UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In Re: Cristoval Silva-Trevino Respondent In Removal Proceedings	File No. A [Redacted]

SUPPLEMENTAL BRIEF OF AMICUS PARTY FEDERATION FOR AMERICAN IMMIGRATION REFORM

June 19, 2015

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On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request of the Board of Immigration Appeals, dated April 29, 2014, for supplemental briefing on this matter.

Issues for Supplemental Briefing:

(1) How adjudicators are to determine whether a particular criminal offense is a crime involving moral turpitude (CIMT) under the Act.
(2) When, and to what extent, adjudicators may use a modified categorical approach and consider a record of conviction in determining whether an alien has been "convicted of … a crime involving moral turpitude" in applying section 212(a)(2) of the Act and similar provisions.
(3) Whether an alien who seeks a favorable exercise of discretion under the Act after having engaged in criminal acts constituting the sexual abuse of a minor should be required to make a heightened evidentiary showing of hardship or other factors that would warrant a favorable exercise of discretion.

Table of Contents

Table of Authorities

Cases

Federal Statutes

Federal Regulations

Other Authorities

Statement of the Case.

Pursuant to 8 C.F.R. § 1003.1(h)(1)(i), the Attorney General on April 15, 2015 exercised *vacatur* over *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), "in its entirety" and directed the Board of Immigration Appeals (BIA) to consider the questions now presented for supplemental briefing. *Re Cristoval Silva-Trevino, 26 I&N Dec. 550* (A.G. 2015). The 2015 Attorney General's interim decision states, "The central issue raised by this case is how to determine whether an alien has been "convicted of . . . a crime involving moral turpitude" within the meaning of section 212(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2) (2012)." *Id.* at 550.

The key point of dispute in the April 15, 2015 order was with the determination in the 2008 Mukasey decision that consistent identification of a crime involving moral turpitude (CIMT) by the immigration courts required a third adjudicative step, in cases where the categorical or modified categorical approaches, as endorsed by the United States Supreme Court, could not produce a determination that a given state, federal, or foreign conviction was a CIMT.

In October 2004, respondent had entered a no contest plea[1] to Tex. Penal Code Ann. § 21.11(a)(1), which prohibits various forms of sexual contact with a child under 17 years old, including touching the child's breast, and requires that the defendant intend "to arouse or gratify the sexual desire of any person," is not categorically a CIMT because that statute penalizes even a defendant who reasonably believes that the child is older than 17. *Matter of Silva-Trevino,* 24 I&N at 707-08. The crime is a second-degree state

[1] The status of a no-contest plea as a conviction for immigration purposes is not at issue.

law felony and an aggravated felony under INA § 237(a)(2)(A)(iii) and § 101(a)(43)(A) (designating conviction for sexual abuse of a minor an aggravated felony). *Id.* at 691.

In subsequent removal proceedings in 2005, Silva-Trevino had requested discretionary relief through adjustment to legal permanent resident (LPR) status pursuant to INA §245(a), arguing he was not inadmissible under INA §212(a)(2) because the crime of conviction was not a CIMT. This contention was rejected by the immigration judge (IJ), who denied relief from removal, and the ensuing BIA and circuit courts reviews commenced. *Matter of Silva-Trevino,* 24 I&N at 691.

In its original August 8, 2006 decision, the Board had determined that Silva-Trevino's conviction for the Texas criminal offense of "indecency with a child" should not be considered a crime of moral turpitude because the Texas statute under which he had been convicted criminalized at least some conduct that did not involve moral turpitude and was thus not categorically a crime involving moral turpitude. *Matter of Silva-Trevino,* 24 I&N Dec. at 690-92.

In July 2007 Attorney General Gonzales then elected to review the decision. 26 I&N Dec. at 550-551. In November 2008, his successor, Attorney General Mukasey, vacated the BIA's August 2006 decision and issued a new opinion "establishing a three-step framework" for use by Executive Office for Immigration Review (EOIR) adjudicators to determine whether an alien had been convicted of a CIMT. 24 I&N Dec. 687. Attorney General Mukasey held that where a conviction record indicates intentional sexual contact with a minor, immigration judges should look for evidence that the alien

"knew or should have known" that the victim was, in fact, a minor. *Id.* at 705.[2] Under Attorney General Mukasey's view, the intent to arouse or gratify sexual desire alone did not make criminal conduct turpitudinous. *Cisneros-Guerrero v. Holder*, 774 F.3d 1056, 1060 (5th Cir. Tex. 2014).

