	5	0	0.0
Ninth	107	91	16	15.0
Tenth	6	6	0	0.0
Eleventh	7	7	0	0.0
All	194	166	28	14.4

The 194 decisions included 112 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 51 direct appeals from denials of other forms of relief from removal or from findings of removal; and 31 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	Reversed
Asylum	112	93	19	17.0
Other Relief	51	46	5	9.8
Motions	31	27	4	12.9

The 19 reversals or remands in asylum cases involved particular social group (9 cases), credibility (4 cases), protection under the Convention Against Torture (2 cases), level of harm for past persecution, the 1-year

filing requirement, well-founded fear, and the serious nonpolitical crime bar to asylum.

The five reversals or remands in the "other relief" category addressed crimes involving moral turpitude (two cases), suppression of evidence, continuance for adjustment of status, and good moral character preclusion based on confinement to prison for 180 days or more.

The four motions cases involved changed country conditions, the physical presence requirement for cancellation of removal, equitable tolling, and a Government motion to reopen to add additional grounds for removal.

The chart below shows the combined numbers for January through June 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	554	439	115	20.8
Third	66	55	11	16.7
Seventh	22	19	3	13.6
First	16	14	2	12.5
Second	207	185	22	10.6
Fourth	60	55	5	8.3
Sixth	51	48	3	5.9
Fifth	100	94	6	6.0
Tenth	25	24	1	4.0
Eleventh	53	51	2	3.8
Eighth	36	36	0	0.0
All	1190	1020	170	14.3

Last year's reversal rate at this point (January through June 2013) was 12.8%, with 1090 total decisions and 140 reversals.

The numbers by type of case on appeal for the first 6 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	641	533	108	16.8
Other Relief	249	207	42	16.9
Motions	300	280	20	6.7

## CIRCUIT COURT DECISIONS FOR JULY 2014

*by John Guendelsberger*

The United States courts of appeals issued 199 decisions in July 2014 in cases appealed from the Board. The courts affirmed the Board in 167 cases and reversed or remanded in 32, for an overall reversal rate of 16.1%, compared to last month's 14.4%. There were no reversals from the Third, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for July 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	19	16	3	15.8
Second	27	22	5	18.5
Third	13	13	0	0.0
Fourth	8	6	2	25.0
Fifth	16	15	1	6.3
Sixth	12	12	0	0.0
Seventh	10	6	4	40.0
Eighth	4	4	0	0.0
Ninth	72	56	16	22.2
Tenth	7	7	0	0.0
Eleventh	11	10	1	9.1
All	199	167	32	16.1

The 199 decisions included 104 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 47 direct appeals from denials of other forms of relief from removal or from findings of removal; and 48 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	104	86	18	17.3
Other Relief	47	37	10	21.3
Motions	48	44	4	8.3

The 18 reversals or remands in asylum cases involved particular social group (4 cases), nexus (2 cases), credibility (2 cases), corroboration (2 cases), protection under the Convention Against Torture (2 cases), level of harm for past persecution, the 1-year filing requirement,

the particularly serious crime bar, competency, standard of review, and a remand for further explanation.

The 10 reversals or remands in the "other relief" category addressed crimes involving moral turpitude (2 cases), categorical and modified categorical approach (2 cases), a continuance request, good moral character, retroactive application of a new rule under the Child Status Protection Act, NACARA eligibility, fact-finding by the Board, and a remand to consider an issue not addressed. The four motions cases involved changed country conditions (two cases), ineffective assistance of counsel, and a motion to reconsider.

The chart below shows the combined numbers for January through July 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	32	25	7	21.9
Ninth	626	495	131	20.9
First	35	30	5	14.3
Third	79	68	11	13.9
Second	234	207	27	11.5
Fourth	68	61	7	10.3
Fifth	116	109	7	6.0
Sixth	63	60	3	4.8
Eleventh	64	61	3	4.7
Tenth	32	31	1	3.1
Eighth	40	40	0	0.0
All	1389	1187	202	14.5

Last year's reversal rate at this point (January through July 2013) was 12.9%, with 1301 total decisions and 168 reversals.

The numbers by type of case on appeal for the first 7 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	745	619	126	16.9
Other Relief	296	244	52	17.6
Motions	348	324	24	6.9

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## RECENT COURT OPINIONS

### ***Second Circuit:***

*Weinong Lin v. Holder*, No. 12-179-ag, 2014 WL 4067162 (2d Cir. Aug. 19, 2014): The Second Circuit granted a petition for review of the Board's denial of an asylum application as untimely and remanded for further consideration. The petitioner, a national of China, claimed that he met the "changed circumstances" exception for late filing, based on his public political activism in the U.S. as a member of an organization called the China Democratic Party World Union. The Immigration Judge found that these new facts were not "changed circumstances," but rather "another aspect of the same reason that the applicant always had to apply for asylum." The Board affirmed. The court acknowledged that the petitioner's subjective anti-communist political beliefs, which he held privately in China, remained unchanged. It found, however, that his engagement in public activism for the first time constituted a change in objective circumstances consistent with 8 C.F.R. § 1208.4(a)(4)(i)(B), which states that "changed circumstances" include activities an applicant becomes involved in outside the country of feared persecution. The court cited to a footnote in *Matter of C-W-L-*, interpreting the regulations to apply to "changes in objective circumstances relating to the applicant." 24 I&N Dec. 346, 352 n.9 (BIA 2007). The court found the Board's determination in this case to be "an unexplained, and therefore impermissible, departure from agency precedent." The court invited the Board on remand to provide "precedential consideration of various unresolved issues that inhere in this case." Specifically, the court identified the need to provide a framework for assessing claims in which an asylum applicant "initiates or intensifies public opposition" for the first time after arriving in the U.S., including guidance in assessing credibility in such claims and in determining the risk of persecution when such a claim is denied. The court additionally asked the Board to consider the asylum statute's concern (if any) with sincerity in such claims, including whether there is "a presumption one way or another."

*Dawkins v. Holder*, No. 12-4569, 2014 WL 3907045 (2d Cir. Aug. 12, 2014): The Second Circuit denied the petition for review of the Board's decision affirming an Immigration Judge's order of removal. The Immigration Judge had concluded that the petitioner's theft offense constituted an aggravated felony under section 101(a)(43)(G) of the Act. The petitioner's sole argument on review was that the Immigration Judge erred in ruling

that her conviction carried a sentence of at least 1 year of imprisonment. Although the Connecticut statute under which the petitioner was convicted carried a maximum sentence of 3 months, she received a suspended sentence of 3 years' imprisonment under the State's recidivist sentence enhancements, based on her four separate larceny convictions. The petitioner claimed that recidivist sentence enhancements should not be considered in determining whether a term of imprisonment was for at least 1 year under section 101(a)(43)(G) of the Act. The petitioner further argued that the Supreme Court's decision in *United States v. Rodriguez*, 553 U.S. 377 (2008) (interpreting the phrase "maximum term of imprisonment" in Armed Career Criminal Act ("ACCA") to include recidivist sentence enhancements), is distinguishable based on the different purposes of the ACCA and the Immigration and Nationality Act. The court disagreed. Noting that under *United States v. Pacheco*, 225 F.3d 148, 153 (2d Cir. 2000), the sentence actually imposed determines whether a term of imprisonment is for at least 1 year for purposes of section 101(a)(43)(G) of the Act, the court stated that "it would defy both the plain and common meaning of the phrase 'term of imprisonment'" to subtract any sentence enhancements actually imposed before making such a determination. The court also noted that the Supreme Court in *Rodriguez* had disposed of the argument that a recidivist enhancement is not a sentence imposed for a single conviction by holding that "100% of the punishment is for the offense of conviction." As a result, the court concluded that the 3-year suspended sentence was sufficient to qualify the petitioner's conviction as one for an aggravated felony.

