No. _____

In the
Supreme Court of the United States

JOEL LUQUE-RODRIGUEZ,
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

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QUESTION PRESENTED

To establish that a "realistic probability" exists that a state statute applies to conduct not covered by a generic, federal offense for purposes of the categorical approach under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), must a defendant be able to point to actual state prosecutions under the state statute for non-generic conduct?

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INTRODUCTION

Federal courts use the "categorical approach" hundreds of times per year to determine whether a defendant's prior state conviction triggers a sentencing enhancement. And federal courts and immigration officials use it thousands of times per year to resolve the immigration consequences of a non-citizen's prior conviction. The approach requires a comparison of the elements of an individual's prior state conviction with the elements of the relevant generic, federal offense. If those elements match, or if the federal elements are broader than the state elements, the defendant has necessarily been "convicted of" the generic offense, and a categorical match therefore exists. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). In that situation, the prior conviction triggers the sentencing enhancement or immigration consequence. *See id.* at 2248–49. On the other hand, if the state statute covers conduct federal law does not, no categorical match exists, and the sentencing enhancement or immigration consequence may not follow. *See id.*

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), this Court addressed the categorical approach and its requirement that a court determine state law's scope. This Court warned the lower courts against applying "legal imagination to a state statute's language" and instead asked courts to ensure that there was a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* at 193.

Following *Duenas-Alvarez*, the federal courts of appeals have openly and deeply divided over what this Court meant by its "realistic probability" language.

According to the First, Second, Third, Fourth, Sixth, Tenth, and Eleventh Circuits, *Duenas-Alvarez* merely warned lower courts against applying novel interpretation of state law to find that the state statute covers non-generic conduct. Under this view, the realistic-probability test –

+just requires the defendant to establish, through either the state statute's text or state judicial decisions, that the legal scope of state law covers non-generic conduct. Once the court is satisfied that state law criminalizes non-generic conduct, a realistic probability exists that the state would apply its statute to non-generic conduct, and there is no categorical match.

On the other hand, the Fifth and Eighth Circuits, as well as the Board of Immigration Appeals, view *Duenas-Alvarez* differently. Under their view, it does not matter whether a state statute's *legal scope* is broader than federal law. Instead, what matters is whether the state actually *prosecutes* individuals for that non-generic conduct. Only if a defendant can point to a specific prosecution can he or she establish a "realistic probability" that a state would apply its statute to non-generic conduct.

The Ninth Circuit has embraced both views. Sometimes, a Ninth Circuit panel holds that the state statute's legal scope is dispositive. Other times, a panel holds that whether a state prosecutes individuals for non-generic conduct is dipositive. The Ninth Circuit panel below embraced this latter view. The court held that Petitioner "did not present a real-life example demonstrating" that his statute of conviction "would be applied in the overbroad manner he describes." Pet.

App. 2a (citing *Duenas-Alvarez*, 549 U.S. at 193). It simply did not matter that the state statute's legal scope was broader than the generic offense.

This Court should grant review to resolve this long-simmering and well-developed circuit split. Only this Court can resolve what *Duenas-Alvarez* means. Until this Court does so, courts will continue to adjudicate a huge volume of cases involving the categorical approach under different standards. Moreover, this case presents an ideal vehicle to resolve the question presented. State case law makes clear that Petitioner's state statute of conviction criminalizes conduct that does not fall under the generic offense. Thus, in the First, Second, Third, Fourth, Sixth, Tenth, and Eleventh Circuits—or before a different Ninth Circuit panel—his prior conviction would not have categorically qualified as a generic offense. The panel below, however, held that a categorical match between state and federal law existed only because Petitioner could not prove the State prosecutes non-generic conduct. That is, he could not provide a "real-life example" of a state defendant prosecuted for non-generic conduct. Pet. App. 2a. The Fifth Circuit, Eighth Circuit, and Board would have reached a similar conclusion. This Petition, then, squarely raises the question presented and will allow this Court to resolve the circuit split.

OPINION BELOW

The unpublished decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced on pages 1 through 3 of the appendix. The court's denial of Petitioner's petition for rehearing can be found on page 4 of the appendix.

JURISDICTION

The court of appeals entered judgment on March 18, 2019. Pet. App. 1a. The court denied the petition for rehearing on May 29, 2019. Pet. App. 4a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix contains the following statutory provisions: (1) 8 U.S.C. § 1101, Pet. App. 5a–31a; (2) 8 U.S.C. § 1326, Pet. App. 32a–34a; and (3) California Health & Safety Code § 11379.6, Pet. App. 35a–36a.

STATEMENT OF THE CASE

1. Petitioner is a Mexican citizen. In 1988, when he was 19, he moved from Mexico to the United States to find work. He settled in Los Angeles, California. In 2000, he pleaded guilty to violating California Health and Safety Code § 11379.6(a) for manufacturing a controlled substance. *See* Pet. App. 1a–2a. He received a three-year sentence.

While serving his prison sentence, Petitioner received a "Notice of Intent to Issue a Final Administrative Removal Order," an immigration charging document that initiates removal proceedings under 8 U.S.C. § 1228(a)(1). Those are removal proceedings limited to non-citizens convicted of certain categories of offenses, including offenses "covered in section 1227(a)(2)(A)(iii)"—that is, "aggravated felon[ies]." Petitioner's Notice of Intent alleged that his conviction for violating California Health and Safety Code § 11379.6 qualified as an aggravated felony. The

immigration officer found that Petitioner's conviction qualified as an aggravated felony and ordered him removed.

2. This case arose out of Petitioner's January 2015 arrest just north of the U.S.-Mexico border near San Ysidro, California. Following his arrest, the government charged him with attempting to enter after having been ordered deported, a felony under 8 U.S.C. § 1326.

Petitioner moved to have the charge against him dismissed by attacking the validity of the predicate removal order under 8 U.S.C. § 1326(d). Among other things, Petitioner contended that his conviction under California Health and Safety Code § 11379.6 did not qualify as an aggravated felony, as immigration authorities had determined. That rendered entry of his removal order "fundamentally unfair." *See* 8 U.S.C. § 1326(d)(3).

The parties agreed that the only conceivable basis on which a conviction under California Health and Safety Code § 11379.6 could qualify as an aggravated felony was 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)[.]" *See* 8 U.S.C. § 1101(a)(43)(B). Petitioner contended that his state conviction did not qualify under that federal predicate because the intent element of the state statute criminalized more conduct than the intent element of the federal predicate offense.

