No.

IN THE

Supreme Court of the United States

CLEMENTE AVELINO PEREIDA,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A noncitizen may not apply for relief from deportation, including asylum and cancellation of removal, if he has been convicted of a disqualifying offense listed in the Immigration and Nationality Act. The categorical approach (including its "modified" variant) governs the analysis of potentially disqualifying convictions. Under that approach, a conviction for a state offense does not carry immigration consequences unless it "necessarily" establishes all elements of the potentially corresponding federal offense. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

Accordingly, four courts of appeals hold that a state conviction does not bar relief from removal if the state-court record is merely ambiguous as to whether the conviction involved the elements of the corresponding federal offense. In their view, ambiguity means the conviction does not "necessarily" establish the elements of the federal offense. Four other courts of appeals—including the Eighth Circuit below—take the opposite view. They hold that a merely ambiguous conviction is nonetheless disqualifying because the immigration laws place an evidentiary burden of proof on noncitizens to establish eligibility for relief.

The question presented is:

Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act.

RELATED PROCEEDINGS

Pereida v. Barr, No. 17-3377 (8th Cir.) (opinion and judgment issued Mar. 1, 2019)

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INTRODUCTION

Petitioner Clemente Avelino Pereida came to the United States from Mexico nearly 25 years ago. He was not lawfully admitted to the United States, so, in his deportation proceeding, he conceded he is removable. But he applied for cancellation of removal because of the "exceptional and extremely unusual hardship" his removal would cause his U.S.-citizen child. 8 U.S.C. § 1229b(b)(1)(D).

Mr. Pereida's eligibility for cancellation turned on whether his prior Nebraska conviction for "attempted criminal impersonation"—a misdemeanor for which the only punishment he received was a $100 fine—disqualified him. If the conviction counted as a "crime involving moral turpitude" (CIMT) under federal immigration law, then it would not only render Mr. Pereida deportable, but also bar him from this form of discretionary relief from removal. 8 U.S.C. § 1229b(b)(1)(C); *see also* §§ 1182(a)(2), 1227(a)(2).

The Eighth Circuit held that Mr. Pereida was ineligible for cancellation because he had not negated the possibility that his conviction could qualify as a CIMT. The Eighth Circuit agreed with Mr. Pereida that not all convictions under the Nebraska criminal statute count as CIMTs as defined by federal law, because at least one prong of the statute does not require proof of fraudulent intent. The court also agreed that the record of Mr. Pereida's conviction did not show that he *was* convicted under one of the disqualifying prongs of the statute; it was simply inconclusive in that regard. The court nevertheless held that Mr. Pereida was barred from seeking cancellation of

removal because he had not affirmatively proven that he was *not* convicted under a disqualifying prong. The court cited provisions of the Immigration and Nationality Act (INA) and immigration regulations that place a generally applicable burden of proof on noncitizens to establish their eligibility for relief from removal. 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d). It believed that this *evidentiary* burden was relevant to—and dispositive of—the *legal* analysis of an ambiguous record of conviction under the so-called "modified categorical approach."

As seven courts of appeals have openly acknowledged, the circuits are divided on the question presented. The First, Second, Third, and Ninth Circuits have reached the opposite conclusion from the Eighth Circuit: They hold that a conviction does not automatically bar relief from removal when the record of conviction is inconclusive. In their view, a merely ambiguous record cannot overcome the legal presumption that a "conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (brackets omitted). The Fourth, Sixth, and Tenth Circuits agree with the Eighth Circuit that an ambiguous record of conviction is *always* disqualifying because it does not disprove the possibility that the offense falls within the federal definition of a disqualifying offense. Under that rule, an ambiguous record bars a noncitizen from any opportunity even to argue that he merits relief from removal.

This Court's intervention is necessary. The immigration laws must have the same meaning throughout the country. The question presented will also

continue to recur. In the short time since this question was last presented to this Court a year ago, two more circuits have weighed in, reaching opposite conclusions. So the split will not resolve itself.

This case also presents an ideal vehicle to resolve the conflict. The question presented was "the heart of the matter in this particular case" and was squarely addressed below. Pet. App. 7a-8a. And the vehicle problems cited by the government in last year's petitions are not present here.

Moreover, the Eighth Circuit's opinion is wrong. As the First, Third, and Ninth Circuits have recognized, the conclusion that an ambiguous record cannot bar relief from removal follows directly from this Court's decision in *Moncrieffe*. Under *Moncrieffe*, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." 569 U.S. at 190-91 (brackets omitted). That presumption is rebutted only if the "record of conviction of the predicate offense *necessarily* establishes" the elements of the narrower disqualifying offense defined by federal law. *Id.* at 197-98 (emphasis added). But mere "[a]mbiguity" with respect to a prior conviction "means that the conviction did not 'necessarily' involve" the elements of a federal offense, and thus is not disqualifying. *Id.* at 194-95.

In short, the Eighth Circuit's approach flips the categorical approach on its head. Rather than presuming a conviction rests on the *least* of the acts criminalized, the Eighth Circuit's rule presumes it rests on the *more* serious acts criminalized unless the noncitizen can show otherwise—using only limited

conviction records that may no longer exist and may never have clarified the basis for the conviction in the first place. That rule often requires noncitizens to prove the unprovable, pinning their fates on the fortuity of state recordkeeping practices.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The decision of the Eighth Circuit is reported at 916 F.3d 1128 and reproduced at Pet. App. 1a-10a. The order denying rehearing en banc is reproduced at Pet. App. 31a-32a. The decisions of the Board of Immigration Appeals and Immigration Judge are unreported and reproduced at Pet. App. 11a-19a and 20a-30a, respectively.

JURISDICTION

The Eighth Circuit entered judgment on March 1, 2019, Pet. App. 1a, and denied a timely petition for rehearing en banc on July 2, 2019, Pet. App. 31a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the INA addressing crimes involving moral turpitude, 8 U.S.C. §§ 1182(a)(2)(A)(i), 1227(a)(2)(A)(i); establishing the burden for proving eligibility for relief from removal, 8 U.S.C. § 1229a(c)(4)(A); and governing cancellation of removal for certain permanent and nonpermanent residents, 8 U.S.C. § 1229b(a), (b)(1), are reproduced at Pet. App. 33a-34a, 35a, 36a, and 37a-38a, respectively. The regulation relating to burdens of proof on

applications for relief from removal, 8 C.F.R. § 1240.8(d), is reproduced at Pet. App. 39a-40a. The Nebraska provisions addressing attempt, Neb. Rev. Stat. § 28-201 (2008), and criminal impersonation, Neb. Rev. Stat. § 28-608 (2008), are reproduced at Pet. App. 41a-42a, and 43a-44a, respectively.

STATEMENT

1. Noncitizens may be ordered removed from the United States if they have not been lawfully admitted or have been convicted of certain crimes. 8 U.S.C. § 1227(a)(1)(B), (a)(2). "Ordinarily, when a noncitizen is found to be deportable on one of these grounds, he may ask the Attorney General for certain forms of discretionary relief from removal," including asylum and cancellation of removal. *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013). To apply for relief from removal, however, a noncitizen must meet certain eligibility requirements. Both lawful permanent residents and nonpermanent residents are ineligible for asylum and cancellation if they have been convicted of an aggravated felony. 8 U.S.C. § 1158(b)(2)(A)(ii), (b)(2)(B)(i) (asylum); 8 U.S.C. § 1229b(a)(3), (b)(1)(C) (cancellation of removal). Nonpermanent residents are also ineligible for cancellation if they have been convicted of one of several other categories of lower-level crimes, including, as relevant here, "a crime involving moral turpitude [CIMT]." 8 U.S.C. § 1182(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i). *See* 8 U.S.C. § 1229b(b)(1)(C).

To determine whether a state conviction meets the definition of an offense described in the INA, such as a CIMT, courts apply the "categorical approach."

Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015). This approach has a "long pedigree in our Nation's immigration law." *Moncrieffe*, 569 U.S. at 191 (noting it has applied since 1913). It "looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior," and compares the elements of that offense with the federal definition. *Mellouli*, 135 S. Ct. at 1986.[1]

A state offense is a "categorical" match only if it includes all the elements of the federally defined offense. *Descamps v. United States*, 570 U.S. 254, 261 (2013). If the state statute criminalizes any conduct that falls beyond the federal definition, then the statute is "overbroad" and not a categorical match. But a conviction under the statute can still yield immigration consequences if the state statute is "divisible," meaning that it "list[s] elements in the alternative, and thereby define[s] multiple crimes," at least one of which falls within the scope of the federal definition. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). For these "divisible" statutes, courts take an additional step: They look to "a limited class of documents … to determine what crime, with what elements, a defendant was convicted of" before "compar[ing] that crime, as the categorical approach commands, with the relevant generic offense." *Id.* This "modified" variant of the categorical approach is

[1] The Court has recognized an exception to the categorical approach where the plain text of the INA requires an inquiry into "the specific circumstances in which a crime was committed," as in *Nijhawan v. Holder*, 557 U.S. 29, 38 (2009). That limited exception is not at issue here.

merely "a tool for implementing the categorical approach." *Descamps*, 570 U.S. at 262. The object is the same—determining whether the crime of conviction necessarily meets "'all the elements of [the] generic [definition].'" *Id.* at 261-62 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

Courts analyzing a prior conviction "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 569 U.S. at 190-91 (brackets omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). That is because the categorical approach looks to "what the state conviction necessarily involved, not the facts underlying the case." *Id.* "By focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 135 S. Ct. at 1987.

A separate section of the INA, which does not specifically address the analysis of prior convictions, provides that, "[i]n general," an "alien applying for relief or protection from removal has the burden of proof to establish that the alien … satisfies the applicable eligibility requirements." 8 U.S.C. § 1229a(c)(4)(A). A related immigration regulation similarly imposes a burden on noncitizens to establish their eligibility for relief from removal. 8 C.F.R. § 1240.8(d).

2. Petitioner Clemente Avelino Pereida is a 48-year-old native and citizen of Mexico. Pet. App. 3a. He has lived in the United States for nearly 25 years. Pet.

