



Immigration Law Advisor

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The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals.

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Calculating "Loss to the Victim or Victims" under section 101(a)(43)(M)(i) of the Immigration and Nationality Act: Survey of Circuit Court Decisions

by Ellen Liebowitz

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), provides that an alien convicted of an aggravated felony is removable from the United States. The definition of an "aggravated felony" is found at section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), subsections (A) through (U). Section 101(a)(43)(M) of the Act¹ defines an aggravated felony as:

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 the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000; . . .

This article addresses how various United States Courts of Appeal have determined the amount of loss to the victim(s) under section 101(a)(43)(M)(i) of the Act.² First, some background information is provided.

To determine whether an alien has been convicted of an aggravated felony, an analysis referred to as the "categorical approach" is generally applied. *See generally Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 818-19 (2007) (*citing Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143 (1990), and other cases). Under this approach, an adjudicator looks to the statutory definition of the underlying offense to determine whether it falls within the enumerated aggravated felony ground. The particular facts surrounding the conviction are not considered. If the

criminal statute is divisible (e.g., contains parts which are and are not aggravated felonies), or has disjunctive phrasing, the adjudicator may look at the record of conviction to determine whether the aggravated felony ground will apply. See *Gonzales v. Duenas-Alvarez*, *supra*, at 819.³ The record of conviction is typically comprised of the indictment/information, plea, verdict and sentence. *Matter of Madrigal*, 21 I&N Dec. 323, 325-26 (BIA 1996). When a jury verdict is involved, the conviction record may include documents such as jury instructions. See *Gonzales v. Duenas-Alvarez*, *supra*, at 819 (internal citations omitted). In non-jury cases, the record of conviction may include a plea agreement, the transcript of a plea colloquy, or some comparable judicial record of information about the factual basis of the plea. *Id.*

Certain aggravated felony grounds contain elements which are not likely to be found in the underlying criminal statute, and therefore some inquiry beyond the formal categorical approach is invited. See *Singh v. Ashcroft*, 383 F.3d 144, 161-62 (3rd Cir. 2004); *Matter of Gertsenshteyn*, 24 I&N Dec. 111, 114 (BIA 2007) (discussing the element of “commercial advantage” under 101(a)(43)(K) of the Act). The loss element of section 101(a)(43)(M)(i) of the Act is recognized as falling within this category. See *Singh v. Ashcroft*, *supra*, at 161 (stating that the loss element “expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue.”).

This raises the question of exactly how loss is to be calculated under section 101(a)(43)(M)(i) of the Act.⁴ The matter has been considered by several federal courts of appeal. The body of case law which has emerged is not uniform in result, and only covers a limited range of facts and issues. Further, some circuits have not addressed the issue at all. Accordingly, a calculation of loss under section 101(a)(43)(M)(i) which is not evident from the criminal statute involved will require careful consideration of the individual evidence in the case and pertinent case law. Below is a survey of significant federal cases addressing the loss element at issue. It is not an exhaustive list, and is only intended to provide a starting point for an analysis of this challenging issue.

First Circuit - *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006). The respondent was convicted by a jury of two federal charges related to a conspiracy to defraud a financial institution. The underlying monetary amounts which had been included in the indictment exceeded \$54,000. The

Presentence Investigation Report (PSR) found that the respondent’s actions caused an attempted loss exceeding \$54,000. The district court ordered restitution in the amount of \$34,200, based upon its calculation of the victim’s actual loss. The Board upheld aggravated felony removal charges based on sections 101(a)(43)(M)(i) and (U) (conspiracy). In determining the element of loss, the Board relied on the indictment, judgment, and PSR, in conjunction with the respondent’s testimony at his removal hearing. The respondent appealed this decision.

On review, the Court of Appeals first explained that when a criminal statute did not specifically contain an element of the aggravated felony ground at issue, a “looser modified categorical approach” could be invoked which is specifically tailored to fit the immigration context. *Id.* at 55. The government would therefore not be required to show that a jury in the prior criminal case necessarily found (or, where a plea entered, that the defendant necessarily admitted), every element of an offense enumerated in section 101(a)(43) of the Act. *Id.* The government’s burden, rather, was to show by clear and convincing evidence from the record of the prior criminal proceeding that (1) the alien was convicted of a crime, and (2) that crime involved every element of one of the enumerated offenses. *Id.* at 55-56.

Applying this approach to the loss analysis under section 101(a)(43)(M)(i), the Court found that the Board erred in considering the respondent’s post-conviction testimony, and the PSR, because neither were part of the formal record of conviction. *Id.* at 58-59. The indictment and final judgment, including the restitution order, however, could be considered because they were part of the record of conviction. Further, these documents adequately established that the conspiratorial objective of the respondent’s crime involved a loss to the victims of more than \$10,000. The Court emphasized that under the “looser” categorical approach being applied, it need not be proven that the amount was separately charged in the indictment or found by the jury beyond a reasonable doubt. *Id.* at 61; *cf. Chang v. INS*, 307 F.3d 1185, 110-91(9th Cir. 2004) (finding that judgment of conviction did not establish amount of loss because there was no proof that the jury actually found that these monetary amounts were involved); *see also Obasohan v. Attorney General*, 479 F.3d 785 (11th Cir. 2007).