*Paloka v. Holder*, No. 12-4987-ag, 2014 WL 3865992 (2d Cir. Aug. 7, 2014): The Second Circuit vacated a decision of the Board denying asylum from Albania and remanded the case for consideration of the claimed particular social group. The petitioner claimed to fear persecution on account of her membership in a particular social group, consisting of either "unmarried women," "young women in Albania," or "unmarried young women in Albania." As a teenaged girl, she was targeted by an unknown individual acting in cooperation with a man in a police uniform, who apparently wanted to sell her into prostitution. The Board concluded that all three proposed groups lacked "sufficient particularity to be cognizable social groups." The Board also found that the petitioner had not established that she was targeted on account of her family's political opinion, but she was targeted instead "because she was a good target for criminal opportunistic

behavior.” The court noted that the Board had issued two precedent decisions subsequent to its decision in this case, *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), which further refined and clarified its interpretation of the “particular social group” requirements. The court found it appropriate to remand for the Board to reconsider the record in light of the two new decisions. The court found the Board’s clarifications in the new decisions to be of importance to cases like this one that “straddle the line” between fear of government-condoned criminality on account of membership in a particular social group and country-wide “pervasive criminality.” The court also noted that during the pendency of the petition, the petitioner further refined her proposed social group to be limited to young, unmarried women “between the ages of 15 and 25,” a subgroup that is specifically mentioned in the supporting country conditions evidence of record.

*Acharya v. Holder*, No. 11-4362-ag, 2014 WL 3821132 (2d Cir. Aug. 5, 2014): The Second Circuit granted a petition for review of the Board’s decision affirming an Immigration Judge’s denial of asylum from Nepal. The petitioner was employed with the Nepali Police Force, gathering information on Maoist insurgents. He and his family members were also members of the Nepali Congress Party. He was detained and physically abused by Maoists while on an intelligence gathering assignment in a village in Nepal. The Immigration Judge found the petitioner credible but concluded that the evidence did not establish that the petitioner’s political opinion was “the central ground” for his persecution by the Maoists. The Immigration Judge stated that it appeared that the Maoists targeted the petitioner because of his employment with the police force because the effectiveness of the petitioner’s police activities seemed to “naturally upset” his attackers. In affirming, the Board stated that the petitioner had not shown that his Nepali Congress role was “one central reason” that he was targeted. The court found that the Immigration Judge’s reference to “the central ground” constituted legal error because it created a more stringent standard than the statutory requirement that a protected ground provide “at least one central reason” for the persecution. The court noted that under the standard articulated by the Immigration Judge, “multiple motives for persecution must be analyzed in competition with each other, rather than in concert.” Thus, the Immigration Judge’s finding of another more likely motive would prevent the petitioner from satisfying

the standard. However, the court cited to case law in which a showing of mixed motives for persecution was sufficient to satisfy the “at least one central reason” standard. The court further found that according to the petitioner’s credible testimony, in three separate incidents (including the petitioner’s own abduction), the Maoists specifically referenced both the petitioner’s police activities *and* his political party ties. The court found that this evidence established the petitioner’s political opinion as “at least one (of only two, in fact) reason for their targeting.” The court additionally found that the Board’s use of the proper standard in its decision did not correct the legal error without further analysis of how the standard articulated by the Immigration Judge might have impacted the findings. It therefore remanded the record to the Board. The court raised an additional issue for consideration on remand, involving the Board’s application of *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988) (holding that dangers arising from employment as a policeman in an area of domestic unrest do not constitute persecution on account of a protected ground). The court noted that the Board had distinguished the court’s holding in *Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010), which involved a policeman acting as a whistleblower against police corruption. The court explained that *Castro* may be interpreted as more broadly focusing on “the activities and responsibilities unique to the petitioner in assessing the relationship between persecution and a protected ground.” Applying *Castro* to the facts of this case, the court stated that such a reading of *Castro* would lead to consideration whether the Maoists viewed the petitioner’s police work as an “effort to undermine [the Maoists’] plurality position in the national legislature,” based on the political allegiance of the petitioner and his family to the Nepali Congress party. The court thus concluded that on remand the Board may be required to “take account of the depth of this political component” of the petitioner’s police work.

***Fourth Circuit:***

*De Leon v. Holder*, No. 13-1651, 2014 WL 3734519 (4th Cir. Jul. 30, 2014): The Fourth Circuit granted the petition challenging the Board’s decision finding the petitioner ineligible for NACARA “special rule” cancellation of removal. The issue in question was whether the petitioner (a native and citizen of Guatemala who had originally entered the U.S. in 1988) was apprehended at the time of entry when he returned from an unauthorized trip abroad in 2003. If so, the petitioner would be ineligible for relief pursuant to 8 C.F.R.

§ 1240.61(a)(1). The court applied the Board's definition of "entry" from *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973), which requires (1) crossing into U.S. territory; (2) either inspection and admission by an immigration officer, or actual and intentional evasion of inspection; and (3) freedom from official restraint. The court noted that the Board had defined "official restraint" to include "surveillance, unbeknownst to the alien." In this case, the Board had held that the petitioner did not meet his burden of demonstrating entry prior to his apprehension, relying in part on a border patrol agent's written report that he had observed the truck transporting the petitioner 17 miles from the border and followed the truck for 8 miles before apprehending its passengers. The Board found that the facts established that the petitioner had met the first two criteria of the *Pierre* test but had not presented sufficient evidence that he was ever free from official restraint after crossing the border. The Fourth Circuit disagreed, holding that the petitioner met his burden by relying on the border patrol agent's report, which stated that he "first saw" the petitioner at milepost nine, seventeen miles beyond the border. The court held that the petitioner met his burden by relying on the report as credible evidence that he entered the United States free from restraint. One of the three judges on the panel dissented, concluding that the petitioner did not meet his burden because the Immigration Judge found his testimony not credible and he did not present any other credible evidence regarding the circumstances of his entry, including whether he was observed by a government official prior to reaching mile marker 17.

*Cordova v. Holder*, No. 13-1597, 2014 WL 3537873 (4th Cir. Jul. 18, 2014): The Fourth Circuit (in a split decision by a three judge panel) granted the petition for review of the Board's decision affirming an Immigration Judge's denial of asylum from El Salvador. The asylum claim was based on the petitioner's fear of persecution at the hands of the Mara Salvatrucha gang ("MS-13"). The petitioner first entered the U.S. in 2004, but he returned to El Salvador in February 2008 pursuant to a grant of voluntary departure. He reentered the U.S. in July 2010. In his 2 plus years in El Salvador, the petitioner had three encounters with MS-13, and one with the rival gang Mara 18. Shortly after his return to his country, the petitioner was beaten by MS-13 members and threatened with death if he did not either join the gang or pay for its protection. The police simply advised the petitioner to stay inside his home. He continued to receive threats from MS-13. The following year, armed members of

Mara 18 chased and shot at the petitioner, threatening to kill him if he did not join their gang. The petitioner encountered MS-13 members twice more in 2010. Both times, the petitioner was threatened and attacked as a result of his cousin's membership in the rival Mara 18 gang, which the petitioner believed was imputed to him based on kinship. In the first encounter, the petitioner was accosted with his cousin and was chased, choked, and threatened, but he managed to escape. In the second incident, MS-13 gang members shot into the petitioner's home for an hour, shouting that they knew both his and his cousin's identity and that he was going to die. The petitioner managed to flee to the U.S. shortly thereafter; while en route, his cousin was shot and killed by an MS-13 member. An uncle of the petitioner who had also been a Mara 18 member was killed in 2007. The petitioner argued to the Immigration Judge that he was a member of a particular social group consisting of those with kinship ties to gang members because the MS-13 members had seen and associated the petitioner with his Mara 18 member cousin. After making a mixed credibility finding, the Immigration Judge found that the petitioner had not established that a Salvadoran "who came to the U.S., returned to El Salvador, had problems with a gang, and the police did not help" qualified as a member of a particular social group. The Immigration Judge additionally concluded that the petitioner had not suffered past persecution and had not established that future persecution was a "reasonable probability." The Immigration Judge denied the applications for asylum and related relief. The Board, in a single member decision, affirmed, holding that "family members of persons killed by rival gang members, as well as being threatened themselves for refusing to join a gang" was not a cognizable social group. The Board alternatively found that the petitioner had not established a nexus between his actual or feared persecution and the proposed social group. The court's majority decision addressed the two findings of the Board. Regarding whether the particular social group is cognizable, the court noted that the group stated by the Immigration Judge differed from the language proposed by the petitioner. Significantly, the proposed group analyzed by the Immigration Judge lacked the kinship element put forth by the petitioner. The court observed that on appeal, the Board cited to its precedent decision in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006) (holding that family membership can constitute a particular social group), but in summarily affirming the Immigration Judge's ruling, it did not conduct a family-based analysis. The court thus determined that remand was required to

allow for additional explanation by the Board. The court was unpersuaded by the Government's argument that remand was unnecessary in light of case law supporting the Board's conclusion. The court distinguished the facts involved in the cited cases (involving only gang recruitment or extortion) from this case, in which the petitioner claimed to be targeted by one gang because of his kinship ties to members of a rival gang. The court next examined the Board's nexus analysis. While the Board had correctly found that the petitioner's family members had not been killed on account of a protected ground (but rather on account of their gang membership), the court held that such a finding did not mean "that MS-13 did not target [the petitioner] on account of *his* kinship ties to his cousin and uncle." The court additionally found the fact that the petitioner's initial encounter with MS-13 involved only a motive to recruit still required the Board to address the facts surrounding the last two incidents, in which "MS-13 purportedly targeted him because it associated him with his cousin, a rival gang member." The record was accordingly remanded for further explanation on these points as well. The court's decision contained a dissent.

