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Immigrant Defense Project

PRACTICE ADVISORY
The Impact of *Nijhawan v. Holder* on Application of the Categorical Approach to Aggravated Felony Determinations[1]

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Using the approach that sometimes some good can come of a bad decision, this advisory reviews the specific holding in the Supreme Court's recent decision in *Nijhawan v. Holder*, No. 08-495**,** 2009 WL 1650187 (U.S. June 15, 2009), analyzes the decision's impact on application of the categorical approach to aggravated felony determinations generally, and provides specific suggestions on how *Nijhawan* may be used affirmatively to overcome unfavorable case law in certain jurisdictions on certain aggravated felony issues, including the reach of the sexual abuse of a minor and drug trafficking grounds. The advisory also attaches an Appendix Chart summarizing the impact of the *Nijhawan* decision on the analytical approach to be applied to each of the various aggravated felony grounds.

Overview

On June 15, the Supreme Court issued its decision in *Nijhawan v. Holder*, 2009 WL 1650187 (June 15, 2009), a case challenging the government's abandonment of the categorical approach with respect to the $10,000 monetary loss required for a fraud offense to be deemed an "aggravated felony." Under the traditional categorical approach, the adjudicator is not permitted to look at the alleged conduct underlying the conviction, but instead to look only at the statute of conviction and what is established by the conviction itself. In *Nijhawan*, however, the Supreme Court allowed the adjudicator to consider and rely on factual admissions and findings made for sentencing purposes, once conviction had already occurred.

Nevertheless, while the Supreme Court's decision affirms the government's deviation from the categorical approach in the context of the $10,000 loss requirement for a fraud offense to be deemed an aggravated felony (and may support deviations from the categorical approach in certain other contexts), there is also potential for the Court's opinion to be used to support strict application of the categorical approach in other contexts. Among the points that immigration practitioners should keep in mind are the following:

- The Court applied what it called the "circumstance-specific" approach instead of the categorical approach to the $10,000 loss requirement for a fraud offense to be deemed an aggravated felony, but made clear that this approach applies only

[1] The Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild jointly prepared this advisory that Dan Kesselbrenner and Manuel D. Vargas wrote with assistance from Stephanie Kolmar and Patrick Taurel, who is primarily responsible for the Appendix chart.

where the factor at issue is found to refer to the specific way in which an offender committed a crime on a particular occasion.

- The Court made clear that the categorical approach applies to most aggravated felony removal grounds or provisions, which reference generic crimes rather than the particular factual circumstances surrounding commission of the crime on a specific occasion (see Appendix for impact of *Nijhawan* on analysis of other aggravated felony grounds).

- The Court also indicated that the categorical approach to be applied to generic crimes is the same strict categorical test applied in the criminal sentencing context in cases such as *Taylor v. United States*, 495 U.S. 575 (1990).

- Even where a circumstance-specific approach may be applied, the Court limited inquiry into the facts underlying a conviction to findings "tied to the specific counts covered by the conviction" and that are obtained under "fundamentally fair procedures" where the evidence that the government offers must meet a "clear and convincing" standard.

The *Nijhawan* decision and its impact

Q. What was the case about?

A. The Supreme Court granted certiorari to determine whether a noncitizen is deportable under the fraud or deceit aggravated felony for having a loss to the victim that exceeds $10,000 where the statute of conviction does not include an element of loss. The petitioner argued that the categorical approach, which the Court applies to determine enhancements under the Armed Career Criminal Act (ACCA), a federal sentencing enhancement statute,[2] precluded a finding of deportability where the elements of the statute of conviction do not match the elements of the ground of deportability.

Q. What is the background to the case?

A. In brief, a jury found Mr. Nijhawan guilty of conspiracy, fraud, and money laundering. The fraud statute under which Mr. Nijhawan was convicted did not include a loss element, nor was jury asked to make a loss finding. After conviction, Mr. Nijhawan stipulated for sentencing purposes that the loss exceeded $100 million. The court ordered defendant to pay $683 million in restitution and sentenced him to a forty-one month period of incarceration.