The Court rejected the respondent’s argument that the Board erroneously conflated the amount of restitution

with the amount of loss to the victim. It explained that the restitution order was not based solely on the PSR, but that the district court made an explicit finding of the amount of loss as part of its final judgment. As this judgment was part of the record of conviction, the Court failed to see why it should not be considered as reliable with respect to the respondent's predicate offense. *Id.* at 62.

Second Circuit - *Sui v. INS*, 250 F.3d 105 (2nd Cir. 2001). In federal court, the respondent pled guilty to knowingly/unlawfully possessing counterfeit securities, with intent to deceive, that had a value of over \$22,000. He was ordered to pay \$8,664.43 in restitution. The respondent was found removable as an alien convicted of an aggravated felony under sections 101(a)(43)(M)(i) and (U) (attempt).

On review, the Court of Appeals found that section 101(a)(43)(U) of the Act applied because the

respondent's plea to the indictment established that his crime fit the generic definition of an attempt crime.⁵ It found that to determine the element of loss to the victim, the question was whether the respondent's conviction constituted a "substantial step" towards causing a loss which exceeded \$10,000. *Id.* at 118. It found that it did not. The Court explained that there was no jury finding or plea to establish that such a substantial step had been taken, and that possession of counterfeit securities did not necessarily constitute an attempt to pass the securities and cause a loss. The Court emphasized that neither the Court nor the Board could look beyond the statute of conviction or the indictment to determine the particular circumstances of the respondent's crime. The Court also found that because there was no actual loss, the respondent was not removable under subsection 101(a)(43)(M)(i) alone.

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FEDERAL COURT ACTIVITY

Falsus in Uno: Second Circuit Rules on Permissible Inferences and Speculation

by Edward R. Grant

In life as in law, the question often presents: I have caught you lying in one important matter. Does that mean I cannot trust anything you say?

While judges of all stripes must wrestle with this question, Immigration Judges wrestle with it more than most, and with profound consequence: the potential of granting humanitarian protection to someone who does not deserve it, and the potential of failing to grant such protection to one who does, and may face imprisonment or even death as a result.

Given the hundreds of federal appellate decisions on the subject of credibility in immigration proceedings, it may seem that little new can be said on the subject. Yet, with continuing high immigration caseloads, several circuits continue to "fine-tune" their approaches to address new issues, and in an apparent attempt to provide a more predictable set of rules on the subject.

A recent example is the United States Court of Appeals for the Second Circuit's decision in *Siewe v. Gonzales*, 480 F.3d 160 (2d Cir. 2007), which, among other things, discussed the acceptable use of the principle of *falsus in uno, falsus in omnibus* (false in one thing, false

in everything.). Given that the decision was written by new Circuit Chief Judge Jacobs, and was joined by his predecessor, Judge Walker, it is reasonable to infer that *Siewe* is intended to reconcile variant approaches taken by panels within the circuit on credibility issues.

The issues in *Siewe* are not untypical: the respondent, from Cameroon, consistently asserted that he had been detained for 10 weeks after national elections in June 2002, but his accounts were discrepant on some details (such as where he was detained), and certain documents he produced were also inconsistent with his account. An arrest warrant, for example, incorrectly stated the number of his children and curiously acknowledged the existence of a "political police;" another document, a letter purportedly from a political party head, stated an inaccurate date for the elections. The Immigration Judge also noted the absence of an original of the arrest warrant. Based on these discrepancies, the Immigration Judge found the respondent not credible, and the Board affirmed without opinion.

In rejecting the respondent's claim that the Immigration Judge's findings with regard to the arrest warrant were based on "mere conjecture and speculation,"

the Second Circuit strongly endorsed the authority of Immigration Judges to draw permissible inferences from direct and circumstantial evidence, even when an opposing inference would be equally justified by the evidence, or even more so. This capacity is the “very essence” of the factfinder’s function, the Court declared, emphasizing that decisions as to which competing inferences to draw “are entirely within the province of the trier of fact.”

Some measure of speculation, the Court further noted, is an essential part of this process. To underscore this point, the Court adopted for immigration proceedings the principles established by the Supreme Court for “speculation-based” challenges to a civil jury verdict.

Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. [S]peculation and conjecture become impermissible “[o]nly when there is a complete absence of probative facts to support the conclusion reached, [and] the appellate court’s function is exhausted when that evidentiary basis becomes apparent.”

Siewe v. Gonzales, 480 F.3d 160, 167 (2d Cir. 2007) (quoting *Lavender v. Kurn*, 327 US 645, 653 (1946)).

The “imprecise” line between reasonable inference-drawing and impermissible speculation is best drawn, the Second Circuit wrote, by examining whether *probative facts* exist to support the inference. This is what distinguishes the permissible inference from “bald” speculation: the existence in the record of facts, or even a single fact, “viewed in the light of common sense and ordinary experience,” that would support the inference. “So long as an inferential leap is tethered to the evidentiary record, we will accord deference to the finding.” *Siewe*, 480 F.3d at 169.

Applying these standards, the Court found that the adverse inferences drawn by the Immigration Judge regarding the credibility of the arrest warrant were based on record facts regarding the provenance of the document, its incorrect statements regarding the respondent’s children, and its curious reference to “political police.”

