



Immigration Law Advisor

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Affording Material Support to a Terrorist Organization – A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place

by Linda Alberty

A sixteen-year-old Colombian boy is kidnapped by paramilitary soldiers and forced to dig graves for the victims of their killing spree; his application for asylum in the United States is denied because his aid to the terrorists renders him ineligible.¹ During the Liberian civil war, a woman's home is invaded, her father is murdered, she is gang-raped and abducted, and during her captivity, she is forced to cook and do laundry for the rebels.² When she attempts to adjust her status, the application is pretermitted because of her inadmissibility for providing material support to a terrorist group. An Iraqi acts as a translator for the United States forces in his country, receives multiple commendations and acknowledgment of his bravery and hard work, and is admitted to the United States under a special visa program. However, his application for lawful permanent resident status is denied, because once he was a member of the Kurdish Democratic Party, an undesignated terrorist organization.³ Sympathetic stories similar to these are presented to the Board of Immigration Appeals and the Immigration Judges with increasing frequency, but how are applications for relief from such individuals to be adjudicated in light of the bar to admission to aliens who provided material support to a terrorist organization? This article endeavors to set out the legal framework and discusses recent developments which may resolve these difficult situations.

Background

Under section 212(a)(3)(B)(iv)(VI) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), an alien who affords material support⁴ for the commission of a terrorist activity to a terrorist organization⁵ or to an individual who has committed, or plans to commit, a terrorist

activity⁶, is inadmissible or deportable and is ineligible for most immigration benefits, including but not limited to asylum under section 208(b)(2)(A)(v) of the Act, 8 U.S.C. § 1158(b)(2)(A)(v); withholding of removal under section 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv); adjustment of status under section 245(a)(2), 8 U.S.C. § 1255(a)(2); cancellation of removal under section 240A(b)(2)(A)(iv), 8 U.S.C. § 1229b(b)(2)(A)(iv); refugee admission pursuant to section 207(c)(3), 8 U.S.C. § 1157(c)(3); temporary protective status under section 244(c)(2)(A)(iii)(III), 8 U.S.C. § 1254a(c)(2)(A)(iii)(III); and section 203(B) of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, title II, 111 Stat. 2193 (1997), amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997) (NACARA). Notably, although an alien is inadmissible for providing material support to a terrorist organization designated as “Tier I,” as listed on the Foreign Terrorist Organization List, or “Tier II,” as included on the Terrorist Exclusion List, an alien is not inadmissible for providing material support to an undesignated, or “Tier III” terrorist organization, if he or she can show, by clear and convincing evidence, that he or she did not know and should not reasonably have known, that the organization was a terrorist organization. Section 212(a)(3)(B)(iv)(VI)(dd) of the Act.

Further discussion of the definitions of these Tier designations is merited here because these designations are significant. “Tier I” designated foreign terrorist organizations must engage in terrorist activity, as defined in section 212(a)(3)(B) of the Act, or terrorism as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. § 2656f(d)(2)), or retain the capability and intent to engage in terrorist activity or terrorism that threatens United States nationals or U.S. national security. Examples of Tier I groups include Hamas and al Qa’ida.

“Tier II” organizations commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; plan or prepare a terrorist activity; gather information on potential targets; or provide material support to further terrorist activity. Section 411 of the Patriot Act of 2001 (8 U.S.C. § 1182). Examples of Tier II groups are Afghan Support Committee and The Lord’s Resistance Army.

“Tier III” organizations are known as undesignated terrorist organizations. The Foreign Terrorist Organization

List and Terrorist Exclusion List can be found on the State Department’s Office of Counterterrorism homepage at www.state.gov/s/ct/list/.

The Board addressed the material support bar in *Matter of S-K-*, 23 I&N Dec. 936 (2006) (*S-K- I*), when a panel affirmed an Immigration Judge’s decision that a Burmese Christian ethnic Chin who had contributed money to the Chin National Front (CNF) was statutorily ineligible for asylum and withholding of removal because she provided material support to a terrorist organization. The Board determined that the respondent was eligible for deferral of removal under the Convention Against Torture and granted her that relief, remanding the case for background and identity checks.

The Board identified two major questions arising in the case: (1) what standards or definitions should be utilized to determine whether “material support” should be defined narrowly or broadly; whether the provider’s *mens rea*⁷ should be considered; and whether material support includes providing financial support and an attempt to donate goods as the respondent had done; and (2) to what extent should an organization’s purpose and goals – in the case of the CNF, purportedly using justifiable force against an illegitimate regime – be factored in to an assessment of whether the organization is engaged in terrorist activity.⁸ The Board ultimately concluded that the statutory scheme, particularly the bar to relief under section 212(a)(3)(B)(i)(I) of the Act, precludes a “totality of the circumstances” approach to determine whether a group falls within the definition of a terrorist organization as contemplated by section 212(a)(3)(B)(vi) of the Act.⁹ The Board additionally rejected the respondent’s argument that a link must exist between the provision of material support and the recipient terrorist organization’s intended use of the support to further a terrorist activity.¹⁰ Finally, the Board reasoned that it need not decide the question of whether the definition of “material” expands so broadly as to encompass even *de minimis*¹¹ forms of aid, since the respondent’s financial contribution was sufficiently substantial to affect the CNF’s ability to achieve its goals.¹²

In his concurring opinion, Acting Chairman Osuna questioned whether the result reached by applying the law to the respondent in *S-K-* was actually that intended by Congress.¹³ He observed that section 212(d)(3) of the Act provided a waiver provision that the Department of

Homeland Security (DHS) was authorized to exercise, and suggested that the respondent in *S-K* was an individual to whom the grant of such a waiver was appropriate.¹⁴

The Section 212(d)(3)(B) Waiver Authority

Until December 26, 2007, section 212(d)(3)(B) of the Act provided that the DHS Secretary or the Secretary of State, in consultation with one another and with the Attorney General, “may conclude in such secretary’s sole unreviewable discretion that . . . subsection (a)(3)(B)(iv)(VI) shall not apply with respect to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity. . . .” It appears that the waiver authority was exercised sparingly – in 2006, Secretary of State Rice exercised her authority to waive the material support bar in the refugee admission context for Burmese Karen individuals who had provided material support to the Karen National Union (KNU) or Karen National Liberation Army (KNLA), and for Chin Burmese refugees who provided material support to the CNF or Chin National Army (CNA).¹⁵ In January 2007, she exercised her discretionary waiver authority to create “group-based exemptions” for refugee resettlement applicants who had provided material support to 10 additional organizations, irrespective of whether the support had been provided under duress.¹⁶

In February 2007, DHS Secretary Chertoff exercised his authority to recognize those same group-based exemptions without regard to whether the support was provided under duress. He also exercised his authority to waive the material support inadmissibility bar for certain aliens if the material support was provided under duress to an undesignated terrorist organization and the totality of the circumstances justified the favorable exercise of discretion, thus recognizing the “duress exemption.” He initially withheld eligibility for the “duress exemption” to individuals who provided material support to Tier I and Tier II terrorist organizations. Shortly thereafter, however, he authorized the U.S. Citizenship and Immigration Services (USCIS) to consider the duress exemption in adjudicating cases for aliens who provided material support to the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army of Colombia (ELN), both Tier I terrorist organizations.¹⁷ This was significant both because it was the first time he moved forward with his exemption authority for these organizations, and because the authorization memorandum provided adjudication guidelines to CIS.

