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

OPENING BRIEF AND REQUIRED SHORT APPENDIX OF PETITIONER MANUEL DE JESUS FAMILIA ROSARIO

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Dated: March 4, 2011

Attorneys for Petitioner

ORAL ARGUMENT REQUESTED

RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **10-3433**

Short Caption: ***Familia Rosario v. Holder***

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Manuel de Jesus Familia Rosario

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP
National Immigrant Justice Center

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and **Not Applicable.**

ii) list any publicly held company that owns 10% or more of the party's or amicus's stock: **Not Applicable.**

Attorney's Signature: **s/ Garrett A. Levin** Date: **March 4, 2011**

Attorney's Printed Name: **Garrett A. Levin**

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d): **Yes X No**

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Attorney's Signature: **s/ Iris E. Bennett** Date: **March 4, 2011**

Attorney's Printed Name: **Iris E. Bennett**

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d): **Yes** **No X**

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Attorney's Signature: **s/ Charles Roth** Date: **March 4, 2011**

Attorney's Printed Name: **Charles Roth**

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d): **Yes No X**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Jurisdiction is proper pursuant to 8 U.S.C. § 1252(a)(2)(D), which permits this Court to decide constitutional claims and questions of law arising out of decisions of the Board of Immigration Appeals ("BIA"). The BIA had jurisdiction to review the decision of the Immigration Judge ("IJ") under 8 C.F.R. § 1003.1(b). The BIA issued its decision on September 20, 2010. This Petition for Review was timely filed on October 19, 2010. *See* 8 U.S.C. § 1252(b)(1).

STATEMENT OF ISSUE

1. Whether the Board of Immigration Appeals improperly determined that Manuel de Jesus Familia Rosario had committed an aggravated felony related to owning, controlling, managing or supervising a prostitution business when he pled guilty to aiding and abetting a conspiracy by assisting with the distribution of condoms.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. Familia Rosario's Immigration Status and Criminal Conviction

Familia Rosario is a 60 year-old man from the Dominican Republic who has lived in the United States as a Lawful Permanent Resident since 1999. AR150-51.[1] He has extensive family ties to the United States, including a United States citizen wife, two United States citizen children, and a Lawful Permanent Resident child. AR152-53. Familia Rosario's wife is quite ill and struggles to support herself financially. AR160.

[1] Throughout this brief, citations to the Certified Administrative Record will appear as "AR" followed by the applicable page numbers.

In November of 2007, pursuant to a single-count Information, Familia Rosario pled guilty in the United States District Court for the District of Minnesota to aiding and abetting "two or more who conspired to commit an offense against the United States . . . in violation of Title 18, United States Code, Sections 371 and 2." AR190-203. The "offense against the United States" that was the object of the conspiracy was a violation of 8 U.S.C. § 1328. AR190. In the plea agreement, the parties agreed to the following factual basis: (1) during the relevant time period, "two or more persons came to an agreement or understanding to . . . run a prostitution operation in the State of Minnesota using women from other countries and states"; (2) Familia Rosario "voluntarily and intentionally aided and abetted the conspiracy" and had "knowledge of the existence and purpose of the conspiracy"; and (3) "[i]n furtherance of the conspiracy [he] distributed condoms . . . to various brothels for the purpose of prostitution." AR196.

The government conceded that Familia Rosario was "a minor participant" in the prostitution business. AR198. In November of 2009, judgment was entered and Familia Rosario was sentenced to time served. AR192.

B. Procedural Background

1. IJ Decision

Removal proceedings against Familia Rosario were commenced in early 2010 and he was served with a Notice to Appear and was detained by the Department of Homeland Security ("DHS") on March 23, 2010. AR212-15. On the basis of the factual allegations in the Notice to Appear, DHS charged that

Familia Rosario was removable from the United States for having committed a crime of moral turpitude, pursuant to § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act ("INA"), and for having indirectly or directly procured prostitutes or persons for the purpose of prostitution, pursuant to § 212(a)(2)(D)(ii) of the INA. AR214.

During a hearing before the IJ in May of 2010, Familia Rosario admitted five of the six factual allegations and conceded removability under INA § 212(a)(2)(A)(i)(I), relating to a crime of moral turpitude. AR74-75. Familia Rosario denied removability under INA § 212(a)(2)(D)(ii), relating to the procurement of prostitutes. AR75. He also argued that he was eligible for cancellation of removal under INA § 240A(a).

Because Familia Rosario conceded removability under § 212(a)(2)(A)(i)(I), the IJ determined that removability was established and did not reach the question of his removability under § 212(a)(2)(D)(ii). AR2. Next, the IJ addressed Familia Rosario's application for cancellation of removal. To be eligible for cancellation of removal, the applicant must not have been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(3). DHS argued that Familia Rosario's conviction qualified as an aggravated felony under INA § 101(a)(43)(K)(i), AR2, which makes it an aggravated felony to commit "an offense that relates to the owning, controlling, managing or supervising of a prostitution business." 8 U.S.C. § 1101(a)(43)(K)(i).

