**No. 10-3433**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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**MANUEL DE JESUS FAMILIA ROSARIO,**

**Petitioner,**

**v.**

**ERIC H. HOLDER, JR., United States Attorney General,**

**Respondent.**

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**ON PETITION FOR REVIEW OF AN ORDER OF**
**THE BOARD OF IMMIGRATION APPEALS**
**Alien No. 046-778-586**

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# BRIEF OF RESPONDENT

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**No. 10-3433**

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# BRIEF OF RESPONDENT

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## STATEMENT OF JURISDICTION

Petitioner's jurisdictional statement is not complete and correct. See Petitioner's Brief ("Petr's Br.") 1; Circuit Rule 28(b).

Petitioner, Manuel De Jesus Familia Rosario ("Rosario"), seeks review of a final order of removal issued by the Board of Immigration Appeals ("Board") on September 20, 2010, wherein the

Board dismissed his appeal of an immigration judge's June 4, 2010 decision finding him removable and pretermitting his application for cancellation of removal. Certified Administrative Record ("A.R.") 3-4, 54-59.

The Board's jurisdiction arose under 8 C.F.R. §§ 1003.1(b)(3) and 1240.15 (2010), granting it appellate jurisdiction over immigration judges' decisions in removal proceedings. This Court's jurisdiction generally arises under section 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252 (2006). The Petition for Review is timely because the Board's final order was issued on September 20, 2010, and the Petition for Review was filed on October 19, 2010. See INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (2006). Venue is proper in this Court because removal proceedings were completed in Chicago, Illinois, which is within this Judicial Circuit. See INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2006); A.R. 54-59, 110-18.

This Court's jurisdiction is limited by INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), based on Rosario's criminal offenses. However, the Court retains jurisdiction to review "constitutional claims or questions of law" raised in a petition for review filed by a

criminal alien, such as whether Rosario is ineligible for cancellation of removal based on a conviction for an aggravated felony. See INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2006).

## STATEMENT REGARDING ORAL ARGUMENT

Respondent states that the issues raised in this case are adequately addressed in the respective briefs and do not require oral argument. In the event, however, that the Court schedules oral argument, the Respondent desires to be heard.

## ISSUE PRESENTED

Whether Rosario's conviction for aiding and abetting a conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2 & 371 (2006), where the object of the conspiracy was to violate INA § 278, 8 U.S.C. § 1328 (2006), which prohibits the importation of aliens into the United States for prostitution or immoral purposes, is an offense relating to the owning, controlling, managing, or supervising of a prostitution business pursuant to INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i), and therefore an aggravated felony.

## STATEMENT OF THE CASE AND RELEVANT FACTS

### I. BACKGROUND AND COMMENCEMENT OF PROCEEDINGS

Rosario, a native and citizen of the Dominican Republic, was admitted to the United States as a lawful permanent resident on January 15, 1999, at Miami, Florida. A.R. 150, 214. On December 26, 2006, after departing the United States temporarily, Rosario attempted to reenter at Miami International Airport. A.R. 37, 165. At that time, inspection was deferred in light of pending criminal charges. A.R. 165.

In November 2007, before the United States District Court for the District of Minnesota, Rosario entered a plea of guilty to aiding and abetting a conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2 & 371 (2006), where the object of the conspiracy was to violate INA § 278, 8 U.S.C. § 1328 (2006).[1] A.R. 190-203. The factual basis of Rosario's plea read as follows:

> From in or about 2006 to on or about May 19, 2007, two or more persons came to an agreement or understanding to commit an offense against the United States, namely to run a prostitution operation in the State of Minnesota using women from other countries and states . . . . With

[1] INA § 278, 8 U.S.C. § 1328, prohibits, in part, "[t]he importation into the United States of any alien for the purpose of prostitution, or for any other immoral purpose . . . ."

> knowledge of the existence and purpose of the conspiracy, the defendant voluntarily and intentionally aided and abetted the conspiracy . . . . In furtherance of the conspiracy, the defendant distributed condoms or "chocolates" to various brothels for the purpose of prostitution.

A.R. 196. On November 5, 2009, the court entered judgment, and Rosario was sentenced to three years of supervised release, and time served. A.R. 54, 190-94.

On March 23, 2010, the Department of Homeland Security ("DHS") served Rosario with a Notice to Appear ("NTA"), alleging, inter alia, that Rosario was a native and citizen of the Dominican Republic; that he was admitted to the United States on January 15, 1999 as a lawful permanent resident; that Rosario aided and abetted a criminal conspiracy whose object was a prostitution business; and that on or about November 5, 2009, before the District Court of Minnesota, he was convicted of conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2 & 371 (2006), and was sentenced to time served and supervised release. A.R. 214. The NTA charged Rosario with being subject to removal pursuant to INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006), as an alien convicted of, or admits having

committed, a crime involving moral turpitude, and pursuant to INA § 212(a)(2)(D)(ii), 8 U.S.C. § 1182(a)(2)(D)(ii) (2006), as an alien who directly or indirectly procured persons for the purposes of prostitution. A.R. 214.