In the meantime, Secretary Chertoff issued a directive¹⁸ to DHS instructing that, if warranted by the totality of the circumstances, the material support bar under section 212(a)(3)(B)(iv)(VI) shall not apply to aliens who provided material support under duress. He specified that a “duress exemption” would be available to an alien who could satisfy the threshold requirements of:

- seeking a benefit or protection under the Act and having been determined to be otherwise eligible for the benefit or protection;
- undergoing and passing relevant background and security checks;
- fully disclosing in all relevant applications and interviews with U.S. government representatives the nature and circumstances of each provision of material support; and
- posing no danger to the safety and security of the United States.

The Secretary identified factors to consider in determining whether the support had been provided under duress, including:

- whether the applicant reasonably could have avoided or taken steps to avoid providing material support;
- the severity and type of harm inflicted or threatened to obtain the support,
- to whom the threat or harm was directed, and, in cases of threat alone,
- the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted.¹⁹

The DHS Secretary also listed factors to be considered under the totality-of-the-circumstances²⁰ analysis in addition to the duress-related factors, to include:

- the amount, type and frequency of material support provided;
- the nature of the activities committed by the terrorist organization;
- the alien’s awareness of such activities;
- the length of time since the material support was provided;

- the alien's conduct in the interim; and
- any other relevant factor.²¹

The A.G. Certifies Matter of S-K- Following DHS Waiver Actions

Following DHS's designation of the group-based exemptions, the Attorney General certified to himself *Matter of S-K-*, *supra*.²² After observing that Secretary Chertoff had determined that the material support bar did not apply to an alien who had supplied material support to the CNF and who satisfied certain criteria, he remanded *S-K-I* to the Board.²³ During the pendency of the remand, legislation was enacted bearing a significant impact on the material support bar and related inadmissibility grounds (a detailed discussion follows in the next section of this article). In response, on March 11, 2008, the Board, in *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008) ("*S-K-II*") found that the respondent S-K-, who was no longer subject to the material support bar for her contributions to the CNF/Chin National Army, was eligible for asylum and granted her that relief. Significantly, the Board clarified that *S-K-I* continues to control determinations involving the applicability and interpretation of the material support bar, except as to those groups no longer classified as terrorist organizations pursuant to section 691(b) of legislation known as the Consolidated Appropriations Act of 2008²⁴, Division J of Pub. L. No. 110-161, 121 Stat. 1844, 2365 (enacted Dec. 26, 2007), which will be discussed in depth in the next section

The Consolidated Appropriations Act of 2008

The Consolidated Appropriations Act of 2008 (CAA), which expanded the discretionary authority of the Secretaries of State and of DHS to waive certain terrorism-related inadmissibility grounds, took effect on December 26, 2007.²⁵ One of its provisions, section 691(a), authorizes the Secretaries of State and Homeland Security, in consultation with the Attorney General, to exempt section 212(a)(3)(B)'s terrorism-related inadmissibility grounds for undesignated terrorist organizations (known as "Tier III" organizations), as defined under section 212(a)(3)(B)(vi)(III) of the Act, or for an individual alien who provided material support to such an undesignated terrorist organization. This section expressly limits judicial review of a determination under the waiver provision to review a final order of removal to the extent provided under section 242(a)(2)(D) of

the Act, 8 U.S.C § 1252(a)(2)(D). Section 691(a) also precludes the Secretary of State from exercising the waiver discretion under section 212(d)(3)(B)(i) while an alien is subject to removal proceedings.²⁶

Section 691(b) of the CAA named certain groups²⁷ that were not to be considered terrorist organizations under the Act based on activities prior to the CAA's December 26, 2007, enactment. It is this provision that the Board invoked in *S-K-II* as the CNF was one of these organizations. In addition, section 691(d) designated the Taliban a Tier I terrorist organization for purposes of section 212(a)(3)(B) of the Act. Section 691(e) imposed a reporting requirement on DHS to advise the congressional Judiciary committees of enumerated statistical and descriptive information relating to material support for terrorist organizations. Finally, section 691(f) specifies that the amendments shall apply to removal proceedings instituted before, on, or after their December 27, 2007, effective date; and to grounds for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after that date.²⁸

One effect of the amendments is to extend the availability of the existing waiver authority to members of Tier III groups; to aliens who engaged in terrorist activity or association so long as it was not on behalf of a Tier I or Tier II terrorist group; to aliens who engaged in a terrorist activity or association on behalf of a Tier I or Tier II terrorist group but did so under duress or without *mens rea*; and to spouses and children inadmissible under section 212(a)(3)(B)(i)(IX) who are not statutorily excepted under section 212(a)(3)(B)(ii) for lack of knowledge of their relative's terrorist-related activity or for renouncing the activity.²⁹

However, the members of Tier I and Tier II terrorist groups are still not eligible for a waiver. Also ineligible are persons who knowingly and voluntarily engaged in, endorsed, espoused, or persuaded others to endorse or espouse terrorist activity on behalf of a Tier I or Tier II group; and persons who knowingly and voluntarily received military training from a Tier I or Tier II terrorist group.³⁰

Status of Pending and Future Cases

Since requests for material support bar waivers may originate pre-admission, upon admission, and in conjunction with removal grounds and applications for

relief during removal proceedings, it would appear that DHS will have to contemplate systems for adjudicating waiver applications in all of those contexts. At present, DHS has not announced a procedure to implement the waiver authority for applicants who are already in removal proceedings. In the interim, USCIS has placed on hold all cases under its jurisdiction where the only ground for referral or denial is a terrorist-related inadmissibility provision and the applicant is: (1) associated with one of the groups designated under section 691(b) of the CAA as no longer considered a terrorist organization based on events occurring before December 26, 2007, but who otherwise may be inadmissible under section 212(a)(3)(B) of the Act for a terrorism-related ground; (2) inadmissible under the Act's terrorism provisions based on activity associated with a Tier III Group not under duress; (3) inadmissible under the terrorism-related provisions of the Act, other than material support, based on any activity or association with a Tier I, II, or III Group that *was under duress*; (4) a voluntary provider of medical care to any Tier I, II, or III organizations, to their members, or to individuals who have engaged in terrorist activity; and (5) inadmissible as the spouse or child of aliens described above, whether or not the aliens have applied for an immigration benefit.³¹ This suggests that the scope of the amended waiver provisions will be wide-reaching.

It is unclear at this point what impact the expanded availability of a material support waiver will have on the work of the Board and the Immigration Judges. Representatives of U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, and EOIR formed an interagency working group to discuss developing a process for implementing Secretary Chertoff's exercise of his exemption authority for aliens in removal proceedings. EOIR, of course, has no jurisdiction over the waiver, but procedural questions regarding the handling of these cases between these agencies remain. Furthermore, as Secretary Chertoff's procedure is finalized, implemented, and publicized throughout the immigration bar, it is reasonable to expect that the Board and the Immigration Judges will see motions to reopen so that affected aliens may pursue waiver applications. The Board can anticipate being presented with complex issues regarding inadmissibility, including the question left open in *Matter of S-K-*, *supra*, of whether the term "material" has a *de minimis* threshold and must be defined independently of the term "support." And, looking to the examples at the beginning of this article, will these or other similarly situated individuals qualify for relief from

removal? This developing new area of immigration law surely will present interesting and significant challenges as a procedure for granting material support waivers is implemented, and as the inevitable appeals come before the Board.

