

# **FUNDAMENTALS OF IMMIGRATION LAW**

by

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Revised February 2016  
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## **I. Admission**

### **A. Applicants for admission**

1. Section 235(a)(1) of the Act provides that “An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this Act an applicant for admission.”
2. The term “arriving alien” means an alien who seeks admission to or transit through the United States, as provided in 8 C.F.R. § 1235.1, at a port of entry, or an alien who is interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. 8 C.F.R. § 1001.1(q).
3. An arriving alien remains such even if paroled pursuant to § 212(d)(5) of the Act. 8 C.F.R. § 1001.1(q). An alien who arrives in the U.S. pursuant to a grant of advance parole is an “arriving alien” as that term is defined in the regulations. *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998).
4. An alien who leaves the U.S. to seek refugee status in Canada, and then returns to the U.S. after the application was denied in Canada, is deemed to be seeking admission to the U.S. Therefore, such an alien is deemed to be an arriving alien. *Matter of R-D-*, 24 I&N Dec. 221 (BIA 2007).

### **B. Admission or admitted**

1. Section 101(a)(13)(A) of the Act, as amended by section 301 of the IIRIRA, provides that the terms “admission” and “admitted” mean the lawful entry of an alien into the U.S. after inspection and authorization by an immigration officer.
  - a. An alien’s admission is “lawful” if it is “procedurally regular.” *Matter of Quilantan*, 25 I&N Dec. 285, 290 (BIA 2010).
  - b. However, an alien who was allowed to enter after fraudulently claiming to be a United States citizen was not admitted. *See Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013); *Matter of Areguillin*, 17 I&N Dec. 308, 309 n.3 (BIA 1980).
2. An alien who has not been admitted to the United States is subject to the inadmissibility grounds under § 212(a) of the Act, 8 U.S.C. § 1182(a). Pursuant to § 237(a), 8 U.S.C. § 1227(a), an alien (including an alien crew member) in and admitted to the United States is subject to the deportation grounds under that section. Under § 237(a)(1)(A), deportable aliens includes any alien who was inadmissible at the time of entry or adjustment of status.
3. The Board held that an alien who initially entered the U.S. without inspection, but whose conviction for an aggravated felony was subsequent to her adjustment of status to that of a lawful permanent resident under § 245A of the Act, is deportable under § 237(a)(2)(A)(iii) as



an alien who was convicted of an aggravated felony “after admission.” *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999).

### **C. Parole and crewmen**

1. An alien who is paroled under § 212(d)(5) or permitted to land temporarily as a crewman shall not be considered to have been admitted. INA § 101(a)(13)(B).

### **D. History lesson**

1. Before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), the decision as to whether an alien was subject to deportation proceedings or exclusion proceedings was based on whether or not the alien had made an “entry” into the U.S. An alien who had made an entry was entitled to a deportation hearing and the greater procedural safeguards it provided. An alien who had not made an entry was placed in exclusion proceedings. Former section 101(a)(13) of the Act defined entry as “any coming of an alien into the U.S. from a foreign port or place.” The Board of Immigration Appeals (“Board”) formulated a more precise definition of entry so as to better distinguish between exclusion and deportation in *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973), *Matter of Phelisna*, 18 I&N Dec. 272 (BIA 1982), and *Matter of G-*, 20 I&N Dec. 764 (BIA 1993). All of this came to be known as “the entry doctrine.”
2. An exception also arose for lawful permanent residents (“LPR”s) returning to the U.S. after a brief, casual, and innocent departure. The Supreme Court held that such a departure would not constitute an “entry” within the meaning of former section 101(a)(13). *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). This became known as the “*Fleuti* Doctrine.”
3. These two doctrines caused a great deal of litigation over the issue of whether certain aliens were properly placed in exclusion proceedings. They were rather time consuming and, since they dealt with the issue of whether or not the alien was in the proper proceeding, delayed the addressing of the ultimate issues in the cases, i.e., the issues of excludability and eligibility for relief.
4. In the IIRIRA, Congress sought to simplify things by creating removal proceedings which are applicable to aliens admitted to the United States, aliens applying for admission, and aliens present in the United States without being inspected and admitted. It also made the difference dependent simply on whether the alien had been admitted or not.

### **E. Lawful permanent residents**

1. Section 101(a)(13)(C) provides that an alien lawfully admitted for permanent residence shall not be regarded as seeking an admission into the U.S. unless the alien:
  - a. has abandoned or relinquished LPR status [INA § 101(a)(13)(C)(i)];
  - b. has been absent from the U.S. for a continuous period in excess of 180 days [INA § 101(a)(13)(C)(ii)];
  - c. has engaged in illegal activity after departing the U.S. [INA § 101(a)(13)(C)(iii)];

- d. has departed from the U.S. while under legal process seeking removal of the alien from the U.S., including removal proceedings and extradition proceedings [INA § 101(a)(13)(C)(iv)];
  - e. has committed an offense identified in § 212(a)(2), unless since such offense the alien has been granted relief under §§ 212(h) or 240A(a) [INA § 101(a)(13)(C)(v)];
  - f. is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the U.S. after inspection and authorization by an immigration officer [INA § 101(a)(13)(C)(vi)].
- (1) The Board has held that the [Fleuti doctrine](#) did not survive the amendment of § 101(a)(13) of the Act by IIRIRA. *Matter of Collado*, 21 I&N Dec. 1061 (BIA 1998). In that same decision, the Board held that an LPR described in § 101(a)(13)(i)-(vi) is to be regarded as “seeking an admission into the U.S. for purposes of the immigration laws,” without further inquiry into the nature and circumstances of a departure from and return to the U.S. *See also Othi v. Holder*, 734 F.3d 259 (4th Cir. 2014).
- 2. In order to establish that a returning lawful permanent resident alien is to be treated as an applicant for admission to the United States, the DHS has the burden of proving by clear and convincing evidence that one of the six exceptions to the general rule for lawful permanent residents set forth at § 101(a)(13)(C) applies. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). The DHS can meet that burden at the time of the removal proceedings, and need not have the evidence at the time of the parole decision. *Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012).

## II. Inspection and credible fear review

### A. Inspection

- 1. All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the U.S. shall be inspected by immigration officers. INA § 235(a)(3).
- 2. Parolees and aliens formerly considered to have entered without inspection. Section 235(a)(1) of the Act provides that an alien present in the U.S. who has not been admitted or who arrives in the U.S. (whether or not at a designated port of arrival and including an alien who is brought to the U.S. after having been interdicted in international or U.S. waters) shall be deemed an applicant for admission.
- 3. Statements. An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the U.S., including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a U.S. citizen, and whether the applicant is inadmissible. INA § 235(a)(5).

## **B. Withdrawal of application for admission**

1. An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the U.S. INA § 235(a)(4).

## **C. Summary removal**

1. An immigration officer shall order an alien removed from the United States without further hearing or review if: (1) the alien is not an alien described at § 235(b)(1)(F); and (2) the alien is arriving in the United States; or (3) the alien is described at § 235(b)(1)(A)(iii); and (4) the alien is inadmissible under § 212(a)(6)(C) or 212(a)(7); unless (5) the alien indicates either an intention to apply for asylum under § 208 or a fear of persecution. INA § 235(b)(1)(A)(i).

## **D. Stowaways**

1. An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer unless the alien indicates an intention to apply for asylum or a fear of persecution. INA § 235(a)(2).

## **E. Credible Fear Interview**

1. An alien who indicates either an intention to apply for [asylum](#) under § 208 or a fear of persecution shall be referred for an interview by an asylum officer. INA § 235(b)(1)(B)(ii).
  - a. If the officer determines at the time of the interview that an alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum. INA § 235(b)(1)(A)(ii).
    - (1) A credible fear of persecution means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of his claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under § 208. INA § 235(b)(1)(B)(v).
  - b. If the officer determines that the alien does not have a credible fear of persecution, the officer shall order the alien removed from the U.S. without further hearing or review. INA § 235(b)(1)(B)(iii)(I). The officer shall prepare a written record of a determination. INA § 235(b)(1)(B)(iii)(II). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary. The Attorney General shall provide by regulation and upon the alien's request for prompt review by an IJ of the determination that the alien

does not have a credible fear of persecution. INA § 235(b)(1)(B)(iii)(III). Such review shall include an opportunity for the alien to be heard and questioned by the IJ either in person or by telephonic or video connection. Review shall be concluded, if possible, within 24 hours, but in no case later than 7 days after the date of the asylum officer's determination. Such alien shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed. INA § 235(b)(1)(B)(iii)(IV).

#### **F. Inspection of other aliens**

Except for an alien described above [inadmissible under § 212(a)(6)(C) or 212(a)(7) of the Act], an alien who is a [crewman](#), or an alien who is a [stowaway](#), if the examining officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under § 240. INA § 235(b)(2)(A)-(B).

1. Aliens arriving from foreign contiguous territory. In the case of an alien arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S., the Attorney General may return the alien to that territory pending a proceeding under § 240 of the Act. INA § 235(b)(2)(C).
2. Challenge of decision. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an IJ for a proceeding under § 240. INA § 235(b)(3).

#### **G. Removal of aliens inadmissible on security and related grounds**

1. If an immigration officer or an IJ suspects that an arriving alien may be inadmissible under § [212\(a\)\(3\)\(A\)](#) [other than clause (ii)], [\(B\)](#), or [\(C\)](#), the officer or judge shall order the alien removed, report the order of removal to the Attorney General, and not conduct any further inquiry or hearing until ordered by the Attorney General. INA § 235(c)(1). Section 235(c)(3) provides that the alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.
2. If the Attorney General is satisfied on the basis of confidential information that the alien is inadmissible under the portions of § 212(a)(3) listed above and after consulting with appropriate security agencies concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, the Attorney General may order the alien removed without further inquiry or hearing by an IJ. INA § 235(c)(2)(B). If the Attorney General does not order the alien removed, the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case. INA § 235(c)(2)(C).

### **III. Bond and Custody under IIRIRA**

#### **A. Background**

1. Section 236(a) of the Act provides that on a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the U.S. In a custody redetermination under § 236(a), where an alien must establish to the satisfaction of the IJ that he or she does not present a danger to others, a threat to national security, or a flight risk, the IJ has wide discretion in deciding the factors that may be considered. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).
2. Transition Period Custody Rules. The TPCR were a temporary “stop-gap” measure invoked after the IIRIRA’s enactment to address the lack of detention space necessary to immediately implement the mandatory detention rule of § 236(c)(1). Under the TPCR, IJs had retained discretionary authority to release certain criminal aliens upon a demonstration that they did not present a danger to the community or a flight risk. That discretion ended with the TPCR’s expiration on October 8, 1998, and aliens released after that date are not covered by the TPCR’s provisions. You may still see references to Transition Period Custody Rules. Case-law from this period regarding danger to the safety of persons or property remains generally applicable.

#### **B. Arriving aliens**

1. An IJ has no authority to redetermine or set bond for an arriving alien, including individuals who are returning pursuant to a grant of advance parole. 8 C.F.R. § 1003.19(h)(1)(i)(B); *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998).

#### **C. Detention of criminal aliens**

1. Section 236(c)(1) of the Act provides that the Attorney General shall take into custody any alien who is inadmissible by reason of having committed any offense covered in § 212(a)(2), is deportable by reason of having committed any offense covered in § 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D), is deportable under § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or is inadmissible under § 212(a)(3)(B) or deportable under § 237(a)(4)(B) when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
2. Section 236(c)(2) provides that the Attorney General may release an alien described above only if the Attorney General decides pursuant to 18 U.S.C. § 3521 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of

property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

3. Constitutionality – The Supreme Court upheld the constitutionality of § 236(c)(1) of the Act. *Demore v. Kim*, 538 U.S. 510 (2003).
4. Detention hearings after final orders of removal in the Ninth Circuit:
  - a. The Ninth Circuit has held that authorization for detention under INA § 236(c) ends when the Board of Immigration Appeals affirms the removal order. *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008). “Thereafter, the Attorney General’s detention authority rests with [the general discretionary authority to detain under § 236(a)] until the alien enters his ‘removal period,’ which occurs only after we have rejected his final petition for review or his time to seek such review expires.” *Id.* at 948. The Ninth Circuit further ruled that “the government may not detain a legal permanent resident . . . for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention.” *Id.* at 949. In such hearings, DHS bears the burden of establishing that continued detention is warranted.
  - b. In *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), the Ninth Circuit held that an individual facing prolonged immigration detention under § 241(a)(6), is entitled to be released on bond unless the government establishes the individual is a flight risk or a danger to the community. The court reasoned that individuals detained under § 241(a)(6) are entitled to the same procedural safeguards against prolonged detention as individuals detained under § 236(a), including an individualized bond hearing before an IJ. *Id.* at 1085. The court acknowledged that it was extending its holding in *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008).
5. “When released”
  - a. Mandatory detention only applies if the alien is taken into DHS custody “when released.” Otherwise, an alien is entitled to an individual bond hearing.
  - b. The Board has ruled that DHS need not take an alien into custody immediately after a “release” from incarceration. *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). See also *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012). However, this view has been criticized by several federal district courts. See, e.g., *Araujo-Cortes v. Shanahan*, 35 F.Supp.3d 533 (S.D.N.Y. 2014); *Valdez v. Terry*, 874 F. Supp. 2d 1262 (D.N.M. 2012); see also *Castaneda v. Souza*, 769 F.3d 32 (1st Cir. 2014), *withdrawn, reh’g en banc granted*, (Jan. 23, 2015).
  - c. The release must be directly tied to a basis of detention under § 236(c)(1)(A)-(D). See *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010); see also *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009).

- d. The Board has also held that the use of the words “release” or “released” in § 303 of the IIRIRA consistently appears to refer to a form of physical restraint. *Matter of West*, 22 I&N Dec. 1405 (BIA 2000). The word “released” can also refer to release from physical custody following arrest, not just a sentence.
  - e. The alien need not be charged with a ground of removability on which the mandatory detention is based. *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).
6. Danger to property or persons
- a. An alien who is a danger to the public is not properly released on bond. The alien seeking bond bears the burden of establishing that he or she is not a danger to property or persons, unless the alien is subject to the [civil detention hearing rules in the Ninth Circuit](#).
    - (1) This provision includes danger to property as well as to persons, and does not require the threat of direct physical violence. *Matter of Melo*, 21 I&N Dec. 883 (BIA 1997) (holding the risk of continued narcotics trafficking also constitutes a danger to the safety of persons).
7. An IJ may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:
- a. Aliens in exclusion proceedings;
  - b. Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to § 212(d)(5);
  - c. Aliens described in § 237(a)(4);
  - d. Aliens in removal proceedings subject to § 236(c)(1); and
  - e. Aliens in deportation proceedings subject to § 242(a)(2) as in effect prior to April 1, 1997.
8. However, 8 C.F.R. § 1003.19(h)(2)(ii) provides that, “Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.”
- a. An alien will not be considered “properly included” in a mandatory detention category when an IJ or the Board of Immigration Appeals finds, on the basis of the bond record as a whole, that it is substantially unlikely that the Immigration



and Naturalization Service will prevail on the charge or charges of removability specified in § 236(c)(1). *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

- b. When an IJ bases a bond determination on evidence presented in the underlying merits case, it is the responsibility of the parties and the IJ to ensure that the bond record establishes the nature and substance of the specific factual information considered by the IJ in reaching the bond determination. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).
  - c. In assessing whether an alien is “properly included” in a mandatory detention category during a bond hearing taking place early in the removal process, the IJ must necessarily look forward to what is likely to be shown during the hearing on the underlying removal case. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). Thus, for example, the failure of the Service to possess a certified copy of a conviction record shortly after taking an alien into custody would not necessarily be indicative of its ability to produce such a record at the merits hearing. *Id.*
- 9. 8 C.F.R. § 1003.19(h)(4) provides that a determination by a district director (“DD”) or other designated official regarding the exercise of authority under § 303(b)(3)(B)(ii) of Pub. L. 104-208 (concerning release of aliens who cannot be removed) is final, and shall not be subject to redetermination by an IJ.
  - 10. 8 C.F.R. § 1003.19(i)(1) provides that the Board has the authority to stay the custody order of an IJ when the Service appeals the custody decision and the Service is entitled to seek an emergency stay from the Board in connection with such an appeal at any time.
  - 11. 8 C.F.R. § 1003.19(i)(2) provides that in any case in which the DHS determined that an alien should not be released and has set a bond of \$10,000 or more, any order of the IJ authorizing release (on bond or otherwise) shall be stayed upon the DHS’s filing of a Notice of Service Intent to Appeal Custody Redetermination (Form EOIR-43), with the Immigration Court within one business day of the order, except as otherwise provided in 8 C.F.R. § 1003.6(c), and shall remain in abeyance pending decision of the appeal by the Board of Immigration Appeals. The stay shall lapse upon failure of the Service to file a timely notice of appeal in accordance with 8 C.F.R. § 1003.38.
    - a. An automatic stay of an IJ’s release order that has been invoked by the Service pursuant to 8 C.F.R. § 1003.19(i)(2) is extinguished by the Board’s decision in the Service’s bond appeal from that release order. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

#### **D. Detention of aliens certified as terrorists - Section 236A of the Act**

- 1. Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (“USA Patriot Act”) added section 236A to the Act.



2. Section 236A provides that the Attorney General shall take into custody any alien who is certified under section 236A(a)(3). INA § 236A(a)(1).
3. Section 236A(a)(3) provides that the Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien is described in
  - a. Section 212(a)(3)(A)(i) - an alien seeking to enter the U.S. to engage in espionage or sabotage.
  - b. Section 212(a)(3)(A)(iii) - an alien seeking to enter the U.S. to engage in any activity a purpose of which is the overthrow of the government of the U.S. by force, violence, or other unlawful means.
  - c. Section 212(a)(3)(B) - an alien engaged in terrorist activity.
  - d. Section 237(a)(4)(A)(i) - engaged in espionage or sabotage.
  - e. Section 237(a)(4)(A)(iii) - an alien engaged in any activity a purpose of which is the overthrow of the government of the U.S. by force, violence, or other unlawful means.
  - f. Section 237(a)(4)(B) - an alien engaged in terrorist activity.
  - g. Or is engaged in any other activity that endangers the national security of the U.S.
4. Section 236A(a)(4) of the Act provides that the Attorney General may delegate the authority provided under paragraph 3 only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.
5. National security interests may be implicated by mass migrations. *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003). The Attorney General stated that it is reasonable to assume that the release on bond of mass migrants would come to the attention of others in their country and encourage future surges in illegal migration. *Id.* Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests. *Id.*

#### **E. Aliens subject to expedited removal**

1. 8 C.F.R. § 1235.3(b)(2)(iii) provides that an alien whose inadmissibility is being considered under the expedited removal procedures of 8 C.F.R. § 235.3(b)(1)(ii) or who has been ordered removed pursuant to that regulation shall be detained pending removal, but may be allowed parole by the immigration authorities. Therefore, such an alien is not eligible for bond redetermination by an IJ.

## **F. All other, non-criminal, non-terrorist, aliens**

1. Pending a decision on whether the alien is to be removed from the U.S., the Attorney General may continue to detain the arrested alien, and may release the alien on a bond of at least \$1,500 or conditional parole but may not provide the alien with work authorization unless the alien is a LPR or otherwise would be provided such authorization. INA § 236(a).
  - a. Note: An alien who is initially screened for expedited removal under § 235(b)(1)(A), as a member of a class of aliens designated pursuant to the authority in § 235(b)(1)(A)(iii), but who is subsequently placed in removal proceedings under § 240, following a positive credible fear determination, is eligible for a custody redetermination hearing before an IJ unless the alien is a member of any of the listed classes of alien who are specifically excluded from the custody jurisdiction of IJs pursuant to 8 C.F.R. § 1003.19(h)(2)(i). *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).
2. The purpose of a bond in removal proceedings is to insure that the respondent will appear for the removal hearing. Neither § 236(a) nor the applicable regulations confer on an alien the right to release on bond. *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003).
  - a. In determining a respondent's reliability as a bail risk and the amount of bond to be required, these factors may properly be considered:
    - (1) respondent's employment history and its stability;
    - (2) respondent's length of residence in the community;
    - (3) respondent's family ties in the U. S. and whether they are such that they may entitle the respondent to reside permanently in the U. S. at a future date;
    - (4) respondent's record of nonappearance at court proceedings;
    - (5) respondent's previous or pending criminal violations and the seriousness of the charges;
    - (6) the effect such criminal violations may have upon eligibility for relief from deportation;
    - (7) evidence of respondent's disrespect for the law;
    - (8) evidence which adversely reflects upon respondent's character;
    - (9) respondent's previous immigration violations; and
    - (10) respondent's manner of entry into the United States.

- b. The Board of Immigration Appeals' decisions on bonds which discuss the above are:
- (1) *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976) *superseded by statute as stated in Matter of Valdez-Valdez*, 21 I&N Dec. 703 (BIA 1997);
  - (2) *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974);
  - (3) *Matter of Spiliopoulos*, 16 I&N Dec. 561 (BIA 1978);
  - (4) *Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); and
  - (5) *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987).
- c. The following factors may not be considered in redetermining an alien's custody status:
- (1) The potential difficulties that DHS may face in executing an order of removal because of conditions in the alien's country. *Matter of P-C-M-*, 20 I&N Dec. 432 (BIA 1991).
  - (2) The determination of bond in a removal case is independent of the bond proceedings in any criminal case in which the respondent has been involved, and it is inappropriate for the IJ to speculate as to the possible rationale for a low bond set in a pending criminal case and to find that the low criminal bond weighs in favor of a larger bond in the removal case. *Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979).
  - (3) An alien's early release from prison and transition to a parole status do not necessarily reflect rehabilitation for one may receive an early release for other reasons. *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987). Therefore, such facts do not carry significant weight in determining whether the alien is a good bail risk for immigration purposes. *Id.*
- d. An alien subject to criminal proceedings in the country to which the DHS seeks to remove him may be appropriately ordered detained without bond as a poor bail risk. *Matter of Khalifah*, 21 I&N Dec. 107 (BIA 1995).
- e. An IJ's jurisdiction includes the authority to increase the amount of bond initially set by the DD. *Matter of Spiliopoulos*, 16 I&N Dec. 561 (BIA 1978).
- f. Even though a respondent has had a bond redetermination hearing before an IJ, if later there is a change of circumstances affecting his reliability as a bail risk, the DD has authority to increase the amount of bond. *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981). The new bond amount may be subject to redetermination by an IJ.

## G. Procedure in bond proceedings

1. The initial decision on custody is made by the DD or his/her delegate. 8 C.F.R. § 1236.1(d)(1).
  - a. In order to make a proper custody determination, the DHS must have custody of the respondent. A respondent who is in the custody of a State or agency other than the DHS is not in the custody of the DHS. *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990).
  - b. Even if DHS has placed a detainer on a respondent held in the custody of another agency, the detainer does not entitle the respondent to have a bond set by the DD. *Matter of Lehder*, 15 I&N Dec. 159 (BIA 1975); *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990). A detainer is merely an administrative mechanism to insure that a person subject to confinement will not be released until the party requesting the detainer has an opportunity to act. *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990).
  - c. 8 C.F.R. § 1236.1(d)(1) provides that an IJ only acquires jurisdiction over bond after the DD's initial determination of bond under 8 C.F.R. § 242.2(c)(2). Therefore, a respondent who is in the custody of a State or other agency other than DHS is not subject to having a bond set by the DD under 8 C.F.R. § 242.2(c)(2) or reviewed by an IJ under 8 C.F.R. § 242.2(d). *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990).
  - d. Immigration Judges do not have authority to redetermine the conditions of custody imposed by DHS with respect to aliens who have not been issued and served with a Notice to Appear ("NTA") in relation to removal proceedings pursuant to 8 C.F.R. § 1240, though the NTA need not have been filed in an Immigration Court. *Matter of Werner*, 25 I&N Dec. 45 (BIA 2009). An alien admitted to the U.S. pursuant to the Visa Waiver Program who has not been served with an NTA pursuant to 8 C.F.R. § 1240 is not entitled to a custody hearing before an IJ. *Id.* (acknowledging that *Matter of Gallardo*, 21 I&N Dec. 210 (BIA 1996) has been superseded by regulation).
  - e. Although aliens present in the U.S. without being admitted or paroled are charged under the grounds of inadmissibility listed in § 212(a), they are not arriving aliens and may have their bond redetermined by an IJ.
2. 8 C.F.R. § 1003.19(b) and 8 C.F.R. § 1236.1(d)(1) provide authority for an IJ to redetermine custody status only upon application by the respondent or his/her representative. An IJ may not redetermine custody status on his/her own motion. *Matter of P-C-M-*, 20 I&N Dec. 432 (BIA 1991).
  - a. 8 C.F.R. § 1236.1(d)(1) provides authority to the IJ to review and modify the conditions placed on the alien's release from DHS custody. *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009).

- b. Where the respondent is still in custody, the respondent may file an application for release at any time. 8 C.F.R. § 1236.1(d)(1). Custody means actual physical restraint or confinement within a given space and does not include electronic monitoring or home confinement. *Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 752-53 (BIA 2009). Where the respondent has been released from custody, the respondent must file an application for amelioration of the terms of release within 7 days of release. 8 C.F.R. § 1236.1(d)(1). If the application for amelioration occurs after 7 days from release, the IJ lacks authority to redetermine custody status. *Aguilar-Aquino*, 24 I&N Dec. at 753.
- 3. 8 C.F.R. § 1236.1(c)(5) provides that an IJ may not exercise bond redetermination authority with respect to:
  - a. A criminal alien subject to § 303(b)(3)(A)(ii) or (iii) of Div. C. of Pub. L. 104-208, if the alien has been sentenced, including in the aggregate, to at least 2 years imprisonment and the alien:
    - (1) Is described in § 237(a)(2)(D)(i) or (ii) [espionage and sabotage] or has been convicted of a crime described in § 101(a)(43)(A), (C), (E)(i), (H), (I), (K)(iii) or (L) [select aggravated felonies];
    - (2) Is described in § 237(a)(2)(A)(iv) [high speed flight]; or
    - (3) Has escaped or attempted to escape from the lawful custody of a local, State or Federal prison, agency or officer within the United States.
- 4. An IJ loses jurisdiction to redetermine bond when an order of removal becomes administratively final. 8 C.F.R. § 1236.1(d). In the Ninth Circuit, this may be impacted by [civil detention proceedings](#).
- 5. The background investigations and security checks requirement at 8 C.F.R. § 1003.47(g) does not apply to proceedings seeking the redetermination of conditions of custody. However, in scheduling an initial custody redetermination hearing, the IJ shall, to the extent practicable consistent with expedited nature of such cases, take account of the brief initial period of time needed for the Department of Homeland Security to conduct the automated portions of its identity, law enforcement or security examinations or investigations with respect to aliens detained in connection with immigration proceedings. 8 C.F.R. § 1003.47(k).

#### **H. Requests for additional or subsequent bond redeterminations**

- 1. After an initial bond redetermination, any request for subsequent determinations must be made in writing and must demonstrate a material change in circumstances since the prior bond redetermination. 8 C.F.R. § 1003.19(e).
- 2. An IJ maintains continuing jurisdiction to entertain requests by an alien for subsequent bond redeterminations even after the timely filing of an appeal with the Board from a previous bond redetermination decision. *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997). If, after a bond appeal has been filed by an alien, the IJ grants

a request for a subsequent bond redetermination, the appeal is rendered moot and the Board will promptly return the record to the Immigration Court. *Id.*

## **I. Appeals of bond decisions**

1. 8 C.F.R. § 1236.1(d)(3) provides that an appeal to the Board may be filed as follows:
  - a. Within 30 days by either the alien or the Service from a decision of an IJ.
  - b. Within 10 days by the alien from a decision of a DD once the IJ has lost jurisdiction, i.e., 7 days after posting bond or when an order of removal becomes administratively final.

## **IV. Grounds of inadmissibility in removal proceedings**

### **A. Health-related grounds - Section 212(a)(1) of the Act**

1. For available waivers, see § 212(g).
2. Communicable disease – Section 212(a)(1)(A)(i) of the Act provides that any alien who is determined in accordance with regulations by the Secretary of Health and Human Services (“HHS”) to have a communicable disease of public health significance is inadmissible.
3. Vaccinations – Section 212(a)(1)(A)(ii) provides that any alien who seeks admission as an immigrant, or who seeks adjustment of status, who has failed to present documentation of having received vaccination against vaccine-preventable diseases, including those listed in the section is inadmissible.
4. Mental disorder –
  - a. Section 212(a)(1)(A)(iii)(I) provides that any alien who is determined in accordance with regulations by the Secretary of HHS in consultation with the Attorney General to have a physical or mental disorder and a history of behavior associated with the disorder that has posed or may pose a threat to the property, safety, or welfare of the alien or others is inadmissible.
  - b. Section 212(a)(1)(A)(iii)(II) provides that any alien who is determined in accordance with regulations by the Secretary of Health and Human Services in consultation with the Attorney General to have had in the past a physical or mental disorder and a history of behavior associated with the disorder which behavior has posed a threat to the property, safety, or welfare of the alien and which behavior is likely to recur or to lead to other harmful behavior is inadmissible.
5. Drug abusers – Section 212(a)(1)(A)(iv) provides that any alien determined in accordance with regulations by the Secretary of HHS to be a drug abuser or addict is inadmissible.

## **B. Crime involving moral turpitude (“CIMT”)**

1. Section 212(a)(2)(A)(i)(I) provides that any alien convicted of, or who admits having committed, or admits committing acts which constitute the essential elements of a [crime involving moral turpitude](#) (other than a purely political offense or an attempt or conspiracy to commit such a crime) is inadmissible.
2. History Lesson - Before 1990, excludability for a CIMT was covered in § 212(a)(9). In 1990, the Act was reorganized and that subject came under § 212(a)(2)(A)(i)(I). In 1996, it stayed under that section number. Many cases on this subject from before 1990 involve § 212(a)(9) as the ground of inadmissibility.

## **C. Controlled substance offenses**

1. Section 212 (a)(2)(A)(i)(II) provides that any alien convicted of, or who admits committing acts which constitute the essential elements of, a violation of or a conspiracy to violate any law or regulation of a State, the U.S., or a foreign country [relating to a controlled substance](#) as defined in § 102 of the Controlled Substances Act (21 U.S.C. § 802) is inadmissible.
2. History Lesson- Before 1990, excludability for a drug offense was covered in part of § 212(a)(23). In 1990, the Act was reorganized and that subject came under § 212(a)(2)(A)(i)(II). In 1996, it stayed under that section. Many cases on this subject from before 1990 involve former section 212(a)(23) as the ground of inadmissibility.

## **D. Multiple criminal convictions**

1. Section 212(a)(2)(B) provides that any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were 5 years or more is inadmissible.
2. History Lesson - Before 1990, excludability for 2 or more offenses was covered in § 212(a)(10). In 1990, the Act was reorganized and that subject came under § 212(a)(2)(A)(i)(I). In 1996, it stayed under that section. Cases on this subject from before 1990 involve § 212(a)(10) as the ground of inadmissibility.
3. In interpreting former section 212(a)(10), the Board held that if an alien has been convicted of 2 counts of an offense and sentenced to serve 2 concurrent 3-year terms, the aggregate sentence is only 3 years. *Matter of Fernandez*, 14 I&N Dec. 24 (BIA 1972). Apparently the alien must be sentenced to consecutive terms in order for the terms to be combined in determining an aggregate sentence. This appears to still be good law because *Fernandez* was cited with approval in *Matter of Aldabesheh*, 22 I&N Dec. 983 (BIA 1999), which dealt with the “aggregate sentence” of an alien convicted of two or more aggravated felonies and sentenced to



concurrent sentences of imprisonment. Because the aggregate sentence was less than 5 years, the respondent was eligible for withholding of removal.

#### **E. Trafficking in controlled substances**

1. Section 212(a)(2)(C) provides that any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any controlled substance or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in controlled substances is inadmissible.
2. History Lesson - Before 1990, excludability for being a drug trafficker was covered in part of § 212(a)(23). In 1990, the Act was reorganized and being a drug trafficker came under § 212(a)(2)(C). In 1996, it stayed under that section. Many cases on this subject from before 1990 involve former section 212(a)(23) as the ground of inadmissibility.
3. The statute does not require a conviction to establish inadmissibility under this section. *Matter of Rico*, 16 I&N Dec. 181, 184 (BIA 1977); *see also Mena-Flores v. Holder*, 776 F.3d 1152 (10th Cir. 2015).
  - a. The Eleventh Circuit held that an alien's vacated guilty plea along with hearsay statements in police reports did not amount to reason to believe that alien trafficked in controlled substances and, therefore, the alien was not removable under § 212(a)(2)(C). *Garces v. Att'y Gen.*, 611 F.3d 1337 (11th Cir. 2010); *but see Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014).
4. In cases involving former section 212(a)(23), the Board held that a single act will constitute a "trafficking" and it is not necessary to show a pattern or continuous trade in drugs. *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979); *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977); *Matter of P-*, 5 I&N Dec. 190 (BIA 1953). However, *Matter of Rico* and *Matter of Favela* do imply that it is necessary to show an act of more than simple possession such as sale of drugs or possession of such a large quantity of drugs that it could not be intended for personal use.
5. An alien who knowingly and consciously acts as a conduit in the transfer of marijuana between a dealer and the customers of the dealer was excludable under former section 212(a)(23) as an "illicit trafficker" in drugs, even though he derived no personal gain or profit from the transaction. *Matter of R-H-*, 7 I&N Dec. 675 (BIA 1958) (finding illicit trafficking where the alien on 3 occasions held marijuana cigarettes for a dealer and distributed them to customers who either had already paid the dealer in advance or left payment with the alien for later collection by the dealer).
6. Applicants who, at the time of arrival, were in possession of 6 marijuana cigarettes for personal use were not excludable under former section 212(a)(23) of the Act because there had been no conviction for possession of marijuana and their possession of a small quantity for personal use did not constitute "trafficking." *Matter of McDonald and Brewster*, 15 I&N Dec. 203 (BIA 1975).



## **F. Prostitution**

1. Section 212(a)(2)(D)(i) provides that any alien coming to the U.S. solely, principally, or incidentally to engage in prostitution or who has engaged in prostitution within 10 years of the application for a visa, admission, or adjustment of status is inadmissible.

## **G. Procurers & importers of prostitutes**

1. Section 212(a)(2)(D)(ii) provides that the following aliens are inadmissible: Those who directly or indirectly procure or attempt to procure prostitutes or persons for the purpose of prostitution, or who receive, in whole or in part, the proceeds of prostitution.
  - a. The Board has ruled that a conviction under California Penal Code § 647(b) does not render an alien inadmissible under § 212(a)(2)(D)(ii) for “procur[ing] . . . prostitutes or persons for the purpose of prostitution.” *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008). The California statute punishes anyone “[w]ho solicits or who agrees to engage in or who engages in any act of prostitution,” and it states that “‘prostitution’ includes any lewd act between persons for money or other consideration.” *Id.* at 551. The Board ruled that “the term ‘procure’ [in INA § 212(a)(2)(D)(ii)] does not extend to an act of solicitation of a prostitute on one’s own behalf.” *Id.* at 551-52. The Board further ruled that, even if INA § 212(a)(2)(D)(ii) encompasses soliciting a prostitute on one’s own behalf, California Penal Code § 647(b) still falls outside that statute. *Id.* at 553. For this holding, the Board cited to 22 C.F.R. § 40.24(b), which states that, for purposes of INA § 212(a)(2)(D)(ii), “‘prostitution’ means engaging in promiscuous sexual intercourse for hire. A finding that an alien has ‘engaged’ in prostitution must be based on elements of continuity and regularity.” *Id.* The Board explained that the California statute is broader than INA § 212(a)(2)(D)(ii) because: (1) it covers “lewd act[s]” rather than simply “sexual intercourse;” and (2) it does not require “a pattern of behavior or deliberate course of conduct.” *Id.*
2. Those who have within 10 years of the application for a visa, admission, or adjustment of status procured, attempted to procure, or to import prostitutes or persons for the purpose of prostitution.
3. Those who receive or have received within 10 years of the application for a visa, admission, or adjustment of status, in whole or in part, the proceeds of prostitution.

## **H. Commercialized vice**

1. Section 212(a)(2)(D)(iii) provides that any alien coming to the U.S. to engage in any other unlawful commercialized vice, whether or not related to prostitution is inadmissible.

## **I. Aliens who asserted immunity from prosecution - Section 212(a)(2)(E)**

1. Any alien is inadmissible:
  - a. Who has committed in the U.S. at any time a serious criminal offense as defined in § 101(h);
  - b. For whom immunity from criminal jurisdiction was exercised with respect to that offense;
  - c. Who departed from the U.S. as a consequence of the offense and the exercise of immunity; and
  - d. Who has not subsequently submitted fully to the jurisdiction of the court in the U.S. which has jurisdiction with respect to the offense.
2. The term “serious criminal offense,” defined in § 101(h) means:
  - a. Any felony;
  - b. Any [crime of violence](#), as defined in 18 U.S.C. § 16; or
  - c. Any crime of reckless driving or driving while intoxicated or under the influence of prohibited substances if the crime involves personal injury to another.
3. A waiver is available at § 212(h).

## **J. Espionage or sabotage**

1. Section 212(a)(3)(A)(i) provides that any alien is inadmissible who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to engage solely, principally or incidentally in:
  - a. any activity to violate any law of the U.S. relating to espionage or sabotage, or
  - b. to violate or evade any law prohibiting the export from the U.S. of goods, technology, or sensitive information.
2. Former section 241(a)(4)(A)(i) of the Act, which provided for the deportability of any alien who after entry has engaged in “any activity to violate any law of the United States relating to espionage,” does not require evidence that the alien was either engaged in an act of espionage or was convicted of violating a law relating to espionage. *Matter of Luis*, 22 I&N Dec. 747 (BIA 1999).
3. An alien who has knowledge of, or has received instruction in, the espionage or counter-espionage service or tactics of a foreign government in violation of 50

U.S.C. § 851 (1994), is deportable under former section 241(a)(4)(A)(i) of the Act. *Matter of Luis*, 22 I&N Dec. 747 (BIA 1999).

#### **K. Any unlawful activity**

1. Section 212(a)(3)(A)(ii) provides that any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to engage solely, principally or incidentally in any unlawful activity is inadmissible.

#### **L. Overthrow of the Government of the U.S.**

1. Section 212(a)(3)(A)(iii) provides that any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to engage solely, principally or incidentally in any activity a purpose of which is the opposition to, or overthrow of the Government of the U.S. by force, violence, or other unlawful means is inadmissible.

#### **M. Terrorist activities**

1. Section 212(a)(3)(B)(i) [amended by the REAL ID Act of 2005] provides that any alien is inadmissible who:
  - a. has engaged in a terrorist activity [INA § 212(a)(3)(B)(i)(I)];
  - b. a consular officer or the Attorney General or Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or likely to engage after entry in any terrorist activity [INA § 212(a)(3)(B)(i)(II)];
  - c. has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity [INA § 212(a)(3)(B)(i)(III)];
  - d. is a representative of a terrorist organization or a political, social or other group that endorses or espouses terrorist activity [INA § 212(a)(3)(B)(i)(IV)];
  - e. is a member of a terrorist organization (unless the alien can demonstrated by clear and convincing evidence that he did not know and should not reasonably have known that the organization was a terrorist organization) [INA §§ 212(a)(3)(B)(i)(V) & (VI)];
  - f. endorses or espouses a terrorist activity or persecutes others to endorse or espouse a terrorist activity or support a terrorist organization [INA § 212(a)(3)(B)(i)(VII)];
  - g. has received military-type training (as defined in 18 U.S.C. § 2339D(c)(1)) from or on behalf of any organization that, at the time the training was received, was a terrorist organization [INA § 212(a)(3)(B)(i)(VIII)]; or

- h. is the spouse or child of an alien found inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years [INA § 212(a)(3)(B)(i)(IX)].
- 2. The term “terrorist activity” is defined in § 212(a)(3)(B)(iii) of the Act as any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the U.S., would be unlawful under the laws of the U.S. or any State) and which involves any of the following:
  - a. The high jacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle) [INA § 212(a)(3)(B)(iii)(I)];
  - b. The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained [INA § 212(a)(3)(B)(iii)(II)];
  - c. A violent attack upon an internationally protected person (as defined in 18 U.S.C. § 1116(b)(4)) or upon the liberty of such a person [INA § 212(a)(3)(B)(iii)(III)];
  - d. An assassination [INA § 212(a)(3)(B)(iii)(IV)];
  - e. The use of any (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property [INA § 212(a)(3)(B)(iii)(V)];
  - f. A threat, attempt, or conspiracy to do any of the foregoing [INA § 212(a)(3)(B)(iii)(VI)].
- 3. The term “to engage in terrorist activity” is defined in § 212(a)(3)(B)(iv) and means, in an individual capacity or as a member of an organization,
  - a. to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity [INA § 212(a)(3)(B)(iv)(I)];
    - (1) The question of whether an alien had the requisite intent has been held to constitute an issue of fact. *See Zumel v. Lynch*, 803 F.3d 463 (9th Cir. 2015).
  - b. to prepare or plan a terrorist activity [INA § 212(a)(3)(B)(iv)(II)];
  - c. to gather information on potential targets for a terrorist activity [INA § 212(a)(3)(B)(iv)(III)];

- d. to solicit funds or other things of value for a terrorist activity or a terrorist organization (unless the solicitor can demonstrate by clear and convincing evidence that he did not know and should not reasonable have known, that the organization was a terrorist organization) [INA § 212(a)(3)(B)(iv)(IV)];
  - e. to solicit any individual to engage in conduct otherwise described in this subsection, for membership in a terrorist organization (unless the solicitor can demonstrate by clear and convincing evidence that he did not know and should not reasonable have known, that the organization was a terrorist organization) [INA § 212(a)(3)(B)(iv)(V)]; or
  - f. to commit an act that the actor knows or reasonable should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identifications, weapons (including chemical, biological, or radiological weapons), explosives or training for (1) the commission of a terrorist activity, (2) to any individual who the actors knows or reasonably should know has committed or plans to commit a terrorist activity, or (3) to a terrorist organization (unless the actor can demonstrate by clear and convincing evidence that he did not know and should not reasonable have known, that the organization was a terrorist organization) [INA § 212(a)(3)(B)(iv)(VI)].
    - (1) Neither an alien’s intent in making a donation to a terrorist organization nor the intended use of the donation by the recipient is considered in assessing whether the alien provided “material support” to a terrorist organization under section 212(a)(3)(B)(iv)(VI). *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006).
    - (2) Other cases interpreting the meaning of “material support” include *Sesay v. Atty. Gen. of the United States*, 787 F.3d 215 (3d Cir. 2015); *Bojnoordi v. Holder*, 757 F.3d 1075 (9th Cir. 2014); *Alturo v. United States Atty. Gen.*, 716 F.3d 1310 (11th Cir. 2013); *Viegas v. Holder*, 699 F.3d 798 (4th Cir. 2012); *Hussain v. Mukasey*, 518 F.3d 534 (7th Cir. 2008).
4. The statutory language of § 212(a)(3)(B) does not allow a “totality of the circumstances” test to be employed in determining whether an organization is engaged in a terrorist activity, so factors such as an organization’s purposes or goals and the nature of the regime that the organization opposes may not be considered. *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). The definition of “terrorist activity” under the INA does not provide an exception for armed resistance against military targets notwithstanding that it may be permitted under international laws of armed conflict. *Khan v. Holder*, 584 F.3d 773 (9th Cir. 2009).
- a. Subsequent to the issuance of *Matter of S-K-*, the Secretary of Homeland Security made a determination that section 212(a)(3)(B)(iv)(VI) shall not apply with respect to material support provided to the Chin National

Front/Chin National Army of Burma by an alien who meets certain criteria. Notice of Determination, 72 Fed. Reg. 9957-01 (Mar. 6, 2007). Thereafter, the Attorney General remanded *Matter of S-K-* to the Board for consideration of the effect of the Secretary's determination. *Matter of S-K-*, 24 I&N Dec. 289 (A.G. 2007). The Board determined that the Secretary's determination made the respondent eligible for asylum, and granted relief. *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008). The Attorney General's remand does not affect the precedential nature of the Board's conclusions in the first *Matter of S-K-*. *Id.*

5. Duress exemption:

- a. The Secretary of the Department of Homeland Security has the discretion to waive the material support inadmissibility bar for certain aliens if the material support was provided under duress in certain circumstances.
  - b. On October 23, 2008, following interagency meetings, the Department of Homeland Security issued a Fact Sheet announcing its procedure for handling cases that may be considered for an exemption afforded by § 212(d)(3)(B), in which there is an administratively final order of removal. Fact Sheet, Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal (Oct. 23, 2008). Previously, USCIS had been adjudicating the available exemptions for cases not in removal proceedings. Under the new procedures, certain cases involving aliens in removal proceedings can be referred to USCIS, if the respondent was found ineligible for relief or a benefit solely because of a terrorism bar for which the Secretary has exercised his exemption authority. If USCIS grants the exemption, the case can be reopened and relief granted. For a case to be referred for consideration of this exemption, the adjudicator must conclude the alien would have received relief but for the material support bar. Exemptions granted to date are available at <http://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissability-grounds-exemptions>.
  - c. Immigration Judges lack authority to adjudicate exemptions to the material support bar. However, there has been some disagreement among the circuit courts on this matter. *See, e.g., Ay v. Holder*, 743 F.3d 317 (2d Cir. 2015); *Sesay v. Att'y Gen. of the United States*, 787 F.3d 215, 224 n.9 (3d Cir. 2015)
6. The term “representative” is defined at § 212(a)(3)(B)(v) as an officer, official, or spokesman of an organization and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.
7. The term “terrorist organization” is defined at § 212(a)(3)(B)(vi) as an organization
- a. designated under § 219 of the Act;

- b. otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding the organization engages in terrorist activity [INA § 212(a)(3)(B)(vi)(II)]; or
- c. that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, terrorist activity [INA § 212(a)(3)(B)(vi)(III)].

#### **N. Adverse effects on foreign policy**

1. Section 212(a)(3)(C)(i) of the Act provides that any alien whose entry or proposed activities in the U.S. the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the U.S. is inadmissible.
2. Exception for officials. Section 212(a)(3)(C)(ii) provides that an alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the U.S. solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the U.S.
3. Exception for other aliens. Section 212(a)(3)(C)(iii) provides that an alien, other than an official described above, shall not be excludable or subject to restrictions or conditions on entry into the U.S. because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the U.S., unless the Secretary of State personally determines that the alien's admission would compromise a compelling U.S. foreign policy interest.

#### **O. Communist or totalitarian party membership**

1. Section 212(a)(3)(D)(i) of the Act provides that any immigrant who is or has been a member of or affiliated with the Communist Party or any other totalitarian party, or subdivision or affiliate thereof, whether foreign or domestic is inadmissible.
2. Since section 212(a)(3)(D)(i) applies only to immigrants, aliens seeking admission as nonimmigrants are not rendered inadmissible by party membership.
3. Exception for involuntary membership – Section 212(a)(3)(D)(ii) provides that § 212(a)(3)(D)(i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that
  - a. the membership or affiliation is or was involuntary, or



- b. is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.
- 4. Exception for past membership – Section 212(a)(3)(D)(iii) provides that § 212(a)(3)(D)(i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation terminated
  - a. at least 2 years before the date of such application, or
  - b. 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and
  - c. the alien is not a threat to the security of the U.S.
- 5. Exception for certain close family members–
  - a. Although the statute refers to this as an “exception”, it is actually a waiver since it involves the exercise of discretion.
  - b. Section 212(a)(3)(D)(iv) provides that the Attorney General may, in the Attorney General’s discretion, waive the application of § 212(a)(3)(D)(i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the U.S. or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the U.S.

#### **P. Nazi persecution**

- 1. Section 212(a)(3)(E)(i) of the Act provides that any alien who participated in the persecution of others in connection with the Nazi government of Germany from 1933 to 1945 is inadmissible.

#### **Q. Genocide or Acts of Torture or Extrajudicial Killing**

- 1. Section 212(a)(3)(E)(ii) of the Act provides that any alien who has engaged in genocide is inadmissible. Section 212(a)(3)(E)(iii) provides that any alien who has committed, ordered, incited, assisted, or otherwise participated in the commission of torture or extrajudicial killing is inadmissible.

#### **R. Public Charge**

- 1. Section 212(a)(4) of the Act provides that any alien who in the opinion of the consular officer at the time of application for a visa or the Attorney General at the



time of application for admission or adjustment of status, is likely to become a public charge is inadmissible.

2. Factors to be taken into account—

a. Section 212(a)(4)(B)(i) provides that in determining admissibility, the consular officer or Attorney General shall at a minimum consider the alien's

- (1) age;
- (2) health;
- (3) family status;
- (4) assets, resources, and financial status; and
- (5) education and skills.

b. Section 212(a)(4)(B)(ii) provides that, in addition to the factors listed above, the consular officer or Attorney General may also consider any affidavit of support under § 213A.

3. Section 212(a)(4)(C) provides that any alien who seeks admission or adjustment of status under a visa number issued under §§ 201(b)(2) or 203(a) is inadmissible under § 212(4) unless the alien has obtained status as a spouse or child of a U.S. citizen pursuant to clause (ii), (iii), or (iv) of § 204(a)(1)(A), or classification pursuant to clause (ii) or (iii) of § 204(a)(1)(B), or the person petitioning for the alien's admission (including any additional sponsor required under § 213A(f)) has executed an affidavit of support described in § 213A with respect to such alien.
4. Section 212(a)(4)(D) provides that any alien who seeks admission or adjustment of status under a visa number issued under § 203(b) by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible unless such relative has executed an affidavit of support described in § 213A with respect to such alien.

#### **S. No labor certification**

1. Section 212(a)(5)(A) of the Act provides that any alien seeking to enter the U.S. to perform labor who has no labor certification is inadmissible.

#### **T. Foreign medical graduates**

1. Section 212(a)(5)(B) of the Act provides that certain foreign medical graduates who have not passed the NBME exam and who are not competent in oral and written English are inadmissible.

## **U. Uncertified foreign health-care workers**

1. Section 212(a)(5)(C) of the Act provides that any alien is inadmissible who seeks to enter the U.S. as a health-care worker, other than a physician, who does not present to the consular officer, or Attorney General if seeking adjustment of status, a certificate from the Commission on Graduates of Foreign Nursing Schools or its equivalent.

## **V. Illegal entrants and immigration violators**

1. Not admitted or paroled – Section 212(a)(6)(A)(i) of the Act provides that an alien present in the U.S. without being admitted or paroled, or who arrives in the U.S. at any time or place other than as designated by the Attorney General is inadmissible.
  - a. Exception for certain battered women and children – Section 212(a)(6)(A)(ii) provides that § 212(a)(6)(A)(i) shall not apply to an alien who demonstrates that:
    - (1) the alien qualifies for immigrant status under § 204(a)(1)(A)(iii), (A)(iv), (B)(ii), or (B)(iii) [VAWA self-petitioner], and
    - (2) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or
    - (3) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and
    - (4) there was a substantial connection between the battery or cruelty and the alien's unlawful entry into the U.S.
2. Failure to attend hearing – Section 212(a)(6)(B) provides that any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the U.S. within 5 years of such alien's subsequent departure or removal is inadmissible.
3. Misrepresentation
  - a. Fraud or misrepresentation of a material fact – Section 212(a)(6)(C)(i) provides that any alien who seeks to procure, has sought to procure, or has procured a visa, other documentation, entry into the U.S., or other benefit

under the Act by fraud or willfully misrepresenting a material fact is inadmissible.

- (1) A waiver for this ground of inadmissibility is available under § 212(i).
  - (2) A concealment or misrepresentation is material if it had the natural tendency to influence the adjudicator. *Matter of D-R-*, 25 I&N Dec. 445, 450 (BIA 2011) (*quoting Kungys v. United States*, 485 U.S. 759, 772 (1988)). It is not necessary to establish that the misrepresentation actually influenced the adjudicator or that but for the misrepresentation, the alien would have been denied the benefit he sought. *Id.*
- b. False claim to U.S. citizenship – Section 212(a)(6)(C)(ii)(I) provides that any alien who falsely represents or has falsely represented himself or herself to be a citizen of the U.S. for any purpose or benefit under the Act or any other Federal or State law is inadmissible. Aliens who reasonably believed that they were citizens may be excepted under § 212(a)(6)(C)(ii)(II).
  - (1) A waiver for this ground of inadmissibility is available under § 212(i). INA § 212(a)(6)(C)(iii).
  - (2) An alien who willfully and knowingly makes a false misrepresentation of birth in the United States on a passport application has falsely represented herself to be a U.S. citizen. *Matter of Barcenas*, 25 I&N Dec. 40 (BIA 2009).
4. [Stowaways](#) – Section 212(a)(6)(D) provides that any alien who is a stowaway is inadmissible. The term is defined at § 101(a)(49).
5. Alien smugglers – Section 212(a)(6)(E)(i) provides that any alien who at any time knowingly has encouraged, assisted, abetted, or aided, any other alien to enter or try to enter the U.S. in violation of law is inadmissible.
  - a. Section 212(a)(6)(E)(i) shall not apply in the case of an alien who is an eligible immigrant as defined in § 301(b)(1) of the Immigration Act of 1990, was physically present in the U.S. on May 5, 1988, and is seeking admission as an immediate relative or under § 203(a)(2) (including under § 112 of the Immigration Act of 1990) or benefits under § 301(a) of the immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien’s spouse, parent, son, or daughter (and no other individual) to enter the U.S. in violation of law. INA § 212(a)(6)(E)(ii).
    - (1) Section 301(b)(1) of the Immigration Act of 1990 defines the term “eligible immigrant” as a qualified immigrant who is the spouse or unmarried child of a legalized alien.

- b. A waiver of inadmissibility may also be available under § 212(d)(11). INA § 212(a)(6)(E)(iii).
- 6. Violators of § 274C – Section 212(a)(6)(F) provides that any alien who is the subject of a final order for violation of § 274C is inadmissible. Section 274C provides for a hearing before an administrative law judge, civil fines of between \$250 and \$2,000 for each document, and makes unlawful the following: to forge, attempt to use, possess, obtain, or falsely make any document for the purpose of satisfying a requirement of the Act; to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of the Act; to use or attempt to use or to provide or attempt to provide any document lawfully issued to a person other than the possessor for the purpose of satisfying a requirement of the Act; to accept or receive or to provide any document lawfully issued to a person other than the possessor for the purpose of complying with § 274A(b).
  - a. A waiver may be available under § 212(d)(12). INA § 212(a)(6)(F)(ii).
- 7. Student visa abusers – Section 212(a)(6)(G) provides that an alien who obtains the status of a nonimmigrant under § 101(a)(15)(F)(i) and who violates a term or condition of such status under § 214(l) is inadmissible until the alien has been outside the U.S. for a continuous period of 5 years after the date of the violation. This section should likely refer to current § 214(m) rather than § 214(l) as § 214(m) refers to foreign students. *See* Pub. L. 106-386, Victims of Trafficking and Violence Protection Act of 2000, § 107(e)(2)(a).

#### **W. Not in possession of valid, unexpired documents**

- 1. Section 212(a)(7)(A)(i) of the Act provides that any immigrant who, at the time of the application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act and a valid unexpired passport or other suitable travel document or document of identity and nationality if required by the regulations under § 211(a), or whose visa has been issued without compliance with the provisions of § 203 (the preferences by which immigrant visas are issued) is inadmissible.
- 2. A waiver may be available under § 212(k). INA § 212(a)(7)(A)(ii).

#### **X. Not in possession of valid entry documents, such as visa**

- 1. Section 212(a)(7)(B)(i)(I) provides that any nonimmigrant who is not in possession of a passport valid for a minimum of 6 months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period is inadmissible.
- 2. Section 212(a)(7)(B)(i)(II) provides that any nonimmigrant not in possession of a valid nonimmigrant visa or a border crossing identification card is inadmissible.

3. Waivers available—

- a. A waiver of both of the above is available under § 212(d)(4). INA § 212(a)(7)(B)(ii).
- b. A waiver for certain nonimmigrant visitors to Guam is also available under § 212(l). INA § 212(a)(7)(B)(iii).
- c. A general waiver is also available under the Visa Waiver Pilot Program discussed in § 217. INA § 212(a)(7)(B)(iv).

**Y. Immigrants who are permanently ineligible for citizenship - Section 212(a)(8)(A)**

1. The term “ineligible to citizenship” is defined at § 101(a)(19) and refers to persons who have requested exemption from military service on account of alienage.
2. The phrase “ineligible to citizenship” in § 212(a)(8)(A) refers only to those aliens who are barred from naturalization by virtue of their evasion of military service. *Matter of Kanga*, 22 I&N Dec. 1206 (BIA 2000). Therefore, an alien convicted of an aggravated felony is not thereby rendered inadmissible under § 212(a)(8)(A) as an alien who is permanently “ineligible to citizenship.” *Id.*
3. Note that § 212(a)(8)(A) is applicable only to aliens seeking to enter the U.S. as an immigrant. It does not apply to nonimmigrants.

**Z. Draft evaders**

1. Section 212(a)(8)(B) provides that any person who has departed from or remained outside the U.S. to avoid or evade training or service in the armed forces in time of war or national emergency is inadmissible.
2. This section states that it is not applicable to aliens who were nonimmigrants when they departed the U.S. and who are seeking admission as nonimmigrants.

**AA. Aliens previously removed or unlawfully present**

1. Section 212(a)(9)(A)(i) provides that any alien who has been ordered removed under § 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien’s arrival in the U.S. who again seeks admission within 5 years of the date of removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible unless the Attorney General has consented to the alien’s applying for readmission under § 212(a)(9)(A)(iii).
2. Section 212(a)(9)(A)(ii) provides that any alien not described in § 212(a)(9)(A)(i) who has been ordered removed under § 240 or any other provision of law or departed the U.S. while an order of removal was outstanding and who seeks admission within 10 years of the date of such alien’s departure or removal (or within

20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

- a. Exception – Section 212(a)(9)(A)(iii) provides that § 212(a)(9)(A) shall not apply to an alien seeking admission within a period if, prior to the date of the alien’s reembarkation at a place outside the U.S. or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien’s reapplying for admission.
3. Section 212(a)(9)(B)(i)(I) provides that any alien (other than an alien lawfully admitted for permanent residence) who was unlawfully present in the U.S. for a period of more than 180 days but less than 1 year, voluntarily departed the U.S. (whether or not pursuant to § 244(e)) prior to the commencement of proceedings under §§ 235(b)(1) or 240, and again seeks admission within 3 years of the date of such departure or removal is inadmissible.
4. Section 212(a)(9)(B)(i)(II) provides that any alien (other than a LPR) who has been unlawfully present in the U.S. for one year or more and who again seeks admission within 10 years of the date of such alien’s departure or removal from the U.S. is inadmissible. To be rendered inadmissible for 10 years pursuant to this provision, an alien must depart the United States after having been unlawfully present in the United States for one year or longer. *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006). Pursuant to IIRIRA, no period of an alien’s presence in the United States prior to April 1, 1997, may be considered “unlawful presence” for the purposes of determining an alien’s inadmissibility under § 212(a)(9)(B).
  - a. The Board has ruled that when an alien is unlawfully present for at least 1 year, then leaves the U.S. and, subsequently, seeks admission within 10 years after the departure, the alien is inadmissible under § 212(a)(9)(B)(i)(II) absent a waiver even if the alien’s departure was not made pursuant to an order of removal or grant of voluntary departure. *Matter of Lemus-Losa*, 25 I&N Dec. 734 (BIA 2012).
5. “Unlawful presence” defined – An alien is deemed to be unlawfully present in the U.S. if the alien is present in the U.S. after the expiration of the period of stay authorized by the Attorney General or is present in the U.S. without being admitted or paroled. INA § 212(a)(9)(B)(ii).
  - a. Note: Periods of unlawful presence have been interpreted to begin on or after April 1, 1997. Dep’t of State Cable (no. 98-State-060539) (April 4, 1998), *reprinted in* 75 Interpreter Releases 543 (April 20, 1998).
  - b. Exceptions
    - (1) Minors – No period of time in which an alien is under 18 shall be taken into account. INA § 212(a)(9)(B)(iii)(I).

- (2) Asylees – No period of time in which an alien has a bona fide application for asylum pending shall be taken into account unless during such period the alien was employed without authorization in the U.S. INA § 212(a)(9)(B)(iii)(II).
  - (3) Family unity – No period of time in which the alien is a beneficiary of family unity protection pursuant to § 301 of the Immigration Act of 1990 shall be taken into account. INA § 212(a)(9)(B)(iii)(III).
  - (4) Battered women and children – Section 212(a)(9)(B)(i) shall not apply to an alien who demonstrates that the alien qualifies for immigrant status under § 204(a)(1)(A)(iii),(A)(iv),(B)(ii), or (B)(iii) and the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty and there was a substantial connection between the battery or cruelty and the alien's violation of the terms of the alien's nonimmigrant visa. INA § 212(a)(9)(B)(iii)(IV).
  - (5) Victims of severe forms of trafficking in persons – Section 212(a)(9)(B)(i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in § 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102)) was at least one central reason for the alien's unlawful presence in the United States. INA § 212(a)(9)(B)(iii)(V).
- c. Tolling for good cause – If an alien has been lawfully admitted or paroled into the U.S., has filed, a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and has not been employed without authorization in the U.S. before or during the pendency of such application, the calculation of the period of time unlawfully present in the U.S. shall be tolled during the pendency of such application, but not to exceed 120 days. INA § 212(a)(9)(B)(iv).
  - d. Waiver under § 212(a)(9)(B)(v) – The Attorney General has sole discretion to waive § 212(a)(9)(B)(i) in the case of an immigrant who is the spouse or son or daughter of a U.S. citizen or of a LPR if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant would result in extreme hardship to the citizen or LPR spouse or parent of such alien.



