No. 10-3433

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MANUEL DE JESUS FAMILIA ROSARIO,
Petitioner,

vs.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL
Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

REPLY BRIEF OF PETITIONER MANUEL DE JESUS FAMILIA ROSARIO

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INTRODUCTION

Familia Rosario was a minor participant in a criminal enterprise that involved the operation of a prostitution business. He delivered condoms to brothels and, as a result, he pled guilty to aiding and abetting the conspiracy. Despite this minor involvement, the agency determined that Familia Rosario is an aggravated felon, thereby denying Familia Rosario the opportunity to seek discretionary relief from removal. In making this determination, the agency erred in failing to analyze Familia Rosario's crime of conviction, applying an impermissibly broad interpretation of the aggravated felony provision at issue, and providing an insufficient explanation for its determination. The agency's determination that Familia Rosario is an aggravated felon ignored directly applicable criminal law precedent regarding the important distinction between aiding and abetting a conspiracy and being a co-conspirator. That error was compounded by the agency's unsupportable and incorrect statutory interpretation of what constitutes an "offense that relates to the owning, controlling, managing, or supervising of a prostitution business." And the agency did not sufficiently explain why it was applying the analysis it chose to Familia Rosario's conviction.

The government's opposition fails to adequately address these errors at the heart of the agency's decision. Ultimately, the government claims that the agency's decision should be affirmed because Familia Rosario should in effect be treated as a co-conspirator despite the fact that he was not convicted of conspiracy and he was not a party to the conspiratorial agreement. The

government would disregard the fact that Familia Rosario was convicted only as an aider and abettor of a conspiracy, a crime which is qualitatively different under criminal law from the crime of conspiracy. His crime, at most, "relates to" a conspiracy that in turn "relates to" the owning, controlling, managing or supervising of a prostitution business. Familia Rosario's crime did not itself "relate to" owning, controlling, managing or supervising a prostitution business. The government's arguments should be rejected and the agency's legal error should be reversed.

ARGUMENT

I. The agency erred by focusing on the object of the underlying conspiracy rather than on the crime of conviction.

There is no dispute that Familia Rosario was convicted of aiding and abetting a conspiracy to commit an offense against the United States in violation of 18 U.S.C. §§ 2, 371. The BIA acknowledged that it found Familia Rosario to be an aggravated felon on the basis of his conviction for aiding and abetting a conspiracy. AR2. And the government has conceded that it "does not suggest that Rosario was or could have been convicted of being a co-conspirator." Resp. Br. 28. Despite these statements, however, the BIA, the IJ, and the government in its brief to this Court have chosen to focus not on Familia Rosario's conviction, but rather on the object of the underlying conspiracy, which was a violation of 8 U.S.C. § 1328. This approach was in error and the agency's decision should be reversed.

A. The criminal law distinction between aiding and abetting a conspiracy and being a co-conspirator is integral to this case.

According to the government, "reliance on criminal law precedent regarding legal liability for one convicted of aiding and abetting versus conspiracy" is "misplaced" and "represents a fundamental misunderstanding." Resp. Br. 27-28. The government fails to grapple with this Court's precedent regarding liability for aiding and abetting a conspiracy and instead claims that to discuss criminal precedent is irrelevant and means that Familia Rosario is trying to collaterally attack his conviction. Yet criminal law precedent is precisely what is relevant to decide what is the nature of a conviction and the government proceeds to rely on criminal law precedent in its discussion of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). *See* Resp. Br. 28-29.

This Court has explicitly recognized that aiding and abetting a conspiracy is a distinct offense from being a co-conspirator and that liability for aiding and abetting a conspiracy does not necessarily result in liability for being a co-conspirator. *See United States v. Loscalzo*, 18 F.3d 374, 383 (7th Cir. 1994) (explaining that prosecutions for aiding and abetting a conspiracy are necessary to ensure punishment of "those who have knowingly furthered the aims of the conspiracy but who were not members of the conspiracy"); Pet. Br. 7-12. Those who aid and abet a conspiracy do not violate the law by agreeing to commit an offense against the United States through the object of the conspiracy. Instead, they violate the law by helping those who have agreed

to commit an offense against the United States. An aider and abettor of a conspiracy is not the equivalent of a co-conspirator.

