U.S. Department of Justice
Executive Office for Immigration Review

http://eoir-vll/lib_index.html
Published since 2007

Immigration Law Advisor

August 2013 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 7 No. 7*

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Moncrieffe v. Holder: Exploring the Legal Landscape of Section 101(a)(43)(B) of the Act

by Sam Chow, Rachael Dizard, and Cindy Heidelberg

The recent decision of the United States Supreme Court in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), resolved a Federal circuit split regarding the aggravated felony defined as "illicit trafficking in a controlled substance" under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). Specifically, the Supreme Court considered whether a State criminal conviction is for an aggravated felony under section 101(a)(43)(B) when the State statute of conviction covers both felony and misdemeanor conduct under the Federal statutory scheme. The Court determined that under the categorical approach, such convictions are not for aggravated felonies because the minimum conduct necessary to sustain a conviction would not be punishable as a Federal felony. This article explores the pre-*Moncrieffe* landscape and then examines the reasoning in *Moncrieffe* to elucidate its potential implications.

Background

Under section 101(a)(43)(B) of the Act, an aggravated felony includes "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act, including a 'drug trafficking' crime (as defined in [18 U.S.C. § 942(c)])." A State drug conviction is for an aggravated felony when the State offense includes all the elements of a crime that could be punishable as a felony "under the Controlled Substances Act (21 U.S.C. § 801 et seq.)" ("CSA"). *Lopez v. Gonzalez*, 549 U.S. 47, 60 (2006).[1] The State's categorization of the offense as a misdemeanor or a felony is irrelevant, as long as the hypothetical Federal conviction would be for a felony under Federal law.[2]

The concept is relatively straightforward when applied to convictions for manufacturing, distributing, or dispensing (or possessing with intent to manufacture, distribute, or dispense) a controlled substance other than marijuana, which likely carry terms of imprisonment of more than 1 year under the CSA. *See* 21 U.S.C. §§ 812, 841. The more difficult issue,

confronted in the cases leading up to *Moncrieffe*, involves a single State conviction for a marijuana distribution crime. The CSA, in 21 U.S.C. § 841(a)(1), makes it an offense to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Under 21 U.S.C. § 841(b)(1)(D), this offense is punishable by up to 5 years' imprisonment, making it a Federal felony. However, under 21 U.S.C. § 841(b)(4) marijuana distribution is only punishable as a Federal misdemeanor if the offense involves "a small amount of marihuana [distributed] for no remuneration."

The issue before the Board of Immigration Appeals and circuit courts leading up to *Moncrieffe* was how to treat the Federal misdemeanor in relation to the Federal felony in 21 U.S.C. § 841 and whether the burden is on the Government or the alien to demonstrate that the conduct falls within the definition of the Federal felony.

Exploring the Circuit Split: Minimum Conduct Versus Felony Default Approach

Prior to *Moncrieffe*, each court that considered the issue acknowledged that the misdemeanor contained in 21 U.S.C. § 841(b)(4) is an exception to the related Federal felony. The Second and Third Circuits considered the entire continuum of conduct criminalized in *both* the misdemeanor exception and the felony provision and looked to whether the "minimum criminal conduct" contained in the State statute falls within the Federal misdemeanor. The First, Fifth, and Sixth Circuits and the Board considered how 21 U.S.C. § 841 is prosecuted in criminal proceedings and concluded that because the offense is a felony by default, it should be so deemed in the immigration context as well. Similarly, because the misdemeanor sentencing provision is an exception to be proven by the criminal defendant in criminal proceedings, the burden must be mirrored in the immigration context. The article refers to these as the "minimum conduct" approach and the "Federal default" approach, respectively.

Minimum Criminal Conduct Approach

The "minimum conduct" approach was adopted by both the Second and Third Circuits. Unlike those circuits adopting the "Federal default approach," the Second and Third Circuits did not assume that State offenses that *could be* felonies under the CSA actually *were* aggravated felonies under the Act. By avoiding this presumption, these circuits declined to place the burden on the alien to prove that his or her State conviction qualified for the Federal misdemeanor exception and therefore was not for the Federal felony.

In *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003), the Third Circuit was the first circuit court to hold that a conviction under a broad State criminal drug statute could not be analogized to the Federal felony contained in 21 U.S.C. § 841(b)(1)(D). The petitioner in *Wilson* was a native and citizen of Jamaica who entered the United States unlawfully in 1989. In 1995, he was convicted after entering a guilty plea to violating section 2C:35-5b(11) of the New Jersey Statutes Annotated.[3] After marrying a U.S. citizen in 1996, the petitioner attempted to adjust his status to that of a lawful permanent resident but was placed into removal proceedings as a result of his 1995 State drug conviction. He was charged with removability as an alien convicted of an aggravated felony.

Applying the categorical approach to Wilson's conviction, the Third Circuit held that "[b]ecause the state statute under which [the petitioner] pled guilty does not contain sale for remuneration as an element, we cannot determine from the state court judgment that [the petitioner's] conviction necessarily entails a finding of remuneration." *Wilson*, 350 F.3d at 381. The court declined the Government's request to explore the specific facts underlying the petitioner's State conviction, concluding that "[w]e rely on 'what the convicting court must necessarily have found to support the conviction and not to other conduct in which the defendant may have engaged in connection with the offense.'" *Id.* at 382 (quoting *Steele v. Blackman*, 236 F.3d 130, 136 (3d Cir. 2001)).[4] The court extended the same rationale in *Jeune v. Attorney General of U.S.*, 476 F.3d 199 (3d Cir. 2007), to a similar Pennsylvania statute in title 35, section 780-113(a)(30) of the Pennsylvania Statutes Annotated.

In *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), the Second Circuit held that criminal sale of marijuana in the fourth degree in violation of section 221.40 of the New York Penal Law, a State misdemeanor, is not an offense punishable as a Federal felony. The petitioner had been a lawful permanent resident since 1989 and was placed in removal proceedings following two convictions for violating section 221.40. The petitioner sought cancellation of removal before the Immigration Judge, a form of relief that is unavailable to aliens convicted of an aggravated felony.

Under section 221.40, "[a] person is guilty of criminal sale of marihuana in the fourth degree when he knowingly and unlawfully sells marihuana except as provided in section 221.35 of this article." Correspondingly, section 221.35 of the New York Penal Law applies to certain conduct involving less than 2 grams, or one cigarette, of marijuana. "Sale" under New York law includes any form of transfer of a controlled substance, regardless of whether money was involved. Therefore, the petitioner's conviction could have been for any form of nonremunerative transfer of as little as 2 grams of marijuana.

The Second Circuit concluded that "[a]s the categorical approach requires, we look no further than to the fact that [the petitioner's] conviction could have been for precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841(b)(4)." *Martinez*, 551 F.3d at 120.

The court accepted that 21 U.S.C. § 841(b)(4) provides an exception to the Federal felony. Nevertheless, it concluded that the minimum conduct necessary to sustain a conviction under the New York statute would have been a misdemeanor under Federal law. Accordingly, such a conviction could not be deemed to be for an aggravated felony under the categorical approach for Federal immigration purposes.