On remand, the BIA affirmed the IJ decision to consider extrinsic evidence—the alien's stipulation, testimony, and the victim's birth certificate—to find that Silva-Trevino had been convicted of a CIMT. *See Silva-Trevino v. Holder*, 742 F.3d 197, 199 (5th Cir. 2014).

Attorney General Eric Holder did not decide to vacate the 2008 Mukasey test until the Fifth Circuit became the fifth circuit court of appeals to reject Attorney General Mukasey's construction of the statute. *Silva-Trevino v. Holder,* 742 F.3d at 200-06 [3]

On appeal from the BIA in *Matter of Silva-Trevino,* the Fifth Circuit in 2014 had considered the crime of "indecency with a child" under Texas Penal Code § 21.11(a)(1). The Fifth Circuit held that the relevant statutory language and "legislative ratification of the longstanding, nearly universal use of the categorical inquiry trumped the agency's contrary interpretation." 742 F.3d. at 201-202. The opinion clarified that it only considered "the means by which judges may determine whether a given conviction qualifies [as a CIMT]," *id.* at 200, and remanded the case to the BIA.

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[2] The agency never claimed that Silva-Trevino had admitted to committing the elements of a CIMT crime or act, an alternate standard for inadmissibility under §212(a)(20(A).

[3] The four prior circuit decisions to reject the Mukasey three-level test were *Jean-Louis v. Atty Gen. of U.S.*, 582 F.3d 462, 472-82 (3d Cir. 2009); *Sanchez Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1307-11 (11th Cir. 2011); *Prudencio v. Holder*, 669 F.3d 472, 480-84 (4th Cir. 2012); and *Olivas-Motta v. Holder*, 746 F.3d 907, 911-16 (9th Cir. 2013). All four circuits found that the "convicted of" language in INA §212(a)(2)(A)(i) was unambiguous, and did recognize the applicability of *Chevron* deference. The opinions varied but generally agreed that the phrase "convicted of" as used in the INA foreclosed any inquiry into evidence outside of the record of conviction.

However, the Seventh and Eighth circuits have deferred to Attorney General Mukasey's construction of the statute as reasonable under *Chevron* deference standards, and permitted a three-level approach.[4] As a consequence of this circuit split, immigration judges and the BIA must apply different CIMT standards in different circuits, effectively nullifying one of the asserted objectives of the categorical analysis of crimes for immigration purposes, *i.e.,* implementing "a uniform framework for ensuring that the Act's moral turpitude provisions are fairly and accurately applied. *Matter of Silva-Trevino,* 24 I&N Dec. at 688." *See Silva-Trevino, 742 F.3d at 205*.

Relevant Law.

INA §212(a)(2)(A)(i)(I) provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is inadmissible.[5] INA §237(a)(2)(A)(i) provides that "[a]ny alien who . . . is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and . . . for which a sentence of one year or longer may be imposed" is deportable. INA §245(a), in turn, provides that such an inadmissible alien is ineligible for discretionary adjustment of status to lawful permanent resident status. Similarly, an alien convicted of a CIMT is ineligible for temporary protected status. INA §244(c)(2)(A)(iii)(I).

[4] *Bobadilla v. Holder,* 679 F.3d 1052, 1057 (8th Cir. 2012); *Mata-Guerrero v. Holder,* 627 F.3d 256, 260 (7th Cir. 2010).

[5] Conviction for immigration law purposes includes any period of suspension of a term of incarceration or confinement. INA §101(a)(48)(B).

INA §101(f)(3) mandates that "no person shall be regarded as, or found to be, a person of good moral character who … was … (3) … a person, whether inadmissible or not, described in subparagraph[] (A) of section 212(a)(2)." INA §101(f) also includes a catch-all provision permitting a discretionary finding: "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." Good moral character is a requirement for a grant of voluntary departure under INA §240B(b)(1)(B), for non-LPR cancellation of removal under INA §240A(b)(1), for adjustment of status under INA §245(a), as well as adjustment of status under certain legalization laws, such as the Nicaraguan Adjustment and Central American Relief Act (NACARA). Perhaps most importantly, an applicant for naturalization must have been and remain a person of good moral character "for all the periods referred to in this subsection." INA §316(a)(3).