Contrary to the government's contention, Familia Rosario is not collaterally attacking his conviction. Resp. Br. 28 n.5. Rather, he is arguing that it is his actual conviction for aiding and abetting a conspiracy that should have been analyzed by the IJ and BIA. Instead, the IJ and BIA both ignored the important distinctions between aiding and abetting a conspiracy and being a co-conspirator. They analyzed Familia Rosario's conviction as if he was a co-conspirator. The agency, and now the government in its brief to this Court, would treat him as if he was guilty of a crime to which he did not plead guilty.

B. The government's arguments about the agency's use of the modified categorical approach and the applicability of *Duenas-Alvarez* rest on the mistaken foundation of examining 8 U.S.C. § 1328.

The agency focused on the statute that was the goal of the conspiracy – 8 U.S.C. § 1328 – and applied the modified categorical approach to that statute. The government argues that this was the correct approach to Familia Rosario's conviction. Resp. Br. 19-20. In effect, the agency either treated Familia Rosario as a co-conspirator in a conspiracy to violate 8 U.S.C. § 1328 or as a person who substantively violated 8 U.S.C. § 1328. Neither approach is correct. Simply put, Familia Rosario was not convicted of violating 8 U.S.C. § 1328. He was not convicted of conspiring to violate 8 U.S.C. § 1328. He was convicted of aiding and abetting a conspiracy to commit an offense against the United States, in violation of 18 U.S.C. §§ 2, 371. The BIA committed legal

error by applying the modified categorical approach to 8 U.S.C. § 1328, because it was not the crime of conviction.

Despite the government's strange contention that criminal law precedent is somehow irrelevant to determining the nature of a conviction and whether it qualifies as an aggravated felony, the only justification that the government offers for applying the modified categorical approach to 8 U.S.C. § 1328 lies in its reading of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).[1] *Duenas-Alvarez*, of course, analyzed criminal law precedent in order to determine whether the petitioner in that case was an aggravated felon. According to the government, *Duenas-Alvarez* and its analysis of the disappearance of the common law distinction between aiders and abettors and principals requires the conclusion that "any argument that Rosario, as an aider and abettor of a conspiracy to commit prostitution, should be treated differently than a principal is improper." Resp. Br. 29. This interpretation of *Duenas-Alvarez* offers the only support for the government's assertion that the agency properly "applied the modified categorical approach as it had already determined that Rosario's felony conviction was overinclusive," Resp. Br. 29-30, despite the fact that the statute the agency found to be "overinclusive" was not Familia Rosario's crime of conviction.

In *Duenas-Alvarez*, the Court held that a conviction for aiding and abetting a vehicle theft under a state theft statute that explicitly included

[1] As noted in Familia Rosario's opening brief, neither the IJ nor the BIA cited *Duenas-Alvarez*. Pet. Br. 9.

aiding and abetting was an aggravated felony because it was "a theft offense . . . for which the term of imprisonment [is] at least one year." 549 U.S. at 185 (citing 8 U.S.C. § 1101(a)(43)(G)). This holding rests on the conclusion that the generic definition of a "theft offense" includes aiding and abetting, even when not explicitly provided for in a statute. *Id.* at 189-90. Specifically, the Court explained that "'the generic sense in which' the term 'theft' 'is now used in the criminal codes of most States' covers such 'aiders and abettors' as well as principals," and therefore "the criminal activities of these aiders and abettors of a generic theft must themselves fall with the scope of term 'theft' in the federal statute." *Id.* at 190 (quoting *Taylor*, 495 U.S. at 598) (internal citations omitted).