*Quitaniella v. Holder*, No. 12-2329, 2014 WL 3397757 (4th Cir. Jul.14, 2014): The Fourth Circuit denied a petition for review challenging a denial of special rule cancellation of removal under section 202 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193, 2193 (1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997) ("NACARA"). An Immigration Judge had found the petitioner ineligible under the "persecutor bar" of section 241(b)(3)(B) of the Act. The Immigration Judge concluded that as sergeant in the Salvadoran military, the petitioner arrested 20 to 50 suspected terrorists, whom he turned over to his superiors with the likely understanding that they would be tortured or killed. That decision was affirmed by the Board. The petitioner argued that he did not assist in the persecution of others but was merely a soldier following orders. The court disagreed. It referenced decisions of the Second and Seventh Circuits holding that "those who take custody of or transport individuals for the purpose of persecution may be subject to the persecutor bar." The court found that the record established that the petitioner "oversaw the investigation and capture" of the 20 to 50 individuals and that the country conditions materials of record established that such prisoners were "routinely interrogated, tortured and sometimes killed." As to scienter, the court found that it was "unable to disturb" the Immigration Judge's

conclusion that the petitioner "most likely understood that the individuals he investigated or arrested would be tortured and killed." The court additionally cited its own published decision holding that intelligence gathering that led to the persecution of others was sufficient to satisfy the persecutor bar, even where the petitioner did not personally inflict physical harm.

#### ***Seventh Circuit:***

*Albu v. Holder*, No. 13-2864, 2014 WL 3824239 (7th Cir. Aug. 5, 2014): The Seventh Circuit denied a petition for review of a Board decision affirming an Immigration Judge's determination that the petitioner was ineligible to apply for cancellation of removal, as one who has knowingly filed a frivolous asylum application. The petitioner had filed an asylum application containing facts fabricated by his then attorney's office. The petitioner attended an asylum interview with a Romanian interpreter employed by the same lawyer's office. At the interview, the petitioner signed an oath indicating that he was aware of the consequences of filing a frivolous application; the interpreter certified on the same form that he had interpreted the warnings contained therein for the petitioner. Both the attorney and the interpreter were eventually convicted of filing more than 1200 false asylum applications. The petitioner was placed into removal proceedings, where he withdrew his asylum application and sought to apply for cancellation of removal. However, the Immigration Judge found the petitioner ineligible for relief based on the frivolousness bar and ordered the petitioner removed. The petitioner admitted before the Immigration Judge that he knew that the contents of the asylum application were fraudulent, and the Immigration Judge did not find credible the petitioner's claim that he was unaware of the consequences. The petitioner testified that he did not remember whether the interpreter had translated the warnings into Romanian. However, he argued that although the interpreter indicated that he had done so, the interpreter had an incentive to lie because he was also convicted in the fraud scheme. In affirming, the Board largely adopted the Immigration Judge's conclusion that the frivolousness bar applied. The Board also found no clear error in the Immigration Judge's adverse credibility finding. On appeal, the circuit court noted that whether an application is false, whether the falsehood is material, and whether it was made knowingly are all questions of fact. The court further noted that the petitioner contested neither the falsehood nor materiality; his sole argument was that he did not receive proper notice of the consequences, as required by the statute.

The court cited to its decision in *Pavlov v. Holder*, 697 F.3d 616 (7th Cir. 2012), holding that warnings given on the application itself or at the time of interview suffice to satisfy the statute’s notice requirement. The court stated that although this case differed from *Pavlov* in the involvement of an interpreter, the question whether the warnings were actually interpreted for the petitioner is a question of fact that the Immigration Judge was entitled to resolve. The court found that substantial evidence supported the Immigration Judge’s determination—the interpreter’s attestation and the fact that the petitioner testified that he could not recall if the warnings were translated for him, rather than that they were not. The court thus found the Immigration Judge’s conclusion to be “well within the realm of reason.”

## BIA PRECEDENT DECISIONS

**I**n *Matter of P-S-H-*, 26 I&N Dec. 329 (BIA 2014), the Board held that a grant of asylum may be terminated pursuant to 8 C.F.R. § 1208.24 only if the Department of Homeland Security (“DHS”) establishes by a preponderance of the evidence that (1) there was fraud in the alien’s asylum application and (2) the fraud was such that the alien was not eligible for asylum at the time it was granted. However, the DHS need not prove that the alien knew of the fraud to satisfy the first requirement.

After recapping the statutory and regulatory framework outlined in *Matter of A-S-J-*, 25 I&N Dec. 893 (2012), the Board noted that the DHS may move to reopen proceedings to terminate asylum status previously granted by the Board or an Immigration Judge. In such a reopened proceeding, the DHS must establish, by a preponderance of the evidence, one or more grounds for termination. 8 C.F.R. § 1208.24(f). The regulations provide for termination upon a showing of, among other things, fraud in the application such that the alien was not eligible for asylum at the time it was granted. 8 C.F.R. § 1208.24(a)(1).

The respondent’s attorneys were convicted of making false statements in his asylum application relating to a medical certificate. The Immigration Judge found that the fraudulent certificate, a questionable narrative in the asylum application, instructions from the respondent’s attorneys to replace one of two identical affidavits with a differently worded affidavit, and a statement by the respondent’s friend that was contradicted by a

foreign service investigator were indicia that the asylum application was fraudulent. The Immigration Judge terminated the respondent’s asylum status and ordered him removed.

The respondent appealed, arguing that he had no knowledge of the fraud, which he asserted the DHS must prove in order to terminate his grant of asylum. The Board observed that the regulations contained no such requirement and concluded that the relevant inquiry was whether there was fraud in the application, irrespective of whether the respondent was personally involved in or aware of the fraud. The Board acknowledged controlling Ninth Circuit precedent holding that submission of a fraudulent document is not necessarily dispositive of a respondent’s credibility, particularly in the absence of a finding that the alien knew of the fraud. Additionally, the Ninth Circuit and the Board hold that an alien must know that a representation is false to be inadmissible on that basis. However, the Board pointed out that 8 C.F.R. §§ 1208.24(a)(1) and (f) provide that the DHS must establish “fraud in the alien’s application,” with no requirement that the alien must have been involved in or aware of the fraud. Additionally, the Board posited that in light of the importance of maintaining the integrity of the asylum process, Congress likely did not intend to immunize an asylee from termination if otherwise ineligible, even if he or she was not complicit in the fraud underpinning the asylum grant. Based on the plain language of 8 C.F.R. § 1208.24(a)(1), the Board concluded that the DHS is not required to establish that an alien knew of the fraud to prove that there was fraud in his or her asylum application. Based on the alien’s concessions and the strong evidence of fraud in the record, the Board determined that the DHS met its burden of establishing, by a preponderance of the evidence, that there was fraud in the respondent’s asylum application.

However, the Board noted that a showing of fraud in the respondent’s asylum application was insufficient to terminate the respondent’s asylum grant because the regulations include a second step that requires the DHS to prove that the fraud in the alien’s asylum application was such that he was not eligible for asylum at the time it was granted. 8 C.F.R. § 1208.24(a)(1). In other words, if the alien was eligible for asylum despite the fraud, the asylum grant cannot be terminated under 8 C.F.R. § 1208.24(a)(1). Since the Immigration Judge had not adequately considered whether the respondent was eligible for asylum but for the fraud in his application, the

Board remanded the record for the Immigration Judge to make that determination.

