

**FILED**

No. 04-75584

JUN 2 - 2008

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U.S. COURT OF APPEALS

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

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**MARIO SANCHEZ,  
(A77-832-827)**

**Petitioner,**

**v.**

**MICHAEL B. MUKASEY, United States Attorney General,**

**Respondent.**

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**RESPONDENT'S PETITION FOR REHEARING EN BANC**

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## INTRODUCTION

The panel's decision disregards the plain text of the statute, conflicts with a prior holding of this Court, and is in significant tension with decisions in two other circuits. *Sanchez v. Mukasey*, 521 F.3d 1106 (9th Cir. 2008), following and applying *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005). The panel itself acknowledges the result in *Moran* is in tension with this Court's decision in *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000), but points out that the government has not yet petitioned for rehearing en banc. Judge Wallace, a panel member writing separately, states that *Moran* conflicts with *Khourassany* and expressly calls for en banc rehearing to resolve the conflict.

By the plain language of the statute, alien smugglers cannot satisfy the "good moral character" eligibility requirement for cancellation of removal relief. However, the panel creates a waiver which enables cancellation applicants to get around this good moral character bar. It does so by rewriting the plain language of a carefully crafted waiver that applies to an entirely different category of alien. In so doing, the panel undermines Congress's policy against alien smuggling.

The straightforward question of statutory interpretation involves several provisions of the Immigration and Nationality Act (INA). First, the statute requires an applicant for cancellation of removal to show good moral character.

8 U.S.C. § 1229b(b)(1)(B). Second, the INA provision defining good moral character states that a person cannot be of good moral character if that person is a member of classes of persons described in another section of the INA. 8 U.S.C. § 1101(f)(3). Third, that other section of the statute describes one of these classes of persons as alien smugglers: “any alien, who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.” 8 U.S.C. § 1182(a)(6)(E)(i).

Under a straightforward application of this language, the panel should have determined that Sanchez, who admitted assisting in the smuggling of his wife into the United States, was precluded from demonstrating good moral character and thus was ineligible for cancellation of removal. Instead, the panel held that Sanchez could get around this bar by applying for a waiver under a separate provision of the statute, even though that provision applies to waiver of inadmissibility, not ineligibility for cancellation. 8 U.S.C. § 1182(d)(11) (“family unity” alien smuggling waiver).

In applying this waiver to Sanchez, the panel disregards the plain text of section 1182(d)(11), which: (1) applies to aliens applying for adjustment of status (not cancellation of removal); and (2) waives inadmissibility (not good moral character). The panel’s erroneous reading of section 1182(d)(11) rewrites and

expands that provision from a waiver of inadmissibility for certain aliens seeking adjustment of status, to a waiver of good moral character for aliens seeking cancellation. En banc rehearing is warranted, to correct the panel's erroneous application of the waiver provision.

### **STATEMENT**

1. Eligibility for cancellation of removal requires a showing that the applicant “has been a person of good moral character” during a specified period. 8 U.S.C. § 1229b(b)(1)(B). The INA precludes persons from demonstrating good moral character if they fall into certain classes. In relevant part, “no person shall be regarded as, or found to be, a person of good moral character who, during the [relevant] period . . . is, or was . . . a member of one or more of the classes of persons, *whether inadmissible or not*, described in paragraphs (2)(D), (6)(E), and 10(A) of section 1182(a) of this title . . . .” 8 U.S.C. § 1101(f)(3) (emphasis added). Section 1182(a)(6)(E)(i) – which generally sets forth grounds of inadmissibility – describes a class of persons consisting of “any alien, who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.” Thus, by definition, an alien smuggler cannot demonstrate good moral character and is barred from eligibility for cancellation of removal.

The definition of good moral character in section 1101(f)(3) does not tie good moral character to a finding of admissibility or inadmissibility, but instead focuses on underlying conduct. It expressly provides that an alien, “whether inadmissible or not” (*i.e.*, even if the inadmissibility were waived) is precluded from demonstrating good moral character if he fits within the conduct described in section 1182(a)(6)(E).

