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The Evolving Interpretation of the Categorical and Modified Categorical Approaches: *Chairez III* and *Silva-Trevino III*

by Anne J. Greer and Teresa L. Donovan

In 2016, the Supreme Court, the United States Circuit Courts of Appeals, and the Board of Immigration Appeals continued to refine the interpretation of the categorical and modified categorical approaches—a process that has been ongoing since the Supreme Court adopted the categorical approach in *Taylor v. United States*, 495 U.S. 575, 598–99 (1990). These approaches, which were developed in the criminal context, are applied to determine whether a conviction under a criminal statute falls within an enumerated category of crime for immigration purposes, e.g., an aggravated felony or a crime involving moral turpitude. They involve examination of the elements of the criminal statute of conviction without regard to the underlying facts. *Mathis v. United States,* 136 S. Ct. 2243, 2248 (2016) (explaining that courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime], while ignoring the particular facts of the case" under the categorical approach). This article examines two significant Board cases from 2016 in the wake of the Supreme Court's decision in *Mathis*. The first addresses the issue of divisibility and the second addresses the application of the categorical approach in the context of crimes involving moral turpitude.

The Categorical and Modified Categorical Approaches

Under the categorical approach, Immigration Judges and the Board compare the elements of the criminal statute of conviction with the generic crime referenced under the relevant criminal ground of removability. If the criminal statute's elements are the same as or narrower than the generic offense, there is a categorical match to the criminal ground of removability. *See Taylor*, 495 U.S. at 599. If the criminal statute encompasses broader conduct than the generic crime, adjudicators determine whether a realistic probability exists that the minimum criminal conduct punished under the

statute would be subject to prosecution. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013). If not, then the statute is a categorical match to the generic offense. If so, then recourse to the modified categorical approach becomes relevant and can be applied provided that the criminal statute is divisible.

In particular, the criminal statute may list a single offense that incorporates disjunctive language or discrete offenses listed as alternatives. If not all of the disjunctive alternatives or discrete offenses categorically match the generic offense, the statute is considered to be divisible, and the modified categorical approach can be applied. Under the modified categorical approach, adjudicators may consult specific documents from the record of conviction to attempt to ascertain which set of elements were required to be proven for conviction under the criminal statute. *See Mathis*, 136 S. Ct. at 2249 (instructing that under the modified categorical approach, "[A] sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.").

Divisibility

In *Mathis*, the Supreme Court expanded on and clarified the analytical approach to divisibility it announced earlier in *Descamps v. United States*, 133 S. Ct. 2276 (2013). In the immigration context, prior to *Descamps*, the Board had adopted a different interpretation of divisibility in *Matter of Lanferman*, 25 I&N Dec. 721, 727 (BIA 2012) (holding that a statute is divisible whenever its elements "could be satisfied either by removable or non-removable conduct" (quoting *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 90 (2d Cir. 2009)). In response to *Descamps*, the Board issued *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014) ("*Chairez I*"), which modified the Board's divisibility analysis in conformity with its interpretation of the approach set forth in *Descamps*.

The respondent in *Chairez* was convicted after pleading guilty to felony discharge of a firearm in violation of section 76-10-508.1(1) of the Utah Code, for which he received a sentence to an indeterminate term of imprisonment not to exceed 5 years. The divisibility issue arose in determining whether this conviction rendered the respondent removable under sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(F) and 237(a)(2)(A)(iii), for a "crime of violence" aggravated felony.

Utah Code section 76-10-508.1(1) contains three distinct subsections, none of which were specifically charged in the criminal information. The Board concluded that sections 76-10-508.1(1)(b) and (c) include as an element the deliberate "use" of "violent physical force" against the person or property of another and therefore qualify as categorical crimes of violence under 18 U.S.C. § 16(a), an alternative listed under section 101(a)(43)(F) of the Act.

However, section 76-10-508.1(1)(a) only requires the perpetrator to "know[] or hav[e] reason to believe" that discharge of the firearm may endanger any person. Citing applicable precedent, the Board concluded that this section lacks the element of the deliberate use of violent physical force required for a crime of violence under 18 U.S.C. § 16(a). Furthermore, the Board observed it does not meet the alternative requirements for a crime of violence under 18 U.S.C. § 16(b) because a defendant who recklessly discharges a firearm may create a substantial risk of injury, but does not do so deliberately. *See United States v. Zuniga-Soto*, 527 F.3d 1110, 1122–24 (10th Cir. 2008).