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1. A hypothetical scenario.
2. *Id.*
3. "Stalwart Service for U.S. in Iraq is Not Enough to Gain Green Card" (March 23, 2008) *Washington Post*.
4. "Material support" includes providing a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training. Section 212(a)(3)(B)(iv)(VI) of the Act.
5. A terrorist organization is an organization—

(I) designated under section 219;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in sub clauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in sub clauses (I) through (VI) of clause (iv).

Section 212(a)(3)(B)(vi) of the Act, 8 U.S.C. § 1182(a)(3)(B)(vi).

6. Under the Act, "terrorist activity" means

(iii) . . . any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any state) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained;

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—(a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device

(other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

Section 212(a)(3)(B)(iii) of the Act, 8 U.S.C. § 1182(a)(3)(B)(iii).

7. “guilty mind” A term used in discussing the mindset of an accused criminal.

8. See *Matter of S-K-*, 23 I&N Dec. 936 at 946.

9. *Id.*

10. *Id.* at 943-44.

11. “about minimal things” *De minimis*, in a more formal legal sense, means something which is unworthy of the law’s attention.

12. *Id.* at 945-46.

13. *Id.* at 946-50.

14. *Id.* at 950.

15. See “Exercise of Authority under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act” (May 5, 2006; August 24, 2006; October 11, 2006).

16. See *id.* (January 24, 2007).

17. See “Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to the Revolutionary Armed Forces of Colombia (FARC)” (September 6, 2007), *USCIS*; “Authorization to Process Cases Involving the Provision of Material Support to the ELN” (December 18, 2007), *Department of Homeland Security Authorization Document*.

18. See 72 Fed. Reg. 26138 (May 8, 2007).

19. *Id.*

20. It should be noted that a “totality of the circumstances” approach was rejected by the Board in *S-K- I* in analyzing whether an entity is a terrorist organization. Additionally, the Board has not decided whether the amount of the assistance provided is relevant.

21. *Id.*

22. See 72 Fed. Reg. 9957 (March 6, 2007).

23. See *Matter of S-K-*, 24 I&N Dec. 289 (A.G. 2007).

24. See *Matter of S-K-*, 24 I&N Dec. 475, 477-78 (BIA 2008) (“*S-K- II*”).

25. See Pub. L. 110-161, 121 Stat. 1844 (“CAA”), section 212(d)(3)(B)(i) of the Act.

26. *Id.* at section 691(a).

27. The list includes: the Hmong; Karen National Union/Karen National Liberation Army; Chin National Front/Chin National Army; Chin National League for Democracy; Kayan New Land Party; Arakan Liberation Party; Tibetan Mustangs; Cuban Alzados; Karenni National Progressive Party; and groups affiliated with the Hmong and the Montagnards.

28. *Id.* at sections 691(b), (d)-(f). Section (c) made a technical correction not at issue in this discussion.

29. See “Newly Enacted Amendments to the ‘Terrorism Bars’ and Related Waivers Under the Immigration and Nationality Act” (January 29, 2008), *Human Rights First*.

30. *Id.*

31. See “Withholding Adjudication and Review of Prior Denials of Certain Categories of Cases Involving Association With, or Provision of Material Support to, Certain Terrorist Organizations or Other Groups” (March 26, 2008), *USCIS Memorandum*.

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR MARCH 2008

by John Guendelsberger

The United States Courts of Appeals issued 513 decisions in March 2008 in cases appealed from the Board. The courts affirmed the Board in 444 cases and reversed or remanded in 69 for an overall reversal rate of 13.5% compared to last month’s 12.3%. There were no reversals from the First, Fourth, Eighth and Tenth Circuits.

The chart below provides the results from each circuit for March 2008 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	10	10	0	0.0
2nd	126	104	22	17.5
3rd	32	28	4	12.5
4th	10	10	0	0.0
5th	9	8	1	11.1
6th	2	1	1	50.0
7th	10	8	2	20.0
8th	12	12	0	0.0
9th	274	236	38	13.9
10th	5	5	0	0.0
11th	23	22	1	4.3
All:	513	444	69	13.5

The Ninth Circuit issued over half of the month’s total decisions, reversing or remanding in 38 of its 274 cases (13.9%). About one third of the reversals came in asylum claims including issues related to credibility (4 cases); cumulative harm amounting to past persecution (6); and conflation of the credibility and burden of proof determination (2). The Court also remanded a case for a decision on when the age of minority ends for determining exceptions to the one-year filing deadline. Another third of the Ninth Circuit reversals came in motions to reopen, several involving claims of non-receipt of hearing notice sent by regular mail. Several other decisions were remanded to address aspects of the appeal which the Court found were overlooked or not fully addressed by the Board.

Most of the Second Circuit’s 22 reversals involved asylum claims and included issues relating to credibility (5 cases); nexus (3); well-founded fear (2); pattern and prac-

tice of persecution; confidentiality violation; persecutor bar; frivolousness, improper fact-finding by the Board, and inappropriate administrative notice of the 2007 profile by the Board. Two reversals concerned whether a visa petition was “approvable when filed” for section 245(i) “grandfathering.”

Outside the Second and Ninth Circuits, all of the other circuit courts combined decided 113 cases (22% of total cases) and reversed in 9 (13%). Four of these reversals were from the Third Circuit and involved a remand for clarification of the relevant standards for asylum claims involving forced IUD insertions; the appropriate standard for determining “danger to national security”; due diligence in seeking reopening based on ineffective assistance of counsel; and a remand to further consider an appeal from a denial for a request for a continuance.

The chart below shows the combined results for the first three months of 2008 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total Cases	Affirmed	Reversed	% Reversed
7th	24	17	7	29.2%
6th	26	21	5	19.2%
2nd	375	314	61	16.3%
9th	549	466	83	15.1%
11th	53	48	5	9.4%
3rd	106	96	10	9.4%
5th	37	35	2	3.6%
4th	35	34	1	2.9%
10th	14	14	0	0.0%
8th	19	19	0	0.0%
1st	27	27	0	0.0%
All :	1265	1091	174	13.8%

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One Toke Over The Line: The Immigration Consequences of Drug Offenses

by Edward R. Grant

A certain branch of comedy exploits the fine line between pain and laughter. By this, I am not referring to the feeling we got when former EOIR Director Rooney cleared his throat and started telling a joke. That was

a different kind of pain. What I do mean is the style of comedy exemplified by Bob Newhart (remember the “group therapy” sessions in his 1970s CBS series?), or more currently, in *The Office*.

But for a pure moment of stunning, “is-this-funny-or-is-this-my-fingernails-on-the-chalkboard” humor, go home tonight and plug the words “Lawrence Welk Toke” into your search engine of choice. You will be two clicks away from Gail & Dale, on the 1970s *Lawrence Welk Show*, singing (as a Gospel song, I kid you not), the Brewer & Shipley hit, *One Toke Over the Line*. The song, banned on many radio stations for its drug references, brightened the evening of millions of grandparents (and who knows how many of their grandchildren) for a spine-tingling 1 minute and 56 seconds. Whoever managed to pull this one off on the show’s host deserves an Emmy for Lifetime Achievement. Either that or the late maestro of New Year’s Eve was a lot more hip than we thought.

