06-0238-ag

To Be Argued By:
WILLIAM J. NARDINI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-0238-ag

MARCIN WALA,

Petitioner,

-vs-

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERT GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Jurisdiction viii

Statement of Issue Presented for Review ix

Preliminary Statement 1

Statement of the Case 2

Statement of Facts and Proceedings Relevant to this Appeal 4

A. Background 4

B. The IJ's Decision 6

C. The BIA's Decision 8

Summary of Argument 9

Argument 11

I. The BIA Correctly Concluded That the Petitioner Was Convicted of Burglary with Intent to Commit Larceny, and That These Convictions Were for Crimes Involving Moral Turpitude 11

A. Governing Law and Standard of Review 11

B. Discussion 21

1. The Record of Conviction Shows That Petitioner's Burglary Convictions Involved Larceny with Intent to Permanently Take the Victim's Property, Qualifying Them as CIMTs 21

2. The IJ Did Not Engage in Impermissible Fact Finding 28

Conclusion 31

Certification per Fed. R. App. P. 32(a)(7)(C)

Addendum

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Abdelqadar v. Gonzales,
413 F.3d 668 (7th Cir. 2005) 29

Brett v. INS,
386 F.2d 439 (2d Cir. 1967) 17

Campbell v. Ganter,
353 F.Supp.2d 332 (E.D.N.Y. 2004) 15

Canada v. Gonzales,
448 F.3d 560 (2d Cir. 2006) 13

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 14

Chiaramonte v. INS,
626 F.2d 1093 (2d Cir. 1980) 17

Cuevas-Gaspar v. Gonzales,
430 F.3d 1013 (9th Cir. 2005) 16

Dickson v. Ashcroft,
346 F.3d 44 (2d Cir. 2003) 7, 8, 13

Garcia v. Attorney General,
No. 05-2786 (3d Cir. Sept. 5, 2006) 26

Gill v. INS,
420 F.3d 82 (2d Cir. 2005) 14

Hamdan v. INS,
98 F.3d 183 (5th Cir. 1996) 11, 12, 29

In re G,
1 I. & N. Dec. 403 (BIA 1943) 16

In re Serna,
20 I. & N. Dec. 579 (BIA 1992) 12

Kuhali v. Reno,
266 F.3d 93 (2d Cir. 2001) 13

Leocal v. Ashcroft,
543 U.S. 1 (2004) 13

Matter of D-,
1 I. & N. Dec. 143 (BIA 1941) 18, 24

Matter of Esfandiary,
16 I. & N. Dec. 659 (BIA 1979) 20

Matter of G-,
2 I. & N. Dec. 235 (BIA 1945) 19

Matter of Grazley,
14 I. & N. Dec. 330 (BIA 1973) 17-19, 24, 26

Matter of M,
2 I. & N. Dec. 721 (BIA 1946) 7, 15, 23, 26

Matter of P-,
2 I. & N. Dec. 887 (BIA 1947) 18

Matter of R,
1 I. & N. Dec. 540 (BIA 1943) 7, 16

Matter of Scarpulla,
15 I. & N. Dec. 139 (BIA 1974) 20

Matter of Short,
20 I. & N. Dec. 136 (BIA 1989) 6, 12, 13

Matter of T-,
2 I. & N. Dec. 22 (BIA 1944) 19

Matter of V-Z-S-,
22 I. & N. Dec. 1338 (BIA 2000) 19

Messiah v. Duncan,
435 F.3d 186 (2d Cir. 2006) 27

Michel v. INS,
206 F.3d 253 (2d Cir. 2000) 12, 16, 20, 24

Padilla v. Gonzales,
397 F.3d 1016 (7th Cir. 2005) 12

Rodriguez v. Gonzales,
451 F.3d 60 (2d Cir. 2006) . . . . . vii, 11, 14

Shepard v. United States,
544 U.S. 13 (2005) 9, 13, 14

State v. Little,
485 A.2d 913 (Conn. 1984) 15

State v. Spillane,
255 Conn. 746 (2001) 25

State v. Wieler,
233 Conn. 552 (1995) 25

State v. Wieler,
35 Conn. App. 566 (1994) 25

Sui v. INS,
250 F.3d 105 (2d Cir. 2001) 28

Taylor v. United States,
495 U.S. 575 (1990) 13, 29

United States v. Crosby,
397 F.3d 103 (2d Cir. 2005) 27

United States ex rel. Amato v. Commissioner of Immigration, 18 F.Supp. 480 (S.D.N.Y. 1937) . . 15

United States ex rel. Cerami v. Uhl,
78 F.2d 698 (2d Cir. 1935) 15

United States ex rel. Meyer v. Day,
54 F.2d 336 (2d Cir. 1931) 17

United States ex rel. Ventura v. Shaughnessy,
219 F.2d 249 (2d Cir. 1955) 16, 24

STATUTES

8 U.S.C. § 1101 29

8 U.S.C. § 1182 . . . . . *passim*

8 U.S.C. § 1227 . . . . . 28, 29

8 U.S.C. § 1252 vii

Conn. Gen. Stat. § 53a-103 . . . . . *passim*

Conn. Gen. Stat. § 53a-173 4

New York Penal Law § 165.40 17

REAL ID Act of 2005,
Pub.L. No. 109-13 (May 11, 2005) vii

STATEMENT OF JURISDICTION

On January 19, 2006, the petitioner filed a timely petition for review from a final order by the Board of Immigration Appeals ("BIA") dated December 27, 2005. That order affirmed the decision of an Immigration Judge ("IJ"), denying petitioner's Motion to Terminate Removal Proceedings and ordering the petitioner's removal. Although the REAL ID Act of 2005, Pub.L. No. 109-13, Div. B, tit. I, § 106(b), 119 Stat. 231, 311 (May 11, 2005), provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in 8 U.S.C. § 1182(a)(2)," this Court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review "questions of law raised upon a petition for review filed with the appropriate court of appeals."