6. Section 212(a)(9)(C)(i) provides that any alien who (I) has been unlawfully present in the U.S. for an aggregate period of more than 1 year or (II) has been ordered removed under §§ 235(b)(1), 240, or any other provision of the law, is inadmissible.
  - a. Exception – Section 212(a)(9)(C)(i) shall not apply to an alien seeking admission more than 10 years after the date of the alien’s last departure from the U.S. if, prior to the alien’s reembarkation at a place outside the U.S. or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien’s reapplying for admission. INA § 212(a)(9)(C)(ii). However, an alien who reenters the United States without admission after having previously been removed is inadmissible under § 212(a)(9)(C)(i)(II), even if the alien obtained the Attorney General’s permission to reapply for admission prior to reentering lawfully. *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); see *Gonzalez-Balderas v. Holder*, 597 F.3d 869 (7th Cir. 2010) (upholding *Matter of Torres-Garcia*); *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013).
    - (1) In *Sarango v. Att’y Gen.*, 651 F.3d 380 (3d Cir. 2011), the Third Circuit held that IJs lack jurisdiction to consider requests for consent to reapply for admission under § 212(a)(9)(C)(ii) because the plain language of that section authorizes the Secretary of Homeland Security, not the Attorney General, to consider these requests.
    - (2) An alien who is inadmissible under § 212(a)(9)(C)(i)(I) is also ineligible for adjustment of status under § 245(f). *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).
  - b. Waiver – The Secretary of Homeland Security may waive the application of § 212(a)(9)(C)(i) in the case of an alien who is a VAWA self-petitioner if there is a connection between the alien’s battering or subjection to extreme cruelty and the alien’s removal, departure from the United States, or reentry or reentries into the United States; or attempted reentry into the United States. INA § 212(a)(9)(C)(iii).

#### **BB. Polygamists**

1. Section 212(a)(10)(A) of the Act provides that any immigrant coming to the U.S. to practice polygamy is inadmissible.
2. Note that this section is applicable only to aliens seeking to enter the U.S. as an immigrant. It does not apply to nonimmigrants.

#### **CC. Guardian required to accompany helpless alien**

1. Section 212(a)(10)(B) makes inadmissible any alien accompanying another alien who is inadmissible and certified under § 232(c) to be helpless from infancy, sickness, or mental or physical disability if the accompanying alien's protection or guardianship is required by the inadmissible alien.



#### **DD. International child abductors**

1. Section 212(a)(10)(C)(i) involves the custody of U.S. citizen children and makes inadmissible aliens who, after a court order granting custody to a U.S. citizen of a child having a lawful claim to U.S. citizenship, detain or withhold custody outside the U.S. from the citizen granted custody.
2. This ground of inadmissibility exists only until the child is surrendered to the U.S. citizen. *See* INA § 212(a)(10)(C)(ii).
3. However, § 212(a)(10)(C)(iii) provides that § 212(a)(10)(C)(i)-(ii) shall not apply:
  - a. To a government official of the United States who is acting within the scope of his or her official duties;
  - b. To a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or
  - c. So long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

#### **EE. Unlawful voters**

1. Section 212(a)(10)(D)(i) provides that any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible. An exception may be available for those who reasonably believed that they were U.S. citizens. *See* INA § 212(a)(10)(D)(ii).

#### **FF. Former citizens who renounced citizenship to avoid taxation**

1. Section 212(a)(10)(E) provides that any alien who is a former citizen of the U.S. who officially renounces U.S. citizenship and who is determined by the Attorney General to have renounced U.S. citizenship for the purpose of avoiding taxation by the U.S. is inadmissible.

### **V. Grounds of deportability in removal proceedings**

#### **A. Inadmissible at time of entry or adjustment of status**

1. Section 237(a)(1)(A) provides that any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.
2. A waiver is available under § 237(a)(1)(H) for those who are inadmissible under § 212(a)(6)(C)(i).

## **B. Present in violation of law**

1. Section 237(a)(1)(B) provides that any alien who is present in the U.S. in violation of this Act or any other law of the U.S. is deportable.

## **C. Violated nonimmigrant status**

1. Section 237(a)(1)(C)(i) provides that any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under § 248, or to comply with the conditions of any such status, is deportable.

## **D. Violators of conditions of entry**

1. Section 237(a)(1)(C)(ii) provides that any alien whom the Secretary of Health and Human Services certifies has failed to comply with the terms, conditions, and controls that were imposed under § 212(g) is deportable.

## **E. Termination of conditional permanent residence**

1. Section 237(a)(1)(D)(i) provides that any alien with permanent residence on a conditional basis under §§ 216 or 216A who has had such status terminated under such respective section is deportable.
  - a. Exception – Section 237(a)(1)(D)(ii) provides that § 237(a)(1)(D)(i) shall not apply in the cases described in § 216(c)(4) (relating to certain hardship waivers).

## **F. Alien smuggling**

1. Section 237(a)(1)(E)(i) provides that any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the U.S. in violation of law is deportable.
2. Section 237(a)(1)(E)(i) does not require a conviction.
  - a. Because § 237(a)(1)(E)(i) does not require a conviction, an IJ is not limited by cases which prohibit looking to the factual basis of a conviction, but may consider the underlying facts. *Matter of Martinez-Serrano*, 25 I&N Dec. 151, 155 (BIA 2009).
3. A conviction for transporting an illegal alien within the U.S. (rather than smuggling across the border) was not a deportable offense under former § 241(a)(13). *Matter of I-M-*, 7 I&N Dec. 389 (BIA 1957).
4. A conviction for aiding and abetting other aliens to evade and elude examination and inspection by immigration officers in violation of 18 U.S.C. § 2(a) (2006) and 8

U.S.C. § 1325(a)(2) (2006) renders the convicted alien removable under section 237(a)(1)(E)(i). *Matter of Martinez-Serrano*, 25 I&N Dec. at 154-55.

5. Special rule in the case of family reunification – Section 237(a)(1)(E)(ii) provides that § 237(a)(1)(E)(i) shall not apply in the case of an alien who is an eligible immigrant (as defined in § 301(b)(1) of the Immigration Act of 1990), was physically present in the U.S. on May 5, 1988, and is seeking admission as an immediate relative or under § 203(a)(2) (including under § 112 of the Immigration Act of 1990) or benefits under § 301(a) of the immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the U.S. in violation of law.
6. Waiver – Section 237(a)(1)(E)(iii) provides that the Attorney General may, in the exercise of discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of § 237(a)(1)(E)(i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the U.S. in violation of law.

#### **G. Marriage fraud**

1. Section 237(a)(1)(G)(i) provides that an alien shall be considered deportable as having procured a visa or other documentation by fraud (within the meaning of § 212(a)(6)(i)) and to be in the U.S. in violation of this Act (within the meaning of § 237(a)(1)(B)) if the alien obtains any admission into the U.S. with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the U.S., shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws.
2. Section 237(a)(1)(G)(ii) provides that an alien shall be considered deportable as having procured a visa or other documentation by fraud (within the meaning of § 212(a)(6)(i)) and to be in the U.S. in violation of this Act (within the meaning of § 237(a)(1)(B)) if it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

#### **H. CIMT w/in 5 years of admission**

1. Section 237(a)(2)(A)(i) provides that any alien who is convicted of a [crime involving moral turpitude](#) committed within 5 years (or 10 years in the case of an alien provided LPR status under § 245(j)) after the date of admission, and is

convicted of a crime for which a sentence of one year or longer may be imposed is deportable.

2. History – Before 1988, deportability for conviction of a CIMT was covered in § 241(a)(4) of the Act. In 1988, when the concept of an aggravated felony was introduced, deportability for being convicted of one was placed under § 241(a)(4)(B). Conviction for a CIMT was redesignated as § 241(a)(4)(A). In 1990, the Act was reorganized and conviction of a CIMT came under § 241(a)(2)(A)(i). In 1996, it was again moved to § 237(a)(2)(A)(i). Therefore, many cases from before 1996 involve these various sections of the Act as the ground of deportability.
  - a. Under earlier sections, the alien’s first entry or any subsequent entry could be used as a basis for a deportation charge relating to the alien’s conviction of a CIMT committed within 5 years of entry. *Matter of A-*, 6 I&N Dec. 684 (BIA 1955).
  - b. Also, prior to 1996, an alien convicted of a CIMT was deportable only if he was sentenced to confinement or confined for one year or longer. The IIRIRA changed the statute to read “for which a sentence of one year or longer *may be* imposed.” See INA § 237(a)(2)(A)(i)(II).
3. Under current section 237(a)(2)(A)(i), an alien is removable if the crime was committed within 5 years after the date of the admission by virtue of which the alien was present in the United States when he committed the crime. *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011) (*overruling in part Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005)).
  - a. The 5-year clock is not reset by a new admission from within the United States through adjustment of status because that admission merely extends the alien’s presence. *Id.* at 406-07. However, if an alien adjusts status after entering the United States without inspection, the date of adjustment would be the date of admission for purposes of § 237(a)(2)(A)(i) because that date would have commenced the alien’s period of presence in the United States following an admission. *Id.* at 408 n.9.
  - b. An alien who commits a CIMT while in the United States after entering without inspection is inadmissible under § 212(a)(6)(A)(i) and § 212(a)(2)(A)(i)(I), not deportable under § 237(a)(2)(A)(i), even if he had been admitted to the United States at some point in the past, because the past admissions are not tied to the period of presence during which he committed the crime. *Id.* at 406, 406 n.5.
  - c. The “date of admission” for an alien who adjusted status pursuant to § 1 of the Cuban Refugee Adjustment Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, is the date referred to in § 1 of that Act: “a date thirty months prior to the filing of [the application for permanent residence] or the

date of his last arrival into the United States, which ever date is later.”  
*Matter of Carrillo*, 25 I&N Dec. 99 (BIA 2009).

4. A waiver is available at § 237(a)(2)(A)(vi).

## **I. Two CIMTs**

1. Section 237(a)(2)(A)(ii) provides that any alien who at any time after admission is convicted of two or more [crimes involving moral turpitude](#), not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.
2. The concept of “a single scheme of criminal misconduct” –
  - a. Notwithstanding prior circuit court precedent, the Board of Immigration Appeals has set forth a nation-wide standard for determining whether criminal convictions arose out of “a single scheme of criminal misconduct.” *Matter of Islam*, 25 I&N Dec. 637 (BIA 2011). Therefore, Immigration Judges should apply the standards articulated in *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992).
  - b. In *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992), the Board adopted the analysis in *Pacheco v. INS*, 546 F.2d 448 (1st Cir. 1976), *cert. denied*, 430 U.S. 985 (1977) which states that to be a “single scheme,” the scheme must take place at one time, meaning there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done. The Board also refused to conclude that Congress intended by the “single scheme” language to insulate from deportability individuals who formulate a plan at one time for criminal behavior involving multiple separate crimes, while making deportable those who commit only two such crimes without a plan and held that the statutory exception refers to acts, which although separate crimes in and of themselves, were performed in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct. *Id.*
    - (1) Under this analysis, it is of no consequence that the alien’s separate crimes (such as forgery or unauthorized use of a credit card) were committed pursuant to an elaborate plan and that the modus operandi was the same in each instance. *Id.* The Board focused on the alien’s actual receipt of money from a victim as accomplishing the criminal objective. *Id.* With each act, the alien accomplished a specific criminal objective when he obtained things of value. *Id.* After each act, the alien had the opportunity to disassociate himself from the enterprise and reflect on what he had done and the commission of additional acts to obtain things of value did not flow from and was not a natural consequence of the first act of criminal misconduct. *Id.*

- c. The statutory language of a “single scheme of criminal misconduct” was meant to distinguish cases where there are separate and distinct crimes, but they are performed in furtherance of a single criminal episode, such as where two crimes flow from and are the natural consequence of a single act of criminal misconduct. *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992).
3. No single scheme was found in the following cases:
- a. Robbery involving separate persons at different times. *Matter of A-*, 5 I&N Dec. 470 (BIA 1953).
  - b. Obtaining money by false pretenses involving distinct offenses. *Matter of D-*, 5 I&N Dec. 728 (BIA 1954).
  - c. Two counts of income tax evasion with each count relating to a separate year. *Matter of J-*, 6 I&N Dec. 382 (BIA 1954).
  - d. Forgery and uttering of different checks at different times even though both checks were made payable to the same person. *Matter of Z-*, 6 I&N Dec. 167 (BIA 1954).
  - e. Passing forged checks on two different occasions within 10 days notwithstanding a general criminal intent to continue to defraud victims. *Matter of B-*, 8 I&N Dec. 236 (BIA 1958).
  - f. Using credit cards in the names of different people, with intent to defraud, and obtaining things of value with the cards, notwithstanding that the crimes were committed pursuant to an elaborate plan and the modus operandi was the same in each instance. *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992).
  - g. Use of multiple stolen credit or debit cards to obtain various items of value from several retail outlets on five separate occasions in two counties, notwithstanding that the crimes took place over a short period of time. *Matter of Islam*, 25 I&N Dec. 637 (BIA 2011).
4. A waiver is available at § 237(a)(2)(A)(vi).

#### **J. Convicted of an aggravated felony**

- 1. Section 237(a)(2)(A)(iii) provides that any alien who is convicted of an aggravated felony at any time after admission is deportable. A waiver is available at § 237(a)(2)(A)(vi).
- 2. An alien who initially entered the U.S. without inspection but whose conviction for an aggravated felony was subsequent to her adjustment of status to that of a lawful permanent resident under § 245A is deportable under § 237(a)(2)(A)(iii) as an alien who was convicted of an aggravated felony “after admission.” *Matter of Rosas*, 22

I&N Dec. 616 (BIA 1999); *see also Matter of Chavez-Alvarez*, 26 I&N Dec. 274 (BIA 2014).

#### **K. Convicted of high speed flight**

1. Section 237(a)(2)(A)(iv) provides that any alien convicted of a violation of 18 U.S.C. § 758 (relating to high speed flight from an immigration checkpoint) is deportable. A waiver is available at § 237(a)(2)(A)(vi).

#### **L. Failure to register as a sex offender**

1. Section 237(a)(2)(A)(v) provides that any alien who is convicted under 18 U.S.C. § 2250 is deportable. (Pursuant to the Adam Walsh Child Protection and Safety Act of 2006).

#### **M. Controlled substance conviction**

1. Section 237(a)(2)(B)(i) provides that any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance (as defined in § 102 of the Controlled Substances Act (21 U.S.C. § 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.
2. History – Before 1990, deportability for conviction of drug offenses was covered in § 241(a)(11) of the Act. In 1990, the Act was reorganized and drug offenses came under § 241(a)(2)(B)(i). In 1996, it was again moved to § 237(a)(2)(B)(i). Therefore, many cases from before 1990 involve § 241(a)(11) as the ground of deportability.
  - a. Former section 241(a)(11) did not contain the word “attempt.” However, the Board had long held that an alien convicted of an attempt to commit a drug offense is deportable. *Matter of G-*, 6 I&N Dec. 353 (BIA 1954); *Matter of Bronsztejn*, 15 I&N Dec. 281 (BIA 1974).
3. The exception for a single offense of possession for one's own use of 30 grams or less of marijuana does not apply to an alien convicted under a statute that has an element requiring that possession of the marijuana be in a prison or other correctional setting. *Matter of Moncada*, 24 I&N Dec. 62 (BIA 2007).
4. Whether the alien was convicted of possession of marijuana “for one's own use” is a circumstance-specific inquiry, which does not involve the application of the categorical approach. *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014); *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).
5. A sentence to confinement is not necessary for an alien to be removable under this section. INA § 237(a)(2)(B)(i).



6. Even if the imposition (rather than the execution) of sentence was suspended, the alien is still removable. *Matter of Tucker*, 15 I&N Dec. 337 (BIA 1975); *Matter of Wong*, 12 I&N Dec. 721 (BIA 1968); *Matter of Gonzalez de Lara*, 12 I&N Dec. 806 (BIA 1968); *Matter of Johnson*, 11 I&N Dec. 401 (BIA 1965).
7. In general, the determination regarding whether the conviction was for a controlled substance is a categorical inquiry. Where the state or foreign entity criminalizes controlled substances which are not included in the Controlled Substances Act, an Immigration Judge may apply the modified categorical approach and examine the conviction record to determine what controlled substance was at issue. *See, e.g., Ragasa v. Holder*, 752 F.3d 1173 (9th Cir. 2014).
8. Where a state or foreign record of conviction is silent as to the controlled substance involved, and the state or foreign entity criminalizes controlled substances which are not listed in the Controlled Substances Act, the Immigration Judge should consider whether there is a realistic probability that the state would prosecute such conduct related to those additional controlled substances. *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014).
9. To trigger removability, possession of drug paraphernalia must be linked to a specific controlled substance. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).
10. A conviction under a general solicitation statute for conspiracy to commit a crime relating to a controlled substance renders an alien removable in most circuits. *Matter of Zorilla-Vidal*, 24 I&N Dec. 768 (BIA 2009).
  - a. The Ninth Circuit disagrees with this principle with respect to general solicitation or accessory statutes. *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). However, an alien may be removable for solicitation, conspiracy, or attempt in the Ninth Circuit if the statute under which the alien was convicted is specific to controlled substances. *See Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009).

## **N. Drug abusers and addicts**

1. Section 237(a)(2)(B)(ii) provides that any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

## **O. Firearm offenses**

1. Section 237(a)(2)(C) provides that any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, *exchange*, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in 18 U.S.C. § 921(a)) in violation of any law is deportable.



2. History lesson - Before 1990, deportability for conviction of firearm offenses was covered in § 241(a)(14) of the Act. In 1990, the Act was reorganized and firearm offenses came under § 241(a)(2)(C). In 1996, it was again moved to § 237(a)(2)(C). Therefore, many cases from before 1996 involve former section 241(a)(2)(C) as the ground of deportability.
  - a. Prior statutes and retroactivity – Former section 241(a)(2)(C) of the Act represented the enactment of a new statutory provision rather than a change of the numerical designation of former section 241(a)(14) because it increased the number of weapons offenses that render an alien deportable. That former section also completely superseded all former versions of that deportation ground and was not limited regarding the date when a conviction must take place. Therefore, aliens were deportable who were convicted before the enactment of former section 241(a)(2)(C) as well as after. *Matter of Chow*, 20 I&N Dec. 647 (BIA 1993), *aff'd sub nom. Chow v. INS*, 9 F.3d 1547 (5th Cir. 1993). Present section 237(a)(2)(C) also appears to include aliens convicted before 1996.
3. Definition of “firearm” - 18 U.S.C. § 921(a)(3) defines a firearm as:
  - a. any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
  - b. the frame or receiver of any such weapon;
  - c. any firearm muffler or firearm silencer; or
  - d. any destructive device. HOWEVER:
  - e. the definition does not include an antique firearm.
4. Definition of “destructive device” - 18 U.S.C. § 921(a)(4) defines a destructive device as:
  - a. any bomb, grenade, rocket (having a propellant charge of more than 4 ounces), missile (having an explosive or incendiary charge of more than 1/4 ounce), mine, or similar device which is explosive, incendiary, or contains poison gas;
  - b. any weapon (other than shotguns or shotgun shells for sporting use) which will or may be converted to expel a projectile by explosive or other propellant and which has a barrel with a bore of more than 1/2 inch in diameter; or
  - c. any combination of parts from which a destructive device may be assembled.
5. The antique firearm exception to the definition of “firearm” in 18 U.S.C. § 921(a)(3) is an affirmative defense that must be sufficiently raised by an alien charged under section 237(a)(2)(C) of the Act. *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010). Where the government has presented evidence that an alien has been

convicted of an offense involving a firearm, it has met its burden of presenting clear and convincing evidence of deportability, and the burden then shifts to the respondent to show a reasonable probability that the state would prosecute an individual for an offense regarding an antique firearm. *Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014).

6. A conviction for improper delivery of a firearm under 18 U.S.C. § 922(e) qualifies as a firearms offense under section 237(a)(2)(C), despite the fact that the enumerated list does not mention delivery. *Malilia v. Holder*, 632 F.3d 598 (9th Cir. 2011).
7. Sentence enhancement or element of the offense—
  - a. The sentence enhancement provision of section 12022(a) of the California Penal Code, which allows for the imposition of an additional and consecutive term of imprisonment upon a person convicted of a felony where any one of the principals was armed with a firearm, does not create a separate offense, but rather imposes additional punishment, and therefore does not constitute a conviction under California law. *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992). Therefore, an alien who was convicted of 5 counts of attempted murder in the second degree and whose sentence under one count was enhanced pursuant to section 12022(a) of the California Penal Code because a codefendant was armed with a firearm in the attempted commission of the felony has not been convicted of a firearm offense under California law and is not deportable under former section 241(a)(2)(C) of the Act. *Id.*
  - b. A conviction for assault in the third degree under section 9A.36.031(1)(f) of the Revised Code of Washington is not a firearm offense where use of a firearm is not an element of the offense and a respondent so convicted is not deportable under former section 241(a)(2)(C) of the Act. *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992). In this case, no element of the crime to which the respondent entered a plea of guilty related to the use of a weapon. Although the criminal information stated that the respondent used a pistol in the assault, he was not charged with use of a pistol; and did not plead guilty to such use.
  - c. A respondent convicted of assault with a firearm, in violation of California Penal Code section 245(a)(2), has been convicted of a firearms violation and is deportable under former section 241(a)(2)(C) of the Act. *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992), *superseded by statute on other grounds as recognized by Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), *review granted, cause remanded by Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). Although the case primarily involved eligibility for a waiver under former section 212(c) of the Act and the Board did not discuss at length the issue of deportability, it seems that the respondent was deportable under section 241(a)(2)(C) because the use of a firearm was an element of the offense specifically stated in the statute. The Board also rejected an argument that because the respondent's conviction for assault with a firearm could also

render him excludable under section 212(a)(2)(A)(i)(I) of the Act as an alien convicted of a CIMT, he should be allowed to apply for a waiver under section 212(c).

- d. An alien convicted under 18 U.S.C. § 924(c)(1) for use of a firearm during a drug trafficking crime is deportable under former section 241(a)(2)(C) of the Act as an alien convicted of a firearm violation as well as under former section 241(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony. *Matter of K-L-*, 20 I&N Dec. 654 (BIA 1993). In this case, the Board distinguished its decision in *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992) and held that 18 U.S.C. § 924(c)(1) creates an offense separate from the underlying offenses and is not merely a sentence enhancement.
  - e. An alien convicted of the first degree felonies of armed burglary and robbery with a firearm under sections 810.02 and 812.13 of the Florida Statutes was convicted of firearm offenses and therefore deportable under former section 241(a)(2)(C) of the Act because the use of a firearm was an essential element of the crimes, i.e. the use of a firearm elevated the crimes to first degree felonies and triggered a mandatory minimum sentence as distinguished from a statutory sentence enhancement. *Matter of P-F-*, 20 I&N Dec. 661 (BIA 1993).
  - f. Although section 775.087 of the Florida Statutes is, on its face, a penalty enhancement provision designed to raise the penalty for conviction of a felony (actually the degree of the felony) where the felony is committed with the use of a firearm, under Florida case law, use of a firearm becomes an element of the substantive offense of first degree murder with a firearm where the elements of murder under section 782.04 of the Florida Statutes and use of a firearm under section 775.087 of the Florida Statutes are charged and proven. *Matter of Lopez-Amaro*, 20 I&N Dec. 668 (BIA 1993), *aff'd Lopez-Amaro v. INS*, 25 F.3d 986 (11th Cir. 1994). Therefore, a conviction for first degree murder in violation of sections 782.04 and 775.087 of the Florida Statutes constitutes a firearms offense under former section 241(a)(2)(C) of the Act because the use of a firearm is deemed to be an element of the substantive offense. *Id.*
8. Before a circuit court, the alien argued that for his conduct to trigger former section 241(a)(2)(C), the alien contends that he not only need have made false statements in connection with a firearms purchase, he must also have been the individual doing the buying. *Hall v. INS*, 167 F.3d 852 (4th Cir. 1999). The court, in dismissing the appeal, held that nothing on the face of former section 241(a)(2)(C), limits the statute to the actual purchaser of the firearm. *Id.*
9. The First Circuit has held that the offense of “control” of a firearm in violation of Rhode Island section 11-47-7 constitutes constructive possession of a firearm. *Aybar-Alejo v. INS*, 230 F.3d 487 (1st Cir. 2000).

## 10. Evidence

- a. Apply a [categorical approach](#) to determining whether the offense constitutes a firearm violation within the meaning of section 241(a)(2)(C) of the Act. *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996); *Matter of Madrigal*, 21 I&N Dec. 323 (BIA 1996); *Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996).

### **P. Miscellaneous crimes**

1. Section 237(a)(2)(D) provides that an alien is deportable who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate:
  - a. Any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18, United States Code, for which a term of imprisonment of 5 or more years may be imposed;
  - b. Any offense under 18 U.S.C. § 871 or 960;
  - c. A violation of any provision of the Military Selective Service Act (50 U.S.C. App 451 *et seq.* or the Trading With the Enemy Act (50 U.S.C. App. 1 *et seq.*); or
  - d. A violation of §§ 215 or 278 of the Act.

### **Q. Crimes of domestic violence, stalking, and child abuse**

1. Section 237(a)(2)(E)(i) provides that any alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.
2. Definition of “a crime of domestic violence.” Section 237(a)(2)(E)(i) provides “For purposes of this clause, the term ‘crime of domestic violence’ means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.”
  - a. “Crime of Domestic Violence”–
    - (1) To qualify as a crime of domestic violence, a crime must qualify categorically as a “crime of violence” under 18 U.S.C. § 16, and be directed against an individual with whom the perpetrator has a

domestic relationship such that it may be considered a “crime of domestic violence” under section 237(a)(2)(E)(i) of the Act. *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *see also Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010); *Matter of Milion-Dubon*, 25 I&N Dec. 197 (BIA 2010).

- (2) The Fourth Circuit has held that courts should apply a “circumstance-specific” approach rather than a categorical one to determine whether a conviction was for domestic violence. *Hernandez-Zavala v. Lynch*, 806 F.3d 259, (4th Cir. 2015).
- (3) The Ninth Circuit has held that the definition of a “crime of violence” in 18 U.S.C. § 16(b) is void for vagueness. *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015); *but see also Carrillo v. Holder*, 781 F.3d 1155 (9th Cir. 2015) (holding that California Penal Code § 273.5(a) is categorically a crime of domestic violence).

b. Child abuse – Child abuse is not defined in the Act. However, the Board of Immigration Appeals has recognized that child abuse encompasses a broad range of activity, including any form of cruelty to a child’s physical, moral or mental well-being. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). The Board subsequently held that the term “crime of child abuse” means any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation. The Board also held that whether a person is removable based on a conviction for a “crime of child abuse” is determined by the elements of the alien’s offense, as reflected in the statutory definition of the crime or admissible portions of the conviction record. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).

- (1) The Board has held the term “crime of child abuse” is not limited to offenses requiring proof of injury to the child. *Matter of Soram*, 25 I&N Dec. 378, 381 (BIA 2010); *see also Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015). The phrase “an act or omission that constitutes maltreatment of child” is sufficiently broad to encompass endangerment-type crimes, including a crime in violation of section 18-6-401(1)(a) of the Colorado Revised Statutes. *Matter of Soram*, 25 I&N Dec. at 383.
- (2) However, the Ninth Circuit has held that a conviction for child endangerment, in violation of California Penal Code section 273a(b), is not categorically a crime of child abuse within the meaning of section 237(a)(2)(E)(i) because it reaches conduct that creates only potential harm to a child and does not require actual injury. *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009).

## **R. Violators of protection orders**

1. Section 237(a)(2)(E)(ii) provides that any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.
2. Section 237(a)(E)(ii) requires that an alien violate part of the protection order that “involves protection against violence, threats, or harassment” not that the alien actually engage in violent, threatening, or harassing behavior. *Szalai v. Holder*, 572 F.3d 975, 981 (9th Cir. 2009); *Hoodho v. Holder*, 558 F.3d 184 (2d Cir. 2009). See *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011).

## **S. Failure to register**

1. Section 237(a)(3)(A) provides that an alien who has failed to comply with the provisions of section 265 is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.
  - a. Section 265 requires certain aliens to notify the Attorney General in writing of each change of address and new address within 10 days of a change of address.
2. Conviction for failure to register or falsification of documents—
  - a. Section 237(a)(3)(B) provides that any alien is deportable who at any time has been convicted:
    - (1) under section 266(c) of the Act or under section 36(c) of the Alien Registration Act, 1940,
    - (2) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611 *et seq.*), or
    - (3) of a violation of, or an attempt or a conspiracy to violate, 18 U.S.C. § 1546 (relating to fraud and misuse of visas, permits, and other entry documents).
  - b. The parenthetical in (3) has been held to be “merely descriptive” rather than “limiting” in the kinds of fraud the statute describes. *Gourche v. Holder*, 663 F.3d 882 (7th Cir. 2011).

## **T. Document fraud**

1. Section 237(a)(3)(C)(i) provides that an alien who is the subject of a final order for violation of § 274C is deportable.

2. Waiver – Section 237(a)(3)(C)(ii) provides that the Attorney General may waive § 237(a)(3)(C)(i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under § 274C and the offense was incurred solely to assist, aid, or support the alien’s spouse or child (and no other individual).

#### **U. Falsely claiming citizenship**

1. Section 237(a)(3)(D)(i) provides that any alien who falsely represents, or has falsely represented, himself to be a citizen of the U.S. for any purpose or benefit under the Act (including § 274A) or any Federal or State law is deportable. A false representation of United States citizenship for the purpose of obtaining employment from a private employer is considered to be done for a “purpose or benefit” under the Act. *Muiruri v. Lynch*, 803 F.3d 984 (8th Cir. 2015); *Ferrans v. Holder*, 612 F.3d 528 (6th Cir. 2010); *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007); *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th Cir. 2007).
2. Cases in which a “purpose or benefit” was not found or was otherwise in dispute include: *Richmond v. Holder*, 714 F.3d 725 (7th Cir. 2013); *Castro v. Att’y Gen. of the United States*, 671 F.3d 356 (3d Cir. 2012); *Hassan v. Holder*, 604 F.3d 915 (6th Cir. 2010).
3. An alien who reasonably believed that he was a citizen may fall under an exception at § 237(a)(3)(D)(ii).

#### **V. National security and related grounds**

1. Section 237(a)(4)(A) provides that any alien is deportable who has engaged, is engaged, or at any time after admission engages in:
  - a. any activity to violate any law of the U.S. relating to espionage or sabotage or to violate or evade any law prohibiting the export from the U.S. of goods, technology, or sensitive information,
  - b. any other criminal activity which endangers public safety or national security, or
  - c. any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the U.S. by force, violence, or other unlawful means.

#### **W. Terrorist activities**

1. Section 237(a)(4)(B) of the Act [as amended by the REAL ID Act of 2005] provides that any alien who has engaged, is engaged, or at any time after admission [engages in any terrorist activity](#) (as defined in § 212(a)(3)(B), (F)) is deportable.



## **X. Adverse foreign policy consequences**

1. Section 237(a)(4)(C)(i), former section 241(a)(4)(C)(i) of the Act provides that an alien whose presence or activities in the U.S. the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the U.S. is deportable.
2. In order to establish removability under this section, the DHS has the burden of proving by clear and convincing evidence that the Secretary of State has made a facially reasonable and bona fide determination that an alien's presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States. *Matter of Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999). A letter from the Secretary of State conveying the Secretary's determination that an alien's presence in this country would have potentially serious adverse foreign policy consequences for the United States, and stating facially reasonable and bona fide reasons for that determination, is presumptive and sufficient evidence that the alien is removable under § 237(a)(4)(C)(i), and the Service is not required to present additional evidence of deportability. *Id.*
3. Extradition proceedings are separate and apart from any immigration proceeding and the Government's success or failure in obtaining an order of extradition has no effect on removal proceedings. *Matter of McMullen*, 17 I&N Dec. 542, 548 (BIA 1980), *rev'd on other grounds*, 658 F.2d 1312 (9th Cir. 1981), *on remand*, *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984), *aff'd*, 788 F.2d 591 (9th Cir. 1986), *overruled in part on other grounds by Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005); *Matter of Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999).
4. Exceptions – Section 237(a)(4)(C)(ii) provides that the exceptions described in clauses (ii) and (iii) of § 212(a)(3)(C) shall apply to deportability under § 237(a)(4)(C)(i) in the same manner as they apply to inadmissibility under § 212(a)(3)(C)(i).

## **Y. Assisted in Nazi persecution or engaged in genocide**

1. Section 237(a)(4)(D) provides that any alien described in clause (i) or (ii) of § 212(a)(3)(E) is removable. *See Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011).

## **Z. Public Charge**

1. Section 237(a)(5) provides that any alien who, within 5 years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

## **AA. Unlawful voters**

1. Section 237(a)(6)(A) provides that any alien who has voted in violation of any Federal, state, or local constitutional provision, statute, ordinance, or regulation is deportable. An alien who reasonably believed that he was a U.S. citizen may fall under an exception at § 237(a)(6)(B).



## **BB. Deportation of certain nonimmigrants prohibited without approval**

1. Section 237(b) provides that an alien admitted as a nonimmigrant under the provisions of either § 101(a)(15)(A)(i) or 101(a)(15)(G)(i), and who fails to maintain a status under either of those provisions, shall not be required to depart from the U.S. without the approval of the Secretary of State, unless such alien is subject to deportation under § 237(a)(4).

## **CC. Waiver under section 237(c) for special immigrants**

1. Section 237(c) provides that the following grounds of deportability shall not apply to a special immigrant described in § 101(a)(27)(J) [an immigrant declared dependent on a juvenile court] based upon circumstances that existed before the date the alien was provided such special immigrant status:
  - a. Section 237(a)(1)(A) - inadmissible at time of entry for grounds of inadmissibility other than:
    - (1) Section 212(a)(2) - criminal & related grounds, and
    - (2) Section 212(a)(3) - national security, terrorist activity, & related grounds.
  - b. Section 237(a)(1)(B) - in the U.S. in violation of law.
  - c. Section 237(a)(1)(C) - violated nonimmigrant status or condition of entry.
  - d. Section 237(a)(1)(D) - termination of conditional residence.
  - e. Section 237(a)(3)(A) - failure to report change of address.

## **VI. Procedure in removal proceedings**

### **A. Notice to the alien**

1. The charging document– Notice to Appear (“NTA”). Section 239(a)(1) provides that in removal proceedings under § 240, written notice (referred to as a notice to appear) shall be given in person to the alien or, if personal service is not practicable, through service by mail to the alien or the alien's counsel of record and shall specify the following:
  - a. the nature of the proceedings against the alien;
  - b. the legal authority under which the proceedings are conducted;
  - c. the acts or conduct alleged to be in violation of the law;

- d. the charges against the alien and the statutory provisions alleged to have been violated;
  - e. the right to be represented by counsel;
  - f. the requirement that the alien must immediately provide the Attorney General with a written record of any address and telephone number (if any) at which the alien may be contacted;
  - g. the requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number;
  - h. the consequences under § 240(b)(5) of failure to provide address and telephone information;
  - i. the time and place at which the proceeding will be held; and
  - j. the consequences under § 240(b)(5) of the failure, except under exceptional circumstances, to appear at such proceedings.
2. Section 239(a)(2)(A) provides that in the case of any change or postponement in the time and place of such proceedings, a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the new time or place of the proceedings and the consequences under § 240(b)(5) of failing, except under exceptional circumstance, to attend such proceedings.
- a. Exception: Section 239(a)(2)(B) provides that in the case of an alien not in detention, a written notice shall not be required if the alien has failed to provide the address required.
3. Securing of counsel – Section 239(b)(1) provides that in order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under § 240, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.
- a. Free legal service provider list – Section 239(b)(2) provides that the Attorney General shall provide lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under § 240. *See* 8 C.F.R. § 1003.61 *et seq.*
  - b. Rule of construction – Section 239(b)(3) states that nothing in section 239(b) may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 240 if the 10 days has elapsed and the alien has failed to secure counsel.

- c. All of the above would lead to the conclusion that the alien has only 10 days in which to acquire counsel. However 8 C.F.R. § 1240.10(a)(1) provides that an IJ shall advise a respondent of the right to be represented and to determine if the alien desires representation. If the alien desires representation, the hearing is to be continued to allow him to seek counsel. *See Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998).
  - d. Failure to advise an alien of the availability of free legal service providers, or failure to provide an alien with a copy of the list of pro bono legal service providers, may constitute a due process violation for which no showing of prejudice is required. *See Leslie v. Att’y Gen. of the United States*, 611 F.3d 171 (3d Cir. 2010); *Picca v. Mukasey*, 512 F.3d 75 (2d Cir. 2008).
4. Prompt initiation of removal – Section 239(d)(1) provides that in the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction. However, § 239(d)(2) provides that § 239(d)(1) shall not be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the U.S. or its agencies or officers or any other person.
  5. Termination of parole – The Board held that exclusion proceedings could not be instituted against a paroled alien who is entitled by regulation to written notice of the termination of parole until the alien receives such written notice. *Matter of O*, 16 I&N Dec. 344 (BIA 1977). No definition of the term “parole” is contained in the Act, the regulations, or any judicial or administrative decision. *Id.* At the time this decision was made, it appears that the regulations provided for written notice to all paroled aliens. The current regulations provide for termination of parole as follows:
    - a. Automatic termination under 8 C.F.R. § 212.5(e)(1)(i) & (ii). Parole is automatically terminated without written notice:
      - (1) Upon the paroled alien’s departure from the U.S., or
      - (2) At the expiration of the time for which parole was authorized.
    - b. Termination on notice under 8 C.F.R. § 212.5(e)(2) – In all cases not covered above, parole must be terminated upon written notice to the alien:
      - (1) Upon accomplishment of the purpose for which parole was authorized has been accomplished (apparently upon the happening of an event rather than upon the expiration of a period of time), or
      - (2) When the DD or Chief Patrol Agent in charge of the area where the alien is located determines that neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the U.S.

- (3) However, 8 C.F.R. § 212.5(e)(2)(i) provides that when a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified.
- (4) 8 C.F.R. § 212.5(e)(2)(ii) also provides that an alien granted parole into the United States after enactment of the Immigration Reform and Control Act of 1986 (“IRCA”) for other than the specific purpose of applying for adjustment of status under § 245A shall not be permitted to avail himself of the privilege of adjustment thereunder. Failure to abide by this provision through making such an application will subject the alien to termination of parole status and institutions of proceedings under §§ 235 and 236 (should read 239 and 240) without the written notice of termination required by 8 C.F.R. § 212.5(e)(2)(i).

## **B. Service of the NTA**

1. Section 239(a)(1) provides that in removal proceedings under § 240, written notice (the NTA) shall be given in person to the alien or, if personal service is not practicable, through service by mail to the alien or the alien’s counsel of record.
2. Persons confined – 8 C.F.R. § 103.5a(c)(2)(i) provides that if a person is confined in a penal or mental institution or hospital and is competent to understand the nature of the proceedings initiated against him, service shall be made both on him and the person in charge of the institution or hospital. If the confined person is not competent to understand, service shall be made only on the person in charge of the institution or hospital and such service will be deemed service on the confined person.
3. Minors and anyone suffering from [mental incompetency](#). 8 C.F.R. § 103.5a(c)(2)(ii) provides that in case of mental incompetency, whether or not confined in an institution, and in the case of a minor under 14 years of age, service shall be made upon the person with whom the incompetent or minor resides.
  - a. If an individual is incompetent, service should be made on three individuals:
    - (1) a person with whom the respondent resides, who, when the respondent is detained in a penal or mental institution, will be someone in a position of demonstrated authority in the institution or his or her delegate and, when the respondent is not detained, will be a responsible party in the household, if available;
    - (2) whenever applicable or possible, a relative, guardian, or person similarly close to the respondent;

- (3) in most cases, the respondent. *Matter of E-S-I*, 26 I&N Dec. 136 (BIA 2013).
- b. The Board has reaffirmed that service on an adult is only required when the minor is under 14 years of age. *Matter of Cubor-Cruz*, 25 I&N Dec. 470 (BIA 2011).
- c. When a minor is detained by the Service, his residence is the particular setting in which he is detained because that setting is the alien's actual dwelling place. *Matter of Amaya*, 21 I&N Dec. 583 (BIA 1996). Therefore, service of an OSC was held to be properly made on the director of the facility in which the minor is detained. *Id.*
- d. A minor respondent, who could not be expected to attend immigration proceedings on her own, was properly notified of her hearing, through proper mailing of a Notice to Appear (Form I-862) to the last address provided by her parent, with whom she was residing. *Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002). Although the headnote states that the NTA was served by mail, the decision indicates it was personally served and the notice of the hearing was served by mail.
- e. The regulations governing service of a NTA on a minor respondent do not explicitly require service on the parent or parents in all circumstances. *Matter of Mejia-Andino*, 23 I&N Dec. 533, 536 (BIA 2002). If a minor respondent's parents are not present in the U.S., service on an uncle or other near relative accompanying the child may suffice. *Id.* However, when it appears that the minor child will be residing with her parents in the U.S., the regulation requires service on the parents, whenever possible, in addition to service that may be made on an accompanying adult or more distant relative. *Id.* Therefore, removal proceedings against a minor under 14 years of age were properly terminated because service of the NTA failed to meet the requirements of 8 C.F.R. § 103.5a(c)(2)(ii), as it was served only on a person identified as the respondent's uncle, and no effort was made to serve the notice on the respondent's parents, who apparently live in the U.S. *Id.*
- (1) Note: The Ninth Circuit has held that when the Government releases a minor alien into an adult's custody pursuant to its juvenile release and notice regulations, it must serve notice of the alien's rights and responsibilities upon that adult if the alien is under 18. *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004); *but see Matter of Cubor-Cruz*, 25 I&N Dec. 470 (BIA 2011). Other Circuits have disagreed with or called into doubt this interpretation. *Llanos-Fernandez v. Mukasey*, 35 F.3d 79 (2d Cir. 2008); *Lopez-Dupon v. Holder*, 609 F.3d 642 (5th Cir. 2010); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897 (8th Cir. 2008)
- (2) Note: The Second Circuit has held that when DHS fails to properly serve the NTA pursuant to 8 C.F.R. § 103.5a(c)(2)(ii), that failure

implicates a minor's fundamental rights only where the minor was prevented from receiving notice of the NTA and a meaningful opportunity to participate in the minor's removal proceedings. *Nolasco v. Holder*, 637 F.3d 159 (2d Cir. 2011).

4. Section 239(c) provides that service by mail of the NTA shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with § 239(a)(1)(F).
5. The violation of former 8 C.F.R. § 242.1(c), with respect to a requirement that the contents of an Order to Show Cause ("OSC") be explained to an alien under certain circumstances when the OSC is served, did not necessarily result in prejudice to the alien. The application of this provision is addressed in *Matter of Hernandez*, 21 I&N Dec. 224 (BIA 1996).

### **C. Cancellation of the NTA, motions to dismiss and remand, and termination by the IJ**

#### **1. Cancellation of the NTA**

- a. 8 C.F.R. § 239.2(a) provides that any officer authorized by 8 C.F.R. § 239.1(a) to issue a NTA may cancel such notice prior to jurisdiction vesting with the IJ provided the officer is satisfied that:
  - (1) The respondent is a national of the U.S.;
  - (2) The respondent is not deportable or inadmissible under immigration laws;
  - (3) The respondent is deceased;
  - (4) The respondent is not in the U.S.;
  - (5) The NTA was issued for the respondent's failure to file a timely petition as required by § 216(c) of the Act, but the failure to file was excused in accordance with § 216(d)(2)(B);
  - (6) The NTA was improvidently issued; or
  - (7) Circumstances of the case have changed after the NTA was issued to such an extent that continuation is no longer in the best interest of the government.
- b. A decision by DHS to institute removal or other proceedings, or to cancel a NTA or other charging document before jurisdiction vests with the IJ, involves the exercise of prosecutorial discretion and is not a decision that the IJ or the Board may review. *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998).

2. Motion to dismiss – 8 C.F.R. § 1239.2(c) provides that after commencement of proceedings under 8 C.F.R. § 1003.14, the Service may move for dismissal of the matter on the grounds set forth above. Dismissal of the matter shall be without prejudice to the alien or the Service.
  - a. Once the charging document is filed with the Immigration Court and jurisdiction is vested in the IJ, the Service may move to dismiss the proceedings, but it may not simply cancel the charging document. *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998).
  - b. The IJ is not required to terminate proceedings upon the Service’s invocation of prosecutorial discretion but rather must adjudicate the motion on the merits. *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998); *see also Matter of Avetisyan*, 25 I&N Dec. 688, 695 n.6 (BIA 2012) (noting when termination of proceedings typically occurs).
3. Motion for remand – 8 C.F.R. § 1239.2(d) provides that after commencement of the hearing, the Service may move for remand of the matter to district jurisdiction on the ground that the foreign relations of the U.S. are involved and require further consideration. Remand of the matter shall be without prejudice to the alien or the Service.
4. Termination by IJ – 8 C.F.R. § 1239.2(f) provides that an IJ may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.
  - a. The Board held that: (1) because the Board and the IJs lack jurisdiction to adjudicate applications for naturalization, removal proceedings may only be terminated pursuant to 8 C.F.R. § 1239.2(f) where DHS has presented an affirmative communication attesting to an alien’s prima facie eligibility for naturalization; and (2) an adjudication by DHS on the merits of an alien’s naturalization application while removal proceedings are pending is not an affirmative communication of the alien’s prima facie eligibility for naturalization that would permit termination of proceedings under 8 C.F.R. § 1239.2(f). *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007); *but see Perriello v. Napolitano*, 579 F.3d 135 (2d Cir. 2009).

#### **D. Hearing in removal proceedings**

1. Section 240(a)(1) provides that an IJ shall conduct proceedings for deciding the inadmissibility or deportability of an alien.



2. Charges – Section 240(a)(2) provides that an alien placed in removal proceedings may be charged with any applicable ground of inadmissibility under § 212(a) or any applicable ground of deportability under § 237(a).
3. Exclusive procedures – Section 240(a)(3) provides that, unless otherwise specified in the Act, removal proceedings under § 240 shall be the sole and exclusive procedure for determining whether an alien may be admitted to the U.S. or, if the alien has been so admitted, removed from the U.S. However, nothing in § 240(a)(3) shall affect proceedings conducted pursuant to § 238 (expedited removal).
4. Authority of IJ – Section 240(b)(1) provides that the IJ shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The IJ may issue subpoenas for the attendance of witnesses and presentation of evidence. The IJ shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the IJ's proper exercise of authority.
  - a. For information regarding subpoenas, *see* 8 C.F.R. § 1287.4.
  - b. Regulations regarding contempt power have yet to be enacted.
  - c. The IJ has authority to set filing deadlines for applications and related documents and an application or document that is not filed within the time established by the IJ may be deemed waived. 8 C.F.R. § 1003.31(c). Where an application is timely filed but related documents are not timely filed, the proper course for the IJ is to deem the alien's opportunity to file these documents waived and to determine what effect the failure to present them had on his ability to meet his burden of establishing that he or she is eligible for the relief sought. *Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010). The regulations do not permit an IJ to deem a timely filed application abandoned for failure to file supplemental documents within a specified time. *Id.*
5. Form of proceeding – Section 240(b)(2)(A) provides that the proceeding may take place in person, where agreed upon by the parties in the absence of the alien, through video conference, or through telephone conference. However, § 240(b)(2)(B) provides that an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.
6. Presence of alien – Section 240(b)(3) provides that if it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien. *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).
7. Competency–
  - a. The Board has established a nation-wide standard for addressing the competency of individuals in proceedings. *Matter of J-S-S-*, 26 I&N Dec.



679 (BIA 2015). Where there are “indicia of incompetency,” the Immigration Judge should collect evidence and determine whether the alien is competent based on the preponderance of the evidence. The proper standard for determining competency is set forth in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), and is based on whether:

- (1) he or she has a rational and factual understanding of the nature and object of the proceedings;
    - (2) can consult with the attorney or representative if there is one; and
    - (3) has a reasonable opportunity to examine and present evidence and cross-examine witnesses.
  - b. In other words, the alien must be capable (with assistance or other reasonable accommodations) to perform the acts necessary for the hearing to take place in such a way that the alien’s due process rights are preserved. If an alien is incompetent, removal proceedings can continue so long as adequate safeguards are in place to ensure the protection of the alien’s rights and privileges under the Act. *Matter of J-S-S-*, 26 I&N Dec. at 681. The specific safeguards necessary are determined on a case-by-case basis.
  - c. This policy is consistent with the District Court’s orders regarding class members described in *Franco-Gonzalez v. Holder*, No. CV 10-02211-DMG (DTBx), 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013). These are immigration detainees in Arizona, California and Washington, who lack representation and who are determined by a qualified mental health provider to suffer from one of several incompetencies or diagnoses.
8. Alien’s rights in proceeding. Section 240(b)(4) provides that in proceedings under § 240, under regulations of the Attorney General, the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings, the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien’s admission to the U.S. or to an application by the alien for discretionary relief.
  9. Record. Section 240(b)(4)(C) provides that a complete record shall be kept of all testimony and evidence produced at the hearing.
  10. Pleading by respondent. 8 C.F.R. § 1240.10(c) provides that the IJ shall require the respondent to plead to the NTA by stating whether he admits or denies the factual allegations and his removability under the charges contained in the NTA.
    - a. If the respondent admits the factual allegations and his removability under the charges and the IJ is satisfied that no issue of law or fact remain, the IJ may

determine that removability as charged has been established by the admissions of the respondent. 8 C.F.R. § 1240.10(c).

- b. The IJ shall not accept an admission of removability from an unrepresented respondent who is [incompetent](#) or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When the IJ does not accept an admission of removability, he shall direct a hearing on the issues. 8 C.F.R. § 1240.10(c).

- (1) Minors. Although an IJ could not accept an admission to a charge of deportability from an unaccompanied and unrepresented minor, the Board held that an IJ is not precluded from accepting a minor's admissions of factual allegations, which may properly form the sole basis of a finding that such a minor is deportable. *Matter of Amaya*, 21 I&N Dec. 583 (BIA 1996). However, when an unaccompanied and unrepresented minor admits to the factual allegations made against him, the IJ must take into consideration the minor's age and pro se status in determining whether the minor's testimony is reliable and whether he understands the facts that are admitted so that his deportability is established by clear, convincing, and unequivocal evidence. *Id.*

- (2) The Immigration and Naturalization Service met its burden of establishing a minor respondent's deportability for entry without inspection by clear, unequivocal, and convincing evidence, where (1) a Record of Deportable Alien (Form I-213) was submitted, documenting the respondent's identity and alienage; (2) the respondent, who failed without good cause to appear at his deportation hearing, made no challenge to the admissibility of the Form I-213; and (3) there were no grounds for a finding that the admission of the Form I-213 would be fundamentally unfair. *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999).

## 11. Country of removal

- a. In general. The term "country" means a foreign place with "territory" in a geographical sense and a "government" in the sense of a political organization exercising power over people subject to its jurisdiction. *Matter of Linnas*, 19 I&N Dec. 302 (BIA 1985). Therefore, an alien may not designate an office of his government that is within the U.S. *Id.*

- b. [Arriving aliens](#)

- (1) Section 241(b)(1)(A) of the Act provides that an alien who arrives at the U.S. and against whom removal proceedings were initiated at the time of arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the U.S.

- (2) Section 241(b)(1)(B) provides that if the alien boarded the vessel or aircraft in a foreign territory contiguous to the U.S., an island adjacent to the U.S., or an island adjacent to a foreign territory contiguous to the U.S., and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.
- (3) Section 241(b)(1)(C) provides that if the government of the country designated in § 241(b)(1)(A) or (B) is unwilling to accept the alien into its territory, removal shall be to the following countries, as directed by the Attorney General:
  - (a) The country of which the alien is a citizen, subject, or national;
  - (b) The country in which the alien was born;
  - (c) The country in which the alien has a residence; or
  - (d) A country with a government that will accept the alien if removal to each country above is impracticable, inadvisable, or impossible.

c. All other aliens

- (1) Section 241(b)(2)(A) provides that an alien who has been ordered removed and who is not an arriving alien (§ 241(b)(1)) may designate one country to which he wants to be removed and the Attorney General shall remove the alien to the country designated.
- (2) 8 C.F.R. § 1240.10(f) provides that the IJ shall notify the alien that if he is finally ordered removed, the country of removal will in the first instance be directed pursuant to § 241(b) to the country designated by the alien, unless § 241(b)(2)(C) applies, and shall afford him the opportunity then and there to make such designation.
- (3) Section 241(b)(2)(B) of the Act provides that an alien may designate a foreign territory contiguous to the U.S., an adjacent island, or an island adjacent to a foreign territory contiguous to the U.S. only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.
- (4) Section 241(b)(2)(E) permits the Attorney General to remove an alien to any of the following countries:

- (a) The country from which the alien was admitted to the United States;
- (b) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States;
- (c) A country in which the alien resided before the alien entered the country from which the alien entered the United States;
- (d) The country in which the alien was born;
- (e) The country that had sovereignty over the alien's birthplace when the alien was born;
- (f) The country in which the alien's birthplace is located when the alien is ordered removed; or
- (g) If impracticable, inadvisable or impossible to remove the alien to these countries, another country whose government will accept the alien into that country.
- (h) Note: The Supreme Court has held that § 241(b)(2)(E) permits an alien to be removed to a country without advance consent of that country's government, except as provided in § 241(b)(2)(E)(vii). *Jama v. ICE*, 543 U.S. 335 (2005).

d. Foreign contiguous territory and adjacent islands. Foreign contiguous territory is, of course, Canada and Mexico. The term "adjacent islands" (defined in § 101(b)(5)) includes:

- (1) Saint Pierre
- (2) Miquelon
- (3) Cuba
- (4) the Dominican Republic
- (5) Haiti
- (6) Bermuda
- (7) the Bahamas
- (8) Barbados
- (9) Jamaica

- (10) the Windward & Leeward Islands
- (11) Trinidad
- (12) Martinique
- (13) other British, French, & Netherlands territory in or bordering on the Caribbean Sea.

## 12. Motion to Continue

- a. Pending I-130 visa petition. When determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending family-based visa petition, an Immigration Judge should consider five factors: “(1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment [of status] merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.” *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). Where DHS does not oppose the continuance, “the proceedings ordinarily should be continued by the Immigration Judge in the absence of unusual, clearly identified, and supported reasons for not doing so.” *Id.* at 791. In holding that the decision to grant a continuance was a discretionary one, the Board noted that “[f]actors relevant to determining whether a favorable exercise of discretion is warranted include, but are not limited to, the existence of family ties in the United States; the length of the respondent’s residence in the United States; the hardship of traveling abroad; and the respondent’s immigration history, including any preconceived intent to immigrate at the time of entering as a nonimmigrant.” *Id.* at 793.
- b. Pending I-140 visa petition or labor certification. In *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009) the Board articulated the factors an IJ should consider in determining whether good cause exists to continue removal proceedings to allow adjudication of an employment-based visa petition or labor certification. In determining whether good cause exists to continue proceedings, the IJ should determine the alien’s place in the adjustment of status process and consider and balance the factors identified in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (see above) and any other relevant considerations. *Rajah*, 25 I&N Dec. at 130. An alien’s unopposed motion to continue ongoing removal proceedings to await adjudication of a pending employment-based visa petition should generally be granted if approval of the visa petition would render him prima facie eligible for adjustment of status. *Id.* However, the pendency of a labor certification is generally not sufficient to warrant a grant of a continuance. *Id.* at 137.

- c. Pending U-visa application. An Immigration Judge should consider (1) the response of the Department of Homeland Security to the alien's motion to continue; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors. *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012).
13. Decision. Section 240(c)(1)(A) provides that at the conclusion of the proceeding the IJ shall decide whether an alien is removable from the U.S. The IJ's determination shall be based only on the evidence produced at the hearing. Section 240(c)(1)(B) provides that if a medical officer or civil surgeon or board of medical officers has certified under § 232(b) that an alien has a disease, illness, or addiction which would make the alien inadmissible under § 212(a)(1), the IJ's decision shall be based solely upon such certification.
- a. A summary decision pursuant to 8 C.F.R. § 1240.12(b) may properly be issued by an IJ in removal proceedings in lieu of an oral or written decision only when the respondent has expressly admitted to both the factual allegations and the charges of removability; and, either the respondent's ineligibility for any form of relief is clearly established on the pleadings; or, after appropriate advisement of and opportunity to apply for any form of relief for which it appears from the pleadings that he or she may be eligible, the respondent chooses not to apply for relief or applies only for, and is granted, the relief of voluntary departure. *Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999).
  - b. A remand of the record for issuance of a full and separate decision apprising the parties of the legal basis of the IJ's decision is not required under *Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999), where the respondent had notice of the factual and legal basis of the decision and had an adequate opportunity to contest them on appeal, the uncontested facts established at the hearing are dispositive of the issues raised on appeal, and the hearing was fundamentally fair. *Matter of Rodriguez-Carillo*, 22 I&N Dec. 1031 (BIA 1999).
  - c. Section 240(c)(5) provides that if the IJ decides that the alien is removable and orders the alien to be removed, the IJ shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.
  - d. The Board has held that, if an IJ includes an attachment to a decision, "particular care must be taken to insure that a complete record is preserved." *Matter of Kelly*, 24 I&N Dec. 446, 447 (BIA 2008). In particular, (1) the attachment should include the respondent's name and A-number, and the decision date; (2) the attachment should be appended to the written memorandum summarizing the oral decision (which should reflect that there is an attachment); (3) the IJ should state on the record at the time of the oral decision that he or she will append an attachment to the decision; (4) a copy of the attachment should be provided to the parties; and (5) the parties should be given the opportunity to make any objections to the use of an attachment. *Id.*

Finally, the Board noted that “it is the [IJ]’s] responsibility to insure that the decision in the record is complete.” *Id.*

#### **E. Failure to appear - in absentia hearings**

1. INTRODUCTION - The Due Process Clause protects aliens in removal proceedings and includes the right to a full and fair hearing. Notice of proceedings is an important component of any legal process. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002) (quoting *Landon v. Plasencia*, 459 U.S. 21 (1982)).
  - a. Personal service clearly is adequate notice. *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002).
2. History lesson - Prior to 1992, the Act provided only that “the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held.” Former INA § 242(b)(1).
  - a. The Act was amended in 1990 by adding section 242B, governing deportation proceedings. Effective as to any Order to Show Cause served after June 13, 1992, § 242B stated that with regard to both an Order to Show Cause and a notice of the time and place of proceedings, “written notice shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien’s counsel of record, if any).” Therefore, at that time, certified mail was made the required method of notification if personal service was not practicable (and it remains so for deportation proceedings). See 8 C.F.R. § 1003.13; *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995) (citing *Matter of Huete*, 20 I&N Dec. 250 (BIA 1991), *superseded by statute as stated in Nibagwire v. Gonzales*, 450 F.3d 153 (4th Cir. 2006), for a similar requirement prior to the enactment of section 242B(a)(1)).
3. Present Law - The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) changed the procedures with regard to notification of proceedings. In removal proceedings, the statute now provides that “written notice . . . shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any).” Section 239(c) of the Act provides that service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with § 239(a)(1)(F). No particular method of mailing is specified. Although the Act no longer requires that notice be sent by certified mail, service by certified mail is not expressly disapproved.



- a. Section 240(b)(5)(A) and 8 C.F.R. § 1003.26(c) provide that if an alien does not attend a proceeding under § 240, after written notice required under § 239(a)(1) or (2) has been provided to the alien or alien's counsel of record, the alien shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable. The written notice by the Attorney General shall be considered sufficient if provided at the most recent address provided under § 239(a)(1)(F). Section 240(b)(5)(B) provides that no written notice shall be required under § 240(b)(5)(A) if the alien has failed to provide the address required under § 239(a)(1)(F).
- (1) If the alien did not receive (or cannot be charged with receiving) a Notice to Appear informing him or her of the consequences of failing to provide a current address under § 239(a)(1)(F), then the alien should not be held responsible for failing to provide the Immigration Court with his or her most recent address. *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001).
- (2) In *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002), the Board distinguished *Matter of G-Y-R-* as follows: “Unlike the present case, *Matter of G-Y-R-* involved a situation where there was a dispute over whether the notice had been mailed to the correct address. *Matter of G-Y-R-*, however, is instructive for making the point that the alien need not personally receive, read, and understand the NTA for the notice requirements to be satisfied. As we noted in *Matter of G-Y-R-*, ‘An alien can, in certain circumstances, be properly charged with receiving notice, even though he or she did not personally see the mailed document. If, for example, the Notice to Appear reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper notice will have been effected.’ The case before us is similar to *Matter of G-Y-R-* in that the respondent was served by certified mail at an address obtained from an asylum application. Importantly, however, there is no dispute here regarding the correct address. The respondent had provided the address only a few weeks before the hearing, and he admits that he was living at that address when the Notice to Appear was mailed. Unlike our decision in *Matter of G-Y-R-*, the issue in the present case is whether the respondent can be charged with receiving the Notice to Appear.” 23 I&N Dec. at 545 (emphasis in original).
- b. In *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008), the Ninth Circuit held that an alien “who arrives late for his immigration hearing, but while the IJ is still in the courtroom, has not failed to appear for that hearing.” The petitioner, who had been ordered removed in absentia, was scheduled for a 9:00 hearing but arrived at 11:00, at which time the IJ was “still on the bench.”