On May 11, 2010, Rosario appeared, with counsel, before an immigration judge and conceded removability pursuant to INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for a crime involving moral turpitude under, but denied the charge under INA § 212(a)(2)(D)(ii), 8 U.S.C. § 1182(a)(2)(D)(ii), for prostitution. A.R. 74-75. Rosario further admitted that he was convicted in the District Court of Minnesota of aiding and abetting conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2 & 371 (2006). A.R. 76-79, 86. However, Rosario denied the allegation set forth in the NTA that he aided and abetted a criminal conspiracy whose object was a prostitution business. A.R. 76, 80-81. Rosario also took the position that, as a lawful permanent resident, he was eligible for cancellation of removal pursuant to INA § 240A(a), 8 U.S.C. § 1229b(a) (2006), as his conviction was not an aggravated felony. A.R. 88-90. The immigration judge requested that the parties put their respective

positions in writing. A.R. 90-94. On May 20, 2010, Rosario submitted his Brief on Statutory Eligibility for Cancellation or Removal. A.R. 132-49. On May 20, 2010, DHS submitted its Brief in Support of Removability. A.R. 127-30.[2]

The hearing resumed on May 25, 2010, and concluded on June 4, 2010. A.R. 95-109, 110-18. On May 25, 2010, Rosario submitted his application for cancellation of removal for certain permanent residents. A.R. 97-98, 150-61. During the hearings the immigration judge focused on argument by the respective parties concerning whether Rosario was removable as a lawful permanent resident convicted of an aggravated felony. A.R. 95-109. Rosario maintained the position that his conviction for conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 371 & 2 is not an aggravated felony since the predicate offense, 8 U.S.C. § 1328, does not relate to the owning, controlling, managing or supervising of a prostitution business. A.R. 133-44. In its brief, DHS, relying on the Supreme Court's decision in Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), asserted that as

[2] Rosario was permitted to submit a reply to the DHS brief. A.R. 120-26.

an aider and abettor, Rosario was as liable as the "principal[s] running the prostitution ring," and ineligible for cancellation of removal based on his conviction for an aggravated felony. A.R. 129-30.

## II. THE IMMIGRATION JUDGE'S JUNE 4, 2010 DECISION

On June 4, 2010, the immigration judge pretermitted Rosario's application for cancellation of removal. A.R. 54-59. The immigration judge found Rosario was convicted of an aggravated felony pursuant to INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006), for an "offense relating to the owning, controlling, managing or supervising of a prostitution business." A.R. 59. Accordingly, the immigration judge concluded that Rosario "is statutorily ineligible for cancellation of removal under [section] 240A(a)" of the INA. Id.

The immigration judge noted that in "determining whether a conviction constitutes an aggravated felony," an immigration judge must use a "categorical approach and examine the generic elements of the offense." A.R. 56 (citing Eke v. Mukasey, 512 F.3d 372, 378 (7th Cir. 2008)). The immigration judge further noted that, if an alien "could have been convicted under the statute for conduct that

would not satisfy the generic aggravated felony offense, then an [i]mmigration [j]udge must use the modified categorical approach." Id. (citing Eke, 512 F.3d at 378-79). When applying the "modified categorical approach . . . an [i]mmigration [j]udge looks to the information in the record of conviction to determine" whether the alien was "convicted of the generic aggravated felony offense." Id. (citing Eke, 512 F.3d at 379).

The immigration judge concluded that a conviction pursuant to 8 U.S.C. § 1328 is "not categorically an aggravated felony because the statute punishes . . . conduct that would and would not constitute an aggravated felony." A.R. 56. Specifically, if Rosario "imported an alien into the United States for 'any other immoral purposes,'" this would not be an aggravated felony pursuant to INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006). A.R. 56-57 (citing U.S. v. Clark, 582 F.3d 607 (5th Cir. 2009)). That is, "'any other immoral purposes' could constitute conduct that does not relate to owning, controlling, managing or supervising a prostitution business." Id. Accordingly, the immigration judge applied the modified categorical approach. A.R. 57.