The IJ applied the modified categorical approach and reviewed Familia Rosario's record of conviction to determine if his guilty plea to aiding and

abetting a conspiracy qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(K)(i). AR3-5. Relying on a number of unpublished BIA decisions and focusing on the stated object of the conspiracy, the IJ concluded that, despite Familia Rosario's admittedly minor role in the criminal enterprise, "[a]ny assistance the respondent provided was to advance the purpose of the conspiracy: namely, to run a prostitution business." AR5. The IJ thus ruled that Familia Rosario was an aggravated felon and statutorily ineligible for cancellation of removal. AR6.

2. BIA Decision

Familia Rosario appealed the IJ's Order to the BIA in June of 2010. AR49-52. The BIA reviewed the IJ's decision *de novo*, and affirmed "the determination that the respondent has been convicted of an aggravated felony." AR3. In reaching this conclusion, the BIA reviewed Familia Rosario's plea agreement and "confirm[ed] that the object of the conspiracy was the operation of a prostitution business, which falls under the aggravated felony definition" of 8 U.S.C. § 1101(a)(43)(K)(i). AR3. The BIA further concluded that the phrase "relates to" should "be broadly construed to include facilitation" and that Familia Rosario's "assistance rendered to advance the object of the conspiracy 'relates to' owning, controlling, managing, or supervising the prostitution business." AR3-4.

Finally, the BIA expressly rejected the applicability of INA § 101(a)(43)(U), which defines as an aggravated felony a conspiracy or attempt to commit an offense described in 8 U.S.C. § 1101(a)(43) that would otherwise be an

aggravated felony. AR4; 8 U.S.C. § 1101(a)(43)(U). The BIA concluded that arguments about Section 1101(a)(43)(U) are "misplaced" because Familia Rosario pled guilty to "aiding and abetting a conspiracy" rather than "the offense of conspiracy under 18 U.S.C. § 371." AR4.

Following the filing of a timely petition for review, Familia Rosario filed an Emergency Motion to Stay Removal in this Court. Dkt. #3. That motion was granted on November 17, 2010. Dkt. #7. Familia Rosario remains in custody pending resolution of this appeal.

SUMMARY OF ARGUMENT

Familia Rosario is not an aggravated felon. The BIA improperly determined that Familia Rosario is an aggravated felon by essentially deeming him a co-conspirator in running the prostitution business rather than the minor aider and abettor of the conspiracy that he pled guilty to being. There is no evidence that Familia Rosario provided anything other than the minor assistance of distributing condoms to an ongoing enterprise, and there is certainly no evidence that he was a party to a conspiratorial agreement. The BIA, however, determined that because his plea agreement revealed that the object of the conspiracy (that he was not a party to) was to "run a prostitution business," Familia Rosario's offense relates to the owning, controlling, managing or supervising of a prostitution business.

No jury could convict Familia Rosario of a conspiracy on the basis of the facts in his guilty plea. Yet the BIA has treated Familia Roasrio as if he had been found to be a co-conspirator in determining that he is aggravated felon.

As this Court has recognized, liability for aiding and abetting a conspiracy is intended to punish the kind of conduct engaged in by Familia Rosario – low-level assistance to the leaders of the conspiracy. That distinction has been ignored by the BIA on the basis of faulty assumptions about the scope of accomplice liability. Familia Rosario's conviction conclusively demonstrates that aiding and abetting a conspiracy encompasses more and different conduct than being a co-conspirator, and that the two offenses cannot be conflated in the aggravated felony context.

The BIA also misread 8 U.S.C. § 1101(a)(43)(K)(i) to apply to all offenders who are in any way connected to a prostitution business. Despite the fact that the statute clearly applies only to those offenses that are connected to the ownership, control, management or supervision of a prostitution business, the BIA adopted an all-consuming definition that renders meaningless words in the statute. Such a reading ignores basic principles of statutory construction and the plain meaning of the words of the statute and must be rejected.

Finally, the BIA failed to adequately explain its analytical approach. The BIA purported to apply the modified categorical approach that has been developed for analyzing so-called divisible statutes that include multiple offenses, some of which categorically qualify as aggravated felonies and some which do not. Despite using this approach, however, the BIA did not state what statute at issue was divisible, in what way it was divisible, and how Familia Rosario's offense qualifies as an aggravated felony under a divisible

portion of the statute. This fundamental deficiency should prevent this Court from affirming the BIA's decision.

STANDARD OF REVIEW

This Court reviews *de novo* the determination that Familia Rosario committed an aggravated felony. *Eke v. Mukasey*, 512 F.3d 372, 378 (7th Cir. 2008). The legal standards applied by the BIA are also reviewed *de novo*. *Id.*

ARGUMENT

I. The BIA improperly focused on the object of the underlying conspiracy rather than Familia Rosario's conviction for aiding and abetting the conspiracy.