Because this appeal raises such a question, i.e., whether the petitioner's burglary convictions are "crimes involving moral turpitude" for purposes of removal under 8 U.S.C. § 1182(a)(2), this Court has jurisdiction to review the petitioner's challenge to his removal order. *See Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006) (per curiam).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the BIA correctly concluded that the petitioner's third-degree burglary convictions under Conn. Gen. Stat. § 53a-103 constitute "crimes involving moral turpitude" rendering him removable under 8 U.S.C. § 1182(a)(2)(A)(i)(I).

United States Court of Appeals

FOR THE SECOND CIRCUIT

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-vs-

ALBERTO GONZALES, ATTORNEY GENERAL

Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO GONZALES ATTORNEY GENERAL OF THE UNITED STATES

Preliminary Statement

This case presents a single legal issue: whether the petitioner's convictions for third-degree burglary under Connecticut law are crimes involving moral turpitude ("CIMT") warranting removal from the United States pursuant to the Immigration and Nationality Act ("INA"). The immigration judge ("IJ") held that the Connecticut

burglary statute is divisible, in the sense that certain categories of violations would qualify as CIMTs, and others would not. Because the record of conviction can be used to determine which part of a divisible offense was the object of the petitioner's conviction, the IJ consulted the petitioner's plea colloquy. Based on that transcript, the IJ held that the petitioner's burglary convictions involved larcenies, which are CIMTs. The BIA affirmed this conclusion by written opinion, noting that the plea colloquy supported the conclusion that petitioner's larcenies involved an intent to permanently deprive the victim of property.

This Court should deny the petition for review. This Court has held that larceny is inherently a CIMT. Even if burglary is a divisible statute rather than one that always constitutes a CIMT, the record of conviction indicates that the petitioner admitted to twice entering the victim's house and to taking the victim's cash, jewelry, and credit card. The BIA did not err in concluding that the record of conviction shows that the petitioner intended to permanently (not temporarily) deprive the victim of her belongings. Because the petitioner's offenses qualify as CIMTs, the petition for review should be denied.

Statement of the Case

Petitioner Wala had previously been charged in Connecticut Superior Court in Stamford with Failure to Appear, Possession of Marijuana, Larceny, and two counts of Burglary. He pleaded guilty to the burglary charges and

the failure to appear charge on August 7, 2002. JA 108-117.

The petitioner was placed into removal proceedings through a Notice to Appear ("NTA") dated July 7, 2003. Joint Appendix ("JA") 194-97.

On October 21, 2003, the petitioner appeared for a hearing before an IJ in Newark, New Jersey, at which the IJ ordered a change in venue to Connecticut. JA 55-59. Hearings on November 25, 2003, and afterwards were continued in order to give the parties time to obtain and review the transcript of the plea colloquy. JA 60-102.

On January 9, 2004, the petitioner submitted a written motion to terminate his removal proceedings on the ground that his conviction did not qualify as a CIMT. JA 50, 173-87.

The final removal hearing took place in Hartford, Connecticut, on July 13, 2004. JA 103-06.

On August 4, 2004, IJ Michael W. Straus issued a written ruling denying the petitioner's motion to terminate and ordering him removed to Poland based on his prior conviction for third-degree burglary. JA 49-54. The IJ did not address Wala's conviction for failure to appear in the first degree. JA 53.

On September 2, 2004, the petitioner filed a timely appeal of the IJ's decision to the Board of Immigration Appeals ("BIA"). JA 35-38. On December 27, 2005, the BIA affirmed, dismissing the petitioner's appeal. JA 1-2.

On January 19, 2006, the petitioner filed a timely petition for review with this Court.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Background

Petitioner Marcin Wala is a native and citizen of Poland who was admitted to the United States as a lawful permanent resident on June 24, 1994. JA 195. He was convicted on August 7, 2002, in the Superior Court in Stamford, Connecticut for two counts of Burglary in the third degree in violation of Conn. Gen. Stat. § 53a-103, pursuant to a guilty plea. He was also convicted upon a guilty plea on one count of Failure to Appear in the first degree in violation of Conn. Gen. Stat. § 53a-173. JA 108-17. The petitioner was sentenced to five years suspended, three years probation for each of the three counts, and payment of "[r]estitution for all uninsured out of pocket expenses." JA 115, 119-22.

Connecticut's burglary statute defines burglary as "enter[ing] or remain[ing] unlawfully in a building with intent to commit a crime therein." Conn. Gen. Stat. § 53a-103. The Original Information indicates that the prosecutor entered a nolle prosequi for two charges of Larceny and one charge of Credit Card Theft originating from the same incidents (JA 119-20); however, the transcripts of the plea colloquy and sentencing refer only to the acts of theft, and do not specifically name the

intended crime associated with the burglary conviction. JA 111-17.

At the plea colloquy hearing, the prosecutor stated the factual basis for the plea as follows (in pertinent part):

> . . . the defendant admitted that on two occasions [he and his co-worker] went into the victim's house and took items from the victim's house. The first time they took two rings. The second time they took official jewelry and the next time a first union credit card and two watches. . . . [T]his defendant, the co-defendant, and a third person committed those crimes.