Under California Health and Safety Code § 11379.6, the defendant must know "the character of the substance being manufactured." *People v. Coria*, 21

Cal.4th 868, 872 (1999). The California Supreme Court has interpreted the statute this way to bring the manufacturing prohibition in line with similar California drug crimes, including possession, sale, and transportation of a controlled substance. *Id.* at 874–75. California courts have also consistently interpreted their drug statutes to cover conduct where the defendant possess, sells, or transports one controlled substance under state law believing they were possessing, selling, or transporting another controlled substance under state law. *See, e.g.*, *People v. Romero*, 55 Cal. App. 4th. 147, 149–152, 157 (Cal. Ct. App. 1997); *People v. Guy*, 107 Cal. App. 3d 593, 601 (Cal. Ct. App. 1980); *People v. Garringer*, 48 Cal. App. 3d 827, 830–31, 834–35 (Cal. Ct. App. 1975). Thus, a defendant holding a cocaine shipment for distribution is guilty under state law even if he believes that the shipment is marijuana, since state law criminalizes both substances. *See Romero*, 55 Cal. App. 4th at 151–52.

Petitioner argued that these state cases meant his § 11379.6 conviction for manufacturing did not qualify as a federal drug-trafficking crime. Under federal law, a defendant must know "that the substance he is dealing with is . . . listed on the federal drug schedules." *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015). But the California drug statutes and federal drug statutes do not match. There are substances on the state drug schedules that do not appear on the federal drug statutes. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) (discussing mismatch between California and federal drug schedules). For example, California criminalizes Chorionic gonadotropin—commonly called "HGC"—but

federal law does not. *Coronado v. Holder*, 759 F.3d 977, 983 n.1 (9th Cir. 2014) (citing CAL. HEALTH & SAFETY CODE § 11056(f)(32)). Thus, under state law, a defendant involved in manufacturing methamphetamine—that is, someone at least involved in the "initial and intermediate steps carried out to process a controlled substance," *Coria*, 21 Cal. 4th at 874—who believed he was involved in manufacturing HCG would be guilty under state law, but not federal law. Thus, Petitioner argued, state law reached more conduct than federal law.

In denying the motion to dismiss, the court held, among other things, that Petitioner had not met his burden under *Duenas-Alvarez* to point to a California state case in which a defendant had been prosecuted under § 11379.6 for non-generic conduct.

Petitioner was later convicted at a bench trial of violating 8 U.S.C. § 1326.

3. On appeal, Petitioner argued (among other things) that the mismatch between the intent element of his § 11379.6 conviction and the generic offense meant that his conviction did not qualify as an aggravated felony.

The government disagreed. In doing so, the government conceded that there was not a complete match between the California and federal drug schedules. The government also did not dispute that the intent element of § 11379.6 required the State to prove that the substance the defendant believed he was manufacturing was listed on the broader California drug schedules. Instead, the government's sole argument in response was to rely on *Duenas-Alvarez*'s "realistic probability" language.

According to the government, under *Duenas-Alvarez*, Petitioner had "to show at least one instance where a defendant was convicted for violating § 11379.6 for manufacturing a federally listed drug, while all the while maintaining a *mens rea* tied to one of those few substances—like khat or HCG—that fall outside the federal schedule." Gov't C.A. Br. at 20–21. The government noted that the state cases Petitioner had relied on all involved federally controlled substances. The government also noted that Petitioner had "not provided any § 11379.6 cases that even mention" one of the substances criminalized under state law, but not federal law. Gov't C.A. Br. at 22. Thus, the government claimed that Petitioner's argument failed because he could not point to "one real-world example" of the State *prosecuting* a defendant for non-generic conduct. Gov't C.A. Br. at 20.

The court of appeals affirmed. In addressing Petitioner's intent-based argument, the court rejected it solely based on the government's *Duenas-Alvarez* argument:

> The district court properly rejected Luque-Rodriguez's argument that his California conviction is not an aggravated felony because the intent element under California law is broader than the intent element under the corresponding federal law. Luque-Rodriguez's argument fails to meet the "realistic probability" standard because he does not present a real-life example demonstrating that § 11379.6(a) would be applied in the overbroad manner he describes. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Pet. App. 2a.

Petitioner petitioned for rehearing en banc arguing that the panel had misapplied *Duenas-Alvarez*. The court denied the petition. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

This Court ought to grant this petition to resolve a reoccurring question about the categorical approach that has openly and deeply divided the circuits: what did this Court mean, in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), when it required a non-citizen to prove there was a "realistic probability" that a state would apply its statute in a non-generic way? In the wake of *Duenas-Alvarez*, courts have offered conflicting answers to that question. Seven circuits have held that a non-citizen can meet that burden by establishing that state law covers non-generic conduct. By contrast, two circuits and the Board have held that a non-citizen must prove that a state actually prosecutes non-generic conduct. Only this Court can resolve that conflict and ensure that courts apply the categorical approach uniformly throughout the country.

Moreover, this case presents an ideal vehicle to resolve the split. The petition squarely presents the issue of what this Court meant in *Duenas-Alvarez*. Petitioner's state statute of conviction criminalizes non-generic conduct, although Petitioner could not prove that the State prosecutes non-generic conduct. Thus, which view of *Duenas-Alvarez* controls is outcome determinative. Additionally, granting review is particularly warranted because this Court's post-*Duenas-Alvarez* cases have sent mixed signals on what *Duenas-Alvarez* means. Confusion will therefore continue until this Court addresses which view of *Duenas-Alvarez* is correct. Finally, this Court should grant review because the lower court, applying the actual-prosecution view of *Duenas-Alvarez*, misinterpreted the decision.

I. The circuits are openly and deeply split over what *Duenas-Alvarez* meant when it required courts to ensure that there was a "realistic probability" that a state "would apply its statute" to non-generic conduct before holding that there was no categorical match between state and federal law.

In *Duenas-Alvarez*, this Court addressed whether a non-citizen's car-theft conviction categorically qualified as a "theft offense," thereby rendering him removable as an aggravated felon under 8 U.S.C. § 1101(a)(43)(G). 549 U.S. at 188. In addressing that question, this Court explained that it must compare the scope of "the state statute defining the crime of conviction" with the generic offense. *Id.* at 186. If the state statute contained the same "basic elements of" the generic offense, there was a categorical match. *Id.* (internal quotation marks omitted). But if the statute applied to conduct not covered by the generic offense, there was no categorical match, and the immigration consequence might not follow. *Id.* In undertaking that analysis, this Court observed that California's car-theft statute covered not only stealing a car—conduct that qualified as generic theft—but also "aiding and abetting" someone else's car theft. *Id.* at 188. This Court then held that, if a jurisdiction defined "aiding and abetting" in a generic way, a defendant convicted of aiding and abetting a generic theft could be deemed to have been convicted of a generic offense. *Id.*

The non-citizen in *Duenas-Alvarez* tried to show that California had a non-generic definition of aiding and abetting. *Id.* He pointed out that California's aiding-and-abetting doctrine covered not only the crime the defendant had "intend[ed], but also . . . any crime that 'naturally and probably result[ed] from [the]

intended crime.'" *Id.* at 820–21 (quoting *People v. Durham*, 449 P.2d 198, 204 (1964)). "This fact alone," however, did "not show that the statute covers a nongeneric theft crime, for relatively few jurisdictions . . . have expressly rejected the 'natural and probable consequences doctrine.'" *Id.* at 821. The non-citizen then argued that most other jurisdictions used a meaningfully different test. *Id.* According to the non-citizen, California defendants could be liable for conduct that they did not intend. *Id.* Counsel "[a]t oral argument . . . suggested that California's doctrine . . . might hold an individual who wrongly bought liquor for an underage drinker criminally responsible for that young drinker's later (unforeseen) reckless driving." *Id.* To support this hypothetical, counsel pointed to three California cases. But none included a fact pattern like the hypothetical, and the court in each case had held that the defendant *did* intend to cause the crime for which he was charged with aiding and abetting. *Id.* at 191–93.