The Government argued that the petitioner's State convictions should be deemed to be for aggravated felonies for three reasons. First, it asserted that the Second Circuit had already decided the matter in *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002). The *Martinez* court concluded that while *Simpson* did hold that a violation of section 221.40 was an aggravated felony under section 101(a)(43)(B) of the Act, that holding was distinguishable because it applied in the context of sentencing factors. In fact, the court in *Simpson* had specified that the crimes were aggravated felonies "for purposes of sentencing under the Guidelines." *Id.* at 85. In *Martinez*, the Second Circuit further noted that *Simpson* apparently did not utilize the categorical approach, rendering that decision inapposite in the immigration context. *Martinez*, 551 F.3d at 120-21.

Second, the Government argued that it was the petitioner's burden to prove the necessary facts to establish that his conviction would be punishable as a Federal misdemeanor only. The Second Circuit rejected this argument and determined that placing the burden on the petitioner would require factual inquiries not appropriate under the categorical approach. Finally, the Government argued that because the petitioner was seeking the relief of cancellation of removal, it was his burden to demonstrate eligibility for relief, including the fact that he had not been convicted of an aggravated felony. Again, the Second Circuit rejected this argument as an inappropriate departure from the categorical approach. The court concluded that while the petitioner indeed bore the burden of proving that he had not been convicted of an aggravated felony, he could do so by "showing that the minimum conduct for which he was convicted was not an aggravated felony" and he did not need to prove the specific facts of his criminal conduct. *Id.* at 122.

Felony Default Approach

In contrast to the minimum conduct approach adopted by the Second and Third Circuits, the First, Fifth, and Sixth Circuits, along with the Board, have held that an alien's State conviction for possession of marijuana with intent to distribute is presumed to be for a Federal felony. Each court reasoned that 21 U.S.C. § 841(b)(4) is not a stand-alone misdemeanor provision involving relevant "minimum criminal conduct" but rather is more akin to a mitigating sentencing provision. They concluded that the alien's offense is presumed to be analogous to the Federal felony, and the alien has the burden to demonstrate that he or she falls within the misdemeanor exception in 21 U.S.C. § 841(b)(4) for "distributing a small amount of marihuana for no remuneration."

In *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), the First Circuit considered the alien's Massachusetts conviction for possession of marijuana with intent to distribute.[5] The lawful permanent resident petitioner sought review of the decisions of the Immigration Judge and Board denying his application for cancellation of removal based on their findings that he was convicted of an aggravated felony.

The First Circuit noted at the outset that it had previously held in *Berhe v. Gonzalez*, 464 F.3d 74 (1st Cir. 2006), that the Massachusetts crime of possession with intent to distribute marijuana is punishable as a felony under the CSA and is thus an aggravated felony. The court then considered Julce's argument, not raised in *Berhe*, that because the State marijuana statute encompasses

conduct that *could* constitute a Federal misdemeanor under 21 U.S.C. § 841(b)(4), the Government must prove that his conviction involved more than a small amount of marijuana or that he intended to distribute for remuneration.

The First Circuit, looking to how violations of 21 U.S.C. § 841 are prosecuted under Federal criminal law, stated that § 841(b)(4) "does not create a stand-alone misdemeanor offense. Rather it is best understood as a mitigating sentencing provision." *Julce*, 530 F.3d at 35. The court held that under Federal criminal law, it is the defendant's burden to demonstrate that the offense should be reduced to a misdemeanor under § 841(b)(4), and it saw "no reason to adopt a different rule for purposes of defining an 'aggravated felony' under immigration law." *Id.*

In *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011), the Sixth Circuit considered a similar Michigan marijuana distribution statute and came to the same conclusion as the First Circuit. Citing to *Julce*, the Sixth Circuit held that § 841(b)(4) is a "mitigating sentencing provision" rather than a stand-alone misdemeanor statute, and the criminal defendant bears the burden of producing mitigating evidence. *Id.* at 516 (citing *Julce*, 530 F.3d at 35).

The Sixth Circuit acknowledged the contrary decisions of the Second and Third Circuits holding that the "minimum criminal conduct" could fall within the Federal misdemeanor exception. However, the court relied on its controlling decision in *United States v. Bartholomew*, 310 F.3d 912 (6th Cir. 2002), a criminal sentencing case holding that the amount of marijuana need not be proven to convict under § 841(a) or to punish as a felony under § 841(b)(1)(D) and that the default punishment is as a felony where the amount of marijuana is not proven. The Sixth Circuit thus held that even looking to the minimum conduct necessary to sustain a conviction, "because the amount of marihuana is not an element of the relevant federal felony, Garcia's state conviction is an aggravated felony under the categorical approach." *Garcia*, 638 F.3d at 518.

The Board was the last adjudicatory body to weigh in prior to the Supreme Court's decision in *Moncrieffe*. In *Matter of Castro Rodriguez*, 25 I&N Dec. 698 (BIA 2012), a lawful permanent resident was charged with removability as an alien convicted of an aggravated felony on the basis of his conviction under section 18.2-248.1(a)(1) of the Virginia Code Annotated for possession with the intent to distribute less than half an ounce of marijuana. The Board reaffirmed its 2008 decision in *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008), and addressed the additional question whether the alien may present evidence outside the record of conviction to show that a State offense was within the misdemeanor provision of § 841(b)(4).

In *Matter of Aruna*, the Board held that absent controlling circuit precedent to the contrary, "a State law misdemeanor offense of conspiracy to distribute marijuana qualifies as an 'aggravated felony' under section 101(a)(43)(B) of the Act where its elements correspond to the elements of the Federal felony offense of conspiracy to distribute an indeterminate quantity of marijuana, as defined by 21 U.S.C. §§ 841(a)(1) and (b)(1)(D)." *Matter of Castro Rodriguez*, 25 I&N Dec. at 701 (discussing *Matter of Aruna*). The Board rejected the argument that marijuana distribution under the relevant State crime did not correspond to the Federal felony because it could include conduct contained in the Federal misdemeanor exception. As in *Julce* and *Garcia*, the Board held that § 841(b)(4) does not define elements of an offense of "misdemeanor marijuana distribution" but rather "defines a 'mitigating exception' to the otherwise applicable 5-year statutory minimum." *Id.* It is the criminal defendant's burden to prove that the amount of marijuana was "small" and was for no remuneration.

In *Matter of Castro Rodriguez*, 25 I&N Dec. at 702, the Board further held that "in accord with the Immigration Judge and the majority of the courts of appeals that have considered the issue," the respondent bears the burden of proving that his State law conviction for distribution of marijuana involved a small quantity for no remuneration pursuant to § 841(b)(4) in order to avoid a finding that his conviction is for an aggravated felony. As to the question whether it is permissible to look beyond the record of conviction, the Board concluded that because the "smallness" of the marijuana and lack of remuneration are not elements of the felony offense, the categorical approach is not applicable to determine these facts; rather, the inquiry is "of a 'circumstance-specific' nature," and the alien may introduce in Immigration Court evidence outside the record of conviction to prove that his conviction falls within § 841(b)(4). *Id.* (citing *Nijhawan v. Holder*, 557 U.S. 29 (2009)).

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CIRCUIT COURT DECISIONS FOR JULY 2013

by John Guendelsberger

The United States courts of appeals issued 211 decisions in July 2013 in cases appealed from the Board. The courts affirmed the Board in 183 cases and reversed or remanded in 28, for an overall reversal rate of 13.3%, compared to last month's 10.5%. There were no reversals from the First, Fourth, Fifth, Sixth, and Eighth Circuits.

