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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

**Amicus Invitation: 21-30-09**

**REQUEST TO APPEAR AS AMICUS CURIAE  
AND BRIEF FOR AMICUS CURIAE ATTORNEYS  
UNITED FOR A SECURE AMERICA**

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## **REQUEST TO APPEAR AS AMICUS CURIAE**

Attorneys United for a Secure America (AUSA), 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 (BIA 2021). The *amicus curiae* brief is submitted with this request.

## **INTEREST OF AMICUS CURIAE**

AUSA is a nationwide network of attorneys, law students, and paralegals who support strong immigration law enforcement. AUSA is a project of the Immigration Reform Law Institute (IRLI), a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. AUSA members have filed briefs in many immigration-related cases before federal courts and administrative bodies, including *State of Texas v. United States of America*, 6:21-cv-00003 (S.D. Tex.), *State of Texas, Missouri v. Biden*, 21A21 (U.S.), 21-10806 (5th Cir.), 2:21-cv-00067 (N.D. Tex.), *Dep't of Homeland Sec. v. Thuraissigiam*, 19-161 (U.S.), *Gomez v. Trump*, 1:20-cv-01419 (D.D.C.), and *Matter of Reyes*, 28 I&N Dec. 52 (B.I.A. 2020). AUSA believes immigration policies must be reformed to serve the national interest. Specifically, AUSA seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. Therefore, AUSA respectfully requests leave to file the brief accompanying this motion to assist the Board with the issue presented.

## **ISSUES PRESENTED**

The Board's issues 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)(4)(i) 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 THE ARGUMENT**

Congress enumerated the requirements for removal proceedings in section 240. Included is a list of evidence that a court can consider as conclusive proof of a conviction for a disqualifying crime. 8 U.S.C. § 1229a(c)(3)(B). The United States Supreme Court, *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), issued a clear ruling in which it concluded that an Immigration Judge may review any document covered under the INA to review whether the alien was convicted of a divisible statute and discern which crime, or crimes, apply to Congress' generic federal laws using a modified categorical analysis.

Immigration courts are federal civil law courts that conduct removal proceedings and adjudicate asylum claims. Jurisdiction for Immigration courts is also vested with whether an alien is eligible for cancellation of a withdrawal as discussed in *Pereida*. Included among the limited documents an Immigration Judge may review to make a determination whether the conviction matched a generic federal crime is the official court transcript. The modified

categorical approach may only be used for criminal statutes that are divisible, that is, statutes that contain more than one element to create separate crimes.

An alien cannot 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. The *Young* Court held that when a court applies a modified categorical approach, an alien cannot demonstrate eligibility for cancellation of removal on an “inconclusive record” because...“it is both possible that the petitioner's prior conviction constitutes an aggravated felony and possible that it does not require a different result.” *See Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012) (en banc). *Pereida* confirms that an inconclusive or ambiguous record means an alien has not met the required burden of proof. The modified categorical approach merely allows a court reviewing a prior conviction, under a divisible statute, to determine which of several different crimes was at issue. The burden remains on the alien, as the moving party, to prove the conviction was not a generic federal crime to prove eligibility for cancellation of removal.

#### **ARGUMENT:**

#### **I. A JUDGE MAY CONSULT A “LIMITED CLASS OF DOCUMENTS” OF A DEFENDANT’S CONVICTION UNDER INA SECTION 240(c)(3)(B)**

When a state criminal statute is divisible, an Immigration Judge (IJ) applies the modified categorical approach to determine whether the alien’s conviction is for a removable offense. An Immigration Judge may rely on “any document of record” covered by section 240(c)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3)(B), to determine which offenses, or offense, in a divisible statute, the alien was convicted of. *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021).

Section 240(c)(3)(B) of the INA, removal proceedings, states that:

“... any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal 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 a 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.”

8 U.S.C. § 1229a(3)(B)

At a removal hearing, the burden is on the federal government to prove an alien committed a removable offense. 8 U.S.C. § 12(c)(3)(A) (“In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.”). However, at a withholding of removal hearing, the burden is on the alien, as the moving party, to establish that he “satisfies the eligibility requirements” and “merits” relief. 8 U.S.C. § 1229a(c)(4).