- c. In *Hamazaspyan v. Holder*, 590 F.3d 744 (9th Cir. 2009), the Ninth Circuit held that, under INA section 239, it is insufficient to serve a hearing notice on an alien, but not the alien's counsel of record. The court further held that an in absentia order of removal must be rescinded if the government sent notice of the time and place of the removal hearing by mail to an address provided by the alien but, (1) there is not proof the alien received actual notice; (2) the alien proved he is represented by counsel who filed a notice of appearance as counsel of record with the immigration court before such notice was sent; and (3) the government did not prove that it sent notice to the alien's counsel of record.
- d. The statute only generally provides for the use of "service by mail." Although the Board interpreted the statute to allow service by regular mail, it did not read the regulation at 8 C.F.R. § 3.13 (now 8 C.F.R. § 1003.13) as conferring on an alien a right to require the use of regular mail instead of certified mail. The regulation provides for the use of regular mail as a convenience to the Service, not as a mandate to use regular mail instead of certified mail. *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002).
- e. Presumption of Delivery.
  - (1) As a general matter, when an NTA or hearing notice is properly addressed and sent by regular mail according to normal office procedures, there is a presumption of delivery. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008). The law ordinarily recognizes a presumption that "[a] letter properly addressed, stamped and mailed is presumed to have been duly delivered to the addressee." *Federal Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134, 1137 n.6 (4th Cir. 1984) (quoting C. McCormick, *McCormick's Handbook of the Law of Evidence* § 343 (1972)).
  - (2) When the mail was sent via certified mail, the presumption is especially strong and clear and convincing evidence is required to overcome the presumption. *Federal Deposit Ins. Corp. v. Schaffer*, *supra*, at 1137 n.6.
  - (3) An Immigration Judge must consider "all relevant evidence" in determining whether a presumption of delivery has been overcome. In *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008), the Board held that the respondent overcame the presumption of delivery of a hearing notice that was sent by regular mail where he submitted affidavits indicating that he did not receive the notice, had previously filed an asylum application and appeared for his first removal hearing, and exercised due diligence in promptly obtaining counsel and requesting reopening of the proceedings. *Id.*; see also *Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008).

- (4) The Second, Third, Eighth, and Ninth Circuits have held that where a respondent actually initiates a proceeding to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing, a sworn affidavit from the respondent that neither she nor a responsible party residing at her address received the notice should ordinarily be sufficient to rebut the presumption of delivery and entitle the respondent to an evidentiary hearing to consider the veracity of her allegations. *Lopes v. Mukasey*, 517 F.3d 156 (2d Cir. 2008); *Santana Gonzalez v. Att’y Gen.*, 506 F.3d 274 (3d Cir. 2007); *Ghounem v. Ashcroft*, 378 F.3d 740 (8th Cir. 2004); *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002). The Ninth Circuit went further in *Sembiring v. Gonzales*, 499 F.3d 981, 989 (9th Cir. 2007), holding that “a sworn affidavit was not required to establish that [the petitioner] did not receive notice,” given that “[t]he test for whether an alien has produced sufficient evidence to overcome the presumption of effective service by regular mail is practical and commonsensical rather than rigidly formulaic.” Note that in the Ninth Circuit, the contents of an alien’s affidavit accompanying a motion to reopen must be accepted as true “unless inherently unbelievable.” *Celis-Castellano v. Ashcroft*, 298 F.3d 888 (9th Cir. 2002).
- f. A minor respondent, who could not be expected to attend immigration proceedings on her own, was properly notified of her hearing, through proper mailing of a Notice to Appear (Form I-862) to the last address provided by her parent, with whom she was residing. *Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002). Although the headnote states that the NTA was served by mail, the decision indicates it was personally served and the notice of the hearing was served by mail. The Board also stated, “we believe it is implicit in the statute and regulations dealing with notice that an adult relative who receives notice on behalf of a minor alien bears the responsibility to assure that the minor appears for the hearing, as required.” *Id.* at 528.
4. Rescission of a removal order rendered in absentia
- a. An in absentia order of removal may be rescinded (1) at any time upon a showing of lack of notice or that the alien was in Federal or State custody, or (2) within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances. INA § 240(b)(5)(C)(i). See [motions to reopen](#).
5. Aliens in contiguous territory. Section 240(b)(5)(E) provide that the notice and in absentia provisions of § 240 shall apply to all aliens placed in proceedings under § 240, including any alien who remains in a contiguous foreign territory pursuant to § 235(b)(2)(C). This provision appears to change the conclusion reached in *Matter of Sanchez*, 21 I&N Dec. 444 (BIA 1996).

6. Limitation on discretionary relief for failure to appear. Section 240(b)(7) provides that any alien against whom a final order of removal is entered in absentia and who, at the time of the notice described in § 239(a)(1) or (2) was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences of failing, other than because of exceptional circumstances, to attend a proceeding under § 240, shall not be eligible for relief under §§ 240A, 240B, 245, 248, or 249 for a period of 10 years after the date of the entry of the final order of removal.

## **F. Stipulated removal**

1. The Attorney General shall provide by regulation for the entry by an IJ of an order of removal stipulated to by the alien (or the alien's representative) and the service. INA § 240(d). A stipulated order shall constitute a conclusive determination of the alien's removability from the U.S.

## **G. Methods of removal not involving an IJ**

1. Expedited removal of aliens convicted of aggravated felonies. Section 238(b) of the Act provides for the removal of aliens who are not LPRs and who have been convicted of aggravated felonies.
  - a. The procedure for such removal is set forth in 8 C.F.R. § 1238.1.
2. Expedited removal of other aliens. 8 C.F.R. § 1235.3(b)(1) provides that the expedited removal procedure shall apply to the following classes of aliens:
  - a. Arriving aliens inadmissible under section 212(a)(6)(C) and section 212(a)(7) except for citizens of Cuba arriving at a U.S. port-of-entry by aircraft.
  - b. Subject to designation by the Commissioner, aliens arriving, attempting to enter, or who have entered the U.S. without being admitted or paroled by an immigration officer who have not established to the satisfaction of the immigration officer that they have been physically present in the U.S. for 2 years immediately prior to the determination of inadmissibility.
    - (1) On November 13, 2002, the Commissioner designated all aliens who arrive in the U.S. on or after November 13, 2002 by sea who are not admitted or paroled and who have not been physically present in the U.S. for 2 years immediately prior to the determination of inadmissibility by an immigration officer. The Commissioner's designation does not apply to aliens who arrive at U.S. ports-of-entry, alien crewmen or stowaways, and Cuban citizens or nationals who arrive by sea.
3. Reinstatement of removal orders against aliens illegally reentering. Section 241(a)(5) of the Act provides that if the Attorney General finds that an alien has reentered the U.S. illegally after having been removed or having departed

voluntarily under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible for and may not apply for any relief under the Act, and the alien shall be removed under the prior order at any time after reentry.

- a. The procedure for reinstatement of removal orders and the exception for withholding of removal are discussed in 8 C.F.R. § 1241.8.
  - b. Immigration judges and the Board lack jurisdiction to review a decision of the Service to reinstate a prior order of removal pursuant to § 241(a)(5). *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998).
  - c. The Supreme Court held that § 241(a)(5) applies to aliens who reentered the United States before the effective date of IIRIRA and does not retroactively affect any right of, or impose any burden, on such aliens. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).
  - d. An IJ has no authority to reinstate a prior order of deportation or removal pursuant to § 241(a)(5), and an alien subject to reinstatement of an order under § 241(a)(5) has no right to a hearing before an IJ. *Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007). The IJ may properly terminate proceedings as improvidently begun where the respondent is subject to reinstatement of a prior order. *Id.*
4. Judicial removal. Section 238(c) provides that a U.S. District Judge shall have jurisdiction to enter a judicial order of removal at the time of sentencing an alien who is deportable, if such an order has been requested by the U.S. Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.
    - a. The procedure for judicial removal is set forth in § 238(c)(2).

## **VII. Criminal Convictions**

### **A. Definitions**

1. Conviction
  - a. Generally. Section 322 of the IIRIRA added § 101(a)(48)(A) to the Act:
    - (1) “The term ‘conviction’ means, with respect to an alien, a formal judgment of guilt of the alien entered by the court, or if adjudication of guilt has been withheld, where
    - (2) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

- (3) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.”
- b. Section 322(c) of IIRIRA, which added § 101(a)(48)(A), specifically states that its amendments “shall apply to convictions and sentences entered before, on, or after the date of enactment of this Act.” Therefore the date when a conviction took place is of no consequence. *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998); *but see also Siddiqui v. Holder*, 670 F.3d 736 (7th Cir. 2012) (holding that the definition was impermissibly retroactive for an alien whose legalization application was unreasonably delayed in the 1980s).
- c. The imposition of costs and surcharges in the criminal sentencing context constitutes a form of “punishment” or “penalty” for purposes of establishing that an alien has suffered a “conviction” within the meaning of § 101(a)(48)(A). *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008); *see also Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010).
- d. A judgement of guilt entered by a general court-martial of the U.S. Armed Forces qualifies as a “conviction” within the meaning of § 101(a)(48)(A). *Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008).
- e. State convictions of a minor who was tried as an adult. The First, Second, Ninth and Eleventh Circuits have held that an alien’s conviction as an adult in state court is a conviction for immigration purposes, even though the alien was a minor at the time and would not have been eligible for transfer to a federal adult court under the Federal Juvenile Delinquency Act (“FJDA”) standards. *Vieira Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001); *Savchuck v. Mukasey*, 518 F.3d 119, 122 (2d Cir. 2008); *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 922-23 (9th Cir. 2007); *Singh v. Att’y Gen.*, 561 F.3d 1275, 1279 (11th Cir. 2009).
- f. Deferred Adjudication Statutes
  - (1) In *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011), the Fourth Circuit held that an alien’s prior deferred adjudication for possession of marijuana, under Virginia law applying to first offenders, did not qualify as “conviction,” within meaning of § 101(a)(48)(A), because the alien pled not guilty and the adjudication lacked sufficient finding of guilt.
- g. There is some dispute about whether a conviction with a pending direct appeal is “final” for immigration purposes.
  - (1) The Fifth, Seventh, and Ninth Circuits have held that a conviction with a pending direct appeal is “final” for immigration purposes. *Planes v. Holder*, 686 F.3d 1033 (9th Cir. 2012); *Montenegro v.*

*Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (though some have distinguished this case, as it concerned a collateral appeal); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); *see also Puello v. CIS*, 511 F.3d 324 (2d Cir. 2007) (not addressing direct appeals, but concluding that a conviction occurs when judgment is entered rather than when a plea of guilty is made).

- (2) The Third Circuit has held a direct appeal must have been exhausted or waived for the conviction to be final. *Orabi v. Att’y Gen. of the United States*, 738 F.3d 535 (3d Cir. 2014).
- (3) In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the U.S. Supreme Court held that the Sixth Amendment requires criminal defense counsel to advise a noncitizen client of the risk of deportation arising from a guilty plea. The fact that an alien may be pursuing post-conviction relief in the form of a collateral (for immigration purposes) attack on a conviction in state criminal court does not affect the conviction’s finality for federal immigration purposes. *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992). The conviction is final, unless and until it is overturned by the criminal court. *See Matter of Ponce de Leon*, 21 I&N Dec. 154 (A.G. 1997; BIA 1997, 1996); *see also Paredes v. Att’y Gen.*, 528 F.3d 196, 198 (3d Cir. 2009); *United States v. Garcia-Echaverria*, 374 F.3d 440, 445-46 (6th Cir. 2004); *Jimenez-Guzman v. Holder*, 642 F.3d 1294 (10th Cir. 2011) (finding IJ’s denial of motion to continue was “eminently rational”).
- (4) An alien who has waived or exhausted the right to a direct appeal of a conviction is subject to removal, and the potential for discretionary review on direct appeal will not prevent the conviction from being considered final for immigration purposes. *Matter of Polanco*, 20 I&N Dec. 894 (BIA 1994); *see also Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009).
- (5) While a conviction on direct appeal may not support a finding of deportability, it may still be considered in the exercise of discretion. *Matter of Gonzalez*, 16 I&N Dec. 134 (BIA 1977); *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967).
  - (a) Where an alien has been convicted following a jury trial of several crimes but the convictions are not final due to an appeal, an Immigration Judge can consider in the exercise of discretion: the fact that an alien has been arrested or convicted may constitute evidence that he has committed the crimes and the conduct underlying those convictions; the alien’s conduct in prison, including any disciplinary infractions; in absentia convictions; pending criminal charges, including police reports. *Matter of Thomas*, 21

I&N Dec. 20 (BIA 1995); *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988).

- (b) However, an arrest report without a subsequent conviction, particularly where prosecution was declined and the alien admitted no wrongdoing, may be entitled to only limited weight. *Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995).

## 2. Juvenile delinquency

- a. An act of juvenile delinquency is not a crime in the United States. Therefore, an adjudication of delinquency is not a crime within the meaning of the immigration laws. *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981); *Matter of C-M-*, 5 I&N Dec. 327 (BIA 1953).
- b. A juvenile delinquency proceeding results in the adjudication of a status rather than conviction for a crime. An adjudication of youthful offender status pursuant to Article 720 of the New York Criminal Procedure Law, which corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1994 & Supp. II 1996), does not constitute a judgment of conviction for a crime within the meaning of § 101(a)(48)(A). *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).
- c. Once a youthful offender determination has been made, that decision cannot be changed as a consequence of the offender's subsequent behavior. Therefore, the resentencing of a youthful offender in New York following a violation of probation does not convert the youthful offender adjudication into a judgment of conviction. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).
- d. Foreign convictions of juveniles. In order for a foreign conviction to serve as a basis for a finding of inadmissibility, the conviction must be for conduct which is deemed criminal by U.S. standards. *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978), *aff'd McNaughton v. INS*, 612 F.2d 457 (9th Cir. 1980).
  - (1) Conduct underlying a foreign conviction which constitutes an act of juvenile delinquency under U.S. standards (no matter how the case was treated by a foreign court) is not a crime for purposes of the Act. *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981).
  - (2) In order to determine whether a foreign conviction is to be treated as an adjudication of delinquency, the Board relies on the Federal Juvenile Delinquency Act (FJDC), 18 U.S.C. § 5031 *et seq.* *Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981); *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981).



### 3. Pardons

#### a. Pardons of crimes involving moral turpitude.

- (1) History lesson - Former section 241(b) which provided that an alien who has received a pardon is not deportable under former section 241(a)(4) was repealed by the Immigration Act of 1990. Former section 241(e) was redesignated as § 241(b). However, the Immigration Act of 1990 also enacted § 241(a)(2)(A)(iv) which provided that the provisions of § 241(a)(2)(A)(i) [relating to aliens convicted of a CIMT] shall not apply in the case of an alien who, after the conviction, has been granted a full and unconditional pardon by the President of the U.S. or by the Governor of any state.
  - (2) As added by IIRIRA, § 237(a)(2)(A)(v) of the Act now provides that clauses (i), (ii), (iii), and (iv) [of § 237(a)(2)(A)] shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the U.S. or by the Governor of any state. The clauses listed are as follows:
    - (a) Section 237(a)(2)(A)(i) - CIMT w/in 5 years of admission;
    - (b) Section 237(a)(2)(A)(ii) - 2 CIMTs not arising out of a single scheme;
    - (c) Section 237(a)(2)(A)(iii) - aggravated felony;
    - (d) Section 237(a)(2)(A)(iv) - high speed flight.
- b. A presidential or gubernatorial pardon waives only the grounds of removal specifically set forth in § 237(a)(2)(A)(v), and no implicit waivers may be read into the statute. Therefore, a respondent's pardon of a conviction for sexual battery of a minor did not waive his removability as an alien convicted of a crime of domestic violence or child abuse under § 237(a)(2)(E)(i), because that section is not specifically included in § 237(a)(2)(A)(v). *Matter of Suh*, 23 I&N Dec. 626 (BIA 2003).
- c. Only an executive pardon will prevent removability; a legislative pardon is no bar to removability. *Matter of R-*, 6 I&N Dec. 444 (BIA 1954).
- d. However, if a state has a constitutional provision which allows pardon authority to be exercised by a board or by a commission, such a pardon is considered an executive pardon. *Matter of Tajer*, 15 I&N Dec. 125 (BIA 1974), *Matter of D-*, 7 I&N Dec. 476 (BIA 1957).

- e. An executive pardon must be unconditional in order to prevent deportation. It may not be dependent upon a condition precedent or a condition subsequent. *Matter of C-*, 5 I&N Dec. 630 (BIA 1954).
- f. A foreign pardon (or amnesty, expungement, or extinction) is not effective to prevent deportation. *Matter of G-*, 5 I&N Dec. 129 (BIA 1953); *Matter of F-Y-G-*, 4 I&N Dec. 717 (BIA 1952).
- g. The availability of a pardon under state or federal law, or the existence or nonexistence of a qualifying pardoning authority, is not determinative of whether an offense constitutes a crime for immigration purposes. *Matter of Nolan*, 19 I&N Dec. 539 (BIA 1988).
- h. With respect to aggravated felony pardons:
  - (1) Aliens convicted of an aggravated felony who received notice of their deportation hearing before March 1, 1991 and were therefore deportable under former section 241(a)(4)(B) are deportable even if they are granted a pardon.
  - (2) Aliens convicted of an aggravated felony who received notice of their deportation hearing on or after March 1, 1991 and are deportable under current § 237(a)(2)(A)(iii) are not deportable if they have received a full and unconditional pardon from the President of the U.S. or the Governor of any state.

4. Expungements of criminal convictions.

- a. HISTORY: Prior to the enactment of § 101(a)(48)(A) of the Act, a conviction which was expunged would not support an order of deportation. *See e.g.*, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), *superseded by* INA § 101(a)(48)(A). However, an expungement of a conviction for a controlled substances offense would not eliminate the conviction for immigration purposes (unless the expungement was pursuant to the Federal Youth Offenders Act, or the first offender provisions of the Controlled Substances Act, or a state rehabilitative statute which was equivalent to the CSA's first offender provisions) because the manner in which a state deals with a person after his conviction is not controlling in a deportation proceeding. *Rehman v. INS*, 544 F.2d 71 (2d Cir. 1976), *superseded by statute as in* *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001); *Yanez-Popp v. INS*, 998 F.2d 231 (4th Cir. 1993); *Gonzalez de Lara v. INS*, 439 F.2d 1316 (5th Cir. 1971); *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975); *Will v. INS*, 447 F.2d 529 (7th Cir. 1971); *de la Cruz-Martinez v. INS*, 404 F.2d 1198 (9th Cir. 1968); *Matter of Werk*, 16 I&N Dec. 234 (BIA 1977); *Matter of Zingis*, 14 I&N Dec. 621 (BIA 1974).
- b. After passage of § 101(a)(48), the Board held that no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss,

cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a “conviction” as defined at § 101(a)(48)(A), the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

- c. All of the circuits are now in agreement with the Board’s decision in *Matter of Roldan*. However, the Ninth Circuit initially disagreed. In the Ninth Circuit, controlled substances convictions which took place between the publication of *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc), are subject to the rules in *Lujan-Armendariz*.
  - d. If a court vacates an alien’s conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev’d on other grounds*, 454 F.3d 525 (6th Cir. 2006), *amended and superseded*, 465 F.3d 263 (6th Cir. 2006).
  - e. In *Renteria-Gonzales v. INS*, 322 F.3d 804 (5th Cir. 2002), the Fifth Circuit held that a conviction vacated on *any* grounds remains a conviction under section 101(a)(48)(A). *See also Discipio v. Ashcroft*, 369 F.3d 472 (5th Cir. 2004). This holding contradicts the Board’s ruling in *Matter of Pickering*. However, as practical matter, the *Matter of Pickering* standard may still apply in the Fifth Circuit as the government has indicated that, in Fifth Circuit cases involving vacated convictions, it will seek to remand to the Board for a ruling under *Matter of Pickering*. *See Gaona-Romero v. Gonzales*, 497 F.3d 694 (5th Cir. 2007).
  - f. An alien seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. *Matter of Chavez*, 24 I&N Dec. 272 (BIA 2007).
  - g. A conviction vacated pursuant to § 2943.031 of the Ohio Revised Code for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).
5. Naturalized citizen at time of conviction.
- a. The Board has held that a denaturalized citizen who committed crimes while a lawful permanent resident and concealed them during the naturalization process is removable on the basis of the crimes, even though the alien was a naturalized citizen at the time of conviction. *Matter of Gonzalez-Munro*, 24 I&N Dec. 472 (BIA 2008).

## 6. Sentences

- a. Under INA § 101(a)(48)(B), “Any reference to a term of imprisonment of a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.” Thus, the relevant inquiry is the term to which the alien was sentenced by the trial court, regardless whether the imposition or execution of the sentence was suspended. *Matter of S-S-*, 21 I&N Dec. 900 (BIA 1997).
- b. However, some circuit courts have held that if an alien was sentenced only to a period of probation (as distinguished from a sentence to incarceration to be served on probation) that may not qualify as a sentence to incarceration. *United States v. Ayala-Gomez*, 255 F.3d 1314 (11th Cir. 2001); *United States v. Banda-Zamora*, 178 F.3d 728 (5th Cir. 1999); *see also United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000).
- c. Reduction in sentence. A trial court’s decision to modify or reduce an alien’s criminal sentence *nunc pro tunc* is entitled to full faith and credit by the IJ and the Board. Such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court’s reasons for effecting the modification or reduction. *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), *clarifying Matter of Song*, 23 I&N Dec. 173 (BIA 2001) and *distinguishing Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

## B. Categorical Approach

### 1. In General

- a. To determine whether a statute of conviction constitutes a removable offense, you must compare the elements of the general offense with the elements of the statute of conviction.
- b. If the elements in the respondent’s statute of conviction contain all the elements in the generic offense, then the statute of conviction is a categorical match. However, if the statute of conviction contains some elements “in the alternative,” some of which meet the generic definition and some which do not, then the statute is considered “divisible.” *See Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005); *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990). In that case, an adjudicator must apply a “modified categorical approach” to determine whether the respondent was convicted under a portion of the statute which meets the generic definition of the offense. *See also Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).
- c. If the elements in the respondent’s statute of conviction contain all the elements in the generic offense, then the statute of conviction is a categorical

match. However, if the statute of conviction contains some elements “in the alternative,” some of which meet the generic definition and some which do not, then the statute is considered “divisible.” *See Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005); *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990). In that case, an adjudicator must apply a “modified categorical approach” to determine whether the respondent was convicted under a portion of the statute which meets the generic definition of the offense. *See also Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

- d. If the statute is more broadly worded than the generic offense, or does not contain clear, alternate elements, the statute is “indivisible” and the conviction does not render the alien removable on that ground. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013).

## **Modified Categorical Approach**

### **1. Generally**

- a. The modified categorical approach is only applicable if the statute of conviction required that the adjudicator specifically find one of a set of alternative facts to support the conviction.
- b. An Immigration Judge may examine the record of conviction – including the charging document, plea agreement, or plea colloquy – to determine which of those specific elements form the basis of the respondent’s conviction. *Descamps v. United States*, 133 S. Ct. 2276 (2013). The record of conviction may include the contents of a police report only where they were specifically incorporated into the guilty plea or were admitted by the alien during the criminal proceedings. *Matter of Milian-Dubon*, 25 I&N Dec. 197 (BIA 2010); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996).

### **2. Jury Unanimity**

- a. The Attorney General has referred to herself the issue of whether under the modified categorical approach jury unanimity is required as part of the definition of an offense’s “elements.” *Matter of Chairez-Castrejon*, 26 I&N Dec. 686 (A.G. 2015). Therefore, at present, prior cases addressing this issue no longer have precedential effect.

### **3. Federally Available Exceptions and Defenses**

- a. In some cases a state criminal statute can, on its face, permit a conviction based on facts which would qualify for an exception or under federal law. For instance, some state criminal statutes regarding possession of firearms do not provide an exception for “antique” firearms—a statutory exception under federal law.
- b. Under these circumstances, an adjudicator must determine whether there is a “realistic probability” that such conduct would be prosecuted under the state

criminal statute. *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014). However, in circuits that expressly disallow that approach, Immigration Courts should apply the applicable circuit's law. *Matter of Chairez-Castrejon*, 26 I&N Dec. 478 (BIA 2015); *see also United States v. Trent*, 767 F.3d 1046 (10th Cir. 2014).

#### 4. Crimes Involving Moral Turpitude

- a. The application of the modified categorical approach to § 212(a)(2) of the Act, involving CIMT convictions, has been referred to the Board by the Attorney General. *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015).
- b. Moral turpitude refers generally to conduct that is inherently base, vile or depraved and contrary to the accepted rules of morality in general. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), *aff'd* 72 F.3d 571 (8th Cir. 1995). Moral turpitude does not depend on felony or misdemeanor distinction. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Tillinghast v. Edmead*, 31 F.2d 81 (1st Cir. 1929). Nor does the seriousness of a criminal offense or the severity of the sentence imposed determine whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992).
- c. Purely political offense exception. In order for an offense to qualify for the "purely political offense" exception to the ground of inadmissibility under INA § 212(a)(2)(A)(i)(I), based on an alien's conviction for a CIMT, the offense must be completely or totally "political." *Matter of O'Cealleagh*, 23 I&N Dec. 976 (BIA 2006).
- d. Petty offense exception.
  - (1) Section 212(a)(2)(A)(ii) provides that § 212(a)(2)(A)(i)(I) shall not apply to an alien who committed only one crime if:
    - (a) the crime was committed when the alien was under 18 and the crime was committed (and the alien released from any confinement) more than 5 years before both the visa application and the application for admission [INA § 212(a)(2)(A)(ii)(I)]; or
    - (b) the maximum penalty possible for the crime did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to 6 months or more (regardless of the extent to which the sentence was ultimately executed) [INA § 212(a)(2)(A)(ii)(II)].
  - (2) The maximum sentence possible for an offense, not the standard sentence under sentencing guidelines, determines the alien's eligibility for this exception. *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011).



- (3) The commission of more than one petty offense is not ineligible for the “petty offense” exception if only one crime is a CIMT. *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003).
- e. “Moral turpitude” does not have a clear definition. Individual decisions of the Board and the courts must be reviewed before reaching a conclusion.
  - (1) Some of the more esoteric definitions mentioned by the Board are: “anything done contrary to justice, honesty, principle, or good morals,” “an act of baseness, vileness, or depravity in the private social duties which man owes to his fellow man or to society,” “a crime involves moral turpitude when its nature is such that it manifests upon the part of its perpetrator personal depravity or baseness.” *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972); *Matter of Sloan*, 12 I&N Dec. 840 (BIA 1966; A.G. 1968); *Matter of E-*, 2 I&N Dec. 134 (BIA 1944).
  - (2) The Board has adopted the requirement of intent and holds that a test in determining what crimes involve moral turpitude is whether the act is accompanied by a “vicious motive” or “corrupt mind.” A crime must by its very nature and at its minimum, as defined by statute, involve an evil intent before a finding of moral turpitude would be justified. Malicious and mischievous intention, or what is equivalent to such intention, is the broad boundary between right and wrong and between crimes involving moral turpitude and those which do not. *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972); *Matter of P-*, 3 I&N Dec. 56 (BIA 1948); *Matter of E-*, 2 I&N Dec. 134 (BIA 1944).
  - (3) The Board has held that an “evil intent” (actually its equivalent) may be found in a statute based on “recklessness” rather than specific criminal intent, such as manslaughter defined as recklessly causing the death of another. The Board held that recklessness is evidenced when a person is “aware of and consciously disregards a substantial and unjustifiable risk” and the risk “constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994); *Matter of Wojtkow*, 18 I&N Dec. 111 (BIA 1981).
- f. General considerations
  - (1) Convictions for attempts, conspiracy, accessory, or aiding in commission of a crime: If the substantive offense underlying an alien’s conviction for an attempt, conspiracy, accessory, or aiding in the commission of an offense is a crime involving moral turpitude, the alien has been convicted of a crime involving moral turpitude. *Matter of Vo*, 25 I&N Dec. 426 (BIA 2011); *see also United States ex*



*rel. Meyer v. Day*, 54 F.2d 336 (2d Cir. 1931); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972); *Matter of E-*, 9 I&N Dec. 421 (BIA 1961); *Matter of F-*, 6 I&N Dec. 783 (BIA 1955).

- (2) Any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have known that the victim was a child. *Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011).

g. Specific offenses:

- (1) **Trafficking in counterfeit goods or services** in violation of 18 U.S.C. § 2320 is a CIMT. *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007).
- (2) **Sponsoring or exhibiting an animal in an animal fighting venture** in violation of 7 U.S.C. § 2156(a)(1) (2006) is categorically a crime involving moral turpitude. *Matter of Ortega-Lopez*, 26 I&N Dec. 99 (BIA 2013).
- (3) The Board has held **that willful failure to register as a sex offender** by an individual who has previously been apprised of the obligation to register, in violation of § 290(g)(1) of the California Penal Code, is a crime involving moral turpitude. *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007). However, several circuit courts have determined that state statutes criminalizing the failure to register are not crimes involving moral turpitude. *See Mohammed v. Holder*, 769 F.3d 885 (4th Cir. 2013) (Va. Code Ann. § 18.2-472.1 is not a CIMT); *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011) (Colo. Rev. Stat. § 18-3-412.5(1)(a), (3) is not a CIMT); *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008) (Nev. Rev. Stat. § 179D.550, is not a CIMT).
- (4) **Assault.** Assault statutes may be CIMTs where they require intentional infliction of injury. *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007). A reckless assault may also qualify if it involved recklessness which “places another in imminent danger of serious bodily injury” or included other aggravating factors such as use of a deadly weapon. *Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015); *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012), *aff’d* 771 F.3d 1140 (9th Cir. 2014); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) *aff’d* 547 F.2d 1171 (7th Cir. 1977); *Keungne v. Att’y Gen.*, 561 F.3d 1281 (11th Cir. 2009).
  - (a) Assault and battery against a family or household member under Virginia Code § 18.2-57.2 is not categorically a CIMT. A person is guilty of this offense if he or she "commits an

assault and battery against a family or household member,” but it includes “touching, however slight.” *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007).

- (5) **Burglary of an occupied dwelling** in violation of Florida Statutes § 810.02(3)(a) is categorically a CIMT. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009).
- (6) **Fraud** – “[A] crime in which fraud is an ingredient involves moral turpitude.” *Jordan v. De George*, 341 U.S. 223, 227 (1951). The Ninth Circuit held that a conviction for providing false information to obtain credit cards and using the cards to obtain goods, in violation of Cal. Penal Code § 532(a)(1), constitutes a CIMT because it involves fraud. *Tijani v. Holder*, 598 F.3d 647 (9th Cir. 2010), *superseded by Tijani v. Holder*, 628 F.3d 1071 (9th Cir. 2010).
  - (a) Fraudulent use of a social security number or identifying information is a crime involving moral turpitude. *See Guardado v. Holder*, 615 F.3d 900 (8th Cir. 2010); *Lateef v. DHS*, 592 F.3d 926 (8th Cir. 2010); *Serrato-Soto v. Holder*, 570 F.3d 686 (6th Cir. 2009) (citing *Matter of Kochlani*, 24 I&N Dec. 128, 130 (BIA 2007)); *Hyder v. Keilser*, 506 F.3d 388 (5th Cir. 2007); *Marin-Rodriguez v. Holder*, 710 F.3d 734 (7th Cir. 2013); *but see Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (holding that use of a false social security number to establish credit and work in the United States did not involve moral turpitude).
  - (b) Making a false, fictitious, or fraudulent statement to obtain a United States passport in violation of 18 U.S.C. § 1001(a)(2) is a crime involving moral turpitude. *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013).
- (7) **Theft** – Theft or larceny offenses generally involve moral turpitude. *Matter of Jurado-Delgado*, 24 I&N Dec. 29 (BIA 2006) (retail theft); *Matter of Kim*, 17 I&N Dec. 144 (BIA 1979) (robbery). Circuit courts have generally agreed that theft offenses involve moral turpitude. *See, e.g., Fitzgerald ex rel. Miceli v. Landon*, 238 F.2d 864, 865-66 (1st Cir. 1956); *Garcia-Padron v. Holder*, 558 F.3d 196, 198 (2d Cir. 2009); *Tassari v. Schmucker*, 53 F.2d 570, 572-73 (4th Cir. 1931); *Costello v. Ramsey*, 88 F.2d 622, 623 (8th Cir. 1937); *Mendoza v. Holder*, 623 F.3d 1299 (9th Cir. 2010); *Camacho-Salinas v. Att’y Gen.*, 460 F.3d 1343, 1345 (11th Cir. 2006).
- (8) **Receipt of Stolen Property** – Receipt of stolen property generally constitutes a crime involving moral turpitude if the statute requires the receipt was done knowingly. *See, e.g., Michel v. INS*, 206 F.3d

253, 263 (2d Cir. 2000); *De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 637 (3d Cir. 2002); *United States v. Castro*, 26 F.3d 557, 558 n.1 (5th Cir. 1994); *Hashish v. Gonzales*, 442 F.3d 572, 576 n.4 (7th Cir. 2006); *Okoroha v. INS*, 715 F.2d 380, 382 (8th Cir. 1983); *De Leon v. Lynch*, 808 F.3d 1224 (10th Cir. 2015).

- (9) Certain Aggravated DUIs – A DUI is ordinarily not a CIMT absent some aggravating factor. For instance, DUI while license suspended or cancelled, or DUI aggravated by child endangerment resulting in bodily injury, have constituted aggravated DUI. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999); *Hernandez-Perez v. Holder*, 569 F.3d 345 (8th Cir. 2009); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).

h. “Admitted the Essential Elements”—INA § 212(a)(2)(A)(i)

- (1) This provision was added by the Immigration Act of 1990. In order to be removable based on having admitted the essential elements of an offense:
  - (a) It must be clear that the conduct in question constitutes a crime or misdemeanor under the law where it is alleged to have occurred;
  - (b) The alien must be advised in a clear manner of the essential elements of the alleged crime;
  - (c) The alien must clearly admit conduct constituting the essential elements of the crime;
  - (d) It must appear that the crime admitted actually involves moral turpitude, although it is not required that the alien himself concede the element of moral turpitude; and
  - (e) The admissions must be free and voluntary. *See Matter of J-*, 2 I&N Dec. 285 (BIA 1945); *Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953).
- (2) The “admission” does not have to be made in the course of the removal hearing, and may include a sworn statement given to DHS officers or in a proceeding held in a different tribunal.
- (3) The Board has held that a plea of guilty in a criminal prosecution may be regarded as an “admission” within the meaning of the immigration laws. *Matter of K-*, 9 I&N Dec. 143 (BIA 1959, A.G. 1961); *Matter of P-*, 4 I&N Dec. 373 (BIA 1951). However, where a plea of guilty results in something less than a conviction, the plea, without more, is not tantamount to an admission of commission of

the crime for immigration purposes. *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980) (treated under a first offender statute), *overruled on other grounds by Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988), *superseded by statute as stated in Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968) (no sentence imposed and case placed “on file”).

- (4) The Board also held that an alien is not inadmissible when he or she admits committing acts which constitute the essential elements of a CIMT if such admission relates to the same crime for which he or she was previously convicted and for which he or she obtained a pardon. *Matter of E-V-*, 5 I&N Dec. 194 (BIA 1953).

## C. Controlled Substance Offenses

### 1. Grounds of removal

- a. Section 212(a)(2)(A)(i)(II) of the Act renders inadmissible anyone who has been convicted, or who admits having committed, or who admits committing acts that constitute the essential elements of a violation of any law or regulation of a state, the United States, or a foreign country relating to a controlled substance.
- b. Section 212(a)(2)(C) – Controlled Substance Traffickers
  - (1) Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in controlled substances or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in controlled substances.
  - (2) A “reason to believe” determination can be made even if the alien was never convicted of any offense. *See Matter of Favela*, 16 I&N Dec. 753 (BIA 1979).
  - (3) The respondent has to knowingly engage in trafficking. *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).
  - (4) The Ninth Circuit has stated that the appropriate way to measure whether there is “reason to believe” that an alien is trafficking in drugs is “to determine whether substantial evidence supports such a conclusion.” *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000).
- c. Section 237(a)(2)(B)(i) renders deportable any alien who “at any time after admission” has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance, “other than a single offense involving possession for one’s own use of 30 grams or less of marijuana.

- (1) The determination of whether an offense involved “possession for one’s own use of 30 grams or less of marijuana” requires a circumstance-specific inquiry, and not application of a categorical approach. *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014).
  - d. An alien may also be found deportable if he or she engaged in illicit trafficking of a controlled substance, which constitutes an aggravated felony.
2. “Relating to” a “controlled substance”
  - a. The term “controlled substance” is defined in 21 U.S.C. § 802. The list of designated drugs are found at schedules I through V in 21 C.F.R. § 1308.1.
  - b. The term “any law or regulation of a state” may also include a conviction for violating a municipal ordinance for possession of marijuana. *Matter of Cuellar*, 25 I&N Dec. 850, 855-60 (BIA 2012).
  - c. If an alien is convicted of a drug offense in a state which controls substances not included in 21 U.S.C. § 802 or 21 C.F.R. § 1308.1, that does not necessarily mean the statute is categorically overbroad. Instead, the alien must demonstrate a realistic probability that the state would prosecute conduct which falls outside the removable offense. *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014).
  - d. Drug Paraphernalia – The Supreme Court has held that for a conviction involving drug paraphernalia to constitute a controlled substance conviction, the paraphernalia must be categorically linked to a specific controlled substance listed in 21 U.S.C. § 802. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *see also Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015).
  - e. If a conviction was expunged under the Federal First Offender Act, the expunged conviction does not constitute evidence that an alien admitted having committed or admitting having committed acts that constituted the essential elements of a controlled substance offense. A guilty plea which results in something less than a “conviction” is not tantamount to an “admission” of the crime for immigration purposes. *See, e.g., Romero v. Holder*, 568 F.3d 1054, 1062 (9th Cir. 2009); *Matter of Seda*, 17 I&N Dec. 550, 554 (BIA 1980), *overruled on other grounds by Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988); *Matter of Winter*, 12 I&N Dec. 638, 642 (BIA 1967, 1968); *Matter of E-V-*, 5 I&N Dec. 194, 196 (BIA 1953); *Matter of C-Y-C-*, 3 I&N Dec. 623, 629 (BIA 1950).
3. Waiver considerations
  - a. For general information on waivers of this section, please refer to the discussion on [waivers under section 212\(h\) of the Act](#).

- b. An alien who is inadmissible based on a controlled substance offense – including one involving drug paraphernalia – may qualify for a waiver of inadmissibility under § 212(h) if the offense “relates to a single offense of simple possession of 30 grams or less of marijuana.” *Matter of Martinez-Espinoza*, 25 I&N Dec. 118, 123-26 (BIA 2009).

## **VIII. Aggravated felonies**

### **A. Background**

1. The concept of an “aggravated felony” was first created and added to the INA by the Anti-Drug Abuse Act of 1988, which became effective on November 18, 1988. Section 501 of the Immigration Act of 1990 (effective November 29, 1990) amended the definition and added two new crimes: money laundering and crime of violence. A few corrections were made by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (enacted December 12, 1991). Section 222(a) of the Immigration and Technical Corrections Act of 1994 again amended the definition and added many new crimes to it. It was again amended by § 321(a)(3) of the IIRIRA in 1996.
2. The term “aggravated felony” is defined in § 101(a)(43) of the Act as the following crimes committed within the United States or in a foreign country. It applies to violations of both state and federal law. The original definition provided that if the offense is a violation of foreign law, the offense must have been committed after the effective date of the Immigration Act of 1990 (November 29, 1990), and the term of imprisonment must have been completed within the previous fifteen years. The definition now includes an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous fifteen years.

### **B. Murder, rape, or sexual abuse of a minor**

1. Under INA § 101(a)(43)(A), an aggravated felony includes murder, rape, or sexual abuse of a minor. A victim of sexual abuse who is under the age of eighteen is a “minor” for purposes of determining whether an alien has been convicted of sexual abuse of a minor within the meaning of § 101(a)(43)(A) of the Act. *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006); *see also Velasco-Giron v. Holder*, 773 F.3d 774 (9th Cir. 2014) (deferring to the Board’s definition of “minor”).
2. The offense of indecency with a child by exposure pursuant to § 21.11(a)(2) of the Texas Penal Code constitutes sexual abuse of a minor and is therefore an aggravated felony within the meaning of § 101(a)(43)(A). *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999).
3. In seeking to define the term “sexual abuse of a minor,” the Board referred to the *Black’s Law Dictionary* definition of the term stating that it is commonly defined as “[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance.” *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA



1999). The Board also used the definition of the term found in 18 U.S.C. § 3509(a) which defines “sexual abuse” as “the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.” 18 U.S.C. § 3509(a)(8). Sexually explicit conduct includes lascivious exhibition of the genitals or pubic area of a person or animal. 18 U.S.C. § 3509(a)(9)(D); *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999); see *Restrepo v. Att’y Gen.*, 617 F.3d 787, 796-97 (3d Cir. 2010) (affording *Chevron* deference to the Board’s interpretation of “sexual abuse of a minor” and rejecting the Ninth Circuit’s interpretation of “sexual abuse of a minor” in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc)).

- a. The Board also stated, “Abuse is defined in relevant part as physical or mental maltreatment.” *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999). This definition suggests that the common usage of the term includes a broad range of maltreatment of a sexual nature, and it does not indicate that contact with the minor is a limiting factor. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999).
4. A conviction under California Penal Code § 288(a), for lewd or lascivious act on a child under the age of fourteen years, qualifies as a conviction for “sexual abuse of a minor” and is an aggravated felony. *United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999). In reaching that conclusion, the court stated, “We look solely to the statutory definition of the crime, not to the name given to the offense or to the underlying circumstances of the predicate conviction.” *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999).
  - a. The Ninth Circuit addressed the generic definition of “sexual abuse of a minor” in two decisions: *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc), and *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009). In *Estrada-Espinoza*, the court explained that a statutory rape statute of conviction qualifies as the generic offense of “sexual abuse of a minor” if it includes the following elements: (1) a mens rea of knowingly engaging in; (2) a sexual act; (3) with a minor who is at least twelve but not yet sixteen years of age; and (4) an age difference of at least four years between the defendant and the minor. 546 F.3d at 1152, 1158 (citing 18 U.S.C. § 2243). In *Medina-Villa*, the court held that a crime that is not a statutory rape crime may meet the federal generic offense of “sexual abuse of a minor” if: (1) the conduct prohibited by the criminal statute is sexual, (2) the statute protects a minor, and (3) the statute requires abuse. 567 F.3d at 513. A criminal statute includes “abuse” if it expressly prohibits conduct that causes “‘physical or psychological harm’ in light of the age of the victim in question.” *Id.*
5. The Board originally held that a conviction for “murder, rape, or sexual abuse of a minor” must be for a felony offense in order for the crime to be considered an aggravated felony under § 101(a)(43)(A). *Matter of Crammond*, 23 I&N Dec. 9 (BIA 2001). It later vacated that decision because the alien had departed the United States during the pendency of the Board’s ruling on the alien’s motion to reopen.



*Matter of Crammond*, 23 I&N Dec. 179 (BIA 2001). The Board now holds that a misdemeanor offense of sexual abuse of a minor constitutes an aggravated felony under § 101(a)(43)(A). *Matter of Small*, 23 I&N Dec. 448 (BIA 2002). The Board stated that the change in its position was based on decisions of Circuit Courts in *United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002); *United States v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001); *United States v. Marin-Navarette*, 244 F.3d 1284 (11th Cir. 2001); *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001).

- a. Under federal law, an offense is defined as a felony if it is one for which the maximum term of imprisonment authorized is, at a minimum, “more than 1 year.” An offense is classified as a misdemeanor if the maximum authorized term of imprisonment is “one year or less,” and the minimum authorized term of imprisonment is five days. See 18 U.S.C. § 3559.

### **C. Illicit trafficking in any controlled substance**

1. Under INA § 101(a)(43)(B), an aggravated felony includes illicit trafficking in a controlled substance (as defined in § 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in 18 U.S.C. § 942(c)).
2. The term “drug trafficking crime” referenced in the aggravated felony definition is defined in 18 U.S.C. § 924(c) as “any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) (“CSA”), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 *et seq.*).” *Matter of Yanez-Garcia*, 23 I&N Dec. 390, 393 (BIA 2002).
  - a. An offense in violation of Mich. Comp. Laws § 333.7401(2)(d)(iii) is categorically an aggravated felony pursuant to § 101(a)(43)(B). *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011), *vacated*, 133 S. Ct. 2019 (2013).
3. The Controlled Substances Act defines the term “felony” at 21 U.S.C. § 802(13) as “any Federal or State offense classified by applicable Federal or State law as a felony.” This definition also applies to the Controlled Substances Import and Export Act and the Maritime Drug Law Enforcement Act. See 21 U.S.C. § 951(b); 46 U.S.C. App. § 1903(i); *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002).
  - a. Absent contrary controlling precedent, a state law misdemeanor offense of conspiracy to distribute marijuana qualifies as an aggravated felony under INA § 101(a)(43)(B) where its elements correspond to the elements of the Federal felony offense of conspiracy to distribute an indeterminate quantity of marijuana. *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008).
  - b. Some conduct may be treated as a felony under state law but as a misdemeanor under the CSA. A state offense constitutes a “felony punishable under the Controlled Substances Act” only if it proscribes conduct that would be punishable as a felony under that federal law. *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

#### 4. Recidivism

- a. The Board has held that, where an alien is convicted of a simple drug possession offense under state law, this conviction is only deemed to be an aggravated felony as a recidivist drug trafficking offense if, during the criminal proceedings, the alien either admitted his or her status as a recidivist drug offender or this status was determined by a judge or jury. *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), *overruled on other grounds by Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *see also Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007).
- b. The Supreme Court overruled the Fifth Circuit and held that second or subsequent simple possession offenses are not aggravated felonies under § 101(a)(43) when the state conviction is not based on the fact of a prior conviction. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), *overruling Carachuri-Rosendo*, 570 F.3d 263 (5th Cir. 2009), and *abrogating Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008); *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007); *see Espinal v. Holder*, 636 F.3d 703 (5th Cir. 2011).
- c. An alien convicted under 18 U.S.C. § 924(c)(1) for use of a firearm during a drug trafficking crime is deportable under § 241(a)(2)(A)(iii) of the Act [now § 237(a)(2)(A)(iii)] as an alien convicted of an aggravated felony as well as under § 241(a)(2)(C) of the Act as an alien convicted of a firearm violation. *Matter of K-L*, 20 I&N Dec. 654 (BIA 1993).

#### **D. Illicit trafficking in firearms or destructive devices**

1. Under INA § 101(a)(43)(C), an aggravated felony includes illicit trafficking in firearms or destructive devices (as defined in 18 U.S.C. § 921) or in explosive materials as defined in 18 U.S.C. § 841(c).
  - a. 18 U.S.C. § 921 defines “firearms” as:
    - (1) any weapon which will or may be converted to expel a projectile by explosive action;
    - (2) the frame or receiver of any such weapon;
    - (3) any firearm muffler or silencer; or
    - (4) any destructive device, but does not include antique firearms.
  - b. 18 U.S.C. § 921 defines “destructive device” as:
    - (1) any bomb, grenade, rocket, missile, mine, or similar device which is explosive, incendiary, or contains poison gas;

- (2) any weapon (other than shotgun shells for sporting use) which will or may be converted to expel a projectile by explosive or other propellant and which has a barrel with a bore of more than one-half inch in diameter; or
- (3) any combination of parts from which a destructive device may be assembled.

c. 18 U.S.C. § 841(c) defines “explosive materials” as explosives, blasting agents, and detonators.

#### **E. Laundering of monetary instruments**

- 1. Under INA § 101(a)(43)(D), an aggravated felony includes any offense described in 18 U.S.C. § 1956 (relating to laundering of monetary instruments) or an offense described in 18 U.S.C. § 1957 (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000.
- 2. Proof that all of the money was gained through unlawful activity is not required. *Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010).

#### **F. Explosive materials and firearms offenses**

- 1. Under INA § 101(a)(43)(E)(i), an aggravated felony includes any offense described in 18 U.S.C. § 842(h) or (i) or 18 U.S.C. § 844(d), (e), (f), (g), (h), or (i) (relating to explosive materials offenses).
  - a. 18 U.S.C. § 842(h)—it is unlawful for any person to receive, conceal, transport, ship, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such materials were stolen.
  - b. 18 U.S.C. § 842(i)—it is unlawful for any explosive to be shipped in or received from interstate or foreign commerce by any person who:
    - (1) is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term not exceeding one year;
    - (2) is a fugitive from justice;
    - (3) is an unlawful user of or addicted to any controlled substance as defined in § 102 of the Controlled Substances Act (21 U.S.C. § 802); or
    - (4) has been adjudicated as a mental defective or who has been committed to a mental institution.

- c. 18 U.S.C. § 844(d)—it is unlawful to transport or receive in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or to unlawfully damage any property.
  - d. 18 U.S.C. § 844(e)—it is unlawful to use the mail, telephone, etc. to make a bomb threat.
  - e. 18 U.S.C. § 844(f)—it is unlawful to damage federal property by fire or explosive.
  - f. 18 U.S.C. § 844(g)—it is unlawful to possess an explosive in an airport or federal building.
  - g. 18 U.S.C. § 844(h) provides for increased penalties for use of fire or an explosive to commit any felony and for carrying an explosive during the commission of any felony.
  - h. 18 U.S.C. § 844(i)—it is unlawful to damage by fire or explosive any property used in or affecting interstate or foreign commerce.
2. Under INA § 101(a)(43)(E)(ii), an aggravated felony includes any offense described in 18 U.S.C. § 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 18 U.S.C. § 924(b) or (h) (relating to firearms offenses).
- a. 18 U.S.C. § 922(g)(1)-(5) provides that it is unlawful for any firearm or ammunition to be shipped in or received from interstate or foreign commerce by any person who:
    - (1) has been convicted in any court of, a crime punishable by imprisonment for a term not exceeding one year;
    - (2) is a fugitive from justice;
    - (3) is an unlawful user of or addicted to any controlled substance as defined in § 102 of the Controlled Substances Act (21 U.S.C. § 802);
    - (4) has been adjudicated as a mental defective or who has been committed to a mental institution; or
    - (5) is an alien illegally or unlawfully in the U.S.
  - b. An offense defined by state or foreign law may be classified as an aggravated felony as an offense “described in” a federal statute enumerated in § 101(a)(43) even if lacks the jurisdictional element of “affecting interstate or foreign commerce.” *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002); *see also Espinal-Andrades v. Holder*, 777 F.3d 163 (4th Cir. 2015); *Torres v. Holder*, 764 F.3d 152 (2d Cir. 2014), *cert. granted sub nom. Torres*

*v. Lynch*, 135 S. Ct. 2918 (2015); *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012); *Nieto Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001). Therefore, possession of a firearm by a felon in violation of § 12021(a)(1) of the California Penal Code (and perhaps any other similar state crime) is an aggravated felony under § 101(a)(43)(E)(ii) because it is an offense “described in” 18 U.S.C. § 922(g)(1). *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002).

- c. 18 U.S.C. § 922(j)—it is unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition which is moving in interstate or foreign commerce knowing or having reasonable cause to believe that the firearm or ammunition was stolen.
  - d. 18 U.S.C. § 922(n)—it is unlawful for any person under indictment for a crime punishable by imprisonment for a term exceeding one year to ship in or receive from interstate or foreign commerce any firearm or ammunition.
  - e. 18 U.S.C. § 922(o)—it is unlawful to transfer or possess a machine gun.
  - f. 18 U.S.C. § 922(p)—it is unlawful to manufacture, import, sell, ship, deliver, possess, transfer, or receive a firearm not as detectable by a metal detector as the Security Exemplar.
  - g. 18 U.S.C. § 922(r)—it is unlawful to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under 18 U.S.C. § 925(d)(3).
  - h. 18 U.S.C. § 924(b)—it is unlawful to ship in or receive from interstate or foreign commerce a firearm or any ammunition with intent to commit an offense therewith.
  - i. 18 U.S.C. § 924(h)—it is unlawful to transfer a firearm knowing that it will be used to commit a crime of violence or drug trafficking crime.
3. Under INA § 101(a)(43)(E)(iii), an aggravated felony includes any offense described in § 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses – 26 U.S.C. § 5851).

## **G. Crimes of violence**

- 1. Under INA § 101(a)(43)(F), an aggravated felony includes a crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense), for which the term of imprisonment is at least one year.
- 2. 18 U.S.C. § 16 defines a “crime of violence” as:

- a. An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
  - b. any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
  - c. Note – Both the Seventh and Ninth Circuits have concluded that the definition of a crime of violence under 18 U.S.C. § 16(b) is void for vagueness. *See Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015).
3. A crime of violence need not be a felony. Section 101(a)(43)(F) refers specifically to the federal definition of a “crime of violence” in 18 U.S.C. § 16, which requires that any crime falling within § 16(b) be a felony but contains no such requirement for offenses falling within § 16(a). It further provides a specific minimum sentence of “at least one year” for the offense. Thus, this section has been found to include crimes that are not “felonies” within the federal definition of that term. *See, e.g., United States v. Ramirez*, 731 F.3d 351 (5th Cir. 2013); *United States v. Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004); *United States v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir. 2002); *United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002); *United States v. Urias-Escobar*, 281 F.3d 165 (5th Cir. 2002); *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001); *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999).
4. Mens rea
  - a. The Supreme Court held that a “crime of violence” requires a higher mens rea than merely accidental or negligent conduct. *Leocal v. Ashcroft*, 543 U.S. 1 (2004).
  - b. In addition, the Third, Fourth, Sixth, and Tenth Circuits have held that reckless crimes cannot be crimes of violence under 18 U.S.C. § 16(b). *United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008); *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006); *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005).
  - c. Relying on *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987), the Board held that the legislative history of 18 U.S.C. § 16 indicates that Congress did not limit the term “crime of violence” to crimes of specific intent. *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994).
5. Modified Categorical Approach
  - a. Where the state statute under which an alien has been convicted is divisible, meaning it encompasses offenses that constitute crimes of violence as defined

under 18 U.S.C. § 16 as well as offenses that do not constitute crimes of violence, it is necessary to look to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes an aggravated felony as defined in § 101(a)(43)(F). *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999).

- (1) As noted above, both the Seventh and Ninth Circuits have concluded that the definition of a crime of violence under 18 U.S.C. § 16(b) is void for vagueness. *See Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015). Therefore, the following analysis may not apply in those circuits.
  - b. For purposes of determining whether an offense is a crime of violence as defined in 18 U.S.C. § 16(b), it is necessary to examine the criminal conduct required for conviction, rather than the consequence of the crime, to find if the offense, by its nature, involves “a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *Id.* To find that a criminal offense is a crime of violence under 18 U.S.C. § 16(b), a causal link between the potential for harm and the “substantial risk” of “physical force” being used must be present. *Id.*
  - c. Analysis under 18 U.S.C. § 16(b) requires first that the offense be a felony and, if it is, that the nature of the crime as elucidated by the generic elements of the offense is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs. While this analysis of 18 U.S.C. § 16(b) might occasionally include consideration of the charging papers or jury instructions in order to identify the “offense,” it does not extend to consideration of the underlying facts of the conviction. *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994).
6. Indeterminate sentences. Under Massachusetts law, an indeterminate sentence is considered to be a sentence for the maximum term imposed. Therefore, an alien convicted of a crime of violence and sentenced to prison for a minimum of four and a half years to a maximum of seven years is convicted of an aggravated felony. *Matter of D-*, 20 I&N Dec. 827 (BIA 1994).
  7. Modification of sentences. Where an alien’s sentence has been modified to include a term of imprisonment following a violation of probation, the resulting sentence is considered to be part of the penalty imposed for the original underlying crime. *Matter of Ramirez*, 25 I&N Dec. 203 (BIA 2010).
  8. Manslaughter
    - a. Involuntary Manslaughter - A respondent's conviction for involuntary manslaughter under Illinois Rev. Stat. ch. 38. para. 9-3(a), for which he was sentenced to 10 years in prison, is a “crime of violence” and, therefore, an



aggravated felony. *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994). The Fourth Circuit has held that involuntary manslaughter under Virginia law is not a crime of violence because it requires only a mens rea of recklessness. *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005).

- b. 2nd Degree Manslaughter - Second-degree manslaughter under New York law, which required only that the perpetrator recklessly cause the death of another, was not a crime of violence under 18 U.S.C. § 16(b). *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003). Focusing on the verb “use” in 18 U.S.C. § 16(b), the court stated that the statute contemplates only the risk of an intentional use of force. *Id.*
  - c. 1st Degree Manslaughter - Because first-degree manslaughter requires proof of intent to cause serious physical injury or death, it differs significantly from the reckless conduct required for second-degree manslaughter, which the *Jobson* court found “encompass[e]d many situations.” *Id.* at 373. The offense of manslaughter in the first degree in violation of § 125.20 of the New York Penal Law is a crime of violence under 18 U.S.C. § 16(b) and is therefore an aggravated felony under § 101(a)(43)(F). *Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004).
  - d. Vehicular Manslaughter - In *Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005), the parties agreed that vehicular manslaughter under New Jersey law is not a crime of violence under 18 U.S.C. § 16(a). The court held that the reasoning in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), suggests that the offense is not a crime of violence under 18 U.S.C. § 16(b) as the offense requires recklessness. The Ninth Circuit held in *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005), that pursuant to the reasoning in *Leocal*, a conviction under § 191.5(a) of the California Penal Code for gross vehicular manslaughter while intoxicated is not a crime of violence because the mens rea is gross negligence and the intentional use of a vehicle to cause injury is not an element of the offense.
9. Arson - An alien who was convicted of arson in the first degree under the law of Alaska and sentenced to seven years imprisonment with three years suspended was convicted of a “crime of violence” within the meaning of § 101(a)(43)(F), and therefore is deportable under § 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony. *Matter of Palacios-Pinera*, 22 I&N Dec. 434 (BIA 1998).
10. Assault - The offense of third-degree assault in violation of § 53a-61(a)(1) of the Connecticut General Statutes, which involves the intentional infliction of physical injury upon another, is a crime of violence under 18 U.S.C. § 16(a). *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). *But see Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (finding that an offense under § 53a-61(a)(1) of the Connecticut General Statutes is not a crime of violence). In *United States v. Heron-Salinas*, 566 F.3d 898 (9th Cir. 2009), the court, in the criminal context, found that a conviction for assault with a firearm under California Penal Code § 245(a)(1) is a crime of violence under 18 U.S.C. § 16(a) and (b).

11. Willful infliction of corporal injury - A misdemeanor conviction for willful infliction of corporal injury on a spouse in violation of § 273.5(a) of the California Penal Code which resulted in a sentence to a term of imprisonment for one year qualifies categorically as a conviction for a “crime of violence” within the meaning of 18 U.S.C. § 16(a). *Matter of Ramirez*, 25 I&N Dec. 203 (BIA 2010).
12. Drunk Driving
  - a. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court held that the alien’s DUI offense was not a crime of violence under 18 U.S.C. § 16(a) as the statute’s key phrase – the use of physical force against the person or property of another – suggested a higher degree of intent than negligent or merely accidental conduct. The DUI conviction was not a crime of violence under 18 U.S.C. § 16(b) for similar reasons: it required a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense. The ordinary meaning of the term “crime of violence,” combined with 18 U.S.C. § 16’s emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggested a category of violent, active crimes that did not include DUI offenses. Thus, 18 U.S.C. § 16 could not be read to include the alien’s conviction for DUI causing serious bodily injury under Florida law.
  - b. *Leocal* left open the question of whether an offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence. *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004).
13. Intoxication Assault - The Fifth Circuit found that intentional use of force was not an element of the crime of Texas intoxication assault and this offense did not qualify as a “crime of violence” for sentence enhancement purposes. *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004).
14. Criminally Negligent Child Abuse - An alien convicted of criminally negligent child abuse under § 18-6-401(1) and (7) of the Colorado Revised Statutes, whose negligence in leaving his stepson alone in a bathtub resulted in the child’s death, was not convicted of a crime of violence under 18 U.S.C. § 16(b) because there was not “substantial risk that physical force” would be used in the commission of the crime. *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999).
15. Sexual Abuse of a Child - When an adult attempts to sexually touch a child under the age of consent, there is always a substantial risk that physical force will be used to ensure the child’s compliance; crimes of sexual abuse of a child or child molestation are therefore crimes of violence. See *United States v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993); *United States v. Bauer*, 990 F.2d 373 (8th Cir. 1993); *United States v. Rodriguez*, 979 F.2d 138 (8th Cir. 1992). The Board has held that statutory rape is a crime of violence for the same reason. *Matter of B-*, 21 I&N Dec. 287 (BIA 1996).

