

**Carolyn B. Lamm**  
President

**AMERICAN BAR ASSOCIATION**

321 North Clark Street  
Chicago, IL 60654-7598  
(312) 988-5109  
Fax: (312) 988-5100  
E-mail: abapresident@abanet.org

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

---

<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).

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>

---

<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

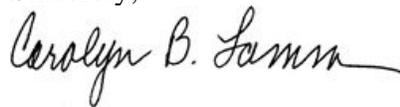
**The categorical approach provides uniformity and predictability while *Silva-Trevino* creates uncertain consequences that will disrupt plea negotiation and the settled expectations of criminal defendants, courts, and prosecutors.**

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

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**

**AUGUST 3-4, 2009**

**RECOMMENDATION**

RESOLVED, That the American Bar Association supports legislation, policies, and practices that preserve the categorical approach used to determine the immigration consequences of past criminal convictions, under which the adjudicator relies on the criminal statute and the record of conviction rather than conducting a new factual inquiry into the basis for the conviction.

FURTHER RESOLVED, That the American Bar Association urges U.S. immigration authorities to interpret immigration laws in accordance with the categorical approach.

## REPORT

### Preserving the Categorical Approach in Immigration Adjudications

#### I. Introduction

For nearly a century, immigration adjudicators have used the categorical approach for determining the immigration consequences of criminal convictions.<sup>6</sup> Under the categorical approach, immigration adjudicators assess a criminal conviction as it is defined by the relevant criminal statute and, where necessary, limited by the record of conviction.<sup>7</sup> In other words, the categorical approach permits immigration adjudicators to rely on the legal interpretation of the criminal statute and what was determined in the criminal court proceeding, thereby avoiding any relitigation of the underlying conduct. The categorical approach promotes uniform treatment of convictions, fairness, and due process, as noncitizens convicted under identical provisions of criminal law will face the same set of immigration consequences and will not be forced to defend themselves against old criminal allegations without the due process protections of a criminal proceeding. The categorical approach is particularly important given the potential severity of the immigration consequences of criminal convictions, which may impact a noncitizen's eligibility for relief from removal,<sup>8</sup> naturalization,<sup>9</sup> and asylum,<sup>10</sup> as well as determine whether a noncitizen is subject to mandatory detention<sup>11</sup> and administrative removal.<sup>12</sup>

In a series of recent cases, U.S. immigration officials have sought to curtail the use of the categorical approach. In *Ali v. Mukasey*,<sup>13</sup> the United States Court of Appeals for the Seventh Circuit concluded that immigration judges may look outside the record of conviction to determine whether a conviction can be classified as a "crime involving moral turpitude." Former Attorney General Mukasey then adopted this approach in *Matter of Silva-Trevino*.<sup>14</sup> The Board of Immigration Appeals has also cut back on the categorical approach in cases involving

---

<sup>6</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); Rebecca Sharpless, *Towards a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979, 994-995 (July 2008) (describing case law from 1914 onwards setting out categorical approach for immigration adjudications).

<sup>7</sup> See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-87 (2007) (applying *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005)); *Matter of Pichardo-Sufren*, 21 I & N Dec. 330, 334 (BIA 1996).

<sup>8</sup> 8 U.S.C. § 1229b.

<sup>9</sup> 8 U.S.C. § 1427(d), § 1101(f)(8).

<sup>10</sup> 8 U.S.C. § 1158(b)(2)(A)(ii), § 1158(b)(2)(B)(i).

<sup>11</sup> 8 U.S.C. § 1226(c).

<sup>12</sup> 8 U.S.C. 1228(a)-(b). This section of the INA gives the government sweeping power to administratively remove immigrants who may have been convicted of an aggravated felony. Immigrants who are administratively removed cannot apply for adjustment of status or cancellation. Abandoning the categorical approach would expand the government's power to use administrative removal in an unpredictable and unreviewable manner, to the detriment of immigrants' due process rights.

<sup>13</sup> 521 F.3d 737 (7th Cir. 2008), *petition for cert. pending*, No. 08-552 (filed Oct. 23, 2008).

<sup>14</sup> 24 I & N Dec. 687 (A.G. 2008). Former Attorney General Mukasey denied rehearing and an opportunity for briefing just days before the change in administration. See Office of the Attorney General, Order No. 3034-2009, *Matter of Silva-Trevino* (dated Jan. 19, 2009, faxed to counsel Jan. 22, 2009).

classification of crimes as meeting the “aggravated felony” ground for deportation.<sup>15</sup> Each of these decisions provides that there can be a new adjudication of the facts beyond what was established in the criminal case to determine the immigration classification of the offense. Because immigration proceedings can come long after the criminal conviction and lack the procedural protections of criminal cases, these holdings make it very difficult for an immigrant to mount a defense to removal or seek discretionary relief. They also disrupt the expectations of prosecutors, judges and defense lawyers as to the immigration consequences of a plea in a criminal case.