JA 111-12. The prosecutor indicated that the report of theft to the Greenwich Police Department also listed cash among the stolen items. JA 111-12. The state judge then questioned the petitioner about the voluntariness of his plea and his satisfaction with his lawyer's advice, and informed him of the rights he would be giving up as a result of the plea. JA 112. The judge asked Wala: "The State's Attorney related certain facts, which he alleged occurred. Is that what you did? Is that what you are guilty of?" JA 113. The petitioner replied, "Yes sir," and again upon a second inquiry, "Yes sir." *Id.*

The court then advised the petitioner of the potential adverse deportation consequences of his conviction and imposed concurrent suspended sentences of five years of imprisonment and three years of probation for each

burglary charge and for the failure to appear charge. JA 114-15.

On July 7, 2003, the petitioner was personally served with a Notice to Appear alleging that upon arriving in the United States via Scandinavian Airlines at Newark, New Jersey on June 13, 2003, he applied for admission as a returning lawful permanent resident. JA 195. The NTA listed the petitioner's prior convictions for Burglary and Failure to Appear and charged the petitioner under § 212(a)(2)(A)(i)(I) of the INA (8 U.S.C. §1182(a)(2)(A)(i)(I)) for acts which involve moral turpitude.

B. The IJ's Decision

In a written decision dated August 4, 2004, the IJ denied the petitioner's motion to terminate the removal proceedings and ordered the petitioner removed to Poland. JA 39-45. He cited the BIA's definitions of a CIMT as conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general" and "an act which is per se morally reprehensible and intrinsically wrong." JA 42. Citing *Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989), the IJ held that "[i]t is the inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction which determines whether the offense is one involving moral turpitude." JA 43 (internal quotation marks omitted).

The IJ further held that Conn. Gen. Stat. § 53a-103 is divisible because it requires "intent to commit any crime," therefore including offenses which may or may not be considered a CIMT. JA 43. Because the statute is divisible, the Court found that the record of conviction may be considered in determining whether the burglary is a CIMT. *Id.* (citing *Matter of M*, 2 I. & N. Dec. 721 (BIA 1946); *Matter of R*, 1 I. & N. Dec. 540 (BIA 1943)). The record of conviction includes "among other things, the following: a charging document, plea agreement, a judgment of conviction, a record of the sentence, and a plea colloquy transcript." JA 44 (citing *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003)).

The IJ found that the record of conviction in the petitioner's case "indicates that the respondent was also charged with larceny in the fourth degree" and that the "plea colloquy is included, which documents the respondent's guilty plea to burglary in the third degree and details the respondent's actions that accompanied the burglary in the third degree." JA 44. The IJ found that the plea colloquy "mentions in detail the respondent's intent and the particular crimes and acts that accompany third degree burglary. The plea colloquy transcript states that the Greenwich Police Department responded to a report of a break-in from a local resident. The victim informed the police that while away on vacation her home was entered into and items were taken. The police discovered the respondent was one of two workers at the victim's home. Moreover, 'the respondent admitted that on two occasions [he and a co-worker] went into the victim's house and took items from the victim's house.'" *Id.* Among those things,

the IJ continues, were two rings, jewelry, two watches and a credit card. The IJ concludes: "In reviewing the plea colloquy transcript, which is part of the record of conviction under *Dickson*, the Court finds that the respondent committed a CIMT, since the intent of the burglary was to commit larceny." *Id.* The IJ was therefore "unable to grant the respondent's request to terminate his removal proceedings because his 2002 conviction for burglary in the third degree under Conn. Gen. Stat. Section 53a-103 is a crime that involves moral turpitude." As the respondent had pursued no other form of relief from removal and appeared ineligible for relief, the IJ found no valid grounds on which to terminate the proceedings and ordered the petitioner removed. *Id.*

C. The BIA's Decision

The BIA reviewed the record and found that the IJ's factual findings were not clearly erroneous and that his decision was "thorough and well-reasoned." JA 2. The BIA continued: "In particular, we concur in the Immigration Judge's finding the underlying crime of larceny involved in the burglary conviction is a crime involving moral turpitude. The plea transcript is adequate to show that such offense involved a permanent taking of property." *Id.* The BIA ordered the appeal dismissed.

SUMMARY OF ARGUMENT

Consistent with longstanding case law, the IJ and the BIA reasonably concluded that the petitioner's burglary convictions qualified as crimes involving moral turpitude ("CIMT"). The Connecticut burglary offense of which the petitioner was convicted is divisible for purposes of immigration law. Depending on which crime was intended to be committed in connection with the breaking and entering, a burglary might or might not constitute a CIMT. Accordingly, the IJ and the BIA acted consistently with the modified categorical approach, as outlined by the Supreme Court in *Shepard v. United States*, 544 U.S. 13 (2005), in looking to the record of conviction. The plea colloquy and the charging document disclose that the petitioner's burglary convictions involved larcenies, in that he admitted stealing cash, jewelry, and a credit card.

This Court may deny the petition for review on either of two grounds. First, because this Court reviews *de novo* whether a particular offense fits within the class of CIMTs, it need look no further than its own precedents (as well as some of the BIA's case law) for the proposition that larceny categorically constitutes a CIMT. Alternatively, if the Court were to consider the BIA's sometimes-expressed view that larceny is a CIMT only if it involves an intent to permanently (as opposed to temporarily) deprive the owner of property, the petitioner's offense still constitutes a CIMT. Even where the BIA has distinguished between temporary and permanent takings, it has held that theft of cash is inconsistent with the conclusion that only a temporary taking was intended.

