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Removability for Smuggling Under Sections 212(a)(6)(E) and 237(a)(1)(E) of the Immigration and Nationality Act

by Sarah Cade

Two sections of the Immigration and Nationality Act provide for the removal of smugglers—section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E), regarding inadmissibility and section 237(a)(1)(E) of the Act, 8 U.S.C. § 1227(a)(1)(E), regarding deportability. These provisions use the same language in referring to any alien who "knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law."

This article will briefly address the history of the smuggling provisions, as well as questions that have arisen regarding the proper interpretation of the statute. It will first look at the circumstances under which a person can be deemed to have "encouraged, induced, assisted, abetted, or aided" another's entry. It will also examine when actions taken inside the United States can be construed as encouraging or aiding an alien "to enter" the country.

The History of Smuggling Provisions in the Act

Sections 212(a)(6)(E) and 237(a)(1)(E) of the Act took effect as part of the Immigration Act of 1990, Pub. L. No. 101-649, §§ 601(a), 602(a), 104 Stat. 4978, 5073-74, 5078 (effective Nov. 29, 1990). Prior to that point, former sections 212(a)(31) of the Act, 8 U.S.C. § 1182(a)(31) (1988), and 241(a)(13) of the Act, 8 U.S.C. § 1251(a)(13) (1988), covered aliens who had "knowingly *and for gain*, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law." (Emphasis added.)

Most of the decisions that arose under the former provisions of the Act analyzed whether an alien had engaged in smuggling "for gain."

See, e.g., *Soto-Hernandez v. INS*, 726 F.2d 1070 (5th Cir. 1984); *see also Ribeiro v. INS*, 531 F.2d 179 (3d Cir. 1976); *Matter of Tiwari*, 19 I&N Dec. 875 (BIA 1989); *Matter of Arthur*, 16 I&N Dec. 558 (BIA 1978). Other issues that were addressed included whether the alien had made a "departure" during the smuggling attempt, *see, e.g.*, *Matter of Contreras*, 18 I&N Dec. 30 (BIA 1981) (finding that a lawful permanent resident was making an "entry" where he departed with the intention of assisting an alien to enter illegally); *Matter of Valdovinos*, 14 I&N Dec. 438 (BIA 1973) (same), or whether the ground of exclusion or deportation required a conviction, *see Matter of Estrada*, 17 I&N Dec. 187 (BIA 1979) (finding that a conviction was not required for a finding of deportability under former section 241(a)(13) of the Act).

Neither the Board of Immigration Appeals nor the various Federal circuit courts of appeals ever directly addressed what might constitute encouraging, inducing, assisting, abetting, or aiding a smuggling attempt, since the cases under the previous sections more often hinged on whether the aliens in proceedings had received payment for whatever assistance had been given. Typically, the presence of compensable, affirmative assistance was obvious.

When Congress revised the smuggling provisions in 1990, it only eliminated the "for gain" requirement—the other elements of the statutes remained intact. *See Matter of Compean*, 21 I&N Dec. 51, 52-53 (BIA 1995) (explaining the history of the smuggling sections vis-à-vis the changes from the Immigration Act of 1990). This change led the courts to address for the first time an interesting legal question—when has someone knowingly "assisted" an entry?

Assisting an Alien To Enter

In January 2005, four friends living in Chicago piled into a rented van for a road trip to Toronto, Ontario. *Tapucu v. Gonzales*, 399 F.3d 736 (6th Cir. 2005). They shared driving responsibilities during the trip to Toronto and back, and on returning to the United States, a lawful permanent resident named Morhay Tapucu was driving when they stopped at the border crossing. Immigration officials questioned each occupant, and one of the passengers, Kirkor Deveci, falsely claimed that he resided in Canada. In actuality, Deveci had been residing unlawfully in the United States for a number of years. When immigration officials discovered that Deveci had no legal right to enter the United States, Tapucu was placed into removal proceedings on a charge of violating section 212(a)(6)(E) of the Act. The charge was based on two acts Tapucu had allegedly done to "assist" Deveci's entry—driving the van and failing to correct Deveci's statement to border officers.

Tapucu admitted to the border officers than he knew Deveci had been living illegally in this country, but he told them that he believed Deveci was lawfully permitted to enter the United States because of a pending application for lawful permanent resident status. At the close of removal proceedings, the Immigration Judge held that Tapucu had knowingly assisted an attempt at unlawful entry and was therefore inadmissible. A Board Member affirmed in a one-sentence opinion.

In reversing, the United States Court of Appeals for the Sixth Circuit held that Tapucu "did not commit a single affirmative act designed to assist an illegal effort" to cross the border and "indeed Tapucu thought Deveci legally could re-enter." *Id.* at 739. The court stated that it was "difficult to see how Tapucu had done anything to interfere with the proper enforcement of the immigration laws" and that he "no more assisted the illegal re-entry of an alien—by the happenstance of being the current driver of the car—than he assisted the government in preventing the re-entry." *Id.*

In determining that Tapucu's knowledge of Deveci's prior unlawful habitation in the United States was irrelevant, the Sixth Circuit cited the 1995 Department of State Foreign Affairs Manual, interpreting the term "knowingly" in the statute to require knowledge that the attempted entry would be unlawful. *Id.* at 739-40 (citing 9 U.S. Dep't of State Foreign Affairs Manual § 40.65 n.4 (1995) ("[T]he 'smuggler' must act with intention of encouraging or *assisting the alien to achieve the illegal entry*. Therefore, belief that the alien was entitled to enter legally, although mistaken, would be a defense to ineligibility for a suspected 'smuggler.'")). The decision also noted a dictionary definition of "smuggler" as those who "'import or export secretly'" or "'bring in[] or take out . . . (merchandise, forbidden articles, or persons) contrary to law and *with a fraudulent intent*.'" *Id.* at 740 (quoting *Webster's Third New International Dictionary* 2153 (2002)). The court concluded that Tapucu did not qualify as a smuggler under this definition, stating that

"there was nothing illicit or secret about Tapucu's actions at the border." *Id.*

The Sixth Circuit noted that when Congress revised the smuggling provision in 1990, it did so because the previous section's requirement that the assistance be "for gain" had "created difficult proof problems" in certain situations, such as where payment had not yet been tendered. *Id.* (citing 9 U.S. Dep't of State Foreign Affairs Manual § 40.65 n.7 (1995)). The Sixth Circuit concluded that "the provision still requires an affirmative and illicit act of assistance" and that "[p]ut another way, the statute still requires the would-be smuggler to commit a compensable act—to do something for which remuneration reasonably *could* be made even if it need not be proved." *Id.*