The American Bar Association (ABA) has long voiced its concern about the expansive immigration consequences of criminal convictions and the lack of due process protections governing these determinations by immigration officials. In 2004, the ABA released *American Justice Through Immigrants’ Eyes*, a report by the ABA Commission on Immigration and the Leadership Conference on Civil Rights and Education Fund, which criticized the 1996 amendments to the immigration laws for, among other things, adding new grounds of removability to the law while simultaneously eliminating relief for noncitizens, including lawful permanent residents, refugees/asylees, and others.<sup>16</sup> The report also highlighted the shift of judicial authority to low-level immigration officers, who make countless assessments of the impact of noncitizens’ criminal convictions each year.<sup>17</sup> An erosion of the categorical approach would mean that increasing numbers of noncitizens with criminal convictions would face immigration consequences that are neither uniform nor predictable.

This recommendation would affirm the important role of the categorical approach in achieving uniform and fair results in immigration proceedings.

## **II. Relevant ABA Policies**

The need for due process, uniformity, predictability, and fairness in immigration adjudications is a core concern of the ABA. Promoting these results through the fair and uniform assessment of criminal convictions in immigration adjudications advances the rule of law (Goal IV) by providing for a fair legal process. The ABA has previously addressed similar issues in a series of recommendations addressing the immigration consequences of criminal convictions and fairness in the administrative immigration process:

---

<sup>15</sup>See *Matter of Babaisakov*, 24 I & N Dec. 306 (BIA 2007). The Supreme Court is currently considering a case involving the same classification as that at issue in *Babaisakov*. See *Nijhawan v. Holder*, No. 08-495 (argued April 27, 2009). Regardless of the outcome in *Nijhawan*, the underlying question of the role of the categorical approach for other grounds of deportability, including crimes involving moral turpitude, will remain. Furthermore, there will be a heightened need to defend the categorical approach within the agency, the courts and Congress if the Supreme Court upholds the lower court’s partial retreat from the categorical approach in the context of the specific deportability provision at issue in *Nijhawan*.

<sup>16</sup> American Bar Association, Commission on Immigration, *American Justice Through Immigrants’ Eyes* (2004), available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeyes.pdf> [hereinafter *American Justice Through Immigrants’ Eyes*].

<sup>17</sup> *American Justice Through Immigrants’ Eyes* at 17-32.

- In 2006, the House of Delegates adopted a policy on deportation or removal of noncitizens based upon conviction of a crime, calling for “immigration authorities to avoid interpretations of the immigration laws that extend the reach of the ‘aggravated felony’ mandatory deportation ground” and supporting other policies that would restore discretion where a person would otherwise be subject to removal. (06M300)
- In 2006, the House adopted a policy on due process and judicial review, calling for an “administrative agency structure that will provide all noncitizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws.” (06M107C)
- In 2006, the House adopted a policy on the administration of U.S. immigration laws, calling for “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.” (06M107D)

These policies recognize the crucial importance of uniformity, fairness, and due process for immigrants facing removal and other negative immigration consequences due to criminal convictions. However, they do not directly address the erosion of the traditional categorical approach in assessing criminal convictions in immigration adjudications.

### **III. The Issue**

Individuals throughout the immigration system, including immigration judges, agency officers, and immigration and criminal defense practitioners, utilize the categorical approach when making important decisions. Determinations of whether a past conviction is categorized as a removable offense—for example, a “crime involving moral turpitude” or an “aggravated felony”—will affect an individual’s opportunities for a formal, in-person hearing, relief from removal, asylum, and release from detention.

#### **A. The Role of the Categorical Approach in Agency Adjudication**

In removal proceedings, immigration judges are routinely called on to make determinations about how to classify a past conviction. The classification affects deportability,<sup>18</sup> eligibility for relief from removal,<sup>19</sup> the availability of judicial review,<sup>20</sup> and eligibility for an individualized assessment of the suitability of release on bond.<sup>21</sup>

While immigration judges are key decision makers in the immigration system, many other adjudicators are also charged with making decisions about how to classify a past conviction for immigration purposes. Department of Homeland Security (“DHS”) officers that must classify a past conviction include naturalization officers, asylum officers, deportation officers,

---

<sup>18</sup> 8 U.S.C. § 1227(a)(2).