The Department of Homeland Security charged Mr. Nijhawan with being deportable under the aggravated felony ground for having a conviction for a crime involving fraud or deceit aggravated felony with a loss to the victim that exceeded $10,000. The Immigration Judge found that the conviction fell within the definition of "aggravated

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[2] *See Taylor v. United States*, 495 U.S. 575 (1990); *Chambers v. United States*, 129 S.Ct. 687 (2009); *James v. United States*, 550 U.S. 192 (2007); 18 U.S.C. §924(e)

felony" under INA § 101(a)(43)(M)(i) based on evidence obtained from the sentencing records. The Board of Immigration Appeals (BIA) and Third Circuit affirmed the Immigration Judge's decision.

Q. What did the Court decide?

A. The Supreme Court held that a noncitizen is deportable under the fraud aggravated felony ground regardless of whether a loss amount is an element of the statute of conviction. The Court further held that a factfinder can rely on sentencing admissions and findings to demonstrate the amount of the loss.

Q. How did the Court reach its decision?

A. The Court examined the aggravated felony definition and found that not all its provisions require application of the categorical approach. First, it determined that certain sections refer to "a generic crime," which do require the factfinder to use the categorical approach. *See Nijhawan*, 2009 WL 1650187, at *6. The Court indicated that the categorical approach to be applied to deportability provisions based on such generic crimes is the same strict categorical test applied in the criminal sentencing context in cases such as *Taylor v. United States*, 495 U.S. 575 (1990). *See Nijhawan*, 2009 WL 1650187, at *3 (referencing *Taylor* categorical approach as applicable had the Court determined that the $10,000 loss requirement had to be an element of the statute under which Mr. Nijhawan was convicted). As the Court explained, under the strict *Taylor* categorical test, whether a conviction falls within a statutory description of a generic crime may be determined only "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)." *See Nijhawan*, 2009 WL 1650187, at *5.

According to the Court, though, a second group of sections require a "circumstance-specific" inquiry, in which the decision maker may determine whether the offense constitutes an aggravated felony by examining the alleged facts and circumstances underlying a noncitizen's crime. The Court applied this approach to the $10,000 loss requirement finding that the loss requirement "refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion." *Nijhawan*, 2009 WL 1650187, at *3. The Court reasoned that, because so few state or federal criminal fraud statues contain this monetary element, a categorical method of inquiry would render the $10,000 threshold meaningless.

Q. Does *Nijhawan* provide any guidance on whether other aggravated felony grounds or provisions are subject to the categorical approach?

A. The Court's decision differentiates between aggravated felony grounds that require a generic crime conviction and aggravated felony grounds that are "circumstance specific." For a generic aggravated felony ground, the traditional categorical approach applies. For a "circumstance specific" ground, the record of conviction is not the limit of the evidence

a factfinder can consider in deciding whether the respondent's conviction constitutes an aggravated felony. *See* Appendix chart below for a detailed provision by provision analysis of the various aggravated felony grounds, and provisions within each ground, that the Court stated or suggested were generic crimes subject to the categorical approach or to the circumstance-specific approach).

Q. Are there limits to the evidence a factfinder can consider in determining whether a respondent's conviction satisfies the definition of a "circumstance-specific" aggravated felony?

A. Yes. The Court permitted evidence of loss beyond what the conviction establishes only if the procedures were fundamentally fair, "including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims." *See Nijhawan*, 2009 WL 1650187, at *8. The Court specifically indicated that there must be a tether between the evidence of loss and the conviction, and that dismissed counts must not be the source of the evidence. *Nijhawan*, 2009 WL 1650187, at *8. Indeed, the opinion approvingly cites the Government's statement that the "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." *See Nijhawan*, 2009 WL 1650187, at *9. Moreover, the evidence taken together must also constitute "clear and convincing" evidence that the loss exceeds $10,000.