To promote humanitarian purposes, the public interest, or family unity, Congress authorizes the Attorney General to grant in limited circumstances a discretionary waiver of inadmissibility to an alien who has been found inadmissible for alien smuggling. This inadmissibility waiver applies only where an “alien has encouraged, induced, assisted, abetted, or aided only an alien’s spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.” 8 U.S.C. § 1182(d)(11). The waiver is further limited to: (1) a lawful permanent resident who has temporarily proceeded abroad voluntarily and is admissible as a returning resident; or (2) an alien seeking admission or adjustment of status under 8 U.S.C. § 1153(a).

2. Sanchez is a native and citizen of Mexico who entered the United States in 1988 without inspection. The former Immigration and Naturalization Service (INS) initiated removal proceedings against him in 2000, as an alien present in the

United States without admission or inspection. In response, Sanchez applied for cancellation of removal, based on alleged hardship to his three United States citizen children and his father, a lawful permanent resident of the United States. The Immigration Judge denied Sanchez's application for cancellation of removal because Sanchez admitted he had paid \$1,000 to have his alien wife smuggled into the United States, after he married her in Mexico in 1993. The Immigration Judge concluded that Sanchez's alien smuggling activity precluded him from demonstrating good moral character, a prerequisite for cancellation eligibility. The Board of Immigration Appeals (BIA) affirmed this determination.

3. Sanchez challenged the Board's final order of removal on the basis that *Moran v. Ashcroft*, 395 F.3d 1089 (9th Cir. 2005), issued subsequent to the Board's order, was controlling and allowed him to seek a waiver of the good moral character requirement for cancellation of removal. The government argued that by its plain terms, the section 1182(d)(11) waiver did not apply to Sanchez, and that *Moran* was dictum in this respect.

A panel of the Ninth Circuit reversed the Board's denial of cancellation in *Sanchez*, 521 F.3d 1106. *Sanchez*, which relies almost entirely on *Moran*, holds that the family unity waiver of inadmissibility for alien smuggling in section 1182(d)(11), which expressly applies to aliens seeking adjustment of status, also

applies to cancellation of removal, and allows waiver of the good moral character requirement for cancellation. 521 F.3d at 1110.

The *Sanchez* panel notes *Moran*'s acknowledgment that section 1182(d)(11), by its terms, applies to adjustment of status, not cancellation of removal. *Id.* at 1108. However, the panel concludes that under the reasoning of *Moran*, "all of the provisions of § 1182(a)(6)(E) pertaining to admissibility, including the family unity waiver, must be read into the provisions governing eligibility for cancellation." *Id.* at 1109. *Sanchez* notes that in the absence of a textual predicate for such an application, *Moran* simply "adapt[ed]" the language of the relevant provisions. *Id.* at 1108. *Sanchez* also endorses *Moran*'s interpretation of *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9th Cir. 2004) to justify the practice of judicially "cross-referencing" provisions applicable to different types of immigration relief. *Id.* Finally, *Sanchez* rejects the argument that *Moran* is dictum, and concludes that it is bound to apply the law as stated by *Moran*, despite *Moran*'s acknowledgment that its conclusion is "in tension" with *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000). *Id.* at 1110.

Writing separately, Judge Wallace: notes that the issue decided in *Moran* was not briefed by the parties in that case; classifies *Moran* as "clearly dicta;" and argues that *Moran* "was wrongly decided and should be reconsidered by this court

sitting *en banc*.” Judge Wallace’s extensive statutory analysis concludes that the section 1182(d)(11) family unity waiver is inapplicable to cancellation of removal, and that *Moran* and *Sanchez* create an intra-circuit split with *Khourassany*.

### DISCUSSION

This decision warrants *en banc* rehearing for several reasons.

1. The panel’s opinion squarely conflicts with *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000), and is analytically in tension with precedents in the Second and Third Circuits. In *Khourassany*, the Ninth Circuit held that the alien smuggling waiver of inadmissibility under section 1182(d)(11) has no application to a determination of good moral character for purposes of an application for voluntary departure. 208 F.3d at 1101. Like cancellation of removal, eligibility for voluntary departure requires a showing of good moral character. *See* 8 U.S.C. § 1229c(b)(1)(B) (formerly 8 U.S.C. § 1254). After determining that *Khourassany* had engaged in smuggling activity involving his wife and child, the Court held that “[n]o exceptions or other waivers to the alien smuggler provision apply to *Khourassany*. *See* 8 U.S.C. § 1182(a)(6)(E)(ii) & (iii); 8 U.S.C. § 1182(d)(11).” 283 F.3d at 1101. For purposes of the issue presented in *Sanchez*, the analysis is identical; it is a distinction without a difference that *Sanchez* applied for cancellation of removal, while *Khourassany* sought voluntary departure.