Returning to the hypothetical, this Court made the following pronouncement about "realistic probability"—a pronouncement that would become a source of controversy among the courts of appeals:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Id. at 193. The non-citizen, this Court observed, made "no such showing here," and thus there was a categorical match between his conviction and generic theft. *Id.* at 193–94.

Since *Duenas-Alvarez*, the circuits have split over what this Court meant by a "realistic probability" existing that "the State would apply its statute to" cover non-generic conduct. As explained below, seven circuits have interpreted *Duenas-Alvarez* as a gloss on the categorical approach—that this Court merely intended to warn courts against holding, as a legal matter, that state law covers non-generic conduct based on novel, speculative interpretations of state law. By contrast, two circuits (joined by the Board) have interpreted *Duenas-Alvarez* to alter the categorical approach radically—that this Court now requires a defendant to prove a state prosecutes non-generic conduct, even when state law covers non-generic conduct. The Ninth Circuit, for its part, has issued many decisions consistent with both views.

A. Under the majority view—adopted by the First, Second, Third, Fourth, Sixth, Tenth, and Eleventh Circuits—a realistic probability exists that a state applies its statute to non-generic conduct if the legal scope of state law criminalizes non-generic conduct.

Seven courts of appeals have interpreted *Duenas-Alvarez* to mean that courts should not apply novel interpretations of state law to find that a state statute covers non-generic conduct. In these courts, the defendant need not prove that the state prosecutes individuals for non-generic conduct; instead, if state law covers non-

generic conduct, a "realistic probability" exists that state law applies in a non-generic way.

First Circuit. In *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017), the court addressed whether the Board had properly determined that a non-citizen's Rhode Island drug conviction categorically qualified as a federal drug-trafficking offense. In analyzing the state statute, the First Circuit noted that "the Rhode Island drug schedules included at the relevant time at least one drug—thenylfentanyl—not listed on the federal drug schedules." *Id.* at 65. The Board had recognized the statute's overbreadth, but (citing *Duenas-Alvarez*) held that the non-citizen "had failed to show that there was a realistic probability that Rhode Island would actually prosecute offenses" involving thenylfentanyl. *Id.* The First Circuit rejected this actual-prosecution analysis. "*Duenas-Alvarez*," the court noted, "made no reference to the state's enforcement practices." *Id.* at 66. Rather, the case "discussed only how broadly the state criminal statute applied." *Id.* (underlining in original). Thus, *Duenas-Alvarez* offered only "sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes," caution that had "no relevance" when a state statute's language criminalized non-generic conduct. *Id.*

Second Circuit. In *Hylton v. Sessions*, 897 F.3d 57, 59–60 (2d Cir. 2018), the court addressed whether the Board had properly determined that a non-citizen's New York conviction for selling marijuana categorically qualified as illicit trafficking. Under federal law, a defendant has not committed an illicit trafficking

offense if the offense involved fewer than 30 grams of marijuana. *Id.* at 61. The Second Circuit held that the non-citizen's prior conviction did not qualify under that standard because the minimum conduct criminalized under the state statute was "the nonremunerative transfer of anything over 25 grams of a substance containing marijuana." *Id.* at 62–63. In reaching that conclusion, the court rejected the Board's contention that there was not a "realistic probability" that New York would apply its statute to that non-generic conduct. *Id.* at 60, 63. The Second Circuit held that the "realistic probability" standard applied only "as a backstop when a statute has indeterminate reach[.]" *Id.* at 63. Here, the state statute's language made clear that it criminalized conduct that fell outside the generic definition. *Id.* at 63–64.

Third Circuit. In *Jean-Louis v. Attorney General*, 582 F.3d 462 (3d Cir. 2009), the court addressed whether the Board had properly determined that a non-citizen's Pennsylvania conviction for assaulting a child categorically qualified as a crime involving moral turpitude. The Third Circuit acknowledged that the state statute covered situations "where a reckless driver strikes a vehicle bearing a child occupant"; such reckless conduct, the court pointed out, did not appear to "implicate 'moral turpitude[.]'" *Id.* at 468–69. The court then addressed the realistic-probability test, a test the Board viewed as a requirement that the non-citizen prove the state would prosecute non-generic conduct. *Id.* at 481. The court rejected the idea that the test had relevance to a case in which the "elements" of the state crime "are clear." *Id.* Because the non-citizen had established that the state law's legal

scope was broader than the federal offense, there was no categorical match between state and federal law. *Id.*

Fourth Circuit. In *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014) (en banc), the court addressed whether a Maryland conviction for resisting arrest had, "as an element, the use, attempted use, or threatened use of physical force against the person of another" for purposes of the illegal re-entry Guideline. In applying the categorical approach, the Fourth Circuit noted that state courts interpreted the crime of resisting arrest to require only the use of "de minimis force" rather than the violent force required to qualify under "the use of physical force" clause. *Id.* at 155–56. The government argued that state authorities did not as a factual matter prosecute cases involving non-violent conduct and thus there was no categorical match under *Duenas-Alvarez*. *Id.* at 157. The Fourth Circuit rejected this analysis. It noted that "the Government's argument misses the point of the categorical approach and wrenches the Supreme Court's language in *Duenas-Alvarez* from its context." *Id.* (internal quotation marks omitted). The court continued: "We do not need to hypothesize about whether there is a 'realistic probability' that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so." *Id.*

Sixth Circuit. In *United States v. McGrattan*, 504 F.3d 608 (6th Cir. 2007), the court addressed whether Ohio's child-pornography statute categorically matched the federal child-pornography statute. The Sixth Circuit determined that

the state statute prohibited "all lewd exhibitions of nudity involving minors," even in cases that "did not involve the genitals." *Id.* at 614. That meant it did not categorically qualify as a federal child-pornography offense. *Id.* The court then addressed *Duenas-Alvarez*'s realistic-probability test. The court conceded that it could not find a case in which Ohio "prosecuted" someone for lewd material not involving genitals. *Id.* All the same, the court held that a realistic probability existed that the statute could apply to such a situation because many state cases had held that the statute's legal scope reached that conduct. *Id.* at 614–15.