Thus, Utah Code section 76-10-508.1(1) is subject to the modified categorical approach because it is comprised of two sections that are categorically crimes of violence and one section that is not. However, section 76-10-508.1(1)(a), which is not a categorical crime of violence, is not further divisible to allow recourse to the modified categorical approach because it can be proven by intent, knowledge, or recklessness, without specifying the mens rea as an element of the offense. The Board therefore concluded that the DHS did not meet its burden to establish the respondent's removability for an aggravated felony crime of violence because section 76-10-508.1(1)(a) is not divisible with respect to the mens rea necessary to qualify as a crime of violence.

In sum, section 76-10-508.1(1)(a) is not divisible because, as explained by the Supreme Court in *Descamps*, each statutory alternative (i.e., committing the offense intentionally, knowingly, or recklessly) is not a separate element that must be proven to convict. *See Descamps*, 133 S. Ct. at 2281, 2283. Hence, the Board determined that the respondent was not removable for having committed

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CIRCUIT COURT DECISIONS FOR DECEMBER 2016 AND CALENDAR YEAR TOTALS FOR 2016

by John Guendelsberger

The United States courts of appeals issued 132 decisions in December 2016 in cases appealed from the Board. The courts affirmed the Board in 116 cases and reversed or remanded in 16, for an overall reversal rate of 12.1%, compared to last month's 8.3%. There were no reversals from the First, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for December 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	4	0	0.0
Second	16	14	2	12.5
Third	8	6	2	25.0
Fourth	8	6	2	25.0
Fifth	4	4	0	0.0
Sixth	3	2	1	33.3
Seventh	1	1	0	0.0
Eighth	5	5	0	0.0
Ninth	78	69	9	11.5
Tenth	1	1	0	0.0
Eleventh	4	4	0	0.0
All	132	116	16	12.1

The 132 decisions included 62 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 32 direct appeals from denials of other forms of relief from removal or from findings of removal; and 38 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	62	54	8	12.9
Other Relief	32	28	4	12.5
Motions	38	34	4	10.5

The eight reversals or remands in asylum cases involved particular social group (two cases), level of harm for past persecution (two cases), well-founded fear (two cases), and the Convention Against Torture (two cases). The four reversals or remands in the "other relief" category addressed crimes involving moral turpitude, sexual abuse of a minor aggravated felony, misrepresentation of citizenship, and a vacated conviction. The four motions cases involved changed country conditions (two cases), the provisional unlawful presence waiver, and ineffective assistance of counsel.

The chart below shows the combined numbers for January through December 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	40	31	9	22.5
Tenth	31	25	6	19.4
Sixth	46	38	8	17.4
Third	86	73	13	15.1
Ninth	992	856	136	13.7
Eleventh	52	48	4	7.7
First	41	38	3	7.3
Fifth	139	130	9	6.5
Eighth	63	59	4	6.3
Second	327	308	19	5.8
Fourth	95	90	5	5.3
All	1,912	1,696	216	11.3

Last year's reversal rate at this point (January through December 2015) was 13.1 %, with 1,903 total decisions and 250 reversals or remands.

The numbers by type of case on appeal for the first 12 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1,023	920	103	10.1
Other Relief	461	382	79	17.1
Motions	428	394	34	7.9

REVERSALS AND REMANDS OVER THE LAST 11 YEARS

As the chart below indicates, for over a decade there has been a steady downward trend in the total number of circuit court decisions reported each year. The number of cases remained steady in 2016 while the numbers of reversals or remands continued to drop. As in 2014 and 2015, many of the reversals or remands were to apply case law developments in two areas: (1) Board and circuit court law clarifying the definition of "particular social group" for asylum/withholding of removal and (2) Supreme Court and circuit court decisions clarifying the application of the categorical and modified categorical approaches to criminal grounds of removal.

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Total Cases	5,398	4,932	4,510	4,829	4,050	3,123	2,711	2,408	2,172	1,903	1,912
Reversals/Remands	944	753	568	540	466	399	253	263	345	250	216
% Reversals/Remands	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9	15.9	13.1	11.3

The reversal/remand percentages by circuit for the last 11 calendar years are shown in the following chart.