I stumbled on this morsel of TV trivia, inspired by the Seventh Circuit’s recent decision in *Escobar Barraza v. Mukasey*, 519 F.3d 388 (7th Cir. 2008), a case in which the Court displayed a, shall we say, Welkian grasp of the minutiae of marijuana consumption and modes of delivery. *Barraza* is but one of the Seventh Circuit’s forays into the immigration consequences of drug offenses in recent months which, when considered with a smattering of cases from other Circuits, provide an appropriate basis on which to explore this frequent topic in immigration litigation.

As humorous as such references can be, the consequences of drug offenses are serious business, particularly for the thousands of immigrants who risk losing their status each year as a result of their offenses, and the illegal immigrants and other applicants who are barred from relief for the same reason. It’s also serious business for all those in the chain of immigration litigation – including, recently, those who speak with less frequency in precedent decisions, the Attorney General of the United States, and the United States Supreme Court. We will start then, with some background on past and current immigration law relating to drug offenses.

Drug Offenses in the Immigration Context: Some History

Our story begins in 1941, when a Mexican immigrant was placed into deportation proceedings

for violating provisions of the Internal Revenue Code requiring payment of a “transfer tax” by one coming into possession of marijuana – in this case, 12 cigarettes. The respondent was charged as one deportable under the Act of February 18, 1931, the straightforward provisions of which stand in great contrast to the current array of provisions in the Immigration and Nationality Act.

That any alien (*except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this act*) who, after the enactment of this Act, shall be convicted for violation of or conspiracy to violate any Statute [federal or state] taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported.

46 Stat. 1171 (emphasis supplied).

Later that same year, the decision of the presiding inspector to recommend deportation of the alien was reversed. *Matter of V-*, 1 I&N Dec. 160 (BIA 1941). The decision is worth reading as a reminder both of how much the issues regarding the treatment of offenses have not changed over seven decades and how more leniently certain questions were resolved at that time. Note the italicized exemption for addicts, as well as the fact that the provision was not retroactive. *Matter of V-* also quoted President Roosevelt’s veto message of subsequent legislation that would have removed the exemption, and done so retroactively, by making any conviction after entry valid grounds for deportation. *Id.* at 162-63. (“While severe treatment should be properly meted out to purveyors of narcotics, enlightened consideration of the entire subject inescapably leads to the conclusion that this principle does not necessarily apply to the unfortunate addicts of drugs who do not participate in peddling them to others. Addiction to narcotics is to be regarded as a lamentable disease, rather than a crime. It does not seem clear why aliens who acquire this weakness should be singled out for deportation.” *Id.*)

In the end, the BIA held that the respondent was not removable because as a “simple” transferee of

marijuana, not one engaged in the illegal traffic of drugs, he was akin to one who merely possesses the drug – which, at that time, was not a deportable offense. “After due consideration of the legislative history of [the Act], upon analysis of the language of such statute, and mindful of the fact that no time limit is placed upon deportation for narcotics violations, it is [our] opinion . . . that this legislation was directed at the seller, distributor, or transferor and not at the transferee of marijuana.” *Id.* at 164.

The following year, in an identically-captioned case, the Board held that an alien convicted of importing 11 pounds of crude opium *was* excludable under the Act of February 18, 1931 (title 8, U.S.Code, sec. 156 (a)). *Matter of V-*, 1 I&N Dec. 293 (BIA 1942). Notably, the Board found that this offense, classified as a regulatory offense administered primarily by the Treasury Department, was not a crime involving moral turpitude. This latter holding might still be good law, as subsequent cases focus on the question of intent in determining whether sale and distribution offenses are CIMT’s. *See Matter of Khourn*, 21 I&N Dec. 1041, 1044-47 (BIA 1997). Having found the alien excludable, the issue was then one of relief, whether he was eligible for the precursor of former section 212(c) of the Immigration and Nationality Act, the so-called “seventh proviso” to section 3 of the Immigration Act of 1917. In deciding this latter question, the Board addressed legal issues of a type all-too-familiar to many of us: whether provisions specified for the *deportation* of aliens from the United States could be cited as grounds to *exclude* aliens; and whether, given that the exclusion ground in question was not part of the 1917 Act, the relief provisions in that Act should nevertheless be available. The Board answered both questions in the affirmative, but found the alien, who had six United States citizen children, was unworthy of a waiver under the “seventh proviso.”

Drug Offenses Today: Briefly Reviewed

That was then, you might say, and you would be correct, at least to a point. Undeniably, the immigration consequences of drug offenses are far more severe today than seven decades ago. Possessory offenses *are* grounds for inadmissibility and deportability. *See* sections 212 (a)(22)(2)(A)(i)(II) and 237 (a)(2)(B) of the Act, 8 U.S.C. § §1182 (a)(22)(2)(A)(i)(II) and 1227 (a)(2)(B). Recidivist possessory offenses may even be treated as the equivalent of trafficking offenses. *Matter of Carachuri-*

Rosendo, 24 I&N Dec. 382 (BIA 2007). As for trafficking offenses themselves, they serve as a bar to virtually all forms of discretionary relief sections, *see* 101 (a)(43)(b), 208 (b)(2)(A)(ii), and 240A (a)(3) of the Act, 8 U.S.C. § 1101 (a)(43)(b), 1158(b)(2)(A)(ii), and 1229b (a)(3), and are presumptively categorized as “particularly serious crimes” that bar the non-discretionary relief of withholding of removal. *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002).

Yet, litigation continues, even to the level of the United States Supreme Court, *see Lopez v. Gonzalez*, 549 U.S. 47 (2006), on the precise match between drug offenses as prosecuted in state and federal courts, and such offenses as described in the removability provisions of the INA. Further, as noted in last month’s *Immigration Law Advisor*, there is substantial ferment, chiefly but not limited to the Ninth Circuit, regarding proof of whether particular convictions for drug offenses are cognizable under the immigration laws. *See Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007).

With this background, we can conclude with a brief review of notable recent cases addressing whether particular state drug offenses are so cognizable.

“Trafficking” Offenses Post-Lopez: When is Possession Enough?

Following the decision of the United States Supreme Court in *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (state offenses constitutes a “felony punishable under the Controlled Substances Act,” (CSA) and thus an aggravated felony, only if it proscribes conduct punishable as a felony under federal law), it was unclear whether the prototypical “hypothetical federal felony” – a recidivist conviction for drug possession – could be recognized as such even if the alien’s second possession conviction was not specifically prosecuted as a recidivist offense. The Board quickly took up this question, and decided in late 2007 that in order for a state conviction for simple possession to be treated as a “felony punishable under the [CSA],” the alien’s status as a recidivist drug offender must either have been admitted by the alien, or determined by a judge or jury, in connection with the prosecution for that simple possession offense. *Carachuri-Rosendo*, *supra*.