Tenth Circuit. In *United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017), the court addressed whether an Oklahoma statute prohibiting an individual from pointing a gun at another categorically qualified as a "violent felony" under the Armed Career Criminal Act. The Tenth Circuit pointed out that the Oklahoma statute criminalized pointing a gun at someone "for purposes of whimsy, humor or prank," conduct that was non-violent. *Id.* at 1270, 1272–73 (internal quotation marks omitted). Even so, the government argued that the defendant could not "prevail because he [had] not supplied 'any cases in which Oklahoma [had] prosecuted someone . . . for pointing a firearm in obvious jest.'" *Id.* at 1274. The Tenth Circuit rejected this argument. It stated that the defendant had not asked the court to use "legal imagination[.]" *Id.* Instead, the statute's "plain language" criminalized non-generic conduct, and there was therefore no categorical match. *Id.* This reading of *Duenas-Alvarez*, the Tenth Circuit noted, tracked decisions from the First, Third, Fourth, Ninth, and Eleventh Circuits. *Id.* at 1275 n.23.

Eleventh Circuit. In *Ramos v. Attorney General*, 709 F.3d 1066 (11th Cir. 2013), the court addressed whether the Board had properly determined that a non-citizen's Georgia shoplifting conviction categorically qualified as a generic theft offense. In doing so, the court noted that a defendant could commit shoplifting in Georgia with an intent to "appropriate" the property, conduct that would not qualify as generic theft. *Id.* at 1067, 1069–71. In response, the government (citing *Duenas-Alvarez*) argued that the non-citizen needed to "show that Georgia would use the Georgia statute to prosecute conduct falling outside the generic definition of theft[.]" *Id.* at 1071. The Eleventh Circuit disagreed. It held that "[t]he [state] statute's language . . . creates the 'realistic probability' that [Georgia] will punish crimes that do qualify as theft offenses and crimes that do not." *Id.* at 1072.

In short, under the majority view, *Duenas-Alvarez* did not alter the categorical approach. The case did not require a defendant to point to an actual state prosecution for non-generic conduct to establish that the state statute criminalized non-generic conduct. Instead, *Duenas-Alvarez* merely warned lower courts against giving state law an unreasonable interpretation.

B. Under the minority view—adopted by the Fifth Circuit, Eighth Circuit, and Board of Immigration Appeals—a realistic probability exists that a state applies its statute to non-generic conduct only if the state actually prosecutes individuals for non-generic conduct.

Two courts of appeals and the Board view *Duenas-Alvarez* differently. They contend that state law's legal scope cannot by itself establish the lack of categorical fit between state and federal law. Instead, the defendant must prove that the state

would actually prosecute someone for the non-generic conduct. Only by pointing to a particular prosecution can the defendant establish there is a "realistic probability" that the state would apply its statute to non-generic conduct.

Fifth Circuit. In *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 501 (2017), the court addressed whether there was a categorical match between Texas's felon-in-possession statute and the federal felon-in-possession statute. The state statute provides that a felony constitutes any offense that "'(1) is designated by a law of this state as a felony; (2) contains all the elements of an offense designated by a law of this state as a felony; or (3) is punishable by confinement for one year or more in a penitentiary.'" *Id.* at 222 (quoting TEX. PENAL CODE § 46.04(f)). By contrast, federal law defines a felony as any offense for which the term of imprisonment exceeds one year. *Id.* Texas law, then, more broadly defines felony. *Id.* Nevertheless, a divided en banc court held that this legal discrepancy did not matter; the defendant needed to point to a case in which Texas prosecuted someone for being a felon in possession of a firearm where the definition of felony used would not qualify under federal law. *Id.* According to the majority, there was "no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face." *Id.* at 223. In support, the court pointed to a string of Fifth Circuit cases requiring the defendant to prove that the state actually prosecuted someone for non-generic conduct. *Id.* at 223–25. Because the defendant could not point to a case in which Texas had prosecuted someone for being a felon in possession where the

prior offense would not qualify as a felony under federal law, the court held there was no categorical match. *Id.* at 224–25.

Seven judges dissented, arguing that the majority had misread *Duenas-Alvarez.* The dissent contended that the defendant did not rely on "legal imagination," as *Duenas-Alvarez* had warned against. *Id.* at 238 (Dennis, J., dissenting). Instead, he had relied on "the statute's plain language." *Id.* The dissent criticized the majority for failing to "address or even acknowledge that its holding directly conflict[ed] with holdings from the First, Third, Sixth, Ninth, and Eleventh Circuits. *Id.* at 241 (listing cases). Applying *Duenas-Alvarez* properly, the dissent argued, meant that the defendant had proven there was no categorical match between state and federal law. *Id.*

Eighth Circuit. In *Mowlana v. Lynch*, 803 F.3d 923 (8th Cir. 2015), the court addressed whether the Board properly determined that a non-citizen's federal conviction for possessing benefits in a manner contrary to regulations categorically qualified as a generic fraud offense. In addressing the categorical approach, the Eighth Circuit stated that it must determine whether there was a "'realistic probability' that the government would apply its statute to conduct that does not involve fraud or deceit." *Id.* at 925 (quoting *Duenas-Alvarez*, 549 U.S. at 193). The court further refined this requirement: "Our analysis of realistic probability must go beyond the text of the statute of conviction to inquire whether the government actually prosecutes offense" that would not qualify as generic conduct. *Id.* Applying that test, the Eighth Circuit determined that there was a categorical match because

all of the "prosecutions" the government brought under the statute involved fraud or deceit. *Id.* at 926–27.

One judge concurred. He pointed out that the "plain language" of the statute of conviction "contradicts the . . . conclusion that every violation of the statute necessarily involves fraudulent or deceitful conduct." *Id.* at 929. The concurring judge questioned the majority's reading of *Duenas-Alvarez*, stating that "the Supreme Court has clearly not directed or permitted this court to speculate as to whether or not[] a United States Attorney or even most United States Attorneys would or would not charge and prosecute" non-generic conduct. *Id.* That sort of fact-based inquiry was inconsistent with the "traditional categorical/modified categorical framework" the courts must employ. *Id.* at 930–31. That said, the concurring judge said he would affirm on the alternative ground that, under the modified categorical approach, the defendant had been convicted of a generic fraud offense. *Id.* at 931.

The Board. In *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014), the Board addressed whether a non-citizen's Connecticut drug-trafficking conviction categorically qualified as illicit trafficking in a controlled substance under federal law. The Board first acknowledged that the Connecticut drug schedules regulated "two obscure opiate derivatives (benzylfentanyl and thenylfentanyl) that have not been included in the Federal controlled substance schedules since 1986." *Id.* at 416–17. The non-citizen, seizing on this discrepancy, argued that his prior conviction was not a categorical match to federal law. *Id.* at 417. The Board,

however, rejected this argument. It held that, "even where a State statute on its face covers a type of object or substance not included in a Federal statute's generic definition, there must be a realistic probability that the State would prosecute conduct falling outside the generic crime" for there to not be a categorical match. *Id.* at 420–21. The Board noted that this analysis required "fact-finding," which the immigration judge had not performed. *Id.* at 422. As a result, the Board remanded the case so the immigration judge could determine whether either party could supply "evidence of Connecticut prosecutions (or lack thereof) for possession or sale of benzylfentanyl or thenylfentanyl[.]" *Id.*

In short, under the minority view, *Duenas-Alvarez* significantly altered the categorical approach. The case requires defendants to point to an actual state prosecution for non-generic conduct to establish that the state statute criminalized non-generic conduct. *Duenas-Alvarez* was not merely a warning against giving state law an unreasonable interpretation.

