Preliminary Advisory on *Nijhawan v. Holder*

Kathy Brady, Immigrant Legal Resource Center

This is a preliminary advisory on the Supreme Court's decision in *Nijhawan v. Holder*, 557 U.S.__ (2009), 2009 U.S. LEXIS 4320, 2009 WL 1650187 (June 15, 2009). The advisory will (1) summarize the opinion, (2) provide some practice tips for criminal and immigration counsel, and (3) highlight one of several issues to be considered under the opinion, relating to the categorical approach and the "missing element" rule. Note that a summary of the categorical approach under *Nijhawan* and other cases begins at p. 11.

While *Nijhawan* deals only with the aggravated felony definition, this advisory will explore the potential effect if courts apply the *Nijhawan* approach to *selected grounds of inadmissibility and deportability.*

Please see also Kesselbrenner and Vargas, "The Impact of *Nijhawan v. Holder* on Application of the Categorical Approach to Aggravated Felony Determinations," which focuses on aggravated felony determinations under *Nijhawan*. Go to www.nationalimmigrationproject.org.

1. Summary of Nijhawan v. Holder

In *Nijhawan v. Holder* (hereafter "*Nijhawan*") the Supreme Court addressed how the categorical approach applies in immigration proceedings. Immigration judges and other federal authorities use the categorical approach to identify the elements of an offense that was the subject of a prior conviction, in order to determine whether the conviction was of an aggravated felony, crime involving moral turpitude, crime of domestic violence, etc.

A note on terminology may be useful for Ninth Circuit practitioners. The Supreme Court has held that a reviewing court may "go beyond the mere fact of conviction" and consult the individual record of conviction "in a narrow range of cases where a jury was actually required to find all the elements of" the generic crime." *Taylor v. United States*, 495 U.S. 575, 602 (1990); see also *Shepard v. United States*, 544 U.S. 13 (2005). Strict rules apply as to what kinds of documents are sufficiently trustworthy to be used in this approach. The Ninth Circuit refers to this review of the record as the "modified" categorical approach, while some other circuits, and the Supreme Court in *Nijhawan*, do not use that term and refer to the entire process as the "categorical approach." This advisory will adopt that language. Therefore the term the "categorical approach" will refer both to the analysis of the criminal statute, and to the rules governing when and how the court may proceed to review the individual's conviction record.

Mr. Nijhawan, the petitioner, was found guilty by a jury of conspiring to commit fraud offenses and money laundering under 18 USC §§ 371, 1341, 1343, 1344, 1956(h). Because none of these statutes requires a finding of a victim loss, the jury made no finding about the amount of the loss. At sentencing the petitioner stipulated that the loss exceeded $100 million. The court required restitution of $683 million. *Nijhawan* at *2.

The government charged the petitioner with being deportable based on conviction of an aggravated felony, as an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." INA § 101(a)(43)(M)(i), 8 USC § 1101(a)(43)(M)(i) ("subparagraph (M)(i)").

The petitioner argued that subparagraph (M)(i) describes a fraud offense that contains *as an element* a loss to the victim/s exceeding $10,000. He asserted that because the criminal statutes under which he was convicted lacked this amount of financial loss as an element, as a matter of law his convictions could not be found to come within subparagraph (M)(i). In the alternative, he argued that even if his convictions potentially could come within (M)(i), fairness dictates that only the strictly limited evidence acceptable under the categorical approach could be consulted to determine the amount of loss to the victim/s.

The Supreme Court first examined the aggravated felony statute and determined that its provisions can be divided into two groups. Some provisions describe "generic" crimes, which require interpretation under the categorical approach, while others describe the specific circumstances surrounding a particular crime, which do not require such an approach.

> The interpretive difficulty before us reflects the linguistic fact that in ordinary speech words such as "crime," "felony, "offense," and the like sometimes refer to a generic crime, say, the crime of fraud or theft in general, and sometimes refer to the specific acts in which an offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed last month. See *Chambers* v. *United States*, 555 U. S. ___, ___ (2009) (slip op., at 3). The question here, as we have said, is whether the italicized statutory words "offense that involves fraud or deceit *in which the loss to the . . . victims exceeds $10,000*" should be interpreted in the first sense (which we shall call "categorical"), *i.e.*, as referring to a generic crime, or in the second sense (which we shall call "circumstance specific"), as referring to the specific way in which an offender committed the crime on a specific occasion. If the first, we must look to the statute defining the offense to determine whether it has an appropriate monetary threshold; if the second, we must look to the facts and circumstances underlying an offender's conviction.
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> *Nijhawan* at *3.

The court stated that if the $10,000 loss *were* held part of the "generic" offense described in (M)(i), then a noncitizen's conviction would have to be under a criminal statute that *required* at least that amount of loss as an element of the offense. *Id.* at *1, 3, 8-9. This aspect of the case, regarding when the statute of conviction must set out all of the elements of a generic offense, is discussed further at Part 3, *infra.*

The court concluded that the $10,000 loss is not an element of the "generic" fraud offense in (M)(i), but rather is a description of circumstances in the particular crime. In support of this, the court noted that the phrase "in which" the loss exceeds $10,000 indicates a description of a particular crime (as does the same language in subparagraph (M)(ii)[1]). *Id.* at *8. In addition, the Court found that the fact that there are very few federal or state statutes that have a monetary loss of $10,000 as an element indicates that Congress did not intend the $10,000 loss to be treated as a generic offense, because if it were, the subparagraph would be left "with little, if any, meaningful application." *Id.* at *9-10. The Court concluded, "Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i.e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."

Because the loss exceeding $10,000 is established using a "circumstance specific" approach, the statute of conviction does not have to have an element of at least a $10,000 loss for a the conviction to come within subparagraph (M)(i). *Id.* at *10. Furthermore, in proving the amount of loss to the victim, the government is not restricted to using evidence acceptable under the categorical approach. The court found the removal process could be sufficiently fair without this protection. *Id.* at *11-12. Among other factors,[2] the Court took note of the government's concession that the $10,000 loss must be based on the count/s of conviction only.

> And, as the Government points out, the "loss" must "be tied to the specific counts covered by the conviction." Brief for Respondent 44; see, *e.g.*, *Alaka* v. *Attorney General of United States*, 456 F. 3d 88, 107 (CA3 2006) (loss amount must be tethered to offense of conviction; amount cannot be based on acquitted or dismissed counts or general conduct); *Knutsen* v. *Gonzales*, 429 F. 3d 733, 739–740 (CA7 2005) (same).
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> *Nijhawan* at *12.