So far, the Seventh Circuit is the only federal appeals court to have addressed this issue, either post-*Lopez*, or post-*Carachuri*. *United States v. Pacheco-Diaz*,

506 F.3d 545, 549 (7th Cir. 2007) (finding, post-*Lopez*, that alien convicted of second possession offense in state court has committed a “felony” under the CSA because, if charged in federal court with identical offense, he would have been subject to recidivist enhancement under 21 U.S.C. § 844(a)) (*Pacheco-Diaz I*); *United States v. Pacheco-Diaz*, 513 F.3d 776 (7th Cir. 2008) (on motion for rehearing, rejecting Board’s approach in *Carachuri-Rosendo*) (*Pacheco-Diaz II*). In both decisions, the Seventh Circuit emphasized in applying a “hypothetical federal felony” approach, it is not sufficient to address only the *elements* of the offense as charged under the state statute. Rather, the inquiry must focus on the *conduct* as charged, and whether such conduct would be a drug felony under federal law.

[T]he point of *Lopez* is that, when state and federal crimes are differently defined, the federal court must determine whether the conduct is a *federal* felony, not which statute the state cited in the indictment. . . . In a hypothetical-federal-felony approach, it does not matter whether the defendant was charged in state court as a recidivist; indeed, it does not matter whether the state has a recidivist statute in the first place. What provides the classification under [section 101(a)(43) of the INA] is federal rather than state law.

Pacheco-Diaz II, 513 F.3d at 778-79.

Dissenting from the denial of rehearing, Judge Rovner concluded that the majority’s approach, with its focus on the *conduct* underlying the state criminal conviction, could not be squared with the “categorical approach” customarily used to determine if a state conviction constitutes an aggravated felony. In *Carachuri-Rosendo*, the Board mentioned the categorical approach as one factor in its conclusion that the federal statutes are “ambiguous” on the treatment of second and subsequent state possession offenses. *Carachuri-Rosendo*, 24 I&N Dec. at 389. The Board, however, focused on a point not fully developed either by Judge Rovner or by the majority in *Pacheco-Diaz II* – that the federal “recidivist” provisions in 21 U.S.C. § 844(a) are not strictly elements-based, but are an “amalgam of elements, substantive sentencing factors, and procedural safeguards, many of which need never have been submitted to a jury.” *Id.* Judge Rovner’s decision hints at, and the majority’s decision essentially ignores,

the core of the Board's analysis, namely that the reasoning and holding of *Lopez* – including the Court's conclusion that equating "trafficking" with "simple possession" lacks coherence "with any commonsense conception" of the term's ordinary meaning – requires a clear indication that a State has chosen specifically to prosecute a repeat drug offender as a recidivist. *Carachuri-Rosendo*, 24 I&N Dec. at 390.

Pacheco-Diaz, therefore, contributes no greater clarity to the status of "two-or-more possession" cases in the wake of *Lopez* and *Carachuri*. There is a clear split among the circuits in their pre-*Lopez* cases. Even those circuits that, contrary to the Seventh, would not find a second possession offense to necessarily constitute a "hypothetical" federal felony disagree on the rationale. Compare *Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004) (for purposes of uniformity, state recidivist enhancements cannot be taken into account in classification of a state drug offense as a "felony" or "misdemeanor" under federal standards) with *Gerbier v. Holmes*, 280 F.3d 297, 310-311 (3d Cir. 2002) and *Steele v. Blackman*, 236 F.3d 130, 137 (3d Cir. 2001) (both holding that misdemeanor possession conviction cannot be counted as "recidivist" offense, and thus hypothetical federal felony, in the absence of procedural safeguards similar to those in federal recidivist provisions). Other circuits have found second possession offenses to satisfy the "hypothetical" federal felony rule chiefly in criminal law cases. See, *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002); *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), cert. denied 546 U.S. 1137 (5th Cir. 2006); *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005).

Just a Bit More on the Categorical Approach

Updates on the "categorical approach" as applied to drug offenses could become a monthly habit in these pages, certainly until the Ninth Circuit resolves the question presented in *United States v. Snellenberger*, 493 F.3d 1015 (9th Cir. 2007), *reh'g en banc granted and amended*, 519 F.3d 908 (2008) (to establish a crime of violence, government must provide terms of plea agreement or transcript of colloquy between judge and defendant in which factual basis for plea was confirmed by defendant, or comparable judicial record; facts stated in criminal information not sufficient). More recently, the Ninth Circuit, ruling in a criminal case, added further gloss to this issue. *United States v. Crowford*, __F.3d__, 2008 WL 819772 (9th Cir. Mar. 28, 2008).

Crowford involved the sentencing of a defendant convicted of distribution of heroin and of crack cocaine, who had prior convictions for sale and transportation of cocaine in California, and for delivery of crack cocaine in Washington. At issue was whether these prior offenses could be considered career-offender predicates for purposes of sentence enhancement. Regarding the California conviction, the Ninth Circuit noted that section 11352(a) of the California Health & Safety Code is "overbroad," and thus cannot be considered a categorical career-offender predicate, but held that the defendant's clear admission in his plea agreement to transportation and sale of cocaine satisfied the "modified" categorical standard. In the case of the Washington conviction, the Court faced the separate issue of how a maximum sentence under state law should be determined for purposes of classifying an offense as a felony or misdemeanor under federal law. The Court rejected the defendant's argument that despite a 10-year maximum in the Washington criminal statute under which he was convicted, the 12-month maximum called for in the state sentencing guidelines should determine the question. Relying on prior rulings that a sentence *enhancement* provided for and imposed under state guidelines could not be used to re-classify a statutory misdemeanor into a felony, the Court held that a sentence *limitation* provided in state guidelines could not convert a statutory felony into a misdemeanor. *Crowford*, 2008 WL 819772 at *6. A complex question, made simpler by the symmetry of the Circuit's resolution.

The Eighth Circuit, ruling in a reentry after deportation case, also dealt with the "overbroad" provisions of section 11352(a) of the California Health & Safety Code, but resolved the issue of the defendant's plea to the underlying criminal indictment in a manner contrary to that of the Ninth Circuit. *United States v. Garcia-Medina*, 497 F.3d 875 (8th Cir. 2007). At issue was the enhancement of the defendant's sentence for illegal reentry after deportation, based on his felony conviction under section 11352(a), the defendant contending that it was not a drug-trafficking offense. The Eighth Circuit noted that the charging document for the offense tracked the language of section 11352(a), with one key distinction: instead of listing elements such as "transport," "import," "sell," "furnish," or "give away" in the disjunctive, as stated in the statute, the charging document listed them in the conjunctive – using "and." *Id.* at 877-78. In addition to the charging document, the evidence included an abstract of judgment and a minute order, both indicating a plea of guilty to two counts under section 11352(a) – but no

plea agreement. The Eighth Circuit, citing California law, concluded that the defendant by pleading guilty to the two counts as stated in the charging document, had thus plead to every element stated therein, including those that would bring an offense under section 11352(a) within the ambit of a “drug trafficking offense.” *Garcia-Medina*, 497 F.3d at 878. Significantly, the Court so ruled on the basis of a disposition of arrest, abstract of judgment, and a minute order. *Id.*

Faithful readers might sense something amiss, and they would be correct. In the jurisdiction where convictions under section 11352(a) are mostly likely to be addressed, the Eighth Circuit’s approach to the efficacy of the defendant’s plea to a broadly-drafted indictment, as well as the sufficiency of the evidence of that plea, is clearly not the rule. *See Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (hereinafter “*Ruiz*”) and *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc). A recent immigration case involving California convictions for vehicle theft and evading an officer illustrates the contrast. *Penuliar v. Mukasey*, __F.3d__, 2008 WL 1792649 (9th Cir. Apr. 22, 2008).