C. The Ninth Circuit has taken inconsistent positions.

For its part, the Ninth Circuit has issued published decisions embracing both views of *Duenas-Alvarez.*

At first, the Ninth Circuit embraced the majority view in *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc). There, the court addressed whether an Oregon burglary conviction categorically qualified as generic burglary. The Oregon statute criminalized conduct—burglarizing vehicles, boats, and aircraft—

that did not fall under the generic definition of burglary. *Id.* at 850. Without requiring the defendant to prove that Oregon had prosecuted individuals for burglarizing vehicles, boats, or aircraft, the court held that the defendant had met his burden under *Duenas-Alvarez* to prove that Oregon applied its statute to non-generic conduct. *Id.* "Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." *Id.*

After *Grisel*, a handful of Ninth Circuit panels followed its holding that an overbroad state statute is not a categorical fit with the relevant generic offense no matter whether the defendant has proven that the state has actually prosecuted an individual for non-generic conduct. *See, e.g., United States v. Valdivia-Flores*, 876 F.3d 1201, 1208 (9th Cir. 2017); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015); *Cerezo v. Mukasey*, 512 F.3d 1163, 1167 (9th Cir. 2008); *United States v. Becerril-Lopez*, 541 F.3d 881, 890 (9th Cir. 2008) .

But other Ninth Circuit panels rejected this view of *Duenas-Alvarez*. Instead—consistent with the Fifth Circuit, Eighth Circuit, and Board—these decisions looked to whether the defendant could prove that the state actually prosecutes individuals for non-generic conduct. For example, in *Lopez-Aguilar v. Barr*, 921 F.3d 898, 903–04 (9th Cir. 2019), the Ninth Circuit addressed whether a non-citizen's Oregon robbery conviction qualified as generic theft. The Oregon statute criminalized "theft by deception," which would not qualify as generic theft.

Id. at 903. Yet citing *Duenas-Alvarez*, the court held there was no categorical match because "there is no realistic probability that Oregon would prosecute such conduct under the statute." *Id.* In dissent, Judge Berzon contended that the "plain text" of the Oregon statute established that it was not a categorical match with generic theft. *Id.* at 907–08. Judge Berzon lamented that the majority had misread *Duenas-Alvarez* to require "a case involving an actual prosecution of the state offense in a nongeneric manner." *Id.* She further explained that it would "'make little sense' to require a state appellate decision involving an actual prosecution of nongeneric conduct before concluding that there is a realistic probability that the state statute would be so applied[.]" *Id.* at 910 (quoting Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO MASON L. REV. 625, 659–60 (2011) (bracket omitted)).

Other Ninth Circuit panels have similarly addressed whether a state prosecutes individuals for non-generic conduct to determine whether there is a categorical match. *E.g.*, *United States v. Vega-Ortiz*, 822 F.3d 1031, 1035–36 (9th Cir. 2016); *United States v. Burgos-Ortega*, 777 F.3d 1047, 1053–55 (9th Cir. 2015); *Medina-Lara v. Holder*, 771 F.3d 1106, 1116–17 (9th Cir. 2014); *United States v. Hernandez*, 769 F.3d 1059, 1062–63 (9th Cir. 2014). And, in this case, the Ninth Circuit held that Petitioner could not establish that the state statute was broader because he could not "present a real-life example demonstrating that" his statute of conviction "would be applied in [an] overbroad manner[.]" Pet. App. 2a.

Despite this inconsistency in Ninth Circuit law, the court denied Petitioner's petition for rehearing en banc. Pet. App. 4a. There is thus no indication that the Ninth Circuit plans to resolve the intra-circuit split.

* * *

In sum, the circuits and the Board are openly and deeply split over what *Duenas-Alvarez* meant by requiring defendants to prove that there was a "realistic probability" that a state statute applies to non-generic conduct. As a result, the contours of the categorical approach shift dramatically depending on which circuit resolves the case—and, in the Ninth Circuit, which panel. The existence of a split on the question presented is particularly concerning because of the enormous volume of cases that courts and immigration authorities decide under the categorical approach. Indeed, recognizing the importance of uniformly applying the categorical approach, this Court has not hesitated in the past to grant review when the circuits have divided over aspects of the categorical approach. *E.g.*, *Torres v. Lynch*, 136 S. Ct. 1619, 1624 (2016); *Mathis*, 136 S. Ct. at 2251; *United States v. Castleman*, 134 S. Ct. 1405, 1410 (2014); *Descamps v. United States*, 570 U.S. 254, 260 (2013); *United States v. Hayes*, 555 U.S. 415, 420 (2009). This Court should not hesitate here either.

II. This Court's post-*Duenas-Alvarez* decisions have contributed to the confusion over *Duenas-Alvarez*'s meaning.

Since this Court *Duenas-Alvarez* over a decade ago, this Court has not resolved what its "realistic probability" language meant. That said, this Court's

subsequent case law has sent the lower courts mixed signals over *Duenas-Alvarez*'s meaning. That makes it all the more important that this Court grant review here and provide a clear, definitive answer to the question presented.

To begin with, this Court in dicta has once endorsed the actual-prosecution view of *Duenas-Alvarez*. In *Moncrieffe v. Holder*, 569 U.S. 184 (2013), this Court addressed whether a conviction for marijuana possession under Georgia law qualified as a "felony" drug-trafficking crime under federal law. 569 U.S. at 188. In resolving that question, this Court pointed out that federal law had an express carve out for individuals who distributed a "'small amount of marihuana for no remuneration'"; such individuals were guilty of a misdemeanor, not a felony. *Id.* at 193–94 (quoting 21 U.S.C. § 844). By contrast, under Georgia law, an individual convicted of possessing with an intent to distribute would be guilty of a felony, even if there were no remuneration. *Id.* at 194–95. This mismatch meant there was no categorical fit between state and federal law. *Id.*

After dispatching other government contentions, this Court addressed one final argument, an argument it rejected by relying on *Duenas-Alvarez*:

> Finally, the Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like § 1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U.S.C. § 921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But *Duenas–Alvarez* requires that there be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." 549 U.S., at 193, 127 S. Ct. 815. To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State

> actually prosecutes the relevant offense in cases involving antique firearms.

569 U.S. at 205–06. This dictum is seemingly consistent with the actual-prosecution view of *Duenas-Alvarez*. Indeed, the Fifth Circuit, Eighth Circuit, and the Board have cited this portion of *Moncrieffe* as proof that the categorical approach requires an examination of whether a state would prosecute non-generic conduct. *See Castillo-Rivera*, 853 F.3d at 222; *Mowlana*, 803 F.3d at 925; *Teran-Salas*, 767 F.3d at 460; *Matter of Ferreira*, 26 I. & N. Dec. at 418–20.