- a. Conviction of child molestation under Georgia Code § 16-6-4(a) constitutes a crime of violence under U.S. Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). *United States v. Olalde-Hernandez*, 630 F.3d 372 (5th Cir. 2011).
16. Burglary of Habitation- In an appeal of a sentence in a criminal case, the Fifth Circuit held that burglary of a habitation under Texas Penal Code § 30.02 is per se a crime of violence under 18 U.S.C. § 16(b). *United States v. Guadardo*, 40 F.3d 102 (5th Cir. 1994).
17. Trespass - A trespass conviction under Colorado law, under which a “person commits the crime of first degree criminal trespass if he knowingly and unlawfully enters or remains in a dwelling or if he enters any motor vehicle with intent to steal anything of value” is a crime of violence because entering or remaining in the dwelling of another creates a substantial risk that physical force will be used against the residents in the dwelling. Even when the perpetrator has illegally entered a nonresidential building, there is a substantial risk of physical force being used against the property of another. *United States v. Delgado-Enriquez*, 188 F.3d 592 (5th Cir. 1999).
18. Unauthorized Use of a Vehicle - The Ninth Circuit held that a conviction for carjacking, in violation of California Penal Code § 215, is categorically an aggravated felony crime of violence under 18 U.S.C. § 16(a). *Nieves-Medrano v. Holder*, 590 F.3d 1057 (9th Cir. 2010). The Fifth Circuit held that a Texas conviction for unauthorized use of a motor vehicle pursuant to Texas Penal Code Ann. § 31.07 is not an aggravated felony, crime of violence. *United States v. Armendariz-Moreno*, 571 F.3d 490 (5th Cir. 2009). See also *Van Don Nguyen v. Holder*, 571 F.3d 524 (6th Cir. 2009) (finding that a conviction under California Penal Code § 487, for grand theft of an automobile, is not for an aggravated felony/crime of violence as defined in 18 U.S.C. § 16(b); *United States v. Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007) (Arizona unlawful use of means of transportation is not a crime of violence).
19. Carrying a Firearm - Although unlawfully carrying a firearm on premises which have been licensed to sell alcoholic beverages is a felony under Texas Penal Code § 46.02, the Fifth Circuit found that it is not a crime of violence. *United States v. Hernandez-Neave*, 291 F.3d 296 (5th Cir. 2001).
20. Menacing. The Tenth Circuit has upheld the Board’s finding that a conviction for a violation of Colorado’s menacing statute is a conviction for a crime of violence under 18 U.S.C. § 16(a), and, therefore, an aggravated felony. *Damaso-Mendoza v. Att’y Gen.*, 653 F.3d 1245 (10th Cir. 2011).

## **H. Theft, burglary, and receipt of stolen property**

1. Under INA § 101(a)(43)(G), an aggravated felony includes a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment imposed is at least one year.

2. Section 101(a)(43)(G) defines as aggravated felonies theft or burglary offenses for which the sentence is “at least 1 year” without further qualification. Therefore, it seems to include crimes that are not “felonies” within the federal definition of that term.
  - a. The Third Circuit found, for sentence enhancement purposes, that a misdemeanor theft conviction for which the term of imprisonment is 1 year is an aggravated felony. *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999).
3. Theft
  - a. Although “theft” is a “popular name” for larceny, the term “theft” is generally considered in federal law “to be broader than ‘common law larceny.’” *Matter of V-Z-S-*, 22 I&N Dec. 1338, 1342 (BIA 2000). Under the common law, “larceny” requires the intent to permanently deprive the owner of possession or use of his property. Congress’ use of the term “theft” is therefore broader than the common-law definition of that term. Specifically, a “theft offense” under § 101(a)(43)(G) does not require as a statutory element the specific intent to permanently deprive an owner of his property, an element that was present in the common-law definition of larceny. Rather, a taking of property constitutes a “theft” whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. *Matter of V-Z-S-*, 22 I&N Dec. 1338. Not all takings of property, however, will meet this standard because some takings entail a de minimis deprivation of ownership interests. *Id.*
  - b. A conviction for unlawful driving and taking of a vehicle in violation of section 10851 of the California Vehicle Code, which makes guilty a person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, may constitute “theft offense” under section 101(a)(43)(G) of the Act. *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013) (noting that California Vehicle Code section 10851 is a divisible statute).
  - c. The Ninth Circuit has held that a conviction for grand theft, in violation of California Penal Code section 487(a), is not categorically an aggravated felony because it defines grand theft as the taking of “money, labor, or real or personal property . . . exceeding four hundred dollars,” and the generic theft definition does not include theft of labor. *Ramirez-Villalpando v. Holder*, 601 F.3d 891 (9th Cir. 2010), *opinion amended and superseded on denial of hearing en banc by Ramirez-Villalpando v. Holder*, 645 F.3d 1035 (9th Cir. 2011) (holding that the alien’s conviction was an aggravated felony under the modified categorical approach because the criminal record indicated that he was convicted of theft of personal property, not labor).
  - d. A conviction for welfare fraud in violation of § 40-6-15 of the General Laws of Rhode Island is not a theft offense. *Matter of Garcia-Madruga*, 24 I&N Dec.

436 (BIA 2008). The Board narrowed the definition of “theft,” finding that it requires a taking of property without consent whereas fraud involves fraudulently obtained consent. *Id.* at 439-40.

- e. Aiding and abetting theft. The Supreme Court held that a theft offense under INA § 101(a)(43)(G) includes the crime of “aiding and abetting” a theft offense. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). In this case, the Court vacated a Ninth Circuit case, *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005), in which the Ninth Circuit concluded that a conviction for unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a) is not categorically a theft offense under § 101(a)(43)(G) because the California provision, which includes accomplice liability, is broader than the generic definition of “theft offense.” The Supreme Court observed that all states and the federal government have “expressly abrogated the distinction” among principals and aiders and abettors. *Duenas-Alvarez*, 549 U.S. 183, 189 (2007).

#### 4. Stolen property

- a. In *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000), the Board found that the “receiving stolen property” parenthetical in § 101(a)(43)(G) was intended to clarify that the term “theft” was not being used in its limited, traditional sense to require proof that the offender was involved in the actual taking of the property at issue.
- b. First, the Board noted that the modern view of theft generally treats as equivalent those who knowingly receive and those who knowingly possess stolen property. The commentaries to the Model Penal Code explain that whether the term used is receiving, possessing, buying, or concealing, “[i]t seems clear that the essential idea behind these and other terms is acquisition of control, whether in the sense of physical dominion or of legal power to dispose.” *Id.* at 1390 (citing Model Penal Code § 223.6, cmt. 2, at 235). Accordingly, the Model Penal Code definition of “receiving” is “broad” and includes “the retention of possession [of stolen property].” *Id.* Moreover, under the Model Penal Code, one “is guilty of theft if he ‘receives, retains, or disposes of movable property of another’ with the requisite culpability.” *Id.*
- c. Second, the Board observed that nearly all of the federal “receipt” of stolen property provisions reflect an application of this well-understood meaning of “receiving” stolen property and include “possession” offenses within their scope.
- d. Finally, the Board stated that the focus is not just on the parenthetical in § 101(a)(43)(G), but also on whether an offense is a “theft” offense within this provision. To read the parenthetical in a restricted manner would be to assume that Congress intended to apply a technical distinction within the “theft” definition set forth in § 101(a)(43)(G) that is inconsistent both with the modern

view of “theft” offenses and with the consolidation and definition of theft and related offenses in Chapters 31 and 113 of Title 18 of the United States Code.

- e. The Board concluded that the reference to “receipt of stolen property” in § 101(a)(43)(G) was intended in a generic sense to include the category of offenses involving knowing receipt, possession, or retention of property from its rightful owner. Therefore, a conviction for attempted possession of stolen property, in violation of §§ 193.330 and 205.275 of the Nevada Revised Statutes, is a conviction for an attempted “theft offense (including receipt of stolen property),” and therefore an aggravated felony, within the meaning of § 101(a)(43)(G) and (U) (provided, of course, that a sentence of a year or more was imposed).
- f. A conviction for receipt of stolen property under California Penal Code § 496(a) with a sentence of imprisonment of at least one year, is categorically a receipt of stolen property aggravated felony under § 101(a)(43)(G). *Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009).

## 5. Burglary

- a. The offense of burglary of a vehicle in violation of § 30.04(a) of the Texas Penal Code Annotated is not a “burglary offense” within the definition of an aggravated felony in § 101(a)(43)(G) because burglary is not clearly defined to include burglary of vehicles. *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000).
- b. In this decision, the Board stated that in the absence of a definition of the term “burglary offense” in the Act, or some other clear expression of congressional intent, the logical starting point is the definition of a burglary set forth by the United States Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), which states that for purposes of sentence enhancement under 18 U.S.C. § 924(e), the term “burglary” as used in 18 U.S.C. § 924(e)(2)(B)(ii) means an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.
- c. In *Taylor*, the Supreme Court specifically excluded from the definition of generic burglary statutes which include breaking and entering places other than buildings, such as booths, tents, vehicles, boats, vessels, and railroad cars. In its decision, the *Taylor* court noted that Congress must have thought that certain property crimes, like burglary, so often presented a risk of injury to persons or were so often committed by career criminals that they should be included in the enhancement statute even though they do not necessarily involve the use or threat of force against a person. *Id.* at 597. It also noted that Congress presumably realized that “run-of-the-mill” burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force presented a sufficiently “serious potential risk” to count toward enhancement. *Id.* All of this involves a determination that burglary must somehow pose a substantial risk that physical force will be used against a person before it can be considered in enhancing a sentence. The court concluded that burglaries of places other



than buildings posed much less risk that physical force will be used against a person and therefore excluded them from the generic definition of burglary.

- d. The Board concluded *Matter of Perez* by saying, “The question of the precise scope of the term “burglary offense” under § 101(a)(43)(G) has been neither adequately developed nor fully argued in this appeal. Here, we simply hold that burglary of a vehicle under this particular Texas statute is not a burglary offense under § 101(a)(43)(G).” 22 I&N Dec. at 1327.

## **I. Demand for or receipt of ransom**

1. Under INA § 101(a)(43)(H), an aggravated felony includes an offense described in 18 U.S.C. §§ 875, 876, 877, or 1202 (relating to the demand for or receipt of ransom).
  - a. 18 U.S.C. § 875(a) makes it a crime to transmit a ransom demand in interstate or foreign commerce.
  - b. 18 U.S.C. § 875(b) and (c) make it a crime to transmit in interstate or foreign commerce a threat to kidnap or to injure another. By reference to the other portions of the definition, it appears that the words “relating to the demand for or receipt of ransom” in § 101(a)(43)(H) are illustrative only, and a violation of 18 U.S.C. § 875(b) or (c) would constitute an aggravated felony.
  - c. 18 U.S.C. § 876 makes it a crime to mail a ransom demand.
  - d. 18 U.S.C. § 877 makes it a crime to mail a ransom demand from a foreign country.
  - e. 18 U.S.C. § 1202 makes it a crime to knowingly receive, possess, or dispose of money which at any time has been delivered as ransom in connection with a violation of 18 U.S.C. § 1201 (kidnapping).

## **J. Child pornography**

1. Under INA § 101(a)(43)(I), an aggravated felony includes an offense described in 18 U.S.C. §§ 2251, 2251A, or 2252 (relating to child pornography).
  - a. 18 U.S.C. § 2251 makes it unlawful to make or advertise child pornography.
  - b. 18 U.S.C. § 2251A makes it unlawful to buy or sell children for child pornography.
  - c. 18 U.S.C. § 2252 makes it unlawful to send child pornography or receive same in interstate or foreign commerce.



## **K. Racketeering or gambling**

1. Under INA § 101(a)(43)(J), an aggravated felony includes an offense described in 18 U.S.C. § 1962 (relating to racketeer influenced corrupt organizations) or an offense described in 18 U.S.C. § 1084 (if it is a second or subsequent offense) or 18 U.S.C. § 1955 (relating to gambling offenses) for which a sentence of one year or more may be imposed.
2. 18 U.S.C. § 1963 provides that a violation of 18 U.S.C. § 1962 may be punished by not more than twenty years (or, in some circumstances, life imprisonment). Therefore, it would appear that one year or more may be imposed for any violation of 18 U.S.C. § 1962. Perhaps the reference to a minimum potential sentence is for the violation of a state statute that is the equivalent of 18 U.S.C. § 1962.

## **L. Prostitution, slavery, or involuntary servitude**

1. Under INA § 101(a)(43)(K)(i), an aggravated felony includes an offense related to the owning, controlling, managing, or supervising of a prostitution business.
2. Under INA § 101(a)(43)(K)(ii), an aggravated felony includes an offense described in 18 U.S.C. §§ 2421, 2422, or 2423 (relating to transportation for the purpose of prostitution) if committed for commercial advantage.
3. Under INA § 101(a)(43)(K)(iii), an aggravated felony includes an offense described in 18 U.S.C. §§ 1581-1585, or 1588-1591 (relating to peonage, slavery, involuntary servitude, and trafficking in persons).

## **M. Treason or transmitting national defense information**

1. Under INA § 101(a)(43)(L)(i), an aggravated felony includes an offense described in 18 U.S.C. § 793 (relating to gathering or transmitting national defense information), 18 U.S.C. § 798 (relating to disclosure of classified information), 18 U.S.C. § 2153 (relating to sabotage), or 18 U.S.C. §§ 2381 or 2382 (relating to treason).
2. Under INA § 101(a)(43)(L)(ii), an aggravated felony includes an offense described in § 601 of the National Security Act of 1947 (50 U.S.C. § 421) (relating to protecting the identity of undercover intelligence agents).
3. Under INA § 101(a)(43)(L)(iii), an aggravated felony includes an offense described in § 601 of the National Security Act of 1947 (relating to protecting the identity of undercover agents).

## **N. Fraud or Deceit with Loss of \$10,000 or more**

1. Under INA § 101(a)(43)(M), an aggravated felony includes an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000.
2. An alien who was convicted of submitting a false claim with intent to defraud arising

from an unsuccessful scheme to obtain \$15,000 from an insurance company was convicted of an “attempt” to commit a fraud in which the loss to the victim exceeded \$10,000 under INA § 101(a)(43)(U). *Matter of Onyido*, 22 I&N Dec. 552 (BIA 1999). Because of its decision regarding section 101(a)(43)(U), the Board did not discuss the IJ’s additional finding that the respondent was also deportable as an aggravated felon under § 101(a)(43)(M)(i), as an alien convicted of a fraud or deceit in which the loss to the victim exceeds \$10,000. *See also Pierre v. Holder*, 588 F.3d 767 (2d Cir. 2009) (holding that removal under section 101(a)(43)(U) is not necessarily a lesser included offense of § 101(a)(43)(M), and each must be charged separately).

3. Embezzling more than \$10,000 from the United States was an aggravated felony within the meaning of the exception from waiver of inadmissibility since the federal government qualified as a “victim” within the definition of an aggravated felony. *Balogun v. U.S. Att’y Gen.*, 425 F.3d 1356 (11th Cir. 2005).
4. Restitution. The Third Circuit has held that the amount of restitution is not controlling to determine the amount of loss but may be used to determine the amount of loss if the conviction record is unclear. *Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2003). *See also Nijhawan v. Att’y Gen.*, 523 F.3d 387 (3d Cir. 2008), *aff’d sub nom. Nijhawan v. Holder*, 557 U.S. 29 (2009) (jury determination on amount of loss not required).
5. In a case involving an aggravated felony under § 101(a)(43)(M)(i) as an “offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000,” the Board held that (1) the \$10,000 loss threshold does not have to be an element of the offense; and (2) IJs are therefore not confined to using the categorical or modified categorical approaches in determining loss to the victim but, rather, may consider any admissible evidence. *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007); *see also Nijhawan v. Holder*, 557 U.S. 29 (2009).
6. The Ninth Circuit has held that the definition of an aggravated felony at § 101(a)(43)(M)(i) includes tax offenses other than those described in 26 U.S.C. § 7201, the provision specifically enumerated in the aggravated felony definition at § 101(a)(43)(M)(ii). *Kawashima v. Holder*, 593 F.3d 979 (9th Cir. 2010), *opinion withdrawn and superseded on denial of rehearing by* 615 F.3d 1043. The Ninth Circuit, applying the Supreme Court’s holding in *Nijhawan v. Holder*, 557 U.S. 29 (2009), found that the alien’s conviction for subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1), constituted an aggravated felony. The Supreme Court granted certiorari in *Kawashima* and held that the alien’s convictions for filing, and aiding and abetting in filing, a false statement on a corporate tax return are aggravated felonies under § 101(a)(43)(M)(I). *Kawashima v. Holder*, 132 S. Ct. 1166 (2012).
7. Conspiracy offenses can permissibly be aggravated felonies under § 101(a)(43)(M)(i) and (U) where the substantive crime that was the object of the conspiracy was an offense that involved “fraud or deceit” and where the potential loss to the victim or victims exceeded \$10,000. *Matter of S-I-K-*, 24 I&N Dec. 324

(BIA 2007); *see also Pierre v. Holder*, 588 F.3d 767 (2d Cir. 2009) (INA § 101(a)(43)(U) for attempt or conspiracy is not necessarily a lesser included offense of § 101(a)(43)(M) and each must be charged separately).

8. Under INA § 101(a)(43)(M)(ii), an aggravated felony includes an offense that is described in § 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000.

#### **O. Alien smuggling**

1. Under INA § 101(a)(43)(N), an aggravated felony includes an offense related to alien smuggling described in 18 U.S.C. § 274(a)(1)(A) or (a)(2) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other person) to violate a provision of this Act.
2. A conviction for transporting an illegal alien in violation of § 274(a)(1)(A)(ii) is an aggravated felony, as defined in § 101(a)(43)(N), and, therefore, it supports a finding of deportability under § 237(a)(2)(A)(iii). The parenthetical expression "relating to alien smuggling" does not limit deportable offenses to those involving smuggling. *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999).
3. An alien convicted of an offense described in § 275(a) (illegal entry) is not convicted of an aggravated felony as that term is defined in § 101(a)(43)(N), which specifically refers to those offenses relating to alien smuggling described in § 274(a)(1)(A) and (2). *Matter of Alvarado-Alvino*, 22 I&N Dec. 718 (BIA 1999). A violation of § 275(a) may be an aggravated felony under the circumstances described in § 101(a)(43)(O). *Id.*

#### **P. Illegal reentry**

1. Under INA § 101(a)(43)(O), an aggravated felony includes an offense described in § 275(a) [entering or attempting to enter the United States without inspection or by fraud] or 276 [reentry after exclusion, deportation, or removal] committed by an alien who was previously deported on the basis of a conviction described in another subparagraph of § 101(a)(43).

#### **Q. Falsely making, forging, counterfeiting, mutilating, or altering a passport**

1. Under INA § 101(a)(43)(P), an aggravated felony includes an offense which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of 18 U.S.C. § 1543 or is described in 18 U.S.C. § 1546(a) (relating to document fraud) and for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other person) to violate a provision of this Act.

## **R. Failure to appear for service of sentence**

1. Under INA § 101(a)(43)(Q), an aggravated felony includes an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of five years or more.

## **S. Commercial bribery, counterfeiting, forgery, or trafficking in vehicles**

1. Under INA § 101(a)(43)(R), an aggravated felony includes an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year.
2. The crime of bribery of a public official in violation of 18 U.S.C. § 201(b)(1)(A)(2006) is not an offense “relating to” commercial bribery and is therefore not an aggravated felony under § 101(a)(43)(R). *Matter of Gruenangerl*, 25 I&N Dec. 351 (BIA 2010).

## **T. Obstruction of justice, perjury, or bribery of a witness**

1. Under INA § 101(a)(43)(S), an aggravated felony includes an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.
2. A respondent’s conviction pursuant to 18 U.S.C. § 3 (accessory after the fact) and sentence to at least one year establishes his deportability as an alien convicted of an aggravated felony because the offense of accessory after the fact falls within the definition of an obstruction of justice crime under § 101(a)(43)(S). *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).
3. A conviction for misprision of a felony under 18 U.S.C. § 4 does not constitute a conviction for an aggravated felony under § 101(a)(43)(S) as an offense relating to obstruction of justice because the crime does not require as an element either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice. *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999). The Third Circuit takes a broader reading of “related to” obstruction of justice and has found that a “causal connection” may suffice to make the separate crimes related. *Denis v. Att’y Gen.*, 633 F.3d 201 (3d Cir. 2011).
4. A conviction for perjury in violation of the California Penal Code constitutes a conviction for an aggravated felony under § 101(a)(43)(S). *Matter of Martinez-Recinos*, 23 I&N Dec. 175 (BIA 2001).
5. In *Hoang v. Holder*, 641 F.3d 1157 (9th Cir. 2011), the Ninth Circuit held that an alien’s misdemeanor conviction for rendering criminal assistance in violation of Washington Revised Code § 9A.76.080 was not a crime related to obstruction of justice.

#### **U. Failure to appear before a court pursuant to a court order**

1. Under INA § 101(a)(43)(T), an aggravated felony includes an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of two years' imprisonment or more may be imposed.

#### **V. An attempt or conspiracy to commit any such act described above**

1. Under INA § 101(a)(43)(U), an aggravated felony includes an attempt or conspiracy to commit an offense described in INA § 101(a)(43). The term “conspiracy” in § 101(a)(43)(U) is not limited to conspiracies that require the commission of an overt act in furtherance of the conspiracy by one of the conspirators. *Matter of Richardson*, 25 I&N Dec. 226 (BIA 2010). *But see United States v. Garcia-Santana*, 774 F.3d 528 (9th Cir. 2014) (finding that an overt act is a requirement for conspiracy under the Act).
2. An alien who was only convicted of conspiracy to commit an aggravated felony, but was not also convicted of the substantive aggravated felony offense, may not be found removable for that underlying substantive offense, even though the record of conviction shows that the conspirators actually committed the substantive offense. *Matter of Richardson*, 25 I&N Dec. 226 (BIA 2010) (finding that the IJ erred in sustaining the charge that the respondent was convicted of a theft offense under § 101(a)(43)(G) because such an underlying substantive offense is not necessarily included in a conspiracy). The alien was removable, however, on the basis of the conspiracy conviction under § 101(a)(43)(U). *Id.*
3. The Seventh Circuit held in *Familia-Rosario v. Holder*, 655 F.3d 739 (7th Cir. 2011), that a conviction for aiding and abetting conspiracy, the object of which was the importation of any alien for the purpose of prostitution, or for any other immoral purpose, encompassed conduct other than an offense related to “the owning, controlling, managing or supervising of a prostitution business.” *Id.* at 746. The conviction therefore did not qualify categorically as an aggravated felony, so that the LPR, who was a native and citizen of the Dominican Republic, was not ineligible for cancellation of removal on the basis of that conviction.

#### **W. Limitations by date of conviction, etc.**

1. In deportation proceedings
  - a. The aggravated felony ground of deportation was added to the Act by § 7344(a) of the Anti-Drug Abuse Act of 1988 (ADAA) and was designated as § 241(a)(4)(B). It provided for the deportability of an alien “convicted of an aggravated felony at any time after entry.” Section 7344(b) of the ADAA stated that the amendment “shall apply to any alien who has been convicted, on or after the date of enactment of this Act [November 18, 1988] of an aggravated felony.” Section 602(a) of the Immigration Act of 1990

amended and redesignated the deportation grounds then found at § 241. Section 602(c) of the 1990 Act provided that its provisions “shall apply to all aliens described in subsection (a) thereof notwithstanding that (1) any such alien entered the United States before the date of enactment of this Act, or (2) the facts, by reason of which an alien is described in such subsection, occurred before the date of the enactment of this Act.”

- b. The Board held that this provision eliminated the temporal limitation of § 7344(a) of the ADAA and an alien convicted of an aggravated felony is subject to deportation regardless of the date of conviction when the alien is placed in deportation proceedings on or after March 1, 1991, and the crime falls within the aggravated felony definition. *Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998), *rev’d* by 168 F.3d 463 (11th Cir. 1999), *vacated in part* by 185 F.3d 1216 (11th Cir. 1999), *reh’d* 207 F.3d 1368 (11th Cir. 2000), *affirmed in part and dismissed in part* by 22 I&N Dec. 365 (BIA 1998), *affirmed in part and dismissed in part* by 207 F.3d 1368 (11th Cir. 2000) (upholding the deportation order despite the enactment of the ADAA after the alien’s conviction).

## 2. In removal proceedings

- a. Section 101(a)(43) provides as follows: “Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.” This was placed in the definition by § 321(b) of IIRIRA which was entitled “Effective date of definition.”
- b. Section 321(c) of IIRIRA, entitled “effective date,” provided as follows: “The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred.” It also stated that the amendments shall apply under § 276(b) only to violations of § 276(a) occurring on or after such date.
- c. Various circuit courts have held that, pursuant to IIRIRA, the amendments to the aggravated felony definition in § 101(a)(43) apply retroactively. *See e.g., Alvarado-Fonseca v. Holder*, 631 F.3d 385 (7th Cir. 2011); *Flores-Leon v. INS*, 272 F.3d 433 (7th Cir. 2001); *Sousa v. INS*, 226 F.3d 28 (1st Cir. 2000); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000).

## IX. Relief from Removal

### A. Background and Security Investigations in Proceedings Before an IJ

- 1. In no case shall an IJ grant an application for immigration relief that is subject to the conduct of identity, law enforcement, or security investigations or examinations until DHS has reported to the IJ that the appropriate investigations or examinations



have been completed and are current and DHS has reported any relevant information from the investigations or examinations to the IJ. 8 C.F.R. § 1003.47(g).

2. Covered forms of relief:
  - a. Asylum under § 208;
  - b. Adjustment of status to that of a lawful permanent resident under §§ 209 or 245, or any other provision of law;
  - c. Waiver of inadmissibility or deportability under §§ 209(c), 212, or 237, or any other provision of law;
  - d. Permanent resident status on a conditional basis or removal of the conditional bases of permanent resident status under §§ 216 or 216A, or any other provision of law;
  - e. Cancellation of removal or suspension of deportation under § 240A or former section 244 of the Act, or any other provision of law;
  - f. Relief from removal under former section 212(c) of the Act;
  - g. Withholding of removal under § 241(b)(3) or under the United Nations Convention Against Torture;
  - h. Registry under § 249;
  - i. Conditional grants relating to the above, such as for applications seeking asylum pursuant to § 207(a)(5), or cancellation of removal in light of § 240A(e).
3. Voluntary Departure is not subject to the background investigations and security checks requirement. However, DHS may seek a continuance in order to complete pending investigations and the IJ may grant additional time in the exercise of discretion.

## **B. Relief and the Exercise of Discretion**

1. Certain forms of relief are only available if the alien demonstrates that he or she merits a favorable exercise of discretion. These forms of relief may include (but are not necessarily limited to) voluntary departure, cancellation of removal, asylum (though not withholding of removal or protection under the Convention Against Torture), adjustment of status, and waivers of inadmissibility or deportability.
2. Process: The IJ is required to balance the adverse factors of record evidencing an alien's undesirability for the United States against the favorable factors and social and humane considerations to determine if the granting of relief is in the best interest of the United States.



- a. Among the negative factors to be considered are:
  - (1) the nature and underlying circumstances of the removability ground at issue,
  - (2) the presence of additional significant violations of this country's immigration laws,
  - (3) the existence of a criminal record and, if so, its nature, recency, seriousness, and
  - (4) the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.
- b. Favorable considerations may include such factors as
  - (1) family ties within the United States,
  - (2) residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age),
  - (3) evidence of hardship to the respondent and family if deportation occurs,
  - (4) service in this country's Armed Forces,
  - (5) a history of employment,
  - (6) the existence of property or business ties,
  - (7) evidence of value and service to the community,
  - (8) proof of a genuine rehabilitation if a criminal record exists, and
  - (9) other evidence attesting to a respondent's good character (such as affidavits from family, friends, and responsible community representatives).
- c. These factors are addressed in several pertinent Board cases, including *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Salmon*, 16 I&N Dec. 734 (BIA 1978); *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).
- d. A respondent's lack of remorse or refusal to accept responsibility for criminal acts may be considered as an adverse factor in the exercise of discretion. *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).

- e. While community ties, property and business holdings, or special service to the community are to be considered in the alien's favor, the absence of those additional ties in themselves does not negate the weight to be accorded the alien's long residence in this country which was otherwise without a criminal record and during most of which the alien was employed. *Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995).
- f. Evidence of general conditions in an alien's homeland may be weighed as a factor in evaluating discretionary relief but, since Congress has provided asylum and withholding of deportation under §§ 208 and 243(h) as the appropriate avenues for requesting relief on the basis of a fear of persecution, allegations and evidence regarding a well-founded fear or clear probability of persecution have no place in adjudicating other forms of relief. *Matter of D-*, 20 I&N Dec. 915 (BIA 1994).
- g. As the negative factors grow more serious, it becomes incumbent upon an applicant to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).
  - (1) In *Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995), the Board found the existence of 2 minor dependent US citizen children to be an outstanding equity. The Board also found 20 years of LPR status which commenced at the age of 17 to be an unusual or outstanding equity.
- h. The gravity of any criminal offense must be examined. *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). Unusual or outstanding equities may be required by the presence of a conviction of a single serious crime, or it may be required because of a succession of criminal acts which together establish a pattern of serious criminal misconduct. An IJ need not hold that a criminal conviction falls within a particular ground of removal or apply a categorical approach in a discretionary determination, but rather should examine the nature of the underlying crime itself in determining the degree of equities that will be required to overcome the crime. *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).
  - (1) Inquiry may be had into the circumstances surrounding the commission of a crime in order to determine whether a favorable exercise of discretion is warranted, but it is impermissible to go behind a record of conviction to reassess an alien's ultimate guilt or innocence. *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991); *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).
  - (2) An IJ may consider evidence that the respondent engaged in criminal activity to support his drug habit. *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).

- (3) An IJ may not consider evidence on the issue of entrapment, for that issue directly relates to the question of the respondent's ultimate guilt or innocence. *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).
- (4) For circumstances in which unusual or outstanding equities are required, an alien who demonstrates such equities when required merely satisfies the threshold test for having a favorable exercise of discretion considered in his or her case. Such a showing does not compel that discretion be exercised in his or her favor. *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). In some cases, the seriousness of the crime may still not be overcome by the equities demonstrated, even though the equities are unusual or outstanding. *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991); *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988).
- (5) In response to criticism by some Circuit Courts, the Board stated that, in reviewing a discretionary determination of an IJ, it relies upon its own independent judgment in deciding the ultimate disposition of the case and that it has no de facto policy of denying a § 212(c) waiver to all aliens convicted of a serious drug offense. *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994). However, a serious drug crime will be accorded due weight, as is consistent with the evolution of the immigration law in this area, and may ultimately be the determinative factor in a given case. *Id.*
- (6) Aliens who have been convicted of a crime should make a showing of rehabilitation before waivers of removability will be considered as a matter of discretion. *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).
  - (a) However, a clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion and the issue of rehabilitation should not be viewed as a “threshold test” to be met before other factors are considered in a case involving a criminal conviction. *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).
  - (b) A proper determination as to whether an alien has demonstrated outstanding or unusual equities in an application can only be made after a complete review of the favorable factors in his case, therefore cases must be evaluated on a case-by-case basis, with rehabilitation as a factor to be considered in the exercise of discretion. *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).
  - (c) Confined aliens and those who have recently committed criminal acts have a more difficult task in demonstrating rehabilitation than aliens who have committed the same

offenses in the more distant past. *Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). Dependent upon the nature of the offense and the circumstances of confinement, it may well be that a confined respondent will not be able to demonstrate rehabilitation. *Id.*

- i) Therefore, an IJ did not act with “good cause” under the regulations by granting a 1-year continuance so that the respondent would have more time to establish rehabilitation. *Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992).
- ii) In *Matter of Arreguin*, 21 I&N Dec. 38 (BIA 1995), the Board found that an alien’s acceptance of responsibility for her crime (both during the hearing and in a presentence investigation which resulted in a reduction of sentence) and her achievements while in prison (voluntarily pursuing GED studies for which she received a letter of commendation, pursuing other courses, having no prison infractions, and being involved in volunteer activities) were favorable indicators of efforts at rehabilitation.

### **C. Voluntary departure - Section 240B**

1. Introduction. Voluntary departure is a relief from removal which may be granted by both the DHS and by IJs. If granted, voluntary departure allows the respondent to depart the U.S. at his or her own expense and, if he or she departs within the time allowed, he or she is not considered to have been removed. An alien departing voluntarily may travel to any country of his or her choice. It is not necessary that he or she go to the country designated for removal, but such alien must present a passport or other travel documentation to the DHS sufficient to assure lawful entry into the country to which the alien is departing unless such travel document is not necessary, or the document is already in possession of the DHS. 8 C.F.R. § 1240.26(b)(3), (c)(2).
2. Motion to reopen or reconsider. Effective January 20, 2009, a grant of voluntary departure is automatically terminated upon the filing of a post-decision motion to reopen or reconsider with the Immigration Court or the Board within the voluntary departure period, or upon the filing of a petition for review in a federal court of appeals. 8 C.F.R. § 1240.26(b)(1)(iii), (c)(3)(iii), (e)(1), (i); *see also Dada v. Mukasey*, 554 U.S. 1, 5, 14 (2008). Although the alien no longer has the benefit of voluntary departure with the filing of a post-decision motion to reopen or reconsider or a petition for review, the alien is also not subject to the penalties for failure to depart voluntarily under INA § 240B(d). 8 C.F.R. § 1240.26(b)(1)(iii), (e)(1), (i).
3. Pre-Conclusion Voluntary Departure - Section 240B(a)

- a. In general. The Attorney General may permit an alien to voluntarily depart the U.S. at the alien's own expense in lieu of being subject to proceedings under § 240 or prior to the completion of such proceedings, if the alien makes the request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing, makes no additional requests for relief, concedes removability, waives appeal of all issues, and is not deportable under § 237(a)(2)(A)(iii) [convicted of an aggravated felony] or § 237(a)(4)(B) [engaged in terrorist activities]. INA § 240B(a)(1); 8 C.F.R. § 1240.26(b)(1)(i)
  - (1) When to apply. In *Matter of Ocampo*, 22 I&N Dec. 1301 n.2 (BIA 2000), the Board found that a respondent who indicated his interest in voluntary departure at his first appearance before the IJ, but who did not actually request that relief until his hearing reconvened at a later date, properly applied for relief as "the rescheduling was treated by the parties and the Immigration Judge as a continuation of the master calendar hearing." See also 8 C.F.R. § 1240.26(b)(1)(ii), (b)(2).
  - (2) Appeal. It is necessary for IJs to advise respondents, on the record, that the right to appeal must be waived as a precondition to receiving voluntary departure under § 240B(a). The only instance in which an IJ might safely forego such an oral notification is when the record contains a written stipulation or comparable documentary evidence wherein the respondent, or the respondent's counsel, expressly waives appeal as part of establishing that all the regulatory requirements for this form of voluntary departure have been satisfied. Accordingly, the Board holds that, without an oral notice regarding the waiver of the right to appeal or a written attestation reflecting the respondent's awareness of this requirement, an IJ lacks the authority to grant voluntary departure prior to the completion of proceedings under § 240B(a). *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000).
- b. Voluntary Departure Period. Permission to depart voluntarily under § 240B(a)(1) shall not be valid for a period exceeding 120 days. INA § 240B(a)(2).
- c. Bond. The Attorney General may require an alien permitted to depart voluntarily under § 240B(a)(1) to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the U.S. within the time specified. INA § 240B(a)(3). However, a bond is not required. *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000).
- d. Aliens arriving in the U.S. In the case of an alien arriving in the U.S. against whom proceedings under § 240 are (or would otherwise be) initiated at the time of such alien's arrival, § 240B(a)(1) shall not apply. INA § 240B(a)(4). However, this shall not be construed as preventing such an

alien from withdrawing the application for admission in accordance with § 235(a)(4). *Id.*

- e. **Good Moral Character.** Effective April 1, 1997, an alien may apply for voluntary departure either in lieu of being subject to removal proceedings or before the conclusion of the proceedings under § 240B(a), or at the conclusion of the proceedings under § 240B(b). Unlike an alien applying for post-conclusion voluntary departure pursuant to § 240B(b), an alien applying for pre-conclusion voluntary departure under § 240B(a) need not demonstrate good moral character for a period of 5 years preceding the application for relief and the financial means to depart the United States. *Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999).
  - f. **Discretion.** An alien who applies for voluntary departure under either § 240B(a) or 240B(b) must establish that a favorable exercise of discretion is warranted upon consideration of the factors set forth in *Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972), *modified on other grounds by Matter of Torre*, 19 I&N Dec. 18 (BIA 1984), which governed applications for voluntary departure under the former § 244(e). However, the IJ has broader authority to grant voluntary departure in discretion before the conclusion of removal proceedings under section 240B(a) than under § 240B(b) or former section 244(e). *Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999).
  - g. **Multiple Entries.** An alien who had been granted voluntary departure five times pursuant to former § 244(e) and had returned each time without inspection is eligible to apply for voluntary departure in removal proceedings under § 240B, because the restrictions on eligibility of § 240B(c), relating to aliens who return after having previously been granted voluntary departure, only apply if relief was granted under § 240B. *Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999).
  - h. **Additional advisals.** Effective January 20, 2009, the IJ must advise the respondent that if he files a post-decision motion to reopen or reconsider during the voluntary departure period: (1) the grant of voluntary departure is terminated automatically; (2) the alternate order of removal takes effect immediately; and (3) the penalties for failure to depart voluntarily under § 240B(d) shall not apply. 8 C.F.R. § 1240.26(b)(1)(iii), (3)(iii).
4. **Voluntary Departure at the conclusion of proceedings - Section 240B(b)**
- a. Under § 240B(b)(1), the Attorney General may permit an alien voluntarily to depart the U.S. at the alien's own expense if, at the conclusion of a proceeding under § 240, the IJ enters an order granting voluntary departure in lieu of removal and finds that:
    - (1) the alien has been physically present in the U.S. for a period of at least one year immediately preceding the date the notice to appear was served under § 239(a) [INA § 240B(b)(1)(A)];

- (2) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure [INA § 240B(b)(1)(B)];
  - (3) the alien is not deportable under § 237(a)(2)(A)(iii) [convicted of an aggravated felony] or § 237(a)(4) [security violations, terrorist activities, etc.] [INA § 240B(b)(1)(C)]; and
  - (4) the alien has established by clear and convincing evidence that the alien has the means to depart the U.S. and intends to do so [INA § 240(b)(1)(D)].
- b. Voluntary Departure Period. Permission to depart the U.S. under § 240B(b)(1) shall not be valid for a period exceeding 60 days. INA § 240B(b)(2).
- c. When to apply. The Eleventh Circuit held that an alien who has not sought pre-conclusion voluntary departure may, for the first time, request post-conclusion voluntary departure at the end of a removal proceeding, after the IJ issues an oral decision ordering the alien's removal from the United States. *Alvarado v. Att'y Gen.*, 610 F.3d 1311, 1318 (11th Cir. 2010).
- d. Bond. An alien permitted to depart voluntarily under § 240B(b)(1) shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, but in no case less than \$500, to be surrendered upon proof that the alien has departed the U.S. within the time specified. INA § 240B(b)(3); 8 C.F.R. § 1240.26(c)(3). Effective January 20, 2009, if an alien does not post the bond within the time required, the alien is still obligated to depart within the period allowed and is not exempted from the consequences for failure to depart. 8 C.F.R. § 1240.26(c)(4). This overrules *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). In addition, the failure to post bond may be considered as a negative discretionary factor with respect to any discretionary form of relief. If the alien waived appeal of the IJ's decision, the failure to timely post the voluntary departure bond means that the alternative order of removal takes effect immediately, except that an alien granted post-conclusion voluntary departure will not be deemed to have departed under an order of removal if the alien: (1) departs the U.S. no more than 25 days after the failure to post bond; (2) provides to DHS such evidence of departure as the Immigration and Customs Enforcement ("ICE") Field Office Director may require; and (3) provides evidence DHS deems sufficient that the alien remains outside the U.S. 8 C.F.R. § 1240.26(c)(4).
- (1) The voluntary departure regulations at 8 C.F.R. § 1240.26(c)(4) do not apply retroactively. *Matter of Velasco*, 25 I&N Dec. 143 (BIA 2009). If an IJ granted voluntary departure before January 20, 2009 and the alien failed to post the voluntary departure bond required by INA § 240B(b)(3), the former regulatory scheme, as interpreted in



*Matter of Diaz-Ruacho*, remains applicable and the penalties imposed by § 240B(d)(1) for failure to depart within the voluntary departure period do not apply. *Id.* at 146. In *Matter of Diaz-Ruacho*, the Board held that an alien who has not timely posted the required voluntary departure bond is not subject to the penalties in INA § 240B(d)(1) because the statute stated that the voluntary departure order automatically vacated upon failure to post the bond within the required period of time. 24 I&N Dec. at 51.

- e. Opportunity to decline. Effective January 20, 2009, upon setting the bond and conditions of voluntary departure, the IJ must provide the alien the opportunity to accept the grant of voluntary departure or to decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. 8 C.F.R. § 1240.26(c)(3).
- f. Aliens not eligible. The Attorney General shall not permit an alien to depart voluntarily under § 240B(b)(1) if the alien was previously permitted to so depart after having been found inadmissible under § 212(a)(6)(A) [present without admission or parole]. INA § 240B(c).
- g. Additional conditions. The Attorney General may by regulation limit eligibility for voluntary departure under § 240B for any class or classes of aliens and no court may review any such regulation. INA § 240B(e). The IJ may require that the alien be detained until his or her departure from the U.S. as a condition of a grant of voluntary departure. *Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009).
- h. Civil penalty for failure to depart. If an alien is permitted to depart voluntarily under § 240B and fails to depart the U.S. within the time specified, the alien shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000, and be ineligible for a period of 10 years for any further relief under §§ 240B (voluntary departure), 240A (cancellation of removal), 245 (adjustment of status), 248 (change of nonimmigrant classification), and 249 (registry). The order permitting the alien to depart voluntarily shall inform the alien of these penalties. INA § 240B(d). Effective January 20, 2009, there is a rebuttable presumption of a civil penalty of \$3,000 if the alien fails to depart within the voluntary departure period, but the IJ may set a higher or lower amount as permitted by § 240B(d)(A)(A). 8 C.F.R. § 1240.26(j).
  - (1) The Board lacks authority to apply an “exceptional circumstances” or other general equitable exception to the penalty provisions for failure to depart within the time period afforded for voluntary departure under § 240B(d)(1). *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007). An alien has not voluntarily failed to depart the United States under § 240B(d)(1) when the alien, through no fault of his or her own, was unaware of the voluntary departure order or was physically unable to depart within the time granted. *Id.*

i. Advisals

- (1) Effective January 20, 2009, before granting post-conclusion voluntary departure, the IJ must advise the alien:
  - (a) of any conditions the IJ set beyond those specifically enumerated by regulation; and
  - (b) of the bond amount that will be set and the duty to post bond with the ICE Field Office Director within 5 business days of the order granting voluntary departure.
- (2) Upon granting post-conclusion voluntary departure, the IJ must advise the alien:
  - (a) of the requirement to provide to the Board, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond with the Department of Homeland Security;
  - (b) that the Board will not reinstate the voluntary departure period in its final order if the alien does not submit timely proof to the Board that the voluntary departure bond has been posted; and
  - (c) that if the alien files a post-decision motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure is terminated automatically and the alternate order of removal takes effect immediately. 8 C.F.R. § 1240.26(c)(3).
- (3) Further, 8 C.F.R. § 1240.26(j) provides
  - (a) that the IJ must advise the alien of the precise amount of the civil penalty for failure to depart, pursuant to § 240B(d)(1)(A), and
  - (b) that a rebuttable presumption exists that the penalty will be set at \$3,000 unless the Immigration Judge specifically orders a higher or lower amount, within the permissible range allowed by law, at the time of granting voluntary departure. *See Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010) (remanding the record where IJ failed to provide all the advisals and alien failed to submit timely proof to the Board that bond had been posted and ordering grant of new period of voluntary departure with all required advisals).

- j. Extension of time to depart. Authority to extend the time within which to depart specified initially by an IJ or the Board is within the sole jurisdiction of the DD. 8 C.F.R. § 1240.26(f).
- k. Reinstatement of Voluntary Departure. An IJ or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure if reopening was granted prior to the expiration of the original period of voluntary departure. 8 C.F.R. § 1240.26(h).
  - (1) In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in § 240B. 8 C.F.R. § 1240.26(h).

#### **D. Withdrawal of application for admission**

1. History lesson. Until the passage of the IIRIRA, neither the statute nor the regulations directly provided for the withdrawal of an application for admission. The Board held that an IJ, in his discretion, may permit an alien in exclusion proceedings to withdraw his or her application for admission. An alien could not withdraw his or her application as a matter of right. *Matter of Vargas-Molina*, 13 I&N Dec. 651 (BIA 1971). Instead, in order to withdraw an application for admission, the alien had to demonstrate that he or she had the intent to depart the U.S., that he or she had the means to depart immediately, and that justice would be ill-served if an order of exclusion was entered. *Matter of Gutierrez*, 19 I&N Dec. 562 (BIA 1988). The Board held that once an exclusion hearing has been conducted and the issue of excludability has been resolved, the applicant should ordinarily only be allowed to withdraw his or her application for admission with the concurrence of the INS.
2. Withdrawal of application for admission under IIRIRA
  - a. An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the U.S. INA § 235(a)(4).
  - b. The Attorney General may, in the exercise of discretion, permit any applicant for admission to withdraw his or her application for admission in lieu of removal proceedings under § 240 or expedited removal under § 235(b)(1). 8 C.F.R. § 1235.4.
  - c. The alien's decision to withdraw the application for admission must be made voluntarily, but that shall not be construed to give an alien the right to withdraw the application for admission. 8 C.F.R. § 1235.4.
  - d. An alien permitted to withdraw an application for admission should normally remain in carrier or DHS custody pending departure, unless the DD determines that parole of the alien is warranted. 8 C.F.R. § 1235.4.

- e. Permission to withdraw an application for admission should not normally be granted unless the alien intends and is able to depart the United States immediately. 8 C.F.R. § 1235.4.

## E. Citizenship

1. Definition of a Child. The term “child” for purposes of Title III of the INA, means an unmarried person under the age of 21 born to parents in wedlock, and includes a child legitimated under the law of the child’s residence or domicile, or under the laws of the father’s residence or domicile, whether in the United States or elsewhere, if such legitimation takes place before the child reaches the age of 16, and the child is in the legal custody of the legitimizing parent at the time of such legitimization. INA § 101(c). The term child also means, except as provided in §§ 320 and 321 of the Act, a child adopted in the United States if such adoption takes place before the child reaches the age of 16 (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of INA § 101(b)(1)), and the child is in the legal custody of the adopting parent at the time of such adoption. INA § 101(c).
  - a. Legitimization. A person born out of wedlock may also qualify as a legitimated “child” of his or her biological parents under § 101(c)(1) for purposes of citizenship, if such person was born in a country or State that has eliminated all legal distinctions between children based on the marital status of their parents or had a residence or domicile in such a country or State (including a State within the United States), if otherwise eligible. *Matter of Cross*, 26 I&N Dec. 485, 485 (BIA 2015) (overruling in part *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008), and *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006)) (affirming *Matter of Clahar*, 18 I&N Dec. 1 (BIA 1981), and *Matter of Goorahoo*, 20 I&N Dec. 782 (BIA 1994)).
  - b. Custody. There is a presumption of equal legal custody once the legitimization occurs, absent country laws or affirmative evidence indicating otherwise. *Matter of River*, 17 I&N Dec. 419, 422 (BIA 1980).
  - c. Adoption Age Exception. Natural siblings of adopted children who are adopted while under the age of 18 by the same adoptive parent or parents of their sibling, who have been in the legal custody of, and resided with, the same adoptive parent or parents for at least two years, or who have been battered or subject to extreme cruelty by the adopting parent, parents, or a family member residing in the same household, are also included within the definition of a child under § 101(c). See INA § 101(b)(1)(E)(ii).
  - d. Step Children. A person born outside the United States cannot derive United States citizenship under § 320(a) by virtue of his or her relationship to a nonadoptive stepparent. *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009); see also *Acevedo v. Lynch*, 798 F.3d 1167 (9th Cir. 2015) (holding that definition of “child” under INA § 101(c)(1) does not include stepchildren).

2. Derivative Citizenship under INA § 320. Applies when the event occurs on or after February 27, 2001. A child born outside of the United States derives United States citizenship when at least one parent is a United States citizen (whether by birth or naturalization); the child is under the age of 18; and the child is residing in the United States in the legal and physical custody of the citizen parent, pursuant to a lawful admission for permanent residence. INA § 320(a).
  - a. Adoption. A child, adopted by a United States citizen parent shall derive citizenship under § 320(a), if the child satisfies the requirements applicable to adopted children under § 101(b)(1). INA § 320(b).
  - b. Under § 101(b)(1)(E)(i), the adopted child must be adopted while under the age of 16 and must have been in the legal custody of, and resided with, the adopting parent or parents for at least two years, or has been battered or subject to extreme cruelty by the adopting parent, parents, or a family member residing in the same household. In *Matter of R. Huang*, 26 I&N Dec. 627 (BIA 2015), the BIA held that beneficiary of a visa petition who was adopted pursuant to a State court order that was entered when the beneficiary was more than 16 years old, but with an effective date prior to his or her 16th birthday, may qualify as an adopted child under § 101(b)(1)(E)(i), so long as the adoption petition was filed before the beneficiary's 16th birthday and the State in which the adoption was entered expressly permits an adoption decree to be dated retroactively. *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976), and *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982), modified. (See also Adoption Age Exception above.)
3. Derivative Citizenship under Former Section 320 of the Act. Applies when the relevant event occurred before February 27, 2001. A child born outside of the United States of one alien parent and one United States citizen parent derives United States citizenship upon the naturalization of the alien parent if such naturalization occurs while the child is unmarried and under the age of 18, and such child is residing in the United States as an LPR at the time of naturalization, or thereafter begins to reside permanently in the United States while under the age of 18.
  - a. Adoption. An adopted child derives citizenship under former section 320 of the Act only if the child is residing in the United States at the time of naturalization of such adoptive parent, and is in the custody of his adoptive parents, pursuant to a lawful admission for permanent residence. Former Section 320(b) of the INA.
4. Derivative Citizenship under Former Section 321(a) of the Act. Applies when the relevant event occurs before February 27, 2001. A child born outside of the United States of two alien parents, or of one alien parent and one United States citizen parent who has subsequently lost United States citizenship, becomes a United States citizen: (1) at the naturalization of both parents, or the naturalization of the surviving parent if one of the parents is deceased, or at the naturalization of the parent having legal custody of the child where there has been a legal separation, or at the naturalization of the mother, if the child was born out of wedlock and the paternity

of the child has not been established by legitimization; and (2) the naturalization takes place while the child is under the age of 18, and the child is residing in the United States as a LPR at the time of the parent last naturalized, or thereafter begins to reside permanently in the United States while under the age of 18.

- a. LPR Status. The Board has held that in order to obtain derivative citizenship under former section 321(a), an alien must acquire LPR status “while he or she is under 18 years of age.” *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008); *but see Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013) (holding that the “begins to reside permanently” language of former section 321(a) does not require a child to establish LPR status prior to the age of 18 in order to derive citizenship from a naturalizing parent or parents, and instead only requires “some objective official manifestation of the child’s permanent residence.”).
- b. Custody. A child who has satisfied the statutory conditions of former section 321(a), before the age of 18 years has acquired U.S. citizenship, regardless of whether the naturalized parent acquired legal custody of the child before or after the naturalization. *Matter of Baires*, 24 I&N Dec. 467 (BIA 2008).
- c. Age. Under former section 321(a) of the Act, a child remains “under the age of eighteen years” up until the time of his birth on his eighteenth birthday. *Duarte-Ceri v. Holder*, 630 F.3d 83 (2d Cir. 2010) (holding that if the alien was born in the evening and his mother was naturalized in the morning on the same day 18 years later, he was still under the age of eighteen years when his mother was naturalized).
- d. Common Law Marriage. In *Thompson v. Lynch*, 808 F.3d 939 (1st Cir. 2015), the First Circuit affirmed a BIA decision denying the petitioner’s claim that he derived United States citizenship under former section 321(a) of the Act upon the naturalization of his father, and held that because the petitioner had not proven that Jamaica recognized common-law marriage at the time of his birth, the petitioner’s claim of citizenship under former section 321(a)(3) failed because he could not prove that his parents were in a legally recognized relationship from which they could legally separate.
- e. Adoption. Former section 321 of the Act shall apply to an adopted child only if the child is residing in the United States at the time of the naturalization of such adoptive parent or parents, and is in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence. Former Section 321(b) of the INA.

## **F. Cancellation of removal under sections 240A(a) and 240A(b)**

1. Aliens ineligible for relief. Section 240A(c) provides that the provisions of § 240A(a) and 240A(b)(1) shall not apply to any of the following aliens:
  - a. an alien who entered the U.S. as a crewman subsequent to June 30, 1964 [INA § 240A(c)(1)]; *Matter of G-D-M-*, 25 I&N Dec. 82 (BIA 2009);



- b. an alien who was admitted to the U.S. as a nonimmigrant exchange alien as defined in § 101(a)(15)(J), or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of § 212(e) [INA § 240A(c)(2)];
  - c. an alien who was admitted to the U.S. as a nonimmigrant exchange alien as defined in § 101(a)(15)(J) or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training, is subject to the two-year foreign residence requirement of § 212(e), and has not fulfilled that requirement or received a waiver thereof [INA § 240A(c)(3)];
  - d. an alien who is inadmissible under § 212(a)(3) [espionage, sabotage, etc., terrorist activities, adverse foreign policy consequences, immigrant membership in totalitarian party, participants in Nazi persecutions or genocide], or deportable under § 237(a)(4) [national security violations, terrorist activities, adverse foreign policy consequences, assisted in Nazi persecution or engaged in genocide] [INA § 240A(c)(4)];
  - e. an alien who is described in § 241(b)(3)(B)(i) [participated in the persecution of others] [INA § 240A(c)(5)];
  - f. an alien whose removal has previously been cancelled under § 240A, whose deportation was suspended under (former) § 244(a), or who has been granted relief under (former) § 212(c) as such sections were in effect before the date of enactment of IIRIRA [INA § 240A(c)(6)].
2. Cancellation of Removal for Certain Permanent Residents, § 240A(a). The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the U.S. if the alien: (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the U.S. continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.
- a. The period of an alien's residence in the U.S. after admission as a nonimmigrant may be considered in calculating the 7 years of continuous residence required to establish eligibility for cancellation of removal. *Matter of Blancas*, 23 I&N Dec. 458 (BIA 2002).
    - (1) However, a grant of Family Unity Program benefits does not constitute an "admission." *Matter of Fajardo-Espinoza*, 26 I&N Dec. 603 (BIA 2015).
  - b. An alien in removal proceedings who at one time was a lawful permanent resident and held that status for at least five years but who later lost that status is no longer statutorily eligible for cancellation of removal. *Padilla-Romero*



*v. Holder*, 611 F.3d 1011 (9th Cir. 2010). The Ninth Circuit also held that neither an approved I-130 nor a grant of employment authorization confers admission status on an undocumented alien for purposes of establishing 7 years' continuous residence "after having been admitted in any status" for purposes of § 240A(a)(2). See *Vasquez de Alcantar v. Holder*, 645 F.3d 1097 (9th Cir. 2011); *Guevara v. Holder*, 649 F.3d 1086 (9th Cir. 2011); see also *Cabrera v. Lynch*, 805 F.3d 391 (1st Cir. 2015).

- c. An alien who acquired permanent resident status through fraud or misrepresentation has never been "lawfully admitted for permanent residence" and is therefore ineligible for cancellation of removal under § 240A(a). *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003).
  - d. Neither a parent's lawful permanent resident status nor period of residence can be imputed to a child for purposes of calculating the 5 years of lawful permanent residence or 7 years of continuous residence required for cancellation of removal. *Holder v. Martinez-Gutierrez*, 132 S. Ct. 2011 (2012); *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007).
3. Cancellation of removal and adjustment of status for certain nonpermanent residents under § 240A(b)
- a. History Lesson - Prior to the IIRIRA, a comparable relief from deportation existed in the form of suspension of deportation. In order to qualify for this relief, an alien had to establish physical presence in the U.S. for 7 years (3 years if a battered spouse or child and 10 years if deportable under certain criminal grounds), good moral character for all of that period, and that deportation would result in extreme or exceptionally unusual hardship to the alien or to a qualifying relative (exceptionally unusual hardship if subject to the 10 year statutory period).
  - b. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the U.S. if the alien:
    - (1) has been physically present in the U.S. for a continuous period of not less than 10 years immediately preceding the date of such application;
      - (a) Voluntary departure under the threat of removal breaks an alien's continuous physical presence. *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002). To be under threat of removal, the alien must have been informed that he or she has the right to a hearing before an Immigration Judge and have waived that right. *Matter of Garcia-Ramirez*, 26 I&N Dec. 674 (BIA 2015); *Matter of Castrejon-Colino*, 26 I&N Dec. 667 (BIA 2015).

- (b) A departure from the United States following a criminal conviction for illegal entry under § 275(a)(1) of the Act breaks continuous physical presence. *Matter of Velasquez-Cruz*, 26 I&N Dec. 458 (BIA 2014)
- (2) has been a person of good moral character (“GMC”) during such period;
- (3) has not been convicted of an offense under §§ 212(a)(2), 237(a)(2), or 237(a)(3);
  - (a) Ineligibility due to a conviction which falls within § 212(a)(2) cannot be overcome by a waiver under § 212(h). *Matter of Bustamante*, 25 I&N Dec. 564 (BIA 2011).
  - (a) The Board held that an alien whose conviction precedes the October 1, 1996, effective date of § 237(a)(2)(E) has not been “convicted of an offense” under § 237(a)(2)(E) and, therefore, is not barred by § 240A(b)(1)(C) from establishing eligibility for cancellation of removal. *Matter of Gonzalez-Silva*, 24 I&N Dec. 218 (BIA 2007).
  - (b) In *Obi v. Holder*, 558 F.3d 609 (7th Cir. 2009), the Seventh Circuit upheld the IJ’s determination that the alien was barred from cancellation of removal for nonpermanent residents because his 1996 marriage fraud conviction rendered him “convicted of an offense under . . . section 237(a)(3).” Citing *Lara-Ruiz v. INS*, 241 F.3d 934, 945 (7th Cir. 2001), the court held that Congress clearly intended to apply IIRIRA’s cancellation-of-removal provisions to all proceedings brought after April 1, 1997, regardless of when an alien committed a disqualifying crime.
  - (c) The Ninth Circuit held that the petty offense exception under § 212(a)(2)(A)(ii) is not available with respect to a conviction rendering an alien ineligible for cancellation of removal under § 240A(b) because the petty offense exception does not reference § 237(a)(2) or § 240A(b) and there is no other statutory basis for applying the exception. *Vasquez-Hernandez v. Holder*, 590 F.3d 1053 (9th Cir. 2010).
- (4) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent or child, who is a citizen of the U.S. or an alien lawfully admitted for permanent residence.

- (a) Stepparents and stepchildren. A stepchild who meets the definition of a “child” under § 101(b)(1)(B) is a qualifying relative for purposes of cancellation of removal under § 240A(b)(1)(D). *Matter of Portillo-Gutierrez*, 25 I&N Dec. 148 (BIA 2009). A stepparent who meets the definition of a “parent” under § 101(b)(2) is a qualifying relative for purposes of cancellation of removal under § 240A(b)(1)(D). *Matter of Morales*, 25 I&N Dec. 186 (BIA 2010).
- (b) A “child” who turns 21 before the final adjudication of the application is no longer a qualifying relative, even if the child was under the age of 21 at the time of the initial filing of the application. *Matter of Isidro-Zamorano*, 25 I&N Dec. 829 (BIA 2012).
- (c) To establish “exceptional and extremely unusual hardship”, an applicant for cancellation of removal under § 240A(b) of the Act must demonstrate that his or her citizen or lawful permanent resident spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien’s deportation, but need not show that such hardship would be “unconscionable.” *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).
- (d) Although many of the factors that were considered in assessing “extreme hardship” for suspension of deportation should also be considered in evaluating “exceptional and extremely unusual hardship”, an applicant for cancellation of removal must demonstrate hardship beyond that which has historically been required in suspension of deportation cases involving the “extreme hardship” standard. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).
- (e) In establishing eligibility for cancellation of removal, only hardship to qualifying relatives, not to the applicant himself or herself, may be considered; hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to a qualifying relative. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).
- (f) An unmarried mother of 2 U.S. citizen children (a 6 year old and an 11 year old) did not establish that her children would suffer exceptional and extremely unusual hardship upon her removal to Mexico in spite of the poor economic conditions and diminished educational opportunities in Mexico and the fact that the respondent is unmarried and has no family in

Mexico to assist in her children's adjustment to life there. *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

- (g) The Board distinguished *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001) and *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002) and granted cancellation of removal in *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002). The factors considered in assessing the hardship to the respondent's United States citizen children included the heavy burden imposed on the respondent to provide the sole financial and familial support for her six children if she is deported to Mexico, the lack of any family in her native country, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country. *Recinas*, 23 I&N Dec. 467. The Board stated that the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief. *Id.* at 470. However, the Board also stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.*
  - (h) An unborn child is not a "child" under § 101(b)(1) for purposes of acting as a qualifying relative for cancellation of removal. *Partap v. Holder*, 603 F.3d 1173 (9th Cir. 2010).
- c. Special rule for battered spouse or child - § 240A(b)(2). The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the U.S. if the alien demonstrates that:
- (1) the alien has been battered or subjected to extreme cruelty in the U.S. by a spouse or parent who is a U.S. citizen or LPR (or is the parent of a child of a U.S. citizen or LPR and the child has been battered or subjected to extreme cruelty in the U.S. by such citizen or permanent resident parent);
    - (a) In *Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011), the Ninth Circuit disagreed with the Board that the petitioner failed to show that the beating of her two U.S. citizen children by the children's LPR father constituted battery for purposes of VAWA special rule cancellation. The court examined the definition of "battery or extreme cruelty" in 8 C.F.R. § 204.2(c)(1)(vi), (e)(1)(vi), noting that the subsections are identical but for the last sentence, depending on whether the petitioner is a spouse (§ 204.2(c)) or a child (§ 204.2(e)). After deciding that the regulatory definitions do not address petitioner's situation because 8 C.F.R. §

204.2(c)(1)(vi) requires the abuse take place during the self-petitioner's marriage and 8 C.F.R. § 204.2(e)(1)(vi) applies to a petition from a child, the court nonetheless concluded the Board permissibly extended the use of the definitions. The court held that the statute does not indicate that battery or extreme cruelty is defined differently depending on the marital status of the petitioner.

