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

In the Matter of: Amicus Invitation No. 21–30–09 Notice to Appear	**Amicus Invitation No. 21–30–09**

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE

TABLE OF CONTENTS

REQUEST TO APPEAR AS *AMICUS CURIAE*

The Immigration Reform Law Institute respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 21-30-09 (B.I.A. 2021). The *amicus curiae* brief is submitted with this request.

INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

ISSUE PRESENTED

1. Does *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), authorize an Immigration Judge to rely on any document or record covered by section 240(c)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3)(B), when conducting a modified categorical analysis of a noncitizen's removability?

2. Is a transcript from a defendant's sentencing hearing or sentencing modification hearing a document covered by section 240(c)(3)(B) of the Act, and if it is, can information from the transcript revealing the identity of a controlled substance be considered under a modified categorical analysis?

3. In light of *Pereida* and section 240(c)(3)(B) of the Act, can a noncitizen establish by a preponderance of the evidence his or her eligibility for asylum and withholding of removal if the record is inconclusive as to whether his or her conviction constitutes an aggravated felony and a particularly serious crime?

SUMMARY OF ARGUMENT

The Constitution provides plenary power over immigration to Congress. U.S. Const. art. 1, § 8, cl. 4. *See also Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)) ("The Court without exception has sustained Congress's 'plenary power to make rules for the admission of aliens.'"). Congress established the terms and procedures for aliens wishing to enter and remain in the United States with the Immigration and Naturalization Act, 8 U.S.C. §§ 1101-1537 ("INA"). Aliens who commit certain crimes will be deemed removable and will be ineligible for discretionary relief from removal. 8 U.S.C. §§ 1182(a); 1229b((b)(1)(C).

Under the INA, the government bears "the burden of establishing by clear and convincing evidence" that an alien has committed a crime that renders him removable. 8 U.S.C. § 1229a(c)(3)(A). The burden of establishing eligibility for relief from removal, however, is placed on the alien applicant. 8 U.S.C. § 1229a(c)(4)(A)(i). The INA includes a list of evidence available to either the government or an alien applicant that "shall constitute proof of a criminal conviction." 8 U.S.C. § 1229a(c)(3)(B). Implementing regulations further permit the use of "[a]ny other evidence that reasonably indicates the existence of a criminal conviction." 8 C.F.R. § 1003,41(d).

The Supreme Court recently addressed issues related to evidence of conviction in *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021). The Court confirmed that any document enumerated in section 240(c)(3)(B) of the INA constitutes proof of conviction. Additionally, the Court acknowledged that the list is not exclusive and that other evidence may be used to determine the crime of conviction. It merely lists which documents are *conclusive* proof of an alien's conviction. Finally, the Court confirmed that an alien has not met his burden to prove eligibility for relief where the record is inconclusive or ambiguous as to his crime of conviction.

ARGUMENT

1. *Pereida* authorizes an immigration judge to rely on any document or record covered by section 240(c)(3)(B) as proof of conviction when conducting a modified categorical analysis of an alien's removability.

Aliens with convictions for certain crimes are both removable and ineligible for relief from such removal. Disqualifying convictions include crimes of moral turpitude, aggravated felonies, and crimes involving controlled substances. 8 U.S.C. §§ 1182(a)(2), 1227(a)(2). The INA places the burden on aliens to prove they "are not inadmissible under section 212 [8 U.S.C. § 1182]." 8 U.S.C. § 1229a(c)(2). The statute includes a list of evidence that constitutes conclusive proof of conviction to aide immigration judges in determining crimes of conviction. 8 U.S.C. § 1229a(c)(3)(B).