Judge Wallace, in his separate opinion in *Sanchez*, points out that “*Moran* can hardly be said to have distinguished *Khourassany*; it simply ignored the contrary authority.” 521 F.3d at 1113-14. He concludes that *Moran*’s failure to either acknowledge a conflict with *Khourassany* or justify the contradictory rules it created, results in “the unreasonable situation in which an alien smuggler applying for voluntary departure cannot avail himself of the waiver, whereas an alien smuggler applying for cancellation of removal, using the same statutory scheme, can. That conflict should be addressed by the en banc court.” *Id.*

*Sanchez* is in significant tension with *Miller v. INS*, 762 F.2d 21 (3rd Cir. 1985) and *Chan v. Gantner*, 464 F.3d 289 (2d Cir. 2006). In *Miller*, the Third Circuit held that the provision authorizing waiver of a conviction which would have constituted grounds for exclusion, under former 8 U.S.C. § 1182(h), does not, by its terms, apply to the good moral character definition under section 1101(f): “Congress has not only chosen not to apply the section [1182(h)] waiver to [8 U.S.C. § 1101(f)], it has also chosen not to confer authority on the Attorney General to waive the ‘good moral character’ requirement as defined in section [1101(f)] which is needed for suspension of deportation under section [1254(a)(1)].” 762 F.2d at 24. In *Chan*, the Second Circuit similarly declined to extend the waiver of deportation afforded under former section 1182(c) to the

context of naturalization. 464 F.3d at 295. The Court noted the lack of any authority supporting such an expansion, and concluded that substantive differences between waiver of deportation and the good moral character requirement for naturalization argue against such cross-referencing. *Id.*

These decisions are analytically in conflict with *Moran* and *Sanchez*. In declining to cross-reference waivers from one form of immigration relief to another, the Second and Third Circuits properly applied the plain language of the statutes at issue, observed the substantive distinctions between the provisions sought to be cross-referenced, and refrained from redrafting the plain meaning of the INA provisions at issue. *Moran* and *Sanchez* stand as the only published decisions of which we are aware that interpret section 1182(d)(11) to apply to cancellation of removal and good moral character. The Court should resolve the Ninth Circuit conflict with *Khourassany*, as well as inconsistencies with other judicial circuits, by reversing *Sanchez* on en banc rehearing.

2. *Sanchez* disregards the plain language of the statute.

a. There is no ambiguity or lack of clarity in the relevant statutory provisions, nor does the *Sanchez* panel identify any. None of these provisions – the cancellation of removal provision, the definition of good moral character, the alien smuggling inadmissibility provision, or the alien smuggling waiver provision

– either expressly or implicitly, alone or in combination, make available to Sanchez a waiver of the good moral character bar to his eligibility for cancellation of removal.

Congress clearly expressed that an alien’s admissibility has no bearing on whether he can demonstrate good moral character: “no person shall be regarded as, or found to be, a person of good moral character who . . . is, or was . . . a member of one or more of the classes of persons, *whether inadmissible or not*, described in [the specified subparagraphs] of section 1182(a) . . . .” 8 U.S.C. § 1101(f)(3) (emphasis added). So even if a person were inadmissible for smuggling an alien into the United States, but obtained a waiver of this ground of inadmissibility, that person still could not be found to be a person of good moral character. This clearly drawn distinction between admissibility and good moral character underscores Congress’s recognition of the difference between the two, and demonstrates the invalidity of the panel’s cross-referencing of these provisions. The irrelevance of an alien’s admissibility or inadmissibility (and hence, a waiver of that inadmissibility) to a good moral character determination, explains why section 1101(f)(3) does not expressly incorporate the inadmissibility waiver in

section 1182(d)(11), or any other provision relating to inadmissibility.<sup>1</sup>