Finally, the Sixth Circuit noted that cases that have found a violation of section 212(a)(6)(E)(i) of the Act have all involved at least one "affirmative illicit act" that involved "something more than merely driving to a border station and presenting valid documents to customs officials." *Id.* at 741. The court cited a lengthy list of decisions from other circuits and the Board of Immigration Appeals and indicated that in each case the alien had committed at least one "affirmative act" in assisting or planning a smuggling effort. *Id.*

A member of the three-judge panel dissented in *Tapucu*, taking issue with the majority's characterization of the particular facts of the case. *Id.* at 743. The dissent argued that the court should have affirmed the finding that Tapucu knew Deveci was not entitled to enter the United States. *Id.* at 744. The dissent further stated that "[i]f driving is not assistance under the smuggling statute, one is left to wonder what assistance means." *Id.* The dissent ultimately stated that it was a "close case" but that substantial evidence supported the Immigration Judge's original "conclusion that Tapucu knowingly assisted Deveci's attempted illegal entry." *Id.* at 745. The dissent reasoned that "Tapucu attempted to drive Deveci across the border, knowing he did not have a legal right to live in the U.S., and knowing Deveci was seeking entry as a temporary visitor when he had no intention of returning to Canada." *Id.*

Tapucu has subsequently been cited by two other circuit courts that have addressed the issue—the Ninth and Second—as well as in unpublished Board decisions. The Ninth Circuit has agreed with much of the reasoning in *Tapucu*, although it has not explicitly adopted the Sixth Circuit's holding that an act must be "compensable." In *Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. 2005), the court held that a woman who was traveling into the United States in a car driven by others, with knowledge that an alien was being smuggled in the trunk, did not encourage, induce, assist, abet, or aid the unlawful entry. Altamirano was returning to the United States from a brief trip into Mexico with her husband and father-in-law. Before the return, she was informed by her father-in-law that an alien would be hiding in the vehicle's trunk during the return trip. She was not involved in planning the attempt, and she did not assist in placing the individual into the trunk of the car. The Ninth Circuit held that because she "did not affirmatively act" and was merely "present in the vehicle," she did not "engage in alien smuggling." *Id.* at 592.

The Ninth Circuit, like the Sixth, noted that "when courts or the BIA have determined that an alien is removable under the INA for having engaged in alien smuggling, the alien has provided some form of affirmative assistance to the illegally entering alien." *Id.* The Ninth Circuit also noted that "'the traditional criminal law aiding and abetting doctrine" requires that a defendant "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek *by his action* to make it succeed.'" *Id.* at 594 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). Consequently, there must be "an affirmative act of assistance," and "'mere presence at the scene of the crime and knowledge that the crime is being committed is not enough.'" *Id.* at 594-95 (quoting *United States v. Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997)).

In a more recent decision, *Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204 (9th Cir. 2008), the Ninth Circuit held that an alien had not made an affirmative act when she acquiesced in the use of her children's birth certificates in a smuggling attempt and was present in the car during the attempt, where nothing in the record established that the alien physically handed over the birth certificates. A dissent characterized the alien's reaction to the request for the birth certificates as "explicit permission" rather than "reluctant acquiescence" and concluded that her positive agreement constituted an affirmative act. *Id.* at 1210.

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CIRCUIT COURT DECISIONS FOR FEBRUARY 2010

by John Guendelsberger

The United States courts of appeals issued 417 decisions in February 2010 in cases appealed from the Board. The courts affirmed the Board in 378 cases and reversed or remanded in 39, for an overall reversal rate of 9.4%. The Second and Ninth Circuits together issued 76% of the decisions and 82% of the reversals. There were no reversals from the First, Fourth, Fifth, Seventh, and Tenth Circuits.

The chart below shows the results from each circuit for February 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% reversed
First	2	2	0	0.0
Second	117	107	10	8.5
Third	35	34	1	2.9
Fourth	13	13	0	0.0
Fifth	11	11	0	0.0
Sixth	7	6	1	14.3
Seventh	1	1	0	0.0
Eighth	2	1	1	50.0
Ninth	202	180	22	10.9
Tenth	1	1	0	0.0
Eleventh	26	22	4	15.4
All circuits:	**417**	**378**	**39**	**9.4**

The 417 decisions included 232 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 77 direct appeals from denials of other forms of relief from removal or from findings of removal; and 108 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	232	210	22	9.5
Other Relief	77	6	9	11.7
Motions	108	100	8	7.4

Of the 22 reversals in asylum cases, 9 rejected an adverse credibility determination, 3 involved the nexus determination, another 3 addressed level of harm for past persecution, and 4 addressed protection under the Convention Against Torture.

The nine reversals in the "other relief" category included three cases addressing the criminal bar in cancellation of removal cases, as well as eligibility for NACARA and waivers under sections 212(c) and 216(c)(4).

The eight reversals involving motions included three motions to reopen based on ineffective assistance of counsel and two motions to rescind in absentia orders of removal. The others involved changed country conditions, a request that the Board reissue a decision, and sua sponte reopening.

The chart below shows the combined numbers for the first 2 months of 2010 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Tenth	4	3	1	25.0
Seventh	6	5	1	16.7
Eleventh	54	48	6	11.1
Ninth	396	358	38	9.6
Eighth	12	11	1	8.3
Second	216	201	15	6.9
Fourth	29	27	2	6.9
Sixth	16	15	1	6.3
Third	63	61	2	3.2
First	3	3	0	0.0
Fifth	21	21	0	0.0
All circuits:	**820**	**753**	**67**	**8.2**

The numbers by type of case on appeal for the first 2 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	437	399	38	8.7
Other Relief	154	140	14	9.1
Motions	229	214	15	6.6

John Guendelsberger is a Member of the Board of Immigration Appeals.

Dynes and Newtons: "Crime of Violence" Standards in the Wake of *Johnson v. United States*

by Edward R. Grant

Six years ago, concurring reluctantly in a decision that an Indiana conviction for battery did not constitute a "crime of violence," Seventh Circuit Judge Terence Evans limned one of the central dilemmas facing courts of appeals and Immigration Judges alike:

> Although it's debatable whether expending dynes (to say nothing about newtons) pressing the keys of my wordprocessor to concur in this case is worth the effort, I do so because the result we reach, though correct on the law, is divorced from common sense. For one thing, people don't get charged criminally for expending a newton of force against victims. Flores actually beat his wife—after violating a restraining order based on at least one prior beating—and got a one-year prison sentence for doing so.
>
> If it is permissible to look to Flores' "real conduct" to determine if the person he beat was his wife rather than some stranger, why does it not make perfectly good sense to allow an immigration judge to look at what he really did in other respects as well, rather than restrict the judge to a cramped glance at the "elements" of a cold statute? The more information upon which the judge acts, the better. A common-sense review here should lead one to conclude that Flores committed a "crime of domestic violence." Simply put, by any commonly understood meaning of that term, that's exactly what he did, and that should be the end of the story. We, and the IJ as well in this case, should be able to look at what really happened.
>
> . . . Nevertheless, Judge Easterbrook is correct in applying the law so I join his persuasive (as usual) and colorful—snowballs, spitballs, and paper airplanes et al.—opinion. However, I do not applaud the result we reach. And one final point: Whether doing what Flores *actually* did *should* cause him to be removed from the country is a question we are without jurisdiction to answer. For better or worse, that's a matter for the executive branch as it attempts to implement the will of Congress.

