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ANALYSIS OF CRIMINAL CONVICTIONS

For more on criminal convictions, see boilerplate section titled "Charges of Removability"

I. Criminal Convictions

A. Definition of "Conviction"

Under INA § 101(a)(48)(A), a "conviction" is defined as follows:

> [A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
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> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Concerning the first prong of the "conviction" definition, "the entry of a 'formal judgment of guilt . . . by a court' occurs when judgment is entered on the docket, not when a defendant pleads guilty." Puello v. Bureau of Citizenship & Immigration Services, 511 F.3d 324, 327-34 (2d Cir. 2007). A "judgment is entered on the docket" after the defendant is sentenced and the judge signs the judgment. See id. at 329 ("[T]he definition uses the words 'formal judgment,' the common meaning of which denotes a document signed by the judge and entered on the docket, as in Federal Rule of Criminal Procedure 32(k)(1)"); see id at 333 ("In enacting IIRIRA, Congress had nothing new to say about the standard case in which a court found a defendant guilty, by way of either a verdict or a guilty plea, sentenced him or her, and entered a formal judgment on the docket."). However, Puello appeared to also indicate that the entry of a "formal judgment of guilt" may occur at the time of sentencing. See id. at 329 (in arriving at its holding, reasoning that, "in other contexts[,] the Supreme Court and this Court have considered the judgment to occur at the time of sentencing"); see id. at 333 (emphasis added) (noting that, "even at the time of Puello's guilty plea, defendants were not deemed convicted under the INA *until sentencing at the earliest*").

Further concerning the first prong of the "conviction" definition, a "court" means "[a] governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice." Matter of Rivera-Valencia, 24 I&N Dec. 484, 487 (BIA 2008)) (alteration in original). Moreover, a formal judgment of guilt entered by a court (such as a foreign, municipal, or military court) is a conviction "so long as it was entered in a 'genuine criminal proceeding'—that is, a proceeding that was 'criminal in nature under the governing laws of the prosecuting jurisdiction.'" Matter of Cuellar-Gomez, 25 I&N Dec. 850, 852 (BIA 2012) (quoting Rivera-Valencia, 24 I&N Dec. at 486-87).

A youthful offender status adjudication in New York is not a "conviction" under INA § 101(a)(48)(A), because New York's youthful offender adjudication procedure under article 720 of the N.Y. Criminal Procedure Law "is sufficiently analogous to the procedure under the [Federal Juvenile Delinquency Act] to classify that adjudication as a determination of delinquency, rather than as a conviction for a crime." Matter of Devison-Charles, 22 I&N Dec. 1362, 1365-73 (BIA 2000).

1. Post-Conviction Relief: Vacated and Expunged Convictions

For a vacated conviction to not be considered a "conviction" under INA § 101(a)(48)(A), the conviction must be vacated on the merits. Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003) ("[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a 'conviction' within the meaning of section 101(a)(48)(A)."); Saleh v. Gonzales, 495 F.3d 17, 25 (2d Cir. 2007) (according *Chevron* deference to the BIA's holding "that an alien remains convicted of a removable offense for federal immigration purposes when the predicate conviction is vacated simply to aid the alien in avoiding adverse immigration consequences and not because of any procedural or substantive defect in the original conviction"); Matter of Marroquin-Garcia, 23 I&N Dec. 705, 714 (2005) (holding that a vacated conviction is not a "conviction" only if it concerned "the merits of the underlying adjudication of guilt," such as "insufficiency of the evidence or for procedural errors at trial"); see also Sutherland v. Holder, 769 F.3d 144, 146 (2d Cir. 2014). Thus, a conviction vacated not on the merits (e.g., because of the respondent's rehabilitation or to avoid immigration hardships) is a "conviction" under INA § 101(a)(48)(A). Pickering, 23 I&N Dec. at 624; Saleh, 495 F.3d at 25; Marroquin-Garcia, 23 I&N Dec. at 714.

In Matter of Roldan, 22 I&N Dec. 512, 528 (BIA 1999), the BIA "held that a state conviction followed by rehabilitative action [such as an expungement or Certificate of Relief] that was not related to a procedural or substantive defect in the underlying criminal proceeding [is] still 'a convict[ion] within the meaning of [§] 101(a)(48)(A),' irrespective of whether the defendant could avail himself of [Federal First Offender Act (FFOA)] relief had he been tried in federal court." Wellington v. Holder, 623 F.3d 115, 118-19 (2d Cir. 2010) (citing Roldan, 22 I&N Dec. at 528); see also Matter of Salazar-Regino, 23 I&N Dec. 223, 235 (BIA 2002). In Wellington, the Second Circuit agreed with the BIA "that a Certificate of Relief or similar state rehabilitative treatment does not preclude use of the underlying offense as a basis for removal under [INA § 212(a)(2)(A)(i)(II)] or as a basis for ineligibility for cancellation of removal under [INA § 240A(b)(1)], unless the relief was related to a procedural or substantive defect in the criminal proceedings." 623 F.3d at 122. In reaching its decision, Wellington "assume[d], without deciding, that an exception to the definition of 'conviction' provided in § 101(a)(48)(A) of the INA exists for aliens whose federal charges are dismissed under the FFOA." 623 F.3d at 120.