Familia Rosario's conviction for aiding and abetting a conspiracy to violate 8 U.S.C. § 1328 presents an issue of first impression for this Court: how to properly analyze such a conviction in the context of the aggravated felony definitions. The BIA and IJ purported to apply the modified categorical approach used to analyze divisible statutes. But both the BIA's and IJ's decisions are focused on the object of the conspiracy that Familia Rosario aided and abetted – to run a prostitution business. Although this analysis may be appropriate for determining whether a conspiracy conviction is an aggravated felony, Familia Rosario's conviction requires a different analysis. In determining that Familia Rosario is an aggravated felon, the BIA ultimately conflated aiding and abetting a conspiracy with being a co-conspirator.

A. Liability for aiding and abetting a conspiracy is distinct from co-conspirator liability.

Familia Rosario's guilty plea for a single count of aiding and abetting a conspiracy to commit an offense against the United States, in violation of 18 U.S.C. §§ 2, 371, involved three facts: (1) there was an agreement between two or more people to run a prostitution business, which (2) Familia Rosario knew of and aided and abetted by (3) delivering condoms. AR196. The plea does not allege the elements necessary for a conspiracy conviction – there is no allegation that Familia Rosario was a party to the underlying conspiratorial agreement. In fact, the government acknowledged that Familia Rosario's aiding and abetting was minor and consented to a corresponding offense-level reduction. AR198. In exchange for his guilty plea, the government dismissed the three counts against him in the Superseding Indictment, which had charged Familia Rosario as a co-conspirator. AR195-96.

The BIA determined that Familia Rosario is an aggravated felon under 8 U.S.C. § 1101(a)(43)(K)(i) because, according to the BIA, any assistance rendered by Familia Rosario "to advance the object of the conspiracy 'relates to' owning controlling, managing, or supervising the prostitution business." AR2. Central to that determination is the fact that the object of the conspiracy was "to run a prostitution operation." AR196. The BIA's mistaken focus on the object of the conspiracy effectively treated Familia Rosario as a co-conspirator who entered into a conspiratorial agreement with others to run a prostitution business, rather than someone who offered minor assistance to a criminal

enterprise. The BIA, without clearly articulating its rationale, has determined that because the conspiracy related to owning, controlling, managing or supervising a prostitution business, and Familia Rosario's offense related to the conspiracy, Familia Rosario's offense relates to owning, controlling, managing or supervising a prostitution business. This conclusion reflects a fundamental misunderstanding by the BIA of the relevant criminal law principles applicable to analyzing a conviction for aiding and abetting a conspiracy.

Implicit in the agency's decision is the idea that because federal law has removed the common law distinctions between aiders and abettors and principals, *see* 18 U.S.C. § 2, Familia Rosario's conviction can simply be considered a conviction for conspiracy. *See* AR2 ("[B]y pleading guilty to aiding and abetting under 18 U.S.C. § 2, the respondent acknowledged that he was criminally liable to the same extent as any other participant in the conspiracy."). Neither the BIA nor the IJ, however, actually reached the most relevant question: how to analyze a conviction for aiding and abetting a conspiracy when determining whether an alien has committed an aggravated felony.

Although not cited by either the BIA or the IJ, this approach appears to rest on the Supreme Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which addressed the issue of aiding and abetting liability and aggravated felonies in the context of a substantive theft offense statute. In *Duenas-Alvarez*, the Court addressed the question of whether "the term 'theft

offense' in [8 U.S.C. § 1101(a)(43)(G)] includes the crime of '*aiding and abetting*' a theft offense." 549 U.S. at 185. In answering this question, the Court applied the categorical (or modified categorical) approach that it had established for applying statutory sentencing enhancements and making aggravated felony determinations when an offender violates a statute that covers conduct that falls outside of the scope of a generic offense that merits an enhancement or qualifies as an aggravated felony – a so-called divisible statute. *Id.* at 186-87. Pursuant to this approach, the sentencing court (or immigration court) is permitted "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" a generic offense. *Id.* at 187 (internal quotation marks omitted). The Court concluded that aiders and abettors of theft offenses fall within the generic definition of theft, in part because federal and state law have abrogated the former common law distinctions between first-degree principals, second-degree principals, and accessories before the fact. *Id.* at 189-90.

But the limits of *Duenas-Alvarez*'s reach are highlighted by the present case and Familia Rosario's conviction for aiding and abetting a conspiracy. Such convictions have been addressed on a number of occasions by this Court, although never before in the context of an aggravated felony determination. This Court has explained that aiding and abetting a conspiracy is not to be conflated with joining a conspiracy. In fact, as this Court has noted "[a]t first glance it might seem odd that there could be . . . separate crimes of conspiracy and of aiding and abetting a conspiracy – for would not the act of aiding and

abetting make the aider and abettor a member of the conspiracy? Not necessarily." *United States v. Zafiro*, 945 F.2d 881, 884 (7th Cir. 1991) (internal citations omitted), *aff'd*, 506 U.S. 534 (1993).