Because the petitioner admitted during the plea colloquy that he stole cash, jewelry, and a credit card, his burglary convictions involved larcenies that were CIMTs.

Neither the IJ nor the BIA engaged in any improper fact-finding in determining that the petitioner committed CIMTs. It is well established that immigration authorities may consider plea colloquies and other portions of the record of conviction to ascertain whether an offense renders an alien removable. Moreover, the statutory provision involving CIMTs requires an IJ to determine not simply whether an alien has been "convicted" of a CIMT, but also whether the alien has admitted having committed "acts which constitute the essential elements of a crime involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I). In this respect, the inquiry applicable to CIMTs is broader than the narrower inquiry applicable to aggravated felonies, which focuses only on the elements of the offense of conviction.

ARGUMENT

I. THE BIA CORRECTLY CONCLUDED THAT THE PETITIONER WAS CONVICTED OF BURGLARY WITH INTENT TO COMMIT LARCENY, AND THAT THESE CONVICTIONS WERE FOR CRIMES INVOLVING MORAL TURPITUDE

A. Governing Law and Standard of Review

An alien is inadmissible under the INA for committing any crime involving moral turpitude ("CIMT") where the maximum sentence for such crime exceeds one year in prison, and (if convicted of the crime) the sentence was greater than six months, regardless of the extent to which the sentence was ultimately executed. 8 U.S.C. § 1182(a)(2)(A)(i-ii). The BIA has explained that moral turpitude generally encompasses

> conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is *per se* morally reprehensible and intrinsically wrong or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.

Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006) (per curiam) (citing *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir.

1996)). A CIMT has also been defined as a crime that is "deliberately committed and 'serious,' either in terms of the magnitude of the loss that it causes or the indignation that it arouses in law-abiding public," *Padilla v. Gonzales,* 397 F.3d 1016, 1019 (7th Cir. 2005), or as an act "accompanied by a vicious motive or a corrupt mind," *Hamdan*, 98 F.3d at 186. The severity or triviality of a criminal offense is not determinative of whether it involves moral turpitude. *Michel v. INS,* 206 F.3d 253, 265 (2d Cir. 2000) (majority opinion of Sotomayor, J.) (citing *In re Serna*, 20 I. & N. Dec. 579, 581-82 (BIA 1992)).

Conviction of a crime involving moral turpitude is not required under 8 U.S.C. § 1182(a)(2)(A)(i)(I) if the alien admits having committed a crime involving moral turpitude or "acts which constitute the essential elements of . . . a crime involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I).

In determining whether a prior conviction constitutes a crime involving moral turpitude,

> [i]t is the inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction which determines whether the offense is one involving moral turpitude.

Matter of Short, 20 I. & N. Dec. 136, 137 (BIA 1989) (internal citations omitted). In that case, the BIA further held that

> [t]he statute under which the conviction occurred controls. If it defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for the purposes of the deportation statute.

Id. at 137. Where the statute under which the respondent was convicted includes "some offenses which involve moral turpitude and some which do not," the statute is considered "divisible"; in such a circumstance, the court looks to the record of conviction, including the indictment, plea, verdict, and sentence, to determine whether the alien's offense falls within a category that would justify removal. *Id*. at 137-38.

The BIA holding in *Matter of Short* is consistent with the "categorical approach" outlined in *Taylor v. United States,* in which the Supreme Court held that when examining a conviction for burglary under a state law, "generic burglary" within the meaning of the sentence enhancement statute should be identified by referring to charging documents or recorded judicial acts such as jury instructions. *Taylor,* 495 U.S. 575, 599-600 (1990). *See also Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004); *Canada v. Gonzales*, 448 F.3d 560, 565-66 (2d Cir. 2006) (analyzing "crimes of violence"); *Dickson v. Ashcroft*, 346 F.3d 44, 48, 53 (2d Cir. 2003) (same); *Kuhali v. Reno*, 266 F.3d 93, 106 (2d Cir. 2001) (analyzing deportable firearms offenses).

The Supreme Court held in *Shepard v. United States* that *Taylor's* reasoning also controls the identification of

generic convictions following pleas, as well as convictions on verdicts, in states with nongeneric offenses. In pleaded cases, "the closest analogs to jury instructions would be . . . the statement of factual basis for the charge, shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard*, 544 U.S. 13, 20 (2005) (citation omitted).

So long as Congress has not directly spoken on the issue, and the BIA's interpretation is reasonable, the BIA's construction of undefined statutory terms such as "moral turpitude" is granted deference because of the BIA's expertise in applying and construing the immigration laws. *See, e.g.*, *Rodriguez*, 451 F.3d at 63 (citing *Gill v. INS*, 420 F.3d 82, 89 (2d Cir. 2005)). *See generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-44 (1984). However, because the BIA has no particular expertise in construing federal and state criminal statutes, the Court reviews *de novo* the BIA's finding that a particular crime of conviction falls within its definition of a CIMT. *Rodriguez*, 451 F.3d at 63.

The state law at issue in this case is the Connecticut burglary statute, which states in pertinent part that

> A person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein.

Conn. Gen. Stat. § 53a-103(a). The crime proscribed by this statute "is complete once there has been an unlawful entering or remaining in a building with the intent to commit a crime in that building." *State v. Little*, 485 A.2d 913, 918 (Conn. 1984).

