FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELY MARINELARENA, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 14-72003 Agency No. A095-731-273 OPINION

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

Argued and Submitted June 29, 2021
Pasadena, California

Filed July 26, 2021

Before: A. Wallace Tashima, Barry G. Silverman, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber;
Partial Concurrence and Partial Dissent by Judge Tashima

SUMMARY*

Immigration

Denying Aracely Marinelarena's petition for review of the Board of Immigration Appeals' denial of cancellation of removal, the panel: 1) incorporated by reference its prior holdings, in *Marinelarena v. Sessions* ("*Marinelarena I*"), 869 F.3d 780 (9th Cir. 2017), that conspiracy under California Penal Code ("CPC") § 182(a)(1), is overbroad but divisible as to the target crime, and that sale and transport of a controlled substance under California Health and Safety Code § 11352, is overbroad and divisible as to controlled substance; 2) concluded that *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), is consistent with *Marinelarena I*, and that Petitioner failed to establish that her conviction did not involve a federally controlled substance; 3) declined Petitioner's invitation to remand to present additional evidence; and 4) reaffirmed its conclusion that a conviction expunged under CPC § 1203.4 remains a "conviction" for federal immigration purposes.

In *Marinelarena I*, the panel upheld the BIA's denial of cancellation of removal but, rehearing the case en banc, the court granted the petition for review. Subsequently, the Supreme Court decided *Pereida*, which held that, when a statute places the burden of proof on an applicant for immigration relief to show the absence of a disqualifying conviction, and the applicant stands convicted under a divisible statute that includes some offenses that are

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

disqualifying and others that are not, and the record of conviction is ambiguous concerning which category fits the applicant's crime, then the applicant has failed to carry the required burden of proof. The Court granted the petition for certiorari in this case and remanded proceedings to the en banc court, which in turn remanded the matter to the original panel.

The panel incorporated by reference the portions of *Marinelarena I* relating to the factual and procedural background, the standard of review, and the discussion of overbreadth and divisibility. The panel also supplemented that material with the following observations and holdings.

As to divisibility, the panel noted that no developments in the California Supreme Court since *Marinelarena I* undermined the panel's earlier divisibility analysis, and declined Petitioner's invitation to certify a question to that court. The panel also noted that the jury instructions relating to the conspiracy offense, as well as Petitioner's underlying statute of conviction, support divisibility.

As to burden of proof, the panel explained that *Marinelarena I* is consistent with the Supreme Court's decision in *Pereida* and, for the reasons explained in its original opinion, the panel concluded that Petitioner failed to establish that her conviction did not involve a federally controlled substance.

The panel declined Petitioner's invitation to remand for her to present additional evidence regarding the controlled substance. First, the panel explained that Petitioner never argued earlier that her conviction involved a non-disqualifying controlled substance. Second, the panel

explained that it was clear from documents outside the scope of *Shepard v. United States*, 544 U.S. 13 (2005), that the offense involved was heroin, a federally controlled substance. Third, the panel explained that Petitioner declined the immigration judge's requests to provide additional documents related to her conviction, and that the panel's task was to review the record that was made. The panel also rejected Petitioner's argument that she should have an opportunity to testify before an immigration judge concerning the drug involved, observing that Petitioner had had that opportunity, and that she could have raised such arguments before this court. Thus, the panel concluded that the usual rule that this court gives the agency the first chance to apply a new evidentiary standard on remand did not apply.

Finally, the panel concluded that no developments in the relevant precedents, since *Marinelarena I*, undermined the panel's conclusion that a conviction expunged under CPC § 1203.4 remains a "conviction" for federal immigration purposes.

Concurring in part and dissenting in part, Judge Tashima concurred in the majority's holdings on divisibility and expungement. He disagreed, however, with the decision to deny Marinelarena's request to remand to the BIA. Judge Tashima observed that, in *Pereida*, the Supreme Court rejected Ninth Circuit and BIA precedent and held for the first time that an applicant for cancellation of removal may rely on a broad range of testimonial and documentary evidence to show that she was not convicted of a disqualifying offense. Judge Tashima would grant Marinelarena an opportunity to show, under this new evidentiary standard, that her California conviction does not constitute a controlled substance offense.