Applying the modified categorical approach, the immigration

judge found that the statute of conviction, together with the plea agreement and sentencing stipulations, judgment and information, showed that Rosario's offense was an aggravated felony within the terms of INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006), because he was convicted of an offense relating to the owning, controlling, managing or supervising of a prostitution business. A.R. 57. Specifically, with respect to the information and judgment, Rosario admitted that he "knowingly aided and abetted in a conspiracy to import any alien for the purposes of prostitution, or for other immoral purpose, in violation of 8 U.S.C. § 1328." Id. Additionally, the immigration judge noted that the plea agreement asserted that "two or more individuals conspired to run a prostitution business in Minnesota using women from other countries or states as prostitutes and . . . [Rosario] aided and abetted this conspiracy by distributing condoms to facilitate prostitution at the brothels." Id.

Rosario contended that his conviction was not an aggravated felony under the INA as the "factual basis for his conviction shows that he did not own, control, manage or supervise a prostitution business." A.R. 57. However, dismissing this argument, the

immigration judge found that the issue in question was whether Rosario's conviction "relates to owning, controlling, managing or supervising a prostitution business." A.R. 57-58. Moreover, relying on several unpublished decisions of the Board, the immigration judge concluded that the Board has construed INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006) "broadly." A.R. 58 (citing In re: Giuseppe Parlato, 2009 WL 2981757 (BIA 2009), In re: Miguela de Leon, 2007 WL 2197543 (BIA 2007), In re: Kiet Quan Ly, 2004 WL 3187286 (BIA 2004)). The immigration judge found that Rosario's conviction record stated that the purpose of the conspiracy was to run a prostitution business and Rosario's role was to "distribute condoms to facilitate prostitution." Id. The immigration judge further found that, "any assistance . . . [Rosario] provided . . . advance[d] the purpose of the conspiracy: namely, to run a prostitution business." Id. Accordingly, the immigration judge found that Rosario's offense was an aggravated felony under INA § 101(a)(43)(K)(i), 8 U.S.C.§ 1101(a)(43)(K)(i) (2006), because it "'relates to' owning, controlling, managing or supervising a prostitution business," pretermitted Rosario's application for cancellation of removal under INA § 240A(a), and ordered him

removed to the Dominican Republic. A.R. 58-59. On June 28, 2010, Rosario appealed the immigration judge's decision to the Board. A.R. 49-51.

## III. THE BOARD'S SEPTEMBER 20, 2010 DECISION

On September 20, 2010, the Board dismissed Rosario's appeal. A.R. 3-4. The Board found that Rosario's conviction was an offense relating to the owning, controlling, managing, or supervising a prostitution business and, therefore, an aggravated felony. A.R. 3. The Board further found that the plea agreement "confirms that the object of the conspiracy was the operation of a prostitution business." Id. The Board agreed with the immigration judge's finding that the phrase "relates to" in INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006), is to be "broadly construed to include facilitation." A.R. 3-4 (citing Matter of Beltran, 20 I. & N. Dec. 521 (BIA 1992)). The Board further found that Rosario's arguments were misplaced in that "it is the substantive offense of aiding and abetting a conspiracy under 18 U.S.C. § 2 that is the basis of the aggravated felony bar . . . [and] not the offense of conspiracy under 18 U.S.C. § 371." A.R. 4.

Because Rosario's conviction was an aggravated felony, the Board found that Rosario was removable as charged, and further held that he was statutorily ineligible for cancellation of removal. A.R. 4. The instant Petition for Review followed.

## SUMMARY OF THE ARGUMENT

The agency properly determined that Rosario's conviction for aiding and abetting conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2 & 371, where the object of the conspiracy was to violate INA § 278, 8 U.S.C. § 1328 (2006), which prohibits the importation of aliens into the United States for prostitution or immoral purposes, is an offense relating to the owning, controlling, managing, or supervising of a prostitution business pursuant to INA § 101(a)(43)(K), 8 U.S.C. § 1101(a)(43)(K) (2006), and, therefore, an aggravated felony rendering him statutorily ineligible for cancellation of removal. The agency correctly applied the modified categorical approach and determined that the information and judgment, plea agreement and sentencing stipulations establish that he was convicted of an aggravated felony. Specifically, the plea agreement reveals that Rosario admitted "knowledge of the existence and purpose of the conspiracy [to run a

prostitution operation]," that he "aided and abetted the conspiracy," and in "[i]n furtherance of the conspiracy, . . . [he] distributed condoms or 'chocolates' to various brothels for the purpose of prostitution." The agency reasonably concluded that the phrase "relates to" in INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006), is to be broadly construed. Thus, Rosario's knowing assistance to the brothels involved the control, management, or supervision of a prostitution business.

