No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN FERNANDO LIZARRAGA-LEYVA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

Harini P. Raghupathi
Federal Defenders of San Diego, Inc.
225 Broadway Street, Suite 900
San Diego, California 92101
619.234.8467
Harini_Raghupathi@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Under the Immigration and Nationality Act, a noncitizen is subject to mandatory removal if convicted of an "aggravated felony." The list of aggravated felonies contains "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). This provision has been uniformly interpreted to consist of two definitional routes: (1) "illicit trafficking in a controlled substance (as defined in section 802 of title 21)," and (2) "a drug trafficking crime (as defined in section 924(c) of title 18)." A state drug crime constitutes an "aggravated felony" if it corresponds to either definition.

The question presented concerns the first definitional route: does a conviction for a state drug-trafficking crime with no mens rea element, or a mens rea element different than that required under federal law, constitute the "aggravated felony" of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS **PAGE(S)**

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE STATUES

STATE CASES

ADMINISTRATIVE DECISIONS

SUPREME COURT RULES

MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Fernandez Lizarraga-Leyva respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit is reproduced in Appendix A to this petition. In that memorandum, the court of appeals relied on a related case that was briefed and argued together with Mr. Lizarraga-Leyva's appeal. That related case, *United States v. Verduzco-Rangel*, 884 F.3d 918 (9th Cir. 2018), is reproduced in Appendix B to this petition. Mr. Lizarraga-Leyva subsequently filed a petition for panel rehearing and rehearing en banc, which the court of appeals denied. *See* Appendix C (appellate docket entry # 42).

JURISDICTION

The court of appeals affirmed Mr. Lizarraga-Leyva's conviction on March 9, 2018. *See* Appendix A. The court thereafter denied Mr. Lizarraga-Leyva's petition for rehearing and rehearing en banc on May 18, 2018. *See* Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix D contains the following pertinent constitutional and statutory provisions: (1) U.S. Const. Amend V; (2) 8 U.S.C. § 1101(a)(43); and (3) 8 U.S.C. § 1326(d).

INTRODUCTION

Under the Immigration and Nationality Act ("INA"), a conviction for an "aggravated felony" is like no other crime. While the INA prescribes various consequences for a noncitizen convicted of any crime, "aggravated felonies" are "singled out for the harshest deportation consequences." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010). An aggravated felony conviction "has two primary repercussions for noncitizens:" it subjects them to removal, 8 U.S.C. § 1227(a)(2)(A)(iii), and it "makes them categorically ineligible for several forms of immigration relief ordinarily left to the discretion of the Attorney General." *Torres v. Lynch*, 136 S. Ct. 1619, 1634 (2016).

Among "the approximately 80 'aggravated felonies,'" *Torres*, 136 S. Ct. at 1634, the one for drug-trafficking crimes—"illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)," 8 U.S.C. § 1101(a)(43)(B)—has generated considerable confusion. Indeed, over the past thirty years, since § 1101(a)(43)(B) was promulgated in its current form, Immigration Act of 1990, Pub. L. No. 101-649 § 501, 104 Stat. 4978, this Court has addressed it three times. *See Moncrieffe v.*

Holder, 569 U.S. 184 (2013) (conviction under state law that covers the social sharing of a small amount of marijuana is not a "drug trafficking crime (as defined in section 924(c) of title 18)"); *Carachuri-Rosendo*, 560 U.S. at 563 (state conviction for simple possession offense, committed after state conviction for a prior simple possession offense, is not a "drug trafficking crime (as defined in section 924(c) of title 18)" unless the second conviction was based on the fact of the prior conviction); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (felony conviction under state law that corresponds only to misdemeanor conviction under federal law is not a "drug trafficking crime (as defined in section 924(c) of title 18)").

Much of the confusion arises because "[t]he general phrase 'illicit trafficking' is left undefined[.]" *Lopez*, 549 U.S. at 50. With no express statutory definition to turn to, the lower courts have viewed "the term 'illicit trafficking in a controlled substance[,] . . . including a drug trafficking crime' [a]s a 'riddle wrapped in a mystery inside an enigma.' Churchill by Himself: The Definitive Collection of Quotations 145 (R. Langworth ed. 2008)." *Choizilme v. Att'y Gen.*, 886 F.3d 1016, 1030 (11th Cir. 2018) (Jordan, J., concurring) (second alteration added).

Despite § 1101(a)(43)(B)'s enigmatic character, one point courts have agreed on is that it consists of two definitional routes. That is, a conviction qualifies under § 1101(a)(43)(B) if it either constitutes "illicit trafficking in a controlled substance" or corresponds to a felony under the federal drug laws ("a drug trafficking crime (as defined in section 924(c) of title 18)"). *See Lopez*, 549 U.S. at 57 ("Thus, if Lopez's

state crime actually fell within the general term 'illicit trafficking,' the state felony conviction would count as an 'aggravated felony,' regardless of the existence of a federal felony counterpart."); *Flores-Larrazola v. Lynch*, 840 F.3d 234, 239 & n.11 (5th Cir. 2016) (noting that "illicit trafficking in a controlled substance" and a "drug trafficking crime" are separate tests); *Donawa v. Att'y Gen.*, 735 F.3d 1275, 1280 (11th Cir. 2013) (same); *Daas v. Holder*, 620 F.3d 1050, 1054 (9th Cir. 2010) (recognizing that § 1101(a)(43)(B) gives rise to two different "routes" for a state drug conviction to qualify as an aggravated felony); *Gerbier v. Holmes*, 280 F.3d 297, 312-13 (3d Cir. 2002) ("[A] state drug conviction may constitute an 'aggravated felony' under § 1101(a)(43) when it constitutes either 'illicit trafficking in any controlled substance' or a 'drug trafficking crime.'").

Given § 1101(a)(43)(B)'s two-pronged reach, much of the attention has focused on route two—"a drug trafficking crime (as defined in section 924(c) of title 18)." In fact, all three of this Court's decisions—*Lopez*, *Carachuri-Rosendo*, and *Moncrieffe*—are concerned with the second route. The first route thus remains "a riddle wrapped in a mystery inside an enigma.'" *Choizilme*, 886 F.3d at 1030. The lower courts need guidance on what the elements of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" are. Specifically, does that generic provision incorporate as an element any mental state? And if so, what mental state?

At present, the courts of appeals have provided two different answers to that question. The Fifth and Eleventh Circuits, along with the Board of Immigration Appeals ("BIA"), have held that "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" has no mens rea element. *See Choizilme*, 886 F.3d at 1029; *Flores-Larrazola*, 840 F.3d at 240; *Matter of L-G-H*, 26 I. & N. Dec. 365 (BIA 2014). In contrast, the Ninth Circuit, in the case of Mr. Lizarraga-Leyva and his companion, Mr. Verduzco-Rangel, held that "[t]o the extent 'illicit trafficking' in route one incorporates a mens rea requirement," it requires only that "the intended substance and the actual substance be controlled." *Verduzco-Rangel*, 884 F.3d at 923. In other words, the Ninth Circuit concluded that "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" requires knowledge that the substance involved is controlled by some law, without having to know further which body of law.

The plain language of § 1101(a)(43)(B), the structure of the INA, the categorical approach, and decisions of this Court, however, all counsel in favor of a third reading: "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" requires a noncitizen to know that the substance he is dealing with is controlled by federal law. Because the courts of appeals are in conflict over the generic mens rea element of § 1101(a)(43)(B)'s first definitional route, this Court should hear the case. Granting certiorari will provide a uniform definition of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" and

ensure this uniform definition is satisfied before noncitizens are subject to "the harsh consequence of mandatory removal." *Carachuri-Rosendo*, 560 U.S. at 591; *see* Sup. Ct. R. 10(a) & 10(c).

STATEMENT OF THE CASE

In 2007, Mr. Lizarraga-Leyva, a noncitizen, sustained a conviction for possession of drugs for sale, in violation of California Health and Safety Code § 11378 ("§ 11378"). The following year, on the basis of that conviction, the Department of Homeland Security ("DHS") placed Mr. Lizarraga-Leyva into an expedited administrative removal process reserved for those non-lawful permanent residents with aggravated felony convictions. *See* 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1. Unlike a typical removal hearing that takes place before an immigration judge ("IJ"), the expedited administrative removal statute foregoes "a hearing before an IJ." *Etienne v. Lynch*, 813 F.3d 135, 139 (4th Cir. 2015). "Instead, a DHS officer, who need not be an attorney, presides over this expedited removal process." *Etienne*, 813 F.3d at 139 (citing 8 C.F.R. § 238.1(a)); *see United States v. Cisneros-Rodriguez*, 813 F.3d 748, 752 (9th Cir. 2015) ("Administrative removal proceedings are conducted by ICE agents rather than Immigration Judges.").

At the start of the proceedings, DHS issued a charging document against Mr. Lizarraga-Leyva alleging that he was deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony. Specifically, DHS characterized his § 11378 conviction as the aggravated felony of "illicit

trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). That same day, the examining officer sustained the charges against Mr. Lizarraga-Leyva, and he was returned to Mexico by foot.

Six years later, Mr. Lizarraga-Leyva returned to the United States and was charged with the crime of attempted illegal reentry, in violation of 8 U.S.C. § 1326. His 2008 removal order served as a predicate element of the prosecution. Mr. Lizarraga-Leyva, in turn, moved to dismiss the charges against him, pursuant to 8 U.S.C. § 1326(d) and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). Specifically, he maintained that his removal order was fundamentally unfair, and therefore could not be used as an element of the illegal reentry offense, because his prior 2007 conviction under § 11378 was not, in fact, an aggravated felony.

This was so, according to Mr. Lizarraga-Leyva, because the mens rea element of his § 11378 conviction was overbroad. As an initial matter, he noted that California law proscribes substances not criminalized under federal law. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1038 (9th Cir. 2017) (en banc) (noting that California drug statutes "are not a categorical match with a federal drug trafficking offense" in part because of the greater array of substances that are controlled). Moreover, in terms of mens rea, California drug statutes require only that a defendant knowingly possess any California controlled substance. *See e.g., People v. Romero*, 55 Cal. App. 4th 147, 157 (Cal. App. 1997) (affirming conviction for

possessing for sale and transporting cocaine, although defendant believed he possessed marijuana); *People v. Garringer*, 48 Cal. App. 3d 827, 830 (Cal. App. 1975) (affirming conviction for possessing phenobarbital although defendant believed he possessed secobarbital); *People v. Guy*, 107 Cal. App. 3d 593, 601 (Cal. App. 1980) (affirming conviction under § 11378 for possessing for sale PCP, although defendant believed he possessed cocaine).

In contrast, he maintained that § 1101(a)(43)(B) required a noncitizen to knowingly possess any substance within the narrower class of federally controlled substances. *See McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015) ("The ordinary meaning of [21 U.S.C.] § 841(a)(1) thus requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules."). Because the state mens rea was broader than the generic mens rea of § 1101(a)(43)(B), Mr. Lizarraga-Leyva argued that his conviction was not an aggravated felony.

The district court denied Mr. Lizarraga-Leyva's motion, and he thereafter appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit heard oral argument in Mr. Lizarraga-Leyva's case along with a related case raising the same question. *See United States v. Verduzco-Rangel*, 884 F.3d 918 (9th Cir. 2018). Ultimately, the court issued an unpublished memorandum disposition rejecting Mr. Lizarraga-Leyva's arguments for the reasons stated in its published opinion in *Verduzco-Rangel*. *See United States v. Lizarraga-Leyva*, 727 F. App'x

258, 259 (9th Cir. 2018) (unpublished) ("We reject this argument for the reasons outlined in our decision issued the same day, *see United States v. Verduzco-Rangel*, 15-50559.").

In *Verduzco-Rangel*, the court noted that the generic aggravated felony provision at § 1101(a)(43)(B) "creates two possible routes for a state drug felony to qualify as a drug trafficking aggravated felony[.]" 884 F.3d at 921 (citing *Rendon v. Mukasey*, 520 F.3d 967, 974 (9th Cir. 2008)). First, under § 1101(a)(43)(B)'s initial part, a state drug felony is an aggravated felony if it constitutes "illicit trafficking in a controlled substance." *See Verduzco-Rangel*, 884 F.3d at 921. Second, under § 1101(a)(43)(B)'s latter part, a state drug felony qualifies if it is punishable as a felony under the federal drug laws. *See id.* The court further noted that "California law [] criminalizes trafficking in a few obscure substances that federal law does not, such as chorionic gonadotropin (a performance enhancing drug also banned in many sports)." *Id.*

With that background, the court summarized Mr. Verduzco-Rangel's (and Mr. Lizarraga-Leyva's) position that the mens rea of § 11378 is broader than the mens rea of § 1101(a)(43)(B):

> Verduzco [] argues that his California conviction is not categorically an aggravated felony because section 11378 remains broader than federal law as to defendants' beliefs about the kind of substance in which they were trafficking. Under federal law, a person actually selling cocaine who thought he was selling baking soda does not possess the required mens rea to be guilty of drug trafficking. *See McFadden v. United States*, —— U.S. ——, 135 S. Ct. 2298, 2304, 192 L.Ed.2d 260 (2015).