Turning to the political party letter, the falsehood of which was not “meaningfully contest[ed]” by the respondent, the court addressed a separate, but related issue: when may a single false document (or a single instance of false testimony) “infect the balance of the alien’s uncorroborated or unauthenticated evidence?” *Id.* at 170. The doctrine *falsus in uno* may be applied when a finding of fabrication is supported by substantial evidence, but is subject to several limitations.

First, if other evidence is corroborated independently of the fabricated evidence, this evidence must be independently assessed – the finding of fabrication does not excuse the obligation to do so.

Second, *falsus in uno* should not be applied to fraudulent documents used to escape persecution – indeed, the existence of such documents may tend to corroborate the claim. However, the documents must be acknowledged as false to the Immigration Judge.

Third, false evidence that is “wholly ancillary” to the claim may not be sufficient to apply the doctrine, but it may validly be used to raise questions regarding credibility, and may be used in conjunction with other factors to support an adverse credibility determination.

Fourth, a false statement made during an airport interview may not be sufficient to support the *falsus in uno* doctrine, as aliens may not be entirely forthcoming during such interview due to its circumstances.

Fifth, the submission of documents that the alien does not know, and does not have reason to know, are not authentic is not a basis for applying the doctrine.

Falsus in uno, the Court concluded “is a natural and instinctive tool of the factfinder, like a carpenter’s hammer or a plumber’s wrench.” *Id.* at 171. But as the foregoing conditions illustrate, it is not a tool to be used indiscriminately, and *Siewe* is no license for adverse credibility determinations based on a “gotcha” approach to singular false statements or dubious documents. But *Siewe* read as a whole – provided it is applied consistently – is a key affirmation of the breadth of an Immigration Judge’s authority to draw inferences, even dispositive ones – provided such inferences are supported by substantial evidence in the record.

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CIRCUIT COURT DECISIONS FOR MARCH 2007

By John Guendelsberger

The overall reversal rate for March 2007 by the United States Circuit Courts of Appeals of petitions for review of Board decisions was 10.9%, down considerably from the 14.1 % reversal rate for last month and the 17.5 % reversal rate for calendar year 2006. The following chart provides the results from each circuit for March 2007 based on electronic reports of published and unpublished decisions:

Circuit	Total	Affirmed	Reversed	%
1st	1	1	0	0.0
2nd	104	91	13	12.5
3rd	35	30	5	14.3
4th	12	9	3	25
5th	20	19	1	5
6th	10	10	0	0
7th	10	7	3	30
8th	9	7	2	22.2
9th	198	180	18	9.1
10th	5	3	2	40
11th	35	34	1	2.9
All:	439	391	48	10.9

In a typical month, the United States Court of Appeals for the Second and Ninth Circuits together have been issuing about 70% of the decisions and 80% of the reversals. This month, these Circuits again accounted for nearly 70% of total decisions but issued only about 65% of the reversals. Notably, five Circuits -- the Third, Fourth, Seventh, Eighth and Tenth -- had higher rates of reversals than the Second and the Ninth this month, although their case loads are relatively small.

The Second Circuit reversed in only 13 of its 104 cases (12.5 %), well below its usual reversal rate. Over half of these reversals identified flaws in the adverse credibility determination in asylum claims. The Ninth Circuit reversed in 18 of 198 cases (9.1 %). Only two of the Ninth Circuit reversals focused on the adverse credibility determination. The Court found fault in regard to the nexus determination, changed country conditions, or the reasonableness of internal relocation in several other cases. The Ninth Circuit also remanded in two cases involving the exceptional and extremely unusual

hardship determination for cancellation of removal, finding the transcript defective in one case and reversing in the other for failure to consider cumulative hardships.

Recurring issues which were the subject of reversal in more than one circuit this month included the following: (1) failure to apply the appropriate standard for government acquiescence, i.e., "willful blindness," under the Convention Against Torture (one reversal in the Second Circuit, two in the Third, one in the Fourth, and one in the Eighth); (2) impermissible factfinding by the Board (reversals in the Second Circuit and in the Eighth); and (3) application of the burden of proof in considering reasonableness of internal relocation (reversals in the Seventh Circuit and the Ninth). In a notable development, the Third Circuit issued a precedent decision reversing the Board and applying the nonretroactivity rationale for former section 212(c) relief from *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) and *INS v. St. Cyr*, 533 U.S. 289, 317 (2001) to a respondent who had not entered a guilty plea.

The chart below shows numbers of decisions for the first quarter of calendar year 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	27	20	7	25.9
8th	27	21	6	22.2
2nd	302	239	63	20.9
10th	15	12	3	20
9th	555	475	80	14.4
4th	57	51	6	10.5
3rd	88	79	9	10.2
5th	54	51	3	5.6
6th	39	35	4	4.4
11th	94	91	3	3.2
1st	8	8	0	0
All:	1,266	1,082	184	14.5

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RECENT CIRCUIT COURT DECISIONS

Fifth Circuit

Soriano v. Gonzales, __ F.3d __, 2007 WL 1020462 (5th Cir. April 5, 2007). The Fifth Circuit addressed the issue of whether an alien can be found removable on alien smuggling charges in violation of section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i) when the evidences shows that the alien only transported aliens within the United States. The petitioner claimed that he met three illegal aliens at a McDonald's in El Paso, Texas and agreed to give them a ride to the border. The Immigration Judge found the petitioner was not credible and found him inadmissible due to his participation in an alien-smuggling scheme. On appeal to the Fifth Circuit, the petitioner argued that section 212(a)(6)(E)(i) did not apply to him because it applies only to those who assist aliens in the actual physical crossing of the border. In denying the petition for review, the Fifth Circuit agreed with other circuits in holding that "an individual may knowingly encourage, induce, assist, abet, or aid with illegal entry, even if he did not personally hire the smuggler and even if he is not present at the point of illegal entry."