## ARGUMENT

### ROSARIO'S CONVICTION FOR AIDING AND ABETTING A CONSPIRACY TO COMMIT AN OFFENSE AGAINST THE UNITED STATES IN VIOLATION OF 18 U.S.C. §§ 2 & 371 IS AN AGGRAVATED FELONY UNDER THE INA

#### A. Standard And Scope Of Review

When the Board agrees with an immigration judge's decision and also provides its own analysis, as it did here, the Court reviews both the Board's decision and the immigration judge's decision. See Gaiskov v. Holder, 567 F.3d 832, 825 (7th Cir. 2009); Gidday v. Gonzales, 434 F.3d 543, 547 (7th Cir. 2006). This Court conducts de novo review of the legal question of whether a conviction constitutes an aggravated felony for purposes of eligibility of

cancellation of removal. See Guerrero-Perez v. INS, 242 F.3d 727, 730 (7th Cir. 2001). However, when the Court reviews an interpretation of the INA, the Court must "'defer to the [Board's] interpretation of the statute it administers.'" Gaiskov, 567 F.3d at 835 (quoting Guerrero-Perez, 242 F.3d at 730); see also Draganova v. INS, 82 F.3d 716, 720 (7th Cir. 1996) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). That is, the Court will defer to the Board's interpretation "so long as it is 'consistent with the language and purposes of the statute.'" Gattem v. Gonzales, 412 F.3d 758, 763 (7th Cir. 2005) (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999)).

### B. The Court's Jurisdiction Over Rosario's Petition For Review is Limited Because of Rosario's Aggravated Felony Conviction

INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2006) limits the Court's jurisdiction over petitions for review filed by certain criminal aliens. See Zamora-Mallari, 514 F.3d 679, 693-94 (7th Cir. 2008). However, when the petitioner raises questions of law and constitutional claims, the Court's jurisdiction remains intact. See INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2006); Estrada-Ramos v. Holder, 611 F.3d 318, 320-21 (7th Cir. 2010).

Here, Rosario conceded removability pursuant to INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006), as a lawful permanent resident convicted of, or admitted having committed, a "crime involving moral turpitude." A.R. 74-77. Rosario subsequently submitted a request for cancellation of removal, which was denied because his conviction constituted an aggravated felony. A.R. 150-61. Thus, the Court has jurisdiction over the only question remaining before it, that is, whether Rosario was convicted of an aggravated felony pursuant to INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006), rendering him ineligible for cancellation of removal. See Gaiskov, 567 F.3d at 835.

**C. Burden of Proof**

Cancellation of removal is a form of relief authorized by INA § 240A, 8 U.S.C. § 1229b (2006). Specifically, INA § 240A(a)(1)-(3) provides that

> [t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien -
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
> (3) has not been convicted of any aggravated felony.

INA § 240A(a)(1)-(3), 8 U.S.C. § 1229b(a)(1)-(3) (2006).

An alien carries the burden of proof to establish eligibility for relief from removal. See INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (2006); 8 C.F.R. § 1240.8(d) (2010). "If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." Id.

To determine whether a specific crime is an aggravated felony the Court applies either the categorical or modified categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990); Eke v. Mukasey, 512 F.3d 372, 379-80 (7th Cir. 2008); see Hashish v. Gonzales, 442 F.3d 572, 575-76 (7th Cir.2006). In applying the categorical approach, the Court first "make[s] a categorical comparison between the generic crime . . . and the elements of each particular offense of which" the alien was convicted. Eke, 512 F.3d at 378 (citing Li v. Ashcroft, 389 F.3d 892, 895-96 (9th Cir. 2004) (internal quotations omitted)). If, however, a statute prohibits a broad range of conduct, some of which could be classified as an aggravated felony, and some which can not, the Court will apply the "modified categorical approach." Gaiskov, 567 F.3d at 836 n.2

(citing Fernandez v. Mukasey, 544 F.3d 862, 871 (7th Cir. 2008)). Under the modified categorical approach, the Court conducts a limited examination of documents set forth in the conviction record "to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive." Eke, 512 F.3d at 79 (citations omitted). This agency will review "documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or a guilty plea transcript." Mata-Guerrero v. Holder, 627 F.3d 256, 260 (7th Cir. 2010) (citations omitted). Specifically, INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2006), provides, in part, that the following shall constitute proof of a criminal conviction:

> (i) An official record of judgment and conviction.
> (ii) An official record of plea, verdict, and sentence.
> (iii) A docket entry from court records that indicates the existence of the conviction.
> (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
> . . .
> (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2006).

### D. The Board Properly Determined that Rosario's Conviction for Aiding and Abetting a Conspiracy is Overinclusive and Properly Applied the Modified Categorical Approach

#### 1. Rosario's Conviction Involving the Importation of Aliens for Prostitution or "Other Immoral Purposes" Is Not Categorically an Aggravated Felony

Rosario was convicted of aiding and abetting conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2 & 371, where the object of the conspiracy was to violate INA § 278, 8 U.S.C. § 1328 (2006). A.R. 190-203. Section 2 of Title 18, United States Code, provides that

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (2006).

Further, 18 U.S.C. § 371 reads, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (2006).