App. 3a. He has a wife and three children, all of whom reside in the United States. Pet. App. 3a; Certified Administrative Record (C.A.R.) 125, 127. One of his children is a U.S. citizen and another is a Deferred Action for Childhood Arrivals recipient. C.A.R. 115, 127. To provide for his family, Mr. Pereida has worked difficult jobs in construction and cleaning. Pet. App. 3a; C.A.R. 126; *see* C.A.R. 178-91, 362-445 (tax returns going back to 2001).

3. The government charged Mr. Pereida as removable for being unlawfully present in the United States. Pet. App. 3a. Mr. Pereida conceded removability but applied for cancellation of removal to spare his U.S.-citizen son the extraordinary hardship he (and other members of his family) would face if the family were forced to live without their father and primary breadwinner. Pet. App. 3a, 12a; C.A.R. 104, 124-31. Mr. Pereida's eligibility for cancellation turned on whether he had been convicted of a "crime involving moral turpitude." 8 U.S.C. § 1229b(b)(1)(C); *see* § 1182(a)(2)(A)(i)(I).

An immigration judge (IJ) concluded that Mr. Pereida's misdemeanor conviction for attempted criminal impersonation under Neb. Rev. Stat. §§ 28-201 & 28-608 (2008) counted as a CIMT.[2] The IJ therefore could not even consider Mr. Pereida's application for relief from removal. Pet. App. 25a-30a. That conviction arose from Mr. Pereida's plea of no

[2] Convictions for attempt to commit CIMTs are treated as CIMTs. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

contest to the misdemeanor attempt charge; he received no jail time and was required to pay only a $100 fine. C.A.R. 162-65.

The IJ agreed with Mr. Pereida that a violation of § 28-608 is not *categorically* a CIMT because, to meet the federal CIMT definition, a crime must "involve[] a reprehensible act accompanied by some degree of scienter." Pet. App. 22a. Whereas some Nebraska criminal impersonation offenses are CIMTs because they "contain[] as a necessary element the intent to defraud, deceive, or harm," one subsection of the Nebraska statute, subsection (c), requires no such intent. Pet. App. 26a-27a.

The IJ therefore examined the conviction under the modified categorical approach. Pet. App. 27a. The IJ concluded that the "course of conduct" alleged in the criminal complaint would have involved criminal intent, and thus Mr. Pereida must not have been "convicted of attempting … subsection (c)," and thus the conviction was a CIMT. Pet. App. 27a; *see also* C.A.R. 165.

4. The Board of Immigration Appeals (BIA) dismissed Mr. Pereida's appeal. Pet. App. 18a. Like the IJ, it determined that § 28-608 was overbroad because subsection (c) is not a CIMT. Pet. App. 14a-15a. It then went on to conclude that § 28-608 was divisible. Pet. App. 15a. In its application of the modified categorical approach, however, the BIA disagreed with the IJ's conclusion that the record of conviction affirmatively established a CIMT, because mere allegations in a criminal complaint cannot be considered,

and the conviction record "does not specify the particular subsection of the substantive statute [Mr. Pereida] was ultimately convicted of violating." Pet. App. 17a.

The BIA nonetheless held that Mr. Pereida was ineligible for relief. Pet. App. 17a. It noted that "[i]n the context of relief for removal, the respondent bears the burden of proving that his particular conviction does not bar relief." Pet. App. 17a. Because the record of conviction did not specify which subsection of § 28-608 Mr. Pereida attempted to violate, the BIA ruled that Mr. Pereida had "not carried his burden of proving that his conviction is not CIMT." Pet. App. 17a.

5. The Eighth Circuit denied Mr. Pereida's petition for review. Pet. App. 10a. It first concluded that Nebraska's criminal impersonation statute is overbroad and divisible. Pet. App. 7a. The modified categorical approach therefore applied. The Eighth Circuit then turned to "the heart of the matter in this particular case," which was the impact of the Court's inability "to discern the subsection of § 28-608 under which Pereida was convicted." Pet. App. 7a-8a.

Relying on its prior decision in *Andrade-Zamora v. Lynch*, 814 F.3d 945, 949 (8th Cir. 2016), the court noted that "[w]hile the government bears the burden to prove the alien is deportable or removable, it is the alien's burden under the INA to prove he is eligible for cancellation of removal." Pet. App. 8a-9a. Because "it is not possible to ascertain which subsection formed the basis for Pereida's conviction," the Eighth

Circuit held that Mr. Pereida must "bear[] the adverse consequences of this inconclusive record." Pet. App. 2a. Accordingly, even though Mr. Pereida was "not to blame for the ambiguity surrounding his criminal conviction," the court held that the ambiguity rendered him legally ineligible for relief from removal. Pet. App. 8a.

6. The Eighth Circuit denied rehearing en banc. Pet. App. 31a. Mr. Pereida is currently at liberty and remains at home in Nebraska.

REASONS FOR GRANTING THE PETITION

I. There Is An Acknowledged And Deep Conflict On The Question Presented.

The circuits are deeply divided on the question whether an ambiguous record of conviction renders a noncitizen ineligible for discretionary relief from removal. The First, Second, Third, and Ninth Circuits hold that it does not: Those courts presume that a conviction under a divisible statute rests on the minimum conduct necessary to sustain the conviction, and therefore hold that an ambiguous record of conviction does not "necessarily" establish the elements of the narrower federal definition of a crime. But the Fourth, Sixth, Eighth, and Tenth Circuits hold that, because a noncitizen generally bears a burden of proving his eligibility for relief from removal, courts must treat ambiguous convictions as *dis*qualifying unless the noncitizen affirmatively proves that the conviction involved a nondisqualifying prong of the statute.

A. Four circuits hold that an ambiguous record of conviction does not bar eligibility for relief from removal.

In *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016), as here, the noncitizen was convicted under a divisible state statute, but the record of conviction did not reveal whether he was convicted of a prong of the statute that would correspond to an offense listed in the INA. *Id.* at 531. The court held that *Moncrieffe* "dictates the outcome" where conviction records are ambiguous: The conviction does not bar the individual from applying for relief from removal. *Id.* Under *Moncrieffe*, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* (internal quotation marks and brackets omitted) (quoting *Moncrieffe*, 569 U.S. at 190-91). That least-acts-criminalized presumption can be "rebut[ted]" by using the modified categorical approach if the record establishes that the elements involved in the conviction necessarily match the federal offense. *Id.* (citing *Moncrieffe*, 569 U.S. at 191). But where the record documents "shed no light on the nature of the offense," such that a court "cannot identify the prong of the divisible … statute under which [a noncitizen] was convicted," then nothing rebuts the presumption that the conviction is not disqualifying. *Id*. at 531-32.

The First Circuit expressly rejected contrary decisions from other courts—including the Tenth Circuit, whose rule the Eighth Circuit adopted here. *Id.* at 532 n.10; *see* Pet. App. 8a-9a; *infra* 17. Those courts relied

on a noncitizen's burden to prove eligibility for immigration relief. But, the First Circuit explained, "the categorical approach—with the help of its modified version—answers the purely 'legal question of what a conviction *necessarily* established.'" *Sauceda*, 819 F.3d at 533-34 (quoting *Mellouli*, 135 S. Ct. at 1987). So the noncitizen's *evidentiary* burden of proof "does not come into play" in determining whether, "as a matter of law," the state conviction necessarily is a disqualifying federal offense. *Id.* at 532, 534.

More recently, the en banc Ninth Circuit sided with the First Circuit. *See Marinelarena v. Barr*, 930 F.3d 1039, 1047 & n.6, 1048 n.7 (9th Cir. 2019) (en banc). The court held that, "[u]nder *Moncrieffe*, ambiguity in the record as to a petitioner's offense of conviction means that the petitioner has *not* been convicted of an offense disqualifying her from relief." *Id.* at 1047. That is because "the categorical approach, and by extension the modified categorical approach," is "focused on whether a petitioner was 'necessarily' convicted of a disqualifying offense." *Id.* at 1049 (quoting *Moncrieffe*, 569 U.S. at 190-91). So, if "the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes." *Id.* at 1048.

The Ninth Circuit expressly "declin[ed] to follow the Tenth, Sixth, and Eighth Circuits." *Id.* at 1047 n.6. The Ninth Circuit majority and dissent both addressed the Eighth Circuit's decision in this case specifically. *Id.*; *see also id.* at 1056-57, 1061 n.13 (Ikuta, J., dissenting). Like the First Circuit, the Ninth Cir-

cuit rejected these other courts' reliance on the noncitizen's burden of proof, because the analysis of prior convictions "poses a fundamentally legal question," which is "unaffected by statutory burdens of proof." *Id.* at 1049 (majority op.). Whether "the record of conviction necessarily establishe[s] the elements of the disqualifying federal offense 'is a legal question with a yes or no answer'"; the conviction documents "either show that the petitioner was convicted of a disqualifying offense …, or they do not." *Id.* at 1049-50.[3]

Even before *Moncrieffe* formalized the least-acts-criminalized presumption, the Second and Third Circuits had reached the same conclusion. In *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), another cancellation case, the Second Circuit rejected the government's reliance on the noncitizen's burden of proof and instead applied the traditional categorical approach to analyze a past conviction. *Id.* at 121-22. The court reasoned that a noncitizen satisfies his statutory "burden of proving that he is eligible for cancellation relief" by "showing that the minimum conduct for which he was convicted was not [disqualifying]." *Id* at 122. A contrary rule would undermine "[t]he very basis of the categorical approach," which "is that the *sole* ground for determining whether an immigrant was convicted of [a disqualifying offense] is the minimum criminal conduct necessary to sustain a conviction under a given statute." *Id.* at 121; *see also Scarlett v. U.S. Dep't of Homeland Sec.*, 311 F. App'x

[3] The Ninth Circuit had previously taken the other side of the split in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). *Marinelarena* overruled that decision. 930 F.3d at 1042.

385, 386-87 (2d Cir. 2009) (applying *Martinez* in a case involving the modified categorical approach).