> Under section 11378, defendants can be found guilty even if they were mistaken about what specific substance was being trafficked, as long as the substance in which they intended to traffic is in fact controlled under California law. *See People v. Romero*, 55 Cal.App.4th 147, 64 Cal.Rptr.2d 16, 23 (1997) (affirming conviction of defendant who sold cocaine that he thought was marijuana). This means that a person who believed she was trafficking in chorionic gonadotropin but was in fact trafficking in methamphetamine would violate California law but not federal law. Verduzco argues that section 11378 is thus not categorically a drug trafficking crime under the second route laid out in *Rendon*.

Id. at 922. The government, for its part, assumed the foregoing was true but contended it was "irrelevant." *Id.* In its view, the defendants' position would only make § 11378 overbroad with respect to § 1101(a)(43)(B)'s second route, which expressly incorporates the mental state of the federal drug laws; section 11378 would remain "an aggravated felony under the first route, at least where, as here, the defendant was trafficking a substance (methamphetamine) that is also controlled by federal law." *Id.*

The court agreed. *See id.* It rejected the notion that § 1101(a)(43)(B)'s first route "incorporates the federal law's scienter requirement that the substance in which the defendant intends to traffic be a substance controlled by federal law." *Id.* As support for its holding, the court relied on the plain language of § 1101(a)(43)(B):

> But there is no good reason to suppose that, when Congress defined "aggravated felony" in the INA to include "illicit trafficking in a controlled substance," it meant to implicitly incorporate such a requirement. Indeed, the plain meaning of the statutory language is to the contrary. If the first route were to require (1) a trafficking element, (2) the actual involvement of a drug that is banned federally, and (3) that federal law control the substance in which the defendant intended

> to traffic, then it would cover only drug trafficking crimes punishable as felonies under federal law—exactly what the second route already encompasses. In addition to rendering the statute redundant, Verduzco's proposed reading ignores the word "including," which suggests that what follows is a subset of what preceded, and not that the two are coextensive. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9, 105 S. Ct. 1421, 84 L.Ed.2d 406 (1985).

Id. at 922–23.

Despite rejecting federal law's knowledge requirement, the court did not hold that the first route has no mental state whatsoever. Instead, the court acknowledged that "'illicit trafficking' in route one [may] incorporate[] a mens rea requirement[.]" *Id.* at 923. But it found that "section 11378 suffices because it requires that the defendant intend to possess for sale a controlled substance and actually possess for sale a controlled substance, and that both the intended substance and the actual substance be controlled." *Id.* at 923. That is, the court found that the generic mens rea element of the first route is knowledge that a substance is controlled by some unspecified law.

The Ninth Circuit denied Mr. Lizarraga-Leyva's petitions for panel rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are divided over whether a state drug-trafficking crime with a mens rea element different from the mens rea element required under federal law constitutes "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" under 8 U.S.C. § 1101(a)(43)(B) of the INA.

Two courts of appeals and the BIA have held that the generic definition of "illicit trafficking in a controlled substance" contains no mental state whatsoever and is essentially a strict-liability aggravated felony. Another court of appeals has defined the generic mens rea of "illicit trafficking in a controlled substance" as knowledge that a substance is controlled by law, without having to know which law. Neither approach is consistent with the plain language of § 1101(a)(43)(B), the structure of the INA, or this Court's case law on the categorical approach and aggravated felonies. The issue is a recurring and important one for the many noncitizens subject to mandatory removal, as well as the many noncitizens charged with illegal reentry on the basis of such a removal. Additionally, this case presents a highly suitable vehicle for resolving the conflict. The Court should therefore grant review.

I. The courts of appeals are divided over whether the "illicit trafficking in a controlled substance" aggravated felony has a mens rea element.

The courts of appeals are divided two-to-one over the generic definition of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)."

A. The Fifth and Eleventh Circuits have interpreted "illicit trafficking in a controlled substance" as a strict-liability generic offense.

On the one hand, the Fifth and Eleventh Circuits, along with the BIA, have held that the first definitional route contains no mens rea element. The Fifth Circuit was the first court of appeals to address the question in *Flores-Larrazola v.*

Lynch, 840 F.3d 234 (5th Cir. 2016). There, the court considered whether a noncitizen's Arkansas conviction for "recklessly possessing with the intent to deliver at least ten pounds of marijuana for remuneration" constituted "illicit trafficking in a controlled substance" such that the noncitizen was "an aggravated felon and [wa]s therefore ineligible for relief from removal." *Flores-Larrazola*, 840 F.3d at 236. The court found the conviction to be a categorical match.

The court began by assuming that the Arkansas conviction did not correspond with § 1101(a)(43)(B)'s second route because the federal drug laws require a knowing or intentional mens rea, while the Arkansas statute encompasses reckless conduct. *See id.* at 237-238. The court therefore focused its analysis on § 1101(a)(43)(B)'s first definitional route. *See id.* at 237. In so doing, the court rejected the noncitizen's argument that the first route incorporates federal law's mens rea requirement:

> The *mens rea* required to commit the former is not required to commit the latter. The "rule against superfluities" encourages us to interpret 8 U.S.C. § 1101(a)(43)(B) in a way that "effectuate[s] all its provisions, so that no part is rendered superfluous." We do so here and hold that a state crime can constitute "illicit trafficking in a controlled substance" even if does not qualify as a "drug trafficking crime" as defined in 18 U.S.C. § 924(c)(2).

Id. at 238. Upon holding that the first route does not have the same mens rea as the second route, the court went on to adopt the BIA's definition of "illicit trafficking" as "any state, federal, or qualified foreign felony conviction involving the unlawful trading or dealing in a controlled substance as defined by Federal

law." *Id.* at 239 (internal quotations omitted). That definition plainly contains no mens rea element. Because the noncitizen's Arkansas conviction was a state felony, marijuana is a controlled substance under federal law, and the ten pounds of marijuana was evidence of trafficking, the court held that the conviction was categorically "illicit trafficking in a controlled substance (as defined in section 802 of title 21)." *See id.*

Two years later, the Eleventh Circuit addressed a similar question: is a noncitizen's Florida conviction for sale of cocaine an "illicit trafficking" aggravated felony even though "the Florida statute does not include knowledge of the illicit nature of the controlled substance as an element of the offense[?]" *Choizilme v. Att'y Gen.*, 886 F.3d 1016, 1027 (11th Cir. 2018). The question arose because in 2002, the Florida legislature amended its drug statutes to eliminate knowledge as an element. Fla. Stat. § 893.101; *see Donawa v. Att'y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013). In *Choizilme*, then, the court was forced to address whether the generic definition of "illicit trafficking" "require[s] knowledge of the illicit nature of the substance trafficked." *Choizilme*, 886 F.3d at 1028.

Agreeing with the BIA's decision in *Matter of L-G-H-*, 26 I. & N. Dec. 365 (BIA 2014), the court answered no. *Choizilme*, 886 F.3d at 1027-29. As support for its position, the court considered the plain language of §1101(a)(43)(B) (the word "including" shows that the second definitional route is only a subset of the first); the ordinary meaning of the word "illicit," which does not necessarily imply a mens rea

element; and Congress's intent to expand, rather than limit, the removal of aliens convicted of drug offenses. *See id.* For these three reasons, the court "conclude[d] that 'illicit trafficking' under § 1101(a)(43)(B) does not require a specific mens rea of knowledge of the illicit nature of the controlled substance being trafficked." *Id.* at 1029.

Judge Jordan issued a concurring opinion. He believed a prior Eleventh Circuit case answered the question, even though it did not consider whether § 1101(a)(43)(B)'s first route contained a mens rea requirement. *See id.* at 1029. Nevertheless, Judge Jordan pointed out that the phrase "illicit trafficking in a controlled substance" is hopelessly ambiguous and a "'riddle wrapped in a mystery inside an enigma.' Churchill by Himself: The Definitive Collection of Quotations 145 (R. Langworth ed. 2008)." *Id.* at 1030 (alteration in original). The first problem, he noted, was that the individual words "illicit" and "trafficking," when combined, provided no clear meaning: "If 'trafficking' already connotes some level of illegality or unlawfulness, as Black's Law Dictionary suggests, it is difficult to see what 'illicit' adds to the calculus. And even if 'illicit' means something else as an adjective for 'trafficking,' it is not apparent what that something else is." *Id.*

The second problem, Judge Jordan pointed out, was the odd structure of § 1101(a)(43)(B). *See id.* Although the provision uses the term "including" between the first and second definitional routes, the word "including" does not operate to signify that the second route is a subset of the first. *See id.* Rather, "the example

('a drug trafficking crime') is in some ways broader than the general category ('illicit trafficking in a controlled substance'), and in those instances the example swallows the general category." *Id.* Given this, "it is impossible to say with any certainty that 'a drug trafficking crime' is just a narrower subset of 'illicit trafficking in a controlled substance.'" *Id.*

Third, Judge Jordan explained that other parts of the federal code that used the phrase "illicit trafficking" were unilluminating. *See id.* at 1031. Those other statutes also left the phrase "illicit trafficking" undefined. *See id.* (citing 6 U.S.C. § 348(a)(1), 22 U.S.C. § 2291f(a)(2), 8 U.S.C. § 1101(a)(43)(C)).

B. The Ninth Circuit has interpreted "illicit trafficking in a controlled substance" as containing whatever mens rea state law provides.

In contrast to the Fifth and Eleventh Circuits, the Ninth Circuit has answered the question presented differently. In the companion case to Mr. Lizarraga-Leyva's, the court acknowledged that § 1101(a)(43)(B)'s first definitional route may contain a mens rea element. *See Verduzco-Rangel*, 884 F.3d at 923. But the court went on to define that mens rea as simply knowing the substance was controlled:

> [I]t is sufficient that the state statute contains an "illicit trafficking" element, which [California Health & Safety Code] section 11378 clearly does . . . To the extent "illicit trafficking" in route one incorporates a mens rea requirement, section 11378 suffices because it requires that the defendant intend to possess for sale a controlled substance and

> actually possess for sale a controlled substance, and that both the intended substance and the actual substance be controlled.

Id.

Consequently, the lower courts have two different and contradictory answers to the question presented: § 1101(a)(43)(B)'s first route contains no mens rea element, according to the Fifth and Eleventh Circuits, and it contains a mens rea requirement that a defendant know the substance is controlled, according to the Ninth Circuit.

II. The question presented is extremely important for noncitizens and their families, the courts, prosecutors, and defense counsel.

This Court has frequently granted certiorari to clarify the scope of generic offenses enumerated as "aggravated felonies" under the INA. *See, e.g., Esquivel-Quintana v. Sessions,* 137 S. Ct. 1562 (2017); *Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Kawashima v. Holder*, 565 U.S. 478 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales,* 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1. (2004). Here, too, resolving the conflict over the meaning of "illicit trafficking in a controlled substance" is vitally important for this country's millions of noncitizens, as well for lower courts, prosecutors, and criminal defense attorneys alike.

For lawful permanent residents, the import of whether a conviction constitutes an "aggravated felony"—thus subjecting them to "mandatory removal," *Moncrieffe*, 569 U.S. at 204—can hardly be overstated. "Deportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (recognizing that "deportation is a particularly severe 'penalty.'"). It "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). These consequences are even more severe for lawful permanent residents who came here as children and now face permanent banishment from the country where they built their lives and where their family resides.

For noncitizens who are not lawful permanent residents, like Mr. Lizarraga-Leyva, the "aggravated felony" designation has other substantial and far-reaching consequences. Beyond mandatory removal and ineligibility for any discretionary relief, non-permanent residents convicted of aggravated felonies are subject to mandatory detention, 8 U.S.C. § 1231(a)(2); conclusively presumed to be removable, 8 U.S.C. § 1228(c); and subject to expedited removal, meaning they have no right to a hearing before an immigration judge, 8 U.S.C. § 1228(b).

Because the "stakes are indeed high and momentous," removal decisions should not depend upon "fortuitous or capricious" circumstances or subject

noncitizens to "irrational" hazards. *Delgadillo*, 332 U.S. at 391. Yet the BIA and the courts of appeals have created exactly this sort of irrational scheme.

The specific question presented here, concerning the aggravated felony for drug-trafficking offenses, is even more significant, as drug convictions constitute the second-most common criminal basis for removal of aliens from the United States after immigration crimes. Of the 135,570 aliens removed from the United States in 2016 due to a criminal offense, 23,217 (or 17.1%) were removed for a drug crime. Department of Homeland Security, *Immigration Enforcement Actions*, at 10, available at https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf. The question presented thus arises with frequency in the lower courts and the BIA, and this Court's intervention is needed to address this important and frequently recurring question of law.