For example, this Court has recognized that, much like the conspirators who were aided by Familia Rosario, "conspirators often employ assistants in carrying out their plans." *United States v. Loscalzo*, 18 F.3d 374, 383 (7th Cir. 1994). "Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members – with whom he had had no previous, or for that matter subsequent, dealings – of the impending raid." *Zafiro*, 945 F.2d at 884. That individual "would be an aider and abettor of the drug conspiracy, but not a member of it." *Id.* In other words, aiding and abetting liability is recognized in the conspiracy context to allow prosecution of "those who have knowingly furthered the aims of the conspiracy but who were not members of the conspiracy." *Loscalzo*, 18 F.3d at 383.

Liability for aiding and abetting a conspiracy requires proof of three elements: "knowledge of the illegal activity that is being aided and abetted, a desire to help that activity succeed, and some act of helping." *United States v. Irwin*, 149 F.3d 565, 570 (7th Cir. 1998) (quoting *Zafiro*, 945 F.2d at 887). Conspiracy liability under 18 U.S.C. § 371, on the other hand, requires proof of "(1) an agreement to commit an offense against the United States; (2) an overt act in furtherance of the conspiracy; and (3) knowledge of the conspiratorial purpose." *United States v. Soy*, 454 F.3d 766, 768 (7th Cir. 2006). There are

thus two distinct ways in which a conviction for aiding and abetting a conspiracy and a conviction for conspiracy do not necessarily overlap. First, as exemplified by Familia Rosario, one who aids and abets a conspiracy may act to further the conspiracy without actually being a party to the agreement. *See Zafiro*, 945 F.2d at 884 (explaining that "the essence of conspiracy is agreement" and, in the case of an aider and abettor, there is no agreement). Second, a member of the conspiracy might not commit an overt act in furtherance of the conspiracy and could therefore not be found guilty of aiding and abetting the conspiracy because aiding and abetting liability requires an overt act of helping while a conspiracy requires only that an overt act be committed by one conspirator. *United States v. Hickok*, 77 F.3d 992, 1004-05 (7th Cir. 1996). In other words, not every individual who aids and abets a conspiracy could be found liable as a co-conspirator, and not every co-conspirator could be found liable as an aider and abettor. The two forms of liability are distinct.

B. Familia Rosario's conviction for aiding and abetting a conspiracy demonstrates a realistic probability that such liability can attach to conduct outside the scope of an aggravated felony.

The *Duenas-Alvarez* Court established that not all aiding and abetting convictions will qualify as aggravated felonies, even if the offense that was aided and abetted might itself fall within a generic-definition aggravated felony. As the Court explained, concluding that aiding and abetting liability is not coterminous with a generic-definition aggravated felony requires demonstration

of a "realistic probability, not a theoretical possibility" that aiding and abetting liability "would apply . . . to conduct that falls outside the generic definition of a crime." *Duenas-Alvarez*, 549 U.S. at 193. A petitioner can meet this burden by "show[ing] that the statute was so applied in his own case." *Id.* Familia Rosario's conviction demonstrates not only the necessary "realistic probability," but an actual occurrence of aiding and abetting liability being applied to conduct that falls outside the generic definition of a crime that would otherwise be an aggravated felony. *See, e.g.*, *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160-61 (9th Cir. 2009) (concluding that there was a realistic probability that a California statute criminalized more conduct than is covered by a generic theft offense because of different offense elements and that the offense was therefore not a crime of moral turpitude).

As explained above, to return a conviction on either aiding and abetting a conspiracy or the substantive offense of conspiracy, the jury must find different elements, and liability for aiding and abetting a conspiracy does not "require[] [finding] all the elements of generic" conspiracy. *Taylor v. United States*, 495 U.S. 575, 602 (1990). In other words, unlike aiding and abetting the generic crime of theft, aiding and abetting a conspiracy does not necessarily fall within the "scope of [the] generic definition" of conspiracy. *Duenas-Alvarez*, 549 U.S. at 189. Familia Rosario's conviction for aiding and abetting, the factual basis of which could not support a conviction for conspiracy under § 371, exposes the limitations of simply treating an aider and abettor of a conspiracy as a co-conspirator.