Sixth Circuit

Tapia-Martinez v. Gonzales, __ F.3d __, 2007 WL 627822 (6th Cir. February 27, 2007) The petitioner filed a second motion to reopen with the BIA, on the grounds of ineffective assistance of counsel. The BIA denied the motion, ruling that it was barred by the numerical limitations on motions to reopen. The petitioner appealed to the Sixth Circuit, arguing that equitable tolling should apply to the numerical limitations. While acknowledging that the Second, Fourth, and Ninth Circuits have applied equitable tolling to cases involving the numeric bar, and the Sixth Circuit has applied equitable tolling to the time limitations, the Court declined to reach the issue. The Court instead followed the approach taken by the First, Third, and Eighth Circuits, and denied on another basis. The Court found that the petitioner did not exercise due diligence in pursuing her complaint of ineffective assistance of counsel, citing the 15-month gap between counsel's alleged actions and the petitioner's claim that counsel acted ineffectively. The Court also noted that the petitioner overstayed her voluntary departure period and is therefore not eligible for cancellation of removal, adjustment of status or voluntary departure.

Sarr v. Gonzales, __ F.3d __, 2007 WL 1146465 (6th Cir. April 19, 2007) The petitioner sought review of a Board decision denying his application for asylum, withholding of removal, protection under the CAT, and remand to pursue an adjustment application. The Court ruled that a motion for adjustment pursuant to *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), need not be denied if all the factors set forth in that decision are not present. The Court specifically found that the motion may be granted even if DHS opposes. The Court found, however, that the Board's alternate determination, that the respondent had not submitted a waiver application when one was required, was nonreviewable. While the Court found errors in the Immigration Judge's adverse credibility finding, it found no basis to overturn the denial as there were discrepancies on the record, insufficient corroboration, and sufficient evidence of changed country conditions.

Seventh Circuit

Floroiu v. Gonzales, __ F.3d __, 2007 WL 957528 (7th Cir. April 2, 2007). The petitioners, a husband and wife from Romania, petitioned for review of an order of the Board denying their applications for asylum, withholding of removal, and protection under the CAT. Their claims were based on incidents that occurred in response to their evangelizing as Seventh-day Adventists in Romania. The Immigration Judge denied their requests for relief on the grounds that the asylum application was untimely and that they failed to sustain their burden. The Board, in dismissing the appeal, noted that although the Immigration Judge described the petitioners as "religious zealots" he remained impartial. In granting the petition for review, the Seventh Circuit found that the Immigration Judge's comments showed a "clear bias" against the petitioners and deprived them of their right to a fair hearing. The Court ordered the clerk to send the decision to the Attorney General.

Doe v. Gonzales, __ F.3d __, 2007 WL 1120300 (7th Cir., April 17, 2007). The petitioner, who was an army lieutenant during the El Salvadoran civil war, sought asylum, withholding and protection under the Convention Against Torture. In 1989, the petitioner was ordered to accompany members of an infamous army battalion to kill a Jesuit priest. When the battalion arrived at the university, the petitioner walked about the university grounds, heard shots, and later saw bodies on the ground. Six Jesuits, including the university's

president, were killed, along with a female cook and her daughter. Doe did not give orders, fire his gun, seize anyone, or block anyone's attempted escape, but when he returned to the base, he assisted in destroying log books identifying the soldiers who had participated in the raid. The petitioner was tried and convicted for the murders by a military commission, but released in an amnesty. The Immigration Judge denied the claim, finding that respondent was a persecutor, that he was convicted of a particularly serious crime, and he did not meet his burden to show a well-founded fear of persecution.

The Court first found that petitioner's going along on the mission did not increase the likelihood that the mission would be accomplished and so was not "assistance" in persecution, but questioned whether his presence at the attack may nevertheless have been "participation." The Court also left open the question of whether the cover-up had any significance. Regarding the particularly serious crime finding, the Court found that while normally the Immigration Judge may not look behind a record of conviction, in this case the evidence is clear that the trial was a mockery of justice, and the Immigration Judge could consider that. Lastly, the Court found that the Immigration Judge had overlooked evidence regarding the likelihood of future persecution, and remanded to the Board.

Eighth Circuit

Poniman v. Gonzales, ___ F.3d___, 2007 WL 957526 (8th Cir. April 2, 2007) . The petitioner, a Christian native and citizen of Indonesia, petitioned for a review of the Board's denial of his motion to reopen his removal proceedings on the basis of new evidence regarding changed conditions in Indonesia. An Immigration Judge determined the petitioner was ineligible to apply for asylum because he neither timely filed his asylum application nor demonstrated excuse for his delay. The Immigration Judge also denied withholding of removal and protection under the CAT. The Board adopted and affirmed the Immigration Judge's decision. In January of 2006 the petitioner filed a motion to reopen with the Board asserting he had new evidence of changed conditions in his home district of Mamasa, Indonesia. He submitted affidavits, letters and articles detailing the outbreak of violence against Christian Indonesians. The Board denied the petitioner's motion to reopen because he did not demonstrate a prima facie case for withholding or CAT and because his new evidence did not indicate he would be unable to relocate within Indonesia. In denying the petition for review, the Eighth Circuit stated that "in the absence of credible and substantial evidence concerning the impossibility or unreasonableness of internal relocation" the Board did not abuse its discretion in denying the motion to reopen.