[1] The court noted that "in which" is used in the same manner in subparagraph (M)(ii), relating to tax evasion under 16 USC § 7201 "in which the revenue loss to the Government exceeds $10,000." The court stated, "There is no offense 'described in section 7201 of title 26' that has a specific loss amount as an element. Again, unless the 'revenue loss' language calls for circumstance-specific application, the tax-evasion provision would be pointless." *Id.* at *8. The Court stated that the fact that the phrase "in which" clearly signaled a circumstance specific requirement in (M)(ii) supported its finding that the same phrase signaled the same construction in (M)(i).

[2] In sum, the Court states that "the statute foresees the use of fundamentally fair procedures," and the "evidence that the Government offers must meet a 'clear and convincing' standard." In the context of proving the loss to the victim/s exceeding $10,000, the loss must "be tied to the specific counts covered by the conviction," as opposed to "based on acquitted or dismissed counts or general conduct." "[T]he 'sole purpose' of the 'aggravated felony' inquiry 'is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.'" "These considerations, taken together, mean that petitioner and those in similar circumstances have at least one and possibly two opportunities to contest the amount of loss, the first at the earlier sentencing and the second at the deportation hearing itself….. [U]ncertainties caused by the passage of time are likely to count in the alien's favor." *Nijhawan* at *11-12. While *Nijhawan* includes a citation to *Matter of Babaisakov*, 24 I. & N. Dec. 306 (2007) -- where in a $10,000 case the BIA stated that a wide range of evidence is permitted -- the citation was to a conservative section of the opinion regarding the limits of information gained at sentencing. See further discussion in Part d.

Note that the Court did not endorse use of the wide range of evidence permitted by the BIA in *Matter of Babaisakov*, 24 I. & N. Dec. 306, 311-12 (2007) and *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007). The court cited *Babaisakov*, but only to note that "the Board of Immigration Appeals, too, has recognized that immigration judges must assess findings made at sentencing 'with an eye to what losses are covered and to the burden of proof employed.'" *Nijhawan* at *12. Counsel should argue that the court's discussion of fairness requirements in proving circumstances specific to the crime describes a higher standard than that employed by the BIA in *Babaisakov* and *Gertsenshteyn*, which includes "any evidence, otherwise admissible in removal proceedings, including witness testimony, bearing on the loss to the victim in an aggravated felony case involving section 101(a)(43)(M)(i) of the Act." See discussion in Part 2.

2. Practice Tips for Immigration and Criminal Defense Counsel

While some of these practice tips are phrased as advice to criminal defense counsel, they also contain information on arguments for immigration counsel defending respondents in removal proceedings.

Nijhawan overrules some beneficial Ninth Circuit case law, such as *Kawashima v. Mukasey*, to the extent that cases held that the $10,000 loss must be an element of the offense, or that only evidence permitted under the categorical approach may be used to establish the amount of loss. However, important evidentiary protections remain. See discussion at Part d, below.

a. Use great caution in dealing with a charge or conviction of a domestic violence offense

A noncitizen is deportable for conviction of a "crime of domestic violence" if he or she is convicted of a "crime of violence" as defined under 18 USC § 16 against a victim with whom he shares a delineated type of domestic relationship.[3] *Nijhawan* made no statements about this or any other deportation ground, apart from aggravated felonies, and did not state that its analysis extends to the domestic violence deportation ground. However, if the *Nijhawan*'s formulation is extended to the grounds of inadmissibility and deportability, the government will argue that the definition of a "crime of domestic violence" includes a generic offense (a crime of violence under 18 USC § 16) plus a description of specific circumstances (the domestic relationship). A successful argument on that point would permit the government to use evidence beyond what is permitted under the categorical analysis to prove the domestic relationship.

Currently the Ninth Circuit does not require the domestic relationship to be an element of the violent offense, but it does require the government to prove the relationship by the kind of documents permitted under the categorical approach. See, e.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004), *Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1058 (9th Cir. 2006). The government may argue that these opinions were partially overturned by *Nijhawan.*[4]

[3] INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i) includes in the bases for deportability conviction of a "crime of violence" as defined under 18 USC § 16 "committed by" a defendant who has a certain domestic relationship with the victim, such as a current or former spouse, cohabitant living as a spouse, co-parent of a child, or other party protected under state domestic violence laws. INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

[4] Counsel should be prepared to distinguish a case brought in another criminal context, *United States v. Hayes*, 129 S.Ct. 1079 (2009). In considering a sentence enhancement based on a prior conviction of a similarly defined crime

Criminal defense counsel. To avoid putting a defendant through this difficult fight, criminal defense counsel should put all effort into arranging a plea to an offense that is not a "crime of violence" as defined in 18 USC § 16. In that is done, then even if a domestic relationship is proved the offense will not cause deportability as a "crime of domestic violence." For suggestions on alternate pleas to offenses that do not constitute a "crime of violence," see Charts of state offenses at www.ilrc.org/criminal.php (California and Arizona) or www.defendingimmigrants.org (those plus several other states) and see "Note: Domestic Violence" accompanying the California and Arizona charts.

If a plea to a crime of violence cannot be avoided, other strong defense strategies include pleading to a crime against property rather than against a person, or to an offense committed against a victim who does not have the required domestic relationship, such as the new boyfriend or a neighbor. If none of this is possible and the defendant will plead to a crime of violence where there is a domestic relationship, criminal defense counsel conservatively must warn the defendant of the risk, and do what is possible to distance information about the domestic relationship from the count of conviction.

Immigration counsel. If the respondent is convicted of a "crime of violence" and in fact had the required domestic relationship with the victim, the government may assert that it may prove the domestic relationship with evidence beyond that permitted in a categorical approach, under *Nijhawan.* Among other arguments, immigration counsel should assert that *Nijhawan* maintains important limitations on evidence even under the circumstance specific approach. These are discussed in detail in Part d, *infra.* For example, counsel should argue that testimony before an immigration judge, evidence that is not tied to the particular count of conviction in the original criminal proceedings, and weak or inconclusive evidence is not permitted as proof of the domestic relationship, under a circumstance-specific approach.

b. Plead to a theft rather than a fraud offense if the loss to the victim will exceed $10,000

If a noncitizen defendant is charged with an offense that involves fraud *or deceit* (remember, deceit may be broadly defined) and the loss was over $10,000, the safest option is to plead to an offense that does not involve fraud or deceit at all. That way, even if the $10,000 is proved, the offense will not be an aggravated felony under subparagraph (M)(i).