In *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014), the Board held that an alien's mental health as a factor in a criminal act falls within the province of the criminal courts and is not relevant to an assessment whether the alien was convicted of a "particularly serious crime" for immigration purposes. The respondent, who suffered from chronic paranoid schizophrenia, had been convicted of assault with a deadly weapon in violation of California law and was sentenced to 2 years' imprisonment. The Immigration Judge conducted a removal hearing after implementing procedural safeguards for the mentally incompetent respondent and found that the respondent's conviction was for an aggravated felony crime of violence under section 101(a)(43)(F) of the Act. The Immigration Judge further found that the offense constituted a particularly serious crime, barring the respondent from eligibility for withholding of removal.

On appeal the respondent argued that he committed the offense because of his mental illness. After reviewing the controlling provisions of the Act, the Board noted that section 241(b)(3)(B)(ii) of the Act proscribes granting withholding of removal to an applicant who, by virtue of a conviction for a particularly serious crime, is a danger to the community. Further, section 241(b)(3)(B) provides that an aggravated felony conviction for which a sentence of at least 5 years has been imposed involves a per se particularly serious crime. However, the Board pointed out that as determined in *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), *aff'd*, *N-A-M- v. Holder*, 587 F.3d 1052 (10th Cir. 2009), neither the length of the sentence nor the necessity that the offense be characterized as an aggravated felony is dispositive in assessing whether an offense is a particularly serious crime. For an offense that is not an aggravated felony or which did not result in an aggregate term of imprisonment of 5 years or more, the Board explained that the analysis must include an examination of the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction, but it may also include any other reliable, relevant information.

As the Board noted, "dangerousness" is the pivotal standard for judging whether a crime is particularly serious. The determination focuses on the crime that was committed; the alien's personal circumstances and equities are not considered. Harm to the victim is also

pertinent to evaluating whether a crime is particularly serious. The key is whether the crime indicates that the alien poses a danger to the community. If an offense is found to be particularly serious, no separate dangerousness determination is required.

Applying these standards to the respondent, the Board noted that he was convicted of assault with a deadly weapon for striking an individual with a weightlifting bell, causing a laceration to the victim's head, which required stitches. Considering that the act was dangerous and capable of causing grave injuries and that the respondent was sentenced to 2 years' imprisonment, the Board concurred with the Immigration Judge that the respondent's conviction was for a particularly serious crime.

While acknowledging the significance of the respondent's mental health issues, the Board was unpersuaded by his argument that his mental condition should be a factor in the particularly serious crime analysis. The Board held that it cannot go behind criminal judges' rulings on criminal culpability and that issues concerning a defendant's mental condition are best addressed during criminal prosecution. The Board concluded that the consideration of mental health as a factor in a criminal act falls within the purview of the criminal courts and is not an appropriate factor to consider when determining whether a crime is particularly serious. Observing that the respondent's mental disorder warranted procedural safeguards to ensure that he received a fair hearing in his removal proceedings, the Board explained that his mental condition was not relevant to the particularly serious crime analysis.

The Board also rejected the respondent's argument that he did not act with the requisite intent to render his crime particularly serious. The Board pointed out that intent is not dispositive because the focus in a particularly serious crime inquiry is whether the offense indicates that the respondent poses a danger to the community. The Board therefore concluded that the respondent did not satisfy his burden of proving that his conviction for assault with a deadly weapon was not for a particularly serious crime, rendering him ineligible for withholding of removal. The alien's appeal was dismissed.

In *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), the Board held that the categorical approach is employed to determine whether a conviction for felony

discharge of a firearm under section 76-10-508.1 of the Utah Code is for an aggravated felony crime of violence or a firearms offense under the Act. The Board withdrew from its decision in *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), and held that the DHS did not meet its burden of proving that the respondent was removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony because the DHS did not establish that section 76-10-508.1 is divisible as to the requisite mens rea to constitute a crime of violence. Finally, the Board clarified its holding in *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010), and found that the respondent had not demonstrated that section 76-10-508.1 was categorically overly broad relative to section 237(a)(2)(C) of the Act because he did not show that he or anyone else was successfully prosecuted under that statute for discharging an “antique firearm.”

The respondent was convicted of felony discharge of a firearm and was sentenced to an indeterminate term of imprisonment not to exceed 5 years. The Immigration Judge found him removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony crime of violence under section 101(a)(43)(F), and of a firearms offense pursuant to section 237(a)(2)(C). The Immigration Judge applied the version of the modified categorical approach outlined in *Matter of Lanferman*, and determined in relevant part that sections 76-10-508.1(a) and (b) were divisible because violations of those provisions could entail an intentional, knowing, or reckless mens rea. Applying the modified categorical approach, the Immigration Judge consulted the conviction documents to determine the respondent’s mental state when he committed his offense.

The Board found that *Matter of Lanferman*’s broader approach to divisibility contravened the divisibility framework outlined in *Descamps v. United States*, 133 S. Ct. 2276 (2013). In *Descamps*, the Supreme Court held that a modified categorical inquiry is only authorized if the statute of conviction is divisible. According to the Supreme Court, a statute is divisible if: (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of “elements,” more than one combination of which must be found by a jury unanimously and beyond a reasonable doubt to support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. The Board withdrew from *Matter of*

*Lanferman*, reasoning that it was bound by the divisibility analysis identified in *Descamps* and that it lacked authority to apply *Matter of Lanferman*’s broader approach to divisibility.

The Board explained that it was bound to apply divisibility consistently with each circuit’s interpretation of *Descamps*, observing that the United States Court of Appeals for the Tenth Circuit, the jurisdiction in which this case arose, had not applied *Descamps* in a precedential opinion addressing the mens rea at issue. Analyzing section 76-10-508.1 under *Descamps*, the Board reasoned that the statute’s distinct mens rea (namely, intent, knowledge, and recklessness) render the statute divisible only if Utah requires jury unanimity regarding the mental state with which the accused discharges the firearm. Absent jury unanimity, intent, knowledge, and recklessness are alternative “means” by which the crime can be committed, not alternative “elements” of the offense. The Board found no authority addressing the issue of jury unanimity regarding the necessary mental state for a conviction under section 76-10-508.1, but it noted that in the context of second-degree murder, the Utah Supreme Court has not required jury unanimity where the single crime can be committed in any of three separate manners, each with a different mens rea. Thus, the Board concluded that the DHS had not established that section 76-10-508.1 is divisible. Consequently, since the Immigration Judge was not authorized to conduct a modified categorical inquiry and consult the conviction records to determine the respondent’s mental state, the Board found that the DHS had not satisfied its burden of proving that the respondent was removable under section 237(a)(2)(A)(iii) of the Act.

As to the section 237(a)(2)(C) removability charge, the Board concluded that the respondent was removable because he had been convicted of an offense involving a firearm as defined in 18 U.S.C. § 921(a). The Board rejected the respondent’s argument that section 76-10-508.1 was categorically overbroad because its definition included antique firearms while the Federal firearms definition excludes them. Citing *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), the Board pointed out that the respondent bears the burden of showing a realistic probability, not a theoretical possibility, that Utah had successfully prosecuted an offender under section 76-10-508.1 for discharging an antique firearm. The Board noted that in *Matter of Mendez-Orellana* it held that an alien bore the burden of proving that the firearm

involved in a firearms offense was an “antique” because the “antique firearm” exception was an affirmative defense to a section 237(a)(2)(C) charge of removability. However, in light of *Moncrieffe*’s discussion of the “antique firearms” exception, the Board clarified that a State firearms statute containing no “antique firearms” exception is categorically overbroad relative to section 237(a)(2)(C) only if the alien demonstrates that the State statute has been successfully applied to prosecute offenses involving antique firearms.

The Board rejected the respondent’s argument that the *Moncrieffe* Court’s discussion of “antique firearms” and the “realistic probability” test was dicta, reasoning that pursuant to *Moncrieffe* and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the “realistic probability” requirement is a threshold inquiry conducted as part of a categorical comparison to identify the actual “minimum conduct” proscribed by a statute. The record was remanded.