BIA PRECEDENT DECISIONS

In *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), the Board addressed the requirements for determining whether an asylum application is frivolous. In this case, the Immigration Judge made a frivolous finding based upon inconsistent accounts by the respondent of whether his wife had a child, had an abortion, or adopted a child in the People's Republic of China. The Board found that an Immigration Judge must address the question of frivolousness separately and make specific findings that the applicant deliberately fabricated material elements of the asylum claim. Regarding the burden of proof, the Board found that an Immigration Judge's finding of frivolousness must be supported by a preponderance of the evidence. The Board rejected the suggestion advanced by the United States Court of Appeals for the Second Circuit in this case, that concrete and conclusive evidence of fabrication should be required, noting that proof of knowing or deliberate conduct may be demonstrated by circumstantial evidence. Lastly, the Board found that

the respondent must be afforded a sufficient opportunity to explain any discrepancies or implausibilities. The Board stated that an Immigration Judge may wish to bring to the applicant's attention concerns he or she may have related to a frivolous application. In this case, the Board found that the Immigration Judge appropriately made separate findings, findings that were supported by the preponderance of the evidence, but the Immigration Judge did not give the respondent an adequate opportunity to explain. The Board vacated the frivolous finding.

The Board found that the Federal offense of trafficking in counterfeit goods or services is a crime involving moral turpitude in *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007). The statute at issue, 18 U.S.C. § 2320, prohibits intentionally trafficking or attempting to traffic in goods or services knowingly using a counterfeit mark, which is defined as a trademark. The Immigration Judge had found that because the defendant need not know that trafficking in counterfeit goods was criminal

or that the trafficker specifically intended to defraud the purchaser, the crime is not one of moral turpitude. The Board acknowledged that crimes involving specific intent to defraud are crimes involving moral turpitude, but crimes that do not require specific intent to defraud can be crimes involving moral turpitude. A conviction under 18 U.S.C. § 2320, requires that the offender's expropriation and use of an owner's trademark must be likely to confuse or deceive the public at large with significance adverse consequences for the consumers and for the owner of the mark. Not only do consumers pay for brand-name quality but get a fake, but the offender exploits trademark owners since it dilutes the brand, and the offender earns enormous profits by capitalizing on the reputations, development costs and advertising efforts of the mark owner.

The Board interpreted the effect of the North Korean Human Rights Act of 2004, Pub. L. 108-333, 118 Stat. 1287 (NKHRA) on two respondents' asylum applications in *Matter of K-R-Y and K-C-S*, 24 I&N Dec. 133 (BIA 2007). The respondents are natives of North Korea and citizens of South Korea. The Immigration Judge and the Board had previously found that neither respondent suffered past persecution or a well-founded fear of persecution. The issue was whether the NKHRA provided an independent basis for granting asylum to the respondents, and whether the acquisition of South Korean citizenship precluded them from establishing asylum as to North Korea due to firm resettlement. The Board found that the NKHRA does not provide an independent basis for granting citizenship. The NKHRA only provides that North Koreans cannot be barred from asylum because South Korea gives them the right to apply for citizenship. The NKHRA states that it is not intended to apply to former North Koreans who, like the respondent in this case, actually avail themselves to the right to become South Korean citizens.

The scope of an Immigration Judge's jurisdiction when a case is remanded for completion of the background checks was at issue in *Matter of M-D-*, 24 I&N Dec. 138 (BIA 2007). After sustaining the respondent's appeal in part and finding the respondent eligible for withholding of removal, the Board remanded proceedings for background checks. On remand, the respondent requested that the Immigration Judge consider her application for adjustment of status. The Immigration Judge found that jurisdiction continued to rest with the Board because the Board had issued a final decision. The Board first noted that pursuant

to 8 C.F.R. 1003.1(d)(6), the Board may not issue a final decision granting any application for relief if background checks have not been conducted because the record is not complete. *Matter of Alcantara-Perez*, 23 I&N Dec. 882, 883 (BIA 2006). It is the Immigration Judge who renders the final order in these cases. The Board clarified that when a case is remanded to an Immigration Judge for the appropriate background checks, no final order exists and the remand is effective for all purposes. While the Immigration Judge cannot reconsider the decision of the Board, the Immigration Judge must consider any new evidence revealed by the background checks, and can consider any additional evidence provided it meets the requirements for a motion to reopen. The Board noted that because there is no final order, the time and number limitations on motions to reopen do not apply, nor does the requirement to show changed country conditions if an asylum application is involved.