Theft – meaning a taking without consent -- has been held to be distinct from fraud and deceit in this context, and it is likely that theft with an order of over $10,000 reimbursement cannot be held to be an aggravated felony under (M)(i).[5] However, if a *sentence of a year or*

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of domestic violence, the Supreme Court found that the domestic relationship does not need to be an element of the statutory offense, and evidence not permitted under the categorical can be used to prove the relationship.

[5] In *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005) the Fourth Circuit discussed the difference between the elements of fraud and theft, which is that "theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained." The BIA substantially adopted the distinction described in *Soliman* in *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008). The Board held that the two aggravated felonies — "fraud or deceit" and "theft offense" — "ordinarily involve distinct crimes," and refined the definition of theft offense to clarify that it involves a taking or exercise of control over property with intent to deprive *without consent*. The Board left open the precise meaning of "consent," and did not discount that certain offenses such as "theft by deception" might fit

more is imposed on a conviction for theft of property, the conviction is an aggravated felony under a separate provision.[6]

> **Example:** Maria was charged with credit card fraud of over $14,000. If she pleads generally to theft under Calif. P.C. § 484 and is sentenced to 364 days or less, she will not be convicted of an aggravated felony, even if she is ordered to pay restitution of $14,000. You must assume that she will have a conviction of a crime involving moral turpitude.
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> Note that she should not plead guilty to theft by fraud, embezzlement, or other offenses listed in P.C. § 484 that could be held to involve fraud or deceit. She should plead to a "straight" theft or to the entire language of § 484 in the disjunctive.

See further discussion in "Note: Theft, Fraud" in the *California Quick Reference Chart* at www.ilrc.org/criminal.php, and §§ 9.20, 9.35 in *Defending Immigrants in the Ninth Circuit* (2009, www.ilrc.org/criminal.php).

c. Create a written plea agreement stating that the aggregate loss to the victim/s for the counts of conviction was less than $10,000; distance repayment of loss from the conviction

The Supreme Court in *Nijhawan* held that the evidence that can be used to show the amount of loss is not limited to that permitted under the categorical analysis. However, if counsel is able to conclusively define the amount of loss to the victim in a plea agreement, the government may not be able to overcome this showing with other evidence. (Also, the Court's discussion of fairness may limit evidence that the government can use. See Part d, *infra*.)

Before *Nijhawan* was published, the Ninth Circuit held in *United States v. Chang* that in where a written guilty plea to a fraud offense states that the loss to the victim is less than $10,000, the federal conviction is not of an aggravated felony under subparagraph (M)(i), even if a restitution order requires the defendant to pay more than $10,000.[7] This comports with the statement in Nijhawan that the loss must "be tied to the specific counts covered by the conviction" and "cannot be based on acquitted or dismissed counts or general conduct." *Nijhawan* at *12.

Counsel must examine the relevant state law to see if and how restitution is set in relation to the victim's loss. The Ninth Circuit found that because California law requires the amount of restitution ordered to equal the amount of loss to the victim, a conviction for welfare fraud with a restitution order of $22,000 was an aggravated felony, at least where there was *no statement in*

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into both categories. Under this definition Cal. P.C. § 484(a) should be held divisible for theft and fraud, since it includes both offenses. As long as the record of conviction does not establish that fraud or deceit, as opposed to theft, was involved, a loss to the victim of $10,000 should not establish an aggravated felon under subparagraph (M)(i).

[6] INA § 101(a)(43)(G), 8 USC § 1101(a)(43)(G). For a discussion of strategies for meeting the incarceration demands of the judge and prosecution, while avoiding a sentence of a year or more to be imposed for any one count, see "Note: Sentence" in the California or Arizona Quick Reference Charts at www.ilrc.org/criminal.php.)

[7] *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002).

the plea agreement that the loss was $10,000 or less.[8] Had the plea agreement included this statement, it is possible that the result would have been different. In contrast, Washington state law does not require restitution to equal loss: restitution can equal up to "double the amount of the offender's gain or the victim's loss from the commission of the crime."[9]

Thus immigration counsel still may have a strong argument that the offense is not an aggravated felony if the defendant pleads to one or more counts of fraud coupled with a plea agreement/s that specifically state that the aggregate loss to the victim/s under these counts is a figure that is less than $10,000. Ideally, where law or local procedure permits, counsel also should create a record stating that the restitution paid to the victim based on the crime is this same amount, and additional payments are made in a separate civil venue or other manner that is distanced from the fraud offenses. But if that is not possible, it may be that the statement in the plea agreement/s alone will suffice.

> **Example:** Maria cannot plead to theft. Instead she pleads to two counts of fraud, stating in a written plea bargain that the loss to the victim in each count was $4,000, for a total of $8,000. The other charges are dropped. If possible, she should state that the restitution based on these convictions is $8,000. If needed to settle the case, she may make an arrangement to pay substantial additional funds to the victims or another party, as part of the criminal case or in a civil matter. If possible she should state that this additional payment is not based on the counts of conviction.
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> Even if all she can obtain is the written plea agreement stating a loss of less than $10,000 based on the crimes described in those counts, coupled with a restitution order for an amount higher than $10,000, this still permits immigration counsel to argue that the additional restitution should not be counted as the victim's loss under *Nijhawan* because it is tied to the dropped charges and not the count/s of conviction. This might be sufficient to win.

While criminal defense counsel should act conservatively, immigration counsel defending clients in removal proceedings should aggressively challenge extrinsic evidence offered by the government. See next section.

d. Kawashima v. Mukasey, Matter of Babaisakov, and permissible evidence to establish the loss exceeding $10,000 loss

This section primarily discusses defense strategies for immigration counsel in challenging evidence in a circumstance specific approach.

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[8] *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098-1100 (9th Cir. 2004).