The chart below shows the results from each circuit for July 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	9	9	0	0.0
Second	40	37	3	7.5
Third	17	15	2	11.8
Fourth	11	11	0	0.0
Fifth	14	14	0	0.0
Sixth	12	12	0	0.0
Seventh	9	6	3	33.3
Eighth	3	3	0	0.0
Ninth	78	61	17	21.8
Tenth	4	3	1	25.0
Eleventh	14	12	2	14.3
All	211	183	28	13.3

The 211 decisions included 109 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 43 direct appeals from denials of other forms of relief from removal or from findings of removal; and 59 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	109	93	16	14.7
Other Relief	43	33	10	23.3
Motions	59	57	2	3.4

The 16 reversals or remands in asylum cases involved credibility (5 cases), level of harm for past persecution (2 cases), particular social group (2 cases), past persecution (2 cases), well-founded fear (2 cases), the 1-year bar to asylum, disfavored group, Convention Against Torture, and the sufficiency of evidence to rebut a finding of past persecution.

The 10 reversals or remands in the "other relief" category addressed the application of the categorical approach to various offenses (3 cases), cancellation of removal (2 cases), suppression of evidence for Fourth Amendment violations (2 cases), adjustment of status, section 212(c) waiver, and additional charges exceeding the scope of a previous circuit court remand.

The two motions cases involved the rescission of an in absentia removal order based on exceptional circumstances and a remand to address evidence not considered.

The chart below shows the combined numbers for the first 7 months of 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	51	38	13	25.5
Eleventh	85	68	17	20.0
Ninth	603	497	106	17.6
Tenth	23	19	4	17.4
First	25	22	3	12.0
Second	152	141	11	7.2
Third	128	120	8	6.3
Eighth	24	23	1	4.2
Fourth	69	67	2	2.9
Fifth	78	76	2	2.6
Sixth	63	62	1	1.6
All	1301	1133	168	12.9

Last year's reversal rate at this point (January through July 2012) was 10.4%, with 1610 total decisions and 167 reversals.

The numbers by type of case on appeal for the first 7 months of 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	641	546	95	14.8
Other Relief	325	279	46	14.2
Motions	335	308	27	8.1

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

RECENT COURT OPINIONS

Second Circuit:

Nwozuzu v. Holder, No. 11-5089-ag, 2013 WL 4046273 (2d Cir. Aug. 12, 2013): The Second Circuit granted a petition for review of the Board's precedent decision in *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008). In that case, the Board interpreted section 321(a)(5) of the Act, regarding when a child obtains derivative U.S. citizenship through his or her parents' naturalization. The petitioner was born in Nigeria, entered the U.S. as a nonimmigrant, and in 1995, at the age of 17, was scheduled for an adjustment of status interview based on an I-130 visa petition filed by his U.S. citizen father (both of his parents naturalized in 1994). However, the adjustment interview was postponed. In the interim, the petitioner traveled abroad without first obtaining authorization and was denied readmission in August 1995. He was eventually readmitted in December 1998, after obtaining lawful permanent residence at the age of 21. The petitioner's subsequent criminal convictions caused him to be placed into removal proceedings, but the Immigration Judge terminated the proceedings after finding that the DHS had not met its burden of establishing alienage. On appeal, the Board determined that the petitioner had not derived citizenship through his parents. Although the petitioner was under the age of 18 at the time of his parents' naturalization, the Board held that the statute's additional requirement that the child "thereafter begins to reside permanently in the United States while under the age of eighteen years" required the petitioner to have become a lawful permanent resident ("LPR") while under the age of 18. The circuit court found no basis for according deference to the Board's precedent decision under *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), concluding that the statutory language was not ambiguous, as is required under the second prong of the *Chevron* test. In reaching its conclusion, the court noted that the two clauses of section 321(a)(5) use different language. The first clause uses the specific term of art "lawful admission for permanent residence," while in the clause in question, Congress chose the generic term "reside permanently," which is not defined in the Act. The court relied on the legal presumption that the use of specific language in one section of a statute but not in another is intentional. The court pointed to other sections of the Act in which Congress required lawful permanent resident status and specifically employed the "term of art" used in the first clause of section 321(a)(5). The court also noted that its own precedent in *Ashton v. Gonzales*, 431 F.3d 95, 99 (2d Cir. 2005), already established that the term "to reside permanently" in section 321(a) "requires something less than a lawful admission of permanent residency." The court also stated that its interpretation provides meaning to both clauses of section 321(a) "without rendering either superfluous." The court remanded the record to the Board for proceedings consistent with its opinion.

Cotzojay v. Holder, No. 11-4916-ag, 2013 WL 3927605 (2d Cir. July 31, 2013); and *Pretzantzin v. Holder*, No. 11-2867-ag, 2013 WL 3927587 (2d Cir. July 31, 2013): In these companion cases, the Second Circuit vacated a Board order finding that a motion to suppress evidence used to establish removability should be denied. Both cases involved evidence of identity that was obtained during early morning warrantless searches of a shared apartment. In *Cotzojay*, an Immigration Judge had denied the petitioner's motion to suppress; the Board affirmed on appeal. The Second Circuit held that the petitioner's offer of an affidavit and supporting testimony based on his personal knowledge made out a prima facie case for suppression. The court continued that under Board precedent, such a showing caused the burden of proof to shift to the DHS to show why the evidence in question should be admitted. Next, noting that it has not previously found a Fourth Amendment violation sufficiently severe to require suppression in a removal hearing, the court examined what behavior would qualify as egregious. The court agreed with the view of the Third Circuit that a flexible, case-by-case analysis is required, which should consider a wide range of factors, including

whether the violation was intentional; whether the seizure was gross, unreasonable, and without legal grounds; whether threats, coercion, physical abuse, or unreasonable force were involved in the invasion; and whether there was a racial or ethnic motivation for the arrest or seizure. The court concluded that under the facts alleged by the petitioner, the search constituted an egregious abuse that warranted suppression. The court therefore remanded the record for further proceedings in which the DHS would be allowed to demonstrate that its entry was consensual.

In *Pretzantzin*, an Immigration Judge granted the petitioners' motion to suppress, finding that the facts established an egregious Fourth Amendment violation. The Board reversed on appeal, citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), for the proposition that "identity is never suppressible as the fruit of an unlawful arrest." The Board held that since the petitioners' identities led the DHS to obtain the additional documents (birth certificates and arrest records) used to establish removability, it did not need to determine whether an egregious Fourth Amendment violation occurred. The Second Circuit examined the language in *Lopez-Mendoza* that the Board cited and joined three other circuits (the Fourth, Eighth, and Tenth) in holding that the Court's language reaffirmed a "long-standing rule of personal jurisdiction" but "did not announce a new rule insulating all identity-related evidence from suppression." Thus, the Second Circuit agreed that identity cannot be suppressed to allow an individual to contest whether he or she is, in fact, the person named in the charging documents. However, the court did not find that the DHS had met its burden of proving that the evidence of alienage it used to establish removability was obtained based on identity alone, without reliance on additional information that may have been suppressible. The court therefore remanded the record for the Board to determine whether the DHS agents obtained evidence of alienage through an egregious violation of the petitioners' Fourth Amendment rights. The court directed the Board to consider its holding in *Cotzojay* for guidance in making its determination.