Flores v. Ashcroft, 350 F.3d 666, 672-73 (7th Cir. 2003) (Evans, J., concurring). In the wake of the Supreme Court's recent judgment in *Johnson v. United States*, 130 S. Ct. 1265 (2010), the standard enunciated in *Flores* is now the law of the land; a "crime of violence," as most circuits had already ruled, will only be one whose *elements* require the intentional use of "violent force."

Curtis Darnell Johnson, a career criminal, petitioned the Supreme Court from a 15-year sentence under the Armed Career Criminal Act ("ACCA") following his plea of guilty to possession of ammunition by a convicted felon. 18 U.S.C. § 922(g)(1). The ACCA mandates an enhanced sentence of 15 years to life where the defendant has three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). "Violent felony" is defined in pertinent part in terms familiar to Immigration Judges and the rest of EOIR: any crime that is punishable by more than 1 year in prison, and that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). (The language replicates most of 18 U.S.C. § 16(a) but omits force against property and includes a minimum punishment threshold.) Johnson contended that his 2003 Florida conviction for battery could not constitute a conviction for a "violent felony" because under State law, any intentional and uninvited physical contact, no matter how slight, can result in conviction. *State v. Hearns*, 961 So.2d 211, 218 (Fla. 2007).

In *Flores*, the Seventh Circuit had addressed a similar State battery statute and similar State court decisions adopting the common-law rule that even the slightest physical contact can constitute battery. *Flores*, 350 F.3d at 669-70. The court noted that other Indiana criminal statutes included elements involving "[p]articularly forceful touchings, or those that cause grave injuries," and thus it was not necessary to look beyond the elements of the statute of conviction (simple battery) in

question. *Id.* at 670. The court also emphasized that the element of force must be present in the statute; it cannot be inferred from the element of intent to cause injury, as the Board did in *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). Finally, the Seventh Circuit concluded that since "force" can be measured in units as small as "dynes" and "newtons," the force necessary to constitute a § 16(a) crime of violence must be "violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so." *Flores*, 350 F.3d at 672. (A "newton" is 100,000 dynes, or the equivalent of the force of gravity on Sir Isaac's proverbial falling apple). In short, "violent force," not mere simple force, must be a stated (and not inferred) *element* of the offense to be classified under § 16(a).

Borrowing from the analysis in *Flores*, the Supreme Court in *Johnson* applied the same logic to the definition of a "violent felony" in the ACCA. The Court described the common-law definition of the force needed to complete a battery as including the "slightest offensive touching." *Johnson*, 130 S. Ct. at 1270 (citing 3 W. Blackstone, *Commentaries on the Laws of England* 120 (1768)). The Court rejected the Government's argument that "force" in the context of the ACCA should be given the same "specialized meaning" as that given at common law. *Id.*

> Although a common-law term of art should be given its established common-law meaning, we do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning, and we do not "force term-of-art definitions into contexts where they plainly do not fit and produce nonsense." Here, we are interpreting the phrase "physical force" as used in defining not the crime of battery, but rather the statutory category of "violent felon[ies]."

Id. (quoting *Gonzales v. Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting)) (other citations omitted).

The Court noted that its prior decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), found that the § 16 definitions suggest "a category of violent, active crimes." *Id.* at 11 (holding that driving under the influence and causing serious bodily injury is not a crime of violence under 18 U.S.C. § 16(a) or (b)).

> Just so here. We think it clear that in the context of a statutory definition of "*violent* felony," the phrase "physical force" means *violent* force—that is, force capable of causing physical pain or injury to another person. Even by itself, the word "violent" in [the ACCA] connotes a substantial degree of force. When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer.

Johnson, 130 S. Ct. at 1271 (citing *Flores*, 350 F.3d at 672) (other citations omitted).

Johnson thus clarifies that simple assault and battery convictions are unlikely (depending, of course, on the precise statute of conviction) to be regarded as aggravated felonies under *either* § 16(a) or (b). *Johnson* draws a direct connection between the definitions of "violent felony" in the ACCA and the § 16(a) definition of "crime of violence"; *Leocal* effectively completes the circle by closely tying the concept of "risk of use of force" in § 16(b) to the requirement of force as an element in § 16(a). In other words, *Johnson* in all likelihood forecloses an argument that a simple assault or battery that is prosecuted as a felony (resulting, for example, from the special status of the victim) can be regarded as a § 16(b) crime of violence because of the risk that "violent" force may be used in the completion of the offense. If the elements of the statute do not require such violent force—and particularly if related statutes in the jurisdiction *do* require such force—then the simple assault or battery offense cannot be a crime of violence under either prong of § 16.

The Court addressed but dismissed two practical concerns highlighted by the Government, as well as by the dissenting opinion of Justice Alito (joined by Justice Thomas). The first, relating to criminal law, is that requiring "violent force" as an element of a predicate offense will undermine the ability to enforce the firearm disability provisions of the ACCA, specifically against those previously convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(9); *see also* 18 U.S.C. § 921(a)(33)(A)(ii) (defining a misdemeanor crime of domestic violence to include offenses that have,

"as an element, the use or attempted use of physical force"). The Court noted that it was interpreting the term "physical force" only as it related to the concept of a "violent felony," and stated, "We do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence." *Johnson*, 130 S. Ct. at 1273. While technically correct, it is difficult to see how the Court, after *Johnson*, could hold that the ACCA's definition of a domestic violence offense *does* cover a State offense that does not have, as an element, the use of "violent" force. Conceivably, the Court could distinguish *Johnson* by holding that "crime of domestic violence" is a statutory term of art widely understood to cover offenses that do not require the use, attempted use, or threat of *violent* force. Thus, by including such offenses in the ACCA and other statutes—notably the Immigration and Nationality Act—Congress could have signaled that a lesser standard of "physical force" would satisfy the "term of art" definition. But it would be a risky bet to assume that the Court would make this turn, particularly given the nearly identical, elements-based language used to define both "violent felony" and "misdemeanor crime of domestic violence" in the ACCA.