- (b) the alien has been physically present in the U.S. for a continuous period of not less than 3 years immediately preceding the date of such application;
  - (c) the alien has been a person of GMC during such period;
  - (d) the alien is not inadmissible under § 212(a)(2) or (3), is not deportable under § 237(a)(1)(G) involving marriage fraud, or § 237(a)(2) through (4), and has not been convicted of an aggravated felony; and
    - i) This cannot be waived under § 212(h). *See Matter of Y-N-P-*, 26 I&N Dec. 10 (BIA 2012).
  - (e) the removal would result in extreme hardship to the alien, the alien's child or (in the case of an alien who is a child) to the alien's parent.
- (2) In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. INA § 240A(b)(2). The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General. *Id.*
- (3) As reflected by the plain language of the statute and legislative history, a lawful permanent resident who qualifies as a battered spouse may apply for cancellation of removal pursuant to § 240A(b)(2). *Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009).
- d. Adjustment of status of aliens whose removal is cancelled. Section 240A(b)(3) provides that the Attorney General may adjust to the status of an alien lawfully admitted for permanent residence any alien who the Attorney General determines meets the requirements of § 240A(b)(1) and 240A(b)(2). The number of adjustments shall not exceed 4,000 for any fiscal year. The Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal or determination.

4. Special rules relating to continuous residence or physical presence - § 240A(d)
  - a. Termination of continuous period. Pursuant to § 240A(d)(1), commonly known as the “stop-time” rule, any period of continuous residence or continuous physical presence in the U.S. shall be deemed to end when the alien is served a notice to appear under § 239(a) or when the alien has committed an offense referred to in § 212(a)(2) that renders the alien inadmissible to the U.S. under § 212(a)(2) or removable from the U.S. under § 237(a)(2) or 237(a)(4), whichever is earliest. INA § 240A(d)(1).
    - (1) Termination by service of Notice to Appear
      - (a) In a deportation case involving the respondent’s eligibility for suspension of deportation, the Board found that the continuous physical presence clock does not start anew after the service of an Order to Show Cause so as to allow an alien to accrue the time required to establish eligibility for suspension of deportation after the service of an Order to Show Cause. *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000).
    - (2) Termination by commission of an offense
      - (a) The period of continuous residence required for relief under § 240A(a) commences when the alien has been admitted in any status, which includes admission as a temporary resident. *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999).
      - (b) Continuous residence or physical presence for cancellation of removal purposes is deemed to end on the date that a qualifying offense has been committed, even if the offense was committed prior to the enactment of the IIRIRA of 1996. *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999), *re-aff’d Matter of Robles*, 24 I&N Dec. 22 (BIA 2006). *See also Baraket v. Holder*, 632 F.3d 56 (2d Cir. 2011).
      - i) However, some circuits disagree. *See Jaghoori v. Holder*, 772 F.3d 764 (4th Cir. 2014); *Bakarian v. Mukasey*, 541 F.3d 775 (7th Cir. 2008); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190 (9th Cir. 2006). An alien need not be charged in the NTA with the alleged criminal conduct to terminate the alien’s continuous residence. *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006).
    - (c) Pursuant to § 240A(d)(1), an offense must be one “referred to in section 212(a)(2)” to terminate the period of continuous residence or continuous physical presence required for

cancellation of removal. *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000). A firearms offense that renders an alien removable under § 237(a)(2)(C) is not one “referred to in section 212(a)(2)” and thus does not stop the further accrual of continuous residence or continuous physical presence for purposes of establishing eligibility for cancellation of removal. *Id.*

- (d) An alien who has been convicted of a crime involving moral turpitude that falls within the “petty offense” exception in § 212(a)(2)(A)(ii)(II) is not ineligible for cancellation of removal under § 240A(b)(1)(C) because he “has not been convicted of an offense under section 212(a)(2).” *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003); *see also Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010); *Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003).
  - i) An offense which falls under the “petty offense” exception also does not prevent an alien from establishing good moral character. *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003).
- (e) However, an alien who has been convicted of a crime involving moral turpitude for which a sentence of a year or longer may be imposed has been convicted of an offense “described under” § 237(a)(2) and is therefore ineligible for cancellation of removal under § 240A(b)(1)(C), regardless of the alien’s eligibility for the petty offense exception under § 212(a)(2)(A)(ii)(II). *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010).
- (f) A conviction for a single crime of moral turpitude that qualifies as a “petty offense” conviction does not trigger the “stop time” rule in § 240A(d)(1). *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010).
- (g) Once an alien has been convicted of an offense that stops the accrual of the 7-year period of continuous residence, such period cannot restart simply because the alien departs from and then returns to the United States. *Matter of Nelson*, 25 I&N Dec. 410 (BIA 2011). Where the alien was convicted of an offense that stopped the accrual of the 7-year period and the charge of removability was based on the commission of that offense, he could not restart his period of residence after returning to the United States from a two-day trip to Canada. *See id.* However, if the alien were not charged with removability on the basis of the commission of his crime or if he had received a waiver in relation to the offense, the



departure and return may have restarted his residence. *See id.* at 414-15.

(3) Treatment of certain breaks in presence

- (a) Section 240A(d)(2) is not the exclusive rule respecting all departures. *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005).
- (b) A departure under threat of deportation constitutes a break in the accrual of continuous physical presence. *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002).
- (c) Mere refusal to admit at a land border of entry, without any formal or documented process, does not interrupt continuous physical presence. *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005). *See Vasquez v. Holder*, 635 F.3d 563 (1st Cir. 2011) (holding that the Board reasonably interpreted the Act in finding that the expedited removal proceedings constituted formal, documented process and, therefore, that those proceedings interrupted the alien's period of continuous physical presence).

b. Section 240A(d)(2) provides that an alien has not established continuous physical presence in the United States if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

- (1) This section does not mean that any departure of 90 days or less is forgiven and an alien's continuous physical presence is deemed to end at the time the alien is removed or compelled to depart the U.S. under threat of the institution of deportation or removal proceedings (voluntary departure granted by the Service under former section 242(b) of the Act), even if the absence is for only one day. *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002).
- (2) Where an alien departed the United States for a period less than that specified in § 240A(d)(2) and unsuccessfully attempted reentry at a port of entry before actually reentering, physical presence continued to accrue for purposes of cancellation of removal under § 240A(b)(1)(A) unless, during that attempted reentry, the alien was formally excluded or made subject to an order of expedited removal, was offered and accepted the opportunity to withdraw an application for admission, or was subjected to some other formal, documented process pursuant to which the alien was determined to be inadmissible to the United States. *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005).

- (3) Service of the NTA or OSC stops time forever as compared to a break in time under § 240A(d)(2) which is considered just a break where time can be counted again after break. *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000).
  - c. Continuity not required because of honorable service in Armed Forces and presence upon entry into service. The requirements of continuous residence or continuous physical presence in the U.S. under § 240A(a) and 240A(b) shall not apply to an alien who has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the U.S. and, if separated from such service, was separated under honorable conditions, and at the time of the alien's enlistment or induction was in the U.S. INA § 240A(d)(3).
  - d. The Ninth Circuit held that erroneous advice from a third-party, who stated that the Mexican aliens were eligible for lawful permanent resident status, did not warrant equitable tolling of cancellation of removal's 10-year continuous-presence requirement, even though the aliens were only one-month short of continuous presence requirement and may not have come to the attention of immigration authorities if they had not taken the third party's bad advice. *Hernandez v. Holder*, 633 F.3d 1182 (9th Cir. 2011).
5. Annual limitation. The Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under (former) section 244(a) of a total of more than 4,000 aliens in any fiscal year. This applies regardless of when an alien applied for such cancellation and adjustment and whether such alien had previously applied for suspension under (former) section 244(a). INA § 240A(e).
6. In addition to satisfying the statutory eligibility requirements, an applicant for cancellation of removal must establish that he or she merits such relief as a matter of discretion. *Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998). The general standards developed in *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), *clarified by Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), for the exercise of discretion under § 212(c), which was the predecessor provision to § 240A(a), are applicable to the exercise of discretion under § 240A(a). *Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998).
  - a. However, an applicant for cancellation of removal under § 240A(a) need not meet a threshold test requiring a showing of "unusual or outstanding equities" before a balancing of the favorable and adverse factors of record will be made to determine whether relief should be granted in the exercise of discretion. *Matter of Sotelo*, 23 I&N Dec. 201 (BIA 2001), *clarifying Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998). The Board stated that in any balancing test, various factors, whether positive or negative, are accorded more weight than others according to the specific facts of the individual case. *Id.* at 203. More serious misconduct necessarily weighs more heavily against an exercise of discretion than does less serious misconduct. *Id.* Therefore, an alien must present "additional offsetting favorable evidence" to counterbalance an

adverse factor such as serious criminal activity. *Id.* In *Matter of C-V-T-*, the Board questioned whether the requirement of presenting outstanding or unusual equities had any continuing viability in view of the expanded definition of the term “aggravated felony.” 22 I&N Dec. at 11 n.4. It observed that in each of the precedent decisions where it required a showing of “unusual or outstanding equities,” the alien would now be considered ineligible for relief because of a conviction for an aggravated felony, without any need to reach the issue of discretion. *Id.* In *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), the Board clarified that its decision in *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988), did not require an alien to satisfy a threshold test of showing “unusual or outstanding equities” before it would apply a balancing test to consider whether a favorable exercise of discretion is warranted. The Board specifically stated that it found the reference to a threshold test in *Matter of Buscemi* to be “misleading, as it might be read to imply that a full examination of an alien’s equities can somehow be pretermitted” and emphasized that a “complete review of the favorable factors” in the case is required. 20 I&N Dec. at 196 n.3. Consistent with the clarifying statements in *Matter of Edwards*, 20 I&N Dec. at 196, the Board reiterated that it will not apply a threshold test in cancellation of removal cases. *Sotelo*, 23 I&N Dec. at 204. Instead, the Board will weigh the favorable and adverse factors to determine whether, on balance, the “totality of the evidence before us” indicates that the “respondent has adequately demonstrated that he warrants a favorable exercise of discretion and a grant of cancellation of removal under section 240A(a) of the Act.” *Id.*

- (1) *Matter of Marin* and other cases dealing with the exercise of discretion are discussed below in the section dealing with § 212(c) waivers.

## **G. A waiver under former section 212(c)**

1. Introduction – Former section 212(c) provided for a waiver for certain grounds of exclusion for LPRs who had departed and were seeking re-entry to the United States. Former section 212(c) stated: “Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General, without regard to the provision of subsection (a) of the section[.]” A waiver, if granted, caused a ground of exclusion to be overlooked in considering the alien’s excludability. The alien was returned to the same LPR status previously held. *Matter of Przygocki*, 17 I&N Dec. 361 (BIA 1980). Strictly speaking, this is different from a “relief,” but is usually referred to as one of the forms of relief available from both exclusion and deportation.
2. History lesson
  - a. A sequence of legislation – including the Immigration Act of 1990 (“IMMACT 1990”), § 440(d) of the Antiterrorism and Effective Death Penalty

Act of 1996 (“AEDPA”), and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) – eroded eligibility for former 212(c) of the Act and then repealed section 212(c) entirely. Subsequently, a series of Supreme Court and Circuit Courts of Appeals decisions determined that a waiver under former section 212(c) of the Act remains available for some aliens under principles of non-retroactivity. *See INS v. St. Cyr*, 533 U.S. 289 (2001). These decisions resulted in a patchwork, in which aliens may or may not have retained § 212(c) eligibility for their convictions depending on various dates. Separately, a line of cases developed addressing whether an alien could waive grounds of deportability which lacked a “comparable” ground of inadmissibility.

- b. The BIA has now set forth in a single case the mechanism for determining whether an alien can waive grounds of deportability or inadmissibility under former section 212(c). *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014).

### 3. Availability of former section 212(c) relief

- a. A lawful permanent resident who has accrued 7 consecutive years of lawful, unrelinquished domicile in the United States and who is removable or deportable by virtue of a plea or conviction entered before April 24, 1996, is eligible to apply for discretionary relief under former section 212(c) unless:
  - (1) the applicant is subject to the grounds of inadmissibility under § 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act; or
  - (2) the applicant has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996.
- b. A lawful permanent resident who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable or deportable by virtue of a plea or conviction entered between April 24, 1996, and April 1, 1997, is eligible to apply for discretionary relief from removal or deportation under former section 212(c) of the Act unless:
  - (1) the applicant’s removal or deportation proceedings commenced on or after April 24, 1996, and the conviction renders the applicant removable or deportable under one or more of the deportability grounds enumerated in section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (as amended); or
  - (2) the applicant is subject to the grounds of inadmissibility under § 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act; or (3) the applicant has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996.

- c. A lawful permanent resident who is otherwise eligible for relief under former section 212(c) may apply for such relief in removal or deportation proceedings without regard to whether the relevant conviction resulted from a plea agreement or a trial and without regard to whether he or she was removable or deportable under the law in effect when the conviction was entered.

4. Substantive requirements

- a. An application is made before an IJ by filing an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191).
- b. The alien must be an LPR.
  - (1) Section 101(a)(20) defines the term “lawfully admitted for permanent residence” as the status of having been lawfully accorded the privilege of residing permanently in the U.S. as an immigrant in accordance with the immigration laws, such status not having changed.
    - (a) Therefore, an alien who has lost or abandoned his status as an LPR is not eligible to apply for a § 212(c) waiver. *But see*, 8 C.F.R. § 1003.44 (special motions to reopen for former section 212(c) relief).
  - (2) When LPR status terminates
    - (a) The Board held that the LPR status of an alien terminates within the meaning of § 101(a)(20) with the entry of a final administrative order of deportation. *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981). An order becomes final when the time allotted for appeal expires, or when the Board renders its decision on appeal or certification. *Id.* Since the LPR status of an alien continues until the entry of a final administrative order of deportation, an alien who enters the U.S. while in an excludable class before accruing seven years as an LPR does not lose his lawful status and is eligible to apply for a § 212(c) waiver if he attains seven years before an administratively final order of deportation is entered. *Matter of Duarte*, 18 I&N Dec. 329 (BIA 1982).
- c. The alien must have a lawful unrelinquished domicile in the U.S. for seven consecutive years.
  - (1) Time spent in the United States in an immigration status other than LPR (or lawful temporary resident under § 245A or § 210) does not count toward the seven years. 8 C.F.R. § 1212.(3)(f)(2); *see also Matter of Newton*, 17 I&N Dec. 133 (BIA 1979); *Matter of Anwo*, 16

I&N Dec. 293 (BIA 1977); *Matter of Lok*, 15 I&N Dec. 720 (BIA 1976). In a case involving whether or not time spent as a temporary resident should count toward the 7 years, the Board held that it is bound by and will follow the regulation absent contrary circuit court precedent. *Matter of Ponce de Leon*, 21 I&N Dec. 154 (BIA 1996).

- (2) Commuters. An alien admitted to the U.S. as an LPR who later moved to Mexico to reside and who commuted daily from his home in Mexico to his employment in the U.S. was found to reside in Mexico and not the U.S., to have no domicile in the U.S. during the time he resided in Mexico, and therefore to be statutorily ineligible for relief under section 212(c) of the Act. *Matter of Carrasco*, 16 I&N Dec. 195 (BIA 1977); *Matter of Garcia-Quintero*, 15 I&N Dec. 244 (BIA 1975). The lack of domicile in the U.S. was held to exist even though the alien commuter paid taxes in the U.S., had a California driver's license, and registered in the U.S. for Selective Service. *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980). In *Matter of Garcia-Quintero*, 15 I&N Dec. 244 (BIA 1975), the Board conceded that the alien maintained his LPR status during the time he commuted to the U.S. to work even though he was not residing here, thus distinguishing the “commuter” situation from an alien who abandoned his status as an LPR.
  - (3) The seven-year period begins on the effective date of LPR status. If an alien received a retroactive date of LPR status, (“roll-back” date), the seven-year period begins on the roll-back date, not on the later date when the adjustment of status was approved. *Matter of Diaz-Chambrot*, 19 I&N Dec. 674 (BIA 1988); *Matter of Rivera-Rioseco*, 19 I&N Dec. 833 (BIA 1988).
  - (4) A waiver of deportability under former section 241(f) [now § 237(a)(1)(H)] waives not only the alien’s deportability but also the underlying fraud or misrepresentation and renders the alien a LPR from the time of his initial entry in that status. Therefore, the waiver recipient may use the time accrued since the initial granting of LPR status to establish the seven years required for a § 212(c) waiver. *Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993).
5. Some grounds of inadmissibility and deportability cannot be waived under former section 212(c).
- a. Grounds of inadmissibility which cannot be waived by former section 212(c) are as follows [8 C.F.R. § 1212.3(f)(3)]:
    - (1) Section 212(a)(3)(A) - aliens who are a threat to national security, etc.;
    - (2) Section 212(a)(3)(B) - aliens engaging in terrorist activities;

- (3) Section 212(a)(3)(C) - aliens having an adverse effect on U.S. foreign policy;
  - (4) Section 212(a)(3)(E) - aliens participating in genocide or Nazi persecutions; and
  - (5) Section 212(a)(10)(C) - aliens refusing to surrender custody of citizen children.
6. The alien must merit a [favorable exercise of discretion](#).

## H. Asylum

1. Authority to apply for asylum - Section 208(a)
  - a. Any alien who is physically present in the U.S. or who arrives in the U.S. (whether or not at a designated port of arrival and including an alien who is brought to the U.S. after having been interdicted in international or U.S. waters), irrespective of such alien's status, may apply for asylum in accordance with § 208 or, where applicable, § 235(b). INA § 208(a)(1).
2. Exceptions - Section 208(a)(2)
  - a. Safe third country - Section 208(a)(2)(A). Authority to apply for asylum under § 208(a)(1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of the alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum to the U.S.
    - (1) The United States has a Safe Third Country agreement with Canada. *See* 8 C.F.R. § 208.30(e)(6).
  - b. Time limit - Section 208(a)(2)(B). Subject to the changed circumstances set forth in § 208(a)(2)(D), authority to apply for asylum under § 208(a)(1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States. 8 C.F.R. § 1208.4(a)(2)(ii) provides that the one year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later.



- (1) “Last Arrival” – In *Matter of F-P-R*, 24 I&N Dec. 681 (BIA 2008), the Board held that, for purposes of determining whether an asylum application was filed within one year “from the date of the alien’s last arrival in the United States,” under 8 C.F.R. § 1208.4(a)(2)(ii), “the words ‘last arrival’ refer to an alien’s most recent coming or crossing into the United States after having traveled from somewhere outside of the country.” Here, the respondent had been in the US since 1989, but returned to Mexico on June 17, 2005. He attempted to come back to the US on July 20, 2005. The IJ refused to treat July 20, 2005, as the date of the respondent’s “last arrival,” stating that “applicants should not be able to reset the asylum clock by taking a short excursion abroad.” In reversing the IJ’s ruling, the Board disagreed with *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006), in which the Second Circuit stated that “the term ‘last arrival in the United States’ should not be read to include an alien’s return to the United States after a brief trip abroad pursuant to a parole explicitly permitted by United States immigration authorities.” In addition, the Board stated that “we need not here examine whether the regulation should be read to embody an implicit exception in a case where it is found that an alien’s trip abroad was solely or principally intended to overcome the one-year time bar.” (emphasis in original).
  - (a) In *Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011), the Ninth Circuit held that the Board erred in imposing the corroboration provision of § 208(b)(1)(B)(ii) to the issue of whether an alien’s asylum application was timely filed under § 208(a)(2)(B).
- (2) Changed circumstances – Section 208(a)(2)(D). Notwithstanding § 208(a)(2)(B) & (C), an application for asylum may be considered if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the one-year time period. 8 C.F.R. § 1208.4(a)(4) provides that the term “changed circumstances” shall refer to circumstances materially affecting the applicant’s eligibility for asylum. They may include: changes in conditions in the applicant’s country of nationality or, if the person is stateless, country of last habitual residence or changes in objective circumstances relating to the applicant in the U.S., including changes in applicable U.S. law, that create a reasonable possibility that the applicant may qualify for asylum. 8 C.F.R. § 1208.4(a)(4)(ii) provides that the applicant shall apply for asylum within a reasonable period given those “changed circumstances.”

- (a) An alien does not receive an automatic one-year extension in which to file an asylum application following “changed circumstances.” *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010). The particular circumstances related to delays in filing the application must be evaluated to determine whether the application was filed within a reasonable time. *Id.*
  - (b) Enhancement of previously viable claim – some circuit courts of appeals have held that in some cases “changed circumstances” can be established even if the applicant could previously have submitted an asylum application on the same ground, so long as subsequent events have meaningfully increased the likelihood, nature, or potential severity of persecution. *See Lin v. Holder*, 763 F.3d 244 (2d Cir. 2014); *Vahora v. Holder*, 641 F.3d 1038 (9th Cir. 2011).
- (3) “Extraordinary Circumstances” – 8 C.F.R. § 1208.4(a)(5) provides that the term “extraordinary circumstances” shall refer to events or factors beyond the alien’s control that caused the failure to meet the one-year deadline. Such circumstances shall excuse the failure to file within one year so long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer or IJ that the circumstances were both beyond his control and that, but for those circumstances, he would have filed within the one-year period. These circumstances may include: serious illness or mental or physical disability of significant duration, including any effects of persecution or violent harm suffered in the past, during the one-year period after arrival; legal disability (e.g., unaccompanied minor or mental impairment) during the first year after arrival; ineffective assistance of counsel; the applicant maintained TPS, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application; the applicant submitted an asylum application prior to the expiration of the one-year deadline, but the application was rejected by the service and was refiled within a reasonable period thereafter.
  - (a) An unaccompanied minor who was in the custody of the Service pending removal proceedings during the one-year period following his arrival in the U.S. established extraordinary circumstances that excused his failure to file an asylum application within one year after the date of his arrival. *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002).
- (4) Previous asylum applications – Section 208(a)(2)(C). Subject to the changed circumstances set forth in § 208(a)(2)(D), authority to apply for asylum under § 208(a)(1) shall not apply to an alien if the alien

has previously applied for asylum and had such application denied. 8 C.F.R. § 1208.4(a)(3) provides that an asylum application has not been denied unless denied by an IJ or the Board.

- (a) An asylum application is properly viewed as a new application if it presents a previously unraised basis for relief or is predicated on a new or substantially different factual basis. *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015)

3. Conditions for granting asylum – Section 208(b)

- a. Section 208(b)(1) of the Act provides that the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of § 101(a)(42)(A).

- (1) Section 101(a)(42)(A) defines the term “refugee” as any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable and unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a)(42)(B) also provides that for purposes of determinations under the Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she would be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

- (a) Particular social group

- i) “Persecution on account of membership in a particular social group” refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985),

*modified by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

- ii) To establish a particular social group exists, an application must demonstrate that the group is:
    - a) Composed of members who share a common immutable characteristic;
    - b) Defined with particularity; and
    - c) Socially distinct within the society in question. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).
- (b) Political opinion
- i) In order for an alien to show persecution on account of “political opinion,” it is not sufficient to show that a persecutor’s conduct furthers his goal in a political controversy; rather, the alien must show that it is his own, individual political opinion that a persecutor seeks to overcome by the infliction of harm or suffering. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *modified by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).
  - ii) Depending on the social and political context, an applicant may be able to establish that he or she was targeted due to imputed political opinion. *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011).
- (c) Mixed motive cases
- i) Pre-REAL ID Act of 2005. Before the REAL ID Act, the applicant was required to show that the persecutor was motivated at least in part by a protected ground. *Matter of T-M-B-*, 21 I&N Dec. 775, 778 (BIA 1997).
  - ii) Post-REAL ID Act (applicable to applications made on or after May 11, 2005). The applicant must establish that one of the protected grounds was or will be at least one central reason for persecuting the applicant. INA § 208(b)(1)(B)(i); *Matters of J-B-N- and S-M-*, 24 I&N Dec. 208 (BIA 2007). An applicant must show that a protected ground is more than “incidental, tangential, superficial, or subordinate to another reason for harm.”

*Id.*; see also *Shaikh v. Holder*, 588 F.3d 861 (5th Cir. 2009).

- a) The Third Circuit upheld the Board's test except for the use of the word "subordinate." The Third Circuit reasoned that the mixed motive analysis does not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate. *Ndayshimiye v. Att'y Gen.*, 557 F.3d 124 (3d Cir. 2009).
  - b) The Fourth Circuit applied *Matters of J-B-N- & S-M-* in *Quinteros-Mendoza v. Holder*, 556 F.3d 159 (4th Cir. 2009), holding that although confrontations with the gangs took place at the asylum applicant's church, money and personal animosity (not religion or political opinion), motivated the gangs to attack the asylum applicant.
- (2) Exceptions – Section 208(b)(2). Section 208(b)(1), relating to the Attorney General's authority to grant asylum, shall not apply to an alien if the Attorney General determines that:
- (a) The alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
  - i) It is unclear whether this bar applies to assistance which is coerced. Before *Negusie v. Holder*, 555 U.S. 511, 129 S. Ct. 1159 (2009), the Board relied on *Fedorenko v. United States*, 449 U.S. 490 (1981) to hold that the voluntariness of the alien's actions or the alien's intent were irrelevant in determining whether he assisted in persecution. See *Matter of Laipenieks*, 18 I&N Dec. 433 (1983) (holding that in light of *Fedorenko v. United States*, 449 U.S. 490 (1981), omission of intent element compels conclusion that intent is not relevant factor); *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984) (holding that motivations are immaterial to question of whether alien assisted in persecution); *Matter of Rodriguez-Majano*, 19 I&N Dec. 811 (1988) (holding that alien's participation or assistance in persecution need not be of his own volition to bar relief pursuant to persecutor bar).

In *Negusie v. Holder*, the Supreme Court held that there was a statutory ambiguity regarding the relevance of coercion or duress in determining whether an alien has assisted in persecution. The Supreme Court also concluded that the Board had not exercised any independent agency discretion to interpret the statute because it mistakenly relied on *Fedorenko v. United States* to arrive at its rule regarding voluntariness in assisting persecution. Therefore, the Supreme Court remanded the case to the Board to exercise its discretion and for additional investigation or explanation. As of this date, the Board has not yet published any decision on this issue.

- ii) Some circuit courts have addressed this issue
  - a) The Second Circuit requires that the conduct be “active,” have “direct consequences for the victim,” and not be “tangential to the acts of oppression [or] passive in nature.” *Yan Yan Lin v. Holder*, 584 F.3d 75 (2d Cir. 2009).
  - b) The Sixth Circuit requires both (1) a nexus between the person’s actions and the persecution of others, and (2) that the person acted with scienter by having some level of prior or contemporaneous knowledge that persecution was being conducted. *Diaz-Zanatta v. Holder*, 558 F.3d 450 (6th Cir. 2009).
  - c) The Seventh Circuit remanded a case to the Board where the applicant was present during executions of victims, but did not discourage escape attempts, because the Circuit wanted the Board to address whether “assist” and “participate” were the same; additionally, the Circuit was unclear whether participation in a subsequent cover-up was assisting in the persecution. *Doe v. Gonzales*, 484 F.3d 445 (7th Cir. 2007).
  - d) The Ninth Circuit has held a person interpreting for torturers assisted in persecution because his conduct was a necessary part of a violative interrogation. *Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006).
  - e) The Eleventh Circuit has held an Immigration Judge must make “a particularized, fact-specific

inquiry into whether the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution.”  
*Chen v. Att’y Gen. of the United States*, 513 F.3d 1255 (11th Cir. 2008).

- (b) The alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the U.S.;
  - i) An alien convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime. INA § 208(b)(2)(B)(i).
- (c) There are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the U.S. prior to the arrival of the alien in the U.S.;
- (d) There are reasonable grounds for regarding the alien as a danger to the security of the U.S.;
  - i) The Ninth Circuit held that the Board applied the appropriate standard of “reasonable grounds, i.e., grounds akin to probable cause,” to find that the petitioner posed a danger to the United States and was precluded from asylum and withholding of removal. *Malkandi v. Holder*, 576 F.3d 906 (9th Cir. 2009).
- (e) The alien is described in § 212(a)(3)(B)(i)(I), (II), (III), or (IV) or § 237(a)(4)(B) (relating to terrorist activity) (*see Abufayad v. Holder*, 632 F.3d 623 (9th Cir. 2011) (agreeing with a Board decision finding the alien to be “likely to engage after entry in any terrorist activity” and denying the alien CAT protection)), unless, in the case only of an alien inadmissible under § 212(a)(3)(B)(i)(IV), the Attorney General determines, in the Attorney General’s discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the U.S. (*see Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006)); or
- (f) The alien was firmly resettled in another country prior to arriving in the U.S.
  - i) A firm resettlement finding requires a four-step process. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011); *see also* 8 C.F.R. § 1208.15.



- a) In the first step, DHS has the initial burden to make a prima facie showing of an offer of firm resettlement by (1) presenting direct evidence of an alien's ability to stay in a country indefinitely; or (2) when direct evidence is unavailable, indirect evidence may be used if it has a sufficient level of clarity and force to establish that the alien is able to permanently reside in the country.

Direct evidence "may include evidence of refugee status, a passport, a travel document, or other evidence indicative of permanent residence." *Id.* at 502. Indirect evidence may include the immigration or refugee laws of the country of proposed resettlement, receipt of government benefits or assistance, or other factors. *Id.* "The firm resettlement inquiry ends if the DHS fails to present prima facie evidence of an offer of firm resettlement or the record does not otherwise establish the existence of an offer of firm resettlement." *Id.* at 503.

- b) If the DHS satisfies its initial burden, the analysis moves on to the second step where the alien can rebut the prima facie evidence of an offer of firm resettlement "by showing by a preponderance of the evidence that such an offer has not, in fact, been made or that he or she would not qualify for it." *Id.*
  - c) In the third step, the Immigration Judge will consider the totality of the evidence presented by the parties to determine whether an alien has rebutted the DHS's evidence of an offer of firm resettlement. If the Immigration Judge finds that the alien has not rebutted the DHS's evidence, the Immigration Judge will find the alien firmly resettled.
  - d) In the fourth and final step, the burden shifts to the alien to establish that an exception to firm resettlement applies by a preponderance of the evidence.
- ii) The Board held that North Koreans who have become citizens of South Korea can permissibly be precluded on firm resettlement grounds from asylum, despite the North Korean Human Rights Act of 2004, which

provides that North Koreans cannot be barred from asylum on account of any legal right to citizenship in South Korea. *Matters of K-R-Y- & K-C-S-*, 24 I&N Dec. 133 (BIA 2007).

- (3) The Attorney General may designate by regulation offenses that will be considered to be either a particularly serious crime or a serious nonpolitical crime. INA § 208(b)(2)(B)(ii).
  - (4) The Attorney General may by regulation establish additional limitations and conditions under which an alien shall be ineligible for asylum under § 208(b)(2)(C).
- 4. Asylum procedure – The Attorney General shall establish a procedure for the consideration of asylum applications filed under § 208. INA § 208(d)(1).
  - a. At the time of filing an application for asylum, the Attorney General shall advise the alien of the privilege of being represented by counsel and of the consequences of knowingly filing a frivolous application for asylum and provide the alien a list of persons who have indicated their availability to represent the aliens in asylum proceedings on a pro bono basis. INA § 208(d)(4).
  - b. If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under § 208(d)(4)(A) of the consequences of knowingly filing a frivolous application for asylum, the alien shall be permanently ineligible for any benefits under the Act, effective as of the date of a final determination of such application. INA § 208(d)(6).
    - (1) 8 C.F.R. § 1208.20 provides that, for applications filed on or after April 1, 1997, an applicant is subject to the consequences set forth in § 208(d)(6) only if a final order by an IJ or the Board specifically finds that the alien knowingly filed a frivolous asylum application.
    - (2) Definition of “frivolous” – For purposes of 8 C.F.R. § 1208.20 and § 208(d)(6), an asylum application is frivolous if any material elements is deliberately fabricated. Such finding shall only be made if the IJ or Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. 8 C.F.R. § 1208.20.
    - (3) A finding that an alien filed a frivolous asylum application does not preclude the alien from seeking withholding of removal. 8 C.F.R. § 1208.20.

- (4) Although the Board in *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), suggested that it might be “good practice” for an IJ who believes that an applicant may have submitted a frivolous asylum application to bring this issue to the attention of the applicant prior to the conclusion of proceedings, this suggestion was not meant to require that an IJ must provide additional warnings during the course of the merits hearing that a frivolousness determination is being considered. *Matter of B-Y-*, 25 I&N Dec. 236, 241-42 (BIA 2010). Sufficient notice exists when the IJ explains the consequences of filing a frivolous asylum application, either at the time the asylum application is filed or prior to the merits hearing. *Id.*
- (5) The Board has held that, when making a finding of frivolousness, an IJ must: (1) address the question of frivolousness separately and make specific findings that the applicant deliberately fabricated material elements of the asylum claim; (2) give the applicant sufficient opportunity to account for discrepancies or implausible aspects of the claim; and (3) provide cogent and convincing reasons for determining that a preponderance of the evidence supports a frivolousness finding, taking into account any explanations by the applicant for discrepancies or implausible aspects of the claim. *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007).
- (6) In making a frivolousness determination, an IJ may incorporate by reference any factual findings made in support of an adverse credibility finding, so long as the IJ makes explicit findings that the incredible aspects of the asylum application were (1) material and (2) deliberately fabricated. *Matter of B-Y-*, 25 I&N Dec. 236 (BIA 2010) (clarifying *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007)).
- (7) Materiality – The Sixth Circuit has held that an applicant only submits a frivolous application if, in the absence of the fabrications, the application would have been unsuccessful. *Yousif v. Lynch*, 796 F.3d 622 (6th Cir. 2015) (determining a Chaldean Iraqi would have succeeded on his asylum claim absent the fabricated assertions, based solely on country conditions). The Eighth Circuit has held that an application is frivolous if the fabricated elements “materially bolstered” the claim. *Limbeya v. Holder*, 764 F.3d 894, 900 (8th Cir. 2014) (holding an asylum application was not frivolous merely because alien had lied about who prepared his application).
- (8) In *Yan Liu v. Holder*, 640 F.3d 918 (9th Cir. 2011), the Ninth Circuit vacated a Board finding that the alien filed a frivolous asylum claim, reasoning that the heightened requirements for a frivolous finding established by *Matter of Y-L-* were not satisfied. The court held that the alien was not afforded sufficient opportunity to account for the discrepancies and implausibilities in the claim because the IJ

announced only at the end of the hearing that she intended to make a frivolous finding.

- (9) The Eleventh Circuit held that making intentional and material misrepresentations on an earlier asylum application will disqualify an alien even if he recanted the fraudulent claims in a second application. *Barreto-Claro v. Att’y Gen.*, 275 F.3d 1334 (11th Cir. 2001). In the first asylum application, the alien claimed to have left Cuba and come directly to the U.S. In the revised application, he admitted that he had been granted refugee status in Costa Rica.

c. Section 208(d)(5)(A) requires that the procedure established under § 208(d)(1) shall provide that:

- (1) Asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the U.S., or ineligible to apply for or be granted asylum;
- (2) In the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;
- (3) In the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date the application is filed;
- (4) Any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of completion of removal proceedings before an IJ under § 240, whichever is later;
- (5) In the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.
- (6) Section 208(d)(5)(B) states that the Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with the Act.

5. Burden of proof – The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in § 101(a)(42). The testimony of the applicant, if credible, is sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 1208.13(a).

- a. For applications made on or after May 11, 2005, the REAL ID Act of 2005 states that the testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met his or her burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. INA § 208(b)(1)(B)(ii) (as amended by the REAL ID Act of 2005).
    - (1) The provisions regarding credibility determinations enacted in § 101(a)(3) of the REAL ID Act of 2005 (codified at § 208(b)(1)(B)(iii)) only apply to applications for asylum, withholding, and other relief from removal that were initially filed on or after May 11, 2005, whether with an asylum officer or an IJ. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). Where an alien filed his applications for relief prior to May 11, 2005, but renewed his applications in removal proceedings before an IJ subsequent to that date, the provisions of § 208(b)(1)(B)(iii) are not applicable to credibility determinations made in adjudicating his applications.
  - b. The Lautenberg Amendment sets forth a reduced burden of proof for certain categories of aliens. In *Yakimchuck v. INS*, No. 73219477, 1999 WL 594933 (7th Cir. Aug. 6, 1999) (unpublished), the court agreed with the IJ and the Board that the respondent, in seeking asylum, cannot avail himself of the lower burden of proof established by the Lautenberg Amendment. However, the Board could properly consider the legislative history of the Amendment, which may suggest that certain groups face biases or discrimination. The Lautenberg Amendment expired in June of 2011, and must be renewed annually.
6. Past persecution – 8 C.F.R. § 1208.13(b)(1) provides that an applicant shall be found to be a refugee on the basis of past persecution if he can establish that he has suffered persecution in the past in his country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion, and that he is unable or unwilling to return to or avail himself of the protection of that country owing to such persecution.
    - a. The Board has held that, when evaluating an asylum application, the IJ must make a specific finding on whether the applicant has suffered past persecution based on a statutorily enumerated ground and then apply the regulatory framework at 8 C.F.R. § 1208.13(b)(1). If past persecution is established, then the burden shifts to the DHS to prove by a preponderance of the evidence that there are changed country conditions, or that the applicant could avoid

future persecution by relocating, and that relocation is reasonable under the circumstances. *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008).

- b. See [case law common to asylum and withholding of removal law](#).

## 7. Well-Founded Fear of Future Persecution

- a. Past persecution – 8 C.F.R. § 1208.13(b)(1)(i) provides that if the applicant has established past persecution, there is a presumption the applicant has a well-founded fear of persecution. DHS can overcome this preponderance by establishing that (1) that the applicant could safely relocate elsewhere in the country, or (2) that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return.

- (1) If an applicant has established past persecution, and the record reflects that country conditions have changed to such an extent that the asylum applicant no longer has a well-founded fear of persecution from his original persecutors, the applicant can:

- (a) Demonstrate that he or she has a well-founded fear of persecution from any new source (*Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998)); or

- (b) Demonstrate that he or she warrants a grant of humanitarian asylum based on the severity of the past persecution or a risk of “other serious harm.” *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012); *see also Matter of B-*, 21 I&N Dec. 66 (BIA 1995); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

- (2) The Second Circuit found that the IJ had impermissibly shifted the burden to the respondent to rebut the presumption of a well-founded fear. The alien’s temporary return trips to a country after experiencing past persecution did not, in and of themselves, rebut the presumption of a well-founded fear of persecution. *See Kone v. Holder*, 596 F.3d 141 (2d Cir. 2010).

- b. If the applicant cannot demonstrate past persecution, he or she may establish eligibility for asylum if he or she:

- (1) Has a fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion;
  - (2) There is a reasonable possibility that he or she would suffer such persecution if returned to his country of nationality; and

- (3) He or she is unable or unwilling to avail him or herself of the protection of that country based on that fear. 8 C.F.R. § 1208.12(b)(2)(i)(A)-(C).
  - c. To establish a well-founded fear of persecution, an applicant must present credible testimony that demonstrates that his or her fear of harm is of a level that amounts to persecution, that the harm is on account of a protected characteristic, that the persecutor could become aware or is already aware of the characteristic, and that the persecutor has the means and inclination to persecute. *See Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987). A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. An applicant may establish a subjective fear of persecution based on credible testimony. To meet the objective component, the respondent must show by specific and concrete evidence in the record that his or her fear of persecution is reasonable. *See* 8 C.F.R. § 1208.13.
- 8. Discretion – Statutory and regulatory eligibility for asylum, whether based on past persecution or a well-founded fear of future persecution, does not necessarily compel a grant of asylum. An applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted. *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), *superseded by statute on other grounds as recognized by Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999); *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984). Factors which fall short of the grounds for mandatory denial may constitute discretionary considerations. In exercising discretion, the Board has considered it appropriate to examine the totality of the circumstances and actions of an alien in his or her flight from the country where persecution is feared. *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987).
  - a. When an IJ denies asylum solely in the exercise of discretion and then grants withholding of removal, 8 C.F.R. § 1208.16(e) requires the IJ to reconsider the denial of asylum to take into account factors relevant to family unification. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).
- 9. Termination of asylum
  - a. DHS Terminations under 8 C.F.R. § 208.24(a)(1) – For aliens who were originally granted asylum by an asylum officer, DHS has jurisdiction to terminate the grant of asylum based on fraud. Where DHS independently decides to terminate asylum, Immigration Judges lack jurisdiction to review such determinations. *Matter of A-S-J-*, 25 I&N Dec. 893 (BIA 2012).
  - b. If DHS is moving for termination in the scope of removal proceedings, the IJ should first make a threshold determination on the issue of termination before addressing removability. *Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013).
    - (1) To show termination is warranted, DHS must establish that there was fraud in the alien’s asylum application, and that the fraud was such that the alien was not eligible for asylum at the time it was granted.



- (2) Proof that the alien knew of the fraud in the application is not required. *See Matter of P-S-H-*, 26 I&N Dec. 329 (BIA 2014).

10. Adjustment of status by refugees or aliens granted asylum

a. Aliens admitted as refugees

- (1) Section 209(a)(1) of the Act provides that any alien who has been admitted to the U.S. under § 207 (i.e., as a refugee) shall, at the end of a 1-year period, return or be returned to the custody of DHS for inspection and examination for admission to the U.S. as an immigrant provided:
  - (a) The alien's admission has not been terminated by the Attorney General [INA § 209(a)(1)(A)];
  - (b) The alien has been physically present in the U.S. for at least 1 year [INA § 209(a)(1)(B)]; and
  - (c) The alien has not acquired permanent resident status [INA § 209(a)(1)(C)].
- (2) Any alien who is found upon inspection and examination by an immigration officer or an IJ to be admissible as an immigrant shall be regarded as an LPR as of the date of the alien's arrival in the U.S. notwithstanding any numerical limitation in the Act. INA § 209(a)(2).
- (3) Aliens found inadmissible may apply for a waiver of inadmissibility under § 209(c) discussed below.

b. Aliens granted asylum

- (1) Section 209(b) provides that not more than 10,000 refugee admissions under § 207(a) per fiscal year may be made available by the Attorney General to adjust to LPR status any asylee who:
  - (a) Applies for such adjustment,
  - (b) Has been physically present in the U.S. for at least one year after being granted asylum,
  - (c) Continues to be a refugee as defined in § 101(a)(42)(A) or the spouse or child of such a refugee,
  - (d) Is not firmly resettled in any foreign country, and

- (e) Is admissible as an immigrant.
    - i) Aliens found inadmissible may apply for a waiver of inadmissibility under § 209(c) discussed below.
  - (2) If the application is granted, the Attorney General shall establish a record of the alien's admission as a LPR as of the date 1 year before the approval of the application.
- c. Aliens found to be inadmissible.
- (1) Section 209(c) of the Act provides that in determining an alien's admissibility under both § 209(a)(1) and § 209(b), the following grounds of inadmissibility shall not apply:
    - (a) Section 212(a)(4) - an alien likely to become a public charge.
    - (b) Section 212(a)(5) - an alien not in possession of a labor certification.
    - (c) Section 212(a)(7)(A) - an immigrant not in possession of a valid unexpired immigrant visa or other entry document or not in possession of a valid unexpired passport or other travel document or whose visa has been issued without compliance with § 203.
  - (2) Except for those provisions of § 212(a) listed below, § 209(c) allows the Attorney General to waive any other provisions of § 212(a) for the following reasons:
    - (a) For humanitarian reasons,
    - (b) To assure family unity, or
    - (c) When it is otherwise in the public interest.
  - (3) However, § 209(c) provides that the following grounds of § 212(a) may NOT be waived:
    - (a) Section 212(a)(2)(C) - an alien who the consular or immigration officer knows or has reason to believe is an illicit trafficker in controlled substances;
    - (b) Section 212(a)(3)(A) - an alien who a consular officer or the Attorney General knows or has reasonable ground to believe seeks to enter the U.S. to violate any law of the U.S. relating to espionage or sabotage or to violate any law prohibiting the export of goods, technology, or sensitive information, or to

engage in any activity to overthrow the Government of the U.S., or any other unlawful activity;

- (c) Section 212(a)(3)(B) - an alien who has engaged or is likely to engage in terrorist activity;
  - (d) Section 212(a)(3)(C) - an alien whose entry or proposed activity in the U.S. would adversely affect foreign policy;
  - (e) Section 212(a)(3)(E) - an alien who participated in persecution by the Nazi government of Germany or its allies.
- (4) An alien who previously adjusted from refugee status to that of an LPR under § 209, retains that status until a final order of removal and is ineligible to readjust under § 209(b) in conjunction with a § 209(c) waiver as a form of relief from removal. *Robleto-Pastora v. Holder*, 591 F.3d 1051 (9th Cir. 2010).

## **I. Withholding of removal - Section 241(b)(3)**

1. Section 241(b)(3)(A) provides that the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.
  - a. The Board held in *Matter of I-S- & C-S-*, that before an IJ can issue a decision granting withholding of removal, without a grant of asylum, he or she must first enter an explicit removal order. *Matter of I-S & C-S-*, 24 I&N Dec. 432 (BIA 2008).
2. Exceptions – Section 241(b)(3)(B) provides that § 241(b)(3)(A) does not apply to an alien deportable under § 237(a)(4)(D) [assisted in Nazi persecution or engaged in genocide] or if the Attorney General decides that:
  - a. The alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
  - b. The alien, having been convicted by a final judgment of a [particularly serious crime](#), constitutes a danger to the community of the U.S.;
  - c. There are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the U.S. prior to arrival of the alien in the U.S.; or
  - d. There are reasonable grounds for regarding the alien as a danger to the security of the U.S.

- (1) An alien described in § 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding the alien as a danger to the security of the U.S. INA § 241(b)(3)(B).
3. The burden of proof is on the applicant for withholding of removal to establish that his or her life or freedom would be threatened in the proposed country of removal on account of one of the five reasons set forth above. 8 C.F.R. § 1208.16(b). That regulation also provides that the testimony of the applicant, if credible, may be sufficient proof without corroboration.
  - a. For applications made on or after May 11, 2005, the REAL ID Act provides that in determining whether an alien has demonstrated that the alien's life or freedom would be threatened on account of one of the five enumerated grounds, the trier of fact shall determine whether the alien has sustained his or her burden of proof and shall make credibility determinations as described in § 208(b)(1)(B)(ii) and (iii) (as amended by the REAL ID Act of 2005).
4. The applicant's life or freedom shall be found to be threatened if it is more likely than not that he or she would be persecuted. 8 C.F.R. § 1208.16(b)(1).
5. Past persecution – If the applicant is determined to have suffered persecution in the past such that his or her life or freedom was threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that his or her life or freedom would be threatened on return to that country unless a preponderance of the evidence establishes that conditions in that country have changed to such an extent that it is no longer more likely than not that the applicant would be so persecuted. 8 C.F.R. § 1208.16(b)(1)(i). If the applicant's fear is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm. 8 C.F.R. § 1208.16(b)(1)(iii).
6. 8 C.F.R. § 1208.16(b)(2) provides that in evaluating whether the applicant has sustained the burden of proving that his or her life or freedom would be threatened in that country on account of race, religion, nationality, membership in a particular social group, or political opinion, the AO or IJ shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if the applicant establishes that there is a pattern or practice in the country of proposed removal of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion and the applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her freedom would be threatened upon return.
7. The “one central reason” in so-called mixed motive cases that applies to asylum applications pursuant to § 208(b)(1)(B)(i) also applies to applications for withholding of removal under § 241(b)(3)(A). *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010).

## **J. Case law common to both asylum and withholding of removal**

1. Reasonable grounds for regarding the alien as a danger to the security of the U.S.
  - a. The “reasonable ground to believe” standard is akin to the “probable cause” standard. A “reasonable belief” may be formed if the evidence “is sufficient to justify a reasonable person in the belief that the alien falls within the proscribed category.” *Matter of U-H-*, 23 I&N Dec. 355 (BIA 2002).
  - b. The addition of § 236A to the Act by § 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (“USA Patriot Act”), which provides for the certification of certain aliens as terrorists by the Attorney General, does not change the standard employed to determine whether there is reasonable ground to believe that an alien is engaged in, or is likely to engage in, terrorist activity under § 212(a)(3)(B)(i)(II), or whether there is reasonable ground to believe that he or she is a danger to the security of the U.S. under § 241(b)(3)(B)(iv). The addition of § 236A to the Act merely added certification as another means to address detention of suspected terrorist aliens. It does not indicate that Congress wanted to change the standard of proof or make it easier for terrorists to apply for asylum or withholding of removal. *Matter of U- H-*, 23 I&N Dec. 355 (BIA 2002).
2. Particularly serious crimes.
  - a. Asylum – Section 208 (b)(2)(A)(ii) of the Act provides that asylum is not available to an alien who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community. Section 208(b)(2)(B)(i) of the Act provides that an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.
  - b. Withholding of Removal – Section 241(b)(3)(B)(ii) of the Act provides that the relief of withholding of removal is unavailable to an alien who, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States. Section 241(b)(3)(B) also provides that an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime. The statute goes on to state that the “previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.”
    - (1) An adjudicator may consider factors such as the particular facts and circumstances of the crime in determining whether an offense was for a particularly serious crime. *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012).

- (a) However, an adjudicator should not consider the applicant's mental health as a factor when determining whether a conviction was for a particularly serious crime. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014).
- (2) Particularly Serious Crimes and Aggravated Felonies:
- (a) The Board ruled that, to qualify as a particularly serious crime under § 241(b)(3)(B)(ii), an offense need not be an aggravated felony under § 101(a)(43). The Board further ruled that, if the elements of an offense “potentially bring it within the ambit of” a particularly serious crime, all reliable information may be considered in determining whether the offense is a particularly serious crime, including the conviction records, sentencing information, and other information outside the record of conviction. *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007); *see also N-A-M- v. Holder*, 587 F.3d 1052 (10th Cir. 2009) (holding that a separate analysis as to whether the alien is a danger to the community is not necessary when determining whether a crime is particularly serious). The Board has held this rule should be applied across the country, including in the Third Circuit. *Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *see Alaka v. Att’y Gen.*, 456 F.3d 88 (3d Cir. 2006).
  - (b) The Attorney General held that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute “particularly serious crimes” within the meaning of § 241(b)(3)(B) and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible. *Matter of Y-L-, A-G-, and R-S-R-*, 23 I&N Dec. 270 (A.G. 2002), *overruled in part on other grounds as stated in Rafiq v. Gonzales*, 468 F.3d 165 (2d Cir. 2006).
  - (c) Those unusual circumstances would need to include, at a minimum:
    - i) A very small quantity of controlled substance;
    - ii) A very modest amount of money paid for the drugs in the offending transaction;
    - iii) Merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy;

- iv) The absence of any violence or threat of violence implicit or otherwise, associated with the offense;
    - v) The absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and
    - vi) The absence of any adverse or harmful effect of the activity or transaction on juveniles.
  - (d) Only if all of the above criteria were demonstrated by an alien would it be appropriate to consider whether other, more unusual circumstances (e.g., the prospective distribution was solely for social purposes, rather than for profit) might justify departure from the default interpretation that drug trafficking felonies are “particularly serious crimes.” Finally, the Attorney General stated, “I emphasize here that such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation.”
3. Serious nonpolitical crime – A serious nonpolitical crime is one in which the common-law character of the crime outweighs the political aspect of the offense. *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). To reach this determination, two specific inquiries must be asked: (1) whether there is a gross disproportion between means and ends, and (2) whether atrocious acts are involved. *Id.* Adjudicators must balance the seriousness of the crime against the political aspect. *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012).
4. What constitutes persecution?
- a. Definition – The term “persecution” means harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *modified by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Persecution encompasses harm inflicted by the government or by persons or an organization the government is unable or unwilling to control. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).
  - b. Nexus
    - (1) Criminal prosecution is not persecution unless it is motivated by a protected ground. *Matter of Maccaud*, 14 I&N Dec. 429 (BIA 1973).



- (a) Where an asylum applicant violates currency laws which a government has a legitimate right to enforce, and he suffers harsh treatment as a result, the applicant must show that the government in question has punished him “on account of” his political opinion and not for violation of the currency laws. *Matter of H-M-*, 20 I&N Dec. 683 (BIA 1993).
  - (b) Prosecution under Chinese laws forbidding citizens from providing assistance to illegal immigrants from North Korea does not amount to persecution unless the alien can demonstrate that the prosecution is because of the alien’s political opinion. *Li v. Att’y Gen.*, 633 F.3d 136 (3d Cir. 2011).
  - (c) Prosecution for violating Germany’s compulsory schooling laws was not motivated by the applicants’ religious beliefs. *Romeike v. Holder*, 718 F.3d 528 (6th Cir. 2013).
  - (d) In general, prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution. However, this rule does not necessarily apply to countries where a coup is the only means of effectuating political change. *Matter of Izatula*, 20 I&N Dec. 149 (BIA 1990).
- (2) Opposition to corruption may constitute a political opinion in some circumstances. *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011).
  - (3) A guerrilla organization’s attempt to coerce a person into joining does not necessarily constitute “persecution on account of political opinion.” *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Matter of R-O-*, 20 I&N Dec. 455 (BIA 1992). A victim of forced recruitment must show that he is being persecuted on account of his political opinion, and that his persecution is not solely the result of the guerrillas’ aim in seeking to fill their ranks in order to carry out their war with the Government and pursue their political goal, their political motive being irrelevant. *Matter of R-O-*, 20 I&N Dec. 455 (BIA 1992).
  - (4) In order to satisfy the definition of a “refugee” in § 101(a)(42) of the Act, the persecution must be on account of the victim’s political opinion, not the persecutor’s. Therefore, persecution on account of political opinion is not established by the fact that the coercing guerrillas had political motives. *Matter of R-O-*, 20 I&N Dec. 455 (BIA 1992).
  - (5) A victim of a criminal act is generally not considered persecuted within the Act. *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997).

- (6) Whether a particular social group exists must be determined based on the specific facts presented in the case. Unmarried women in Guatemala may constitute a particular social group. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).
- (7) The failure of a government to permit its citizens the same freedom of speech guaranteed in the U.S. does not constitute persecution. *Matter of Surzycki*, 13 I&N Dec. 261 (BIA 1969).
- (8) Generally harsh conditions shared by many others in a country and the harm arising out of civil strife do not amount to persecution within the meaning of the law. *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), modified by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).
- (9) Coercive Population Control
  - (a) An alien cannot establish past persecution based solely on sterilization of his or her spouse; the applicant must demonstrate he or she was targeted due to the applicant's own "other resistance" to population control policies. See *Matter of J-S-*, 24 I&N Dec. 520, 535 (A.G. 2008).
  - (b) "Other resistance" may include resistance to any portion of China's coercive population control policies, and need not be limited to resistance against forced abortions or sterilizations. *Wang v. Lynch*, 804 F.3d 855 (7th Cir. 2015). Failure to pay an assessed fine due to the birth of a second child does not ordinarily constitute "other resistance" to the policies. *He v. Holder*, 749 F.3d 792 (9th Cir. 2014).
  - (c) An abortion is forced by threats of harm when a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).
  - (d) Forcible insertion of an IUD does not constitute persecution absent some aggravating factor. *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633 (BIA 2008). Additionally, for insertion of the IUD to be based on "other resistance to a [CPC] program," the alien must show that the IUD was "inserted or reinserted for some resistance that the alien manifested."
  - (e) An alien seeking to reopen removal proceedings based on a claim that the birth of a second child in the United States will result in the alien's forced sterilization in China cannot

establish prima facie eligibility for relief where the evidence submitted with the motion and the relevant country conditions reports do not indicate that Chinese nationals returning to that country with foreign-born children have been subjected to persecution in the alien's home province. *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006) (distinguishing *Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. 2004)). See *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010); *Matter of S-Y-G-*, 24 I&N Dec. 247, 257 (BIA 2007).

c. Severity of harm

- (1) Harassment and discrimination do not generally rise to the level of persecution contemplated by the Act (name calling, extortion of money, payment of higher fees, rock throwing, and looting not sufficient to demonstrate past persecution). *Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005).
- (2) A beating that occurs in the context of an arrest or detention may constitute persecution, but does not per se constitute persecution. *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006); *Liu v. Holder*, 632 F.3d 820 (2d Cir. 2011) (finding that the Board did not err when it concluded that Liu's mistreatment by family planning officials resulting in minor bruising and two-day detention did not amount to persecution); *Mekhtiev v. Holder*, 559 F.3d 725 (7th Cir. 2009) (holding past persecution was not established where alien was detained for only one night, was beaten only once and his resultant injuries were not severe).
- (3) Harm, in the aggregate, may rise to the level of persecution. *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998) (holding that alien who suffered repeated beatings and anti-Semitic threats, whose home was vandalized by anti-Semitic nationalists, and whose son was subject to humiliation and intimidation on account of his Jewish nationality suffered harm which, in the aggregate, rises to the level of persecution); see *Vincent v. Holder*, 632 F.3d 351 (6th Cir. 2011) (holding that cumulative effect of murder of alien's son and burning of alien's home rises to the level of persecution).
- (4) A key difference between persecution and less-severe mistreatment is that the former may be shown through systematic events while the latter usually includes only isolated incidents. *Baharon v. Holder*, 588 F.3d 228 (4th Cir. 2009) (holding that violence or threats to one's close relatives is an important factor in deciding whether mistreatment sinks to the level of persecution).
- (5) Harms that are merely disagreeable or unpleasant do not rise to the level of persecution. *Morgan v. Holder*, 634 F.3d 53 (1st Cir. 2011)

(holding that the Board did not err when it found that being taunted, cut by a bottle, detained overnight, and threatened did not amount to persecution).

- (6) Rape and sexual assault are forms of persecution. *Matter of D-V-*, 21 I&N Dec. 77 (BIA 1993).
- (7) Nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).
  - (a) The burning of the respondent's home on account of his political opinion was sufficiently severe and targeted to amount to persecution by economic deprivation. *Vincent v. Holder*, 632 F.3d 351 (6th Cir. 2011).
  - (b) The Fourth Circuit held that to establish "economic persecution," an asylum applicant must demonstrate that, on account of one of the statutorily enumerated grounds, the applicant's life or freedom has been threatened by either (1) a deliberate and severe deprivation of basic necessities or (2) a deliberate imposition of severe financial disadvantage. *Mirisawo v. Holder*, 599 F.3d 391 (4th Cir. 2010). To qualify as persecution, economic deprivation must be so severe that it threatens the person's very life or liberty. *Id.*
  - (c) The Seventh Circuit held that surveillance is a possible form of persecution. *Ayele v. Holder*, 564 F.3d 862, 871 (7th Cir. 2009) (citing *Diallo v. Ashcroft*, 381 F.3d 687, 697 (7th Cir. 2004)). The court further recognized that an inability to work may constitute persecution. *Id.* (citing *Borca v. INS*, 77 F.3d 210, 216 (7th Cir. 1996) for the proposition that deliberate imposition of substantial economic disadvantage may amount to persecution).
  - (d) The Sixth Circuit held that the invalidation of a medical degree constitutes economic persecution. *Stserba v. Holder*, 646 F.3d 964 (6th Cir. 2011) (finding that Estonia's discrimination against ethnic Russians in medical field culminated in invalidation of Russian diplomas, which was a sweeping limitation of job opportunities that made it nearly impossible for respondent to work in her chosen profession as pediatrician).

(8) Military service

- (a) Governments have the right to require military service of their citizens and to enforce that right with reasonable penalties. It is not persecution for a country to require military service or to punish those who have deserted or who refuse to serve, absent some other indication that prosecution was motivated by a protected ground. *Matter of Canas*, 19 I&N Dec. 697 (BIA 1988), *remanded* 970 F.2d 599 (9th Cir. 1992); *Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988); *Matter of Lee*, 13 I&N Dec. 236 (BIA 1969); *Matter of Liao*, 11 I&N Dec. 113 (BIA 1965).

d. Nongovernmental persecution

- (1) There may be situations in which an alien could qualify for asylum and/or withholding of removal even though persecution would not be by the government of a country to which the alien is returnable but rather by an organization or even an individual. In order to prevail with such a claim, however, there must be a showing that the government in power in that country is either unable or unwilling to protect the alien from the organization or individual.
  - (a) The Ninth Circuit held that reporting of private persecution to the authorities is not an essential requirement for establishing government unwillingness or inability to control attackers for purposes of asylum. *Rahimzadeh v. Holder*, 613 F.3d 916 (9th Cir. 2010). A government's inability or unwillingness to control violence by private parties can be established in other ways, such as by demonstrating that a country's laws or customs effectively deprive the alien of any meaningful recourse to governmental protection. *Id.*; *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010).
  - (b) The Eighth Circuit held that "[A]n applicant seeking to establish persecution by a government based on violent conduct of a private actor must show more than difficulty controlling private behavior. Rather, the applicant must show that the government condoned it or at least demonstrated a complete helplessness to protect the victims." *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (internal quotations and alterations omitted). The court held that general problems of governmental ineffectiveness and corruption do not, alone, require a finding that the government is "unable or unwilling" where the evidence specific to the petitioner indicates the contrary to be true. *Id.*; *Khilan v. Holder*, 557 F.3d 583, 586 (8th Cir. 2009).