Sixth Circuit:

Ward v. Holder, No. 12-3197, 2013 WL 4106270 (6th Cir. Aug. 15, 2013): The Sixth Circuit granted a petition for review and vacated the Board's decision affirming an Immigration Judge's order of removal. The Immigration Judge had found the petitioner to be inadmissible because his 3-year stay in the U.K. to care for his mother caused him to abandon his LPR status. The Immigration Judge's decision stated that removability had been established "by the requisite clear and convincing evidence." The circuit court noted that the Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA") had altered the burden of proof to "clear and convincing" evidence for "deportable aliens" (those charged with grounds of removability corresponding to the charges in deportation proceedings under the pre-IIRIRA scheme). IIRIRA did not change the burden of proof for those charged as inadmissible aliens under section 212(a) of the Act (applied in exclusion proceedings prior to the enactment of the IIRIRA). Previously, the court had held in *Hana v. Gonzales*, 400 F.3d 472 (6th Cir. 2005), that the DHS has the burden of establishing inadmissibility by "clear, *unequivocal*, and convincing evidence." As the court further observed, the First, Fifth, and Ninth Circuits have reached the same conclusion. Relying on language from the Supreme Court's decision in *Addington v. Texas*, 441 U.S. 418 (1966), the Sixth Circuit concluded that the inclusion of the word "unequivocal" creates "a more demanding degree of proof" (thus differing from a prior circuit panel decision in *Pickering v. Gonzales*, 465 F.3d 263, 268 n.3 (6th Cir. 2006), which held that IIRIRA's removal of the word "unequivocal" from section 240(c)(3)(A) of the Act had only a minimal impact). The court therefore concluded that the Immigration Judge had not applied the correct burden of proof. Moreover, a close reading of the Immigration Judge's decision revealed that the burden of proof was placed on the petitioner, rather than the Government. The court noted that it had itself erred in applying the "clear and convincing" standard in two cases subsequent to *Hana* involving fact patterns similar to this case. However, it concluded that neither of those decisions overruled *Hana*, because one panel of the circuit court may not overrule the decision of another panel. The court therefore relied on its holding in *Hana*, vacated the Board's decision, and remanded for further proceedings.

Seventh Circuit:

Pouhova v. Holder, No. 12-1665, 2013 WL 4054994 (7th Cir. Aug. 13, 2013): The Seventh Circuit granted a petition for review of the Board's decision affirming an Immigration Judge's order of removal. The court agreed with the petitioner's claim that the Immigration Judge's admission of two documents used to establish her removability violated her procedural rights. The petitioner entered the U.S. in 1999 as a student and overstayed

her visa. But she married a U.S. citizen and filed for adjustment of status based on a spousal visa petition. In June 2000, another woman attempted to enter the U.S. using the petitioner's passport. In a contemporaneous statement given without an interpreter, the woman stated that she was to pay the petitioner $1,500 at a later date. Seven years later, the petitioner was served with a notice to appear charging her with removability under, inter alia, section 237(a)(1)(E) of the Act as one who had assisted in alien smuggling. In support of the charge, the DHS submitted two documents: the June 2000 statement of the woman caught in possession of the petitioner's passport, and an I-213 Record of Deportable Alien prepared in October 2007 by the immigration inspector who had taken the woman's statement. Although the petitioner challenged the admissibility of the documents and requested the opportunity to question the woman and the immigration inspector, neither witness was present at the petitioner's removal proceedings. The petitioner herself testified; her denial of the allegations was not found credible by the Immigration Judge, who admitted the two documents and sustained the smuggling charge. The court concluded that both documents violated the petitioner's statutory procedural rights because they contained hearsay information that was not sufficiently reliable to support the removal charge without the cross-examination of either the affiant or the immigration inspector. The court noted that cross-examination was necessary to allow inquiry into the affiant's English language ability, since the statement was taken without an interpreter, and to address inconsistencies between the statement and the I-213, which were prepared 7 years apart. The court expressed doubts about the Government's argument that such statements are admissible in removal proceedings without cross-examination where reasonable but unsuccessful efforts were made to locate the witnesses. However, the court stated that it need not decide the issue, because the record did not establish that such reasonable efforts were made.

Papazoglou v. Holder, No. 12-2372, 2013 WL 3991878 (7th Cir. Aug. 6, 2013): The Seventh Circuit affirmed a decision of the Board denying the petitioner's application for a waiver of inadmissibility under section 212(h) of the Act. The petitioner, an LPR since 1990, pled guilty in 2008 to third-degree sexual assault, an aggravated felony. He was placed in removal proceedings, where he filed a waiver application in conjunction with an application for adjustment of status based on his marriage to a U.S. citizen. The Immigration Judge granted the adjustment application and waiver. On appeal, the Board ruled that the petitioner was statutorily ineligible for the section 212(h) waiver because he had been convicted of an aggravated felony since being admitted as an LPR. The Board further held that even if the petitioner was eligible, the waiver would be denied as a matter of discretion. The Seventh Circuit addressed each of the Board's conclusions. Without citing *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), by name, the court acknowledged the Board's holding that an adjustment of status in the U.S. constitutes a previous admission as an LPR and would thus bar an adjusted alien who was later convicted of an aggravated felony, regardless of whether the alien had departed the U.S. and been readmitted as an LPR between the time of the adjustment and the time of the conviction. The court noted that the four circuits that have ruled on this issue (the Third, Fourth, Ninth, and Eleventh) have all reached a different conclusion: that only those who were actually LPRs at the time they legally entered the U.S. were barred. The Seventh Circuit agreed with its sister circuits, finding that their position reflected the "unambiguous meaning" of the statute. Noting that the statute bars a person who (1) has "previously been admitted" (2) as an alien "lawfully admitted for permanent residence," the court concluded that the Board's interpretation would render the first part irrelevant "and preclude waiver whenever a person was lawfully admitted for permanent residence." However, it upheld the Board's alternative denial of the waiver as a matter of discretion. Noting that it had no jurisdiction to review the Board's discretionary determination, the court found that the Board applied the correct legal standard and that the petitioner's attempt to recharacterize the Board's discretionary determination as a legal or constitutional challenge was not persuasive.

Zivkovic v. Holder, No. 12-2143, 2013 WL 3942248 (7th Cir. July 31, 2013): The Seventh Circuit granted the petition for review of the Board's decision affirming an Immigration Judge's finding that the petitioner is removable based on his three aggravated felony convictions and that he is ineligible for a section 212(c) waiver. The LPR petitioner pled guilty to burglary in 1976 and was sentenced to 2 to 6 years of imprisonment. He was convicted by jury trial in 1978 of attempted rape and was sentenced to 4 to 12 years in prison. In 2010, he was convicted of criminal trespass and aggravated battery and was sentenced to 3 and 5 years of imprisonment. In a November 2011 decision, the Immigration Judge,

