IMMIGRATION LAW

IN THE NINTH CIRCUIT

Selected Topics

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Suggestions are welcome, and should be forwarded to the Office of Staff Attorneys for the United States Court of Appeals for the Ninth Circuit,
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JURISDICTION OVER IMMIGRATION PETITIONS

I. OVERVIEW

Congress has amended the judicial review provisions of the Immigration and Nationality Act ("INA") several times over the past decade.

Before 1996, judicial review of most administrative action under the INA was governed by 8 U.S.C. § 1105a, which gave exclusive jurisdiction for judicial review over final orders of deportation to the court of appeals. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 476 (1999).

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104–208, 110 Stat. 3009, *as amended by* Pub. L. No. 104–302, 110 Stat. 3656 (Oct. 11, 1996) *and by* NACARA, Pub. L. No. 105–100, § 203(a)(2), 111 Stat. 2160 (1997), and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214. "IIRIRA . . . repealed the old judicial-review scheme set forth in § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252." *Id.* at 475. For example, IIRIRA placed significant limits on judicial review over certain discretionary determinations and petitions for review brought by individuals convicted of certain enumerated offenses. Cases that were pending when IIRIRA took effect on April 1, 1997, were to be governed by § 1105a, as modified by the IIRIRA transitional rules. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).

In May 2005, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), which made several more significant changes to the judicial review provisions of the INA. Although the REAL ID Act did not repeal any of the existing statutory limits on the scope of judicial review implemented by IIRIRA, it eliminated statutory and non-statutory habeas jurisdiction over final orders of removal, deportation and exclusion, and made a petition for review filed with an appropriate court of appeals the sole and exclusive means for judicial review of such orders. Thus, the REAL ID Act restored the pre-IIRIRA scheme of limiting judicial review over final orders of removal and deportation to the courts of appeal, while maintaining IIRIRA's limits on review over certain discretionary determinations and cases involving enumerated offenses. *See* REAL ID Act

§ 106(a) (amending 8 U.S.C. § 1252). Simultaneously, the REAL ID Act expanded the scope of direct judicial review of final orders of removal and deportation by providing explicitly for review of all constitutional and questions of law related to such final orders. *See* REAL ID Act § 106(a)(1)(A); 8 U.S.C. § 1252(a)(2)(D) (as amended).

The REAL ID Act made this new judicial review scheme applicable to both cases governed by the permanent rules and those governed by IIRIRA's transitional rules by providing that a petition for review filed under the transitional rules shall be treated as being filed under the permanent provisions of 8 U.S.C. § 1252. *See* REAL ID Act § 106(d) (uncodified); *Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005) (explaining that jurisdiction over transitional rules cases is now governed by 8 U.S.C. § 1252 rather than 8 U.S.C. § 1105(a)).

The REAL ID Act's amendments to the judicial review provisions of the INA and IIRIRA are effective as to all final administrative orders of removal, deportation, or exclusion issued before, on, or after May 11, 2005, the date of enactment, and thus govern all pending petitions for review. *See* REAL ID Act § 106(b) (uncodified).

II. APPLICABLE STATUTORY PROVISIONS

Petitions for review have been divided into three categories for purposes of judicial review:

A. Permanent Rules: The new rules in 8 U.S.C. § 1252 apply to "removal" proceedings initiated on or after April 1, 1997. *See, e.g.*, *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1102 (9th Cir. 2004). Removal proceedings commence with the filing of a charging document, called a Notice to Appear, with the Immigration Court. *See* Commencement of Proceedings, below.

B. Old Rules: The judicial review provisions in 8 U.S.C. § 1105a, as amended by AEDPA, apply if the final order of deportation or exclusion was entered before October 31, 1996. *See Velarde v. INS*,

140 F.3d 1305, 1309 n.3 (9th Cir. 1998) (holding that the old rules applied where the BIA decided case on September 30, 1996).

C. Transitional Rules: Where deportation proceedings were initiated before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). The transitional rules are not codified, and are located in Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996), *as amended by* Pub. L. No. 104–302, 110 Stat. 3656 (Oct. 11, 1996). Transitional rule cases were previously governed by 8 U.S.C. § 1105a, as modified by the "Transitional Changes in Judicial Review," found in IIRIRA § 309(c)(4). However, the REAL ID Act directs that jurisdiction in transitional rules cases is now governed by 8 U.S.C. § 1252. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 106(d), 119 Stat. 231, 311 (2005); *Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005).

III. GENERAL JURISDICTIONAL PROVISIONS

A. Commencement of Proceedings

Deportation or removal proceedings "commence" on the date the charging document is filed with the immigration court. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1119–21 (9th Cir. 2002) (holding in pre-IIRIRA case that deportation proceedings commence when the Order to Show Cause ("OSC") is filed with the immigration court); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597–98 (9th Cir. 2002) (removal proceedings commence when the Notice to Appear ("NTA") is filed with the immigration court); *see also United States v. Hovsepian*, 359 F.3d 1144, 1165 (9th Cir. 2004) (en banc). The relevant date is the filing of the charging document, not the service of the document on the applicant. *See Cortez-Felipe v. INS*, 245 F.3d 1054, 1056–57 (9th Cir. 2001) (proceedings did not commence until the INS filed the NTA even though the INS served petitioner with an OSC before April 1, 1997).

Merely presenting oneself to the immigration service does not commence proceedings. *See Lopez-Urenda v. Ashcroft*, 345 F.3d 788, 792–94 (9th Cir. 2003)

(filing asylum application before the passage of IIRIRA did not commence proceedings or lead to a settled expectation of placement in deportation, rather than removal, proceedings); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1108 (9th Cir. 2003) (filing of an asylum application before the IIRIRA effective date did not lead to a settled expectation of placement in deportation, rather than removal, proceedings); *Jimenez-Angeles*, 291 F.3d at 600 (deportation and removal proceedings did not commence when applicant surrendered to INS).

B. Petition for Review Exclusive Means for Judicial Review over Final Orders of Deportation and Removal

The REAL ID Act, Pub. L. No. 109-13, Div. B., 119 Stat. 231 (2005), eliminated district court habeas corpus jurisdiction over final orders of deportation or removal, and vested jurisdiction to review such orders exclusively in the courts of appeals. *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005). As amended by § 106(a) of the REAL ID Act, § 1252(a)(5) now provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e).

8 U.S.C. § 1252(a)(5).

In addition to eliminating habeas corpus jurisdiction over final administrative orders, the REAL ID Act directed that all such petitions pending in the district court upon enactment, i.e., May 11, 2005, be transferred to the appropriate court of appeals and treated as if filed as a petition for review under INA § 242, 8 U.S.C. § 1252.

Although the REAL ID Act did not address how to treat appeals of the denial of habeas corpus relief already pending in the court of appeals upon enactment, such appeals will in most cases be treated as timely petitions for review. *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 n.3 (9th Cir. 2005) ("we make

no comment on what should be done in the more unusual case where the pending habeas petition requires further factual development . . . construing a pending habeas petition as a petition for review might bar this court from remanding the petition for further fact-finding."); *Cordes v. Gonzales*, 421 F.3d 889, 892 (9th Cir. 2005); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005); *Almaghzar v. Gonzales*, 457 F.3d 915, 918 (9th Cir. 2006).

"[I]n cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court, and on appeal to this Court, pursuant to 28 U.S.C. § 2241." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075–76 (9th Cir. 2006); *Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) (order) (noting that the transfer provisions of the REAL ID Act do not apply where an applicant does not challenge a final order of removal).

The elimination of habeas corpus review over final orders of removal and deportation does not violate the Suspension Clause. *Puri v. Gonzales*, 464 F.3d 1038, 1042 (9th Cir. 2006).

C. Final Order of Deportation or Removal

1. Definition

"The term 'order of deportation' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). A "special inquiry officer" refers to an immigration judge. *See Molina-Camacho v. Ashcroft*, 393 F.3d 937, 940 (9th Cir. 2004).

The BIA is restricted to affirming orders of deportation or removal, and may not issue them in the first instance. *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 883 (9th Cir. 2003) (BIA acted beyond its authority when it vacated IJ's termination of removal proceedings and issued removal order in the first instance). "[T]here is simply no 'authority' under the INA or any regulation for the BIA to issue an order of removal." *Molina-Camacho*, 393 F.3d at 941. "The BIA's *ultra vires* act of issuing an order of removal in the first instance renders that portion of the proceedings a 'legal nullity,'" and no final order of removal exists that would

provide jurisdiction under 8 U.S.C. § 1252. *Id.* 941–42 (construing a petition for review as a petition for habeas corpus and transferring it to the district court pursuant to 28 U.S.C. § 1631).

Note that in light of the REAL ID Act's elimination of statutory and non-statutory habeas review of final orders of removal, deportation, or exclusion, this court is currently considering the continuing viability of *Noriega-Lopez* and *Molina-Camacho*, and this court's practice of transferring such cases to the district court as habeas corpus petitions. *See Lolong v. Gonzales*, 03-72384 (arg. & sub. en banc 10/5/06).

An order of deportation "shall become final upon the earlier of (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. § 1101(a)(47)(B); *see also Noriega-Lopez*, 335 F.3d at 882–83; *Kalaw v. INS*, 133 F.3d 1147, 1150 n.4 (9th Cir. 1997) (final order includes BIA denial of a motion to reopen).

Jurisdiction over the petition for review ends if the BIA grants an applicant's motion to reopen because "there is no longer a final decision to review." *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (order) (dismissing, without prejudice, for lack of jurisdiction); *Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (order) (dismissing petition and advising parties to notify this court when BIA reopens administrative proceedings while a petition for review is pending).

2. Scope of "Final Order" of Deportation or Removal

"[T]he term final orders in § 106(a) [8 U.S.C. § 1105a(a)] includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." *INS v. Chadha*, 462 U.S. 919, 938 (1983) (internal quotation marks omitted); *see also Montes v. Thornburgh*, 919 F.2d 531, 535 (9th Cir. 1990); *Mohammed-Motlagh v. INS*, 727 F.2d 1450, 1452 (9th Cir. 1984).

Under the permanent rules, "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory

provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). This statutory provision "speaks to . . . the need to consolidate (or 'zip') *petitions for review* into one action in the court of appeals." *Flores-Miramontes v. INS*, 212 F.3d 1133, 1139 (9th Cir. 2000); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999) (describing § 1252(b)(9) as a "general jurisdictional limitation" which "channels judicial review" of immigration actions and decisions, and acts as a "'zipper' clause").

C. Timeliness

1. Petitions for Review

"The petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1); *see also Singh v. INS*, 315 F.3d 1186, 1188 (9th Cir. 2003); *Narayan v. INS*, 105 F.3d 1335 (9th Cir. 1997) (order); IIRIRA § 309(c)(4)(C) (transitional rules). "This provision applies to all final orders of exclusion or deportation entered after October 30, 1996." *Singh*, 315 F.3d at 1188. The time limit is "mandatory and jurisdictional" and "not subject to equitable tolling." *Stone v. INS*, 514 U.S. 386, 405 (1995); *see also Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996); *Caruncho v. INS*, 68 F.3d 356, 359–60 (9th Cir. 1995).

The filing of a motion to reopen or reconsider does not toll the statutory time in which to appeal the underlying final order. *Stone v. INS*, 514 U.S. 386, 405–06 (1995); *Martinez-Serrano*, 94 F.3d at 1258.

The time limit for filing a petition for review begins to run when the BIA mails its decision, which is presumed to be the date indicated on the cover letter to the decision. *See Haroutunian v. INS*, 87 F.3d 374, 375 (9th Cir. 1996). The three-day grace period of Fed. R. App. P. 26(c) does not apply. *See id*. at 377. The time limit does not begin to run until the BIA mails its decision to the correct address. *See Martinez-Serrano*, 94 F.3d at 1258–59; *cf. Singh v. INS*, 315 F.3d 1186, 1188–90 (9th Cir. 2003) (BIA properly mailed decision to the applicant's last known address where attorney never filed a notice of appearance).

A petition for review is "filed" when it is received by the court. *See Sheviakov v. INS*, 237 F.3d 1144, 1148 (9th Cir. 2001). For instance, where a petition is sent via express mail and received at the court's post office on the 30th day, the petition is timely even though it was not stamped by the Clerks's office until the following day. *Id.*

2. Habeas Appeals

A pending appeal of the district court's denial of habeas relief converted by this court into a petition for review will be deemed timely. *See, e.g.*, *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005); *Cordes v. Gonzales*, 421 F.3d 889, 892 (9th Cir. 2005); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005); *Almaghzar v. Gonzales*, 457 F.3d 915, 918 (9th Cir. 2006); *cf. Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006) (district court properly dismissed for lack of jurisdiction a habeas petition filed after the effective date of the REAL ID Act and attempting to challenge a final order of removal).

An appeal from the district court's denial of a 28 U.S.C. § 2241 habeas corpus petition must be filed within 60 days. Fed. R. App. P. 4(a)(1)(B).

D. Venue

"The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2); *see also* IIRIRA § 309(c)(4)(D). Before IIRIRA, an applicant could file a petition for review in the judicial circuit where she resided, or in "the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part." *See* 8 U.S.C. § 1105a(a)(2) (repealed 1996).

E. Stay Issues

1. No Automatic Stay of Removal Pending Review

"Service of the petition [for review] does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. § 1252(b)(3)(B); *see also* IIRIRA § 309(c)(4)(F); *cf.* 8 U.S.C. § 1105a(a)(3)

(repealed 1996) (providing for automatic stay of deportation in most cases upon service of the petition for review). Under *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997), "[t]he filing of a motion for stay or a request for a stay contained in a petition for review will stay a petitioner's deportation temporarily until the court rules on the stay motion." *See also* Ninth Circuit General Order 6.4(c) (setting forth procedures for stays of deportation or removal).

The preliminary injunction standard applies to stay requests. *See Andrieu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (en banc) (heightened standard of 8 U.S.C. § 1252(f)(2) does not apply to stay requests); *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998); *see also Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (preliminary injunction standard applies to stay requests in appeals of the denial of habeas corpus relief). The petitioner must demonstrate "either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor." *Abbassi*, 143 F.3d at 514. "These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified." *Id.*

The stay of removal remains in place until this court issues its mandate. *See Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004).

2. Voluntary Departure Stays

The court lacks jurisdiction to review a denial of voluntary departure. 8 U.S.C. § 1229c(f) ("No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure . . . nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure."); *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 883–84 (9th Cir. 2005); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1255 (9th Cir. 2003); *Antonio-Cruz v. INS*, 147 F.3d 1129, 1130 (9th Cir. 1998); *cf. Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980–82 (9th Cir. 2006) (reviewing contention that BIA lacks authority in a streamlined summary affirmance to reduce the IJ's period of voluntary departure).

The court has equitable jurisdiction to grant a timely request for a stay of the voluntary departure period. *See El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th

Cir. 2003) (order). The same preliminary injunction standard for obtaining a stay of removal applies to a request for a stay of voluntary departure. *Id.* "As a procedural matter, . . . this court shall temporarily stay the voluntary departure period pending determination of a motion for stay of voluntary departure, according to the same procedures presently in place for motions for stay of removal." *Id*. at 1263 n.1 (citing *De Leon v. INS*, 115 F.3d 643 (9th Cir. 1997) (order) and Ninth Circuit General Order 6.4(c)).

Under the transitional rules, the voluntary departure period does not begin to run until this court issues its mandate; a request to stay the voluntary departure period is not necessary. *See Elian v. Ashcroft*, 370 F.3d 897, 901 (9th Cir. 2004) (order) (denying as moot motion to stay voluntary departure period).

Note that this court has not addressed if or how section 106(d) of the REAL ID Act, which directs that petitions for review filed under the transitional rules shall be treated as if filed under the permanent rules of 8 U.S.C. § 1252, affects the running of the voluntary departure period in transitional rules cases.

Under the permanent rules, the voluntary departure period begins to run when the BIA renders its decision. *See Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172–74 (9th Cir. 2003) (announcing that *Contreras-Aragon*, 852 F.2d 1088 (9th Cir. 1988) (en banc), which held that the voluntary departure period was automatically stayed during the pendency of the petition for review, is no longer the law of the circuit after IIRIRA).

A motion for a stay of removal filed before expiration of the voluntary departure period is construed as including a timely motion to stay voluntary departure. *See Desta v. Ashcroft*, 365 F.3d 741, 749–50 (9th Cir. 2004) (denying as unnecessary subsequent untimely motion to stay voluntary departure period). Where the expiration of the voluntary departure period falls on a weekend or holiday it is deemed to fall on the next non-weekend and/or non-holiday day. *Martinez Barroso v. Gonzales*, 429 F.3d 1195, 1204 (9th Cir. 2005); *Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 964–65 (9th Cir. 2004).

This court lacks jurisdiction to grant a voluntary departure stay where the request is filed after expiration of the voluntary departure period. *See Garcia v. Ashcroft*, 368 F.3d 1157, 1159–60 (9th Cir. 2004) (order) (declining to reach the

question of whether petitioners properly relied on *Contreras-Aragon* because the issue was not yet ripe for consideration); *cf. Padilla-Padilla v. Gonzales*, 463 F.3d 972, 982 (9th Cir. 2006) (remanding for the Board to consider whether *Contreras-Aragon* applies where the voluntary departure period expired before this court decided *Zazueta-Carillo*). Where the voluntary departure period expires on a weekend, and the petitioner files a timely petition for review and motion to stay removal on the next court day, the motion to stay voluntary departure is timely under Fed. R. App. P. 26(a). *See Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 965 (9th Cir. 2004).

3. Stay of the Court's Mandate

This court may, upon denial of a petition for review, stay its mandate to allow the applicant to seek additional relief. *See, e.g.*, *Belishta v. Ashcroft*, 378 F.3d 1078, 1079 (9th Cir. 2004) (order) (staying mandate to permit BIA to reopen and consider in the first instance eligibility for asylum based on fear of "other serious harm upon removal"); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1143 (9th Cir. 2000) (staying mandate to permit filing of habeas corpus petition in district court); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (staying mandate to permit applicant to seek reopening under Convention Against Torture); *Ortiz v. INS*, 179 F.3d 1148, 1152 (9th Cir. 1999) (staying mandate to permit applicants to seek reopening for relief under the Nicaraguan Adjustment and Central American Relief Act ("NACARA")); *Ardon-Matute v. INS*, 157 F.3d 696, 697 (9th Cir. 1998) (per curiam) (staying mandate pending BIA's adjudication of motion to reopen seeking NACARA relief); *Aguilar-Escobar v. INS*, 136 F.3d 1240, 1241 (9th Cir. 1998) (reopening for NACARA relief); *Echeverria-Hernandez v. INS*, 946 F.2d 1481, 1482 (9th Cir. 1991) (en banc) (staying mandate pending resolution of administrative proceedings concerning the *American Baptist Churches* settlement agreement); *Roque-Carranza v. INS*, 778 F.2d 1373, 1374 (9th Cir. 1984) (60-day stay to permit applicant to seek reopening to present ineffective assistance of counsel claim); *cf. Valderrama v. INS*, 260 F.3d 1083, 1086 (9th Cir. 2001) (declining to stay the mandate).

F. Exhaustion

This court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C.

§ 1252(d)(1); *see also* 8 U.S.C. § 1105a(c) (repealed 1996). An applicant's failure to raise an issue to the BIA generally constitutes a failure to exhaust, thus depriving this court of jurisdiction to consider the issue. *See Vargas v. INS*, 831 F.2d 906, 907–08 (9th Cir. 1987); *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004) (no subject-matter jurisdiction over legal claims not presented in administrative proceedings below).

"An applicant cannot satisfy the exhaustion requirement by making a general challenge to the IJ's decision, but, rather, must specify which issues form the basis of the appeal." *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004); *see also Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821 (9th Cir. 2004) (no jurisdiction to review withholding of removal claim not raised in brief to BIA); *Barron v. Ashcroft*, 358 F.3d 674, 676 (9th Cir. 2004) (no jurisdiction where BIA appeal failed to mention newly-raised due process challenge); *but see Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004) (per curiam) (applicant exhausted CAT claim by "explicitly mention[ing] in his brief to the BIA that he was requesting reversal of the IJ's denial of relief under the Convention Against Torture"); *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000) (applicants exhausted claim by raising it in their notice of appeal despite failing to address it in briefs before the BIA); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (raising claim in declaration constituted exhaustion).

Claims may be exhausted even if the applicant did not use precise legal language. *See Suntharalinkam v. Gonzales*, 458 F.3d 1034, 1050 (9th Cir. 2006) (mandate pending) (CAT claim exhausted despite failure to identify IJ's alleged errors); *Ladha*, 215 F.3d at 901 n.13 (applicant did not use the exact phrase in brief to BIA); *Agyeman v. INS*, 296 F.3d 871, 877–78 (9th Cir. 2002) ("inartfully" raised due process claim and absence of "exact legalese"); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1183–84 (9th Cir. 2001) (en banc) (applicant that "never specifically invoked the phrase 'equitable tolling' in his briefs to the BIA, [] sufficiently raised the issue before the BIA to permit us to review the issue on appeal"); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030, n.8 (9th Cir. 2000) (addressing imputed political opinion argument even though issue was argued in slightly different manner below).

Where the BIA has addressed an issue, the issue has been exhausted. *See Sagermark v. INS*, 767 F.2d 645, 648 (9th Cir. 1985); *Socop-Gonzalez*, 272 F.3d at 1186. "We do not require an alien to exhaust administrative remedies on legal issues based on events that occur *after* briefing to the BIA has been completed." *Alcaraz v. INS*, 384 F.3d 1150, 1158 (9th Cir. 2004) (applicants exhausted administrative remedies regarding repapering argument because agency's repapering policies were issued after briefing before the BIA).

The BIA's use of the streamlined summary affirmance procedure does not eliminate the exhaustion requirement. *See Zara v. Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004).

1. Exceptions to Exhaustion

a. Constitutional Challenges

"An exception to the exhaustion requirement has been carved for constitutional challenges to the Immigration and Naturalization Act and INS procedures," *Rashtabadi v. INS*, 23 F.3d 1562, 1567 (9th Cir. 1994), because "[t]he BIA does not have jurisdiction to determine the constitutionality of the statutes it administers," *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 977 (9th Cir. 2006). The BIA also lacks jurisdiction over, and an applicant thus need not exhaust, claims arising under international law. *See Padilla-Padilla*, 463 F.3d at 977.

See also Espinoza-Gutierrez v. Smith, 94 F.3d 1270, 1273–74 (9th Cir. 1996) ("the exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation because of conflict with a statute"); *Garberding v. INS*, 30 F.3d 1187, 1188 n.1 (9th Cir. 1994) (considering equal protection claim raised for the first time on appeal); *Bagues-Valles v. INS*, 779 F.2d 483, 484 (9th Cir. 1985) (considering two due process claims not raised before the BIA).

"Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims." *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005) (per curiam).

Nevertheless, "a petitioner cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process." *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987) ("'[d]ue process' is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal"). "The key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the BIA's ken." *Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995); *see also Barron v. Ashcroft*, 358 F.3d 674, 676, 678 (9th Cir. 2004) (requiring exhaustion of due process claims concerning the denial of opportunity to speak and deprivation of right to counsel); *Sanchez-Cruz v. INS*, 255 F.3d 775, 780 (9th Cir. 2001) (due process claim alleging IJ bias must be exhausted).

b. Futility and Remedies "Available . . . As of Right"

An alien must exhaust "all administrative remedies *available* to the alien *as of right*." 8 U.S.C. § 1252(d)(1) (emphasis added). "Some issues may be so entirely foreclosed by prior BIA case law that no remedies are 'available . . . as of right' with regard to them before IJs and the BIA. The realm of such issues, however, cannot be broader than that encompassed by the futility exception to prudential exhaustion requirements." *Sun v. Ashcroft*, 370 F.3d 932, 942–43 (9th Cir. 2004) ("us[ing] the futility cases as a guide to the interpretation of the 'available . . . as of right' requirement"); *see also El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 747 (9th Cir. 1992) ("where the agency's position on the question at issue 'appears already set,' and it is 'very likely' what the result of recourse to administrative remedies would be, such recourse would be futile and is not required").

"[M]otions to reconsider, like motions to reopen, are not 'remedies available . . . as of right' within the meaning of 8 U.S.C. § 1252(d)(1)." *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) (rejecting the INS's contention that habeas petitioner was obliged to file a motion to reopen or reconsider before seeking review of the BIA's order of removal).

c. Nationality Claims

The exhaustion requirement of 8 U.S.C. § 1252(d)(1) does not apply to nationality claims brought under 8 U.S.C. § 1252(b)(5). *Theagene v. Gonzales*, 411 F.3d 1107, 1111 (9th Cir. 2005).

d. Events Occurring After Briefing Before the Board

"We do not require an alien to exhaust administrative remedies on legal issues based on events that occurred *after* briefing to the BIA has been completed." *Alcarez v. INS*, 384 F.3d 1150, 1158 (9th Cir. 2004); *see also Padilla-Padilla v. Gonzales*, 463 F.3d 972 (9th Cir. 2006) (applicant need not have exhausted a challenge to the BIA's reduction of the IJ's voluntary departure period because it occurred after briefing).

G. Departure from the United States

1. Review of Removal Orders

For cases governed by the permanent rules, departure from the United States does not terminate jurisdiction. *See* 8 U.S.C. § 1252(a); *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 844 (9th Cir. 2006).

For cases governed by the transitional rules, former 8 U.S.C. § 1105a(c), the court generally lacks jurisdiction to review a deportation order once the applicant departs from the United States. *See id.* ("An order of deportation or of exclusion shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order."); *see also Stone v. INS*, 514 U.S. 386, 399 (1995) ("Once an alien has been deported, the courts lack jurisdiction to review the deportation order's validity."); *Kon v. Gonzales*, 400 F.3d 1225, 1226 (9th Cir. 2005) (per curiam); *Hajnal v. INS*, 980 F.2d 1247, 1247 (9th Cir. 1992) (per curiam). However, "[u]nder the *Mendez* exception, an alien outside the United States may petition for review of his deportation order when his departure was not 'legally executed.'" *Zepeda-Melendez v. INS*, 741 F.2d 285, 288, 290 (9th Cir. 1984) ("deportation of an alien without notice to his counsel is not a legally executed departure within the meaning of 8 U.S.C. § 1105a(c), and does not strip the court of jurisdiction to review the deportation order whether or not the alien

was in custody at the time of deportation"); *see also Wiedersperg v. INS*, 896 F.2d 1179, 1181–82 (9th Cir. 1990) (deportation based on a vacated conviction was not legally executed).

Cases governed by the transitional rules face a potentially anomalous situation because the court loses jurisdiction once the petitioner departs, *see* 8 U.S.C. § 1105a(c), and the filing of a petition for review no longer results in an automatic stay of deportation, *see* IIRIRA § 309(c)(4)(F).

Note that the Ninth Circuit has not yet addressed the interplay between 8 U.S.C. § 1105a(c), which eliminates jurisdiction in transitional rules cases once a petitioner departs the United States, and section 106(d) of the REAL ID Act, which directs that all petitions for review filed under the transitional rules shall be treated as if filed under the permanent rules of 8 U.S.C. § 1252.

2. Review of Motions to Reopen

"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." 8 C.F.R. § 1003.2(d); *cf. Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (applicant entitled to reopen his deportation proceedings following deportation where his state conviction, which was the sole ground of deportation, was vacated).

"A motion to reopen or 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." 8 C.F.R. § 1003.2(d); *Singh v. Gonzales*, 412 F.3d 1117, 1120 (9th Cir. 2005). "[T]he scope of this regulation is clearly limited to persons who depart the U.S. *after removal proceedings* have already commenced against them." *Singh*, 412 F.3d at 1121 (holding that the regulation does not apply to applicant who first departs the U.S., then becomes subject to removal proceedings, returns, and files motion to reopen) (emphasis in original).

H. Fugitive Disentitlement Doctrine

An applicant who fails to report for deportation or who fails to keep the courts apprised of his or her current address may have a petition for review dismissed under the fugitive disentitlement doctrine. "Although an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice. Like the fugitive in a criminal matter, the alien who is a fugitive from a deportation order should ordinarily be barred by his fugitive status from calling upon the resources of the court to determine his claims." *Zapon v. Dep't of Justice*, 53 F.3d 283, 285 (9th Cir. 1995); *see also Armentero v. INS*, 412 F.3d 1088 (9th Cir. 2005) (order) (dismissing petition for review because applicant was a fugitive from custody); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1091–93 (9th Cir. 2003) (applying the fugitive disentitlement doctrine where applicant had lost contact with his attorney and the agency and all efforts to contact him failed for over two years); *cf. Bhasin v. Gonzales*, 423 F.3d 977, 988–89 (9th Cir. 2005) (declining to uphold the BIA's reliance on the fugitive disentitlement doctrine in denying motion to reopen because applicant failed to receive critical agency documents pertaining to his order of removal).

The fugitive disentitlement doctrine is a "severe sanction that we do not lightly impose." *Bhasin v. Gonzales*, 423 F.3d 977, 987–88 (9th Cir. 2005) (internal quotation marks omitted).

I. Proper Respondent

The proper respondent in a petition for review is the Attorney General. 8 U.S.C. § 1252(b)(3)(A). This court has not addressed whether the proper respondent in an immigration habeas petition under 28 U.S.C. § 2241 is the Attorney General, the Secretary of the Department of Homeland Security, or the immediate custodian. *See Armentero v. INS*, 340 F.3d 1058 (9th Cir. 2003) (Secretary of the Department of Homeland Security and the Attorney General were the proper respondents), *withdrawn*, 382 F.3d 1153 (9th Cir. 2004) (order); *see also Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2718 n.8 (2004) (declining to resolve whether the Attorney General is a proper respondent in an immigration habeas petition).

J. Reorganization of the Immigration and Naturalization Service

The INS was abolished on March 1, 2003 pursuant to the Homeland Security Act of 2002. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003). Immigration functions were transferred to the following agencies within the newly-created Department of Homeland Security ("DHS"):

1. U.S. Immigration and Customs Enforcement ("ICE"), responsible for alien removal and detention.
2. U.S. Citizenship and Immigration Services ("USCIS"), responsible for immigration services such as naturalization, asylum, refugee processing, and adjustment of status.
3. U.S. Customs and Border Protection ("CBP"), responsible for border patrol and processing people through ports of entry.

K. Reorganization of Administrative Regulations

The administrative regulations governing immigration proceedings have been recodified at 8 C.F.R. § 1003 et seq., to reflect the transfer of INS functions to the DHS. *See* 68 Fed. Reg. 9824 (Feb. 28, 2003) (Add 1000 to the old regulation cite to find the current regulatory cite). The Executive Office for Immigration Review ("EOIR"), including the Board of Immigration Appeals and the Immigration Judges, remain under the Department of Justice. *Id.*

L. Exclusion Orders

Before IIRIRA, aliens who had not made an "entry" into the United States were placed in exclusion proceedings. *See Hose v. INS*, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). "Under pre-IIRIRA law, the appropriate avenue for judicial review of a final order of exclusion was for the alien to file a petition for a writ of habeas corpus in the district court." *Id.*; *see also* 8 U.S.C. § 1105a(b) (repealed) ("any alien against whom a final order of exclusion has been made . . . may obtain judicial review of such order by habeas corpus proceedings and not otherwise").

IIRIRA's permanent rules established a unified "removal" proceeding and eliminated the different jurisdictional tracks for deportation and exclusion proceedings. *See Hose*, 180 F.3d at 994 & n.1. IIRIRA's transitional rules

redirected review of exclusion orders from the district courts to the courts of appeal. *See id.* (citing IIRIRA § 309(c)(4)(A)).

IV. LIMITATIONS ON JUDICIAL REVIEW OF DISCRETIONARY DECISIONS

The IIRIRA permanent rules, applicable to removal proceedings initiated on or after April 1, 1997, bar review of certain discretionary decisions. 8 U.S.C. § 1252(a)(2)(B) states:

> Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review–
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) amended the INA by adding 8 U.S.C. § 1252(a)(2)(D), which states:

> Judicial review of certain legal claims
>
> Nothing in subparagraph (B) . . . or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Thus, notwithstanding any limitations on judicial review set forth in 8 U.S.C. § 1252(a)(2)(B), the court has jurisdiction to consider questions of law and constitutional questions raised in a petition for review challenging the agency's discretionary denial of relief. "In short, Congress repealed all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) . . .) following the amendment of that section by the REAL ID Act." *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023 at * 2 (9th Cir. Oct. 26, 2006) (en banc).

A. Definition of Discretionary Decision

The Immigration and Nationality Act does not define what constitutes a discretionary decision. *See Hernandez v. Ashcroft*, 345 F.3d 824, 833 (9th Cir. 2003). This court has held that "determinations that require application of law to factual determinations are nondiscretionary." *Id.* at 833–34 (internal quotation marks and alteration omitted). On the other hand, "an inquiry is discretionary where it is a subjective question that depends on the value judgment of the person or entity examining the issue." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003) (internal quotation marks omitted) (holding that court lacks jurisdiction to review the BIA's exceptional and extremely unusual hardship determination).

"When the BIA acts where it has no legal authority to do so, it does not make a discretionary decision, and such a determination is not protected from judicial review." *Hernandez*, 345 F.3d at 847 (internal citations omitted) (BIA's decision to deny adjustment based on non-viability of the marriage was contrary to law and therefore not discretionary); *see also Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003) ("Even if a statute gives the Attorney General discretion, . . . the courts retain jurisdiction to review whether a particular decision is *ultra vires* the statute in question.").

B. Enumerated Discretionary Decisions

1. Subsection (i)–Permanent Rules

Subsection (i) of section 1252(a)(2)(B) of the permanent rules lists the following forms of discretionary relief:

8 U.S.C. § 1182(h)	Section 212(h) Criminal Inadmissibility Waiver
8 U.S.C. § 1182(i)	Section 212(i) Fraud or Misrepresentation Waiver
8 U.S.C. § 1229b	Cancellation of Removal
8 U.S.C. § 1229c	Voluntary Departure
8 U.S.C. § 1255	Adjustment of Status

2. Transitional Rules

Section 309(c)(4)(E) of the IIRIRA transitional rules contains a similar limitation on direct judicial review of discretionary decisions, stating that: "there shall be no appeal of any discretionary decision under § 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act)"

Section 309(c)(4)(E) refers to the following forms of discretionary relief:

Section 212(c)	Discretionary Waiver for long-time permanent residents
Section 212(h)	Criminal Inadmissibility Waiver
Section 212(i)	Fraud or Misrepresentation Waiver
Section 244	Suspension of deportation
Section 245	Adjustment of Status

Note that the REAL ID Act directs that a petition for review filed under IIRIRA's transitional rules shall be treated as though filed under the permanent provisions of 8 U.S.C. § 1252. *See* REAL ID Act § 106(d) (uncodified).

3. Cases Addressing Jurisdiction over Certain Enumerated Discretionary Decisions

a. Cancellation of Removal/Suspension of Deportation

The court lacks jurisdiction to review the agency's discretionary determination that an applicant failed to establish the requisite hardship for cancellation of removal or suspension of deportation. *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (post-REAL ID Act case); *Romero-Torres v. Gonzales*, 327 F.3d 887, 888 (9th Cir. 2003) (permanent rules case); *Kalaw v. Gonzales*, 133 F.3d 1147, 1152 (9th Cir. 1997) (transitional rules case). However,

the court retains jurisdiction to review colorable constitutional claims or questions of law pertaining to the agency's discretionary hardship determination. 8 U.S.C. § 1252(a)(2)(D); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (court has jurisdiction to consider questions of statutory interpretation including whether the hardship standard is consistent with international law); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1003 (9th Cir. 2003) (challenge to agency's interpretation of the hardship standard constitutes a colorable due process claim).

The court lacks jurisdiction to review an abuse of discretion argument merely recharacterized as due process argument. *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (contention that the agency violated due process by misapplying the facts of the case to the applicable law doid not state a colorable constitutional or legal claim); *Martinez-Rosas*, 424 F.3d at 930 (same post-REAL ID Act).