The Third Circuit has similarly held that a merely ambiguous record of a prior conviction does not preclude eligibility for relief from removal. In *Thomas v. Attorney General*, 625 F.3d 134 (3d Cir. 2010), the petitioner twice pleaded guilty to a divisible controlled-substances offense. *Id.* at 137-38. Because the "sparse" record of conviction was "silent regarding the factual basis for the guilty pleas," the court could not "conclusively determine that Thomas actually admitted" to conduct that constituted a more serious drug offense that would render him ineligible for relief from removal. *Id.* at 146-47. Rather, it was "equally plausible that Thomas's admission of guilt under [the state statute] was to conduct which would *not* constitute" the more serious offense. *Id.* at 147. Accordingly, the court explained, under the categorical and modified categorical approaches, there was no basis to conclude that Thomas was *convicted* of a crime that met the definition of the disqualifying federal offense. *Id.* at 148.

Following *Moncrieffe*, the Third Circuit reaffirmed its view in a modified-categorical-approach case. *Johnson v. Att'y Gen.*, 605 F. App'x 138, 141-42 (3d Cir. 2015). As the court put it, "*Moncrieffe* did not change our existing precedent—it confirmed it." *Id.* at 143.[4]

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[4] The decision below suggested the Third Circuit took the opposite position in *Syblis v. Attorney General*, 763 F.3d 348 (3d Cir. 2014). *See* Pet. App. 9a. But *Syblis* applied a circumstance-specific inquiry that required examination of the actual conduct

In sum, four circuits share the view that, under the modified categorical approach, a merely ambiguous record of a prior conviction does not bar eligibility for relief from removal. And, as the First, Second, and Ninth Circuits have specifically explained, the immigration laws' burden-of-proof provisions do not bear on the purely legal, categorical analysis of what a conviction "necessarily" establishes.

B. Four circuits hold that an ambiguous record bars noncitizens from even applying for relief from removal.

The decision below, in contrast, holds that an ambiguous record of conviction *is* legally disqualifying. The Eighth Circuit explained that Mr. Pereida must "bear[] the adverse consequences of this inconclusive record" because it is his "burden to establish his eligibility for cancellation of removal." Pet. App. 2a. In the Eighth Circuit's view, "the fact that Pereida is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief." Pet. App. 8a.

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and facts of a prior criminal offense—a special context in which "the categorical approach does not apply." 763 F.3d at 356; *see supra* 6 n.1. *Syblis* distinguished the Third Circuit's earlier decision in *Thomas* on exactly this ground. 763 F.3d at 357 n.12. The Third Circuit has since applied its earlier cases—not *Syblis*—where, as here, the modified categorical approach governs. *See Johnson*, 605 F. App'x at 141-42. Moreover, *Syblis* rests on a premise (that the categorical approach does not govern the analysis of controlled-substances offenses, 763 F.3d at 356) that has since been abrogated by *Mellouli* (which holds that the categorical approach does apply in that context), as the Third Circuit recently recognized. *See Hillocks v. Att'y Gen.*, 934 F.3d 332, 345 (3d Cir. 2019).

So the ambiguity means that "Pereida cannot establish that he was eligible for cancellation for removal." Pet. App. 2a.

The Eighth Circuit embraced the Tenth Circuit's rationale in *Lucio-Rayos v. Sessions*, 875 F.3d 573, 581-82 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 865 (2019) (No. 18-64). *See* Pet. App. 9a. *Lucio-Rayos* held that *Moncrieffe*'s least-acts-criminalized presumption does not govern the question whether an ambiguous record of conviction disqualifies a noncitizen from seeking relief from removal. The Tenth Circuit stated that where "it is unclear from [a noncitizen's] record of conviction whether he committed a [disqualifying crime], … he has not proven eligibility for cancellation of removal" because a noncitizen bears the "burden of establishing that he or she is eligible for any requested benefit or privilege." *Lucio-Rayos*, 875 F.3d at 581, 584 (quoting *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009)). Disagreeing with the First Circuit, the Tenth Circuit reasoned that *Moncrieffe* does not govern cases involving relief from removal or the modified categorical approach. *Id.* at 582-84.

The Sixth Circuit similarly followed the Tenth Circuit in *Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 863 (2019) (No. 18-558). The court held that where "the record of conviction is inconclusive as to whether the state offense matched the generic definition of a federal statute, the petitioner [for relief from removal] fails to meet her burden." *Id.* at 779. The court acknowledged that the "circuits are divided" on the question, *id.* at 775 & n.5, and then sided with the Tenth Circuit (while rejecting

the First Circuit's holding in *Sauceda*) because it believed that *Moncrieffe*'s least-acts-criminalized presumption is inapplicable. *Id.* at 776-77.

The Fourth Circuit has also held that an inconclusive record of conviction bars relief from removal. In *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), *cert. denied*, 565 U.S. 1110 (2012) (No. 11-206), the court held that "any lingering uncertainty that remains after consideration of the conviction record necessarily inures to the detriment" of the noncitizen seeking cancellation because of the noncitizen's burden of proof. *Id.* at 114. The Fourth Circuit has continued to apply its rule even after *Moncrieffe*. *See Romero v. Barr*, 755 F. App'x 327, 328 (4th Cir. 2019), *pet. for cert. filed*, No. 19-___ (filed concurrently with this petition on Sept. 30, 2019).

In dicta, the Seventh Circuit has suggested that it too would "agree" with these "Circuits … that if the analysis has run its course and the answer is still unclear [whether a conviction meets the definition of a listed offense], the alien loses by default," but it ruled for the noncitizen on different grounds in that case. *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014).

The BIA shares the same view. *See Matter of Almanza-Arenas*, 24 I. & N. Dec. 771, 774-76 (BIA 2009). It continues to apply that rule in the Fifth and Eleventh Circuits—the only circuits with immigra-

tion courts that have not yet weighed in on the conflict.[5] *See, e.g.*, *In re Moreira*, No. AXXX-XX9-380, 2013 WL 4041244, at *2 (BIA July 29, 2013) (11th Cir.).

C. The conflict is square and intractable.

The conflict is thus square, with courts on both sides considering and rejecting each other's views. Seven courts of appeals have now expressly acknowledged the division. *See Marinelarena*, 930 F.3d at 1047 n.6 ("The Circuits are split on this issue."); *id.* at 1056-57 & nn.5-7 (Ikuta, J., dissenting) (discussing the "circuit split"); *Francisco*, 884 F.3d at 1134 n.37 ("The circuits have split on this issue."); *Gutierrez*, 887 F.3d at 775 (noting its "sister circuits are divided"); *Lucio-Rayos*, 875 F.3d at 582; *Gomez-Perez*, 829 F.3d at 326 & n.1; *Sauceda*, 819 F.3d at 532 n.10; *Salem*, 647 F.3d at 116; *accord* Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 341-42 (16th ed. 2018).

This division is also intractable. In the year since this Court denied certiorari in *Lucio-Rayos* and *Gutierrez*, the split has only deepened. The Eighth Circuit in this case adopted the government's view,

[5] The Fifth and Eleventh Circuits have acknowledged the question presented but have reserved judgment on it thus far. *See Francisco v. Att'y Gen.*, 884 F.3d 1120, 1134 n.37 (11th Cir. 2018); *Gomez-Perez v. Lynch*, 829 F.3d 323, 326 & n.1 (5th Cir. 2016); *Le v. Lynch*¸ 819 F.3d 98, 107 n.5 (5th Cir. 2016).

while the Ninth Circuit—which hears 56% of all immigration appeals[6]—switched sides to adopt our view. The circuits are now deadlocked at four on each side. And there is no chance this conflict resolves itself. The Fourth, Sixth, Eighth, and Tenth Circuits all recently denied direct requests to reconsider their positions en banc,[7] while the First and Ninth Circuits reached their conflicting views only after they granted rehearing and *rejected* the other circuits' holdings.[8] Only this Court's intervention can restore the uniformity of the Nation's immigration law that the Constitution mandates. U.S. Const., art. I, § 8, cl. 4.

Moreover, cases on both sides involve scenarios just like this one, where the narrow set of records that courts may consult simply does not reveal the basis of an old state conviction, and the question is whether the noncitizen's inability to prove a negative under the categorical approach prevents him from proceeding with an application for relief. The government has previously argued, however, that *Sauceda* is sui gen-

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[6] Administrative Office of the U.S. Courts, *U.S. Courts of Appeals – Judicial Business 2018*, https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2018 (last visited Sept. 26, 2019).

[7] *See* Pet. App. 31a; Order Denying Reh'g, *Romero v. Barr*, No. 18-1551 (4th Cir. Jun. 4, 2019); Order Denying Reh'g, *Gutierrez v. Sessions*, No. 17-3749 (6th Cir. Aug. 20, 2018); Order Denying Reh'g, *Lucio-Rayos v. Sessions*, No. 15-9584 (10th Cir. Mar. 9, 2018).

[8] *See Sauceda*, 819 F.3d at 529 (on panel rehearing by three of that court's six active judges); *Marinelarena*, 930 F.3d at 1046-47.

eris because there the record of conviction was "complete." Br. in Opp. 17-18, *Lucio-Rayos v. Whitaker*, No. 18-64 (U.S. Nov. 9, 2018); Br. in Opp. 19-20, *Gutierrez v. Whitaker*, No. 18-558 (U.S. Dec. 12, 2018). It has suggested that *Sauceda* is therefore distinguishable from cases like this, where the decision below noted that there is not "any indication that [Mr. Pereida's] record is complete." Pet. App. 8a. But when the First Circuit called the record in *Sauceda* "complete," it was describing a record *identical* to this one: The record there contained only "the criminal complaint and the judgment reflecting [the petitioner's] guilty plea," but lacked a plea colloquy or plea agreement that might have "clarif[ied] under which prong he was convicted." 819 F.3d at 530 nn.5-6, 531. Here, the exact same documents are present: The record contains a criminal complaint and judgment, but not a plea transcript or colloquy. C.A.R. 162-65.

In any event, *Sauceda* no longer stands alone. In the Ninth Circuit's recent en banc case, the record also did not contain a plea agreement or plea transcript. *Marinelarena*, 930 F.3d at 1046. So there was a question about "whether all relevant and available documents have been produced." *Id.* at 1050. The court squarely rejected the government's argument that an incomplete record affects the analysis of the question presented, however, because that issue relates to a distinct burden of production rather than the noncitizen's burden of proof. *Id.* at 1050, 1053. Nor have the Second or Third Circuits suggested that all conviction records must be present before their rule applies.