Attorney General Holder's *vacatur* order expressly reaffirmed that nothing in the Fifth Circuit's opinion had modified the agency's view, in Attorney General Mukasey's 2008 decision and case precedent—that there are still two elements of a CIMT: (1) Morally reprehensible *malum in se* conduct, and (2) "some degree of scienter, regardless of whether specific intent, deliberateness, willfulness or recklessness." *Re Silva-Trevino*, 26 I&N 550, 553 n.3 (A.G. 2015), citing *Matter of Silva-Trevino*, 24 I&N 687, 688 n.1 and 706 n.5 (A.G. 2008).

While an individual is rendered deportable if convicted of a crime of moral turpitude which carries a possible sentence of one year or more within the alien's first

five years of admission to the United States, INA §237(a)(2)(A)(i),[6] or if convicted at any time after admission of two crimes of moral turpitude not arising out of a single scheme, regardless of the sentence imposed, §237(a)(2)(A)(ii), even a single conviction for a crime of moral turpitude, regardless of where it was committed, renders an individual inadmissible to the United States, unless he or she can qualify for the narrowly drawn juvenile or petty offense exceptions. INA §212(a)(2)(A)(ii).

A noncitizen may be subject to both deportability and inadmissibility if, for example, he is deportable, yet seeks adjustment of status to LPR status as relief from deportation. For example, an LPR may not be deportable from the United States for a crime committed five years after admission, but if he or she leaves the United States even briefly, that LPR will be barred from re-entry as inadmissible. While INA §212(a)(2)(A)(i)(I) does not expressly state that an alien who has been convicted of a crime involving moral turpitude is permanently barred from admission to the United States, absent narrow exceptions found in INA §212(a)(2)(A)(ii), Congress has for over a century intended that such aliens be classified as inadmissible from the time of the conviction, unless a purely discretionary waiver is granted. *See Mayorga v. AG United States*, 757 F.3d 126, 129 (3d Cir. 2014).

Conviction for or admission of the commission of a crime of moral turpitude can also preclude an individual from demonstrating good moral character, which is often a statutory prerequisite for an agency grant of the benefit of relief from removal. INA §101(f).

[6] The liability period is extended to 10 years for an alien granted adjustment of status to LPR status on the basis of INA §101(a)(15)(S)(i) providing critical information essential to prosecution of a criminal enterprise.

Federal courts lack jurisdiction to review final orders of removal against aliens who have committed crimes involving moral turpitude, 8 U.S.C. § 242(a)(2)(C), except to review constitutional questions or other issues of law. *Id.* at § 242(a)(2)(D);*see also Avendano v. Holder*, 770 F.3d 731, 736 (8th Cir. 2014).[7]

The INA does not define moral turpitude. The phrase CIMT is thus "without question ambiguous." *Florentino-Francisco v. Lynch*, 2015 U.S. App. LEXIS 8719 (10th Cir. May 27, 2015) (citing *Villatoro v. Holder*, 760 F.3d 872, 875 (8th Cir. 2014)) (internal quotation marks omitted). The federal courts generally defer to precedential BIA interpretations of ambiguous federal immigration statutes under *Chevron, U.S.A., Inc. v. NRDC Inc.*, 467 U.S. 837 (1984), "so long as the BIA's interpretation does not contravene Congressional intent." *See, e.g., Ibarra v. Holder*, 736 F.3d 903, 910 (10th Cir. 2013).

Determining Whether a Crime is a CIMT for Purposes of Adjudicating Removals.

To determine whether conviction of a state crime constitutes a CIMT, courts and the BIA apply the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005). When the Government alleges that a state conviction qualifies as an aggravated felony (or a controlled substance offense) under the INA, as in the *Silva-Trevino* removal proceeding, the Supreme Court has directed that the categorical approach be used to determine whether the state offense

[7] Congress stripped federal courts of jurisdiction to review orders regarding the granting of relief under §1229b. *See* INA §242(a)(2)(B)(i). However, aliens seeking relief from removal have been able to obtain judicial review by challenging whether the crime for which they were convicted constitutes a removable offense, *e.g.*, an aggravated felony, a controlled substance offense, or as in this case a CIMT , because this type of claim raises a question of law. INA §242(a)(2)(D).

and the INA offense are comparable. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1683 (2013) (citing *Nijhawan v. Holder*, 557 U.S. 29, 33-38 (2009); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-187 (2007)). There has been no comparable definitive Supreme Court ruling to date as to how EOIR adjudicators and federal judges are to make similar comparisons under the CIMT statute, INA §212(a)(2)(A)(i)(I).