A conviction vacated under article 440 of the New York Criminal Procedure Law is not a "conviction" under INA § 101(a)(48)(A) (because that statute is "neither an expungement statute nor a rehabilitative statute"), even if "the conviction was vacated for purposes of avoiding removal, and not for reasons relating to a constitutional or legal defect in the criminal

proceedings." Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378, 1379-80 (BIA 2000); see also Johnson v. Ashcroft, 378 F.3d 164, 171 (2d Cir. 2004) (citing Rodriguez-Ruiz, 22 I&N Dec. at 1378).

2. Finality of Conviction

"A pending collateral attack . . . does not disturb the finality of a conviction and therefore would not justify reopening of removal proceedings." Matter of Cardenas Abreu, 24 I&N Dec. 795, 802 (BIA 2009). However, if the alien's conviction is ultimately vacated, "he would be able to seek reopening to the same extent as an alien with a vacated conviction resulting from a successful collateral attack." Id.; see also Matter of Montiel, 26 I&N Dec. 555, 557 n.2 (BIA 2015) (noting that Matter of Ponce De Leon-Ruiz, 21 I&N Dec. 154, 156-5157 (BIA 1996), "recognize[ed] that the availability of post-conviction motions or other forms of collateral attack does not affect the finality of a conviction for immigration purposes unless the conviction has been overturned").

As of April 2015, there has been "a split of authority over whether the right to file a direct appeal of a criminal conviction must be exhausted or waived for the conviction to be 'final' under the statutory definition of a 'conviction' for immigration purposes." Montiel, 26 I&N Dec. at 558. Compare Orabi v. Att'y Gen., 738 F. 3d 535, 541-42 (3d Cir. 2014) (holding that during the pendency of a direct appeal as of right in a case not concerning deferred adjudication, a conviction is not sufficiently final for immigration law purposes), with Planes v. Holder, 686 F.3d 1033, 1034 (9th Cir. 2012) (collecting court of appeals cases that have held or stated that a formal judgment of guilt entered by a court is a "conviction" under INA § 101(a)(48)(A) "regardless [of] whether appeals have been exhausted or waived"). The BIA has noted that "a forceful argument can be made that," when Congress enacted the IIRIRA, it "intended to preserve the long-standing requirement of finality for direct appeals as of right in immigration law." Cardenas Abreu, 24 I&N Dec. at 798. The Second Circuit has taken a different approach than the BIA. Citing three decisions from three different courts of appeals, the Second Circuit stated, in dicta, that a "conviction" is final as soon as a judgment of guilt is entered by a court, regardless of whether direct appeals have been waived or exhausted. Puello v. Bureau of Citizenship & Immigration Services, 511 F.3d 324, 330 (2d Cir. 2007). However, in a 2010 unpublished decision, the Second Circuit remanded a case to the BIA to determine "whether a conviction is sufficiently final to warrant removal when a petitioner has a direct appeal pending." Abreu v. Holder, 378 F. App'x 59, 62 (2d Cir. May 24, 2010) (unpublished). In that unpublished decision, the Second Circuit "[a]ssum[ed] *arguendo* that the finality requirement remains in effect after the passage of the IIRIRA" and held that "an appeal reinstated pursuant to N.Y. Crim. Proc. Law § 460.30 is equivalent to any other direct appeal for the purposes of finality"). Id. at 61.

In Montiel, the BIA held, "Whether the pendency of a direct appeal warrants administrative closure will depend on the particular circumstances of each case." 26 I&N Dec. at 557. Applying the factors in Matter of Avetisyan, 25 I&N Dec. 688, 696 (BIA 2012), Montiel held that administrative closure was warranted, reasoning that the parties "filed a joint motion seeking administrative closure to await resolution of the direct appeal of the respondent's conviction," that "the respondent was convicted as a result of a jury trial, rather than on the basis

of a guilty plea," and that "his direct appeal concern[ed] the validity of the underlying conviction, as opposed to the sentence imposed." 26 I&N Dec. at 557-58. Recognizing that its case arose in a jurisdiction where "finality is not required for a conviction," Montiel noted that, "should the respondent prevail on the direct appeal of his criminal conviction, he would not be subject to removal on that basis." 26 I&N Dec. at 557-58.