Several courts, including this Court, have held that burglary involves moral turpitude, as does the related offense of unlawfully entering a building under circumstances or in a manner not amounting to burglary, with intent to commit a felony, a larceny, or any malicious mischief. *See, e.g., United States ex rel. Cerami v. Uhl*, 78 F.2d 698, 699 (2d Cir. 1935) (charges of second-degree robbery and unlawful entry with intent to commit larceny both involved moral turpitude warranting deportation); *United States ex rel. Amato v. Commissioner of Immigration*, 18 F. Supp. 480, 481 (S.D.N.Y. 1937) ("It is conceded, as is obvious, that burglary involves moral turpitude.") (discussing New York state conviction for second-degree burglary); *Campbell v. Ganter*, 353 F. Supp.2d 332, 341 (E.D.N.Y. 2004) (burglary conviction constitutes crime of moral turpitude under INA).

The BIA has stated, however, that burglary does not necessarily involve moral turpitude unless the record of conviction shows that the entry was made with intent to commit a crime involving moral turpitude. *See, e.g., Matter of M*, 2 I. & N. Dec. 721, 723 (BIA 1946) (third-degree burglary under New York law does not inherently involve moral turpitude; determinative factor is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude); *In re*

G, 1 I. & N. Dec. 403 (BIA 1943) (it is the crime that accompanies the breaking and entering that has significance in the determination of moral turpitude; if the crime accompanying the breaking and entering were larceny, then the violation would involve moral turpitude); *Matter of R*, 1 I. & N. Dec. 540 (BIA 1943) (third degree burglary in New York, where the indictment on which the accused was convicted charged that he broke and entered a shop with intent to commit larceny therein, was a CIMT since the crime of petit larceny has been held to involve moral turpitude). The Ninth Circuit has adopted that view as well. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1018-20 (9th Cir. 2005) (holding that alien committed CIMT, where he admitted in plea colloquy "to entering a residence with the intent to steal property from the residence").

Because, as discussed *infra*, the underlying crime involved in the petitioner's burglary offense was larceny, another relevant question is whether larceny is likewise a CIMT. As this Court has repeatedly held: "That theft involves moral turpitude cannot be doubted." *United States ex rel. Ventura v. Shaughnessy*, 219 F.2d 249, 251 (2d Cir. 1955) (Swan, J.) (affirming judgment ordering alien deported for Portuguese crime "very similar to what we call burglary or larceny"). The Court reaffirmed its view only a few years ago in *Michel*, in which it upheld the BIA's holding that knowing possession of stolen goods is a CIMT. *See* 206 F.3d at 262-66 (majority opinion of Sotomayor, J.). In that case, the Court held that "upon a *de novo* review of the relevant criminal statute, we conclude that all violations of New York Penal Law

§ 165.40 are, by their nature, morally turpitudinous because knowledge is a requisite element of section 165.40 and corrupt scienter is the touchstone of moral turpitude." 206 F.3d at 263.[1]

Although this Court and others have generally held that larceny involves moral turpitude, the BIA has sometimes taken the slightly narrower view that "[o]rdinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended." *Matter of Grazley*, 14 I. & N. Dec. 330, 333 (BIA 1973). In that case, the BIA held that an alien's Canadian theft conviction might or might not be a CIMT, depending on whether it involved a taking that was permanent or temporary. *Id.* That meant that the statute was divisible, and that the BIA should look to the record of conviction for further details. The record stated that the alien

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[1] *See also, e.g., Chiaramonte v. INS*, 626 F.2d 1093, 1097 (2d Cir. 1980) (theft crimes, however translated into penal provisions, are generally presumed to involve moral turpitude) ("[W]hatever the vicissitudes of the state laws of larceny, it is clear that for immigration purposes, a crime of moral turpitude is involved when, as here, one carries away property knowing it to belong to another.") (citing Gordon & Rosenfield, Immigration Law and Procedure § 4.14(d) (1977)); *Brett v. INS,* 386 F.2d 439, 439 (2d Cir. 1967) (per curiam) (rejecting claim that "petit larceny does not involve moral turpitude" under INA); *United States ex rel. Meyer v. Day*, 54 F.2d 336 (2d Cir. 1931) (Swan, J.) ("Larceny has always been held to involve moral turpitude, so far as we are advised.") (holding that New York conviction for attempted grand larceny in the second degree was CIMT).

"unlawfully did commit theft of a change purse containing money and stamps of a total value not in excess of fifty dollars . . . ." *Id.* The BIA held that these details were determinative of the CIMT question:

> While we have no direct evidence as to what the respondent's intent was at the time he took the purse, we believe it is reasonable to assume, since cash was taken, that he took it with the intention of retaining it permanently. We hold, therefore, that the circumstances surrounding the offense in question indicate that the respondent was convicted for theft involving a permanent taking.

Id. at 333; *see also Matter of D-*, 1 I. & N. Dec. 143, 144-45 (BIA 1941) (holding that California joy-riding statute, covering taking a vehicle "with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, *whether with or without intent to steal the same*," is not a CIMT) (emphasis added).

Even when the BIA has addressed the temporary v. permanent distinction, it has held that "it would be presumed that the theft involved a permanent taking, unless there is affirmative evidence to the contrary." *Matter of P-*, 2 I. & N. Dec. 887, 888 (BIA 1947). In that case, the BIA held that the alien had not committed a CIMT, when the record affirmatively demonstrated that he had been convicted of breaking and entering and theft in Canada for climbing through a window to borrow a Victrola for a party. *Id.* Likewise, in *Matter of R-*, 2 I. &

N. Dec. 819, 828 (BIA 1947), the BIA discussed the prior ruling of the Attorney General in *Matter of T-*, 2 I. & N. Dec. 22 (BIA 1944), which was binding on the BIA, that "it is permissible to determine from the testimony of the alien that a particular offense of theft was committed with the intention of retaining permanent possession of the property." It is in this context – that is, the understanding that the BIA would engage in an inquiry from the record of conviction and concessions by the alien himself to sort out qualifying and nonqualifying offenses – that the BIA expressed the view that "[i]t is settled law that the offense of taking property temporarily does not involve moral turpitude." 2 I. & N. Dec. at 828.