The BIA acknowledged that there is a distinction between a conviction for aiding and abetting a conspiracy and the substantive offense of conspiracy. Specifically, the BIA explained that any arguments about whether Familia Rosario is an aggravated felon under 8 U.S.C. § 1101(a)(43)(U) – which defines a conspiracy or attempt to commit an offense that is otherwise an aggravated felony as an aggravated felony – were "misplaced" because Familia Rosario was convicted of aiding and abetting a conspiracy, and not the conspiracy itself. AR4. But hinging the analysis on the object of the conspiracy is only relevant in the context of an aggravated felony determination under § 1101(a)(43)(U). *See, e.g.*, *Conteh v. Gonzales*, 461 F.3d 45, 57 (1st Cir. 2006) (an alien is removable as an aggravated felon under subsection (U) if "the substantive crime that was the conspiratorial objective . . . qualifies as an aggravated felony" (alteration in original) (quoting *Kamagate v. Ashcroft*, 385 F.3d 144, 153 (2d Cir. 2004)). In other words, the BIA stated that Familia Rosario's conviction was something other than a conspiracy conviction and then proceeded to analyze his offense as if he was a co-conspirator by focusing on the object of the conspiracy.

Under the BIA's erroneous rationale, the hypothetical aider and abettor identified by this Court in *Zafiro*, 945 F.3d at 884, who aids and abets a drug conspiracy by warning the conspirators of an impending police raid, is an aggravated felon as long as the object of the conspiracy is itself an aggravated felony. Put another way, if the third factual predicate in Familia Rosario's guilty plea had read, "In furtherance of the conspiracy, the defendant warned

the conspirators of an impending police raid," the BIA would still have found Familia Rosario to be an aggravated felon for having committed an offense related to the owning, controlling, managing or supervising of a prostitution business. Such a conclusion would be as unwarranted as the BIA's conclusion that Familia Rosario is an aggravated felon for delivering condoms to brothels, and contravenes *Duenas-Alvarez*'s mandate to consider the probability that treating an aider and abettor as an aggravated felon might lead to overbroad categorizations of aggravated felonies not contemplated by the generic definitions of the crimes listed in 8 U.S.C. § 1101(a)(43).[2]

II. The BIA applied an impermissibly broad reading to "relates to."

The BIA's conflation of aiding and abetting a conspiracy and being a co-conspirator was exacerbated by its unsupported reading of the term "relates to" in the context of this statute. Section 1101(a)(43)(K)(i) makes it an aggravated felony to commit "an offense that relates to the owning, controlling, managing, or supervising of a prostitution business." 8 U.S.C. § 1101(a)(43)(K)(i). The

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[2] If this Court concludes that the proper way to analyze aiding and abetting a conspiracy in the aggravated felony context *is* to look to the object of the conspiracy and use the Section 1101(a)(43)(U) approach, then the BIA erred in disavowing the applicability of 43(U). Established precedent confirms that in the context of a conviction for conspiracy, the underlying substantive offense that is the object of the conspiracy and the conspiracy itself are distinct offenses that are not necessarily co-extensive. *See Matter of Richardson*, 25 I&N Dec. 226, 227 (BIA 2010) (concluding that where an individual is charged with and convicted of only a conspiracy, "an underlying substantive offense is not necessarily included in [the] conspiracy" (citing *Pierre v. Holder*, 588 F.3d 767, 774 (2d Cir. 2009)). Thus, under either approach the BIA erred and reversal is appropriate.

BIA's conclusion that Familia Rosario's offense "'relates to' owning, controlling, managing, or supervising the prostitution business," AR2, reflects an impermissibly broad reading of the aggravated felony definition and renders meaningless the requisite direct connection to "owning, controlling, managing, or supervising."

Returning to this Court's example in *Zafiro*, the BIA's analysis would result in a determination that the person who warned the drug conspirators of an impending police raid had committed a crime related to the owning, controlling, managing or supervising of an illegal drug business. Simply put, Familia Rosario's offense does not relate to the owning, controlling, managing or supervising a prostitution business and he is therefore not an aggravated felon.

Statutes criminalizing prostitution-related offenses cover a wide range of conduct, from solicitation of a prostitute to ownership of a prostitution ring. In fact, Congress's choice of "owning, controlling, managing, or supervision" is nearly identical to language in numerous state statutes which differentiate between various degrees of culpability for promotion of prostitution. *See, e.g.*, CONN. GEN. STAT. §§ 53a-87 & 53a-88 (criminalizing promotion of prostitution in the second degree and promotion of prostitution in the third degree); DEL. CODE ANN. tit. 11, §§ 1352 & 1353 (same); HAW. REV. STAT. §§ 712-1203 & 712-1204 (same); MO. REV. STAT. §§ 567.060 & 567.070 (same); LA. REV. STAT. ANN. §§ 14:83.2 & 14:83.1 ("Inciting prostitution is the aiding, abetting, or assisting in an enterprise for profit" involving prostitution, while "[p]romoting

prostitution is the knowing and willful control of, supervision of, or management of an enterprise for profit in which customers are charged a fee for services which include prostitution"); N.Y. PENAL LAW §§ 230.20 & 230.25 (promoting prostitution in the fourth degree and promoting prostitution in the third degree); UTAH CODE ANN. §§ 76-10-1304 & 76-10-1305 (aiding prostitution and exploiting prostitution). The BIA's analysis, however, focused only on the fact that Petitioner's actions related generally to a prostitution business, an approach that would likely turn nearly every violation of any prostitution statute into an aggravated felony.