Moreover, the uncertainty caused by the conflict frustrates the ability of defense counsel and prosecutors to offer a defendant charged with a state drug offense meaningful advice concerning the immigration consequences of a guilty plea or conviction. Resolving whether state drug convictions constitute "aggravated felonies" under the INA would enable prosecutors to make charging and plea-bargaining decisions with full knowledge of the immigration consequences. Indeed, some states impose on prosecutors explicit statutory or ethical duties to consider the immigration consequences of potential plea agreements. *See, e.g.,* Cal. Penal Code

§ 1016.3(b); Va. State Bar Legal Ethics, Formal Op. 1876 (2015). Prosecutors cannot do that effectively against the current backdrop of uncertainty.

Defense attorneys also need clarity in this area. The categorical approach is designed partly to enable noncitizens "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (internal quotations omitted). And defense counsel have a duty to advise clients as to which crimes are "aggravated felonies" and which are not. *See Padilla*, 559 U.S. at 367. Yet defense counsel cannot provide such advice when the very definition of "illicit trafficking in a controlled substance" is disputed.

Finally, the question presented also affects the criminal justice system more widely. As Mr. Lizarraga-Leyva's case illustrates, noncitizens who illegally enter the country are subjected to an enhanced twenty-year penalty, pursuant to 8 U.S.C. § 1326(b)(2), if they have been convicted of an aggravated felony. Such criminal consequences arise frequently. Illegal reentry alone constitutes approximately 26% of all federal criminal cases. U.S. Sentencing Comm'n, *Illegal Reentry Offenses* 8 (Apr. 2015). And approximately 40% of illegal-reentry offenders are convicted of aggravated felonies and face increased sentencing exposure. *Id.* at 9. Courts, prosecutors, and defense counsel need to know when these prosecutions are properly charged and when they are not. For all of these reasons, the question

presented carries weighty real-world consequences and requires intervention by this Court.

III. This case is a good vehicle for the Court to resolve the question presented.

Mr. Lizarraga-Leyva's case is an excellent vehicle for resolving the generic definition of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" for three reasons. First, at every stage in the proceedings, Mr. Lizarraga-Leyva properly raised and preserved his argument that his state law conviction should not be considered an aggravated felony. Second, the companion case, *Verduzco-Rangel*, 884 F.3d at 918, yielded a published Ninth Circuit opinion. And third, the question presented is outcome determinative for Mr. Lizarraga-Leyva. That is, if "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" requires that a noncitizen know the substance he is dealing with is controlled by federal law, then Mr. Lizarraga-Leyva's conviction under California Health & Safety Code § 11378 is not an aggravated felony; his predicate removal order is invalid; and his resulting illegal-reentry conviction is infirm.

IV. Neither of the lower courts' approaches to the mens rea element of the "illicit trafficking" aggravated felony is correct.

Currently, there are two answers to the question presented. According to the Fifth Circuit, the Eleventh Circuit, and the BIA, the generic definition of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" contains

no mens rea element whatsoever. According to the Ninth Circuit, "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" may contain a mens rea element, but that element is simply knowledge that a substance is controlled by some unspecified law. Both approaches are incorrect.

A. Interpretive tools clearly show that the strict-liability interpretation of the Fifth and Eleventh Circuits is wrong.

Each time this Court has addressed § 1101(a)(43)(B), it has focused on the "commonsense conception of 'illicit trafficking,' the term ultimately being defined." *Lopez*, 549 U.S. at 53; *see also Moncrieffe*, 569 U.S. at 206 (sharing a small amount of marijuana for no remuneration does not fit everyday understanding of trafficking); *Carachuri-Rosendo*, 560 U.S. at 573 ("[W]e begin by looking at the terms of the provisions and the 'commonsense conception' of those terms.").

Here, in holding that "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" requires only the act of trafficking, without any corresponding mens rea, the Fifth and Eleventh Circuits have essentially converted the first definitional route of § 1101(a)(43)(B) into a strict-liability provision. If the that position were correct, then a grocer selling what he believed to be oregano, but what in fact turned out to be marijuana, could be deported under the "illicit trafficking" provision as an aggravated felon. Such an outcome, however, is at odds with an everyday understanding of "illicit trafficking in a controlled substance." After all, "Congress meant the term 'aggravated felony' to capture serious crimes

. . . ." *Torres*, 136 S. Ct. at 1626. But applying "an 'aggravated' . . . label to" such an unknowing offender "is, to say the least, counterintuitive and 'unorthodox[.]'" *Carachuri-Rosendo*, 560 U.S. at 574. That alone should leave this Court "very wary of the [the Fifth and Eleventh Circuits'] position." *Lopez*, 549 U.S. at 54.

Moreover, the Fifth and Eleventh Circuits' position fails to give effect to every statutory term at issue: "illicit," "trafficking," and "controlled substance." "Illicit" is defined as "illegal or improper." Black's Law Dictionary (10th ed. 2014). "Trafficking" means "[t]he act of transporting, trading, or dealing, esp. in illegal goods or people." *Id.* Under the Fifth and Eleventh Circuits' reading, what makes an act of trafficking illegal or improper (i.e., "illicit") is that it involves a substance proscribed under law (i.e., a "controlled substance."). But the prohibited nature of the substance is already accounted for by the statutory terms "trafficking" and "controlled substance." Thus, the term "illicit" must have some meaning independent of "trafficking" and "controlled substance" to avoid rendering any term superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (Court has a "duty to give effect, if possible, to every clause and word of a statute.") (internal quotations omitted).

A preferable reading is that "illicit" requires knowledge of the unlawful nature of the controlled substance. *See Choizilme*, 886 F.3d at 1030 (recognizing that "illicit" could denote "the level of mens rea"). Such a reading would distinguish between *lawful* trafficking in a controlled substance (which would cover the

oregano/marijuana seller described above) and *illicit* trafficking in a controlled substance.

Construing "illicit trafficking in a controlled substance" to contain a mens rea element would also ensure cohesion among the aggravated felonies enumerated in § 1101(a)(43). Courts have uniformly come down in favor of a mens rea requirement when interpreting other crimes on the aggravated felony list. *See, e.g., Leocal*, 543 U.S. at 11 (interpreting "crime of violence" aggravated felony to require mental state greater than accidental or negligent conduct).

Against these other aggravated felonies, the Fifth and Eleventh Circuits' position would effectively single out the drug-trafficking provision as encompassing strict-liability offenses. One should be highly skeptical of according 8 U.S.C. § 1101(a)(43)(B) such a singular status, as "word[s]" in a statute are generally "known by the company [they] keep[]." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015).

The legislative history of § 1101(a)(43)(B) further militates against the Fifth and Eleventh Circuits' approach. Congress first coined "aggravated felony" as a term of art within the immigration laws in 1988, with the passage of the Anti-Drug Abuse Act. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 915 (9th Cir. 2004). That provision covered murder, "any drug trafficking crime defined in section 924(c)(2) of title 18, United States Code," or any illicit trafficking in firearms or destructive devices. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102

Stat. 4181 (1998); *see also Cazarez-Gutierrez*, 382 F.3d at 915. This initial version thus exclusively anchored the definition of a drug-trafficking aggravated felony in federal law.

Two years later, with the passage of the Immigration Act of 1990, Congress gave the drug-trafficking aggravated felony its current two-pronged reach, extending it to both "illicit trafficking offenses" and drug-trafficking offenses as defined by federal law. Pub. L. No. 101-649, § 501, 104 Stat. 4978 (1990). The purpose of this amendment was to clarify that the aggravated felony provision extends to state drug offenses:

> Current law clearly renders an alien convicted of a Federal drug trafficking offense an aggravated felon. It has been less clear whether a state drug trafficking conviction brings that same result, although the Board of Immigration Appeals in *Matter of Barrett* (March 6, 1990) has recently ruled that it does. Because the Committee concurs with the recent decision of the Board of Immigration Appeals and wishes to end further litigation on this issue, section 1501 of H.R. 5269 specifies that drug trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal court.

H.R. REP. NO. 101-681(1) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553. Thus, the only reason Congress included the "illicit trafficking" language was to codify the BIA's decision in *Matter of Barrett*, 20 I. & N. Dec. 171, 177-78 (BIA 1990), that a state conviction can qualify as a drug-trafficking aggravated felony for immigration purposes. *See Cazarez-Gutierrez*, 382 F.3d at 916.

Since 1990, Congress "has not altered the definition of a drug trafficking crime." *Id.* at 917. In fact, Congress has left that definition intact despite "expand[ing] the crimes defined as aggravated felonies" and "dramatically overhaul[ing] the INA by enacting the Anti-terrorism and Effective Death Penalty Act of 1996 and IIRIRA." *Id.* at 916-17. Against this backdrop, "there is absolutely no evidence that Congress" was broadening the definition of a drug-trafficking aggravated felony to sweep in strict-liability crimes. *Id.*

Because Congress has not indicated either through "the language or legislative history of the" "illicit trafficking" provision that it intended to create a strict-liability grounds of removal, *Liparota v. United States*, 471 U.S. 419, 425 (1985), the proper approach is to read § 1101(a)(43)(B) "against a 'background rule' that the defendant must know each fact making his conduct illegal." *Torres*, 136 S. Ct. at 1631. This is so even if the term "illicit" does not expressly impart a mens rea requirement. *See id.* at 1630-31 (longstanding rule applies even if statute by its terms does not specify a mental state).

Indeed, this presumption against strict-liability provisions and in favor of a scienter requirement has a long lineage. *See, e.g., Elonis v. United States,* 135 S. Ct. 2001, 2009-12 (2015); *Liparota*, 471 U.S. at 423-27; *Poster 'N' Things, Ltd. v. United States*, 511 U.S. 513, 517-24 (1994); *United States v. X-Citement Video*, 513 U.S. 64, 71-72 (1994); *Staples v. United States*, 511 U.S. 600, 605-07, 614-18 (1994);

Morisette v. United States, 342 U.S. 246, 250-63 (1952). As these cases illustrate, strict-liability provisions remain the exception, not the rule.

The presumption in favor of a scienter requirement gains particular force in cases where the statute carries a "potentially harsh penalty." *Staples*, 511 U.S. at 616; *see also X-Citement Video*, 513 U.S. at 72 (presumption especially appropriate because child-pornography statute carries penalty of up to ten years in prison, substantial fines, and forfeiture). Here, as explained *supra* at Part II, the consequences of an aggravated felony determination are undoubtedly severe. In light of these severe consequences attending the aggravated felony label, the presumption against strict liability is especially appropriate, and the Fifth and Eleventh Circuits' approach is indefensible.

B. Interpretive tools also undercut the Ninth Circuit's state-law dependent approach.

The Ninth Circuit's approach fares not better. The court rejected Mr. Lizarraga-Leyva's position that "the phrase 'illicit trafficking' in § 1101(a)(43)(B) incorporates the federal law's scienter requirement that the substance in which the defendant intends to traffic be a substance controlled by federal law." *Verduzco-Rangel*, 884 F.3d at 922. The court found "no good reason to suppose that, when Congress defined 'aggravated felony' in the INA to include 'illicit trafficking in a controlled substance,' it meant to implicitly incorporate such a

requirement." *Id.* It went on to conclude that "the plain meaning of the statutory language is to the contrary." *Id.*

But there is, in fact, a very good reason to suppose that when Congress codified the "illicit trafficking in a controlled substance" aggravated felony, it meant to incorporate the federal mens rea. That reason is simple: the first definitional route expressly references the federal list of controlled substances—"illicit trafficking in a controlled substance (*as defined in section 801 of title 21).*" 8 U.S.C. § 1101(a)(43)(B) (emphasis added). This express incorporation of the federal drug schedules has two consequences. First, it shows that under the first route, a defendant must traffic in a federally controlled substance—a point the Ninth Circuit recognized. *See Verduzco-Rangel*, 884 F.3d at 921.

Second, it shows that under the first route, a defendant must know the substance he is trafficking in is listed on the federal drug schedules. This second point follows from ordinary rules of English grammar. *See McFadden*, 135 S. Ct. at 2304 ("Under the most natural reading of this provision, the word 'knowingly' applies not just to the statute's verbs but also to the object of those verbs-'a controlled substance.'"); *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) ("As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime."); *Lopez*, 549 U.S. at 56 ("But we do not normally speak or write the Government's way. We do not use a phrase like 'felony punishable under the [CSA]' when we

mean to signal or allow a break between the noun 'felony' and the contiguous modifier 'punishable under the [CSA]' . . . Regular usage points in the other direction."). And it follows from the "'background rule'" that "a defendant must possess a *mens rea*, or guilty mind, as to every element of an offense." *Torres*, 136 S. Ct. at 1630 (quoting *Staples*, 511 U.S. at 619).