Similarly, the text of section 1182(d)(11) itself makes no reference to good moral character or cancellation of removal. Even if Sanchez's admissibility were relevant to his good moral character, he would not qualify for the alien-smuggling waiver of inadmissibility under the plain language of that provision. Section 1182(d)(11) limits the waiver of alien-smuggling inadmissibility to two categories of persons: (1) a lawful permanent resident who has temporarily proceeded abroad voluntarily and is *admissible* as a returning resident; and (2) an alien seeking admission or *adjustment of status* under section 1153(a) (other than under paragraph (a)(4)). Sanchez, never a lawful permanent resident, is an inadmissible alien seeking cancellation of removal under section 1229b who does not fit into either category, and thus is not an intended beneficiary of this waiver.<sup>2</sup>

Despite the plain language of these provisions, the panel ignores the well-established canon of statutory interpretation dictating that if the language of a

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<sup>1</sup> See *Sanchez*, 521 F.3d at 1112 (section 1101 clearly identifies the subsections of 1182 that apply to the definition of good moral character; it does not reference subsection 1182(d)(11) or any other waiver provision) (Opinion of Wallace, J.).

<sup>2</sup> As Judge Wallace correctly observed, "the waiver does not apply to all aliens found inadmissible under section 1182(a)(6)(E)," as it enumerates only certain types of otherwise admissible aliens who are eligible for the waiver. *Id.*

statute is clear, the court looks no further than that language to determine the statute's meaning. *See U.S. v. Lewis*, 67 F.3d 225, 228 (9th Cir. 1995). Instead, the panel ventures well beyond the plain text of the statutes and, following *Moran*, “translat[es] the alien-smuggling inadmissibility provision and its exceptions into the language of cancellation of removal” by “replac[ing] references to admissibility, applications for admission, and adjustment of status with references to cancellation of removal.” 521 F.3d at 1108.

b. *Sanchez* undermines Congress's strong policy against alien smuggling. The panel's expansion of the alien smuggling waiver is at odds with Congress's longstanding policy against alien smuggling, and its pattern of carefully crafting limited exceptions to this policy, including the “family unity” exception at issue here.

Alien smuggling has long been a matter of significant concern in United States immigration policy, and Congress has taken an increasingly strong stand against such activity. Alien smuggling has been a crime since enactment of the INA in 1952. Immigration and Nationality Act of 1952, Pub. L. No. 104-8, 66 Stat. 163 (June 27, 1952); *see* 8 U.S.C. § 1324(a) (June 27, 1952, c. 477, Title II, ch. 8, § 274, 66 Stat. 228). The INA also originally provided that “[a]ny alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted,

abetted, or aided any other alien to enter or to try to enter the United States in violation of law” is excludable. *See* former 8 U.S.C. § 1182(a)(31) (June 27, 1952, c. 477, Title II, ch. 2, § 212, 66 Stat. 182).

Since then, Congress has enacted harsher sanctions against alien smuggling and broadened the scope of restrictions on such activity. In 1990, Congress amended the INA so that any act of smuggling – not just smuggling for gain – constitutes grounds for inadmissibility or exclusion. *See* Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5073-74 (Nov. 29, 1990). In 1996, Congress amended 18 U.S.C. § 1961(1) to establish certain alien smuggling-related crimes as RICO-predicate offenses. *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 433, 11 Stat. 1214, 1274 (Apr. 24, 1996). Congress further amended the INA to provide enhanced enforcement and penalties against alien smuggling. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, §§ 201-205, 110 Stat. 1570 (Sept. 30, 1996).

Congress knows how to craft exclusions to its alien smuggling policy, and has done so in the case of section 1182(d)(11), which was added in 1990 to provide a limited, discretionary “family unity” waiver of alien smuggling inadmissibility in specific circumstances, where: (1) an alien lawfully admitted for

permanent residence had temporarily proceeded abroad voluntarily; (2) was otherwise admissible as a returning resident under section 211(b); and (3) had engaged in alien smuggling involving “only the alien's spouse, parent, son, or daughter (and no other individual).” IMMACT, § 601(d)(2)(F). Congress expanded the scope of this exclusion in 1991, by also making it available to an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a), other than under section 1153(a)(4). Pub. L. 102-232, § 307(d). Congress clarified and limited the scope of this inadmissibility waiver again in 1996, by specifying that the family relationship referenced in the waiver had to exist at the time of the smuggling activity. *See* IIRIRA § 351, 110 Stat. 3009-640.