[9] R.C.W. §9.94A.753(3). See also R.C.W. § 9A.20.030(1) where restitution as an alternative to a fine may not "exceed double the amount of the defendant's gain or victim's loss from the commission of a crime." Washington case law supports the proposition that restitution can exceed the actual loss. See *State v. Tindal*, 50 Wn. App. 401, 748 P.2d 695 (1988); also *State v. Edelman*, 97 Wn. App. 161, 166 (Wash. Ct. App., 1999). Under Washington state restitution statutes the general rule is that an order of restitution must be based on a causal relationship between the offense charged and proved by the state and the loss incurred by the victim of the crime. Restitution need be proven only by evidence sufficiently accurate to afford a reasonable basis for estimating the loss.

Kawashima v. Mukasey. *Nijhawan* overruled key aspects of beneficial Ninth Circuit case law. The Ninth Circuit had held that loss exceeding $10,000 must be an *element* of the fraud or tax fraud offense for a conviction to come within subparagraph (M)(i) or (ii). *Kawashima v. Mukasey ("Kawashima II")*, 530 F.3d 1111 (9th Cir. 2008). This will be held overruled by *Nijhawan's* finding that the $10,000 loss is evaluated under the "circumstance specific," not "categorical," approach and so does not need to be an element of the offense.

Prior to *Kawashima II*, the Ninth Circuit had held that while the $10,000 loss did not have to be an element of the fraud offense, still the amount of loss could only be proved by evidence permitted under the categorical approach. See, e.g., *Kawashima v. Gonzales (Kawashima I")*, 503 F.3d 997 (9th Cir. 2007); *Li v. Ashcroft*, 389 F. 3d 892 (9th Cir. 2004). These cases were superseded by *Kawashima II.* They would not be held good law under *Nijhawan* to the extent that they limit evidence to that permissible under the categorical analysis, per *Taylor* and *Shepard, supra*.

However, there still are significant limits on what evidence may be used in a circumstance specific approach. At least in Mrs. Kawashima's case, arguably the result of the case should remain unchanged, based on the standard for evidence set out in *Nijhawan*. In *Kawashima I, supra,* Mrs. Kawashima denied that there was a $10,000 loss to the victim, and the evidence that there was such a loss came only from her husband's conviction record. Arguably this is not evidence tied to her count of conviction, and cannot be used even in a circumstance specific inquiry. (In contrast, in *Nijhawan*, the evidence that was accepted was the petitioner's own stipulation to the amount of loss at the sentencing hearing for the fraud offense.) The next section discusses the Court's evidence requirements.

Arguing evidence questions in a circumstance specific case. In *Nijhawan* the court stated that "the statute foresees the use of fundamentally fair procedures." *Id.* at *11. The court listed some requirements for fair procedures:

- "The evidence that the Government offers must meet a 'clear and convincing' standard."

- The loss must "be tied to the specific counts covered by the conviction." The finding "cannot be based on acquitted or dismissed counts or general conduct."

- "[T]he 'sole purpose' of the 'aggravated felony' inquiry 'is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.'

- "These considerations, taken together, mean that petitioner and those in similar circumstances have at least one and possibly two opportunities to contest the amount of loss, the first at the earlier sentencing and the second at the deportation hearing itself….. [U]ncertainties caused by the passage of time are likely to count in the alien's favor."

  Id. at *11-12.

These criteria should exclude, for example, testimony at the immigration hearing and other evidence unconnected to what occurred at the criminal proceeding, as well as unreliable or

inconclusive evidence from the criminal proceeding, or evidence regarding losses that flowed from fraud activities that were charged but the charges dismissed.

Among the authorities cited in its description of a fair approach, the Court quoted *Matter of Babaisakov*, 24 I. & N. Dec. 306 (2007), a BIA opinion that set out a very wide range of usable evidence. However the citation was merely to note that "the Board of Immigration Appeals, too, has recognized that immigration judges must assess findings made at sentencing 'with an eye to what losses are covered and to the burden of proof employed.'" *Nijhawan* at *12, citing *Babaisakov* at p. 319. This quote comes from the discussion entitled "Part E. 'Record of Conviction' Evidence to Assess 'Loss' to the Victim." *Babaisakov*, pp. 318-320. Significantly, the Court did not cite to the next segment of *Babaisakov*, "Part F. Independently Assessing the Loss." *Id.* at pp. 320-321. There the Board stated that it is proper for an immigration judge to conduct an independent fact-finding hearing, using "any evidence, otherwise admissible in removal proceedings, including witness testimony, bearing on the loss to the victim in an aggravated felony case involving section 101(a)(43)(M)(i) of the Act." *Id.*, p. 321. This approach was not endorsed by the Court, and does not meet *Nijhawan*'s standards for fairness in proving circumstances specific to the crime. It appears to permit consideration of evidence not "tied" to the original count, and permit the immigration judge to make independent findings on the events which amount to "re-litigating" the case.

e. Warn clients to stay away from immigration authorities and to not travel outside the United States

Until further notice, noncitizens should avoid filing an affirmative application, applying for a ten-year renewal of a green card, or traveling outside the United States without consultation with counsel if there is a conviction that *might* be charged under a mixed "crime/particular circumstances" ground of deportation or inadmissibility (or, considering the fluidity of the law, that might possibly be considered a crime involving moral turpitude).

3. Generic Offenses, the Categorical Approach, and the "Missing Element" Rule

This section is written mainly for immigration counsel. *Part a* discusses one of the many areas that require study under *Nijhawan,* which is its potential effect on the "missing element" or "strictly delineated divisible statute" rule, under the categorical approach. *Part b* summarizes the court's statements regarding which aggravated felony subparagraphs describe generic crimes and which describe requirements tied to the particular crime. *Part c* discusses the possible effect of the court's ruling on selected other immigration provisions including some grounds of inadmissibility and deportability, namely a crime of child abuse, sexual abuse of a minor, a crime of domestic violence, burglary, and crimes involving moral turpitude.

a. Nijhawan's holding on the application of the categorical approach to a generic definition supports the strict application of the "missing element" rule, as interpreted by the Ninth Circuit.

As discussed above, in *Nijhawan* the Court divided the aggravated felony provisions into two categories. Some sections refer to a generic crime, which require the reviewing authority to

use the strict categorical approach set out in *Taylor v. United States*, 495 U.S. 575 (1990). *Nijhawan, supra,* at *6. Other sections contain a "circumstance specific" component, in which the reviewing authority may determine whether the offense constitutes an aggravated felony by examining evidence of the alleged facts and circumstances underlying a noncitizen's crime. In *Nijhawan* the Court applied the latter approach to the $10,000 loss requirement.