The "formal categorical approach" compares the elements of the statute forming the basis of the defendant's state conviction with the elements of the "generic" federal crime, also described as "the offense as commonly understood." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Adjudicators applying the categorical approach must look to the elements of the statutory state offense, not to the specific facts, reading the applicable statute to ascertain the "least culpable conduct" necessary to sustain conviction under the statute. *See, e.g., Jean-Louis v. AG of the United States*, 582 F.3d 462, 465-466 (3d Cir. 2009).

In *Descamps*, the Supreme Court articulated three constitutional considerations supporting the approach: (1) It best "comports with" the "text and history" in the federal statute containing the generic offense, *Descamps*, 133 S. Ct. at 2287 (citing *Taylor v. United States*, 495 U. S. 575, 600 (1990)); (2) The categorical approach avoids a collision with the Sixth Amendment requirement that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 2288 (internal quotation marks omitted); and (3) a focus on the elements "averts the practical difficulties and potential unfairness of a factual approach." *Descamps*, 133 S. Ct. at 2287, *citing Taylor*, 495 U.S. at 601.

The process of determining whether a conviction under a state statute is categorically a conviction for a "crime involving moral turpitude" under INA §237(a)(2)(A)(i) has two components. *Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014) (en banc). The first step is to identify the elements of the statute of conviction. A problem arises for EOIR adjudicators when reviewing courts invoke the doctrine that the BIA lacks expertise in identifying the elements of state statutes, opening the matter to *de novo* review pursuant to the alien's automatic right of appeal from an IJ decision. *Id.*

The second step is to compare the elements of the statute of conviction to the generic definition of a crime of moral turpitude and decide whether the conviction meets that definition. Because the BIA has expertise in that task, federal courts are expected to defer to the Board's conclusion under the *Chevron* framework, especially where the decision is published or directly controlled by a published decision. *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 798 (9th Cir. 2015); *see also Cisneros-Guerrero*, 774 F.3d at 1058 (5th Cir. Tex. 2014); *Efstathiadis v. Holder*, 752 F.3d 591, 594 (2d Cir. 2014).

The first element of a generic crime of moral turpitude is defined by both the BIA and the courts as one that is *malum in se*: "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *See, e.g.*, *Hamdan v. INS*, 98 F.3d 183, 185 (5th Cir. 1996); *Matter of Franklin*, 20 I&N Dec. 867 (1994). However, neither the seriousness of the offense nor the severity of the sentence imposed is determinative. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992).

One challenge for EOIR adjudicators is a lack of circuit court consensus regarding the second element of the CIMT "generic" offense, scienter. The BIA does not currently

require the presence of "a vicious motive or a corrupt mind" as an essential element of a crime involving moral turpitude. *Matter of Torres-Varela,* 23 I&N Dec. 78, 83 (BIA 2001) ("crimes involving moral turpitude often involve an evil intent, [but] such a specific intent is not a prerequisite"). In withdrawing the 2008 test, Attorney General Holder expressly upholds the Board's position that a finding of moral turpitude "requires that a perpetrator have committed the reprehensible act with some form of scienter." *See Silva-Trevino,* 26 I&N Dec. at 553, n 1. The Board now holds that "some degree of scienter" includes "specific intent, deliberateness, willfulness, or recklessness." *Matter of Louissaint*, 24 I&N Dec.754, 757 (2009).

Despite Attorney General Holder's limiting instructions on remand, there is no well-established consensus between the agency and the judiciary as to the scope of scienter in CIMT cases. Compare, *e.g.*, *Avendano*, 770 F.3d at 735 (8th Cir. 2014) (BIA "does not require a finding that an alien acted with a vicious motive or a corrupt mind"); *Michel v. I.N.S.*, 206 F.3d 253, 263 (2d Cir. 2000) ("corrupt scienter is the touchstone of moral turpitude" and "it is in the intent that moral turpitude inheres.") (collecting cases); and *Bobadilla v. Holder*, 679 F.3d 1052, 1054 (8th Cir. 2012) (the BIA definition of scienter "has generated little if any disagreement by reviewing circuit courts.").