The upshot is that, in four circuits, when a record of conviction *as it exists in immigration court* is inconclusive, like Mr. Pereida's, then the conviction is not legally disqualifying under the modified categorical approach. Yet in the four other circuits, an inconclusive record *never* suffices to establish eligibility for relief—even if no other documents exist and the noncitizen "is not to blame for the ambiguity surrounding his criminal conviction." Pet. App. 8a; *see Lucio-Rayos*, 875 F.3d at 582 (same); *Salem*, 647 F.3d at 116 (same).

II. The Question Presented Is Important And Recurring.

The stakes of deportation are "high and momentous." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). It is "the equivalent of banishment or exile." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Deportation thus "cannot be made a sport of chance" that turns on the circuit in which a removal proceeding takes place. *Judulang v. Holder*, 565 U.S. 42, 58-59 (2011) (internal quotation marks omitted). Yet while a misdemeanor conviction for attempted criminal impersonation prevented Mr. Pereida from even being heard on his claim for relief in immigration court in Nebraska, a noncitizen with a past conviction under the very same Nebraska statute would be eligible to seek cancellation in immigration courts in Massachusetts or California.

Worse still, because the venue for removal proceedings is in the government's control, *see* 8 C.F.R. §§ 1003.14(a), 1003.20(a), a noncitizen detained in California, where an ambiguous conviction would not

be disqualifying, could well be transferred to a facility and placed into removal proceedings in Minnesota, where it would.[9] This circuit conflict is untenable.

This issue also recurs regularly, both in court (as the many recent cases in the split illustrate) and even more commonly in proceedings before immigration judges, the BIA, and frontline immigration adjudicators. It affects every immigration benefit that a past "conviction" could preclude, including asylum, cancellation of removal, and relief for battered spouses under the Violence Against Women Act. *See* 8 U.S.C. §§ 1158(b)(2)(B)(i), 1229b(a)(3), 1229b(b)(1)(C), 1229b(b)(2)(A)(iv); *see also* 8 U.S.C. §§ 1255(a), 1182(a)(2)(A)(i) (adjustment of status for relatives of permanent residents and U.S. citizens); 8 U.S.C. § 1255(h)(2)(B), (*l*)(1)(B) (adjustment of status for juveniles granted special immigrant juvenile status and for trafficking victims); 8 U.S.C. § 1427(a)(3) (naturalization); *see Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010) ("conviction" is the "relevant statutory hook" for the categorical approach). Because immigration courts look to past convictions as a threshold step to pretermit applications for relief, and because many conviction records are unclear, the question presented will often be enormously consequential.

And it is not uncommon for conviction records to be missing or inconclusive. This Court has long understood that "in many cases state and local records … will be incomplete," and that this "common-

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[9] *See* Libby Rainey, *ICE transfers immigrants held in detention around the country to keep beds filled*, Denver Post (Sept. 17, 2017), https://tinyurl.com/y7tq3rl2.

enough" occurrence "will often frustrate application of the modified categorical approach." *Johnson*, 559 U.S. at 145. Indeed, records are particularly likely to be devoid of detail in the plea context, where the particular prong of a statute giving rise to a conviction need not be specified if it does not affect the agreed-upon sentence. *Cf. Descamps*, 570 U.S. at 270-71 (observing that defendants are unlikely to "irk the prosecutor or court by squabbling about superfluous [details]").

Where courts do happen to record more detailed information, they may have a practice of destroying records after a few years, especially for minor convictions. Nebraska, for example, permits destruction of certain case files after 15 years.[10] Minnesota and North Dakota authorize disposal of certain records after 10 years.[11] The problem is not limited to the Eighth Circuit: California courts retain records for misdemeanor convictions for five years, and only two years for certain marijuana offenses. Cal. Gov't Code § 68152(c)(7)-(8). North Carolina courts do not even

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[10] Nebraska Records Management Division, *Schedule 18: County Courts* 5 (approved Jan. 3, 2018), https://tinyurl.com/y3swl6vo.

[11] Minnesota Judicial Branch, Courts Services Division, *District Court Retention Schedule* 13 (May 23, 2018), https://tinyurl.com/y2wbqquq; North Dakota Courts, *Record Retention Schedule – Courts* (effective July 1, 2019), https://tinyurl.com/y2myxh34.

create a transcript or a recording of most misdemeanor proceedings.[12]

These short retention periods matter because convictions that are years or even decades old are often raised as potential bars to relief from removal. The convictions in the Third Circuit's leading case on this question, for example, were 12 and 13 years old—"dated, to say the least." *Thomas*, 625 F.3d at 144. So, whether the details of prior convictions were never recorded in the first place or whether they were lost to time, inconclusive records of conviction are commonplace. And, everywhere outside the First, Second, Third, and Ninth Circuits, that fortuity could entirely bar noncitizens from seeking relief from removal.

III. This Case Is An Ideal Vehicle To Resolve The Conflict.

This case presents an ideal vehicle to resolve this conflict. Notably, it lacks the vehicle flaws that the government emphasized in *Lucio-Rayos* and *Gutierrez*. *See Lucio-Rayos* Br. in Opp. 18-20 (No. 18-64); *Gutierrez* Br. in Opp. 20-22 (No. 18-558).

The question presented was the dispositive issue below. There was "no disagreement among the parties or each of the reviewing courts to-date" that the Nebraska criminal impersonation statute is overbroad. Pet. App. 7a. It was also undisputed that the record of

[12] North Carolina Administrative Office of the Courts, *The North Carolina Judicial System* 27-28 (2008 ed.), https://tinyurl.com/ycqc2n9v.

conviction did not indicate "the subsection of the statute under which Pereida was convicted." Pet. App. 8a. So the question presented was "the heart of the matter in this particular case." Pet. App. 7a-8a. The BIA and Eighth Circuit each held that the ambiguity in Mr. Pereida's conviction rendered it legally disqualifying *solely* because Mr. Pereida could not negate the possibility that his conviction arose under the disqualifying prongs of the Nebraska criminal impersonation statute. Pet. App. 2a-3a, 8a-10a, 17a.

In *Lucio-Rayos*, in contrast, the government argued that "the question presented may not be dispositive" because the "government would be free to defend the judgment" on "[t]he BIA's principal ground of decision," which was that the state statute of conviction was not overbroad in the first place. Br. in Opp. 18-20. And in *Gutierrez*, the government argued that "resolution of the question presented" would not be dispositive because the IJ relied on multiple alternative convictions (in addition to the conviction analyzed by the BIA and Sixth Circuit) to find Ms. Gutierrez ineligible for cancellation. Br. in Opp. 21. Neither objection applies here.

The question presented is also very likely to determine the ultimate outcome of Mr. Pereida's application for relief. Because it is undisputed that Mr. Pereida's record of conviction is inconclusive, a ruling that ambiguous convictions fail to satisfy the modified categorical approach would mean that his conviction is not disqualifying. Mr. Pereida meets all the other threshold eligibility criteria for cancellation, *see* 8 U.S.C. § 1229b(b)(1), and he is likely to succeed on that application because he presents a compelling

case for cancellation of removal: His only criminal conviction is this misdemeanor attempt offense for which he served no time in prison, C.A.R. 115, 162-63, 207; he has a long and productive work history; he has paid taxes consistently; and he provides essential support for his family of five. *Supra* 8-9. In *Gutierrez*, in contrast, the government argued that Ms. Gutierrez's "lengthy conviction record dating back to at least 1996, including multiple felony convictions" meant that it was unlikely she would "warrant discretionary relief from removal" on remand even were she to prevail before this Court. Br. in Opp. 21-22.

This case also presents a highly representative context to resolve the question presented. It involves precisely the sort of plea to a low-level offense for which courts most often do not create precise records revealing which prong or sub-prong of a divisible statute gave rise to a conviction. So this case perfectly exemplifies how a noncitizen's fate may depend on the existence of records he neither creates nor maintains.

Finally, unlike *Lucio-Rayos*, in which Justice Gorsuch was recused, a full Court would be able to decide this case. *See* 139 S. Ct. 865; 875 F.3d at 575 n.1 (noting that, prior to his elevation to this Court, then-Judge Gorsuch "participated in the oral argument but not in the decision in this case").

IV. The Decision Below Is Incorrect.

A. The Eighth Circuit's position is incompatible with this Court's recent categorical approach cases. Mr. Pereida's eligibility for cancellation turns on whether he has been "*convicted* of" a CIMT. 8 U.S.C.

§ 1229b(b)(1)(C) (emphasis added); *see also* §§ 1182(a)(2), 1227(a)(2). As *Moncrieffe* held, the inquiry into "what offense the noncitizen was 'convicted of'" requires courts to examine whether "a conviction of the state offense 'necessarily' involved … facts equating to the generic federal offense." 569 U.S. at 190-91 (brackets omitted).

The key word is "necessarily." "Because [courts] examine what the state conviction *necessarily* involved, not the facts underlying the case, [courts] must *presume* that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* (emphasis added) (brackets omitted); *see also, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (same). That is, the categorical approach asks "the legal question of what a conviction *necessarily* established." *Mellouli*, 135 S. Ct. at 1987. Under this Court's cases, then, when a state statute sweeps in conduct that extends beyond the federal definition, a conviction under that statute presumptively is not disqualifying.

This least-acts-criminalized presumption may be rebutted using the modified categorical approach. *See Moncrieffe*, 569 U.S. at 191 (citing the approach as a "qualification" to the presumption). But the presumption is rebutted only if the "record of conviction of the predicate offense *necessarily* establishes" that the "particular offense the noncitizen was convicted of" was the narrower offense corresponding to a disqualifying crime. *Id.* at 190-91, 197-98 (emphasis added). If the record does not *necessarily* establish as much,

the least-acts-criminalized presumption is not displaced. Accordingly, "[a]mbiguity" about the nature of a conviction "means that the conviction did not 'necessarily' involve facts that correspond to [the disqualifying offense category]," and so the noncitizen "was not *convicted* of [the disqualifying offense]," as a matter of law. *Id.* at 194-95 (emphasis added); *see Marinelarena*, 930 F.3d at 1047-48; *Sauceda*, 819 F.3d at 532.