This section highlights one aspect of the court's description of the categorical approach used with a generic crime definition. In *Nijhawan* the court supported the rule, which it first set out in *Taylor, supra,* that in order for a criminal conviction to come within a generic definition, the crime as defined by the statute must contain *all* of the elements of the generic definition. It is not enough for the statute of conviction to set out only some of the elements of the generic definition, and for the court to fill in the missing elements by citing to facts from the record of the particular conviction. (Advocates sometimes refer to this as the "missing element" rule.) Another way to state this is to say that in a categorical approach, a court may only consider facts in the reviewable record that were *required for a finding of guilt*.

For example, the generic definition of a deportable firearms offense includes using, possessing, or carrying a firearm.[10] A state assault offense that does not have "use of a firearm" as an element is not a categorical match to this generic definition. But what if the defendant happened to admit in the plea colloquy that he committed the assault by using a firearm? Does this make the statute "divisible" between assault with a firearm and assault with something else, so that the immigration judge can use the information from the record to find that the conviction comes within the firearms deportation ground?

The Supreme Court, the Ninth Circuit, and in the past the Board of Immigration Appeals (BIA) have agreed that the judge may *not* consult this evidence in a categorical analysis, in an attempt to make the offense of conviction match the generic definition at issue. In the firearms assault case described above, the BIA held that a defendant convicted of assault under a statute which has an element of bodily harm but no element of use of a weapon is not deportable under the firearms ground, even though he pled guilty to a charge that he used a gun in the assault. The BIA cited controlling state law for the proposition that the prosecution did not have to prove that he used the gun in order to prove guilt under the statute; therefore the statement in the charging document alleging the pistol was mere surplusage. *Matter of Perez-Contreras*, 20 I&N Dec. 615 and n. 4 (BIA 1992), considering Wash. Rev. Code § 9A.36.031(1)(f).

In *Taylor v. United States, supra,* the case in which the Supreme Court formally set out the categorical approach, the Court held that facts from the reviewable record of conviction could not be used in this manner in a categorical approach. It stated that a reviewing court may only "go beyond the mere fact of conviction" and consult the individual record "in a narrow range of cases where a jury was *actually required to find* all the elements of" the generic crime. *Taylor v. United States*, 495 U.S. at 602 (emphasis added).

Based on the statement in *Taylor,* the Ninth Circuit in recent years has adopted a strict application of the missing elements rule. The rule was formally adopted in *Navarro-Lopez v.*

[10] Under INA § 237(a)(2)(C), 8 USC § 1227(a)(2)(C), a noncitizen is deportable if he or she is convicted of using, owning, possessing, selling, etc. a firearm or "destructive device" (explosive).

Gonzales, 503 F.3d 1063, 1071 (9th Cir. 2007) (*en banc*); see also, e.g., *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*); *United States v. Aguila-Montes de Oca ("Aguila-Montes II")*, 553 F.3d 1229 (9th Cir. 2009), withdrawing 523 F.3d 1071 (9th Cir. 2008). These cases are discussed further in Part c, *infra*. In contrast, the BIA since has departed from that principle in some cases. See Part c.

In *Nijhawan* the Supreme Court reaffirmed this strict application of the categorical analysis. It explained that each element of a generic offense must appear as an element in the criminal statute of conviction, for the conviction to be a categorical match. The Court stated that if it were to treat the requirement of a loss exceeding $10,000 as part of the generic offense, then only a conviction under a statute that required a loss of this amount *as an element of the offense* would qualify. *Nijhawan* at *1, 8-9. Information from the record of conviction or elsewhere may not be used to supply this element.

This brings up the question, in dealing with a generic definition, when *can* a court properly proceed to review evidence in the record of conviction? The answer is, only when the criminal statute includes *specifically delineated offenses*, some of which contain all the elements of the generic definition and some of which don't, and when the information sought in the record of conviction is required for a finding of guilt. In *Nijhawan* the court illustrated this with an example involving a violent crime as defined under the ACCA,[11] which includes breaking into a building, but not breaking into a ship, vessel or vehicle.

> We also noted that the categorical method is not always easy to apply. That is because sometimes a *separately numbered subsection* of a criminal statute will refer to several different crimes, *each described separately.* And it can happen that some of these crimes involve violence while others do not. A single Massachusetts statute section entitled "Breaking and Entering at Night," for example, criminalizes breaking into a "building, ship, vessel or vehicle." Mass. Gen. Laws, ch. 266, §16 (West 2006). In such an instance, we have said, a court must determine whether an offender's prior conviction was for the violent, rather than the nonviolent, break-ins that this single five word phrase describes (*e.g.*, breaking into a building rather than into a vessel), by examining "the indictment or information and jury instructions," *Taylor*, *supra*, at 602, or, if a guilty plea is at issue, by examining the plea agreement, plea colloquy or "some comparable judicial record" of the factual basis for the plea. *Shepard* v. *United States*, 544 U. S. 13, 26 (2005).
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> *Nijhawan* at *4-5 (emphasis supplied).

Summary of the Categorical Approach. *Nijhawan* reaffirms the full application of the categorical approach as set out in *Taylor v. United States*, 495 U.S. 595 (1990), and adopted by the Ninth Circuit in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1071 (9th Cir. 2007) (*en banc*).

In sum, under the categorical approach to interpreting the application of a generic definition, there are three possible outcomes.

[11] As the opinion explains, under this section of the ACCA a "violent crime" is defined as including "burglary." 18 USC §924(e)(2)(B). Here the court is determining whether the offense is a crime of violence because it meets the generic definition of burglary, which in turn requires entry into a building or structure.

First, if the single offense, or all the offenses, described in the criminal statute contain *all of the elements* of a generic offense, then the statute is a categorical match and *all* convictions under the statute come within the generic definition.

For example, the Ninth Circuit found that the elements set out in Calif. P.C. § 261(a)(3) (non-consensual intercourse where the victim is prevented from resisting by any intoxicating or anesthetic substance … and this condition was known, or reasonably should have been known by the accused) match all of the required elements of the generic definition of rape, which includes rape by intoxication. Therefore any conviction under P.C. § 261(a)(3) meets the definition of the aggravated felony of rape at INA § 101(a)(43)(A). *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000).