Generally, courts "employ the categorical approach to determine whether" an alien's prior crime was disqualifying under the INA. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The reviewing court "compare[]s the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime . . . The prior conviction qualifies . . . only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps v. United States*, 570 U.S. 254, 257 (2013). Thus, the reviewing court "look[s] not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition." *Moncrieffe*, 569 U.S. at 190 (citations omitted). The approach requires analysis of the facts in the record of conviction and not "[w]hether the noncitizen's actual conduct involved such facts." *Id*. *See also Mathis v. United States*, 136 S. Ct. 2243, 2255 (2016) (citation omitted) (explaining that the only relevant facts are those that "a jury necessarily found to convict a defendant (or what he necessarily admitted)."). Thus, under a categorical approach, the judge conducts a straightforward comparison to determine if the statutory

elements "'substantially correspond[ed]' to or w[ere] narrower than the" disqualifying crime in the INA. *Quarles v. United States*, 139 S. Ct. 1872, 1877 (2019) (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)).

When an alien is convicted under a statute where "at least one, but not all, of th[e] crimes" are disqualifying, however, the judge must take an additional step before the categorical approach can be applied. *Descamps v. United States*, 570 U.S. 254, 264 (2013). The Supreme Court determined that reviewing courts should use the modified categorical approach to determine which of the possible crimes the alien was convicted of. The modified categorical approach is "a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque." *Mathis*, 136 S. Ct. at 2253. This method allows the judge to review "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." *Id*. at 2249. If the record reveals which of the possible crimes the alien was convicted of the judge can then conduct the traditional categorical-approach analysis. *Id*. Thus, "the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps*, 570 U.S. at 260.

As the *Pereida* court explained, "the statutory scheme anticipates the need for evidentiary proof about the alien's crime of conviction[.]" *Pereida v. Wilkinson*, 141 S. Ct. 754, 764 (2021). This is because it is often "impossible to discern an individual's offense of conviction without consulting at least some documentary or testimonial evidence." *Id*.

The INA provides that the following evidence serves as conclusive proof of conviction:

> (i) An official record of judgment and conviction.
> (ii) An official record of plea, verdict, and sentence.

> (iii) A docket entry from court records that indicates the existence of the conviction.
> (iv) Official minutes of a court proceeding or transcript of a court hearing in which the court takes notice of the existence of the conviction.
> (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
> (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
> (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

8 U.S.C. § 1229a(c)(3)(B). The plain language of the statute is clear that any item of the enumerated evidence is conclusive "[i]n *any* proceeding under this Act." *Id*. Thus, both aliens and the government can rely on this list to meet their respective burdens in various immigration proceedings. As the *Pereida* Court explained, the "particular forms of evidence" listed in the INA are conclusive proof of conviction "regardless of whether the proceedings involve efforts by the government to remove an alien or efforts by the alien to establish eligibility for relief." *Pereida*, 141 S. Ct. at 757.

2. A transcript from a sentencing hearing or sentencing modification hearing is a document covered by section 240(c)(3)(B) of the Act. Information contained in the transcript that reveals the identity of a controlled substance may be considered under the modified categorical analysis.

As explained above, the INA contains a list of evidence that is conclusive proof of the crime of conviction. Included in this list is "[o]fficial minutes of a court proceeding or transcript of a court hearing in which the court takes notice of a conviction." 8 U.S.C. § 1229a(c)(3)(B)(iv).

Should it be decided that a sentencing transcript does not meet the definition in 1229a(c)(3)(B)(iv), such transcript still may be considered as evidence of the conviction. The

meaning of §1229a(c)(3)(B)—that the listed items are conclusive evidence—is clear from the plain language of the statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (instructing courts to "look to the particular statutory language at issue."); *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (citation omitted) ("The starting point in statutory interpretation is the language [of the statute] itself.").