But since *Moncrieffe*, this Court has consistently applied an elements-based categorical approach without addressing whether the state prosecutes the non-generic conduct. For example, in *Mathis*, this Court held that Iowa's burglary statute did not categorically qualify as generic burglary because the Iowa statute criminalized burglarizing non-structures, such as boats or planes. 136 S. Ct. at 2250. In reaching that conclusion, this Court "did not apply—or even mention—the 'realistic probability' test." *See Titties*, 852 F.3d at 1275 (discussing *Mathis*). Nor did *Mathis* "seek or require instances of actual prosecutions" of individuals for burglarizing boats or planes. *Id.* Instead, the fact that state law's legal scope was overbroad was enough to establish the lack of a categorical fit. *See Mathis*, 136 S. Ct. at 2250. Likewise, in *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984 (2015), this Court held that a Kansas drug conviction did not relate to a federal drug conviction under the categorical approach because "Kansas' [drug] schedules include at least nine substances not included in the federal lists." This Court did not address whether

Kansas prosecutes anyone for those nine substances. This was particularly notable because the case had come from the Eighth Circuit, a circuit that embraces the actual-prosecution view of *Duenas-Alvarez*. *See Mowlana*, 803 F.3d at 926–27. And, in fact, the Eighth Circuit's opinion in *Mellouli* had rejected the relevance of the mismatch between the state and federal schedules by pointing to *Duenas-Alvarez*. *See Mellouli v. Holder*, 719 F.3d 995, 997 (8th Cir. 2013).

For these reasons, this Court's post-*Duenas-Alvarez* decisions have bolstered whichever view of *Duenas-Alvarez* a lower court takes. That means, absent this Court's intervention, the circuit split is unlikely to resolve.

III. This case presents an ideal vehicle to resolve the question presented.

By granting review here, this Court can resolve the question presented, as the petition squarely raises it.

The court of appeals below affirmed the denial of Petitioner's motion to dismiss based on its determination that Petitioner's conviction under California Health and Safety Code § 11379.6 categorically qualifies as a drug-trafficking conviction under federal law. Pet. App. 2a. In doing so, the court did not dispute that California law criminalizes conduct federal law does not. Nor did the government contend that the legal scope of § 11379.6 did not criminalize non-generic conduct. Instead, the court—following the government's lead—held that Petitioner had not pointed to a "real-life example" of a prosecution under § 11379.6 for non-generic conduct. Pet. App. 2a. For that reason, the court determined there

was a categorical match. Pet. App. 2a. The Fifth and Eighth Circuits, as well as the Board, would have reached the same conclusion. *See Castillo-Rivera*, 853 F.3d at 222–25; *Mowlana*, 803 F.3d at 925–27; *Matter of Ferreira*, 26 I. & N. Dec. at 420–21.

But in the First, Third, Fourth, Sixth, Tenth, and Eleventh Circuits—and before some Ninth Circuit panels—the discrepancy between state and federal law would have been dispositive to the categorical-approach analysis. *See, e.g.*, *Swaby*, 847 F.3d at 65–66; *Jean-Louis*, 582 F.3d at 481; *Aparicio-Soria*, 740 F.3d at 155–57; *McGrattan*, 504 F.3d at 614–15; *Grisel*, 488 F.3d at 850; *Titties*, 852 F.3d at 1274–75; *Ramos*, 709 F.3d at 1071–72. It would not have mattered whether Petitioner could prove that California prosecutes non-generic conduct under § 11379.6.

This case, then, presents an ideal vehicle for this Court to address *Duenas-Alvarez*'s meaning. This Court could cleanly answer the question presented and resolve the circuit split.[1]

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[1] Before the court of appeals, the government claimed that Petitioner's separate conviction for receipt of stolen property (not mentioned in the immigration-charging document) separately qualified as an aggravated felony. The government claimed this conviction rendered harmless any error in the immigration-charging document. The court of appeals, however, did not address that issue in its opinion. That conviction does not make this case a poor vehicle to resolve the question presented. If this Court granted review and agreed with Petitioner that his § 11379.6 conviction did not qualify as an aggravated felony, it could then remand this case for the court of appeals to determine what effect, if any, that conviction has on Petitioner's motion to dismiss. This Court, of course, often resolves a predicate issue and then remands the case for the court of appeals to address any other remaining issues. *See, e.g.*, *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (resolving the question presented and remanding the case for the lower court to conduct "proceedings consistent with this opinion"); *Goodyear Tire &*

IV. This Court should grant review because the decision below is wrong.

Granting review is particularly warranted because the court of appeals decision below—embracing the actual-prosecution view of *Duenas-Alvarez*—misunderstands *Duenas-Alvarez*. As explained below, this view finds no support in the language this Court used in *Duenas-Alvarez*; deviates from the categorical approach it purports to apply; and makes no sense on its own terms.

A. The decision below is inconsistent with *Duenas-Alvarez*.

As noted above, *Duenas-Alvarez* addressed the scope of California's aiding-and-abetting doctrine. 549 U.S. at 190–91. The non-citizen's counsel at oral argument had claimed that California's aiding-and-abetting doctrine covered a hypothetical fact pattern that generic aiding-and-abetting would not. *Id.* at 191. In response, this Court stated that:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than application of *legal imagination to a statute's language.*

Id. at 193 (emphasis added). Thus, this Court's language suggests that it was not concerned with "legal imagination" as a stand-alone concept. Instead, this Court's language focused on courts applying an idiosyncratic interpretation of *statutory language* to claim the statute covers non-generic conduct. This Court then continued: "It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a

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Rubber Co. v. Haeger, 137 S. Ct. 1178, 1190 (2017) (same); *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 922 (2017) (same). It could do so here as well.

crime." *Id.* Put together, *Duenas-Alvarez* held that, if you use "legal imagination" to interpret a state statute's language, there would be only a "theoretical possibility," rather than a "realistic probability," that the statute covered such conduct. Thus, when the non-citizen was arguably using legal imagination to interpret state law, this Court required the non-citizen to point to a case (his own or another's) in which the court *interpreted* "the statute in the special (nongeneric) manner for which he argues." *Id.*

Duenas-Alvarez, then, did not deal with a state statute that covered both generic and non-generic conduct. Instead, this Court faced a hypothetical that the state statute did not actually cover—that the non-citizen was just "arguing for a novel judicial interpretation of a state theft statute." *United States v. Madera*, 521 F. Supp. 2d 149, 156 (D. Conn. 2007) (discussing *Duenas-Alvarez*). Viewed this way, *Duenas-Alvarez* was just a case about not misinterpreting state law, nothing more. Indeed, *Duenas-Alvarez* "made no reference to the state's enforcement practices[.]" *Swaby*, 847 F.3d at 66. Only by "wrench[ing] . . . language in *Duenas-Alvarez* from its context" can the case be viewed as having to do with how a statute is typically applied in practice. *Aparicio-Soria*, 740 F.3d at 157–58; *accord Hylton*, 897 F.3d at 65.