Even at an earlier date, the BIA had similarly held that it could draw reasonable inferences from the record when ascertaining whether an alien's intent in a larceny-related crime was to temporarily or permanently deprive an owner of property. In *Matter of G-*, 2 I. & N. Dec. 235, 237 (BIA 1945), the BIA held that an alien convicted in Canada for retaining stolen goods, knowing them to be stolen, had committed a CIMT. Although the BIA held that it had to determine whether or not the alien had intended to deprive the owner of the goods temporarily or permanently, it held that the record of conviction and admissions of the alien demonstrated that he had purchased the stolen goods from the thief. *Id.* at 237-38. The BIA held that such an act was "inconsistent with an intent to deprive temporarily," and therefore concluded that it was a CIMT. *Id.* at 238. *See generally Matter of V-Z-S-*, 22 I. & N. Dec. 1338, 1350 n.12 (BIA 2000) (distinguishing moral turpitude analysis of *Matter of D-* and *Grazley* from analysis of

whether offense constituted "theft" for purposes of aggravated felony statute; referring to these older cases' discussion of temporary v. permanent takings). This holding, of course, is consistent with this Court's recent decision in *Michel, supra*.

Notwithstanding the cases cited above, the BIA has not generally inquired into whether a particular larceny involved the permanent or temporary deprivation of property, and has sometimes held unqualifiedly that larceny is a CIMT. For example, in *Matter of Esfandiary*, 16 I. & N. Dec. 659, 661 (BIA 1979), the BIA held that an alien who pled guilty to entering a dwelling with intent to commit petit larceny had committed a CIMT, because "[p]etit larceny is a crime involving moral turpitude." Similarly, in *Matter of Scarpulla*, 15 I. & N. Dec. 139, 140-41 (BIA 1974), the BIA held that an alien's 1948 conviction in Italy for theft of 300 kilos of olives valued at $35 involved moral turpitude: "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude." The BIA did not inquire as to whether the Italian statute would have permitted conviction for intent to effect a temporary taking.

B. Discussion

1. The Record of Conviction Shows That Petitioner's Burglary Convictions Involved Larceny with Intent to Permanently Take the Victim's Property, Qualifying Them as CIMTs

The BIA properly found the petitioner removable according to the modified categorical approach because the record of conviction indicates that the crime underlying his burglary conviction was a larceny that qualifies as a CIMT.

As a preliminary matter, the record of conviction leaves no doubt that the petitioner committed burglary with intent to commit larceny. In the case at bar, the record of conviction included the transcript of the plea agreement (JA 108-17) and the charging document (the Original Information, JA 119-20). Those documents show that the petitioner admitted to burglary as well as to specific acts accompanying the burglary, including the theft of a credit card, cash and jewelry of the victim. They also show that the petitioner faced charges of larceny and credit card theft in conjunction with the two burglary charges.

Specifically, during the petitioner's plea hearing in Connecticut Superior Court, the prosecutor summarized the factual basis for the plea as follows:

> . . . . On July 8, 2001, someone reported to the Greenwich Police Department that while that person was away on vacation from June 30, 2001 to July 7, 2001 people entered her home and stole cash and jewelry, as well as a credit card. Police investigated and the owner had workers at her house. This defendant was one of the two workers. The Police spoke to the defendant's co-worker and the defendant admitted that on two occasions they went into the victim's house and took items from the victim's house. The first time they took two rings. The second time they took official jewelry and the next time a first union credit card and two watches. The co-defendant said that this defendant, the co-defendant, and a third person committed those crimes. . . .
>
> THE COURT: . . . . The State's Attorney related certain facts, which he alleged occurred. Is that what you did? Is that what you are guilty of?
>
> MR. WALA: Yes sir.
>
> THE COURT: . . . . The Court . . . finds the factual basis for the plea. The plea is accepted and may be recorded. . . .

JA 111-13. By pleading guilty to burglary in the third degree under Conn. Gen. Stat. § 53a-103, the petitioner had to admit having "enter[ed] or remain[ed] unlawfully in a building with intent to commit a crime therein." As

the IJ properly found, this colloquy discloses that "the intent of the burglary was to commit larceny." JA 44.

The petitioner's argument to the contrary is little more than sophistry. Specifically, he argues that only his actions, and not his intent, were discussed in the colloquy. Accordingly, he speculates that his intent upon entering the victim's house might just as easily have been to commit a breach of peace, or to commit some other crime that was not a crime of moral turpitude. Pet. Br. at 26. Yet if we were to indulge such speculations, we might as well speculate that he had no illicit intent at all. That, of course, would lead to the conclusion that the petitioner had provided no factual basis at all for his plea. Yet the petitioner is not so bold as to challenge the validity of his state plea, or to claim that it lacked a factual basis. And rightly so. There is only one commonsense reading of his plea hearing: that the facts outlined for the court were understood by all present as outlining the elements of the crime to which petitioner was pleading guilty, and not mere surplusage. Consistent with the maxim that a person is presumed to intend the consequences of his actions, the petitioner's admission that he entered a victim's house and stole cash, jewelry, and a credit card must have been understood in the context in which it was offered: as an admission to a burglary offense that requires intent to commit a crime.