Q. Is there an argument that *Nijhawan* limits the BIA's interpretation in *Matter of Babaisakov*, 24 I&N Dec. 306, 321 (BIA 2007) that an Immigration Judge could even consider evidence outside the record of conviction like a respondent's admissions in removal proceedings?

A. The BIA in *Babaisakov*, which also dealt with the $10,000 loss requirement for a fraud offense to be deemed an aggravated felony, permitted an Immigration Judge to consider "reliable evidence," which goes beyond sentence-related evidence. The Supreme Court cited to *Babaisakov* only insofar as it dealt with sentencing findings. *Nijhawan* 2009 WL 1650187, at *9. Indeed, even with respect to sentencing-related evidence, the Court cites *Babaisakov* for the evidence-limiting proposition that the BIA itself 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. That the Court focused exclusively on sentencing related evidence, cited to *Babaisakov* solely for sentencing-related evidence, did not defer to *Babaisakov* (see next question), discussed the need for fairness, and required evidence tied to the conviction and not re-litigating the conviction, support the argument that, after *Nijhawan*, only sentence-related evidence is reliable. Thus, one can argue that the Court's narrowly tailored discussion of evidence in *Nijhawan* supersedes the BIA's expansive interpretation of what evidence a factfinder can hear to determine the amount of the loss or any other possible circumstance-specific factor.

Q. Did the Court defer to the BIA's holding in *Matter of Babaisakov,* 24 I&N Dec. 306 (BIA 2007)?

A. In *Babaisakov*, the Board invoked *Nat'l Cable & Telecomms. Ass'n v. Brand X,* 545 U.S. 967 (2005), a Supreme Court case that allows an agency to ignore certain circuit cases that were decided when the agency had a different interpretation and which the agency now rejects. In the BIA's view, it did not have to follow circuit court decisions interpreting monetary loss because the circuits did not have the benefit of the BIA's decision in *Babaisakov* when the circuits addressed the fraud/deceit $10,000 loss issue. The reasoning underlying *Brand X* is the Supreme Court's decision in *Chevron v. NRDC*, 467 U.S. 837 (1984), which requires a reviewing court to defer to an agency's interpretation of an ambiguous statute that it administers unless the agency's interpretation is contrary to the statute or unreasonable. Nevertheless, despite vigorous invocation of *Chevron* and *Brand X* by the government, the Supreme Court did not mention *Chevron* once in *Nijhawan*. The Court's failure to address the *Chevron* issue in an administrative case like *Nijhawan* strongly suggests that the Court treated the issue as a strict question of statutory construction or determined that this issue concerning the reach of the aggravated felony definition, which is also applied in federal criminal contexts, is not subject to *Chevron* deference. *See also Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal* v. Ashcroft, 543 U.S. 1 (2004).

Using *Nijhawan* affirmatively to limit the reach of other aggravated felony categories in the immigration statute

Q. Can *Nijhawan* be used to support arguments to limit the reach of the sexual abuse of a minor section of the aggravated felony definition?

A. Yes, the Supreme Court identified sexual abuse of a minor defined under 8 USC 1101(a)(43)(A) as a generic offense, which requires a conviction to contain the elements of the ground of deportability. *See Nijhawan*, 2009 WL 1650187, at *6. This can be used, for example, to argue against government introduction of evidence to establish the alleged age of a victim when this fact was not required to be established by the elements of the statute of conviction. *See, e.g.*, *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*) (cited by the Supreme Court in *Nijhawan*). Prior to *Nijhawan*, the Seventh Circuit, reached a contrary result, holding that the age of the victim need not be an element of the offense for the conviction to constitute a sexual abuse of a minor aggravated felony. *Lara-Ruiz v. I.N.S.*, 241 F.3d 934 (7th Cir. 2001); *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005). Practitioners in the Seventh Circuit should argue that *Lara-Ruiz* and *Gattem* are no longer good law in light of *Nijhawan*.