Here, Mr. Pereida's conviction leaves ambiguous whether it included the element of intent to defraud, deceive, or cause harm. That element would be required for this type of offense to constitute a CIMT under federal immigration law. *See* Pet. App. 26a; *Jordan v. De George*, 341 U.S. 223, 232 (1951). Because the conviction does not *necessarily* establish a CIMT, by default it does not count as a "conviction" for a CIMT, and so Mr. Pereida should have been permitted to proceed with his application for cancellation of removal.

The Eighth Circuit disagreed because the immigration laws place the burden of proof on noncitizens. Pet. App. 8a-9a. But that burden affects only *factual* questions of eligibility. *Sauceda*, 819 F.3d at 534.[13] For example, Mr. Pereida had to—and did—marshal evidence that his removal would cause his U.S.-citizen son exceptional and extremely unusual hardship. 8 U.S.C. § 1229b(b)(1)(D); *see, e.g.*, C.A.R. 124, 197-98,

[13] This is consistent with the common understanding that the "preponderance of the evidence" standard, referred to in 8 C.F.R. § 1240.8(d), applies to factual inquiries. *See generally* 2 McCormick on Evidence § 339 (7th ed. 2016).

291-301. This burden of proof, however, does not apply to legal questions. *See, e.g.*, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer J., concurring) (an "evidentiary standard of proof applies to questions of fact and not to questions of law"); *Marinelarena*, 930 F.3d at 1049.

In applying the modified categorical approach, a court "answers the purely 'legal question of what a conviction necessarily established.'" *Sauceda*, 819 F.3d at 534 (quoting *Mellouli*, 135 S. Ct. at 1987); *see also Marinelarena*, 930 F.3d at 1049 (same). That means that the burden of proof "does not come into play." *Sauceda*, 819 F.3d at 534.

Think of it this way: After inspecting the "uncontested documents in the record," "nothing remains inconclusive" about whether the prior conviction is disqualifying; the conviction documents "either show that the petitioner was convicted of a disqualifying offense …, or they do not." *Marinelarena*, 930 F.3d at 1049-50. And if "the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes." *Id.* at 1048. Thus, this "legal query requires no factual finding and is therefore unaffected by statutory 'burdens of proof.'" *Id.* at 1049.

In short, the Eighth Circuit's rule improperly reverses *Moncrieffe*'s legal presumption. It requires courts to assume a conviction rests on a *more* serious act criminalized by a divisible statute, unless a noncitizen can affirmatively prove that his conviction

was based on a lesser, nondisqualifying prong. Pet. App. 8a-9a.

B. The decision below (at Pet. App. 9a) endorsed the Tenth Circuit's reasoning in *Lucio-Rayos*, which distinguished *Moncrieffe* on two grounds. Neither withstands scrutiny.

First, the Tenth Circuit concluded that *Moncrieffe*'s least-acts-criminalized presumption applies only to determining removability, not eligibility for cancellation of removal. *Lucio-Rayos*, 875 F.3d at 582-83. But *Moncrieffe* held that the analysis of a prior conviction operates the "same in both [the removal and cancellation] contexts," because the categorical analysis in both the removal and cancellation statutes flow from the same term, "convicted." 569 U.S. at 191 n.4.

Moncrieffe itself involved both removal and cancellation. The question presented in *Moncrieffe* was whether a drug conviction like Mr. Moncrieffe's counted as an aggravated felony. But there was no dispute that his drug conviction was at least a crime "relating to a controlled substance," which was enough to render him removable. *See id.* at 204 (citing 8 U.S.C. § 1227(a)(2)(B)(i)). Whether the conviction was also an aggravated felony mattered *only* because, if it was, he could not apply for discretionary relief from removal. Both the majority and Justice Alito's dissent emphasized as much. *Id.* at 187, 204; *see also id.* at 211 (Alito, J., dissenting) (recognizing that the Court's "holding" was that the noncitizen was "eligible for cancellation of removal"). And the courts on our side of the split have recognized the same. *See*

Marinelarena, 930 F.3d at 1048 (explaining that limiting *Moncrieffe*'s analysis to the removal stage of proceedings "would have led to an exceedingly odd result in *Moncrieffe* itself" because "Moncrieffe would have been not removable as an aggravated felon, as the Court held, yet, based on the same conviction, would be ineligible for asylum or cancellation of removal, also alluded to in the opinion"); *Sauceda*, 819 F.3d at 533-34.

Second, the Tenth Circuit distinguished *Moncrieffe* as applying only the categorical approach without reaching the modified categorical step. *Lucio-Rayos*, 875 F.3d at 583; *accord Gutierrez*, 887 F.3d at 776-77. As the First and Ninth Circuits correctly observed, however, any argument "that *Moncrieffe* is inapplicable because it focused on the categorical approach, not the modified categorical approach," is "preclude[d]" by *Descamps*, which clarifies that "[t]he modified categorical approach is not a wholly distinct inquiry." *Sauceda*, 819 F.3d at 534 (citing *Descamps*, 570 U.S. at 263); *see also Marinelarena*, 930 F.3d at 1050. It "preserves the categorical approach's basic method," *Marinelarena*, 930 F.3d at 1050 (quoting *Descamps*, 570 U.S. at 263), and it is merely "a tool" to "help[] implement the categorical approach." *Sauceda*, 819 F.3d at 534 (quoting *Descamps*, 570 U.S. at 263). Indeed, *Moncrieffe*'s least-acts-criminalized presumption focuses the analysis on the least criminal prong of a divisible statute precisely when the "absence of records" renders the "application of the modified categorical approach" inconclusive. *Johnson*, 559 U.S. at 145; *see id.* at 136-37 (applying the presumption to a divisible statute).

C. The Eighth Circuit's rule is inconsistent with *Moncrieffe* in another respect: It risks placing an impossible burden on the noncitizen seeking relief. Under the Eighth Circuit's rule, the noncitizen is simply out of luck when conviction records that he neither creates nor maintains either do not contain clarifying details or no longer exist. But *Moncrieffe* explained that "[t]he categorical approach was designed to avoid" just the sort of "potential unfairness" that arises when "two noncitizens, each 'convicted of' the same offense, might obtain different [disqualifying-offense] determinations depending on what evidence remains available." 569 U.S. at 201.

Here, for example, Mr. Pereida could not have "submitted testimony from his lawyer" or "the judge who accepted his plea to ascertain what offense was charged and pleaded to in the state court"—subsection (c) or a different subsection—assuming anyone could even remember the details years later. *Sauceda*, 819 F.3d at 532. The categorical and modified categorical approaches prohibit such "minitrials," because after-the-fact testimony is not among the narrow range of official conviction records (the "*Shepard* documents") that courts may look to in determining the basis for a conviction. *Moncrieffe*, 569 U.S. at 191, 200-01.

Congress did not intend to make applicants for relief from removal prove the unprovable by requiring them to establish the basis of their conviction using *Shepard* documents that may no longer exist, and, if they do exist, may not answer the question. Instead, as always under the modified categorical approach, unless the conviction record conclusively establishes

a disqualifying offense, the offense is presumptively *not* disqualifying.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 30, 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-3377

Clemente Avelino Pereida

Petitioner

v.

William P. Barr, Attorney General of the United States

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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Submitted: October 24, 2018
Filed: March 1, 2019

Before ERICKSON, BEAM, and GRASZ, Circuit Judges.

BEAM, Circuit Judge.

Clemente Avelino Pereida, a native and citizen of Mexico, petitions for review of the decision of the Board of Immigration Appeals (Board) affirming the Immigration Judge's (IJ) grant of the Department of Homeland Security's (DHS's) motion to pretermit Pereida's cancellation of removal application. Pereida pleaded no contest to a Nebraska criminal attempt charge (Neb. Rev. Stat. § 28-201(1)(b)) arising from the use of a fraudulent social security card to obtain employment at National Service Company of Iowa, operating in rural Crete, Saline County, in violation of Nebraska Revised Statute § 28-608 (2008).[1] The determinative issue in this matter is whether Pereida's criminal attempt conviction qualifies as a crime involving moral turpitude (CIMT), making him ineligible for cancellation of removal. The criminal impersonation offense underlying Pereida's attempt conviction is a divisible statute with subsections, some of which qualify as CIMTs and one subsection that may not. Applying the modified categorical approach, it is not possible to ascertain which subsection formed the basis for Pereida's conviction. It is Pereida's burden to establish his eligibility for cancellation of removal and he thus bears the adverse consequences of this inconclusive record. Accordingly, because Pereida cannot establish that he was eligible for cancellation of removal, we uphold the Board's

[1] Nebraska Revised Statute § 28-608 was the statute under which Pereida was arrested in July 2009. The statute was revised, effective August 30, 2009, and is currently found at Nebraska Revised Statute § 28-638.

determination that he has not shown such eligibility. Thus, we deny Pereida's petition for review.

I. BACKGROUND

Pereida is a citizen of Mexico who entered the United States without authorization or inspection in, according to his application for cancellation of removal, approximately 1995. He has thus lived in the United States for an extended period of time and, according to the immigration record, has been gainfully employed, paid taxes and with his wife, raised his family (comprised of their three children) here. On August 3, 2009, DHS issued a Notice to Appear (NTA) charging Pereida with removability. Pereida admitted the factual allegations in the NTA and conceded the charge of removability, but in March 2011 filed an application for Cancellation of Removal and Adjustment of Status pursuant to 8 U.S.C. § 1229b(b)(1). In August 2014, DHS filed a Motion to Pretermit Pereida's application asserting that he had been convicted of a CIMT, which is a mandatory bar to his requested relief, given Pereida's no contest plea to a charge of attempted criminal impersonation.

The IJ analyzed the substantive crime of criminal impersonation in Nebraska underlying Pereida's criminal attempt charge and held that the statute is divisible; that Pereida was necessarily convicted under a subsection requiring the specific intent to defraud, deceive or harm; and thus Pereida's conviction under this statute constituted a CIMT. Having found Pereida's attempted criminal impersonation conviction to be a CIMT, the IJ additionally held that because the conviction was

punishable by a maximum term of "not more than one year imprisonment," Neb. Rev. Stat. § 28-106(1), it constituted a conviction "of an offense under subsection 1182(a)(2) [and] 1227(a)(2)," barring Pereida from the relief requested, at least according to the IJ's analysis of 8 U.S.C. § 1229b(b)(1)(C). The IJ's decision was reviewed by the Board, which did not go so far in its analysis.