Combining that background rule with the most natural reading of "illicit trafficking in a controlled substance," the mental state derived from the word "illicit" applies not just to the word "trafficking" but also to the object of that trafficking—"a controlled substance (as defined in section 801 of title 21)." 8 U.S.C. § 1101(a)(43)(B). In other words, the first route requires a defendant to know that the substance he is trafficking is on the federal drug schedules. The Ninth Circuit's approach overlooks the first definitional route's express incorporation of the federal drug schedules. And it ignores that any mental state attaches "to every element of an offense," which, in this case, includes a federally controlled substance. *Torres*, 136 S. Ct. at 1630.

In addition to relying on "the plain meaning of" route one, the Ninth Circuit also invoked the canon of statutory construction against redundancy. *Verduzco-Rangel*, 884 F.3d at 922. Specifically, the court reasoned that "[i]f the first route were to require (1) a trafficking element, (2) the actual involvement of a drug that is banned federally, and (3) that federal law control the substance in which the defendant intended to traffic, then it would cover only drug trafficking crimes

punishable as felonies under federal law—exactly what the second route already encompasses." *Id.*

The court's concern with supposed redundancy, however, is unwarranted. Even adopting Mr. Lizarraga-Leyva's view of the mens rea required for the first definitional route, there would be no redundancy. Under the "illicit trafficking" prong, "trafficking" requires "some sort of commercial dealing." *Lopez*, 549 U.S. at 53). The meaning of "trafficking" in the second definitional route, however, is more expansive. The second route concerns "a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c)(2), in turn, defines a "drug trafficking crime" as any felony punishable under the Controlled Substances Act, the Controlled Substance Import and Export Act, and the Maritime Drug Law Enforcement Act. 18 U.S.C. § 924(c)(2). These acts cover many crimes that do not require any commercial dealing whatsoever, such as:

- Acquiring or obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, 21 U.S.C. § 843(a)(3);

- Using any communication facility in committing, causing, or facilitating an act under the CSA, 21 U.S.C. § 843(b);

- Maintaining a drug-involved premises, 21 U.S.C. § 856;

- Importing a controlled substance, 21 U.S.C. § 952;

- Exporting a controlled substance, 21 U.S.C. § 953;

- Possessing a controlled substance on board a vessel arriving in or departing from the United States, 21 U.S.C. § 955;

- Destroying property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 while on board a covered vessel, 46 U.S.C. § 70502(a)(2); and

- Concealing currency in excess of $100,000 on a covered vessel outfitted for smuggling, 46 U.S.C. § 70502(a)(3).

Therefore, even if the two definitional routes were to have the same mental state, as Mr. Lizarraga-Leyva urges, the routes would not be redundant because of their differing definitions of "trafficking." The Ninth Circuit never addressed that point.

Moreover, as further support for its claim of redundancy, the Ninth Circuit concluded that Mr. Lizarraga-Leyva's "proposed reading ignores the word 'including,' which suggests that what follows [in route two] is a subset of what preceded" in route one. *Id.* at 922-23 (citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9 (1985)). To begin, if what follows in route two is merely a "subset" of what precedes it in route one, then route two would be merely superfluous, a statutory construction to be avoided. *See Choizilme*, 886 F.3d at 1030 (noting that "[t]he majority's reasoning also potentially renders 'drug trafficking crime' superfluous.").

Nor does the Ninth Circuit's reliance on the word "including" carry the weight the court gives it. According to the court, the word "including" generally

connotes an illustrative example of the preceding general category. But "the flaw with this analysis is that, unlike most broad general categories that are followed by narrower illustrative examples, here the example ('a drug trafficking crime') is in some ways broader than the general category ('illicit trafficking in a controlled substance'), and in those instances the example swallows the general category." *Id.* Given this structure, "it is impossible to say with any certainty that 'a drug trafficking crime' is just a narrower subset of 'illicit trafficking in a controlled substance.'" *Id.*

Thus, while the term "including" can be understood to mean part of a larger group, *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979), that term still is commonly understood to have "a broader meaning than compris[ing] . . . [I]t is also used in a non-restrictive way, implying that there may be other things not specifically mentioned that are part of the same category." *See* English Oxford Living Dictionaries (2018). This understanding is consistent with how the term "including" is used in other portions of the INA's aggravated felony definition. Section 1101(a)(43)(G), for example, defines as an aggravated felony any "theft offense (*including* receipt of stolen property)." 8 U.S.C. § 1101(a)(43)(G) (emphasis added). Receipt of stolen property is not a theft offense per se, yet it is included *in addition to* theft offenses in that particular sub-definition of aggravated felonies. *See Hernandez-Mancilla v. I.N.S.*, 246 F.3d 1001, 1008 (7th Cir. 2001). The same holds true in § 1101(a)(43)(B).

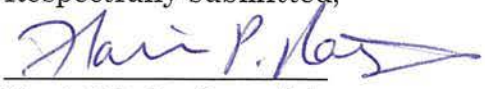
Finally, the Ninth Circuit's approach is fundamentally at odds with the categorical approach this Court first articulated in *Taylor v. United States*, 495 U.S. 575 (1990). The definition the court adopted—knowledge the drug involved is controlled by law, without having to know further which body of law—suffers from serious problems. Knowing that a substance is controlled by law necessarily begs the question: knowing that it is controlled by *which* law? To answer that question, one has to look at the substances that each particular state controls. The court therefore makes the knowledge element necessarily dependent on state law. In so doing, the court "turns the categorical approach on its head by defining the generic federal offense . . . as whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1570. Ultimately, then, "[u]nder the [Ninth Circuit's] preferred approach, there is no 'generic' definition at all." *Id.* Because such a state-law dependent approach cannot be reconciled with the categorical analysis, the Ninth Circuit's approach is erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

August 16, 2018

Respectfully submitted,



Harini P. Raghupathi

TABLE OF CONTENTS

APPENDIX A

727 Fed.Appx. 258
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Juan Fernando **LIZARRAGA-LEYVA**, Defendant-Appellant.

No. 15-50309
|
Argued and Submitted January 8, 2018 Pasadena, California
|
Filed March 9, 2018

Synopsis
Background: Defendant was convicted, pursuant to conditional guilty plea, in the United States District Court for the Southern District of California, No. 3:14-cr-2240-CAB, Cathy Ann Bencivengo, J., of attempted illegal reentry due to his prior removal. Defendant appealed.

[Holding:] The Court of Appeals held that drug involved in defendant's prior California trafficking offense was methamphetamine, a substance barred under federal law, and thus, defendant's prior drug trafficking conviction was aggravated felony under Immigration and Nationality Act's (INA) removal provisions.

Affirmed.

West Headnotes (1)

[1] Aliens, Immigration, and Citizenship
Controlled substances offenses

Drug involved in defendant's prior California trafficking offense was methamphetamine, a substance barred under federal law, and thus, defendant's prior drug trafficking conviction was aggravated felony under Immigration and Nationality Act's (INA) removal provisions; although space on change of plea form where defendant was meant to identify the count to which he was pleading was left blank, defendant's complaint contained only one count for possession of methamphetamine for sale, and abstract judgment showed that defendant pleaded guilty to count one. Immigration and Nationality Act §§ 101, 238, 8 U.S.C.A. §§ 1101(a)(43)(B), 1228; Cal. Health & Safety Code § 11378.

Cases that cite this headnote

Appeal from the United States District Court for the Southern District of California, Cathy Ann Bencivengo, District Judge, Presiding, D.C. No. 3:14-cr-2240-CAB

Attorneys and Law Firms

Harini P. Raghupathi, Federal Defenders of San Diego, Inc., San Diego, CA, for Defendant-Appellant.

Mark R. Rehe, Assistant U.S. Attorney, Office of the U.S. Attorney, San Diego, CA, for Plaintiff-Appellee.

Before: M. SMITH and FRIEDLAND, Circuit Judges, and RAKOFF, * Senior District Judge.

* The Honorable Jed S. Rakoff, Senior United States District Judge for the Southern District of New York, sitting by designation.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendant Juan Fernando Lizarraga-Leyva appeals his conviction for attempted illegal reentry in violation of 8 U.S.C. § 1326. In 2007, Lizarraga, a citizen of Mexico, pleaded guilty to possession of methamphetamine for sale in violation of California Health & Safety Code § 11378. Lizarraga was then removed under 8 U.S.C.

§ 1228 because his 2007 conviction was deemed to be an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B). In 2014, Lizarraga was apprehended while trying to reenter the United States, and charged with one count of attempted illegal reentry due to his prior removal. Lizarraga moved ***259** to dismiss the information, arguing that his prior removal was improper because his 2007 conviction was not an aggravated felony. The court denied Lizarraga's motion, and Lizarraga entered a conditional plea of guilty, preserving his right to appeal.

Lizarraga first argues that § 11378 is not categorically an aggravated felony because it criminalizes more conduct than its federal analog. *See Mellouli v. Lynch*, — U.S. —, 135 S.Ct. 1980, 1986, 192 L.Ed.2d 60 (2015) (describing the categorical approach). We reject this argument for the reasons outlined in our decision issued this same day, *see United States v. Verduzco-Rangel*, 15-50559.

[1] Lizarraga also argues that his 2007 conviction is not an aggravated felony because the Government cannot establish by clear and convincing evidence that the drug involved in his trafficking offense is also banned federally. "California state law treats the type of controlled substance as a separate element in prosecuting relevant drug offenses." *Padilla-Martinez v. Holder*, 770 F.3d 825, 831 n.3 (9th Cir. 2014). We therefore apply the "modified categorical approach," under which we may "determine which particular offense the noncitizen was convicted of" by examining a limited set of documents underlying the conviction to assess whether it still qualifies as an aggravated felony. *Moncrieffe v. Holder*, 569 U.S. 184, 191, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013). These documents include "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 [ ] some comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). "When a court using the modified categorical approach to determine whether an underlying conviction is a predicate offense relies solely on the link between the charging papers and the abstract of judgment, that link must be clear and convincing." *Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014).

Here, to prove that Lizarraga was in fact convicted of trafficking in methamphetamine, a substance barred under federal law, the Government relies on, among other things, an abstract of judgment, a felony complaint, and a change of plea form. The complaint contained only one count as to Lizarraga: Count One, which alleged that Lizarraga possessed methamphetamine for sale. The abstract of judgment shows that Lizarraga pleaded guilty to Count One. However, the space on the change of plea form where Lizarraga was meant to identify the count to which he was pleading was left blank. Lizarraga argues that this blank space introduces the possibility that he did not in fact plead to trafficking in methamphetamine. This argument is foreclosed by *Cabantac v. Holder*, in which we held that "where, as here, the abstract of judgment ... specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment, we can consider the facts alleged in that count." 736 F.3d 787, 793-94 (9th Cir. 2013). Although the abstract of judgment did not itself specify which substance Lizarraga admitted to possessing, his complaint and change of plea form are sufficient to demonstrate that it was methamphetamine. *United States v. Valdavinos-Torres*, 704 F.3d 679, 687 (9th Cir. 2012). Moreover, Lizarraga was charged with only one count, so the blank space on the plea form introduces no ambiguity about the conduct to which he pleaded.

AFFIRMED.

All Citations

727 Fed.Appx. 258

End of Document

APPENDIX B

884 F.3d 918
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Alejandro **VERDUZCO–RANGEL**,
Defendant–Appellant.

No. 15-50559
|
Argued and Submitted January 8, 2018 Pasadena, California
|
Filed March 9, 2018

Synopsis
Background: Defendant was convicted, in the United States District Court for the Southern District of California, No. 3:15–cr–00129–GPC, Gonzalo P. Curiel, J., of attempting to reenter the United States after a prior removal. Defendant appealed.

[Holding:] The Court of Appeals, Jed S. Rakoff, Senior District Judge, sitting by designation, held that A California conviction for felony possession for sale of a controlled substance is a drug trafficking aggravated felony, as basis for removal under Immigration and Nationality Act (INA), where the record of conviction establishes that the substance involved was federally controlled.

Affirmed.

West Headnotes (10)

[1] **Criminal Law**
Review De Novo

On defendant's appeal from his conviction for attempting to reenter the United States after a prior removal, the Court of Appeals would review de novo defendant's collateral attack on his prior removal, which was based on the assertion that his prior conviction was not in fact an aggravated felony, rendering his prior removal invalid. Immigration and Nationality Act §§ 101(a)(43), 237(a)(2)(A)(iii), 276(d), 8 U.S.C.A. §§ 1101(a)(43), 1227(a)(2)(A)(iii), 1326(d).

Cases that cite this headnote

[2] **Aliens, Immigration, and Citizenship**
Collateral Attack

A removal order is fundamentally unfair, as element for collateral attack on removal, in prosecution for reentry after removal, if the relevant immigration laws did not in fact authorize removal. Immigration and Nationality Act § 276(d), 8 U.S.C.A. § 1326(d).