INA § 278, 8 U.S.C. § 1328 (2006), prohibits, inter alia,"[t]he importation into the United States of any alien for the purpose of prostitution, or for any other immoral purpose . . . ." INA § 278, 8 U.S.C. § 1328 (2006). Here, the agency correctly determined that Rosario's conviction is "not categorically an aggravated felony because the statute punishes . . . conduct that would and would not constitute an aggravated felony." A.R. 56. For example, Rosario could have imported an alien "for any other immoral purposes" and this conduct would not fall within the penumbra of the aggravated felony bar of INA § 101 (a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006). A.R. 56-57. That is, "'any other immoral purposes' could constitute conduct that does not relate to owning, controlling, managing or supervising a prostitution business." Id. Finding that Rosario's conviction for aiding and abetting a conspiracy "is not categorically an aggravated felony," the agency proceeded to apply the modified categorical approach. A.R. 56.

### 2. Rosario's Conviction Is an Aggravated Felony Under the Modified Categorical Approach Where His Plea Agreement Admitted that He Was Aware of the Conspiracy and Expressly Distributed Condoms to Further the Conspiracy

Under the modified categorical approach the evidence does not compel a finding that Rosario was not convicted of an aggravated felony. See Eke, 512 F.3d at 379-80. The agency properly conducted a limited examination of the record of conviction, which included the information and judgment, plea agreement and sentencing stipulations.[3] See Id. With respect to the information and judgment, Rosario admitted that he "knowingly aided and abetted in a conspiracy to import any alien for the purposes of prostitution." A.R. 190. Additionally, the agency looked to the factual basis of Rosario's plea agreement where he admitted "knowledge of the existence and purpose of the conspiracy [to run a

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[3] Additionally, Rosario's contention that the agency impermissibly focused on the "object of the conspiracy" is misplaced. Petr's Br. 14. As discussed, the agency correctly applied the modified categorical approach and conducted a limited examination of the record of conviction. A.R. 55-57. Rosario's record of conviction which included, the information, A.R. 190, plea agreement and sentencing stipulations, A.R. 196, detailed his involvement in the conspiracy, and the agency permissibly conducted a review of same. Mata-Guerrero, 627 F.3d at 260.

prostitution operation]," that he "aided and abetted the conspiracy," and in "[i]n furtherance of the conspiracy . . . [he] distributed condoms or 'chocolates' to various brothels for the purpose of prostitution."[4] A.R. 196.

Next, the INA defines an aggravated felony as, inter alia, "an offense that . . . relates to the owning, controlling, managing, or supervising of a prostitution business." INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006). Under the ordinary usage of the terms in INA § 101(a)(43)(K)(i), "own" means "to have, to possess;" "supervise" means "to have general oversight over;" "control" means "to exercise . . . direct[] influence over;" and "manage" means "carr[ies] on the concerns of a business or establishment." Black's Law Dictionary 329, 459, 1105, 1438 (6th Edition 1991). Rosario would have this Court read the phrase "relating to" narrowly to encompass only those situations in which an alien is involved at the "high[est] level[s]" of a prostitution enterprise. Petr's Br. 18. Such a narrow meaning would not only render the phrase meaningless, but directly contradicts Supreme Court, Courts of

[4] Notably, in his brief before the Court, Rosario misstates the factual predicate of his plea by omitting the phrase "in furtherance of the conspiracy." Petr's Br. 8.

Appeal, and Board precedent.

Specifically, the United States Supreme Court has recognized that the term "relating to" generally signals an expansive intent when used in federal legislation. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (interpreting the Airline Deregulation Act); see Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (applying similar "'broad common-sense meaning'" to phrase "'relate to' "as used in the Employee Retirement Income Security Act of 1974 ("ERISA") (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987)); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (discussing ERISA and noting that "related to" has a "broad scope"). Thus, the use of the phrase "relating to" substantially increases a statute's scope. Illinois Corporate Travel, Inc. v. American Airlines, 889 F.2d 751, 754 (7th Cir. 1989) (interpreting the Airline Deregulation Act and concluding that "[p]rice advertising surely 'relates to' price").

Additionally, "Congress intended to give inclusive meaning in the immigration laws to the phrase 'relating to.'" Matter of Beltran, 20 I. & N. Dec. 521, 525-26 (BIA 1992); see also Bronsztejn v. INS, 526 F.2d 1290, 1991 (2d Cir. 1975), aff'g Matter of Bronsztejn, 15 I.