By effectively creating a family unity waiver for cancellation applicants, the panel upsets the balancing of interests chosen by Congress. Whether to extend a family unity-based exception to the good moral character bar for the benefit of cancellation applicants who smuggle family members is a judgment for the legislature to make, not the judiciary. *See Resident Councils of Washington v. Leavitt*, 500 F.3d 1025, 1031 (9th Cir. 2007) (in interpreting statutory meaning, court “may not rewrite a statute, but instead simply ‘construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to

ascertain – neither to add nor to subtract, neither to delete nor to distort.””) (quoting *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951)). See also *INS v. Yueh-Shiao Yang*, 519 U.S. 26, 32 (1996) (agency policy regarding statute cannot be permitted to overcome the unmistakable text of the law). In rewriting section 1182(d)(11) to expand its availability to circumstances beyond its plainly stated scope, the panel impermissibly ignores the policy judgment made by Congress and substitutes its own.

3. The panel misinterprets *Gonzalez-Gonzalez*.

The panel wrongly cites *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9th Cir. 2004) to support its statutory cross-referencing. *Gonzalez-Gonzalez* holds that a reference in the cancellation provision to a list of offenses in other INA provisions is limited to that list of offenses, and does not incorporate any other parts of those provisions. In that case, an inadmissible alien was found to be ineligible for cancellation because he failed to meet one of the requirements for such relief: that he not have been “convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3)” of Title 8. 8 U.S.C. § 1229b(b)(1)(C).<sup>3</sup>

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<sup>3</sup> The lack of such convictions, like good moral character under 8 U.S.C. § 1229b(b)(1)(B), is one of the four statutory requirements for eligibility for cancellation of removal.

The Court rejected the alien's argument that other parts of section 1227 (dealing with deportation) also applied to his cancellation application, holding that "[t]he plain language of § 1229b indicates that it should be limited to cross-reference a *list of offenses* in three statutes, rather than the *statutes as a whole*." 390 F.3d at 652 (emphases added). The *Sanchez* panel, while claiming to apply *Gonzalez-Gonzalez*, looks beyond the conduct listed in section 1182(a)(6)(E) (precluding good moral character) and erroneously incorporates the waiver of inadmissibility provision in section 1182(d)(11) as well. This is precisely what the Court declined to do in *Gonzalez-Gonzalez*. Hence, *Gonzalez-Gonzalez* actually undercuts *Moran*'s "whole-cloth rewriting of the statute," which was adopted by the *Sanchez* panel. 521 F.3d at 1113 (Opinion of Wallace, J.).

**CONCLUSION**

For the foregoing reasons, Respondent requests that the Court grant its petition for rehearing en banc.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Circuit Rules 35-1 and 40-1, the attached Respondent's Petition For Rehearing En Banc is proportionally spaced, has a typeface of 14 points or more, and contains 3,792 words (petitions and answers must not exceed 4,200 words).

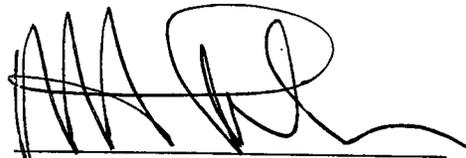
A handwritten signature in black ink, appearing to read 'MANUEL A. PALAU', written over a horizontal line.

MANUEL A. PALAU  
Trial Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on May 30, 2008, two copies of the foregoing Respondent's Petition For Rehearing En Banc were served on Petitioner's counsel by Federal Express next business day delivery service, addressed to:

Frank P. Sprouls, Esq.  
LAW OFFICE OF RICCI AND SPROULS  
445 Washington Street  
San Francisco, CA 94111

A handwritten signature in black ink, appearing to read 'M. Palau', written over a horizontal line.

MANUEL A. PALAU  
Trial Attorney

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IN THE UNITED STATES COURT OF APPEALS  
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MARIO SANCHEZ

Petitioner/Appellant

v.

MICHAEL MUKASEY  
ATTORNEY GENERAL

Respondent

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RESPONSE TO PETITION FOR RE-HEARING EN BANC

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## INTROUDUCTUON

The Government Petition for Re-Hearing En Banc should be dismissed for the simple reason that the Government argument creates conflict where none exists and it ignores the harmonious and utterly reasonable rationale of the statutory scheme crafted by the separate panels in Sanchez v. Mukasey, 521 F.3d. 1106 (9th Cir. 2005) and Moran v. Ashcroft, 395 F.3d. 1089 (9<sup>th</sup> Cir. 2005)

The Government argument posits that there is a facial conflict between Moran/Sanchez and Khourassany v. INS, 208 F.3d. 1096 (9th Cir. 200).