The Board agreed that only three subsections under Nebraska Revised Statute § 28-608 qualified as CIMTs because each contained as a necessary element the intent to defraud or deceive, thus making the statute divisible. Under a modified categorical approach, the Board found no record as to which particular subsection of the statute Pereida was ultimately convicted of violating. This is where the Board ended its analysis. The Board noted that Pereida bore the burden of proving that his particular conviction did not bar relief. 8 U.S.C. § 1229a(c)(4). Accordingly, the Board found that Pereida failed to carry his burden of proving that his conviction was not a CIMT, and that he was thus statutorily ineligible for cancellation of removal. Pereida petitioned this court for review of the Board's order, claiming that his conviction of attempted criminal impersonation does not fall within the definition of a CIMT. Pereida additionally claims that even if his Nebraska conviction qualifies as a CIMT, it falls within the petty offense exception available under 8 U.S.C. § 1182(a)(2)(A)(ii).

II. DISCUSSION

We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) to review "constitutional claims or questions of law raised upon a petition for review." "We review the [Board's] factual determinations under a substantial-evidence standard and its legal conclusions de novo." *Andrade-Zamora v. Lynch*, 814 F.3d 945, 948 (8th Cir. 2016). Where, as here, the Board adopted the reasoning of the IJ, we consider the two decisions together. *Saldana v. Lynch*, 820 F.3d 970, 974 (8th Cir. 2016).

To be eligible for cancellation of removal, Pereida had to meet four requirements. 8 U.S.C. § 1229b(b)(1). At issue here is whether, under 8 U.S.C. § 1229b(b)(1)(C), Pereida's conviction for attempted criminal impersonation is a CIMT as defined by the Immigration and Nationality Act (INA) in 8 U.S.C. § 1182(a)(2) or § 1227(a)(2). If it is, and if no exceptions apply, Pereida is ineligible for cancellation of removal.

We first apply the "categorical approach" to determine whether Pereida's conviction qualifies as a CIMT by comparing the elements of that state offense to see if it fits within the generic definition of a crime involving moral turpitude. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). In doing so, we presume that the conviction rested upon nothing more than the least of the acts criminalized by the state statute. *Gomez-Gutierrez v. Lynch*, 811 F.3d 1053, 1058 (8th Cir. 2016) (applying the realistic probability test in the context of a CIMT analysis). Deferring to the agency's interpretation of this ambiguous statutory

phrase left undefined by Congress, "[c]rimes involving moral turpitude have been held to require conduct 'that is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general.'" *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (quoting *Lateef v. Dep't of Homeland Sec.*, 592 F.3d 926, 929 (8th Cir. 2010)). "Crimes involving the intent to deceive or defraud are generally considered to involve moral turpitude." *Id.* (quoting *Lateef*, 592 F.3d at 929).

The underlying Nebraska offense of criminal impersonation at issue, as it existed at the relevant time, stated:

> (1) A person commits the crime of criminal impersonation if he or she: (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another; (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another; (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or (d) Without the authorization or permission of another and with the intent to deceive or harm another: (i) Obtains or records personal identification documents or personal identifying information; and (ii) Accesses or

> attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608 (2008).

Reviewing this statute as a whole, there appears to be no disagreement among the parties or each of the reviewing courts to-date that the statute defines crimes that are not categorically CIMTs. Both the IJ and the Board concluded that because three of the subsections of § 28-608 contained as a necessary element the intent to deceive, they qualified as a CIMT. However, because a violation of subsection (c) would not, on its face, require the same mens rea requirement, there was a realistic probability that the statute punished non-turpitudinous conduct as well. We agree. Because this statute is divisible, the inquiry does not end here. *Villatoro v. Holder*, 760 F.3d 872, 877 (8th Cir. 2014) (noting that upon application of the categorical approach the inquiry ends if the statute at issue either requires or excludes conduct involving moral turpitude).

Having determined that not all crimes proscribed by the Nebraska statute would qualify as a CIMT, we apply a modified categorical approach to this divisible statute. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (explaining that a divisible statute "list[s] elements in the alternative, and thereby define[s] multiple crimes). It is at this juncture where the IJ and Board's analyses parted ways and where we find

the heart of the matter in this particular case. Applying the modified categorical approach to the record before us, we are unable to discern the subsection of § 28-608 under which Pereida was convicted.

It is a maxim oft repeated that under the INA, the alien bears "the burden of proof to establish that [he] satisfies the applicable eligibility requirements" for cancellation of removal, 8 U.S.C. § 1229a(c)(4)(A)(i), including that he was not "convicted of an offense" that would disqualify him from cancellation of removal, 8 U.S.C. § 1229b(b)(1)(C). *Andrade-Zamora*, 814 F.3d at 948. Here, then, it is Pereida's burden to establish that his conviction for attempted criminal impersonation is not a CIMT. Yet, as Pereida himself acknowledges and argues, there is no indication of the subsection of the statute under which Pereida was convicted, i.e., that the documents filed by DHS, that included the complaint, are insufficient to clarify the matter. This acknowledgment, however, is not in Pereida's favor. There are only a "limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) [that this court can review] to determine what crime, with what elements, [Pereida] was convicted of." *Mathis*, 136 S. Ct. at 2249. On this record, without more, or without any indication that the record is complete, as is, we are unable to make the requisite determination, as the Board itself indicated. Even assuming a complete record is before us, the fact that Pereida is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief under this circuit's precedent. *Andrade-Zamora*, 814

F.3d at 949 ("While the government bears the burden to prove the alien is deportable or removable, it is the alien's burden under the INA to prove he is eligible for cancellation of removal[;] … [or, stated differently] to prove he did not commit an offense that disqualifies him from cancellation of removal."); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 581-82 (10th Cir. 2017) (placing the ultimate burden on the alien where an alien sought discretionary relief and none of the documents in the record indicated under what provision he was convicted), *cert. denied*, 2019 WL 113529 (Jan. 7, 2019); *Syblis v. Att'y Gen. of the U.S.*, 763 F.3d 348, 356 (3d Cir. 2014) (joining the Fourth, Seventh, Ninth and Tenth Circuits in holding that an inconclusive record is insufficient to satisfy a noncitizen's burden of proving eligibility for discretionary relief). We are bound by our precedent absent en banc reconsideration or a superseding contrary decision by the Supreme Court regarding this unique situation.

Our inability to discern the particular crime for which Pereida was convicted forecloses any substantive discussions advanced by Pereida on appeal. For example, Pereida references case law from sister circuits in support of his argument that his particular offense of attempted criminal impersonation is not a CIMT, pointing out various viewpoints on the theoretical boundaries and legal uncertainty in the arena of defining what, exactly, constitutes (or should constitute) moral turpitude in situations such as this. *See, e.g.*, *Beltran-Tirado v. INS*, 213 F.3d 1179, 1184-85 (9th Cir. 2000); *Arias v. Lynch*, 834 F.3d 823, 830-36 (7th Cir. 2016) (Posner, J., concurring). Pereida also alternatively argues that

even *if* this court were to hold that his offense qualifies as a CIMT, the petty offense exception, 8 U.S.C. § 1182(a)(2)(A)(ii)(II), carries the day on these facts. However, the absence of the necessary substantive determination regarding the existence or not of a CIMT in this case precludes any additional discussion and ends the inquiry before us.[2]

III. CONCLUSION

For the foregoing reasons, we deny Pereida's petition for review.

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[2] We do note that whether or not there is a determination regarding the applicability of the petty theft exception under 8 U.S.C. § 1182(a)(2)(A)(ii)(II), Pereida is ultimately foreclosed in seeking cancellation of removal. This court held in *Andrade-Zamora* that the cross-reference in 8 U.S.C. § 1229b(b)(1)(C) only refers to the list of offenses and not the immigration consequences. 814 F.3d at 950-51. Accordingly, Pereida would fail to carry his burden to show that he has not been convicted of an offense under section 1227(a)(2), which includes CIMTs "for which a sentence of one year or longer may be imposed," because Pereida's Nebraska conviction was punishable by a maximum term of "not more than one year imprisonment." 8 U.S.C. §§ 1227(a)(2)(A)(i)(II), 1229b(b)(1)(C); Neb. Rev. Stat. §§ 28-106(1), 28-201(4)(e).

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A093 333 944 – Omaha, NE

Date: OCT 19, 2017

In re: Clemente AVELINO PEREIDA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raul F. Guerra, Esquire

ON BEHALF OF DHS: Matthew E. Morrissey
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(b) of the Act

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated September 25, 2014, denying his application for cancellation under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

The respondent concedes that he is removable as charged (IJ at 1; Tr. at 2) and, therefore, the issue on appeal is whether he qualifies for cancellation of removal, a form of relief that is available only to an applicant who proves that he "has not been convicted of an offense under section 212(a)(2) [or] 237(a)(2)" of the Act. *See* section 240A(b)(1)(C) of the Act. The Immigration Judge determined that the respondent cannot satisfy that requirement because in 2010 he was convicted of attempted Criminal Impersonation, in violation of Nebraska Revised Statutes section 28-201,[1] a crime involving moral turpitude ("CIMT") for which a sentence of 1 year or longer may be imposed under sections 212(a)(2)(i)(I) or 237(a)(2)(A)(i) of the Act, 8 U.S.C. §§ 1182(a)(2)(i)(I), 1227(a)(2)(A)(i) (IJ at 4-5). We affirm the Immigration Judge's decision.

To determine whether the respondent's conviction is a CIMT under the Act, we employ the categorical approach. *Matter of J-G-D-F-*, 27 I&N Dec. 82, 83 (BIA 2017). "This approach requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute." *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016); *see also*

---

[1] Although the respondent was convicted of attempted criminal impersonation, it is well-established that "there is no distinction for immigration purposes in respect to moral turpitude, between the commission of the substantive crime and the attempt to commit it." *See Matter of Davis*, 20 I&N Dec. 536, 545 (BIA 1992) (quoting *Matter of Awaijane*, 14 I&N Dec. 117, 118-19 (BIA 1972)).