Cases that cite this headnote

[3] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

Under the categorical approach for determining whether a state offense is an aggravated felony under the INA, as basis for removal, a defendant's actual conduct is irrelevant; rather, the adjudicator must presume that the conviction rested upon nothing more than the least of the acts criminalized under the state statute. Immigration and Nationality Act §§ 101(a)(43), 237(a)(2)(A)(iii), 8 U.S.C.A. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

Cases that cite this headnote

[4] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

When determining whether a state offense is an aggravated felony under the INA, as basis for removal, if state statutes contain several different crimes, each described separately, a situation commonly referred to as divisibility, courts may determine which particular offense the defendant was convicted of by examining a limited set of documents underlying the conviction, and the court then must determine whether the defendant's specific conviction can be categorized as an aggravated felony.

Immigration and Nationality Act §§ 101(a)(43), 237(a)(2)(A)(iii), 8 U.S.C.A. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

Cases that cite this headnote

[5] **Aliens, Immigration, and Citizenship**
Controlled substances offenses

A state drug trafficking crime is a drug trafficking aggravated felony, as basis for removal, if it would be punishable as a felony under the federal drug laws. Immigration and Nationality Act § 101(a)(43)(B), 8 U.S.C.A. § 1101(a)(43)(B); 18 U.S.C.A. § 924(c).

Cases that cite this headnote

[6] **Aliens, Immigration, and Citizenship**
Controlled substances offenses

The California statute criminalizing, as a felony, possession for sale of methamphetamine is divisible as to which substance the defendant was convicted of actually trafficking, and thus, in determining whether a conviction under the statute is a drug trafficking aggravated felony under the INA, as basis for removal, courts may determine which particular offense the defendant was convicted of by examining a limited set of documents underlying the conviction. Immigration and Nationality Act § 101(a)(43)(B), 8 U.S.C.A. § 1101(a)(43)(B); 18 U.S.C.A. § 924(c).

1 Cases that cite this headnote

[7] **Controlled Substances**
Knowledge and intent

Under federal law, a person actually selling cocaine who thought he was selling baking soda does not possess the required mens rea to be guilty of drug trafficking.

Cases that cite this headnote

[8] **Controlled Substances**
Knowledge and intent

Under California law, defendants can be found guilty of felony possession for sale of a controlled substance, even if they were mistaken about what specific substance was being trafficked, as long as the substance in which they intended to traffic is in fact controlled under California law. Cal. Health & Safety Code § 11378.

Cases that cite this headnote

[9] **Criminal Law**
Acts prohibited by statute

As a general matter, all federal criminal statutes are presumed to incorporate a requirement that the defendant act with a culpable state of mind unless the statute expressly indicates otherwise.

Cases that cite this headnote

[10] **Aliens, Immigration, and Citizenship**
Controlled substances offenses

A California conviction for felony possession for sale of a controlled substance, an offense which has a trafficking element, and which requires that the defendant intend to possess for sale a controlled substance and actually possess for sale a controlled substance, is illicit trafficking in a controlled substance and therefore is a drug trafficking aggravated felony, as basis for removal under INA, where the record of conviction establishes that the substance involved was federally controlled, even if defendant had intended to traffic in a substance that was not federally controlled. Immigration and Nationality Act §§ 101(a)(43)(B), 237(a)(2)(A)(iii), 8 U.S.C.A. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 102, 21 U.S.C.A. § 802; Cal. Health & Safety Code § 11378.

Cases that cite this headnote

*920 Appeal from the United States District Court for the Southern District of California, Gonzalo P. Curiel, District Judge, Presiding, D.C. No. 3:15–cr–00129–GPC

Attorneys and Law Firms

Ellis M. Johnston III, Clarke Johnston Thorp & Rice APPC, San Diego, California, for Defendant–Appellant.

Mark R. Rehe, Assistant United States Attorney; Laura E. Duffy, United States Attorney; Helen H. Hong, Assistant United States Attorney, Chief, Appellate Section, Criminal Division; United States Attorney's Office, San Diego, California; for Plaintiff–Appellee.

Before: Milan D. Smith, Jr. and Michelle T. Friedland, Circuit Judges, and Jed S. Rakoff, * Senior District Judge.

* The Honorable Jed S. Rakoff, Senior United States District Judge for the Southern District of New York, sitting by designation.

OPINION

RAKOFF, Senior District Court Judge:

Defendant–Appellant Alejandro Verduzco–Rangel, an alien, appeals his conviction under 8 U.S.C. § 1326 for attempting to reenter the United States after a prior removal. Verduzco was removed in 2004 under 8 U.S.C. § 1227(a)(2)(A)(iii), a provision of the Immigration and Nationality Act ("INA") that authorized removal if an alien had committed an "aggravated felony," as defined by § 1101(a)(43)(B). The aggravated felony on which the Government relied was Verduzco's prior conviction of felony possession for sale of methamphetamine in violation of California Health & Safety Code section 11378. Verduzco now argues that this conviction was not in fact an aggravated felony, rendering his removal invalid and requiring reversal of his recent conviction. For the reasons that follow, we disagree, reaffirm that a conviction under section 11378 is an aggravated felony for purposes of § 1227(a)(2)(A)(iii) where, as here, the record of conviction establishes that the substance involved was federally controlled, and affirm Verduzco's conviction.

[1] [2] We review *de novo* Verduzco's collateral attack on his 2004 removal. *United States v. Aguilera–Rios*, 769 F.3d 626, 629 (9th Cir. 2014). To prevail on this collateral attack, Verduzco must demonstrate that (1) he exhausted all available administrative remedies, (2) his removal proceeding deprived him of an opportunity for judicial review, and (3) the entry of his removal order was "fundamentally unfair." 8 U.S.C. § 1326(d). For purposes of this appeal, the Government concedes the first two prongs, so the only question is whether the removal was fundamentally unfair. A removal order is fundamentally unfair if the relevant immigration laws did not in fact authorize deportation. *See Aguilera–Rios*, 769 F.3d at 630.

*921 [3] [4] The Supreme Court has decreed that courts should initially employ a "categorical approach" to determine whether a state offense is an aggravated felony under the INA. *See Mellouli v. Lynch*, —— U.S. ——, 135 S.Ct. 1980, 1986, 192 L.Ed.2d 60 (2015). Under this approach, a defendant's actual conduct is irrelevant; rather, "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute." *Id.* (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190–91, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)). Where, however, statutes "contain several different crimes, each described separately"—a situation commonly referred to as "divisibility"—courts may "determine which particular offense the noncitizen was convicted of" by examining a limited set of documents underlying the conviction. *Moncrieffe*, 569 U.S. at 191, 133 S.Ct. 1678; *see also Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (listing permissible documents). The court then must determine whether the defendant's specific conviction can be categorized as an aggravated felony. *Moncrieffe*, 569 U.S. at 191, 133 S.Ct. 1678.

[5] The INA defines "aggravated felony" to include a host of offenses, conviction for any one of which subjects certain aliens to removal from the United States. 8 U.S.C. § 1101(a)(43). Among these offenses is the "drug trafficking aggravated felony," which is defined as "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." *Id.* § 1101(a)(43)(B). This definition creates two possible routes for a state drug felony to qualify as a drug trafficking aggravated felony:

> First, under the phrase "illicit trafficking in a controlled substance," a state drug crime is an aggravated felony "if it contains a trafficking element." Second, under the phrase "including a drug trafficking crime (as defined in section 924(c) of Title 18)," a state drug crime is an

aggravated felony if it would be punishable as a felony under the federal drug laws.

Rendon v. Mukasey, 520 F.3d 967, 974 (9th Cir. 2008) (quoting *Salviejo–Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006)); *see also Lopez v. Gonzales*, 549 U.S. 47, 57, 127 S.Ct. 625, 166 L.Ed.2d 462 (2006) ("[I]f [a defendant's] state crime actually fell within the general term 'illicit trafficking,' the state felony conviction would count as an 'aggravated felony,' regardless of the existence of a federal felony counterpart....").

[6] California's statute is not a perfect categorical match under either route because, although California's list of controlled substances is nearly identical to those contained in the federal statutes and schedules that the INA references,[1] California law also criminalizes trafficking in a few obscure substances that federal law does not, such as chorionic gonadotropin (a performance enhancing drug also banned in many sports). *See Coronado v. Holder*, 759 F.3d 977, 983 n.1 (9th Cir. 2014). However, section 11378 is divisible as to which substance the defendant was convicted of actually trafficking, *see, e.g.*, *United States v. Vega–Ortiz*, 822 F.3d 1031, 1035 (9th Cir. 2016), so courts can look to underlying ***922** records to determine whether a conviction was for a federally banned substance and thus qualifies as an aggravated felony for purposes of federal law. Verduzco's 2004 indictment and plea agreement establish that he was convicted of trafficking methamphetamine, which is a controlled substance under both California and federal law.

1 21 U.S.C. § 802 defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." *Id.* § 802(6). 18 U.S.C. § 924 defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46." *Id.* § 924(c)(2).

[7] [8] Verduzco nonetheless argues that his California conviction is not categorically an aggravated felony because section 11378 remains broader than federal law as to defendants' beliefs about the kind of substance in which they were trafficking. Under federal law, a person actually selling cocaine who thought he was selling baking soda does not possess the required mens rea to be guilty of drug trafficking. *See McFadden v. United States*, —— U.S. ——, 135 S.Ct. 2298, 2304, 192 L.Ed.2d 260 (2015). Under section 11378, defendants can be found guilty even if they were mistaken about what specific substance was being trafficked, as long as the substance in which they intended to traffic is in fact controlled under California law. *See People v. Romero*, 55 Cal.App.4th 147, 64 Cal.Rptr.2d 16, 23 (1997) (affirming conviction of defendant who sold cocaine that he thought was marijuana). This means that a person who believed she was trafficking in chorionic gonadotropin but was in fact trafficking in methamphetamine would violate California law but not federal law. Verduzco argues that section 11378 is thus not categorically a drug trafficking crime under the second route laid out in *Rendon*.

Rather than contesting this point, the Government argues that it is irrelevant because a conviction under section 11378 is an aggravated felony under the first route, at least where, as here, the defendant was trafficking a substance (methamphetamine) that is also controlled by federal law. We agree, and thus need not consider whether Verduzco's conviction would also qualify as an aggravated felony under the second route identified in *Rendon*. Indeed, *Rendon* itself held that "possession of a controlled substance with the intent to sell" under Kansas law "contains a trafficking element and is an aggravated felony on that basis." 520 F.3d at 976 & n.7.

[9] Verduzco counters that (1) *Rendon* did not address what state of mind federal law requires a state statute to have for a conviction under that statute to be an aggravated felony under the first route,[2] and (2) that the phrase "illicit trafficking" in § 1101(a)(43)(B) incorporates the federal law's scienter requirement that the substance in which the defendant intends to traffic be a substance controlled by federal law. But there is no good reason to suppose that, when Congress defined "aggravated felony" in the INA to include "illicit trafficking in a controlled substance," it meant to implicitly incorporate such a requirement. Indeed, the plain meaning of the statutory language is to the contrary. If the first route were to require (1) a trafficking element, (2) the actual involvement of a drug that is banned federally, and (3) that federal law control the substance in which the defendant intended to traffic, then it would cover only drug trafficking crimes punishable as felonies under federal law —exactly what the second route already encompasses. In addition to rendering the statute redundant, Verduzco's proposed reading ignores the word "including," ***923**

which suggests that what follows is a subset of what preceded, and not that the two are coextensive. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985).

2 As a general matter, all federal criminal statutes are presumed to incorporate a requirement that the defendant act with a culpable state of mind unless the statute expressly indicates otherwise. *See Morissette v. United States*, 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).

Under *Rendon*'s first route, we need not consider whether a state drug crime would also be punishable under federal law. *See* 520 F.3d at 974. Rather, it is sufficient that the state statute contains an "illicit trafficking" element, which section 11378 clearly does. *See id.* at 976 & n.7. To the extent "illicit trafficking" in route one incorporates a mens rea requirement, section 11378 suffices because it requires that the defendant intend to possess for sale a controlled substance and actually possess for sale a controlled substance, and that both the intended substance and the actual substance be controlled. This is, in fact, the same mens rea required under federal law. *See McFadden*, 135 S.Ct. at 2304. That Congress would impose consistent deportation consequences for those who engage in equally culpable activity is hardly surprising and is consistent with a generic understanding of "drug trafficking."[3]

3 Our recent decision in *United States v. Valdivia–Flores*, 876 F.3d 1201 (9th Cir. 2017), is not to the contrary. There, we held that Washington State's possession with intent to distribute statute was not a drug trafficking aggravated felony. The Washington statute criminalized more conduct than its federal analogs because one could be convicted under Washington law as an aider and abettor by either knowingly or intentionally assisting a principal, whereas federal law only criminalized intentionally assisting a principal. *Id.* at 1207–08. *Intentionally* abetting the commission of a crime involves a more culpable state of mind than *knowingly* doing so, and it is unlikely that Congress intended the generic "drug trafficking" listed in the INA to reach the less culpable conduct that the Washington statute criminalized. Here, by comparison, knowingly possessing for sale a substance controlled only by state law involves an equally culpable state of mind as knowingly possessing for sale a substance controlled by federal law.