In apportioning the evidentiary burden between the government and a respondent contesting removal, the burden of proof is on the respondent to show that state prosecutors would apply the statute in question to acts that are outside the generic definition of a listed crime in a federal statute. The determination is called the "realistic probability" test. That finding

> requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a

> crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (non-generic) manner for which he argues.

Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (emphasis added). While the applicability of the test was established in the context of litigation under the American Career Criminal Act (ACCA), it remains unresolved in the immigration context.

FAIR recommends that the Board expressly adopt the reasoning from *Gonzales v. Duenas-Alvarez* in the CIMT context. The "least culpable conduct" analysis should start with reference by the respondent to relevant case precedent. This approach is particularly suitable for CIMTs. Moral turpitude determinations derive from the agency's application of the ambiguous statutory text. *See Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs*., 545 U.S. 967, 982 (2005). The concerns raised in *Padilla v. Kentucky* about the importance of counselling as to the immigration consequences of criminal convictions also support this approach, as these CIMTs are themselves identifiable to alien respondents and their counsel as "necessarily turpitudinous" primarily by reference or analogy to Board and judicial precedent. *See, e.g.*, Kurzban, *Immigration Law Sourcebook*, 14th Ed. (2014), 96-108 (listing extensive examples).

Turning to the subset of sexual offenses involving minors at issue in *Silva-Trevino*, FAIR recommends that the Board consider whether a *Nijhawan* exception to the categorical approach exists for some strict liability offenses against minors. A line of reported cases holds or supports the view that certain convictions involving a minor victim would constitute a CIMT even in the absence of a mental component as to lack of consent. *See, e.g., Mehboob v. AG of the United States*, 549 F.3d 272, 278 (3d Cir. 2008) (recognizing "the consensus that moral turpitude inheres in strict liability sex offenses"

involving minors or children) (citing cases); and *Efstathiadis v. Holder*, 752 F.3d at 597 (2d Cir. 2014).

Attorney General Mukasey discussed this body of precedent as well. *Silva-Trevino*, 24 I&N at 705-708 (citing, *inter alia*, *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling."). *Cf. Jean-Louis*, 582 F.3d at 469 (stating "in *Silva-Trevino*, the Attorney General treated the perpetrator's knowledge regarding the victim's age as a critical consideration informing the depravity of the crime").

Recognition by the agency of the uniquely turpitudinous character of crimes committed by (non-citizen) adults against minors would affect two aspects of the CIMT determination. First, the age of a minor is arguably a distinct, "circumstance-specific" factual element of sexual abuse of minor CIMTs, one that can be separately determined by extrinsic evidence without compromising application of the categorical approach to the other elements of the CIMT inquiry. To apply the Supreme Court's criteria in the sexual abuse of minors context, "the [age] threshold applies to the specific circumstances surrounding an offender's commission of a [sexual offense] crime on a specific occasion." *See Nijhawan v. Holder*, 557 U.S. 29, 31 (2009). The element "with a child" in the Texas criminal felony at issue refers to a circumstance-specific act, the distinct and specific factual element being the exact age of the victim. Second, recognition by the Board of the *per se* inherence of turpitude in such acts would resolve the problem of a disputed standard for CIMT scienter for this subset of sexual offenses, as recklessness would be measured by the convicted alien's intentional sexual contact after failure to

determine the age of the victim.[8] A determination by the Board that for purposes of comparison of sexual abuse of a minor offenses the age of the minor is a distinct circumstance-specific element under *Nijhawan,* would resolve the problem without requiring the distortions and added complexity to the categorical approach advocated by Attorney General Mukasey in 2008.

In summary, FAIR concludes that use of the categorical approach for identifying CIMTs in removal proceedings is effectively prescribed by analogous Supreme Court precedent requiring its use where the generic offenses were aggravated felonies and controlled substance offenses under the INA. The circuit courts have without exception applied the categorical approach to aliens contesting their removal based on a conviction for a CIMT. Until the Supreme Court directly considers the question, the approach is thus mandated for BIA review of CIMT-mandated removal orders.

However, application by the Board of the realistic probability standard from *Duenas-Alvarez* to the least-culpable conduct analysis also required by the Supreme Court would, at least in CIMT cases, bring more uniformity to this subset of removal proceedings, and help alleviate lingering concerns about under-inclusiveness in the formal categorical approach.