COUNSEL

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OPINION

GRABER, Circuit Judge:

This case comes before our court for the third time. In *Marinelarena v. Sessions* ("*Marinelarena I*"), 869 F.3d 780 (9th Cir. 2017), we upheld the Board of Immigration Appeals' ("BIA") denial of Petitioner Aracely Marinelarena's application for cancellation of removal. Rehearing the case en banc, the court granted the petition for review on the sole ground that, because the record of Petitioner's state-law conviction was ambiguous, she was not "necessarily" convicted of conspiring to sell and transport a controlled substance as defined under federal law and thus was not barred from relief under 8 U.S.C. § 1229b(b). *Marinelarena v. Barr*, 930 F.3d 1039, 1054 (9th Cir. 2019) (en banc). The Supreme Court of the United States subsequently decided *Pereida v. Wilkinson*, 141 S. Ct. 754, 762–63 (2021), which clarified the effect of an ambiguous record when the relevant

statute places the burden of proof on an applicant for immigration relief to show the absence of a disqualifying conviction. The Court held that, when the applicant stands convicted under a divisible state criminal statute that includes some offenses that are disqualifying and others that are not, and the record of conviction is ambiguous concerning which category fits the applicant's crime, then the applicant has failed to carry the required burden of proof. *Id.* at 762–63. Following *Pereida*, the Court granted the government's petition for certiorari in this case and remanded proceedings to the en banc court, *Wilkinson v. Marinelarena*, 141 S. Ct. 1512 (2021) (mem.), which in turn has remanded the matter to the original panel, *Marinelarena v. Garland*, 992 F.3d 1143 (9th Cir. 2021) (en banc) (mem.). We now deny the petition for review.

We incorporate by reference the following portions of the original panel opinion: the factual and procedural background, *Marinelarena I*, 869 F.3d at 783–84; the standard of review, *id.* at 785; and Part A of the discussion, which concerns overbreadth and divisibility, *id.* at 785–88. We also supplement that material with the following observations and holdings.

A. *Divisibility*

No developments in the California Supreme Court in the years since our 2017 opinion undermine our earlier analysis of divisibility. Because we conclude that the California Supreme Court has provided clear direction, we decline Petitioner's invitation to certify a question to that court.

We also note that a judge, in instructing a California jury on a conspiracy charge, must direct the jury to the elements of the underlying crime. Jud. Council of Cal. Crim. Jury Instr. No. 415 (2014) (hereinafter "CALCRIM"). In turn, the jury instruction concerning the underlying crime of Petitioner's conviction supports divisibility by requiring the judge to identify, and the jury to find, a specific drug:

> The defendant is charged [in Count __] with (selling/furnishing/administering/giving away/transporting for sale/importing)_____ <*insert type of controlled substance*>, a controlled substance, [in violation of _____ <*insert appropriate code section[s]*>].

CALCRIM No. 2300 (emphasis added) (bracketed material in original). Moreover, if the particular controlled substance at issue in the prosecution is not listed in certain statutory schedules, the judge must require the jury to name the specific type of controlled substance and to find whether it is an analog of a listed controlled substance. *Id.*

B. *Burden of Proof*

The Supreme Court's decision in *Pereida* rejected the analysis of the en banc court in *Marinelarena* and is consistent with the panel majority's original decision. *See Marinelarena I*, 869 F.3d at 789 ("It is well established that the party who bears the burden of proof loses if the record is inconclusive on the crucial point."). For the reasons explained in our original opinion, Petitioner failed to establish that her conviction did *not* involve a federally controlled substance. *See* 8 U.S.C. § 1229a(c)(4)(A)(i) (providing that

an applicant for relief from removal "has the burden of proof to establish that" he or she "satisfies the applicable eligibility requirements").