Second, if instead the offense/s described in a criminal statute are *missing an element* contained in a generic offense, then the statute is categorically not a match, and *no* conviction under the statute can come within the generic definition. "When the crime of conviction is missing an element of the generic crime altogether, we can never find that 'a jury was actually required to find all the elements of ' the generic crime." *Navarro-Lopez, supra* at 1073, citing *Taylor, supra* at 602; see also *Nijhawan* at *1, 8-9. The court may not review the record in an attempt to use facts from the specific incident to supply the missing element. In case of doubt as to whether the court may go to the record, consider two questions. Does the statute enumerate "different crimes, each described differently"? *Nijhawan* at *4. Is the fact sought required for a finding of guilt? *Taylor, supra* at p. 602. If the answer is no, the court may not proceed.

For example, the generic definition of "burglary" is an "*unlawful entry* or remaining in a building or structure with the intent to commit a crime." *Taylor, supra* at 598 (emphasis added.) The definition of burglary under Calif. Penal Code § 459 requires only an "entry," not an unlawful entry,[12] and therefore is missing the element in the generic offense of the unlawfulness of the entry. The court may not proceed to the record to see whether the entry was lawful or not. (As a check, note that for this purpose P.C. § 459 does not set out "different crimes, each described separately," and that proof that the entry was unlawful is not necessary for a finding of guilt.) The criminal statute is not a categorical match, and no conviction under P.C. § 459 meets the generic definition of "burglary."[13] See *United States v. Aguila-Montes de Oca ("Aguila-Montes II")*, 553 F.3d 1229 (9th Cir. 2009) and discussion at Part c, *infra*.[14]

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[12] Calif. P.C. § 459 provides in part, "Every person who enters any house, room, apartment… railroad car… [or] vehicle … with intent to commit grand or petit larceny or any felony is guilty of burglary."

[13] Note that while a conviction under §§ 459, 460 is not "burglary," it can cause serious immigration problems under other provisions. It is a divisible statute as a crime of violence (if of a residence), an attempted theft (if the crime intended was larceny), or a crime involving moral turpitude (if the crime intended involves moral turpitude or is an unlawful entry into a residence. Currently the BIA does not resolve moral turpitude determinations under the categorical approach, pursuant to *Matter of Silva*. See Part 3). For more on P.C. § 459-460 see "Note: Theft, Burglary" in the California Quick Reference Chart, and Chapter 9 in *Defending Immigrants in the Ninth Circuit* (2009, ILRC), both at www.ilrc.org/criminal.php.

[14] See also *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1159-1160 (9th Cir. 2008) (*en banc*), where the Court held that a conviction under Calif. P.C. § 261.5(c) is categorically not "sexual abuse of a minor," because the generic definition requires the victim to be under 16 years of age and at least four years younger than the defendant, while § 261.5(c) requires only that the victim is under 18 and at least three years younger than the defendant. See discussion in Part c.

Third, in some cases "a separately numbered subsection of a criminal statute will refer to several different crimes, each described separately." *Nijhawan* at *4. Some of these crimes will contain all of the elements of the generic definition, and others will not. In this case, the court may proceed to the record of conviction to consult facts that were required for a finding of guilt, in order to determine which of the listed crimes was the offense of conviction. This is the classic "divisible statute." If evidence from the record of conviction that is acceptable under the categorical analysis[15] conclusively shows that the offense of conviction contains all of the elements of the generic definition, then the conviction comes within the generic definition. If the evidence in the record is inconclusive on this point, then the offense of conviction does not come within the generic definition.

The classic example of a divisible statute in *Taylor, Shepard* and *Nijhawan* is burglary. In the example cited above in *Nijhawan*, the Massachusetts statute criminalizes breaking into a "building, ship, vessel or vehicle" with intent to commit a crime. The generic definition of burglary, discussed above, has as an element unlawful entry into a "building or structure," but not a ship, vessel or vehicle. Here the court may consult the record. The statute refers to "multiple crimes, each described separately" (breaking into a building, breaking into a ship, etc.) Some crimes contain all the elements of the generic definition, while others do not. The court is trying to determine a fact that was required for guilt, i.e. the prosecutor had to prove that at least one of these four things was broken into, in order to prove the elements of the offense. The court may review the record, under the evidentiary guidelines provided by *Taylor* and *Shepard*, to see if there is conclusive evidence that a building was the target in the particular crime.

Comparison to the "circumstance specific" approach. In the "circumstance specific" approach the government gains two advantages that it does not have under the categorical approach. The criminal statute does not have to include the "circumstances" (e.g., a loss exceeding 10,000) as an element of the offense, and the government is not limited to using only evidence that would be allowed under the categorical analysis (it was able to use a stipulation at sentencing hearing).

A key question, therefore, is which immigration provisions set out a "generic" crime, and which merely describe circumstances specific to an individual conviction?

b. Which aggravated felony definitions did the court identify as being "generic" definitions, and which had a "specific circumstance" component?

In Part II of *Nijhawan* the Court provided several examples of offenses that are "generic" definitions that must be established under the categorical approach. All of the offenses in the Armed Career Criminal Act (ACCA) are. These include "burglary, arson, or extortion;" crimes

[15] As the Court states in *Nijhawan* at *4-5, quoted *supra*, this includes "'the indictment or information and jury instructions,' *Taylor*, *supra*, at 602, or, if a guilty plea is at issue, by examining the plea agreement, plea colloquy or 'some comparable judicial record' of the factual basis for the plea. *Shepard* v. *United States*, 544 U. S. 13, 26 (2005)." See discussion in Chapter 2, § 2.11, in *Defending Immigrants in the Ninth Circuit, supra.*

that have "as an element" the use or threatened use of force; and crimes "involving conduct that presents a serious potential risk of physical injury to another." 18 USC §§924(e)(2) (B)(i)–(ii).

The court listed some examples of aggravated felonies that are "generic" offenses. Subparagraphs relate to the aggravated felony definition at INA § 101(a)(43), 8 USC § 1101(a)(43). See *Nijhawan*, *6 - 9.

Subparagraph (A), "murder, rape, or sexual abuse of a minor." Among other cases, the court cited *Estrada-Espinoza* v. *Mukasey*, 546 F. 3d 1147, 1152 (9th Cir. 2008) (en banc) (applying the categorical approach to "sexual abuse of a minor").

