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January 22, 2010

The Honorable Eric H. Holder Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

**Re: Categorical Approach and *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008).**

Dear Attorney General Holder:

On behalf of the American Bar Association (“ABA”), with almost 400,000 members nationwide, I write to share with you the ABA’s recently adopted resolution supporting policies that preserve the categorical approach used to determine the immigration consequences of past criminal convictions<sup>1</sup> and to urge you to take appropriate action to withdraw former Attorney General Mukasey’s opinion in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008). The categorical approach, adopted universally by immigration adjudicators for nearly a century<sup>2</sup>, has served as an effective and efficient tool for the fair administration of justice. The novel fact-based inquiry authorized in *Silva-Trevino*, by contrast, offends due process, creates inefficiency, and undermines the uniform and predictable administration of justice in the immigration system.

***Silva-Trevino* requires relitigation of criminal convictions without due process of law.**

The categorical approach provides a straightforward system for determining the immigration consequences of criminal convictions. Under the categorical approach, immigration adjudicators assess whether a criminal court conviction triggers a particular immigration consequence based solely on legal analysis of what was established by the conviction under the criminal laws, i.e., analysis of the elements of the criminal statute and, when necessary to establish under what portion of a divisible criminal statute the person was convicted, analysis of the criminal court’s record of conviction. *Silva-Trevino* upends this scheme and instead transforms this legal determination into a re-trial of the criminal case requiring *de novo* fact finding on the conduct underlying the criminal court conviction, but without the due process protections integral to criminal trials.

It is fundamentally unfair to force immigrants to relitigate their criminal cases in immigration court hearings that are not governed by formal rules of evidence, where the Sixth Amendment

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<sup>1</sup> See *Immigration Consequences of Past Criminal Convictions*, American Bar Association policy 09A113 (adopted Aug. 2009) (attached).

<sup>2</sup> See *Matter of Velazquez-Herrera*, 24 I & N Dec 503, 513 (BIA 2008) (discussing the long history of the categorical approach in immigration adjudications).

The Honorable Eric H. Holder Jr.  
January 22, 2010  
Page Two

rights to appointed counsel and to a trial by jury do not apply, and where the Fourth Amendment exclusionary rule and Fifth Amendment privilege against self-incrimination do not apply with

full force. In many cases, respondents subjected to these “immigration retrials” are not only unrepresented but also detained thousands of miles from the jurisdiction where their crimes occurred without any realistic way to access evidence and witnesses.<sup>3</sup> Many immigration adjudications involve old, sometimes decades old, convictions. In such cases, it is often impossible or impractical for immigrants to relitigate the facts underlying their convictions because of unavailable witnesses, faded memories, misplaced documents, or stale evidence. Moreover, while *Silva-Trevino* arose in the context of an immigration court removal proceeding, its framework, unless corrected, will also be utilized in many other types of agency determinations that are non-judicial and where immigrants are afforded even less procedural protections including, for example, adjudication of affirmative applications for benefits such as citizenship, asylum, or protection under the Violence Against Women Act.

**The categorical approach streamlines immigration adjudication while *Silva-Trevino* imposes a significant additional burden on an already strained immigration court system.**

The American Bar Association has long believed that promoting due process requires a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient, and that has sufficient resources to carry out its functions in a timely manner.<sup>4</sup> The categorical approach streamlines the complex immigration system by providing immigration adjudicators with a mechanism to determine the consequences of a criminal conviction by reference only to the criminal statute and, in some cases, the criminal court record of conviction. Under the categorical approach, such determinations are routinely made at initial master calendar hearings without the taking of any testimony or introduction of contested evidence. In contrast, the new *Silva-Trevino* approach will, in many cases, require full-fledged trials on the threshold issue of removability during individual calendar hearings, which are often conducted in small segments and punctuated by significant continuances, thereby causing substantial delays in resolution of the removal proceedings. The existing backlog in immigration courts is well documented, and this novel approach will considerably increase the workload and backlogs of the already overburdened and undermanned courts.<sup>5</sup>

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<sup>3</sup> See *Huge Increase in Transfers of ICE Detainees*, Transactional Records Access Clearinghouse (Dec. 2, 2009), available at, <http://trac.syr.edu/immigration/reports/220/> (finding that “ICE transports detainees from their point of initial ICE detention to many different locations — often over long distances and frequently to remote locations”); see also *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, Department of Homeland Security, Office of the Inspector General (Dec. 2, 2009), available at, [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-13\\_Nov09.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-13_Nov09.pdf).

<sup>4</sup> See *Administration of U.S. Immigration Laws*, American Bar Association policy 06M107D (adopted Feb. 2006).

<sup>5</sup> See generally, *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, Transactional Records Access Clearinghouse (June 18, 2009); Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623 (Nov. 2009); Stuart L. Lustig, *Inside the Judges’ Chambers: Narrative Responses from the Nat’l Ass’n of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008).

The Honorable Eric H. Holder Jr.  
January 22, 2010  
Page Three

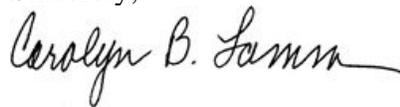
**The categorical approach provides uniformity and predictability while *Silva-Trevino* creates uncertain consequences that will disrupt plea negotiation and the settled expectations of criminal defendants, courts, and prosecutors.**

The categorical approach promotes the fair administration of justice by guaranteeing the uniform application of law, insofar as immigrants convicted under identical provisions of criminal law face the same set of immigration consequences. This uniformity, in turn, allows the criminal justice system to operate efficiently as immigrant defendants can, with the assistance of counsel, predict the immigration consequences of negotiated dispositions. Under the *Silva-Trevino* scheme, defense attorneys are unable to reliably predict the immigration consequences of contemplated dispositions. The resulting uncertainty will make fewer immigrant defendants willing to enter into plea agreements, thereby increasing the number of trials and imposing a substantial new burden on the criminal justice system as a whole. Moreover, by applying the novel *Silva-Trevino* framework retroactively to plea agreements entered into in reliance upon the firmly established categorical approach, the new scheme disrupts the settled expectations of defendants, courts, and prosecutors who entered into or approved plea agreements in reliance upon the categorical approach.

The categorical approach is critical to preserving fair play in immigration adjudications and in safeguarding transparency and due process in our legal system. Maintaining the categorical approach will promote efficiency, uniformity, and predictability in the immigration system, and improve the equitable administration of justice. We urge you to withdraw the former Attorney General opinion in *Silva-Trevino* and restore the categorical approach for determining the immigration consequences of criminal convictions.

Thank you for your time and consideration.

Sincerely,



Carolyn B. Lamm

cc: Tony West, Assistant Attorney General  
Juan Osuna, Deputy Assistant Attorney General  
Tali Farhadian, Counsel to the Attorney General