It does not follow from *Duenas-Alvarez*'s holding, however, that aiding and abetting a conspiracy to commit a theft offense is a theft offense. Yet that is the essence of the government's argument. In other words, according to the government, Familia Rosario is an aggravated felon because he aided and abetted a conspiracy, wherein the conspirators had agreed to run a prostitution business. Thus, the government essentially contends that his aiding and abetting a conspiracy to commit an offense related to owning, controlling, managing, or supervising a prostitution business is itself an offense related to owning, controlling, managing, or supervising a prostitution business.

But unlike the conclusion in *Duenas-Alvarez* that the generic term "theft" incorporates aiders and abettors of thefts, there is no support for the conclusion that the generic sense in which the phrase "relates to the owning,

controlling, managing, or supervising of a prostitution business" includes all aiders and abettors of a conspiracy to run such a business. As discussed more fully below and in Familia Rosario's opening brief, Pet. Br. 15-22, this result, which is based on the agency's implicit and the government's explicit reading of *Duenas-Alvarez*, requires interpreting "relates to the owning, controlling, managing, or supervising of a prostitution business" as "relates to a prostitution business."

In any event, there is a "realistic probability, not a theoretical possibility," that someone could be guilty of aiding and abetting a conspiracy to run a prostitution business through "conduct that falls outside the generic definition" of an offense that relates to the owning, controlling, managing, or supervising of a prostitution business. *See Duenas-Alvarez*, 549 U.S. at 193. Familia Rosario's conviction represents not only such a realistic probability, but an actual occurrence of such a scenario. Thus, the proper analysis is whether the offense to which Familia Rosario pled guilty contains "all the elements of" a crime related to owning, controlling, managing or supervising a prostitution business. *See Duenas-Alvarez*, 549 U.S. at 187. The agency did not undertake this analysis and instead focused only on the object of the conspiracy, thereby committing legal error.

In defense of the agency's approach, the government offers its misplaced reliance on *Duenas-Alvarez*. But by advancing this argument, the government has claimed both that Familia Rosario should be treated as if he was a co-conspirator because of *Duenas-Alvarez* and that it "does not suggest that

Rosario was or could have been convicted of being a co-conspirator." Resp. Br. 28. This irreconcilable contradiction is at the heart of the government's position as well as the agency's legal error. If Familia Rosario was not convicted of being a co-conspirator – and he was not – then it is inappropriate to apply the aggravated felony analysis for conspiracy convictions to him. *See* Pet. Br. 7-15. Neither the IJ, nor the BIA, nor the government in its briefing has cited any precedent for analyzing a conviction for aiding and abetting a conspiracy by looking to the object of the conspiracy. In fact, the BIA expressly rejected the suggestion that the conspiracy aggravated felony provision, 8 U.S.C. § 1101(a)(43)(U), was applicable to Familia Rosario's offense. AR4; *see also* Pet. Br. 14-15.

Ultimately, Familia Rosario's offense, regardless of whether it is for aiding and abetting or as a principal, still requires a relationship to the specific conduct of owning, controlling, managing or supervising a prostitution business. There may be individuals whose offenses, as aiders and abettors to a conspiracy, relate to owning, controlling, managing or supervising a prostitution business. But there is also a realistic probability that some aiders and abettors to conspiracies to violate 8 U.S.C. § 1328 have not committed an offense related to owning, controlling, managing, or supervising a prostitution business. *See* Pet. Br. 12-13. And those individuals, like Familia Rosario, are not aggravated felons.[2]

[2] The government's attempt to distinguish *Duenas-Alvarez* on the ground that it involved only the "categorical approach" while the IJ in the present case

C. The IJ's decision, even if considered, does not provide this Court reason to affirm the aggravated felony determination.