In other words, the BIA treated "relates to" as if it was modifying "prostitution business" rather than "owning, controlling, managing or supervising." By doing so, the BIA left the specific statutory language referring to ownership, control, management, or supervision of a prostitution business with no work to do, thereby "defying one of the basic canons of statutory interpretation." *See United States v. Senn*, 129 F.3d 886, 895 (7th Cir. 1997). An interpretation which leaves part of the statutory language as surplusage is strongly disfavored. *See United States v. Wheeler*, 540 F.3d 683, 690 (7th Cir. 2008) (noting that "courts are reluctant to treat statutory terms as mere surplusage" (internal quotation marks omitted)). Moreover, courts should especially disfavor reading out words of the statute "when the words describe an element of a criminal offense." *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

By their plain, ordinary meaning, the words "owning, controlling, managing, or supervising" relate to operational functions beyond mere involvement in a business. *See, e.g.*, *Cler v. Illinois Educ. Ass'n*, 423 F.3d 726, 731 (7th Cir. 2005) ("[T]he cardinal rule is that words used in statutes must be given their ordinary and plain meaning and . . . we will frequently look to dictionaries to determine the plain meaning of words." (internal quotation marks omitted)). The dictionary defines the relevant words as follows:

- Own: "to have or hold as property or appurtenance : have a rightful title to, whether legal or natural." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1612 (1993).
- Control: "the act or fact of controlling . . . : power or authority to guide or manage : directing or restraining domination." *Id. at* 496.
- Manage: "to control and direct : . . . to direct or carry on business or affairs." *Id. at* 1372.
- Supervise: "to coordinate, direct, and inspect continuously and at first hand the accomplishment of : oversee with the powers of direction and decision the implementation of one's own or another's intentions." *Id. at* 2296.

The import of these definitions is unmistakable – all four of these words denote involvement in the operation and direction of an enterprise at a high level.

In a number of unpublished decisions,[3] the BIA has addressed what it means for an offense to relate to owning, controlling, managing or supervising a prostitution business. Although these cases are nonprecedential, and

[3] This Court has repeatedly cautioned against the use of unpublished BIA decisions as authority in later cases. *See, e.g.*, *Leal-Rodriguez v. INS*, 990 F.2d 939, 946 (7th Cir. 1993). These cases are not being offered as persuasive authority, but rather to demonstrate that the IJ's purported reliance on them was misplaced.

Familia Rosario does not necessarily agree with how the BIA has interpreted the breadth of the statue in these and other cases, they show that the IJ's purported reliance on them in this case was misplaced. None of the cases have stretched the definition so broadly as to encompass Familia Rosario's conduct. For example, in the context of a money laundering conviction, the BIA concluded that

> one who conducts a financial transaction that involves the proceeds of prostitution and that is undertaken with the intention of promoting prostitution has committed an offense that relates to the managing of a prostitution business, notwithstanding the fact that the offense is nominally a money laundering crime rather than a prostitution crime.

In re Kiet Quan Ly, No. A25 088791, 2004 WL 3187286 (BIA Dec. 9, 2004) (internal quotation marks omitted). And the BIA has "deem[ed] it evident that one who advances or profits from a house of prostitution has committed an offense that relates to the owning, controlling, managing or supervising of a prostitution business." *In re Miguela de Leon*, No. A41 744 759, 2007 WL 2197543 (BIA June 29, 2007); *see also In re Giuseppe Parlato*, No. A046 739 524, 2009 WL 2981757 (BIA Aug. 24, 2009). But the BIA has also concluded that an alien convicted under a Texas statute that criminalized solicitation of a prostitute (among other conduct) was not removable under § 1101(a)(43)(K)(i), because a solicitation offense "could also be committed by someone with no ownership, control, management, or supervisory role in a prostitution business." *In re Juan Jesus Luna-Perez*, No. A41 863 135, 2008 WL 496940 (BIA Jan. 31, 2008) (unpublished). Read together, these cases stand for the

proposition that to commit an offense that relates to owning, controlling, managing or supervising a prostitution business, one must either play at least a managerial or supervisory role in the business, profit from such a business, or promote such a business.

Regardless of the appropriate weight to be afforded these decisions, the IJ erroneously interpreted them as standing for the proposition that any type of "facilitation" of a prostitution business relates to owning, controlling, managing or supervising of such a business; an overbroad interpretation that the BIA endorsed without analysis. AR2. The cases do not support so broad a reading. Minor acts of assistance, like the delivery of condoms undertaken by Familia Rosario, do not meet that threshold.