relying on the Board's precedent decision in *Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998), found that the provisions of the IIRIRA (enacted in 1996) applied retroactively to the two older convictions, rendering them aggravated felonies. The Immigration Judge also found the 2010 criminal trespass conviction to be for a crime of violence under section 101(a)(43)(F) of the Act (and thus an aggravated felony), because, like burglary, it involved a substantial risk of the use of physical force. The court first determined that *Chevron* deference was not owed to the Board's opinion since section 101(a)(43)(F) defines a "crime of violence" by reference to 18 U.S.C. § 16, a criminal statute that is generally applicable to cases with no immigration consequences. The court also found that it did not owe *Chevron* deference to the Board's interpretation of IIRIRA's retroactivity, finding the statute lacked the ambiguity required under the first step of the *Chevron* test. Addressing the petitioner's request for section 212(c) relief, the court concluded that the Board correctly found him to be ineligible as a matter of law. Next the court examined whether any of the three convictions relied on by the Immigration Judge was, in fact, for an aggravated felony. The court first found that criminal trespass was not a crime of violence. Noting that "the attempted or threatened use of physical force" is not an element of the crime, the court focused on whether the crime involved "a substantial risk that physical force will be used." The court found that it did not, distinguishing the crime's potential risk of *serious injury* from the risk of the use of *physical for*ce encompassed in the crimes of burglary and breaking and entering (both of which have been found to be crimes of violence). Turning to the older convictions, the court noted that section 7344(b) of the Anti-Drug Abuse Act of 1988, which first made use of the term "aggravated felony," applied its provisions prospectively. The court acknowledged the Board's determination in *Matter of Lettman* that the subsequent Immigration Act of 1990 (which stated its retroactive applicability) repealed by implication the earlier 1988 Act, a conclusion to which the Eleventh and Fourth Circuits have deferred. The court also observed that the Second Circuit independently reached the same conclusion regarding retroactivity. However, the Seventh Circuit agreed with the Ninth in concluding that nothing in the 1990 Act or any other legislation has either explicitly or by implication repealed section 7344(b) of the 1988 Act. The court therefore remanded for the Board to consider other grounds of removal that were raised by the DHS but not previously addressed. Chief Judge Easterbrook wrote a dissent from the panel's decision.

BIA PRECEDENT DECISIONS

In *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013), the Board held that an alien who enters the United States by falsely claiming United States citizenship is not considered to have been inspected by an immigration officer and that the entry is not an "admission" as defined in section 101(a)(13)(A) of the Act. Additionally, it held that the offense of knowingly and willfully making any materially false, fictitious, or fraudulent statement to obtain a United States passport in violation of 18 U.S.C. § 1001(a)(2) is a crime involving moral turpitude.

The respondent had applied for a passport using a false Florida birth certificate and made a false claim to citizenship when she registered to vote. She presented the passport when she last entered the United States and was subsequently convicted of violating 18 U.S.C. § 1001(a)(2). Removal proceedings were initiated, charging the respondent under sections 212(a)(2)(A)(i)(I), (6)(A)(i), (C)(i), and (ii) of the Act. The Immigration Judge sustained all of the removal charges and pretermitted the respondent's application for cancellation of removal under section 240A(b)(1) of the Act but granted her request for voluntary departure. The respondent appealed, arguing that she should have been charged as a deportable alien under section 237(a) of the Act, rather than under the section 212(a) inadmissibility rubric. She also challenged the pretermission of her cancellation of removal application, arguing that she had not been convicted of a crime involving moral turpitude. The DHS cross-appealed the grant of voluntary departure.

Reviewing its jurisprudence, the Board reaffirmed the rule that an alien who enters the United States by falsely claiming United States citizenship has not been inspected by an immigration officer and therefore concluded that the entry is not an admission under section 101(a)(13)(A). Further, the Board sustained the determination that the respondent was removable as an alien who is inadmissible under sections 212(a)(6)(A)(i), (C)(i), and (ii). Examining her offense, the Board also concluded that making a materially false statement that impairs or obstructs a government function with intent to deceive is a turpitudinous offense. Concurring with the Immigration Judge that the respondent was convicted of a crime involving moral turpitude that rendered her inadmissible under section 212(a)(2)(A)(i)(I), the Board

agreed that she was statutory ineligible for section 240A(b) cancellation of removal.

Addressing the DHS's challenge to the voluntary departure grant, the Board determined that the Immigration Judge's favorable exercise of discretion was unwarranted. The Board concluded that the respondent's adverse factors of protracted and repeated fraudulent conduct arising from the false claim to citizenship outweighed her equities of family ties in the United States, her positive contribution to the community, and her payment of taxes. The respondent's appeal was dismissed, the DHS's appeal was sustained, and the respondent was ordered removed.

In *Matter of Estrada*, 26 I&N Dec. 180 (BIA 2013), the Board held that a spouse or child accompanying or following to join a principal grandfathered alien cannot qualify as a derivative grandfathered alien for purposes of adjustment of status under section 245(i) of the Act by virtue of a spouse or child relationship originating after April 30, 2001.

The respondents are a couple who were married in October 2007. The female respondent was the beneficiary of an employment-based I-140 visa petition that was filed in April 2001 but withdrawn in February 2002. At the time of the appeal, she was the beneficiary of an approved I-140 petition filed in June 2006. The male respondent was the beneficiary of an I-130 visa petition filed by his former wife in November 2000. The respondents sought to apply for section 245(i) adjustment of status based on the female respondent's second I-140 petition. They contended that she was grandfathered based on the first I-140 petition filed in April 2001 and that both respondents were grandfathered based on the I-130 petition filed in November 2000 by the male respondent's former wife.

First, the Board found that the female respondent was not a grandfathered alien for section 245(i) purposes because the first I-140 petition filed in April 2001 was not approvable when filed as required under 8 C.F.R. § 1245.10(a)(1)-(3). Analyzing whether the female respondent was grandfathered pursuant to the male respondent's I-130 petition, the Board pointed out that section 245(i) of the Act allows for adjustment of status for grandfathered aliens who meet certain conditions, including being admissible to the United States, being eligible for an immigrant visa that is immediately available, and establishing that adjustment of status is warranted in the exercise of discretion. Additionally, the adjustment application must have been filed prior to April 30, 2001, unless the alien was grandfathered by a qualifying visa petition or labor certification. A grandfathered alien includes the spouse or child of the alien beneficiary, if eligible to receive a visa under section 203(d) of the Act. An alien who does not qualify as either a principal or derivative grandfathered alien cannot be the principal adjustment applicant under section 245(i).

Examining the language of section 245(i), relevant case law, and supplementary legislative material, the Board concluded that only those aliens who satisfied the requirements of the grandfathering provisions as of April 30, 2001, retained eligibility to apply for section 245(i) adjustment after that date. Thus, spouses and children of principal grandfathered aliens whose spouse or child relationship was established after April 30, 2001, are not grandfathered aliens. Noting that the male respondent appeared to qualify as a principal grandfathered alien because he is the beneficiary of a Form I-130 filed in November 2000, the Board pointed out that since he married the female respondent in October 2007, she does not qualify as a derivative grandfathered alien based on that petition. Since she is not a grandfathered alien, she is ineligible for section 245(i) adjustment based on the June 2006 approved I-140 petition. And the female respondent's ineligibility for adjustment of status means that the male respondent is ineligible as a spouse who is accompanying or following to join her under section 203(d) of the Act.

The appeal was dismissed as to the respondents' adjustment of status applications, and the record was remanded for consideration of their eligibility for any other form of relief.

In *Matter of Tavarez Peralta*, 26 I&N Dec. 171 (BIA 2013), the Board held that a an alien who was convicted under 18 U.S.C. § 32(a)(5) for interfering with a helicopter pilot by shining a laser light into the pilot's eyes was removable under section 237(a)(4)(A)(ii) of the Act. The Board further concluded that a violation of 18 U.S.C. § 32(a)(5) is not an aggravated felony crime of violence as defined in section 101(a)(43)(F) of the Act.