Subparagraph (B), "illicit trafficking in a controlled substance."

Subparagraph (C), "illicit trafficking in firearms or destructive devices."

"Other sections refer specifically to an 'offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraphs (E), (H), (I), (J), (L)." These are federal criminal statutes relating to firearms and explosive devices, ransom demands, child pornography, RICO, and national security, respectively.

The court stated that "forgery" under subparagraph (P) "may well refer to a generic crime." It held that "fraud or deceit" is a generic offense.

(It appears likely from the Court's reasoning that all of the "general term" aggravated felonies would be a generic offense, such as forgery, perjury, bribery, obstruction of justice, etc.)

The court also gave examples of other parts of the aggravated felony definition that include a generic crimes plus a description of specific circumstances.

Subparagraph (P), forgery with a one year sentence, with an exception for a first offense for assisting certain family members. The court stated that while forgery "may well refer to a generic crime," the exception could not possibly because no criminal contains any such exception.

Subparagraph (N) (alien smuggling). The court noted that this had an exception for first-time assistance of family members similar to in (P), which it considered circumstance-specific.

"Subparagraph (K)(ii), various prostitution offenses (18 USC §§ 2421, 2422, 2423) *if committed for commercial advantage*'; commercial advantage is circumstance-specific. "But see *Gertsenshteyn* v. *United States Dept. of Justice*, 544 F. 3d 137, 144–145 (CA2 2008)."

Subparagraph (M)(i), (ii) fraud or deceit with loss to the victim/s exceeding $10,000, certain tax evasion offenses in which the revenue loss to the Government exceeds $10,000.

The court presented these as examples rather than an exhaustive list. For an analysis of other aggravated felony sections and whether they may be considered generic or circumstance-specific definitions, see Kesselbrenner, Vargas, "The Impact of *Nijhawan v. Holder* on Application of the Categorical Approach to Aggravated Felony Determinations" at www.nationalimmigrationproject.org.

c. What is the possible effect if the court's approach if applied to selected other immigration categories?

In *Nijhawan* the Court considered offenses in the aggravated felony category, but did not consider generic definitions of offenses in the grounds of inadmissibility and deportability. This section assumes for purposes of discussion that the *Nijhawan* approach will be extended to crimes described in the grounds of inadmissibility and deportability. It discusses what effect the approach might have on grounds based on conviction of a crime of child abuse, crime of domestic violence, and crimes involving moral turpitude, as well as the aggravated felony categories sexual abuse of a minor and burglary.

Crime of child abuse. In *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008) the Board held that even where the age of the victim is not an element of the offense, the immigration judge may use evidence from the reviewable record of conviction showing that the victim is a minor, in order to class the offense as a deportable "crime of child abuse."[16] For example, the judge could look at a conviction under an age-neutral assault statute, look in the record to see if there is an admission that the victim was a minor, and define the offense as a "crime of child abuse." The BIA held, and logic requires, a finding, that "crime of child abuse" is a description of an offense that does not "invite" factual inquiry – as *Nijhawan* expresses it, it is a generic offense.

This use of evidence in the record to attempt to supply the missing element of a generic definition should be considered overruled by *Nijhawan.*

Sexual abuse of a minor. *Nijhawan* listed the aggravated felony "sexual abuse of a minor" as an example of a "generic" offense that must be proved under the categorical analysis, which according to *Nijhawan* and *Taylor* includes the rule against using evidence from the record that was not required for guilt. This affirms the Ninth Circuit's approach in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*). The court held that where the generic definition of the aggravated felony "sexual abuse of a minor" is a sexual act with a victim who is between 12–16 years of age and at least four years younger than the defendant, then no conviction under Calif. P.C. § 261.5(c) can constitute "sexual abuse of a minor," because that section only requires for guilt that the victim be under the age of 18 and at least three years

[16] See discussion at *Velazquez-Herrera*, 24 I&N Dec. at 515, regarding the deportation ground at INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i).

younger than the defendant. Even if the record of conviction shows the requisite age difference and age of the victim, the conviction is not a sufficient match.

Nijhawan should be held to have overruled cases that have found that an age-neutral sexual offense constitutes "sexual abuse of a minor" if evidence shows that the victim in the case was a minor. *Lara-Ruiz v. I.N.S.*, 241 F.3d 934 (7th Cir. 2001); *Gattem v.Gonzales*, 412 F.3d 758 (7th Cir. 2005).

California burglary. *Nijhawan* supports the opinion in *United States v. Aguila-Montes de Oca ("Aguila-Montes II")*, 553 F.3d 1229 (9th Cir. 2009), superseding 523 F.3d 1071, 1076-77 and n.2 (9th Cir. 2008), which reversed the original *Aguila-Montes* decision and held that California burglary under P.C. § 459, 460 cannot be held to be "burglary" because it is missing the element of an "unlawful" entry or remaining. (In the first *Aguila-Montes* opinion, cited above, the panel had stated that it may use evidence from the reviewable record of conviction to determine whether the entry was lawful, because the evidence merely describes a "kind" of entry and does not add in a missing element. The panel later reconsidered.) In fact, *Nijhawan* specifically cites "burglary" as a generic offense. Evidence from the reviewable record of conviction cannot be used to supply a missing element. But see *United States v. Snellenberger*, 548 F.3d 699, 700 (9th Cir.2008) (*en banc*) (holding that a conviction under Calif. P.C. § 460 constitute "burglary of a dwelling" after declining for procedural reasons to reach the issue of the missing element of "unlawful" entry).

Crime of domestic violence. See Part 2, *supra*, for discussion and warning that the government may assert that the "domestic relationship" component of a "crime of domestic violence" should be treated as a description of specific circumstances rather than part of the generic definition. Counsel should invoke the limitations on evidence that can be used in a circumstance specific approach, set out in *Nijhawan*.

Crimes involving moral turpitude. The phrase a "crime involving moral turpitude" is unusual but not unique in criminal statutory provisions, in that it does not set out an actual description of an offense as does, e.g., a fraud offense where the loss to the victim exceeded $10,000, or sexual abuse of a minor. Nevertheless, the phrase is suited to treatment as a generic offense requiring the categorical approach as set out in *Nijhawan*.