B. Proof of Conviction

In any proceeding under the INA, "any of the following documents or records (or a certified copy of such an official document or record)" constitute proof of a criminal conviction: (1) "[a]n official record of judgment and conviction"; (2) "[a]n official record of plea, verdict, and sentence"; (3) "[a] docket entry from court records that indicates the existence of the conviction"; 4) "[o]fficial minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction"; (5) "[a]n abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence"; (6) "[a]ny document or record prepared by, or at the direction of, the court in which the conviction was entered that indicates the existence of the conviction;" and (7) "[a]ny document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record." INA § 240(c)(3)(B).

C. Length of Sentence

The term of imprisonment or a sentence for "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." INA § 101(a)(48)(B); see also Matter of S-S-, 21 I&N Dec. 900, 902 (BIA 1997). An alien sentenced to confinement in a substance abuse felony punishment facility (SAFPF) where he "is not free to leave the facility absent" a release date determination "by a 'qualified profession,'" imposed as a condition of probation, is a "period of . . . confinement" under INA § 101(a)(48)(B), and thus can constitute a "term of imprisonment [of] at least one year" under INA § 101(a)(43)(F). Matter of Calvillo Garcia, 26 I&N Dec. 697, 697-702 (BIA 2015).

An indeterminate sentence is measured by its maximum possible term. S-S-, 21 I&N Dec. at 903 (holding that where an alien was sentenced for a crime "for an indeterminate term not to exceed 5 years," he has been convicted of a crime for which a sentence of at least one year may be imposed). In the context of the federal Sentencing Guidelines, the Second Circuit has held that an indeterminate sentence of imprisonment is considered a sentence for the maximum term that was imposed. United States v. Galicia-Delgado, 130 F.3d 518, 520-22 (2d Cir. 1997); see id. at 522 ("[W]e conclude that Delgado's sentence of 30-90 months' imprisonment (*i.e.*, 2½-7½ years) constitutes a sentence of 'at least five years.'").

The "petty offense" exception under INA § 212(a)(2)(A)(ii)(II) applies where "the maximum penalty possible for the [alien's] crime . . . did not exceed imprisonment for one year

and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months." Matter of Ruiz-Lopez, 25 I&N Dec. 551, 551 (BIA 2011). Thus, if an alien was sentenced for a crime to imprisonment of one year or less but the maximum term of imprisonment for that crime exceeds one year, he is not eligible for that "petty offense" exception. See id. Moreover, a "presumptive sentence is not the maximum sentence possible"; thus, the maximum penalty possible for a state crime could exceed one year's imprisonment even though "the standard range of sentencing for [the] offense [is] from 0 to 60 days under the" state's sentencing guidelines. Id.

If an "alien's sentence has been modified to include a term of imprisonment following a violation of probation, the resulting sentence to confinement is considered to be part of the penalty imposed for the original underlying crime, rather than punishment for a separate offense." Matter of Ramirez, 25 I&N Dec. 203, 206 (BIA 2010). Thus, an alien's "365-day term of imprisonment, imposed following modification of his probation, represent[s] a 1-year sentence" and constitutes a "term of imprisonment [of] at least 1 year" under INA § 101(a)(43)(F). Id. at 204, 206.

Where a court modifies an alien's sentence *nunc pro tunc* to the date of the original sentencing, the revised sentence determines whether he has been convicted of a crime "for which the term of imprisonment [is] at least one year" under INA § 101(a)(43)(F), regardless of the criminal court's reasons for effecting the modification or reduction. Matter of Cota-Vargas, 23 I&N Dec. 849, 850-53 (BIA 2005) (holding that a sentence is not a "term of imprisonment [of] at least 1 year" under INA § 101(a)(43)(F) if a court reduced the "sentence from 365 days to 240 days, nunc pro tunc," even though "the sentence was reduced solely for the purpose of affecting the immigration consequences of the conviction, and not to correct any substantive or procedural defect in the original judgment"); Matter of Song, 23 I&N Dec. 173, 174 (BIA 2001) (holding that a sentence is not a "term of imprisonment [of] at least 1 year" under INA § 101(a)(43)(F) if a court "vacated nunc pro tunc" the sentence and "ordered the sentence revised nunc pro tunc to 360 days, which was suspended"). [1]