Nor was it proper for the BIA to rely on *Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992), for the proposition that "relates to . . . may be broadly construed to include facilitation." AR4. *Beltran* involved a provision of the INA that provided for deportability of aliens that have been "convicted of a violation of, or a conspiracy to violate, any law relating to a controlled substance." 20 I&N Dec. at 525-26 (quoting 8 U.S.C. § 1251(a)(11)). The BIA concluded that, in the context of this statute, inchoate or prepatory crimes are encompassed "when the underlying substantive crime involves a drug offense." *Id.* at 526. The BIA thus interpreted "relates to" in *Beltran* to mean "involves," and unremarkably concluded that if an attempt, conspiracy, facilitation or solicitation conviction involves a drug offense, then it is covered by the statute. *Id.* But unlike *Beltran*, the statute at issue here does not make it an

aggravated felony to commit an offense "related to prostitution" or even "related to a prostitution business." Even if Familia Rosario's offense could be broadly categorized as facilitation of prostitution, it neither involved nor related to owning, controlling, managing or supervising a prostitution business.

This Court's interpretation of "relates to" is no different. In *Desai v. Mukasey*, this Court analyzed the meaning of "relating to," in the context of 8 U.S.C. § 1182(a)(2)(A)(i)(II) which renders an alien removable for violating "any law or regulation of a state, the United States, or a foreign country *relating to* controlled substances." 520 F.3d 762, 764 (7th Cir. 2008) (emphasis in original) (quoting 8 U.S.C. § 1182(a)(2)(A)(i)(II)). Specifically, the *Desai* Court concluded that a conviction for distributing a substance that was designed to look like a controlled substance and would "lead a reasonable person to believe it to be a controlled substance," is a violation of a law relating to controlled substances. *Id.* at 764-65. The idea of distributing a look-alike substance "would not even exist as a legal (or linguistic) concept without its connection to, or relationship with," the actual controlled substance. In contrast, however, Familia Rosario's crime, although related to, and having a connection with, a prostitution business in general has no connection with the ownership, management, control or supervision of such a business.

Applying these definitions and holdings to the present case leads to the conclusion that an offense is not an aggravated felony under § 1101(a)(43)(K)(i) unless the offense, which could potentially be attempt, conspiracy or facilitation, has a direct relation to or connection with the owning, controlling,

managing or supervising of a prostitution business. Familia Rosario's offense may indeed have a connection to or relationship with a prostitution business – it is that connection which arguably makes his conduct criminal. But it does not have the requisite connection to the ownership, control, management or supervision of such a business. The BIA instead essentially rewrote § 1101(a)(43)(K)(i) to cover "offenses related to prostitution" in the same manner that other provisions of the INA cover offenses "relating to a controlled substance."

Just as a low-level employee at an automobile-manufacturing factory would not be said to have a job related to owning, controlling, managing or supervising a car company, so to Familia Rosario's delivery of condoms does not relate to owning, controlling, managing or supervising a prostitution business. In fact, the explicit reference to "owning, controlling, managing or supervising" could support a conclusion that Section 1101(a)(43)(K)(i) simply does not encompass aiders and abettors, although such a conclusion is not necessary in the present case. There is nothing in the plea agreement that suggests that Familia Rosario was in any way connected to the owning, controlling, managing or supervising a prostitution business. The consequence of affirming the BIA's reading of Section 1101(a)(43)(K)(i) in this case is that anyone who has been convicted of a crime that has any connection to a prostitution business, no matter how minor, would be an aggravated felon. Such a reading cannot stand.

III. The BIA did not correctly apply or explain its use of the modified categorical approach to analyze Familia Rosario's aiding and abetting conviction.

If the Court does not conclude that the BIA erred for the reasons detailed above, an alternative ground exists for reversing the BIA's decision. Specifically, the BIA's purported application of the modified categorical approach is neither explained nor correct. By erroneously focusing on the object of the conspiracy, the BIA ignored the disjuncture between Familia Rosario's offense and the type of convictions that qualify as aggravated felonies under § 1101(a)(43)(K)(i), and its lack of sufficient explanation or justification for this analysis requires reversal.

Under long-standing principles of administrative law:

> a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). As this Court has explained, "if the BIA based its conclusion upon an improper basis, we are powerless to affirm that judgment." *Moab v. Gonzales*, 500 F.3d 656, 660 (7th Cir. 2007).

Where a relevant statute prohibits a broad range of conduct, some of which falls within the definition of "aggravated felony" and some which does not, courts employ a "modified categorical approach." *Gaiskov v. Holder,* 567 F.3d 832, 836 n.2 (7th Cir. 2009). The modified categorical approach requires

the adjudicator to "compare the crime of conviction with the more generic term used in 8 U.S.C. § 1101(a)(43) and then determine whether the conduct required for a conviction would categorically constitute" the generic crime defined as an aggravated felony. *Id.* at 835.

Under the modified categorical approach, "it is permissible for the court to examine the charging documents to ascertain whether the alien was convicted of conduct that falls within the federal deportation standard." *Id.* at 836 n.2. In cases involving plea agreements, the inquiry is "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13, 25 (2005). The BIA's approach to "divisible" statutes is "identical to how the federal courts have applied the categorical approach." *In re Babaisakov*, 24 I&N Dec. 306, 311-12 (BIA 2007) (internal quotation marks omitted).