<sup>19</sup> *See, e.g.*, 8 U.S.C. §§ 1158, 1229b, 1229c, 1254a, 1245.

<sup>20</sup> *See, e.g.*, 8 U.S.C. § 1252(a)(2)(C).

<sup>21</sup> 8 U.S.C. § 1226(c).

and detention officers. Naturalization officers, for example, cannot grant naturalization to a noncitizen who has been convicted of an “aggravated felony” after November 29, 1990.<sup>22</sup> These officers must therefore determine how to classify a past conviction. If they conclude that the conviction is not an aggravated felony, they may proceed to consider whether the person has “good moral character” and should be awarded naturalization.<sup>23</sup> The categorical approach to classifying offenses makes the first step straightforward and predictable, while preserving the ability of naturalization officers to make the determination of good moral character based on all of the relevant facts. Similarly, when an immigrant is detained after release from serving a criminal sentence, certain criminal classifications require civil immigration detention.<sup>24</sup> For those who are not subject to mandatory detention, deportation officers have discretion in setting an appropriate bond based on the facts of the case.<sup>25</sup> The categorical inquiry makes the question of whether a conviction triggers mandatory detention simpler to answer while preserving discretion to determine an appropriate bond for those who are not disqualified. Other examples include adjudicators of adjustment applications who must decide whether a past conviction disqualifies the individual from adjustment of status to lawful permanent residence;<sup>26</sup> deportation officers who determine whether they can bypass the immigration courts because the classification of a past offense allows for administrative removal proceedings where they will not be allowed to see an immigration judge or seek relief;<sup>27</sup> and asylum officers who determine whether the individual is disqualified from asylum.<sup>28</sup>

Historically, the categorical approach has provided a transparent and streamlined way for adjudicators to make legal decisions—including decisions regarding eligibility for adjustment, relief from removal, naturalization, and asylum—while leaving the adjudicators free to exercise their judgment on discretionary and factual issues—such as whether to grant adjustment, award relief from removal, find good moral character, or award asylum. The categorical approach has achieved this result by limiting classifications of disqualifying convictions to an assessment of the statute of conviction, and, where appropriate, the record of the conviction.

## **B. The Role of the Categorical Approach in Access to Judicial Review**

In addition to its role in agency adjudications, the categorical approach has provided a transparent and predictable methodology for determining access to judicial review of removal orders. Under current law, the courts of appeals’ jurisdiction to review a removal order depends on the classification of criminal convictions. If, for example, a noncitizen has been convicted of an aggravated felony, there is no judicial review, except for legal questions and constitutional claims.<sup>29</sup> The categorical approach creates a predictable and transparent methodology for determining whether the courts have jurisdiction over the full range of issues presented in a petition for review.

---

<sup>22</sup> 8 U.S.C. § 1101(f)(8).

<sup>23</sup> 8 U.S.C. § 1427(a).

<sup>24</sup> 8 U.S.C. § 1226(c).

<sup>25</sup> 8 U.S.C. § 1226(a).

<sup>26</sup> 8 U.S.C. §§ 1182(a)(2), 1182(a)(h).

<sup>27</sup> 8 U.S.C. § 1228(b).

<sup>28</sup> 8 U.S.C. § 1158(b)(2)(B)(i).

<sup>29</sup> 8 U.S.C. § 1252(a)(2)(C).

### **C. The Role of the Categorical Approach in Promoting Predictability**

Courts, prosecutors, and criminal defense attorneys rely on the categorical approach when determining an appropriate outcome in a criminal case. The categorical approach provides predictability about the immigration consequences of a plea agreement. As a result, defense lawyers can advise their clients about the full ramifications of a plea, courts can assure that the defendant is aware of the consequences, and prosecutors can pursue appropriate and proportional punishment. Indeed, several states mandate some form of immigration warning or advisal for defendants in criminal court.<sup>30</sup>

Similarly, the categorical approach plays an essential role for immigration lawyers in advising their clients. With this approach, practitioners are better able to counsel their clients on their available options for relief from removal or adjustment of status and the risks associated with travel or applications for adjustment. An attorney who knows with relative certainty whether a particular offense qualifies as an aggravated felony or crime involving moral turpitude will be better able to predict the immigration consequences. Such determinations, for example, allow immigration attorneys to advise victims of abuse whether it is wise to file petition under the Violence Against Women Act or other affirmative forms of relief.<sup>31</sup> Departing from the categorical approach will lessen practitioners' ability to foresee the consequences of a given conviction and will decrease their capacity to counsel their clients effectively.