As the Fourth Circuit explained, "[t]he list in § 1229a(c)(3)(B) only sets out what evidence must be treated as conclusive; it contains no language excluding other types of reliable evidence. The statute does not require the IJ or the Board to ignore other persuasive evidence from DHS." *Shaw v. Sessions*, 898 F.3d 448, 455 (4th Cir. 2018). Similarly, the Eleventh Circuit "ha[s] held that evidence is admissible to prove an alien's prior criminal conviction if it is probative." *Robley v. United States AG*, 791 F. App'x 132, 135 (11th Cir. 2019). *See also Fequirre v. INS*, 279 F.3d 1325, 1327 (11th Cir. 2002) (explaining that "[o]ther forms of proof will suffice if probative." In fact, the reviewing court can consider evidence that "reasonably indicate[s] the existence of a criminal conviction," even if such evidence does not "constitute[] clear and convincing" proof of the crime of conviction. *Rosales-Pineda v. Gonzales*, 452 F.3d 627, 631 (7th Cir. 2006). *See also Fraser v. Lynch*, 795 F.3d 859, 863–64 (8th Cir. 2015) (internal citation omitted) ("While these additional documents were not of the type that shall constitute proof of a criminal conviction under the statute, the regulations allow that [a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof."); *Francis v. Gonzales*, 442 F.3d 131, 142 (2d Cir. 2006) (rejecting the claim that the listed proof in the INA is the only permissible proof of conviction, and explaining that "[i]t seems to us to be reasonable enough for the Attorney General to read the statute as a list of what documents constitute conclusive proof of conviction, as it says, but not as a prohibition on admitting other types of documents."). A transcript from an

alien's sentencing hearing certainly meets the reasonable indicator standard and thus is permissible evidence.

Furthermore, the implementing regulations state that "[a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof." 8 C.F.R. § 1003.41(d). Several circuits have found that other "evidence is admissible under § 1003.41(d) if it is probative of the existence of a conviction." *Robley*, 791 F.App'x . at 135. *See also Barradas v. Holder*, 582 F.3d 754, 762 (7th Cir. 2009) ("In light of the deference we accord the agency regulations, however, we have held that the [§ 1229a(c)(3)(B)] list is not exhaustive."). Thus, courts are permitted to consider evidence outside the listed items to determine an alien's crime of conviction. *See, e.g., Gousse v. Ashcroft*, 339 F.3d 91, 94 n.1 (2d Cir. 2003) ("[F]or immigration purposes, a judgment is unnecessary (though preferred) to establish the fact of conviction."); *Sanches-Sanchez v. Lynch*, 620 F. App'x 598, 599 (9th Cir. 2015) ("The agency properly relied on an FBI database print out and Sanches-Sanchez's own admissions to establish the existence of the conviction."); *Perez-Cobon v. AG of United States*, 816 F. App'x 718, 722 (3d Cir. 2020) (finding that "[a] DELJIS charge summary reasonably indicates the existence of a criminal conviction so it could be used to show" what crime the alien had been convicted of.).

As the Ninth Circuit has explained, "Section 1003.41 . . . provides that, in addition to records complying with § 287.6(a), a variety of other specified documents may prove a criminal conviction, as well as any other evidence that reasonably indicates the existence of a criminal conviction." *Singh v. Holder*, 638 F.3d 1196, 1210 (9th Cir. 2011). Even before *Pereida*, evidence such as a sentencing transcript was considered the type that would "reasonably indicate" an alien's crime of conviction. In fact, "[a]dmissibility is generally warranted so long as there is some sort of proof that the document is what it purports to be." *Padilla-Martinez v. Holder*, 770 F.3d 825,

833 (9th Cir. 2014). Such evidence is offered "for the sole purpose of proving the existence of a criminal conviction . . . it does not authorize the admission of evidence for the purpose of proving the facts underlying the offense of conviction." *Conteh v. Gonzales*, 461 F.3d 45, 54 (1st Cir. 2006) (internal citation omitted). Therefore, a transcript from a sentencing hearing is reasonable and admissible evidence to determine whether an alien was convicted of a disqualifying crime.

3. *Pereida* is clear that an alien cannot establish, by a preponderance of the evidence, that he is eligible for relief from removal if the record is inconclusive as to whether his conviction constitutes an aggravated felony and a particularly serious crime.