Villatoro v. Holder, 760 F.3d 872, 877-79 (8th Cir. 2014) (adopting the realistic probability standard in deciding whether a crime categorically involves moral turpitude).

The Act does not define offenses constituting crimes involving moral turpitude. However, the phrase moral turpitude refers generally to conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *See*, *e.g.*, *Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007); *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). It has long been held that crimes involving the intent to deceive or defraud are generally considered to involve moral turpitude. *Jordan v. De George*, 341 U.S. 223, 232 (1951); *Matter of Kochlani*, 24 I&N Dec. 128, 130 (BIA 2007); *Matter of Flores*, 17 I&N Dec. 225, 227-28 (BIA 1980); *Lateef v. Dep't of Homeland Sec.*, 592 F.3d 926, 929 (8th Cir. 2010); *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010).

At the time of the respondent's conviction, Nebraska's criminal impersonation statute was located at section 28-608 and provides that:

> (1) A person commits the crime of criminal impersonation if he or she:
>
> > (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another, or to deceive or harm another; or

> (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another, and to deceive or harm another; or
>
> (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> (d) Without the authorization or permission of another and with the intent to deceive or harm another:
>
> > (i) Obtains or records personal identification documents or personal identifying information; and
> >
> > (ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608 (2010).

We agree with the Immigration Judge's determination that only convictions under section 28-608(a), (b), or (d) qualify as CIMTs because each of these subsections contain as a necessary element the

intent to defraud or deceive (IJ at 3-4). *See Lateef v. Dep't of Homeland Sec.*, 592 F.3d at 929; *Guardado-Garcia v. Holder*, 615 F.3d at 902. Thus, the statute is overbroad relative to the definition of a CIMT. However, the moral turpitude inquiry does not end here. Where an offense is not categorically a CIMT, the modified categorical approach allows for consideration of the respondent's conviction record to identify the statutory provision that the respondent was convicted of violating, but only if the statute is divisible. *See Descamps v. United States*, 133 S. Ct. 2276, 2281(2013); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *see also Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (holding that the concept of divisibility as embodied in *Descamps* and *Mathis* "applies in immigration proceedings to the same extent that it applies in criminal sentencing proceedings").

A state statute is divisible if it sets out alternative elements of the offense, as opposed to alternative means of committing the offense, and "at least one (but not all) of the listed offenses or combinations of disjunctive elements is a 'categorical match' to the relevant generic standard." *Matter of Chairez*, 26 I&N Dec. at 822 (*citing Descamps v. United States*, 133 S. Ct. at 2283). The difference between whether something is an "element" as opposed to a "means" is determined by whether it requires jury unanimity. *Id.* at 822-23 (*citing Mathis v. United States*, 136 S. Ct. at 2248).

Upon our examination of the statute, we conclude that section 28-608 is divisible. Section 28-608 is divided into several subsections, each describing separate crimes with different punishments. *See* Neb.

Rev. Stat. § 28-608; *see also Mathis v. United States*, 136 S. Ct. at 2256 (explaining that the statute on its face may resolve the means versus elements issue, noting that if the statutory alternatives carry different punishments, then under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), they must be elements).

As the Nebraska statute is divisible, we apply the modified categorical approach to a limited class of court documents in the record of conviction to determine the respondent's actual crime of conviction. *See Shepard v. United States*, 544 U.S. 13, 27 (2005) (holding that the record of conviction is "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information"). Here, the DHS submitted a certified copy of the Complaint, which charged the respondent with attempt of criminal impersonation under section 28-608 for "use [of] a fraudulent Social Security card to obtain employment at National Service Company of Iowa, located in rural Crete, Saline County, Nebraska, value $500.00 or more but less than $1500," in violation of section 28-201(1)(b)of the Nebraska Revised Statutes (DHS Filing, Conviction Records at 4 (received August 28, 2014)). The DHS also submitted a certified copy of the Journal Entry and Order indicating that the respondent pled no contest to violating section 28-201 of the Nebraska Revised Statutes, for attempt of a class 3A or class 4 felony (DHS Filing, Conviction Records at 1-2 (received August 28, 2014)).

On appeal, the respondent argues that the Complaint is insufficient to conclusively establish the particular offense he was convicted of violating (Respondent's Br. at 5). We agree with the respondent on this point. The complaint charges the respondent of using a fraudulent social security card to obtain employment, which would seem to support a finding that the crime underlying the respondent's attempt offense involved fraud or deceit. *See Guardado-Garcia v. Holder*, 615 F.3d at 901-02 (holding that misuse of a social security number to obtain employment is a CIMT). However, the entry order does not specify the particular subsection of the substantive statute the respondent was ultimately convicted of violating.

In the context of relief for removal, the respondent bears the burden of proving that his particular conviction does not bar relief. *Andrade-Zamora v. Lynch*, 814 F.3d 945, 948-49 (8th Cir. 2016) (explaining that the alien bears burden of showing eligibility for discretionary cancellation of removal). The respondent has not done so and has not carried his burden of proving that his conviction is not CIMT. *See* sections 240(c)(4)(A)-(B) of the Act; 8 C.F.R. § 1240.8(d). Thus, the respondent is statutorily ineligible for cancellation.

Finally, the Immigration Judge granted the respondent a 60-day voluntary departure period, conditioned upon the posting of a voluntary departure bond in the amount of $500.00 to the DHS within five business days from the date of the order. The respondent has submitted timely proof of having paid the voluntary departure bond. Therefore, the period of voluntary departure will be reinstated.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the DHS. *See* section 240B(b) of the Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under

section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

/s/

FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
OMAHA, NEBRASKA

File #: A093-333-944 Date: September 18, 2014

IN THE MATTER OF:	)
	)
Clemente AVELINO Pereida,	) IN REMOVAL
	) PROCEEDINGS
Respondent.	)

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act")—Alien present in the United States without being admitted or paroled.

APPLICATION: Motion to Pretermit 42B Application

ON BEHALF OF RESPONDENT:
Raul F. Guerra, Esq.
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650 J Street, Suite 401
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ON BEHALF OF THE GOVERNMENT:
Matthew E. Morrissey, Assistant Chief Counsel
U.S. Department of Homeland Security
Immigration and Customs Enforcement

1717 Avenue H, Suite 174
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DECISION OF THE IMMIGRATION JUDGE

I. Background and Procedural History

Respondent is a native and citizen of Mexico who arrived in the United States at or near Nogales, Arizona on or about an unknown date and was not then admitted or paroled after inspection by an immigration officer. Exh. 1. On August 3, 2009, the Department of Homeland Security ("DHS" or "the government") served Respondent with a Notice to Appear ("NTA") charging him with removability pursuant to the above-captioned section of the Act. *See id*. Respondent admitted the factual allegations contained in the NTA and conceded the charge of removability. *See id*. On March 25, 2011, Respondent filed an EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents pursuant to section 240A(b)(1) of the Act. Exh. 2.

On August 28, 2014, DHS filed a Motion to Pretermit Respondent's 42B application asserting that he has been convicted of a crime involving moral turpitude ("CIMT") that is a mandatory bar to the requested relief. *See* DHS Motion Brief to Pretermit Respondent's Cancellation of Removal Application (Aug. 28, 2014) ("Motion to Pretermit"); DHS Filing, Conviction Records (Aug. 28, 2014) ("Conviction Records"). On September 9, 2014, Respondent filed a brief opposing the motion to pretermit. *See* Respondent's Brief in Opposition to DHS's Motion to

Pretermit (Sept. 9, 2014). For the following reasons, the Court will grant the government's motion and pretermit Respondent's 42B application.

II. Statement of Law

Cancellation of removal relief is available to a removable nonpermanent resident alien who: (1) has been physically present in the United States for a continuous period of at least ten years immediately preceding the application, (2) has been a person of good moral character during that time, (3) has not been convicted of an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the INA, and (4) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a United States citizen or lawful permanent resident. INA § 240A(b)(1). An alien who has committed a CIMT is ineligible for cancellation of removal relief because he or she cannot be found to have good moral character. *See* INA § 101(f)(3). Furthermore, an alien who has been convicted of a CIMT is ineligible for cancellation of removal relief because he or she has been convicted of an offense under sections 212(a)(2) and 237(a)(2) of the INA. INA §§ 212(a)(2)(A)(i)(I), 237(a)(2)(A)(i), 240A(b)(1)(C).

The term "crime involving moral turpitude" is ambiguous. *See Bobadilla v. Holder*, 679 F.3d 1052, 1054 (8th Cir. 2012). Generally, a crime involves moral turpitude if it involves a reprehensible act accompanied by some degree of scienter. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 (A.G. 2008). In other words, a CIMT involves conduct that is

"inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Torres-Varela*, 23 I&N Dec. 78, 83 (BIA 2001). Neither the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *See id*. at 84. Instead, the intent required by the statute of conviction is critical to the determination. *See Hernandez-Perez v. Holder*, 569 F.3d 345, 348 (8th Cir. 2009).

To determine whether a respondent's offense qualifies as a CIMT, courts first apply the categorical approach to ascertain whether the statute of conviction necessarily involves moral turpitude. *See Bobadilla*, 679 F.3d at 1055-56; *Silva-Trevino*, 24 I&N Dec. at 704. Then, if a "realistic probability" exists that the statute punishes conduct that does not involve moral turpitude, courts apply the modified categorical approach and look to the respondent's record of conviction to determine whether his specific conduct involved moral turpitude. *See Bobadilla*, 679 F.3d at 1055-56; *Silva-Trevino*, 24 I&N Dec. at 704. The record of conviction includes documents such as the indictment, information, guilty plea, plea transcript, judgment of conviction, and sentence. *See Chanmouny v. Ashcroft*, 376 F.3d 810, 813 (8th Cir. 2004); *Silva-Trevino*, 24 I&N Dec. at 704. Finally, if the respondent's record of conviction does not resolve the CIMT issue, courts may consider any additional evidence that is "necessary or appropriate." *See Silva-Trevino*, 24 I&N Dec. at 704.