Q. Can *Nijhawan* be used to support arguments to limit the reach of the illicit trafficking of a controlled substance section of the aggravated felony definition?

Yes, the Supreme Court also identified illicit trafficking in a controlled substance under 8 USC 1101(a)(43)(B) as a generic offense, which requires a conviction to be analyzed

under the traditional categorical approach. *See Nijhawan*, 2009 WL 1650187, at *6. This may be relevant to ongoing litigation regarding whether a second simple possession drug offense may be deemed a drug trafficking aggravated felony.

The Supreme Court's decision supports the position of the BIA, which has held that, unless circuit law had determined otherwise, an immigration factfinder should stay within the record of conviction of the second or subsequent conviction in determining whether a second or subsequent possession offense constituted recidivist possession of a controlled substance, which would make the offense an aggravated felony under 8 USC § 1101(a)(43)(B). *Matter of Carachuri-Rosendo*, 24 I. & N. Dec. 382, 393 (BIA. 2007). Under this view, only if a state prosecuted the defendant as a repeat offender would a state conviction qualify as illicit trafficking.

In reviewing whether a second conviction for possession of a controlled substance constituted "illicit trafficking, the Fifth Circuit has said to the contrary that "[u]nder this court's approach for successive state possession convictions, a court or an immigration official characterizes the conduct proscribed in the latest conviction, by referring back to the conduct proscribed by a prior conviction as well." *Carachuri-Rosendo v. Holder*, --- F.3d ----, 2009 WL 1492821 (5th Cir. May 29, 2009). In considering the petitioner's prior conviction, the Fifth Circuit examined evidence that was not part of the record of conviction at issue.

Similarly, the Seventh Circuit also considered evidence beyond the statute and record of conviction to determine that a second or subsequent conviction for possession of a controlled substance was an aggravated felony under the illicit trafficking section of aggravated felony definition. *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008); *U.S. v. Pacheco-Diaz*, 513 F.3d 776 (7th Cir. 2008). While the Supreme Court cited *Fernandez*, it cited specifically to pages 871-72 of that decision, where the Seventh Circuit stated that it was following the *Taylor* categorical approach. In fact, the Supreme Court also cited to *Steele v. Blackman*, 236 F.3d 130, 136 (3d Cir. 2001), which reached the opposite conclusion from the Seventh Circuit on the merits of the two possession issue, indicating that the Court was citing these cases for their general adoption of a categorical approach, and not for how the circuits applied that approach to the issue of when a second or subsequent conviction for possession of a controlled substance is an aggravated felony. *See Nijhawan*, 2009 WL 1650187, at *6.

The Supreme Court in *Nijhawan* permitted a factfinder to examine evidence outside of the record of conviction only in "circumstance specific" sections of the aggravated felony definition. The Court classified illicit trafficking aggravated felony definition under 8 USC § 1101(a)(43)(B) as a generic offense, and not a "circumstance specific" offense. *Nijhawan*, 2009 WL 1650187, at *6. Therefore, the Fifth and Seventh Circuits' decisions permitting a factfinder to look at a separate conviction document that is not part of the record of conviction at issue is inconsistent with *Nijhawan*.

Advising criminal defense attorneys representing immigrants facing fraud charges in criminal proceedings

Q. Are there charge bargaining strategies a criminal defense attorney can use to avoid deportability for a fraud or deceit aggravated felony?

A. One strategy that may be of fairly broad applicability is to switch any potential plea from a fraud crime to a theft crime. In a case where the loss to the victim is likely to exceed $10,000, but the court is not likely to sentence the defendant to a year or more, it may be possible to avoid a fraud or deceit aggravated felony by pleading to a theft offense. In the BIA's view, theft and fraud crimes are generally distinct offenses. *Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008). In *Garcia*, the BIA held that a Rhode Island conviction for welfare fraud was not a theft offense because the defendant took the victim's property with the owner's consent and theft is a taking without consent. However, if the plea were instead to a larceny offense, this would avoid the consequences of an aggravated felony conviction if any sentence of imprisonment imposed by the court is less than a year.