Circuit	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
First	7.1	3.8	4.2	5.6	8.6	19.0	10.4	10.5	16.3	13.9	7.3
Second	22.6	18.0	11.8	5.5	4.9	4.9	4.8	7.8	12.1	6.9	5.8
Third	15.8	10.0	9.0	16.4	10.7	11.3	6.7	8.5	15.5	11.1	15.1
Fourth	5.2	7.2	2.8	3.3	5.2	5.2	4.6	2.9	12.3	6.3	5.3
Fifth	5.9	8.7	3.1	4.0	13.5	2.9	7.5	1.9	5.9	2.5	6.5
Sixth	13.0	13.6	12.0	8.6	8.7	6.8	6.6	3.1	7.1	6.9	17.4
Seventh	24.8	29.2	17.1	14.3	21.0	19.4	8.5	25.7	19.6	25.0	22.5
Eighth	11.3	15.9	8.2	7.7	8.1	7.5	7.5	6.3	1.6	4.3	6.3
Ninth	18.1	16.4	16.2	17.2	15.9	18.6	14.4	13.9	22.8	18.1	13.7
Tenth	18.0	7.0	5.5	1.8	4.9	9.5	6.3	11.4	5.6	16.4	19.4
Eleventh	8.6	10.9	8.9	7.1	6.5	6.8	5.8	16.3	5.6	8.5	7.7
All	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9	15.9	13.1	11.3

RECENT COURT OPINIONS

First Circuit:

Wen Yuan Chan v. Lynch, 843 F.3d 539 (1st Cir. 2016): The First Circuit held that the Immigration Court has jurisdiction to inquire into the bona fides of a marriage that formed the basis of an approved Form I-130 visa petition. The First Circuit found that an approved I-130 is just one piece of evidence demonstrating prima facie eligibility for adjustment of status and that the respondent must still demonstrate eligibility, including a bona fide marriage, by a preponderance of evidence in Immigration Court.

Corado-Arriaza v. Lynch, 844 F.3d 74 (1st. Cir. 2016): The First Circuit held that the petitioner failed to show that his arrest was an egregious violation of the Fourth Amendment that so transgressed notions of fundamental fairness and undermined the probative value of the evidence obtained so as to constitute a Fifth Amendment due process violation. Even assuming the respondent's arrest was illegal, the First Circuit found that the respondent did not satisfy

his burden with respect to his motion to suppress because the circumstances surrounding his arrest did not amount to an egregious violation of the Fourth Amendment.

Third Circuit:

Rodriguez v. Att'y Gen. of United States, 844 F.3d 392 (3d Cir. 2016): The Third Circuit held that the Immigration Judge and Board erred in speculating as to the basis for the vacatur of the respondent's 2013 controlled substance offense. Following the vacatur in 2015, the respondent, a lawful permanent resident, was granted a deferred adjudication. The Third Circuit concluded that the state court's rationale for setting aside the conviction was unclear and that it was a contravention of circuit law for the agency to assume it was vacated for immigration purposes. The Board had alternately concluded that the 2015 deferred adjudication agreement would itself constitute a "conviction" as that term is defined for an alien. However, the Third Circuit held that this conclusion contravened due process since the Notice to Appear did not allege that the respondent was removable based on the 2015 deferred adjudication.

Fourth Circuit:

Sotnikau v. Lynch, --- F.3d ---, 2017 WL 344277 (4th Cir. Jan. 24, 2017): The Fourth Circuit held that a conviction for involuntary manslaughter in Virginia does not categorically constitute a crime involving moral turpitude because "a conviction thereof can be predicated on mere criminal negligence." The Fourth Circuit found that the Board's decision in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), was controlling because the intent element of Virginia's involuntary manslaughter offense is similar to the intent element of the assault offense at issue in that case. The Fourth Circuit noted that the Immigration Judge and the Board erred in relying on the Board's decision in *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), which involved an involuntary manslaughter offense that may be predicated on recklessness, to find that the respondent's conviction involved moral turpitude.