### **D. Consequences of Departures from the Categorical Approach**

Departing from the categorical approach would turn immigration hearings and other agency adjudications into mini-trials about an immigrant's past conviction, which would result in inefficiency and unfairness. When adjudicators depart from the categorical approach, they rely on the fact of the conviction to establish the criminal violation. But then they look beyond the record of conviction to try to find out what happened in a past crime and classify the conviction on the basis of this new fact finding process rather than the original record. In this one-way relitigation of the past criminal conviction, the noncitizen is at a serious disadvantage. The evidence may be very old, the witnesses may be long gone, and there may be no practical way to obtain the relevant evidence. The immigrant is left without a practical way to mount a defense to removal or seek discretionary relief.

---

<sup>30</sup> See, e.g., Cal. Penal Code §1016.5(a); Conn. Gen. Stat. § 54-1j(a); D.C. Code Ann. § 16-713(a); Fla. R. Crim. P. Rule 3.172(c)(8); Ga. Code Ann. §17-7-93(c); 725 Ill. Comp. Stat. Ann. 5/113-8; Me. R. Crim. P. Rule 11(h); Md. R. Ann. § 4-242(e); Mass. Ann. Laws ch. 278 § 29D; Minn. R. Crim. P. 15.01; Mont. Code Ann. § 46-12-210(1)(f); Neb. Rev. Stat. § 29-1819.02; N.M.R.A., Form 9-406; N.Y. Crim. Proc. Law § 220.50(7); N.C. Gen. Stat. § 15A-1022(a)(7); Ohio Rev. Code Ann. § 2943.031(A); Or. Rev. Stat. § 135.385(2)(d); R.I. Gen. Laws § 12-12-22(a)-(b); Tex. Code of Crim. Proc. Art. § 26.13(a)(4); 13 V. S. A. § 6565(c); Wash. Rev. Code Ann. § 10.40.200(2); Wis. Stat. Ann. § 971.08(1)(c).

<sup>31</sup> Center for Battered Women's Legal Services, Policy Brief: The Role of the Categorical Approach in Assisting Victims of Domestic Violence and Other Crimes Apply for U Nonimmigrant Status and VAWA Self-Petitions (2009), available at [http://www.immigrantdefenseproject.org/docs/09\\_CenterBatteredWomen%27sLegalServicesPolicyBrief.pdf](http://www.immigrantdefenseproject.org/docs/09_CenterBatteredWomen%27sLegalServicesPolicyBrief.pdf).

- **Departures from the categorical approach leave noncitizens to defend against criminal charges without the due process protections guaranteed in the criminal courts.**

Facts found in criminal proceedings as part of a criminal conviction are different from those that might be found in immigration proceedings because immigration courts are not governed by formal rules of evidence and they do not conform with basic procedural protections guaranteed in the criminal context. Even in immigration courts, which employ more formal procedures than other immigration adjudications outside the courtroom setting, litigation of the underlying facts of past convictions raises serious fairness concerns. First, evidentiary standards in immigration proceedings are less rigorous than those found in criminal courts, as immigration courts are not governed by formal rules of evidence.<sup>32</sup> Second, constitutional and procedural protections, such as the right to counsel and the right to jury trial, do not apply.<sup>33</sup> Nor do the Fourth Amendment exclusionary rule, or the Fifth Amendment privilege against self-incrimination, apply with full force.<sup>34</sup> Third, though the INA permits limited discovery, little discovery is granted in practice, and many immigrants face difficulties and delays obtaining information from the government.<sup>35</sup> These structural differences between criminal and immigration courts counsel against according facts found in immigration courts the same weight as “convicted” conduct found in criminal proceedings. These differences are amplified in other immigration adjudicative contexts where the rules are even more lax and determinations are often made by low-level immigration officers.

- **Departures from the categorical approach that allow consideration of unproven pieces of information would be especially problematic in cases where the conviction is old.**

Given the long time span between many convictions and removal proceedings, witnesses who would otherwise be able to present factual information may be unavailable or forgetful. Documents from long ago likewise may be difficult to access. In order to determine removability or eligibility for relief from removal, an immigration adjudicator may need to find facts never originally found during the criminal trial. Reinvestigating facts of an offense from so long ago is profoundly unfair to immigrants in removal proceedings and a procedural nightmare for the adjudicators. Such reinvestigation is even more problematic in more informal forms of agency adjudication, such as interviews for adjustment, naturalization, or asylum.