In *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), the Board found that a conviction for wilful failure to register by a sex offender who has been previously apprised of the obligation to register, in violation of section 290(g)(1) of the California Penal Code, is a crime involving moral turpitude. The respondent argued that California courts have interpreted the statute to include instances in which an individual failed to register because of forgetfulness which is not the type of "evil intent" usually considered to be turpitudinous. The Board found that contemporary moral standards play a significant role in determining a morally turpitudinous offense, and society outrage at child sex crimes has led to enactment of these statutes. The risk involved in a violation of this duty owed to society is too great, and the obligation to register is so important that a failure to register implicitly involves

REGULATORY UPDATE

72 Fed. Reg 19100 (2007)

DEPARTMENT OF HOMELAND SECURITY
**Removal of the Standardized Request for Evidence
Processing Timeframe**

SUMMARY: This rule amends Department of Homeland Security regulations to provide flexibility to U.S. Citizenship and Immigration Services in setting the time allowed to applicants and petitioners to respond to a Request for Evidence or to a Notice of Intent to Deny. This rule also describes the circumstances under which

U.S. Citizenship and Immigration Services will issue a Request for Evidence or Notice of Intent to Deny before denying an application or petition, but United States Citizenship and Immigration Services will continue generally to provide petitioners and applicants with the opportunity to review and rebut derogatory information of which he or she is unaware. This rule also clarifies when petitioners and applicants may submit copies of documents in lieu of originals. In addition to these changes, this rule removes obsolete references to legacy agencies, and it removes obsolete language relating to certain legalization and agricultural worker programs.

DATES: This final rule is effective June 18, 2007.

72 Fed. Reg 20440 (2007)

DEPARTMENT OF HOMELAND SECURITY

Special Immigrant and Nonimmigrant

Religious Workers

SUMMARY: This rule proposes to amend U.S. Citizenship and Immigration Services (USCIS) regulations regarding the special immigrant and nonimmigrant religious worker visa classifications. This rule addresses concerns about the integrity of the religious worker program by proposing a petition requirement for religious organizations seeking to classify an alien as an immigrant or nonimmigrant religious worker. This rule also addresses an on-site inspection for religious organizations to ensure the legitimacy of petitioner organizations and employment offers made by such organizations.

This rule also would clarify several substantive and procedural issues that have arisen since the religious worker category was created. This notice proposes new definitions that describe more clearly the regulatory requirements, and the proposed rule would add specific evidentiary requirements for petitioning employers and prospective religious workers.

Finally, this rule also proposes to amend how USCIS regulations reference the sunset date, the statutory deadline by which special immigrant religious workers, other than ministers, must immigrate or adjust status to permanent residence, so that regular updates to the regulations are not required each time Congress extends the sunset date.

DATES: Written comments must be submitted on or before June 25, 2007.

Calculating “Loss to the Victim or Victims”

Third Circuit - *Munroe v. Ashcroft*, 353 F.3d 225 (3rd Cir. 2003). The respondent pled guilty to two counts of theft by deception. The two counts together stated that the respondent received more than \$10,000 from the victim (a bank), and he was ordered to pay that amount in restitution. Pursuant to a joint motion between the respondent and the government, the criminal court subsequently reduced the restitution payment to \$9,999. It was undisputed that the reduction was intended to alter the effect of the conviction for immigration purposes.

The Court of Appeals found that despite the amended order of restitution, the respondent’s crime involved a loss greater than \$10,000 for the purposes of section 101(a)(43)(M)(i). The Court considered the amount in the indictment to which the respondent had pled guilty, and that the criminal court’s subsequent reduction was not based upon a recalculation of loss. Significantly, the Court stated that “[t]he amount of restitution ordered as a result of a conviction may be helpful to a court’s inquiry into the amount of loss to the victim if the plea agreement or the indictment is unclear on the issue as to the loss suffered.” *Id.* at 227. It was not, however, of assistance in this case because the amended restitution order was intended solely to affect the defendant’s immigration proceedings. *Id.*

Alaka v. Attorney General, 456 F.3d 88 (3rd Cir. 2006). The respondent pled guilty to one federal count of aiding and abetting in bank fraud where the loss was \$4,716.68. She was ordered to pay that amount of restitution. The sentencing court, however, found that based upon all counts in the indictment, the total intended loss for the respondent’s crime was over \$47,000. An Immigration Judge relied on the sentencing document to conclude that the respondent had been convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act, and this decision was upheld by the Board. The respondent filed an appeal.

On review, the Court of Appeals explained that when evaluating whether an offense is an aggravated felony, the “categorical approach” is presumptively applied but may be abandoned when the terms of the statute on which removal is based, such as the loss requirement in

section 101(a)(43)(M)(i), invites further inquiry into the facts underlying the conviction. *Id.* at 105-06 (internal citations omitted). Under this rationale, the district court's factual findings as articulated in the sentencing report could be considered because they were part of the record of conviction. However, they did not ultimately control because the amount within was not related to the offense for which the respondent was convicted. Rather, the plea agreement was the document which established the amount of loss for aggravated felony purposes because the amount listed within was directly tethered to the crime for which the respondent was convicted. To rely on amounts outside of the conviction itself would "divorce" the \$10,000 loss requirement from the conviction requirement of the aggravated felony provision. *Id.* at 108 (citing *Chang v. INS*, supra, at 1190). In reaching its decision, the Court took guidance from decisions issued in the Seventh, Ninth, and Tenth Circuits, and presented a detailed analysis of the relevant cases. *Id.* at 106-08.