That leads to the question of whether petitioner's larceny is a CIMT. In *Matter of M*, decided in 1946, the BIA held that "if the crime accompanying the breaking and entering is larceny, then this violation . . . would

involve moral turpitude, since larceny is an offense which has been universally held to involve such conduct." 2 I. & N. Dec. at 723. The BIA's interpretation of larceny as qualifying as a CIMT is fully consistent with this Court's similar interpretation of crimes of moral turpitude. *See, e.g.,*, *United States ex rel. Ventura*, 219 F.2d at 251; *Michel,* 206 F.3d at 265. This is the construction upon which the IJ relied in determining that the larceny underlying petitioner's burglary conviction was a CIMT. JA 44. Because this construction tracks this Court's consistently expressed views, it is reasonable. Because the Court applies *de novo* review to the question of whether a particular offense constitutes a CIMT, this Court need look no further than its own settled precedents to deny the petition for review.

As noted above, however, the BIA has sometimes taken the view that a larceny could conceivably fall outside the definition of CIMTs if it was committed with intent only to "temporarily" take the victim's possessions. *See, e.g., Matter of Grazley*, 14 I. & N. Dec. at 333; *Matter of D-*, 1 I. & N. Dec. at 144-45. Although the BIA did not expressly adopt that position in the present case, its opinion acknowledges this line of analysis at least implicitly, since it observes that the record sufficiently demonstrates that the petitioner intended to permanently deprive the victim of her belongings. JA 2.[2] This Court

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[2] The BIA, in affirming that conclusion, further stated that it concurred "[i]n particular" with "the Immigration Judge's finding [that] the underlying crime of larceny involved (continued...)

need not definitively choose between the broader and more limited views of whether larceny constitutes a CIMT, because the IJ and the BIA properly looked to the record of conviction to dispel any doubt that the petitioner might have been convicted of an offense involving such an unusually mild intent.

The petitioner cites Connecticut case law stating that Connecticut's larceny statute is divisible, containing sections which require intent to permanently take a person's belongings (considered a CIMT) and intent to merely temporarily take a person's belongings (not considered a CIMT). *See, e.g.*, *State v. Spillane*, 255 Conn. 746, 754 n.8 (2001); *State v. Wieler*, 233 Conn. 552, 553-56 (1995); *State v. Wieler*, 35 Conn. App. 566, 576-580 (1994). If the Court chooses to accept the petitioner's premise that larceny is a divisible statute, it must determine which variant of the larceny offense is indicated

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[2] (...continued)
in the burglary conviction is a crime involving moral turpitude. The plea transcript is adequate to show that such offense involved a permanent taking of property." JA 2. This holding does not clarify whether the BIA accepted the petitioner's theory that larceny is a divisible statute for purposes of determining whether a CIMT has been committed; however, it does support the mootness of such a question with respect to the petitioner, who in any case was found to have committed a larceny involving a permanent taking of property.

by the record of conviction.[3] Relevant to that inquiry, BIA case law indicates that a theft of cash is a clear indication that the theft was intended as a permanent, not a temporary taking. *See Matter of Grazley*, 14 I. & N. Dec. at 333 ("[W]e believe it is reasonable to assume, since cash was taken, that [defendant] took it with the intention of retaining it permanently.") The petitioner admitted to taking both cash and a credit card in the plea colloquy. JA 111. *Cf. Matter of M*, 2 I. & N. at 724-25 (defendant's guilty plea did not indicate the particular crimes that accompanied the breaking and entering, but merely stated the crime of burglary in the third degree in violation of New York Penal Law).

The petitioner's acts are inconsistent with any inference that his intent was to "temporarily" take the victim's cash; to "temporarily" borrow the victim's credit card; or perhaps to "temporarily" borrow the victim's two rings and two watches. This Court should not force such an absurd interpretation of the record of conviction under the guise of applying the categorical approach. Applying the petitioner's reasoning, it would be virtually impossible

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[3] "[A] statute need not be formally divided into separate subsections in order to be considered disjunctive . . . ." *Garcia v. Attorney General*, No. 05-2786, mem. op. at 13 n.9 (3d Cir. Sept. 5, 2006). By way of illustration, the Third Circuit has explained that if a statestatute prohibited manufacturing drugs, and could be violated in a way that did or did not involving trading or dealing drugs, "the statute is disjunctive in a relevant sense and departure from the categorical approach is appropriate." *Id.*

for any burglary with intent to commit larceny under Connecticut to ever constitute a CIMT, because the defense could always argue that the trier of fact cannot infer an intent to permanently deprive the victim of her property because it is possible the culprit simply might have intended to "borrow" the property for a while. Under the petitioner's reasoning, none of these larcenies, no matter how clearly intended as permanent takings of property, would ever qualify as CIMTs unless the charging instrument or the plea colloquy included the word "permanently."

Such a strange result cannot have been intended by the courts in adopting the modified categorical approach, nor could it have been intended by Congress in its drafting of the INA, particularly in light of clear precedent stating that larceny qualifies as a CIMT. In other contexts, this Court has repeatedly held that it will acknowledge the plain import of what is said in judicial proceedings, and not insist on formulaic recitations.[4] Read in a commonsense fashion, the petitioner's admissions in his guilty plea

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[4] *See, e.g., Messiah v. Duncan*, 435 F.3d 186, 198 (2d Cir. 2006) ("a judge need not engage in 'a talismanic recitation of specific words in order to satisfy *Batson*'"); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (holding that a federal judge need not engage in "robotic incantations" when articulating sentencing rationale); *United States v. George*, 157 F.3d 46, 52 (2d Cir. 1998) (holding that courts "should not interpret supporting affidavits in a hypertechnical, rather than a common sense manner").

correspond to the elements of a larceny that would qualify as a CIMT, and this Court should conclude that the petitioner is subject to removal.