For example, in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*) the Ninth Circuit en banc first adopted the strict categorical approach to analyzing convictions, including the "missing element" rule, which the Supreme Court has now reaffirmed in *Nijhawan*. *Navarro-Lopez* involved a moral turpitude determination. The petitioner had been convicted of being an accessory after the fact under Calif. P.C. § 32. The court refused to consult the reviewable record under the categorical analysis to see if the petitioner's specific offense of conviction involved moral turpitude, because the crime as defined by statute failed to contain the moral turpitude "element." The court found that "[a]ccessory after the fact under California Penal Code section 32 lacks an element of the generic crime -- i.e., the moral turpitude, the requisite depravity… Even if Navarro-Lopez had admitted to depraved acts, those admissions

could not be used to modify the crime because they were not necessary for a conviction."[17] Since then, the Ninth Circuit has gone on to apply the strict categorical approach to other analyses, such as sexual abuse of a minor and the definition of burglary. See discussion above.

Nijhawan supports the rule adapted by *Navarro-Lopez*' that a criminal statute must contain all of the elements of a generic offense, and the missing element may not be supplied by facts from the record. See discussion above.

Nijhawan also can be read as lending support to the Ninth Circuit's decision in *Navarro-Lopez's* to treat a "crime involving moral turpitude" as a "generic" definition. In *Nijhawan* the Court pointed out that even "ambiguous" language that *does not refer to a generic crime* can describe a generic offense for this purpose.

> Consider, first, ACCA in general. That statute defines the "violent" felonies it covers to include "burglary, arson, or extortion" and "crime[s]" that have "as an element" the use or threatened use of force. 18 U. S. C. §§924(e)(2) (B)(i)–(ii). This language refers directly to generic crimes. The statute, however, contains other, more ambiguous language, covering "crime[s]" that "*involv[e] conduct* that presents a serious potential risk of physical injury to another." *Ibid.* (emphasis added). While this language poses greater interpretive difficulty, the Court held that it too refers to crimes as generically defined. *James, supra*, at 202.
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> *Nijhawan* at page *6, citing to *James* v. *United States*, 550 U. S. 192, 202 (2007) (emphasis in opinion).

Evaluating whether a criminal offense has an element of "conduct that presents a serious potential risk of physical injury" [18] is not a task on an entirely different scale than evaluating whether a criminal offense has an element of conduct that is "reprehensible" (or depraved,

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[17] In *Navarro-Lopez* the court set out its statement of the missing element rule that has been used in subsequent decisions. It stated in full,

> The modified categorical approach, however, only applies when the particular elements in the crime of conviction are broader than the generic crime. When the crime of conviction is missing an element of the generic crime altogether, we can never find that "a jury was actually required to find all the elements of" the generic crime. See Li v. Ashcroft, 389 F.3d 892, 899-901 (9th Cir.2004) (Kozinski, J., concurring) (providing examples).
>
> Accessory after the fact under California Penal Code section 32 lacks an element of the generic crime-i.e., the moral turpitude, the requisite depravity. The crime of conviction can never be narrowed to conform to the generic crime because the jury is not required-as Taylor mandates-to find all the elements of the generic crime. Even if Navarro-Lopez had admitted to depraved acts, those admissions could not be used to modify the crime because they were not necessary for a conviction.

Id. at 1073.

(But see *Marmolejo-Campos v. Holder*, 558 F.3d 903, 917 (9th Cir. 2009) (*en banc*), holding that the Ninth Circuit will defer to the BIA's finding as to whether the identified elements

[18] See also 18 USC § 16(b), which defines a "crime of violence" to include a felony offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This offense will be an aggravated felony if a sentence of a year or more is imposed, under INA § 101(a)(43)(F). See discussion of elements in *Leocal v. Ashcroft*, 125 S.Ct. 377, 382 (U.S. 2004).

morally base, fraudulent) by current standards, coupled with an intent of recklessness or more.[19] The generic comparison remains a two-step process. First the "elements" (meaning the description of the criminal acts and intent required for guilt) of the criminal statute must be identified. Second these elements must be examined to see if they contain the elements of the generic definition at issue. In this case, if the elements of the crime do not have "the requisite element of depravity," the crime does not involve moral turpitude, as the Ninth Circuit held en banc in *Navarro-Lopez*.

In contrast, it appears difficult to place a crime involving moral turpitude within the "circumstance specific" category. The government might argue that the "crime" is the generic offense, and "involving moral turpitude" is the factual description of how the offense was committed. However, *Nijhawan* does not provide particular support for this ambiguous term being used to describe "specific" circumstances.

Shortly before he left office, Attorney General Mukasey published *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008), a poorly reasoned opinion that abandons the categorical approach in moral turpitude cases, thereby overturning a century of jurisprudence. *Silva-Trevino* should be reversed, or Attorney General Holder should withdraw *Silva-Trevino* because along with the opinion's other problems, its wide-ranging holdings should be reevaluated in light of *Nijhawan*. *Silva-Trevino* justified its radical departure from settled law by asserting that the AG and BIA deserve *Chevron* deference in every decision relating to crimes involving moral turpitude, including application of the categorical approach. *Silva-Trevino*, pp. 696-698. In contrast, the Court in *Nijhawan* never mentioned *Chevron* in discussing application of the categorical approach, despite the fact that the government aggressively asserted that *Chevron* and *Brand X* applied. The implication is that the Supreme Court does not find that the categorical analysis (or at least the categorical analysis as applied to aggravated felonies) is a matter appropriate to treatment under *Chevron*. If the term "crime involving moral turpitude" may be treated as a generic offense under *Nijhawan*, then under the categorical approach at least two key holdings of *Silva-Trevino* are no longer good law: (a) that evidence can be used to add in an element missing from the generic definition[20] and (b) that an immigration judge may consider evidence not permitted under the categorical analysis to prove this.[21]

[19] In Matter of Silva-Trevino, discussed in the text, AG Mukasey posited a new clarification of the generic definition of a moral turpitude offense, which is a "reprehensible" act committed recklessly, willfully, or intentionally.
[20] In *Silva-Trevino*, the Attorney General remanded to the IJ to take evidence as to whether the defendant knew, or a reasonable person should have known, that the victim was under-age, even though this guilty knowledge was not an element of the offense. 24 I&N Dec. at 708-709.
[21] The AG directed the IJ to take any evidence, including testimony, if the court found that it was "necessary and appropriate" regardless of the categorical analysis. *Ibid.*