The respondent was charged as being removable under section 237(a)(4)(A)(ii) as an alien who engaged in "criminal activity which endangers public safety."

To determine what conduct is covered by that section, the Board parsed the statute and found that the term "endangers the public safety" is ambiguous and should be subject to a narrow interpretation. Concluding that the phrase does not cover single-victim or "everyday crimes," the Board held that "criminal activity which endangers public safety" is limited to situations where the public at large is endangered. Reasoning that a "totality of the circumstances" assessment is appropriate in determining what conduct is included in section 237(a)(4)(A)(ii), the Board advised that the analysis should include the extent and character of the potential harm and the facts and circumstances underlying the criminal activity.

Noting the obvious public safety risk of a helicopter crash over a large city and the concern about future crashes that could be caused by laser targeting, the Board concluded that the respondent's act of repeatedly targeting a helicopter engaged in a public safety mission fell within the ambit of section 237(a)(4)(A)(ii) and that he was therefore removable on that ground. However, the Board found that the respondent was not removable under section 237(a)(2)(A)(iii) of the Act because the offense was not a crime of violence as defined in section 101(a)(43)(F). The record was remanded for the respondent to apply for any available forms of relief.

REGULATORY UPDATE

78 Fed. Reg. 46,671 (Aug. 1, 2013)
DEPARTMENT OF STATE

[Public Notice 8400]

In the Matter of the Review of the Designation of the Revolutionary People's Liberation Party/Front (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 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.

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: July 8, 2013.
John F. Kerry,
Secretary of State, Department of State.

Moncrieffe v. Holder *continued*

Procedural History of *Moncrieffe*

In the case that made its way to the Supreme Court, the Fifth Circuit followed the First and Sixth Circuits, adopting a felony default approach. *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011), *rev'd*, 133 S. Ct. 1678. The procedural history of the case follows.

Adrian Moncrieffe is a native and citizen of Jamaica who entered the United States in 1984 at the age of 3 as a lawful permanent resident. On June 30, 2008, he pleaded guilty to possession of marijuana with intent to distribute in violation of section 16-13-30(j) of the Georgia Code Annotated. [6] In April 2010, the Department of Homeland Security charged Moncrieffe with removability as, inter alia, an alien convicted of an aggravated felony as that term is defined in section 101(a)(43)(B) of the Act. On May 26, 2010, an Immigration Judge found that Moncrieffe's conviction was for an aggravated felony and ordered him removed from the country.

The Board dismissed Moncrieffe's appeal on September 20, 2010. [7] In its decision, the Board found no merit to the respondent's argument that his conviction was not for an aggravated felony. The Board held that "the elements of the respondent's offense correspond to the elements of the Federal felony offense of possession with intent to distribute an indeterminate quantity of marijuana," citing *Matter of Aruna*, 24 I&N Dec. 452, and *Lopez*, 549 U.S. 47 (holding that a State drug offense

only equates to a felony under the CSA if it proscribes conduct that is punishable as a felony under the CSA). *Matter of Moncrieffe*, A038 581 600, 2010 WL 8751124 (BIA Sept. 20, 2010). Thus the Board agreed with the Immigration Judge's finding that Moncrieffe's conviction was for a drug trafficking aggravated felony.

Moncrieffe petitioned the Fifth Circuit for review of the Board's dismissal of his appeal, arguing that because the Georgia criminal statute covers conduct that constitutes both a felony and a misdemeanor under the CSA, a violation of the statute is not categorically a Federal felony. *Moncrieffe*, 662 F.3d at 390.

Acknowledging that possession of a controlled substance with the intent to distribute covers conduct that is both felonious and misdemeanant under the CSA, the Fifth Circuit reviewed the then-circuit split on the question "whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor" under the categorical approach. *Id.* at 391. The Fifth Circuit declined to follow its own prior unpublished case and adopted the felony default approach of the First and Sixth Circuits. The court accepted the Sixth Circuit's reasoning in *Garcia* that the CSA itself defaults to a felony charge and that the misdemeanor provision "is 'best understood as a mitigating sentencing provision' and not 'a stand alone misdemeanor offense.'" *Id.* (quoting *Garcia*, 638 F.3d at 516). Citing to its earlier decisions, the court rejected the "minimum conduct" approach of the Second and Third Circuits. *Id.* at 392. It held that *United States v. Walker*, 302 F.3d 322 (5th Cir. 2002), established the default sentencing range under the CSA to be the felony provision and reasoned that § 841 of the CSA should be treated identically for immigration and sentencing purposes.

The Fifth Circuit concluded that even if the Georgia criminal statute *could* cover conduct that would be considered a misdemeanor under the CSA, Moncrieffe, and not the Government, bore the burden of proving as much. Without meeting that burden, Moncrieffe's conviction was for a drug trafficking aggravated felony.

Examining the Reasoning in *Moncrieffe*: Abandoning the "Felony Default" Approach and Returning to the Classic Categorical Approach

Moncrieffe filed a petition for writ of certiorari which the Supreme Court granted

> to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both [the CSA's] felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that 'proscribes conduct punishable as a felony under' the CSA.

Moncrieffe, 133 S. Ct. at 1684 (quoting *Lopez*, 549 U.S. at 60). The Court, like all of the circuit courts before it, affirmed its application of the categorical approach to the State criminal statute at issue. The remainder of the Court's analysis clarifies what the application of that approach means in practice.

The Court held that when a State statute contains several different crimes, each described separately, it is appropriate to analyze the record of conviction—including the charging document and, in the case of a guilty plea, the plea colloquy, plea agreement, or "some comparable judicial record"—to first determine of which particular offense the alien was convicted. *Id.* (quoting *Nijhawan*, 557 U.S. at 35 (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)) (internal quotation marks omitted)). The Court considered Moncrieffe's record of conviction in light of the Georgia statute and found that the plea agreement established that he was specifically convicted of possessing marijuana with intent to distribute.

The Court then limited the analysis to a determination whether "'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). A State offense meets the definition of a Federal offense only if it "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Id.* (quoting *Shepard*, 544 U.S. at 24) (alteration in original) (internal quotation marks omitted). Importantly, the Court reiterated that the categorical approach is limited to an analysis of the minimum criminal conduct, or the "'least of th[e] acts' criminalized," that is necessary to sustain a conviction under the State statute. *Id.* (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (alteration in original). The Court emphasized that there must be a realistic probability—not a mere theoretical possibility—

that the State would apply its statute to conduct falling outside of the generic definition of a crime in order to sustain a finding that the State offense is not categorically equivalent to the Federal offense. *Id.* at 1685 (citing *Duenas-Alvarez*, 549 U.S. at 193).

The Court then focused its discussion on the specific aggravated felony at issue: illicit trafficking in a controlled substance under section 101(a)(43)(B) of the Act. Citing to *Nijhawan*, 557 U.S. at 37, it found that such an aggravated felony was a "generic crim[e]," requiring the application of the categorical approach. The Court then reasoned under *Lopez*, 549 U.S. at 60, that illicit drug trafficking aggravated felonies encompass "all state offenses that 'proscrib[e] conduct punishable as a felony under [the CSA].'" *Id.* It further held that in order for a State offense to constitute illicit trafficking in a controlled substance (1) it must necessarily proscribe conduct that is an offense under the CSA, and (2) the CSA must necessarily prescribe felony punishment for that conduct.