---

<sup>32</sup> See, e.g., *Duad v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 331289 at \*3-4 (7th Cir. Feb. 12, 2009); *Solis v. Mukasey*, 515 F.3d 832, 835-36 (8th Cir. 2008); *Vatyan v. Mukasey*, 508 F.3d 1179, 1185 (9th Cir. 2007); *Yongo v. INS*, 355 F.3d 27, 30-31 (1st Cir. 2004).

<sup>33</sup> See 8 U.S.C. § 1229a(b)(4)(A).

<sup>34</sup> See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (finding that the exclusionary rule does not apply unless egregious violation).

<sup>35</sup> See C. Gordon et al., *Immigration Law & Procedure* § 3.07 (2008); Department of Homeland Security, 2008 Annual Freedom of Information Act Report to the Attorney General of the United States 12, 20 (2008) (*listing backlogs in FOIA requests including the length of time for a response, and the number of backlogged requests*) available at [http://www.dhs.gov/xlibrary/assets/foia/privacy\\_rpt\\_foia\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2008.pdf).

- **Given the practical realities of immigration proceedings, many immigrants would be unable to mount a proper defense to the reopened investigation.**

Immigrants often have no access to legal counsel in their removal proceedings, and would be unable to defend themselves effectively in a relitigation of the facts of their conviction. Additionally, many immigrants are detained pending the finality of their immigration cases, often far from their families and without connections to legal counsel or other resources.<sup>36</sup> In some cases immigrants are not present at their own hearings, rendering them unable to challenge any evidence brought against them concerning their prior conviction.<sup>37</sup>

- **A departure from the categorical approach in the immigration system would upset the expectations of courts, prosecutors, defense attorneys and defendants of the ramifications of a particular plea agreement.**

Departure from the categorical approach in the immigration system would interfere with longstanding custom and practice in the criminal justice system by upending parties' expectations and thus inhibiting the efficient disposition of cases by plea agreement. Many defendants consider the immigration consequences of a particular offense when deciding whether to plead guilty or go to trial. The Supreme Court expressed its concern with disrupting a defendant's expectations of the consequences of a plea, stating that "if a guilty plea to a lesser ... offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [a more serious charge]."<sup>38</sup> Not only would such disruption be unfair to individual defendants, jeopardizing the predictability of the collateral consequences of pleas could increase the trial burden on the criminal justice system as a whole.

- **Departing from the categorical approach would increase the workload of already overburdened and underequipped immigration judges and officials.**

Increasing the fact-finding responsibilities of immigration judges and officials is imprudent given the evidence that such decision makers are already overwhelmed with their current responsibilities. Immigration judges' caseloads can be onerous even with the time-saving heuristic of the categorical approach. Non-judicial immigration officers lack the legal expertise that such individualized determinations would require. Putting additional fact-finding responsibilities on immigration judges and agency officials would not promote the ABA goal of "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>39</sup>

---

<sup>36</sup> Approximately 440,000 people will be detained in immigrant detention facilities in 2009. Detention Watch Network, About the U.S. Detention and Deportation System, <http://www.detentionwatchnetwork.org/aboutdetention> (last visited May. 9, 2009).

<sup>37</sup> U.S. Dept. of Justice, Executive Office of Immigration Review, Fact Sheet: Types of Immigration Court Proceedings and Removal Hearing Process 3 (July 28, 2004) available at <http://www.usdoj.gov/eoir/press/04/ImmigrationProceedingsFactSheet2004.pdf> (noting that an immigrant may be ordered removed *in absentia*).

<sup>38</sup> *Taylor v. U.S.*, 495 U.S. 575, 601-2 (1990).

<sup>39</sup> American Bar Association policy, Administration of U.S. Immigration Laws (06M107D), adopted February 2006.

#### **IV. Conclusion**

In its reports and policy recommendations, the ABA has consistently recognized the important of transparency and due process protections in immigration determinations. This recommendation builds on past ABA policies by protecting immigrants from having to relitigate the circumstances of a past conviction in new proceedings that lack the procedural protections of the criminal process.

This recommendation recognizes the central role of the categorical approach in preserving fair play in immigration adjudications and in providing a consistent basis on which to classify past convictions for immigration purposes. The recommendation would protect the rights of immigrants, provide for efficiency in the immigration system, and improve the administration of justice.

For all of these reasons, we urge the House to adopt this recommendation.

Respectfully submitted,

Mark D. Agrast  
Chair  
Commission on Immigration

Anthony Joseph  
Chair  
Criminal Justice Section

August 2009