The Court's reply to the second practical argument against its decision—that it will be more difficult to remove, pursuant to section 237(a)(2)(E) of the Act, aliens who have been convicted of a crime of domestic violence—underscores the point just made. The Court did not deny that many generic domestic battery statutes do not require the use of physical force. Its answer, though, was not to suggest that section 237(a)(2)(E) might be interpreted, in a subsequent case, differently from the ACCA definition of violent felony. Rather, the Court stated that recourse must be had to the "modified categorical approach," endorsed in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), "to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." *Johnson*, 130 S. Ct. at 1273. The Court noted that it will often be difficult, based on incomplete records of conviction, to meet this standard. "But absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well." *Id.* The applicable definitions in the ACCA and the Act, the Court effectively concluded, cannot be stretched to plug the gaps that arise in meeting the categorical or modified categorical approaches.

The full impact of *Johnson* on current legal standards at the Board and among the circuits will take time to fully assess, but a few preliminary observations can be safely made. First, the Board's analytical approach in *Matter of Martin*, 23 I&N Dec. 491, already criticized by the Seventh Circuit in *Flores* and rejected by the Second Circuit in *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), may carry no force. The Board relied on a Senate Judiciary Committee report specifically stating that offenses under § 16(a) "'would include a threatened or attempted simple assault or battery on another person.'" *Matter of Martin*, 23 I&N Dec. at 494 (quoting S. Rep. No. 98-225, at 307 (1983)). The Supreme Court's rendering of the statutory text in *Johnson* and *Leocal* may trump any reliance on that bit of legislative history.

Second, also quite obviously, the rule in the Eleventh Circuit, which had specifically rejected *Flores* in holding a simple battery offense to constitute a crime of violence, may now be dead letter. *Hernandez v. U.S. Att'y Gen.*, 513 F.3d 1336 (11th Cir. 2008).

Third, *Johnson* is consistent with the trend, both in the circuits that have specifically addressed the "minimal force" question and in the prevailing doctrine, toward looking to the elements of the offense, as opposed to the underlying conduct, in resolving the crime of violence issue.

A circuit-by-circuit rundown follows, focused on those cases that address the extent of "physical force" necessary to constitute a crime of violence. Some circuits, notably the Fourth and Eighth, have not addressed this question; the Seventh and Eleventh are not surveyed here since their case law is discussed *supra*.

First Circuit: The court held in *Duarte Lopes v. Keisler*, 505 F.3d 58 (1st Cir. 2007), that a Rhode Island conviction for assault and battery had as an element the use, attempted use, or threatened use of physical force and thus was a crime of violence under 18 U.S.C. § 16(a). Using a modified categorical approach, the court relied on conviction records to conclude that the respondent had committed an assault. It then concluded, based on Rhode Island judicial rulings, that "assault" is an unlawful attempt, "with force or violence," to do a "corporal hurt" on another. *Duarte Lopes* did not address whether "violent force" was required under § 16(a), but it clearly determined that such an element was present in

the Rhode Island assault and battery statute, as construed by the State courts.

Second Circuit: Two weeks before *Johnson*, the court ruled in *United States v. Walker*, 595 F.3d 441 (2d Cir. 2010), that a Georgia conviction for strong-arm robbery met the Sentencing Guidelines definition of a "crime of violence"—which is virtually identical to both the ACCA and 18 U.S.C. § 16(a). *Walker* relied primarily on the classification in the Sentencing Guidelines of robbery as a prototypical crime of violence. The major inquiry, which the court resolved in the affirmative, was whether the Georgia statute corresponded substantially to the "generic meaning" of robbery. *Id.* at 445-46. The court also emphasized that under Georgia case law, the gravamen of a robbery charge is the taking by violence or intimidation.

However, in *Blake v. Gonzalez*, 481 F.3d 152 (2d Cir. 2007), the court accepted the Government's argument that a conviction for assault and battery under a statute that required the intentional use of force, "'however slight,'" would qualify as a conviction for a crime of violence under § 16(a). *Id.* at 157 (quoting *Commonwealth v. Ford*, 677 N.E.2d 1149, 1151 (Mass. 1997)). The analysis in *Blake*, which involved a Massachusetts statute for assault and battery on a police officer, was slight; no mention was made, for example, of the Seventh Circuit's contrary ruling in *Flores*. *Blake* focused primarily on the Government's alternate theory that a conviction under the same statute for "wanton or reckless" assault should be treated as a conviction for a crime of violence under § 16(b). The court accepted this argument, noting Massachusetts case law that required physical or bodily injury in order to sustain a conviction under the "reckless or wanton" standard.

Blake thus set up a bifurcated standard, under which the intentional use of force, however slight, could meet the elements-based test in § 16(a), but a conviction for reckless use of force would require infliction of injury. *Blake* has not been subsequently cited in the Second Circuit for this specific proposition. It is therefore likely that its holding on the intentional use of force under Massachusetts law cannot survive *Johnson*. Notably, the Fifth Circuit, in an unpublished decision, held that a Massachusetts assault and battery could not be a crime of violence precisely because the statute covered the use of force, "however slight." *Fortes v. Mukasey*, 256 Fed. App'x 715 (5th Cir. 2007).

Third Circuit: The Third Circuit does not appear to have addressed the "force, however slight" question with regard to a conviction for assault or battery. In two decisions, however, it examined different clauses of the Pennsylvania simple assault statute. In *Popal v. Gonzales*, 416 F.3d 249, 254-55 (3d Cir. 2005), the court held that a conviction under 18 Pa. Cons. Stat. § 2701(a)(1) was not a crime of violence under 18 U.S.C. § 16(a) because it could involve reckless as well as intentional conduct. However, in *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006), the court held that a conviction under § 2701(a)(3) of the same statute satisfies § 16(a) because, under judicial construction, its requirement of attempt by physical menace "to put another in fear of imminent serious bodily injury" must be accomplished by specific intent. *Singh*, 432 F.3d at 539. Nothing in these decisions, or in *Johnson*, suggests a major change in the Third Circuit's approach to crime of violence issues.

Fifth Circuit: Owing both to its proximity to the border and the presence of major immigration detention facilities within its territory, the Fifth Circuit generates a large and varied criminal immigration docket. A sampling of decisions indicates that the court is not only fully "on board" with the *Johnson* standards, but that it closely examines the actual and hypothetical applications of a State statute to determine if it qualifies as a "categorical" crime of violence.

In 2008, the court held that a conviction under a State sexual conduct statute that defines "force" as the actual, attempted, or threatened infliction of bodily harm—thus seemingly meeting the *Johnson* standard—was nevertheless not for a crime of violence. The reason? Because a State court decision affirmed a conviction where the culpable conduct was not, in the common meaning of the term, forcible. *United States v. Rosas-Pulido*, 526 F.3d 829 (5th Cir. 2008).