We decline Petitioner's invitation to remand this case for the purpose of presenting additional evidence. First, in the seven years this case has been in our court, Petitioner has never argued that her conviction involved a non-disqualifying controlled substance. Instead, she always has maintained that she prevails simply because of the ambiguity in her record of conviction. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (holding that the petitioner forfeited issues not raised in the opening brief). Thus, Petitioner's argument rests on ambiguity, and ambiguity is insufficient. "[J]ust as evidentiary gaps work against the government in criminal cases, they work against" Petitioner in an immigration case like this one. *Pereida*, 141 S. Ct. at 766.

Second, it is clear from documents outside the scope of *Shepard v. United States*, 544 U.S. 13, 20–23 (2005),[1] that the conspiracy offense of which Petitioner was convicted involved heroin, a federally controlled substance, 21 U.S.C. § 841(b)(1)(A)(i), (b)(1)(B)(i). The overt-acts allegations in Count 1 of the complaint, to which Petitioner pleaded guilty, refer only to heroin. Similarly, Count 2 refers only to heroin. Pre-trial materials and the probation officer's report state that

[1] When a criminal sentencing enhancement is contingent on the nature of a defendant's prior conviction, the Supreme Court "has circumscribed the proof a judge may consult out of concern for the defendant's Sixth Amendment right to a trial by jury." *Pereida*, 141 S. Ct. at 767. But because "Sixth Amendment concerns are not present in the immigration context," *Pereida* permits courts to consider a broader class of materials, including any document listed in 8 U.S.C. §1229a(c)(3)(B). *Id.*

the offense involved heroin. No non-disqualifying drug is mentioned in any relevant document.

Third, Petitioner declined the immigration judge's requests to provide additional documents related to her conviction, although she had ample time and opportunity to do so, and our task is to review the record that was made. *See Lising v. INS*, 124 F.3d 996, 998 (9th Cir. 1997) (holding that we generally will not consider "evidentiary material that either party could have presented to the BIA but that the petitioner simply failed to introduce at the hearing"). Petitioner also argues that she should have an opportunity to testify before an immigration judge concerning the type of drug involved in the conspiracy to which she pleaded guilty, even if her testimony differs from the information contained in the documents of record. But she had that opportunity. She could have sought to testify, for example, that the records were mistaken or legally flawed. If her testimony was disallowed, she could have made an offer of proof. She also could have argued to this court—before the three-judge panel or the en banc court—that she should be allowed to provide documents beyond *Shepard*'s scope to show that her offense did not, in fact, involve a federally controlled substance. She pursued none of those options. She made no offer of proof, no effort to testify, and no argument that she should be allowed to offer other forms of proof. Thus, our usual rule that we give the agency the first chance to apply a new evidentiary standard on remand, *Kawashima v. Holder*, 615 F.3d 1043, 1056–57 (9th Cir. 2010), *aff'd*, 565 U.S. 478 (2012), does not apply.

C. *Expungement*

No developments in the precedents of this court or of the Supreme Court, since we issued our previous opinion in 2017, undermine our conclusion that a state conviction expunged under California Penal Code section 1203.4 remains a "conviction" for federal immigration purposes. *Marinelarena I*, 869 F.3d at 792 n.8. Indeed, Petitioner concedes that "this argument is foreclosed on its merits." *See*, *e.g.*, *Lopez v. Sessions*, 901 F.3d 1071, 1075–76 (9th Cir. 2018) (holding that a person generally continues to stand convicted of an offense despite such a later expungement). We agree.

Petition DENIED.

TASHIMA, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's holdings on divisibility and expungement. I disagree, however, with the majority's decision to deny Marinelarena's request that this case be remanded to the Board of Immigration Appeals ("BIA"). In *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), the Supreme Court rejected Ninth Circuit and BIA precedent and held for the first time that an applicant for cancellation of removal may rely on a broad range of testimonial and documentary evidence to show that she was not convicted of a disqualifying offense. I would grant Marinelarena an opportunity to show, under this new evidentiary standard, that her California conspiracy conviction does not constitute a

controlled substance offense. I therefore respectfully dissent from Part B of the majority opinion.

I. Background

California Penal Code § 182 makes it a crime "[i]f two or more persons conspire . . . [t]o commit any crime." Cal. Penal Code § 182(a)(1). California Health and Safety Code § 11352 makes it a crime to transport, import, sell, furnish, administer, give away, or offer to transport, import, sell, furnish, administer, or give away, or attempt to import or transport, "any controlled substance" specified elsewhere in the Health and Safety Code. Cal. Health & Safety Code § 11352(a).