[10] Because section 11378 has a trafficking element and requires a sufficiently culpable state of mind, section 11378 is a drug trafficking aggravated felony under § 1101(a)(43)(B) where the record of conviction establishes that the substance involved is federally controlled. Thus, removal under § 1227(a)(2)(A)(iii) based on such a conviction under section 11378 is not fundamentally unfair. Verduzco's conviction is therefore **AFFIRMED**.

All Citations

884 F.3d 918, 18 Cal. Daily Op. Serv. 2390, 2018 Daily Journal D.A.R. 2239

End of Document

APPENDIX C

FILED

MAY 18 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUAN FERNANDO LIZARRAGA-LEYVA, Defendant-Appellant.	No. 15-50309 D.C. No. 3:14-cr-02240-CAB-1 Southern District of California, San Diego ORDER

Before: M. SMITH and FRIEDLAND, Circuit Judges, and RAKOFF,* Senior District Judge.

The panel has unanimously voted to deny Appellant's petition for rehearing. Judges Smith and Friedland have voted to deny the petition for rehearing en banc. Judge Rakoff recommends denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

* The Honorable Jed S. Rakoff, Senior United States District Judge for the Southern District of New York, sitting by designation.

PACER fee: Exempt

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 15-50309
USA v. Juan Lizarraga-Leyva
Appeal From: U.S. District Court for Southern California, San Diego
Fee Status: IFP

Docketed: 07/08/2015
Termed: 03/09/2018

Case Type Information:
1) criminal
2) Direct Criminal
3) null

Originating Court Information:
District: 0974-3 : 3:14-cr-02240-CAB-1
Court Reporter: Mauralee Ramirez
Trial Judge: Cathy Ann Bencivengo, District Judge
Date Filed: 08/07/2014

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
06/24/2015	06/25/2015	07/08/2015	07/08/2015

Prior Cases:
None

Current Cases:
None

UNITED STATES OF AMERICA Plaintiff - Appellee,	Christopher Alexander, Assistant U.S. Attorney Direct: 619-557-5610 [COR LD NTC Assist US Attorney] Office of the US Attorney Suite 6293 880 Front Street San Diego, CA 92101-8893 Helen H. Hong, Assistant U.S. Attorney Direct: 619-557-7459 [COR NTC Assist US Attorney] Office of the US Attorney Room 6293 880 Front Street San Diego, CA 92101-8893 Mark R. Rehe, Assistant U.S. Attorney Direct: 619-546-7986 [COR NTC Assist US Attorney] Office of the US Attorney 6293 880 Front Street San Diego, CA 92101-8893
v.	
JUAN FERNANDO LIZARRAGA-LEYVA Defendant - Appellant,	Harini P. Raghupathi, Esquire [COR NTC Assist Fed Pub Def] Federal Defenders of San Diego, Inc. 225 Broadway San Diego, CA 92101-5030

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JUAN FERNANDO LIZARRAGA-LEYVA, Defendant - Appellant.

07/08/2015	☐ 1 13 pg, 481.41 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Reporters Transcript required: Yes. Sentence imposed: 18 months. Transcript ordered by 07/29/2015. Transcript due 08/28/2015. Appellant briefs and excerpts due by 10/07/2015 for Juan Fernando Lizarraga-Leyva. Appellee brief due 11/06/2015 for United States of America. Appellant's optional reply brief is due 14 days after service of the answering brief. [9603530] (HC) [Entered: 07/08/2015 04:25 PM]
07/23/2015	☐ 2 2 pg, 52.49 KB	Filed (ECF) notice of appearance of Harini P. Raghupathi for Appellant Juan Fernando Lizarraga-Leyva. Date of service: 07/23/2015. [9619952] [15-50309] (Raghupathi, Harini) [Entered: 07/23/2015 11:23 AM]
07/23/2015	☐ 3	Attorney Craig Martin Smith in 15-50309 substituted by Attorney Harini P. Raghupathi in 15-50309 [9619971] (KB) [Entered: 07/23/2015 11:31 AM]
09/30/2015	☐ 4 5 pg, 57.58 KB	Filed (ECF) Appellant Juan Fernando Lizarraga-Leyva Unopposed Motion to extend time to file Opening brief until 11/23/2015. Date of service: 09/30/2015. [9702063] [15-50309] (Raghupathi, Harini) [Entered: 09/30/2015 01:10 PM]
10/01/2015	☐ 5 1 pg, 185.28 KB	Filed clerk order (Deputy Clerk: LKK): Granting Motion (ECF Filing) filed by Appellant Juan Fernando Lizarraga-Leyva; Granting Motion (ECF Filing) motion to extend time to file brief filed by Appellant Juan Fernando Lizarraga-Leyva Appellant briefs and excerpts due by 11/23/2015 for Juan Fernando Lizarraga-Leyva. Appellee brief due 12/23/2015 for United States of America. The optional reply brief is due 14 days after service of the answering brief. [9704019] (LKK) [Entered: 10/01/2015 01:35 PM]
11/16/2015	☐ 6 5 pg, 12.82 KB	Filed (ECF) Appellant Juan Fernando Lizarraga-Leyva Motion to extend time to file Opening brief until 01/22/2016. Date of service: 11/16/2015. [9757448] [15-50309] (Raghupathi, Harini) [Entered: 11/16/2015 03:36 PM]
11/18/2015	☐ 7 1 pg, 186.27 KB	Filed clerk order (Deputy Clerk: LKK): Granting Motion (ECF Filing) filed by Appellant Juan Fernando Lizarraga-Leyva; Granting Motion (ECF Filing) motion to extend time to file brief filed by Appellant Juan Fernando Lizarraga-Leyva Appellant briefs and excerpts due by 01/22/2016 for Juan Fernando Lizarraga-Leyva. Appellee brief due 02/22/2016 for United States of America. The optional reply brief is due 14 days after service of the answering brief. [9761191] (LKK) [Entered: 11/18/2015 03:19 PM]
01/15/2016	☐ 8 5 pg, 12.84 KB	Filed (ECF) Appellant Juan Fernando Lizarraga-Leyva Unopposed Motion to extend time to file Opening brief until 03/22/2016. Date of service: 01/15/2016. [9828849] [15-50309] (Raghupathi, Harini) [Entered: 01/15/2016 10:09 AM]
01/20/2016	☐ 9 1 pg, 32.06 KB	Filed order (Appellate Commissioner): Appellant's unopposed motion for a 60-day extension of time to file the opening brief is granted. The opening brief is due March 22, 2016. The answering brief is due April 21, 2016. The optional reply brief is due within 14 days after service of the answering brief. (Pro Mo) [9833703] (MS) [Entered: 01/20/2016 01:52 PM]
03/22/2016	☐ 10 85 pg, 611.94 KB	Submitted (ECF) Opening Brief for review. Submitted by Appellant Juan Fernando Lizarraga-Leyva. Date of service: 03/22/2016. [9911382] [15-50309] (Raghupathi, Harini) [Entered: 03/22/2016 03:31 PM]
03/22/2016	☐ 11 261 pg, 9.41 MB	Submitted (ECF) excerpts of record. Submitted by Appellant Juan Fernando Lizarraga-Leyva. Date of service: 03/22/2016. [9911403] [15-50309] (Raghupathi, Harini) [Entered: 03/22/2016 03:36 PM]
03/22/2016	☐ 12	Filed (ECF) presentence report UNDER SEAL by Appellant Juan Fernando Lizarraga-Leyva. [9911409] [15-50309] (Raghupathi, Harini) [Entered: 03/22/2016 03:37 PM]
03/23/2016	☐ 13 2 pg, 187.1 KB	Filed clerk order: The opening brief [10] submitted by Juan Fernando Lizarraga-Leyva is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [11] submitted by Juan Fernando Lizarraga-Leyva. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9912276] (SML) [Entered: 03/23/2016 10:57 AM]
03/25/2016	☐ 14	Received 7 paper copies of Opening brief [10] filed by Juan Fernando Lizarraga-Leyva. [9916691] (SD) [Entered: 03/25/2016 04:52 PM]
03/25/2016	☐ 15	Filed Appellant Juan Fernando Lizarraga-Leyva paper copies of excerpts of record [11] in 1 volume(s). [9917738] (SML) [Entered: 03/28/2016 01:15 PM]
04/06/2016	☐ 16 2 pg, 77.68 KB	Filed (ECF) notice of appearance of Mark R. Rehe for Appellee USA. Date of service: 04/06/2016. [9929559] [15-50309] (Rehe, Mark) [Entered: 04/06/2016 12:14 PM]
04/06/2016	☐ 17	Added attorney Mark R. Rehe for USA. [9929895] (RL) [Entered: 04/06/2016 02:16 PM]
04/14/2016	☐ 18	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee USA. New requested due date is 05/23/2016. [9940984] [15-50309] (Rehe, Mark) [Entered: 04/14/2016 05:50 PM]
04/15/2016	☐ 19	**Streamlined request [18] by Appellee USA to extend time to file the brief is approved. Amended briefing schedule: Appellee brief due 05/23/2016 for United States of America. The optional reply brief is due 14 days from the date of service of the answering brief.** [9941132] (JN) [Entered: 04/15/2016 08:30 AM]

05/12/2016	☐ 20 42 pg, 196.11 KB	Submitted (ECF) Answering Brief for review. Submitted by Appellee USA. Date of service: 05/12/2016. [9974931] [15-50309] (Rehe, Mark) [Entered: 05/12/2016 03:25 PM]
05/13/2016	☐ 21 2 pg, 186.58 KB	Filed clerk order: The answering brief [20] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9976519] (LA) [Entered: 05/13/2016 02:42 PM]
05/18/2016	☐ 22	Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellant Juan Fernando Lizarraga-Leyva. New requested due date is 06/27/2016. [9981106] [15-50309] (Raghupathi, Harini) [Entered: 05/18/2016 10:17 AM]
05/18/2016	☐ 23	**Streamlined request [22] by Appellant Juan Fernando Lizarraga-Leyva to extend time to file the brief is approved. Amended briefing schedule: the optional reply brief is due 06/27/2016.** [9981205] (JN) [Entered: 05/18/2016 10:55 AM]
05/23/2016	☐ 24	Received 7 paper copies of Answering Brief [20] filed by USA. [9987235] (SD) [Entered: 05/23/2016 02:35 PM]
06/17/2016	☐ 25 5 pg, 81.12 KB	Filed (ECF) Appellant Juan Fernando Lizarraga-Leyva Unopposed Motion to extend time to file Reply brief until 07/27/2016. Date of service: 06/17/2016. [10019781] [15-50309] (Raghupathi, Harini) [Entered: 06/17/2016 02:41 PM]
06/21/2016	☐ 26 1 pg, 185.05 KB	Filed clerk order (Deputy Clerk: SM): Granting Unopposed Motion (ECF Filing) motion to extend time to file reply brief [25] filed by Appellant Juan Fernando Lizarraga-Leyva. The optional reply brief is due July 27, 2016. [10023875] (SAM) [Entered: 06/21/2016 03:59 PM]
07/27/2016	☐ 27 42 pg, 291.68 KB	Submitted (ECF) Reply Brief for review. Submitted by Appellant Juan Fernando Lizarraga-Leyva. Date of service: 07/27/2016. [10065309] [15-50309] (Raghupathi, Harini) [Entered: 07/27/2016 12:49 PM]
07/27/2016	☐ 28 2 pg, 186.84 KB	Filed clerk order: The reply brief [27] submitted by Juan Fernando Lizarraga-Leyva is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10065642] (SML) [Entered: 07/27/2016 02:43 PM]
08/01/2016	☐ 29	Received 7 paper copies of Reply Brief [27] filed by Juan Fernando Lizarraga-Leyva. [10070624] (SD) [Entered: 08/01/2016 11:56 AM]
10/06/2016	☐ 30 1 pg, 40.72 KB	Filed clerk order (Deputy Clerk: MH): Proceedings in this case shall be held in abeyance pending resolution of United States v. Martinez-Lopez, Appeal No. 14-50014, or further order of this court. [10151895] (GB) [Entered: 10/06/2016 02:42 PM]
09/25/2017	☐ 31	This case is being considered for an upcoming oral argument calendar in Pasadena Please review the Pasadena sitting dates for January 2018 and the two subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please inform the court *within 3 days of this notice*, using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: regarding availability for oral argument). When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter *within 3 days of this notice*, using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: request for mediation).[10592519] (AW) [Entered: 09/25/2017 12:41 PM]
10/30/2017	☐ 32 3 pg, 10.01 KB	Notice of Oral Argument on Monday, January 8, 2018 - 09:00 A.M. - Courtroom 1 - Pasadena CA. View the Oral Argument Calendar for your case **here**. Be sure to review the GUIDELINES for important information about your hearing, including when to arrive (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: PASADENA Office. [10637004] (DJW) [Entered: 10/30/2017 04:56 PM]
10/31/2017	☐ 33 2 pg, 113.76 KB	Filed (ECF) Acknowledgment of hearing notice. Location: Pasadena. Filed by Attorney Ms. Harini P. Raghupathi, Esquire for Appellant Juan Fernando Lizarraga-Leyva. [10637262] [15-50309] (Raghupathi, Harini) [Entered: 10/31/2017 08:33 AM]