Fifth Circuit:

Iruegas-Valdez v. Yates, --- F.3d ---, No. 15-60532, 2017 WL 354315 (5th Cir. Jan. 23, 2017): The Fifth Circuit remanded the case for further analysis of the petitioner's request for protection under the Convention Against Torture. The court stated that a two-part analysis is required: first, is it more likely than not that the alien will be tortured upon return to his homeland; and second, is there sufficient state action involved in that torture. In remanding the case, the court found that the agency erred in considering only whether the government of Mexico would commit torture or display "willful blindness" to such torture. Citing *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014), the court observed that consideration must be given to torture committed by any government actors operating "under color of law." The court vacated and remanded for consideration of the evidence under the proper standard.

United States v. Tanksley, --- F.3d ---, No. 15-11078, 2017 WL 213835 (5th Cir. Jan. 18, 2017): In a sentencing case, the Fifth Circuit found that, in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), Tex. Health & Safety Code § 481.112(a), which provides that a person commits an offense if he or she "knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance," is categorically overbroad and the statute is indivisible with respect to method of delivery such that it cannot serve as a predicate "controlled substance" offense for a sentence enhancement.

Sixth Circuit:

Lovano v. Lynch, --- F.3d ---, No. 16-3245, 2017 WL 244068 (6th Cir. Jan. 20, 2017): The Sixth Circuit held that aggravated assault under Ohio Revised Code § 2903.12 is a crime involving moral turpitude because a conviction requires a showing that the defendant knowingly caused serious physical harm. "Serious physical harm" is defined as including, among other types of serious physical injury, "any physical harm that carries a substantial risk of death." Ohio Rev. Code § 2901.01(A)(5)(b). Citing *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006), the court found that a conviction under Ohio Revised Code § 2903.12(A)(1) is an "assault and battery offense[] that necessarily involve[s] the intentional infliction of serious bodily injury" that makes it a crime involving moral turpitude.

Seventh Circuit:

Rivera v. Lynch, --- F.3d ---, No. 16-3225, 2017 WL 117146 (7th Cir. Jan. 12, 2017): The petitioner sought review of the denial of his application for withholding of removal from El Salvador based on his claimed fear of persecution by gangs whom he alleged would perceive him as being a wealthy returnee from the United States. The panel concluded that although it is

possible that a viable claim for relief could be based on such a scenario, the petitioner had not established that wealthy individuals are targeted in El Salvador or that he specifically faced a probability of mistreatment.

Eighth Circuit:

United States v. Winston, ---F.3d---, No. 15-3739, 2017 WL 83393 (8th Cir. Jan. 10, 2017): In a sentencing case, the Eighth Circuit concluded that second degree battery pursuant to section 5-13-202(a)(2) of the Arkansas Code is a "violent felony," reasoning that the generic requirement—using force capable of causing bodily injury—was a match for the Arkansas requirement that bodily injury result. Since the petitioner's conviction therefore met the "physical force" element, the circuit court affirmed the district court's sentencing enhancement based on a prior "violent felony" conviction.

United States v. Sykes, 844 F.3d 712 (8th Cir. 2016): In a sentencing case, the Eighth Circuit concluded that second degree burglary proscribed by Mo. Ann. Stat. § 569.170 is overbroad compared to generic burglary in prohibiting breaking and entering either a building or an inhabitable structure. However, applying an unexpected interpretation of *Mathis*, the Eighth Circuit reasoned that the statute was divisible by virtue of the word "or." After analyzing the judicially noticeable conviction documents pursuant to the "modified categorical approach," the court found that the petitioner's conviction involved a building. The court then concluded that convictions for burgling a building meet the generic burglary definition and affirmed the district court's sentencing enhancement based on a prior conviction for a "violent felony."

Ninth Circuit:

Barajas-Romero v. Lynch, ---F.3d---, No. 13-70520, 2017 WL 192711 (9th Cir. Jan. 18, 2017): In a significant decision, the Ninth Circuit declined to afford *Matter of C-T-L-*, 25 I&N Dec. 34 (BIA 2010) *Chevron* deference and instead held that applicants requesting withholding of removal under the Act need only demonstrate that one of the five protected grounds was or will be "a reason" for the persecution to meet the nexus requirement. The circuit court also confirmed its prior holding that a state or local public official acquiescing to torture satisfies the requirements for protection under the Convention Against Torture ("CAT") even if the national government would not similarly acquiesce, and concluded that neither statute nor regulation "establish a 'rogue official' exception to CAT relief."