Marinelarena was charged in a two-count criminal complaint. Count 1 charged a conspiracy to violate § 11352:

> On or between October 1, 2006 and October 7, 2006, in the County of Los Angeles, the crime of CONSPIRACY TO COMMIT A CRIME, in violation of PENAL CODE SECTION 182(a)(1), a felony, was committed by . . . ARACELY MARINELARENA . . . , who did unlawfully conspire together and with another person or persons whose identity is unknown to commit the crime of SELL AND TRANSPORT, in violation of Section 11352 of the HEALTH AND SAFETY Code, a felony; that pursuant to and for the purpose of carrying out the objectives and purposes of the aforesaid conspiracy, the said defendants committed the following overt act or acts at

> and in the County of LOS ANGELES: SEE ATTACHED.

Count 1 then alleged sixteen overt acts, only one of which mentioned a drug type—heroin.[1]

Count 2 charged a substantive violation of § 11352:

> On or about October 7, 2006, in the County of Los Angeles, the crime of SALE/TRANSPORTATION/OFFER TO SELL CONTROLLED SUBSTANCE, in violation of HEALTH & SAFETY CODE SECTION 11352(a), a Felony, was committed by . . . ARACELY MARINELARENA, . . . who did unlawfully transport, import into the State of California, sell, furnish, administer, and give away, and offer to transport, import into the State of California, sell, furnish, administer, and give away, and attempt to import into the Slate of California and transport a controlled substance, to wit, HEROIN.

[1] The mention of heroin in one alleged overt act does not show that Marinelarena was convicted of conspiring to sell or transport heroin. Marinelarena's conviction could have rested on any one of the sixteen alleged overt acts. *See Marinelarena v. Barr*, 930 F.3d 1039, 1046 (9th Cir. 2019) (en banc) ("Because Marinelarena's guilty plea could have rested on an overt act that did not relate to heroin, we cannot assume her conviction was predicated on an act involving a federal controlled substance."), *cert. granted, judgment vacated sub nom. Wilkinson v. Marinelarena*, 141 S. Ct. 1512 (2021).

The two charges are distinguishable in one significant respect: whereas Count 2 charged a specific drug type as an element of the charged crime, Count 1 did not.

Marinelarena was convicted of Count 1 following her guilty plea. Neither the plea colloquy nor the judgment of conviction is in the record. Accordingly, the record does not reveal whether Marinelarena was convicted as charged in the criminal complaint or, if not, what crime or elements she was actually convicted of.

Marinelarena applied for cancellation of removal. To establish her eligibility for this form of relief, Marinelarena was required to prove that she had not been convicted of a controlled substance offense. *See* 8 U.S.C. § 1229b(b)(1)(C) ("The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien . . . has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title . . . ."). Section 1182(a)(2)(A)(i)(II) makes inadmissible a noncitizen "convicted of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1182(a)(2)(A)(i)(II).

The BIA concluded that Marinelarena was ineligible for cancellation of removal because she "has not submitted any evidence establishing that her conspiracy conviction was not for a disqualifying controlled substance offense." Marinelarena petitioned for review.

II. Discussion

Under the modified categorical approach, Marinelarena bears the burden of showing that she was not convicted of a controlled substance offense. *Pereida*, 141 S. Ct. at 758, 760; 8 U.S.C. § 1229a(c)(4)(A). All agree that Marinelarena has not yet made that showing. The remaining question is whether this matter should be remanded to the BIA, as Marinelarena requests, to afford her an opportunity to do so under *Pereida*'s new standard. The majority concludes that a remand is unwarranted. For the reasons set forth below, I disagree.