10/31/2017	☐ 34 1 pg, 49.23 KB	Filed (ECF) Acknowledgment of hearing notice. Location: Pasadena. Filed by Attorney Mark R. Rehe for Appellee USA. [10637285] [15-50309] (Rehe, Mark) [Entered: 10/31/2017 08:45 AM]
12/14/2017	☐ 35 3 pg, 156.45 KB	Filed (ECF) Appellant Juan Fernando Lizarraga-Leyva citation of supplemental authorities. Date of service: 12/14/2017. [10691147] [15-50309] (Raghupathi, Harini) [Entered: 12/14/2017 02:47 PM]
01/08/2018	☐ 36	ARGUED AND SUBMITTED TO MILAN D. SMITH, JR., MICHELLE T. FRIEDLAND and JED S. RAKOFF. [10716035] (BG) [Entered: 01/08/2018 10:51 AM]
01/09/2018	☐ 37 1 pg, 3.66 MB	Filed Audio recording of oral argument. **Note:** Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [10718662] (BG) [Entered: 01/09/2018 02:36 PM]
03/09/2018	☐ 38 9 pg, 443.93 KB	FILED MEMORANDUM DISPOSITION (MILAN D. SMITH, JR., MICHELLE T. FRIEDLAND and JED S. RAKOFF) AFFIRMED. FILED AND ENTERED JUDGMENT. [10791989] (RMM) [Entered: 03/09/2018 06:34 AM]
03/15/2018	☐ 39 5 pg, 84.92 KB	Filed (ECF) Appellant Juan Fernando Lizarraga-Leyva Unopposed Motion to extend time to file petition for rehearing until 04/23/2018. Date of service: 03/15/2018. [10800348] [15-50309] (Raghupathi, Harini) [Entered: 03/15/2018 03:53 PM]
03/22/2018	☐ 40 1 pg, 192.95 KB	Filed order (MILAN D. SMITH, JR., MICHELLE T. FRIEDLAND and JED S. RAKOFF): Defendant's motion for an extension of time within which to file a petition for rehearing (and/or a petition for rehearing en banc) is GRANTED. Any petition for rehearing shall be filed no later than April 23, 2018. [10808123] (AF) [Entered: 03/22/2018 09:13 AM]
04/23/2018	☐ 41 34 pg, 427.32 KB	Filed (ECF) Appellant Juan Fernando Lizarraga-Leyva petition for panel rehearing and petition for rehearing en banc (from 03/09/2018 memorandum). Date of service: 04/23/2018. [10846766] [15-50309] (Raghupathi, Harini) [Entered: 04/23/2018 12:47 PM]
05/18/2018	☐ 42 1 pg, 192.62 KB	Filed order (MILAN D. SMITH, JR., MICHELLE T. FRIEDLAND and JED S. RAKOFF): The panel has unanimously voted to deny Appellant's petition for rehearing. Judges Smith and Friedland have voted to deny the petition for rehearing en banc. Judge Rakoff recommends denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are DENIED. [10877310] (AF) [Entered: 05/18/2018 09:15 AM]
05/29/2018	☐ 43 1 pg, 184.8 KB	MANDATE ISSUED.(MDS, MTF and JSR) [10887145] (CW) [Entered: 05/29/2018 08:07 AM]

Clear All

◉ Documents and Docket Summary
○ Documents Only

☑ Include Page Numbers

Selected Pages: 0 Selected Size: 0 KB

View Selected

PACER Service Center			
Transaction Receipt			
U.S. Court of Appeals for the 9th Circuit - 05/29/2018 09:08:32			
PACER Login:	defender9	**Client Code:**	
Description:	Docket Report (filtered)	**Search Criteria:**	15-50309
Billable Pages:	4	**Cost:**	0.40
Exempt Flag:	Exempt	**Exempt Reason:**	Always

APPENDIX D

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V-Due Process

Amendment V. Due Process clause

Currentness

<Notes of Decisions for this clause are displayed in multiple documents. For text, historical notes, and references, see first document for Amendment V.>

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V-Due Process, USCA CONST Amend. V-Due Process
Current through P.L. 114-115 (excluding 114-94 and 114-95) approved 12-28-2015

End of Document

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

8 U.S.C.A. § 1101

§ 1101. Definitions

Effective: January 17, 2014
Currentness

(a) As used in this chapter--

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2) The term "advocates" includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and (B) an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7) The term "clerk of court" means a clerk of a naturalization court.

(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9) The term "consular officer" means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III, for the purpose of adjudicating nationality.

(10) The term "crewman" means a person serving in any capacity on board a vessel or aircraft.

(11) The term "diplomatic visa" means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14) The term "foreign state" includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--

(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam or the Commonwealth of the Northern Mariana Islands and solely in pursuit of his calling as a crewman and to depart from Guam or the Commonwealth of the Northern Mariana Islands with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the

Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title;

(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669), accredited resident members of the staff of such representatives, and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien (i) (a) [Repealed. Pub.L. 106-95, § 2(c), Nov. 12, 1999, 113 Stat. 1316] (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation

described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or (c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p) of section 1184 of this title, an alien who--

(i) is the fiancee or fiance of a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) subject to section 1184(c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M) (i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who--

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production

(including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the alien has no intention of abandoning who--

(i) (a) is described in section 1184(c)(4)(A) of this title (relating to athletes), or (b) is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who--

(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 1184(k) of this title, an alien--

(i) who the Attorney General determines--

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine--

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708(a) of Title 22,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines--

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of Title 22;

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of

the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or

(cc) has not attained 18 years of age; and

(IV) the alien [1] would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

(III) any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, as of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official,

to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or

(V) subject to section 1184(q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if--

(i) such petition has been pending for 3 years or more; or

(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and--

(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153(a)(2)(A) of this title; or

(II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

(16) The term "immigrant visa" means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18) The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.

(19) The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21) The term "national" means a person owing permanent allegiance to a state.

(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(23) The term "naturalization" means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

(24) Repealed. Pub.L. 102-232, Title III, § 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.

(25) The term "noncombatant service" shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.

(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27) The term "special immigrant" means--

(A) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B) an immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship;

(C) an immigrant, and the immigrant's spouse and children if accompanying or following to join the immigrant, who--

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before September 30, 2015, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before September 30, 2015, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of Title 26) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i);

(D) an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: *Provided*, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status;

(E) an immigrant, and his accompanying spouse and children, who is or has been an employee of the Panama Canal Company or Canal Zone Government before the date on which the Panama Canal Treaty of 1977 (as described in section 3602(a)(1) of Title 22) enters into force [October 1, 1979], who was resident in the Canal Zone on the effective date of the exchange of instruments of ratification of such Treaty [April 1, 1979], and who has performed faithful service as such an employee for one year or more;

(F) an immigrant, and his accompanying spouse and children, who is a Panamanian national and (i) who, before the date on which such Panama Canal Treaty of 1977 enters into force [October 1, 1979], has been honorably retired from United States Government employment in the Canal Zone with a total of 15 years or more of faithful service, or (ii) who, on the date on which such Treaty enters into force, has been employed by the United States Government in the Canal Zone with a total of 15 years or more of faithful service and who subsequently is honorably retired

from such employment or continues to be employed by the United States Government in an area of the former Canal Zone;

(G) an immigrant, and his accompanying spouse and children, who was an employee of the Panama Canal Company or Canal Zone Government on the effective date of the exchange of instruments of ratification of such Panama Canal Treaty of 1977 [April 1, 1979], who has performed faithful service for five years or more as such an employee, and whose personal safety, or the personal safety of whose spouse or children, as a direct result of such Treaty, is reasonably placed in danger because of the special nature of any of that employment;

(H) an immigrant, and his accompanying spouse and children, who--

(i) has graduated from a medical school or has qualified to practice medicine in a foreign state,

(ii) was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date,

(iii) entered the United States as a nonimmigrant under subsection (a)(15)(H) or (a)(15)(J) before January 10, 1978, and

(iv) has been continuously present in the United States in the practice or study of medicine since the date of such entry;

(I)(i) an immigrant who is the unmarried son or daughter of an officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and (II) applies for a visa or adjustment of status under this subparagraph no later than his twenty-fifth birthday or six months after October 24, 1988, whichever is later;

(ii) an immigrant who is the surviving spouse of a deceased officer or employee of such an international organization, and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the death of such officer or employee, and (II) files a petition for status under this subparagraph no later than six months after the date of such death or six months after October 24, 1988, whichever is later;

(iii) an immigrant who is a retired officer or employee of such an international organization, and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the officer or employee's retirement from any such international organization, and (II)

files a petition for status under this subparagraph no later than six months after the date of such retirement or six months after October 25, 1994, whichever is later; or

(iv) an immigrant who is the spouse of a retired officer or employee accorded the status of special immigrant under clause (iii), accompanying or following to join such retired officer or employee as a member of his immediate family;

(J) an immigrant who is present in the United States--

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that--

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

(K) an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating--

(i) 12 years and who, if separated from such service, was never separated except under honorable conditions, or

(ii) 6 years, in the case of an immigrant who is on active duty at the time of seeking special immigrant status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years,

and the spouse or child of any such immigrant if accompanying or following to join the immigrant, but only if the executive department under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant;

(L) an immigrant who would be described in clause (i), (ii), (iii), or (iv) of subparagraph (I) if any reference in such a clause--

(i) to an international organization described in paragraph (15)(G)(i) were treated as a reference to the North Atlantic Treaty Organization (NATO);

(ii) to a nonimmigrant under paragraph (15)(G)(iv) were treated as a reference to a nonimmigrant classifiable under NATO-6 (as a member of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, a member of a civilian component attached to or employed by an Allied Headquarters under the "Protocol on the Status of International Military Headquarters" set up pursuant to the North Atlantic Treaty, or as a dependent); and

(iii) to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998 [2]

(M) subject to the numerical limitations of section 1153(b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the immigrant's accompanying spouse and children.

(28) The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

(29) The term "outlying possessions of the United States" means American Samoa and Swains Island.

(30) The term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.

(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34) The term "Service" means the Immigration and Naturalization Service of the Department of Justice.

(35) The term "spouse", "wife", or "husband" do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36) The term "State" includes the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

(37) The term "totalitarian party" means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

(39) The term "unmarried", when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist political movement.

(41) The term "graduates of a medical school" means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who

has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at[3] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[3] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 3121 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 3121 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [4]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(44)(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily--

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) The term "executive capacity" means an assignment within an organization in which the employee primarily--

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(45) The term "substantial" means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

(46) The term "extraordinary ability" means, for purposes of subsection (a)(15)(O)(i), in the case of the arts, distinction.

(47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of--

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

(49) The term "stowaway" means any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered a stowaway.

(50) The term "intended spouse" means any alien who meets the criteria set forth in section 1154(a)(1)(A)(iii)(II)(aa)(BB), 1154(a)(1)(B)(ii)(II)(aa)(BB), or 1229b(b)(2)(A)(i)(III) of this title.

(51) The term "VAWA self-petitioner" means an alien, or a child of the alien, who qualifies for relief under--

(A) clause (iii), (iv), or (vii) of section 1154(a)(1)(A) of this title;

(B) clause (ii) or (iii) of section 1154(a)(1)(B) of this title;

(C) section 1186a(c)(4)(C) of this title;

(D) the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;

(E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 1255 note);

(F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or

(G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

(52) The term "accredited language training program" means a language training program that is accredited by an accrediting agency recognized by the Secretary of Education.