The Supreme Court requires judges to employ a modified categorical approach to review the record materials to discover which of the enumerated alternatives applied to an alien’s prior conviction for a potentially disqualifying crime. The *Pereida* Court stated that “judges may consult 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.” *Pereida*, 141 S. Ct. at 756. Without such evidence, an IJ is left to rely on the statute’s sections of his conviction. The categorical approach requires courts to “loo[k] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those

convictions.” *Id.* at 768. The alien has the burden and the opportunity to provide documents or records that support the petition to cancel removal.

In *Pereida*, the petitioner was convicted of criminal impersonation under sections (a), (b) and (d) of Nebraska criminal statute §28-608 (moved to section §28-638). According to the INA, these sections of the Nebraska statute are crimes of moral turpitude. To be eligible for relief, the alien was left with the burden of proving, as a factual matter, that he was instead convicted of section (c); misusing a business license. The alien declined to provide documents supporting his claim that he was not convicted of a disqualifying offense, instead arguing that the ambiguity surrounding his conviction was enough to compel the IJ to cancel his removal. *Pereida*, 141 S. Ct. at 756. The IJ, therefore, relied on the record of his conviction of finding that the crimes he was charged with was a crime of moral turpitude under the INA and denied his request for cancelation of removal. *Id.* Ultimately, the *Pereida* Court rested its decision on the section of the INA which describes removal proceedings, finding that the Nebraska statute, while divisible, did not make a difference as to whether the modified categorical approach or the categorical approach was applied. *Pereida* at 773 (Breyer, J., dissenting).

The IJ found Mr. Pereida was ineligible for cancelation of removal and the 8<sup>th</sup> Circuit affirmed the ruling. The Supreme Court ruled that an alien had the burden to prove that his conviction was not a crime of moral turpitude to be eligible for cancelation of removal. Since the alien in *Pereida* declined to provide any documents regarding his crime of conviction, there was not sufficient evidence to show his conviction was not for a crime of moral turpitude, the Court affirmed his removal. *Pereida*, 141 S. Ct. at 763.

Under Nebraska law, a person commits criminal impersonation if he:

- (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit 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 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 of another and with the intent to deceive or harm another: (i) Obtains or records personal identifying information; and (ii) Accesses or attempts to access the financial resources of another through the use of personal identifying information for the purpose of obtaining credit, money or any other thing of value.

Neb. Rev. Stat. § 28-608 (2008) (amended and moved to Neb. Rev. Stat. § 28-638). *See also Pereira*, 141 S. Ct. at 756.

To determine exactly which offense in a divisible statute an individual committed, the Supreme Court provides guidance for judges to employ a modified categorical approach. Under this approach, the court reviews the record materials to discover which of the enumerated crimes played a part in the defendant's prior conviction. In aid of the inquiry, "judges may consult 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 763 (internal quotation marks omitted)(emphasis added).

"Before the immigration judge, he refused to produce any evidence about his crime of conviction even after the government introduced evidence suggesting that he was convicted under a statute setting forth some crimes involving fraud." *Pereida*, 141 S. Ct. at 763. The burden of proof lies with the moving party at a withdrawal of removal hearing. 8 U.S.C. § 1229a(c)(4). The alien also "...bears the risks associated with failing to do so." *Pereida* 141 S. Ct. at 765.

Therefore, his failure to provide evidence regarding his conviction meant he was not eligible to have his removal cancelled.

## **II. A TRANSCRIPT IS AN OFFICIAL RECORD THAT MAY BE REVIEWED UNDER A MODIFIED CATEGORICAL APPROACH**

“... (iv) [o]fficial minutes of a court proceeding or a *transcript* of a court hearing in which the court takes notice of the existence of the conviction.” is conclusive evidence of the crime of conviction under a divisible statute. 8 U.S.C. § 1229a(c)(3)(B).

A transcript of a sentencing hearing is thus part of the official record as listed under the INA.