& N. Dec. 281 (BIA 1974) ("Although [petitioner] urges us to construe 'relating to' narrowly . . . such a construction is not supported by the ordinary meaning of the words."). In Matter of Beltran, the Board ascribed broad meaning to the phrase, noting that "[t]he phrase 'relating to' . . . has long been construed to have broad coverage" and that "Congress intended to give inclusive meaning in the immigration laws to the phrase 'relating to.'" 20 I. & N. Dec. at 525-26 (construing phrase in the predecessor to 8 U.S.C. § 1227(a)(2)(B)(i), pertaining to convictions "relating to a controlled substance"). The use of the phrase "relating to . . . 'necessarily' signals Congress's intent to cover a range of activities." Kamagate v. Ashcroft, 385 F.3d 144, 155 (2d Cir. 2004) (in the context of the INA's treatment of forgery, "related to" concerns activities beyond only counterfeiting or forgery)(quoting Abillo-Figuero v. INS, 221 F.3d 1070, 1073 (9th Cir. 2000) (holding that section 101(a)(43)(R) of the INA, which classifies as an aggravated felony any offense "'relating to . . . counterfeiting," "necessarily covers a range of activities beyond those of counterfeiting or forgery itself")). "[R]elating to" has consistently been interpreted to apply broadly and to have an inclusive meaning. See Richards v. Ashcroft, 400

F.3d 125, 129 (2d Cir. 2005) (broadly construing phrase "offense 'relating to' . . . forgery" as used in INA definition of aggravated felony, 8 U.S.C. § 1101(a)(43)(R), and concluding that solicitation of controlled substances is a violation "relating to" controlled substances).

Rosario's conviction for aiding and abetting conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2 & 371, where the object of the conspiracy was to violate INA § 278, 8 U.S.C. § 1328, "relates to the owning, controlling, managing, or supervising a prostitution business." INA § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006). The agency correctly reasoned that Congress intended the phrase "relates to" be considered broadly, and applying this reasoning to the record of conviction, properly determined that Rosario was convicted of an aggravated felony. A.R. 58-59. The agency further noted that the record of conviction "reflects that the purpose of the conspiracy was to run a prostitution business." A.R. 58. Additionally, Rosario's role was to "distribute condoms to facilitate prostitution" and "[a]ny assistance [Rosario] provided was to advance the purpose" of the prostitution business. A.R. 58.

Despite Rosario's plea to this Court that he acted as merely a "low level employee," Petr's Br. 22, a reading of the record of conviction reveals otherwise. That is, Rosario, understanding the "purpose of the conspiracy," "voluntarily aided and abetted" the conspiracy, and distributed condoms in "furtherance of the conspiracy." A.R. 196. The conspiracy, as admitted, was the running of a prostitution business. Id. Rosario's argument would have this Court ignore his voluntary plea and find that Rosario had no knowledge whatsoever of the ongoing criminal enterprise that was the prostitution operation. In fact, specific in his voluntarily plea Rosario admitted knowledge and the existence of this operation and acted in furtherance thereof. A.R. 196. Distributing condoms is unquestionably facilitating the act of prostitution, and is the "exercise . . . [of] direct[] influence over" or conduct that "carr[ies] on the concerns of a business or establishment." Black's Law Dictionary 329, 960 (6th Edition 1991). That is, arguably, absent Rosario's pivotal role in ensuring that brothels are supplied with an adequate amount of condoms, the prostitution operation would not function. Clearly, an alien who comprehends the criminal business enterprise, volitionally acts in furtherance of it, and plays a critical

role in its facilitation is engaging in acts relating to "owning, controlling, managing or supervising" that business.

The Board's analysis properly employed a recognized statutory interpretation technique that resulted in an interpretation that comported with the purposefully inclusive and broad plain language of the statute. See Gattem, 412 F.3d at 763. Simply put, the Board reasonably concluded that Rosario's conviction for aiding and abetting conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2 & 371, where the object of the conspiracy was to violate INA § 278, 8 U.S.C. § 1328, related to "owning, controlling, managing or supervising a prostitution business." As such, he is ineligible for cancellation of removal.

### 3. Rosario Confounds Criminal Law Liability for the Offenses of Aiding and Abetting and Conspiracy with an Alien's Removability as an Aggravated Felon in Immigration Court Proceedings

The core of Rosario's initial argument is that he was convicted of aiding and abetting the conspiracy, and not as a co-conspirator (or principal perpetrator of the conspiracy). Petr's Br. 8-12. Not only is this argument misplaced, but Rosario's fundamental misunderstanding is his reliance on criminal law precedent regarding legal liability for one convicted of aiding and abetting

versus conspiracy.[5] Petr's Br. 11. That is, the government does not suggest that Rosario was or could have been convicted of being a co-conspirator but that, under the "modified categorical approach," his conviction is an aggravated felony pursuant to the INA.

Rosario asserts that he was not a co-conspirator, but merely an aider and abettor to the conspiracy. Petr's Br. 7-12. However, this position is foreclosed by the Supreme Court's decision in Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185 (2007), which held that the INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006), aggravated felony definitions include aiders and abettors.