Escobar v. Lynch, ---F.3d---, No. 12-70930, 2017 WL 242557 (9th Cir. Jan. 20, 2017): The petitioner sought review of the Board's conclusion that his conviction for witness tampering under section 136.1(a) of the California Penal Code constitutes a crime involving moral turpitude—even though the offense need not involve actual or threatened harm. In granting the petition for review the Ninth Circuit explained, "[since] [n]on fraudulent CIMTs will almost always involve an intent to injure someone, an actual injury, or a protected class of victims," and section 136.1(a) does not include any of these elements, it categorically cannot constitute a crime involving moral turpitude.

Eleventh Circuit:

United States v. Garcia-Martinez, --- F.3d ---, No. 14-15725, 2017 WL 104462 (11th Cir. Jan. 11, 2017): In this sentencing case, the Eleventh Circuit held that second degree burglary of a dwelling in violation of the 2009 version of Florida Statute § 810.02(3) is not a crime of violence because it may be violated by entering the curtilage of a building, and this possibility is an alternative means of committing the offense rather than a separate element.

BIA PRECEDENT DECISIONS

In *Matter of Alvarado*, 26 I&N Dec. 895 (BIA 2016), the Board held that the definition of "perjury" in section 101(a)(43)(S) of the Act, 8 U.S.C. § 1101(a)(43)(S), requires that the offender: (1) make a false statement (2) knowingly or willfully (3) under oath or by affirmation (4) where an oath is authorized or required by law. The Board modified its previous holding in *Matter of Martinez-Recinos*, 23 I&N Dec. 175 (BIA 2001), that 18 U.S.C. § 1621 provided the generic definition of perjury as contemplated by the Act.

The Board examined the definitions of perjury codified in state and Federal statutes, the Model Penal Code, and commentary as existing in 1996. Under common law, the elements included: (1) a false statement (2) made under oath (3) in a judicial proceeding (4) sworn willfully, absolutely, and falsely (5) material to the matter at hand. Under the Model Penal Code, the definition expanded to include a false statement made "in any official proceeding." When section 101(a)(43)(S) of the Act was codified in 1996, the majority of states required that perjury include (1) a material (2) false statement (3) made

knowingly or willfully (4) while under oath, affirmation, or under penalty of perjury (5) at a proceeding. The Board also looked to 18 U.S.C. § 1621 as it existed in 1996, pointing out that its elements—false testimony under oath or affirmation concerning a material matter with the willful intent to provide false testimony—were consistent with the majority of state perjury statutes, the Model Penal Code, and common law.

Relying on this survey, the Board concluded that the generic definition of "perjury" in section 101(a)(43)(S) of the Act requires that "an offender make a material false statement knowingly or willfully while under oath or affirmation where an oath is authorized or required by law." To the extent that *Matter of Martinez-Recinos* conflicts with the analysis leading to this conclusion, the Board withdrew from that decision.

Comparing the elements of California Penal Code § 118(a), which criminalizes "a willful statement under oath, of any material matter which the witness knows to be false . . . under circumstances in which the oath of the State of California lawfully may be given," to the generic definition of perjury, the Board concluded that the statute was categorically an offense "relating to" perjury under section 101(a)(43) of the Act. Since the respondent's conviction was for an aggravated felony, he could not establish eligibility for the relief sought. The appeal was dismissed.

In *Matter of Calcano de Millan*, 26 I&N Dec. 904 (BIA 2017), the Board addressed the definition of "conviction" for a United States citizen filing a visa petition where the provisions of the Adam Walsh Child Protection and Safety Act ("Adam Walsh Act" or "AWA") may be implicated. The Board held that a United States citizen petitioner continues to have a relevant conviction notwithstanding post-conviction relief obtained under a rehabilitative statute.

Under the Adam Walsh Act, a United States citizen or lawful permanent resident who has been convicted of a "specified offense against a minor" may not obtain approval of a visa petition for an alien relative absent a determination by the Secretary of Homeland Security (or his or her designate) that the petitioner presents no risk to any beneficiary of the petition.