In *Matter of M-L-M-A-*, 26 I&N Dec. 360 (BIA 2014), the Board concluded that a respondent’s false testimony uttered more than 3 years prior to the entry of a final administrative order was not a bar to establishing good moral character in conjunction with an application for special rule cancellation of removal pursuant to section 240A(b)(2) of the Act, a form of relief under the Violence Against Women Act (“VAWA”). The Board also determined that a favorable exercise of discretion was warranted despite the respondent’s divorce from her abusive husband and subsequent long term relationship with another man because she had not previously been granted special rule cancellation of removal and she had significant equities.

Following a Board remand, the Immigration Judge denied the respondent’s application for special rule cancellation of removal under section 240A(b)(2). The Immigration Judge reaffirmed a previous finding that the respondent lacked credibility because she testified untruthfully about the identities of the individuals with whom she entered the United States. Because she had filed a fraudulent asylum application, the Immigration Judge held that the respondent was unable to establish good moral character as defined in section 101(a)(6) of the Act. Additionally, the Immigration Judge found that the respondent did not merit special rule cancellation of removal in the exercise of discretion, because of her lack of credibility, the fraudulent asylum application, and her

divorce from her abusive husband followed by a long term relationship with another man.

Finding no clear error, the Board upheld the Immigration Judge’s adverse credibility finding. However, since the fraudulent asylum application predated the 3-year period preceding the entry of a final administrative order the Board found that the respondent was not precluded from establishing good moral character under section 101(f)(6) of the Act. Further, assuming that the respondent’s false testimony fell within the “catchall” provision under section 101(f) of the Act, the Board concluded that the false testimony and fraudulent application were of insufficient significance to prevent the respondent from establishing good moral character.

With respect to the exercise of discretion, the Board noted that the respondent had significant equities, including lengthy residence in the United States; extensive family ties to United States citizen and lawful permanent resident relatives; the hardship she and her immediate relatives would suffer if she were removed; the lack of a criminal record; and the fact that she never worked in the United States without authorization. The Board approved of the Immigration Judge’s reliance on the adverse credibility determination and fraudulent asylum application as relevant negative factors in the discretionary analysis. However, with respect to the long-ago termination of her abusive relationship, the Board found that the respondent’s case was distinguishable from *Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009). Unlike the respondent in that case, who was denied special rule cancellation of removal in the exercise of discretion, in part because she previously obtained a form of relief under VAWA, the respondent in this case had not previously received VAWA relief and had no other means of regularizing her status. The Board concluded that the respondent’s significant equities outweighed the adverse factors present and held that the respondent was statutorily eligible for special rule cancellation and merited such relief in the exercise of discretion. The appeal was sustained and the record was remanded for appropriate background checks.

In *Matter of L-G-H-*, 26 I&N Dec. 365 (BIA 2014), the Board determined that the sale of a controlled substance in violation of section 893.13(1)(a)(1) of the Florida Statutes, which lacks a mens rea element as to the illicit nature of the substance but requires knowledge

of its presence and includes an affirmative defense as to its unlawful nature, is an “illicit trafficking” aggravated felony as defined in section 101(a)(43)(B) of the Act.

Following several convictions for drug-related offenses, including selling cocaine in violation of section 893.13(1)(a)(1), the respondent was charged in relevant part with removability pursuant to section 237(a)(2)(A)(iii) of the Act as an alien convicted of illicit trafficking in a controlled substance, an aggravated felony under section 101(a)(43)(B) of the Act. The Immigration Judge found that the respondent’s conviction for selling cocaine was an aggravated felony conviction.

Section 893.13(1)(a)(1) criminalizes the sale, manufacture, or delivery, or possession with the intent to sell, manufacture, or deliver, a controlled substance. The Eleventh Circuit, the controlling jurisdiction for this case, held in *Donawa v. U.S. Att’y Gen.*, 735 F.3d 1275 (11th Cir. 2013), that section 893.13(1)(a)(1) is broader than the corresponding Federal drug trafficking statute, 21 U.S.C. § 841(a), because that provision requires knowledge of the illicit nature of the controlled substance but the Florida statute lacks such a requirement. Consequently, the Eleventh Circuit found that a violation of section 893.13(1)(a)(1) does not constitute an aggravated felony “drug trafficking crime” under section 101(a)(43)(B) of the Act. However, the court declined to consider whether a violation of the Florida statute constituted “illicit trafficking” pursuant to section 101(a)(43)(B) and instructed the Board to consider the question.

In *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992), modified on other grounds, *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002), the Board determined that “illicit trafficking” was intended to include “any state, federal, or qualified foreign felony conviction including the unlawful trading or dealing” in a controlled substance defined by Federal law. Since the respondent was convicted of a State felony involving the federally controlled substance of cocaine, the Board identified the remaining issue as whether the respondent’s conviction involved “unlawful trading or dealing,” a question that required a determination whether the “illicit trafficking” clause of section 101(a)(43)(B) of the Act includes a specific mens rea requirement.

Observing that Congress revised the Controlled Substances Act to expand the removal of aliens convicted

of drug offenses, the Board saw no congressional intent to exclude a State drug trafficking crime from the aggravated felony definition merely because the statute did not require knowledge of the illicit nature of the substance involved. Noting that the Supreme Court has traditionally recognized the constitutional validity of statutes involving public welfare even if they lack a mens rea requirement, the Board reasoned that Congress likely was aware of that view when adding illicit trafficking to the aggravated felony definition. The Board expressly held that the term “illicit” did not implicate a mens rea requirement in the context of section 893.13(1)(a)(1), which still requires that a person be aware of the presence of the substance itself and includes an affirmative defense that is available to assert lack of knowledge that the substance is illicit.

Next, the Board determined that section 893.13(1)(a)(1) was not a categorical match to the Federal drug trafficking statute, 21 U.S.C. § 841(a). Applying the commercial transaction test outlined in *Matter of Davis*, the Board found that section 893.13(1)(a)(1) was divisible because it lists multiple discrete offenses that may or may not categorically match the “illicit trafficking” clause of section 101(a)(43)(B) of the Act. Proceeding to a modified categorical inquiry, the Board examined the record of conviction and determined that the respondent sold cocaine to a confidential informant, a transaction in which consideration inheres. Consequently, selling cocaine in violation of section 893.13(1)(a)(1) is an offense involving a “commercial transaction” and meets the “illicit trafficking” definition in *Matter of Davis*. The Board concluded that the respondent’s conviction was for an aggravated felony as defined in section 101(a)(43)(B) of the Act.

Turning to the respondent’s applications for relief, the Board found that further analysis of his claim for deferral of removal under the Convention Against Torture was required. The record was remanded.

## REGULATORY UPDATE

**79 Fed. Reg. 39,953 (July 11, 2014)**

**DEPARTMENT OF JUSTICE**

Executive Office for Immigration Review

8 CFR Part 1003

RIN 1125–AA77

### **Designation of Temporary Immigration Judges**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This rule amends the Executive Office for Immigration Review (EOIR) regulations relating to the organization of the Office of the Chief Immigration Judge (OCIJ) to allow the Director of EOIR to designate or select, with the approval of the Attorney General, temporary immigration judges.

**DATES:** Effective Date: This rule is effective July 11, 2014. Written comments must be submitted on or before September 9, 2014. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight eastern time at the end of that day.

**79 Fed. Reg. 42,449 (July 22, 2014)**

### **DEPARTMENT OF HOMELAND SECURITY**

8 CFR Part 100

### **Customs and Border Protection**

19 CFR Part 101

[Docket No. USCBP–2012–0037; CBP Dec. 14–08]

### **Closing of the Jamieson Line, New York Border Crossing**

**AGENCY:** U.S. Customs and Border Protection, DHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Department of Homeland Security (DHS) regulations pertaining to the field organization of U.S. Customs and Border Protection (CBP) by closing the Jamieson Line, New York border crossing. The change is part of CBP’s continuing program to utilize its personnel, facilities, and resources more efficiently, and to provide better service to carriers, importers, and the general public.