- (2) Persecution by an individual for personal reasons and not for one of the reasons enumerated in the Act does not constitute persecution which would qualify an alien for asylum or withholding of deportation. *Matter of Pierre*, 15 I&N Dec. 461 (BIA 1975).

e. Persecution on account of gender

(1) Female Genital Mutilation (FGM)

- (a) The practice of FGM, which results in permanent disfigurement and poses a risk of serious and potentially life-threatening complications, can be a basis for a claim of persecution. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).
- (b) FGM may be a continuing form of persecution, such that the alien has a presumption of a well-founded fear of future persecution. *Matter of A-T-*, 24 I&N Dec. 4 (BIA 2009).
  - i) The Ninth Circuit held that the infliction of FGM gives rise to an un rebuttable well-founded fear of future persecution. The court reasoned that (1) forced sterilization gives rise to a well-founded fear of persecution; and (2) like forced sterilization, FGM is a “permanent and continuing” act. *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005).
- (c) The Board held that an alien may not establish eligibility for asylum or withholding of removal based solely on fear that his or her daughter will be forced to undergo female genital mutilation upon returning to the alien’s home country. *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007).
  - i) Some circuit courts of appeals have held that in some cases an applicant’s child being subjected to FGM may constitute direct, as opposed to derivative, targeting of the applicant parent. *Kone v. Holder*, 620 F.3d 760, 765 (7th Cir. 2010); *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004).
  - ii) The Board has indicated that, because of the severity of FGM, a grant of asylum on humanitarian grounds may be warranted even in the absence of a well-founded fear of future persecution. *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008).

- (2) Women in particular countries may constitute a particular social group. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014); *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010).

f. Sexual orientation

- (1) Sexual orientation may place individuals into a particular social group in some countries. *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990); *see also Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003); *Molathwa v. Ashcroft*, 390 F.3d 551, 554 (8th Cir. 2004); *Hernandez-Montiel*, 225 F.3d 1084 (9th Cir. 2000); *Ayala v. Att’y Gen.*, 605 F.3d 941 (11th Cir. 2010).
  - (a) The Ninth Circuit has held that “all alien homosexuals are members of a ‘particular social group.’” *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005).

5. Evidence

- a. Background evidence (in the form of newspaper or magazine articles or reports prepared by government agencies) relating to general or specific conditions in the country of feared persecution is admissible in a hearing if it is relevant, material, and noncumulative, and an IJ’s rejection of all background evidence, even on general conditions in the country, deprives the alien of a full and fair hearing and necessitates a remand by the Board. *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982).
- b. An alien’s own testimony, without corroborative evidence, may be sufficient proof if that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear of persecution. 8 C.F.R. § 1208.13(a); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). However, for applications affected by the REAL ID Act of 2005, where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. INA § 208(b)(1)(B)(ii).
- c. When the basis of a persecution claim becomes less focused on specific events involving the alien personally and instead is more directed to broad allegations regarding general conditions in the country of feared persecution, it may well be essential for the alien to present corroborative background evidence that establishes a plausible context for the persecution claim. *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989).
  - (1) In such cases, background evidence should be presented if it is available or an acceptable explanation should be given for its absence.



- (2) Since the alien bears the evidentiary burden of proof and persuasion, applications will be denied for failure of proof where there are significant, meaningful evidentiary gaps.
- d. The reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure. *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998).
  - e. Country profiles submitted by the Department of State's Bureau of Democracy, Human Rights and Labor are entitled to considerable deference. *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010).
  - f. Credibility
    - (1) Circuit courts have split as to whether the REAL ID Act revived the doctrine of *falsus in uno, falsus in omnibus* (false in one thing, false in all things) with respect to the applicant's credibility. This doctrine permits a trier of fact to cite a witness's false statement relating to one subject to conclude that the witness testified falsely relating to another subject. In a footnote to a pre-REAL ID Act case, the First Circuit stated that the Act revived this doctrine. *Castaneda-Castillo v. Gonzales*, 488 F.3d 17 (1st Cir. 2007). However, in *Kadia v. Gonzales*, 501 F.3d 817 (7th Cir. 2007), the Seventh Circuit stated that it was "dubious" that the REAL ID Act did, in fact, revive the doctrine of *falsus in uno, falsus in omnibus*.
    - (2) The Seventh Circuit held that the IJ's adverse credibility finding was supported by substantial evidence; namely, new assertions not previously stated in the respondent's asylum application and the respondent's failure to provide a satisfactory explanation as to why he omitted certain events. *Hassan v. Holder*, 571 F.3d 631 (7th Cir. 2009). The court found that although the events the IJ relied on to discredit the respondent's claim did not directly contradict his written application and are arguably not central to his asylum claim, the omitted events are not trivial, and under the REAL ID Act, considering all the relevant factors in this case, the IJ could rely on these material omissions to conclude the respondent's omissions were an attempt to embellish his asylum claim. *Id.*
    - (3) The Eighth Circuit upheld an adverse credibility determination, finding that even if the petitioner's explanations could plausibly account for the significant inconsistencies in her asylum applications, the IJ did not err by rejecting them. *Fesehaye v. Holder*, 607 F.3d 523 (8th Cir. 2010).
    - (4) Where an alien did not offer a reasonable and plausible explanation for the discrepancies, which went to the heart of his claim, either

individually or in the aggregate, even though he had ample opportunity to do so, the IJ's adverse credibility finding is supported and it is not necessary to make an "express, point-by-point rejection of [the alien's] explanations." *Rizk v. Holder*, 629 F.3d 1083 (9th Cir. 2011).

- (5) The Ninth Circuit held that an IJ's perception of the alien's ignorance of religious doctrine was not a proper basis for an adverse credibility finding. *Lei Li v. Holder*, 629 F.3d 1154 (9th Cir. 2011) (where the IJ had found a Chinese asylum applicant incredible largely because the applicant thought that Thanksgiving was a Christian holiday and knew little about the differences between the Old and New Testaments).
- (6) Presentation by an asylum applicant of an identification document that is found to be counterfeit by forensic experts not only discredits the applicant's claim as to the critical elements of identity and nationality, but, in the absence of an explanation or rebuttal, also indicates an overall lack of credibility regarding the entire claim. *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998), *overruled in part as stated in Hanaj v. Gonzales*, 446 F.3d 694 (7th Cir. 2006).
- (7) Although the Board has de novo review authority, the Board accords deference to an IJ's findings regarding credibility and credibility-related issues. The Board defers to an adverse credibility finding based on inconsistencies and omissions regarding facts central to an alien's asylum claim where a review of the record reveals that (1) the discrepancies and omissions described by the IJ are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions has not been supplied by the alien. *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998).
- (8) An asylum applicant does not meet his burden of proof by general and meager testimony. Specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum. The weaker an applicant's testimony, the greater the need for corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

## **K. The Convention Against Torture**

1. History lesson - Article 3 of the United Nations Convention against Torture and other Cruel or Degrading Treatment or Punishment has been in effect in the U.S. since November 20, 1994. However, there was no statutory provision to implement Article 3 of the Convention Against Torture in United States domestic law. Therefore, the Board held that it lacked jurisdiction to adjudicate a claim for

relief from deportation pursuant to Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, as there had been no specific legislation to implement the provisions of Article 3, no regulations had been promulgated with respect to Article 3, and the United States Senate has declared that Article 3 is a non-self-executing treaty provision. *Matter of H-M-V-*, 22 I&N Dec. 256 (BIA 1998). On October 21, 1998, the President signed into law legislation which required that “[n]ot later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.” The regulations took effect March 22, 1999.

## 2. Definition of “torture”

- a. 8 C.F.R. § 1208.18(a)(1) states, “Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”
  - (1) An applicant for protection under Article 3 of the Convention against Torture must establish that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity; therefore, protection does not extend to persons who fear entities that a government is unable to control. *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000) *overruled on other grounds by Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010); *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).
- b. 8 C.F.R. § 1208.18(a)(2) states: “Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.”
- c. 8 C.F.R. § 1208.18(a)(3) states: “Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.”
- d. 8 C.F.R. § 1208.18(a)(4) provides that, in order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting

from:

- (1) The intentional infliction or threatened infliction of severe physical pain or suffering;
  - (2) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - (3) The threat of imminent death; or
  - (4) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.
- e. 8 C.F.R. § 1208.18(a)(5) provides that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. *See also Villegas v. Mukasey*, 523 F.3d 984, 985 (9th Cir. 2008). An act that results in unanticipated or unintended severity of pain and suffering is not torture.
- f. 8 C.F.R. § 1208.18(a)(6) states: “In order to constitute torture an act must be directed against a person in the offender’s custody or physical control.”
- (1) An applicant need not demonstrate that she would face torture while under public officials’ prospective custody or physical control. *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004) (“petitioner may qualify for withholding of removal by showing that he or she would likely suffer torture while under *private parties*’ exclusive custody or physical control”).
- g. 8 C.F.R. § 1208.18(a)(7) states that acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.
- (1) Although the public official must have “awareness” of the torturous activity, he need not have actual knowledge of the specific incident of torture. *See Li Chen Zheng v. Ashcroft*, 332 F.3d 1186, 1194-96 (9th Cir. 2003). Acquiescence also does not require that the public official approve of the torture, even implicitly. *See id.* It is sufficient that the public official be aware that torture of the sort feared by the applicant occurs, and remain “willfully blind” to it. *See id.*; *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013).
  - (2) An applicant for protection under the Convention Against Torture need not show that the entire foreign government would consent to or

acquiesce in his torture. Instead, an applicant need only show that “a public official” would so acquiesce. *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013). If public officials at the state and local level would acquiesce in any torture, this satisfies the Convention Against Torture’s requirement that a public official acquiesce in the torture, even if the federal government would not similarly acquiesce. *Madrigal v. Holder*, 716 F.3d 499, 510 (9th Cir. 2013).

- h. 8 C.F.R. § 1208.18(a)(8) states: “Noncompliance with applicable legal procedural standards does not per se constitute torture.”
- 3. Eligibility in spite of frivolous asylum application – Section 208(d)(6) provides that if the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under INA § 208(d)(4)(A) of the consequences of knowingly filing a frivolous application for asylum, the alien shall be permanently ineligible for any benefits under the Act, effective as of the date of a final determination of such application. However 8 C.F.R. § 1208.20 provides that a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.
- 4. Withholding of removal under the Convention Against Torture
  - a. Differences between withholding of removal under § 241(b)(3) and withholding of removal under Article 3 of the Convention Against Torture.
    - (1) Several categories of individuals, including persons who assisted in Nazi persecution or engaged in genocide, persons who have persecuted others, persons who have been convicted of particularly serious crimes, persons who are believed to have committed serious non-political crimes before arriving in the United States, and persons who pose a danger to the security of the United States, are ineligible for withholding of removal under § 241(b)(3)(B). Article 3 of the Convention Against Torture does not exclude such persons from its scope.
      - (a) Per Se Particularly Serious Crime – An alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. INA § 241(b)(3)(B). However, this does not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. *Id.*
      - (b) Particularly Serious Crime Factors – A determination of whether a crime is a “particularly serious crime” will depend

upon the specific facts in each case and, in judging the seriousness of a crime, the Board of Immigration Appeals will consider such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). “[A]ll reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.” *Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010) (affording *Chevron* deference to *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007)).

- (2) Unlike withholding of removal under § 241(b)(3) of the Act, evidence of past torture does not give rise to a rebuttable presumption of future torture and the regulations do not shift the burden of proof to the government. *See Maldonado v. Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015).
  - (3) Section 241(b)(3) applies only to aliens whose life or freedom would be threatened on account of race, religion, nationality, or membership in a particular social group or political opinion. Article 3 covers persons who fear torture that may not be motivated by one of those five grounds.
  - (4) The definition of torture does not encompass all types of harm that might qualify as a threat to life or freedom. Thus, the coverage of Article 3 is different from that of § 241(b)(3): broader in some ways and narrower in others. *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001); *see also Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011).
- b. 8 C.F.R. § 1208.16(c)(2) provides that the burden of proof is on the applicant for withholding of removal under the Convention Against Torture to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. In other words, the respondent must meet a “clear probability” standard. *Zhang v. Ashcroft*, 388 F.3d 713, 721-22 (9th Cir. 2004). Such regulation also provides that the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.
- (1) **Adverse Credibility.** An adverse credibility determination in the asylum context cannot be used to “wash over” the applicants Convention Against Torture claim, especially when the prior adverse credibility determination is not necessarily significant to the torture



claim. *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir.2001) (quoting *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir.2000)). However, when an applicant's Convention Against Torture claim is "based on the same statements ... that the BIA determined to be not credible in the asylum context, the agency may rely upon the same credibility determination in denying both the asylum and [the Convention Against Torture] claims." *Singh v. Lynch*, 802 F.3d 972, 977 (9th Cir. 2015).

- (2) Country Condition Evidence – "[C]ountry conditions alone can play a decisive role in granting relief under the Convention." *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1283 (9th Cir. 2001) (holding that a negative credibility finding in asylum claim does not preclude relief under the Convention, especially where documented country conditions information corroborated the "widespread practice of torture").
- c. 8 C.F.R. § 1208.16(c)(3) provides that in assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:
- (1) Evidence of past torture inflicted upon the applicant;
  - (2) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured. *But see Maldonado v. Lynch*, 786 F.3d 1155, 1163 (9th Cir. 2015) ("Inability to relocate safely is [not] an element of a claim for deferral of removal for which a[n] [applicant] bears a burden of proof.");
  - (3) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
  - (4) Other relevant information regarding conditions in the country of removal.
- d. 8 C.F.R. § 1208.16(c)(4) states that in considering an application for withholding of removal under the Convention Against Torture, the IJ shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the IJ determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3). If an alien entitled to such protection is subject to mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3),



the alien's removal shall be deferred under 8 C.F.R. § 1208.17(a).

5. Deferral of removal under the Convention Against Torture

- a. 8 C.F.R. § 1208.17(a) provides that an alien who: (1) has been ordered removed; (2) has been found under 8 C.F.R. § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and (3) is subject to the provisions for mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.
- b. Notice IJ must give to respondent – 8 C.F.R. § 1208.17(b) requires an IJ who orders an alien described in 8 C.F.R. § 1208.17(a) removed, to inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. The IJ shall inform the alien that deferral of removal:
  - (1) Does not confer upon the alien any lawful or permanent immigration status in the United States;
  - (2) Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;
  - (3) Is effective only until terminated; and
  - (4) Is subject to review and termination if the IJ determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.
- c. The IJ shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.
- d. An alien's eligibility for deferral of removal under the Convention Against Torture cannot be established by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006).

6. Termination of deferral of removal

- a. Termination at the request of the Service
  - (1) 8 C.F.R. § 1208.17(d)(1) provides that at any time while deferral of

removal is in effect, the DHS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under 8 C.F.R. § 1208.17(a) may file a motion with the Immigration Court having administrative control pursuant to 8 C.F.R. § 1003.11 to schedule a hearing to consider whether deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in 8 C.F.R. §§ 1003.2 and 1003.23.

- (2) 8 C.F.R. § 1208.17(d)(2) provides that the Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of 8 C.F.R. § 1208.11.
- (3) 8 C.F.R. § 1208.17(d)(3) provides that the IJ shall conduct a hearing and make a de novo determination, based on the record of proceeding and initial application in addition to any new evidence submitted by the Service or the alien, as to whether the alien is more likely than not to be tortured in the country to which removal has been deferred. This determination shall be made under the standards for eligibility set out in 8 C.F.R. § 1208.16(c). The burden is on the alien to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred.
- (4) 8 C.F.R. § 1208.17(d)(4) provides that if the IJ determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the IJ determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the IJ's decision is filed with the Board.

b. Termination at the request of the alien

- (1) 8 C.F.R. § 1208.17(e)(1) provides that at any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court having administrative control pursuant to 8 C.F.R. § 1003.11 to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the IJ shall terminate the order of deferral and the alien may be removed.
  - (2) 8 C.F.R. § 1208.17(e)(2) allows an IJ, if necessary, to calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the IJ determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the IJ determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.
- c. Termination pursuant to 8 C.F.R. § 1208.18(c), which provides that at any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in 8 C.F.R. § 1208.18(c).

#### **L. Adjustment of status - Section 245 of the Act and 8 C.F.R. § 1245.1, *et seq.***

1. Introduction – Adjustment of status allows an alien who is not an immigrant (or deportable immigrant, if qualified) who is in the U.S. to adjust status to that of an LPR without leaving the U.S. to obtain an immigrant visa and re-entering the U.S. as an immigrant. The date of adjustment of status may be considered an admission in some circumstances. *See Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011).
2. Jurisdiction
  - a. In the case of an any alien who has been placed in deportation proceedings or removal hearings (other than an arriving alien), the IJ hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status. 8 C.F.R. § 1245.2(a)(1).
  - b. [Arriving Aliens](#)
    - (1) An Immigration Judge generally lacks jurisdiction to adjudicate any application for adjustment of status filed by an arriving alien. 8 C.F.R. § 1245.2(a)(1)(ii). There is a narrow exception for an alien who leaves the United States while an adjustment application is pending with USCIS, the alien returns under a grant of advance parole, and USCIS denies the application; an IJ would have jurisdiction to adjudicate the alien's renewed adjustment application. *Id.*; *see also Matter of Silitonga*, 25 I&N Dec. 89 (BIA 2009).

- c. No appeal lies from a district director's denial of adjustment. However, the application may be renewed before the IJ if the alien (other than an arriving alien) is placed in proceedings. 8 C.F.R. § 1245.2(a)(5)(ii).
  - d. Cuban Refugee Adjustment Act– Immigration judges do not have jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status under the Cuban Refugee Adjustment Act of November 2, 1966 (Pub. L. No. 89-732, 80 Stat. 1161) unless the alien has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application. *Matter of Martinez-Montalvo*, 24 I&N Dec. 778 (BIA 2009).
    - (1) The fact that an IJ does not have jurisdiction over applications for adjustment under the Cuban Refugee Adjustment Act does not negate his or her jurisdiction over the removal proceedings of arriving Cuban aliens under section 240 of the Act. *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011).
  - e. Immigration Judges have authority to determine whether the validity of an alien's approved employment-based visa petition is preserved under § 204(j) after the alien's change in jobs or employers. *Matter of Marcal Neto*, 25 I&N Dec. 169 (BIA 2010).
3. Substantive requirements – In order to qualify for adjustment of status, § 245(a) of the Act states that a respondent must prove that he or she:
- a. Has been inspected and admitted (or paroled when the application is before the district director);
    - (1) An alien who was released from custody on conditional parole pursuant to § 236(a)(2)(B) has not been “paroled into the United States” for purposes of establishing eligibility for adjustment of status under § 245(a). *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010); *Delgado-Sobalvarro v. Att’y Gen.*, 625 F.3d 782 (3d Cir. 2010).
    - (2) For purposes of establishing adjustment of status under § 245(a), an alien seeking to show that he or she has been “admitted” to the United States pursuant to § 101(a)(13)(A), need only prove procedural regularity in his or her entry, which does not require the alien to be questioned by immigration authorities or be admitted in a particular status. *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).
      - (a) However, an alien who was permitted to enter the United States after falsely claiming United States citizenship has not

been “admitted” to the United States. *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013).

b. Is admissible under § 212(a) of the Act;

- (1) A respondent who is inadmissible under § 212(a) may apply for any available waiver of the ground of inadmissibility in conjunction with the application for adjustment of status. 8 C.F.R. § 1245.1(f). *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993).
- (2) The “futility doctrine” – The Board has determined that the rule in *Matter of V-*, 1 I&N Dec. 293 (BIA 1942), which held that notwithstanding lack of a specific statutory ground of exclusion, an alien who upon entry would immediately become subject to deportation should be found excludable is not appropriate in the adjustment of status context and held that it is the Board’s practice to interpret the requirement of admissibility in section 245(a) with reference only to the inadmissibility grounds set forth in the Act. *See Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992).

c. Has an immigrant visa number immediately available to him or her

- (1) A respondent cannot adjust status unless he or she is the beneficiary of a valid unexpired visa petition. INA § 245(a). Jurisdiction to adjudicate visa petitions is vested solely in the DD. An IJ has no authority to approve or deny a visa petition. *Matter of Ching*, 15 I&N Dec. 772 (BIA 1976).

(a) Self-petitioning

- i) An alien may self-petition if he or she meets the requirements of INA § 204(a)(1)(A)(iii) or (iv) (immediate relatives of a United States citizen subjected to battery or cruelty), or INA § 204(a)(1)(B)(ii) or (iii) (spouses or children of an LPR who were subjected to battery or extreme cruelty).
- (2) Children – Section 201(f)(1) of the Act may allow the beneficiary of an immediate relative visa petition to retain his status as a “child” after he or she turns 21. If an alien seeking to adjust status was under twenty-one years of age when his visa petition was filed and no final decision was made on the petition prior to August 6, 2002, the applicant may qualify for protection under the CSPA. The Act sets forth a mathematical formula for determining the CSPA age of children of lawful permanent residents who qualify for protection under the CSPA. INA § 203(h)(1); *see also Child Status Protection Act*, Pub. L. No. 107-208, 116 Stat. 927 (2002).

- (a) This section also applies to an individual whose visa petition was approved before the August 6, 2002, effective date of the Child Status Protection Act (“CSPA”), but who filed an application for adjustment of status after that date. *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007).
- (b) In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the Board clarified the application of the automatic conversion and priority date retention provisions § 203(h)(3). The Board held that the beneficiary of a petition could only convert the petition if the visa petition could itself convert into a different category. Therefore, a beneficiary with a second-preference petition filed by her father could not take advantage of the automatic conversion and priority date retention provisions where she had aged out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition filed by her aunt on behalf of her father. The Board found that “[w]hen she aged out from her status as a derivative beneficiary on a fourth-preference petition, there was no other category to which her visa could convert because no category exists for the niece of a United States citizen.” *Id.* at 35. The Board found that the retention language of section 203(h) was meant to apply only where the visa petitions were filed by the same family member and that, therefore, she could not retain the priority date from the petition filed by her aunt for the petition filed by her father. *Id.* at 35-36. This interpretation has been upheld by the Supreme Court. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

(3) Adopted children

- (a) An adopted child, as defined by § 101(b)(1)(E), may not confer immigration benefits upon a natural parent without regard to whether the adopted child has been accorded or could be accorded immigration benefits by virtue of his or her adopted status. *Matter of Li*, 20 I&N Dec. 700 (BIA 1993).
- (b) If the provisions of § 101(b)(1)(E) have been invoked to confer an immigration benefit by virtue of an adoptive relationship, the natural relationship will not therefore be recognized for immigration purposes even if it is established that the adoptive relationship has been legally terminated. *Matter of Li*, 21 I&N Dec. 13 (BIA 1995). A natural parent-child or sibling-sibling relationship may again be recognized for immigration purposes following the legal termination of an adoption that meets the requirements of §

101(b)(1)(E) if the petitioner can establish the following 4 criteria:

- i) That no immigration benefit was obtained or conferred through the adoptive relationship;
  - ii) That a natural parent-child relationship meeting the requirements of § 101(b) once existed;
  - iii) That the adoption has been legally terminated under applicable law; and
  - iv) That the natural relationship has been reestablished by law.
- (c) The Board has ruled that a child who was adopted while under the age of 18, and whose natural sibling was adopted by the same parents while under the age of 16, can qualify as a “child” under § 101(b)(1)(E) regardless of the order in which the two children were adopted. The Board rejected DHS’s argument that, for an older sibling to qualify as a “child” under these circumstances, the older sibling’s adoption must have preceded that of the younger child. *Matter of Anifowoshe*, 24 I&N Dec. 442 (BIA 2008).
- (d) The beneficiary of a visa petition who was adopted pursuant to a State court order that was entered when the beneficiary was more than 16 years old, but with an effective date prior to his or her 16th birthday, may qualify as an adopted child under § 101(b)(1)(E)(i) so long as the adoption petition was filed before the beneficiary’s 16th birthday and the State in which the adoption was entered expressly permits an adoption decree to be dated retroactively. *Matter of Huang*, 26 I&N Dec. 627 (BIA 2015)
- d. It is improper for an IJ to enter a “conditional” grant of adjustment of status which is effective upon the happening of a future event, such as a visa petition being approved, or a visa number becoming available. *Fulgencio v. INS*, 573 F.2d 596 (9th Cir. 1978); *Matter of Reyes*, 17 I&N Dec. 239 (BIA 1980).
- e. A respondent is also ineligible to adjust status if the approval of the visa petition has been revoked. *See, e.g., Kalezic v. INS*, 647 F.2d 920 (9th Cir. 1981).
- (1) Visa petitions may be revoked automatically (through withdrawal by the petitioner, death of the petitioner, divorce, etc.) or by the DD on notice to the petitioner. INA § 205; 8 C.F.R. § 1205.1 et seq.



- (a) In certain cases, death of a petitioner may not automatically revoke a visa petition for a qualifying beneficiary. INA § 204(l). A beneficiary of a family-based visa petition may still retain eligibility for adjustment of status if he or she:
  - i) resided in the United States when the petitioning relative died; and
  - ii) continues to reside in the United States on the date of the decision on the pending petition or application.
- (b) An Immigration Judge does not have jurisdiction to review the DD's decision regarding whether a visa petition is automatically revoked. *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987).

f. Respondent must merit a favorable exercise of discretion

- (1) The grant of an application for adjustment of status is a matter of administrative grace and an applicant has the burden of showing that discretion should be exercised in his or her favor; when adverse factors are present, the applicant may need to show unusual or even outstanding equities in order to offset the adverse factors. *Matter of Patel*, 17 I&N Dec. 597 (BIA 1980); *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). An Immigration Judge should consider both positive and adverse factors.

4. Aliens who are ineligible to adjust

- a. Several categories of aliens who are ineligible to adjust under § 245(a) may be ineligible under § 245(i). This section applies to certain aliens who:
  - (1) Were not inspected and admitted or paroled;
  - (2) Entered as a [crewman](#);
  - (3) Who engaged in unlawful employment in the United States (unless an immediate relative, certain aliens with employment-based visa petitions, or certain categories of special immigrants);
  - (4) Who was not in unlawful status at the time of the application for adjustment (unless an immediate relative, certain aliens with employment-based visa petitions, or certain categories of special immigrants);
  - (5) Who enter as an alien in transit without a visa; or

- (6) Who was admitted as a non-immigrant under § 101(a)(15)(S) (one who is to provide information about a criminal or terrorist organization).
- b. Any such alien may not be ineligible on these bases if he or she is the beneficiary of a visa petition or labor certification filed on his or her behalf on or before April 30, 2001. *See* former INA § 245(i).
- c. Adjustment of status is not available to an alien who was admitted through the Visa Waiver Program (“VWP”). *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010). Non-Visa Waiver Program aliens are held to VWP program requirements if they are admitted through the VWP. *Id.* However, the adjustment of status statute contains a limited exception, providing that discretionary adjustment of status relief is available to an alien admitted under the VWP program on one ground, as “an immediate relative.” INA § 245(c)(4). *See Lang v. Napolitano*, 596 F.3d 426, 428 (8th Cir. 2010).
- d. Adjustment of status is not available to an alien who is an alien lawfully admitted to the U.S. for permanent residence on a conditional basis under §§ 216 or 216A of the Act. INA § 245(d), (f).
  - (1) While the statutory language leaves open the question of whether the bar to adjustment of status extends to an alien whose status as a conditional permanent resident has been terminated, the Board found that the DHS’s regulation at 8 C.F.R. § 245.1(b)(12) (1991) [now 8 C.F.R. § 1245.1(c)(5)] clearly applied the bar only to aliens currently holding conditional permanent resident status. Therefore, the Board held that § 245(d) of the Act does not prohibit an alien whose conditional permanent resident status has been terminated from adjusting status under § 245(a). *Matter of Stockwell*, 20 I&N Dec. 309 (BIA 1991).
- e. Adjustment of status is not available to an alien who entered the U.S. as a K-1 or a K-2, except if the K-1 marries the USC petitioner, the status of the K-1 and/or the K-2 may be adjusted to that of an alien lawfully admitted on a conditional basis under § 216. INA § 245(d).
  - (1) A K-1 visa holder can only adjust status based on the marriage to the fiancé(e) petitioner. *Matter of Sesay*, 25 I&N Dec. 431, 437 (BIA 2011). A K-1 visa holder is not subject to the provision for conditional resident status under § 216 if that K-1 visa holder’s bona fide marriage to the fiancé(e) petitioner is more than two years old at the time the adjustment application is adjudicated. *Id.* at 440-41. The K-1 visa holder satisfies the visa eligibility and visa availability requirements of § 245(a) on the date the K-1 visa holder is admitted to the United States as a K-1 nonimmigrant so long as the K-1 visa holder enters into a bona fide marriage with the fiancé (e) petitioner within 90 days of that date. *Id.* at 440. If the K-1 visa holder can

demonstrate that he or she entered into a bona fide marriage to the fiancé(e) petitioner within the 90-day period, the K-1 visa holder may be granted adjustment of status under § 245(a) and (d), even if the marriage to the fiancé(e) petitioner does not exist at the time that the application for adjustment is adjudicated. *Id.* at 441.

- (2) A derivative child of a K-1 visa holder is not ineligible for adjustment of status simply by virtue of having turned 21 after admission to the United States on a K-2 nonimmigrant visa. *Matter of Le*, 25 I&N Dec. 541 (BIA 2011).
- f. Adjustment of status is not available to an alien who seeks to receive an immigrant visa on the basis of a marriage entered into during the period in which administrative or judicial proceedings are pending regarding the alien's right to enter or remain in the U.S. INA § 245(e)(2).
  - (1) However, § 245(e)(3) provides that an alien may apply for adjustment of status based on a marriage contracted during proceedings if he establishes by clear and convincing evidence the following:
    - (a) That the marriage was entered into in good faith;
    - (b) That the marriage was in accordance with the laws of the place where the marriage took place;
    - (c) That the marriage was not entered into for the purpose of procuring the alien's entry as an immigrant;
    - (d) That no fee (other than attorney's fees) was given for the filing of a visa petition.
  - (2) This exemption is within the province of the District Director and cannot be adjudicated by an Immigration Judge.
- g. The Board ruled that aliens who are inadmissible under § 212(a)(9)(C)(i)(I) (aliens who have "been unlawfully present in the United States for an aggregate period of more than one year . . . and who enter or attempt to reenter the United States without being admitted") are ineligible for adjustment of status under § 245(i). In doing so, the Board ruled that the bar on adjustment of status for aliens who are inadmissible under § 212(a)(9)(C)(i)(I) does not render meaningless the provision in § 245(i)(1)(A) that an alien is eligible for adjustment of status even if he or she "entered the United States without inspection," as § 212(a)(9)(C)(i)(I) only applies to a small subset (recidivist offenders) of aliens who enter without inspection. *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). See *Matter of Diaz & Lopez*, 25 I&N Dec. 188 (BIA 2010) (reaffirming *Matter of Briones*). Several Circuit Courts of Appeal have considered the issue and accorded Chevron deference to the Board's decision in

*Matter of Briones*. See *Padilla-Caldera v. Holder*, 637 F.3d 1140 (10th Cir. 2011); *Mora v. Mukasey*, 550 F.3d 231 (2d Cir. 2008); *Ramirez-Canales v. Mukasey*, 517 F.3d 904 (6th Cir. 2008); *Ramirez v. Holder*, 609 F.3d 331 (4th Cir. 2010); *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011).

- h. The Seventh Circuit reversed the IJ's and the Board's holding that aliens who are inadmissible under § 212(a)(9)(B)(i)(II) (for having accrued more than one year of unlawful presence) are ineligible for adjustment of status under § 245(i). *Lemus-Losa v. Holder*, 576 F.3d 752 (7th Cir. 2009) (asserting that the Board erred in equating the inadmissibility of someone under § 212(a)(9)(C)(i)(I) with the inadmissibility of someone under § 212(a)(9)(B)(i)(II)). The Tenth Circuit, however, found that the Board's interpretation of §§ 245(i) and 212(a)(9)(B)(i)(II) in *Matter of Lemus-Losa*, 24 I&N Dec. 373 (BIA 2007) was permissible. *Herrera-Castillo v. Holder*, 573 F.3d 1004 (10th Cir. 2009). The Tenth Circuit held that aliens who are inadmissible under § 212(a)(9)(B)(i)(II) are ineligible for adjustment of status under § 245(i).
- 5. Deportable LPRs may adjust status. A lawful permanent resident who becomes deportable (usually due to a criminal conviction or for having been inadmissible at entry) is not precluded from establishing eligibility for adjustment of status by the fact that he or she already is an LPR. *Tibke v. INS*, 335 F.2d 42 (2d Cir. 1964); *Matter of Krastman*, 11 I&N Dec. 720 (BIA 1966).
  - a. Any respondent seeking to adjust status must be the beneficiary of an approved visa petition. See 8 C.F.R. § 1245.2(a)(2)(B). An LPR applying for adjustment of status probably has been the beneficiary of an approved visa petition in order to obtain status as an LPR. However, it is necessary for a new visa petition to be filed in his or her behalf and approved before he or she may adjust status for the original visa petition ceased to convey a priority date or visa classification once the respondent/beneficiary used it to obtain LPR status. See 8 C.F.R. § 1245.1(g)(2).
  - b. If the LPR respondent is deportable because he or she was inadmissible at the time of entry, he or she may have to apply for a waiver of the ground of inadmissibility which existed at entry.
  - c. If the LPR respondent is deportable because of a criminal conviction for a CIMT, he or she will have to qualify for a § 212(h) waiver in order to be eligible for adjustment of status.
  - d. If the LPR respondent is deportable because of a criminal conviction for a drug offense, he or she may be ineligible to adjust status because there is no waiver available to an immigrant for a drug conviction other than simple possession of 30 grams or less of marijuana.

6. Miscellaneous cases on adjustment of status

- a. There is no authority to grant adjustment of status under § 245 on a retroactive or nunc pro tunc basis. *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991). There are certain categories of applicants, such as refugees and those seeking adjustment as a Cuban/Haitian applicant, whose status as an LPR is acquired retroactively to a certain date fixed by the statute or the regulations. This is called a “roll-back” date.
- b. An application for adjustment of status cannot be based on an approved visa petition that the applicant has already used to adjust his status to that of a lawful permanent resident. *Matter of Villarreal-Zuniga*, 23 I&N Dec. 886 (BIA 2006); 8 C.F.R. § 204.2(h)(2).
- c. While a court order remains the preferred method of establishing the dissolution of a customary tribal marriage under Ghanaian law, affidavits executed by the heads of household, i.e., the fathers of the couple, that meet specified evidentiary requirements may be sufficient to establish a divorce for immigration purposes. *Matter of Kodwo*, 24 I&N Dec. 479 (BIA 2008).
- d. There is a circuit split regarding whether § 246(a) acts as a five-year statute of limitations proscribing untimely rescission of an alien’s adjustment of status to permanent resident through the initiation of removal proceedings. The Third has held that § 246(a) does create a statute of limitations. *Garcia v. Att’y Gen.*, 553 F.3d 724 (3d Cir. 2009). The Sixth and Eleventh Circuits have held that it does not. *Stolaj v. Holder*, 577 F.3d 651 (6th Cir. 2009); *Alhuay v. United States Att’y Gen.*, 661 F.3d 534 (11th Cir. 2011).
  - (1) The Board has found that, regardless of any five year statute of limitations as discussed in *Garcia*, such a limitation would not apply to rescission of LPR status for aliens admitted with an immigrant visa. *Matter of Cruz de Ortiz*, 25 I&N Dec. 601 (BIA 2011). The Second and Third Circuits have subsequently held that § 246(a) does not apply to aliens admitted as LPRs through the consular process. *Adams v. Holder*, 692 F.3d 91 (2d Cir. 2012); *Malik v. Att’y Gen.*, 659 F.3d 253 (3d Cir. 2011).

## M. Waivers

1. A respondent cannot “bootstrap” eligibility from one waiver to another where he or she is not separately eligible for either. *Matter of Roman*, 19 I&N Dec. 855 (BIA 1988).
2. A waiver for inadmissible refugees – Section 207(c)(3) provides that certain grounds of inadmissibility are not applicable to aliens seeking admission to the U.S. as refugees and allows the Attorney General to waive certain other grounds of inadmissibility.

- a. Under § 207(c)(3), the following grounds of inadmissibility are not applicable to aliens seeking admission as refugees:
    - (1) Section 212(a)(4) - aliens likely to become a public charge;
    - (2) Section 212(a)(5) - aliens not in possession of a labor certification;
    - (3) Section 212(a)(7)(A) - immigrants not in possession of a valid, unexpired immigrant visa or other entry document.
  - b. Section 207(c)(3) allows the Attorney General to waive all other grounds of inadmissibility EXCEPT the following:
    - (1) Section 212(a)(2)(C) - aliens believed to be traffickers in controlled substances;
    - (2) Section 212(a)(3)(A) - aliens seeking to enter to perform activities which threaten the security of the U.S.;
    - (3) Section 212(a)(3)(B) - aliens engaged in terrorist activities;
    - (4) Section 212(a)(3)(C) - aliens inadmissible for their effect on the foreign policy of the U.S.;
    - (5) Section 212(a)(3)(E) - aliens who participated in persecution by the Nazis.
  - c. Under § 207(c)(3), the grant of a waiver should be made:
    - (1) For humanitarian purposes;
    - (2) To assure family unity; or
    - (3) When it is otherwise in the public interest.
3. A waiver of passport, immigrant visa, or other entry documents for returning residents – Section 211(b) provides that, notwithstanding § 212(a)(7)(A), returning resident immigrants, defined in § 101(a)(27)(A), may be readmitted to the U.S. in the Attorney General’s discretion without being required to obtain a passport, immigrant visa, reentry permit, or other documentation.
- a. Section 101(a)(27)(A) defines the term “special immigrant.” Included in that definition at § 101(a)(27)(A) is “an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad.”
  - b. This waiver is discussed at 8 C.F.R. § 1211.4.

4. Permission to reapply after deportation, exclusion or removal - 8 C.F.R. § 1212.2.
  - a. An IJ does not have authority to grant advance permission to reapply. *Matter of Vrettakos*, 14 I&N Dec. 593 (BIA 1974).
  - b. An IJ does have authority to grant *nunc pro tunc* permission to reapply, but only where the grant of the application will conclude the proceedings, i.e., where the only ground of inadmissibility would be eliminated, or the alien would receive a grant of adjustment of status in conjunction with any other waivers of inadmissibility.
  - c. The cases supporting these propositions are:
    - (1) *Matter of Vrettakos*, 14 I&N Dec. 593 (BIA 1973 & 1974);
    - (2) *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976);
    - (3) *Matter of Martinez*, 15 I&N Dec. 563 (BIA 1976);
    - (4) *Matter of Ng*, 17 I&N Dec. 63 (BIA 1979);
    - (5) *Matter of Roman*, 19 I&N Dec. 855 (BIA 1988).
5. A waiver for nonimmigrants coming to provide information about criminal activity – Section 212(d)(1) provides that the Attorney General, in the exercise of discretion, may waive any ground of inadmissibility (other than § 212(a)(3)(E) [aliens involved in Nazi persecutions]) in the case of a nonimmigrant described in § 101(a)(15)(S), if the Attorney General considers it to be in the national interest to do so.
  - a. Section 212(d)(1) also provides that it does not prohibit DHS from instituting removal proceedings against an “S” nonimmigrant for conduct committed after the alien's admission or for conduct or a condition that was not disclosed to the Attorney General.
  - b. This waiver is also discussed in the regulations at 8 C.F.R. § 1212.4(i).
6. A general waiver for nonimmigrants – Section 212(d)(3) provides that an inadmissible nonimmigrant may be issued a visa and/or admitted temporarily in the Attorney General’s discretion.
  - a. Part (A) of § 212(d)(3) is applicable to aliens applying for a nonimmigrant visa before a consular officer. Part (B) is applicable to aliens applying for admission. The following grounds of inadmissibility may not be waived under either part:
    - (1) Section 212(a)(3)(A)(i)(I) - espionage or sabotage;



- (2) Section 212(a)(3)(A)(ii) - any unlawful activity;
    - (3) Section 212(a)(3)(A)(iii) - overthrow of U.S. government;
    - (4) Section 212(a)(3)(C) - adverse effect on foreign policy;
    - (5) Section 212(a)(3)(E) - Nazi persecutors.
  - b. Under *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978), a decision on a § 212(d)(3) waiver requires a weighing of at least 3 factors:
    - (1) The risk of harm to society if the alien is admitted;
    - (2) The seriousness of the alien's immigration or criminal violations, if any; and
    - (3) The nature of the alien's reasons for wishing to enter the U.S.
  - c. A waiver under § 212(d)(3) could be granted in exclusion proceedings, but was unavailable *nunc pro tunc* in deportation proceedings because the regulations provided for the renewal of an application denied by the DD only in proceedings under §§ 235 and 236. *Matter of Fueyo*, 20 I&N Dec. 84 (BIA 1989).
  - d. Section 212(d)(3) waivers are also discussed at 8 C.F.R. § 1212.4.
7. A waiver of documents for nonimmigrants – Section 212(d)(4) provides that either or both of the requirements of § 212(a)(7)(B)(i), relating to a nonimmigrant's lack of passport and/or visa, may be waived by the Attorney General and the Secretary of State acting jointly:
- a. On the basis of unforeseen emergency in individual cases, or
  - b. On the basis of reciprocity with respect to nationals of foreign contiguous territory or adjacent islands, or
  - c. In the case of aliens proceeding in immediate and continuous transit through the U.S. under contracts authorized in § 238(c).
  - d. An IJ has authority to grant a § 212(d)(4) waiver. *Matter of Kazemi*, 19 I&N Dec. 49 (BIA 1984), *overruling Matter of Ketema*, 18 I&N Dec. 266 (BIA 1982).
8. A waiver of alien smuggling - Section 212(d)(11).
- a. History lesson – Former section 212(a)(31) of the Act, which dealt with the inadmissibility of alien smugglers, required that the smuggling had to be “for gain” in order to render an alien excludable. The Immigration Act of 1990

eliminated the element of gain. It also created a discretionary waiver under § 212(d)(11) for LPRs who attempted to smuggle their spouse, parent, son, or daughter. Section 307(d) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 amended section 212(d)(11) to make its provisions available to aliens seeking admission or adjustment of status as immediate relatives or immigrants under section 203(a) (family-sponsored immigrants).

- b. Section 212(d)(11) of the Act authorizes the Attorney General to waive § 212(a)(6)(E)(i) relating to alien smuggling.

- (1) A section 212(d)(11) waiver is available only to:

- (a) An LPR who temporarily proceeded abroad voluntarily and not under an order of deportation or an alien applying for admission or adjustment of status as an immediate relative or family-sponsored immigrant under § 203(a);

- (b) Who is otherwise admissible as a returning resident under § 211(b);

- (c) Who smuggled only an individual who at the time of the smuggling was his spouse, parent, son, or daughter.

- i) The requirement of “at the time of” was added to the Act by § 351 of the IIRIRA, apparently to overrule the decision in *Matter of Farias-Mendez*, 21 I&N Dec. 269 (BIA 1996), in which the Board held that the familial relationship did not have to exist at the time of the smuggling incident as long as it existed at the time of the application for relief.

- (2) The alien must also merit a favorable exercise of discretion, and the waiver must be for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

- (3) Section 212(d)(11) of the Act does not create two separate classes of aliens with separate requirements for eligibility. Both an LPR alien returning from a temporary trip abroad and an alien seeking admission or adjustment of status as an immediate relative or family-sponsored immigrant must show that the object of the alien's smuggling attempt was the alien's spouse, parent, son, or daughter. *Matter of Compean-Guevara*, 21 I&N Dec. 51 (BIA 1995).

## 9. Waiver for document fraud – Section 212(d)(12).

- a. Aliens who are eligible

- (1) An LPR who proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the U.S. as a returning resident under § 211(b); or
- (2) An alien seeking admission or adjustment of status under § 201(b)(2)(A) [immediate relative] or § 203(a) [family sponsored immigrants].

b. Substantive law

- (1) Section 212(d)(12) provides that the Attorney General may waive a finding of inadmissibility under § 212(a)(6)(F)(i) if:
  - (a) No previous civil money penalty was imposed against the alien under § 274C; and
  - (b) The offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual).
- (2) The alien must also merit a favorable exercise of discretion, and the waiver must be for humanitarian purposes or to assure family unity.

10. A waiver of the 2-year foreign residence requirement imposed on exchange nonimmigrants under § 101(a)(15)(J) – A § 212(e) waiver may be granted only by a District Director (with favorable recommendation by the Director of USIA). Therefore, an IJ has no authority to grant a § 212(e) waiver or to overrule a denial of a waiver by the District Director. *Matter of Rosenblatt*, 10 I&N Dec. 154 (BIA 1963); *Matter of Irie*, 10 I&N Dec. 372 (BIA 1963); *Matter of Han*, 10 I&N Dec. 53 (BIA 1962).

11. A waiver of inadmissibility for disease, mental illness, etc., under § 212(a)(1)(A) – Section 212(g) contains 3 waivers:

- a. Section 212(g)(1) allows the Attorney General to waive inadmissibility under § 212(a)(1)(A)(i) [alien determined to have a communicable disease of public health significance] in the case of an alien who is the spouse, unmarried son/daughter, minor unmarried lawfully adopted child, or who has a son/daughter who is a USC, an LPR, or an alien who has been issued an immigrant visa.
- b. Section 212(g)(2) allows the Attorney General to waive inadmissibility under § 212(a)(1)(A)(ii) [alien not presenting documentation of vaccinations] in the case of any alien:
  - (1) Who receives vaccination against the disease(s) for which the alien has failed to present documentation of previous vaccination;

- (2) For which a civil surgeon, medical officer, or panel physician (as defined in 42 C.F.R. § 34.2) certifies that such vaccination would not be medically appropriate; or
    - (3) Under such circumstances as the Attorney General provides by regulation, with respect to whom the requirement of such a vaccination would be contrary to the alien's religious beliefs or moral convictions.
  - c. Section 212(g)(3) allows the Attorney General to waive inadmissibility under § 212(a)(1)(A)(iii) [involving aliens determined to have a physical or mental disorder] in the case of any alien with such terms, conditions, and controls, including giving bond, as the Attorney General (after consultation with the Secretary of Health & Human Services) may prescribe by regulation.
  - d. These waivers are also discussed in 8 C.F.R. § 1212.7(b).
12. A waiver of criminal activity – Section 212(h)
- a. Section 212(h) provides that the Attorney General may waive the following grounds of inadmissibility:
    - (1) Section 212(a)(2)(A)(i)(I) – aliens convicted of or admitting the commission of a CIMT;
    - (2) Section 212(a)(2)(B) – aliens convicted of 2 or more offenses (other than purely political) with an aggregate sentence of 5 years;
    - (3) Section 212(a)(2)(D) – aliens involved in prostitution or commercialized vice;
    - (4) Section 212(a)(2)(E) – aliens involved in serious criminal activity who have asserted immunity from prosecution;
    - (5) Section 212(a)(2)(A)(i)(II) – aliens convicted of or admitting drug offenses as that section relates to a single offense of simple possession of 30 grams or less of marijuana.
      - (a) The Board ruled that this exception is not available where the alien was convicted under a statute containing, as an element, a requirement that the possession occur in a prison or other correctional setting. *Matter of Moncada-Servellon*, 24 I&N Dec. 62 (BIA 2007).
      - (b) In *Matter of Martinez-Zapata*, the Board ruled that this exception is not available where the respondent's conviction was enhanced by virtue of the possession of marijuana occurring in a "drug-free zone," where the enhancement

factor increased the maximum penalty for the underlying offense and had to be proved beyond a reasonable doubt to a jury. *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007).

- (c) In *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 125 (BIA 2009), the Board held that an alien who is inadmissible under § 212(a)(2)(A)(i)(II) of the Act may apply for a § 212(h) waiver if he demonstrates by a preponderance of the evidence that the conduct that made him inadmissible was either a single offense of simple possession of 30 grams or less of marijuana or an act that related to such an offense.

b. Aliens who are ineligible

- (1) Section 212(h)(2) provides that no waiver shall be provided in the case of an alien who has been convicted of (or who has admitted acts that constitute) murder or criminal acts involving torture or an attempt or conspiracy to commit murder or a criminal act involving torture.
- (2) Section 212(h) does not permit a “stand alone” waiver without a concurrently filed application for adjustment of status. *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013).
- (3) Section 348 of IIRIRA amended § 212(h)(2) to provide: “No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.” This amendment was discussed by the Board in *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1997).
  - (a) An alien who has not previously been admitted to the U.S. as an alien lawfully admitted for permanent residence is statutorily eligible for a § 212(h) waiver despite his conviction for an aggravated felony. *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998).
  - (b) An alien who entered the United States without inspection and later obtained lawful permanent resident status through adjustment of status has not “previously been admitted to the United States as an alien lawfully admitted for permanent residence.” *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015).

- (c) The lawfulness of the alien's status as a LPR is not relevant. Therefore, an alien who has previously been admitted as a LPR but later claims that such admission was not lawful because he concealed criminal activities from DHS cannot qualify for a § 212(h) waiver if he has not resided continuously in the U.S. for 7 years or has been convicted of an aggravated felony. *Matter of Ayala*, 22 I&N Dec. 398 (BIA 1998).
- c. Substantive requirements – A § 212(h) waiver is available to 2 classes of immigrants: those related to a USC or LPR and all other immigrants. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).
  - (1) Immigrants who are the spouse, parent, son, or daughter of a USC or LPR must establish the following:
    - (a) The alien's exclusion would result in extreme hardship to the alien's USC or LPR spouse, parent, son, or daughter;
      - i) In interpreting the pre-amendment version of § 212(h), the Board held that the hardship to the alien himself may not be considered. *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968).
      - ii) In the same case, the Board held that the term "extreme hardship" encompasses both present and future hardship.
      - iii) By use of the term "extreme hardship," Congress intended a showing of more than the mere hardship caused by family separation. *Matter of W-*, 9 I&N Dec. 1 (BIA 1960).
    - (b) The alien merits a favorable exercise of discretion;
      - i) In interpreting the pre-amendment version of § 212(h), the Board held that when an alien has been convicted of serious crimes, there should be a reasonable showing of rehabilitation before there can be a finding that his or her admission would not be contrary to the national welfare, safety, or security of the U.S. *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968). Neither the "welfare, safety, or security" requirement or the "rehabilitation" requirement of amended § 212(h) is applicable to an immigrant seeking the waiver on the basis of his or her relationship to a USC or LPR.

- ii) Establishing extreme hardship and eligibility for § 212(h)(1)(B) relief does not create any entitlement to that relief. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).
  - iii) Under 8 C.F.R. § 1212.7(d), an Immigration Judge should not favorably exercise discretion under § 212(h)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances (national security or foreign policy considerations, or where the denial would result in exceptional or extremely unusual hardship). Depending on the gravity of the alien's criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion.
- (2) Immigrants not having the requisite relationship to a USC or LPR must establish the following:
  - (a) That the alien is inadmissible only under § 212(a)(2)(D)(i) or (ii) [all grounds involving prostitution, except coming to the U.S. to engage in any other commercialized vice as described in § 212(a)(2)(D)(iii)], or that the activities for which the alien is inadmissible occurred more than 15 years before the date of application;
  - (b) That his or her admission to the U.S. would not be contrary to the national welfare, safety, or security of the U.S.;
  - (c) That he or she has been rehabilitated; and
  - (d) That she or he merits a favorable exercise of discretion.
    - i) An application for discretionary relief, including a waiver under § 212(h), may be denied in the exercise of discretion without express rulings on the question of statutory eligibility. *INS v. Bagamasbad*, 429 U.S. 24 (1976).
- 13. A waiver of inadmissibility for fraud or misrepresentation – Section 212(i) of the Act allows the Attorney General to waive § 212(a)(6)(C)(i) relating to fraud or misrepresentation of a material fact in procuring a visa, admission into the U.S., or other benefit under the Act.



- a. Under § 212(i)(1), the waiver is available to an immigrant who is the spouse, son, or daughter of a USC or LPR if it is established that the refusal of admission to the U.S. of the immigrant would result in extreme hardship to the USC or LPR spouse or parent. Section 212(i)(1) also requires that the immigrant merit a favorable exercise of discretion.
  - b. Section 212(i) waivers are discussed in 8 C.F.R. § 1212.7.
  - c. Section 212(i) of the Act is not available to waive inadmissibility under § 212(a)(6)(F) of the Act which makes inadmissible aliens subject to a final order under § 274C involving document fraud. *Matter of Lazarte*, 21 I&N Dec. 214 (BIA 1996).
  - d. The provisions of § 212(i) which require that an alien establish extreme hardship to his or her United States citizen or permanent resident alien spouse or parent in order to qualify for a waiver of inadmissibility, are applicable to pending cases. *Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999), *following Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996, A.G. 1997).
  - e. The factors to be used in determining whether an alien has established extreme hardship pursuant to § 212(i) include, but are not limited to, the following: the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to the unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999).
  - f. The underlying fraud or misrepresentation for which an alien seeks a waiver of inadmissibility under § 212(i) may be considered as an adverse factor in adjudicating the waiver application in the exercise of discretion. *Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999).
14. A waiver of inadmissibility under § 212(a)(5)(A) and 212(a)(7)(A)(i) –Section 212(k) provides that any alien inadmissible under § 212(a)(5)(A) [no labor certification] or § 212(a)(7)(A)(i) [immigrant not in possession of valid immigrant visa] who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the Attorney General's discretion if the Attorney General is satisfied that "exclusion was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission."
- a. This waiver is also discussed at 8 C.F.R. § 1212.10.

- b. The only case in recent years dealing with § 212(k) waivers is *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987).
- 15. A waiver of inadmissibility as a public charge – Section 213.
  - a. Immigration judges have jurisdiction to grant a waiver of inadmissibility under § 213 of the Act and are required to advise an alien found to be inadmissible as a public charge under § 212(a)(4)(B) of his or her right to apply for a waiver. *Matter of Ulloa*, 22 I&N Dec. 725 (BIA 1999).
  - b. Section 213 provides that an alien inadmissible under § 212(a)(4) [likely to become a public charge] may be admitted if:
    - (1) Bond is posted;
    - (2) The alien is otherwise admissible; and
    - (3) The alien merits a favorable exercise of discretion.
- 16. A waiver of the requirement to file joint petition for removal of conditions – Section 216(c)(4).
  - a. Introduction
    - (1) The Act provides two means by which the conditional basis of a conditional permanent resident's (CPR) status may be removed: (1) the alien and the citizen spouse may file a joint petition to remove the conditional basis of the alien's permanent resident status under § 216(c)(1) of the Act, or (2) the alien may file an application for a waiver of the requirement to file a joint petition under § 216(c)(4). *Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994); *Matter of Anderson*, 20 I&N Dec. 888 (BIA 1994); *Matter of Balsillie*, 20 I&N Dec. 486 (BIA 1992).
    - (2) A conditional permanent resident under § 216(a) who is seeking to remove the conditional basis of that status and who has timely filed the petition and appeared for the interview required under § 216(c)(1), does not need a separate § 216(c)(4) hardship waiver if the petitioning spouse died during the 2-year conditional period. *Matter of Rose*, 25 I&N Dec. 181 (BIA 2010).
    - (3) When an alien in removal proceedings seeks "review" of the DHS's denial of a waiver under § 216 of the Act, of the requirement to file a joint petition to remove the conditional basis of lawful permanent resident status, he or she may introduce, and the IJ should consider, any relevant evidence without regard to whether it was previously submitted or considered in proceedings before the DHS. *Matter of Herrera del Orden*, 25 I&N Dec. 589 (BIA 2011).

- (4) The relevant period for determining extreme hardship is the two year period during which the alien was admitted as a CPR. *Matter of Munroe*, 26 I&N Dec. 428 (BIA 2014).
- (5) The 1986 amendment which created CPR status contained the word “or” between the extreme hardship ground for waiver and the good faith ground which follows it. A 1990 amendment removed the word “or,” but added a third ground for waiver available to battered spouses or children. The third ground is preceded by the word “or.” These changes were for the purposes of syntax only and not to combine the first 2 grounds for a waiver. There are 3 separate waivers which a CPR may file. *Matter of Balsillie*, 20 I&N Dec. 486 (BIA 1992).
  - (a) A CPR who seeks to remove the conditional basis of that status by means of a waiver under § 216(c)(4) should apply for any applicable waiver provided under that section. *Matter of Anderson*, 20 I&N Dec. 888 (BIA 1994).
  - (b) An alien whose application for a specific waiver under § 216(c)(4) has been denied by DHS may not seek consideration of an alternative waiver under that section in deportation proceedings before an IJ. *Id.*
  - (c) Where an alien becomes eligible for an additional waiver under § 216(c)(4) due to changed circumstances, the deportation proceedings may be continued in order to give the alien a reasonable opportunity to submit an application to the Service. *Id.*
  - (d) Inasmuch as the Board only has authority to review a waiver application after DHS and the IJ have considered it, an alien may not apply for a waiver under § 216(c)(4) on appeal. *Id.*
  - (e) In order to preserve an application for relief under § 216(c)(4), an alien must request during deportation proceedings before an IJ a review of the Service's denial of such application. *Matter of Gawaran*, 20 I&N Dec. 938 (BIA 1995).
- b. The extreme hardship waiver – In order to qualify for this waiver, the CPR must establish that extreme hardship would result if he or she is deported. Neither the statute nor the regulations specify to whom the extreme hardship must result.

- (1) The regulations emphasize that hardship results from any deportation and that the waiver should be granted only in those cases in which the hardship is extreme. 8 C.F.R. § 1216.5(e)(1).
    - (a) In determining extreme hardship, only circumstances occurring after the alien acquired CPR status may be considered. INA § 216(c)(4); 8 C.F.R. § 1216.5(e)(1).
  - c. The “good faith” waiver – In order to qualify for this waiver, the alien must establish that he/she entered into the qualifying marriage in good faith, but the qualifying marriage was terminated (other than by death of a spouse) and the alien was not at fault in failing to meet the petition and interview requirements.
  - d. The battered spouse or child waiver. In order to qualify for this waiver, it must be shown that the alien entered into the qualifying marriage in good faith, was battered by or the subject of extreme cruelty by his or her spouse or parent, and was not at fault in failing to meet the petition and interview requirements. INA § 216(c)(4)(C).
17. A waiver of fraud in removal proceedings – Section 237(a)(1)(H) provides that an alien subject to removal as inadmissible at the time of application for admission under § 212(a)(6)(C)(i) because of either willful or innocent fraud or misrepresentation of a material fact in obtaining a visa, entry, or other benefit may be granted a waiver of the fraud or misrepresentation and any ground of inadmissibility at time of application for admission which resulted from the fraud or misrepresentation.
  - a. In order to qualify for the waiver, the respondent must demonstrate the following:
    - (1) The respondent must be the spouse, parent, son or daughter of a USC or LPR;
      - (a) The Board has ruled that, for an alien to qualify for a waiver of inadmissibility under § 237(a)(1)(H)(i), the alien’s qualifying relative must be living. The Board rejected the respondent’s argument that he qualified for a waiver of inadmissibility under § 237(a)(1)(H)(i) based on his deceased U.S.-citizen mother. *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008). The Ninth Circuit overruled the Board’s decision in *Matter of Federiso*, and held that an individual whose United States citizen parent has died remains the son of a U.S. citizen and is therefore eligible for a waiver of removal under § 237(a)(1)(H). *Federiso v. Holder*, 605 F.3d 695 (9th Cir. 2010).
    - (2) The respondent must have been in possession of an immigrant visa at the time of entry;

- (3) The respondent must have been otherwise admissible at the time of entry except for § 212(a)(5)(A) [no labor certification] and § 212(a)(7)(A) [no valid, unexpired immigrant visa] which were a direct result of the fraud or misrepresentation; and
  - (4) The respondent must merit a favorable exercise of discretion.
- b. Section 237(a)(1)(H) provides that “a waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive deportation based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.”
  - (1) Section 237(a)(1)(H) authorizes a waiver of removability under § 237(a)(1)(A) based on charges of inadmissibility at the time of admission under § 212(a)(7)(A)(i)(I), for lack of a valid immigrant visa or entry document, as well as under § 212(a)(6)(C)(i) for fraud or willful misrepresentation of a material fact, where there was a misrepresentation made at the time of admission, whether innocent or not. *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006).
  - (2) An alien who is charged with removability under § 237(a)(1)(A) and (D), based upon a determination of marriage fraud, is eligible for a waiver under § 237(a)(1)(H) to waive both charges because the charges are predicated on the same event – the entry into the United States through a fraudulent marriage. *Vasquez v. Holder*, 602 F.3d 1003 (9th Cir. 2010).
- c. Section 237(a)(1)(H) states that its waiver is unavailable to any alien described in § 241(a)(4)(D) [Nazi persecutors].
- d. Former section 241(f)(1) of the Act was held to be unavailable to waive an alien’s deportability under former § 241(a)(9)(B) (an alien with LPR status on a conditional basis whose status on a conditional basis is terminated) because termination of the alien’s conditional permanent resident status constitutes a basis for deportability which is separate and distinct from the charge that the alien is “excludable at the time of entry” within the meaning of former section 241(f)(1). *Matter of Gawaran*, 20 I&N Dec. 938 (BIA 1995). Section 237(a)(1)(H) appears subject to the same interpretation.
- e. Adjustment of status qualifies as an “admission” for purposes of this waiver. *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015).
- f. Former section 241(f) was held to be available only in deportation proceedings and not in rescission proceedings. *Matter of Pereira*, 19 I&N Dec. 169 (BIA 1984).