Fifth Circuit - *James v. Gonzalez*, 464 F.3d 505 (5th Cir. 2006). The respondent pled guilty to one count of aiding and abetting bank fraud involving a transaction amount of \$9,500. He was ordered to pay restitution exceeding \$100,000. The Board found that the loss to the victim for purposes of section 101(a)(43)(M)(i) of the Act exceed \$10,000, and relied on the restitution amount as based on conduct included in the indictment, PSR, and judgment of conviction. The respondent argued on appeal that loss should be limited to that listed in the single count to which he pled guilty, which was under \$10,000.

The Court of Appeals initially explained that because the underlying criminal statute did not provide a threshold monetary amount, it would look beyond the statute to the record of conviction to determine the amount of loss. *See id.* at 510. The Court then upheld the Board's calculation of loss because the respondent's indictment alleged a scheme to defraud which totaled amounts over \$10,000. The Court did not provide much analysis, but considered that neither party suggested that the plea agreement defined the amount of loss by either limiting the loss to the count to which the respondent pled guilty or expanding the loss to the restitution amount. *Id.* at 511-12 (comparing *Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2004) (alien pled guilty to one charge which encompassed a criminal scheme involving losses over the threshold amount). The Court also dismissed the respondent's argument that the predicate of the

restitution order - the PSR - was based on intended losses only and therefore could not be considered. It pointed out the amount of loss had been carefully calculated in the conviction records, and that the restitution order was in fact based on actual loss.

Seventh Circuit - *Knutsen v. Gonzales*, 429 F.3d 733 (7th Cir. 2005). The respondent pled guilty to one federal charge of bank fraud, which alleged a loss of \$7350, in exchange for the dismissal of the remaining charge. The respondent also agreed that the facts in the dismissed charge constituted "relevant conduct" under the federal sentence guidelines, and that the total loss from his conviction and relevant conduct exceeded \$20,000. The judge determined that restitution should be \$22,480. In removal proceedings, the respondent was found to have committed an aggravated felony under section 101(a)(43)(M)(i) of the Act.

On appeal, the respondent argued that he was not removable because he only pled guilty to a single count which involved a loss under \$10,000. The Court agreed with this assertion. It considered that section 101(a)(43)(M)(i) predicated removal on a "convicted offense." In this case, the respondent had only been convicted of a single discreet offense where it was agreed that the loss was under \$10,000, and this was the conviction which should be considered. *Id.* at 739-40.⁶ The Court explained that the "relevant conduct" portion of the respondent's plea was only related to losses calculated solely for the purpose of sentencing guidelines, and was not properly tethered to the offense of conviction.

Ninth Circuit - *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002). The respondent pled guilty to one count of bank fraud for knowingly passing a bad check which amounted in a loss to the victim of \$605.30. He also agreed to pay restitution in excess of \$20,000. The district court ordered him to pay \$32,628.67 in restitution based upon amounts set out in additional alleged fraudulent transactions. The Board, considering the plea agreement and the PSR, found that the loss requirement for section 101(a)(43)(M)(i) was satisfied.

On review, the Ninth Circuit applied what it termed to be a "modified categorical approach" to determine the loss amount, and examined the record of conviction. It found that the amount of loss for aggravated felony purposes was established by the

respondent's plea to incurring losses of \$605.30, as this was the only crime for which he was convicted. The Court would not consider the restitution order because it was only based upon a finding of "relevant conduct" for federal sentencing purposes. This conduct did not need to be admitted, charged, or proven to a jury in order to impose restitution or an enhanced sentence, and to allow it to control would "divorce the loss requirement from the conviction requirement" of section 101(a)(43) of the Act. *See Id.* at 1190-91.

Li v. Ashcroft, 389 F.3d 892 (9th Cir. 2004). The respondent was convicted by a jury of several fraud-related federal offenses, which were listed in the information as involving a loss to the victims exceeding \$10,000. The Board found that the respondent's crime resulted in losses of over \$10,000. It relied on the information, and the judgment of conviction, wherein it was stated that the respondent was found guilty of the aforementioned counts in the indictment.

The Court of Appeals, again employing a "modified categorical approach," reversed the Board's decision. It found no indication in the record of conviction that the jury in fact found that the defendant caused/intended to cause losses exceeding \$10,000, despite being charged with these facts. The Court explained that the judgment's statement that the respondent was found guilty of the charges in question did not establish that the jury actually found these monetary amounts were involved. *Cf. Conteh v. Gonzales, supra* (relying on facts gleaned from the record of conviction; jury findings not necessarily determinative). Further, the finding of relevant conduct for sentencing purposes, amounting to losses over \$10,000, would not establish loss for removability under *Chang v. INS, supra*. The Court specifically expressed no opinion on whether a sentencing fact found beyond a reasonable doubt by either a jury or a judge would qualify as a conviction to the fact, or whether a defendant's admission of a specific sentencing fact would suffice. *See Id.* at 898.

Ferreira v. Ashcroft, 390 F.3d 1091 (9th Cir. 2004). The respondent pled guilty in a California court to welfare fraud involving over \$400, and she agreed to pay \$22,305 in restitution. She was ordered removed as an alien convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act.

Reviewing the issue of loss to the victim, the Ninth Circuit applied a "modified categorical approach"

and examined the record of conviction. It found that the restitution order, which was part of the plea agreement, could be relied upon to establish the amount of loss. The Court distinguished *Munroe v. Ashcroft, supra*, and *Chang v. INS, supra*, because both contained restitution orders which contradicted the amount of loss in the plea agreement or indictment. Contrastingly, in Ferreira's case, no specific loss amount was mentioned in the criminal complaint except that it exceeded \$400, and the plea agreement set restitution at an amount consistent with, not contrary to, the complaint. Further, the loss assessment for restitution was not tied to "relevant conduct" under federal sentencing guidelines. Rather, the applicable California statute provided that restitution amounts were based on actual loss claimed by the victims.