Before *Pereida*, an applicant for cancellation of removal seeking to prove that she was not convicted of a disqualifying offense was narrowly limited as to the evidence that could be offered on this issue to the so-called *Shepard* documents. *See Young v. Holder*, 697 F.3d 976, 983 (9th Cir. 2012) (en banc) ("[W]e may review only the charging instrument, transcript of the plea colloquy, plea agreement, and comparable judicial record of this information." (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005))); *Matter of Milian-Dubon*, 25 I. & N. Dec. 197, 197 (BIA 2010) ("In applying the modified categorical approach to assess an alien's conviction, the Immigration Judge and the Board may look beyond the language of the statute of conviction to a specific set of judicially noticeable documents that are part of the record of conviction, including the charging document, the judgment of conviction, jury instructions, a signed guilty plea, the transcript from the plea proceedings, and any explicit factual findings by the trial judge to which the alien assented in the criminal proceedings."); *In Re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 411 (BIA 2007) ("Under the categorical (and modified categorical) approach . . . , it is well settled that in

order to determine whether a conviction constitutes an aggravated felony under section 101(a)(43), only the record of conviction may be consulted."), *disagreed with on other grounds by United States v. Pacheco-Diaz*, 513 F.3d 776, 778 (7th Cir. 2008). The administrative proceedings in this case occurred between 2007 and 2014. Throughout that entire period, Marinelarena was constrained by Ninth Circuit and BIA precedent which limited the proof that she could adduce to the *Shepard* documents.

Pereida abrogated this precedent and held that a broad range of evidence may be presented. *Pereida*, 141 S. Ct. at 767. Under *Pereida*, an applicant for cancellation of removal may rely not only on the *Shepard* documents but also on other documentary evidence, *see id.* (citing 8 U.S.C. § 1229a(c)(3)(B)), and testimonial evidence, *see id.* at 764 ("[It is] impossible to discern an individual's offense of conviction without consulting at least some documentary or testimonial evidence."). Permissible testimonial evidence appears to include a noncitizen's own testimony. *See id.* at 767 (cross-referencing footnote 5 of the Court's opinion); *id.* at 764 n.5 ("The INA authorizes an immigration judge to make 'credibility determination[s]' based on an alien's proof, § 1229a(c)(4)(C); it says the immigration judge must determine whether 'testimony is credible, is persuasive, and refers to specific facts sufficient to [discharge] the applicant's burden of proof,' § 1229a(c)(4)(B) . . . . In all of these additional ways, the INA again anticipates the need for proof and the possibility of its challenge in an application for relief—and nowhere does the statute suggest some special carveout exists when it comes to evidence concerning prior convictions." (some alterations in original)); *see also id.* at 775 (Breyer, J., dissenting) (criticizing the majority for "allowing parties to introduce a wide range of documentary

evidence and testimony to establish the crime of conviction"); *id.* at 776 (noting that noncitizens may rely on "their own testimony").[2] Because we are now under a new regime established by *Pereida*, fairness requires that Marinelarena should have an opportunity to show, under this new evidentiary rule, that her conspiracy conviction does not qualify as a controlled substance offense. I would therefore remand this matter to the BIA.

The majority concludes that a remand is unwarranted because (1) Marinelarena "declined the immigration judge's requests to provide additional documents related to her conviction, although she had ample time and opportunity to do so," Maj. Op. at 9, and (2) "has never argued that her conviction involved a non-disqualifying controlled substance," Maj. Op. at 8. I disagree. Throughout the pendency of her administrative proceedings, Marinelarena plainly was constrained by Circuit and BIA case law limiting the kinds of evidence she could offer. She cannot be faulted for failing to present evidence that Ninth Circuit and BIA precedent squarely barred her from presenting. *See Szonyi v. Whitaker*, 915 F.3d 1228, 1233 (9th Cir. 2019) (as amended) ("Where the agency's position 'appears already set' and recourse to administrative remedies is 'very likely' futile, exhaustion is not required." (quoting *El Rescate Legal Servs., Inc. v. Exec. Office of Immig. Rev.*, 959 F.2d 742, 747 (9th

[2] If there is uncertainty as to the types of evidence allowed, this too favors a remand. *See Kawashima v. Holder*, 615 F.3d 1043, 1056 (9th Cir. 2010) ("[T]he government argues that we should remand this case to the BIA so that the agency may determine, in the first instance, what additional types of evidence it may consider under this newly announced standard and so that the government may have the opportunity to introduce evidence to meet this standard. We agree."), *aff'd*, 565 U.S. 478 (2012).