- g. In making the discretionary determination on a waiver of deportability pursuant to former section 241(a)(1)(H), an IJ should consider the alien's initial fraud or misrepresentation in the overall assessment of positive and negative factors. *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998). In that decision, the Board specifically declined to follow the policy set forth by the Commissioner of the Immigration and Naturalization Service in *Matter of Alonzo*, 17 I&N Dec. 292 (Comm. 1979), that the underlying fraud or misrepresentation for which the alien seeks a waiver should be disregarded.
18. A waiver of passport and visa for certain nonimmigrant visitors seeking admission to Guam –Section 212(l).
- a. This waiver is discussed in the regulations at 8 C.F.R. § 1212.1(e).

#### **N. Nicaraguan Adjustment and Central American Relief Act (NACARA)**

- 1. Adjustment of status by nationals of Nicaragua or Cuba – Section 202 of NACARA provides that the status of an alien shall be adjusted to that of a LPR if the alien:
  - a. Is a national of Nicaragua or Cuba who has been physically present in the U.S. for a continuous period , beginning not later than December 1, 1995 and ending not earlier than the date the application for adjustment is filed. NACARA § 202(a)(b)(1).
    - (1) Section 202(b)(2) of NACARA provides that, for purposes of establishing that the period of continuous physical presence commenced not later than December 1, 1995, an alien shall demonstrate that prior to December 1, 1995, he:
      - (a) Applied to the Attorney General for asylum;
      - (b) Was issued an OSC under former section 242 or 242B of the Act (as in effect prior to April 1, 1997);
      - (c) was placed in exclusion proceedings under former section 236 of the Act (as in effect prior to April 1, 1997);
      - (d) Applied for adjustment of status under § 245 of the Act;
      - (e) Performed service, or engaged in a trade or business, within the U.S. which is evidenced by records maintained by the Commissioner of Social Security;
      - (f) Applied for any other benefit under the Act by means of an application establishing the alien's presence in the U.S. prior to December 1, 1995; or

- (g) shall make such other demonstration of physical presence as the Attorney General may provide for by regulation.
- b. Applies for NACARA adjustment before April 1, 2000; and
- c. Is otherwise eligible to receive an immigrant visa and is otherwise admissible to the U. S. for permanent residence;
  - (1) The following grounds of inadmissibility shall not apply:
    - (a) Section 212(a)(4) - public charge;
    - (b) Section 212(a)(5) - labor certification;
    - (c) Section 212(a)(6)(A) - present without admission or parole;
    - (d) Section 212(a)(7)(A) - not in possession of a valid entry document.
- d. Application in lieu of MTR – Section 202(a)(2) of NACARA provides that an alien present in the U.S. who has been ordered excluded, deported, removed, or ordered to depart voluntarily from the U.S. under any provision of the Act may, notwithstanding such order, apply for adjustment of status under § 202(a)(1) of NACARA. Such an alien may not be required, as a condition of submitting or granting such application, to file a separate motion to reopen, reconsider, or vacate such order. If the Attorney General grants the application, the Attorney General shall cancel the order. If the Attorney General renders a final administrative decision to deny the application, the order shall be effective and enforceable to the same extent as if the application had not been made.
  - (1) Section 202(g) of NACARA provides that when an alien’s status is adjusted to that of an LPR, the Secretary of State is not required to reduce the number of immigrant visas available to be issued.
- 2. Special rule for cancellation of removal for Salvadorans, Guatemalans, and aliens from Soviet bloc countries. Section 203(b) of NACARA amended § 309 of IIRIRA to add § 309(b) which provides that, subject to the provisions of the Act in effect after IIRIRA, other than § 240A(b)(1), 240A(d)(1), and 240A(e) [but including § 242(a)(2)(B)], the Attorney General may cancel removal and adjust to the status of an LPR an alien who is inadmissible or deportable from the U.S. who:
  - a. Applies for such relief;
  - b. Is described in § 203(a)(5)(C)(i) of NACARA;
    - (1) Has not been convicted of an aggravated felony;



- (2) Was not apprehended after December 19, 1990; and
- (3) Is a Salvadoran national who first entered the U.S. on or before September 19, 1990 and who registered for benefits pursuant to the settlement agreement in *American Baptist Churches, et al v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) on or before October 31, 1991 or applied for TPS on or before October 31, 1991; or
  - (a) For guidance on what constitutes evidence of registration for benefits under the ABC settlement agreement, *see Chaly-Garcia v. United States*, 508 F.3d 1201 (9th Cir. 2007). USCIS implemented a new nationwide policy in light of this decision.
- (4) Is a Guatemalan national who first entered the U. S. on or before October 1, 1990, and who registered for benefits pursuant to the settlement agreement in *American Baptist Churches, et al v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) on or before October 31, 1991; or
  - (a) For guidance on what constitutes evidence of registration for benefits under the ABC settlement agreement, *see Chaly-Garcia v. United States*, 508 F.3d 1201 (9th Cir. 2007). USCIS implemented a new nationwide policy in light of this decision.
- (5) Is a Guatemalan or Salvadoran national who filed an application for asylum with the INS on or before April 1, 1990; or
- (6) Is the spouse or child (as defined in § 101(b)(1) of the Act) of an individual described in this clause at the time the individual is granted suspension or cancellation; or
- (7) Is the unmarried son or daughter of an alien parent described in this subclause at the time suspension or cancellation is granted the parent - if the unmarried son or daughter is 21 years of age or older at the time the decision is rendered, the son or daughter must have entered the U.S. on or before October 1, 1990; or
- (8) Is an alien who entered the U.S. on or before December 31, 1990 and who filed an application for asylum on or before that date, and who was, at the time of filing the application, a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.

- c. The alien is not inadmissible or deportable under § 212(a)(2) or (3), or § 237(a)(2), (3), or (4);
  - d. Is not an alien described in § 241(b)(3)(B)(i) of the Act;
  - e. Has been physically present in the U.S. for a continuous period of not less than 7 years immediately preceding the date of application;
    - (1) The Board held that, as an application for special rule cancellation of removal is deemed to be a “continuing” application, an applicant can continue to accrue physical presence until a final administrative decision is issued. *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007).
    - (2) The Ninth Circuit held that a minor who seeks NACARA relief as derivative must personally satisfy the requirement of seven years of continuous physical presence; and the parent's physical presence in United States was not imputable to minor. *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009).
  - f. Has been a person of GMC during such period; and
  - g. Establishes that removal would result in extreme hardship to the alien or the alien’s spouse, parent, or child who is a USC or LPR; or
  - h. If the alien is inadmissible or deportable under §§ 212(a)(2), 237(a)(2) [other than § 237(a)(2)(A)(iii)], or § 237(a)(3); and
  - i. Is not an alien described in § 241(b)(3)(B)(i) or § 101(a)(43) [an alien convicted of an aggravated felony]; and
  - j. Has been physically present in the U.S. for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for removal; and
    - (1) This should be measured from the applicant’s most recently incurred ground of removal among those listed in 8 C.F.R. § 1240.66(c)(1). *Matter of Castro-Lopez*, 26 I&N Dec. 693 (BIA 2015).
  - k. Establishes that removal would result in exceptional and extremely unusual hardship to the alien or the alien’s spouse, parent, or child who is a USC or LPR.
3. Section 309(f)(2) of IIRIRA was amended to provide that § 240A(d)(2) of the Act shall apply for purposes of calculating any period of continuous physical presence, except that “reference to subsection (b)(1) in such section shall be considered to be a reference to paragraph (1) of this section.”

4. Motions to reopen – Section 203(g) of NACARA provides that, notwithstanding any limitation imposed by law on motions to reopen removal or deportation proceedings (except limitations premised on an alien’s conviction of an aggravated felony), any alien who has become eligible for cancellation of removal or suspension of deportation as a result of the amendments made by § 203 of NACARA may file one motion to reopen removal or deportation proceedings to apply for cancellation of removal or suspension of deportation. It also provides that the Attorney General shall designate a specific time period in which all such motions to reopen are required to be filed. The period shall begin no later than 60 days after the date of enactment of NACARA and shall extend for a period not to exceed 240 days.
5. Calculation of physical presence for Salvadorans, Guatemalans, and aliens from Soviet bloc countries – Section 203(a)(5)(C)(i) of NACARA provides that, for purposes of calculating the period of continuous physical presence under former section 244(a) of the Act (suspension of deportation) and § 240A of the Act (cancellation of removal for non-LPRs), subparagraph (A) and § 240A(d)(1) and (2) [relating to termination of and breaks in residence or physical presence] shall not apply in the case of an alien, regardless of whether in exclusion or deportation proceedings, who:
  - a. Has not been convicted of an aggravated felony;
  - b. Was not apprehended after December 19, 1990; and
    - (1) Is a Salvadoran national who first entered the U.S. on or before September 19, 1990 and who registered for benefits pursuant to the settlement agreement in *American Baptist Churches, et al v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) on or before October 31, 1991 or applied for TPS on or before October 31, 1991; or
      - (a) For guidance on what constitutes evidence of registration for benefits under the ABC settlement agreement, *see Chaly-Garcia v. United States*, 508 F.3d 1201 (9th Cir. 2007). USCIS implemented a new nationwide policy in light of this decision.
    - (2) Is a Guatemalan national who first entered the U. S. on or before October 1, 1990, and who registered for benefits pursuant to the settlement agreement in *American Baptist Churches, et al v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) on or before October 31, 1991; or
      - (a) For guidance on what constitutes evidence of registration for benefits under the ABC settlement agreement, *see Chaly-Garcia v. United States*, 508 F.3d 1201 (9th Cir. 2007). USCIS implemented a new nationwide policy in light of this decision.

- (3) Is a Guatemalan or Salvadoran national who filed an application for asylum with the INS on or before April 1, 1990; or
- (4) Is the spouse or child (as defined in § 101(b)(1) of the Act) of an individual described in this clause at the time the individual is granted suspension or cancellation; or
- (5) Is the unmarried son or daughter of an alien parent described in this subclause at the time suspension or cancellation is granted the parent - if the unmarried son or daughter is 21 years of age or older at the time the decision is rendered, the son or daughter must have entered the U.S. on or before October 1, 1990; or
- (6) Is an alien who entered the U.S. on or before December 31, 1990 and who filed an application for asylum on or before that date, and who was, at the time of filing the application, a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.

## **O. Advance parole**

- 1. Advance parole is a mechanism by which a District Director can, as a humanitarian measure, advise an alien who is in the U.S., but who knows or fears that he will be inadmissible if he leaves and tries to return, that he can leave with the assurance that he will be paroled back into the U.S. upon return, under prescribed conditions, if he cannot establish that he is admissible at that time; *Matter of G-A-C-*, 22 I&N Dec. 83 (BIA 1998). In that same decision, the Board pointed out that the term “advance parole” is something of a misnomer. An alien in the U.S. may request an advance authorization of parole and, if the request is approved, the alien is not at that point paroled. Rather, the alien is advised in advance of a departure that, if he meets certain requirements, he will be paroled into the U.S. when he returns.
- 2. An alien who leaves the United States and reenters under a grant of advance parole has not made a “departure” within the meaning of § 212(a)(9)(B)(i)(II) of the Act. *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

## **X. Evidence**

### **A. In general**

- 1. Immigration proceedings are not bound by the strict rules of evidence. *Dallo v. INS*, 765 F.2d 581 (6th Cir. 1985); *Longoria-Castaneda v. INS*, 548 F.2d 233 (8th Cir. 1977); *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983); *Matter of Devera*, 16 I&N Dec. 266 (BIA 1977).

2. The general rule with respect to evidence in immigration proceedings favors admissibility as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law. *Tashnizi v. INS*, 585 F.2d 781 (5th Cir. 1978); *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983); *Trias-Hernandez v. INS*, 528 F.2d 366 (9th Cir. 1975); *Marlowe v. INS*, 457 F.2d 1314 (9th Cir. 1972); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168 (BIA 1972).
3. Receipt of Evidence:
  - a. 8 C.F.R. § 1240.7(a) provides that an IJ “may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.”
  - b. However, 8 C.F.R. § 1003.19(d) provides that consideration by an IJ of an application or request regarding custody or bond shall be separate and apart from, and shall form no part of, any deportation hearing or proceeding. Therefore, it would seem that an IJ is precluded from considering any evidence from a bond hearing in the course of a hearing on deportability or relief from deportation unless, of course, the evidence is reintroduced and received in the deportation hearing.
  - c. The opposite is not true, however. 8 C.F.R. § 1003.19(d) provides that the determination of the IJ as to custody status or bond may be based upon any information available to the IJ (such as information from the deportation hearing) or that is presented during the bond hearing by the respondent or the Service. When an IJ bases a bond determination on evidence presented in the underlying merits case, it is the responsibility of the parties and the IJ to ensure that the bond record establishes the nature and substance of the specific factual information considered by the IJ in reaching the bond determination. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).
4. Since the rules of evidence are not applicable and admissibility is favored, the pertinent question regarding most evidence in immigration proceedings is not whether or not it is admissible, but what weight the fact finder should accord it in adjudicating the issues on which the evidence has been submitted.

## **B. Burden of proof and presumptions**

1. Removability
  - a. The Department of Homeland Security (DHS) bears the burden to establish deportability. Deportability must be established by evidence which is clear, convincing and unequivocal. *Woodby v. INS*, 385 U.S. 276 (1966).
    - (1) An exception to the “clear, convincing and unequivocal” standard exists in when an alien is charged with removability under §

237(a)(1)(D)(i) as an alien whose status as a conditional permanent resident has been terminated under § 216(b) of the Act. Section 216(b)(2) states that DHS bears the burden of demonstrating “by a preponderance of the evidence” that a condition described in § 216(b)(1)(A) is met. *Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991).

- b. The burden is on the respondent to show the time, place, and manner of entry. INA § 291. If this burden of proof is not sustained, the respondent is presumed to be in the U. S. in violation of law. *Id.* In presenting his or her proof, the respondent is entitled to the production of his visa or other entry document, if any, and of any other documents and records pertaining to his or her entry which are in the custody of DHS and not considered confidential by the Attorney General. *Id.*
  - (1) This burden and presumption is applicable to any charge of deportability which brings into question the time, place, and manner of entry. *Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984).
    - (a) The 9th Circuit disagrees and holds that the presumption of section 291 applies only in cases involving illegal entry. *Iran v. INS*, 656 F.2d 469 (9th Cir. 1981).
  - (2) Therefore, in a case in which the charge involves time, place, and manner of entry, DHS’s burden is often reduced to establishing alienage.
    - (a) In removal proceedings there is no presumption of citizenship similar to the presumption of innocence which exists in criminal cases. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).
    - (b) A person born abroad is presumed to be an alien until he or she shows otherwise. *United States ex rel. Rongetti v. Neelly*, 207 F.2d 281 (7th Cir. 1953); *Corona-Palomera v. INS*, 661 F.2d 814 (9th Cir. 1981); *Matter of Ponco*, 15 I&N Dec. 120 (BIA 1974); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969); *Matter of A-M-*, 7 I&N Dec. 332 (BIA 1956).
  - (3) Although § 291 of the Act places the burden of proof on the respondent to establish the time, place, and manner of entry, it cannot serve as a basis on which to predicate a charge of deportability, i.e. the respondent may not be charged under § 291 as an alien who has failed to establish the time, place, and manner of entry. A charge of deportability must be under one of the provisions of § 241. *Matter of Li*, 12 I&N Dec. 293 (BIA 1967).

- c. In applications for relief from deportation, the burden of proof is on the respondent. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien has the burden of proving by a preponderance of the evidence that such grounds do not apply. 8 C.F.R. § 1240.8(d).

## 2. Inadmissibility

- a. The burden of proof is on the applicant to show that he or she is not subject to exclusion under any provision of the Act. INA § 291.
  - (1) Except when the applicant has a “colorable” claim to status as a returning resident. In that case the burden of proof to establish excludability is on the DHS. *Matter of Kane*, 15 I&N Dec. 258 (BIA 1975); *see also Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).
    - (a) The DHS burden in such a case is to show by “clear, unequivocal, and convincing evidence” that the applicant should be deprived of LPR status. *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988).
    - (b) An alien “commuter” is not returning to an actual unrelinquished permanent residence in the U.S., therefore he is not entitled to a hearing at which the DHS bears the burden of proof. *Matter of Moore*, 13 I&N Dec. 711 (BIA 1971).
    - (c) If the LPR contends that inadmissibility is not proper, apply law [regarding departure and entry or admission](#) to the United States.
  - (2) Where the applicant has no “colorable claim” to LPR status and alleges that inadmissibility allegations are improper because of a past entry, the burden is on the applicant to show that he or she has effected an entry. *Matter of Z-*, 20 I&N Dec. 707 (BIA 1993); *Matter of Matelot*, 18 I&N Dec. 334 (BIA 1982); *Matter of Pheliswa*, 18 I&N Dec. 272 (BIA 1982). In a case where there is no clear evidence of the facts determinative of the entry issue, the case ultimately must be resolved on where the burden of proof lies. *Matter of G-*, 20 I&N Dec. 764 (BIA 1993).
- b. Under § 214(b) of the Act, every alien is presumed to be an immigrant. The burden of proof is on the alien to establish nonimmigrant status under § 101(a)(15).
- c. In cases in which the applicant bears the burden of proof, the burden of proof never shifts and is always on the applicant. *Matter of Rivero-Diaz*, 12 I&N Dec. 475 (BIA 1967); *Matter of M-*, 3 I&N Dec. 777 (BIA 1949). Where the



evidence is of equal probative weight, the party having the burden of proof cannot prevail. *Id.*

- (1) An applicant for admission to the U.S. as a citizen of the U.S. has the burden of proving citizenship. *Tillinghast v. Flynn ex rel. Chin King*, 38 F.2d 5 (1st Cir. 1930), *cert. denied* 281 U.S. 768 (1930); *Mah Ying Og v. Wixon*, 124 F.2d 1015 (9th Cir. 1942); *Lum Mon Sing v. United States*, 124 F.2d 21 (9th Cir. 1941); *Matter of G-R*, 3 I&N Dec. 141 (BIA 1948).
- (2) Once the applicant establishes that he or she was once a citizen and the DHS asserts that he or she lost that status, then the DHS bears the burden of proving expatriation. *Id.*
- (3) The standard of proof to establish expatriation is less than the “clear, unequivocal, and convincing” evidence test as applied in denaturalization cases but more than a mere preponderance of evidence. The proof must be strict and exact. *Id.*

3. Rescission proceedings

- a. In rescission proceedings the burden of proof is on DHS.
- b. The burden is “clear, convincing, and unequivocal evidence.” *Waziri v. INS*, 392 F.2d 55 (9th Cir. 1968); *Matter of Vilanova-Gonzalez*, 13 I&N Dec. 399 (BIA 1969).
- c. This is the same burden as DHS bears with respect to grounds of deportation.

4. Removal proceedings involving arriving aliens or aliens alleged to be present in the U.S. without being admitted or paroled

- a. If the alien is an applicant for admission, the alien has the burden of establishing that he or she is clearly and beyond doubt entitled to be admitted and is not inadmissible under § 212 or by clear and convincing evidence, that he is lawfully present in the U.S. pursuant to a prior admission. INA § 240(c)(2). In meeting the burden that he/she is lawfully present in the U.S., the alien shall have access to the alien’s visa or other entry document, if any and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien’s admission or presence in the U.S. *Id.*
- b. The Government has the burden of proof to show that an applicant with a “colorable” claim to status as a returning resident should be deprived of LPR status. *Katebi v. Ashcroft*, 396 F.3d 463 (1st Cir. 2005); *Singh v. Reno*, 113 F.3d 1512 (9th Cir. 1997).

5. In removal proceedings involving aliens who have been admitted.

- a. In the case of an alien who has been admitted to the U.S., the DHS has the burden of establishing by clear and convincing evidence that the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. INA § 240(c)(3).
- b. However, it is the alien's burden of proof to establish by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission. INA § 240(c)(2)(B).

## **C. Documents**

### **1. Certification**

#### **a. Domestic documents**

- (1) 8 C.F.R. § 1287.6(a) provides that an official record, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy.
- (2) Proof of criminal convictions. Section 240(c)(3)(B) of the Act and 8 C.F.R. § 1003.41(a) provide that in any proceeding under the Act, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:
  - (a) An official record of judgment and conviction;
  - (b) An official record of plea, verdict, and sentence;
  - (c) A docket entry from court records that indicates the existence of the conviction;
  - (d) Official minutes of a court proceeding or a transcript of a court hearing that indicates the existence of the conviction;
  - (e) An abstract of a record of conviction prepared by the court in which the conviction was entered or by a State official associated with the State's repository of criminal justice records which indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence;
  - (f) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction;

- (g) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.
- (3) 8 C.F.R. § 1003.41(b) provides that any document or record listed in 8 C.F.R. § 1003.41(a) may be submitted if:
  - (a) It complies with the provisions of 8 C.F.R. § 287.6(a), i.e., attested by the custodian of the document or his authorized deputy; or
  - (b) It is attested by an immigration officer to be a true and correct copy of the original.
- (4) Section 240(c)(3)(C) and 8 C.F.R. § 1003.41(c) provide that any record of conviction or abstract submitted by electronic means to the Service from a state or court shall be admissible as evidence to prove a criminal conviction if:
  - (a) It is certified by a state official associated with the state's repository of criminal justice records as an official record from its repository or by a court official from the court in which conviction was entered as an official record from its repository (§ 240(c)(3)(C) and 8 C.F.R. § 1003.41(c)(1) provide that the certification may be by means of a computer-generated signature and statement of authenticity); and
  - (b) It is certified in writing by a Service official as having been received electronically from the state's record repository or the court's record repository.
- (5) 8 C.F.R. § 1003.41(d) provides that any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.

b. Foreign documents

- (1) Documents from Canada – 8 C.F.R. § 1287.6(d) provides that an official record or entry therein issued by a Canadian government entity within the geographical boundaries of Canada, when admissible for any purpose, shall be evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy.
- (2) Documents from countries signatory to the Convention Abolishing the Requirement of Legislation for Foreign Public Document

- (a) 8 C.F.R. § 1287.6(c) provides that a public document or entry therein, when admissible for any purpose, may be evidenced by an official publication or by a copy properly certified under the Convention.
- (b) No certification is needed from an officer in the Foreign Service of public documents. 8 C.F.R. § 1287.6(c)(2). In order to be properly certified however, the copy must be accompanied by a certificate in the form dictated by the Convention. This certificate must be signed by a foreign officer so authorized by the signatory country and it must certify (1) the authenticity of the signature of the person signing the document, (2) the capacity in which that person acted, and (3) where appropriate, the identity of the seal or stamp the document bears.
- (c) 8 C.F.R. § 1287.6(c)(3) provides that in accordance with the Convention, the following documents are deemed to be public documents:
  - i) Documents emanating from an authority or an official connected with the courts or tribunals of the state, including those emanating from a public prosecutor, a clerk of a court, or a process server;
  - ii) Administrative documents;
  - iii) Notarial acts; and
  - iv) Official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures.
- (d) 8 C.F.R. § 1287.6(c)(4) provides that in accordance with the Convention, the following documents are deemed not to be public documents and are subject to the more stringent requirements of 8 C.F.R. § 1287.6(b):
  - i) Documents executed by diplomatic or consular agents; and
  - ii) Administrative documents dealing directly with commercial or customs operations.

- (3) Documents from countries not signatory to the Convention
  - (a) 8 C.F.R. § 1287.6(b) provides that an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized; 8 C.F.R. § 1287.6(b)(1). This attested copy, with the additional foreign certificates if any, must be certified by an officer in the Foreign Service of the U.S., stationed in the country where the record is kept. 8 C.F.R. § 1287.6(b)(2). The Foreign Service officer must certify the genuineness of the signature and the official position either of either:
    - i) The attesting officer; or
    - ii) Any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. (8 C.F.R. § 1287.6(a)(1) provides that the copy attested by an authorized foreign officer may, but need not, be certified in turn by any authorized foreign officer both as to the genuineness of the signature of the attesting officer and as to his/her official position. The signature and official position of this certifying officer may then likewise be certified by any other foreign officer so authorized, thereby creating a chain of certificates. In that situation, the officer of the Foreign Service of the U.S. may certify any signature in the chain.)
- 2. Translation – 8 C.F.R. § 1003.33 provides that any foreign language document offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed. Such certification must include a statement that the translator is competent to translate the document and that the translation is true and accurate to the best of the translator's abilities.
- 3. Service – 8 C.F.R. § 1003.32(a) provides that, except in absentia hearings, a copy of all documents (including proposed exhibits or applications) filed with or presented to the IJ shall be simultaneously served by the presenting party on the opposing party or parties.
  - a. Service of copies shall be in person or by first class mail to the most recent address contained in the ROP. 8 C.F.R. § 1003.32(a).

- b. Any documents or applications not containing a certificate certifying service on the opposing party on a date certain will not be considered by the IJ unless service is made on the record during a hearing. 8 C.F.R. § 1003.32(a).
- 4. Size and format of documents
  - a. Unless otherwise permitted by the IJ, all written material presented to IJs must be on 8 ½" x 11" size paper. 8 C.F.R. § 1003.32(b).
  - b. An IJ may require that exhibits or other written material presented be indexed and paginated and that a table of contents be provided. 8 C.F.R. § 1003.32(b).
- 5. Presumption of regularity of Government documents – The Board held that government documents are entitled to a presumption of regularity. *Matter of P-N*, 8 I&N Dec. 456 (BIA 1959).
- 6. Similarity of names – When documentary evidence bears a name identical to that of the respondent, an IJ may reasonably infer that such evidence relates to the respondent in the absence of evidence that it does not relate to him or her. *United States v. Rebon-Delgado*, 467 F.2d 11 (9th Cir. 1972); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Leyva*, 16 I&N Dec. 118 (BIA 1977); *Matter of Li*, 15 I&N Dec. 514 (BIA 1975); *Matter of Cheung*, 13 I&N Dec. 794 (BIA 1971).
- 7. Cases regarding specific documents
  - a. Form I-213, Record of Deportable/Inadmissible Alien
    - (1) Absent proof that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and removability. *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976).
    - (2) The document would be admissible even under the Federal Rules of Evidence as an exception to the hearsay rule as a public record or report. *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976).
    - (3) A Form I-213 is admissible and ordinarily sufficient “for a prima facie case of deportability,” whereupon the “burden shifts to the alien to prove that he is here legally” under section 291 of the Act. *Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990); *see also Espinoza v. INS*, 45 F.3d 308 (9th Cir. 1995); *Matter of Benitez*, 19 I&N Dec. 173 (BIA 1984).
    - (4) In *in absentia* proceedings, DHS met its burden of establishing a minor respondent’s removability by clear, unequivocal, and convincing evidence, where (1) a Record of Deportable/Inadmissible

Alien (Form I-213) was submitted, documenting the respondent's identity and alienage; (2) the respondent, who failed without good cause to appear at her removal hearing, made no challenge to the admissibility of the Form I-213; (3) there were no grounds for a finding that the admission of the Form I-213 would be fundamentally unfair; and (4) no independent evidence in the record supported the IJ's conclusion that the respondent may not have been the child of the adult who claimed to be the respondent's parent and who furnished the information regarding her foreign citizenship; *Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002); *see also Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999).

- b. Sworn statement by respondent – Where an alien in deportation proceedings admits his name and then stands mute, his sworn statement may be relied upon as evidence of deportability and need not be identified by the officer to whom the statement was made although it represented the sole evidence of deportability other than the inference to be drawn from the alien's silence. *Matter of P-*, 7 I&N Dec. 133 (BIA 1956); *Matter of V-*, 7 I&N Dec. 308 (BIA 1956).
- c. Form I-130, visa petition – A Form I-130 and accompanying documents (birth certificate, marriage certificate, etc.) are admissible, even without identification of the I-130 by its maker, if there is an identity of name with the name of the respondent. *Matter of Gonzalez*, 16 I&N Dec. 44 (BIA 1976).
- d. Police reports – Inasmuch as all relevant factors regarding an alien's arrest and conviction should be considered in cases involving discretionary relief, police reports concerning circumstances of arrest are appropriately admitted into evidence. *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995). Since the question posed in an application for discretionary relief is whether a favorable exercise of discretion is warranted, a police report may be helpful in answering that question because it bears on the issue of the alien's conduct where he or she was arrested and this in turn is germane to whether he or she merits discretionary relief. *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996). However, a police report should not be considered for the purpose of determining removability where the statute mandates a focus on a criminal conviction, rather than on conduct. *Id.*
- e. Admissions made by counsel – Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his or her professional capacity binds his or her client as a judicial admission. *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986). Thus, when an admission of removability is made as a tactical decision by an attorney in a deportation proceeding, the admission is binding on his or her alien client and may be relied upon as evidence of deportability. *Id.* There is a strong presumption that an attorney's decision to concede an alien's deportability in a motion for change of venue was a reasonable tactical decision, and, absent a showing of egregious circumstances, such a concession



is binding upon the alien as an admission. *Id.* It is immaterial whether an alien actually authorized his or her attorney to concede deportability in a motion to change venue, for so long as the motion was prepared and filed by an attorney on behalf of his or her alien client, it is prima facie regarded as authorized by the alien and is admissible as evidence. *Id.*

- f. State Department reports of investigations – Reliance on reports of investigations that do not provide sufficient information about how the investigation was conducted are fundamentally unfair because, without that information, it is nearly impossible for the immigration court to assess the report's probative value and the asylum applicant is not allowed a meaningful opportunity to rebut the investigation's allegations. *See Anim v. Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008); *Banat v. Holder*, 557 F.3d 886 (8th Cir. 2009). “The Department of Justice itself has recognized the need for a detailed [investigation] report.” *Lin v. U.S. Dep’t of Justice*, 459 F.3d 255, 270 (2d Cir. 2006).

## **D. Testimony**

### **1. Calling the alien to testify**

- a. The DHS may call the respondent as a witness to establish a ground of deportability. Requiring the respondent to testify does not violate due process, absent a claim of self-incrimination. *Matter of Laqui*, 13 I&N Dec. 232 (BIA 1969), *aff’d Laqui v. INS*, 422 F.2d 807 (7th Cir. 1970).
- b. A valid claim to privilege against compulsory self-incrimination under the 5th amendment may be raised only as to questions that present a real and substantial danger of self-incrimination. *Marchetti v. United States*, 390 U.S. 39 (1968). Therefore, an IJ does not err in compelling non-incriminating testimony. *Chavez-Raya v. INS*, 519 F.2d 397 (7th Cir. 1975); *Wall v. INS*, 722 F.2d 1442 (9th Cir. 1984); *Matter of Santos*, 19 I&N Dec. 105, 109 n.2 (BIA 1984) (no crime is implicated when a nonimmigrant overstays his allotted time of admission).
- c. Neither the IJ nor the DHS is in a position to offer immunity from criminal prosecution. This is an action which can only be authorized by the Attorney General or certain officials designated by him. *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979); *Matter of King and Yang*, 16 I&N Dec. 502 (BIA 1978); *Matter of Exantus and Pierre*, 16 I&N Dec. 382 (BIA 1977).

### **2. Refusal by the alien to testify**

- a. On the issue of removability
  - (1) Refusal to testify without legal justification in removal proceedings concerning the questions of alienage, time, place, and manner of entry is reliable, substantial, and probative evidence supporting a

finding of deportability. *Matter of Pang*, 11 I&N Dec. 489 (BIA 1966), *aff'd Ah Chiu Pang v. INS*, 368 F.2d 637 (3d Cir. 1966); *Matter of R-S-*, 7 I&N Dec. 271 (BIA 1956, A.G. 1956).

- (2) It is also proper to draw an unfavorable inference from refusal to answer pertinent questions where such refusal is based upon a permissible claim of privilege as well as where privilege is not a factor. *Matter of O-*, 6 I&N Dec. 246 (BIA 1954). The prohibition against the drawing of an unfavorable inference from a claim of privilege arises in criminal proceedings, not civil proceedings. *Id.* The logical conclusion to be drawn from the silence of one who claims his answers may subject him to possible prosecution or punishment is that the testimony withheld would be adverse to the interests of the person claiming privilege. *Id.* Even if the refusal to testify is based on the 5th Amendment privilege against self-incrimination, the refusal forms the basis of an inference and such inference is evidence. *United States v. Alderete-Deras*, 743 F.2d 645 (9th Cir. 1984); *Matter of M-*, 8 I&N Dec. 535 (BIA 1960); *Matter of P-*, 7 I&N Dec. 133 (BIA 1956); *Matter of V-*, 7 I&N Dec. 308 (BIA 1956).
- (3) Although it is proper to draw an unfavorable inference from a respondent's refusal to answer pertinent questions, the inference may only be drawn after a prima facie case of deportability has been established. *Matter of J-*, 8 I&N Dec. 568 (BIA 1960); *Matter of O-*, 6 I&N Dec. 246 (BIA 1954). In deportation proceedings, the respondent's silence alone, in the absence of any other evidence of record, is insufficient to constitute prima facie evidence of the respondent's alienage and is therefore also insufficient to establish the respondent's deportability. *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991). Also, the record should show that the respondent was requested to give testimony, that there was a refusal to testify, and the ground of refusal. *Matter of J-*, 8 I&N Dec. 568 (BIA 1960).

b. On the issue of relief

- (1) In the case of an alien who refused to answer the questions of a congressional committee on the grounds that the answers might incriminate him, the Board held that it might well be inferred that what would be revealed by the answers to such questions would not add to the alien's desirability as a resident. Therefore, he was found not to be a desirable resident of the U.S. and his application for suspension of deportation was denied as a matter of discretion. *Matter of M-*, 5 I&N Dec. 261 (BIA 1953).
- (2) An applicant for discretionary relief has the duty of making a full disclosure of all pertinent information. If, under a claim of privilege against self-incrimination pursuant to the 5th amendment, an

applicant refuses to testify concerning prior false claims to U.S. citizenship, denial of his application is justified on the ground that he has failed to meet the burden of proving his fitness for relief. *Matter of Y-*, 7 I&N Dec. 697 (BIA 1958).

- (3) A respondent's refusal to answer questions pertaining to his application for voluntary departure prevented a full examination of his statutory (or discretionary, depending on the questions) eligibility for the relief sought and such relief is properly denied. *Matter of Li*, 15 I&N Dec. 514 (BIA 1975). Since the grant of voluntary departure is a matter of discretion and administrative grace, a respondent's refusal to answer questions directed to him bearing on his application for voluntary departure is a factor which an IJ may consider in the exercise of discretion. *Matter of Mariani*, 11 I&N Dec. 210 (BIA 1965).

#### **E. Hearsay**

1. Hearsay evidence is admissible in removal proceedings unless its use is fundamentally unfair to an alien. *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988).

#### **F. Evidence from an application to adjust an alien's status under section 210 of the Act**

1. Information provided in an application to adjust an alien's status to that of a lawful temporary resident under § 210 is confidential and prohibited from use in rescission proceedings under § 246, or for any purpose other than to make a determination on an application for lawful temporary residence, to terminate such temporary residence, or to prosecute the alien for fraud during the time of application. *Matter of Masri*, 22 I&N Dec. 1145 (BIA 1999).

#### **G. The exclusionary rule in immigration proceedings and motions to suppress**

1. Burdens
  - a. Whenever an alien in removal proceedings questions the legality of evidence, he or she must provide proof establishing a prima facie case that the DHS's evidence was unlawfully obtained before the burden will shift to the DHS to justify the manner in which it obtained the evidence. *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). The motion to suppress must enumerate the articles to be suppressed. *Wong*, 13 I&N Dec. at 822. The motion must be supported by an affidavit containing specific and detailed statements based on personal knowledge. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971).
2. Invoking the Fifth Amendment Privilege Against Self-Incrimination
  - a. The Fifth Amendment privilege against self-incrimination "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to

criminal responsibility him who gives it.” *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

- (1) Section 275(a) of the Act, 8 U.S.C. § 1325(a), provides that it is a crime for an alien to enter the United States without inspection.
  - b. A Fifth Amendment privilege against self-incrimination must be asserted on a question-by-question basis, and, as to each question asked, the party has to decide whether or not to raise his or her Fifth Amendment right. *See Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1019 (9th Cir. 2006).
3. Grounds for Suppression: Fourth and Fifth Amendment Violations, Regulatory Violations
  - a. Fourth Amendment
    - (1) Generally, the exclusionary rule does not apply in removal proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). However, the exclusionary rule may apply where there are “egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained” or if “there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.” *Id.* at 1050-51; *see also Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980) (finding that circumstances surrounding an arrest and interrogation in violation of Fourth Amendment may result in evidence, the admission of which would be fundamentally unfair and violate the Due Process Clause of the Fifth Amendment).
    - (2) Seizure
      - (a) “[A]n initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, ‘if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’” *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Where an individual’s freedom of movement is restricted by a factor independent of law enforcement conduct, such as being a passenger on a bus, the proper analysis is “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

(3) Violations of the Fourth Amendment

- (a) To lawfully stop a person, the officer must have a reasonable suspicion that the person is unlawfully present in the United States and must be able to articulate objective facts to support that suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975); *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994).
  - i) Proximity to the border and the suspect's behavior may be considered. *United States v. Garcia-Barron*, 116 F.3d 1305, 1308 (9th Cir. 1997); *United States v. Tehrani*, 49 F.3d 54 (2d Cir. 1995).
  - ii) Speaking a foreign language may be considered along with the person's inability to speak English, but that factor alone will not justify a stop. *United States v. Manzo-Jurado*, 457 F.3d 928, 937 (9th Cir. 2006).
  - iii) Failure to acknowledge a law enforcement officer may be considered as a factor. *United States v. Arvizu*, 534 U.S. 266, 275-76 (2002).
- (b) To lawfully execute a warrantless arrest, the officer must have a reason to believe that the person is unlawfully present in the United States and that the individual is likely to escape before a warrant can be obtained. *See* INA § 287(a)(2).

(4) Standards for an Egregious Violation of the Fourth Amendment

- (a) Second Circuit –An egregious violation exists where (1) the violation transgressed notions of fundamental fairness; or (2) the violation - regardless of the egregiousness or unfairness - undermined the probative value of the evidence obtained. *Maldonado v. Holder*, 763 F.3d 155 (2d Cir. 2014); *Cotzojay v. Holder*, 725 F.3d 172 (2d Cir. 2014); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234-35 (2d Cir. 2006).
- (b) Third Circuit –Suppression may be warranted based on egregious violations in the individual case (which is determined on a case-by-case basis) or based on a widespread pattern of violations. *Oliva-Ramos v. Atty. Gen. of the United States*, 694 F.3d 259 (3d Cir. 2012).
- (c) Fourth Circuit – The exclusionary rule does apply in removal proceedings where there has been an egregious violation. The determination of whether there has been an egregious

violation is based on the totality of the circumstances.  
*Yanez-Marquez v. Lynch*, 789 F.3d 434 (4th Cir. 2015).

- (d) Eighth Circuit – The Eighth Circuit has noted that the exclusionary rule may apply in instances where there has been an egregious violation, but so far has not found that exclusion of evidence was compelled. They have given examples of where an egregious violation may have occurred but so far have not held that a violation was egregious. The determination would be based on the totality of the circumstances, and must include determinations regarding whether the violation transgressed notions of fundamental fairness and whether the violation undermined the probative value of the evidence. *Chavez-Castillo v. Holder*, 771 F.3d 1081 (8th Cir. 2014); *Carcamo v. Holder*, 713 F.3d 916, 922 (8th Cir. 2013). The exclusionary rule is not available to remedy violations of the Federal Educational Rights and Privacy Act. *Downs v. Holder*, 758 F.3d 994 (8th Cir. 2014).
- (e) Ninth Circuit – An egregious violation of the Fourth Amendment occurs where the violation is a bad faith violation. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5 (9th Cir. 1994).
  - i) A bad faith violation occurs where evidence is obtained (1) by a deliberate violation of the Fourth Amendment or (2) by conduct a reasonable officer should have known is in violation of the Constitution. *Id.* at 1449 (quoting *Adamson v. Comm'r*, 745 F.2d 541, 545 (9th Cir. 1984)). See *Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011).
  - ii) Cases finding egregiousness: *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008) (nonconsensual warrantless entry into home); *Orhorhaghe v. INS*, 38 F.3d 488, 493-94 (9th Cir. 1994) (nonconsensual warrantless search based on alien's foreign-sounding name).

#### b. Fifth Amendment

- (1) The Due Process Clause of the Fifth Amendment entitles non-citizens to fair removal proceedings and mandates that evidence be used in a fundamentally fair manner. See *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *United States ex rel. Vajtauer v. Comm'r*, 273 U.S. 103, 106 (1927); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). Evidence obtained in violation of the Due Process Clause is

suppressible. *See Matter of Sandoval*, 17 I&N Dec. 70, 83 n.23 (BIA 1979).

- (2) Due process requires that statements which are coerced or involuntarily given be excluded from the record. *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980); *Navia-Duran v. INS*, 568 F.2d 803, 811 (1st Cir. 1977); *Singh v. Mukasey*, 553 F.3d 207, 214-16 (2d Cir. 2009).
  - (a) Where the immigration officer fails to provide the advisals at 8 C.F.R. § 287.3(c), such a failure is a factor to consider in determining whether the alien's statements were involuntarily given. *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980); *Navia-Duran v. INS*, 568 F.2d 803, 811 (1st Cir. 1977); *Sing v. Mukasey*, 553 F.3d 207, 214-16 (2d Cir. 2009). However, a failure to provide the advisals would not render an otherwise voluntary statement inadmissible. *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 23 (1st Cir. 2004). It should be noted that the above cases addressed 8 C.F.R. § 287.3(c) before *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011) made clear that the advisals are not required to be given until the NTA is filed.
  - (b) Interference with an individual's exercise of the right to counsel will render a statement involuntary. *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).
- (3) 8 C.F.R. § 287.8(c)(2)(vii) prohibits immigration officers from using threats, coercion, or physical abuse to induce a suspect to waive his or her rights or to make a statement. Therefore, statements obtained through coercion should be suppressed as a regulatory violation as well as a Fifth Amendment violation.
- (4) Factual scenarios to consider generally
  - (a) Denial of food or drink. *Mineo v. INS*, 19 F.3d 11 (4th Cir. 1994) (unpublished).
  - (b) Threats of inevitable deportation or promised preferential treatment. *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977).
  - (c) Length and time of day of the interrogation. *Navia-Duran v. INS*, 568 F.2d at 804, 810.



c. Regulations

- (1) Evidence obtained in violation of federal regulations may also be suppressed if (1) the violated regulation is promulgated to serve “a purpose of benefit to the alien” and (2) the violation “prejudiced interests of the alien which were protected by the regulation.” *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328 (BIA 1980).
  - (a) To demonstrate prejudice, the alien must establish that the outcome of the case would be different if the regulatory provision had not been violated. *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002).
  - (b) Prejudice is presumed where (1) compliance with the regulation is mandated by the Constitution or (2) a procedural framework designed to ensure the fair processing of an action affecting an individual is created, but not followed by an agency. *Garcia-Flores*, 17 I&N Dec. at 329. *See Leslie v. Att’y Gen.*, 611 F.3d 171, 178 (3d Cir. 2010).
- (2) Relevant Regulatory Provisions
  - (a) Interrogation - “An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.” 8 C.F.R. § 287.8(b)(1). *See* INA § 287(a)(1). Section 287(a)(1) of the act requires that immigration officers possess a “reasonable suspicion of alienage” before questioning individuals about their immigration status, even where the individuals are not being detained. *Matter of King and Yang*, 16 I&N Dec. 502, 504-05 (BIA 1978).
  - (b) Brief Detentions – “If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.” 8 C.F.R. § 287.8(b)(2).
  - (c) Arrests – An immigration officer authorized by 8 C.F.R. § 287.5(c)(1) has the power to arrest aliens for immigration violations. *See* INA § 287(a)(2). An officer may arrest a person only when he has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States. 8 C.F.R. § 287.8(c)(2)(i). “A warrant of arrest shall be obtained

except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.” 8 C.F.R. § 287.8(c)(2)(ii).

- (d) Arrests without warrant – The Act empowers immigration officers authorized by regulation to arrest aliens whom the officers have reason to believe is in the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion or removal of aliens. INA § 287(a)(2). 8 C.F.R. § 287.5(c)(1) authorizes a specified list of immigration officers to conduct these arrests.
- (e) Examination of Aliens Arrested Without Warrant – “An alien arrested without a warrant of arrest under the authority contained in § 287(a)(2) of the Act will be examined by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer . . . may examine the alien.” 8 C.F.R. § 287.3(a).
  - i) The Constitution does not mandate compliance with this section, nor is there any evidence that this section was promulgated to protect fundamental statutory or constitutional rights. *See Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002).
- (f) Determination of Proceedings After Examination – If the examining officer is satisfied that prima facie evidence exists demonstrating that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will (1) refer the case to an immigration judge; (2) order the alien removed; or (3) take whatever other action may be appropriate or required by the applicable laws or regulations. 8 C.F.R. § 287.3(b).
- (g) Provision of Advisals – “[A]n alien arrested without a warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services . . . The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.” 8 C.F.R. § 287.3(c). In *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011), the Board held that this regulation does not require immigration officers to provide these advisals until after the alien who has been arrested without a

warrant is placed in formal proceedings by the filing of a Notice to Appear.

- i) 8 C.F.R. § 287.3(c) was intended to serve a purpose of benefit to the alien. *Matter of Garcia-Flores*, 17 I&N Dec. at 329.
- (h) Alien's Right to Counsel – 8 C.F.R. § 292.5(b) states that “[w]hen an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative . . . .”
  - i) ICE refers to post-arrest questioning of aliens as “examination” in its regulations. See 8 C.F.R. § 287.3(a). Therefore, aliens have a right to counsel at those examinations. See *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006). However, the alien is not entitled to be advised of this right until the NTA is filed with the immigration court. See *E-R-M-F- & A-S-M-*, 25 I&N Dec. at 584.
  - ii) Where the alien is denied the opportunity to exercise this right, the alien's statements are considered involuntary and must be excluded. See *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980).

d. Common issues

(1) Alleged Violations Involving non-ICE Law Enforcement Officers

(a) Regulatory violations

- i) In *Samayoa-Martinez v. Holder*, 558 F.3d 897, 900-01 (9th Cir. 2009), the Ninth Circuit found that the military police officer who arrested Samayoa was not an agent of the former INS and, therefore, was not required to comply with former INS regulations. The court also noted that the military police officer had authority to arrest Samayoa “for on-base violations of civil law.” *Id.* at 901.
- (b) INA § 287(g)(10)
  - i) Pursuant to § 287(g)(1), state and local law enforcement may perform certain immigration officer functions if they enter into an agreement with DHS.
  - ii) Section 287(g)(10) states that “Nothing in this subsection shall be construed to require an agreement

under this subsection in order for any officer or employee of a State or political subdivision of a State – (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”

- iii) DHS may argue that, pursuant to § 287(g)(10)(B), a state or local police officer is authorized to arrest, detain, and/or transport an alien. Courts have interpreted this section of the Act in different ways.
  - a) The Sixth Circuit has stated that this section stands for the proposition that local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General . . .” *United States v. Urrieta*, 520 F.3d 569, 575 (6th Cir. 2008).
  - b) The Eighth Circuit has interpreted § 287(g)(10)(B) to authorize state law enforcement to, at the request of ICE, take into custody, transport, and detain overnight an individual who had been ticketed for speeding. *United States v. Quintana*, 623 F.3d 1237, 1242 (8th Cir. 2010).
  - c) The Ninth Circuit interprets the “otherwise to cooperate” language of § 287(g)(10)(B) to mean that “when the Attorney General calls upon state and local law enforcement officers – or such officers are confronted with the necessity – to cooperate with federal immigration enforcement on an incidental and as needed basis, state and local officers are permitted to provide this cooperative help without the written agreements that are required for systematic and routine cooperation.” *United States v. Arizona*, 641 F.3d 339, 349 (9th Cir. 2010) (emphasis in original).
  - d) The Tenth Circuit has found that this section “evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.” *United*

*States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999).

- (c) An authorized immigration officer may issue a detainer which serves to advise another law enforcement agency that ICE seeks custody of an alien presently in the custody of that agency for the purpose of arresting and removing the alien. 8 C.F.R. § 287.7(a).

(2) Independent Source Doctrine

- (a) An alien's identity is never suppressible, even if it was obtained as a result of an unlawful arrest, search, or interrogation. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984).
  - i) This has led some courts to find that pre-existing governmental records are not suppressible under *Lopez-Mendoza* because they are related to identity. *United States v. Bowley*, 435 F.3d 426, 430-41 (3d Cir. 2006); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir. 2009). However, other courts have held that such records can be excluded. *Pretzatzin v. Holder*, 736 F.3d 641 (2d Cir. 2013); *United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Guevara-Martinez*, 262 F.3d 751, 753-55 (8th Cir. 2001); *United States v. Garcia-Beltran*, 389 F.3d 864, 865 (9th Cir. 2004); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111-12 (10th Cir. 2006).
- (b) Evidence of alienage is treated as separate from evidence of identity and is suppressible. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006); *Puc-Ruiz v. Holder*, 629 F.3d 771, 777 n.1 (8th Cir. 2010); *Matter of Sandoval*, 17 I&N Dec. 70, 79 (BIA 1979). *But see United States v. Garcia-Garcia*, 633 F.3d 608, 616 (7th Cir. 2011).
- (c) Any evidence obtained independently of a deficient search may be relied upon. *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996).
  - i) If the alien admits factual allegations or fails to object to documents sufficient to establish removability, the IJ may determine that removability has been established by clear and convincing evidence, notwithstanding the

existence of inadmissible prior statements. *See Miguel v. INS*, 359 F.3d 408, 410-11 (6th Cir. 2004); 8 C.F.R. §§ 1240.8(a), 1240.10(c).

- ii) DHS may use the alien's identity to obtain information regarding prior entries or immigration violations from official files maintained by DHS or other entities. *United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994); *United States v. Orozco-Rico*, 589 F.2d 433, 435 (9th Cir. 1978). *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353-54 (BIA 1996).

### (3) Reliability of the Form I-213

- (a) "[A]bsent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress, that document, although hearsay, is inherently trustworthy and admissible as evidence to prove alienage or deportability." *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 524 (BIA 2002). An I-213 may be suppressed if the officer completing it relied on the hearsay statements of a non-governmental third party who is not the respondent and that third party is not made available for cross-examination. *See Murphy v. INS*, 54 F.3d 605, 610 (9th Cir. 1995).
- (b) An I-213 will only be suppressed based on incorrect factual information where that factual information is material to the purpose for which the form was admitted. *See Espinoza v. INS*, 45 F.3d 308, 309 (9th Cir. 1995).

### (4) Waiver or Collateral Estoppel

- (a) A guilty plea in criminal court does not preclude a respondent from moving to suppress evidence in removal proceedings. *See United States v. Gregg*, 463 F.3d 160, 164 (2d Cir. 2006).

## H. The doctrine of equitable estoppel

1. Equitable estoppel is a judicially devised doctrine which precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or defense, regardless of its substantive validity. *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991).
2. The Supreme Court has recognized the possibility that the doctrine of equitable estoppel might be applied against the Government in a case where it is established that its agents engaged in "affirmative misconduct." *INS v. Hibi*, 414 U.S. 5 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961). However, the Supreme Court has not yet decided whether even "affirmative misconduct" is sufficient to estop the

Government from enforcing the immigration laws. *INS v. Miranda*, 459 U.S. 14 (1982).

3. Estoppel is an equitable form of action and only equitable rights are recognized. By contrast, the Board can only exercise such discretion and authority conferred upon the Attorney General by law. The Board's jurisdiction is defined by the regulations and it has no jurisdiction unless it is affirmatively granted by the regulations. Therefore, the Board and IJs are without authority to apply the doctrine of equitable estoppel against the DHS so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991).

## **I. The doctrine of collateral estoppel**

1. In general
  - a. The doctrine of collateral estoppel precludes parties to a judgment on the merits in a prior suit from relitigating in a subsequent suit issues that were actually litigated and necessary to the outcome of the prior suit. *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984). The doctrine of collateral estoppel generally applies to the Government as well as to private litigants.
  - b. The doctrine of collateral estoppel may be applied to preclude reconsideration of an issue of law, as well as fact, so long as the issue arises in both the prior and subsequent suits from virtually identical facts and there has been no change in the in the controlling law. *Id.*
  - c. The doctrine of collateral estoppel applied in deportation proceedings (and likely in removal proceedings) when there has been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect, the parties had a full and fair opportunity to litigate the issues resolved by and necessary to the outcome of the prior judgment, and the use of collateral estoppel is not unfair. *Id.*
  - d. The language in § 240(a)(3), which provides that a removal proceeding shall be “the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States,” does not preclude the use of collateral estoppel in a deportation or removal proceeding. Rather, this language was intended to exempt deportation proceedings from the provisions of any other law, most particularly the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, repealed by Pub. L. No. 89-554, 80 Stat. 378 (1966). *Id.*
  - e. Under the doctrine of collateral estoppel, a prior judgment conclusively establishes the "ultimate facts" of a subsequent deportation proceeding, i.e., those facts upon which an alien's deportability and eligibility for relief from deportation are to be determined, and precludes reconsideration of issues of law resolved by the prior judgment, so long as the issues in the prior suit and



the deportation proceeding arise from virtually identical facts and there has been no change in the controlling law. *Id.*

2. Decisions in criminal proceedings

- a. The adverse judgment of a court in a criminal proceeding is binding in a deportation or removal proceeding in which the respondent was the defendant in the criminal case and in which the issue is one which was also an issue in the criminal case. *Matter of Z-*, 5 I&N Dec. 708 (BIA 1954).
- b. Where a respondent has been convicted in a criminal proceeding of a conspiracy to violate 8 U.S.C. § 1325 (entry without inspection or by willfully false or misleading representation or the willful concealment of a material fact) but the indictment does not contain an allegation that the respondent procured a visa by fraud, his conviction will not, under the doctrine of collateral estoppel, establish his deportability as an alien who procured a visa by fraud. *Matter of Marinho*, 10 I&N Dec. 214 (BIA 1962, 1963).
- c. The doctrine of collateral estoppel prevents respondent, who was convicted of entry without inspection under § 275 of the Act (8 U.S.C. 1325), from relitigating the illegal entry in subsequent deportation proceedings. *Matter of Rina*, 15 I&N Dec. 453 (BIA 1975).
- d. Where a respondent has been acquitted on a criminal charge, one of the essential elements of which was alienage, the doctrine of collateral estoppel does not preclude litigation of the question of his alienage in a subsequent deportation proceeding because of the difference in the burden of proof applicable to criminal proceedings and to deportation proceedings. *Matter of Perez-Valle*, 17 I&N Dec. 581 (BIA 1980).

3. Decisions in denaturalization cases

- a. Under the doctrine of collateral estoppel, a prior denaturalization judgment conclusively establishes the “ultimate facts” of a subsequent deportation proceeding, i.e., those facts upon which an alien's deportability and eligibility for relief from deportation are to be determined, and precludes reconsideration of issues of law resolved by the prior judgment, so long as the issues in the prior suit and the deportation proceeding arise from virtually identical facts and there has been no change in the controlling law. *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984).
- b. Where one of the principal issues in a denaturalization suit was whether the respondent had been a member of the Communist Party from 1930 to 1936 and this issue was litigated and was essential to the court's determination which resulted in a judgment revoking citizenship, by the doctrine of collateral estoppel the finding by the court in the denaturalization suit was conclusive in the subsequent deportation proceeding involving a charge based upon a like

period of membership in the Communist Party. *Matter of C-*, 8 I&N Dec. 577 (BIA 1960).

4. Decisions in prior deportation or removal proceedings or other administrative decisions
  - a. Based on the decision of the Supreme Court in *Pearson v. Williams*, 202 U.S. 281 (1906) and other federal courts which held that the doctrine of res judicata has no application in administrative proceedings, the Board held that the doctrine is not applicable to deportation proceedings. *Matter of M-*, 8 I&N Dec. 535 (BIA 1960); *Matter of K-*, 3 I&N Dec. 575 (BIA 1949).
  - b. The Supreme Court stated that when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the doctrine of res judicata may apply. *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394 (1982) (citing *Pearson v. Williams*, 202 U.S. 281 (1906) as an example of where a court used language that was too broad in stating that res judicata principles do not apply to administrative proceedings); *see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) (requiring a full and fair opportunity to litigate the claim or issue).
5. Miscellaneous cases
  - a. The fact that a respondent was inspected and erroneously admitted to the U.S. by a Service officer does not operate to estop the Service from instituting a deportation proceeding against the respondent if it is later discovered that he was excludable at the time of his admission. *Matter of Khan*, 14 I&N Dec. 397 (BIA 1973), *aff'd sub nom. Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975); *Matter of Polanco*, 14 I&N Dec. 483 (BIA 1973).

## **J. Classified information**

1. 8 C.F.R. § 1240.33(c)(4) provides that counsel for DHS may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the IJ or the Board has determined that such information is relevant to the hearing. Although 8 C.F.R. § 1240.33 deals specifically with applications for asylum, the rules cited below appear applicable anytime classified material is presented.
  - a. 8 C.F.R. § 1240.33(c)(4) also provides that the applicant shall be informed when the IJ receives such classified information.
  - b. 8 C.F.R. § 1240.33(c)(4) also states that the agency that provides the classified information to the IJ may provide an unclassified summary of the information for release to the applicant whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source.

The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence.

- c. 8 C.F.R. § 1240.33(c)(4) also provides that a decision based in whole or in part on classified information shall state that such information is material to the decision.

## **K. Protective orders**

1. 8 C.F.R. § 1003.46(a) provides that in any immigration or bond proceeding, an IJ may issue a protective order barring disclosure of information upon a showing by DHS of a substantial likelihood that specific information submitted under seal or to be submitted under seal will, if disclosed, harm the national security as defined in § 219(d)(2) of the Act or law enforcement interests of the U.S.
  - a. Section 219(d)(2) defines the term “national security” as the national defense, foreign relations, or economic interests of the United States.
2. 8 C.F.R. § 1003.46(b) provides that the Department of Homeland Security may at any time after filing a NTA or other charging document with the IJ, file a motion for an order to protect specific information it intends to submit or is submitting under seal.
  - a. The motion shall describe, to the extent practical, the information that the Department of Homeland Security seeks to protect from disclosure.
  - b. The motion shall specify the relief requested in the protective order.
  - c. The motion shall be served upon the respondent.
  - d. The respondent may file a response to the motion within 10 days after the motion is served.
  - e. 8 C.F.R. § 1003.46(c) provides that, in the Department of Homeland Security’s discretion, DHS may file the specific information as a sealed annex to the motion, which shall not be served upon the respondent. If DHS files a sealed annex, or the IJ, in his or her discretion, instructs that the information be filed as a sealed annex in order to determine whether to grant or deny the motion, the IJ shall consider the information only for the purpose of determining whether to grant or deny the motion.
3. 8 C.F.R. § 1003.46(d) provides that the IJ shall give appropriate deference to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit in determining whether the disclosure of information will harm the national security or law enforcement interests of the U.S.
4. Denied motions – 8 C.F.R. § 1003.46(e) provides that if the motion is denied, any sealed annex shall be returned to the Department of Homeland Security, and the IJ

shall give no weight to such information. DHS may immediately appeal denial of the motion to the Board, which shall have jurisdiction to hear the appeal, by filing a Notice of Appeal and the sealed annex with the Board. The IJ shall hold any further proceedings in abeyance pending resolution of the appeal by the Board.

5. Granted motions – 8 C.F.R. § 1003.46(f) provides that if the motion is granted, the IJ shall issue an appropriate protective order.
6. 8 C.F.R. § 1003.46(f)(1) provides that the IJ shall ensure that the protective order encompasses such witnesses as the respondent demonstrates are reasonably necessary to the presentation of his case. If necessary, the IJ may impose the requirements of the protective order on any witness before the IJ to whom such information may be disclosed.
7. The protective order may require that the respondent, and his or her attorney or accredited representative, if any, to do any of the following (8 C.F.R. § 1003.46(f)(2)):
  - a. Not divulge any of the information submitted under the protective order, or any information derived therefrom, to any person or entity, other than authorized personnel of EOIR, the Department of Homeland Security, or such other persons approved by DHS or the IJ;
  - b. When transmitting any information under a protective order, or any information derived therefrom, to EOIR or the Department of Homeland Security, include a cover sheet identifying the contents of the submission as containing information subject to a protective order under 8 C.F.R. § 1003.46;
  - c. Store any information under a protective order, or any information derived therefrom, in a reasonably secure manner, and return all copies of such information to the Department of Homeland Security upon completion of proceedings, including judicial review; and
  - d. Such other requirements as the IJ finds necessary to protect the information from disclosure.
8. Upon issuance of a protective order, the Department of Homeland Security shall serve the respondent with the protective order and the sealed information. Once a protective order is issued, it shall remain in effect until vacated by the IJ. 8 C.F.R. § 1003.46(f)(3).
9. 8 C.F.R. § 1003.46(f)(4) provides that further review of the protective order before the Board shall only be had pursuant to review of an order of the IJ resolving all issues of removability and any applications for relief pending in the matter pursuant to 8 C.F.R. § 3.1(b). It also provides that, notwithstanding any other provision the regulation, the IJ shall retain jurisdiction to modify or vacate a protective order upon motion of the Department of Homeland Security or the respondent. An IJ may not grant a motion by the respondent to modify or vacate a protective order until either:

DHS files a response to such motion or 10 days after service of such motion on DHS.