In 2001, the petitioner was convicted in California of a sexual battery. He received a suspended sentence and was required to comply with the state's sex offender registration requirements. In 2006, the conviction was set aside pursuant to the provisions of section 1203.4 of the California Penal Code, which is a rehabilitative statute. The respondent argued that he thus no longer had a "conviction" for a specified offense. However, citing the Immigration and Nationality Act's definition of a "conviction" for an alien and Board precedent that addresses the limited effect of post-conviction relief obtained by an alien for rehabilitative reasons, the Director concluded that the petitioner's dismissed charge remained a "conviction" under the Adam Walsh Act.

In its analysis of the issue, the Board noted that the term "conviction" does not have a unitary meaning under Federal law and is not defined for a United States citizen in either the Adam Walsh Act or Immigration and Nationality Act. After consideration of the purpose of the Adam Walsh Act—the protection of children from violent crime and sexual exploitation—and Federal guidelines that recognize a "conviction" notwithstanding any post-conviction relief for a ground other than innocence, the Board found it appropriate to adopt a uniform definition of the term that is consistent with the same definition applied to aliens. That is, a conviction exists where a formal judgment of guilt has been entered or, if adjudication has been withheld, where a plea, finding, or admission of facts established the petitioner's guilt and some form of punishment, penalty, or restraint on liberty has been ordered by the court. The Board concluded that this definition is not inconsistent with California law, which limits the effect of relief obtained under section 1203.4, and with the many limitations that the various other states offer with respect to rehabilitative post-conviction relief for sex offenders.

The Board dismissed the remaining challenges raised by the petitioner. While the petitioner argued that the age of the victim was not an element of the statute of conviction, the Board concluded that the Director properly applied the "circumstance-specific" examination adopted in *Matter of Introcaso*, 26 I&N Dec. 304 (BIA 2015). The petitioner did not otherwise dispute that the victim of his offense was a minor. The Board noted that it does not otherwise have jurisdiction to review the Director's risk determination and dismissed the appeal.

AAO PRECEDENT DECISION

In *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), the Administrative Appeals Office ("AAO") determined that, pursuant to section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i), U.S. Citizenship and Immigration Services ("USCIS") may grant a national interest waiver of the job offer and labor certification requirements to "qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States."

The AAO adopted a framework for determining eligibility for a national interest waiver, which includes requiring the petitioner to demonstrate by a preponderance of the evidence: (1) that his or her proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, the United States would benefit from waiving the job offer and labor certification requirements.

In this case, the AAO concurred with the Director that the petitioner was qualified for the national interest waiver as a matter of discretion. The appeal was sustained and the petition was approved.

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an aggravated felony crime of violence. *See Mathis*, 136 S. Ct. at 2256–57, 2257 n. 7 (explaining that in determining whether the listed items in an alternatively phrased statute are "elements" or "means," adjudicators analyze state court decisions, the statutory text, and in some cases record of conviction documents such as indictments, jury instructions, plea colloquies, and plea agreements).

Shortly after the issuance of *Chairez I*, the Tenth Circuit issued a precedent decision that provided an alternative approach to divisibility from that adopted by the Board. In *United States v. Trent*, 767 F.3d 1046, 1060–61 (10th Cir. 2014), the court concluded that a statute is divisible under *Descamps* if it employs "alternative statutory phrases." This divergence reflected the then-prevailing circuit court split. In particular, the Fourth, Ninth, and Eleventh Circuits followed the approach taken by the Board in *Chairez I*, whereas the First and Third agreed with the Tenth Circuit's analysis as set forth in *Trent*. *See Matter of Chairez* ("*Chairez II*"), 26 I&N Dec. 478, 483, n.3 (BIA 2015) (collecting cases). Hence, the Board reconsidered its decision in *Chairez I* and applied *Trent* to the Utah statute, but held that it would continue to apply its interpretation of *Descamps* elsewhere in the absence of contrary controlling authority in the relevant circuit. *Chairez II*, *supra*.

Thereafter in *Mathis*, the Supreme Court reinforced the interpretation adopted by the Board in *Chairez I*. In the wake of *Mathis*, the Board issued its third *Chairez* decision, relying on the Court's affirmation of *Descamps* and clarification that a criminal statute is not divisible based on disjunctive statutory language unless each statutory alternative defines an element of the offense rather than describing different means to commit the offense. *Matter of Chairez* ("*Chairez III*"), 26 I&N Dec. 819 (BIA 2016).