2. The IJ Did Not Engage in Impermissible Fact Finding

The petitioner argues that the BIA and the IJ are not factfinders with regard to criminal convictions, and therefore are not permitted to draw inferences from the plea colloquy to support a conclusion that acts constituting a CIMT had been admitted. Given the plain text of the INA's CIMT-based removability section in question here, this argument overstates the limitations on the role of immigration judges, and is based on inapposite case law. The petitioner's primary cited case, *Sui v. INS*, 250 F.3d 105 (2d Cir. 2001), is distinguishable from the present case because the statute in *Sui* "clearly required" *conviction* of an aggravated felony,[5] *id*. at 113, 117, whereas the moral turpitude provision's plain text states that removal is appropriate if the alien admits to "*acts which constitute* the essential elements of . . . a crime

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[5] 8 U.S.C. § 1227(a)(2)(A)(iii) states that "[a]ny alien who is *convicted* of an aggravated felony at any time after admission is deportable." (emphasis added). As noted in *Sui*, the statute uses the words "convicted" of an aggravated felony, not "committed" an aggravated felony. *See* 250 F.3d at 117. This stands in stark contrast with § 1182(a)(2)(A)(i)(I), which renders aliens inadmissible for having "committed" a CIMT, as well as for simply "committing acts which constitute the essential elements of" a CIMT.

involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I) (emphasis added). The CIMT statute thus allows the IJ and the BIA to find that a particular conviction for burglary has as its underlying crime *acts* (to which an alien has admitted) which constitute a CIMT, regardless of the presence or absence of state-specific convictions that statutorily constitute CIMTs – unlike the aggravated felony provision, which does not make such an allowance. 8 U.S.C. § 1227(a)(2)(A)(iii).[6]

Contrary to the petitioner's assertions, the IJ might sometimes be required to act in ways that can be described as "fact finding" when a CIMT is charged because she may have to consider the record of conviction to determine which of multiple alternative elements inhere in a particular conviction. *See, e.g., Hamdan*, 98 F.3d at 189 (remanding for BIA to make the requisite factual findings for a determination that Hamdan was convicted under a section involving moral turpitude). Moreover, in the

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[6] The Court of Appeals for the Seventh Circuit has questioned the uncritical application of the *Taylor* categorical to ascertaining whether an offense is a "crime of moral turpitude." *See Abdelqadar v. Gonzales*, 413 F.3d 668, 672 (7th Cir. 2005) ("It is the language of [18 U.S.C.] § 16 (and some other provisions to which [8 U.S.C.] § 1101(a)(43) refers), and not anything in [8 U.S.C.] § 1227(a)(2)(A), that limits some inquiries to statutory elements."). Like the Seventh Circuit in *Abdelqadar*, this Court need not reach that question in the present case because an examination of the defendant's "admissions when pleading guilty . . . . puts his conviction on the 'crime of moral turpitude' side of any divide." 413 F.3d at 672.

CIMT context, the IJ may have to determine not only whether the alien has been convicted of a CIMT, but also (in the alternative) whether the alien has admitted to acts constituting the "essential elements" of a CIMT. The IJ reasonably concluded in the case at bar that the facts admitted in the plea colloquy and the rest of the record of conviction indicate that petitioner had committed a CIMT because a larceny, in the view of the IJ, is a CIMT; however, the IJ's holding would have been no less appropriate or justified if he had instead chosen to analyze whether or not the acts to which the petitioner admitted constituted a CIMT in their own right.[7]

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[7] The petitioner also attempts to impeach the validity of the plea colloquy by arguing that the prosecuting State's Attorney, not the petitioner, made the factual statements contained in the plea colloquy. The record clearly indicates, however, that the court asked the petitioner several times if he understood the plea he was making, and directly confirmed that he was pleading guilty to the facts as related by the State's Attorney. JA 113. This argument by the petitioner therefore has no merit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 11, 2006

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,387 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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ADDENDUM

8 U.S.C. § 1101. Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924 (c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842 (h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922 (g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at [4] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [4] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581–1585 or 1588–1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324 (a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [5]

(O) an offense described in section 1325 (a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense

(i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and

(ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only

the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

8 U.S.C. § 1182. Inadmissible aliens.

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if--

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

is inadmissible.

8 U.S.C. § 1227(a)(2)(A)(iii)

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

(A) General crimes

* * *

(iii) Aggravated felony Any alien who is convicted of an aggravated felony at any time after admission is deportable.

Conn. Gen. Stat. § 53a-103.

(a) A person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein.

Conn. Gen. Stat. § 53a-173.

(a) A person is guilty of failure to appear in the second degree when (1) while charged with the commission of a misdemeanor or a motor vehicle violation for which a sentence to a term of imprisonment may be imposed and while out on bail or released under other procedure of law, he wilfully fails to appear when legally called according to the terms of his bail bond or promise to appear, or (2) while on probation for conviction of a misdemeanor or motor vehicle violation, he wilfully fails to appear when legally called for a violation of probation hearing.

(b) Failure to appear in the second degree is a class A misdemeanor.