In Khourassany, the panel held that an alien seeking Voluntary Departure and charged with alien smuggling cannot demonstrate good moral character and no waivers are available.

The Government posits that "the analysis is identical; it is a distinction without a difference that Sanchez applied for Cancellation of Removal while Khourasany sought Voluntary Departure." (Gov't petition, page 7)

As will be explained below this is wildly incorrect as there are vastly different legislative goals and intent

between the two; there are vastly different statutory and procedural underpinnings between the two and finally, a facial reading of the Cancellation statute reveals that any alien applying for Cancellation of Removal is indeed, seeking to "Adjust" his or her status and thus the alien is seeking admission and the waivers of inadmissibility properly apply.

On the contrary, an alien seeking Voluntary Departure is waiving all relief and departing the United States.

I. THE DECISIONS IN SANCHEZ AND MORAN ARE CONGRUENT WITH THE STATUTORY LANGUAGE AND THE PANELS DID NOT ENGAGE IN IMPERMISSIBLE "CROSS-REFERENCING"

At the outset, Petitioner would argue that a "plain language" reading of the statute reveals that Sanchez and Moran were correctly decided.

"The Attorney General may cancel the removal of and adjust the status of an alien....."

It is axiomatic in immigration law that an alien who is adjusting his status is assimilated into the position of an applicant for "entry" into the United States. Matter of Hernandez-Pune, Int. Dec. 3153 (BIA 1991)

It is equally clear that an alien who is seeking Adjustment is subject to the grounds of inadmissibility.

Thus is a pure fiction as an alien who is physically present in the United States, who committed criminal offenses in the United States or committed civil immigration violations in the United States, is still only subject to the bars of inadmissibility, not removability and, concomitantly the waivers of inadmissibility.

Next, as the Sanchez Court pointed out, {Sanchez, at 1109) there is clear textual support to apply the waivers of inadmissibility to a Cancellation applicant in the sense that the "good moral character" requirement for Cancellation of Removal eligibility at 8 U.S.C. 1229b (1) (B) makes reference to the definitional section of "good moral character" found at 8 U.S.C. 1101 (f) (3).

Now, 8 U.S.C. 1101 (f) (3) deals specifically with the grounds of inadmissibility, not removability.

When the language of the statute references Adjustment of Status in which the alien is assimilated into the position of making an entry and when the statute itself cross-references the grounds of inadmissibility, it is entirely reasonable to conclude that Congress intended the waivers of inadmissibility to similarly apply.

II. THERE IS NO CONFLICT BETWEEN KHOURASSANY AND SANCHEZ AND MORAN.

At the outset the Khoursany case was published in the year 2000.

Subsequent to Khourassany, two separate panels have addressed the "alien smuggling waiver" under 8 U.S.C. 1182 et seq. and they have unambiguously held that it applies to a Non-Permanent Resident who is seeking to adjust his status thorough Cancellation of Removal under INA 240A (b). Moran v. Ashcroft, 395 F.3d. 1089 (9<sup>th</sup> Cir. 2005); Sanchez, supra,

It is presumed that a federal court is aware of the legal landscape at the time that they publish a decision and announce a precedent.

Indeed, Moran makes specific reference to Khourassany (Moran at 1094) and they found no conflict between the two provisions.

It is thus argued that the Government is creating a conflict where none exists.

However, to the extent that there is some tension between the two cases, the different treatment of alien smuggling in the context of Voluntary Departure and Cancellation of Removal is perfectly explicable.

A. AN ALIEN WHO IS APPLYING FOR CANCELLATION OF REMOVAL IS SEEKING AN ENTRY AND THUS ADJUSTMENT OF STATUS WHILE AN ALIEN SEEKING VOLUNTARY DEPARTURE IS FOREGOING ALL CLAIMS TO RELIEF.

A plain reading of the statutes reveals the differences between Voluntary Departure and Cancellation.

Section 240A (b) (1) states,

"The Attorney General may cancel the removal of and adjust the status of an alien....."