Mr. Penuliar, already the subject of a favorable Ninth Circuit ruling, albeit one vacated by the United States Supreme Court, *see Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006) (conviction under section 10851 of California Vehicle Code not an aggravated felony “theft”), *cert. granted and judgment vacated*, __U.S. __, 127 S.Ct. 1146 (2007), was charged with two aggravated felonies: crime of violence based on his conviction for evading an officer under section 2800.2(a) of the California Vehicle Code, and theft offense for the aforesaid violation of VC section 10851. Regarding the section 2800.2 violation, the Court first held that it was no longer bound by its decision in *United States v. Campos-Fuerte*, 357 F.3d 956 (9th Cir. 2004), in which it had held that an offense under section 2800.2 *was* a crime of violence. The difference, the Court stated, was the subsequent amendment of section 2800.2 to provide that the element of “wilful and wanton disregard for the safety of persons or property” may be satisfied by proof that the defendant has three prior moving violations that are assigned “points.” *Penuliar*, 2008 WL 1792649 at *3-4. Since those prior violations could have been committed in a negligent manner, an offense under section 2800.2 could no longer be considered a “categorical” crime of violence.

Turning to the modified categorical approach, the distinction between the approaches of the Eighth and Ninth Circuit’s is clearly seen. The criminal indictment charged Penuliar broadly, tracking the language of the statute, charged that he “wilfully and unlawfully,” and with “intent to evade,” failed to heed the lights and siren of a pursuing officer, and that he did so with “wilful and wanton disregard for persons and property.” *Id.* While not entirely clear, it is reasonable to assume that the Eighth Circuit would conclude that Penuliar had plead to the entirety of the indictment, and everything alleged therein. The Ninth Circuit, however, effectively held that since it is possible that Penuliar was pleading only to that measure of “wilful and wanton disregard” defined by having three or more moving violations, the modified categorical approach was not satisfied.

The issue of Penuliar’s conviction under section 10851(a) was resolved, in large part, by the Ninth Circuit’s prior ruling in *United States v. Vidal*, *supra*, discussed in detail in the last issue of the Bulletin. In *Penuliar*, the Court expounded on that ruling, emphasizing that the type of “broad pleading” found sufficient by the Eighth Circuit will not suffice. Penuliar was indicted for, *inter alia*, “unlawfully driv[ing] and tak[ing]” a Ford Escort, without consent, and “with intent, either permanently or temporarily, to deprive” the owner of title and possession.

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Recent Court Decisions

First Circuit

Cuko v. Mukasey, __ F.3d __, 2008 WL 846115 (1st Cir. Mar. 31, 2008) The First Circuit denied the respondent’s appeal of the denial of his application for asylum. The Court upheld as reasonable the Immigration Judge’s finding that the respondent was not credible due to inconsistencies between his testimony and two supporting documents (his party membership card and a certificate from the party chairman), as well as the respondent’s three different accounts as to how he obtained the former. The Court also upheld the Immigration Judge’s finding of material inconsistencies regarding the respondent’s testimony as to how and when he retained a smuggler for his wife and child. The Court also found such inconsistencies to be reasonably material under the pre-REAL ID Act standard. The Court also found the Immigration Judge’s reliance on the State Department reports sufficient to rebut a

presumption of a well-founded fear of persecution. Lastly, the Court found the Immigration Judge's conduct to fall properly within his broad discretion, and not indicative of any pre-disposed bias.

Phal v. Mukasey, ___ F.3d ___, 2008 WL 1759160 (1st Cir. April 18, 2008) The petitioner, a citizen of Cambodia, sought review of the Board's order denying asylum. An IJ found that the petitioner was not credible, citing to a number of discrepancies, and denied asylum. The Board adopted and affirmed the IJ's decision that the petitioner failed to present a credible claim of persecution. The petitioner argued to the Court that the IJ erred in making her adverse credibility finding, and, relief should be granted because the record demonstrates that the alien sustained past persecution and that she has a well-founded fear of future persecution. The Court held that the Board's adverse credibility finding is supported by substantial evidence, and, the Board's decision that the alien failed to demonstrate a reasonable fear of future persecution is supported by substantial evidence.

Second Circuit

Emokah v. Mukasey, ___ F. 3d ___, 2008 WL 1788268 (2d Cir. Apr. 22, 2008) The Second Circuit dismissed the appeal from the Immigration Judge's decision denying the respondent's application for adjustment of status based upon an I-360 "battered spouse" petition. The Immigration Judge had found that the respondent had committed visa fraud to initially enter the U.S., and had failed to establish extreme hardship necessary for approval of a 212(i) fraud waiver. The Court upheld the Immigration Judge's decision, finding sufficient evidence to support his finding that the visa fraud was knowing and willful and further finding that the alleged spousal mistreatment was not substantially connected to the unlawful entry.

Seventh Circuit

Ali v. Mukasey, ___ F. 3d ___, 2008 WL 901467 (7th Cir. Apr. 4, 2008) The Seventh Circuit dismissed the appeal from the Board's decision barring the respondent from adjusting his status because his conviction for unlicensed commercial trafficking in firearms constituted a crime involving moral turpitude (CIMT). The Board gave two reasons for its CIMT determination. The Court disagreed with the Board's determination that the crime was "morally reprehensible", noting that gun licensing is a recent invention and that such crime is thus *malum*

prohibitum rather than *malum in se*. However, the Court found the second reason, that the crime was one of fraud, to be deserving of *Chevron* deference.

Ninth Circuit

U.S. v. Reveles-Espinoza, ___ F. 3d ___, 2008 WL 1722828 (9th Cir. Apr. 15, 2008) The Ninth Circuit affirmed the respondent's criminal conviction under 8 U.S.C. §1326 as a previously deported alien found in the U.S. without the express consent of the Attorney General or DHS. The respondent had challenged on appeal his prior deportation, based upon his conviction under California Health and Safety Code § 11358, which involves planting, cultivating, harvesting, drying or processing marijuana. The Court first rejected the respondent's argument that the Immigration Judge had failed to advise him that he was eligible for cancellation of removal. The Court held that the respondent was properly found to be an aggravated felon, making him ineligible for cancellation of removal. The Court further rejected the respondent's claim that he received insufficient notice of the basis for his deportation proceedings, because the language in the NTA characterized his conviction as a "controlled substance offense" rather than an "aggravated felony." The Court ruled that the two adjournments by the Immigration Judge for the government to provide conviction records to allow the Immigration Judge to determine eligibility for relief constituted sufficient notice to the respondent that "he was subject to removal proceedings in which he might be ineligible for cancellation of removal."

Villegas v. Mukasey, ___ F. 3d ___, 2008 WL 1808390 (9th Cir. Apr. 23, 2008) The Ninth Circuit dismissed the appeal of the Immigration Judge's denial of protection under the Convention Against Torture (CAT) to a respondent with severe bipolar disorder. The Court first held that they lacked jurisdiction to review the Immigration Judge's determination that the respondent was ineligible for the relief of withholding of removal because the respondent's robbery conviction constituted a "particularly serious crime." As to the CAT claim, the Court found that the IJ had "correctly construed 'torture' to require specific intent to inflict harm" which was "not present in this record." Distinguishing this case from *Zheng v. Ashcroft*, 332 F. 3d 1186 (9th Cir. 2003), the Court held that under CAT, an applicant "must show that severe pain and torture was specifically intended," which in this case was undermined by evidence of a desire to improve the Mexican mental health system, and that steps were being taken to improve conditions.