II. Categorical, Modified Categorical, and Circumstance Specific Approaches

A. Burdens of Proof

DHS bears the burden of establishing by clear and convincing evidence that an alien is deportable as charged. See INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a); see also Woodby v. INS, 385 U.S. 276, 286 (1966). The categorical and modified categorical approaches are used to determine whether an alien is removable based on a crime. See Moncrieffe v. Holder, 133 S. Ct. 1678, 1683-84 (2013); see also Matter of Silva-Trevino, 26 I&N Dec. 826 (BIA 2016) (categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a crime involving moral turpitude). Under the categorical approach, the "'singular circumstances of an [alien's] crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under [the alien's statute of

[1] In an unpublished decision, Wilks v. Gonzales, 218 F. Appx. 55, 57 (2d Cir. 2007) (unpublished), the Second Circuit appeared to assume the validity of Cota-Vargas.

conviction] is relevant.'" Flores v. Holder, 779 F.3d 159, 165 (2d Cir. 2015). Thus, the categorical approach requires looking to whether the conviction statute "defining the crime of conviction categorically fits within" a removability statute." Id. at 165.

An applicant bears the burden of establishing eligibility for relief or protection from removal. INA § 240(c)(4)(A)(i); 8 C.F.R. § 1240.8(d); Matter of Almanza-Arenas, 24 I&N Dec. 771, 774 (BIA 2009). An applicant's burden to prove his eligibility for relief does not alter the scope of the inquiry permitted by the categorical approach. Martinez v. Mukasey, 551 F.3d 113, 120-22 (2d Cir. 2008). Because the categorical approach prohibits any inquiry beyond the statute of conviction, it is error to require, at the categorical stage, an applicant to prove the *facts* of his crime to show that he has not been convicted of a removable crime. *Id.*

B. Categorical Approach

In Moncrieffe v. Holder, the Supreme Court reaffirmed the application of the categorical approach for determining whether a criminal conviction constitutes an aggravated felony. 133 S. Ct. 1678, 1684 (2013) ("When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA, we generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA."). Under the categorical approach, the Court "looks 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a" removable offense. Id. (citing Gonzales v. Duenas–Alvarez, 549 U.S. 183, 186 (2007)). Thus, the Court "must presume that [a] conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." Id. (quoting Johnson v. United States, 559 U.S. 133, 135 (2010)); see also id. (citing Shepard v. United States, 544 U.S. 13, 24 (2005)) (internal quotation marks omitted) (ellipses and alterations in original) ("[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved . . . facts equating to [the] generic [federal offense]."); Mathis v. United States, 579 U. S. ____ (2016) (holding that because the elements of Iowa's burglary law are broader than those of generic burglary, petitioner's prior convictions cannot give rise to the Armed Career Criminal Act's sentence enhancement).

The categorical approach is not only concerned with the elements of a crime. A state "conviction for possession with intent to distribute marijuana, standing alone," is not a felony punishable under the Controlled Substances Act ("CSA"), because the fact of the conviction "does not reveal whether either remuneration or more than a small amount of marijuana was involved" and the conviction could thus "correspond to either the CSA felony or the CSA misdemeanor."[2] Moncrieffe, 133 S. Ct. at 1686-87. For a state crime to constitute a felony punishable under the CSA, "not only must the state offense of conviction meet the 'elements' of the generic federal offense defined by the INA, but the CSA must punish that offense as a felony." Id. at 1687. Thus, a state conviction for possession with intent to distribute marijuana,

[2] The CSA makes it a felony to "knowingly or intentionally . . . "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," 21 U.S.C. § 841(a)(1), but the CSA contains a "mitigating exception" and treats such an offense as a misdemeanor if the it is committed "by distributing a small amount of marihuana for no remuneration," 21 U.S.C. § 841(b)(4).

standing alone, demonstrates "a crime that may be either a felony or a misdemeanor, depending upon the presence or absence of certain factors that are not themselves elements of the crime. And so to qualify as an aggravated felony, a conviction for the predicate offense must necessarily establish those factors as well." Id. at 1687.

A state crime can categorically match an aggravated felony under INA § 101(a)(43) even if the state crime lacks a jurisdictional element of the aggravated felony statute, at least where the substantive elements of the state and generic crime are "'substantially the same.'" Matter of Bautista, 25 I&N Dec. 616, 620 (BIA 2011) (quoting Matter of Vasquez-Muniz, 23 I&N Dec. 207, 211 (BIA 2002)); see also Weiland v. Lynch, No. 14-3631-AG, 2016 WL 3548350, at *1 (2d Cir. June 29, 2016) (finding that a state conviction for possession of child pornography under NYPL § 263.11 qualified as an aggravated felony despite lacking the jurisdictional element of interstate commerce present in the federal analogue statute). Thus, attempting to "intentionally damage[] a building or motor vehicle by starting a fire or causing an explosion, in violation of NYPL §§ 110-150.10, is a crime "described in" INA § 101(a)(43)(E)(i), even though that crime does not require—as does the relevant generic arson crime requires—"that the property be 'used in interstate or foreign commerce.'" Bautista, 25 I&N Dec. at 618-20.