The court also lacks jurisdiction to review the agency's discretionary good moral character determination. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 854 (9th Cir. 2006). However, the court retains jurisdiction to review the agency's determination that an applicant is statutorily precluded from establishing good moral character. *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (explaining that good moral character determination is reviewable only where based on one of the statutory exclusions found in 8 U.S.C. § 1101(f)).

The court retains jurisdiction to review the agency's determination as to whether a petitioner met the continuous physical requirement for cancellation of removal or suspension of deportation. *Kalaw v. INS*, 133 F.3d 1147, 1150–51 (9th Cir. 1997).

b. Adjustment of status

The court lacks jurisdiction to review a discretionary denial of adjustment of status. *Hosseini v. Gonzales*, 464 F.3d 1018, 1021 (9th Cir. 2006). An applicant's contention that the agency violated due process by failing to properly weigh the equities and hardship for adjustment of status is merely a non-reviewable abuse of discretion argument and does not constitute a colorable due process claim. *Bazua-*

Cota v. Gonzales, No. 06-70717, 2006 WL 2854382 at *1 (9th Cir. Oct. 3, 2006) (per curiam)

c. Voluntary Departure

The court lacks jurisdiction to review the agency's decision to grant or deny voluntary departure, as well as its discretionary decision to reduce a period of voluntary departure. 8 U.S.C. § 1129c(f); *Galeana-Mendoza v. Gonzales*, No. 04-73100, 2006 WL 2846379, at *2 n.5 (9th Cir. 2006); *cf. Padilla-Padilla v. Gonzales*, 463 F.3d 972, 976 (9th Cir. 2006) (reviewing contention that BIA exceeded its authority by reducing in a streamlined summary affirmance the IJ's period of voluntary departure).

C. Judicial Review Remains Over Non-Discretionary Determinations

The limitation on judicial review of discretionary decisions applies only to those decisions involving the exercise of discretion. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002) (holding that section 1252(a)(2)(B)(i) "eliminates jurisdiction only over decisions by the BIA that involve the exercise of discretion"). Accordingly, the court retains jurisdiction over non-discretionary questions, such as whether the applicant satisfied the continuous physical presence requirement, and whether an adult daughter qualifies as a child. *Id*. at 1144–45 (court retained jurisdiction to review the purely legal question of whether the applicant's adult daughter qualified as a "child" for purposes of cancellation of removal).

See also Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) (court retained jurisdiction to review purely legal claim of whether applicant qualified as a spouse for purposes of adjustment of status); *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (court retained jurisdiction over IJ's non-discretionary determination that cancellation applicant lacked good moral character based on incarceration in county jail); *Lagandaon v. Ashcroft*, 383 F.3d 983, 986–87 (9th Cir. 2004) (court retained jurisdiction over statutory question of whether cancellation applicant accrued ten years of physical presence before service of notice to appear); *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 788 (9th Cir. 2004) (court retained jurisdiction over BIA's "purely legal, rather than discretionary," denial of a Form I-212 waiver); *Hernandez v. Ashcroft*, 345 F.3d 824, 833–35 (9th

Cir. 2003) (court retained jurisdiction over non-discretionary determination that VAWA applicant suffered "extreme cruelty"); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003) (court retained jurisdiction to consider whether applicant was eligible for suspension under the petty offense exception); *Murillo-Salmeron v. INS*, 327 F.3d 898, 901(9th Cir. 2003) (court retained jurisdiction to review whether applicant's DUI conviction rendered him inadmissible, thus requiring a § 212(h) waiver of inadmissibility); *Molina-Estrada v. INS*, 293 F.3d 1089, 1093–94 (9th Cir. 2002) (court retained jurisdiction to review whether applicant's mother was a lawful permanent resident); *Dillingham v. INS*, 267 F.3d 996, 1003 (9th Cir. 2001) (court retained jurisdiction over BIA's determination that applicant was statutorily ineligible for adjustment of status); *Pondoc Hernaez v. INS*, 244 F.3d 752, 758 (9th Cir. 2001) (court retained jurisdiction under transitional rules to review continuous physical presence); *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (court retained jurisdiction under transitional rules to review continuous physical presence inquiry and certain statutory moral character determinations); *cf. Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (abuse of discretion argument characterized as due process violation did not confer jurisdiction); *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270–71 (9th Cir. 2001) (contention that BIA committed legal error by misapplying BIA precedent to her evidence of extreme hardship did not make the determination non-discretionary);.

The court also retains "jurisdiction to review whether the BIA applied the correct discretionary waiver standard in the first instance." *Murillo-Salmeron v. INS*, 327 F.3d 898, 901 (9th Cir. 2003) (holding that section 309(c)(4)(E) did not divest the court of jurisdiction where the BIA purported to affirm a discretionary decision that the IJ did not make) (internal quotation marks omitted); *see also Cervantes-Gonzales v. INS*, 244 F.3d 1001, 1005 (9th Cir. 2001) (court retained jurisdiction to review whether BIA applied the correct standard for determining eligibility for a section 212(i) waiver of inadmissibility).

D. Jurisdictional Bar Limited to Statutory Discretionary Eligibility Requirements

This court has "interpreted section 309(c)(4)(E) to pertain to the statutory eligibility requirements found in INA § 244(a)(1) and to the ultimate discretionary decision whether to grant the suspension based on the merits of the case." *Castillo-Perez v. INS*, 212 F.3d 518, 524 (9th Cir. 2000). An IJ's decision to deem

an application for suspension to be abandoned, and the BIA's decision to dismiss a claim of ineffective assistance of counsel are not discretionary decisions under section 244 of the INA, and the court retains jurisdiction over these claims. *Id*. (remanding for application of the law as it existed at the time of applicant's original hearing).

E. Jurisdiction Over Constitutional Issues and Questions of Law

The court retains jurisdiction to consider both constitutional questions and questions of law raised in a petition for review of a discretionary decision. 8 U.S.C. § 1252(a)(2)(D); *see also Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023 at * 2 (9th Cir. Oct. 26, 2006) (en banc)); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (post-REAL ID Act); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978–80 (9th Cir. 2006) (reviewing post-REAL ID Act due process and international law challenge to the ten-year physical presence requirement and applicability of the stop-time rule); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004 (9th Cir. 2003) (BIA's interpretation of the exceptional and extremely unusual hardship standard violated due process); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1166 (9th Cir. 2004) (due process and equal protection challenges to voluntary departure regime); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003) (due process challenge to streamlining procedure); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (due process challenge based on IJ bias); *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) (due process, ineffective assistance of counsel, and equitable tolling contentions); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105 (9th Cir. 2003) (due process claim); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (en banc) (due process challenge to the BIA's refusal to allow suspension applicant to supplement the record); *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002) (suspension applicant's due process claim); *Sanchez-Cruz v. INS*, 255 F.3d 775, 779–80 (9th Cir. 2001) (holding that the court would retain jurisdiction over allegations of IJ bias, but that applicant failed to exhaust her due process claim before the BIA); *Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000) (due process claim that BIA failed to review all relevant evidence submitted in suspension case); *Antonio-Cruz v. INS*, 147 F.3d 1129, 1131 (9th Cir. 1998) (due process claim based on IJ's "harsh manner and tone").

F. Authorized and Specified Discretionary Decisions–Subsection (ii)

Under subsection (ii) of 8 U.S.C. § 1252(a)(2)(B),

> no court shall have jurisdiction to review . . . any other decision or action of the Attorney General the authority for which is specified under [8 U.S.C. §§ 1151–1378] to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title [relating to asylum].

Spencer Enterprises, Inc. v. United States, 345 F.3d 683, 688–89 (9th Cir. 2003) (quoting 8 U.S.C. § 1252(a)(2)(B)(ii), and holding that section did not preclude jurisdiction over a challenge to the denial of an immigrant investor visa pursuant to 8 U.S.C. § 1153(b)(5)).

The *Spencer* court held that § 1252(a)(2)(B)(ii) does not bar review over all discretionary decisions, rather it applies only where the Attorney General's discretionary authority is "specified" in the statute in question. *Spencer,* 345 F.3d at 689. More specifically, for subsection (ii) to apply, "the language of the statute in question must provide the discretionary authority." *Id*.

Moreover, the "authority" to act must be in the discretion of the Attorney General, meaning that "the right or power to act is entirely within his or her judgment or conscience." *Spencer*, 345 F.3d at 690. In order to bar review, the statute must give the Attorney General "pure discretion, rather than discretion guided by legal standards." *Id.*; *see also Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (§ 1252(a)(2)(B)(ii) bars review of determination that aggravated felony qualifies as a "particularly serious crime" because statute provides discretionary authority without statutory guidelines). "In general terms, if a legal standard from an appropriate source governs the determination in question, that determination is reviewable for a clarification of that legal standard." *ANA Int'l Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004). More specifically, "if the statutory provision granting the Attorney General power to make a given decision also sets out specific standards governing that decision, the decision is not in the discretion of the Attorney General." *Id.* at 892 (internal quotation marks omitted). Although the court may not look to agency practice as a source for the relevant legal standards,

the court may use judicial precedent in order to interpret the relevant statutory standards. *See id*. at 893.

See also Nath v. Gonzales, No. 05-16557, 2006 WL 3110424, at *2 (9th Cir. Nov. 3, 2006) (§ 1252(a)(2)(B)(ii) does not bar jurisdiction over denial of motion to reopen) (citing *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004)); *Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006) (court retained jurisdiction to review whether agency applied correct legal standard in making "particularly serious crime" determination); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157–58 (9th Cir. 2005) (stating that court would have jurisdiction to review IJ's statutory denial of section 237(a)(1)(H) waiver of removal but not discretionary denial of waiver); *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1142 (9th Cir. 2005) (court retained jurisdiction to consider statutory waiver under 8 U.S.C. § 1186a(c)(4) to remove conditional basis of permanent resident status because determination not purely discretionary); *Unuakhaulu v. Gonzales*, 416 F.3d 931 (9th Cir. 2005) (§ 1252(a)(2)(B)(ii) precluded judicial review over agency's discretionary determination that offense qualifies as "particularly serious"); *Nakamoto v. Ashcroft*, 363 F.3d 874, 878 (9th Cir. 2004) (court retained jurisdiction over IJ's marriage fraud determination under 8 U.S.C. § 1227(a)(1)(G)(ii) because "the determination of whether a petitioner committed marriage fraud is not a decision the authority for which is specified under the INA to be entirely discretionary"); *ANA Int'l Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004) (Attorney General's decision to revoke visa under 8 U.S.C. § 1155 not barred by subsection (ii) as specified discretionary decision); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004) (court retained jurisdiction over denial of motion to reopen to adjust status); *Avendano-Ramirez v. Ashcroft*, 364 F.3d 813, 819 (9th Cir. 2004) (§ 1252(a)(2)(B)(ii) barred review of applicant's claim that IJ should have permitted her to withdraw application for admission under 8 U.S.C. § 1225(a)(4) because decision committed by statute to discretion of Attorney General); *Hernandez v. Ashcroft*, 345 F.3d 824, 833–34 (9th Cir. 2003) (determination of whether applicant suffered "extreme cruelty" a reviewable legal and factual determination); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (court retained jurisdiction to consider legal question regarding extent of Attorney General's authority under post-removal-period detention statute).

The REAL ID Act clarified that section 1252(a)(2)(B)(ii) applies regardless of whether the "judgment, decision, or action is made in removal proceedings." 8 U.S.C. § 1252(a)(2)(B) (as amended by the REAL ID Act); *compare Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 692 (9th Cir. 2003) (noting circuit split over whether section (ii) applies outside the context of removal proceedings); *see also ANA Int'l Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004) (assuming, but not deciding, applicability of subsection (ii) to a visa revocation decision under 8 U.S.C. § 1155).

G. Asylum Relief

Although asylum is a discretionary form of relief, 8 U.S.C. § 1252(a)(2)(B)(ii) explicitly exempts asylum determinations from the jurisdictional bar over discretionary decisions. Several new restrictions on eligibility for asylum, however, are not subject to judicial review:

1. One-Year Bar

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her asylum application was filed within one year after arrival in the United States. *See Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001); 8 U.S.C. § 1158(a)(2)(B).

Pursuant to 8 U.S.C. § 1158(a)(3), the court lacks jurisdiction to review the agency's determination that an asylum application is not timely. *Hakeem*, 273 F.3d at 815; *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 786 (9th Cir. 2004). The court also lacks jurisdiction over the agency's determination that no extraordinary circumstances excused the untimely filing of the application. *Molina-Estrada*, 293 F.3d at 1093 (citing 8 U.S.C. § 1158(a)(3)). The REAL ID Act did not restore judicial review over these determinations. *See Ramadan v. Gonzales*, 427 F.3d 1218, 1222–23 (9th Cir. 2005), *rehearing granted and case resubmitted on 7/26/06* (statutory provision permitting judicial review of constitutional and legal questions, 8 U.S.C. § 1252(a)(2)(D), did not confer jurisdiction over factual timeliness and extraordinary circumstance determinations).

2. Previous-Denial Bar

An applicant who previously applied for and was denied asylum is barred from receiving a grant of asylum. *See* 8 U.S.C. § 1158(a)(2)(C). The court lacks jurisdiction to review this determination. 8 U.S.C. §1158(a)(3).

3. Safe Third Country Bar

An applicant has no right to apply for asylum if he or she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality . . .) in which the alien's life or freedom would not be threatened on account of" the statutory grounds. 8 U.S.C. § 1158(a)(2)(A); *see, e.g.*, 8 C.F.R. § 208.30(e)(6) (implementing bilateral agreement between Canada and the U.S.). The court lacks jurisdiction to review the IJ's determination under this section. 8 U.S.C. § 1158(a)(3).

4. Terrorist Activity Bar

The court lacks jurisdiction to review the Attorney General's determination that an applicant is ineligible for asylum based on terrorist activity under 8 U.S.C. § 1158(b)(2)(A)(v). *See* 8 U.S.C. § 1158(b)(2)(D); *Bellout v. Ashcroft*, 363 F.3d 975, 977 (9th Cir. 2004). Section 1158(b)(2)(A)(v) eliminates eligibility for asylum if:

> the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or removable under section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, 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 United States.

Note that as to all removal proceedings instituted before, on, or after May 11, 2005, the REAL ID Act expanded the definitions of terrorist organizations and terrorist related activities. *See* Pub. L. No. 109-13, §§ 103–105, 119 Stat. 231 (2005), 8 U.S.C. § 1182(a)(3)(B) and 1227(a)(4)(B) (as amended).

5. Standard of Review

Under the permanent rules, the Attorney General's discretionary judgment whether to grant asylum relief "shall be conclusive unless manifestly contrary to the law and an abuse of discretion." 8 U.S.C. § 1252(b)(4)(D). "Thus, when refugee status has been established, we review the Attorney General's grant or denial of asylum for abuse of discretion." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004).

V. LIMITATIONS ON JUDICIAL REVIEW BASED ON CRIMINAL OFFENSES

A. Judicial Review Framework Before Enactment of the REAL ID Act of 2005

Before enactment of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), this court had limited jurisdiction over final administrative orders against applicants found removable, deportable or excludable based on enumerated criminal offenses.

Section 440(a) of AEDPA, enacted on April 24, 1996, amended 8 U.S.C. § 1105a(a)(10) by repealing judicial review over final orders of deportation against most criminal aliens. As amended, section 1105a(a)(10) provided that "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court." AEDPA, Pub. L. No. 104–132, § 440(a) (as amended by IIRIRA section 306(d)). This court held that section 440(a) is constitutional, and that it applies retroactively to pending cases. *See Duldulao v. INS*, 90 F.3d 396, 399–400 (9th Cir. 1996).

"Section 1105a(a)(10) and many other provisions of the Immigration Act were superseded by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996." *Elramly v. INS*, 131 F.3d 1284, 1285 n.1 (9th Cir. 1997) (per curiam). Section 321 of IIRIRA amended the aggravated felony definition in 8

U.S.C. §§ 1101(a)(43)(F) and 1101(a)(43)(S) by increasing the number of crimes qualifying as aggravated felonies. The aggravated felony amendments apply to "actions taken" on or after the September 30, 1996 enactment of IIRIRA. *See Valderrama-Fonseca v. INS*, 116 F.3d 853, 856–57 (9th Cir. 1997) ("actions taken" refers to administrative orders and decisions issued against an applicant, and may include steps taken by the applicant, but do not include acts of the courts); *cf. Park v. INS*, 252 F.3d 1018, 1025 (9th Cir. 2001) (aggravated felony amendments applied to actions taken on or after enactment of IIRIRA).

IIRIRA's transitional rules, applicable to cases in which deportation proceedings were initiated before April 1, 1997, and the final agency order was entered on or after October 31, 1996, limited petition-for-review jurisdiction for individuals found deportable based on enumerated offenses.

IIRIRA section 309(c)(4)(G) provides:

> [T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

The listed criminal offenses are:

Section 212(a)(2):	the criminal grounds of inadmissibility
Section 241(a)(2)(A)(i) & (ii):	two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, for which both crimes carry possible sentences of one year or longer

Section 241(a)(2)(A)(iii):	conviction of an aggravated felony at any time after admission
Section 241(a)(2)(B):	controlled substance convictions and drug abuse
Section 241(a)(2)(C):	certain firearm offenses
Section 241(a)(2)(D):	miscellaneous crimes

Likewise, IIRIRA's permanent rules, applicable to removal proceedings initiated on or after April 1, 1997, limited petition for review jurisdiction for individuals found removable based on enumerated offenses.

Section 1252(a)(2)(C) provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

The listed criminal offenses are:

8 U.S.C. § 1182(a)(2):	the criminal grounds of inadmissibility
8 U.S.C. § 1227(a)(2)(A)(i) & (ii):	two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, for which both crimes carry possible sentences of one year or longer
8 U.S.C. § 1227(a)(2)(A)(iii):	conviction of an aggravated felony at any time after admission

8 U.S.C. § 1227(a)(2)(B):	controlled substance convictions and drug abuse
8 U.S.C. § 1227(a)(2)(C):	certain firearm offenses
8 U.S.C. § 1227(a)(2)(D):	miscellaneous crimes

Despite these provisions limiting judicial review, this court held that it retained jurisdiction to determine it own jurisdiction. *Ye v. INS*, 241 F.3d 1128, 1131 (9th Cir. 2000). Thus, the court retained jurisdiction to address three threshold issues: "whether the petitioner is [1] an alien, [2] removable, and [3] removable because of a conviction for a qualifying crime." *Zavaleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotation marks, alteration, and emphasis omitted) (retaining jurisdiction to review whether petitioner was "removable").

The court explained that often "the jurisdictional question and the merits collapse into one." *Ye*, 214 F.3d at 1131. If the court determined that the applicant was removable based on a conviction of an enumerated crime, the court lacked direct judicial review over the petition for review. *See Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073 (9th Cir. 2001); *see also Unuakhaulu v. Ashcroft*, 416 F.3d 931, 936–37 (9th Cir. 2005) (as amended) (holding that court lacks jurisdiction only where applicant is found removable or ineligible for relief based on conviction of an enumerated crime).

This elimination of direct review applied to constitutional and other claims. *See, e.g.*, *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1064 (9th Cir. 2003) (no jurisdiction to review due process and equal protection claims on petition for review); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1135–36 (9th Cir. 2000) (no jurisdiction to review "substantial constitutional" claims on petition for review); *Alfaro-Reyes v. INS*, 224 F.3d 916, 921–22 (9th Cir. 2000) ("IIRIRA section 309(c)(4)(G) divests us of jurisdiction to hear constitutional claims on direct appeal"). The court held, however, that despite the elimination of direct review, such constitutional claims could be raised in habeas corpus proceedings. *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 878–79 (9th Cir. 2003); *see also INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (AEDPA and IIRIRA did not repeal habeas corpus jurisdiction to challenge legal validity of final order of deportation or removal);

Arreola-Arreola v. Ashcroft, 383 F.3d 956, 964 (9th Cir. 2004) (same); *see also Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999) (holding, pre-*St. Cyr*, that neither AEDPA nor IIRIRA repealed statutory habeas remedy under 28 U.S.C. § 2241).

B. Judicial Review Following Enactment of the REAL ID Act of 2005

The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), amended the judicial review provisions of the Immigration and Nationality Act by eliminating statutory and non-statutory habeas jurisdiction over final orders of removal, deportation and exclusion, by transferring to this court all such cases pending in the district courts as of the date of enactment, and by explicitly providing for judicial review of constitutional questions and questions of law raised in petitions for review over which the court would otherwise lack jurisdiction.

The REAL ID Act's amendments to the judicial review provisions of the Immigration and Nationality Act and IIRIRA are effective as to all final administrative orders of removal, deportation, or exclusion issued before, on, or after May 11, 2005, the date of enactment. *See* REAL ID Act § 106(b) (uncodified).

1. Expanded Scope of Review

Although the REAL ID Act did not repeal 8 U.S.C. § 1252(a)(2)(C), it added a new provision, § 1252(a)(2)(D), as follows:

> Judicial Review of Certain Legal Claims –
> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023 at *2 (9th Cir. Oct. 26, 2006) (en banc), this court interpreted § 1252(a)(2)(D) as

repealing "all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) or (C)) following the amendment of that section by the REAL ID Act." Moreover, the court held that "Congress explicitly made the amendments restoring our jurisdiction retroactive," and that "§ 1252(a)(2)(D), as added by the REAL ID Act, applies to . . . all [] pending or future petitions for direct review challenging final orders of removal, except as may otherwise be provided in § 1252 itself." *Id.* (citing the REAL ID Act § 106(b)).

Pursuant to 8 U.S.C. § 1252(a)(2)(D), the court has jurisdiction to determine whether an offense qualifies as an aggravated felony. *See, e.g.*, *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1053 (9th Cir. 2006) (discussing the expanded scope of review under 8 U.S.C. § 1252(a)(2)(D)); *Parrilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005); *Lisbey v. Gonzales*, 420 F.3d 930, 931 (9th Cir. 2005); *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1024–25 (9th Cir. 2005).

The court also has jurisdiction to determine whether a conviction qualifies as a crime of domestic violence, *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1013 (9th Cir. 2006), or a crime involving moral turpitude, *Galeana-Mendoza v. Gonzales*, No. 04-73100, 2006 WL 2846379 at * 2 (9th Cir. Oct. 6, 2006); *Navarro-Lopez v. Gonzales*, 455 F.3d 1055, 1057 (9th Cir. 2006); *Notash v. Gonzales*, 427 F.3d 693, 695–96 (9th Cir. 2005).

See also Perez-Enriquez v. Gonzales, 463 F.3d 1007, 1009–10 (9th Cir. 2006) (en banc) (court retained jurisdiction to consider legal question of whether applicant's admissibility is determined as of admission to lawful temporary status or adjustment to lawful permanent resident status).

2. Limitation on Forum for Review

Although the REAL ID Act expanded the *scope* of judicial review over final orders of removal in cases involving enumerated criminal offenses, it narrowed the *forum* of judicial review by eliminating habeas corpus jurisdiction in such cases. *See* REAL ID Act, § 106(a) (amending 8 U.S.C. § 1252). Thus, a petition for review filed with the appropriate court of appeals is now the sole means of challenging a final agency order of removal, deportation or exclusion.

3. Applicability to Former Transitional Rules Cases

In addition to restoring direct judicial review and eliminating habeas jurisdiction over final orders of removal in cases involving enumerated criminal offenses, section 106(d) of the REAL ID Act directs that a petition for review filed in a transitional rules case "shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252) [IIRIRA's permanent rules]." *See* REAL ID Act § 106(d) (uncodified); *Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005) (explaining that jurisdiction over transitional rules cases is now governed by 8 U.S.C. § 1252 rather than 8 U.S.C. § 1105(a)). Accordingly, the restoration of direct judicial review over cases involving enumerated offenses applies to both transitional rules and permanent rules cases.

4. Limitations on Jurisdiction under 8 U.S.C. § 1252(a)(2)(C)

The court lacks jurisdiction over petitions for review brought by applicants convicted of enumerated offenses who do not raise a colorable question of law or constitutional question. *See* 8 U.S.C. § 1252(a)(2)(C); *see also, e.g.*, *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1103 (9th Cir. 2006) ("While we have no jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense, including a controlled substance offense . . . we are not barred from hearing the constitutional claims or questions of law raised in [the] petition.") (internal quotation marks omitted); *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1065 (9th Cir. 2006); *Navarro-Lopez v. Gonzales*, 455 F.3d 1055, 1057 (9th Cir. 2006); *Almaghzar v. Gonzales*, 457 F.3d 915, 923 (9th Cir. 2006) (noting that court lacked jurisdiction under 8 U.S.C. § 1252(a)(2)(C) to review discretionary determination that convictions constituted particularly serious crimes but retaining jurisdiction to review due process challenge to that determination).

8 U.S.C. § 1252(a)(2)(C) does not preclude judicial review unless the agency premises removability on the enumerated criminal offenses. *Kelava v. Gonzales*, 434 F.3d 1120, 1122–23 (9th Cir. 2006) (8 U.S.C. § 1252(a)(2)(C) did not preclude judicial review where BIA failed to address IJ's findings on aggravated felony charge and instead based decision solely on terrorist activity charge); *Unuakhaulu v. Ashcroft*, 416 F.3d 931, 936–37 (9th Cir. 2005) (as

amended) (retaining jurisdiction even though agency found applicant *removable* based on aggravated felony conviction because removal not ordered on that basis and alternate grounds of removal charged).

VI. EXCLUSIVE JURISDICTION PROVISION–8 U.S.C. § 1252(g)

Section 242(g) of IIRIRA, 8 U.S.C. § 1252(g), provides:

> Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

"Section 1252(g) is not subject to IIRIRA's transitional rules; it applies without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under the Act." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (citing IIRIRA § 306(c)(1)) (internal quotation marks omitted).

In *Reno v. American-Arab Anti-Discrimination Comm.*, the Supreme Court construed Section 1252(g) narrowly, holding that "[t]he provision applies only to three discrete actions that the Attorney General may take: her decision or action to *commence* proceedings, *adjudicate* cases, or *execute* removal orders." 525 U.S. 471, 482 (1999) (internal quotation marks omitted). The Court held that it lacked jurisdiction over the aliens' selective enforcement claims because these claims fell squarely within the prohibition on review of the Attorney's General's decision to "commence proceedings." *Id.* at 486.

See also Alcaraz v. INS, 384 F.3d 1150, 1161 (9th Cir. 2004) (§ 1252(g) did not bar jurisdiction over repapering claim); *Wong v. United States*, 373 F.3d 952, 965 (9th Cir. 2004) (§ 1252(g) did not bar review of actions occurring *prior* to decision to commence proceedings or execute removal order); *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) (§ 1252(g) did not bar

district court's injunction requiring agency to treat criminal alien under immigration law existing at time of offense); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598–99 (9th Cir. 2002) (§ 1252(g) barred review over claim that agency should have commenced deportation proceedings immediately upon becoming aware of applicant's illegal presence but did not bar review of retroactivity challenge to application of IIRIRA's permanent rules); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120–21 (9th Cir. 2001) (§ 1252(g) barred review of discretionary, quasi-prosecutorial decisions by asylum officers and INS district directors to adjudicate cases or refer them to IJs for hearing but did not bar review of challenge to agency decision to halt consideration of suspension of deportation applications indefinitely); *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc) (§ 1252(g) did deprive district court of jurisdiction to enter preliminary injunction); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 (9th Cir. 2000) (§ 1252(g) did not deprive district court of habeas jurisdiction); *Barapind v. Reno*, 225 F.3d 1100, 1109–10 (9th Cir. 2000) (§ 1252(g) did not affect the availability and scope of habeas review); *Sulit v. Schiltgen*, 213 F.3d 449, 453 (9th Cir. 2000) (§ 1252(g) did not bar review of due process claim that green cards were seized improperly without a hearing); *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999) (§ 1252(g) did not strip district court of habeas jurisdiction); *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) (§ 1252(g) did not prohibit district court from enjoining deportation of aliens who raised general collateral challenges to unconstitutional agency practices).

VII. JURISDICTION OVER OTHER PROCEEDINGS

A. Jurisdiction Over Motions to Reopen

The denial of a motion to reopen is a final administrative decision generally subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321–22 (9th Cir. 1997) ("other recent changes to the INA did not alter our traditional understanding that the denial of a motion to reconsider or to reopen generally does fall within our jurisdiction over final orders of deportation"); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (permanent rules); *see also* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order").

However, jurisdiction over motions to reopen may be limited where the underlying request for relief is discretionary. "Section 1252(a)(2)(B)(i) permits the exercise of jurisdiction in cases in which the BIA rules that a motion to reopen fails to satisfy procedural standards such as the evidentiary requirements specified in 8 C.F.R. § 1003.2(c)(1), but bars jurisdiction where the question presented is essentially the same discretionary issue originally decided." *Fernandez v. Gonzales*, 439 F.3d 592, 600 (9th Cir. 2006). Thus, "[i]f . . . the BIA determines that a motion to reopen proceedings in which there has already been an unreviewable discretionary determination concerning a statutory prerequisite to relief does not make out a prima facie case for that relief, § 1252(a)(2)(B)(i) precludes our visiting the merits, just as it would if the BIA had affirmed the IJ on direct appeal." *Id*. at 601.

However, "[w]here the relief sought is formally the same as was previously denied but the evidence submitted with a motion to reopen is directed at a different basis for providing the same relief, the circumstances can take the matter out of the realm of § 1252(a)(2)(B)(i)." *Id*. For example, the court would have jurisdiction to review the denial of a motion to reopen seeking consideration of non-cumulative evidence, such as a newly-discovered life threatening medical condition afflicting a qualifying relative. *Id*.

The court also has jurisdiction to review motions to reopen seeking consideration of new requests for discretionary forms of relief. *See de Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004) (court retained jurisdiction to review denial of motion to reopen to apply for adjustment of status); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 527 (9th Cir. 2004) (§ 1252(a)(2)(B)(i) did not preclude review of denial of motion to reopen to re-apply for adjustment of status where agency had not previously ruled on discretionary adjustment application); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1169–70 (9th Cir. 2003) (§ 1252(a)(2)(B)(i) did not bar review of denial of motion to reopen to apply for adjustment of status); *Arrozal v. INS*, 159 F.3d 429, 431–32 (9th Cir. 1998) (§ 309(c)(4)(E) of transitional rules did not bar review of denial of motion to reopen to apply in the first instance for suspension of deportation).

Likewise, the court has jurisdiction to review the denial of motions to reopen in which an independent claim of ineffective assistance of counsel is at issue. *Fernandez*, 439 F.3d at 602. This is true even where evaluations of ineffectiveness

and prejudice require an indirect weighing of discretionary factors. *See id.*; *see also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002).

"In sum, we have jurisdiction over motions to reopen regarding cases in which: (1) the agency has not made a prior discretionary determination regarding the relief sought; (2) the agency's denial of a motion to reopen applies a procedural statute, regulation, or rule, as opposed to determining that the movant did not establish a prima facie case for relief that merits reopening a prior decision denying relief on an unreviewable discretionary ground; (3) the evidence submitted addresses a hardship ground so distinct from that considered previously as to make the motion to reopen a request for new relief, rather than for reconsideration of a prior denial; and (4) an independent claim such as ineffective assistance of counsel is at issue. Section 1252(a)(2)(B)(i) bars jurisdiction, however, to review the denial of a motion to reopen that pertains only to the merits basis for a previously-made discretionary determination under one of the enumerated provisions, 8 U.S.C. §§ 1182(h), 1182(i), 1229b, 1229c, and 1255." *Fernandez*, 439 F.3d at 602–03.

The court lacks jurisdiction to review the BIA's decision not to invoke its sua sponte authority to reopen proceedings under 8 C.F.R. § 1003.2(a). *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

B. Expedited Removal Proceedings

Under 8 U.S.C. § 1225(b)(1), the government may order the expedited removal of certain inadmissible aliens at the port of entry. *See Padilla v. Ashcroft*, 334 F.3d 921, 922–23 (9th Cir. 2003) (describing expedited removal procedure); *see also* 8 C.F.R. § 235.3(b). Under the expedited removal process, "the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i).

Except for limited habeas proceedings, "no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited] order of removal pursuant to section 1225(b)(1) of this title." 8 U.S.C. § 1252(a)(2)(A).

Habeas proceedings in the expedited removal context are limited to determinations of:

> (A) whether the petitioner is an alien,
> (B) whether the petitioner was ordered removed under such section, and
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee . . . or has been granted asylum . . . .

8 U.S.C. § 1252(e)(2).

C. Legalization Denials

The Immigration Reform and Control Act of 1986 ("IRCA") established a legalization or "amnesty" program for two groups of aliens: (1) those who entered the United States illegally before January 1, 1982, *see* 8 U.S.C. § 1255a, INA § 245A; and (2) Special Agricultural Workers ("SAWs"), *see* 8 U.S.C. § 1160, INA § 210.

Judicial review of a § 1255a legalization denial is available only during review of a final order of deportation or removal. *See Guzman-Andrade v. Gonzales*, 407 F.3d 1073, 1075 (9th Cir. 2005) (holding that court continues to have jurisdiction to review denial of a § 1255a legalization application when reviewing final removal order of an individual who would have been placed in deportation proceedings prior to passage of IIRIRA); *Noriega-Sandoval v. INS*, 911 F.2d 258, 261 (9th Cir. 1990) (per curiam) (court lacked jurisdiction to review Legalization Appeals Unit's denial of application for adjustment to temporary resident status under IRCA because challenge did not arise in context of review of order of deportation). "Thus, until the INS initiates deportation proceedings against an alien who unsuccessfully applies for legalization, that alien has no access to substantive judicial review of the LAU's denial." *Proyecto San Pablo v. INS*, 189 F.3d 1130, 1134 (9th Cir. 1999); *see also* 8 U.S.C. § 1255a(f)(4)(A) ("There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title (as in effect before October 1, 1996)."). The courts lack jurisdiction to review § 1255a legalization denials in

exclusion proceedings. *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1278 (9th Cir. 1996) ("the plain meaning of the statute precludes review of a legalization application in an exclusion proceeding").

For SAW denials, judicial review is available during review of a final order of deportation or exclusion. *See* 8 U.S.C. § 1160(e)(3)(A) ("There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title (as in effect before October 1, 1996)."); *see also Espinoza-Gutierrez*, 94 F.3d at 1278 (noting that for SAW applicants, "Congress did provide for judicial review of LAU denials in exclusion proceedings"). The SAW judicial review provision applies to judicial review of a final order of removal under 8 U.S.C. § 1252(a)(1). *Perez-Martin v. Ashcroft*, 394 F.3d 752, 757 (9th Cir. 2005). The BIA lacks jurisdiction to review the denial of SAW status. *Id.* at 758.

D. Registry

The transitional rules do not bar review of the denial of an application for registry under 8 U.S.C. § 1259. *See Beltran-Tirado v. INS*, 213 F.3d 1179, 1182–83 (9th Cir. 2000).

E. In Absentia Removal Orders

Any petition for review from an in absentia order of removal "shall . . . be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable." 8 U.S.C. § 1229a(b)(5)(D); *see also Lo v. Ashcroft*, 341 F.3d 934, 936 (9th Cir. 2003). These limitations do not apply if the applicant claims to be a national of the United States. *See* 8 U.S.C. § 1229a(b)(5)(D) (excluding cases described in 8 U.S.C. § 1252(b)(5)).

F. Reinstated Removal Proceedings

8 U.S.C. § 1231(a)(5) provides:

> Reinstatement of removal orders against aliens illegally reentering
>
> If the Attorney General finds that an alien has reentered the United States 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 and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Id. (enacted in 1996, replacing the former reinstatement provision at 8 U.S.C. § 1252(f) (repealed 1996)).

Jurisdiction over reinstatement orders lies in the court of appeals. *See Castro-Cortez v. INS*, 239 F.3d 1037, 1043–44 (9th Cir. 2001) (holding that new reinstatement provision does not apply to aliens who reentered the United States before April 1, 1997).