To determine whether a state law conviction qualifies as an aggravated felony under federal law, courts must use the modified categorical approach which applies only to divisible statutes. A statute is divisible “if it contains multiple, alternative elements of functionally separate crimes, and as to each alternative element,” in which a judge, or jury, may convict a defendant if the finding is beyond a reasonable doubt. *Padilla-Martinez v. Holder*, 770 F.3d 825, 828 (9th Cir. 2014). If the statute of conviction is not a categorical match, but is divisible, the court compares the elements of a crime the defendant was convicted. *See Mathis v. United States*, 136 S. Ct. 2243, 2249, 195 L. Ed. 2d 604 (2016) (citing *Shepard v. United States*, 544 U.S. 13, 26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)).

The modified categorical approach provides the courts authorization to consider a class of documents to “determine the elements established by the prior conviction, without considering the factual circumstances of the crime.” *Maie v. Garland*, No. 19-73099 at 23 (9th Cir. Aug. 2, 2021). The crime or crimes an alien was convicted of can then be compared to the federal generic crime, even if the state criminal statute was broader. However, if a statute is not

indivisible then a modified categorical approach cannot be applied and “our inquiry ends.” *Id.* at 24.

### **III. AN ALIEN CANNOT ESTABLISH ELIGIBILITY FOR CANCELLATION OF REMOVAL BASED ON AN INCONCLUSIVE RECORD FOR CONVICTION OF A DIVISIBLE STATUTE.**

All defendants may appeal a conviction in the criminal appellate courts. American citizens are not given yet another “bite at the apple” to have a criminal conviction overturned, once they have exhausted their remedies at the appellate courts. It is not within the immigration courts’ jurisdiction, however, to re-litigate a criminal case. Opponents of this law argue that at an alien faces removal from the United States after imprisonment while an American does not face the same consequence. This is a fallacy of the “false equivalence”. An American citizen did not break immigration laws. An illegal alien not only broke immigration laws but was also convicted under one or more criminal statutes. An American who illegally enters into a foreign country, regardless of whether or not they committed other crimes, would be removed. And likely without the same deference illegal aliens receive in our justice system.

Section 240 of the INA, as written into law by Congress, and the relevant implementing regulations, outline the duties of an IJ presiding in formal, quasi-judicial hearings. 8 U.S.C. § 1229a; 8 C.F.R. § 1003.10. An IJ is able to review a “limited class of documents” of an alien’s conviction under INA section 240(c)(3)(B). The IJ can then determine whether that conviction, using the modified categorical method, is a removable offense under Congress’ generic federal laws.

The *Young* Court held that when a court applies a modified categorical approach, an alien cannot demonstrate eligibility for cancellation of removal on an “inconclusive record” because...“it is both possible that the petitioner's prior conviction constitutes an aggravated

felony and possible that it does not require a different result.” See *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012) (en banc). The modified categorical approach allows a court reviewing a prior conviction, under a divisible statute, to determine which of "several different . . . crimes" was at issue. *Descamps*, 133 S. Ct. at 2285 (quoting *Nijhawan*, 129 S. Ct. at 2303) (internal quotation marks omitted). *Rendon v. Holder*, 764 F.3d 1077, 1083 (9th Cir. 2014).

Similarly, the Fourth Circuit held that, where the “evidence of conviction is inconclusive, the burden remains on the alien to prove eligibility” for cancellation of removal. *Salem v. Holder*, 647 F.3d 111, 116-20 (4th Cir. 2011). *Le v. Lynch*, 819 F.3d 98, 106 (5th Cir. 2016). It is the same standard applied to the prosecution to provide sufficient evidence to have a defendant convicted beyond a reasonable doubt. After conviction, an alien may appeal a conviction alleging “inconclusive evidence”, including other arguments, through the appellate courts. The burden remains on the alien as the moving party to produce evidence in order to have their removal cancelled.

## CONCLUSION

For the forgoing reasons, the extent to which *Pereida v. Wilkinson* affects the jurisdiction of immigration court cases is limited to review of the criminal conviction: not whether the conviction was correct.

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**CERTIFICATE OF SERVICE**

I hereby certify that on, October 19, 2021, I submitted the forgoing *amicus curiae* brief the Board of Immigration Appeals via courier service sent three (3) copies for distribution to the parties, to:

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