The government devotes the final six pages of its brief to arguing that both the BIA's and IJ's decisions should be considered by this Court as the final agency decision. Resp. Br. 30-35. According to the government, Familia Rosario made a "critical misstep" by failing to analyze the IJ's decision and focusing solely on the analysis of the BIA. Resp. Br. 33. The government, however, never explains what exactly this "critical misstep" entails. Nor does the government explain how consideration of the IJ's decision would affect the outcome of the case; the similarity between the IJ's and BIA's analysis demonstrates that consideration of the IJ's decision would have no effect whatsoever.

As Familia Rosario explained in his opening brief, this Court cannot affirm the agency's decision on a ground not articulated by the agency. Pet. Br. 23-27. The government accuses Familia Rosario of adopting a cramped reading of *Moab v. Gonzales*, 500 F.3d 656 (7th Cir. 2007). Resp. Br. 32.

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applied the "modified categorical approach," Resp. Br. 29-30, rests on a distinction that is not recognized by the Supreme Court. Specifically, the Court in *Duenas-Alvarez* explicitly stated that when a statute "include[s] both a (generically defined) listed crime and also one or more nonlisted crimes," then "the Court's 'categorical approach' permits the sentencing court 'to go beyond the mere fact of conviction' in order to determine whether the earlier 'jury was actually required to find all the elements of generic burglary.'" 549 U.S. at 186-87 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). The Court then noted that "some courts refer to this step of the *Taylor* inquiry as a 'modified categorical approach.'" *Id.* at 187. According to the Court, therefore, there is no reason to draw a distinction between the categorical and modified categorical approaches, they are simply two names for the same analytical framework.

Although the government correctly points out that *Borovksy v. Holder*, 612 F.3d 917 (7th Cir. 2010), held that "explicit language" of adoption by the BIA is not "always necessary to incorporate the IJ's decision as part of the agency decision under review," *id.* at 920, *Borovsky* did not disturb *Moab*'s ruling that "if the BIA based its conclusion upon an improper basis, we are powerless to affirm that judgment," 500 F.3d at 660. In other words, the *Chenery* doctrine – which prevents this Court from affirming on any ground other than what was articulated by the agency – applies regardless of whether the agency decision includes both the BIA and IJ decisions or just the BIA decision. *See Borovsky*, 612 F.3d at 920 (explaining that *Chenery* dictates that "a court cannot uphold an agency's decision on a ground not actually relied on by the agency").

Moreover, unlike the BIA in *Borovsky*, the BIA in the present case did not "summarize[] and agree[] with each of the IJ's rationales." 612 F.3d at 920. Specifically, the BIA did not discuss why it was proper to apply the modified categorical approach in the first instance, and merely said "[t]he Immigration Judge properly considered a plea agreement found the record of conviction to find that the respondent was convicted of an offense relating to the owning, controlling, managing, or supervising of a prostitution business." AR3. Although the BIA cites to the IJ's decision following that sentence, nowhere in the BIA's decision is there a summary of or agreement with the IJ's determination that 8 U.S.C. § 1328 was the proper focus of the aggravated felony determination or that the statute could be divided into offenses that are not aggravated felonies (e.g., importation for other immoral purposes) and

offenses that are aggravated felonies (e.g., importation for the purpose of prostitution). AR3. The BIA's agreement with the IJ's conclusions is implicit within its opinion, but such guesswork is not required of either Familia Rosario or this Court.

In any event, even if the IJ's decision is considered fully adopted and supplemented by the BIA, the IJ made the exact same errors as the BIA. That is, the IJ treated Familia Rosario as a co-conspirator and focused on 8 U.S.C. § 1328 rather than his actual offense of aiding and abetting a conspiracy. Moreover, even assuming that the IJ and BIA were right to apply the modified categorical approach directly to 8 U.S.C. § 1328, they both focused solely on the "other immoral purposes" component of 8 U.S.C. § 1328. But Familia Rosario's brief shows that 8 U.S.C. § 1328 includes numerous offenses, not all of which would qualify as aggravated felonies, and not just because of the distinction between "other immoral purposes" and "prostitution." Pet. Br. 25-26. The government ignores the clear language of the statute, does not address this argument and repeats the error of the BIA and IJ. *See* Resp. Br. 20, 31.[3]