This court has addressed the revised reinstatement provisions in the following cases: *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) (reinstatement procedures in 8 C.F.R. § 241.8 violate the INA because they provide for reinstatement without right to hearing before an IJ) (opinion withdrawn pending rehearing en banc); *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 784 (9th Cir. 2004) (reinstatement provisions are not impermissibly retroactive when applied to pre-1996 deportation orders); *Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003) (declining to decide whether reinstated expedited removal order violates due process because applicant could not show prejudice); *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173–74 (9th Cir. 2001) (reinstatement of prior removal order did not violate due process because applicant already had one full and fair hearing); *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123 (9th Cir. 2001) (INS may reinstate order of deportation pertaining applicant granted voluntary departure in lieu of deportation).

G. Discretionary Waivers

1. Three and Ten-year Unlawful Presence Bars

"No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver" of the three and ten-year unlawful presence bars set forth in 8 U.S.C. § 1182(a)(9)(B)(i). 8 U.S.C. § 1182(a)(9)(B)(v) (the "Attorney General has sole discretion to waive [the bars] in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien").

2. Document Fraud Waiver

"No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver" of the document fraud ground of inadmissibility in 8 U.S.C. § 1182(a)(6)(F)(i). 8 U.S.C. § 1182(d)(12).

3. Criminal Inadmissibility Waivers

"No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a [Section 212(h)] waiver." 8 U.S.C. § 1182(h).

4. Fraud Waivers

"No court shall have jurisdiction to review a decision or action of the Attorney General regarding a [Section 212(i)] waiver." 8 U.S.C. § 1182(i)(2).

H. Inadmissibility on Medical Grounds

An individual may not appeal an IJ's removal decision that is based solely on a medical certification that he or she is inadmissible under the health-related grounds in 8 U.S.C. § 1182(a)(i). *See* 8 U.S.C. § 1252(a)(3) ("No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.").

VIII. SCOPE AND STANDARD OF REVIEW

A. Scope of Review

1. Where BIA Conducts De Novo Review

"Where . . . the BIA reviews the IJ's decision de novo, our review is limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted." *Shah v. INS*, 220 F.3d 1062, 1067 (9th Cir. 2000) (internal quotation marks omitted). Where the BIA conducts a de novo review, "[a]ny error committed by the IJ will be rendered harmless by the Board's application of the correct legal standard." *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995).

2. Where BIA Conducts Abuse of Discretion Review

"If . . . the BIA reviews the IJ's decision for an abuse of discretion, we review the IJ's decision." *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997); *see also Yepes-Prado v. INS*, 10 F.3d 1363, 1366–67 (9th Cir. 1993).

3. Where BIA Incorporates IJ's Decision

"Where . . . the BIA has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's." *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002).

4. *Burbano* Adoption and Affirmance

Where the BIA cites its decision in *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), and does not express disagreement with any part of the IJ's decision, the BIA adopts the IJ's decision in its entirety. *See Abebe v. Gonzales*, 432 F.3d 1037, 1040 (9th Cir. 2005) (en banc). Unlike a streamlined summary affirmance (discussed below), which signifies only that the result the BIA reached was correct and any errors were harmless or nonmaterial, a *Burbano* affirmance signifies that the BIA has conducted an independent review of the record and has determined that its conclusions are the same as those articulated by the IJ. *See id.* If the BIA intends to constrict the scope of its opinion to apply to only certain grounds upon which the IJ's decision rested, the BIA can and should specifically state that it is so

limiting its opinion. *See id*. (citing *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005) (summarily reversed on other grounds in *Gonzales v. Tchoukhrova*, --- S.Ct. ----, No. 05-1401, 2006 WL 1221941 (Oct. 2, 2006)).

5. Where BIA's Standard of Review is Unclear

Where it is unclear whether the BIA conducted a de novo review, the court may also "look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion." *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197 (9th Cir. 2000) (reviewing both opinions even though the BIA's "phrasing seems in part to suggest that it did conduct an independent review of the record," because "the lack of analysis that the BIA opinion devoted to the issue at hand–its simple statement of a conclusion–also suggests that the BIA gave significant weight to the IJ's findings.").

6. Single Board Member Review

Although appeals of the immigration judge's denial of relief were previously heard by three-member BIA panels, an appeal may now be reviewed by a single member of the BIA pursuant to 8 C.F.R. § 1003.1(e)(5). A single BIA member is charged with the task of deciding an appeal and issuing a brief order, unless the member determines that an opinion is necessary and therefore designates the case for decision by a three-member panel under 8 C.F.R. § 1003.1(e)(5). *See Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012–13 (9th Cir. 2006) (comparing BIA single-member and three-panel member review). A case must be decided by a three-member panel if it presents "[t]he need to establish precedent construing the meaning of laws, regulations, or procedures." 8 C.F.R. § 1003.1(e)(6).

The BIA's unpublished one-member decisions are not entitled to *Chevron* deference. *Garcia-Quintero*, 455 F.3d at 1009. However, unpublished decisions may be eligible for some deference under *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). *Id*.

7. Streamlined Cases

One member of the BIA may summarily affirm or "streamline" an IJ's decision, without opinion, under 8 C.F.R. § 1003.1(e)(4) or 8 C.F.R. § 1003.1(a)(7) (formerly codified at 8 C.F.R. § 3.1(e)(4) and 8 C.F.R. § 3.1(a)(7)). If the BIA member determines that the decision should be affirmed without opinion, the BIA shall issue an order stating "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination." 8 C.F.R. § 1003.1(e)(4)(ii). Moreover, "[a]n order affirming without opinion . . . shall not include further explanation or reasoning." *Id.* This court has held that a streamlined decision that included a footnote disavowing the IJ's adverse credibility determination, although in violation of the regulation, was nothing more than harmless surplusage and caused no prejudice. *See Kumar v. Gonzales*, 439 F.3d 520, 523–24 (9th Cir. 2006) (mandate pending). However, this court has also explained that when the BIA issues a streamlined decision, it is required to affirm the entirety of the IJ's decision. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980 (9th Cir. 2006) (BIA abused its discretion in reducing in streamlined decision IJ's voluntary departure period).

"The practical effect of streamlining is that, unless the BIA opts for three-judge review, the IJ's decision becomes the BIA's decision and we evaluate the IJ's decision as we would that of the Board." *Lanza v. Ashcroft*, 389 F.3d 917, 925 (9th Cir. 2004) (internal quotation marks omitted). Even though the IJ's decision becomes the final agency determination, summary affirmance does not necessarily mean that the BIA has adopted or approved of the IJ's reasoning, only that the BIA approves the result reached." *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821 (9th Cir. 2004). "[W]hen the BIA invokes its summary affirmance procedures, it pays for the opacity of its decision by taking on the risk of reversal in declining to articulate a different or alternate basis for the decision should the reasoning proffered by the IJ prove faulty." *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 786 (9th Cir. 2004) (internal quotation marks and alterations omitted).

The BIA's summary affirmance procedure does not violate due process. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848 (9th Cir. 2003) (cancellation of removal); *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (same in asylum context).

a. Jurisdiction Over Regulatory or "As-Applied" Challenges to Streamlining

Where the decision on review is a discretionary hardship determination, the court lacks jurisdiction over a challenge that the BIA's decision to streamline a case violated the regulations. *See Falcon Carriche*, 350 F.3d at 852–54; *Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 962 (9th Cir. 2004).

The court retains jurisdiction over regulatory challenges to streamlining in other contexts. *See, e.g.*, *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (holding that regulatory challenge to streamlining in asylum case is not beyond judicial review, but declining to reach the question because the court granted the petition); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821–22 (9th Cir. 2004); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 852 (9th Cir. 2003) (rejecting the government's contention that the BIA's decision to streamline a case is inherently discretionary, and therefore never subject to review); *Chen v. Ashcroft*, 378 F.3d 1081 (9th Cir. 2004) (retaining jurisdiction over regulatory challenge to streamlining and concluding that BIA erred in summarily affirming IJ's denial of application for adjustment of status under Chinese Student Protection Act because legal issue presented not squarely controlled by existing BIA or federal court precedent).

However, where the court reaches the merits of the agency decision, it is "unnecessary and duplicative" to review the BIA's decision to streamline. *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154–55 (9th Cir. 2005); *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (review of the BIA's decision to streamline decision would be "superfluous" under rationale set forth in *Falcon Carriche*).

b. Streamlining and Multiple Grounds

Where the BIA's summary affirmance without opinion leaves the court unable to discern whether it affirmed the IJ on a reviewable ground or an unreviewable ground, the court will remand the case to the BIA for clarification of the grounds for its decision. *See Lanza v. Ashcroft*, 389 F.3d 917, 924 (9th Cir. 2004) (remanding asylum case where it was unclear whether the BIA's affirmance without opinion was based on a reviewable ground – the merits of the asylum

claim – or an unreviewable ground – untimeliness); *Diaz-Ramos v. Gonzales*, 404 F.3d 1118, 1118 (9th Cir. 2005) (per curiam order) (granting government's motion to remand for clarification of grounds for summary affirmance without opinion of denial of cancellation of removal); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157 (9th Cir. 2005) (remanding streamlined appeal for determination of whether BIA affirmed IJ's denial of waiver of removal on statutory or discretionary grounds); *see also Falcon Carriche v. Ashcroft*, 350 F.3d 845, 855 n.10 (9th Cir. 2003) (noting, but not reaching, the "potentially anomalous situation . . . where both discretionary and non-discretionary issues are presented to the BIA and the BIA's streamlining procedure prevents us from discerning the reasons for the BIA's decision").

However, where the court must necessarily decide the merits of the reviewable ground in the course of deciding the other claims for relief, "jurisprudential considerations that weighed in favor of remand to the BIA in *Lanza* do not apply." *Kasnecovic v. Gonzales*, 400 F.3d 812, 815 (9th Cir. 2005) (IJ denied asylum based on the non-reviewable one-year bar and reviewable adverse credibility grounds and this court affirmed the adverse credibility determination in reviewing the denial of withholding of removal and CAT relief).

c. Novel Legal Issues

The BIA errs in streamlining an appeal despite the presence of novel legal questions not squarely controlled by existing BIA or federal court precedent, factual and legal questions that are not insubstantial, a complex factual scenario, and applicability to numerous other aliens. *Chen v. Gonzales*, 378 F.3d 1081, 1086–87 (9th Cir. 2004) (remanding to the BIA for consideration of a novel legal issue in the first instance).

d. Streamlining and Motions to Reopen

"[W]here the BIA entertains a motion to reopen in the first instance, and then fails to provide specific and cogent reasons for its decision, we are left without a reasoned decision to review." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005). Accordingly, the BIA abuses its discretion when it summarily denies a motion to reopen without explanation. *Id.* (rejecting

government's contention that BIA's summary denial of a motion to reopen and remand was consistent with BIA's streamlining procedures).

8. Review Limited to BIA's Reasoning

"[T]his court cannot affirm the BIA on a ground upon which it did not rely." *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000); *see also Hasan v. Ashcroft*, 380 F.3d 1114, 1122 (9th Cir. 2004) (rejecting government's contention that applicants were ineligible for asylum because they could have relocated because agency did not rely on that basis in denying asylum relief). In other words, "we must decide whether to grant or deny the petition for review based on the Board's reasoning rather than our independent analysis of the record." *Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004); *see also Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) ("In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency. If we conclude that the BIA's decision cannot be sustained upon its reasoning, we must remand to allow the agency to decide any issues remaining in the case.").

9. Review Generally Limited to Administrative Record

This court's review is generally limited to the information in the administrative record. *See Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (court is "statutorily prevented from taking judicial notice of the Country Report" that petitioner did not submit to the BIA). "We may review out-of-record evidence only where (1) the Board considers the evidence; or (2) the Board abuses its discretion by failing to consider such evidence upon the motion of an applicant." *Id.* at 964; *Altawil v. INS*, 179 F.3d 791, 792 (9th Cir. 1999) (order) (denying motion to reconsider order striking supplemental excerpts of record).

10. Judicial and Administrative Notice

However, this court is not precluded from taking judicial notice of an agency's own records. *See Lising v. INS*, 124 F.3d 996, 998–99 (9th Cir. 1997) (taking judicial notice of application for naturalization). This court may take judicial notice of "dramatic foreign developments" that occur after the BIA's determination. *See Gafoor v. INS*, 231 F.3d 645, 655–56 (9th Cir. 2000) (taking judicial notice of Fijian coup which occurred after the BIA's decision). This court

may also take judicial notice under Federal Rule of Evidence 201 of adjudicative facts not subject to reasonable dispute. *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004) (taking judicial notice of existence and operations of Indian counter-terrorism agency and reversing negative credibility finding based on insufficient corroborative evidence).

When the agency takes administrative notice of events occurring after the merits hearing, it must provide notice to the parties, and in some cases, an opportunity to respond. *See Circu v. Gonzales*, 450 F.3d 990, 994–95 (9th Cir. 2006) (en banc) (IJ violated due process by taking judicial notice of a new country report without providing notice and an opportunity to respond). Notice of intent to take administrative notice is all that is required if extra-record facts and questions are "legislative, indisputable, and general." *See Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992). However, "more controversial or individualized facts require *both* notice to the alien that administrative notice will be taken *and* an opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts." *Circu*, 450 F.3d at 993 (emphasis in original and citations omitted) (IJ violated due process by taking judicial notice of new country report without providing notice and opportunity to respond). An example of an indisputable fact is a political party's victory in an election, whereas a controversial fact would be whether the election has vitiated any previously well-founded fear of persecution. *Id*. at 994.

11. No Additional Evidence

Under 8 U.S.C. § 1252(a)(1), "the court may not order the taking of additional evidence under section 2347(c) of Title 28." *See also Altawil v. INS*, 179 F.3d 791, 792–93 (9th Cir. 1999) (order) (denying motion for leave to adduce additional evidence); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003).

12. Waiver

"Issues raised in a brief that are not supported by argument are deemed abandoned." *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (challenge to denial of motion to reopen, referred to in statement of the case but not discussed in body of the opening brief, was waived); *see also Chebchoub v. INS*,

257 F.3d 1038, 1045 (9th Cir. 2001) (petitioner failed to brief denial of motion to reopen); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) (declining to reach issue raised for the first time in the reply brief).

Cf. Mamouzian v. Ashcroft, 390 F.3d 1129, 1136 (9th Cir. 2004) (holding that applicant did not waive challenge to future persecution finding, and refusing to "pars[e] her brief's language in a hyper technical manner"); *Ndom v. Ashcroft*, 384 F.3d 743, 750–51 (9th Cir. 2004) (rejecting government's contention that applicant waived asylum and withholding of removal claims by failing to articulate proper standard of review or argue past persecution); *Guo v. Ashcroft*, 361 F.3d 1194, 1199 (9th Cir. 2004) (rejecting government's contention that asylum applicant waived challenge to negative credibility finding because issue sufficiently argued in opening brief); *Mejia v. Ashcroft*, 298 F.3d 873, 876 (9th Cir. 2002) ("failure to recite the proper standard of review does not constitute waiver of a properly raised merits issue").

a. Exceptions to Waiver

(i) No Prejudice to Opposing Party

The court has discretion to review an issue not raised in a petitioner's briefs "if the failure to raise the issue properly did not prejudice the defense of the opposing party." *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (internal quotation marks omitted) (reviewing repapering issue raised first in Fed. R. App. P. 28(j) letter and discussed at oral argument and in post-argument supplemental briefs); *see also Ndom v. Ashcroft*, 384 F.3d 743, 751 (9th Cir. 2004) (noting lack of prejudice because government briefed issue); *Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004) (reviewing appropriateness of summary dismissal because issue briefed by government).

(ii) Manifest Injustice

The court may also "review an issue not raised in a petitioner's opening brief if the failure to do so would result in manifest injustice." *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (internal quotation marks omitted) (failure to review applicant's repapering issue would result in manifest injustice).

13. Agency Bound by Scope of 9th Circuit's Remand

The BIA is bound by the scope of this court's remand in situations where the scope of the remand is clear. *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1173 (9th Cir. 2006) (BIA did not err in refusing to entertain issue beyond scope of this court's remand).

14. Where Agency Ignores a Procedural Defect

"When the BIA has ignored a procedural defect and elected to consider an issue on its substantive merits, [this court] cannot then decline to consider the issue based upon this procedural defect." *Abebe v. Gonzales*, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc).

B. Standards of Review

The proper standard of review in immigration proceedings depends on the nature of the decision being reviewed. *See Manzo-Fontes v. INS*, 53 F.3d 280, 282 (9th Cir. 1995) (discussing standards); *see also* 8 U.S.C. § 1252(b)(4) *and* Ninth Circuit Standards of Review Outline.

1. De Novo Review

Questions of law are reviewed de novo. *See, e.g., Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1287 (9th Cir. 2004) (equal protection challenge); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) (whether offense constitutes an aggravated felony); *Kankamalage v. INS*, 335 F.3d 858, 862 (9th Cir. 2003) (whether regulation had retroactive effect); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003) (due process challenge); *Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (district court's decision whether to grant or deny a petition for writ of habeas corpus); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1145 (9th Cir. 2002) (legal determination of whether applicant's daughter was a qualifying "child").

"The BIA's interpretation of immigration laws is entitled to deference[, but] we are not obligated to accept an interpretation clearly contrary to the plain and sensible meaning of the statute." *Kankamalage v. INS*, 335 F.3d 858, 861 (9th Cir.

2003). Additionally, the court "will not defer to BIA decisions that conflict with circuit precedent." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003). Moreover, the court will not defer to the BIA's interpretation of statutes that it does not administer. *See Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003) (court would not give deference to agency interpretation of the California Penal Code).

2. Substantial Evidence Review

The IJ's or BIA's factual findings are reviewed for substantial evidence. *See, e.g.*, *Ramos-Vasquez v. INS*, 57 F.3d 857, 861 (9th Cir. 1995) (reviewing denial of asylum, withholding, and negative credibility findings for substantial evidence). For instance, the BIA's determination that an applicant is not eligible for asylum "can be reversed only if the evidence presented by [the applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992) (noting that "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it"); *see also Khourassany v. INS*, 208 F.3d 1096, 1100 (9th Cir. 2000) ("Under our venerable standards of review of BIA decisions, we may grant the petition for review only if the evidence presented . . . is such that a reasonable fact-finder would be compelled to conclude that the requisite fear of persecution existed."); *cf. Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir. 1995) (reviewing de novo the BIA's determination that petitioner's harm was not on account of political opinion because the question involved "the application of established legal principles to undisputed facts").

"The substantial evidence test is essentially a case-by-case analysis requiring review of the whole record. Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Turcios v. INS*, 821 F.2d 1396, 1398 (9th Cir. 1987) (internal citation omitted). "[W]e do not reverse the BIA simply because we disagree with its evaluation of the facts, but only if we conclude that the BIA's evaluation is not supported by substantial evidence." *Aruta v. INS*, 80 F.3d 1389, 1393 (9th Cir. 1996) (internal quotation marks omitted); *see also Ghebllawi v. INS*, 28 F.3d 83, 85 (9th Cir. 1994) ("The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth

of the testimony of witnesses or its informed judgment on matters within its special competence or both.").

The permanent rules define the substantial evidence standard by stating that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C § 1252(b)(4)(B); *see also Tawadrus v. Ashcroft*, 364 F.3d 1099, 1102 (9th Cir. 2004) (quoting 8 U.S.C § 1252(b)(4)(B)). The previous jurisdictional statute provided that "findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." 8 U.S.C. § 1105a(a)(4) (repealed 1996).

3. Abuse of Discretion Review

"If the agency determines that the alien is statutorily eligible for relief, but denies such relief as a matter of discretion, we review that denial for an abuse of discretion." *Manzo-Fontes v. INS*, 53 F.3d 280, 282 (9th Cir. 1995).

The BIA's denial of a motion to reopen or reconsider is reviewed for abuse of discretion. *See Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002); *see also Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (same standard for denial of motion to remand). The discretionary decision to deny asylum to an eligible petitioner is also reviewed for abuse of discretion. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004); *see also* 8 U.S.C. § 1252(b)(4)(D) ("the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion").

The BIA abuses its discretion when it acts "arbitrarily, irrationally, or contrary to the law." *See Lainez-Ortiz v. INS*, 96 F.3d 393, 395 (9th Cir. 1996). "The BIA abuses its discretion when it fails to comply with its own regulations." *Iturribarria v. INS*, 321 F.3d 889, 895 (9th Cir. 2003).

a. Failure to Provide Reasoned Explanation

The court has "long held that the BIA abuses its discretion when it fails to provide a reasoned explanation for its actions." *Movsisian v. Ashcroft*, 95 F.3d

1095, 1098 (9th Cir. 2005) (BIA abused its discretion by denying motion to remand without any explanation); *see also Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (remanding for explanation of the BIA's reasoning); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA's unexplained failure to address applicant's ineffective assistance of counsel claim); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1141–42 (9th Cir. 2004) (explaining that conclusory statements are insufficient and BIA must provide an explanation showing that it "heard, considered, and decided" the issue (internal quotation marks omitted)); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (remanding motion to reopen to apply for suspension of deportation where BIA did not engage in substantive analysis or articulate any reasons for its decision); *Arrozal v. INS*, 159 F.3d 429, 432 (9th Cir. 1998) ("BIA abuses its discretion when it fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief" (internal quotation marks and emphasis omitted)); *but cf. Almaghzar v. Gonzales*, 457 F.3d 915, 921–22 (9th Cir. 2006) (IJ's generalized statement that he considered all the evidence was sufficient).

b. Failure to Consider Arguments or Evidence

"IJs and the BIA are not free to ignore arguments raised by [a party]." *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (IJ erred by failing to consider extraordinary circumstances proffered to excuse untimely asylum application). "Immigration judges, although given significant discretion, cannot reach their decisions capriciously and must indicate that how they weighed factors involved and how they arrived at their conclusion." *Id.* (internal quotation marks and citations omitted). *See also Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (BIA abused its discretion by failing to identify and evaluate favorable factors in support of motion to reopen); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA's unexplained failure to address ineffective assistance of counsel claim); *Chen v. Ashcroft*, 362 F.3d 611, 620 (9th Cir. 2004) (IJ erred by failing to consider explanation for witness's failure to testify at hearing); *but see Almaghzar v. Gonzales*, 457 F.3d 915, 921–22 (9th Cir. 2006) (explaining that individualized consideration does not require an IJ's decision to discuss every piece of evidence and accepting the IJ's general statement that he considered all the evidence before him); *Fernandez v. Gonzales*, 439 F.3d 592, 604 (9th Cir. 2006) (noting that any concerns about the court's ability to review inadequately reasoned or cursory decisions do not apply

where the court has already determined it lacks jurisdiction to review the agency's decision on the merits).

C. Boilerplate Decisions

"[W]e do not allow the Board to rely on 'boilerplate' opinions 'which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.'" *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995) (quoting *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991)). The BIA's decision "must contain a statement of its reasons for denying the petitioner relief adequate for us to conduct our review." *Id*. However, this court will not impose "unnecessarily burdensome or technical requirements." *Id*. As long as the BIA provides "a comprehensible reason for its decision sufficient for us to conduct our review and to be assured that the petitioner's case received individualized attention," remand will not be required. *Id*.

ASYLUM, WITHHOLDING and the CONVENTION AGAINST TORTURE

I. THE CONTEXT

The heart of United States asylum law is the protection of refugees fleeing persecution. This court has recognized that independent judicial review is critical in this "area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death." *Rodriguez-Roman v. INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring).

Under 8 U.S.C. § 1158(b)(1), the Attorney General may grant asylum to any applicant who qualifies as a "refugee." The Immigration and Nationality Act ("INA") defines a "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 or 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.

INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987) (quoting 8 U.S.C. § 1101(a)(42)(A)); *see also* 8 C.F.R. § 1208.13. An applicant may apply for asylum if she is "physically present in the United States" or at the border. 8 U.S.C. § 1158(a)(1). Individuals seeking protection from outside the United States may apply for refugee status under 8 U.S.C. § 1157.

"The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution." 8 C.F.R. § 1208.13(b). More specifically,

> the applicant can show past persecution on account of a protected ground. Once past persecution is demonstrated, then

> fear of future persecution is presumed, and the burden shifts to the government to show, by a preponderance of the evidence, that there has been a fundamental change in circumstances such that the applicant no longer has a well founded fear of persecution, or [t]he applicant could avoid future persecution by relocating to another part of the applicant's country. An applicant may also qualify for asylum by actually showing a well founded fear of future persecution, again on account of a protected ground.

Deloso v. Ashcroft, 393 F.3d 858, 863–64 (9th Cir. 2005) (internal citations and quotation marks omitted).

In enacting the Refugee Act of 1980, "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *Cardoza-Fonseca*, 480 U.S. at 436–37. When interpreting the definition of "refugee," the courts are guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/IP/4/Eng./REV.2 (ed. 1992) (1979) ("UNHCR Handbook"). *Id.* at 438–39; *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (recognizing the UNHCR Handbook as "a useful interpretative aid" that is "not binding on the Attorney General, the BIA, or United States courts").

II. ASYLUM

A. Burden of Proof

An applicant bears the burden of establishing that he or she is eligible for asylum. 8 C.F.R. § 208.13(a). Section 101(a)(3) of the REAL ID Act, Pub. L. 109-13, 119 Stat. 231, codified this standard. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (as amended and applicable to all applications filed on or after May 11, 2005).

B. Defining Persecution

The term "persecution" is not defined by the Immigration and Nationality Act. "Our caselaw characterizes persecution as an extreme concept, marked by the infliction of suffering or harm . . . in a way regarded as offensive." *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (internal quotation marks and citations omitted). Persecution covers a range of acts and harms, and "[t]he determination that actions rise to the level of persecution is very fact-dependent." *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000); *see also* Forms of Persecution, below. Minor disadvantages or trivial inconveniences do not rise to the level of persecution. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

1. Cumulative Effect of Harms

The cumulative effect of harms and abuses that might not individually rise to the level of persecution may support an asylum claim. *See Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (finding persecution where Ukranian Jew witnessed violent attacks, and suffered extortion, harassment, and threats by anti-Semitic ultra-nationalists). The court "look[s] at the totality of the circumstances in deciding whether a finding of persecution is compelled." *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (finding persecution where Chinese Christian was arrested, detained twice, physically abused, and forced to renounce religion).

See also Krotova v. Gonzales, 416 F.3d 1080, 1087 (9th Cir. 2005) ("The combination of sustained economic pressure, physical violence and threats against Petitioner and her close associates, and the restrictions on Petitioner's ability to practice her religion cumulatively amount to persecution."); *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1192–95 (9th Cir. 2005), *summarily reversed for reconsideration by Tchoukhrova v. Gonzales*, --- S. Ct. ----, 2006 WL 1221941 (2006) (memorandum) (disposal of disabled newborn child in waste pile of human remains, confinement in a filthy state-run institution with little human contact, violence, and discrimination, including the denial of medical care and public education amounted cumulatively to persecution); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120–21 (9th Cir. 2004) (death threats, violence against family, vandalism

of residence, threat of mob violence, economic harm and emotional trauma suffered by ethnic-Afghan family in Germany); *Narayan v. Ashcroft*, 384 F.3d 1065, 1066–67 (9th Cir. 2004) (Indo-Fijian attacked and stabbed, denied medical treatment and police assistance, and home burglarized); *Faruk v. Ashcroft*, 378 F.3d 940, 942 (9th Cir. 2004) (mixed-race, mixed-religion Fijian couple beaten, attacked, verbally assaulted, assailed with rocks, repeatedly threatened, and denied marriage certificate); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, economic hardship, violence and discrimination against Israeli Arab and his family); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (harassment, wiretapping, staged car crashes, detention, and interrogation of anti-communist Romanian constituted persecution); *Popova v. INS*, 273 F.3d 1251, 1258–58 (9th Cir. 2001) (anti-communist Bulgarian was harassed, fired, interrogated, threatened, assaulted and arrested); *Surita v. INS*, 95 F.3d 814, 819–21 (9th Cir. 1996) (Indo-Fijian robbed multiple times, compelled to quit job, and family home looted); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (Indo-Fijian family harassed, assaulted and threatened).

2. No Subjective Intent to Harm Required

A subjective intent to harm or punish an applicant is not required for a finding of persecution. *See Pitcherskaia v. INS*, 118 F.3d 641, 646–48 (9th Cir. 1997) (Russian government's attempt to "cure" lesbian applicant established persecution). Moreover, harm can constitute persecution even if the persecutor had an "entirely rational and strategic purpose behind it." *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

3. Forms of Persecution

a. Physical Violence

Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution. *See Chand v. INS*, 222 F.3d 1066, 1073–74 (9th Cir. 2000) ("Physical harm has consistently been treated as persecution."). The cultural practice of female genital mutilation also constitutes persecution. *See Abebe v. Gonzales*, 432 F.3d 1037, 1042 (9th Cir. 2005) (en banc).

An applicant's failure to "seek medical treatment for the [injury] suffered is hardly the touchstone of whether [the harm] amounted to persecution." *Lopez v. Ashcroft*, 366 F.3d 799, 803 (9th Cir. 2004) (applicant tied up by guerillas and left to die in burning building, coupled with subsequent death threats, amounted to past persecution despite failure to seek medical treatment). Moreover, the absence of serious bodily injury is not necessarily dispositive. *See, e.g.*, *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004) (10-day detention, accompanied by daily beatings and hard labor constituted persecution).

(i) Physical Violence Sufficient to Constitute Persecution

See Guo v. Ashcroft, 361 F.3d 1194, 1197, 1203 (9th Cir. 2004) (two arrests and repeated beatings constituted persecution); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1134 (9th Cir. 2004) (repeated physical abuse combined with detentions and threats); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1072 (9th Cir. 2004) (gang raped by Guatemalan soldiers); *Hoque v. Ashcroft*, 367 F.3d 1190, 1197–98 (9th Cir. 2004) (Bangladeshi kidnaped, beaten and stabbed); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (Ethiopian raped by soldiers); *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (Chinese applicant subjected to physically invasive and emotionally traumatic forced pregnancy examination); *Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (Guatemalan kidnaped and wounded by guerillas and husband and brother killed); *Agbuya v. INS*, 241 F.3d 1224, 1227–28 (9th Cir. 2001) (Filipino kidnaped by New People's Army, falsely imprisoned, hit, threatened with a gun); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (Indian Sikh arrested and tortured, including electric shocks); *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000) (Indo-Fijian assaulted in front of family, held captive for a week and beaten unconscious); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (per curiam) (politically active Nigerian arrested, tortured and scarred); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (ethnic Amhara Ethiopian beaten and raped at gunpoint); *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (Iranian beaten repeatedly and falsely accused of rape); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (Mexican homosexual raped and sexually assaulted by police); *Chand v. INS*, 222 F.3d 1066, 1073–74 (9th

Cir. 2000) (Indo-Fijian attacked repeatedly, robbed, and forced to leave home); *Maini v. INS*, 212 F.3d 1167, 1174 (9th Cir. 2000) (inter-faith Indian family subjected to physical attacks, death threats, and harassment at home, school and work); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161–62 (9th Cir. 1999) (repeated beatings and severe verbal harassment in the Guatemalan military); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (Indo-Fijian jailed, beaten, and subjected to sadistic and degrading treatment); *Lopez-Galarza v. INS*, 99 F.3d 954, 960 (9th Cir. 1996) (Nicaraguan raped by Sandinista soldiers, abused, deprived of food and subjected to forced labor); *Singh v. Ilchert*, 69 F.3d 375, 377–79 (9th Cir. 1995) (per curiam) (Indian Sikh arrested, detained and tortured); *Singh v. Moschorak*, 53 F.3d 1031, 1032–34 (9th Cir. 1995) (Indian Sikh arrested and tortured).

(ii) Physical Violence Insufficient to Constitute Persecution

See Gu v. Gonzales, 454 F.3d 1014, 1019–21 (9th Cir. 2006) (mandate pending) ((brief detention, beating and interrogation did not compel a finding of past persecution by Chinese police on account of unsanctioned religious practice); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (harassment, threats, and one beating unconnected with any particular threat did not compel finding that ethnic Albanian suffered past persecution in Kosovo); *Prasad v. INS*, 47 F.3d 336, 339–40 (9th Cir. 1995) (minor abuse of Indo-Fijian during 4–6 hour detention did not compel finding of past persecution).

b. Torture

"Torture is *per se* disproportionately harsh; it is inherently and impermissibly severe; and it is *a fortiori* conduct that reaches the level of persecution." *Nuru v. Gonzales*, 404 F.3d 1207, 1225 (9th Cir. 2005); *see also Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (torture sufficient to establish past persecution); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (extra-prosecutorial torture, even if conducted for a legitimate purpose, constitutes persecution); *Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995).

c. Threats

Threats of serious harm, particularly when combined with confrontation or other mistreatment, may constitute persecution. *See*, *e.g.*, *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120–21 (9th Cir. 2004) (death threats, violence against family, vandalism of residence, threat of mob violence, economic harm and emotional trauma suffered by ethnic Afghan family in Germany). "Threats on one's life, within a context of political and social turmoil or violence, have long been held sufficient to satisfy a petitioner's burden of showing an objective basis for fear of persecution." *Kaiser v. Ashcroft*, 390 F.3d 653, 658 (9th Cir. 2004). "What matters is whether the group making the threat has the will or the ability to carry it out." *Id*. (citation omitted). The fact that threats are unfulfilled is not necessarily dispositive. *See id*. at 658–59; *but see Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats received by ethnic Albanian "constitute harassment rather than persecution").

(i) Cases Holding Threats Establish Persecution

Canales-Vargas v. Gonzales, 441 F.3d 739, 745 (9th Cir. 2006) (mandate pending) (Peruvian national who received anonymous death threats fifteen years ago demonstrated an at least one-in-ten chance of future persecution sufficient to establish a well-founded fear); *Ndom v. Ashcroft*, 384 F.3d 743, 751–52 (9th Cir. 2004) (Senegalese native subjected to severe death threats coupled with two lengthy detentions without formal charges); *Deloso v. Ashcroft*, 393 F.3d 858, 860–61 (9th Cir. 2005) (Filipino applicant attacked, threatened with death, followed, and store ransacked); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (threats, combined with anguish suffered as a result of torture and killing of fellow Burmese Christian preacher); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, violence and discrimination against Israeli Arab and family amounted to persecution); *Ruano v. Ashcroft*, 301 F.3d 1155, 1160–61 (9th Cir. 2002) (Guatemalan who faced multiple death threats at home and business, "closely confronted" and actively chased); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074–75, *as amended by* 290 F.3d 964 (9th Cir. 2002) (multiple death threats, harm to family, and murders of counterparts by Shining Path guerillas); *Chouchkov v. INS*, 220 F.3d 1077, 1083–84 (9th Cir.

2000) (Russian who suffered harassment, including threats, attacks on family, intimidation, and thefts); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (Indian applicant's politically active husband killed, and she and family threatened repeatedly); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) ("we have consistently held that death threats alone can constitute persecution;" Salvadoran threatened, shot at, family members killed, mother beaten); *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) ("[T]he determination that actions rise to the level of persecution is very fact-dependent, . . . though threats of violence and death are enough."); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (multiple death threats faced by Colombian prosecutor); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (Salvadoran harassed, detained and threatened by former guerillas); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (two death threats from Salvadoran guerillas, and cousins and their families killed); *Garrovillas v. INS*, 156 F.3d 1010, 1016–17 (9th Cir. 1998) (if credible, three death threat letters received by former Filipino military agent would appear to constitute past persecution); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1295–96 (9th Cir. 1997), *as amended by* 133 F.3d 726 (9th Cir. 1998) (suggesting that threats to life and business based on opposition to Shining Path constituted past persecution); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (Indian Sikh threatened, home burglarized, and father beaten); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (Nicaraguan threatened with death by Sandinistas, house marked, ration card appropriated, and family harassed).