At the categorical stage, the Court must apply the "realistic probability test." Matter of Ferreira, 26 I&N Dec. 415, 419 (BIA 2014) cf. Matter of Silva-Trevino, I&N Dec. 826 (BIA 2016) (in the context of a CIMT, applying the "realistic probability" test unless controlling circuit law dictates).[3] The Court's "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be '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.'" Moncrieffe, 133 S. Ct. at 1684-85 (quoting Duenas-Alvarez, 549 U.S. at 193). The realistic probability test must be applied "even where a State statute on its face covers a type of object or substance not included in a Federal statute's generic definition." Ferreira, 26 I&N Dec. at 420-21. To establish that realistic probability and thereby defeat a categorical comparison, an alien "'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 (nongeneric) manner for which he argues.'" Ferreira, 26 I&N Dec. at 419 (quoting Duenas-Alvarez, 549 U.S. at 193). Concerning stabling a realistic probability, the Supreme Court has stated that the alien must "demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." Moncrieffe, 133 S. Ct. at 1693. In contrast, the BIA has stated that "there must be a realistic probability that the State would prosecute conduct falling outside the generic crime," Ferreira, 26 I&N Dec. at 420-21 (BIA 2014), but the BIA has also indicated that there must be a realistic probability that the State "actually prosecutes" such conduct, id. at 421, and has also indicated that there must be a realistic probability that the State successfully prosecutes conduct falling outside the generic crime, Matter of Chairez-Castrejon, 26 I&N Dec. 349, 356, 358 (BIA 2014), vacated in part on other grounds by Matter of Chairez, 26 I&N Dec. 478 (BIA 2015). In Matter of Mendoza-Osorio, the BIA noted that proof of a conviction is required to demonstrate

[3] In addressing the disparity between Federal courts of appeals on whether to extend the realistic probability test to the context of crimes involving moral turpitude, the BIA held that "we will apply the Supreme Court's realistic probability test in deciding whether an offense categorically qualifies as a crime involving moral turpitude, unless controlling circuit law expressly dictates otherwise." *Matter of Silva-Trevino*, 26 I&N Dec. 826, 832 (BIA 2016) (applying the Fifth Circuit's "minimum reading" approach to the categorical inquiry).

that, under the state law, there is a realistic probability of a "successful prosecution" for conduct that is outside the scope of the ground of removability in question. 26 I&N Dec. 703, 707 (BIA 2016). The BIA was "not persuaded" that a realistic probability of a successful prosecution may be shown by looking only to a charging document or redacted complaint that did not necessarily result in a conviction because "a judge or jury may have found that the facts as charged were insufficient to support a conviction." Id. at n.4. Similarly, the BIA stated that cases concerning pretrial motions to dismiss that were granted, cases that did not result in a conviction, and cases vacating convictions were insufficient to satisfy the realistic probability test. Id. at n.4, 709 n.6.

In Ferreira, the BIA applied the realistic probability test to determine whether a conviction under section 21a-277(a) of the Connecticut General Statutes Annotated is categorically a felony punishable under the CSA. 26 I&N Dec. at 415-16. The BIA found that the state statute "corresponds to a felony punishable under the CSA since the maximum term of imprisonment exceeds 1 year" and punishes "conduct that is an offense under the CSA: possession of a controlled substance with intent to distribute. *See* 21 U.S.C. § 841(a)(1)." Ferreira, 26 I&N Dec. at 421. Even though the state statute on its face covered substances not punishable by the CSA, the BIA held that the realistic probability test must be applied. Id. at 420-22.

Notably, in Matter of Silva-Trevino, 26 I&N Dec. 826 (BIA 2016), the BIA sought to develop a uniform standard for determining whether a particular criminal offense is a crime involving moral turpitude. In examining the categorical approach with respect to the "realistic probability" test, the BIA held that "we will apply the Supreme Court's realistic probability test in deciding whether an offense categorically qualifies as a crime involving moral turpitude, unless controlling circuit law expressly dictates otherwise." *Id*. at 832. The BIA then applied the Fifth Circuit's "minimum reading" approach to the respondent's crime under section 21.11(a)(1) of the Texas Penal Code, concluding that the crime was not categorically a crime involving moral turpitude because section 21.11(a)(1) is "broad enough to punish behavior that is not accompanied by the defendant's knowledge that the victim was a minor, the offense does not necessarily involve moral turpitude." *Id*. at 833.