Eleventh Circuit

Santamaria v. U.S. Atty. Gen., ___ F.3d ___, 2008 WL 1787731 (11th Cir. Apr. 22, 2008) The Eleventh Circuit vacated their prior decision in this case *sua sponte* (512 F.3d 1308 (11th Cir. 2007)) and entered a new decision. The Court again granted the respondent's appeal from the denial of her asylum application. Noting that the Immigration Judge had found the respondent to be credible, the Court found that her past treatment, which included repeated threats over two years; yanking her out of her vehicle by her hair, injuring her; and torturing and killing her groundskeeper for refusing to disclose her whereabouts, constituted past persecution. The Court further held that such persecution was on account of her political opinion, and entitled her to a presumption of a well-founded fear of future persecution which as a legal matter was not rebutted by her returning several times to her home country from the U.S. The Court noted that the respondent had traveled to the U.S. each time to evade the FARC; had returned to Colombia each time to remain with her family and to work against the persecutors, and that the persecution she faced on each return became more serious.

BIA PRECEDENT DECISIONS

In *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008), the Board found that a general court-martial qualifies as a "conviction" under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). The respondent was convicted by a general court martial of carnal knowledge in violation of Article 120(b) of the Uniform Code of Military Justice. The Board first found that a court-martial meets the definition of a conviction. Recognizing that some differences exist between civilian courts and general courts-martial, the Board has nevertheless considered judgments entered by courts-martial to be valid convictions for immigration purposes. The Supreme Court has long held that courts-martial judgments are accorded the finality of civil courts, so in, for instance computing sentencing enhancements, courts-martial sentences are considered. The Board found that *Gubbels v. Hoy*, 261 F.2d 952 (9th Cir. 1958), which held that an alien's conviction by a French criminal court while serving in the United States army could not serve as a basis for deportation, was distinguishable because this is not a Ninth Circuit case, 101(a)(48)(A) was not yet in existence, and the primary support for the decision, the inability of the court to make a judicial recommendation

against deportation, has been eliminated. The respondent also argued that he was not informed of his consular notification rights during the criminal proceedings. The Board found this to be irrelevant to term the "conviction," even if there was a violation, it would not invalidate or vitiate his conviction for criminal purposes, and Immigration Judges cannot entertain collateral challenges absent evidence the conviction is void on its face. Finding the respondent removable as charged, the Board dismissed the appeal.

REGULATORY UPDATE

73 Fed. Reg. 18384

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 212 and 235

DEPARTMENT OF STATE

22 CFR Parts 41 and 53

Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports of Entry From Within the Western Hemisphere

ACTION: Final rule.

SUMMARY: This rule finalizes the second phase of a joint Department of Homeland Security and Department of State plan, known as the Western Hemisphere Travel Initiative, to implement new documentation requirements for U.S. citizens and certain nonimmigrant aliens entering the United States. This final rule details the documents U.S. citizens and nonimmigrant citizens of Canada, Bermuda, and Mexico will be required to present when entering the United States from within the Western Hemisphere at sea and land ports of entry.

DATES: This final rule is effective on June 1, 2009.

73 Fed. Reg. 23067

DEPARTMENT OF STATE

22 CFR Parts 40 and 41

Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended

ACTION: Final rule.

SUMMARY: This final rule amends the Department of State's regulations related to application for a nonimmigrant visa, to offer a completely electronic application procedure as an alternative to submission of the Form DS-156.

DATES: This rule is effective on April 29, 2008.

Addendum - Calculating “Loss to Victim or Victims” under section 101(a)(43)(M) of the Immigration and Nationality Act...

In *Arguelles-Olivares v. Mukasey*, _ F.3d _, 2008 WL 1799987 (5th Cir., April 22, 2008), the Court of Appeals addressed, among other issues, the calculation of loss to a victim or victims under section 101(a)(43)(M) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M). The petitioner was convicted in federal court of knowingly filing a false tax return. The Court, acknowledging a disagreement between circuit courts about how loss could be determined under section 101(a)(43)(M), found that the Pre-Sentence Investigation Report (PSR) in the petitioner’s case established the necessary loss for removability. The Court considered that the amount of loss was not an element of the crime at issue, and it seemed highly unlikely that Congress intended for 101(a)(43)(M)(i) to apply only to convictions under statutes that included a monetary loss to a victim in excess of \$10,000 as an element of the offense. Further, the calculation of loss was not limited to a “modified categorical approach”, and the record in this case adequately established that the PSR accurately reflected the amount of loss. The PSR could therefore be used to establish that the loss amount exceeded \$10,000.

For the original article Calculating “Loss to the Victim or Victims”..., see the Immigration Law Advisor Vol 1 No 4. Additional updates can be found in Vol. 1 No. 6, Vol. 1 No. 11, Vol 2 No. 1 and Vol.2 No. 3.

One Toke Over The Line *cont.*

However, the Court reiterated its prior holdings that an indictment which tracks the language of a statute is insufficient alone to establish the specific facts being alleged, and that a plea to such an indictment does not constitute the admission of such facts. *Penuliar*, 2008 WL 1792649 at *6, *Vidal*, 504 F.3d at 1088-89.

The split in approach here, however, is not merely with another Circuit – it appears to be *intra*-Circuit as well. Another panel of the Ninth Circuit, subsequent to *Vidal*, held that a conviction under section 10851 does constitute a “theft offense,” and thus, an aggravated felony. *Arteaga v. Mukasey*, 511 F.3d 940, 947-48 (9th Cir. 2007). Acknowledging *Vidal*’s holding that section 10851(a) is not a categorical theft offense because of the

possible inclusion of “accessory” liability, the prior panel found that

The record of conviction in *Arteaga*’s case conclusively establishes that *Arteaga* was convicted, under § 10851(a), of unlawfully taking a vehicle with the intent to either permanently or temporarily deprive the owner of possession – a theft offense. In other words, in light of *Duenas-Alvarez*’s incorporation of the generic definition of theft offense, and *Vidal*’s holding that § 10851(a) is not a categorical theft offense, applying the *Taylor* modified-categorical approach to the facts here reveals that *Arteaga* was convicted of a theft offense, an aggravated felony under federal immigration law.

Arteaga, 511 F.3d at 947.

Arteaga did not mention the specific documents in the record of conviction upon which it relied. This provided a “hook” for the panel in *Penuliar* to distinguish the case:

Arteaga did not describe the record before it concerning the conviction or explain what in the record of conviction indicated that the offense of conviction was a generic theft offense. *Arteaga* is therefore not precedent with regard to application of the *Taylor* modified categorical approach to any particular kind of documents or any specific language appearing in those documents. Legal rulings in a prior opinion are applicable to future cases only to the degree one can ascertain from the opinion itself the reach of the ruling. Where the underlying facts do not appear, later courts are bound by any rule of law explicitly announced, but not by the application of that law to unstated factual circumstances.