Specifically, the Supreme Court noted that "the common law divided participants in a felony into four basic categories." Duenas-Alvarez, 549 U.S. at 189. Namely, principals in the first degree, principals in the second degree (aiders and abettors), accessories before the fact, and accessories after the fact. Id. Indeed, the

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[5] Notably, any attempt by Rosario to now challenge the underlying conviction is an improper "collateral attack." That is, "an alien may not collaterally attack a conviction in an [immigration] proceeding." Ghani v. Holder, 557 F.3d 836, 839 (7th Cir. 2009) (quoting Mansoori v. INS, 32 F.3d 1020, 1024 (7th Cir. 1994), citing Palmer v. INS, 4 F.3d 482, 489 (7th Cir. 1993); Guillen-Garcia v. INS, 999 F.2d 199, 204 (7th Cir. 1993); and Rassano v. INS, 377 F.2d 971, 974 (7th Cir. 1966)).

Supreme Court concluded "every jurisdiction - all States and the Federal Government - has 'expressly abrogated the distinction' among principals and aiders and abettors who fall into the second and third categories." Id. (citing 2 W. La Fave, Substantive Criminal Law § 13.1(e), p.333 (2d ed. 2003)). As a general matter, the Supreme Court reasoned, those who aid and abet a felony are treated the same as if they had personally committed the offense. Id. Thus, any argument that Rosario, as an aider and abettor of a conspiracy to commit prostitution, should be treated differently than a principal is improper.

Additionally, Rosario misstates the applicability of Duenas-Alvarez to the facts of the present case. Petr's Br. 12-15. In Duenas-Alvarez, the Supreme Court addressed whether a conviction for aiding and abetting a theft, under California law, qualified as a "generic theft offense" under the INA and reasoned that the categorical approach requires "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." 549 U.S. at 184. Unlike the Supreme Court's categorical analysis in Duenas-Alvarez, here, the agency applied the modified categorical

approach as it had already determined that Rosario's felony conviction was overinclusive. A.R. 3-4, 54-59. Accordingly, Rosario's contention that the agency's decision "contravenes Duenas-Alevarez's mandate" is incorrect. Petr's Br. 15; see Duenas-Alvarez, 542 U.S. at 184.

**4. The Board Properly Adopted and Supplemented the Immigration Judge's Decision and Provided Rosario with a Final Administrative Decision**

Rosario's contention that the Board failed to "correctly apply or explain its use of the modified categorical approach" is equally unavailing. Petr Br. 23. First, the immigration judge provided, A.R. 56-57, and the Board adopted and supplemented, A.R. 3-4, a deliberate recitation of the application of the modified categorical approach. Second, the agency complied with 8 C.F.R. § 1003.1(e)(5) (2010)[6] and articulated the relevant facts and issues presented, and clearly demonstrated that it considered the issues raised and announced its decision. A.R. 3-4, 54-59.

[6] Under the controlling regulation, a single Board member may affirm an immigration judge's decision with a "brief order," modify the immigration judge's decision, or remand to the Immigration Court. 8 C.F.R. § 1003.1(e)(5) (2010).

As discussed heretofore, after laying out the applicable legal standards for both the modified categorical and categorical approaches, the immigration judge concluded that Rosario's conviction is "not categorically an aggravated felony because the statute punishes . . . conduct that . . . would not constitute an aggravated felony." A.R. 56-57. Specifically, the immigration judge noted that if Rosario "imported an alien into the United States for 'any other immoral purposes,'" this would not be an aggravated felony pursuant to INA § 101 (a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i) (2006). A.R. 56-57 (citation omitted). The immigration judge further stated he "must apply the modified categorical approach and look to the conviction record." A.R. 57. Accordingly, the immigration judge unequivocally applied the modified categorical approach. Id.

Following Rosario's appeal, the Board, pursuant to its de novo review, affirmed the immigration judge's determination that Rosario was convicted of an aggravated felony, and therefore, ineligible for cancellation of removal A.R. 3-4. Additionally, the Board found that the immigration judge, applying the modified categorical

approach, "properly considered a plea agreement,"[7] and "confirm[ed] that the object of the conspiracy [which Rosario aided and abetted] was the operation of a prostitution business." A.R. 3. Accordingly, as the Board adopted and supplemented the immigration judge's decision with its own reasoning, it is the immigration judge's "decision, as supplemented, that forms the basis" of this Court's de novo review. Tchemkou v. Gonzales, 495 F.3d 785, 790 (7th Cir. 2007); Moab v. Gonzales, 500 F.3d 656, 659 (7th Cir. 2007) (where the Board's decision merely supplements the immigration judge's opinion, it is the immigration judge's opinion, as supplemented, that is the Court's basis for review)(citation omitted).[8] That is, the agency decision in this instance is the immigration judge's decision

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[7] As discussed, only when conducting a "modified categorical approach" may an immigration judge examine "a signed guilty plea." Mata-Guerrero, 627 F.3d at 260.