1. Modified Categorical Approach

In determining whether a statute is divisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016), Immigration Judges may consider or "peek" at an alien's conviction record only to discern whether statutory alternatives define "elements" or "means," provided State law does not otherwise resolve the question. *Matter of Chairez-Castrejon*, 27 I&N Dec. 21 (BIA 2017). When evaluating divisibility, immigration judges apply the law of their circuit's court of appeals. Matter of Chairez, 26 I&N Dec. 478, 481-82 (BIA 2015).[4] In the Second Circuit, divisibility

[4] In Matter of Chairez, 26 I&N Dec. 349, 353-54 (BIA 2014), vacated in part on other grounds by Matter of Chairez, 26 I&N Dec. 478 (BIA 2015), the BIA withdrew from its decision in Matter of Lanferman, 25 I&N Dec. 721 (BIA 2012), "to the extent that it is inconsistent with Descamps" concerning divisibility. In Lanferman, the BIA distinguished between criminal and immigration proceedings to find that a statute's divisibility for immigration purposes is governed by an approach more expansive than the one used in criminal sentencing proceedings. 25 I&N Dec. at 728. However, the BIA in Chairez explained, "The Federal courts have not accorded deference to our application of divisibility, particularly given that Descamps itself makes no distinction between the criminal and immigration contexts and the circuit courts have held that the approach to statutory divisibility announced there

analysis is governed by" Descamps v. United States, 133 S. Ct. 2276 (2013), which "clarified that a statute is 'divisible,' and thus subject to the modified categorical approach, when it 'lists multiple, alternative elements, and so effectively creates several different . . . crimes.'" Flores v. Holder, 779 F.3d 159, 165 (2d Cir. 2015) (quoting Descamps, 133 S. Ct. at 2285).[5] According to the BIA, Descamps's approach to divisibility is as follows:

> A criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,' more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard.

Matter of Chairez-Castrejon, 26 I&N Dec. 349, 353 (BIA 2014), vacated in part on other grounds by Matter of Chairez, 26 I&N Dec. 478 (BIA 2015) (citing Descamps, 133 S. Ct. at 2281, 2283); see also Descamps, 133 S. Ct. at 2281 (noting that a divisible statute is one that "sets out one or more elements of the offense in the alternative" and "one alternative . . . matches an element in the generic offense, but the other . . . does not"). A statute is not subject to the modified categorical approach if it defines a crime "not alternatively, but only more broadly than the generic offense." Descamps, 133 S. Ct. at 2282; see id at 2286 (noting that resort to the modified categorical approach is permitted only when a statute defines a crime not "overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not"); see United States v. Beardsley, 691 F.3d 252, 258 (2d Cir. 2012) ("[T]he modified categorical approach is appropriate only where a statute is divisible into qualifying and non-qualifying offenses, and not where the statute is merely worded so broadly to encompass *conduct* that might fall within with the definition of the federal predicate offense . . . as well as other conduct that does not. Where a statute of prior conviction is merely broad, but does not comprise separate offenses, some of which qualify as federal predicates and others of which do not, . . . courts [are limited] to the traditional, strict categorical approach.").

2. Nature of Modified Categorical Approach

The modified categorical approach allows a court to look beyond the statute of conviction, to the "record of conviction," for the limited purpose of determining which particular crime of a divisible statute the alien was convicted of violating. Moncrieffe v. Holder, 133 S. Ct.

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applies in removal proceedings in the same manner as in criminal sentencing proceedings." Chairez, 26 I&N Dec. at 354. Because the BIA was "not given deference on this issue," it held that, "going forward [it is] also bound to apply divisibility consistently with the individual circuits' interpretation of divisibility under Descamps." Id. In Matter of Chairez-Castrejon, 26 I&N Dec. 478, 484 (BIA 2015), the BIA noted, "Immigration Judges should continue to follow the interpretation of divisibility under Chairez[, 26 I&N Dec. 349,] absent applicable circuit court authority to the contrary."

[5] On an appeal, the BIA may "refuse to consider an issue that could have been, but was not, raised before an [immigration judge]." Prabhudial v. Holder, 780 F.3d 553, 555 (2d Cir. 2015). Thus, where an alien failed to assert before the immigration judge ("IJ") that Descamps prohibits applying the modified categorical approach to his conviction statute, it was proper for the BIA to hold that the alien "waived the argument that the categorical rather than the modified categorical approach applied to his sale conviction." Prabhudial, 780 F.3d at 555.