Tenth Circuit - *Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2002). The respondent pled guilty to one charge of defrauding a financial institution. The charge, Count Two, referred to an insufficient-fund check in the amount of \$9,308. The respondent had been charged in a four count indictment, where each count incorporated the same two paragraphs alleging a scheme to defraud a bank. The respondent's plea agreement stated that he would pay restitution in the amount of the actual loss to be determined by the court at sentencing. The court ordered restitution exceeding \$20,000. The respondent was found removable for an aggravated felony under section 101(a)(43)(M)(i) of the Act.

The respondent argued before the Court of Appeals that he was not removable because he only pled guilty to Count Two in his indictment which listed a loss of \$9,308. Accordingly, the loss to his victim could not exceed that amount. The Court rejected this argument and found that the respondent's indictment did not allege a discrete fraud only involving the single check; rather, it alleged a scheme to defraud that encompassed a number of checks and accordingly there was "no ambiguity" regarding the scope of the offense to which the respondent pleaded. *Id.* at 980. The offense of conviction was the entire scheme charged in Count Two, and the loss to be measured was the loss resulting from the scheme. The respondent did not dispute that under this calculation, the loss exceeded \$10,000. The removal order was accordingly upheld.

Eleventh Circuit - *Obasohan v. Attorney General*, 479 F.3d 785 (11th Cir. 2007). The respondent pled guilty to a federal charge of conspiracy to produce, use, and traffic in counterfeit access devices. He agreed that the

court could order restitution, but he did not admit to any loss. During the plea colloquy, the government stated that there had been no loss to the victim in this case, but that it was pursuing another case against the respondent which involved a loss of thousands of dollars. The PSR referred to this alternative investigation, which had uncovered that the respondent engaged in other crimes involving losses in excess of \$37,000. The criminal court ordered restitution pursuant to the loss amount listed in the PSR. The respondent was found removable for an aggravated felony under section 101(a)(43)(M)(i) of the Act.

The Court of Appeals reversed the removal order, and found that an adequate level of loss for section 101(a)(43)(M)(i) purposes was not established by either the statutory elements of the criminal offense, or by the indictment, the plea, or the plea colloquy. The loss amounts contained in the restitution order were not sufficient to establish removability because they were based on conduct outside of that forming the basis for the conviction underlying the aggravated felony charge. The Court also pointed out that the loss amounts in the restitution order, pursuant to the federal sentencing guidelines, did not need to be charged, proven, or admitted, and only needed to be established by a preponderance of the evidence. *See Id.* at 791. This rendered them insufficient as a matter of law to support removability.

In conclusion, the federal cases addressing the calculation of the loss to the victim(s) under section 101(a)(43)(M)(i) of the Act are broad-ranging, and do not present a uniform approach as to how to address this issue. *Cf. Conteh v. Gonzales, supra*, with *Chang v. INS, supra*. As a result, evaluations of whether a loss element is satisfied in a given case will require careful consideration of the evidence and any controlling or otherwise pertinent case law. Particular attention should be paid to how the court evaluates the record of conviction, and what it determines needs to be established before the element of loss is satisfied for immigration purposes. It might also be useful to explore decisions addressing other provisions of the aggravated felony definition which contain elements which will not be presented in the underlying criminal statute. *See e.g., Singh v. Ashcroft, supra*.

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¹Section 101(a)(43)(M) was added to the aggravated felony definition by section 222(a) of the Immigration and Nationality Technical Corrections Act of 1994, Pub.L.No. 103-416, 108 Stat. 4305. At that time, the loss threshold for subsection (i) was \$200,000. That amount was lowered to \$10,000 in 1996 by section 321(a)(7) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

²This article does not address how to determine whether a crime involves fraud or deceit, which can be considered the first part of a two part analysis as to whether section 101(a)(43)(M)(i) of the Act applies to a particular case. See generally *Li v. Ashcroft*, 389 F.3d 892, 896 (9th Cir. 2004).

³This is often referred to as the “modified categorical approach.” For a discussion about the lack of a universal definition for this term for immigration purposes, see *Conteh v. Gonzales*, 461 F.3d 45, 54 (1st Cir. 2006); see also *Matter of Gertsenshteyn*, 24 I&N Dec. 111 at n.1 (BIA 2007).

⁴The Board does not have a case addressing the issue. *Cf. Matter of Gertsenshteyn, supra* (holding that evidence extrinsic to the record of conviction may be considered when determining the “commercial advantage” element under section 101(a)(43)(K)(ii) of the Act).

⁵See also *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999) (discussing section 101(a)(43)(U)).

⁶*Cf. Iysheh v. Gonzales*, 437 F.3d 613, 615 (7th Cir. 2006) (finding amount of loss for purposes of sections 101(a)(M)(i) and (U) was established by the respondent’s admission in plea agreement that the total loss from his conspiracy was more than \$200,000).

⁷In this regard, the Court pointed out that the inclusion of a jury verdict form or similar document could have greatly assisted in determining this issue. See *id.* at 897.

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