At issue was whether a Minnesota conviction for fourth degree sexual conduct, defined as sexual contact using force or coercion, was for a "crime of violence" under the Sentencing Guidelines. The statute, as noted, appeared to require the type of force that could result in bodily harm. However, a State supreme court decision affirmed a juvenile conviction under the same provision where the defendant had tapped a classmate on the shoulder, then grabbed and pinched her breast hard enough to cause pain. *In re D.L.K.*, 381 N.W.2d 435

(Minn. 1986). The Fifth Circuit thus concluded that the statute "can encompass conduct that is not a 'forcible sex offense' because it can include conduct that is not 'forcible' as that term is commonly understood. For the same reasons, the offense . . . does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'" *Rosas-Pulido*, 526 F.3d at 835 (quoting U.S.S.G. § 2L1.2, cmt. n.1(B)(iii)) (footnote omitted).

In an earlier case, the Fifth Circuit held that a Kansas conviction for aggravated battery was not for a crime of violence because it could require mere "physical contact" to secure a conviction. *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 466 (5th Cir. 2006). The Kansas statute was two pronged; the court had "little difficulty" in concluding that the offense defined in the first prong, covering intentional physical contact with a deadly weapon, was a crime of violence under 18 U.S.C. § 16(b) because of the inherent risk of the use of force in completing the offense. *Id.* at 465-66. However, the offense in the second prong, "intentionally causing physical contact . . . in any manner whereby great bodily harm, disfigurement or death can be inflicted," Kan. Stat. Ann. § 21-3414(a)(1)(C), is not categorically a crime of violence because the statute can be violated by conduct that does not involve the use of physical force or create a substantial risk that intentional force would be employed to complete the offense. *Id.* at 466-67. In so ruling, the court accepted the petitioner's claim that the statute could plausibly be used to convict a physician or dentist whose negligent "physical contact" with a patient resulted in severe allergic reaction or infection. The court did not cite any cases in which the statute had been so employed, nor explain why such purely hypothetical uses of the statute were relevant to the case of a petitioner who clearly was neither an M.D. nor a D.D.S.

More recently, the court distinguished *Larin-Ulloa* in holding that the Virginia felony of unlawful wounding constituted a crime of violence. *Singh v. Holder*, 568 F.3d 525 (5th Cir. 2009). The key elements of the statute in question are to "maliciously shoot, stab, cut, or wound any person . . . with the intent to main, disfigure, disable, or kill." Va. Code Ann. § 18.2-51. Not surprisingly, the court concluded that the petitioner could offer "no hypothetical situations in which a person could commit an unlawful wounding that does not constitute a crime of violence." *Singh*, 568 F.3d at 529. Similarly, in *Perez-Munoz v. Keisler*, 507 F.3d 357, 364 (5th Cir. 2007), involving a Texas conviction for injury to a child, the court concluded that "when the defendant is charged with causing bodily injury to a child by an intentional act, the perpetrator uses or risks the use of physical force in committing the offense. Being able to imagine unusual ways the crime could be committed without the use of physical force does not prevent it from qualifying as a crime of violence under § 16(b)."

Given the benchmarks developed in cases such as *Rosas-Pulido*, *Larin-Ulloa*, *Singh*, and *Perez-Munoz*, the immediate impact of *Johnson* within the Fifth Circuit may be slight. The greatest effect, as in other circuits, may arise in cases involving convictions for domestic battery. In such cases, the court's holdings that it is permissible to use a charging instrument to "pare down" a broad statute that does not otherwise define a categorical crime of violence may come into play. *See Perez-Munoz*, 507 F.3d at 362; *see also Larin-Ulloa*, 462 F.3d at 467-68. It is well worth watching how broadly the Fifth Circuit employs the "pare down" doctrine in resolving future crime of violence questions in the wake of *Johnson*.

Sixth Circuit: The court held in 2009 that a California conviction for grand theft-auto was not for a crime of violence under 18 U.S.C. § 16(b) because while there is "*some* chance that violent force may be used against an automobile to gain entry or that the car might be damaged or vandalized during the theft, we cannot see that the risk is 'substantial.'" *Van Don Nguyen v. Holder*, 571 F.3d 524, 530 (6th Cir. 2009). The court's decision concords with others holding that vehicle theft or other similar offenses do not constitute crimes of violence. *See, e.g.*, *United States v. Williams*, 537 F.3d 969 (8th Cir. 2008) (holding that auto tampering under Missouri law is not a crime of violence); *United States v. Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007) (holding that unlawful use of means of transportation under Arizona law is not a crime of violence); *United States v. Charles*, 301 F.3d 309 (5th Cir. 2002) (holding that simple motor vehicle theft under Texas law is not a crime of violence); *United States v. Crowell*, 997 F.2d 146 (6th Cir. 1993) (holding that aggravated motor vehicle theft under Colorado law is not a crime of violence). The court added a further gloss, consistent with the analysis in *Johnson*:

> Logic and common sense dictate that Congress did not intend to punish a

> person who merely takes an unoccupied car in the same manner it would punish a convicted murderer, rapist, robber, or others who take property by force against a person. The government's analogies to entering homes to commit burglary are not similar to the taking of an unoccupied car. There is always the possibility that the owner may return and a confrontation may ensue. With a car, the car is generally driven away and the owner returns to an empty parking spot. Should a perpetrator approach an occupied vehicle with the intent to take it by force, the charge will rarely be auto theft—it will almost certainly be carjacking or robbery or another much more serious charge.

Van Don Nguyen, 571 F.3d at 530 (citation omitted). Judge Griffin, concurring, dismissed this analysis as obiter dicta. But dicta or not, these passages from *Van Don Nguyen* reveal a court favorably disposed to the standard enunciated in *Johnson*.

Eighth Circuit: The court does not appear to have addressed whether common offenses of assault and battery can constitute a crime of violence or a violent felony. However, it has ruled, consistent with other circuits, that manslaughter under a statute that does not include use of force as an element and covers omissions, as well as overt acts, is not a crime of violence under either 18 U.S.C. § 16(a) or (b). *United States v. Torres-Villalobos*, 487 F.3d 607, 616-17 (8th Cir. 2007).

Ninth Circuit: The court's recent decision in *United States v. Laurico-Yeno*, 590 F.3d 818 (9th Cir. 2010), ably maps out its approach to the question posed in *Johnson*. The defendant, convicted of wilful infliction of corporal injury on a spouse or cohabitant, claimed that the offense could not be classified as a "crime of violence" because the statute of conviction covered a range of conduct that included simple battery. The court rejected the argument. Following its jurisprudence that a crime of violence must penalize the intentional (as opposed to reckless or negligent) use of force and must be in the category of "violent, active crimes," the court concluded that the California provision at issue, section 273.5 of the Penal Code, met the standards. "Section 273.5 does not penalize minimal, non-violent touchings. It penalizes the intentional use of force that results in traumatic condition. This California definition of domestic violence covers a category of 'violent, active crimes.'" *Id.* at 822 (quoting *Leocal v. Ashcroft*, 543 U.S. at 11). The "hypothetical" possibility that a nonviolent touching could result in traumatic injury, the court concluded, is not one it was bound to consider, unless the text of the statute or applicable case law demonstrated that the statute could apply outside the boundaries of the definition of a crime of violence. *Id.* (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). *Laurico-Yeno*, therefore, presents a useful contrast to *Johnson*, demonstrating how a more narrowly drawn State domestic violence statute may be determined to sustain a charge under section 237(a)(2)(E)(i) of the Act.