1678, 1684 (2013); see also Descamps v. United States, 133 S. Ct. 2276, 2281 (2013) (noting that the modified categorical approach allows the Court to consider the record of conviction "to determine which alternative formed the basis of the defendant's prior conviction"); Dulal-Whiteway v. U.S. Dep't of Homeland Sec., 501 F.3d 116, 131 (2d Cir. 2007) abrogated on other grounds by Nijhawan v. Holder, 557 U.S. 29 (2009) ("The 'necessarily pleaded' requirement links the record of conviction inquiry to the divisibility inquiry: once we determine that a criminal statute is divisible, because one or more of its elements can be satisfied both by conduct that is removable and by conduct that is not, we may consult the record of conviction to determine which type of conduct represents the basis of the conviction."); Matter of Vargas-Sarmiento, 23 I&N Dec. 651, 654 (BIA 2004) (citing Dickson v. Ashcroft, 346 F.3d 44, 48-49 (2d Cir. 2003)) ("When reviewing a conviction under a divisible statute, it is permissible to refer to the record of conviction for the limited purpose of determining under which part of the divisible statute the defendant was convicted."). The modified categorical approach is a means to implement the categorical approach in the case of a divisible statute; thus, the Court must "focus on the elements, rather than the facts, of [the] crime" and compar[e] those elements with the generic offense's." Descamps, 133 S. Ct. 2276 at 2285 (2013).

If an alien's conviction was for violating a divisible statute, the Court proceeds to the modified categorical approach, which permits the Court to consider the "record of conviction" in order to elucidate the relevant elements comprising the conviction. See Descamps, 133 S. Ct. at 2281 (2013). The record of conviction includes the charging document, jury instructions, a verdict or judgment of conviction, a record of the sentence, a signed plea agreement, the plea colloquy transcript, or "some comparable judicial record" of the factual basis for the plea. Moncrieffe, 133 S. Ct. at 1684; Shepard v. United States, 544 U.S. 13, 26 (2005); Ganzhi v. Holder, 624 F.3d 23, 30 (2d Cir. 2010) (citing INA § 240(c)(3); 8 C.F.R. § 1003.41(a)); Dulal-Whiteway., 501 F.3d at 129 (citing INA § 240(c)(3)); see also Shepard, 544 U.S. at 20 ("In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, Fed. Rule Crim. Proc. 11(a)(3), shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea."). Police reports and complaint applications are not part of the record of conviction and thus cannot be considered when applying the modified categorical approach. Shepard, 544 U.S. at 21-24 (2005).

Concerning convictions following a trial, the Court "may rely only upon facts actually and necessarily found beyond a reasonable doubt by a jury or judge in order to establish the elements of the offense, as indicated by a charging document or jury instructions." Dulal-Whiteway, 501 F.3d at 131. For example, in the case of alien who was convicted of a burglary statute that "include[s] entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction" to show that the alien was convicted of burglary by entering a building. Taylor v. United States, 495 U.S. 575, 602 (1990).

Concerning convictions following a plea, the Court "may rely only upon facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, [] plea colloquy transcript," Dulal-

Whiteway, 501 F.3d at 131, or "some comparable judicial record" of the plea's factual basis, Moncrieffe, 133 S. Ct. at 1684. "If a statute 'requires no finding of the particular element at issue and there is no charging document that narrows the charge to those limits, the only certainty in a pleaded case of that finding lies in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea.'" Akinsade v. Holder, 678 F.3d 138, 144-45 (2d Cir. 2012). The Court cannot make inferences, even reasonable ones, to determine which particular crime of a divisible statute the alien was convicted of violating. Id. at 146 (citing Wala v. Mukasey, 511 F.3d 102, 109 (2d Cir. 2007)). Thus, if a plea colloquy transcript shows that the alien "admitted to taking 'two rings,' 'official jewelry,' 'a first union credit card,' and 'two watches' from the victim's home," that is insufficient evidence to establish that the alien actually admitted to taking the "items with the intent to appropriate them permanently." Wala, 511 F.3d at 109.