Cir. 1991))); *cf. Harris v. Carter*, 515 F.3d 1051, 1054 (9th Cir. 2008) (granting equitable tolling where the petitioner relied to his detriment on Ninth Circuit precedent later overturned by the Supreme Court). Nor can she be faulted for failing to present arguments that would have relied on such evidence.[3]

The majority alternatively concludes that remand is unwarranted because "it is clear from documents outside the scope of *Shepard v. United States*, 544 U.S. 13, 20–23 (2005), that the conspiracy offense of which Petitioner was convicted involved heroin, a federally controlled substance." Maj. Op. at 8. The question here, however, is not whether Marinelarena's offense "involved heroin." Rather, the question is whether Marinelarena was convicted of an offense of which heroin was an *element*. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) ("To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case."). Here, Count 1 of the criminal complaint (as opposed to Count 2) does not treat drug type as an element. If Marinelarena was convicted "as charged" in the complaint, then I do not see how she was convicted of a disqualifying controlled substance offense. If Marinelarena pled guilty only to the

[3] The Majority derides Marinelarena for not having sought "to provide documents beyond *Shepard*'s scope," and not "argu[ing] that she should be allowed to offer other forms of proof." Maj. Op. at 9. But we have held in similar circumstances that a party need not engage in such acts where "a solid wall of Circuit authority would have rendered [such acts] futile." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 864 (9th Cir. 2002) (en banc.).

elements set out in the complaint, then she did not plead guilty to conspiring to sell or transport *heroin*; she pled guilty only to conspiring to sell or transport a *controlled substance*. And if that is the case, then she did not plead guilty to—and was not convicted of—a disqualifying controlled substance offense. Even if, as a matter of California law, Marinelarena *should have been* convicted of a specific drug-type element,[4] what matters is whether she was *in fact* convicted of a drug-type element. *See Descamps*, 570 U.S. at 257 (under the modified categorical approach, we "compare the elements of the crime of conviction (including the alternative element *used in the case*) with the elements of the generic crime" (emphasis added)).[5]

I recognize that we have held that "[c]harging papers alone are never sufficient" to establish the elements of the crime of conviction. *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). Assuming that case law applies in this context, Marinelarena cannot rely on the criminal complaint alone to show that she was not convicted of conspiracy to sell or transport heroin. But she can present evidence under *Pereida* to show that she was convicted "as charged." Such evidence, in combination with the criminal complaint, presumably would be sufficient.

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[4] Marinelarena argues that a § 182(a)(1)/11352 offense is indivisible as to drug type. While she concedes that a substantive § 11352(a) offense is divisible as to drug type, *see United States v. Martinez-Lopez*, 864 F.3d 1034, 1041 (9th Cir. 2017) (en banc), she argues that a *conspiracy* to violate § 11352 is not.

[5] The majority also notes that California pattern instructions require that in a conspiracy case, the court is required to "direct the jury to the elements of the underlying crime." Maj. Op. 7. But what may be required in a jury trial is of little relevance in a plea taking colloquy.

What the majority has done is to bind Marinelarena to the pre-*Pereida* rules, although nothing in *Pereida* requires such a result.[6] Rather than speculating that a remand under the new *Pereida* standard would be futile, I would afford Marinelarena an opportunity to prove her case under the new evidentiary standard announced in *Pereida*. Marinelarena should be afforded this opportunity before being removed from this country and separated from her family.[7]

[6] Without knowing what evidence Marinelarena intends to offer on remand, the majority speculates that remand would be futile. We are not a fact-finding agency; that function has been assigned to the immigration judge.

[7] In one respect, this case is unlike *Pereida*. There, the noncitizen did not seek "a remand for another chance to . . . introduc[e] evidence about his crime of conviction; at oral argument, he even disclaimed interest in the possibility." *Pereida*, 141 S. Ct. at 763. Here, by contrast, Marinelarena ardently seeks a remand to afford her another chance to prove her eligibility for cancellation of removal.