Crimes Involving Moral Turpitude

In *Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 830 (BIA 2016), the Board was required "to develop a uniform standard" for determining whether a crime involves moral turpitude under the Act. The Board concluded that the categorical and modified categorical approaches apply when analyzing whether a criminal conviction constitutes a crime involving moral turpitude for immigration purposes. The Board also reaffirmed that, absent governing Federal court of appeals precedent to the contrary, the realistic probability test should be applied as part of the categorical inquiry in this context. As discussed, this test focuses on the minimum conduct that has a realistic probability of being prosecuted under the criminal statute and is part of the categorical inquiry in the aggravated felony context. *See Moncrieffe*, 133 S. Ct. at 1684–85; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (explaining that, under the realistic probability test, an offender may not rely solely on legal imagination to define the least culpable conduct that could result in a conviction but "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues"); *see also Matter of Chairez*, 26 I&N Dec. at 355–58 (discussing the realistic probability test in the context of a firearms offense under section 237(a)(2)(C) of the Act).

The respondent in *Silva-Trevino* stood convicted of indecency with a child under section 21.11(a)(1) of the Texas Penal Code. At issue was whether the respondent was ineligible to adjust status because his conviction constituted a crime involving moral turpitude that rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The Texas statute reached conduct that was not morally turpitudinous and could not be said to be a categorical match on its face with the moral turpitude ground of inadmissibility. Because the Fifth Circuit has rejected the realistic probability test in favor of a "minimum reading" approach, the Board applied the Fifth Circuit test to determine whether a minimum reading of the criminal statute only reaches offenses involving moral turpitude. *Gomez-Perez v. Lynch*, 829 F.3d 323, 327 (5th Cir. 2016).

The Board concluded that, under the Fifth Circuit's minimum reading approach, the respondent's crime is not a categorical crime involving moral turpitude because Texas Penal Code section 21.11(a)(1) is broad enough to punish behavior that is not accompanied by the defendant's knowledge that the victim was a minor, and case law from Texas courts reflected prosecution of non-turpitudinous touching. *Silva-Trevino*, 26 I&N Dec. at 835–36. Since it was undisputed that Texas Penal Code section 21.11(a)(1) is not divisible, the modified categorical approach did not apply, and the respondent was not ineligible to adjust status for having committed a crime involving moral turpitude. *Id*. at 838.

Silva-Trevino highlights the circuit court split on the application of the realistic probability test. In particular, the Seventh, Eighth, Ninth, and Tenth Circuits have adopted the realistic probability test in the context of crimes involving moral turpitude, whereas the Third and Fifth Circuits have rejected it. The remaining circuits have either reserved the question, including the First, or not spoken to the issue, including the Second, Fourth, Sixth, and Eleventh Circuits. *See id.* at 831–32 (collecting cases).

Conclusion

The application of the categorical and modified categorical approaches continues to evolve. Immigration Judges and the Board are bound to apply the governing law from the relevant circuit court of appeals, absent Supreme Court precedent to the contrary. *See Matter of Chairez*, 26 I&N Dec. at 820 (reiterating that "Immigration Judges and the Board must follow applicable circuit law to the fullest extent possible when seeking to determine what *Descamps* and *Mathis* require."). Accordingly, it is essential to research, analyze, and apply post-*Mathis* circuit court law when employing these approaches. First, determine whether the circuit court has applied *Mathis* to the relevant statute of conviction in the immigration or criminal context. *See, e.g.*, *Singh v. Att'y Gen. of U.S.,* 839 F.3d 273 (3d Cir. 2016) (applying *Mathis* and finding 35 Pa. Stat. Ann. § 780-113(a)(30) divisible for purposes of section 101(a)(43)(B) of the Act because the particular drug under the statute is an element of the offense and the Pennsylvania drug schedules are more inclusive than the Federal schedules); *United States v. Henderson*, 841 F.3d 623 (3d Cir. 2016) (applying *Mathis* and concluding that 35 Pa. Stat. Ann. § 780-113(f)(1) is divisible for purposes of Federal sentencing under 18 U.S.C. § 924(e) because the particular drug is a distinct element of the offense). Absent authority specific to the criminal statute of conviction, cases applying post-*Mathis* categorical analysis to other criminal statutes in the governing circuit will provide guidance.

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