(ii) Cases Holding Threats Not Persecution

Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1171–72 (9th Cir. 2006) (vague and conclusory allegations regarding threats insufficient to establish a well-founded fear of persecution); *Ramadan v. Gonzales*, 427 F.3d 1218, 1223 (9th Cir. 2005), *reh'g granted and resubmitted* 7/25/06 (threats of harm too speculative to meet much higher threshold for withholding of removal),; *Nahrvani v. Gonzales*, 399 F.3d 1148, 1153–54 (9th Cir. 2005) (two "serious" but anonymous threats coupled with harassment and de minimis property damage); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 n.6 (9th Cir. 2003) ("unspecified threats" received by Mexican national not "sufficiently menacing to constitute past persecution");

Hoxha v. Ashcroft, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats received by ethnic Albanian "constitute harassment rather than persecution"); *Lim v. INS*, 224 F.3d 929, 936–37 (9th Cir. 2000) (mail and telephone threats received by former Filipino intelligence officer); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (anonymous threat received by Salvadoran military musician).

d. Detention

Detention and confinement may constitute persecution. *See Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (Senegalese applicant threatened and detained twice under harsh conditions for a total of 25 days established persecution); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004) (imprisonment in over-crowded Congolese jail cell with harsh, unsanitary and life-threatening conditions established past persecution); *see also Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (suggesting that forced institutionalization of Russian lesbian could amount to persecution).

Cf. Khup v. Ashcroft, 376 F.3d 898, 903–04 (9th Cir. 2004) (evidence did not compel finding that one day of forced porterage suffered by Burmese Christian preacher amounted to persecution); *Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (Iraqi's five to six day detention not persecution), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order); *Khourassany v. INS*, 208 F.3d 1096, 1100–01 (9th Cir. 2000) (Palestinian Israeli's short detentions not persecution); *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (Iranian's brief detention not persecution); *Mendez-Efrain v. INS*, 813 F.2d 279, 283 (9th Cir. 1987) (Salvadoran's four-day detention not persecution).

e. Mental, Emotional, and Psychological Harm

Physical harm is not required for a finding of persecution. *See Kovac v. INS*, 407 F.2d 102, 105–07 (9th Cir. 1969). "Persecution may be emotional or psychological, as well as physical." *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (discussing emotional trauma suffered by ethnic Afghan family based on anti-foreigner violence in Germany); *see also Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (threats, combined with

anguish suffered as a result of torture and killing of fellow Burmese preacher).

Cf. Kazlauskas v. INS, 46 F.3d 902, 907 (9th Cir. 1995) (harassment and ostracism of Lithuanian was not sufficiently atrocious to support a humanitarian grant of asylum).

f. Substantial Economic Deprivation

Substantial economic deprivation that constitutes a threat to life or freedom may constitute persecution. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, violence and discrimination made it virtually impossible for Israeli Arab to earn a living). The absolute inability to support one's family is not required. *Id*.

See also Tawadrus v. Ashcroft, 364 F.3d 1099, 1106 (9th Cir. 2004) (Egyptian Coptic Christian had a "potentially viable" asylum claim based on government-imposed economic sanctions); *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (granting withholding of removal to stateless Palestinians born in Kuwait based on likelihood of extreme state-sponsored economic discrimination); *Surita v. INS*, 95 F.3d 814, 819–21 (1996) (Indo-Fijian robbed, threatened, compelled to quit job, and house looted by soldiers); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (threats by Sandinistas, violence against family, and seizure of family land, ration card, and ability to buy business inventory); *Desir v. Ilchert*, 840 F.2d 723, 727–29 (9th Cir. 1988) (considering impact of extortion by government security forces on Haitian fisherman's ability to earn livelihood); *Samimi v. INS*, 714 F.2d 992, 995 (9th Cir. 1983) (seizure of land and livelihood could contribute to a finding of persecution); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (persecution may encompass "a deliberate imposition of substantial economic disadvantage"); *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

However, "mere economic disadvantage alone does not rise to the level of persecution." *Gormley v. Ashcroft*, 364 F.3d 1172, 1178 (9th Cir. 2004) (loss of employment pursuant to South Africa's affirmative action plan did

not amount to persecution); *see also Zehatye v. Gonzales*, 453 F.3d 1182, 1186 (9th Cir. 2006) (mandate pending) (Eritrean government's seizure of father's business, along with some degree of social ostracism, did not rise to the level of persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003) (employment discrimination faced by Ukrainian Christian did not rise to level of persecution); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (forced closing of Palestinian Israeli's restaurant, when he continued to operate other businesses, did not constitute persecution); *Ubau-Marenco v. INS*, 67 F.3d 750, 755 (9th Cir. 1995) (confiscation of Nicaraguan family business by Sandinistas may not be enough to support finding of economic persecution), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1985) (denial of food discounts and special work permit by Sandinistas did not amount to persecution); *Raass v. INS*, 692 F.2d 596 (9th Cir. 1982) (asylum claim filed by Tonga Islanders required more than "generalized economic disadvantage").

g. Discrimination and Harassment

Persecution generally "does not include mere discrimination, as offensive as it may be." *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (brief detention and searches of Iranian women accused of violating dress and conduct rules did not constitute persecution); *see also Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005) (harassment on the way to weekly Catholic services in Bangladesh did not rise to the level of persecution); *Mansour v. Ashcroft*, 390 F.3d 667, 673 (9th Cir. 2004) (discrimination against Coptic Christians in Egypt did not constitute persecution); *Padash v. INS*, 358 F.3d 1161, 1166 (9th Cir. 2004) (discrimination by isolated individuals against Indian Muslims did not amount to past persecution); *Halaim v. INS*, 358 F.3d 1128, 1132 (9th Cir. 2004) (discrimination against Ukranian sisters on account of Pentecostal Christian religion did not compel a finding that they suffered past persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016–17 (9th Cir. 2003) (record did not compel finding that Ukrainian Pentecostal Christian who was "teased, bothered, discriminated against and harassed" suffered from past persecution); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1201–02 (9th Cir. 2000) (harassment of ethnic Armenian in Russia, inability to get a job, and

violence against friend did not rise to level of past persecution, but did support her well-founded fear); *Singh v. INS*, 134 F.3d 962, 969 (9th Cir. 1998) (repeated vandalism of Indo-Fijian's property, with no physical injury or threat of injury, not persecution).

However, discrimination, in combination with other harms, may be sufficient to establish persecution. *See Kotasz v. INS*, 31 F.3d 847, 853 (9th Cir. 1994) ("Proof that the government or other persecutor has discriminated against a group to which the petitioner belongs is, accordingly, *always* relevant to an asylum claim."); *see also Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2004) (anti-Semitic harassment, sustained economic and social discrimination, and violence against Russian Jew and her family compelled a finding of past persecution); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (discrimination, harassment and violence against Ukrainian Jew can constitute persecution); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1239 (9th Cir. 1996) (finding persecution where Nicaraguan school teacher was branded as a traitor, harassed, threatened, home vandalized and relative imprisoned for refusing to teach Sandinista doctrine); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (discrimination, harassment and violence against Indo-Fijian family can constitute persecution).

Moreover, severe and pervasive discriminatory measures can amount to persecution. *See Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (noting that the BIA has held that severe and pervasive discrimination can constitute persecution in "extraordinary cases"); *see also El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (granting withholding of removal based on the extreme state-sponsored economic discrimination that stateless Palestinians born in Kuwait would face); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161–62 (9th Cir. 1999) (rejecting BIA's determination that Guatemalan soldier suffered discrimination, rather than persecution, where he was subjected to repeated beatings, severe verbal harassment, and race-based insults).

C. Source or Agent of Persecution

In order to qualify for asylum, the source of the persecution must be the government, a quasi-official group, or persons or groups that the government is unwilling or unable to control. *See Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). The fact that financial considerations may account for the state's inability to stop the persecution is not relevant. *Id.* at 1198. However, an unsuccessful government investigation does not necessarily demonstrate that the government was unwilling or unable to control the source or agent of persecution. *See, e.g.*, *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (German police took reports and investigated incidents, but were unable to solve the crimes).

Affirmative state action is not necessary to establish a well-founded fear of persecution if the government is unable or unwilling to control the agents of persecution. *Siong v. INS*, 376 F.3d 1030, 1039 (9th Cir. 2004). In cases of non-governmental persecution, "we consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors." *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004); *see also Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (failure to report non-governmental persecution due to belief that police would do nothing did not establish that government was unwilling or unable to control agent of persecution).

1. Harm Inflicted by Relatives

"There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it." *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) (mixed-race, mixed-religion couple in Fiji suffered persecution at the hand of family members and others).

2. Reporting of Persecution Not Always Required

When the government is responsible for the persecution, there is no need to inquire whether applicant sought help from the police. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (Israeli Arab persecuted by Israeli Marines); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir.

2005) (Mexican homosexual man persecuted by police). Moreover, "an applicant who seeks to establish eligibility for [withholding] of removal under section 1231(b)(3) on the basis of past persecution at the hands of private parties the government is unwilling or unable to control need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006) (mandate pending) (government officials and employees tacitly accepted abuse applicant suffered); *cf. Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (applicant failed to provide evidence sufficient to justify the failure to report alleged abuse).

3. Cases Discussing Source or Agent of Persecution

Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1056–58 (9th Cir. 2006) (mandate pending) (applicant arrested by Mexican police, raped by family members and family friends, and abused by co-workers on account of his female sexual identity); *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (applicant raped by boyfriend in Honduras failed to show that the Honduran government was unwilling or unable to control rape); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120–21 (9th Cir. 2004) (ethnic Afghan family in Germany attacked by anti-foreigner mobs); *Deloso v. Ashcroft*, 393 F.3d 858, 861 (9th Cir. 2005) (attacks by a Filipino Communist party henchman); *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) ("Random, isolated criminal acts perpetrated by anonymous thieves do not establish persecution."); *Jahed v. INS*, 356 F.3d 991, 998–99 (9th Cir. 2004) (extortion by member of the Iranian Revolutionary Guard); *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1239–40 (9th Cir. 2001) (fear of violence from cousin in El Salvador not sufficient); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (rape by Ethiopian government official where government never prosecuted the perpetrator); *Ladha v. INS*, 215 F.3d 889, 902 (9th Cir. 2000) (Pakistani government unable to control violence by non-state actors); *Mgoian v. INS*, 184 F.3d 1029, 1036–37 (9th Cir. 1999) (state action not required to establish persecution of Kurdish-Moslem family in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1042–43 (9th Cir. 1999) (Azerbaijani government did not protect ethnic Armenian); *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc) (non-state actors in the Philippines);

Korablina v. INS, 158 F.3d 1038, 1045 (9th Cir. 1998) (ultra-nationalist anti-Semitic Ukranian group); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (Fijian government encouraged discrimination, harassment and violence against Indo-Fijians); *Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (persecution of Nicaraguan by a government-sponsored group); *Gomez-Saballos v. INS*, 79 F.3d 912, 916–17 (9th Cir. 1996) (fear of former Nicaraguan National Guard members); *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (denying petition because Egyptian Coptic Christian feared harms not "condoned by the state nor the prevailing social norm"); *Desir v. Ilchert*, 840 F.2d 723, 727–28 (9th Cir. 1988) (persecution by quasi-official Haitian security force); *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988) (Salvadoran guerilla movement); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434–35 (9th Cir. 1987) (persecution by Salvadoran army sergeant), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc).

D. Past Persecution

An applicant may qualify as a refugee in two ways:

> First, the applicant can show past persecution on account of a protected ground. Once past persecution is demonstrated, then fear of future persecution is presumed, and the burden shifts to the government to show, by a preponderance of the evidence, that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or the applicant could avoid future persecution by relocating to another part of the applicant's country. An applicant may also qualify for asylum by actually showing a well-founded fear of future persecution, again on account of a protected ground.

Deloso v. Ashcroft, 393 F.3d 858, 863–64 (9th Cir. 2005) (internal citations and quotation marks omitted); *see also Ratnam v. INS*, 154 F.3d 990, 994 (9th Cir. 1998) ("Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum."); 8 C.F.R. § 1208.13(b).

Once an applicant establishes past persecution, he is a refugee eligible for a grant of asylum, and the likelihood of future persecution is a relevant factor to consider in the exercise of discretion. *See Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996); *Kazlauskas v. INS*, 46 F.3d 902, 905 (9th Cir. 1995); *see also* 8 C.F.R. § 1208.13(b)(1)(i)(A). In assessing the likelihood of future persecution, the IJ shall consider whether the applicant could avoid persecution by relocating to another part of his or her country. 8 C.F.R. § 1208.13(b)(1)(i)(B).

In order to establish "past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is 'on account of' one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either 'unable or unwilling' to control." *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000).

"[P]roof of particularized persecution is not required to establish past persecution." *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004) (Serb petitioners suffered past persecution because their town was specifically targeted for bombing, invasion, occupation and ethnic cleansing by Croat military). In other words, "even in situations of widespread civil strife, it is irrelevant whether one person, twenty persons, or a thousand persons were targeted or placed at risk so long as there is a nexus to a protected ground." *Ndom v. Ashcroft*, 384 F.3d 743, 754 (9th Cir. 2004) (internal quotation marks and citation omitted).

1. Presumption of a Well-Founded Fear

"If past persecution is established, a rebuttable presumption of a well-founded fear arises, 8 C.F.R. § 208.13(b)(1), and the burden shifts to the government to demonstrate that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (internal quotation marks omitted); *see also Singh v. Ilchert*, 63 F.3d 1501, 1510 (9th Cir. 1995) ("[O]nce an applicant has demonstrated that he suffered past persecution, there is a presumption that he faces a similar threat on return.").

Past persecution need not be atrocious to give rise to the presumption of future persecution. *See Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (past persecution by Sandinistas). The presumption raised by a finding of past persecution applies only to a future fear based on the original claim, and not to a fear of persecution from a new source. *See* 8 C.F.R. § 1208.13(b)(1) (2002) ("If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.").

2. Rebutting the Presumption of a Well-Founded Fear

a. Fundamental Change in Circumstances

Pursuant to 8 C.F.R. § 1208.13(b)(1)(i), the government may rebut the presumption of a well-founded fear by showing "by a preponderance of the evidence" that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear." *See also Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) ("[O]ur precedent compels the conclusion that genital mutilation, like forced sterilization, is a 'permanent and continuing' act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear."); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (government failed to meet burden); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161 (9th Cir. 2002) (1996 State Department report insufficient to established changed country conditions in Guatemala); *Gui v. INS*, 280 F.3d 1217, 1228 (9th Cir. 2002) (State Department report insufficient to establish changed country conditions in Romania). If the government does not rebut the presumption, the applicant is statutorily eligible for asylum. *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004).

b. Government's Burden

In order to meet its burden under 8 C.F.R. § 208.13(b)(1), the government is "obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds for his well-founded fear of future persecution." *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001) (internal quotation marks omitted) (Bulgaria). "If past persecution is shown, the BIA cannot discount it merely on a say-so. Rather, our precedent establishes that in such a case the BIA must provide an individualized analysis of how changed conditions will affect the specific petitioner's situation." *Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004) (citation and internal quotation marks omitted) (Guatemala). "Information about general changes in the country is not sufficient." *Garrovillas v. INS*, 156 F.3d 1010, 1017 (9th Cir. 1998) (Philippines).

If an applicant is entitled to a presumption of a well-founded fear of future persecution and the government made no arguments concerning changed country conditions before the IJ or BIA, the court will not remand to provide the government another opportunity to do so. *Ndom v. Ashcroft*, 384 F.3d 743, 756 (9th Cir. 2004); *see also Quan v. Gonzales*, 428 F.3d 883, 889 (9th Cir. 2005).

(i) State Department Report

Where past persecution has been established, generalized information from a State Department report on country conditions is not sufficient to rebut the presumption of future persecution. *See Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002) (Guatemala). "Instead, we have required an individualized analysis of how changed conditions will affect the specific petitioner's situation." *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1074 (9th Cir. 2004) (internal quotation marks omitted); *see also Lopez v. Ashcroft*, 366 F.3d 799, 805–06 (9th Cir. 2004) (remanding for individualized analysis of changed country conditions); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 998–1000 (9th Cir. 2003) (individualized analysis of changed conditions in Guatemala rebutted presumption of well-founded fear based on political opinion); *Marcu v. INS*, 147 F.3d 1078, 1081–82 (9th Cir. 1998) (presumption of well-founded fear rebutted by individualized analysis of State Department letter and report regarding sweeping changes in Romania).

(ii) Administrative Notice of Changed Country Conditions

The BIA may not take administrative notice of changed conditions in the country of feared persecution without giving the applicant notice of its intent to do so, and an opportunity to show cause why such notice should not be taken, or to present additional evidence. *See Circu v. Gonzales*, 450 F.3d 990, 993–95 (9th Cir. 2006) (en banc); *Getachew v. INS*, 25 F.3d 841, 846–47 (9th Cir. 1994) (request in INS brief to take administrative notice of changes in Ethiopia did not provide adequate notice to petitioner); *Kahssai v. INS*, 16 F.3d 323, 324–25 (9th Cir. 1994) (per curiam) (Ethiopia); *Gomez-Vigil v. INS*, 990 F.2d 1111, 1114 (9th Cir. 1993) (per curiam) (Nicaragua); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026–31 (9th Cir. 1992) (denial of pre-decisional notice violated due process and demonstrated failure to make individualized assessment of Nicaraguan's claims).

If an IJ takes administrative notice of changed country conditions during the hearing, there is no violation of due process because the applicant has an opportunity to respond with rebuttal evidence. *See Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995) (Lithuania); *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993) (Polish Solidarity supporters "had ample opportunity to argue before the immigration judges and before the [BIA] that their fear of persecution remained well-founded"); *Kotasz v. INS*, 31 F.3d 847, 855 n.13 (9th Cir. 1994) (applicants given ample opportunity to discuss changes in Hungary).

This court has taken judicial notice of recent events occurring after the BIA's decision. *See Gafoor v. INS*, 231 F.3d 645, 655–56 (9th Cir. 2000) (taking judicial notice of recent events in Fiji and noting that the government would have an opportunity to challenge the significance of the evidence on remand). However, this court may not determine the issue of changed country conditions in the first instance. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 999–1000 (9th Cir. 2003) (Guatemala).

c. Cases where Changed Circumstances or Conditions Insufficient to Rebut Presumption of Well-Founded Fear

Note that in some pre-*Ventura* cases, this court decided the issue of changed country conditions in the first instance. Post-*Ventura*, this court would remand such cases to the agency for consideration of changed country conditions in the first instance.

See Baballah v. Ashcroft, 367 F.3d 1067, 1078–79 (9th Cir. 2004) (Israel); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161–62 (9th Cir. 2002) (Guatemala); *Rios v. Ashcroft*, 287 F.3d 895, 901–02 (9th Cir. 2002) (Guatemala); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1076–77, *as amended by* 290 F.3d 964 (9th Cir. 2002) (Peru); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (Romania); *Popova v. INS*, 273 F.3d 1251, 1259–60 (9th Cir. 2001) (Bulgaria); *Lal v. INS*, 255 F.3d 998, 1010–11 (9th Cir. 2001) (Fiji), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Agbuya v. INS*, 241 F.3d 1224, 1230–31 (9th Cir. 2001) (past persecution by New People's Army in the Philippines); *Kataria v. INS*, 232 F.3d 1107, 1115–16 (9th Cir. 2000) (State Department report stating that arrests and killings had declined significantly in India not sufficient); *Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000) (past persecution of religious minority in Iran); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexican police); *Chand v. INS*, 222 F.3d 1066, 1078–79 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Chanchavac v. INS*, 207 F.3d 584, 592 (9th Cir. 2000) (Guatemala); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (Colombia); *Tarubac v. INS*, 182 F.3d 1114, 1119–20 (9th Cir. 1999) (State Department's mixed assessment of human rights conditions in the Philippines insufficient); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1163 (9th Cir. 1999) (Guatemala); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (Philippines); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (El Salvador); *Meza-Manay v. INS*, 139 F.3d 759, 765–66 (9th Cir. 1998) (Peru); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1239–40 (9th Cir. 1996) (Nicaragua); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (Fiji); *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995) (India).

d. Internal Relocation

"[B]ecause a presumption of well-founded fear arises upon a showing of past persecution, the burden is on the INS to demonstrate by a preponderance of the evidence, once such a showing is made, that the applicant can reasonably relocate internally to an area of safety." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003); *see also Mashiri v. Ashcroft*, 383 F.3d 1112, 1122–23 (9th Cir. 2004) (IJ erred by placing the burden of proof on ethnic Afghan to show "that the German government was unable or unwilling to control anti-foreigner violence 'on a countrywide basis'"); 8 C.F.R. §§ 1208.13(b)(1)(i)(B), (b)(1)(ii).

"The reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and family ties." *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214–15 (9th Cir. 2004) (citing 8 C.F.R. § 1208.13(b)(3); remanding for determination of whether internal relocation would be reasonable for elderly Serbian couple from Bosnia). This non-exhaustive list of factors "may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3). *See also Mashiri v. Ashcroft*, 383 F.3d 1112, 1123 (9th Cir. 2004) (relocation was not reasonable given evidence of anti-foreigner violence throughout Germany, financial and logistical barriers, and family ties in the U.S.); *Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002) (discussing reasonableness in light of threats in Peru); *Hasan v. Ashcroft*, 380 F.3d 1114, 1121–22 (9th Cir. 2004) (noting the different legal standards for evaluation of internal relocation in the context of asylum and Convention Against Torture relief).

Where the persecutor is the government, "[i]t has never been thought that there are safe places within a nation" for the applicant to return. *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995). "In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal

relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3)(ii).

3. Humanitarian Asylum

The IJ or BIA may grant asylum to a victim of past persecution, even where the government has rebutted the applicant's fear of future persecution, "if the asylum seeker establishes (1) 'compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,' 8 C.F.R. § 1208.13(b)(1)(iii)(A), or (2) 'a reasonable possibility that he or she may suffer other serious harm upon removal to that country,' 8 C.F.R. § 1208.13(b)(1)(iii)(B)." *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. Aug. 9, 2004) (order).

a. Severe Past Persecution

In cases of severe past persecution, an applicant may obtain asylum even if he has no well-founded fear in the future, provided that he has "compelling reasons" for being unwilling to return. *See* 8 C.F.R. § 1208.13(b)(1)(iii)(A). The United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979), para. 136, states that "[i]t is frequently recognized that a person who–or whose family–has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee." This court has not decided whether an applicant could be eligible for relief based on the severity of the past persecution of his family, where the applicant himself did not suffer severe past persecution.

"This avenue for asylum has been reserved for rare situations of 'atrocious' persecution, where the alien establishes that, regardless of any threat of future persecution, the circumstances surrounding the past persecution were so unusual and severe that he is unable to return to his home country." *Vongsakdy v. INS*, 171 F.3d 1203, 1205 (9th Cir. 1999) (Laos).

Ongoing disability as a result of the persecution is not required. *Lal v. INS*, 255 F.3d 998, 1004 (Indo-Fijian), *as amended by* 268 F.3d 1148 (9th Cir. 2001).

(i) Compelling Cases of Past Persecution for Humanitarian Asylum

Lal v. INS, 255 F.3d 998, 1009–10, *as amended by* 268 F.3d 1148 (9th Cir. 2001) (Indo-Fijian arrested, detained three times, beaten, tortured, urine forced into mouth, cut with knives, burned with cigarettes, forced to watch sexual assault of wife, forced to eat meat, house set ablaze twice, temple ransacked, and holy text burned); *Vongsakdy v. INS*, 171 F.3d 1203, 1206–07 (9th Cir. 1999) (Laotian applicant threatened, beaten and attacked, forced to perform hard manual labor and to attend "reeducation," fed once a day, denied adequate water and medical care, and forced to watch the guards kill one of his friends); *Lopez-Galarza v. INS*, 99 F.3d 954, 960–63 (9th Cir. 1996) (Nicaraguan applicant imprisoned for 15 days, raped and physically abused repeatedly, confined in a jail cell for long periods without food, forced to clean bathrooms and floors of men's jail cells, mobs stoned and vandalized family home, and the authorities took away food ration card); *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988) (Haitian applicant arrested, assaulted, beaten some fifty times with wooden stick, and threatened with death by the Macoutes on several occasions); *see also Matter of Chen*, 20 I. & N. Dec. 16, 20–21 (BIA 1989) (Red Guards ransacked and destroyed applicant's home, imprisoned and dragged father through streets, and badly burned him in a bonfire of Bibles; as a child placed under house arrest, kept from school, interrogated, beaten, deprived of food, seriously injured by rocks, and exiled to the countryside for "re-education," abused, forced to criticize father, and denied medical care).

The court has remanded for consideration of humanitarian relief in: *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (Ethiopian raped by two soldiers during one house search and family harassed and harmed repeatedly); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (Guatemalan gang raped by soldiers as part of an "orchestrated campaign" to punish entire village); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160–61 (9th Cir. 1996) (Nicaraguan severely beaten, threatened with

death, imprisoned for working without a permit, witnessed sister being tortured and killed, and family denied food rations and work permit).

(ii) Insufficiently Severe Past Persecution for Humanitarian Asylum

Belishta v. Ashcroft, 378 F.3d 1078, 1081, n.2 (9th Cir. 2004) (order) (economic and emotional persecution based on father's 10-year imprisonment in Albania); *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1240 (9th Cir. 2001) (per curiam) (Salvadoran applicant targeted by government sporadically between 1978 and 1980, and then not again until 1991, when forces searched home looking for FMLN sympathizers); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (ethnic Amhara Ethiopian detained for a month, interrogated, beaten for 45 minutes, and almost raped by guards, children detained temporarily and beaten, family harassed); *Kumar v. INS*, 204 F.3d 931, 934–35 (9th Cir. 2000) (Indo-Fijian applicant stripped and fondled in front of parents, punched and kicked, forced to renounce religion, and beaten unconscious; soldiers tied up and beat parents, detained father, and knocked mother unconscious; temple ransacked); *Marcu v. INS*, 147 F.3d 1078, 1082–83 (9th Cir. 1998) (Romanian taunted as a child, denounced as an "enemy of the people," detained, interrogated and beaten by police on mutiple occasions, family's possessions confiscated, and mother imprisoned for refusing to renounce U.S. citizenship); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (Sandinista authorities made multiple death threats, marked applicant's house, took away ration card and means to buy inventory, and harassed and confiscated family property); *Kazlauskas v. INS*, 46 F.3d 902, 906–907 (9th Cir. 1995) (Lithuanian applicant ostracized, harassed by teachers and peers, and prevented from advancing to university; father imprisoned in Soviet labor camps); *Acewicz v. INS*, 984 F.2d 1056, 1062 (9th Cir. 1993) (Polish citizens suffered insufficiently severe past persecution).

b. Fear of Other Serious Harm

Victims of past persecution who no longer reasonably fear future persecution on account of a protected ground may be granted asylum if they can establish a reasonable possibility that they may suffer other serious harm upon removal to that country. *See Belishta v. Ashcroft*, 378 F.3d 1078, 1081

(9th Cir. 2004) (order); 8 C.F.R. § 1208.13(b)(1)(iii)(B). The fear of future harm need not be related to a protected ground. *Belishta*, 378 F.3d at 1081 (remanding for consideration of humanitarian grant where former government agents terrorized Albanian family in an effort to take over their residence).

E. Well-Founded Fear of Persecution

Even in the absence of past persecution, an applicant may be eligible for asylum based on a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b). A well-founded fear must be subjectively genuine and objectively reasonable. *See Montecino v. INS*, 915 F.2d 518, 520–21 (9th Cir. 1990) (noting the importance of the applicant's subjective state of mind). An applicant can demonstrate a well-founded fear of persecution if: (A) she has a fear of persecution in her country; (B) there is a reasonable possibility of suffering such persecution; and (C) she is unable or unwilling to return to that country because of such fear. *See* 8 C.F.R. § 1208.13(b)(2)(i). A "'well-founded fear' . . . can only be given concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

1. Past Persecution Not Required

A showing of past persecution is not required to qualify for asylum. *See Velarde v. INS*, 140 F.3d 1305, 1309 (9th Cir. 1998) ("Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum."); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 (9th Cir. 2003). However the past persecution of an applicant creates a rebuttable presumption that he will be persecuted in the future. *See* Past Persecution, above. Moreover, past harm not amounting to persecution is relevant to the reasonableness of an applicant's fear of future persecution. *See Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir. 2000) (harassment of ethnic Armenian in Russia, inability to get a job, and violence against friend did not rise to level of past persecution, but did support her well-founded fear); *see also Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (explaining that past threats, although insufficient under the circumstances to establish past persecution, are relevant to a well-founded fear of future persecution).

2. Subjective Prong

The subjective prong of the well-founded fear test is satisfied by an applicant's credible testimony that he or she genuinely fears harm. *See Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995) (Indian Sikh). "[F]ortitude in face of danger" does not denote an "absence of fear." *Id.*; *cf. Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1996) (finding no subjective fear where testimony of Nicaraguan who claimed to be a Jehovah's Witness was not credible); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1257–58 (9th Cir. 1992) (Nicaraguan who "failed to present 'candid, credible and sincere testimony' demonstrating a genuine fear of persecution, . . . failed to satisfy the subjective component of the well-founded fear standard").

A fear of persecution need not be the applicant's only reason for leaving his country of origin. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374–75 (9th Cir. 1985) (holding that Salvadoran's mixed motives for departure, including economic motives, did not bar asylum claim).

3. Objective Prong

The objective prong of the well-founded fear analysis can be satisfied in two different ways: "One way to satisfy the objective component is to prove persecution in the past, giving rise to a rebuttable presumption that a well-founded fear of future persecution exists. The second way is to show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. The objective requirement can be met by either through the production of specific documentary evidence or by credible and persuasive testimony." *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (internal citations and quotation marks omitted).

"A well-founded fear does not require certainty of persecution or even a probability of persecution." *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003). "[E]ven a ten percent chance of persecution may establish a well-founded fear." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001). This court has stated that objective circumstances "must be determined in the

political, social and cultural milieu of the place where the petitioner lived." *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

A claim based solely on general civil strife or widespread random violence is not sufficient. *See, e.g., Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Christian Armenians fearful of Azeris); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese-Filipino); *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986) (El Salvador). However, the existence of general civil unrest does not preclude asylum eligibility. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) ("[T]he fact that the individual resides in a country where the lives and freedom of a large number of persons has been threatened may make the threat *more* serious or credible." (internal quotation marks and alterations omitted)); *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) ("[T]he existence of civil strife does not. . . make a particular asylum claim less compelling.")

Even when an applicant has not established past persecution, and the rebuttable presumption of future persecution does not arise, current country conditions may be relevant to whether the applicant has demonstrated an objectively reasonable fear of future persecution. *See Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002) ("When, as here, a petitioner has *not* established past persecution, there is no presumption to overcome . . . [and] the IJ and the BIA are entitled to rely on all relevant evidence in the record, including a State Department report"). In determining whether an applicant's fear of future persecution is objectively reasonable in light of current country conditions, the agency must conduct an individualized analysis of how such conditions will affect the applicant's specific situation. *Marcos v. Gonzales*, 410 F.3d 1112, 1120–21 (9th Cir. 2005) (concluding applicant had a well-founded fear of future persecution).

4. Demonstrating a Well-Founded Fear

a. Targeted for Persecution

An applicant may demonstrate a well-founded fear by showing that he has been targeted for persecution. *See, e.g., Marcos v. Gonzales*, 410 F.3d 1112, 1119 (9th Cir. 2005) (Philippine applicant demonstrated well-founded fear based on credible death threats by members of the New People's Army); *Zhang v. Ashcroft*, 388 F.3d 713, 718 (9th Cir. 2004) (per curiam) (applicant qualified for withholding of removal in part because Chinese authorities identified him as an anti-government Falun Gong practitioner and demonstrated their continuing interest in him); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (Abkhazian applicant was eligible for asylum because the Separatists specifically targeted him for conscription); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (Filipino applicant was threatened, followed, appeared on a death list, and several colleagues were killed); *Mendoza Perez v. INS*, 902 F.2d 760, 762 (9th Cir. 1990) (Salvadoran applicant received a direct, specific and individual threat from death squad).

b. Family Ties

Acts of violence against an applicant's family members and friends may establish a well-founded fear of persecution. *See Korablina v. INS*, 158 F.3d 1038, 1044–45 (9th Cir. 1998) (Jewish citizen of the Ukraine). However, the violence must "create a pattern of persecution closely tied to the petitioner." *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (Guatemala). "[T]he death of one family member does not automatically trigger a sweeping entitlement to asylum eligibility for all members of her extended family. Rather, when evidence regarding a family history of persecution is considered, the relationship that exists between the persecution of family members and the circumstances of the applicant must be examined." *Navas v. INS*, 217 F.3d 646, 659 n.18 (9th Cir. 2000) (internal quotation marks, punctuation, and citations omitted).

See also Zhang v. Ashcroft, 388 F.3d 713, 718 (9th Cir. 2004) (per curiam) (arrest and detention of family members who also practice Falun Gong among other factors compelled a finding that applicant is entitled to withholding of removal); *Njuguna v. Ashcroft*, 374 F.3d 765, 769 (9th Cir. 2004) (persecution of family in Kenya); *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999) (violence and harassment against entire Kurdish Muslim family in Armenia); *Gonzalez v. INS*, 82 F.3d 903, 909–10 (9th Cir. 1996)

(Nicaraguan family suffered violence for supporting Somoza); *Ramirez Rivas v. INS*, 899 F.2d 864, 868–69 (9th Cir. 1990) (granting relief where applicant was a member of a large politically active family that had been persecuted by Salvadoran authorities); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 515 (9th Cir. 1985) (Salvadoran applicant presented prima facie eligibility for asylum based on the persecution of her family).

c. Pattern and Practice of Persecution

An applicant need not show that she will be singled out individually for persecution if:

> (A) The applicant establishes that there is a pattern or practice in his or her country . . . 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
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

8 C.F.R. § 1208.13(b)(2)(iii); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) (evidence of a Croat pattern and practice of ethnically cleansing Bosnian Serbs); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *cf. Suntharalinkam v. Gonzales*, 458 F.3d 1034, 1049–50 (9th Cir. 2006) (mandate pending) (no pattern or practice of persecution of Tamil civilians by Sri Lankan government in light of current conditions). "[T]his 'group' of similarly situated persons is not necessarily the same as the more limited 'social group' category mentioned in the asylum statute." *Mgoian*, 184 F.3d at 1036.

d. Membership in Disfavored Group

In the Ninth Circuit, a member of a "disfavored group" that is not subject to a pattern or practice of persecution may also demonstrate a well-

founded fear. *See Kotasz v. INS*, 31 F.3d 847, 853–54 (9th Cir. 1994) (opponents of the Hungarian Communist Regime). *See also Sael v. Ashcroft*, 386 F.3d 922, 927 (9th Cir. 2004) (Indonesia's ethnic Chinese minority); *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (stateless Palestinians born in Kuwait are members of a persecuted minority); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182–83 (9th Cir. 2003) (ethnic Albanians in Kosovo); *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996) (Indo-Fijians).

In determining whether an applicant had established a well-founded fear of persecution based on membership in a disfavored group, "this court will look to (1) the risk level of membership in the group (i.e., the extent and the severity of persecution suffered by the group) and (2) the alien's individual risk level (i.e., whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution)." *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). "The relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be." *Id.*; *see also Sael v. Gonzales*, 386 F.3d 922, 927 (9th Cir. 2004) (stating that members of the significantly disfavored group comprising ethnic Chinese Indonesians need demonstrate a "comparatively low" level of particularized risk).

Past experiences, including threats and violence, even if not sufficient to compel a finding of past persecution, are indicative of individualized risk of future harm. *See Sael v. Ashcroft*, 386 F.3d 922, 928–29 (9th Cir. 2004); *Hoxha v. v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003).

Evidence of changed circumstances that may be sufficient to undermine an applicant's claim that there is a "pattern or practice" of persecution may not diminish a claim based on disfavored status. *See Sael*, 386 F.3d at 929 ("When a minority group's 'disfavored' status is rooted in centuries of persecution, year-to-year fluctuations cannot reasonably be viewed as disposing of an applicant's claim.").