**DATES:** This final rule is effective on August 21, 2014.

**79 Fed. Reg. 46,499 (Aug. 8, 2014)**

### **DEPARTMENT OF STATE**

[Public Notice: 8812]

### **In the Matter of the Review and Amendment of the Designation of Harakat ul-Mujahidin; aka Harakat ul-Mujahideen; aka Harakat ul-Ansar; aka Jamiat ul-Ansar; aka HUA; aka HUM; aka al-Hadid; aka al-Hadith; aka al-Faran; as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act**

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) and (b) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C), (b)) (“INA”), and in consultation with the Attorney General and the Secretary of the Treasury, the Secretary of State concludes that the circumstances that were the basis for the 2008 decision to maintain the designation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation of Harakat ul-Mujahidin, and that there is a sufficient factual basis to find that Harakat ul-Mujahidin, also known under the aliases listed above, uses or has used additional aliases, namely, Ansar ul-Ummah.

Therefore, the Secretary of State hereby determines that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained. In addition, effective upon the date of publication in the Federal Register, the Secretary of State hereby amends the 2008 review of Harakat ul-Mujahidin as a foreign terrorist organization, pursuant to § 219(b) of the INA (8 U.S.C. 1189(b)), to include the following new alias and other possible transliterations thereof:

Ansar ul-Ummah

Dated: July 23, 2014.

John F. Kerry,  
Secretary of State.

[FR Doc. 2014–18802 Filed 8–7–14; 8:45 am]

DEPARTMENT OF STATE

[Public Notice 8821]

**In the Matter of the Review of the Designation of Asbat al-Ansar, (and other aliases), as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (“INA”), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2009 decision to maintain the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained. This determination shall be published in the Federal Register.

Dated: August 1, 2014.

John F. Kerry,

Secretary of State.

[FR Doc. 2014–19151 Filed 8–12–14; 8:45 am]

DEPARTMENT OF STATE

[Public Notice 8828]

**In the Matter of the Designation of Mujahidin Shura Council in the Environs of Jerusalem (MSC), Also Known as MSC, Also Known as Mujahideen Shura Council in the Environs of Jerusalem, Also Known as Mujahideen Shura Council, Also Known as Majlis Shura al-Mujahedin Fi Aknaf Bayt al-Maqdis, Also Known as Majlis Shura al-Mujahidin, Also Known as Majlis Shura al-Mujahideen, Also Known as Magles Shoura al- Mujahddin, as a Foreign**

**Terrorist Organization Pursuant to Section 219, of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter “INA”) (8 U.S.C. 1189), exist with respect to Mujahidin Shura Council in the Environs of Jerusalem (MSC), also known as MSC, also known as Mujahideen Shura Council in the Environs of Jerusalem, also known as Mujahideen Shura Council, also known as Majlis Shura al-Mujahedin Fi Aknaf Bayt al-Maqdis, also known as Majlis Shura al-Mujahidin, also known as Majlis Shura al-Mujahideen, also known as Magles Shoura al-Mujahddin.

Therefore, I hereby designate the aforementioned organization and its aliases as a Foreign Terrorist Organization pursuant to section 219 of the INA. This determination shall be published in the Federal Register.

Dated: August 1, 2014.

John F. Kerry,

Secretary of State.

[FR Doc. 2014–19778 Filed 8–19–14; 8:45 am]

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***Finality Rule continued***

finality requirement for deferred adjudications and provide that a conviction exists for such adjudications under section 101(a)(48)(A) once there is a finding of guilt and the imposition of punishment. Nevertheless, the dissent concluded that “[t]he elimination of the finality provision for deferred adjudications, along with the failure to make any change in the language regarding direct appeals as of right, further demonstrates Congress’ intent to retain the finality rule for the latter category of appeals.” *Id.* at 1040.

Judge Ikuta and the other concurring judges rejected this argument, stating that the plain language of section 101(a)(48)(A) is unambiguous, and thus the court was not permitted to read additional requirements into the statute. Judge Ikuta additionally asserted that, in light of Congress’ adoption of language from the first and second elements of *Matter of Ozkok* verbatim, and its complete omission of *Ozkok*’s third element and footnote

7 from section 101(a)(48)(A)'s text, "it is most reasonable to infer that Congress intentionally omitted *any* finality requirement from [section 101(a)(48)(A)'s] definition of 'conviction.'" *Id.* at 1036 (Ikuta, J., concurring) (emphasis added).

### *The Third Circuit*

In contrast to the Ninth Circuit, the Third Circuit concluded that Congress only intended section 101(a)(48)(A) of the Act to eliminate the finality rule for deferred adjudications, for reasons similar to those outlined by the judges dissenting from the denial of rehearing en banc of *Planes*. According to the Third Circuit, section 101(a)(48)(A) did not eliminate the finality requirement for convictions subject to direct appeal as of right. *Orabi*, 738 F.3d at 540–42.

The alien in *Orabi* was convicted of conspiracy to commit fraud in connection with access devices and related offenses and appealed his sentence to the Second Circuit. After filing his appeal, he was placed into removal proceedings and found to be removable based on his conviction. The alien appealed the removal order to the Board and argued that his conviction was not final for immigration purposes because his appeal was still pending with the Second Circuit. The Board dismissed the appeal, finding that the respondent had sustained a "conviction" within the meaning of section 101(a)(48)(A) because he had a "formal judgment of guilt" entered against him by a court, and "[w]hether such a judgment may be subject to direct appeal is immaterial to the attachment of immigration consequences." *Id.* at 538 (quoting the Board's decision).

The Third Circuit disagreed with the Board's conclusion, noting that the legislative history of section 101(a)(48)(A) "refers only to the modification of deferred adjudications," not to formal judgments of guilt. *Id.* at 541 (citing H.R. Rep. No. 104-828, at 224 (providing that section 101(a)(48)(A) of the Act, "by removing the third prong of *Ozkok*, clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws" (emphasis added))). Agreeing with the dissent in *Planes*, the court stated: "[N]othing in IIRIRA or its legislative history suggests that Congress intended the phrase 'formal judgment of guilt' to be interpreted any differently from how it always had been interpreted prior to the enactment of the

statute . . . ." *Id.* (quoting *Planes*, 686 F.3d at 1039–40 (Reinhardt, J., dissenting)). Accordingly, the Third Circuit held that section 101(a)(48)(A)'s "elimination of the finality requirement in the case of *deferred adjudications* [did] not disturb the longstanding finality rule for direct appeals recognized in *Ozkok*." *Id.* at 541–42.

Moreover, the Third Circuit disagreed with the Ninth Circuit's assertion in *Planes* that there was a consensus regarding the "finality rule" among the circuits, stating that "each of the cases cited by [the *Planes* court] is distinguishable, and only [*United States v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007),] purports to hold that a petitioner is not entitled to a direct appeal as of right prior to being deported." *Id.* at 542 (quoting *Planes*, 686 F.3d at 1039 n.4) (Reinhardt, J., dissenting) (internal quotation marks omitted). Thus, the Third Circuit concluded that "the principle announced and held in *Ozkok*—that 'a conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived'—[is] alive and well." *Id.* at 543 (quoting *Matter of Ozkok*, 19 I&N Dec. at 552 n.7) (footnote omitted). Since the alien's conviction was pursuant to a formal judgment of guilt rather than a deferred adjudication, the court reversed the Board and directed that the alien be permitted to return to the United States.

### **Other Circuit Case Law**

#### *The First Circuit*

The First Circuit's decision in *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001), involved an alien who had been convicted of a firearms offense through a State procedure known as "guilty-filed"—a form of deferred adjudication. The alien argued that he had not sustained a "conviction" for immigration purposes and that the Immigration Judge had improperly found him removable on the basis of his firearms offense. Relying on its decision in *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) (en banc), the Board determined that the alien's deferred adjudication constituted a "conviction" pursuant to section 101(a)(48)(A) of the Act.

In *Matter of Punu*, the Board considered a deferred adjudication under Texas law. After a review of the text of section 101(a)(48)(A) and the legislative history surrounding that provision, the Board concluded that Congress specifically excluded the finality requirement

under third element of *Matter of Ozkok* for purposes of deferred adjudications. Thus, a deferred adjudication was considered a “conviction” for immigration purposes, even though direct appeal as of right had not yet been waived or exhausted.