[8] Notably, this Court has specifically rejected Rosario's cramped reading of Moab. Petr's Br. 23. In Borovsky v. Holder, 612 F.3d 917 (7th Cir. 2010), this Court found that despite the Board's opinion lacking "express words of adoption . . . such explicit language" is not "always necessary to incorporate the [immigration judge's] decision as part of the agency decision under review." Id. at 920. Specifically where, as here, the Board's opinion "summarizes and agrees" with the immigration judge, the Board's opinion is "only a supplement to the [immigration judge's] decision" and this Court will review the immigration judge's decision as supplemented. Id.

as supplemented and adopted by the Board, and not merely the Board's as stated by Rosario. In fact, Rosario made a critical misstep in limiting his analysis to the Board's decision. Accordingly, when reviewing the immigration judge's decision, as supplemented by the Board's, Rosario's argument that the agency failed to explain its application of the modified categorical approach is without merit.

Additionally, absent a statutory requirement specifying the manner in which an agency decision must be articulated, it is generally improper to find error on this basis. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 557 (1978). The agency is not required to write an "exegesis" on every contention and is merely required to demonstrate that it considered the issues raised and announce its decision. Mansour v. INS, 230 F.3d 902, 908 (7th Cir. 2000) (citations omitted). The Court is required to "'consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'" Rashiah v. Ashcroft, 388 F.3d 1126, 1130-31 (7th Cir. 2004) (quoting Mansour, 230 F.3d at 908). All that is

necessary is a decision that sets out terms sufficient to enable a reviewing court to see what it has heard, considered, and decided. Villanueva-Franco v. INS, 802 F.2d 327, 330 (9th Cir. 1986). The agency is also entitled to a presumption of regularity. See Yuk v. Ashcroft, 355 F.3d 1222, 1232 (10th Cir. 2004) ("In view of the presumption of regularity attaching to administrative procedures, we will not assume, without any evidence, that [Board] members do not follow the regulations or do not perform their jobs properly.") (citation omitted); see also Fernandez v. Gonzales, 439 F.3d 592, 603 (9th Cir. 2006) ("To the extent that [the petitioner] asserts that the [Board] . . . failed to consider some or all of her evidence, she has not overcome the presumption that the . . . [Board] did review the record."). As discussed, a reasonable review of the agency's decisions in the instant case reveals a clear articulation of the facts presented and the relevant issues. See A.R. 3-4, 54-69.

As the law required, the Board provided Rosario with a final administrative decision wherein the basis for the action is spelled out with sufficient clarity. See SEC v. Chenery Corp., et al., 322 U.S. 194, 196-97 (1947). That is, as long as the decision presented to the court of appeals is generated in accordance with the agency

regulations, that decision will serve as the "agency" action. Id. In adopting and supplementing the immigration judge's decision, and dismissing Rosario's appeal, the Board complied with agency regulations, articulated the facts, issues presented, and its application of the modified categorical approach, and provided sufficient support for its denial of Rosario's appeal.[9]

[9] Additionally, without any citation to legal authority, Rosario suggests that somehow the agency bore the initial burden of informing Rosario that he is eligible for cancellation of removal. Petr's Br. 27. This is incorrect as a matter of law. See 8 U.S.C. § 1229a(c)(4)(A)(i) (2006) ("An alien applying for relief of protection from removal has the burden of proof to establish that the alien satisfies the applicable eligibility requirements"); see also Vasquez-Martinez v. Holder, 564 F.3d 712, 716 (5th Cir. 2009) (concluding that "initial burden of production of evidence that the alien is ineligible for discretionary relief" does not rest with the government. "Such a conclusion does not flow from the language of the statute or the concomitant regulation.") (citing 8 U.S.C. § 1229a(c)(4)(A)(i) (2006) and 8 C.F.R. § 1240.8(d) (2010)). The only instance when the immigration judge has a duty to inform an alien of the potential for relief is when the alien expresses fear of persecution. See 8 C.F.R. § 1240.11(c)(1)(i) (2010). This particular regulation does not apply to this case.

## CONCLUSION

For the foregoing reasons this Court should deny the Petition for Review.

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**CERTIFICATE OF SERVICE**

The undersigned, counsel for the Respondent, Eric H. Holder, Jr., hereby certifies that on May 3, 2011, two copies of the Brief of Respondent were delivered to counsel for the Petitioner, Manuel De Jesus Familia Rosario by directing that they be placed in a Department of Justice mail room for same day mailing, postage prepaid, addressed to:

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