5. Countrywide Persecution

"An applicant is ineligible for asylum if the evidence establishes that 'the applicant could avoid persecution by relocating to another part of the

applicant's country of nationality . . . if under all the circumstances it would be reasonable to expect the applicant to do so.'" *Kaiser v. Ashcroft*, 390 F.3d 653, 659 (9th Cir. 2004) (quoting 8 C.F.R. § 1208.13(b)(2)(ii)); *see also Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003). "Specifically, the IJ may deny eligibility for asylum to an applicant who has otherwise demonstrated a well-founded fear of persecution where the evidence establishes that internal relocation is a reasonable option under all of the circumstances." *Melkonian*, 320 F.3d at 1069 (remanding for a determination of the reasonableness of internal relocation in Georgia); *see also Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) ("The Immigration and Nationality Act . . . defines a 'refugee' in terms of a person who cannot return to a 'country,' not a particular village, city, or area within a country.").

The inquiry into internal relocation or countrywide persecution is two-fold. "[W]e must first ask whether an applicant could relocate safely to another part of the applicant's country of origin." *Kaiser v. Ashcroft*, 390 F.3d 653, 660 (9th Cir. 2004) (holding that Pakistani couple could not safely relocate where threats occurred even after petitioners moved to the opposite side of the country). "If the evidence indicates that the applicant could relocate safely, we next ask whether it would be reasonable to require the applicant to do so." *Id*. at 659. A previous successful internal relocation may undermine the well-founded fear of future persecution. *See Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005).

In cases where the applicant has not established past persecution, the applicant bears the burden of establishing that it would be either unsafe or unreasonable for him to relocate, unless the persecution is by a government or is government sponsored. *Kaiser v. Ashcroft*, 390 F.3d 653, 659 (9th Cir. 2004); 8 C.F.R. § 1208.13(b)(3)(i).

"In cases in which the persecutor is a government or is government-sponsored, . . . it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3)(ii); *see also Melkonian*, 320 F.3d at 1069 (where the source of persecution is the government, a rebuttable presumption arises that the threat exists nationwide, and that internal relocation would be unreasonable); *Damaize-Job v. INS*, 787 F.2d 1332, 1336–37 (9th Cir. 1986)

(no need for Miskito Indian from Nicaragua to demonstrate countrywide persecution if persecutor shows no intent to limit his persecution to one area, and applicant can be readily identified); *cf. Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (no country-wide danger based on anonymous threat in hometown in El Salvador).

The regulations state that the reasonableness of internal relocation may be based on "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 1208.13(b)(3) (stating that this non-exhaustive list may, or may not, be relevant, depending on the case); *see also Knezevic v. Ashcroft*, 367 F.3d 1206, 1215 (9th Cir. 2004) (holding that Bosnian Serb couple could safely relocate to Serb-held areas of Bosnia, and remanding for determination whether such relocation would be reasonable).

6. Continued Presence of Applicant

An applicant's continued presence in her country of persecution before flight, while relevant, does not necessarily undermine a well-founded fear. *See, e.g., Canales-Vargas v. Gonzales*, 441 F.3d 739, 746 (9th Cir. 2006) (mandate pending) ("We do not fault Canales-Vargas for remaining in Peru until the quantity and severity of the threats she received eclipsed her breaking point."); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (post-threat harmless period did not undermine well-founded fear of former Filipino police officer). There is no "rule that if the departure was a considerable time after the first threat, then the fear was not genuine or well founded." *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996); *see also Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (8-year stay in Nicaragua after release from prison did not negate claim based on severe past persecution); *Turcios v. INS*, 821 F.2d 1396, 1401–02 (9th Cir. 1987) (remaining in El Salvador for several months after release from prison did not negate fear); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (two-year stay in Nicaragua after release not determinative).

Cf. Lata v. INS, 204 F.3d 1241, 1245 (9th Cir. 2000) (Indo-Fijian's fear undermined by two-year stay in Fiji after incidents of harm)*; Castillo v.*

INS, 951 F.2d 1117, 1122 (9th Cir. 1991) (asylum denied where applicant remained over five years in Nicaragua after interrogation without further harm or contacts from authorities).

7. Continued Presence of Family

The continued presence of family members in the country of origin does not necessarily rebut an applicant's well-founded fear, unless there is evidence that the family was similarly situated or subject to similar risk. *See Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (family in Burma not similarly situated because they "didn't do anything against the government"); *Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (where petitioner was singled out for persecution, the situation of remaining relatives in Iran is "manifestly irrelevant"); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (evidence of the condition of the applicant's family is relevant only when the family is similarly situated to the applicant); *Rios v. Ashcroft*, 287 F.3d 895, 902 (9th Cir. 2002) (Guatemala); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (Philippines).

Cf. Li v. Ashcroft, 378 F.3d 959, 964 (9th Cir. 2004) (claim that applicant's family was so afraid of being arrested that it was forced to go deep into hiding was inconsistent with wife's travel to hometown without trouble); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) ("An applicant's claim of persecution upon return is weakened, even undercut, when similarly-situated family members continue to live in the country without incident, . . . or when the applicant has returned to the country without incident." (internal quotation marks and citation omitted)); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (Israel); *Aruta v. INS*, 80 F.3d 1389, 1395 (9th Cir. 1996) (sister remained in the Philippines without incident); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir.1988) (per curiam) (family unmolested in El Salvador); *Mendez-Efrain v. INS*, 813 F.2d 279, 282 (9th Cir. 1987) (continued and unmolested presence of family in El Salvador undermined well-founded fear).

8. Possession of Passport or Travel Documents

Possession of a valid passport does not necessarily undermine the subjective or objective basis for an applicant's fear. *See Mamouzian v.*

Ashcroft, 390 F.3d 1129, 1137 (9th Cir. 2004) ("A petitioner's ability to escape her persecutors does not undermine her claim of a well-founded fear of future persecution, even when she succeeds in obtaining government documents that permit her to depart."); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (possession and renewal of Burmese passport did not undermine petitioner's subjective fear of persecution); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (holding that ethnic Albanian from Kosovo who obtained passport had well-founded fear because "Serbian authorities actively supported an Albanian exodus instead of opposing it"); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1200 (9th Cir. 2000) (minimizing significance of Russian passport issuance); *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987) (rejecting IJ's presumption that Salvadoran government would not persecute an individual that was allowed to leave the country); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (obtaining passport through a friend did not undermine fear); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985).

Cf. Khourassany v. INS, 208 F.3d 1096, 1101 (9th Cir. 2000) (denying, in part, because Palestinian retained Israeli passport and was able to travel freely); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988) (per curiam) (observing that ability to obtain passport is a relevant factor); *Espinoza-Martinez v. INS*, 74 F.2d 1536, 1540 (9th Cir. 1985) (holding that acquisition of Nicaraguan passport without difficulty cut against applicant's asylum claim).

9. Safe Return to Country of Persecution

Return trips can be considered as one factor, among others, that rebut the presumption of a nationwide threat of persecution. *See Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (presumption of nationwide threat of persecution was rebutted when petitioner made three return trips, there had been two favorable changes in government, and fifteen years had passed between the past persecution and the asylum request); *but see Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9th Cir. 2005) (holding that petitioner's repeated return trips to Mexico to gather enough income to flee permanently did not rebut the presumption of a well-founded fear of persecution).

10. Cases Finding No Well-Founded Fear

Gomes v. Gonzales, 429 F.3d 1264, 1267 (9th Cir. 2005) (fear of persecution in Bangladesh undermined by prior successful internal relocation and current country conditions); *Nagoulko v. INS*, 333 F.3d 1012, 1018 (9th Cir. 2003) (possibility of future persecution in Ukraine too speculative); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (no well-founded fear of persecution in Ethiopia on account of imputed political opinion); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Armenians from Nagorno-Karabakh region did not establish past persecution or a well-founded fear of future persecution by Azeris); *Acewicz v. INS*, 984 F.2d 1056, 1059–61 (9th Cir. 1993) (BIA properly took administrative notice of changed political conditions in Poland); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988) (per curiam) (no well-founded fear of Salvadoran guerillas where, *inter alia*, potential persecutor was dead).

F. Nexus to the Five Statutorily Protected Grounds

In order to be eligible for asylum, the past or anticipated persecution must be "on account of" one or more of the five grounds enumerated in 8 U.S.C. § 1101(a)(42)(A): race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992); *Sangha v. INS*, 103 F.3d 1482, 1486 (9th Cir. 1997). The applicant must provide some evidence, direct or circumstantial, that the persecutor was or would be motivated to persecute him because of his actual or imputed status or belief. *See Sangha*, 103 F.3d at 1486–87.

For applications filed on or after May 11, 2005, the REAL ID Act of 2005, Pub. L. No. 109-113, 119 Stat. 231, created a new nexus standard, requiring that an applicant establish that "race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added).

1. Proving a Nexus

The persecutor's motivation may be established by direct or circumstantial evidence. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483

(1992). "[A]n applicant need only produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground." *Gafoor v. INS*, 231 F.3d 645, 650–51 (9th Cir. 2000) (internal quotation marks omitted).

An applicant's uncontroverted credible testimony as to the persecutor's motivations may be sufficient to establish nexus. *See, e.g., Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076–77 (9th Cir. 2004) (accepting applicant's testimony that the Guatemalan government persecuted entire village based on imputed political opinion); *Shoafera v. INS*, 228 F.3d 1070, 1074–75 (9th Cir. 2000) (Ethiopian applicant established through her credible testimony and witness testimony that the perpetrator was motivated to rape her based, in part, on her Amhara ethnicity); *Maini v. INS*, 212 F.3d 1167, 1175–76 (9th Cir. 2000) (evidence compelled a finding that Indian family was persecuted on account of inter-faith marriage based on credible witness testimony and statements by attackers).

a. Direct Evidence

Direct proof of motivation may consist of evidence concerning statements made by the persecutor to the victim, or by victim to persecutor. *See, e.g., Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (soldiers stated that rape was because of Kebede's family's position in prior Ethiopian regime); *Lopez v. Ashcroft*, 366 F.3d 799, 804 (9th Cir. 2004) (Guatemalan guerillas told applicant that he should not work for the wealthy); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 2000) (en banc) (applicant articulated her political opposition to the NPA); *Gonzalez-Neyra v. INS*, 122 F.3d 1293, 1295 (9th Cir. 1997) (applicant told Shining Path that he would not submit to extortion because of opposition), *amended by* 133 F.3d 726 (9th Cir. 1998).

b. Circumstantial Evidence

Circumstantial proof of motivation may consist of severe or disproportionate punishment for violations of laws, or other evidence that the persecutor generally regards those who resist as political enemies. *See, e.g., Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (severe punishment for illegal departure). Circumstantial evidence of motive may also include, *inter alia*, the timing of the persecution and signs or emblems left at the site of

persecution. *See Deloso v. Ashcroft*, 393 F.3d 858, 865–66 (9th Cir. 2005). Statements made by the persecutor may constitute circumstantial evidence of motive. *See Gafoor v. INS*, 231 F.3d 645, 651–52 (9th Cir. 2000) (holding that Fijian "soldiers' statements to Gafoor [to 'go back to India' were] unmistakable circumstantial evidence that they were motivated by his race and imputed political opinion").

"In some cases, the factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of political opinion, or one of the other protected grounds. Indeed, this court has held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue." *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) (internal citation omitted); *see also Canales-Vargas v. Gonzales*, 441 F.3d 739, 744–45 (9th Cir. 2006) (mandate pending) (anonymous threats began several weeks after applicant spoke out against Shining Path guerillas at a political rally). Moreover, "if there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political." *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (internal quotation marks omitted); *see also* Imputed Political Opinion, below.

2. Mixed-Motive Cases

A persecutor may have multiple motives for inflicting harm on an applicant. As long as the applicant produces evidence from which it is reasonable to believe that the persecutor's action was motivated, at least in part, by a protected ground, the applicant is eligible for asylum. *See Borja v. INS*, 175 F.3d 732, 736–37 (9th Cir. 1999) (en banc) (Filipino targeted for extortion plus political motives); *Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc).

See Nuru v. Gonzales, 404 F.3d 1207, 1227–28 (9th Cir. 2005) (Eritrean army deserter had well-founded fear of future persecution on account of political opinion and as punishment for desertion); *Deloso v. Ashcroft*, 393 F.3d 858, 864–66 (9th Cir. 2005) (Filipino anti-communist targeted on account of political opinion and revenge); *Mihalev v. Ashcroft*, 388 F.3d 722, 727–30 (9th Cir. 2004) (Bulgarian gypsy established that police persecuted her, in part, based on her Roma ethnicity); *Mamouzian v.*

Ashcroft, 390 F.3d 1129, 1134 (9th Cir. 2004) ("That [petitioner's] supervisor might also have been motivated by personal dislike . . . does not undermine [petitioner's] claim of persecution."); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (gang rape by Guatemalan soldiers motivated in part by imputed political opinion); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (Bangladeshi targeted based on "political jealousy" and political opinion); *Jahed v. INS*, 356 F.3d 991, 999 (9th Cir. 2004) (Iranian National Guard's motive was "inextricably intertwined with petitioner's past political affiliation" even though he was motivated in part by his desire for money); *Gafoor v. INS*, 231 F.3d 645, 652–54 (9th Cir. 2000) (Indo-Fijian targeted for race, political opinion, and personal vendetta); *Shoafera v. INS*, 228 F.3d 1070, 1075–76 (9th Cir. 2000) (rape by Ethiopian government official motivated in part by ethnicity); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) ("revenge plus" motive of guerillas to harm former Filipino police officer who testified against the NPA); *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (at least one motive was the imputation of pro-guerilla political opinion to Salvadoran applicant); *Maini v. INS*, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000) (persecution of Indian family motivated by religious and economic grounds); *Tarubac v. INS*, 182 F.3d 1114, 1118–19 (9th Cir. 1999) (NPA persecution based on political opinion and economic motives); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) ("Torture in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation even if the torture served intelligence gathering purposes.").

For applications filed on or after May 11, 2005, section 101(a)(3) of the REAL ID Act provides that an applicant must establish that "race, religion, nationality, membership in a particular social group, or political opinion, was or will be <u>at least one central reason</u> for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). The legislative history of the REAL ID Act suggests that the addition of this "central reason" standard is motivated, at least in part, by this court's mixed-motives caselaw. *See* Conference Committee Statement, 151 Cong. Rec. H2869 (daily ed. May 3, 2005) (suggesting that this court's decisions in *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995), *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988), and *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) violate Supreme Court precedent requiring asylum applicants to provide evidence of

motivation and improperly shift the burden to the government to prove legitimate purpose, adverse credibility, or some other statutory bar to relief).

3. Shared Identity Between Victim and Persecutor

"That a person shares an identity with a persecutor does not . . . foreclose a claim of persecution on account of a protected ground. If an applicant can establish that others in his group persecuted him because they found him insufficiently loyal or authentic to the religious, political, national, racial, or ethnic ideal they espouse, he has shown persecution on account of a protected ground." *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) (internal citation and parenthetical omitted) (persecution of interfaith Indian family).

4. Civil Unrest and Motive

Although widespread civil unrest does not, on its own, establish asylum eligibility, the existence of general civil strife does not preclude relief. *See Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) ("[T]he existence of civil strife does not alter our normal approach to determining refugee status or make a particular asylum claim less compelling."). "The difficulty of determining motive in situations of general civil unrest should not . . . diminish the protections of asylum for persons who have been punished because of their actual or imputed political views, as opposed to their criminal or violent conduct." *Arulampalam v. Ashcroft*, 353 F.3d 679, 685 n.4 (9th Cir. 2003) (internal quotation marks omitted). "In certain contexts, . . . the existence of civil strife supports a finding that claimed persecution was on account of a protected ground." *Ndom v. Ashcroft*, 384 F.3d 743, 753 (9th Cir. 2004) (armed conflict between Senegalese forces and secessionist rebels).

See also Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1073 (9th Cir. 2004) (Guatemalan civil war); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211–12 (9th Cir. 2004) (distinguishing between displaced persons fleeing the ravages of war and refugees fleeing ethnic cleansing); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (widespread political violence in Bangladesh "says very little about" whether applicant could demonstrate a persecutory motive).

5. Resistance to Discriminatory Government Action

Resistance to discriminatory government action that results in persecution is persecution on account of a protected ground. *See Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (Chinese Christian who was arrested and physically abused after he attempted to stop an officer from removing a cross from a tomb was persecuted on account of religion); *Chand v. INS*, 222 F.3d 1066, 1077 (9th Cir. 2000) (persecution of Indo-Fijian for resisting racial discrimination).

6. The Protected Grounds

a. Race

Claims of race and nationality persecution often overlap. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1160 n.5 (9th Cir. 1999) (Quiche Indian from Guatemala). Recent cases use the more precise term "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality." *Shoafera v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotation marks omitted) (ethnic Amhara in Ethiopia); *see also Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.10 (9th Cir. 2004) (Arab Israeli). Individuals forced to flee ethnic cleansing by hostile military forces are refugees who fear persecution on account of ethnicity. *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211–12 (9th Cir. 2004) (distinguishing displaced persons).

(i) Cases Finding Racial or Ethnic Persecution

Mashiri v. Ashcroft, 383 F.3d 1112, 1119–20 (9th Cir. 2004) (past persecution of ethnic Afghans in Germany); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (mixed-race, mixed-religion couple from Fiji suffered past persecution); *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004) (Serbian couple from Bosnia-Herzegovina established past persecution and a well-founded fear of future persecution on account of ethnicity because their town was targeted for bombing, invasion, occupation, and a "systematic campaign of ethnic cleansing by the Croats"); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (Armenian applicant was eligible for asylum because Abkhazian separatists specifically targeted him for conscription based on his ethnicity and religion); *Gafoor v. INS*, 231 F.3d 645, 651–52 (9th Cir. 2000) (Indo-Fijian persecuted on account of race and imputed political opinion); *Shoafera v. INS*, 228 F.3d 1070, 1075–76 (9th Cir. 2000) (rape motivated in

part by Amhara ethnicity); *Chand v. INS*, 222 F.3d 1066, 1076 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197–98 (9th Cir. 2000) (well-founded fear of persecution on the basis of Armenian ethnicity); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem in Armenia); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (past persecution of Quiche Indian from Guatemala); *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996) (past persecution of Indo-Fijian);

(ii) Cases Finding No Racial or Ethnic Persecution

Gormley v. Ashcroft, 364 F.3d 1172, 1177 (9th Cir. 2004) (holding that random criminal acts in South Africa bore no nexus to race); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (Kanjobal Indian from Guatemala failed to establish asylum eligibility on basis of race); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese Filipino failed to establish a well-founded fear on account of race or ethnicity).

b. Religion

Persecution on the basis of religion may assume various forms, including:

> prohibition of membership of a religious community, or worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

Handbook on Procedures and Criteria for Determining Refugee Status, U.N. Doc. HCR/IP/4/Eng./REV.2 (ed. 1992) ("UNHCR Handbook"), para. 72.

"The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience, and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance." UNHCR Handbook, para. 72.

Moreover, "[a]n individual (or group) may be persecuted on the basis of religion, even if the individual or other members of the group adamantly deny that their belief, identity and/or way of life constitute a 'religion.'" *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (per curiam) (practitioner of Falun Gong) (quoting UNHCR Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (HCR/GIP/04/06, 28 April 2004)).

An applicant cannot be required to practice his religious beliefs in private in order to escape persecution. *See Zhang v. Ashcroft*, 388 F.3d 713, 719 (9th Cir. 2004) (per curiam) ("[T]o require [petitioner] to practice his beliefs in secret is contrary to our basic principles of religious freedom and the protection of religious refugees.").

(i) Cases Finding Religious Persecution

Zhang v. Ashcroft, 388 F.3d 713, 720 (9th Cir. 2004) (per curiam) (holding that petitioner established clear probability of persecution in China on account of his practice of Falun Gong); *Malty v. Ashcroft*, 381 F.3d 942, 948 (9th Cir. 2004) (BIA erred in denying motion to reopen because Egyptian Coptic Christian demonstrated prima facie eligibility for asylum); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (mixed-race, mixed-religion couple from Fiji suffered past persecution); *Khup v. Ashcroft*, 376 F.3d 898, (9th Cir. 2004) (Burmese Seventh Day Adventist minister); *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (Chinese Christian was persecuted on account of his religion when he was arrested, detained, physically abused, and forced to sign an affidavit renouncing his religion, after he participated in illegal religious activities and attempted to stop an officer from removing a cross from a tomb); *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.9 (9th Cir. 2004) (noting strong correlation between ethnicity and religion in the Middle East); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (Armenian applicant was eligible for asylum because Abkhazian separatists specifically targeted him for conscription based on his ethnicity and religion); *Popova v. INS*, 273 F.3d 1251, 1257–58 (9th Cir. 2001) (harassment and threats in Bulgaria based on applicant's religious surname and political opinion); *Lal v. INS*, 255 F.3d 998 (9th Cir. 2001) (Indo-Fijian faced religious and political persecution), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Bandari v. INS*,

227 F.3d 1160 (9th Cir. 2000) (past persecution of Christian who attempted interfaith dating in Iran); *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (if credible, past persecution of Shia Muslims by Sunni Muslims in Pakistan); *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) ("persecution aimed at stamping out an interfaith marriage is without question persecution on account of religion"); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) (past persecution of Jewish citizen of the Ukraine); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (arrest of family member at church may provide basis for eligibility); *Hartooni v. INS*, 21 F.3d 336, 341–42 (9th Cir. 1994) (if credible, Christian Armenian in Iran eligible for asylum).

(ii) Cases Finding No Religious Persecution

Padash v. INS, 358 F.3d 1161, 1166 (9th Cir. 2004) (Indian Muslim was not eligible for asylum based on two incidents of religious-inspired violence at his father's restaurant); *Halaim v. INS*, 358 F.3d 1128, 1132 (9th Cir. 2004) (holding that discrimination against Ukranian sisters on account of Pentecostal Christian religion did not compel a finding that they suffered past persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016–17, 1018 (9th Cir. 2003) (past harassment of Christian in Ukraine not persecution; future fear too speculative); *Hakeem v. INS*, 273 F.3d 812, 817 (9th Cir. 2001) (Ahmadi in Pakistan not eligible for withholding); *Tecun-Florian v. INS*, 207 F.3d 1107, 1110 (9th Cir. 2000) (past torture by Guatemalan guerillas had no nexus to applicant's religious beliefs); *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996) (conscription of Nicaraguan Jehovah's Witness); *Abedini v. INS*, 971 F.2d 188, 191–92 (9th Cir. 1992) (prosecution of Iranian for distribution of Western videos); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (applicant's violation of restrictive dress and conduct rules did not establish persecution on account of religion or political opinion); *Ghaly v. INS*, 58 F.3d 1425 (9th Cir. 1995) (prejudice and discrimination against Egyptian Coptic Christian insufficient); *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (religious objection to service in the Salvadoran military insufficient to establish a nexus); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1991) (religious converts in Egypt).

c. Nationality

Claims of race and nationality persecution often overlap. *See* cases cited under Race, above. Recent cases use the more precise term "ethnicity," "which falls somewhere between and within the protected grounds of race and nationality." *Shoafera v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotation marks omitted) (ethnic Amhara in Ethiopia); *see also Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Armenians from Nagorno-Karabakh had no well-founded fear); *Andriasian v. INS*, 180 F.3d 1033, 1042 (9th Cir. 1999) (persecution of Armenian in Azerbaijan).

d. Membership in a Particular Social Group

"[A] 'particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it," *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (Mexican gay men with female sexual identities constitute a particular social group). It "implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576–77 (9th Cir. 1986) (stating that a family is a "prototypical example" of a social group, but young working class urban males of military age are not); *see also Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (focusing on the presence of a "common, immutable characteristic"), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); UNHCR's Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002). Large, internally diverse, demographic groups rarely constitute distinct social groups. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576–77 (9th Cir. 1986) ("Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status.").

The BIA has rejected this court's "voluntary associational relationship" test, explaining: "Under *Acosta*, we do not require a "voluntary associational relationship" among group members. Nor do we require an element of "cohesiveness" or homogeneity among group members." *Matter of C-A-*, 23

I. & N. Dec. 951, 956–57 (BIA 2006). The BIA focuses instead on the extent to which members of a society perceive those with the characteristics in question as members of a social group." *Id*. at 957.

(i) Types of Social Groups

(A) Family and Clan

"[I]n some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes." *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002); *see also Lin v. Ashcroft*, 377 F.3d 1014, 1028–29 (9th Cir. 2004) (family membership may be a plausible basis for protected social group refugee status in the context of families who have violated China's coercive population control policy); *Sanchez-Trujillo v. INS*, 801 F.2d 1572, 1576–77 (9th Cir. 1986) (family is a "prototypical example" of a social group); *but see Estrada-Posados v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) ("the concept of persecution of a social group [does not extend] to the persecution of a family").

Clan membership may constitute membership in a particular social group. *Mohammed v. Gonzales*, 400 F.3d 785, 796–98 (9th Cir. 2005) (membership in the Bendadiri clan in Somalia); *see also Matter of H-*, 21 I. & N. Dec. 337 (BIA 1996).

(B) Gender-Related Claims

"Gender" is not listed as a protected ground in the refugee definition. However, this court and others have begun to address the circumstances under which gender is relevant to a statutorily protected ground, including gender as a social group and gender-related harm.

(1) Gender Defined Social Group

Gender may constitute membership in a social group in the case of female genital mutilation. *See Mohammed v. Gonzales*, 400 F.3d 785, 796–798 (9th Cir. 2005). Similarly, the gender-defined group of Mexican gay men with female sexual identities constitutes a particular social group. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000); *see also*

Fisher v. INS, 79 F.3d 955, 965–66 (9th Cir. 1996) (en banc) (Canby, J., concurring) (although petitioner did not establish persecution on account of religion or political opinion based on her violation of restrictive dress and conduct rules, eligibility on account of membership in a particular social group was not argued, and thus not foreclosed). *See also In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (en banc) (granting asylum based on a gender-defined social group of "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by the tribe, and who oppose the practice"); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (defining persecution on account of membership in a particular social group as "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . such as sex, color, or kinship ties, . . ."), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

(2) Gender-Specific Harm

Gender-specific harm may take many forms, including sexual violence, domestic or family violence, female genital mutilation or cutting, persecution of gays and lesbians, coerced family planning, and repressive social norms. *See* UNHCR's Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01, 7 May 2002) (discussing various forms of gender-related persecution); *see also* INS Office of International Affairs, Gender Guidelines, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995) (described in *Fisher v. INS*, 79 F.3d 955, 967 (9th Cir. 1996) (en banc) (Noonan, J., dissenting)); K. Musalo & S. Knight, "Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions," *reprinted in*: 03-12 Immigr. Briefings 1.

Female genital mutilation ("FGM") constitutes persecution on account of membership in a social group. *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (social group comprised of young girls in the Benadiri clan or Somalian females). Moreover, FGM is a "permanent and continuing" act of persecution that cannot be rebutted. *Id.* at 801. *See also Abebe v. Gonzales*, 432 F.3d 1037, 1041–43 (9th Cir. 2005) (en banc) (remanding for consideration of whether U.S. citizen daughter's fear of FGM could be imputed to her parents); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004)

(remanding CAT claim based on petitioner's past FGM in Nigeria, and fear that her daughter would suffer FGM if returned).

Rape and other forms of sexual or gender-based violence can constitute persecution on account of political opinion or other enumerated grounds. *See, e.g.*, *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (Salvadoran woman's prolonged sexual abuse by Salvadoran military sergeant was persecution on account of political opinion), *overruled in part on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Lopez-Galarza v. INS*, 99 F.3d 954, 959–60 (9th Cir. 1996) (Nicaraguan woman raped, abused, deprived of food, and subjected to forced labor on account of political opinion); *Shoafera v. INS*, 228 F.3d 1070, 1075–76 (9th Cir. 2000) (Ethiopian woman beaten and raped at gunpoint on account of Amhara ethnicity); *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc) (forced pregnancy examination constituted persecution on account of political opposition to China's coercive family planning policy); *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004) (Ethiopian woman raped because of her family's association with the previous government); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004) (Guatemalan woman gang raped by soldiers on account of a pro-guerilla political opinion imputed to her entire village); *cf. Matter of Rodi Alvarado Pena*, 22 I. & N. Dec. 906 (BIA 1999) (married women in Guatemala who are unable to leave abusive relationships do not constitute a particular social group), *vacated and remanded by* 23 I. & N. Dec. 694 (BIA 2005) (for reconsideration in light of a proposed regulatory amendment, 65 Fed. Reg. 76, 588 (Dec. 7, 2000), stating that gender can form the basis of a particular social group).

(C) Sexual Orientation

Sexual orientation and sexual identity can be the basis for establishing a particular social group. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that all alien homosexuals are members of a "particular social group."). *See also Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088–89 (9th Cir. 2005) (Mexican homosexual man forced to perform nine sex acts on a police officer and threatened with death persecuted on account of sexual

orientation); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094–95 (9th Cir. 2000) (Mexican gay men with female sexual identities constitute a particular social group); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (BIA 1990) (Cuban homosexual man established membership in a particular social group).

(D) Former Status or Occupation

An applicant's status based on her former occupations, associations, or shared experiences, may be the basis for social group claim. *See, e.g., Cruz-Navarro v. INS*, 232 F.3d 1024, 1028–29 (9th Cir. 2000) (member of Peruvian National Police). "Persons who are persecuted because of their status as a former police or military officer, for example, may constitute a cognizable social group under the INA." *Id*. at 1029 (holding that current police or military are not a social group).

(E) Other Social Groups

In *Tchoukhrova v. Gonzales*, this court held that Russian children with disabilities that are serious and long lasting or permanent in nature, and their parents who provide care for them, constitute a particular social group, and the harms suffered by the disabled child must be taken into account in determining whether the parents are eligible for asylum. 404 F.3d 1181, 1189–91 (9th Cir. 2005), *vacated and remanded by* --- S.Ct. ----, 2006 WL 1221941 (Oct. 2, 2006) (memorandum) (remanding for reconsideration in light of *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (per curiam)).

(ii) Cases Denying Social Group Claims

Ochoa v. Gonzales, 406 F.3d 1166, 1171 (9th Cir. 2005) (business owners in Colombia who rejected demands by narco-traffickers to participate in illegal activity was too broad a category to qualify as a particular social group); *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002) (evidence did not compel a finding that Guatemalan applicant was persecuted on account of family membership); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1050–51 (9th

Cir. 2000) (Kanjobal Indians comprising large percentage of population in a given area not a particular social group); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (persons of low economic status in China not a particular social group); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (former servicemen in Guatemalan military not a particular social group); *Estrada-Posados v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (family not a particular social group); *De Valle v. INS*, 901 F.2d 787, 792–93 (9th Cir. 1990) (family members of Salvadoran military deserter not a particular social group).

e. Political Opinion

"[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted 'on account of' a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted him (or that he faces the prospect of such persecution) *because of* his political opinion." *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (internal citation omitted). In other words, that an applicant holds a political opinion "is not, by itself, enough to establish that any future persecution would be 'on account' of this opinion. He must establish that the political opinion would motivate his potential persecutors." *Njuguna v. Ashcroft*, 374 F.3d 765, 770 (9th Cir. 2004).

Political opinion encompasses more than electoral politics or formal political ideology or action. *See, e.g., Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (recognizing that an applicant's statements regarding the unfair distribution of food in Iraq resulted in the imputation of an anti-government political opinion), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (refusal to pay revolutionary tax to the NPA in the face of threats constitutes an expression of political belief). A political opinion can be an actual opinion held by the applicant, or an opinion imputed to him or her by the persecutor. *See Sangha v. INS*, 103 F.3d 1482, 1488–89 (9th Cir. 1997); *see also* Imputed Political Opinion, below.

(i) Organizational Membership

An applicant may manifest his or her political opinion by membership or participation in an organization with political purposes or goals. *See, e.g., Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (membership in political group opposing the Sandinistas); *Mendoza Perez v. INS*, 902 F.2d 760 (9th Cir. 1990) (involvement with Salvadoran land reform organization); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985) (active member of anti-government political organization in El Salvador).

(ii) Refusal to Support Organization

An applicant may manifest a political opinion by his refusal to join or support an organization, or departing from the same. *See, e.g., Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (opposition to NPA); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (death threats and forced recruitment, where applicant did not agree with Salvadoran guerillas); *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997) (refusal to make payments to Shining Path guerilla movement), *amended by* 133 F.3d 726 (9th Cir. 1998); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996) (refusal to support Sandinistas); *Gonzalez v. INS*, 82 F.3d 903, 906 (9th Cir. 1996) (same).

(iii) Labor Union Membership and Activities

Cases recognizing the political nature of trade union and workplace activity include: *Agbuya v. INS*, 241 F.3d 1224, 1229 (9th Cir. 2001) (applicant was viewed by NPA guerillas as politically aligned with mining company and government); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998) (president of street vendors' cooperative in Peru targeted by Shining Path on account of imputed political opinion); *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996) (secretary of labor union in Fiji); *Zavala-Bonilla v. INS*, 730 F.2d 562, 563 (9th Cir. 1984) (persecution of Salvadoran trade union member).

(iv) Opposition to Government Corruption

A whistleblower's exposure of government corruption "may constitute political activity sufficient to form the basis of persecution on account of political opinion." *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000)

(Filipino policeman and customs officer). "When the alleged corruption is inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily political." *Id.* (distinguishing personal retaliation "completely untethered to a governmental system"). *See also Mamouzian v. Ashcroft*, 390 F.3d 1129, 1133–35 (9th Cir. 2004) (retaliation against Armenian applicant who protested government corruption demonstrated persecution on account of political opinion); *Hasan v. Ashcroft*, 380 F.3d 1114, 1121 (9th Cir. 2004) ("When a powerful political leader uses his political office as a means to siphon public money for personal use, and uses political connections throughout a wide swath of government agencies, both to facilitate and to protect his illicit operations, exposure of his corruption is inherently political."); *Njuguna v. Ashcroft*, 374 F.3d 765, 770–71 (9th Cir. 2004) (retaliation against Kenyan applicant who opposed government corruption by helping domestic servants escape was on account of political opinion); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245–46 (9th Cir. 1999) (death threats received after Colombian prosecutor investigated political corruption by opposition political party constituted persecution on account of political opinion); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (Haitian fisherman's refusal to accede to government extortion).

Cf. Kozulin v. INS, 218 F.3d 1112, 1115–17 (9th Cir. 2000) (evidence did not compel conclusion that beating of Russian anti-communist, shortly after he reported misconduct of his ship captain, was on account of political opinion); *Zayas-Marini v. INS*, 785 F.2d 801 (9th Cir. 1986) (although petitioner was threatened with death after accusing Paraguayan government officials of corruption, the threats were grounded in personal animosity given, *inter alia*, petitioner's continued close association with ruling members of the government).

(v) Neutrality

A conscious choice not to side with any political faction can be a manifestation of a political opinion. *See Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997) (recognizing the doctrine of hazardous neutrality, and noting that *Elias-Zacarias* questioned, but did not overrule this theory); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir. 1995) (desertion from Honduran military established neutrality). An applicant's neutrality must be result of an

affirmative decision to remain neutral, rather than mere apathy. *See Lopez v. INS*, 775 F.2d 1015, 1016–17 (9th Cir. 1985) (El Salvador).

See also Navas v. INS, 217 F.3d 646, 656 n.12 (9th Cir. 2000) (Salvadoran established claim based on political neutrality); *Rivera-Moreno v. INS*, 213 F.3d 481 (9th Cir. 2000) (rejecting Salvadoran's claim of neutrality); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 413–14 (9th Cir. 1991) (rejecting Guatemalan soldier's claim of neutrality); *Cuadras v. INS*, 910 F.2d 567, 571 (9th Cir. 1990) (rejecting Salvadoran's claim of neutrality); *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989) (Salvadoran established political neutrality); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984) ("Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction."); *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985) (Salvadoran established political neutrality).