Regarding the analytical problems with the interrelated elements of scienter and the age of the victim in CIMT cases where the state offense is a variant of sexual abuse of a minor, FAIR concludes that the Board may legitimately designate the age of the victim as a *Nijhawan* fact-specific inquiry, separate from the categorical approach to convictions for sex crimes leading to removability, and also should consider the treatment of the

[8] This agency gap-filling determination would only be operative for those state offenses where a mistake-of-age defense was not an element of the crime.

scienter element of knowledge of the victims underage status as recklessness in failing to ascertain the child's age, consistent with the line of case precedent discussed above. The changes in agency policy would respond to the concerns regarding under-inclusiveness produced by the categorical approach, as expressed for example by Judge Esterbrook in *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), without undermining any of the administrative benefits or constitutional safeguards attributed to the categorical approach by jurists.

Use of records of conviction for CIMT determinations under the modified categorical approach.

Descamps v. United States addressed when the categorical approach and the modified categorical approach could be used. 133 S. Ct. 2276 (2013). For a state criminal statute which lists potential elements in the alternative, the duty of an IJ conducting a removal proceeding is to determine "if at least one, but not all of those [state] crimes matches the generic [federal] version, … which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach." *Descamps,* 133 S. Ct. at 2285.

An agency or court may use the modified categorical approach to determine whether a prior conviction is for a qualified offense when a statute is divisible. *Descamps,* 133 S. Ct. at 2281. Divisible means the statute "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile." *Id.* 133 S. Ct. at 2281 (internal quotation marks omitted).

Descamps held that the modified categorical approach is acceptable only "when a statute lists multiple, alternative elements, and so effectively creates several different

crimes." *Descamps*, 133 S. Ct. at 2285. In that context a prosecutor must have selected the relevant element from the statute's list of alternatives, and the jury, per clear instruction from the judge, must then find that element present "unanimously and beyond a reasonable doubt." *Id.* at 2290. The Supreme Court explained that the modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Id.* at 2285.

If the statutory definition of the prior conviction sets out alternative formulations of *mens rea*, such as knowingly or recklessly, and under one of the alternatives the conduct is a CIMT, the statute is divisible and adjudicated under a modified categorical approach. *Dzerekey v. Holder*, 562 Fed. Appx. 659, 662 (10th Cir.) (citing *Descamps*, 133 S. Ct. at 2281; *United States v. Ramon Silva*, 608 F.3d 663, 669 (10th Cir. 2010)).

The Supreme Court in *Descamps* vigorously rejected what might be called a "modified factual approach," as formulated by the Ninth Circuit in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011). Rejecting the Ninth Circuit's approach, *Descamps* explained that, "sentencing courts . . . would have to expend resources examining (often aged) documents for … facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Id.* Only when a statute is divisible can the modified categorical approach satisfy the Supreme Court's three policy considerations, to conform to statutory language, satisfy the Sixth Amendment, and lead to fair results. *See Descamps*, 133 S. Ct. at 2289-91.

The Supreme Court has also recognized a narrow exception to the categorical/modified categorical approach in *Nijhawan v. Holder*, 557 U.S. 29 (2009). The high court tailored its analysis to the specific language in a particular subsection of

the aggravated felony definition in the INA. See *Nijhawan*, 557 U.S. at 38. The opinion specifically distinguished the "circumstance-specific" offense at issue from "generic" categories of aggravated felonies for which a categorical approach might be appropriate. *See id.* at 36-39;[9] *see also Carachuri-Rosendo v. Holder*, 560 U.S. 563, 577 (2010).

Where an offense may not qualify under all the alternatives in a divisible statute, the modified categorical approach directs the court to examine certain definitive underlying documents to determine which alternative the defendant's conviction satisfied. *Descamps*, 133 S. Ct. at 2283-84. There is no exhaustive list of which documents can be examined under the modified categorical approach in all areas of law, but the Supreme Court has stated that permissible documents include "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 v. United States*, 559 U.S. 133, 144 (2010).

Regarding proofs of conviction, the INA contains specific statutory language, applicable "to any proceeding under this Act," providing a list of "documents or records (or a certified copy of such an official document or record) [that] shall constitute proof of a criminal conviction." INA §240(c)(3)(B).[10] Use of electronic means of submission and computer-generated signatures by certifying State officials is also authorized. INA

[9] But there was no dispute that the alien petitioner actually had been "convicted" of fraud; *Nijhawan* only considered how to calculate the amount of loss once a conviction for a particular category of aggravated felony had occurred.