In its decision, the BIA simply stated that "[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, managing, or supervising of a prostitution business." AR3. The BIA then cited *Shepard* as support for reviewing documents such as plea agreements, which the IJ did. AR3. But those documents are to be consulted when a statute is found to be divisible, and the BIA made no attempt whatsoever to articulate the

way in which any relevant statute was divisible.[4] In fact, the BIA did not even articulate what statute it thought should be analyzed by reference to the plea agreement and other charging documents under the modified categorical approach.

If the BIA was purporting to analyze Section 1328 because it was the object of the conspiracy that Familia Rosario aided and abetted, then this approach was incorrect for the reasons stated above in Section I. To the extent the BIA intended to analyze Section 1328 for some other purpose, it should have parsed the offenses encompassed within Section 1328 to determine if Familia Rosario is an aggravated felon, rather than simply focusing on the statute as the underlying object of the conspiracy (to which Familia Rosario was not a party). A cursory review of Section 1328 reveals that the statute includes numerous offenses, not all of which qualify as an aggravated felony. Specifically, the statute provides:

> Whoever shall, directly or indirectly, import, or attempt to import into the United States any alien for the purpose of prostitution or for any other immoral purpose, or shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien, in pursuance of such illegal importation, shall be fined under title 18, or imprisoned not more than 10 years, or both.

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[4] The BIA asserted that it was engaging in a *de novo* review of the IJ's decision and did not expressly adopt that earlier decision. *See Moab*, 500 F.3d at 659 n.1 (noting that the IJ's analysis can be reviewed when there is "language of express adoption" by the BIA).

8 U.S.C. § 1328.

This provision includes offenses that go well beyond the scope of 8 U.S.C. § 1101(a)(43)(K)(i), which defines as an aggravated felony an offense that "relates to the owning, controlling, managing, or supervising of a prostitution business." 8 U.S.C. § 1101(a)(43)(K)(i).[5] For example, the language punishing anyone who "shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien, in pursuance of such illegal importation" defines offenses that would involve conduct related to the owning, controlling, managing, or supervising of a prostitution business and offenses that do not include such conduct. 8 U.S.C. § 1328. The BIA, however, made no mention of any of these various offenses and which might be relevant to Familia Rosario. Moreover, recognition of the difference between aiding and abetting a conspiracy and being a co-conspirator should be fundamental to any analysis of what, if any, offense under § 1328 is relevant to determining whether Familia Rosario is an aggravated felon.

Regardless of what the BIA was intending to do with its analysis, however, neither Familia Rosario nor this Court are required to guess as to the BIA's justification for its ruling. *See, e.g.*, *Atunnise v. Mukasey*, 523 F.3d 830,

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[5] 18 U.S.C. § 371, which criminalizes all conspiracies to "commit any offense against the United States," also encompasses far more offenses than those that qualify as an aggravated felony under INA § 101(a)(43)(U), which requires that a conspiracy be aimed at committing an offense that is itself an aggravated felony. 8 U.S.C. § 1101(a)(43)(U). As discussed above, however, the proper inquiry is whether Familia Rosario's aiding and abetting a conspiracy qualifies as an aggravated felony, not whether the object of the conspiracy would.

838 (7th Cir. 2008) (the agency's ruling may not be defended "on a ground that is not articulated – or at least discernable – in the decision itself"). Because the BIA did not provide sufficient support for its determination, the decision must be reversed.[6]

[6] The BIA likewise erred in failing to properly address the burden of proof applicable to an application for cancellation of removal. The applicable regulation provides that "[i]f 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." 8 C.F.R. § 1240.8(d). Although Familia Rosario would ultimately have the burden of persuasion to prove that he is not an aggravated felon, the regulation first requires a determination that the "evidence indicates" that a ground for mandatory denial may apply. The BIA failed to engage in that analysis.

CONCLUSION

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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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6995 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: March 4, 2011

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Garrett A. Levin

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e)(1), versions of the brief and all of the appendix items that are available in non-scanned PDF format.

Dated: March 4, 2011

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Garrett A. Levin

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I, Garrett A. Levin, an attorney, certify that all material required by Circuit Rule 30(a) and Circuit Rule 30(b) are included in the appendix bound with this brief.

Dated: March 4, 2011

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Garrett A. Levin

CERTIFICATE OF SERVICE

Garrett A. Levin, an attorney, hereby certifies that he caused an original and 15 copies and an electronic version of the foregoing Brief and Required Short Appendix of Petitioner Manuel de Jesus Familia Rosario to be transmitted to the Court for filing via hand delivery, and two copies and an electronic disc version of the Brief and Required Short Appendix of Petitioner Manuel de Jesus Familia Rosario to be served on the party below, via USPS Express Mail, on March 4, 2011.

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