(vi) Other Expressions of Political Opinion

See Zahedi v. INS, 222 F.3d 1157 (9th Cir. 2000) (holding that applicant who was involved in translation and distribution of "The Satanic Verses" had a well-founded fear of persecution on account of political opinion); *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000) (Russian nuclear engineer's belief that his government should not sell nuclear technology to Iran); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (Salvadoran woman's resistance to rape and beating through flight constituted assertion of a political opinion opposing forced sexual subjugation), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc).

(vii) Imputed Political Opinion

"Imputed political opinion is still a valid basis for relief after *Elias-Zacarias*." *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992); *see also Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997). An imputed political opinion arises when "[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views." *Canas-Segovia*, 970 F.2d at 602. Under the imputed

political opinion doctrine, the applicant's own opinions are irrelevant. *See Kumar v. Gonzales*, 444 F.3d 1043, 1054 (9th Cir. 2006) (Indian police persecuted applicant based on their false belief concerning his terrorist affiliation); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). "[O]ur analysis focuses on how the persecutor perceived the applicant's actions and allegiances, and what motivated their abuse." *Agbuya v. INS*, 241 F.3d 1224, 1229 (9th Cir. 2001) (NPA perceived applicant to be an enemy of the laborers, the communist cause, and the NPA itself).

(A) Family Association

An imputed political opinion claim may arise from the applicant's associations with others, including family, organizational, governmental or personal affiliations, which cause assumptions to be made about him. "Typically, where killings and other acts of violence are inflicted on members of the same family by government forces, the inference that they are connected and politically motivated is an appropriate one." *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (imputation of pro-guerilla political opinion by Salvadoran soldiers) (internal quotation marks omitted); *see also Lopez-Galarza v. INS*, 99 F.3d 954, 959–60 (9th Cir. 1996) (Sandinistas imputed a political opinion based on family's ties to former government); *Ramirez Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990) (imputed opinion based on association with large, historically politically active Salvadoran family); *cf. Sangha v. INS*, 103 F.3d 1482, 1489–90 (9th Cir. 1997) (Sikh failed to show that the militants imputed his father's Akali Dal political opinion to him).

(B) No Evidence of Legitimate Prosecutorial Purpose

"[I]f there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political." *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (internal quotation marks omitted). Moreover, "extra-judicial punishment of suspected anti-government guerillas can constitute persecution on account of imputed political opinion." *Singh v. Ilchert*, 63 F.3d 1501,

1508–09 (9th Cir. 1995) (discussing difference between legitimate criminal prosecution and persecution); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (refusing to characterize death threats by Salvadoran security forces "as an example of legitimate criminal prosecution"); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) ("When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government's actions are politically motivated.").

Cf. Dinu v. Ashcroft, 372 F.3d 1041, 1044–45 (9th Cir. 2004) (distinguishing the above line of cases because Dinu acknowledged that the Romanian authorities had a legitimate goal of apprehending those who shot civilian demonstrators during the uprising).

Section 101(a)(3) of the REAL ID Act, Pub. L 109–13, 119 Stat. 231 (2005), codified the existing regulatory standard that the burden of proof is on the asylum applicant to establish eligibility for relief. 8 U.S.C. § 1158(b)(1)(B)(I). The legislative history of the REAL ID Act indicates that the codification of the burden of proof was motivated by Ninth Circuit precedent applying a presumption of improper motive where there is no reason to believe that an applicant engaged in illegal, terrorist, militant or guerilla activity. *See* Conference Committee Statement, 151 Cong. Rec. H2813-01, *H2869 (daily ed. May 3, 2005) ("This presumption violates the Supreme Court precedent *Elias-Zacarias*, which requires asylum applicants to provide evidence of motivation. Further, this presumption effectively, but improperly, shifts the burden to the government to prove [legitimate purpose, adverse credibility, or some other statutory bar to relief]").

(C) Government Employees

An applicant's status as a government employee alone may establish imputed political opinion. *Sagaydak v. Gonzales*, 405 F.3d 1035, 1042 (9th Cir. 2005) (petitioner "was aligned with the political opinion of his employer simply by the fact that he worked as a government official enforcing government policies"). *See also Aguilera Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) ("[Petitioner]'s status as a government employee caused the

opponents of the government to classify him as a person 'guilty' of a political opinion.").

(D) Other Cases Discussing Imputed Political Opinion

Zhou v. Gonzales, 437 F.3d 860, 869-70 (9th Cir. 2006) (importing and distributing material critical of Chinese government's treatment of Falun Gong practitioners could be imputed as anti-governmental political opinion); *Ndom v. Ashcroft*, 384 F.3d 743, 755–56 (9th Cir. 2004) (applicant was persecuted by Senegalese armed forces on account of imputed political opinion); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076–77 (9th Cir. 2004) (Guatemalan woman who was gang raped by soldiers was persecuted on account of a pro-guerilla political opinion imputed to her entire village); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (rape because of applicant's family's association with the previous Ethiopian government); *Rios v. Ashcroft*, 287 F.3d 895, 900–01 (9th Cir. 2002) (perceived to be political opponents of the Guatemalan guerillas); *Al-Harbi v. INS*, 242 F.3d 882, 890 (9th Cir. 2001) (imputed political opinion based on United States evacuation from Iraq); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (former Filipino intelligence officer feared retaliation for testifying against guerilla leaders); *Yazitchian v. INS*, 207 F.3d 1164, 1168 (9th Cir. 2000) (political opinion of prominent Dashnak imputed to Armenian couple); *Chanchavac v. INS*, 207 F.3d 584, 591 (9th Cir. 2000) (Guatemalan military accused applicant of being a guerilla when beating him); *Cordon-Garcia v. INS*, 204 F.3d 985, 991–92 (9th Cir. 2000) (Guatemalan guerilla abductor told applicant that her teaching efforts undermined their recruitment efforts); *Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc) (Filipino military informant placed on NPA death list); *Ratnam v. INS*, 154 F.3d 990, 995–96 (9th Cir. 1998) (torture by Sri Lankan government on account of imputed political opinion); *Vera-Valera v. INS*, 147 F.3d 1036, 1039 (9th Cir. 1998) (president of street vendor's cooperative in Peru); *Velarde v. INS*, 140 F.3d 1305, 1312 (9th Cir. 1998) (bodyguard to former Peruvian President's family), *superseded in part on other grounds by Falcon Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003); *Meza-Manay v. INS*, 139 F.3d 759, 764 (9th Cir. 1998) (husband was member of Peruvian counter-insurgency unit); *Rodriguez-Roman v. INS*, 98 F.3d 416, 429–30 (9th Cir. 1996) (Cuban illegal departure statute imputes disloyalty); *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996) (Sandinista prison director); *Singh v. Ilchert*, 69 F.3d 375,

379 (9th Cir. 1995) (per curiam) (imputed beliefs of Sikh separatists); *Alonzo v. INS*, 915 F.2d 546, 549 (9th Cir. 1990) (refusal to join Guatemalan military); *Beltran-Zavala v. INS*, 912 F.2d 1027, 1029–30 (9th Cir. 1990) (based on friendship with Guatemalan guerilla supporter), *overruled in part on other grounds by Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) (imputed opinion based on employment by Salvadoran government); *Maldonado-Cruz v. INS*, 883 F.2d 788, 792 (9th Cir. 1989) (supposed association with Salvadoran guerillas); *Blanco-Lopez v. INS*, 858 F.2d 531, 533 (9th Cir. 1988) (false accusation that applicant was a Salvadoran guerilla); *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) (Haitian's refusal to accede to extortion led to classification and treatment as a subversive); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (deliberate and cynical imputation of a political viewpoint by Salvadoran military official), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

(viii) Opposition to Coercive Population Control Policies

Congress amended the refugee definition in 1996 to provide that forced abortion or sterilization, and punishment for opposition to coercive population control policies, constitute persecution on account of political opinion. *See* 8 U.S.C. § 1101(a)(42)(B) (added by section 601 of IIRIRA).

The Immigration and Nationality Act now provides that:

> 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 will 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.

Id. Although previously only 1,000 people could be admitted under this provision each year, *see* 8 U.S.C. § 1157(a)(5) (2004); *Li v. Ashcroft*, 356 F.3d 1153, 1161 n.6 (9th Cir. 2004) (en banc), section 101(g)(2) of the REAL ID Act of 2005, Pub. L. 109–13, 119 Stat. 231, eliminated the cap, *see* 8 U.S.C. § 1157(a)(5) (2005) (as amended).

(A) Forced Abortion

"The plain language of the statute provides that forced abortions are per se persecution and trigger asylum eligibility." *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was eligible for asylum and withholding). "[A]n asylum applicant seeking to prove he was subjected to a coercive family planning policy need not demonstrate that he was physically restrained during a 'forced' procedure. Rather, 'forced' is a much broader concept, which includes compelling, obliging, or constraining by mental, moral or circumstantial means, in addition to physical restraint." *Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004) (applicant suffered forced abortion where she was suspended from work for a month and required to attend birth control reeducation classes and was later forced into a van, driven to the hospital, and placed onto a surgical table for the abortion).

(B) Forced Sterilization

A person who has been forcibly sterilized, or his or her spouse, is automatically eligible for asylum. *See He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) (reversing BIA's negative credibility finding and holding that husband whose wife was forcibly sterilized after the birth of her second child, was entitled to asylum); *see also Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) ("Ge is automatically eligible for asylum if he can show that his wife was forced to undergo an abortion under China's one-child policy)*; Zheng v. Ashcroft*, 397 F.3d 1139 (9th Cir. 2005) (same).

The child of a parent forcibly sterilized is not automatically eligible for asylum. *Zhang v. Gonzales*, 408 F.3d 1239, 1244–46 (9th Cir. 2005) (upholding under *Chevron* deference the BIA's interpretation that 8 U.S.C.

§ 1101(a)(42)(B) does not apply to children of forcibly sterilized parents); *cf. Lin v. Ashcroft*, 377 F.3d 1014, (9th Cir. 2004) (not deciding but suggesting that the children of forcibly sterilized parents might be automatically eligible for asylum). In *Zhang*, however, the court held that the child of forcibly sterilized parents may be able to establish persecution on account of her parents' resistance to China's population controls measures where she suffered hardships as a result of her father's forced sterilization, including economic deprivation, the limitation of her educational opportunities, and the trauma of witnessing her father's forcible removal from her home. *See Zhang*, 408 F.3d at 1249–50 (remanding for new asylum determination).

"[W]hen an applicant suffers past persecution by means of an involuntary sterilization in accordance with the country's coercive population control policy, he is [automatically] entitled by virtue of that fact alone to withholding of removal." *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (following a forced sterilization "it is not possible, as a matter of law, for conditions to change or relocation to occur that would eliminate a well-founded fear of persecution."); *see also Matter of Y-T-L-*, 23 I. & N. Dec. 601, 606–07 (BIA 2003); *but see Zheng v. Ashcroft*, 397 F.3d 1139, 1149 (9th Cir. 2005) (remanding the withholding of removal claim after determining that petitioner established a well-founded fear of persecution because the parties did not brief the issue).

(C) Other Resistance to a Coercive Population Control Policy

In *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc), the court held that a forced pregnancy examination constituted persecution, given the timing and physical force involved in the procedure. The applicant described a physically invasive and emotionally traumatic half-hour exam, which was conducted over her physical protests. Li was also threatened with future exams, abortion, sterilization of her boyfriend, and arrest. The court held that the persecutory pregnancy exam was on account of petitioner's vocal and physical resistance to China's marriage-age restriction and one-child policy.

In *Chen v. Ashcroft*, 362 F.3d 611, 621–23 (9th Cir. 2004), the court reversed a negative credibility finding and remanded to the BIA to allow it to determine whether the involuntary insertion of an IUD and the imposition of a large fine for an unauthorized pregnancy constituted past persecution. The court also ordered the BIA to determine whether petitioner's future fear of forced abortion, sterilization, or other persecution, was well founded.

(D) Family Members

The spouse of an individual who has been forced to undergo abortion or sterilization is also eligible for asylum. *See He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003). In *Ge v. Ashcroft*, 367 F.3d 1121, 1126–27 (9th Cir. 2004), this court reversed a negative credibility finding and held that the applicant conclusively established past persecution based on his wife's three forced abortions. Ge was also detained, interrogated, and beaten when his wife failed to appear for a mandatory physical examination, and both Ge and his wife were fired from their jobs.

The prohibition on underage marriage is an integral part of China's population control policy. *Ma v. Ashcroft*, 361 F.3d 553, 559–61 (9th Cir. 2004) (husband who could not legally register his marriage because of his age was eligible for asylum based on wife's forced abortion); *see also Zheng v. Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005) (same).

The children of families who have violated China's coercive population control policy may also be entitled to relief. In *Zhang v. Gonzales*, 408 F.3d 1239, 1249–50 (9th Cir. 2005), the panel held that the child of a parent forcibly sterilized was not automatically eligible for asylum. However, the panel concluded that the petitioner, who was 14-years old when she left China, suffered hardships, including economic deprivation, limitation of educational opportunities, and the trauma of seeing her father forcibly removed from her home, all on account of her father's forced sterilization and opposition to China's coercive population control program. In *Lin v. Ashcroft*, 377 F.3d 1014, 1028–31 (9th Cir. 2004), the court held that the 14-year-old applicant was prejudiced by his counsel's ineffective assistance in failing to raise plausible claims for relief on account of particular social group and imputed political opinion, where

Lin's parents violated the mandatory limits on procreation by having a second child, his mother was forcibly sterilized, and the family faced other forms of harassment and harm.

f. Prosecution

Ordinary prosecution for criminal activity is generally not persecution. *Chanco v. INS*, 82 F.3d 298, 301 (9th Cir. 1996) (prosecution for involvement in military coup in the Philippines); *Mabugat v. INS*, 937 F.2d 426 (9th Cir. 1991) (prosecution for misappropriation of funds); *Fisher v. INS*, 79 F.3d 955, 961–62 (9th Cir. 1996) (en banc) (punishment for violation of Iranian dress and conduct rules); *Abedini v. INS*, 971 F.2d 188, 191–92 (9th Cir. 1992) (punishment for distribution of Western videos and films, use of false passport, and avoidance of conscription in Iran). "[W]here there is evidence of legitimate prosecutorial purpose, foreign authorities enjoy much latitude in vigorously enforcing their laws." *Singh v. Gonzales*, 439 F.3d 1100, 1112 (9th Cir. 2006); *see also Dinu v. Ashcroft*, 372 F.3d 1041, 1043–44 (9th Cir. 2004) (legitimate prosecutorial purpose existed for "heavy-handed" investigation of shootings during civil uprising).

The fact that the police may have acted pursuant to an anti-terrorism or other criminal law does not necessarily rule out a statutorily protected motive. *Singh*, 439 F.3d at 1111; *see also Hoque v. Ashcroft*, 367 F.3d 1190, 1197–98 (9th Cir. 2004) (IJ's determination that Bangladeshi applicant feared prosecution rather than persecution was unsupported by the record).

(i) Pretextual Prosecution

However, if the prosecution is motivated by a protected ground, and the punishment is sufficiently serious or disproportionate, the sanctions imposed could amount to persecution. *See Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (violation of Iranian law against public displays of affection can be basis for asylum claim). Additionally, "even if the

government authorities' motivation for detaining and mistreating [an applicant] was partially for reasons of security, persecution in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation, even if the persecution served intelligence gathering purposes." *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004) (past persecution by Senegalese armed forces) (internal quotation marks and alterations omitted); *see also Navas v. INS*, 217 F.3d 646, 660 (9th Cir. 2000) ("If there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political.") (internal quotation marks omitted); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (extra-prosecutorial torture of Sri Lankan applicant, even if conducted for intelligence gathering purposes, constitutes persecution); *Rodriguez-Roman v. INS*, 98 F.3d 416, 427 (9th Cir. 1996) (severe punishment under Cuban illegal departure law); *Ramirez Rivas v. INS*, 899 F.2d 864, 867–68 (9th Cir. 1990) (extra-prosecutorial mistreatment of family members in El Salvador); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (governmental harm without formal prosecutorial measures is persecution).

(ii) Illegal Departure Laws

"Criminal prosecution for illegal departure is generally not considered to be persecution." *Li v. INS*, 92 F.3d 985, 988 (9th Cir. 1996) (fine and three-week confinement upon return to China not persecution); *Kozulin v. INS*, 218 F.3d 1112, 1117–18 (9th Cir. 2000) (applicant failed to establish that illegal departure from Russia would result in disproportionately severe punishment); *Abedini v. INS*, 971 F.2d 188, 191–92 (9th Cir. 1992) (punishment of Iranian for use of false passport not persecution).

However, an applicant may establish persecution where there is evidence that departure control laws provide severe or disproportionate punishment, or label violators as defectors, traitors, or enemies of the government. *See Al-Harbi v. INS*, 242 F.3d 882, 893–94 (9th Cir. 2001) (fear of execution based on U.S. evacuation from Iraq); *Rodriguez-Roman v. INS*, 98 F.3d 416, 430–31 (9th Cir. 1996) (severe punishment for violation of Cuban illegal departure law which "imputes to those who are

prosecuted pursuant to it, a political opinion"); *Kovac v. INS*, 407 F.2d 102, 104 (9th Cir. 1969) (holding in Yugoslavian case that asylum law protects applicants who would be punished for violation of a "politically motivated prohibition against defection from a police state").

g. Military and Conscription Issues

(i) Conscription Generally Not Persecution

Forced military conscription, or punishment for evading compulsory military service is generally not persecution. *See, e.g. Zehatye v. Gonzales*, 453 F.3d 1182, 1188 (9th Cir. 2006) (mandate pending) (applicant presented no evidence of individualized threat, and weak, if any, evidence that she would be singled out for severe disproportionate punishment for refusing to serve in the Eritrean military due to her religious beliefs); *Padash v. INS*, 358 F.3d 1161, 1166–67 (9th Cir. 2004) (applicant presented no evidence that Iranian military sought to recruit or harm him on account of a statutory ground); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1150–51 (9th Cir. 2000) (attempts by military and guerillas to recruit Guatemalan not persecution absent evidence of discriminatory purpose); *Gonzalez v. INS*, 82 F.3d 983, 908 (9th Cir. 1996) (forced uniformed and armed national service did not amount to persecution of Nicaraguan Jehovah's Witness); *Ubau-Marenco v. INS*, 67 F.3d 750, 754 (9th Cir. 1995) (no evidence that petitioner was given active military duty in Cuba on account of his anti-communist views), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992) (punishment for avoiding military conscription in Iran not persecution); *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) (unmotivated Nicaraguan conscientious objector); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990) (conscription attempts by Guatemalan military not persecution absent indication that military knew of applicant's religious or political beliefs); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1005 (9th Cir. 1988) (per curiam) (El Salvador); *Kaveh-Haghigy v. INS*, 783 F.2d 1321, 1323 (9th Cir. 1986) (per curiam) (conscription in Iran); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289–90 (9th Cir. 1984) (neutral Salvadoran male of military age did not establish well-founded fear of persecution).

(ii) Exceptions

However, the Ninth Circuit has recognized that forced conscription or punishment for violation of military service rules can constitute persecution in the following circumstances:

(A) Disproportionately Severe Punishment

Where individual would suffer disproportionately severe punishment for evasion on account of one of the grounds. *See Ramos-Vasquez v. INS*, 57 F.3d 857, 864 (9th Cir. 1995) (Honduran army deserter would face torture and summary execution); *see also Duarte de Guinac v. INS*, 179 F.3d 1156, 1161 (9th Cir. 1999) (Guatemalan conscript was subjected to repeated beatings, severe verbal harassment, and race-based insults); *Barraza Rivera v. INS*, 913 F.2d 1443, 1451 (9th Cir. 1990).

(B) Inhuman Conduct

"If a soldier deserts in order to avoid participating in acts condemned by the international community as contrary to the basic rules of human conduct, and is reasonably likely to face persecution should he return to his native country, his desertion may be said to constitute grounds for asylum based on political opinion." *Ramos-Vasquez v. INS*, 57 F.3d 857, 864 (9th Cir. 1995) ("Both this court and the BIA have recognized conscientious objection to military service as grounds for relief from deportation, where the alien would be required to engage in inhuman conduct were he to continue serving in the military."); *Barraza Rivera v. INS*, 913 F.2d 1443, 1450–52 (9th Cir. 1990) (no objection to military service per se, but fear of death or punishment for desertion given petitioner's refusal to assassinate two men in El Salvador); *Tagaga v. INS*, 228 F.3d 1030, 1034–35 (9th Cir. 2000) (prosecution for refusal to persecute Indo-Fijians); *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005) (persecution based on voiced opposition to war between Eritrea and Sudan).

(C) Moral or Religious Grounds

Where an individual refuses to serve based on moral or religious beliefs. *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005) (petitioner deserted army after being tortured for voicing opposition to war); *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) ("[R]efusal to perform military service on account of genuine reasons of conscience, including genuine religious convictions, may be a basis for refugee status."); *Barraza Rivera v. INS*, 913 F.2d 1443, 1450–51 (9th Cir. 1990); *cf. Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (requiring conscientious objector Jehovah's Witnesses to serve did not establish religious persecution).

(iii) Participation in Coup

"Prosecution for participation in a coup does not constitute persecution on account of political opinion when peaceful means of protest are available for which the alien would not face punishment." *Chanco v. INS*, 82 F.3d 298, 302 (9th Cir. 1996). The Ninth Circuit has not decided whether punishment for a failed coup against a regime which prohibits peaceful protest or change could be grounds for asylum. *See id.*

(iv) Military Informers

An informer for the military in a conflict that is "political at its core" would be perceived as a political opponent by the group informed upon. *Mejia v. Ashcroft*, 298 F.3d 873, 877 (9th Cir. 2002) ("[I]f an informer against the NPA appears on a NPA hit list, he has a well-founded fear of persecution based on imputed political opinion"); *see also Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (NPA infiltrator); *Briones v. INS*, 175 F.3d 727, 728–29 (9th Cir. 1999) (en banc) (NPA infiltrator).

(v) Military or Law Enforcement Membership

(A) Current Status

To the extent that an applicant fears that he will be targeted as a current member of the military, this danger does not constitute persecution on account of political opinion or membership in a social group. *See Cruz-Navarro v. INS*, 232 F.3d 1024, 1028–29 (9th Cir. 2000) (current member

of Peruvian military); *Chanco v. INS*, 82 F.3d 298, 302–03 (9th Cir. 1996) (current member of Philippines' military); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) ("Military enlistment in Central America does not create automatic asylum eligibility."); *cf. Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) (Granting petition where Filipino whistle-blowing law enforcement officer feared political retribution by government, not mere criminals or guerilla forces).

(B) Former Status

However, an applicant's status based on his former service could be the basis for a claim based on social group or imputed political opinion. *See Velarde v. INS*, 140 F.3d 1305, 1311 (9th Cir. 1998) (former bodyguard to daughters of former Peruvian president); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (ex-soldier eligible for asylum because guerilla persecutors identified him politically with the Salvadoran government); *cf. Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (prior military service in Guatemala not a basis for asylum).

(vi) Non-Governmental Conscription

A guerilla group's attempt to conscript an asylum seeker does not necessarily constitute persecution on account of political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003). In order to establish asylum eligibility, the applicant must show that the guerillas will persecute him because of his political opinion, or other protected ground, rather than merely because he refused to fight with them. *Melkonian*, 320 F.3d at 1068 (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his Armenian ethnicity and religion); *see also Pedro-Mateo v. INS*, 224 F.3d 1147, 1150–51 (9th Cir. 2000) (indigenous Guatemalan not eligible for failure to show that forced recruitment was on account of statutory ground); *Tecun-Florian v. INS*, 207 F.3d 1107, 1109 (9th Cir. 2000) (Guatemalan not eligible when guerillas tortured him because he refused to join them); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 509 (9th Cir. 1999) (Guatemalan not eligible for failure to show that guerillas beat and threatened him on account of imputed political opinion rather than for refusal to join them);

Del Carmen Molina v. INS, 170 F.3d 1247, 1249 (9th Cir. 1999) (granting petition where substantial evidence did not support BIA's determination that Salvadoran guerillas' threats were merely recruitment attempts); *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989) (petition for review granted, pre *Elias-Zacarias*).

h. Cases Concluding No Nexus to a Protected Ground

Dinu v. Ashcroft, 372 F.3d 1041, 1044–45 (9th Cir. 2004) (petitioner failed to meet his burden of proof that the authorities imputed a pro-Ceauşescu political opinion to him, or that the purported criminal investigation had no bona fide objective); *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) (random criminal acts bore no nexus to race); *Molina-Estrada v. INS*, 293 F.3d 1089, 1094–95 (9th Cir. 2002) (no evidence to compel finding that Guatemalan guerillas attacked petitioner's family on account of actual or imputed political opinion); *Ochave v. INS*, 254 F.3d 859, 865–66 (9th Cir. 2001) (no nexus between rape by NPA guerillas and any protected ground); *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (rape and murder of aunt by government politician in El Salvador was personal dispute); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000) (no evidence to show that guerillas imputed contrary political opinion to Peruvian police officer); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (kidnaping by Guatemalan government soldiers and guerillas not on account of political opinion, race or social group); *Kozulin v. INS*, 218 F.3d 1112, 1115–17 (9th Cir. 2000) (failed to prove attack was motivated by anti-Communist views); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (no imputed political opinion based on views of former husband); *Rivera-Moreno v. INS*, 213 F.3d 481, 486 (9th Cir. 2000) (no nexus between bombing of home and refusal to join guerillas); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (random violence during civil strife in Armenia); *Tecun-Florian v. INS*, 207 F.3d 1107, 1109–10 (9th Cir. 2000) (past torture by Guatemalan guerillas had no nexus to applicant's religious beliefs or political opinion); *Bolshakov v. INS*, 133 F.3d 1279, 1281 (9th Cir. 1998) (criminal extortion and robbery by Russian thugs); *Sangha v. INS*, 103 F.3d 1482, 1488–91 (9th Cir. 1997) (Sikh applicant failed to provide direct or circumstantial evidence that the militants sought to recruit him on

account of an actual or imputed political opinion); *Li v. INS*, 92 F.3d 985, 987–88 (9th Cir. 1996) (fear of punishment from unpaid smugglers); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (violation of restrictive dress and conduct rules did not establish persecution on account of religion or political opinion); *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (no evidence of imputed political opinion); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990) (no imputed neutrality); *De Valle v. INS*, 901 F.2d 787, 791 (9th Cir. 1990) (rejecting claim of "doubly imputed" political opinion based on husband's desertion from Salvadoran army); *Florez-de Solis v. INS*, 796 F.2d 330, 335 (9th Cir. 1986) (violent collection of private debt or random crime during civil strife in El Salvador); *Rebollo-Jovel v. INS*, 94 F.2d 441, 447–48 (9th Cir. 1986) (general conditions of unrest in El Salvador); *Zayas-Marini v. INS*, 785 F.2d 801, 806 (9th Cir. 1986) (death threats based on personal hostility); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984) (danger based on family's ownership of strategically located house or non-commitment to either faction in El Salvador not on account of protected ground).

G. Exercise of Discretion

"Asylum is a two-step process, requiring the applicant first to establish his *eligibility* for asylum by demonstrating that he meets the statutory definition of a 'refugee,' and second to show that he is *entitled* to asylum as a matter of discretion." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004). Once an "applicant establishes statutory eligibility for asylum, the Attorney General must, by a proper exercise of [] discretion, determine whether to grant that relief." *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987) ("It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General.*'"); *see also* 8 U.S.C. § 1158(b).

The Attorney General's ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion. *See Andriasian v. INS*, 180 F.3d 1033, 1040 (9th Cir. 1999); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("By statute, 'the Attorney General's

discretionary judgment whether to grant [asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion.'")(quoting 8 U.S.C. § 1252(b)(4)(D)). An IJ abuses his discretion when he conflates his discretionary determination of whether an applicant is entitled to asylum with his non-discretionary determination concerning eligibility for asylum. *See Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004).

The BIA must "state its reasons and show proper consideration of all factors when weighing equities and denying relief." *Kalubi*, 364 F.3d at 1140 (internal quotation marks omitted). Conclusory statements are inappropriate, and the BIA must explain sufficiently how each factor figures in the balance so that the court can tell that it has been heard, considered, and decided. *Id.* at 1141–42; *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996).

In exercising its discretion, the BIA must consider both favorable and unfavorable factors, including the severity of the past persecution suffered. *See Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995) (discussing likelihood of future persecution, severity of past persecution, alcohol rehabilitation, circumstances surrounding departure and entry into U.S., and criminal record in U.S.); *see also Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (IJ abused his discretion in failing to balance favorable factors against factors identified as negative); *Andriasian v. INS*, 180 F.3d 1033, 1043–47 (9th Cir. 1999) (discussing petitioner's temporary stay in a third country); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996) (discussing likelihood of future persecution and humanitarian considerations).

"There is no definitive list of factors that the BIA must consider or may not consider. Each asylum application is different, and factors that are probative in one context may not be in others. However, all relevant favorable and adverse factors must be considered and weighed." *Kalubi*, 364 F.3d at 1139, 1140 & n.6 (holding that the relevant factors in Kalubi's case were: membership in a terrorist organization, forum shopping, the likelihood of future persecution, separation from a spouse, and the applicant's health). "[T]he likelihood of future persecution is a particularly important factor to consider." *Id.* at 1141 (internal quotation marks omitted); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996).

Uncontested evidence that an applicant committed immigration fraud is sufficient to support the discretionary denial of asylum. *Hosseini v. Gonzales*, 464 F.3d 1018, 1021 (9th Cir. 2006) (mandate pending). In contrast, an applicant's entry into the United States using false documentation is worth little if any weight in balancing positive and negative factors. *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004).

If asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994) (granting petition).

H. Remanding Under *INS v. Ventura*

In *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam), the Supreme Court held that where the BIA has not yet considered an issue, the proper course is to remand to allow the BIA to consider the issue in the first instance. *See also Gonzales v. Thomas*, 126 S. Ct. 1613, 1615 (2006) (per curiam). *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (reversing BIA's no-nexus finding and remanding for determination of changed circumstances); *Singh v. Ashcroft*, 362 F.3d 1164, 1172 (9th Cir. 2004) (reversing negative credibility finding and remanding for determination of eligibility); *Guo v. Ashcroft*, 361 F.3d 1194, 1204 (9th Cir. 2004) (reversing negative credibility finding and remanding for a determination of changed country conditions).

However, where the agency has already passed on the relevant issue, this court has remanded in some cases, but not in others. For example, in *Khup v. Ashcroft*, 376 F.3d 898, 904–05 (9th Cir. 2004), and *Baballah v. Ashcroft*, 367 F.3d 1067, 1078–78 (9th Cir. 2004), this court declined to remand because the IJ had already considered the applicants' eligibility for asylum and withholding. In contrast, in *Lopez v. Ashcroft*, 366 F.3d 799, 806 (9th Cir. 2004), this court held that the applicant had established past persecution, and determined that a remand for a redetermination of changed country conditions was "more consistent with the spirit and reasoning of *Ventura*." *See also Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (remanding withholding claim).

The ordinary remand rule is unnecessary where the applicant is automatically eligible for asylum. *See He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir. 2003) (holding that applicant was statutorily eligible for asylum based on the forced sterilization of his spouse); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was statutorily eligible for asylum and withholding); *cf. Chen v. Ashcroft*, 362 F.3d 611, 621–23 (9th Cir. 2004) (reversing negative credibility finding and remanding to allow BIA to determine whether the involuntary insertion of an IUD and the imposition of a large fine for an unauthorized pregnancy constituted past persecution, and whether she had a well-founded fear of future persecution).

Remand may not be warranted where the government waives an argument by failing to raise it or fails to submit evidence on an issue before the agency. *See, e.g.*, *Mashiri v. Ashcroft*, 383 F.3d 1112, 1123 n.7 (9th Cir. 2004) (remand unnecessary where government failed to rebut substantial evidence that internal relocation was neither safe nor feasible); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004); *Ndom v. Ashcroft*, 384 F.3d 743, 756 (9th Cir. 2004) (INS failed to put forth argument or evidence of changed country conditions; *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1135 (9th Cir. 2004) (same).

I. Derivative Asylees

"A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien." *Ma v. Ashcroft*, 361 F.3d 553, 561 n.10 (9th Cir. 2004) (quoting 8 U.S.C. § 1158(b)(3)); *see also* 8 C.F.R. § 1208.21. An individual who is eligible for asylum in her own right cannot benefit from the derivative status set forth in § 1158(b)(3). *Ma*, 361 F.3d at 560–61. Although minor children may obtain asylum derivatively through their parents, there is no comparable provision permitting parents to obtain relief derivatively through their minor children. *See* 8 U.S.C. § 1158(b)(3); 8

C.F.R. § 207.7(b)(6) (stating that parents, siblings, grandparents, grandchildren and other relatives of a refugee are ineligible for accompanying or follow-to-join benefits); *but see Abebe v. Gonzales*, 432 F.3d 1037, 1043 (9th Cir. 2005) (en banc) (remanding for BIA to consider in the first instance whether parents of a U.S. citizen child likely to face persecution in their native country may qualify derivatively for asylum).

J. Bars to Asylum

1. One-Year Bar

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her application for asylum was filed within one year after arrival in the United States. *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001); 8 U.S.C. § 1158(a)(2)(B). "The 1-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." 8 C.F.R. § 1208.4(a)(2)(ii). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. *Hakeem*, 273 F.3d at 815; *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002); *see also Ramadan v. Gonzales*, 427 F.3d 1218 (9th Cir. 2005), *reh'g granted and resubmitted* 7/25/06 (holding that the REAL ID Act did not restore jurisdiction over the agency's asylum application timeliness determination).

"There is no statutory time limit for bringing a petition for withholding of removal." *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004).

a. Exceptions to the Deadline

If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. *See* 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4) & (5). The court lacks jurisdiction over the BIA's determination that no extraordinary circumstances excused the untimely filing of the application. *Ramadan v. Gonzales*, 427 F.3d 1218, 1221–22 (9th Cir. 2005), *reh'g granted and resubmitted* 7/25/06 (post-REAL ID

Act); *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) (citing 8 U.S.C. § 1158(a)(3)). However, the court has jurisdiction to review a claim that an IJ failed to address the argument that an asylum application was untimely due to extraordinary circumstances. *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (remanding).

In *El Himri v. Ashcroft*, 378 F.3d 932, 936 (9th Cir. 2004), the court agreed that the applicant's asylum application was time-barred, yet the court considered the merits of her son's derivative asylum claim because of his status as a minor.

2. Previous-Denial Bar

An applicant who previously applied for and was denied asylum is barred. 8 U.S.C. § 1158(a)(2)(C). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. *See* 8 C.F.R. § 1208.13(c)(1) and (2).

3. Safe Third Country Bar

An applicant has no right to apply for asylum if she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality . . .) in which the alien's life or freedom would not be threatened on account of" the statutory grounds. 8 U.S.C. § 1158(a)(2)(A). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. *See* 8 C.F.R. § 1208.13(c)(1) and (2).

The United States and Canada entered into a bilateral agreement, effective December 29, 2004, which recognizes that both countries "offer generous systems of refugee protection" and provides, subject to exceptions, that aliens arriving in the United states from Canada at a land border port-of-entry shall be returned to Canada to seek protection under Canadian immigration law. *See* "The Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals

of Third Countries," U.S.-Can., Dec. 5, 2002 *available at* http://www.cic.gc.ca/english/policy/safe-third.html. The Agreement indicates that an alien may apply for asylum, withholding of removal or protection under the Convention Against Torture in one or the other, but not both, countries. *See also* 8 C.F.R. § 208.30(e)(6) (implementing regulation); 69 FR 69480 (Nov. 29, 2004) (rules implementing United States-Canada agreement).