The First Circuit deferred to *Matter of Punu*’s interpretation of section 101(a)(48)(A) for two reasons. First, the plain language of that provision adopted the first two elements of *Matter of Ozkok*, while omitting the third. Second, the legislative history of section 101(a)(48)(A) indicated that the third element of *Ozkok* was eliminated to clarify that a finding of guilt and the imposition of punishment was sufficient to establish a conviction for immigration purposes. The First Circuit nevertheless found that the record was inconclusive with regard to whether a punishment had, in fact, been imposed on the alien. It therefore remanded the case to the Board to consider whether the record supported the conclusion that the year of probation served by the alien was punishment for the “guilty-filed” charge.

It is important to note that the First Circuit’s decision was exclusively limited to whether a deferred adjudication constituted a “conviction” for immigration purposes. The court concluded that the Board’s decision in *Matter of Punu*—upon which the court based its holding—was similarly limited. *Griffiths*, 243 F.3d at 51 (“Implicit in [*Matter of Punu*’s] holding is a conclusion that the ‘finality’ requirement no longer applied to *deferred adjudications* under the new definition, as the concurrence makes explicit.” (emphasis added) (citing *Matter of Punu*, 22 I&N Dec. at 234 (Grant, concurring))). As the court noted, “The Board did not address the meaning of the first prong of INA § 101(a)(48)(A), governing cases where there is a ‘formal judgment of guilt,’ in its decision construing the statute.” *Id.* at 53 n.3 (citing *Matter of Punu*, 22 I&N Dec. at 234 n.1 (Grant, concurring) (“For example, this opinion does not address the circumstance of an alien against whom a formal adjudication of guilt has been entered by a court, but who has pending a noncollateral post-judgment motion or appeal.”)). The court further specified that the Government was “not taking the position it could deport someone adjudicated guilty while their appeal or appeal period was pending.” *Id.* at 54.

The Ninth Circuit recognized that *Griffiths*’ holding is limited to deferred adjudications, noting that the First Circuit has observed that “finality is not

required under the deferred-adjudication portion” of section 101(a)(48)(A) of the Act. *Planes*, 652 F.3d 991, 996–97 (citing *Griffiths*, 243 F.3d at 50–51). The Third Circuit similarly acknowledged the contours of *Griffiths*’ holding, noting that the First Circuit found that section 101(a)(48)(A) required a “distinct mode of treatment for deferred adjudications” with respect to the finality rule. *Orabi*, 738 F.3d at 542–43 (quoting *Griffiths*, 243 F.3d at 54) (internal quotation marks omitted).

### *The Second Circuit*

In passing, the Second Circuit has stated that section 101(a)(48)(A) “eliminate[d] the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the statute.” *Puella v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 332 (2d Cir. 2007). However, the Third and Ninth Circuits dispute whether this language is dicta. Compare *Orabi*, 738 F.3d at 542 (characterizing the language as dicta), and *Planes*, 686 F.3d at 1039 n.4 (Reinhardt, J., dissenting) (noting that “[t]he statement regarding the finality rule in *Puella* . . . was dicta, as later recognized by the Second Circuit itself” in unpublished decisions), with *Planes*, 686 F.3d at 1034 & n.1 (Ikuta, J., concurring) (characterizing the language in *Puella* as a “conclusion” that the Second Circuit has reiterated in unpublished decisions and with which “no Second Circuit opinion has disagreed”). Following *Puella*, the Second Circuit has issued at least one unpublished decision indicating that the finality rule survived the enactment of section 101(a)(48)(A) of the Act. See *Abreu v. Holder*, 378 F. App’x 59, 62 (2d Cir. 2010).

In *Abreu*, the Second Circuit reviewed *Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009) (en banc), which involved an alien who had been convicted, placed into removal proceedings, and ordered removed, but then filed a motion for a later-reinstated appeal, which was granted by the State court. Based on the reinstatement of appeal, the alien moved to reopen his removal proceedings, arguing that his conviction was no longer final. The Board determined that a late-reinstated appeal was distinct from a direct appeal—that is, an appeal from a “formal judgment of guilt” under section 101(a)(48)(A) of the Act. Instead, the Board determined that a late-reinstated appeal was analogous to a deferred adjudication and that such an appeal “does not undermine the finality of his conviction for purposes of the immigration laws.” *Id.* at 802. The Second Circuit reversed, finding that the

Board's distinction between a late-reinstated appeal and a direct appeal was based on legal error. Despite *Puello's* observation regarding finality, the court remanded the case for the Board to "address, in the first instance, whether IIRIRA's definition of conviction is ambiguous with respect to the finality requirement." *Abreu*, 378 F. App'x at 62.

### *The Fifth Circuit*

In *Moosa v. INS*, 171 F.3d 994, 1001–02 (5th Cir. 2009), the Fifth Circuit determined that section 101(a)(48)(A) eliminated the finality rule with respect to an alien's deferred adjudication under Texas law. The Fifth Circuit noted that *Matter of Ozkok* outlined three requirements that must be met for a deferred adjudication to constitute a "conviction" for immigration purposes. The court observed that footnote 7 of *Ozkok* "[s]uperimposed on these three requirements . . . the finality requirement." *Id.* at 1000. The court noted, however, that section 101(a)(48)(A)(i)–(ii) (relating to deferred adjudications) omitted language from the footnote. The Fifth Circuit concluded, based on the omission of footnote 7, that Congress had eliminated the finality requirement, at least insofar as it related to deferred adjudications. *Id.* at 1009 ("There is no indication that the finality requirement imposed by *Pino*, and this court, prior to 1996, survives the new definition of 'conviction' found" in section 101(a)(48)(A) of the Act). Thus, according to the Fifth Circuit, a deferred adjudication need not be final to constitute a "conviction" for immigration purposes.

The alien countered that eliminating the finality rule would lead to absurd results. Specifically, he argued that such an interpretation may result in the removal of an alien whose conviction is on appeal and is later reversed. The court noted, however, that that was not at issue because the alien had no appeals pending. Moreover, in the Fifth Circuit's view, such concerns would be best left to Congress. "Congress has made the policy choice to eliminate the finality requirement, and we will not second-guess such policy choices properly made by the legislative branch." *Id.*

The Third Circuit found that *Moosa* is limited to deferred adjudications; it does not apply to direct appeals. *Orabi*, 738 F.3d at 543; *see also Planes*, 686 F.3d at 1039 n.4 (Reinhardt, J., dissenting) ("*Moosa* unquestionably did *not* deal with direct appeals as of right.>").

The Ninth Circuit, in contrast, reads *Moosa* more broadly. According to the Ninth Circuit, *Moosa* stands for the proposition that section 101(a)(48)(A) of the Act eliminated the finality requirement entirely—for deferred adjudications *and* direct appeals as of right. In support of its interpretation, the Ninth Circuit states that the *Moosa* court found that footnote 7 in *Matter of Ozkok* "superimposed" a "finality requirement" on the *entire* definition of a "conviction" in *Ozkok*. *Planes*, 686 F.3d at 1035 (Ikuta, J., concurring) (citing *Moosa*, 171 F.3d at 1000). Thus, in the Ninth Circuit's view, Congress's omission of the footnote from the new definition of a "conviction" under section 101(a)(48)(A) eliminated the finality requirement as to *all* convictions. Nevertheless, the Ninth Circuit glosses over the fact that the Fifth Circuit specifically stated that *Matter of Ozkok's* footnote 7 superimposed a finality requirement on the three elements in *Ozkok* pertaining to deferred adjudications. *See Moosa*, 171 F.3d at 1000.

### *The Sixth Circuit*

The Sixth Circuit's decision in *United States v. Garcia-Echaverria*, 374 F.3d 440 (6th Cir. 2004), involved an alien who was the subject of illegal reentry proceedings. The alien had been convicted of a removable offense and was ordered removed on the basis of that conviction while a collateral attack against the conviction was pending before a State appellate court. He was removed, apprehended for illegally reentering the country, and charged accordingly. In illegal reentry proceedings, the district court found that the alien's conviction was a proper basis for removal despite his pending post-conviction motion. The alien appealed, arguing that his conviction was insufficiently final for immigration purposes on account of his pending collateral attack.