[10] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) expanded the definition of conviction "with respect to an alien" to include "<u>any reference</u> to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." Pub. L. No. 104-208, §301(a), amending INA §101(a)(48)(B).

§240(c)(3)(C). Records listed under this provision are presumptively proof of a conviction. *Francis v. Gonzales,* 442 F.3d 131, 142 (2d Cir. 2006).

EOIR regulations moreover include a "catch-all" clause, providing that, "in any proceeding before an Immigration Judge… (d) [a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof." 8 C.F.R. §1003.41(d). Individually, the government bears the burden to show those records meet the standard in *Woodby v. INS*, 385 U.S. 276, 286 (1966) ("clear, unequivocal, and convincing evidence that the facts alleged as grounds of removability are true."). 8 U.S.C. §1229a(c)(3)(A); 8 C.F.R. §1240.8(a).[11]

FAIR concludes that where use of the modified categorical approach is authorized, due to the divisible nature of the statute, it is permissible to use documents described in INA §240(c)(3)(B) and 8 C.F.R. §1003.41 to establish an illustrative list provided by the Supreme Court in *Johnson v. U.S*. Use of the INA or CFR lists for proof of conviction under the modified categorical approach has been upheld by multiple circuits. *See Singh v. United States Dep't of Homeland Sec.* 526 F.3d 72, (2d Cir. 2008) (CIMT determination); *Patel v. Gonzales*, 178 Fed. Appx. 564, 568 (7th Cir. 2006); *Fequiere v. Ashcroft*, 279 F.3d 1325, 1327 (11th Cir. 2002). Moreover, use of documents not included on the specified lists pursuant to the catch-all CFR, subject to *Woodby* scrutiny, is also permissible under *Chevron* deference principles. *Francis*, 442 F.3d at 142; *Fequiere*, 279 F.3d at 1327. Finally, as the Sixth Circuit has explained, the relevance of the due process and Sixth Amendment concerns expressed in the *Taylor, Shepard*, and

[11] Technically this standard applies to use of the document as proof of removability, not the admissibility of the document itself in proceedings.

Johnson line of Supreme Court precedent to civil immigration proceedings is questionable. *See Ali v. Mukasey*, 521 F.3d 737, 741 (7th Cir. 2008).[12]

Adjudication of applications for discretionary immigration relief from aliens convicted of sexual abuse of a minor offenses.

Important legal and constitutional differences exist between immigration removal adjudications and adjudications of alien applications for relief from removal, where the INA provides that the agency grants the benefit at its discretion, as noted above in the summary of relevant law. The justification for allowing the EOIR adjudicator to require an alien seeking a favorable exercise of discretion in a cancellation of removal, voluntary departure, or discretionary adjustment of status or similar case—where a respondent voluntarily applies for relief or some other immigration benefit—to make a heightened evidentiary showing of determinative factors is much stronger than where the alien has been charged with CIMT-based inadmissibility and "detained" for an INA §240 removal proceeding.

First, following the reforms of the REAL ID Act of 2005, an alien who has conceded removability has "the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion." 8 C.F.R. §1240.8(d)); INA §240(c); *see also Matter of Almanza*, 24 I&N Dec. 771 (BIA

[12] "Taylor [] stressed the benefits of simple application, so that sentencing not be burdened by a retrial of the original prosecution, and in Shepard it stressed the allocation of tasks between judge and jury under the sixth amendment. The Justices adopted a rule that prevented the sentencing judge in the new case from assuming a role that the Constitution assigns to the jurors in the first case. Neither of these reasons applies to immigration proceedings. They are not criminal prosecutions, so the sixth amendment and the doctrine of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), do not come into play."

2009). If that record is inconclusive or ambiguous, the petitioner has failed to meet this burden. *Garcia v. Holde*r, 584 F.3d 1288, 1290 (10th Cir. 2009).