Tenth Circuit: Citing and agreeing with *Flores*, the court has ruled that the first prong of a Wyoming battery statute prohibiting "rude, insolent, or angry" touching can cover minimal force and thus does not define a crime of violence. Therefore, simple battery and assault offenses do not constitute crimes of violence. *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008). *Johnson*, obviously, confirms this ruling.

The court also has determined, consistent with the majority of circuits, that an offense under a statute prohibiting, inter alia, the reckless use of force is not a categorical crime of violence. *United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008). The Supreme Court reserved this question in *Leocal*; it may be the next important crime of violence issue to merit its attention.

Conclusion

Based on the existing trends in the circuits, *Johnson* may confirm, rather than alter, the prevailing rulings on crime of violence questions in Immigration Courts and at the Board. However, *Johnson* lays down clear markers on some tough questions. First, if the statute of conviction in a particular State is broadly drawn, either as the result of legislative craft or the persistence of a common-law approach to crimes such as assault and battery, a "crime of violence" charge may be out of reach—and not because the conduct leading to the conviction does not warrant that result. Second, if a State has revised and "tiered" its statutes, a conviction under a lesser tier (often the result of a plea bargain) will stand as secure evidence that the respondent has not been convicted of more violent

conduct. Third, the Court is not moved by the practical difficulty faced by prosecutors in gathering evidence to satisfy the modified categorical approach.

Johnson thus points up one of the conundrums of the "categorical" approach to identifying crimes that subject an alien to inadmissibility or deportability—as opposed to the more malleable "moral turpitude" standard that dominated before the days of the "aggravated felony" and similarly drawn provisions in the Act. The aggravated felony charges sweep broadly indeed over a wide potential range of State statutes. But the sweep is tempered, sometimes in rather arbitrary fashion, by the judicial presumption that Congress intended a categorical approach to determining if the enactments of 50-plus legislative bodies meet the generic standards of the Act's definitions. *Johnson*, and the cases discussed here, demonstrate that as certain issues become more settled, the fundamental dilemma described by Judge Evans in his *Flores* concurrence—a dilemma equally applicable to the question of a less culpable alien caught in the technical cross-hairs of an "aggravated felony" conviction—remains. Whether this dilemma will provoke further attention from Congress, and how Congress reacts, are critical, yet rarely discussed, questions of immigration law and policy.

Edward R. Grant was appointed a Board Member at the Board of Immigration Appeals in January 1998.

RECENT COURT OPINIONS

Supreme Court:

Johnson v. United States, 130 S. Ct. 1265 (2010): The Court held that a felony battery conviction pursuant to sections 784.03(1)(a) and (2) of the Florida Statutes did not categorically constitute a violent felony. The Court noted that the slightest touching could constitute battery under Florida law, whereas a violent felony requires force capable of causing physical injury or pain. Responding to the Government's argument that such interpretation will make it more difficult to remove aliens convicted of battery pursuant to section 237(a)(2)(E)(i) of the Act, the Court stated that in the case of divisible statutes involving differing degrees of force, the modified categorical approach approved in *Nijhawan v. Holder* allows consultation of the trial record to determine the statutory phrase that formed the basis of the conviction.

Fourth Circuit:

Mirisawo v. Holder, __F.3d__, 2010 WL 963200 (4th Cir. Mar. 17, 2010): The Fourth Circuit upheld an Immigration Judge's decision (affirmed by the Board) denying an asylum application from Zimbabwe claiming past persecution based on the Government's destruction of the alien's home and a well-founded fear of future persecution based on the antigovernment political opinion of her family members and neighbors being imputed to her. The court concurred with the Immigration Judge's conclusion that the destruction of the house (which the alien purchased while living and working in the United States for use by her brother and children in Zimbabwe) did not amount to deprivation of a basic necessity of life where she neither lived in the house nor relied on it for her livelihood. The court further found the facts that the alien's brother continued to live in Zimbabwe after a 2002 politically motivated beating without further incident and that she herself was not harmed during a visit shortly after such beating lent substantial support to the Immigration Judge's determination that the alien's fear of persecution was not objectively reasonable.

Sixth Circuit:

Urbina-Mejia v. Holder, __F.3d__, 2010 WL 743845 (6th Cir. Mar. 5, 2010): The Sixth Circuit denied a petition for review of an Immigration Judge's decision denying withholding of removal from Honduras based on a claim of former gang membership. The court reversed the Immigration Judge's determination that the alien failed to establish his membership in a particular social group. Rather, the Sixth Circuit held that former gang membership is an immutable characteristic, because such membership is "impossible to leave save by rejoining the organization." However, the court upheld the Immigration Judge's denial under the REAL ID Act based on the alien's failure to sufficiently corroborate his otherwise credible testimony with available evidence (although the court held that some of the evidence cited by the Immigration Judge was unlikely to have probative value).

Seventh Circuit:

Juarez v. Holder, __F.3d__, 2010 WL 936166 (7th Cir. Mar. 12, 2010): The Seventh Circuit upheld an Immigration Judge's denial of a continuance and order of removal based on the aliens' failure to file timely applications for relief and to comply with the biometric requirements under 8 C.F.R. § 1208.10. The court held that it was well within the Immigration Judge's discretion

to deny the aliens' continuance requests and to deny their requests for relief where they conceded that they had no good cause for their failure to timely file and submit to biometrics. The court further noted that "the submission of biometrics is not a mere technicality, but rather is necessary to verify . . . identity and determine whether there are grounds for inadmissibility or ineligibility for relief." Lastly, the court called for an investigation of the handling of the case by the aliens' counsel.

Ninth Circuit:

Tijani v. Holder, __F.3d__, 2010 WL 816973 (9th Cir. Mar. 11, 2010): The Ninth Circuit found the crime of credit card fraud under section 532a(1) of the California Penal Code to be categorically a crime involving moral turpitude. Although the statute "does not explicitly list intent to defraud as an element," the court held that fraud was "implicit in the nature of the crime." The court nonetheless remanded because, in a pre-REAL ID Act case, the Immigration Judge denied asylum for lack of corroboration but failed to make an explicit adverse credibility finding.