This Court's language in *Duenas-Alvarez* is inconsistent with the way the Ninth Circuit employed it in the decision below. Petitioner simply relied on state court decisions to decipher the legal scope of state law. He did not ask the court to apply "legal imagination" to the state statute's language, and thus there *was* a

"realistic probability" that California "would apply its statute" to criminalize non-generic conduct. *See Duenas-Alvarez*, 549 U.S. at 193. Put another way, "[t]he statute's language" itself, as interpreted by state courts, created "the 'realistic probability' that [the State] will punish crimes that . . . do not" qualify under federal law. *See Ramos*, 709 F.3d at 1072. That means that "this case does not require an exercise of imagination, merely mundane legal research skills." *See Aparicio-Soria*, 740 F.3d at 157.

The decisions that have interpreted *Duenas-Alvarez* to articulate an actual-prosecution view seem to take it as self-evident that *Duenas-Alvarez* supports their view. For example, in *Castillo-Rivera*, the Fifth Circuit en banc majority merely quotes *Duenas-Alvarez's* language and takes it as a given that understanding how a statute applies means determining who is prosecuted under the statute. *See* 853 F.3d at 222–25. And while the dissent pointed out that relying on an unambiguous statute required no "legal imagination," *id.* at 238 (Dennis, J., dissenting), the majority just retorted that "interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability,'" *id.* at 223. Likewise, in the decision below, the court merely quoted *Duenas-Alvarez*'s "realistic probability" language, *see* Pet. App. 2a, without addressing how Petitioner's argument required "the application of legal imagination to a state statute's language," *see Duenas-Alvarez*, 549 U.S. at 193. Thus, these decisions have not meaningfully engaged the actual language this Court used.

In short, it is impossible to square *Duenas-Alvarez*'s language with the decision below or the actual-prosecution view it embraces. *See* Keller, *supra*, at 648–51 (explaining that a close reading of *Duenas-Alvarez* is inconsistent with the view that the decision requires litigants to figure out how state officials apply the statute in practice).

B. The decision below conflicts with decades of case law from this Court on the categorical approach.

This Court's decision in *Duenas-Alvarez* must also be viewed in the context of this Court's categorical-approach jurisprudence more generally. And when viewed in that context, interpreting *Duenas-Alvarez* as requiring a focus on who is prosecuted under state law makes no sense.

Since the beginning, this Court has made clear that the categorical approach is an elements-based inquiry. *See Descamps*, 570 U.S. at 260–61 (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)). And this Court has reiterated that foundational premise in the 30 years since. Most recently, this Court in *Mathis* wrote that the categorical approach "focus[es] *solely* on whether the elements of the crime of conviction sufficiently match the elements of" the relevant generic offense. 136 S. Ct. at 2248 (emphasis added). This continued reminder that courts should focus on the "elements" of the defendant's prior conviction—nothing else—has become something of a "mantra" in this Court's categorical-approach case law. *Id.* at 2251. This elements-based inquiry is a "legal question," not a factual one. *Mellouli*, 135 S. Ct. at 1987. And in determining the elements of a state prior

conviction, courts must answer that question by looking to "state law[.]" *Johnson v. United States*, 559 U.S. 133, 138 (2010). This legal inquiry—comparing the elements of state law to the elements of the federal qualifying offense—avoids the "practical difficulties and potential unfairness of a factual approach[.]" *Taylor*, 495 U.S. at 601.

It is impossible to reconcile an elements-based approach—an approach that focuses on the legal question of state law's scope—with the fact-based view embraced by the court below, the Fifth Circuit, the Eighth Circuit, and the Board. Whatever can be said of the actual-prosecution view, it has nothing to do with an elements-based categorical approach. *See Aparicio-Soria*, 740 F.3d at 158 (rejecting the actual-prosecution view because what "really matters" for categorical approach purposes is "'elements, not facts'"). A state criminal statute, after all, does not alter in legal scope based on what conduct state prosecuting authorities choose to charge. Thus, reading *Duenas-Alvarez* consistent with an actual-prosecution view as the decision purports to apply the categorical approach leads to a reading of the decision that renders it incoherent.

Nor does *Moncrieffe* meaningfully support the actual-prosecution view. While *Moncrieffe* seemingly embraced that view of *Duenas-Alvarez*, it only did so in dicta—and the "dictum" appeared "in a rebuttal to a counterargument," a particularly disfavored type of dicta. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 518, 548 (2013). Thus, the statement should not receive much weight, especially when "more complete argument demonstrates that the dicta is not

correct," as is the case here. *See id.*; *see also Castillo-Rivera*, 853 F.3d at 238 n.2 (Dennis, J., dissenting) (noting that *Moncrieffe*'s discussion of *Duenas-Alvarez* "is not the kind of detailed analysis that we have found persuasive").

In short, when considered against the backdrop of this Court's categorical-approach jurisprudence as a whole, *Duenas-Alvarez* cannot be read to require individuals to prove that a state actually prosecutes non-generic conduct. Reading *Duenas-Alvarez* that way would improperly "turn[] an elements-based inquiry into an evidence-based one." *See Descamps,* 570 U.S. at 266–67. Only by interpreting *Duenas-Alvarez* consistently with the majority view ensures that the categorical approach "retains" its "central feature: a focus on the elements, rather than the facts, of a crime." *See id.* at 263.

C. The decision below articulates a view of the categorical approach that would waste time and resources.

Not only is the actual-prosecution view inconsistent with this Court's precedent, it fails on its own terms. The view "creates the same 'daunting' difficulties and inequities that first encouraged [this Court] to adopt the categorical approach." *See Descamps*, 570 U.S. at 270 (quoting *Taylor*, 495 U.S. at 601–02). Specifically, the view would ultimately require courts (and immigration officials) to waste time and resources determining the particular facts of prior convictions.

If courts must determine how a state chooses to enforce its statutes in practice under *Duenas-Alvarez*, it makes little sense to limit the universe of materials courts can consult to appellate decisions. Our "criminal justice today is

for the most part a system of pleas," and "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Lafler v. Cooper*, 566 U.S. 156, 169–70 (2012). That means the total universe of cases that end up on appeal represents a microscopic fraction of the cases prosecuted under the statute. It is hard to learn anything meaningful, then, about how a state enforces its statutes by reviewing appellate decisions. This is especially so in small states and when a defendant was convicted of a new statute. In those situations, it is likely that there will be few, if any, appellate decisions at all. Given that reality, it would be unfair and arbitrary—and raise troubling due process concerns—to limit in an artificial way the type of evidence someone could adduce to establish that a state prosecutes non-generic conduct.