10. Admissibility as evidence – 8 C.F.R. § 1003.46(g) provides that the issuance of a protective order shall not prejudice the respondent's right to challenge the admissibility of the information subject to a protective order. The IJ may not find the information inadmissible solely because it is subject to a protective order.
11. 8 C.F.R. § 1003.46(h) provides that any submission to the IJ including any briefs referring to information subject to a protective order shall be filed under seal. Any information submitted subject to a protective order shall remain under seal as part of the administrative record.
12. Failure to comply with protective order – 8 C.F.R. § 1003.46(i) provides that if the Department of Homeland Security establishes that a respondent, or the respondent's attorney or accredited representative, has disclosed information subject to a protective order, the IJ shall deny all forms of discretionary relief, except bond, unless the respondent fully cooperates with DHS or other law enforcement agencies in any investigation relating to the noncompliance with the protective order and disclosure of the information; and establishes by clear and convincing evidence either that extraordinary and extremely unusual circumstances exist or that failure to comply with the protective order was beyond the control of the respondent and his or her attorney or accredited representative. Failure to comply with a protective order may also result in the suspension of an attorney's or an accredited representative's privilege of appearing before EOIR or before DHS.
13. The consequence of breaching a protective order is discussed in *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003). That case holds that the presence of federal employees, including court personnel or Department of Justice attorneys, at a closed hearing in which a protective order is discussed does not violate the protective order regulations.

#### **L. Constitutional issues**

1. Neither the Board nor an IJ may rule on the constitutionality of the statutes they administer or the regulations properly promulgated under the provisions of the Immigration and Nationality Act. *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bogart*, 15 I&N Dec. 552 (BIA 1975, 1976; A.G. 1976).

#### **M. Administrative notice**

1. Although immigration proceedings are not bound by the Federal Rules of Evidence, reference is made herein to the Federal Rules of Evidence for the purposes of definition and background.
  - a. Rule 201(b) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial

jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

- b. Rule 201(c) provides that judicial notice is discretionary and a court may take judicial notice, whether requested or not. Rule 201(d) discusses when it is mandatory and provides that a court shall take judicial notice if requested by a party and supplied with the necessary information.
  - c. Rule 201(e) discusses the opportunity to be heard and states that a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. It goes on to state that in the absence of prior notification, the request may be made after judicial notice has been taken.
- 2. The Board has held that it is well established that administrative agencies and the courts may take judicial (or administrative) notice of commonly known facts. *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998); *Matter of H-M-*, 20 I&N Dec. 683 (BIA 1993); *Matter of R-R-*, 20 I&N Dec. 547, 551 n.2 (BIA 1992) (citing *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937)). Administrative notice at the Board level is explicitly provided for in 8 C.F.R. § 1003.1(d)(3)(iv).
  - 3. The issue of administrative notice arises most often in the asylum context and the Board has held that it may take administrative notice of changes in foreign governments. *Matter of R-R-*, 20 I&N Dec. 547 (BIA 1992).
  - 4. There is a circuit split regarding the extent to which an alien must be afforded an opportunity to respond when the Board takes administrative notice of facts.
    - a. The Second, Ninth, and Tenth Circuits have held that it is improper for the Board to take administrative notice of “controversial,” “dispositive,” or “individualized” facts without providing the parties an opportunity to respond or rebut. *Burger v. Gonzales*, 498 F.3d 131 (2d Cir. 2007); *Chhetry v. Dep’t of Justice*, 490 F.3d 196, 201 (2d Cir. 2007); *Circu v. Gonzales*, 450 F.3d 990 (9th Cir. 2006); *Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1099 (10th Cir. 1994).
    - b. The First, Fifth, and Seventh Circuits have disagreed with the above circuits. The First has permitted administrative notice of foreign government reports, without prior notice to the parties, in the context of motions to reopen to reapply for asylum. *Perera v. Holder*, 750 F.3d 25 (1st Cir. 2014). The Seventh has stated that “the motion to reopen procedure allows asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts which is sufficient to satisfy” due process requirements. *Kaczmarczyk v. INS*, 933 F.2d 588, 597 (7th Cir. 1991). Similarly, the Fifth Circuit has held that “[t]he motion to reopen provides [aliens who have applied for asylum] with an opportunity to be heard regarding facts officially noticed and to

present contrary evidence.” *Rivera-Cruz v. INS*, 948 F.2d 962, 968 (5th Cir. 1991).

#### **N. Items which are not evidence**

1. The arguments of counsel and statements made in a brief or on a Notice of Appeal are not evidence and therefore not entitled to any evidentiary weight. *INS v. Phinpathya*, 464 U.S. 183 (1984), *superseded by statute on other grounds as recognized by INS v. Hector*, 479 U.S. 85 (1986); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

#### **O. An Immigration Judge’s duties regarding evidence**

1. The Board’s limited fact-finding ability on appeal heightens the need for IJs to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law. *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).

### **XI. Good moral character (“GMC”) - Section 101(f) of the Act**

#### **A. Requirement of Good Moral Character (“GMC”)**

1. A showing of GMC is required for several forms of relief, including voluntary departure, non-LPR cancellation of removal, NACARA special rule cancellation of removal, suspension of deportation, and registry.
2. A finding of GMC for a given period is not barred merely because of several arrests during that period which resulted in subsequent release without conviction. *Matter of V-I-*, 3 I&N Dec. 571 (BIA 1949).
3. A conviction which forms a basis for a finding that an alien lacks GMC need not be the basis upon which the alien is found deportable. *Matter of Correa-Garces*, 20 I&N Dec. 451 (BIA 1992).

#### **B. Persons lacking GMC as listed in section 101(f)**

1. Section 101(f) (as amended by § 822 of the Violence Against Women and Department of Justice Reauthorization Act of 2005) provides that no person shall be found to be a person of GMC who, during the period for which GMC is required, was:
2. A habitual drunkard [INA § 101(f)(1)];
3. Whether inadmissible or not, persons described in the following paragraphs of § 212(a):
  - a. Section 212(a)(2)(D) - prostitutes and commercialized vice;



- b. Section 212(a)(6)(E) - alien smugglers;
- c. Section 212(a)(10)(A) - miscellaneous (including polygamists);
- d. Section 212(a)(2)(A) - persons convicted or admitting to acts which constitute the essential elements of a [crime involving moral turpitude](#) and persons convicted [of any law or regulation relating to a controlled substance](#);
  - (1) An alien who has committed a crime involving moral turpitude that falls within the “petty offense” exception is not ineligible for cancellation of removal under § 240A(b)(1)(B), because commission of a petty offense does not bar the offender from establishing good moral character under § 101(f)(3). *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003).
  - (2) An alien who has committed more than one petty offense is not ineligible for the “petty offense” exception if “only one crime” is a crime involving moral turpitude. *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003).
  - (3) Persons convicted of a single offense of simple possession of 30 grams or less of marijuana are not precluded from establishing good moral character. INA § 101(f)(3).
- e. Section 212(a)(2)(B) - persons convicted of two or more offenses for which the aggregate sentences to confinement were 5 years or more;
  - (1) Other than purely political offenses;
  - (2) Regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct;
  - (3) Regardless of whether the offenses involved moral turpitude.
- f. Section 212(a)(2)(C) - an alien who the consular or immigration officer [knows or has reason to believe is or has been an illicit trafficker in controlled substances](#) or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in controlled substances;
- 4. A person whose income is derived principally from illegal gambling activities [INA § 101(f)(4)];
- 5. A person who has been convicted of 2 or more gambling offenses committed during the statutory period [INA § 101(f)(5)];
- 6. A person who has given false testimony for the purpose of obtaining any benefit under the Act [INA § 101(f)(6)];

- a. In order to constitute false testimony under § 101(f)(6), the testimony must be under oath. *Matter of G-*, 6 I&N Dec. 208 (BIA 1954).
- b. False statements in a written application, whether or not under oath, do not constitute false “testimony.” The word “testimony” refers solely to oral utterances of witnesses under oath. *Matter of L-D-E*, 8 I&N Dec. 399 (BIA 1959).
- c. False information given under oath in a question-and-answer statement before an INS officer made in connection with a written application is “testimony.” *Matter of Ngan*, 10 I&N Dec. 725 (BIA 1964); *Matter of G-L-T-*, 8 I&N Dec. 403 (BIA 1959).
- d. In order to come within the prohibition of § 101(f)(6), it is not necessary that false testimony be given in order to obtain a benefit under the Act for oneself. False testimony given in connection with a visa petition filed on another’s behalf will preclude a showing of GMC. The benefit sought by the petitioner is to have the beneficiary join him in the U.S. *Matter of Ngan*, 10 I&N Dec. 725 (BIA 1964); *Matter of W-J-W-*, 7 I&N Dec. 706 (BIA 1958).
- e. It is not a requirement of the statute that a benefit be obtained, only that the false testimony be given for the purpose of obtaining a benefit. *Matter of L-D-E-*, 8 I&N Dec. 399 (BIA 1959).
- f. If an alien in immigration proceedings testifies falsely under oath as to a material fact but voluntarily and without prior exposure of his false testimony comes forward and corrects his testimony, he has not committed perjury and an exclusion charge based on the commission of perjury is not sustained. *Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949). Following the reasoning of this case, the Board has held that an alien is not barred from establishing GMC if he has made a voluntary and timely retraction of attempted false testimony. *Matter of M-*, 9 I&N Dec. 118 (BIA 1960). The recantation must be voluntary and made without delay in order for the false statement and its withdrawal to be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn. *See also Matter of Namio*, 14 I&N Dec. 412 (BIA 1973) (holding that the alien’s recantation of the false testimony approximately one year later when disclosure of its falsity was imminent was neither a voluntary nor timely retraction and, therefore, was ineffective to remove the bar to his establishing GMC under § 101(f)(6)).
- g. The Ninth Circuit has held that “testimony means a statement made by a witness under oath for the purpose of establishing proof of a fact to a court or tribunal. *Phinpathya v. INS*, 673 F.2d 1013, 1019 (9th Cir. 1981) *rev’d on other grounds*, 464 U.S. 183 (1984).
- h. The Ninth Circuit has not defined what constitutes “a court or tribunal.” However, the Ninth Circuit has held that false statements made under oath

during a naturalization examination constitute false testimony within the meaning of § 101(f)(6). *Bernal v. INS*, 154 F.3d 1020 (9th Cir. 1998).

- i. False oral statements under oath to an asylum officer can constitute false testimony as defined by the Ninth Circuit in *Phinpathya v. INS*, 673 F.2d 1013 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 183 (1984); *Matter of R-S-J-*, 22 I&N Dec. 863 (BIA 1999).
  - j. In a denaturalization case, the Supreme Court has held that there is no requirement that false testimony under § 101(f)(6) must have been material (as opposed to visa fraud or misrepresentations under former § 212(a)(19) [now § 212(a)(6)(C)(i)] which must be material). *Kungys v. United States*, 485 U.S. 759 (1988).
7. A person who, during the period in question, was confined as a result of conviction to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense was committed during the period [INA § 101(f)(7)];
- a. Section 101(f)(7) is concerned with “persons” not “aliens.” Therefore an individual who falls within the terms of § 101(f)(7) is precluded from establishing GMC regardless of whether he was a citizen or an alien during the period of confinement to the penal institution. *Matter of B-*, 7 I&N Dec. 405 (BIA 1957).
  - b. An alien whose conviction resulted only in a sentence to a period of probation with no incarceration is not, as a matter of law, precluded from a showing of GMC by section 101(f)(7). *Matter of Gantus-Bobadilla*, 13 I&N Dec. 777 (BIA 1971), *overruled on other grounds by Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994).
  - c. Section 101(f)(7) makes no exception for a prison term resulting from violation of probation rather than from an original sentence to incarceration and an alien so confined for an aggregate period of 180 days or more within the statutory period is barred from establishing GMC. *Matter of Piroglu*, 17 I&N Dec. 578 (BIA 1980).
  - d. Since pre-sentence confinement is credited in determining the date of release from custody (under § 2900.5 of the California Penal Code), such pre-sentence confinement is counted in determining whether a respondent has been confined as a result of conviction for an aggregate period of 180 days. *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982).
  - e. A term of confinement in a substance abuse treatment facility imposed as a condition of probation constitutes a “term of confinement” under § 101(a)(48)(B), for purposes of determining if an offense is a crime of violence under § 101(a)(43)(F). *Matter of Calvillo Garcia*, 26 I&N Dec. 697 (BIA 2015).

8. A person who has been convicted of an aggravated felony at any time (even outside the statutory period) [INA § 101(f)(8)].
  - a. Prior to an amendment to the Act, effective on November 29, 1990, § 101(f)(8) made a showing of GMC unavailable to anyone convicted of the crime of murder, even if the conviction took place outside the statutory period.
  - b. The amendment to include aggravated felonies applies to convictions occurring on or after November 29, 1990.
  - c. Following the amendment, it was doubtful whether persons convicted of murder before November 29, 1990 were able to demonstrate GMC. As part of the Miscellaneous Technical Immigration and Naturalization Amendments in 1991, Congress again amended § 101(f)(8) to provide that a person convicted of murder cannot demonstrate GMC regardless of the date of the conviction.
  - d. The Board has acknowledged these amendments and holds that an alien convicted of murder, regardless of the date of the conviction, is forever precluded from establishing GMC under § 101(f)(8). *Matter of Reyes*, 20 I&N Dec. 789 (BIA 1994). An alien convicted of an aggravated felony other than murder is forever barred from establishing GMC under § 101(f)(8) if the aggravated felony conviction occurred on or after November 29, 1990, regardless of the statutory period. *Id.*
    - (1) The Board previously held that a conviction for attempted murder was not a permanent bar to a showing of GMC and only barred a showing of GMC under § 101(f)(3) if the offense was committed within the statutory period for relief. *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972). The alien's sentence was commuted to less than 180 days, so § 101(f)(7) was not an issue.
    - (2) Since the definition of "aggravated felony" includes the offense of murder and any attempt to commit an enumerated offense, an alien convicted of attempted murder after November 29, 1990 should be permanently barred from demonstrating GMC as an alien convicted of an aggravated felony. *See* INA § 101(a)(43)(A), (U).
    - (3) Relying on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) *petition for reh'g en banc filed* (Nov. 18, 2015), the Ninth Circuit held that INA § 101(a)(43)(F)'s definition of a "crime of violence" as defined by 18 U.S.C. § 16(b) is unconstitutionally void for vagueness.

### C. Catch-all provision of section 101(f)

1. Section 101(f) concludes as follows: "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is not or was not of good moral character." This catch-all provision also states that a

finding that an alien lacks good moral character cannot be based on “a false statement or claim of citizenship” if “the alien reasonably believed at the time of such statement . . . that he or she was a citizen.”

2. The Board has ruled that a person “who has made a false claim of United States citizenship may be considered a person who is not of good moral character. [INA § 101(f)] does not, however, mandate such an outcome.” The Board rejected the analysis that, because an unknowing false claim to U.S. citizenship cannot be grounds to find a lack of GMC, a *knowing* false claim to U.S. citizenship mandates a finding of no good moral character. *Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008).
3. The determination of whether an alien is of GMC under the catchall provision is a discretionary determination done on a case-by-case basis. *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967). *See also Matter of K-*, 3 I&N Dec. 69 (BIA 1947) (stating that an alien’s GMC is not destroyed by a single lapse and that it should be determined by considering the person’s actions generally and the regard in which he or she is held by the community as a whole); *Matter of U-*, 2 I&N Dec. 830, 831 (BIA, A.G. 1947) (stating that GMC does not require moral excellence but is the measure of a person’s natural worth derived from the sum total of all his actions in the community); *see also Posusta v. United States*, 285 F.2d 533, 535 (2d Cir. 1961) (stating that “a person may have a ‘good moral character’ though he has been delinquent upon occasion in the past; it is enough if he shows that he does not transgress the accepted canons more often than is usual”).

## **XII. Temporary protected status (TPS) - Section 244**

### **A. A grant of TPS waives certain grounds of inadmissibility or deportability**

1. These grounds are waived solely to permit an alien to remain and work temporarily in the U.S. for the period of time that TPS is effective. *Matter of Sosa Ventura*, 25 I&N Dec. 391 (BIA 2010).
2. When an application for TPS that has been denied by the USCIS is renewed in removal proceedings, the IJ may consider any material and relevant evidence, regardless of whether the evidence was previously considered in proceedings before the USCIS. *Matter of Figueroa*, 25 I&N Dec. 596 (BIA 2011).

### **B. Designation by the Attorney General**

1. The Attorney General may designate any foreign state or any part of such foreign state under § 244(b) of the Act if:
  - a. The Attorney General finds that there is an ongoing armed conflict within the state which would pose a threat to nationals of that state required to return there [INA § 244(b)(1)(A)];
  - b. The Attorney General finds that there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial,

but temporary, disruption of living conditions in the area affected [INA § 244(b)(1)(B)(i)];

- c. The Attorney General finds that the foreign state is temporarily unable to adequately handle the return of its nationals [INA § 244(b)(1)(B)(ii)];
- d. The Attorney General finds that the foreign state has officially requested designation [INA § 244(b)(1)(B)(iii)]; or
- e. The Attorney General finds that there exist extraordinary temporary conditions in the foreign state that prevent nationals of that state from returning in safety, unless the Attorney General finds that permitting such aliens to remain temporarily in the U.S. is contrary to the national interest of the U.S. [INA § 244(b)(1)(C)].

### **C. Effective period of designation**

- 1. The designation of a foreign state shall take effect upon the date of publication of the designation by the Attorney General in the Federal Register or such later date as the Attorney General may specify and shall remain in effect until the effective date of termination. INA § 244(b)(2).
- 2. The initial period of designation shall be not less than 6 months and not more than 18 months. INA § 244(b)(2)(B).
- 3. At least 60 days before the end of the initial period or any extended period of designation, the Attorney General shall review the conditions in the foreign state. INA § 244(b)(3)(A).
- 4. If the Attorney General determines that a foreign state no longer meets the conditions for designation, the designation shall be terminated by publishing notice in the Federal Register. The termination shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the last extension. INA § 244(b)(3)(B).
- 5. If the Attorney General determines that the foreign state continues to meet the conditions for designation, the period of designation is extended for an additional period of 6 months (or in the Attorney General's discretion, a period of 12 or 18 months). INA § 244(b)(3)(C).

### **D. Jurisdiction to consider applications**

- 1. Before the District Director – 8 C.F.R. § 1244.7(a) provides that an application for TPS shall be filed with the DD having jurisdiction over the applicant's place of residence.

- a. If the application is denied by the DD, the alien has the right to appeal the denial to the Administrative Appeals Unit (AAU). 8 C.F.R. § 1244.10(c). However, if the basis for the denial of TPS constitutes a ground for deportability or excludability which renders the alien ineligible for TPS, the decision shall include a charging document which sets forth such ground(s). 8 C.F.R. § 1244.10(c)(1). If a charging document is issued, the alien shall not have the right to appeal the DD's decision, but the decision shall apprise the alien of the right to a *de novo* determination of his or her eligibility before the IJ. 8 C.F.R. § 1244.10(c)(2).

## 2. Before an IJ

- a. Proceedings pending before EOIR – 8 C.F.R. § 1244.7(d) provides that if the alien has a pending case before an IJ or the Board at the time a state is designated, the alien shall be given written notice concerning TPS. The alien shall have an opportunity to submit an application to the DD during the registration period unless the basis of the charging document, if established, would render the alien ineligible for TPS. In that case, eligibility for TPS shall be decided by EOIR during the proceedings.
- b. Appeal from DD denial – The Board held in *Matter of Barrientos*, 24 I&N Dec. 100 (BIA 2007) that section 244(b)(5)(B) of the Act permits an alien to seek *de novo* review of eligibility for TPS in removal proceedings, even if an appeal was previously filed and denied by the AAU. In *Matter of Lopez-Aldana*, 25 I&N Dec. 49 (BIA 2009), the Board clarified its holding in *Barrientos* and held that an alien may seek *de novo* review of eligibility for TPS in removal proceedings even if he or she never filed an appeal with the AAU.
- c. Renewed TPS application – 8 C.F.R. § 1244.11 provides that if a charging document is served on an alien with a notice of denial or withdrawal of TPS, the alien may renew the application for TPS in deportation or exclusion proceedings before an IJ, and any determination on eligibility for TPS may be appealed to the Board. See also *Matter of Henriquez Rivera*, 25 I&N Dec. 575 (BIA 2011) (holding that an IJ may, in the appropriate circumstances, require DHS to provide the application that the applicant filed with USCIS when the alien is renewing that application in removal proceedings.) However, the provisions of 8 C.F.R. § 1244.11 do extend the benefits of TPS beyond the termination of a foreign state's designation.
- d. It is not proper to terminate an alien's removal proceedings based on a grant of TPS. *Matter of Sosa Ventura*, 25 I&N Dec. 391 (BIA 2010).

## E. Aliens eligible for TPS

1. An alien who is a national (or, having no nationality, is a person who last "habitually resided" in a designated state) of a state designated under section 244(b)(1) is eligible for TPS only if:



- a. The alien has been continuously physically present in the U.S. since the effective date of the most recent designation of that state. INA § 244(c)(1)(A)(i).
  - (1) Absences are allowed if they are brief, casual, and innocent. INA § 244(c)(4)(A).
  - (2) A parent's continuous physical presence or residence cannot be imputed to a child applicant for purposes of TPS eligibility. *Matter of Duarte-Luna & Luna*, 26 I&N Dec. 325 (BIA 2014).
- b. The alien has continuously resided in the U.S. since such date as the Attorney General may designate. INA § 244(c)(1)(A)(ii).
  - (1) Absences are allowed if they are brief, casual, and innocent or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien. INA § 244(c)(4)(B).
- c. The alien is admissible as an immigrant. INA § 244(c)(1)(A)(iii).
  - (1) Section 244(c)(2)(A)(i) of the Act provides that the following paragraphs of section 212(a) shall not apply in determining an alien's admissibility:
    - (a) Section 212(a)(5) which makes inadmissible aliens with no labor certification;
    - (b) Section 212(a)(7)(A) which makes inadmissible immigrants not in possession of a valid, unexpired immigrant visa or other entry document.
  - (2) Section 244(c)(2)(A)(ii) authorizes the Attorney General to waive any other provision of section 212(a) [except those listed below] in individual cases for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.
  - (3) Section 244(c)(2)(A)(iii) provides that the following paragraphs of § 212(a) may NOT be waived:
    - (a) Section 212(a)(2)(A) and 212(a)(2)(B) relating to criminals;
    - (b) Section 212(a)(2)(C) relating to drug offenses, EXCEPT a single offense of simple possession of 30 grams or less of marijuana;

- (c) Section 212(a)(3)(A) relating to national security and sabotage, etc.;
  - (d) Section 212(a)(3)(B) relating to aliens engaged in terrorist activities;
  - (e) Section 212(a)(3)(C) relating to aliens whose entry or proposed activity in the U.S. may have adverse foreign policy consequences; and
  - (f) Section 212(a)(3)(E) relating to those aliens who participated in Nazi persecution or genocide.
- (4) Under § 244(c)(2)(B), an alien is also not eligible for TPS if:
- (a) The alien has been convicted of any felony or 2 or more misdemeanors committed in the U.S.; or
  - (b) The alien is described in § 208(b)(2)(A) which lists the following:
    - (i) the alien participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
    - (ii) the alien, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the U.S. Section 208(b)(2)(B)(i) provides that a conviction of an aggravated felony is per se a particularly serious crime;
    - (iii) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the U.S. prior to arrival in the U.S.;
    - (iv) there are reasonable grounds for regarding the alien as a danger to the security of the U.S.;
    - (v) the alien is inadmissible under § 212(a)(3)(B)(i)(I) [has engaged in a terrorist activity], § 212(a)(3)(B)(i)(II) [Attorney General knows or has reason to believe alien is engaged in or likely to engage in terrorist activity], § 212(a)(3)(B)(i)(III) [has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity], or § 212(a)(3)(B)(i)(IV) [is a representative of a foreign terrorist organization] unless, in the case only of a representative, the Attorney General determines, as a matter of discretion, that there are not

reasonable grounds for regarding the alien as a danger to the security of the U.S. See *Abufayad v. Holder*, 632 F.3d 623 (9th Cir. 2011) (agreeing with a Board decision finding the alien to be “likely to engage after entry in any terrorist activity” and denying the alien CAT protection).

- (vi) the alien was firmly resettled in another country prior to arriving in the U.S.
- b. To the extent and in a manner which the Attorney General establishes, the alien registers for TPS during a registration period of not less than 180 days. INA § 244(c)(1)(A)(iv).
  - (1) To be eligible for late initial registration for TPS, an applicant filing as the “child of an alien currently eligible to be a TPS registrant” must establish only that he or she qualified as a “child” at the time of the initial registration period.” *Matter of N-C-M-*, 25 I&N Dec. 535 (BIA 2011).
  - (2) A late initial registrant for TPS must independently meet all initial registration requirements of TPS. *Matter of Echeverria*, 25 I&N Dec. 512 (BIA 2011).
- c. Section 244(c)(5) provides that the existence of the statute authorizing TPS does not authorize an alien to apply for admission to, or to be admitted to, the U.S. in order to apply for TPS.

#### **F. Withdrawal of TPS - Section 244(c)(3) of the Act**

- 1. The Attorney General shall withdraw TPS granted to an alien if:
  - a. The Attorney General finds that the alien was not in fact eligible for TPS; or
    - (1) Except for brief, casual, and innocent absences or absences with the prior consent of the Attorney General under section 244(f)(3), the alien has not remained continuously physically present in the U.S. from the date he or she was first granted TPS; or
    - (2) The alien fails, without good cause, to register with the Attorney General annually at the end of each 12 month period after the granting of TPS.

2. 8 C.F.R. § 1244.18 provides that a charging document may be issued against an alien granted TPS on grounds of deportability or excludability which would have rendered the alien statutorily ineligible for TPS under 8 C.F.R. §§ 1244.3(c) and 1244.4, unless the Service had expressly granted a waiver of those grounds. If the alien is deportable on a waivable ground, and no such waiver for the charged offense has been previously granted, then the alien may seek such waiver in the deportation or exclusion proceedings. The charging document shall constitute notice to the alien that his or her status in the U.S. is subject to withdrawal and a final order of deportation or exclusion shall constitute a withdrawal of TPS status.

#### **G. TPS and cancellation of removal under § 240A(a)**

1. Section 244(e) of the Act makes the following provisions:
  - a. The period of TPS shall not be counted as physical presence in the U.S. for purposes of cancellation of removal under § 240A(a) unless the Attorney General determines that extreme hardship exists.
  - b. The reference to § 240A(a) appears to be an error since that section requires continuous residence and LPR status, not continuous physical presence. Congress must have meant to refer to cancellation of removal and adjustment of status under § 240A(b).
2. The period of TPS shall not cause a break in the continuity of residence for purposes of suspension of deportation under § 244(a). The period of time before TPS may be added to the period of time after TPS to determine the period of physical presence.

#### **H. Benefits and status during TPS - Section 244(f) of the Act**

1. During the TPS period, the alien shall not be considered to be permanently residing in the U.S. under color of law. INA § 244(f)(1).
2. During the TPS period, the alien may be deemed ineligible for public assistance by a State. INA § 244(f)(2).
3. During the TPS period, the alien may travel abroad with the prior consent of the Attorney General. INA § 244(f)(3).
4. For purposes of adjustment of status under section 245 of the Act or change of status under section 248 of the Act, an alien in TPS shall be considered as being in, and maintaining, lawful status as a nonimmigrant. INA § 244(f)(4).

#### **I. Countries that have been designated for TPS**

1. Available at  
[http://www.uscis.gov/humanitarian/temporary-protected-status#Countries Currently Designated for TPS](http://www.uscis.gov/humanitarian/temporary-protected-status#Countries%20Currently%20Designated%20for%20TPS)

## 2. Countries for which TPS designation has expired

- a. Burundi was designated from November 4, 1997 to November 3, 1998. It was extended to November 3, 1999. It was again extended to November 2, 2000. The notice also re-designates Burundi under the TPS program, thereby expanding TPS eligibility to include nationals of Burundi (and aliens having no nationality who last habitually resided in Burundi) who have been “continuously present in the United States” and who have “continuously resided in the United States” since November 9, 1999. It has been extended additional times. On October 29, 2007, DHS determined that TPS status for Burundi would terminate effective May 2, 2009.
- b. Angola was designated from March 29, 2000, until March 29, 2001. It was extended again. The last designation was on February 1, 2002, which extended it to March 29, 2003. It expired on March 29, 2003.
- c. TPS was granted to nationals of (and aliens having no nationality who last habitually resided in) Bosnia-Herzegovina who have been continuously physically present and have continuously resided in the U.S. since August 10, 1992. The registration period began on August 10, 1992, and ended on August 10, 1993. TPS was due to expire on August 10, 1993, but on July 29, 1993, it was extended to August 10, 1994. Those previously granted TPS were required to re-register by filing a new application between July 29, 1993, and August 30, 1993. It was extended several times, but terminated on February 10, 2001.
- d. The province of Kosovo in the Republic of Serbia in the state of the Federal Republic of Yugoslavia (Serbia-Montenegro) was designated from June 9, 1998, until June 8, 1999. It was extended and also re-designated a few times, but expired on December 8, 2000.
- e. TPS was granted to nationals of Kuwait on March 27, 1991. The period of TPS expired on March 27, 1992.
- f. TPS was granted to nationals of Lebanon on March 27, 1991. It was to expire on March 27, 1992, but was extended to March 28, 1993. Non-national habitual residents were granted from March 28, 1992, to September 28, 1992, to apply for TPS. TPS for Lebanon was terminated on April 9, 1993.
- g. Montserrat was designated in 1998. It was extended until August 27, 2000. Eligible nationals of Montserrat (or aliens having no nationality who last habitually resided in Montserrat) could re-register for TPS and an extension of employment authorization. Re-registration was limited to persons who registered for the initial period of TPS, which ended on August 27, 1998, or who registered after that date under the late initial registration provision. Persons who are eligible for late initial registration may register for TPS during this extension. It was extended several times, the last was on July 6, 2004, when it was extended to February 27, 2005. It expired on that date.

- h. TPS was granted to nationals of (and aliens having no nationality who last habitually resided in) Rwanda. The registration period began on June 7, 1994 and was to expire on June 6, 1995. On November 14, 1996, TPS was extended until June 6, 1997. TPS for Rwanda terminated on December 6, 1997.

### **XIII. Motions to reopen, reconsider, and remand**

#### **A. Distinguishing Between Types of Motions**

1. A motion to reopen (MTR) seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing. INA § 240(c)(7)(C); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).
2. A motion to reconsider is a request that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991).
3. A motion to remand is a request to the Board to return an active Record of Proceeding (“ROP”) to the IJ for receipt of additional evidence. It is distinguished from a MTR because a motion to remand is made to the Board while it is still considering an appeal from an IJ’s decision rather than after the Board has made its decision. Since the Board’s function is to review a record rather than create a record, it cannot receive evidence and, if the motion is granted, it must return the ROP to the IJ for receipt of the evidence at a hearing.
  - a. The term “motion to remand” is also used at the trial level to describe a request to an IJ to remand a case to the jurisdiction of the District Director (DD) so that the DD can consider a remedy over which he has exclusive jurisdiction, such as reinstatement of student status, or concurrent jurisdiction with the IJ, such as adjustment of status.

#### **B. Motion to reconsider in general**

1. The alien may file one motion to reconsider a decision that the alien is removable from the U.S. INA § 240(c)(5)(A). The motion must be filed within 30 days of the date of entry of a final administrative order of removal. INA § 240(c)(5)(B). The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(5)(C). A party cannot request reconsideration of the denial of a prior motion to reconsider. 8 C.F.R. § 1003.23(b)(2).
2. Considerations regarding the [departure bar](#) may apply to motions to reconsider.

3. A motion to reconsider which is based on a legal argument that could have been raised earlier in the proceedings will not be granted. *Matter of Medrano*, 20 I&N Dec. 216 (BIA 1990).

### C. Motions to reopen in general

1. An alien may file one motion to reopen proceedings under section 240. INA § 240(c)(6)(A). The motion to reopen shall state the new facts that will be proven if the motion is granted, and shall be supported by affidavits or other evidence. INA § 240(c)(6)(B).
2. Evidence submitted in support of a motion must be “material.”
  - a. Motions based on a pending I-130 or I-140:
    1. The Board held in *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), that a properly filed MTR may be granted, in the exercise of discretion, to provide an alien an opportunity to pursue an application for adjustment of status where the following factors are present:
      - (a) The motion is timely filed;
      - (b) The motion is not numerically barred by the regulations;
      - (c) The motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996) [where the respondent lost eligibility for relief by overstaying a period of voluntary departure] or on any other procedural grounds;
      - (d) The motion presents clear and convincing evidence indicating a strong likelihood that the respondent’s marriage is bona fide; and
      - (e) The Service either does not oppose the motion or bases its opposition solely on *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992).
    - i) The Second, Ninth, and Sixth Circuits have held that MTRs should not be denied solely because DHS opposed the motion. *Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008); *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008); *Sarr v. Gonzales*, 485 F.3d 354 (6th Cir. 2007). However, the Third Circuit has found that, under *Matter of Velarde*, DHS opposition is an appropriate reason for denying a MTR. *Bhiski v. Ashcroft*, 373 F.3d 363 (3d Cir. 2004). The Board has clarified that the fifth factor does not grant DHS a veto power over an otherwise approvable *Velarde* motion, but



that the IJ must consider the merits of DHS opposition.  
*Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009).

3. Departure bar

- a. Under 8 C.F.R. § 1003.2(d), “[a] motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.”
- b. The Board has held that the Board and Immigration Judges lack authority to reopen proceedings, either by motion or *sua sponte*, after the alien has left the United States. *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008). The Board has also held that they maintain jurisdictions over motions to reopen where an alien left the United States, but claimed not to have received notice of the warrant of removal. *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009).
- c. Most circuit courts of appeals have rejected the Board’s decision in *Matter of Armendarez-Mendez*, and have held that the regulatory departure bar does not eliminate an alien’s statutory right to file a motion to reopen.

(1) *See Perez Santana v. Holder*, 731 F.3d 50, (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. Att’y Gen.*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Toor v. Lynch*, 789 F.3d 1055 (9th Cir. 2015); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012).

- d. However, the departure bar may be construed as a limitation on the agency’s discretionary authority to reopen *sua sponte*. *See Zhang v. Holder*, 617 F.3d 650, 665 (2d Cir. 2010); *Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011).

4. Time in which to file – With certain exceptions, a motion to reopen must generally be filed within 90 days of the date of entry of a final administrative order of removal. INA § 240(c)(6)(C)(i).

- a. Exceptions to this deadline include:

(1) motions to reopen to [apply for asylum or withholding of removal based on changed conditions in the country of removal](#);

- (2) a motion to reopen an [in absentia order](#) entered pursuant to section 240(b)(5) which is subject to the deadline specified in section 240(b)(5)(C);
  - (3) motions to reopen filed by a [battered spouse, parent, or child](#) seeking to reopen proceedings as a self-petitioner or for cancellation of removal; and
  - (4) circumstances in which the deadline is subject to [equitable tolling](#), such as may be warranted due to ineffective assistance of counsel.
- b. A ruling by a Circuit Court of Appeals cannot be considered the final administrative decision, and the filing of a petition for review or court action seeking judicial review does not extend the time for filing a motion to reopen administrative proceedings. *Matter of Susma*, 22 I&N Dec. 947 (BIA 1999).
  - c. Where an alien has filed an untimely motion to reopen alleging that the DHS failed to prove the alien's removability, the burden of proof no longer lies with the DHS to establish removability, but shifts to the alien to demonstrate that *sua sponte* reopening is warranted. *Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000).

#### **D. Motion to reopen to apply for asylum or withholding of removal**

- 1. There is no time limit on the filing of a MTR if the basis of the motion is to apply for relief under sections 208 or 241(b)(3) and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding. INA § 240(c)(7)(C)(ii).
  - a. Note that this is different from the standard for whether an asylum application filed outside the one-year deadline may be considered timely filed.
- 2. Changed country conditions do not include a change in personal circumstances in the United States, absent some accompanying change in conditions in the country of removal. *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007); *see also Yuen Jin v. Mukasey*, 538 F.3d 143 (2d Cir. 2008); *Zheng v. Att'y Gen.*, 549 F.3d 260 (3d Cir. 2008); *Liu v. Att'y Gen. of the United States*, 555 F.3d 145 (3d Cir. 2009); *Zheng v. Holder*, 562 F.3d 647 (4th Cir. 2009); *Liu v. Holder*, 560 F.3d 485 (6th Cir. 2009); *Lin Xing Jiang v. Holder*, 639 F.3d 751 (7th Cir. 2011); *Chen v. United States Att'y Gen.*, 565 F.3d 805 (11th Cir. 2009).

#### **E. Motion to reopen to rescind an order rendered in absentia**

- 1. An in absentia order of removal may be rescinded only:

- a. Upon a MTR filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances [INA § 240(b)(5)(C)(i)]; or
- (1) The term “exceptional circumstances” is defined at § 240(e)(1) and refers to exceptional circumstances (such as serious illness or death of the spouse, child or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.
  - (2) Cases discussing “exceptional circumstances”
    - (a) An alien (in deportation proceedings) failed to establish that a serious headache he suffered on the day of his hearing amounted to exceptional circumstances to excuse his failure to appear where he gave no explanation for neglecting to contact the Immigration Court on the day of the hearing and did not support his claim with medical records or other evidence, such as affidavits by persons with knowledge regarding the extent and seriousness of the alien’s headache and the remedies he used to treat it. *Matter of J-P-*, 22 I&N Dec. 33 (BIA 1998).
    - (b) An alien (in deportation proceedings) who claimed that his failure to appear at his hearing resulted from an “illegible hearing date” on the OSC and notice of hearing failed to establish by sufficient evidence that he received inadequate notice under former § 242B(c)(3)(B) or that his absence was the result of exceptional circumstances under former section 242B(c)(3)(A). *Matter of S-M-*, 22 I&N Dec. 49 (BIA 1998).
    - (c) An alien (in deportation proceedings) failed to establish that a foot injury he suffered on the day before his hearing amounted to exceptional circumstances to excuse his failure to appear where he gave no explanation for neglecting to contact the Immigration Court on the day of the hearing and did not support his claim with medical records or other evidence, such as an affidavit from his employer. *Matter of B-A-S-*, 22 I&N Dec. 57 (BIA 1998).
    - (d) An alien seeking to reopen in absentia proceedings based on her unsuccessful communications with her attorney did not establish exceptional circumstances under former section 242B(c)(3)(A) of the Act where she failed to satisfy all the requirements for an ineffective assistance of counsel claim set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). A claim of ineffective assistance of counsel does not constitute an exception to the 180 day statutory limit for the filing of a MTR to rescind an in absentia order of deportation under

former section 242B(c)(3)(A). *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998); *Matter of Lei*, 22 I&N Dec. 113 (BIA 1998).

- i) However, in some cases [equitable tolling](#) of the time limit may be warranted.
- b. Upon a MTR filed at any time if the alien demonstrates that the alien did not receive notice in accordance with section 239(a)(1) or (2) or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien [INA § 240(b)(5)(C)(ii)].
  - (1) Where a Notice to Appear or Notice of Hearing is properly addressed and sent by regular mail according to normal office procedures, there is a presumption of delivery, but it is weaker than the presumption that applies to documents sent by certified mail. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008); *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995).
    - (a) Even if notice of a hearing was returned as undeliverable, reopening may not be warranted if the alien was notified of the requirement that he or she keep the Immigration Court apprised of his or her most recent address and failed to do so.
    - (b) An alien cannot be charged with receipt of a Notice to Appear if DHS utilized an address from records which were several years old, and the alien submits an affidavit with the motion indicating that he or she did not reside at that location at the time of the mailing. *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001).
  - (2) An alien who is in Federal or State custody is necessarily unable to appear through no fault of his own. *Matter of Evra*, 25 I&N Dec. 79 (BIA 2009). The conduct underlying an alien's arrest and incarceration does not constitute "fault" within the meaning of § 240(b)(5)(C)(ii). *Id.* at 81.
- 2. The filing of the MTR to rescind an in absentia order of removal shall stay the removal of the alien pending disposition of the motion by the IJ. INA § 240(b)(5)(C). The Board has held that the automatic stay of deportation associated with the filing of a MTR after an in absentia hearing under former section 242B(C)(3) continued during the pendency of an appeal from the denial of the MTR. *Matter of Rivera*, 21 I&N Dec. 232 (BIA 1996). Section 240(b)(5)(C) appears subject to the same interpretation.
- 3. In absentia orders in deportation proceedings may be rescinded only:
  - a. Upon an MTR filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional

circumstances beyond the control of the alien; or [8 C.F.R. § 1003.23(b)(4)(iii)(A)(1)]; or

- b. Upon an MTR filed at any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien. [8 C.F.R. § 1003.23(b)(4)(iii)(A)(2)].

- (1) A hearing notice which is sent by *certified* mail to the alien's last known address is sufficient to establish clear, unequivocal, and convincing evidence that the alien received "written notice" of the deportation hearing. *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995). To overcome this presumption and establish nonreceipt an alien "must present substantial and probative evidence such as documentary evidence from the Postal Service, third party affidavits, or other similar evidence demonstrating that there was improper delivery or that nondelivery was not due to the [alien's] failure to provide an address where he [or she] could receive mail. *Id.* at 37.

- 4. In absentia orders in exclusion proceedings: Although the subheading at 8 C.F.R. § 1003.23(b)(4)(iii) signals that this regulation provides a time exception for motions to reopen both deportation and exclusion proceedings conducted in absentia, the regulation itself provides a time exception only for motions to reopen deportation proceedings conducted in absentia. The regulation is silent as to what specific time exception applies to motions to reopen exclusion proceedings conducted in absentia. The regulation provides only a standard for reopening, stating that "[a] motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear." 8 C.F.R. § 1003.23(b)(4)(iii)(B). Therefore, the Board held that the regulatory language at 8 C.F.R. § 1003.23(b)(4)(iii)(B) contains no time or numerical limitations on aliens who wish to file a motion to reopen exclusion proceedings conducted in absentia. *Matter of N-B-*, 22 I&N Dec. 590 (BIA 1999).

#### **F. A motion to reopen by a battered spouse, parent, or child**

- 1. Section 240(c)(7)(C)(iv) of the Act permits an alien to file a motion to reopen to seek adjustment as a self-petitioner or cancellation of removal:
  - a. If the basis for the motion is to apply for adjustment of status as a [self-petitioner](#) or [cancellation of removal as a battered relative](#);
  - b. If the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with DHS;
  - c. If the motion to reopen is filed within 1 year of the entry of the final order of removal; or

- (1) Except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child.

- d. If the alien is physically present in the United States at the time of filing the motion.

**G. A motion to reopen or reconsider based upon a claim of ineffective assistance of counsel**

1. A motion to reopen or reconsider based upon a claim of ineffective assistance of counsel should comply with the following criteria:
  - a. The motion should be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;
  - b. Counsel whose integrity or competence is being impugned should be informed of the allegations leveled against him and be given an opportunity to respond;
  - c. The motion should reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
    - (1) The Ninth Circuit has held that the *Lozada* requirements need not be rigidly enforced where their purpose is fully served by other means. *Castillo-Perez v. INS*, 212 F.3d 518 (9th Cir. 2000).
2. Equitable tolling for motions based on ineffective assistance of counsel.
  - a. Equitable tolling – Some of the circuits permit the filing deadlines or numerical limitations for motions to reopen to be tolled upon a showing of ineffective assistance of counsel. Often, a showing of “due diligence” by the alien is required.
    - (1) First Circuit: Whether time limits may be tolled remains an open question under *Chen v. Gonzales*, 415 F.3d 151 (1st Cir. 2005). However, the First Circuit has held that if equitable tolling is available an alien would need to demonstrate lack of actual notice of a time limit, lack of constructive notice, the reasonableness of the alien's continued ignorance of the time limit, due diligence in pursuit of one's rights, and lack of prejudice to the opposing party. *See Dawoud v. Holder*, 561 F.3d 31 (1st Cir. 2009).

- (2) Second Circuit: Time limits may be tolled. *Iavorski v. INS*, 232 F.3d 124, 129-133 (2d Cir. 2000). In *Wang v. BIA*, 508 F.3d 710 (2d Cir. 2007), the Second Circuit articulated a two-step inquiry for equitably tolling deadlines for motions to reopen for ineffective assistance of counsel. First, the court evaluates when the ineffective assistance should have been discovered by a reasonable person. Second, the court asks whether the alien showed due diligence in the period between discovering the ineffective assistance and filing the motion to reopen. The court emphasized that there is no per se time period within which the motion must be filed.
- (3) Third Circuit: Time limits may be tolled where fraud and due diligence were shown. *Borges v. Gonzales*, 402 F.3d 398, 406-407 (3d Cir. 2005). In *Borges*, the Court also found that the alien acted with requisite due diligence to resolve his immigration status over the course of five years. In contrast, the court found the alien in *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005) did not demonstrate due diligence. He allowed his case to lapse twice over one year intervals, without taking steps to inquire about the status of his case.
- (4) Fourth Circuit: No published cases.
- (5) Fifth Circuit: The Fifth Circuit has held that it lacked jurisdiction to consider requests for equitable tolling, as they fell within the Board's authority to reopen *sua sponte*. That holding has been overruled by *Mata v. Lynch*, 135 S. Ct. 2150 (2015).
- (6) Sixth Circuit: Time limits may be tolled. *Harchenko v. INS*, 379 F.3d 405, 409-10 (6th Cir. 2004). The court found in *Tapia-Martinez v. Gonzales*, 482 F.3d 417 (6th Cir. 2007), that waiting fifteen months after discovery of counsel's deficient performance to raise an ineffective assistance claim, does not satisfy the due diligence requirement.
- (7) Seventh Circuit: Tolling of numerical limits permitted. *Joshi v. Ashcroft*, 389 F.3d 732, 735 (7th Cir. 2004). Tolling of time limits for motions to reopen may be warranted in *in absentia* proceedings. *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005). Due diligence is required. *Patel v. Gonzales*, 442 F.3d 1011 (7th Cir. 2006).
- (8) Eighth Circuit: Equitable tolling of time limits permitted sparingly, when extraordinary circumstances beyond the alien's control prevented timely filing. *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005). Due diligence is required. *Habchy v. Gonzales*, 471 F.3d 858 (8th Cir. 2006). In *Habchy*, the court held that waiting



four months to file a second motion to reopen absent any explanation for delay, does not constitute due diligence.

- (9) Ninth Circuit: Time and numerical limits may be equitably tolled “during periods when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud or error.” *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). In *Singh v. Gonzales*, 491 F.3d 1090 (2d Cir. 2007), the Ninth Circuit found that due diligence did not exist when the alien waited six months after becoming suspicious that his prior counsel acted ineffectively before consulting another attorney regarding reopening his case on ineffective assistance grounds.
- (10) Tenth Circuit: Equitable tolling is permitted, and due diligence required. *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002).
- (11) Eleventh Circuit: Time limitations can be equitably tolled where the alien has filed a defective pleading during the statutory period or where the alien has been induced or tricked by misconduct into allowing the filing deadline to pass. *Abdi v. Att’y Gen.*, 430 F.3d 1148 (11th Cir. 2005). Time limitations may not be tolled for motions to reopen in absentia deportation orders, on account of ineffective assistance of counsel. *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

## **H. Motion to reopen to apply for cancellation of removal under section 240A of the Act**

- 1. A motion to reopen for consideration or further consideration of an application for cancellation of removal under § 240A(a) or § 240A(b) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief, under § 240A(d)(1), prior to the service of the notice to appear, or prior to the commission of an offense referred to in § 212(a)(2) that renders the alien inadmissible or removable under § 237(a)(2).
- 2. The provision in 8 C.F.R. § 1003.23(b)(3) that an applicant for cancellation of removal under § 240A(b), must demonstrate statutory eligibility for that relief prior to the service of a Notice to Appear applies only to the continuous physical presence requirement and has no bearing on the issues of qualifying relatives, hardship, or good moral character. *Matter of Bautista-Gomez*, 23 I&N Dec. 893 (BIA 2006).

## **I. Where to file the motion**

- 1. In general
  - a. The general rule is that the MTR or reconsider is filed with the maker of the last decision in the case. *See* 8 C.F.R. § 1003.23(b)(1).

- b. When the Board dismisses an appeal solely for lack of jurisdiction, without adjudication on the merits, the appeal is deemed nugatory, and the IJ retains jurisdiction over any subsequent motion to reopen or reconsider. *Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974).
  - c. However, where the Board dismisses an appeal as untimely, without adjudication on the merits, the Board retains jurisdiction over a motion to reconsider its dismissal of the untimely appeal to the extent that the motion challenges the finding of untimeliness or requests consideration of the reasons for untimeliness. *Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998).
- 2. Motions to reopen or reconsider decisions of the Board
  - a. 8 C.F.R. § 1003.2(g)(2)(i) provides that a MTR or motion to reconsider a decision of the Board pertaining to proceedings before an IJ shall be filed directly with the Board.
  - b. 8 C.F.R. § 1003.2(g)(2)(ii) provides that a MTR or motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by DHS shall be filed with the DHS officer having administrative control over the record of proceeding.
- 3. Motions to reopen or reconsider decisions of IJs
  - a. 8 C.F.R. § 1003.23(b)(ii) provides that motions to reopen or reconsider a decision of an IJ must be filed with the Immigration Court having administrative control over the ROP.

#### **J. *Sua sponte* reopening or reconsideration**

- 1. Although § 240(c)(5) and (6) place time limits on motions to reopen or reconsider, 8 C.F.R. § 1003.23(b) provides that an IJ may reopen or reconsider a decision on his or her own motion at any time.
- 2. The Board has this same authority under 8 C.F.R. § 1003.2(a). However, in a decision rendered before IIRIRA when motions to reconsider were governed only by the regulations, the Board held that its power to reopen or reconsider cases *sua sponte* is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).
- 3. Where an alien has filed an untimely motion to reopen alleging that the INS failed to prove the alien's removability, the burden is on the alien to demonstrate that an exceptional situation exists that warrants reopening by the Board on its own motion. *Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000). Where an alien seeking to reopen removal proceedings failed to demonstrate a substantial likelihood that the result in his case would be changed if the proceedings were reopened, by showing

that he was not, in fact, removable, he failed to present an exceptional situation to warrant a grant of his untimely motion. *Id.*

4. In order for a change in the law to qualify as an exceptional situation that merits the exercise of discretion by the Board to reopen or reconsider a case *sua sponte*, the change must be fundamental in nature and not merely an incremental development in the state of the law (such as a Board or court decision). *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). A change in law may not warrant reopening if a significant amount of time has passed since the change. *Matter of G-C-L-*, 23 I&N Dec. 359, 361 (BIA 2002).

## **K. Appeals to the Board from decisions made by an IJ**

### **1. Notice of right to appeal**

- a. A party affected by a decision who is entitled to appeal to the Board from a decision of an IJ shall be given notice of the right to appeal. 8 C.F.R. § 1003.3(a)(1).

### **2. Filing the appeal**

- a. An appeal from a decision of an IJ shall be taken by filing a Notice of Appeal (Form EOIR-26) directly with the Board within the time specified for an appeal. 8 C.F.R. § 1003.3(a)(1).

### **3. Time limits for appeal**

- a. The Notice of Appeal must be filed directly with the Board within 30 calendar days after the stating of an IJ's oral decision or the mailing of an IJ's written decision. 8 C.F.R. § 1003.38(b). If the final date for filing falls on a Saturday, Sunday or on a legal holiday, the appeal time is extended to the next business day. *Id.*
- b. The 30-day period set forth in 8 C.F.R. § 1003.38(b) for filing an appeal to the Board is mandatory and jurisdictional, and it begins to run upon the issuance of a final disposition in a case. *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).
- c. Neither the INA nor the regulations grant the Board authority to extend the thirty-day time limit for filing an appeal to the Board. *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006).
- d. The Board's authority under 8 C.F.R. § 1003.1(c) to certify cases to itself in its discretion is limited to exceptional circumstances and is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing the regulations might result in hardship. *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). A short delay by an overnight service is not a rare or extraordinary event that would warrant

consideration of an untimely appeal on certification. *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006).

- e. The date of filing of the Notice of Appeal is the date the Notice is received by the Board. 8 C.F.R. § 1003.38(c).
  - f. There is no authority in the regulations to extend the time for filing an appeal. *Matter of Correa-Garces*, 20 I&N Dec. 451 (BIA 1992); *Matter of G-Z-*, 5 I&N Dec. 295 (BIA 1953). Nor is there authority for an IJ to reopen a case on his own motion for the sole purpose of permitting a late appeal to be taken. *Matter of D-*, 5 I&N Dec. 520 (BIA 1953).
4. The appealing parties
- a. The appeal parties are only those who are covered by the decision and are named in the Notice of Appeal. 8 C.F.R. § 1003.3(a)(1).
5. Fee for appeal
- a. The Notice of Appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of 8 C.F.R. § 1003.8. 8 C.F.R. § 1003.3(a)(1).
  - b. Waiver of fees
    - (1) The Board may, in its discretion, authorize the prosecution of any appeal or motion over which it has jurisdiction without payment of the required fee. 8 C.F.R. § 1003.8(a)(3).
    - (2) In any case in which an alien or other party affected is unable to pay the fee fixed for an appeal or motion, he or she shall file with the Notice of Appeal or motion, an Appeal Fee Waiver Request (Form EOIR-26A). 8 C.F.R. § 1003.8(a)(3).
    - (3) If the request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed. 8 C.F.R. § 1003.8(a)(3).
6. Representation by counsel
- a. If the respondent is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR-27) must be filed with the Notice of Appeal. 8 C.F.R. § 1003.3(a)(1).
7. Proof of service
- a. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. 8 C.F.R. § 1003.3(a)(1).

- b. An appeal and all attachments must be in English or accompanied by a certified translation. 8 C.F.R. § 1003.3(a)(1).
- c. An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time allowed for filing. 8 C.F.R. § 1003.3(a)(1).

## 8. Waiving Appeal

- a. A notice of appeal may not be filed by any party who has waived appeal pursuant to 8 C.F.R. § 1003.39. 8 C.F.R. § 1003.3(a)(1).
- b. 8 C.F.R. § 1003.39 provides that, except when certified to the Board, the decision of an IJ becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever comes first.
  - (1) A party wishing to challenge the validity of an appeal waiver may file either a motion to reconsider with the IJ or an appeal directly with the Board explaining why the waiver was invalid. *Matter of Patino*, 23 I&N Dec. 74 (BIA 2001).
  - (2) If an IJ fails to make clear that acceptance of a decision as “final” irrevocably waives the right to an appeal (particularly with respect to an unrepresented alien), the alien may not have effectively waived his or her right to an appeal and the Board may accept jurisdiction. *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320 (BIA 2000).
    - (a) In footnote 2 of the case, the Board suggested the following colloquy: “You have the right to appeal my decision. You do not have to decide today if you want to appeal, but you should decide soon. You can also give up your right to appeal by waiving it. If you want to appeal my decision, or if you want to think about appeal and decide later, you must reserve appeal now. If you reserve appeal, you will have 30 days from today to file your appeal with the Board of Immigration Appeals. Your notice of appeal must actually arrive at and be received by the Board within 30 days. Your appeal right will be lost if the notice of appeal arrives late. If you do not want to appeal my decision, you may waive appeal. If you waive appeal, my decision becomes final, and your case is completely finished. You cannot change your mind later and try to file an appeal. Do you understand? Do you want to reserve appeal or waive appeal?”
    - (b) *See also Narine v. Holder*, 559 F.3d 246 (4th Cir. 2009) (holding that an alien did not waive appeal where his counsel withdrew before the final hearing, former counsel had advised

him about voluntary departure but not about waiving appeal, and there was no indication that the petitioner clearly understood what the IJ meant in reference to a “final decision”).

- c. Departure from the U.S. of a person who is the subject of removal proceedings, prior appealing a decision in his or her case shall constitute a waiver of his or her right to appeal. 8 C.F.R. § 1003.3(e).

9. Standard of review on appeal

- a. Under 8 C.F.R. § 1003.1(d)(3), the Board defers to the factual findings of an IJ unless the findings contain clear error. The Board reviews de novo pure questions of law, issues of discretion, weight to be accorded evidence, and the application of a particular standard of law to facts as found by the Immigration Judge.
- b. The likelihood of future events constitutes a factual determination, which the Board reviews for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015).

10. Interlocutory appeals

- a. As a general rule, the Board does not entertain appeals from interlocutory decisions of an IJ, such as decisions on change of venue, admissibility of evidence, etc. *Matter of Victorino*, 18 I&N Dec. 259 (BIA 1982); *Matter of Ruiz-Campuzano*, 17 I&N Dec. 108 (BIA 1979).
- b. Only where a significant issue is raised which affects the administration of the immigration laws will the Board accept an interlocutory appeal. *Matter of Victorino*, 18 I&N Dec. 259 (BIA 1982); *Matter of Alphonse*, 18 I&N Dec. 178 (BIA 1981); *Matter of Wadas*, 17 I&N Dec. 346 (BIA 1980).

11. Appeals from in absentia orders of removal

- a. The Board lacks jurisdiction to consider an appeal from an in absentia order in removal proceedings where section 240(b)(5)(C) of the Act provides that such an order may only be rescinded by filing a motion to reopen with the IJ. *Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999).

12. Withdrawal of appeal

- a. In any case in which an appeal has been taken, the party taking the appeal may file a written withdrawal thereof with the office at which the Notice of Appeal was filed. 8 C.F.R. § 1003.4. (This may appear to be left over from the time that Notices of Appeal were filed with the Immigration Court rather than directly with the Board. However, it still applies to appeals from

decisions by DHS because those Notices of Appeal are filed with DHS and then forwarded with the record to the Board).

- (1) If the record in the case has not been forwarded to the Board on appeal (as is the case in appeals from DHS decisions), the decision in the case shall be final as if no appeal had been taken. 8 C.F.R. § 1003.4.
  - (2) If the record has been forwarded to the Board, the withdrawal shall also be forwarded there and, if no decision on the case has been made by the Board, the decision in the case shall be final as if no appeal had been taken. 8 C.F.R. § 1003.4.
- b. Departure from the U.S. of a person who is the subject of deportation proceedings, prior to the taking of an appeal from a decision in his or her case shall constitute a waiver of his or her right to appeal. 8 C.F.R. § 1003.3(e).
- c. Departure from the U.S. by a person who is the subject of deportation or removal proceedings (other than an arriving alien defined in 8 C.F.R. § 1001.1(q)), subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal and the decision in the case shall be final as if no appeal had been taken. 8 C.F.R. § 1003.4.
  - (1) The exception of arriving aliens seems to be for the purpose of codifying the Board decision that departure from the U.S. by an applicant for admission in exclusion proceedings after the taking of an appeal from an IJ's order denying admission does not constitute withdrawal of the appeal. *Matter of Keyte*, 20 I&N Dec. 158 (BIA 1990).
- d. A respondent's departure from the United States is not a constructive withdrawal under 8 C.F.R. § 1003.4 of an appeal by the Department of Homeland Security. *Matter of Luis*, 22 I&N Dec. 747 (BIA 1999). It also does not render DHS's appeal moot. *Id.*

### 13. Certification

- a. 8 C.F.R. § 1003.1(c) provides that an IJ may also certify a case to the Board.
- b. 8 C.F.R. § 1003.7 provides that when a case is certified to the Board, the alien or other party affected shall be given notice of certification.
- c. It also provides that an IJ may certify a case only after an initial decision has been made and before an appeal has been taken.
- d. It also provides that if it is known at the time the decision is rendered that the case will be certified, the notice of certification shall be included in the decision and no further notice of certification shall be required.



14. Remand from Board for background and security checks

- a. When the Board has remanded the record for completion of background and security checks and new information that may affect the alien's eligibility for relief is revealed, the IJ has discretion to determine whether to conduct an additional hearing to consider the new evidence before entering an order granting or denying relief. *Matter of Alcantara-Perez*, 23 I&N Dec. 882 (BIA 2006). When a proceeding is remanded for background and security checks, but no new information is presented as a result of those checks, the IJ should enter an order granting relief.
- b. When the Board remands a case to the IJ for the appropriate background checks, the IJ reacquires jurisdiction over the proceedings and may consider additional evidence regarding new or previously considered relief if the evidence meets the requirements for reopening the proceedings. *Matter of M-D-*, 24 I&N Dec. 138 (BIA 2007). When a case is on remand for completion of background checks, the IJ is required to enter a final order granting or denying the requested relief.