Eleventh Circuit:

Vila v. U.S. Att'y Gen., __F.3d__, 2010 WL 786605 (11th Cir. Mar. 10, 2010): The Eleventh Circuit denied a petition for review of a decision of the Board finding the alien ineligible for a waiver under section 212(h) of the Act. The alien entered the United States without inspection in 1988 but adjusted his status under section 245(i)of the Act in the year 2000. In 2003, he was placed in removal proceedings as a result of his conviction for a crime involving moral turpitude. An Immigration Judge had found the alien eligible for a section 212(h) waiver, crediting him with lawful continuous residence for the 6-year period following the approval of his I-140 immigrant visa petition but preceding his actual adjustment of status. The Board relied on its precedent decision in *Matter of Rotimi* to reverse. The court acknowledged that it had previously granted *Chevron* deference to *Rotimi* in its decision in *Quinchia v. U.S. Att'y Gen*. It further rejected the alien's attempt to distinguish the facts of his case (where an I-140 had been previously approved on his behalf) from those of *Rotimi*, noting that the approval of the I-140 "did not make him a lawful resident," but rather "was nothing more than a preliminary step in his application for adjustment of status."

BIA PRECEDENT DECISIONS

In *Matter of Perez Ramirez*, 25 I&N Dec. 203 (BIA 2010), the Board considered the impact of a sentence imposed after a violation of probation. The respondent, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident in 1990. In 2004, he was convicted of the misdemeanor offense of inflicting corporal injury on a spouse in violation of section 273.5(a) of the California Penal Code. The trial court suspended imposition of a sentence and granted the respondent 36 months of "summary probation." In 2007, the trial court found that the respondent was in violation of probation, reinstated his probation, and ordered him to serve 365 days in the Los Angeles County Jail. The respondent was thereafter placed in proceedings as an alien convicted of an aggravated felony pursuant to section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). The respondent argued that under California law, the 365-day jail term imposed by the trial court did not represent a sentence to a "term of imprisonment of at least one year" in connection with his underlying criminal conviction, but it was instead the result of his probation violation and constituted a condition of his reinstated and modified order of probation. Based on Supreme Court and circuit court precedent, the Board found that the modification of the respondent's sentence following his probation violation must be considered not as a separate offense, but as part of the sentence imposed against him for the original crime.

The Board also considered whether the respondent's conviction for violating section 273.5(a) of the California Penal Code is for a crime of violence aggravated felony under 18 U.S.C. § 16(a) where the statute of conviction requires the willful infliction of corporal injury resulting in a traumatic condition on a spouse. The respondent argued that a conviction under section 273.5(a) does not require the use, attempted use, or threatened use of physical force against the person of another, which is necessary for a conviction under 18 U.S.C. § 16(a). He pointed out that under section 7(1) of the California Penal Code, the term "willfully" does not require any showing of intent to injure another. The Board found that because a person cannot be convicted under section 273.5(a) of the California Penal Code without willfully

and directly applying upon another person force that is of such violence as to cause a wound or external or internal injury to the victim, the offense has the "use" of physical force against the person of another as an element within the meaning of 18 U.S.C. § 16(a). The fact that the term "willfully" does not require any intent to injure is not determinative. The "volition" requirement implicit in the term "use" relates to the application of force against the victim and not to the resulting infliction of injury. *See also United States v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010) (finding a conviction under section 273.5(a) of the California Penal Code to be for a crime of violence).

REGULATORY UPDATE

75 Fed. Reg. 15,991

DEPARTMENT OF HOMELAND SECURITY
8 CFR Part 217

Designation of Greece for the Visa Waiver Program

ACTION: Final rule; technical amendment.
SUMMARY: Citizens and eligible nationals of participating Visa Waiver Program countries may apply for admission to the United States at U.S. ports of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. On March 4, 2010, the Secretary of Homeland Security, in consultation with the Secretary of State, designated Greece as a country that is eligible to participate in the Visa Waiver Program. Accordingly, this rule updates the list of countries authorized to participate in the Visa Waiver Program by adding Greece.
DATES: This final rule is effective on April 5, 2010.

Removability for Smuggling *continued*

The Second Circuit has also briefly touched on this issue but has declined to create any "bright-line test" on whether actions are sufficient to prove that an alien encouraged, induced, assisted, abetted, or aided in an smuggling attempt in violation of section 212(a)(6)(E) of the Act. *See Chambers v. Office of Chief Counsel*, 494 F.3d 274, 279 (2d Cir. 2007). In *Chambers*, the alien had traveled to Ontario to visit relatives. While there, she met a former boyfriend who had been deported from the United States for a criminal conviction. They returned to the United States together, accompanied by Chambers' brother. When they arrived at the border, Chambers was in the front passenger seat, and her former boyfriend was in the back seat. During questioning at the border crossing, Chambers "repeatedly said that [her former boyfriend] lived in Long Island" and "denied having [his] passport," which she had hidden and subsequently produced. *Id.* at 276.

The Second Circuit held that assistance was demonstrated because the alien "personally arranged to provide transportation for [the smuggled alien] into the United States and purposefully deceived customs officials at the time of his attempted entry" in accordance with "the pre-planned intent to bring [him] across the border in her car." *Id.* at 279. The court specifically contrasted the behavior of Chambers with that of the aliens in *Tapucu* and *Altamirano* and held that she did "not qualify as an innocent bystander on any reading of the facts." *Id.*

Finally, the Eighth Circuit briefly touched on the issue in *Sandoval-Loffredo v. Gonzales*, 414 F.3d 892 (8th Cir. 2005), holding that an individual who drove his brother to the U.S.-Canadian border and falsely claimed that his brother was a United States citizen was inadmissible under section 212(a)(6)(E)(i) of the Act. In that case, the Eighth Circuit appeared to hold that whether the charge was sustainable depended on whether the Immigration Judge appropriately discredited the petitioner's testimony that he did not know ahead of time that his brother would claim to be a United States citizen but believed instead that he would seek a reentry permit. The court found that the testimony of the immigration inspectors and other evidence taken at the time the incident occurred supported the Immigration Judge's conclusion that the petitioner did, in fact, attempt to assist his brother by making a false claim at the border and was therefore engaged in illegal activity.

Encouraging or Inducing an Alien To Enter

A related scenario involving the smuggling statutes concerns situations where an alien has "encouraged" or "induced" others to enter the U.S. illegally. In *Sanchez-Marquez v. U.S. INS*, 725 F.2d 61 (7th Cir. 1984), an alien claimed that he had gone to Mexico on vacation where he met seven other aliens by coincidence. He testified that he told the aliens he would drive them from the Texas

border to Chicago if they met him on the American side of the border, but he argued that he was not deportable because he did nothing to "assist" them in crossing the border. The Fifth Circuit held that his statement to the aliens could clearly be construed as having encouraged or induced them to cross the border illegally, and it upheld the finding of deportability. Thus, it appears that, in some circumstances, an alien may be found inadmissible or deportable for having made promises that convinced another alien to make an unlawful entry, for example, an offer of transportation or employment, even if no actual assistance to effectuate the entry was involved. *See also Sena v. Gonzales*, 428 F.3d 50, 51 (1st Cir. 2005) (holding that the offense of "encourag[ing] or induc[ing] an alien to . . . reside in the United States in violation of law" under section 274(a)(1)(A)(iv) of Act, 8 U.S.C. § 1324(a)(1)(A)(iv), is not analogous to the crime of alien smuggling in section 212(a)(6)(E)(i) of the Act).