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[3] In fact, the government compounds the error by misstating the contents of the information to which Familia Rosario pled guilty. According to the government, "Rosario admitted that he 'knowingly aided and abetted in a conspiracy to import any alien for the purpose of prostitution.'" Resp. Br. 21. The record citation provided by the government is to AR190, which is the criminal information to which Familia Rosario pled guilty. No such language appears on the document at that record cite. Rather, the criminal information, which clearly sets forth that Familia Rosario was charged with a violation of 18 U.S.C. §§ 2, 371 states that Familia Rosario "did knowingly aid and abet two or more who conspired to commit an offense against the United States, namely to violate 8 U.S.C. § 1328, and one or more persons did act to effect the object of the conspiracy, all in violation of Title 18, United States Code, Sections 371

The relevance of the *Chenery* doctrine here does not turn on whether the BIA expressly adopted the IJ's decision. Rather, *Chenery* is relevant because both the BIA and IJ failed entirely to engage in the proper analysis of Familia Rosario's conviction and instead focused solely on 8 U.S.C. § 1328 without any explanation as to why. Because this analysis was incorrect, this Court cannot affirm the agency's decision.[4]

II. The government's overly broad interpretation of 8 U.S.C. § 1101(a)(43)(K)(i) makes it an aggravated felony to commit an offense "related to a prostitution business" whether or not the offense "relates to the *owning, controlling, managing, or supervising* of a prostitution business."

The BIA determined that Familia Rosario's conviction was an aggravated felony under 8 U.S.C. § 1101(a)(43)(K)(i) as an "offense that relates to the

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and 2." AR 190. The plea agreement likewise does not contain in its recitation of the factual basis for the plea the alleged "admission" cited by the government. AR 196.

[4] The government incorrectly frames the issue before this Court when it argues that "the evidence does not compel a finding that Rosario was not convicted of an aggravated felony." Resp. Br. 21. This formulation of the burden of proof is the substantial evidence standard applicable for review of denials of claims for asylum, withholding of removal and relief under the Convention Against Torture. *See, e.g., Vahora v. Holder*, 626 F.3d 907, 912-13 (7th Cir. 2010) (explaining that in the context of these factual determinations, "we may reverse the IJ's determinations only if we determine that the evidence compels a different result" (quoting *Balogun v. Ashcroft*, 374 F.3d 492, 498 (7th Cir. 2004)). The substantial evidence standard does not apply to this Court's review of the agency's aggravated felony determination. *Eke v. Mukasey*, 512 F.3d 372, 378 (7th Cir. 2008). In any event, the question before this Court requires a *de novo* review of the undisputed factual record to determine whether the agency properly applied the law to the record of conviction, and the government's claims about the burden of proof do not change that analysis.

owning, controlling, managing, or supervising of a prostitution business." According to the government, this conclusion was correct because "relates to" is entitled to a broad reading. Resp. Br. 21-27. But to read the "relates to" clause this broadly is to render meaningless the words "owning, controlling, managing or supervising."

To begin with, Familia Rosario does not, as the government asserts, seek to have this Court find that he "had no knowledge whatsoever of the ongoing criminal enterprise that was the prostitution operation," Resp. Br. 26. Familia Rosario's plea agreement clearly states that he had "knowledge of the existence and purpose of the conspiracy." AR 196. Moreover, Familia Rosario does not dispute that his aiding and abetting was in furtherance of the conspiracy and he explicitly acknowledged that fact in his opening brief to this Court, *see* Pet. Br. 2. Those are the basic elements of aiding and abetting a conspiracy as recognized by this Court. *See* Pet. Br. 11-12. But Familia Rosario's knowledge that the purpose of the business was prostitution and his low-level assistance to that business are not sufficient to establish that his offense relates specifically to the *owning, controlling, managing, or supervising* of a prostitution business.