Under the first prong of the analysis, the Court determined that possession of marijuana with intent to distribute necessarily proscribes conduct that is an offense—either a felony or a misdemeanor—under the CSA. The crux of the Court's analysis occurs under the second prong—determining whether or not the CSA necessarily treats the offense as a felony.

The Court noted that the CSA's felony provision is located in a section titled "Unlawful acts," and the misdemeanor provision is located in the "Penalties" section of the statute. *Id.* at 1685-86; *see also* 21 U.S.C. §§ 841, 844. Despite their disparate placement within the CSA, the Court found that "[t]hese dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, and one not. The only way to know whether a marijuana distribution offense is 'punishable as a felony' under the CSA . . . is to know whether the conditions described" in the misdemeanor provision, that is, distribution of a small amount of marijuana for no remuneration, are present or not. *Id.* at 1886 (citation omitted).

The Court determined that Moncrieffe's marijuana distribution conviction under the Georgia statute is not for a felony under the CSA because it does not *necessarily* involve either remuneration or more than a small amount of marijuana. There is a "reasonable possibility" that a defendant will be convicted for possession of a small amount of marijuana with intent to distribute for no remuneration, which the Court held would be treated as a misdemeanor under the CSA. Under the categorical approach, ambiguity under the second prong compels the legal conclusion that the marijuana distribution offense at issue is not an aggravated felony. *Id.* at 1686-87; *see also* 21 U.S.C. §§ 812(c), 841(a)(1).

The Court rejected the following arguments by the Government as bases for finding that Moncrieffe's conviction was for an aggravated felony: (1) § 841(b)(4) is a mitigating sentencing provision and therefore irrelevant to a categorical analysis of the elements of a crime and; (2) in Federal criminal prosecutions, because marijuana distribution offenses are presumed to be felonies under the CSA, any State offense with the same elements should presumptively be an aggravated felony.

The Court noted that the Government's first argument is inconsistent with *Carachuri-Rosendo*, 130 S. Ct. 2577 (2010), in which the Court "recognized that when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too." *Moncrieffe*, 133 S. Ct. at 1687. With respect to the aggravated felony at issue, not only must the State statute contain the "elements" of the generic Federal offense, but "the CSA must punish that offense as a felony." *Id.* The Court thus held that in order to sustain a finding that a State offense is for a drug trafficking aggravated felony, "a conviction for the predicate offense must necessarily establish" the presence of "factors that are not themselves elements of the crime"—that is, the sentencing factors that make the crime punishable as a felony and not a misdemeanor. *Id.*

With respect to the Government's second argument, the Court rejected outright the contention that a marijuana distribution offense is presumptively a felony. *Id.* (stating "that is simply incorrect, and the Government's argument collapses as a result"). The Court emphasized the text of the CSA, which "creates no default punishment," over the Federal criminal prosecution practices referred to by the Government. *Id.* at 1688. The Court further rejected the Government's reliance on sentencing cases, clarifying that those cases are analyzed in light of Sixth Amendment concerns not relevant here, and that the applicable approach in the immigration context for this specific aggravated felony under section 101(a)(43)(B) of the Act considers the "generic" Federal offenses as defined

in the statute, not criminal prosecutions. Importantly, the Court reversed the presumption promoted by the Government and instead relied on the rule of lenity, holding that "ambiguity in criminal statutes referenced by the [Act] must be construed in the noncitizen's favor," even if it results in underinclusiveness. *Id.* at 1693.

The Court additionally rejected the Government's proposal—and the Board's in *Matter of Castro Rodriguez*—to allow the alien to submit factual evidence in Immigration Court to rebut the presumption that his marijuana distribution crime is an aggravated felony. The Court found this practice to be inconsistent with its understanding of the categorical approach and the text of the Act (which refers to "convictions" and not conduct) and to risk inefficient relitigation of facts long after convictions have been entered in criminal court. *See Matter of Castro Rodriguez*, 25 I&N Dec. 698.

Justice Alito's Dissent in *Moncrieffe*

Justice Alito authored a thorough dissent in *Moncrieffe*, a summary of which is useful in fully elucidating the concerns, holding, and reasoning in the case. First, Justice Alito disputed that the majority's holding stemmed from a proper application of the "pure categorical approach." *Id.* at 1698. Specifically, he disagreed that both § 841(b)(1)(D) and § 841(b)(4) should be considered when comparing the conduct necessary for the State conviction to the elements of the Federal felony under § 841(a). Rather, Justice Alito stated that the CSA "does not contain any such two-tiered provision . . . [a]nd § 841(b)(4) does not alter the elements of the § 841(a) offense" because it is merely a mitigating sentencing guideline. *Id*. He cited to the Court's decision in *Carachuri-Rosendo* as an example of a "faithful[]" application of the pure categorical approach. *Id.* at 1699.

Second, Justice Alito surmised that the majority's holding rests not on solid analytical ground, but on the belief—which he shares—that a proper application of the categorical approach would lead to unnecessarily harsh results, which Congress "surely did not intend" and which are out of step with the punishments prescribed in the CSA. *Id.* at 1699. He warned that the majority's holding would lead to significant disparities between equally culpable defendants convicted in different States. *Id.* at 1700. As a solution, Justice Alito suggested that "departures from the categorical approach are warranted" and that in determining whether a State conviction is punishable as a Federal felony, it would be appropriate—as the Board held in *Matter of Castro-Rodriguez*—to look beyond the record of conviction to the facts admitted or proven in criminal court. *Id.* at 1701.

How *Moncrieffe* Changes the Landscape

The obvious consequence of *Moncrieffe* is that the felony default approach is rejected and the categorical approach as it is understood in the Second and Third Circuits, namely as focusing on the minimum criminal conduct, is reaffirmed. While the general analytical approach is now clear, the practical effects and scope of the decision are less obvious. Particularly relevant for adjudicators is the effect *Moncrieffe* may have on burdens of proof—specifically, which party must demonstrate that a conviction is or is not for an aggravated felony and what evidence may be considered in meeting that burden.

In *Moncrieffe*, the Court answered these questions in the context of removability. That is, when the Government charges an alien with removability as an aggravated felon, it bears the burden of proving the charge by clear and convincing evidence, except in the case of an arriving alien. *See* 8 C.F.R. § 1240.8(a)-(b); *see also* section 240(c)(3)(A) of the Act. The Government's burden is not met if the alien demonstrates that the minimum criminal conduct for which he *may* have been convicted is not an aggravated felony. The Court also rejected the Government's proposed reliance on the particular facts underlying the conviction in meeting this burden.

One remaining open question pertains to the application of the categorical approach when an applicant for relief from removal must prove eligibility for relief by establishing, by a preponderance of the evidence, that he has not been convicted of an aggravated felony. *See* 8 C.F.R. § 1240.8(d); *see also* section 240(c)(4)(A) of the Act. In *Martinez*, 551 F.3d 113, the Second Circuit directly addressed this issue, affirming that for relief applications, the applicant bears the burden of establishing that he has not been convicted of an aggravated felony. The court stated that the applicant's burden is met if he can establish that the least culpable conduct for which he *could have* been convicted is not an aggravated felony. In other words, it is not the applicant's burden to show that he *could not* have been convicted of an aggravated felony, only that he *may no*t have been.