The BIA has emphasized that, where an absence of moral turpitude is an element for a discretionary grant of relief from removal, there must be a finding that the alien is of good moral character. The INA definitional statute specifically provides that the fact that a person is not within any of the enumerated categories of INA §101(f) shall not preclude a finding that for other reasons such person is or was not of good moral character (last sentence of section 101(f)). *Matter of Turcotte*, 12 I&N Dec. 206, 208 (BIA 1967). The respondent, for any application where it is a necessary element of eligibility, has the burden of establishing good moral character, and "this is not necessarily borne by a showing that a particular act in violation of the law does not preclude a showing of good moral character." *Id.* (citations omitted). Even where specific conduct does not preclude a finding of good moral character under the enumerated categories of INA §101(f), that same conduct may nevertheless be considered in making a determination on good moral character in accordance with the last sentence of section 101(f). *Id.* (citing, *Matter of L-D- E-*, 8 I&N Dec. 399 (1959)).

Second, Congress has arguably authorized the agency to exercise broad discretion in screening out the class of non-citizens who lack moral character from entering, residing permanently in, or becoming naturalized citizens of the United States for longer than any other class of aliens. *See, e.g.*, *In re Spenser*, 22 F.Cas. 921 (C.D. Or. 1878) (perjury); Imm. Act of 1906, P.L. No. 59-338 §4 (1906) (naturalization); *In re Di Cerico*, 158 F. 905, 907 (D.N.Y. 1908); *In re Bonner*, 279 F.789 (D. Mont. 1922) (sale of alcohol); INA §101(f)(2), P.L. No. 82-414 (1952) (adultery). Unlike in a case where the

categorical approach is applied, the agency has never formulated an inflexible standard available to immigration judges for determining who should be granted discretionary relief, and each case must be judged on its own merits. *Matter of C-V-T*, 22 I&N Dec. 7, 11 (BIA 1998). Within this context, the Board ruled in *Matter of Marin* that an IJ, in exercising discretion under former INA §212(c) must after review of the record as a whole, balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of . . . relief appears in the best interest of this country." *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978).

In the specific context of good moral character determinations pursuant to cancellation and voluntary departure applications, the Board permissibly reviews the facts under a substantial evidence test. *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002). The BIA may exercise unfavorable discretion in finding a lack of good moral character based on criminal behavior that does not constitute an automatic bar. *Ikenokwalu-White v. INS*, 316 F.3d 798, 804 (8th Cir. 2003). However, the IJ decision must show consideration of all countervailing positive factors presented by the applicant in support of her claim that there is no good moral character statutory bar to the application for relief. *Torres-Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986).

Third, various waivers of removability do not apply to applications for immigration benefits where substantial evidence of the commission of a CIMT offense (as opposed to the record of conviction demanded in determinations using the categorical approach) exists. *See, e.g.*, *Matter of Bustamante*, 25 I&N Dec. 564 (BIA 2011) (no §212(h) waiver available); *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (no

§212(d)(11) family unity waiver available); *Matter of Roberts*, 25 I&N Dec. 294 (BIA 1991) (inquiry into circumstances surrounding commission of a crime permissible in exercise of discretion determinations).

The balancing of favorable and unfavorable factors in the record and the mechanistic approach to matching elements in the categorical approach are thus fundamentally different adjudications. The focus of the fact-intensive balancing test under *Marin* seems almost diametrically opposed to the mechanistic categorical approach, as imposed by the Supreme Court on EOIR and the circuit courts for determining the classification of state or foreign crimes in immigration removal proceedings. The former is concerned about the "best interest of this country," while the categorical approach serves to protect the Sixth Amendment interest of individuals in the finality and fairness of sentencing upon their conviction for a crime or crimes with immigration consequences. The BIA has every reason to maintain a clear agency distinction between the analysis of CIMT crimes in removal proceedings and discretionary relief applications.

Applying these considerations to the respondent *Silva-Trevino*, FAIR concludes that a heightened evidentiary showing regarding the *Marin* discretionary factors of value to the community, genuine rehabilitation, existence of a criminal record, and evidence of good or bad character or undesirability is clearly appropriate. *See Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998). However, the existence of hardship, both as a statutory element of certain relief from removal grounds and as a *Marin* balancing test factor, is a distinct inquiry. FAIR can find no authoritative case precedent or policy reason for concatenating

the adverse consequences of removal on the alien's cognizable relatives into an inquiry as to the alien's own showing or lack of good moral character.

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 19, 2015, a copy of this supplemental amicus brief was served on the parties below, by first class mail, postage prepaid, as directed by the Board of Immigration Appeals:

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