The government also misstates Familia Rosario's argument by claiming that Familia Rosario has argued that only those aliens that are "involved at the 'high[est] level[s]' of a prostitution enterprise," Resp. Br. 22, are aggravated

felons under 8 U.S.C. § 1101(a)(43)(K)(i).[5] The point made in Familia Rosario's brief is simply that the words "owning, controlling, managing or supervising" must be given meaning in the statute. The plain meaning of the words, as reflected in the definitions quoted by both parties, demonstrate that those words require a level of operational involvement in the enterprise beyond the minor role played by Familia Rosario. Pet. Br. 18; Resp. Br. 22. For example, the government appears to contend that Familia Rosario's offense relates to both controlling and managing a prostitution business. *See* Resp. Br. 22, 26. But the government's proffered definition of "control" from Black's Law Dictionary features a substantive alteration to the definition. Resp. Br. 22. The government's quoted definition is "to exercise . . . direct[] influence over." The actual definition is "to exercise direct*ing* influence over." *Black's Law Dictionary* 329 (6th ed. 1991) (emphasis added). The difference between direct influence and directing influence is material. Similarly, the government selectively quotes only part of the definition of "manage.". The government omitted the fact that the term "manage," as defined by Black's, is "generally applied to affairs that are somewhat complicated and that involve skill and judgment." *Id.* at 960. These words "denote involvement . . . at a high level," Pet. Br. 18, as opposed to a minor participant such as Familia Rosario,

The INA supports this conclusion as well. For example, 8 U.S.C. § 1101(a)(44)(A) defines the term "managerial capacity," and refers explicitly to

[5] Familia Rosario argued that the term "denote[s] involvement . . . at a high level," Pet. Br. 18, not "the highest levels."

the kind of high-level involvement in the operations of an organization that is included within the plain meaning of "manage."[6] To be sure, this provision does not control the interpretation of Section 1101(a)(43)(K)(i), but it explicitly reflect Congress' understanding, in the same section of the INA, of the significant degree of authority required in order for someone to act as a manager.

Granting that the inclusion of the term "relating to" in a statute may encompass a broader range of conduct than would be otherwise covered, those words simply cannot bear the weight assigned them by the government. Nor do the immigration cases cited by the government support the expansive interpretation of Section 1101(a)(43)(K)(i) urged by the government. Those cases dealt with the immigration consequences of convictions "relating to a

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[6] That provision reads, in its entirety, as follows:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily—
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.
>
> A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

controlled substance," *Matter of Beltran*, 20 I. & N. Dec. 521, 525-26 (BIA 1992) (quotation marks omitted), "relating to counterfeiting," *Kamagate v. Ashcroft*, 385 F.3d 144, 155 (2d Cir. 2004), and "relating to . . . forgery," *Richards v. Ashcroft*, 400 F.3d 125, 129 (2d Cir. 2005) (quotation marks omitted; ellipsis in original); *see also Desai v. Mukasey*, 520 F.3d 762, 764 (7th Cir. 2008).[7]

In each of those statutory provisions, Congress used "relating to" to expand the range of a general category, without using any other words to limit the range of the covered category. Section 1101(a)(43)(K)(i), by contrast, contains significant limiting language to accompany the broadening term, insofar as the offense must be related to owning, controlling, managing or supervising a prostitution business to be an aggravated felony. The inclusion of this additional language makes Section 1101(a)(43)(K)(i) dissimilar to the government's examples. For example, the statute at issue in *Beltran* could have covered convictions "relating to distributing a controlled substance." If Congress had used "relating to" in that manner, the statute would have encompassed offenses beyond the act of distribution itself, but also would have been narrower than a category of offenses relating generally "to a controlled substance."