4. Firm Resettlement Bar

As of October 1, 1990, an applicant may not be granted asylum if he or she "was firmly resettled in another country prior to arriving in the United States." *See* 8 U.S.C. § 1158(b)(2)(A)(vi). Prior to October 1, 1990, firm resettlement was merely one of the factors to be considered in evaluating an asylum claim as a matter of discretion. *See Maharaj v. Gonzales*, 450 F.3d 961, 968–69 (9th Cir. 2006) (en banc) (recounting the history of the firm resettlement doctrine). A finding of firm resettlement is a factual determination reviewed for substantial evidence. *Id*. at 967.

The definition of firm resettlement is currently found at 8 C.F.R. § 1208.15. "Subject to two exceptions, an alien has firmly resettled if, prior to arrival in the United States, he or she entered another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 819 (9th Cir. 2004) (internal quotation marks omitted). An applicant who received an offer of permanent resettlement will not be firmly resettled if he can establish:

> (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or
>
> (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions

> under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

8 C.F.R. § 1208.15.

The government bears the initial burden of showing by direct or indirect evidence an offer of permanent resident status, citizenship, or some other type of permanent resettlement. *Maharaj v. Gonzales*, 450 F.3d 961, 972 (9th Cir. 2006) (en banc). Whether relying on direct or circumstantial evidence, the focus of the firm resettlement inquiry remains on *an offer* of permanent resettlement. *Id.* The fact that a country offers a process for applying for some type of refugee or asylum status is not the same as offering the status itself. *Id.* at 977. However, an applicant may have an offer if he or she is entitled to permanent resettlement and all that remains in the process is for the applicant to complete some ministerial act. *Id*. Thus, the firm resettlement bar may apply if the applicant chooses to walk away instead of completing the process and accepting the third country's offer of permanent resettlement. *Id*. The fact that an applicant no longer has travel authorization does not preclude a finding of permanent resettlement when the applicant has permitted his documentation to lapse. *Id.* at 969 (citing *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998) and *Yang v. INS*, 79 F.3d 932 (9th Cir. 1996).

Once the government presents evidence of an offer of some type of permanent resettlement, the burden shifts to the applicant to show that the nature of his stay and ties was too tenuous, or the conditions of his residence too restricted, for him to be firmly resettled. *Maharaj*, 450 F.3d at 976–77.

For further discussion of the firm resettlement doctrine, *see Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir. 1998) (discussing the former firm resettlement regulation, 8 C.F.R. § 208.14(c) (1997)). *See also*

Camposeco-Montejo, 384 F.3d 814, 820–21(9th Cir. 2004) (Guatemalan was not firmly resettled in Mexico because he did not receive an offer of permanent resettlement, was restricted to the municipality in which his refugee camp was located, was not allowed to attend Mexican schools, and was threatened with repatriation); *Andriasian v. INS*, 180 F.3d 1033, 1043–47 (9th Cir. 1999) (ethnic Armenian from Azerbaijan was not firmly resettled because he was harassed and threatened in Armenia, and accused of being loyal to the Azerbaijanis); *Yang v. INS*, 79 F.3d 932, 934–39 (9th Cir. 1996) (discussing 1990 firm resettlement regulation).

A finding of firm resettlement does not bar eligibility for withholding of removal. *Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004) (reversing denial of a Laotian applicants' motion to reopen because they presented plausible grounds for claiming that they were not firmly resettled in France, their country of citizenship, given their credible fear of persecution in France).

5. Persecution-of-Others Bar

A person who "ordered, incited, assisted, or otherwise participated in the persecution" of any person on account of one of the five grounds may not be granted asylum. 8 U.S.C. § 1158(b)(2)(A)(i); 8 U.S.C. § 1101(a)(42). In interpreting the persecutor of others bar, this and other courts have turned for guidance to caselaw interpreting similar statutes. *See, e.g.*, *Laipenieks v. INS*, 750 F.2d 1427, 1431 (9th Cir. 1985) (interpreting former 8 U.S.C. § 1251(a)(19), and holding that there was insufficient evidence that applicant assisted or participated in persecution of others based on political beliefs); *Fedorenko v. United States*, 449 U.S. 490, 514 n.34 (1981) (interpreting a similarly-worded statute passed at the close of World War II and noting that an individual who merely cut the hair of inmates before execution did not assist in the persecution of civilians, but that an armed uniformed guard who shot at escaping inmates qualified as a persecutor).

Determining whether an applicant assisted in the persecution of others "requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability." *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 (9th Cir. 2006) (serving as a

military interpreter during interrogation and torture of suspected Peruvian Shining Path members constituted persecution of others due to integral role in persecution); *see also Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) (IJ failed to conduct a particularized evaluation to determine Bosnian applicant's individual accountability for persecution). "This standard does not require actual trigger-pulling . . . but mere acquiescence or membership in an organization, is insufficient to satisfy the persecutor exception." *Miranda Alvarado*, 449 F.3d at 927 (internal citations omitted); *see also Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004) (recognizing that merely being a member of an organization that persecutes others is insufficient for persecutor of others bar to apply).

Acts of true self-defense do not constitute persecution of others. *Vukmirovic*, 362 F.3d at 1252 ("As a textual matter, holding that acts of true self-defense qualify as persecution would run afoul of the 'on account of' requirement in the provision. It would also be contrary to the purpose of the statute.").

Where the evidence raises the inference that an applicant persecuted others on account of a protected ground, the applicant must demonstrate otherwise by a preponderance of the evidence. *See* 8 C.F.R. §§ 208.13(c)(2)(ii) & 208.16(d)(2); *see also Miranda Alvarado*, 449 F.3d at 930. In the case of military or police interrogations, an applicant may meet this burden by presenting evidence that the actions were part of legitimate criminal prosecutions that were not tainted, even in part, by impermissible motives pertaining to a protected ground. *See Miranda Alvarado*, 449 F.3d at 930. Likewise, an applicant may present evidence that his or her conduct was "part of generalized civil discord, rather than politically-motivated persecution." *Id*. at 931. However, "wide-spread violence and detention cannot override record evidence that persecution occurred at least in part as a result of an applicant's protected status." *Id.*

6. Particularly-Serious-Crime Bar

An applicant in removal proceedings is barred from relief if, "having been convicted by a final judgment of a particularly serious crime, [he] constitutes a danger to the community in the United States." *See* 8 U.S.C. § 1158 (b)(2)(A)(ii); *see also Kankamalage v. INS*, 335 F.3d 858, 864 (9th

Cir. 2003) (noting that this statutory provision applies only to immigration proceedings commenced on or after April 1, 1997). A person convicted of a particularly serious crime is considered per se to be a danger to the community. *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987) (upholding BIA's decision not to balance the seriousness of the offense [drug possession and trafficking] against the degree of persecution feared in El Salvador); *see also Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994) (noting that the bar "is based on the reasonable determination that persons convicted of particularly serious crimes pose a danger to the community").

A person convicted of an aggravated felony "shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i).

If an applicant plead guilty to the crime before October 1, 1990, the particularly serious crime bar cannot be applied to categorically deny relief. *See Kankamalage v. INS*, 335 F.3d 858, 864 (9th Cir. 2003). Instead, the conviction may be considered in the exercise of discretion. *Id.*

Cross-Reference: For more information on aggravated felonies, *see* Criminal Issues in Immigration Law.

7. Serious Non-Political Crime Bar

An applicant is barred from relief if there are serious reasons for believing that he or she committed a serious, non-political crime outside the United States prior to arrival. 8 U.S.C. § 1158 (b)(2)(A)(iii); *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1986) ("serious reasons for believing" means probable cause). The IJ is not required to balance the seriousness of the offense against the degree of persecution feared. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999)

8. Security Bar

An applicant is ineligible for asylum if there are reasonable grounds for regarding the alien as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv).

9. Terrorist Bar

An applicant is ineligible for asylum if he is inadmissible or removable for reasons relating to terrorist activity, unless in the case of an applicant inadmissible as a representative of a terrorist organization or group that espouses or endorses terrorist activity, the Attorney General determines in his discretion that there are not reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(v).

In *Cheema v. Ashcroft*, this court analyzed a prior version of the statute, INA § 208 (repealed 1996), which permitted a discretionary waiver of the terrorist asylum bar to any applicant excludable or deportable for reasons relating to terrorist activity, if Attorney General determined that there were not reasonable grounds for regarding an applicant as a danger to the security of the United States. *See* 383 F.3d 848 (9th Cir. 2004). The court explained that the "statute imposes a two-prong analysis: (1) whether an alien engaged in a terrorist activity, and (2) whether there are not reasonable grounds to believe that the alien is a danger to the security of the United States." *Id*. at 855–56. Given this two-prong inquiry, the court held that the BIA erred by focusing solely on terrorist activity in concluding that Cheema was a danger to the security of the United States. *Id.* at 857–58; *cf. Bellout v. Ashcroft*, 363 F.3d 975, 978-79 (9th Cir. 2004) (applying a newer version of the statute that does not include the two-prong test and concluding that the applicant was barred from withholding due to his terrorist activities).

Note that as to all removal proceedings instituted before, on, or after the effective date of May 11, 2005, the REAL ID Act expanded the definitions of terrorist organizations and terrorist related activities. *See* Pub. L. No. 109–13, §§ 103–105, 119 Stat. 231 (2005), 8 U.S.C. § 1182(a)(3)(B) and 1227(a)(4)(B).

III. WITHHOLDING OF REMOVAL OR DEPORTATION

An application for asylum under 8 U.S.C. § 1158 is generally considered an application for withholding of removal under 8 U.S.C. § 1231(b)(3), (INA § 241(b)(3)), as well. *See* 8 C.F.R. § 1208.3(b); *Ghadessi v. INS*, 797 F.2d 804, 804 n.1 (9th Cir. 1986). Where deportation or exclusion proceedings were commenced before April 1, 1997, withholding of deportation is available under former 8 U.S.C. § 1253(h) (INA § 243(h)). Withholding codifies the international norm of "nonrefoulement" or non-return to a country where an applicant would face persecution. *See Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1998) (en banc); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("The basic withholding provision . . . parallels Article 33 [of the Refugee Convention], which provides that no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [a protected ground].") (internal quotation marks and alteration omitted).

In order to qualify for withholding of removal, an applicant must show that her "life or freedom would be threatened" if she is returned to her homeland, on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(b). The agent of persecution must be "the government or . . . persons or organizations which the government is unable or unwilling to control." *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2004) (internal quotation marks omitted).

A. Eligibility for Withholding

1. Higher Burden of Proof

"To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that he would be subject to persecution on one of the specified grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation marks omitted); *see also INS v. Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. § 1208.16(b)(2). "This clear probability standard for withholding of removal is more stringent than the well-founded fear standard governing asylum." *Al-Harbi*, 242 F.3d at 888–89

(internal quotation marks and citation omitted). The "standard has no subjective component, but, in fact, requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

An applicant who fails to satisfy the lower standard of proof for asylum necessarily fails to satisfy the more stringent standard for withholding of removal. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003). However, if asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994).

2. Mandatory Relief

"Unlike asylum, withholding of removal is not discretionary. The Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the same protected grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on U.S. evacuation from Iraq) (internal quotation marks and citation omitted).

3. Nature of Relief

Under asylum, an applicant granted relief may apply for permanent residence after one year. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 n.6 (1987). Under withholding, the successful applicant is only given a right not to be removed to the country of persecution. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419–20 (1999). Withholding does not confer protection from removal to any other country. *El Himri v. Ashcroft*, 378 F.3d 932, 937–38 (9th Cir. 2004); *Huang v. Ashcroft*, 390 F.3d 1118, 1121 n.2 (9th Cir. 2004).

4. Past Persecution

Past persecution generates a presumption of eligibility for withholding of removal. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1079 (9th Cir. 2004); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1164 (9th Cir. 1999); *Korablina*

v. INS, 158 F.3d 1038, 1046 (9th Cir. 1998); *see also* 8 C.F.R. § 1208.16(b)(1)(i) (if past persecution, "it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim"). The presumption may be rebutted if the government establishes "by a preponderance of the evidence" that: (A) that there has been a fundamental change in circumstances; or (B) the applicant could reasonably relocate internally to avoid a future threat to life or freedom. 8 C.F.R. § 1208.16(b)(1)(i) & (ii).

5. No Time Limit

"There is no statutory time limit for bringing a petition for withholding of removal." *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004).

6. Firm Resettlement Not a Bar

A finding of firm resettlement does not bar eligibility for withholding of removal. *See Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004).

7. Entitled to Withholding

Ndom v. Ashcroft, 384 F.3d 743 (9th Cir. 2004) (past persecution by Senegalese armed forces); *El Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004) (stateless Palestinians in Kuwait subjected to severe economic discrimination); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (applicant's family persecuted and applicant threatened by government for Falun Gong practice); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (arrest, torture and killing of fellow preachers, military pursuit and documented history of human rights abuses in Burma); *Njuguna v. Ashcroft*, 374 F.3d 765, 772 (9th Cir. 2004) (applicant threatened and family members in Kenya attacked and imprisoned); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (applicant harassed and forced to have two abortions and an IUD inserted); *Baballah v. Ashcroft*, 367 F.3d 1067, 1079 (9th Cir. 2004) (applicant and family suffered severe harassment, threats, violence and discrimination); *Ruano v. Ashcroft*, 301 F.3d 1155, 1162 (9th Cir. 2002) (applicant received multiple death threats at home and business,

was "closely confronted" and actively chased); *Cardenas v. INS*, 294 F.3d 1062, 1068 (9th Cir. 2002) (direct threats by Shining Path guerillas); *Rios v. Ashcroft*, 287 F.3d 895, 902–03 (9th Cir. 2002) (kidnaped and wounded by guerillas, husband and brother killed); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074–75, *as amended by* 290 F.3d 964 (9th Cir. 2002) (death threats combined with harm to family and murders of his counterparts); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. 2001) (harassed, fired, interrogated, threatened, assaulted and arrested); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on evacuation from Iraq by United States); *Agbuya v. INS*, 241 F.3d 1224, 1231 (9th Cir. 2001) (kidnaped, falsely imprisoned, hit, threatened with a gun by NPA); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000) (past torture by Indian authorities); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (per curiam) (arrested, tortured, and scarred); *Tagaga v. INS*, 228 F.3d 1030, 1035 (9th Cir. 2000) (past sentence and would face treason trial if returned); *Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000) (past persecution of religious minority who engaged in prohibited interfaith co-mingling); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexican police); *Zahedi v. INS*, 222 F.3d 1157, 1168 (9th Cir. 2000) (summoned for interrogation based on effort to translate and distribute banned book in Iran); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (husband killed, applicant and family threatened in India); *Maini v. INS*, 212 F.3d 1167, 1177–78 (9th Cir. 2000) (physical attacks, death threats, and harassment at home, school and work in India); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (multiple death threats by opposition political party in Colombia); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1043 (9th Cir. 1999) (ethnic Armenian from Azerbaijan); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (applicant beaten harassed and threatened with death by military); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (death threats from Philippine guerillas); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (death threats from Salvadoran Recontra guerillas); *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (torture by Sri Lankan authorities); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1297 (9th Cir. 1997), *as amended on denial of rehearing*, 133 F.3d 726 (9th Cir. 1998) (harassment by Peruvian Shining Path guerillas); *Korablina v. INS*, 158 F.3d 1038, 1045–46 (9th Cir. 1998) (past discrimination, harassment and violence);

Vallecillo-Castillo v. INS, 121 F.3d 1237, 1240 (9th Cir. 1996) (harassment by Sandinista government in Nicaragua); *Montoya-Ulloa v. INS*, 79 F.3d 930, 932 (9th Cir. 1996) (harassed, threatened, beaten, placed on "black list" by Nicaraguan authorities); *Gomez-Saballos v. INS*, 79 F.3d 912, 918 (9th Cir. 1996) (death threats by Sandinistas); *Singh v. Ilchert*, 69 F.3d 375, 380–81 (9th Cir. 1995) (per curiam); *Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994) (applicant threatened and close colleagues persecuted); *Mendoza Perez v. INS*, 902 F.2d 760, 763–64 (9th Cir. 1990); *Ramirez Rivas v. INS*, 899 F.2d 864, 872–73 (9th Cir. 1990) (death squads killed many family members and a close friend).

8. Not Entitled to Withholding

Faruk v. Ashcroft, 378 F.3d 940, 944 (9th Cir. 2004) (evidence of harassment and attacks on interracial and interreligious couple in Fiji not strong enough); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 (9th Cir. 2003) (no compelling evidence that persecution of non-political Albanians in Kosovo is so widespread that applicant faced a clear probability of persecution); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (given changes in Romania since departure); *Hakeem v. INS*, 273 F.3d 812, 817 (9th Cir. 2001) (remaining family unharmed, and applicant made two trips to Pakistan); *Lim v. INS*, 224 F.3d 929, 938 (9th Cir. 2000) (given post-threat harmless period and family safety); *Barraza Rivera v. INS*, 913 F.2d 1443, 1454 (9th Cir. 1990) (insufficient evidence to show that he would be forced to participate in assassinations); *Arteaga v. INS*, 836 F.2d 1227, 1231 n.6 (9th Cir. 1988) (one-time threat of conscription sufficient for asylum, but not for withholding); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1373 (9th Cir. 1985) (no specific threat, and government unaware of applicant's protest activities).

9. No Derivative Withholding of Removal

Unlike asylum, withholding of removal relief is not derivative. *Compare* 8 U.S.C. § 1158(b)(3) (permitting derivative asylum for spouses and children as defined in 8 U.S.C. § 1101(b)(1)(A), (B), (C), (D), or (E)), *with* 8 C.F.R. § 1208.21, with 8 U.S.C. § 1231(b)(3) (failing to provide derivative withholding of removal); *see also Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005).

B. Bars to Withholding

As a general rule, withholding is mandatory, unless an exception applies. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

1. Nazis

Those who assisted in Nazi persecution or engaged in genocide are barred from withholding. *See* 8 U.S.C. § 1231(b)(3)(B) (stating that withholding does not apply to aliens deportable for Nazi persecution or genocide under 8 U.S.C. § 1227(a)(4)(D)).

2. Persecution-of-Others Bar

Withholding is not available if the applicant "ordered, incited, assisted, or otherwise participated in the persecution of an individual" on account of the protected grounds. 8 U.S.C. § 1231(b)(3)(B)(i).

3. Particularly Serious Crime Bar

Withholding is not available if the applicant, "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); *Singh v. Ashcroft*, 351 F.3d 435, 438–39 (9th Cir. 2003). This bar is more narrowly defined than the bar in the asylum context because not all aggravated felonies are considered to be particularly serious. For cases filed on or after April 1, 1997, an aggravated felony conviction is considered to be a particularly serious crime if the applicant has been sentenced to an aggregate term of imprisonment of at least five years. 8 U.S.C. § 1231(b)(3)(B).

The Attorney General has "discretion, pursuant to Section 1231(b)(3)(B)(ii), 'to determine whether an aggravated felony conviction resulting in a sentence of less than 5 years is a particularly serious crime.'" *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001). This court lacks jurisdiction to review this discretionary finding under 8 U.S.C. § 1252(a)(2)(B)(ii). *Id*. (leaving open the question of whether the court would have jurisdiction over a non-discretionary denial of withholding).

For more information on aggravated felonies, *see* Criminal Issues in Immigration Law.

4. Serious Non-Political Crime Bar

Withholding is not available if "there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before" arrival. 8 U.S.C. § 1231(b)(3)(B)(iii); *see also McMullen v. INS*, 788 F.2d 591, 598–99 (9th Cir. 1986) (holding that applicant was ineligible for withholding because he facilitated or assisted Provisional Irish Republican Army terrorists to commit serious non-political crimes). The BIA is not required to balance the applicant's criminal acts against the risk of persecution. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999); *see also Kenyeres v. Ashcroft*, 538 U.S. 1301, 1306 (2003) (holding that petitioner was not eligible for a stay of removal pending review because substantial evidence supported the IJ's determination that petitioner committed serious financial crimes in Hungary).

5. Security and Terrorist Bar

An applicant is ineligible for withholding of removal if the Attorney General decides that there are reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1231(b)(3)(B). An applicant who is deportable for engaging in terrorist activity "shall be considered to be an alien for whom there are reasonable grounds for regarding as a danger to the security of the United States." 8 U.S.C. § 1231(b)(3)(B)(iv)).

Interpreting the prior version of the terrorist bar to withholding in *Cheema v. Ashcroft*, this court held it impermissible to find an applicant a danger to the security of the United States solely because he engaged in terrorist activity. 383 F.3d 848, 857 (9th Cir. 2004). The court explained that in order for an applicant to be barred by this section, there must be a finding supported by substantial evidence that links the terrorist activity with one of the criteria relating to this country's national security. *Id*. at 857; *see also Hosseini v. Gonzales*, No. 03-73734, 2006 WL 2773095 at *3 (9th Cir. 2006) (remanding for further consideration of the security bar in light of *Cheema*); *cf. Bellout v. Ashcroft*, 363 F.3d 975, 978-79 (9th Cir.

2004) (applying a newer version of the statute that does not include the two-prong test and concluding that the applicant was barred from withholding due to his terrorist activities).

Note that as to all removal proceedings instituted before, on, or after the effective date of May 11, 2005, the REAL ID Act expanded the definitions of terrorist organizations and terrorist related activities. *See* Pub. L. No. 109–13, §§ 103–105, 119 Stat. 231 (2005), 8 U.S.C. §§ 1182(a)(3)(B) and 1227(a)(4)(B).

IV. CONVENTION AGAINST TORTURE ("CAT")

Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits states from returning anyone to another state where he or she may be tortured. *See Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) ("Article 3 provides that a signatory nation will not expel, return . . . or extradite a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture.") (internal quotation marks omitted), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order). The United States signed the Convention Against Torture on April 18, 1988, and Congress passed the Foreign Affairs Reform and Restructuring Act ("FARRA") in 1988 to implement Article 3 of CAT. Pub. L. No. 105-277, Div. G, Title XXII, 112 Stat. 2681–822 (codified as Note to 8 U.S.C. § 1231).

The implementing regulations for the Convention Against Torture are found in 8 C.F.R. § 1208.16 to 1208.18. Asylum applications filed on or after April 1, 1997, "shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal." 8 C.F.R. § 1208.13(c)(1); *Nuru v. Gonzales*, 404 F.3d 1207, 1223 n.13 (9th Cir. 2005). Aliens who were under an order of removal that became final before March 22, 1999 were permitted to move to reopen proceedings for the sole purpose of seeking protection under the Convention, so long as the motion was filed by June 21, 1999 and the evidence submitted in support

of the motion demonstrated prima facie eligibility for relief. *See* 8 C.F.R. §§ 1208.(b)(2)(i) and (ii).

There are two forms of protection under the Convention Against Torture: (1) withholding of removal under 8 C.F.R. § 1208.16(c) for aliens who are not barred from eligibility under FARRA for having been convicted of a "particularly serious crime" or of an aggravated felony for which the term of imprisonment is at least five years, and (2) deferral of removal under 8 C.F.R. § 1208.17(a) for aliens entitled to protection but subject to mandatory denial of withholding. *See Huang v. Ashcroft*, 390 F.3d 1118, 1121 (9th Cir. 2005).

A. Standard of Review

This court reviews for substantial evidence the factual findings underlying the BIA's determination that an applicant is not eligible for protection under the Convention Against Torture. *See Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003). The BIA's interpretation of purely legal questions is reviewed de novo. *See id.* at 1194.

B. Definition of Torture

"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." *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(1) (2000)). "'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.'" *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(2)), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order).

"The United States included a reservation when it ratified the Convention, narrowing the definition of torture with respect to 'mental pain or suffering.' The reservation states that 'mental pain or suffering refers to the 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." *Nuru v. Gonzales*, 404 F.3d 1207, 1217 n.5 (9th Cir. 2005) (citing U.S. Reservations to CAT, *available at* <http://www.ohchr.org/english/countries/ratification/9.htm#N11>

"'Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'" *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(3) (2002)), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order). However, "[w]hether used as a means of punishing desertion or some other form of military or civilian misconduct or whether inflicted on account of a person's political opinion, torture is *never* a lawful means of punishment." *Nuru*, 404 F.3d at 1207. Lawful sanctions encompass "'judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty,' but only so long as those sanctions do not 'defeat the object and purpose of [CAT] to prohibit torture.'" *Id*. at 1221 (citing 8 C.F.R. § 1208.18(a)(3)). "A government cannot exempt tortuous acts from CAT's prohibition merely by authorizing them as permissible forms of punishment in its domestic law." *Id*.

C. Burden of Proof

In order to be eligible for withholding of removal under the Convention Against Torture, the applicant has the burden of establishing that if removed to the proposed country of removal "he is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned

by that country, *but* defeats the object and purpose of CAT." *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005) (citing *Wang v. Ashcroft*, 320 F.3d 130, 134 (2d Cir. 2003) (emphasis in original); *see also* 8 C.F.R. § 1208.16(c)(2). This standard requires that an applicant demonstrate "only a chance greater than fifty percent that he will be tortured" if removed. *Hamoui v. Ashcroft*, 389 F.3d 821, 827 (9th Cir. 2004).

"The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(2)).

A "petitioner carries this burden whenever he or she presents evidence establishing 'substantial grounds for believing that he [or she] would be in danger of being subjected to torture' in the country of removal" *Id.* at 1284. The "failure to establish eligibility for asylum does not necessarily doom an application for relief under the United Nations Convention Against Torture." Instead, "the standards for the two bases of relief are distinct and should not be conflated." *Farah v. Ashcroft*, 348 F.3d 1153, 1156–57 (9th Cir. 2003). *See Kamalthas v. INS*, 251 F.3d 1279, 1282–83 (9th Cir. 2001) (remanding for reconsideration of a CAT claim where the BIA relied unduly on its prior adverse credibility determination and failed to consider relevant county conditions in the record); *Taha v. Ashcroft*, 389 F.3d 800, 802 (9th Cir. 2004) (per curiam) (remanding for consideration of CAT claim that the BIA denied on same adverse credibility grounds cited for denial of asylum); *but see Farah*, 348 F.3d at 1157 (affirming denial of asylum and CAT claim based on adverse credibility determination where applicant pointed to no additional evidence relevant to the CAT claim).

D. Country Conditions 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 against Tamil males"). "[A]ll evidence relevant to the possibility of future torture shall be considered, including, but not limited

to . . . [e]vidence of gross, flagrant or mass violations of human rights within the country of removal; and [o]ther relevant information regarding conditions in the country of removal." *Id*. at 1282 (quoting 8 C.F.R. § 208.16(c)(3) (emphasis deleted)).

See also Nuru v. Gonzales, 404 F.3d 1207, 1219 (9th Cir. 2005) (relying on country report showing that the Eritrean government routinely prosecutes military deserters and subjects at least some of them to torture); *Abassi v. INS*, 305 F.3d 1028, 1029 (9th Cir. 2002) (holding that the BIA must consider the most recent State Department country conditions report where a pro se applicant refers to the report in his moving papers); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that the BIA was required to consider relevant information in the State Department report on Iraq), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order); *Khup v. Ashcroft*, 376 F.3d 898, 906–07 (9th Cir. 2004) (Seventh Day Adventist petitioner eligible for CAT relief given past persecution, and country conditions reports indicating that the Burmese government regularly tortures detainees).

E. Past Torture

Evidence of past torture is relevant to a determination of eligibility for CAT relief. *Mohammed v. Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005) (quoting 8 C.F.R. § 1208.16(c)(3) (2000)); *see also Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001). However, unlike asylum, past torture does not provide a separate basis for eligibility. Nevertheless, evidence of past torture that causes "permanent and continuing harm" alone may be enough to establish automatic entitlement to CAT relief. *See Mohammed*, 400 F.3d at 802 (comparing *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) for the proposition that continuing persecution may establish entitlement to withholding of removal). "[I]f an individual has been tortured and has escaped to another country, it is likely that he will be tortured again if returned to the site of his prior suffering, unless circumstances or conditions have changed significantly, not just in general, but with respect to the particular individual." *Nuru v. Gonzales*, 404 F.3d 1207, 1217–18 (9th Cir. 2005) (noting that "individualized analysis" of how changed conditions will affect the specific applicant's situation is required).

F. Internal Relocation

"Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured" is relevant to the possibility of future torture. *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3) (2000)); *see also Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006) (applicant would presumably be safe in another area of India where police are not under the mistaken impression that he is a separatist); *Singh v. Ashcroft*, 351 F.3d 435, 443 (9th Cir. 2003) (applicant could settle in a part of India where he is not likely to be tortured and was not personally threatened); *Hasan v. Ashcroft*, 380 F.3d 1114, 1122 (9th Cir. 2004) (noting differing standards for evaluating possibility of internal relocation for asylum and CAT claims). However, "it will rarely be safe to remove a potential torture victim on the assumption that torture will be averted simply by relocating him to another part of the country." *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005).

G. Differences Between CAT Protection and Asylum and Withholding

"[T]he Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured 'on account of' a protected ground; it is narrower, however, because the petitioner must show that it is 'more likely than not' that he or she will be tortured, and not simply persecuted upon removal to a given country." *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001); *see also Nuru v. Gonzales*, 404 F.3d 1207, 1224 (9th Cir. 2005); *Khup v. Ashcroft*, 376 F.3d 898, 906–07 (9th Cir. 2004).

H. Agent or Source of Torture

To qualify for relief under the Convention, the torture must be "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." *Zheng v. Ashcroft*, 332 F.3d 1186, 1188 (9th Cir. 2003) (quoting 8 C.F.R. § 208.18(a)(1) (2002)) (emphasis and internal quotation marks omitted).

"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." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1059 (9th cir. 2006) (mandate pending) (citing 8 C.F.R. § 208.18(a)(1)). "Acquiescence" by government officials does not require actual knowledge or willful acceptance, rather awareness and willful blindness by governmental officials is sufficient. *Zheng*, 332 F.3d at 1197 (remanding CAT claim of Chinese applicant who feared being killed by the smugglers who brought him to the United States). Nor does the standard require that public officials sanction the alleged conduct. *Ornelas-Chavez*, 458 F.3d at 1059 (holding that "sanctioned" is too strict a standard). "It is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it." *Id*. at 1060.

An applicant is not necessarily required to report his alleged torture to public officials to qualify for CAT relief. *See Ornelas-Chavez*, 458 F.3d 1060.

An applicant also 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"); *see also Ornelas-Chavez*, 458 F.3d at 1059 (same in the case of a Mexican male with female sexual identity); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787 (9th Cir. 2004) (same in the case of a Salvadoran homosexual male with a female sexual identity).

I. Mandatory Relief

"If an alien meets his burden of proof regarding future torture, withholding of removal [under CAT] is mandatory under the implementing regulations, just as it is in the case of a well-founded fear of persecution." *Nuru v. Gonzales*, 404 F.3d 1207, 1216 (9th Cir. 2005) (citing INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), and 8 C.F.R. §§ 1208.16–1208.18). However, there is one qualification to the mandatory nature of withholding

under the CAT. "If the alien has committed a 'particularly serious crime' or an aggravated felony for which the term of imprisonment is at least five years, only deferral of removal, not withholding of removal, is authorized." *Nuru*, 404 F.3d at 1216 n.4 (citing 8 C.F.R. §§ 1208.16(d), 1208.17).

Although an applicant will be denied withholding of removal under CAT if the Attorney General has reasonable grounds to believe that the alien is a danger to the security of the United States, *see* 8 U.S.C. § 1231(b)(3)(B)(iv) and 8 C.F.R. § 1208.16(d)(2), he may still be eligible for deferral of removal under CAT, *see* 8 C.F.R. § 1208.17(a); *see also Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (discussing Algerian terrorist's eligibility for deferral of removal); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (holding, in the case of a Bosnian Serb, that even a persecutor may be eligible for deferral of removal).

J. Nature of Relief

Unlike asylum, Convention relief does not confer status, only protection from return to the country where the applicant would be tortured. *See* 8 C.F.R. § 1208.16(f). However, "[w]ithholding entitles the alien to remain indefinitely in the United States and eventually to apply for permanent residence." *Huang v. Ashcroft*, 390 F.3d 1118, 1121, *as amended* (9th Cir. 2005). Deferral of removal also prevents removal, but does not confer lawful or permanent status. *Id*.

K. Derivative Torture Claims

This court has not yet decided whether an applicant may assert a derivative torture claim on behalf of a child. *See Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004) (remanding for determination of whether Nigerian applicant may assert a derivative torture claim based on feared FGM of her daughter).

L. Exhaustion

This court will not address a Convention claim unless it was first raised before the BIA. *See Ortiz v. INS*, 179 F.3d 1148, 1152–53 (9th Cir. 1999) (granting a stay of the mandate to allow the applicants to move the

BIA to reopen to apply for CAT protection). The proper procedure is for the applicant to file a motion to reopen with the BIA to apply for protection. *See Khourassany v. INS*, 208 F.3d 1096, 1100–01 (9th Cir. 2000) (denying applicant's motion to remand his case; staying the mandate to allow applicant to file motion to reopen with the BIA).

M. Habeas Jurisdiction

Pursuant to section 106(a)(1)(B) of the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, a petition for review filed with the appropriate court of appeals is the sole and exclusive means for judicial review of any cause or claim under the CAT, except as provided by 8 U.S.C. § 1252(e). *See* 8 U.S.C. § 1252(a)(2)(D) (2005); *cf. Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (recognizing habeas jurisdiction over CAT claims before enactment of the REAL ID Act).

N. Cases Granting CAT Protection

Hosseini v. Gonzales, 464 F.3d 1018, 1024–25 (9th Cir. 2006) (mandate pending) (applicant entitled to deferral of removal because it was more likely than not that Iranian government would torture him based on his involvement with an Iranian terrorist organization); *Nuru v. Gonzales*, 404 F.3d 1207, 1223 (9th Cir. 2005) (Eritrean soldier who was bound, whipped, beaten and placed in the broiling sun for nearly one month after voicing political opposition to war between Eritrea and Sudan entitled to CAT relief); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (repeated beatings and cigarette burns of Iraqi Sunni Muslim constitute torture), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order); *Khup v. Ashcroft*, 376 F.3d 898, 906–07 (9th Cir. 2004) (Seventh Day Adventist entitled to CAT protection given past persecution and country conditions reports indicating that the Burmese government regularly tortures detainees).

O. Cases Finding No Eligibility for CAT Protection

Hosseini v. Gonzales, 464 F.3d 1018 1022–23 (9th Cir. 2006) (mandate pending) (affirming denial of withholding of removal under CAT because substantial evidence supported the finding that applicant engaged

in terrorist activity); *Almaghzar v. Gonzales*, 457 F.3d 915, 822–23 (9th Cir. 2006) (evidence of possible future torture was insufficient to overcome prior adverse credibility determination); *Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006) (evidence did not compel finding of likelihood of torture where applicant failed to demonstrate that he could not live safely elsewhere in India); *Kumar v. Gonzales*, 444 F.3d 1043, 1055–56 (9th Cir. 2006) (arrest and severe beating by Indian police did not rise to the level of torture); *Hasan v. Ashcroft*, 380 F.3d 1114, 1122–23 (9th Cir. 2004) (journalist from Bangladesh failed to show future harm rising to level of torture, or inability to avoid harm by relocating); *El Himri v. Ashcroft*, 378 F.3d 932, 938 (9th Cir. 2004) (stateless Palestinians in Kuwait, where "most of most of the physical violence perpetrated by the government against Palestinians ended when constitutional government returned"); *Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (member of State-Department-designated terrorist organization failed to show that Algerian government was aware of or interested in him); *Singh v. Ashcroft*, 351 F.3d 435, 443 (9th Cir. 2003) (fear of members of mother's family who are police officers); *Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003) (Somali applicant's claim "based on the same statements . . . that the BIA determined to be not credible"); *Cano-Merida v. INS*, 311 F.3d 960, 965–66 (9th Cir. 2002) (affirming BIA's denial of motion to reopen to present Convention claim based on fear of return to Guatemala); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (harassment, wiretapping, staged car crashes, detention and interrogation of Romanian anti-Communist did not amount to torture).