Aiding Entry After the Fact

The Board and several circuit courts have held that transporting an alien exclusively within the United States does not, by itself, render a person subject to section 212(a)(6)(E)(i) or 237(a)(1)(E)(i) of the Act, or the predecessors of these statutes.[1] *See Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 509 n.3 (5th Cir. 1995); *Lopez-Blanco v. INS*, 302 F.2d 553, 554 (7th Cir. 1962); *Matter of I-M-*, 7 I&N Dec. 389 (BIA 1957). However, there is near-universal agreement—as the Board again recently confirmed in *Matter of Martinez-Serrano*, 25 I&N Dec. 151 (BIA 2009)—that an alien may be removable under section 212(a)(6)(E) or 237(a)(1)(E) of the Act for actions taken subsequent to another's unlawful entry, as least so long as the subsequent assistance had furthered the smuggled alien's entry in some way. *See, e.g.*, *Soriano v. Gonzales*, 484 F.3d 318 (5th Cir. 2007) (finding an alien to be inadmissible where the evidence indicated that he participated in a scheme to aid others to enter when he met and transported them shortly after they crossed the border). This has usually taken the form of harboring or transporting an alien within the United States in concert with a prearranged plan. Less clear is how long after the alien has first entered the country the assistance can be related back to the entry itself.

Only the Ninth Circuit has articulated a bright-line rule, finding that an individual may be held accountable for assisting a smuggling effort "until the initial transporter who brings the alien to the United States ceases to transport the alien." *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 747 (9th Cir. 2007). The court acknowledged the broad scope of the statute, stating that section 212(a)(6)(E)(i) of the Act "does not describe acts that constitute static or instantaneous occurrences," but rather includes acts that "occur over a period of time and distance, and do not occur at one particular moment or location." *Id.* at 748. Therefore, the alien's participation in a scheme to bring his brother illegally to the U.S., which "took place prior to the completion of the alien smuggling venture," rendered him inadmissible. *Id.*

Considering what evidence might be sufficient to find that a prearranged plan existed, the Fifth Circuit has held that the act of transporting an alien near the border shortly after the initial entry may be sufficient evidence that a plan was in effect "regardless of whether the assisting individual was present at the border crossing." *Soriano*, 484 F.3d at 321.

Recently, in *Matter of Martinez-Serrano*, 25 I&N Dec. 151, the Board addressed the question of when an "entry" has been completed. Ms. Martinez-Serrano had been found harboring 15 illegal aliens in her home. She was subsequently convicted "of aiding and abetting two aliens to evade and elude examination and inspection by immigration officers in violation of 18 U.S.C. § 2(a) (2006) and 8 U.S.C. § 1325(a)(2) (2006)." *Id.* at 152. The plea agreement did not indicate that she had assisted the aliens in crossing the border into the United States, and she denied in removal proceedings that she had done so. The Immigration Judge found that although she had harbored the aliens after they entered the country, there was insufficient evidence to show that she had assisted them to "enter" the United States illegally.

On appeal, the Board considered the definition of "entry" from precedent decisions, stating that "'an entry requires: (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2) (a) an inspection and admission by an immigration officer, or (b) an *actual and intentional evasion of inspection at the nearest inspection point*; and (3) freedom from official restraint.'" *Id.* at 153 (quoting *Matter of Z-*, 20 I&N Dec. 707, 708 (BIA 1993)). Further, the act of entry can "include other related acts that occurred either before, during, or after a border crossing" so long as the Government establishes that the acts were "in furtherance of, and may be considered to be part of, the act of securing and accomplishing the entry." *Id.* at 154. The Board therefore concluded that section

237(a)(1)(E)(i) of the Act was "intended to cover a broad range of conduct, and direct participation in the physical border crossing is not required." *Id.*

Consequently, the Board ruled that the respondent's conviction rendered her removable under section 237(a)(1)(E)(i) of the Act. The Board further stated that even if the conviction alone did not establish removability, the respondent would still be removable because "her conduct was tied to the aliens' manner of entry." *Id.* at 155.

Conclusion

The approaches for analyzing cases involving alien smuggling may depend on the circuit in which the case arises. With respect to whether an alien assisted another person's entry into the United States, an important inquiry may often involve the degree of affirmative assistance provided. Specifically, the critical questions may be whether the alien can be deemed to have committed an affirmative "act" to further the smuggling attempt, whether he or she knew that the person being smuggled had no legal right to enter, and whether he or she corrected any untrue statements made to border officers. So far, the circuits have adopted slightly different approaches to these issues. For example, the Sixth Circuit has held that an affirmative act of assistance must be "compensable" in nature to be considered smuggling. The Sixth Circuit has also required that an affirmative act be "illicit" and has appeared to hold that there is not necessarily a duty to correct another person's untrue statements at a border crossing. In addition, the Ninth Circuit has differentiated between acting affirmatively to further a smuggling attempt and merely being present when the smuggling occurs.

There is limited case law holding that an alien may be removable in certain situations under section 212(a)(6)(E) or 237(a)(1)(E) for encouraging or inducing an alien to enter the U.S. even if the alien in removal proceedings did not actually participate directly in the smuggling. There also appears to be a general consensus that an alien may be removable in certain situations for harboring another alien after he or she was smuggled into the United States. However, the analysis in the latter scenario may depend on the jurisdiction where the case arises. Specifically, while acknowledging that the statutes above are broad in the conduct they can cover after the smuggling occurs, the Ninth Circuit articulated a bright-line standard that liability exists only until the initial transporter stops transporting the alien. In contrast, the Board adopted a somewhat different standard that permits a finding that an alien is removable so long as his or her conduct was tied to the smuggled aliens' manner of entry.

On all of these issues, it remains to be seen what, if any, stance the remaining circuit courts will take. In the meantime, scenarios similar to the ones described in this article may frequently lead to fact-specific inquiries.

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1. However, a conviction for transporting or harboring an alien within the United States in violation of section 274(a)(1)(A)(ii) of the Act, 8 U.S.C. § 1324(a)(1)(A)(ii), may constitute an aggravated felony under section 101(a)(43)(N) of the Act, 8 U.S.C. § 1101(a)(43)(N). *See Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999).