Q. Are there any strategies a criminal defense attorney can use to keep the government from meeting its burden that the loss exceeds $10,000 by clear and convincing evidence?

A. In *Nijhawan*, the Court, in concluding that the restitution order and stipulation constituted clear and convincing evidence, noted with significance the absence of any conflicting evidence as to the amount of the loss. *Nijhawan*, 2009 WL 1650187, at *9. One possibility would be for a defendant to enter a plea for a sum certain that is $10,000 or less. Another possibility would be for the criminal court to approve a plea agreement for a sum certain that is $10,000 or less. In both such cases, the existence of such conflicting evidence may mean that the government is unable to establish by clear and convincing evidence that the loss exceeds $10,000 even where there is evidence introduced later under the lesser burden of proof at sentencing that the loss exceeded $10,000.

For further information

For information regarding how *Nijhawan* affects criminal grounds of removal other than aggravated felonies, *see* Immigrant Legal Resource Center Preliminary Advisory on *Nijhawan* at www.nationalimmigrationproject.org. For the latest legal developments or litigation support on issues discussed in this advisory, or other future advisories further developing or expanding on the issues discussed here, contact the National Immigration Project at (617) 227-9727 or the Immigrant Defense Project at (212) 725-6422.

APPENDIX

Aggravated Felony Analytical Approach Post-*Nijhawan*

Aggravated Felony 101(a)(43)	**Likely Analytical Approach (Categorical or Circumstance-Specific or Sentence-Based)**	**Basis in *Nijhawan* for Determination on Likely Analytical Approach**
(A) murder, rape, or sexual abuse of a minor	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes. Subparagraph (A), for example, lists 'murder, rape, or sexual abuse of a minor.' *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (CA9 2008); *Singh v. Ashcroft*, 383 F.3d 144 (CA3 2004); *Santos v. Gonzales*, 436 F.3d 323 (CA2 2005)" (*Nijhawan*, 2009 WL 1650187, at*6).
(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 942(c) of Title 18)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Subparagraph (B) lists 'illicit trafficking in a controlled substance.' *Gousse v. Ashcroft*, 339 F.3d 91 (CA2 2003); *Fernandez v. Mukasey*, 544 F.3d 862 (CA7 2008); *Steele v. Blackman*, 236 F.3d 130 (CA3 2001)." (*Nijhawan*, 2009 WL 1650187, at *6) – *See also Lopez v. Gonzales*, 549 U.S. 47 (2006) (without naming its approach, essentially applied categorical approach to this aggravated felony ground).
(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)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…And subparagraph (C) lists "illicit trafficking in firearms or destructive devices." (*Nijhawan*, 2009 WL 1650187, at *6).

° **Signifies that *Nijhawan* includes language expressly stating or suggesting that this approach should be used with respect to this provision of the aggravated felony definition.**

(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) …	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to an 'offense described in' a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6).
…if the amount of the funds exceeded $10,000	Uncertain	Reasoning: 1. The provision at issue somewhat parallels the (M)(i) provision at issue in *Nijhawan*. 2. On the other hand, at least one of the referenced federal criminal statutes did in 1996 require findings that the amount of the funds exceeded $10,000. *See* 18 U.S.C. § 1957; *see also* 18 U.S.C. § 1956(b)(1) (providing for civil penalty greater than $10,000 if value involved in the transaction exceeded $10,000). 3. State money laundering statutes in 1996 varied on whether they identified $10,000 as an element. *Compare* N.Y. Penal Law § 470.05 (West 1995) ($10,000 threshold); IL ST CH 38 ¶ 29B/1 (West 1996)($10,000 threshold), *with* Cal.Penal Code §§ 186.10(a) (West 1996), 186.10(c)(1)(A) (West 1996)(amount other than $10,000 specified); Tex. Penal Code Ann. § 34.02 (West 1996)(same).
(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 offense); (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).	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph (E)" (*Nijhawan*, 2009 WL 1650187, at *6).