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[7] The government fails to discuss the nonprecedential BIA decisions expressly relied on by the IJ (and endorsed without analysis by the BIA) that demonstrate the impermissible breadth of the Agency's interpretation of Section 1101(a)(43)(K)(i). *See* Pet. Br. 19-20. Nor does the government address the fact that many state statutes distinguish between various prostitution offenses using language that is highly similar to the language in Section 1101(a)(43)(K)(i), which directly supports the conclusion that not all prostitution-related offenses are aggravated felonies. *See* Pet. Br. 16-17.

Here, Congress, could have, but did not make it an aggravated felony to commit an offense "related to a prostitution business." Instead, Congress set a boundary at offenses specifically related to owning, controlling, managing or supervising such a business. This statutory structure ensures that a wide range of offenses are properly deemed aggravated felonies, but prevents undue punishment for minor prostitution-related offenses. The government urges the Court to ignore the narrowing term, focusing only on the broadening term; but this interpretation would do violence to the statute. *See* Pet. Br. 17-18.

According to the government, "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." Resp. Br. 26-27. In other words, to find that an offense is an aggravated felony under § 1101(a)(43)(K)(i) the alien must only: (1) have knowledge of a prostitution business; (2) act in furtherance of that business; and (3) engage in an act that is "critical" to the prostitution business generally. The government then asserts that "absent Rosario's pivotal role in ensuring that brothels are supplied with an adequate supply of condoms, the prostitution operation would not function." Resp. Br. 26. Setting aside the lack of evidentiary support for the assertion that Familia Rosario's delivery of condoms was a necessary component of the prostitution business, the government's present characterization of Familia Rosario's conduct directly contradicts the prosecution's explicit acknowledgement in the

plea agreement that Familia Rosario was entitled to an offense level reduction as a "minor participant." AR 198.

Ultimately, the government's interpretation of what offenses relate to owning, controlling, managing or supervising a prostitution business would render virtually any offense related to prostitution an aggravated felony. To take an extreme example – and yet one that easily falls within the purview of the government's reading – consider the prostitutes and customers themselves. The two roles that are most "critical" (to use the government's term) to a prostitution business are the prostitute and the customer. With very few exceptions, being a prostitute and soliciting a prostitute are crimes. Under the government's interpretation of Section 1101(a)(43)(K)(i), both of those individuals (assuming that the prostitute is a voluntary participant), if convicted of their respective offenses, would be aggravated felons: both "comprehend[] the criminal business enterprise, volitionally act[] in furtherance of it, and play[] a critical role in [the] facilitation" of a prostitution business. *See* Resp. Br. 19-20. Another example is the hypothetical aider and abettor previously identified by this Court, who warns the operators of a criminal enterprise of an impending police raid (with the requisite knowledge of the fact that it is a criminal enterprise). *See* Pet. Br. 11, 16; *United States v. Zafiro*, 945 F.2d 881, 884 (7th Cir. 1991), *aff'd*, 506 U.S. 534 (1993). If the criminal enterprise is a prostitution business, then that individual would also be an aggravated felon under the government's interpretation of 8 U.S.C. § 1101(a)(43)(K)(i).

The assembly-line employee at an automobile-manufacturing facility comprehends the business enterprise of building and selling cars, volitionally acts in furtherance of manufacturing those cars, and plays a critical role in facilitating the manufacturing of the cars. Yet that low-level employee would not be said to have a job related to the owning, controlling, managing or supervising of a car company. Familia Rosario's offense, in which he played the government-acknowledged minor role of delivering condoms, is not related to owning, controlling, managing or supervising a prostitution business.

CONCLUSION

For all of the reasons set forth above and in Familia Rosario's opening brief, the decision of the BIA should be reversed and the case should be remanded for consideration of Familia Rosario's request for cancellation of removal.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,083 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Bookman Old Style, Font Size 12.

Dated: May 18, 2011

s/ Garrett A. Levin
Garrett A. Levin

☑

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CERTIFICATE OF SERVICE

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

counsel / party:	address:
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

s/_____