As a related matter, it should be noted that while the Second Circuit accepted that § 841(b)(4) is a sentencing exception under criminal law, which the defendant bears the burden of proving, the court did not impose the criminal law burden on the applicant for immigration relief. That is, burdens in criminal proceedings are not necessarily applicable in the immigration context, despite the now rejected felony default approach rationale. The Supreme Court held the same in the context of removability in *Moncrieffe*.

These questions are not directly addressed in *Moncrieffe*, and they remain relevant in the face of a seemingly different approach taken by several circuits and the Board prior to *Moncrieffe*. In *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012), the Ninth Circuit held that an alien with a prior conviction cannot carry his or her burden of demonstrating eligibility for cancellation of removal by establishing that the relevant record of conviction is inconclusive as to whether the conviction is for an aggravated felony. In contrast to the Second Circuit's approach in *Martinez*, the Ninth Circuit focused on the burden-shifting framework in the Act, concluding that because "it is possible that the [alien]'s prior conviction constitutes an aggravated felony" and the alien "bears the burden of demonstrating that he was *not* convicted of an aggravated felony," the alien failed to carry his burden. *Id*. at 990. Noting the split from the Second Circuit's approach, the Ninth Circuit agreed with the Fourth Circuit's conclusion in *Salem v. Holder*, 647 F.3d 111, 115 (4th Cir. 2011), that fidelity to Congress' plainly expressed intent requires that the alien, as the party bearing the burden of proof, suffer the detriment of an inconclusive record of conviction where eligibility for relief is at issue.

The Tenth Circuit and Board have taken a similar approach, albeit in a different context. In a case involving whether the alien had been convicted of a crime involving moral turpitude, which would bar him from seeking relief, the Tenth Circuit held that the alien could not sustain his burden by submitting an inconclusive record of conviction because allowing otherwise would "effectively nullif[y] the statutorily prescribed burden of proof." *Garcia v. Holder,* 584 F.3d 1288, 1289-90 (10th Cir. 2009). Similarly, the Board held in *Matter of Almanza*, 24 I&N Dec. 771, 776 (BIA 2009), that the alien could not satisfy his burden "by producing the inconclusive portions of a record of conviction, and by failing to comply with an appropriate request from the Immigration Judge to produce the more conclusive portions of that record." The Board left open the possibility that the alien could have met that burden if he had provided a more complete criminal record of conviction, which was available in that case. While not directly dispositive, the alternative approaches taken by the Tenth Circuit and the Board in the moral turpitude context and the Second Circuit in the aggravated felony context highlight the questions regarding the categorical approach that remain unanswered in *Moncrieffe*.

Applying the Supreme Court's reasoning in *Moncrieffe* to the relief stage, it appears that the alien may meet his burden by establishing that the least culpable conduct would not render him ineligible for relief. In other words, it appears that the alien's burden may be to establish only that the conviction is not categorically for an aggravated felony, rather than that it is categorically not for an aggravated felony. However, and quite importantly, the Supreme Court does not address whether its analysis would apply to the relief stage, or whether it would differ if all available documents in the criminal record of conviction were not submitted to the Immigration Court in applying for relief.

A final point of potential conflict arises as a result of the Supreme Court's determination in *Moncrieffe* that the relevant Georgia criminal statute is divisible because it "contain[s] several different crimes, each described separately." *Moncrieffe*, 133 S. Ct. at 1684. That interpretation of divisibility is narrower than the approach taken by the Board in *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012) (holding that a criminal statute is divisible, regardless of its structure, if, based on the elements of the offense, some but not all violations of the statute give rise to grounds for removal or ineligibility for relief). In that case, the Board stated that "divisibility would be permitted in 'all statutes of conviction . . . regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct.'" *Id.* at 727 (quoting *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 90 (2d Cir. 2009)). Under the Board's approach, even if a statute was not obviously divisible into concrete offenses, it may be deemed divisible if the terms of the statute necessarily include a broad range of conduct, some of which is conduct for which an alien may be removable and some of which is not. The Board further noted that while the broader approach to divisibility may be different from that taken in the criminal context, it is permissible in the immigration context. *Id.* at 728. However, the

Supreme Court appeared to disagree with this bifurcation in *Moncrieffe*.

More recently, in *Descamps v. United States*, 133 S. Ct. 2276 (2013), a sentencing case decided in the context of the Armed Career Criminal Act, 18 U.S.C. § 924(e), the Supreme Court held that the modified categorical approach does not apply to statutes like section 459 of the California Penal Code, which contained only a single, indivisible set of elements.[8] The Court concluded that it would be impermissible for sentencing courts to make factual findings in order to determine the underlying basis of a defendant's conviction. *Id.* at 2287-90 (citing *Shepard*, 544 U.S. at 25). In so holding, the Court rejected the application of an immigration case, *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011), in the sentencing context because its application of the categorical and modified categorical approaches was broader than, and did not align with, that articulated in *Descamps*. The approach taken in *Descamps* is also in conflict with that taken by the Board in *Lanferman*.

These are questions that are not conclusively answered in *Moncrieffe* but have important implications in immigration proceedings.

Conclusion

Moncrieffe resolved a long-standing circuit split on an issue that has important consequences for many aliens with drug convictions, and it did so solidly in the alien's favor. In the process, the Supreme Court left open many other questions regarding the scope of its decision to other aggravated felonies and crimes involving moral turpitude, and to questions of eligibility for relief. The resolution of these questions will be of continuing importance to adjudicators.

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1. A State drug conviction is also for an aggravated felony if it contains a trafficking element and is a felony under State law. *Lopez*, 549 U.S. at 57.
2. An offense is a felony under the CSA if the maximum term of imprisonment authorized by the CSA is more than 1 year. *See* 18 U.S.C. § 3559(a)(5).
3. Section 2C:35-5a provides that it shall be unlawful for any person knowingly or purposely:

> (1) To manufacture, distribute or dispense, or to possess or have under his control with intent to manufacture, distribute or dispense, a controlled dangerous substance or controlled substance analog; or
> (2) To create, distribute, or possess or have under his control with intent to distribute, a counterfeit controlled dangerous substance.

The subsection describing the relevant controlled substance in the petitioner's case is found in section 2C:35-5b(11), which states:

> Any person who violates subsection a. with respect to:
> Marijuana in a quantity of one ounce or more but less than five pounds including any adulterants or dilutants, or hashish in a quantity of five grams or more but less than one pound including any adulterants or dilutants, is guilty of a crime of the third degree….

4. The Third Circuit in *Wilson* remanded the case to the district court to consider whether Wilson's conviction is for an aggravated felony as a State felony conviction that contains a trafficking element. *Id.* at 382.
5. The Massachusetts statute makes it a crime when any person "knowingly or intentionally manufactures, distributes, dispenses or cultivates, or possesses with intent to manufacture, distribute, dispense or cultivate [marijuana]." Mass. Gen. Laws Ann. ch. 94C, § 32C (2003).
6. At the time of Moncrieffe's conviction, section 16-13-30(j)(1) of the Georgia Code Annotated provided: "It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana."
7. The decisions of the Immigration Judge, the Board, and the Fifth Circuit were issued prior to the issuance of *Matter of Castro Rodriguez*.
8. The California statute states in pertinent part: "Every person who enters any house . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." Cal. Penal Code § 459 (West 2010).