The plain language of the INA makes clear that the burden is on an alien to prove he was not convicted of a disqualifying crime such as an aggravated felony to be eligible for relief from removal. The statute provides that "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien satisfies the applicable eligibility requirements and with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4). The implementing regulations provide that in cases where "the evidence indicates that one or more of the grounds of 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." 8 C.F.R. § 1240.8(d). Nothing about the modified categorical approach relieves the alien of this burden of proof.

Eligibility for relief from a lawful order of removal requires the

> alien . . . prove four things: (1) he has been present in the United States for at least 10 years; (2) he has been a person of good moral character; (3) he has not been convicted of certain criminal offenses; and (4) his removal would impose an exceptional and extremely unusual hardship on a close relative who is either a citizen or permanent resident

Pereida, 141 S. Ct. at 759 (citing 8 U.S.C. § 1229a(c)(4)). As the Court explained, "[t]he INA expressly requires individuals seeking relief from lawful removal orders to prove *all aspects of*

their eligibility. That includes proving they do not stand convicted of a disqualifying criminal offense." *Pereida*, 141 S. Ct. at 758 (emphasis added). The Court stated that "any lingering uncertainty about" an alien's crime of conviction "would appear enough to defeat his application for relief." *Id*. at 761. Because an alien must prove that his conviction was not for a "disqualifying offense," the Court held that "he has not carried that burden when the record shows he has been convicted under a statute listing multiple offenses, some of which are disqualifying, and the record is ambiguous as to which crime formed the basis of his conviction." *Id.*, at 756-57. Thus, *Pereida* confirms the explicit language of the INA that an alien bears the burden of proving that he has not been convicted of a disqualifying crime such as an aggravated felony.

Courts implementing *Pereida* have been clear that an inconclusive or ambiguous record does not meet the preponderance of the evidence standard. *See, e.g., Marinelarena v. Garland*, No. 14-72003, 2021 U.S. App. LEXIS 22053, at *2 (9th Cir. 2021) (explaining that if "the record of conviction is ambiguous concerning which category fits the applicant's crime, then the applicant has failed to carry the required burden of proof."); *Perez-Cuevas v. Garland*, No. 16-72897, 2021 U.S. App. LEXIS 28598, at *2 (9th Cir. 2021) ("Although Perez-Cuevas contends the record is inconclusive as to the controlled substance, he does not benefit under this argument because it is his burden to establish his eligibility for adjustment of status."); *Rojas-Salazar v. Garland*, No. 17-73462, 2021 U.S. App. LEXIS 28597, at *1-2 (9th Cir. 2021) ("To the extent Rojas-Salazar contends that the record is ambiguous as to the subsection of his conviction and he was therefore eligible for relief, his contention fails."); *Mayan v. United States AG*, 842 F. App'x 538, 539 (11th Cir. 2021) ("[A] petitioner in Mayan's shoes—whose record of conviction is ambiguous as to whether the conviction was for an aggravated felony—has failed to meet his burden of proof to demonstrate he is eligible for cancellation of removal."); *Nije v. Garland*, No. 21-3065, 2021 U.S.

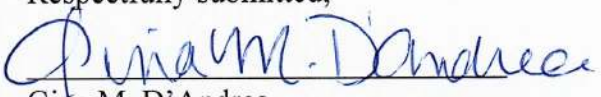
App. LEXIS 30233, at *5 (6th Cir. 2021) (finding the alien "failed to meet his burden of proof" where the record reflected discrepancies).

Clearly, an alien has not met his burden to prove by a preponderance of the evidence his or her eligibility for asylum and withholding of removal if the record is inconclusive as to whether his or her conviction constitutes an aggravated felony and a particularly serious crime.

CONCLUSION

For the foregoing reasons, issues (1) and (2) are answered in the affirmative and issue (3) in the negative.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2021, I, Gina M. D'Andrea, submitted three (3) copies of the foregoing *amicus curiae* brief to the Board of Immigration Appeals at the following address:

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October 18, 2021

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