Penuliar, 2008 WL 1792649 at *7.

A potential flaw in *Penuliar*’s analysis here is that the record of conviction, or at least relevant portions thereof, were easily accessible from the record in *Arteaga* before the Ninth Circuit. Thanks to EOIR’s Virtual Law Library,

the Immigration Judge decision in *Arteaga* is accessible, and quotes the following from the indictment: [That the defendant did] “unlawfully drive and take [a certain vehicle] . . . then and there the property of [another] without the consent of and with the intent, either permanently or temporarily, to deprive the owner of title to and possession of said vehicle.” *Matter of Arteaga*, No. A92 085 513 (Decision of the Immigration Judge, Imperial California, June 28, 2004). The Immigration Judge decision is not perfect evidence of what is stated in the indictment, but given the pattern of pleading in California criminal cases – a pattern remarked upon by the Ninth Circuit in both *Vidal* and *Penuliar*, there is a reasonable likelihood that the record of conviction in *Arteaga* differed in no important aspect from that in *Penuliar*. There was no overlap in panel membership between the two cases. It will have to be seen if, in *Snellenberger*, or some other case, the Ninth Circuit provides clarification of this evident conflict. In the meantime, at least according to the panel in *Penuliar*, its decision is the binding precedent in section 10851 cases.

Other Drug Offenses: The Importance of “Relating To”

Our introduction did promise some comic relief, and that in turn may have been provided by the Seventh Circuit. In a more pedestrian matter, the Circuit recently held that an Illinois conviction for distributing substances that “substantially resemble” controlled substances – so-called “Look-Alike Substances” – is a conviction for violation of a law relating to a federal controlled substance. *Desai v. Mukasey*, __F.3d __, 2008 WL 818946 (7th Cir. Mar. 28, 2008). The defendant met a woman at a nightclub, but did not realize she was an undercover police officer. Ever gallant, he offered her some chocolates purportedly laced with Psilocybin, known in the trade as “shrooms.” Ever on the job, she accepted, but insisted on paying \$20 for the chocolates, and asking whether he could procure some more. He demurred, but in the interest of pursuing other angles, gave her his phone number. She later called, looking for more laced chocolates, and the defendant gave her the name of a potential supplier.

His gallantry, alas, got him nothing but a conviction for Unlawful Delivery of a Look-Alike Substance, a conviction he argued could not be one relating to a controlled substance because the chocolates did not, in fact, contain such a substance. The Court dismissed his claim, noting that the term “relating to” is

intended to have a broadening effect, consistent with the ordinary meaning of “relating.” The state law “is focused on punishing those distribute substances that would lead a reasonable person to believe it to be a controlled substance,” which, in the case of Psilocybin, it is under the federal schedule. *Desai*, 2008 WL 818946 at *3. The Court also rejected the alien’s argument that the “hypothetical-federal-felony” approach should be applied to the removal ground under section 212(a)(2)(A)(i)(II) of the INA. The flaw in that argument is that the provision specifically refers to the violation of the law or regulation “of any State,” thus obviating the need to establish that the crime in question would be prosecuted under federal law. *Id.* at *4.

Desai was followed two weeks later on examination of another novel question: whether a conviction for possession of drug paraphernalia – importantly, a marijuana pipe – can be classified as a conviction for mere possession of marijuana, thus enabling the alien to qualify for the “possession of 30 grams or less” provision in section 212(h) of the Act, and in turn make him eligible for a waiver under that section. *Escobar Barraza v. Mukasey*, __F.3d __, 2008 WL 656897 (7th Cir. Mar. 13, 2008). The Board had concluded that since a conviction for possession of paraphernalia is different from one for possession of a drug itself, the exemption in section 212(h) cannot apply. However, the Court noted that, as in the case of section 212(a)(2)(A)(i)(II) itself, the language in section 212(h) is couched broadly: the Attorney General may waive the provisions of that subparagraph “insofar as it *relates to* a single offense of simple possession of 30 grams or less of marijuana.” 2008 WL 656897 at *3 (emphasis in original).

Consider the case, the Court then asked, of one arrested while smoking marijuana from a pot pipe during a concert. The offender is potentially liable for three offenses: possession of the drug, possession of the pipe, and using in public. Concluding (on the basis of a comparison to the weight-per-cigarette of tobacco) that 30 grams of marijuana is considerably more than one person could smoke at a concert, the Court concluded that neither a conviction for possessing the marijuana in the pipe (and perhaps enough for a refill or two), nor for using in public (same rationale) would bring the defendant’s crime over the 30 gram threshold, thus enabling him to apply for relief under section 212(h). Both offenses, the Court also concluded, “Relate to [an] offense” of possessing

marijuana, even if possession is not itself the criminal charge. The Court continued, perhaps memorably:

And it is hard to see why things should be different if the prosecutor charges the alien with possessing paraphernalia to smoke the weed. Not even Thomas Reed Powell – who famously defined the legal mind as one that can think of something that is inextricably connected to something else without thinking about what it is connected to – could miss the fact that a pot pipe is related to the pot that it is used to smoke.

Id. at 3.

Returning to the case before it, the Court acknowledged that the record of conviction showed that the alien “had the pipe but not the pot.” Still, it concluded, the pipe must be “related to” the possession of marijuana; owning a pipe for smoking tobacco is clearly not illegal, and it is only the fact that this pipe was “related to” marijuana that made it illegal.

The final question, then, is whether a conviction for possession of a pot pipe, with no mention of any quantity of marijuana, relates to an offense of possession of “30 grams or less” of that marijuana. Here, the Court ventured into some mathematical theory, and probability:

If Escobar had been caught with the pipe and five grams, the answer would be yes. As it happens, he was caught with the pipe and zero grams. Yet zero is less than five. The ancient Romans and Greeks did not think zero a number, but today we understand that zero is smaller than 30. Actually it is most unlikely that Escobar’s quantity of marijuana was “zero;” the reason the pipe he was carrying could be classed as drug paraphernalia was the presence of a minute quantity of marijuana (or cannabis residue) in the bowl or stem. A “minute quantity” is less than 30 grams.

Id. At 4.

While it possible that Escobar possessed more than 30 grams, there is no record of that, and the paraphernalia he did possess – in contrast to items such as scales, bagging gear, weights, and growing lamps – is one associated with the simple possession of small amounts of marijuana for personal use. Thus he, unlike one convicted of possession of these other items, meets the threshold set in section 212(h).

Conclusion

One is increasingly tempted to say, after reviewing such a range of decisions: draw your own conclusions. Yet, it is increasingly important to recognize potential contested issues of law, and to treat them as such, even if the parties are slow to recognize them, and are less than fully helpful in their arguments. It is difficult to “put on the mind” of the Circuit in which one sits – which may mean multiple Circuits for our traveling and “video star” Immigration Judges, as well as for all at the Board. That’s why it is important to highlight at least some of the more notable circuit court precedents not merely for their formal holdings, but also to attempt to tease out the factors that may be motivating particular rulings. Sometimes, like this month, we can find one circuit perhaps being caught in its own conflict, and another trying, in the words of legal maven Rumpole of the Bailey, to have a bit of “harmless fun.” Which, 40 years hence, is probably what some producer on the Lawrence Welk Show was just trying to do.

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