(b) As used in subchapters I and II--

(1) The term "child" means an unmarried person under twenty-one years of age who is--

(A) a child born in wedlock;

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

(E)(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same proviso as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i); (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years;

(F)(i) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen who is at least 25 years of age, at least 1 of whom personally saw and observed the child before or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same provisos as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (E)(i); (II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive

parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151(b) of this title; or

(G)(i) a child, younger than 16 years of age at the time a petition is filed on the child's behalf to accord a classification as an immediate relative under section 1151(b) of this title, who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993, or who is emigrating from such a foreign state to be adopted in the United States by a United States citizen and spouse jointly or by an unmarried United States citizen who is at least 25 years of age, Provided, That--

(I) the Secretary of Homeland Security is satisfied that proper care will be furnished the child if admitted to the United States;

(II) the child's natural parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child, have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child's emigration and adoption;

(III) in the case of a child having two living natural parents, the natural parents are incapable of providing proper care for the child;

(IV) the Secretary of Homeland Security is satisfied that the purpose of the adoption is to form a bona fide parent-child relationship, and the parent-child relationship of the child and the natural parents has been terminated (and in carrying out both obligations under this subclause the Secretary of Homeland Security may consider whether there is a petition pending to confer immigrant status on one or both of such natural parents); and

(V) in the case of a child who has not been adopted--

(aa) the competent authority of the foreign state has approved the child's emigration to the United States for the purpose of adoption by the prospective adoptive parent or parents; and

(bb) the prospective adoptive parent or parents has or have complied with any pre-adoption requirements of the child's proposed residence; and

(ii) except that no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(iii) subject to the same provisos as in clauses (i) and (ii), a child who--

(I) is a natural sibling of a child described in clause (i), subparagraph (E)(i), or subparagraph (F)(i);

(II) was adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in clause (i), subparagraph (E)(i), or subparagraph (F)(i); and

(III) is otherwise described in clause (i), except that the child is younger than 18 years of age at the time a petition is filed on his or her behalf for classification as an immediate relative under section 1151(b) of this title.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) and paragraph (1)(G)(i) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term "parent" does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

(3) The term "person" means an individual or an organization.

(4) The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

(5) The term "adjacent islands" includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.

(c) As used in subchapter III--

(1) The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431 and 1432 of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1)), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

(2) The terms "parent", "father", and "mother" include in the case of a posthumous child a deceased parent, father, and mother.

(d) Repealed. Pub.L. 100-525, § 9(a)(3), Oct. 24, 1988, 102 Stat. 2619.

(e) For the purposes of this chapter--

(1) The giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine shall constitute the advocating of such doctrine; but nothing in this paragraph shall be construed as an exclusive definition of advocating.

(2) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(3) Advocating the economic, international, and governmental doctrines of world communism means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(f) For the purposes of this chapter--

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was--

(1) a habitual drunkard;

(2) Repealed. Pub.L. 97-116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section [5] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)); or

(9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

(g) For the purposes of this chapter any alien ordered deported or removed (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

(h) For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--

(1) any felony;

(2) any crime of violence, as defined in section 16 of Title 18; or

(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

(i) With respect to each nonimmigrant alien described in subsection (a)(15)(T)(i)--

(1) the Secretary of Homeland Security, the Attorney General, and other Government officials, where appropriate, shall provide the alien with a referral to a nongovernmental organization that would advise the alien regarding the alien's options while in the United States and the resources available to the alien; and

(2) the Secretary of Homeland Security shall, during the period the alien is in lawful temporary resident status under that subsection, grant the alien authorization to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

CREDIT(S)

(June 27, 1952, c. 477, Title I, § 101, 66 Stat. 166; Pub.L. 85-316, §§ 1, 2, Sept. 11, 1957, 71 Stat. 639; Pub.L. 85-508, § 22, July 7, 1958, 72 Stat. 351; Pub.L. 86-3, § 20(a), Mar. 18, 1959, 73 Stat. 13; Pub.L. 87-256, § 109(a), (b), Sept. 21, 1961, 75 Stat. 534; Pub.L. 87-301, §§ 1, 2, 7, Sept. 26, 1961, 75 Stat. 650, 653; Pub.L. 89-236, §§ 8, 24, Oct. 3, 1965, 79 Stat.

916, 922; Pub.L. 89-710, Nov. 2, 1966, 80 Stat. 1104; Pub.L. 91-225, § 1, Apr. 7, 1970, 84 Stat. 116; Pub.L. 94-155, Dec. 16, 1975, 89 Stat. 824; Pub.L. 94-484, Title VI, § 601(b), (e), Oct. 12, 1976, 90 Stat. 2301, 2302; Pub.L. 94-571, § 7(a), Oct. 20, 1976, 90 Stat. 2706; Pub.L. 94-484, Title VI, § 602(c), Oct. 12, 1976, as added Pub.L. 95-83, Title III, § 307(q)(3), Aug. 1, 1977, 91 Stat. 395; Pub.L. 95-105, Title I, § 109(b)(3), Aug. 17, 1977, 91 Stat. 847; Pub.L. 96-70, Title III, § 3201(a), Sept. 27, 1979, 93 Stat. 496; Pub.L. 96-212, Title II, § 201(a), Mar. 17, 1980, 94 Stat. 102; Pub.L. 97-116, §§ 2, 5(d)(1), 18(a), Dec. 29, 1981, 95 Stat. 1611, 1614, 1619; Pub.L. 98-47, § 3, Oct. 30, 1984, 98 Stat. 3435; Pub.L. 99-505, § 1, Oct. 21, 1986, 100 Stat. 1806; Pub.L. 99-603, Title III, §§ 301(a), 312, 315(a), Nov. 6, 1986, 100 Stat. 3411, 3434, 3439; Pub.L. 99-653, §§ 2, 3, Nov. 14, 1986, 100 Stat. 3655; Pub.L. 100-459, Title II, § 210(a), Oct. 1, 1988, 102 Stat. 2203; Pub.L. 100-525, §§ 2(o)(1), 8(b), 9(a), Oct. 24, 1988, 102 Stat. 2613, 2617, 2619; Pub.L. 100-690, Title VII, § 7342, Nov. 18, 1988, 102 Stat. 4469; Pub.L. 101-162, Title VI, § 611(a), Nov. 21, 1989, 103 Stat. 1038; Pub.L. 101-238, § 3(a), Dec. 18, 1989, 103 Stat. 2100; Pub.L. 101-246, Title I, § 131(b), Feb. 16, 1990,104 Stat. 31; Pub.L. 101-649, Title I, §§ 123, 151(a), 153(a), 162(f)(2)(A), Title II, §§ 203(c), 204(a), (c), 205(c)(1), (d), (e), 206(c), 207(a), 208, 209(a), Title IV, § 407(a)(2), Title V, §§ 501(a), 509(a), Title VI, § 603(a)(1), Nov. 29, 1990, 104 Stat. 4995, 5004, 5005, 5012, 5018 to 5020, 5022, 5023, 5026, 5027, 5040, 5048, 5051, 5082; Pub.L. 102-110, § 2(a), Oct. 1, 1991, 105 Stat. 555; Pub.L. 102-232, Title II, §§ 203(a), 205(a) to (c), 206(b), (c)(1), (d), 207(b), Title III, §§ 302(e)(8)(A), 303(a)(5)(A), (7)(A), (14), 305(m)(1), 306(a)(1), 309(b)(1), (4), Dec. 12, 1991, 105 Stat. 1737, 1740, 1741, 1746 to 1748, 1750, 1751, 1758; Pub.L. 103-236, Title I, § 162(h)(1), Apr. 30, 1994, 108 Stat. 407; Pub.L. 103-322, Title XIII, § 130003(a), Sept. 13, 1994, 108 Stat. 2024; Pub.L. 103-337, Div. C, Title XXXVI, § 3605, Oct. 5, 1994, 108 Stat. 3113; Pub.L. 103-416, Title II, §§ 201, 202, 214, 219(a), 222(a), Oct. 25, 1994, 108 Stat. 4310, 4311, 4314, 4316, 4320; Pub.L. 104-51, § 1, Nov. 15, 1995, 109 Stat. 467; Pub.L. 104-132, Title IV, § 440(b), (e), Apr. 24, 1996, 110 Stat. 1277; Pub.L. 104-208, Div. C, Title I, § 104(a), Title III, §§ 301(a), 308(d)(3)(A), (4)(A), (e)(3), (f)(1)(A), (B), 321(a), (b), 322(a)(1), (2)(A), 361(a), 371(a), Title VI, §§ 601(a)(1), 625(a)(2), 671(a)(3)(B), (b)(5), (e)(2), Sept. 30, 1996, 110 Stat. 3009-555, 3009-575, 3009-617, 3009-620, 3009-621, 3009-627 to 3009-629, 3009-644, 3009-645, 3009-689, 3009-700, 3009-721 to 3009-723; Pub.L. 105-54, § 1(a), Oct. 6, 1997, 111 Stat. 1175; Pub.L. 105-119, Title I, § 113, Nov. 26, 1997, 111 Stat. 2460; Pub.L. 105-277, Div. C, Title IV, § 421, Div. G, Title XXII, § 2222(e), Oct. 21, 1998, 112 Stat. 2681-657, 2681-819; Pub.L. 105-319, § 2(b)(1), (e)(2), formerly (d)(2), Oct. 30, 1998, 112 Stat. 3014, 3015; renumbered § 2(e)(2), Pub.L. 108-449, § 1(a)(3)(A), Dec. 10, 2004, 118 Stat. 3470; amended Pub.L. 106-95, § 2(a), (c), Nov. 12, 1999, 113 Stat. 1312; Pub.L. 106-139, § (1)(a), (b)(1), Dec. 7, 1999, 113 Stat. 1696; Pub.L. 106-279, Title III, § 302(a), (c), Oct. 6, 2000, 114 Stat. 838, 839; Pub.L. 106-386, Div. A, § 107(e)(1), (4), Div. B, Title V, §§ 1503(a), 1513(b), Oct. 28, 2000, 114 Stat. 1477, 1479, 1518, 1534; Pub.L. 106-395, Title II, § 201(a)(1), Oct. 30, 2000, 114 Stat. 1633; Pub.L. 106-409, § 2(a), Nov. 1, 2000, 114 Stat. 1787; Pub.L. 106-536, § 1(a), Nov. 22, 2000, 114 Stat. 2560; Pub.L. 106-553, § 1(a)(2) [Title XI, § 1102(a), 1103(a)], Dec. 21, 2000, 114 Stat. 2762, 2762A-142, 2762A-143; Pub.L. 107-125, § 2(b), Jan. 16, 2002, 115 Stat. 2403; Pub.L. 107-274, § 2(a), (b), Nov. 2, 2002, 116 Stat. 1923; Pub.L. 108-77, Title IV, § 402(a)(1), Sept. 3, 2003, 117 Stat. 939; Pub.L. 108-99, § 1, Oct. 15, 2003, 117 Stat. 1176; Pub.L. 108-193, §§ 4(b)(1), (5), 8(a)(1), Dec. 19, 2003, 117 Stat. 2878, 2879, 2886; Pub.L. 108-449, § 1(a)(2)(B), (b)(1), Dec. 10, 2004, 118 Stat. 3469, 3470; Pub.L. 108-458, Title V, § 5504, Dec. 17, 2004, 118 Stat. 3741; Pub.L. 109-13, Div. B, Title V, § 501(a), May 11, 2005, 119 Stat. 321; Pub.L. 109-90, Title V, § 536, Oct. 18, 2005, 119 Stat. 2087; Pub.L. 109-162, Title VIII, §§ 801, 805(d), 811, 822(c)(1), Jan. 5, 2006, 119 Stat. 3053, 3056, 3057, 3063; Pub.L. 109-248, Title IV, § 402(b), July 27, 2006, 120 Stat. 623; Pub.L. 110-229, Title VII, § 702(j)(1) to (3), May 8, 2008, 122 Stat. 866; Pub.L. 110-391, § 2(a), Oct. 10, 2008, 122 Stat. 4193; Pub.L. 110-457, Title II, §§ 201(a), 235(d)(1), Dec. 23, 2008, 122 Stat. 5052, 5079; Pub.L. 111-9, § 1, Mar. 20, 2009, 123 Stat. 989; Pub.L. 111-83, Title V, § 568(a)(1), Oct. 28, 2009, 123 Stat. 2186; Pub.L. 111-287, § 3, Nov. 30, 2010, 124 Stat. 3058; Pub.L. 111-306, § 1(a), Dec. 14, 2010, 124 Stat. 3280; Pub.L. 112-176, § 3, Sept. 28, 2012, 126 Stat. 1325; Pub.L. 113-4, Title VIII, § 801, Title XII, §§ 1221, 1222, Mar. 7, 2013, 127 Stat. 110, 144; Pub.L. 113-76, Div. K, Title VII, § 7083, Jan. 17, 2014, 128 Stat. 567.)

Footnotes

1 So in original. The words "the alien" probably should not appear.

2 So in original. Probably should be followed by "; or".

3 So in original. Probably should be preceded by "is".

4 So in original. Probably should be followed by a semicolon.

5 So in original. The phrase "of such section" probably should not appear.

8 U.S.C.A. § 1101, 8 USCA § 1101

Current through P.L. 115-223. Also includes P.L. 115-225 to 115-229. Title 26 current through P.L. 115-230.

End of Document

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United

States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104-208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 115-223. Also includes P.L. 115-225 to 115-229. Title 26 current through P.L. 115-230.

End of Document