(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 least one year [sic]	Categorical Refer to Sentence Imposed	Reasoning: 1. Refers to a category of offenses generically defined in the Federal Criminal Code at 18 U.S.C. § 16. *Cf. Nijhawan* discussion of requirement that courts use the "categorical method" to determine whether a conviction for attempted burglary was a conviction for a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii) definitional language covering a crime that "involved conduct that presents a serious potential risk of physical injury to another." (*Nijhawan*, 2009 WL 1650187, at *4). 2. No language in this provision calls for a circumstance-specific approach. 3. Its position within § 101(a)(43) does not point to a circumstance-specific approach. 4. No problems applying the very clearly identified elements that appear in 18 U.S.C. § 16. 5. *See also Leocal v. Ashcroft*, 543 U.S. 1 (2004) (without naming its approach, essentially applied categorical approach to this aggravated felony ground).
(G) a theft offense (including receipt of stolen property) or burglary offense… …for which the term of imprisonment at least one year [sic]	Categorical Refer to Sentence Imposed	Reasoning: 1. Refers to generic crimes of "theft offense" (including "receipt of stolen property") and "burglary offense." 2. No language in this provision calls for a circumstance-specific approach. 3. Its position within § 101(a)(43) does not point to a circumstance-specific approach. 4. *See also Gonzales v. Duenas-Alvarez* 549 U.S. 183 (2007) (understanding 'theft' to be used in the generic sense and expressly applying categorical approach).
(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph…(H)" (*Nijhawan*, 2009 WL 1650187, at *6).
(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph…(I)" (*Nijhawan*, 2009 WL 1650187, at *6).

(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),…	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph…(J)" (*Nijhawan*, 2009 WL 1650187, at *6).
…for which a sentence of one year imprisonment or more may be imposed	Refer to Potential Sentence	
(K) an offense that - (i) relates to the owning, controlling, managing, or supervising of a prostitution business	Categorical	Reasoning: Refers to generic offenses with no qualifying language.
(K) an offense that… (ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution)…	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6).
… if committed for commercial advantage	Circumstance-Specific°	"The statute has other provisions that contain qualifying language that certainly seems to call for circumstance-specific application. Subparagraph (K)(ii), for example…" - However, Supreme Court adds: "*But see Gertsenshteyn v. United States Dept. of Justice*, 544 F.3d 137, 144-145 (CA2 2008)." (*Nijhawan*, 2009 WL 1650187, at *6).
(K) an offense that... (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)	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6).

(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)	Categorical°	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to 'an offense described in' a particular section of the Federal Criminal Code. See, *e.g.*, subparagraph…(L)" (*Nijhawan*, 2009 WL 1650187, at *6).
(M) an offense that - (i) involves fraud or deceit…	Categorical°	Reasoning: *Nijhawan* distinguishes monetary threshold factor from the elements of a generic offense involving "fraud" or "deceit." -- "The question before us is whether the italicized language [in which the loss to the victim or victims exceeds $10,000] refers to an element of the fraud or deceit 'offense'…" (*Nijhawan*, 2009 WL 1650187, at *3).
…in which the loss to the victim or victims exceeds $10,000	Circumstance Specific°	"We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically…Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." (*Nijhawan*, 2009 WL 1650187, at *8).
(M)(ii) an offense that – … (ii) is described in section 7201 of Title 26 (relating to tax evasion)…	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6).
…in which the revenue loss to the Government exceeds $10,000	Circumstance-Specific°	"The statute [INA 101(a)(43)] has other provisions that contain qualifying language that certainly seems to call for circumstance-specific application…Subparagraph (M)(ii) provides yet another example…" (*Nijhawan*, 2009 WL 1650187, at *6-7).