To avoid that problem, courts would need to allow individuals to rely on other sorts of evidence to establish that a state prosecutes non-generic conduct. That would presumably lead to evidentiary hearings in which the parties would litigate what happened in other state cases. *Cf. Matter of Ferreira*, 26 I. & N. Dec. at 420–21 (remanding so an immigration judge could conduct "fact-finding" and take "evidence" about who Connecticut prosecutes under its drug statutes).

In *Taylor*, however, this Court made clear that one of the virtues of the categorical approach was that courts would avoid wasting time and resources by not holding mini-trials on the facts of a prior conviction. 495 U.S. at 601–02; *accord Moncrieffe*, 569 U.S. at 200–02. And the mini-trial *Taylor* contemplated concerned the defendant's conviction. 495 U.S. at 601–02. These actual-prosecution mini-

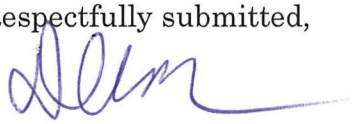
trials, however, would be the facts of someone else's conviction. Thus, the actual-prosecution view flips a strength of the categorical approach on its head. Moreover, it would mean that whether a defendant receives a sentencing enhancement, or whether a noncitizen suffers an immigration consequence, turns on the particular facts of someone else's conviction rather than what the defendant or non-citizen necessarily admitted to when they were convicted of the prior conviction at issue. That makes little sense.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

August 23, 2019

Respectfully submitted,



Doug Keller

Appendix

NOT FOR PUBLICATION

FILED

MAR 18 2019

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. JOEL LUQUE-RODRIGUEZ, Defendant-Appellant.	No. 16-50119 D.C. No. 3:15-cr-00808-BEN-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted March 7, 2019
Pasadena, California

Before: WARDLAW and BENNETT, Circuit Judges, and CARDONE,** District Judge.

Joel Luque-Rodriguez challenges the district court's denial of his motion to dismiss an indictment for attempted illegal reentry in violation of 8 U.S.C. § 1326. Specifically, Luque-Rodriguez argues that the underlying removal order, which

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

** The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

served as a predicate element of his § 1326 conviction, was invalid because his conviction for manufacturing a controlled substance under California Health & Safety Code § 11379.6(a) was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). "We review de novo the denial of a motion to dismiss an indictment under 8 U.S.C. § 1326 when the motion is based on alleged due process defects in an underlying deportation proceeding." *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1201 (9th Cir. 2014). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court properly rejected Luque-Rodriguez's argument that his California conviction is not an aggravated felony because the intent element under California law is broader than the intent element under the corresponding federal law. Luque-Rodriguez's argument fails to meet the "realistic probability" standard because he does not present a real-life example demonstrating that § 11379.6(a) would be applied in the overbroad manner he describes. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

2. Luque-Rodriguez's remaining argument is that the district court erred in finding that § 11379.6(a) is an aggravated felony because California law criminalizes more types of methamphetamine than does federal law. We consider this argument under the plain error standard of review because it was not raised below. *See* Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights

may be considered even though it was not brought to the court's attention.").

Because this argument raises a factual issue—whether geometric isomers of methamphetamine exist—the district court's purported error that turned on this unresolved factual issue did not amount to plain error. *See United States v. Zhou*, 838 F.3d 1007, 1011 (9th Cir. 2016) ("[A]n error that hinges on a factual dispute is not 'obvious' as required by the 'plain error' standard. . . . Accordingly, by the time we determine that an issue hinges on a factual dispute, we have concluded that any error is not 'plain.'").

The government's motion to supplement the record (Dkt. 49) is denied as moot.

AFFIRMED.

FILED

MAY 29 2019

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. JOEL LUQUE-RODRIGUEZ, Defendant-Appellant.	No. 16-50119 D.C. No. 3:15-cr-00808-BEN-1 Southern District of California, San Diego ORDER

Before: WARDLAW and BENNETT, Circuit Judges, and CARDONE,* District Judge.

Joel Luque-Rodriguez filed a petition for panel rehearing and a petition for rehearing en banc. [Dkt. 77] The panel has voted to deny the petition for panel rehearing. Judges Wardlaw and Bennett vote to deny the petition for rehearing en banc, and Judge Cardone so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on en banc rehearing. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

* The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

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. 116-29.

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. 116-29.

End of Document

West's Annotated California Codes
Health and Safety Code (Refs & Annos)
Division 10. Uniform Controlled Substances Act (Refs & Annos)
Chapter 6. Offenses and Penalties (Refs & Annos)
Article 5. Offenses Involving Controlled Substances Formerly Classified as Restricted Dangerous Drugs (Refs & Annos)

West's Ann.Cal.Health & Safety Code § 11379.6

§ 11379.6. Manufacturing, compounding, converting, producing, deriving, processing or preparing by chemical extraction or independently by means of chemical synthesis enumerated controlled substances; factor in aggravation; terms of imprisonment; fines

Effective: January 1, 2016
Currentness

(a) Except as otherwise provided by law, every person who manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independently by means of chemical synthesis, any controlled substance specified in Section 11054, 11055, 11056, 11057, or 11058 shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, five, or seven years and by a fine not exceeding fifty thousand dollars ($50,000).

(b) Except when an enhancement pursuant to Section 11379.7 is pled and proved, the fact that a person under 16 years of age resided in a structure in which a violation of this section involving methamphetamine occurred shall be considered a factor in aggravation by the sentencing court.

(c) Except when an enhancement pursuant to Section 11379.7 is pled and proved, the fact that a violation of this section involving methamphetamine occurred within 200 feet of an occupied residence or any structure where another person was present at the time the offense was committed may be considered a factor in aggravation by the sentencing court.

(d) The fact that a violation of this section involving the use of a volatile solvent to chemically extract concentrated cannabis occurred within 300 feet of an occupied residence or any structure where another person was present at the time the offense was committed may be considered a factor in aggravation by the sentencing court.

(e) Except as otherwise provided by law, every person who offers to perform an act which is punishable under subdivision (a) shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

(f) All fines collected pursuant to subdivision (a) shall be transferred to the State Treasury for deposit in the Clandestine Drug Lab Clean-up Account, as established by Section 5 of Chapter 1295 of the Statutes of 1987. The transmission to the State Treasury shall be carried out in the same manner as fines collected for the state by the county.

Credits

(Added by Stats.1985, c. 3, § 8, eff. Jan. 29, 1985. Amended by Stats.1985, c. 323, § 1, eff. July 29, 1985; Stats.1989, c. 1024, § 1; Stats.2003, c. 620 (A.B.233), § 1; Stats.2011, c. 15 (A.B.109), § 176, eff. April 4, 2011, operative Oct. 1, 2011; Stats.2015, c. 141 (S.B.212), § 1, eff. Jan. 1, 2016.)

West's Ann. Cal. Health & Safety Code § 11379.6, CA HLTH & S § 11379.6
Current with urgency legislation through Ch. 120 of the 2019 Reg.Sess. Some statute sections may be more current, see credits for details.

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