III. Analysis and Findings

Pursuant to 8 C.F.R. section 1240.8(d), "if the evidence indicates that one or more of the grounds for mandatory denial of [an] application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." Here, DHS asserts that Respondent's conviction for attempted criminal impersonation is a CIMT that bars the requested relief. *See* Motion to Pretermit; Conviction Records. Respondent therefore bears the burden to demonstrate by a preponderance of the evidence that his conviction is not a mandatory bar to cancellation of removal under section 240A(b)(1) of the Act. *See* 8 C.F.R. § 1240.8(d).

DHS filed a certified copy of a Journal Entry and Order, indicating that, on June 14, 2010, Respondent pled no contest and was found guilty of violating Nebraska Revised Statute section 28-201, for "attempt of a class 3A or class 4 felony." *See* Conviction Records at 2. Section 28-201, Nebraska's criminal attempt statute, provides that criminal attempt is a "Class I misdemeanor when the crime attempted is a Class IIIA or Class IV felony." Neb. Rev. Stat. § 28-201(4)(e) (2010). Although Respondent's conviction is for the inchoate crime of attempt, as opposed to the completed crime, the moral turpitude analysis draws "no distinction between the commission of the substantive crime and the attempt to commit it." *See Matter of Vo*, 25 I&N Dec. 426, 428 (BIA 2011). The Board of Immigration Appeals has held that "[a]n attempt involves the specific intent to commit the substantive crime, and if commission of the substantive crime involves moral turpitude, then

so does the attempt, because moral turpitude inheres in the intent." *Id*.

Accordingly, the Court must determine whether the substantive crime underlying Respondent's attempt conviction involves moral turpitude. Although the Journal Entry and Order does not reflect the underlying offense attempted, DHS submitted the corresponding Complaint, which charges Respondent with attempted criminal impersonation under former Neb. Rev. Stat. section 28-608, a Class IV felony. *See* Conviction Records at 2-4. The Complaint is dated June 8, 2010, and the Journal Entry and Order was entered June 14, 2010, the date of Respondent's hearing in the case. *See id*. at 1-4. All documents bear the same case number—CR 10-197. *See id*. The Court therefore finds the Complaint to be sufficiently reliable evidence that criminal impersonation was the substantive crime underlying Respondent's attempt conviction. In 2010, Nebraska's criminal impersonation statute was located at section 28-608 and provided:

> (1) A person commits the crime of criminal impersonation if he or she:
>
> (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another;
>
> (b) Pretends to be a representative of some person or organization and does an act in his or her pretend capacity with the intent to gain

> a pecuniary benefit for himself, herself, or another and to deceive or harm another;
>
> (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> (d) Without the authorization or permission of another and with the intent to deceive or harm another: (i) Obtains or records personal identification documents or personal identifying information; and (ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608 (2010).[1] The Court finds that a conviction under subsection (a), (b), or (d) of the statute is a CIMT because each subsection contains as a necessary element the intent to defraud, deceive, or harm. *See id*. Crimes that require proof of a specific intent to defraud or deceive involve moral turpitude. *See Jordan v. De George*, 341 U.S. 223, 232 (1951); *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010). Additionally, the intent to harm another person by assuming a false identity or representative capacity, or by using personal identifying information to access financial resources, reflects a sufficiently

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[1] Nebraska's criminal impersonation statute is now located at Neb. Rev. Stat. § 28-638 (2014).

depraved state of mind to render a conviction under subsections (a), (b), or (d) morally turpitudinous. Subsection (c), by contrast, contains no *mens rea* requirement and punishes even unknowing licensure violations. Because a violation of subsection (c) does not require a vicious motive or corrupt mind, a realistic probability exists that former Neb. Rev. Stat. section 28-608 punishes non-turpitudinous conduct. *See Bobadilla*, 679 F.3d at 1055-56; *Silva-Trevino*, 24 I&N Dec. at 704.

Accordingly, the Court turns to the modified categorical approach to determine whether Respondent was convicted under subsection (a), (b), or (d), rendering his offense a CIMT, or under subsection (c). The Complaint charges that Respondent intentionally completed a substantial step in a course of conduct intended to culminate in commission of criminal impersonation, when he "did use a fraudulent Social Security card to obtain employment at National Service Company of Iowa, located in rural Crete, Saline County, Nebraska, value $500 or more but less than $1500." *See* Conviction Records at 4. The Complaint demonstrates that Respondent was not convicted of attempting to carry on a business without a license under subsection (c) of the criminal impersonation statute, and he was therefore necessarily convicted under subsection (a), (b), or (d), any of which involves moral turpitude. The Court concludes that the substantive crime underlying Respondent's attempt conviction was a subsection of Neb. Rev. Stat. section 28-608 requiring the specific intent to defraud, deceive, or harm, and therefore finds that the offense is a CIMT.

Having found Respondent's attempted criminal impersonation conviction to be a CIMT, the Court must next determine whether it renders him ineligible for cancellation of removal relief as a conviction "of an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3)" of the Act. *See* INA § 240A(b)(1)(C). An alien who has been convicted of a CIMT for which the maximum possible sentence is less than one year, and which qualifies under the "petty offense" exception, is not convicted of an offense "described under" either section 212(a)(2) or 237(a)(2) of the Act and is not barred from cancellation of removal relief if otherwise eligible. *Matter of Cortez*, 25 I&N Dec. 301, 307 (BIA 2010); *see also Matter of Pedroza*, 25 I&N Dec. 312, 314 (BIA 2010). The petty offense exception at INA section 212(a)(2)(A)(ii)(II) exempts from inadmissibility an individual who has committed only one CIMT for which the maximum possible penalty is imprisonment for one year or less, and for which the alien was sentenced to a term of imprisonment of six months or less (regardless of the extent to which the sentence was ultimately executed). *See* INA § 212(a)(2)(A)(ii)(II). Therefore, conviction of a single CIMT offense, which is punishable by a maximum term of imprisonment of *less than one year* and for which the alien was sentenced to six months or less, does not bar 42B relief. *See*, *e.g.*, *Pedroza*, 25 I&N Dec. at 314-15.

However, conviction of a CIMT for which a sentence of *one year or longer* may be imposed is an offense "described under" section 237(a)(2)(A)(i) of the Act that renders an alien ineligible for cancellation of removal pursuant to INA section 240A(b)(1)(C), even if the alien is charged under section 212 grounds of

inadmissibility or is eligible for the petty offense exception. *See Cortez*, 25 I&N Dec. at 307 (clarifying *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009)). The statutory language pertaining only to aspects of immigration law—such as the requirement at section 237(a)(2)(A)(i)(I) that the CIMT in question was "committed within five years … after the date of admission"—is not relevant because only language specifically pertaining to the criminal offense, such as the crime itself and the sentence potentially and actually imposed, should be considered in determining which offenses bar cancellation of removal relief. *Id*.

In the instant case, Respondent's conviction for criminal attempt under Neb. Rev. Stat. section 28-201 is a Class I misdemeanor. *See* Conviction Records at 2; Neb. Rev. Stat. § 28-201(4)(e) (2010). A Class I misdemeanor is punishable in Nebraska by a maximum term of "not more than one year imprisonment." *See* Neb. Rev. Stat. § 28-106(1). In other words, conviction under the statute could result in imprisonment for a term of one year. *See id*. Accordingly, the maximum possible sentence for Respondent's conviction is not *less than one year*, but one year or less, and it is therefore an offense described under section 212(a)(2) that precludes 42B relief. *See Cortez*, 25 I&N Dec. at 307. Furthermore, because a sentence of one year may be imposed, it is an offense described under section 237(a)(2). *See id*. Accordingly, Respondent's attempted criminal impersonation crime is a conviction "of an offense under sections 212(a)(2) [and] 237(a)(2)" of the Act, which constitutes a mandatory bar to 42B relief. *See* INA § 240A(b)(1)(C).

IV. Conclusion

Because Respondent has not demonstrated by a preponderance of the evidence that his conviction for attempted criminal impersonation is not a mandatory bar to the requested relief, the Court will grant DHS's motion to pretermit his 42B application. *See* 8 C.F.R. § 1240.8(d). Accordingly, the following order will be entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that DHS's Motion to Pretermit Respondent's Cancellation of Removal Application is **GRANTED**.

/s/ JACK L. ANDERSON
JACK L. ANDERSON
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3377

Clemente Avelino Pereida

Petitioner

v.

William P. Barr, Attorney General of the United States

Respondent

Immigrant Legal Resource Center, et al.

Amici on Behalf of Petitioner

Petition for Review of an Order of the Board of Immigration Appeals
(A093-333-944)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 02, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1182

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

***

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a

controlled substance (as defined in section 802 of Title 21),

is inadmissible.

APPENDIX F

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1227

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

***

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

APPENDIX G

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1229a

§ 1229a. Removal proceedings

***

(c) Decision and burden of proof

***

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

APPENDIX H

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1229b

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10

years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

APPENDIX I

Code of Federal Regulations
Title 8. Aliens and Nationality

8 C.F.R. § 1240.8

§ 1240.8. Burdens of proof in removal proceedings

(a) *Deportable aliens*. A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged.

(b) *Arriving aliens*. In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(c) *Aliens present in the United States without being admitted or paroled*. In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(d) *Relief from removal*. The respondent shall have the burden of establishing that he or she is eligible for any

requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

APPENDIX J

Revised Statutes of Nebraska
Chapter 28. Crimes and Punishments

Neb. Rev. Stat. § 28-201 (2008)

§ 28-201. Criminal attempt; conduct; penalties

(1) A person shall be guilty of an attempt to commit a crime if he or she:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

(4) Criminal attempt is:

***

(e) A Class I misdemeanor when the crime attempted is a Class IIIA or Class IV felony;

APPENDIX K

Revised Statutes of Nebraska
Chapter 28. Crimes and Punishments

Neb. Rev. Stat. § 28-608 (2008)

§ 28-608. Criminal impersonation; penalty; restitution

(1) A person commits the crime of criminal impersonation if he or she:

(a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another;

(b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another;

(c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or

(d) Without the authorization or permission of another and with the intent to deceive or harm another:

(i) Obtains or records personal identification documents or personal identifying information; and

(ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.