"[F]actual admissions and judicial findings in the context of a guilty plea must be adopted or confirmed by the defendant to be considered in determining the nature of the defendant's crime by the modified categorical approach." United States v. Moreno, --- F.3d ---, No. 14-4700-CR, 2016 WL 691128, at *4 (2d Cir. 2016). Thus, "statements made during a plea colloquy by someone other than the defendant" may be considered under "the modified categorical approach only when the defendant adopted the statements in some overt fashion." Id. at *4. Moreno held that where "a defendant pleads guilty prior to a prosecutor's allegations about the offense conduct, and does not confirm those allegations in any manner, the defendant cannot be said to have assented to, or adopted, those allegations." Id. If the defendant did not assent to or adopt a prosecutor's allegations, "the prosecutor's account may not be used to establish, under the modified categorical approach, the particular portion of a divisible statute that the defendant violated." Id.

The Third Circuit has noted that a New York misdemeanor complaint may not be part of the record of conviction, because the complaint may not be the charging document to which the alien pleaded guilty to. Thomas v. Att'y Gen. of U.S., 625 F.3d 134, 144-45 (3d Cir. 2010). In New York, a criminal defendant has the right to be prosecuted by an "information," a document with higher evidentiary standards than a misdemeanor complaint. NYCPL §§ 100.10(1), (4). A misdemeanor complaint must "be replaced by an information," unless the defendant "waive[s] prosecution by information and consent[s] to be prosecuted upon the misdemeanor complaint." NYCPL § 170.65(1), (3). "If the misdemeanor complaint is supplemented by a supporting deposition and such instruments taken together satisfy the requirements for a valid information, such misdemeanor complaint is deemed to have been converted to and to constitute a replacing information." NYCPL § 170.65(1). Absent "an effective admonition of the right to be prosecuted by information, . . . a waiver or consent to prosecution by misdemeanor complaint cannot be presumed." People v. Weinberg, 34 N.Y.2d 429, 431 (1974). Thus, the Third Circuit has been "unwilling to accept" that a "police officer's written statements" were "the relevant accusatory instruments under New York Crim. Proc. Law § 100.10, as [it was] unable to find, and [it was] not . . . directed to, any authority establishing that a police officer's lone written statement, punishable if false under § 210.45, constitutes an 'information' or a 'misdemeanor complaint.'" Thomas, 625 F.3d at 144-45. The Third Circuit further held that, "even if the statements alone qualified as informations or misdemeanor complaints, without some judicial indication of whether the statement was processed as an information or a misdemeanor complaint, we would be unable to determine if such written statements were the relevant

charging documents under New York law," because "without documentation as to the type of accusatory instrument that was filed, we could not ascertain if the defendant had to waive his right to prosecution by information." Id. at 145 (citing NYCPL § 170.65(1), (3); see also Evanson v. Attorney Gen. of U.S., 550 F.3d 284, 293 n.7 (3d Cir. 2008) ("[B]ecause the criminal complaint was superceded by the criminal information in this case, it is not the relevant charging document and is not an appropriate source under the modified categorical approach.").

C. Circumstance Specific Approach

For more on circumstances-specific approach, see boilerplate section titled "Charges of Removability"

When determining whether a conviction was for a removable offense, a circumstance-specific approach (i.e., an inquiry into the nature of the alien's conduct) must sometimes be applied instead of the categorical and modified categorical approaches. In Nijhawan v. Holder, the Supreme Court held that the monetary threshold in INA § 101(a)(43)(M)(i) "applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." 557 U.S. 29, 40 (2009). Nijhawan reasoned, in part, that in subparagraph (M)(i), the "words 'in which' (which modify 'offense') can refer to the conduct involved '*in*' the commission of the offense of conviction, rather than to the elements *of* the offense." Id. at 39. Nijhawan further noted that to apply a categorical approach "would leave subparagraph (M)(i) with little, if any, meaningful application," because the Supreme Court could not find a "widely applicable federal fraud statute that contains a relevant monetary loss threshold." Id. Because the evidence in Nijhawan established that the alien's "conviction involved losses considerably greater than $10,000," the Supreme Court concluded that he his conviction was for an aggravated felony under INA § 101(a)(43)(M)(i). Id. at 42-43. The BIA has held that the circumstance-specific approach applies when dealing with INA § 212(h), Matter of Martinez Espinoza, 25 I&N Dec. 118, 124 (BIA 2009), and when dealing with INA § 237(a)(2)(B)(i), Matter of Dominguez-Rodriguez, 26 I&N Dec. 408, 408 (BIA 2014), abrogated on other grounds by Mellouli v. Lynch, 135 S.Ct. 1980 (2015). Lastly, Nijhawan indicated that the circumstance-specific approach may also apply when determining whether a conviction was for an aggravated felony under subparagraphs (K)(ii), (M)(ii), (N), and (P) of INA § 101(a)(43). 557 U.S. at 36-38.