It is axiomatic in immigration law that an alien who is adjusting his status is assimilated into the position of an applicant for entry into the United States. Matter of Hernandez-Pune, Int. Dec. 3153 (BIA 1991)

As was explained above, it is for this reason that the waivers of inadmissibility apply to Cancellation of Removal, however, it also demonstrates the wide gulf that exists between Cancellation of Removal and Voluntary Departure and why disparate treatment of the two statutes in terms of alien smuggling is utterly explicable.

To repeat, an alien seeking Cancellation is raising a defense against Removal but they are also seeking to adjust their Status to Residency.

This is an affirmative application for Residency and the sole burden is on the alien to demonstrate eligibility and the sole benefit is to the self-same alien.

Voluntary Departure on the other hand, as Justice Kennedy observed, is akin to a plea bargain in which both the alien and the Government gain a benefit,

"Voluntary Departure, under the current structure allows the Government and the alien to agree upon a quid pro quo" Samson Taiwo DADA v. Mukasey, 08 CDOS 7335 (S. Ct. June 17, 2008)

This is a very unique component of the Immigration statute that quite properly exists outside of the context of an alien seeking admission.

Next, the Voluntary Departure statute itself treats alien smuggling differently.

For instance, if the alien is seeking pre-hearing Voluntary Departure under INA 240B (1) the only aliens precluded are those accused of terrorist activities and aggravated felons.

Thus, an alien charged with alien smuggling could avail himself or herself of pre-Hearing Voluntary Departure based on a cost-benefit analysis plea bargain with the Government.

Further, by providing this benefit to the alien, the Government hopes to induce parties to accept Voluntary Departure.

As is apparent, the legislative intent and the procedure between Voluntary Departure and Cancellation of

Removal are completely distinct and there is no Legislative conflict between the lack of an alien smuggling waiver in the context of Voluntary Departure found at INA 240B and the availability of an alien smuggler waiver at 240A (b)

### III. THE REASONING OF SANCHEZ AND MORAN DO NOT CONTRAVENE

#### CONGRESSIONAL INTENT IN TERMS OF ALIEN SMUGGLING

Finally, the Government argues, by cross-referencing other sections of the law, that allowing a waiver for family-based alien smuggling in the context of Cancellation of Removal, contravenes the increasingly harsh treatment that Congress affords to alien smuggling.

No one disputes the many vices associated with alien smuggling.

However, they are generally associated with the actions of the rapacious and predatory Coyotes - professional criminal alien smugglers.

Their practices spawn related crime, corruption, violent exploitation, destruction of border property and drug trafficking.

Here, on the other hand, we are dealing with the most sacred relationships in our Judeo-Christian universe - parents to their children and spouses to each other.

The fact that that Congress intended an alien

smuggling family-unity waiver to exist in the context of an Adjustment of Status application as well as in Cancellation of Removal - but nowhere else - hardly betrays a retreat in the harsh treatment afforded alien smugglers.

CONCLUSION

Based on the foregoing, the Government Petition for Re-Hearing should be denied.

Dated; 7-11 2008



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v. Michael Mukasey

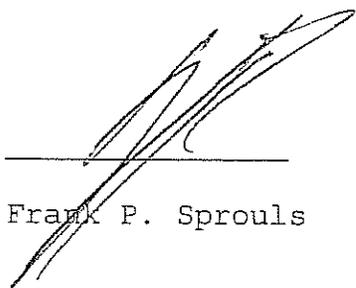
Respondent

BRIEF FORMAT CERTIFICATION

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Pursuant to Ninth Circuit Rule 32 (e) (4), I certify that the opening brief is mono-spaced, has a typeface of fourteen points and contains 1, 294 words.

Dated: 7/11 2008

  
\_\_\_\_\_  
Frank P. Sprouls

SKUTCHER v. Mukasey

\_\_\_\_\_ PETITION FOR REVIEW

\_\_\_\_\_ REQUEST FOR STAY OF REMOVAL AND VOLUNTARY DEPARTURE

\_\_\_\_\_ OPENING BRIEF ON APPEAL

~~X~~ RESPONSE TO GOV'T PETITION

Case# 04-75584

Lower Docket#

I, the undersigned, declare that I am an employee of

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And my business address is 445 Washington Street, San Francisco CA 94111.

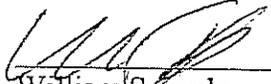
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