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) [8 U.S.C.A. § 1324(a)] (relating to alien smuggling),…	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6). That reasoning should apply with equal force in the context of INA criminal provisions.
…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 Act	Circumstance-Specific°	"[T]he 'aggravated felony' statute differs from ACCA in that it lists certain other 'offenses' using language that almost certainly does not refer to generic crimes but refers to specific circumstances…See also subparagraph (N)" (*Nijhawan*, 2009 WL 1650187, at *6).
(O) an offense described in section 275(a) [8 U.S.C.A. § 1325(a)] or 276 [8 U.S.C.A. § 1326]…	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6). That reasoning should apply with equal or force in the context of INA criminal provisions.
…committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph	Circumstance-Specific with respect to INA § 275(a) Uncertain with respect to INA § 276.	Reasoning: This qualifying language will probably be deemed to call for a circumstance-specific approach with respect to an offense under INA § 275 since this offense does not have as an element that the individual was "previously deported." Reasoning: Same qualifying language applies but INA § 276 can be said to have as an element that the individual was "previously deported," and imposes a greater penalty if the prior removal was subsequent to a conviction of an aggravated felony. *See* 8 U.S.C. § 1326(b)(2).

(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)…	Categorical	"The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes…Other sections refer specifically to "an offense described in" a particular section of the Federal Criminal Code." (*Nijhawan*, 2009 WL 1650187, at *6).
…for which the term of imprisonment is at least 12 months,…	Refer to Sentence Imposed	
…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 Act	Circumstance-Specific°	"[T]he 'aggravated felony' statute differs from ACCA in that it lists certain other 'offenses' using language that almost certainly does not refer to generic crimes but refers to specific circumstances. For example, subparagraph (P)…" (*Nijhawan*, 2009 WL 1650187, at *6).
(Q) an offense relating to a failure to appear by a defendant for service of sentence…	Categorical	Reasoning: 1. The language suggests a generic offense. 2. No applicability problems as this offense was criminalized across the country in 1996. *See e.g.* Cal. Penal Code Ann. § 166(a)(4) (West 1996); N.Y. Penal Law Ann. § 215.55 (West 1995); Tex. Penal Code Ann. § 38.10 (West 1996).
…if the underlying offense is punishable by imprisonment for a term of 5 years or more	Circumstance-Specific	Reasoning: There are applicability problems if this language is treated as an element. In 1996, few state statutes that criminalized failure to appear had as an element that the underlying offense be punishable by a term of imprisonment of 5 years or more; more commonly, statutes would heighten the seriousness of the offense if the underlying offense was simply "a felony." *See e.g.* Tex. Penal Code Ann. § 38.10 (West 1996).

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered…	Categorical	Reasoning: The language suggests generic offenses. Such an interpretation would have posed no applicability problems in 1996.
…for which the term of imprisonment is at least one year	Refer to Sentence Imposed	
(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness,…	Categorical	Reasoning: The language suggests generic offenses. Such an interpretation would have posed no applicability problems in 1996.
…for which the term of imprisonment is at least one year	Refer to Sentence Imposed	
(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…	Categorical	Reasoning: The language suggests a generic offense. Such an interpretation would have posed no applicability problems in 1996. *See e.g.* N.Y. Penal Law Ann. § 215.56 (bail jumping in the second degree) (West 1995).
…for which a sentence of 2 years imprisonment or more may be imposed	Circumstance-Specific	Reasoning: There are applicability problems if this language is treated as an element. In 1996, few state statutes that criminalized failure to appear had as an element that the underlying offense be punishable by a term of imprisonment of 2 years or more; more commonly, statutes would heighten the seriousness of the offense if the underlying charge was simply "of a felony." *See e.g.* N.Y. Penal Law § 215.56 (bail jumping in the second degree) (West 1995).
(U) an attempt or conspiracy…	Categorical	Reasoning: These are accessory or preparatory offenses with elements generally defined by statute or case law.
…to commit an offense described in this paragraph.	SEE ABOVE FOR ANALYSIS OF UNDERLYING OFFENSE	SEE ABOVE FOR ANALYSIS OF UNDERLYING OFFENSE