The Sixth Circuit disagreed. The court recognized that for removal purposes "a conviction must be final." *Id.* at 445 (citing *Pino*, 349 U.S. 901). The court explained that "[f]inality requires the defendant to have *exhausted or waived his rights to direct appeal*." *Id.* (emphasis added). Nevertheless, the court noted that the alien's "exercise of *post-conviction remedies* does not . . . undermine the finality of his conviction." *Id.* (emphasis added).

The Ninth Circuit acknowledged that in *Garcia-Echaverria* the Sixth Circuit retained an "exhaustion-or-waiver requirement" following the enactment of section

101(a)(48)(A) of the Act. *Planes*, 652 F.3d at 997 n.7. However, the court found it significant that the Sixth Circuit’s decision “did so without analyzing the effect or import” of section 101(a)(48)(A) of the Act. *Id.* The Third Circuit, however, emphasized that the Sixth Circuit’s holding in *Garcia-Echaverria* was contingent on the fact that the alien was seeking to collaterally attack a criminal judgment; it did not involve “a direct appeal.” *Orabi*, 738 F.3d 542. Thus, in the Third Circuit’s view, the enactment of section 101(a)(48)(A) of the Act did not disturb the longstanding rule, enunciated in *Garcia-Echaverria*, that waiver or exhaustion of *direct appeal* as of right is required before a conviction is sufficiently final for immigration purposes.

### *The Seventh Circuit*

The alien in *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (per curiam), argued that the Immigration Judge denied him due process by ordering him removed on the basis of a conviction he was challenging on appeal. Specifically, the alien asserted that his conviction was insufficiently final for immigration purposes because, at the time of his removal proceedings, he had two petitions still pending—a writ of certiorari in the United States Supreme Court and an appeal from the denial of his post-conviction petition in the Illinois Appellate Court. Both petitions were later denied.

The Seventh Circuit noted that prior to the enactment of section 101(a)(48)(A), “the Supreme Court required that a deportation proceeding be based on a conviction that had sufficient ‘finality[.]’ . . . which [the Seventh Circuit] interpreted to mean that the alien no longer had any direct appeal pending.” *Montenegro*, 355 F.3d at 1037 (citing *Pino*, 349 U.S. at 901; *Mansoori v. INS*, 32 F.3d 1020, 1024 (7th Cir. 1994)). The court observed, however, that section 101(a)(48)(A) “treats an alien as ‘convicted’ once a court enters a *formal judgment of guilt*.” *Id.* at 1038 (emphasis added) (citing *Moosa v. INS*, 171 F.3d 994, 1008–09 (5th Cir. 1999)). Unlike some of its sister circuits, the Seventh Circuit drew no distinction between formal adjudications of guilt and deferred adjudications. *Id.* (“[The statute] eliminated the finality requirement for a conviction, set forth in *Pino* . . .”). Therefore, the court concluded that the alien had a “conviction” for immigration purposes pursuant to section 101(a)(48)(A).

The Ninth Circuit appears to read *Montenegro* broadly and cites the case in support of the proposition that section 101(a)(48)(A) of the Act eliminated the finality requirement entirely for “formal judgments of guilt,” regardless of whether direct appeal as of right has been exhausted or waived. *See Planes*, 686 F.3d at 1035 (Ikuta, J., concurring); *Planes*, 652 F.3d at 996–97 (interpreting *Montenegro* as “relying on the plain language of [the statute] to dismiss [the] alien’s contention that he was unlawfully ordered removed while he still had *direct appeals pending*” (emphasis added) (citing *Montenegro*, 355 F.3d at 1037)).

The Third Circuit, however, interpreted *Montenegro* more narrowly. According to the Third Circuit, *Montenegro* only involved an alien who was collaterally attacking his conviction and petitioning for certiorari but did not involve a “direct appeal.” *Orabi*, 738 F.3d at 542 (citing *Montenegro*, 355 F.3d 1035); *see also Planes*, 686 F.3d at 1039 n.4 (observing that *Montenegro* “involved a petition for certiorari to the Supreme Court and a collateral attack on a conviction, neither of which is a direct appeal as of right and neither of which affected the finality of a conviction for immigration purposes even under pre-IIRIRA case law”). Thus, in the Third Circuit’s view, *Montenegro* did not hold that section 101(a)(48)(A) eliminated the finality requirement for direct appeals as of right. Rather, the court appears to read *Montenegro* as standing for the more narrow proposition that section 101(a)(48)(A) eliminated the finality requirement for aliens who have exhausted or waived direct appeal as of right, even if their convictions are subject to discretionary review or collateral attack.

### *The Tenth Circuit*

The Tenth Circuit first addressed the issue of finality in *United States v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007), a sentencing guidelines case. In *Saenz-Gomez*, the district court applied a sentencing enhancement to the alien after finding that he had previously been ordered removed based on a conviction for an aggravated felony. The alien attacked the underlying removal order, arguing that his conviction could not have served as a basis for removal because, when the Immigration Judge ordered him removed, he had yet to exhaust or waive his right to direct appeal. In other words, his conviction was not sufficiently final for immigration purposes. The district court rejected the alien’s arguments regarding

finality and applied the sentencing enhancement. The Tenth Circuit affirmed, finding that the plain text of section 101(a)(48)(A) of the Act was unambiguous and did not require finality.

The Tenth Circuit revisited the issue of finality in *Waugh v. Holder*, 642 F.3d 1279 (10th Cir. 2011). In that case, an alien was convicted of an aggravated felony and then contested removability by arguing that his conviction was not final in light of a pending challenge pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010)—a form of collateral attack. The Immigration Judge rejected these arguments and determined that unless and until the alien’s conviction was overturned, it was final for immigration purposes. The Board dismissed the alien’s appeal based on similar reasoning.

The Tenth Circuit agreed with the Board’s decision, explaining that Congress enacted section 101(a)(48)(A) “to *supplant* a prior BIA interpretation that had required deportation to wait until direct appellate review (though never collateral review) of the conviction was exhausted or waived.” *Id.* at 1284 (quoting *United States v. Adame-Orozco*, 607 F.3d 647, 653 (10th Cir. 2010)) (internal quotation mark omitted). “From this,” the court concluded, “it follows that an alien is lawfully deportable as soon as a formal judgment of guilt is entered by a trial court.” *Id.* (quoting same) (internal quotation marks omitted).

The Third and Ninth Circuits agree that the Tenth Circuit’s decision in *Saenz-Gomez* stands for the proposition that section 101(a)(48)(A) does not require exhaustion or waiver of appeals for formal judgments of guilt. *Orabi*, 738 F.3d at 542; *Planes*, 686 F.3d at 1034 (Ikuta, J., concurring). However, the Third and Ninth Circuits dispute whether *Waugh*’s holding reaches direct appeals as of right or is limited only to collateral attacks. According to the Third Circuit, the Tenth Circuit in *Waugh* denied the alien’s appeal “where his *collateral attack* is pending.” *Orabi*, 738 F.3d at 542 (citing *Waugh*, 642 F.3d at 1281–82). The Ninth Circuit viewed *Waugh* differently, stating that the Tenth Circuit “explained in no uncertain terms” that section 101(a)(48)(A) specifically supplanted the finality rule. *Planes*, 686 F.3d at 1034 (citing *Waugh*, 642 F.3d at 1284).

## Conclusion

The Third and Ninth Circuits are split over whether the exhaustion or waiver of direct appeals as of right is required before a “formal judgment of guilt” qualifies as a “conviction” under section 101(a)(48)(A) of the Act. The other circuits’ positions on this point are less than clear. However, the circuits appear to be in close alignment on other issues surrounding the finality rule. Specifically, they agree that collateral attacks and discretionary appeals do not vitiate the immigration consequences of a criminal conviction unless and until the conviction is overturned. Furthermore, most circuits agree that finality is not required before a deferred adjudication will constitute a “conviction” for immigration purposes.

*Christine DiDomenico and Elizabeth Komar are Attorney Advisors at the Newark Immigration Court. Rachael Dizard is an Attorney Advisor at the Elizabeth Immigration Court.*

### EOIR Immigration Law Advisor

**David L. Neal, Chairman**

*Board of Immigration Appeals*

**Brian M. O’Leary, Chief Immigration Judge**

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