V. CREDIBILITY DETERMINATIONS

Note that the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) codified several new standards governing credibility determinations and judicial review of such determinations. These standards apply to all *applications filed* on or after May 11, 2005. REAL ID Act § 101(h)(2).

A. Standard of Review

Adverse credibility findings are reviewed under the substantial evidence standard. *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002).

Deference is given to the IJ's credibility determination, because the IJ is in the best position to assess the trustworthiness of the applicant's testimony. *See Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003); *Canjura-Flores v. INS*, 784 F.2d 885, 888 (9th Cir. 1985). Moreover, false statements or inconsistencies "must be viewed in light of all the evidence presented in the case." *Kaur v. Gonzales*, 418 F.3d 1061, 1066 (9th Cir. 2005).

"While the substantial evidence standard demands deference to the IJ, we do not accept blindly an IJ's conclusion that a petitioner is not credible. Rather, we examine the record to see whether substantial evidence supports that conclusion and determine whether the reasoning employed by the IJ is fatally flawed." *Gui*, 280 F.3d at 1225 (internal quotation marks omitted).

An IJ must articulate a legitimate basis to question the applicant's credibility, and must offer specific and cogent reasons for any stated disbelief. *Id.* "Any such reason must be substantial and bear a legitimate nexus to the finding." *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (per curiam) (internal quotation marks omitted). "Generalized statements that do not identify specific examples of evasiveness or contradiction in the petitioner's testimony" are insufficient. *Garrovillas v. INS*, 156 F.3d 1010, 1013 (9th Cir. 1998). However, "[t]he obligation to provide a specific, cogent reason for a negative credibility finding does not require the recitation of unique or particular words." *de Leon-Barrios v. INS*, 116 F.3d 391, 394 (9th Cir. 1997) (concluding that the IJ made a specific and cogent negative credibility finding).

The IJ or BIA must explain "the significance of the discrepancy or point[] to the petitioner's obvious evasiveness when asked about it." *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000); *see also Singh v. INS*, 362 F.3d 1164, 1171 (9th Cir. 2004) (BIA failed to clarify why purported discrepancy was significant).

As long as one of the identified grounds underlying a negative credibility finding is supported by substantial evidence and goes to the heart of the claims of persecution, the court is bound to accept the negative credibility finding. *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (affirming negative credibility finding even though some of the factors were factually unsupported or irrelevant); *see also Wang v. INS*, 352 F.3d 1250, 1259 (9th Cir. 2003) ("whether we have rejected some of the IJ's grounds for an adverse credibility finding is irrelevant").

The court's review focuses only on the actual reasons relied upon by the agency. *Marcos v. Gonzales*, 410 F.3d 1112, 1116 (9th Cir. 2005). "[W]hen each of the IJ's or BIA's proffered reasons for an adverse credibility finding fails, we must accept a petitioner's testimony as credible." *Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004).

B. Opportunity to Explain

"[T]he BIA must provide a petitioner with a reasonable opportunity to offer an explanation of any perceived inconsistencies that form the basis of a denial of asylum." *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999); *see also Suntharalinkam v. Gonzales*, 458 F.3d 1034, 1043–46 (9th Cir. 2006) (mandate pending) (reversing adverse credibility determination where it was unclear whether discrepancies existed and IJ failed to ask for an explanation for purported discrepancies); *Quan v. Gonzales*, 428 F.3d 883, 886 (9th Cir. 2005) (explaining that an applicant must be given an opportunity to clarify unclear testimony); *Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004) (reversing negative credibility finding because, *inter alia*, applicant was denied a reasonable opportunity to explain a perceived inconsistency); *Guo v. Ashcroft*, 361 F.3d 1194, 1200 (9th Cir. 2004) (reversing negative credibility finding because, *inter alia*, applicant was not afforded an opportunity to explain ambiguous witness testimony); *Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003) ("[T]he BIA did not identify and respond to Ordonez's explanations. Either Ordonez was given no chance to contest the issue or the BIA did not address his arguments. Either way, Ordonez's rights were violated.").

The IJ must also consider and address the applicant's explanation for the identified discrepancy. *See Singh v. Gonzales*, 439 F.3d 1100,

1105–06 (9th Cir. 2006); *Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004) ("An adverse credibility finding is improper when an IJ fails to address a petitioner's explanation for a discrepancy or inconsistency."); *Guo v. Ashcroft*, 361 F.3d 1194, 1200 (9th Cir. 2004) (reversing negative credibility finding because, *inter alia*, the IJ did not address Guo's reasonable and plausible explanation for a perceived inconsistency); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (substantial evidence lacking where applicant provided an explanation for a discrepancy, but neither the BIA nor the IJ addressed it); *Chen v. INS*, 266 F.3d 1094, 1100 (9th Cir. 2001) ("[B]y not considering Chen's explanation [for a date discrepancy], the IJ and the [BIA] ignored well-established precedent that testimonial evidence may be the most important and dispositive part of any asylum claim."), *overruled on other grounds by INS v. Ventura*, 537 U.S. 12 (2002) (per curiam); *cf. Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004) (affirming negative credibility finding and noting that the IJ addressed Li's explanation for an inconsistency).

C. Credibility Factors

1. Demeanor

Credibility determinations that are based on an applicant's demeanor are given "special deference." *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999) (deferring to the IJ's observation that the applicant "began to literally jump around in his seat and to squirm rather uncomfortably while testifying" on cross-examination). However, boilerplate demeanor findings are not appropriate. *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1048, 1051–52 (9th Cir. 2002) ("Cookie cutter credibility findings are the antithesis of the individualized determination required in asylum cases."). Moreover, an IJ's demeanor-based negative credibility finding must specifically and cogently refer to the non-credible aspects of the applicant's demeanor. *See Arulampalam v. Ashcroft*, 353 F.3d 679, 686 (9th Cir. 2003). An applicant's demeanor has been described as "including the expression of his countenance, how he sits or

stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication." *Id.* (internal quotation marks omitted).

2. Responsiveness

"To support an adverse credibility determination based on unresponsiveness, the BIA must identify particular instances in the record where the petitioner refused to answer questions asked of him." *Singh v. Ashcroft*, 301 F.3d 1109, 1114 (9th Cir. 2002); *see also Garrovillas v. INS*, 156 F.3d 1010, 1014–15 (9th Cir. 1998) (decisions below "fail[ed] to specify any particular instances in his testimony when Garrovillas refused to answer questions"); *Arulampalam v. Ashcroft*, 353 F.3d 679, 687 (9th Cir. 2003) (noting importance of sensitivity to petitioner's cultural and educational background when appraising manner of speech).

3. Specificity and Detail

The level of specificity in an applicant's testimony is an appropriate consideration. *See Singh-Kaur v. INS*, 183 F.3d 1147, 1153 (9th Cir. 1999) (approving IJ's finding that an applicant's testimony was suspicious given its lack of specificity); *cf. Zheng v. Ashcroft*, 397 F.3d 1139, 1147 (9th Cir. 2005) (testimony was fairly detailed, and IJ did not identify examples of how Zheng's testimony lacked detail); *Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004) ("[A] general response to questioning, followed by a more specific, consistent response to further questioning is not a cogent reason for supporting a negative credibility finding."); *Akinmade v. INS*, 196 F.3d 951. 957 (9th Cir. 1999) (finding testimony to be sufficiently detailed and specific, "especially when Akinmade was not given notice that he should provide such information, nor asked at the hearing to do so").

4. Inconsistencies

a. Minor Inconsistencies

"Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are

insufficient to support an adverse credibility finding." *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003); *see also Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000) ("Any alleged inconsistencies in dates that reveal nothing about a petitioner's credibility cannot form the basis of an adverse credibility finding."). "[I]nconsistencies of less than substantial importance for which a plausible explanation is offered" also cannot serve as the sole basis for an negative credibility finding. *Garrovillas v. INS*, 156 F.3d 1010, 1014 (9th Cir. 1998); *see also Guo v. Ashcroft*, 361 F.3d 1194, 1201 (9th Cir. 2004) (failure to remember company name claimed on his B-1 visa application did not go to the heart of his claim involving persecution on account of his Christian beliefs).

Discrepancies that cannot be viewed as attempts to enhance claims of persecution generally have no bearing on credibility. *Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004); *Wang v. Ashcroft*, 341 F.3d 1015, 1021 (9th Cir. 2003); *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000); *cf. Kaur v. Gonzales*, 418 F.3d 1061, 1065 (9th Cir. 2005) ("Our court has never articulated a *per se* rule that whenever inconsistencies technically weaken an asylum claim they can never serve as the basis of an adverse credibility finding.").

b. Substantial Inconsistencies

Substantial inconsistencies, however, damage a claim and support a negative credibility finding. *See, e.g., Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) ("geographic discrepancies which went to the heart" of applicant's claim). "An adverse credibility ruling will be upheld so long as identified inconsistencies go to the heart of the asylum claim." *Li v. Ashcroft*, 378 F.3d 959, 962 (9th Cir. 2004) (three prior asylum applications contained key omissions and discrepancies) (internal quotation marks and alteration omitted); *see also Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) (failure to include in either of two asylum applications or principal testimony the incident that precipitated flight from Guatemala); *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001) (inconsistencies relating to "the events leading up to his departure and the number of times he was arrested"); *de Leon-Barrios v. INS*, 116 F.3d 391, 393–94 (9th Cir. 1997) (inconsistency relating to the basis for the alleged fear).

Inconsistencies should not be viewed in isolation, but rather should be considered in light of all the evidence presented. *See Kaur v. Gonzales*, 418 F.3d 1061, 1067 (9th Cir. 2005) (repeated and significant inconsistencies deprived claim of the requisite "ring of truth").

c. Mistranslation/Miscommunication

Apparent inconsistencies based on faulty or unreliable translations may not be sufficient to support a negative credibility finding. *See Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) (discrepancies had more to do with the witness's difficulties with English rather than prevarication); *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) ("Even where there is no due process violation, faulty or unreliable translations can undermine the evidence on which an adverse credibility determination is based."); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) ("[W]e have long recognized that difficulties in interpretation may result in seeming inconsistencies, especially in cases . . . where there is a language barrier."); *Singh v. INS*, 292 F.3d 1017, 1021–23 (9th Cir. 2002) (perceived inconsistencies between applicant's airport interview and testimony did not constitute a valid ground for an adverse credibility determination given the lack of an interpreter who spoke applicant's language); *Zahedi v. INS*, 222 F.3d 1157, 1167 (9th Cir. 2000) (applicant "was not enhancing his claim with any of the confusing dates, and the confusion seems to have stemmed, at least in part, from language problems"); *Abovian v. INS*, 219 F.3d 972, 979, *as amended by* 228 F.3d 1127 *and* 234 F.3d 492 (9th Cir. 2000) (noting that translation difficulties may have contributed to the purported disjointedness and incoherence in testimony).

Discrepancies "capable of being attributed to a typographical or clerical error . . . cannot form the basis of an adverse credibility finding." *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000); *see also Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) (forensic experts' inability to determine authenticity of documents cannot alone constitute a basis for an adverse credibility finding).

Cf. Singh v. Ashcroft, 367 F.3d 1139, 1143 (9th Cir. 2004) (IJ's specific and cogent negative credibility finding was proper despite suggestion that hearing transcription was problematic because applicant

did not contest any particular portion of the transcript or request remand for clarification).

5. Omissions

"[T]he mere omission of details is insufficient to uphold an adverse credibility finding." *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000). For example, an omission of one detail included in an applicant's oral testimony does not make a supporting document inconsistent or incompatible. *See Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (doctor's letter failed to mention all of the applicant's injuries). Where an applicant gives one account of persecution but then revises the story "so as to lessen the degree of persecution he experienced, rather than to increase it, the discrepancy generally does not support an adverse credibility finding." *Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (internal quotation marks omitted); *see also Garrovillas v. INS*, 156 F.3d 1010, 1013–14 (9th Cir. 1998) ("there was no reason for Garrovillas to disavow the earlier statement other than a desire to correct an error of which he had not been aware").

6. Incomplete Asylum Application

"It is well settled that an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application." *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996); *see also Singh v. INS*, 292 F.3d 1017, 1021 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant's initial statements at the airport); *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) ("[A] concern that the affidavit is not as complete as might be desired cannot, without more, properly serve as a basis for a finding of lack of credibility.") (internal quotation marks omitted); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) (failure to mention two collateral incidents involving relatives on application not sufficient for adverse credibility determination).

Moreover, "asylum forms filled out by people who are unable to retain counsel should be read charitably, especially when it comes to the absence of a comprehensive and thorough account of all past instances of

persecution." *Smolniakova v. Gonzales*, 422 F.3d 1037, 1045 (9th Cir. 2005) (internal quotation marks omitted).

7. Sexual Abuse or Assault

An applicant's failure to relate details about sexual assault or abuse at the first opportunity "cannot reasonably be characterized as an inconsistency." *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052–53 (9th Cir. 2002). "That a woman who has suffered sexual abuse at the hands of male officials does not spontaneously reveal the details of that abuse to a male interviewer does not constitute an inconsistency from which it could reasonably be inferred that she is lying." *Id.* at 1053; *see also Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) ("A victim of sexual assault does not irredeemably compromise his or her credibility by failing to report the assault at the first opportunity.").

8. Airport Interviews

This court "hesitate[s] to view statements given during airport interviews as valuable impeachment sources because of the conditions under which they are taken and because a newly-arriving alien cannot be expected to divulge every detail of the persecution he or she sustained." *Li v. Ashcroft*, 378 F.3d 959, 962–63 (9th Cir. 2004) (sworn airport interview statement was a reliable impeachment source supported adverse credibility determination); *see also Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (omission at the airport of specific details of torture that were revealed later did not support negative credibility finding); *Singh v. INS*, 292 F.3d 1017, 1021–24 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant's initial statements at the airport).

9. Asylum Interview/Assessment to Refer

"Certain features of an asylum interview make it a potentially unreliable point of comparison to a petitioner's testimony for purposes of a credibility determination." *See Singh v. Gonzales*, 403 F.3d 1081, 1087–88 (9th Cir. 2005) (discussing the nature of an asylum interview and concluding that discrepancies between Assessment To Refer and

applicant's testimony did not support an adverse credibility determination). For example, the informal conference conducted by an asylum officer is quasi-prosecutorial in nature. *See id*. (citing *Barahona-Gomez v. Reno*, 236 F.3d 115 (9th Cir. 2001), for a description of the asylum interview). In addition, although the regulations provide that an asylum officer "shall have the authority to administer oaths," there is no requirement "that the officer *must* take evidence under oath." *See id*. (citing 8 C.F.R. § 208.9(c)). Moreover, in the event that an applicant is unable to proceed with the interview in English, the applicant must provide at his or her own expense a competent translator. *See id*.

In *Singh*, the court rejected the agency's reliance on the Assessment To Refer to support its adverse credibility determination where the Assessment did not contain any record of the questions and answers at the asylum interview, or other detailed, contemporary, chronological notes of the interview, but included only a short conclusory summary, there was no transcript of the interview, or any indication of the language of the interview or of the administration of an oath before it took place, the asylum officer did not testify at the removal hearing, and the applicant was not asked at the removal hearing about the accuracy of the asylum officer's report or given any opportunity to explain the discrepancies the asylum officer perceived. *See id*. at 1089–90.

10. State Department and other Government Reports

"The IJ may consider the State Department's reports in evaluating a petitioner's credibility." *Zheng v. Ashcroft*, 397 F.3d 1139, 1143 (9th Cir. 2005). "[A]s a predicate, the petitioner's testimony must be inconsistent with facts contained in the country report or profile before the IJ may discredit the petitioner's testimony." *Id.* at 1144 (concluding that petitioner's testimony was not inconsistent with the State Department reports on China). Additionally, the court "will not infer that a petitioner's otherwise credible testimony is not believable merely because the events he relates are not described in a State Department document." *Chand v. INS*, 222 F.3d 1066, 1077 (9th Cir. 2000) ("[W]e have never assumed that all potentially relevant incidents of persecution in a country are collected in the State Department's documentation.").

The IJ must conduct an individualized credibility analysis, and it is improper for the BIA to rely exclusively "on a factually unsupported assertion in a State Department report to deem [an applicant] not credible." *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) (noting the "perennial concern that the [State] Department soft-pedals human rights violations by countries that the United States wants to have good relations with.") (internal quotation marks omitted). For instance, a general assertion about conditions of peace in India was insufficient to support a negative credibility finding because it was a blanket statement without individualized analysis, and it was based on conjecture and speculation. *Id.*

It is permissible, however, for the agency to place supplemental reliance on a State Department report to discredit general portions of an applicant's testimony. *See Chebchoub v. INS*, 257 F.3d 1038, 1043–44 (9th Cir. 2001) (affirming negative credibility finding based in part on country conditions evidence that Morocco did not practice enforced exile of dissidents). In *Chebchoub*, the court also noted that the State Department report was not used to discredit specific testimony regarding the petitioner's individual experiences. *Id.* at 1044.

See also Singh v. Gonzales, 439 F.3d 1100, 1110–11 (9th Cir. 2006) (IJ erred in relying on generalized country report to find specific testimony about experiences implausible); *Suntharalinkam v. Gonzales*, 458 F.3d 1034, 1047–48 (9th Cir. 2006) (mandate pending) (rejecting IJ's reliance on government agent's report that a group of Sri Lankan individuals attempting to enter the U.S. were likely members of the Tamil Tiger terrorist group); *Zheng v. Ashcroft*, 397 F.3d 1139, 1143–44 (9th Cir. 2005) (rejecting the IJ's reliance on a country report in finding it unbelievable that applicants were forced to abort a child conceived outside of marriage); *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (alleged discrepancy based on country report statement that early marriage fines and regular IUD insertions were common, had no bearing on applicant's credibility); *Ge v. Ashcroft*, 367 F.3d 1121, 1126 (9th Cir. 2004) (to the extent that the IJ relied on blanket statements in the State Department report regarding detention conditions in China, the IJ's finding was not sufficiently individualized); *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) ("Mere failure to authenticate documents, at least in the absence of

evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding," despite State Department's observations regarding high incidence of document fabrication in China.).

11. Speculation and Conjecture

"Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence." *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000).

See Kumar v. Gonzales, 444 F.3d 1043, 1050–53 (9th Cir. 2006) (speculation concerning appropriate appearance of foreign official documents, investigative practices of Indian police, and whether applicant should know the whereabouts of his brother with whom he fled India); *Singh v. Gonzales*, 439 F.3d 1100, 1108 (9th Cir. 2006) (speculation about the types of questions Indian police would ask during a beating); *Suntharalinkam v. Gonzales*, 458 F.3d 1034, 1040–41 (9th Cir. 2006) (mandate pending) (assumptions about applicant's knowledge of geography and speculation concerning appropriate appearance of cigarette burn scars); *Zhou v. Gonzales*, 437 F.3d 860, 865 (9th Cir. 2006) (implausibility that applicant would risk privileged position in society to smuggle illegal material into China for a friend); *Lin v. Gonzales*, 434 F.3d 1158, 1162–67 (9th Cir. 2006) (speculation concerning appropriate appearance of foreign official documents); *Quan v. Gonzales*, 428 F.3d 883, 887–88 (9th Cir. 2005) (speculation regarding police capabilities based on country's geographical size and unsupported assumption that banks in China would be closed on Sundays); *Shire v. Ashcroft*, 388 F.3d 1288, 1296–97 (9th Cir. 2004) (speculation concerning believability that applicant could enter the U.S. using false documents and not remember the names of the cities through which he traveled by bus from New York to San Diego); *Kaur v. Ashcroft*, 379 F.3d 876, 887–88 (9th Cir. 2004) ("personal conjecture about the manner in which Indian passport officials carry out their duties" and how an applicant would describe an event); *Ge v. Ashcroft*, 367 F.3d 1121, 1125 (9th Cir. 2004) (personal conjecture about what the Chinese authorities would or would not do); *Guo v. Ashcroft*, 361 F.3d 1194, 1201–02 (9th Cir. 2004) (speculation as to why applicant did not apply for asylum immediately upon entry); *Arulampalam v. Ashcroft*, 353 F.3d 679, 687–88 (9th Cir. 2003) (IJ's hypotheses

regarding abilities of Sri Lankan soldiers and police, and official registration requirements); *Wang v. INS*, 352 F.3d 1250, 1255–56 (9th Cir. 2003) (speculation regarding China's use of force against demonstrators and enforcement of one-child policy); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (IJ's hypothesis as to what motivated the applicant's departure from Sri Lanka); *Singh v. INS*, 292 F.3d 1017, 1024 (9th Cir. 2002) (assumption regarding Indian police motives); *Gui v. INS*, 280 F.3d 1217, 1226–27 (9th Cir. 2002) (IJ's opinion about appropriate way to silence a dissident and implications of Romanian government's failure to kill applicant); *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (per curiam) (rejecting BIA's unsupported assumptions regarding the plausibility of applicant's political activities in Nigeria); *Bandari v. INS*, 227 F.3d 1160, 1167–68 (9th Cir. 2000) ("IJ's subjective view of what a persecuted person would include in his asylum application," personal belief that applicant should have bled when he was flogged, and speculation about a foreign government's educational policies); *Chouchkov v. INS*, 220 F.3d 1077, 1083 (9th Cir. 2000) (personal conjecture about expected efficiency and competence of government officials); *Shah v. INS*, 220 F.3d 1062, 1069, 1071 (9th Cir. 2000) (State Department conjecture about the effect of electoral victory on existing political persecution and BIA's conjecture about appropriate quantity and appearance of letters); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) ("personal conjecture about what guerillas likely would and would not do" not sufficient).

12. Counterfeit and Unauthenticated Documents

Use of counterfeit documents is not a legitimate basis for a negative credibility finding if the evidence does not go the heart of the asylum claim. *See Akinmade v. INS*, 196 F.3d 951, 955–56 (9th Cir. 1999) (use of false passport and false declaration that applicant was a Canadian citizen supported claim of persecution); *Kaur v. Ashcroft*, 379 F.3d 876, 889 (9th Cir. 2004) ("the fact that an asylum seeker . . . used false passports to enter this or another country, without more, is not a proper basis for finding her not credible"). The court should consider the totality of the circumstances even when an applicant submits an allegedly fraudulent document that goes to the heart of the claim. *See, e.g., Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 911 (9th Cir. 2004) (reversing adverse credibility determination

based solely on the use of one allegedly fraudulent document where applicant corroborated testimony and nothing in the record suggested lack of credibility or knowledge that document was fraudulent).

Cf. Desta v. Ashcroft, 365 F.3d 741, 745 (9th Cir. 2004) (fraudulent documents concerning alleged membership in the All Amhara People's Organization and the Ethiopian Medhin Democratic Party went to the heart of his claim); *Pal v. INS*, 204 F.3d 935, 938 (9th Cir. 2000) (noting contradictions between testimony and doctor's letter).

Failure to supply affirmative authentication for documents does not meet the substantial evidence standard. *See Shire v. Ashcroft*, 388 F.3d 1288, 1299 (9th Cir. 2004). "Mere failure to authenticate documents, at least in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding." *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003); *see also Lin v. Gonzales*, 434 F.3d 1158, 1164–65 (9th Cir. 2006) (an applicant does not have an affirmative duty to have every document authenticated by a document examiner); *Zhou v. Gonzales*, 437 F.3d 860, 866 (9th Cir. 2006) (failure to authenticate cannot support an adverse credibility determination absent some evidence of forgery or other unreliability).

"Although a State Department report on widespread forgery within a particular region may be part of the IJ's analysis, speculation that a document is unreliable merely because other documents from the same region have been forged in the past can hardly be regarded as substantial evidence." *Lin*, 434 F.3d at 1165; *see also Wang*, 352 F.3d at 1254 ("State Department's general observations regarding the high incidence of document fabrication in China" cannot alone support adverse credibility finding).

13. Implausible Testimony

Skepticism as to the plausibility of testimony may in certain circumstances be a proper basis for finding that the testimony is inherently unbelievable if the IJ's logical inferences are supported by substantial evidence. *See Singh v. Gonzales*, 439 F.3d 1100, 1100 (9th Cir. 2006) (ultimately concluding that the IJ's inferences were not supported by

substantial evidence); *see also Zhou v. Gonzales*, 437 F.3d 860, 865 (9th Cir. 2006) (implausibility that applicant would risk privileged position in society to smuggle illegal material into China for a friend was improper speculation and conjecture).

14. Previous Misrepresentations

"Untrue statements by themselves are not reason for refusal of refugee status." *Turcios v. INS*, 821 F.2d 1396, 1400–01 (9th Cir. 1987) (Salvadoran applicant's false claim to INS officials that he was Mexican did not undermine his credibility). For example, "the fact that an asylum seeker has lied to immigration officers or used false passports to enter this or another country, without more, is not a proper basis for finding her not credible." *Kaur v. Ashcroft*, 379 F.3d 876, 889 (9th Cir. 2004). These statements must be examined in light of all of the circumstances of the case. *Turcios*, 821 F.2d at 1400–01. *See also Marcos v. Gonzales*, 410 F.3d 1112, 1116 (9th Cir. 2005) (misrepresentation on visa application); *Guo v. Ashcroft*, 361 F.3d 1194, 1202 (9th Cir. 2004) (false statements made to extend B-1 visa); *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) (distinguishing between "false statements made to establish the critical elements of the asylum claim from false statements made to evade INS officials").

False statements regarding alleged persecution may support a negative credibility finding. *See Al-Harbi v. INS*, 242 F.3d 882, 889–90 (9th Cir. 2001) (affirming negative credibility finding based on Iraqi dissident's "propensity to change his story regarding incidents of past persecution"); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1393 (9th Cir. 1985) (negative credibility based on Salvadoran applicant's lies to get passport and under oath to INS officials, travel under an assumed name, and conviction of illegally transporting aliens into the U.S).

15. Classified Information

If the IJ makes an adverse credibility finding on the basis of classified evidence, such evidence must be produced before this court. *Singh v. INS*, 328 F.3d 1205, 1206 (9th Cir. 2003) (order).

16. Failure to Seek Asylum Elsewhere

The failure to seek asylum in the first country in which an applicant arrives does not necessarily undermine a credible fear of persecution. *See Singh v. Gonzales*, 439 F.3d 1100, 1107 (9th Cir. 2006); *Ding v. Ashcroft*, 387 F.3d 1131, 1140 (9th Cir. 2004) (citing *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986).

17. Cumulative Effect of Adverse Credibility Grounds

Grounds that do not individually support an adverse credibility determination may not cumulatively support that determination. *See, e.g.*, *Suntharalinkam v. Gonzales*, 458 F.3d 1034, 1047 (9th Cir. 2006) (mandate pending) ("[t]he inconsistencies on which the IJ relied in finding cumulative impact sufficient to support an adverse credibility finding were not 'significant,' and the totality of the purported inconsistencies does not add up to a sufficient basis for an adverse credibility finding."). Nevertheless, "repeated and significant inconsistencies" may deprive a claim of the "requisite ring of truth." *Kaur v. Gonzales*, 418 F.3d 1061, 1067 (9th Cir. 2005); *see also Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) ("the inconsistencies are the sum total of [the applicant's] testimony").

D. Presumption of Credibility

Where the BIA does not make an adverse credibility finding, this court accepts the applicant's factual contentions as true. *See Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005) ("When the BIA's decision is silent on the issue of credibility, despite an IJ's explicit adverse credibility finding, we may presume that the BIA found the petitioner to be credible."); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("Testimony must be accepted as true in the absence of an explicit adverse credibility finding."); *Navas v. INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000) (same); *Maldonado-Cruz v. INS*, 883 F.2d 788, 792 (9th Cir. 1989) ("The BIA's refusal to consider credibility leads to the presumption that it found the petitioner credible").

E. Implied Credibility Findings

1. Immigration Judges

"[I]t is clearly our rule that when the IJ makes implicit credibility observations in passing, . . . this does not constitute a credibility finding." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137–38 (9th Cir. 2004) (internal quotation marks and alteration omitted); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 658–59 (9th Cir. 2003) (same); *see also Mansour v. Ashcroft*, 390 F.3d 667, 672 (9th Cir. 2004); *Shoafera v. INS*, 228 F.3d 1070, 1075 n.3 (9th Cir. 2000); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) ("In the absence of an explicit adverse credibility finding, we must assume that [the applicant's] factual contentions are true."); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1383 (9th Cir. 1990) ("The mere statement that an applicant is 'not entirely credible' is not enough.").

2. Board of Immigration Appeals

When the BIA finds that an applicant's testimony is "implausible," but does not make an explicit credibility finding of its own, this court has treated the implausibility finding as an adverse credibility determination. *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (per curiam) ("Because a finding that testimony is 'implausible' indicates disbelief, for the purposes of this appeal, we treat the BIA's comments regarding 'implausibility' as an adverse credibility finding.").

F. Sua Sponte Credibility Determinations and Notice

The BIA may not make an adverse credibility determination in the first instance unless the applicant is afforded certain due process protections. *See Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003) (due process violation where the IJ made a credibility observation but failed to make an express credibility determination); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) (BIA violated due process by sua sponte reversing an IJ's favorable credibility finding); *Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (remanding to allow the applicant to explain issues raised in BIA's sua sponte negative credibility finding). *See also Abovian v. INS*, 219 F.3d 972, 978 (9th Cir. 2000), *as amended by* 228 F.3d 1127 (9th Cir. 2000) (order) *and* 234 F.3d

492 (9th Cir. 2000) (order) (extending the logic of *Campos-Sanchez* to cases where the IJ did not make a credibility finding).

Where credibility is determinative, the BIA should remand to the IJ to make a legally sufficient credibility determination, or provide the applicant with specific notice that his credibility is at issue, and an opportunity to respond. *See Mendoza Manimbao*, 329 F.3d at 661 ("under the most recent INS regulations, the BIA would have no choice but to remand to the IJ for an initial credibility determination, as the BIA is now limited to reviewing the IJ's factual findings, including credibility determinations, for clear error.") (citing 8 C.F.R. § 1003.1(d)(3)(i) (2003)).

Where the IJ makes an adverse credibility determination and the BIA affirms that determination for different reasons, there is no due process violation because the applicant was on notice that her credibility was at issue. *Pal v. INS*, 204 F.3d 935, 939 (9th Cir. 2000).

Where an applicant had no notice that a negative credibility finding could be based on his failure to call a witness to corroborate his testimony, due process requires a remand for a new hearing. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000).

G. Discretionary Decisions

If an applicant's testimony on an issue is found to be credible for purposes of determining whether he is eligible for asylum, he cannot be found incredible on the same issue for purposes of determining whether he is entitled to asylum as a matter of discretion. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1138 (9th Cir. 2004) ("It makes no sense that Kalubi could be both truthful and untruthful on the same issue in the same proceeding.")

H. Frivolous Applications

For asylum applications filed on or after April 1, 1997, the frivolous asylum application bar, 8 U.S.C. § 1158(d)(6), renders an applicant permanently ineligible for immigration benefits if his or her asylum application is found to be knowingly frivolous. An application is frivolous "if any of its material elements is deliberately fabricated." 8 C.F.R. §

1208.20. The bar will not apply unless the applicant received notice of the consequences of filing a frivolous application. 8 U.S.C. § 1158(d)(4)(A). Moreover, the agency must identify the specific inconsistencies or implausible elements of the applicant's claim and provide him with an opportunity to explain or account for them. 8 U.S.C. § 1208.20; *Farah v. Ashcroft*, 348 F.3d 1153, 1158 (9th Cir. 2003) (reversing frivolous asylum application determination because applicant was not given adequate opportunity to explain discrepancies). *See also Almaghzar v. Gonzales*, 457 F.3d 915, 920 (9th Cir. 2006) (declining to consider legal challenge to frivolous asylum application determination for failure to exhaust).

I. Remedy

When this court reverses the BIA's adverse credibility determination, it must ordinarily remand the case so that the BIA can determine in the first instance whether the applicant has met the other criteria for eligibility. *See He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir. 2003) (citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam)); *see also Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006) (reversing negative credibility finding and remanding for determination of eligibility); *Singh v. Ashcroft*, 362 F.3d 1164, 1172 (9th Cir. 2004) (same).

However, if the applicant would be eligible for relief automatically absent the adverse credibility determination, remand is not necessary. *See He*, 328 F.3d at 604 (remand unnecessary because applicant statutorily eligible for asylum based on spouse's forced sterilization); *see also Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (remand unnecessary because applicant who had two forced abortions and an IUD inserted was statutorily eligible for asylum and withholding); *cf. Chen v. Ashcroft*, 362 F.3d 611, 622–23 (9th Cir. 2004) (reversing negative credibility finding and remanding to allow BIA to determine whether petitioner had a well-founded fear that she would be forced to abort a pregnancy or to undergo involuntary sterilization).

Where the IJ makes an additional finding on the merits of the case, and this court reverse**s** a negative credibility finding, a remand for "further consideration and investigation in light of the ruling that the petitioner is

credible" is not required with respect to the issues addressed by the IJ. *See Guo v. Ashcroft*, 361 F.3d 1194, 1204 (9th Cir. 2004).

When this court determines that substantial evidence does not support a negative credibility finding, it may deem the applicant credible, *see, e.g.*, *Arulampalam v. Ashcroft*, 353 F.3d 679, 689 (9th Cir. 2003), or it may remand for a renewed credibility determination, *see, e.g.*, *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998); *Hartooni v. INS*, 21 F.3d 336, 343 (9th Cir. 1994) (remanding for credibility finding because the court could not "say that 'no doubts have been raised' about" applicant's credibility).

J. Applicability of Asylum Credibility Finding to the Denial of other Forms of Relief

An adverse credibility determination in the context of an asylum application does not necessarily support the denial of other forms of relief on that basis. *See, e.g.*, *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) ("We are not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim . . . .") (citation omitted); *see also Smolniakova v. Gonzales*, 422 F.3d 1037, 1054 (9th Cir. 2005) (rejecting adverse credibility finding as to qualifying marriage claim where it was tainted by an unsupported credibility determination concerning asylum claim); *Taha v. Ashcroft*, 389 F.3d 800, 802 (9th Cir. 2004); *cf. Almaghzar v. Gonzales*, 457 F.3d 915, 921–22 (9th Cir. 2006) ("*Kamalthas* requires that an applicant be given the opportunity to make a claim under the CAT by introducing documentary evidence of torture, but neither *Kamalthas* nor due process requires an IJ to rely on that evidence to grant relief when the applicant is not credible."); *Farah v. Ashcroft*, 348 F.3d 1153, 1157 (9th Cir. 2003) (upholding denial of asylum and CAT relief based on adverse credibility determination where CAT claim depended upon same evidence presented in support of asylum).

K. Cases Reversing Negative Credibility Findings

Kumar v. Gonzales, 444 F.3d 1043 (9th Cir. 2006) (veiled concerns about terrorist ties clouded adverse credibility determination and minor discrepancies that would not support determination individually could not

support determination cumulatively); *Singh v. Gonzales*, 439 F.3d 1100 (9th Cir. 2006) (speculation; improper reliance on country report; irregular translation; discrepancies that do not go to the heart of the claim); *Suntharalinkam v. Gonzales*, 458 F.3d 1034 (9th Cir. 2006) (mandate pending) (speculation; unsupported inconsistencies; no opportunity to explain; *Lin v. Gonzales*, 434 F.3d 1158 (9th Cir. 2006) (impermissible speculation regarding authenticity of several official documents); *Jibril v. Gonzales*, 423 F.3d 1129 (9th Cir. 2005) (inconsistencies on trivial matters not going to heart of claim; speculation and conjecture; unsupported demeanor finding); *Smolniakova v. Gonzales*, 422 F.3d 1037 (9th Cir. 2005) (adverse credibility determination based on misconstruction of the record; insufficient evidence; improper speculation and conjecture); *Zheng v. Ashcroft*, 397 F.3d 1139 (9th Cir. 2005) (State Department reports on China not inconsistent with applicant testimony); *Kaur v. Ashcroft*, 379 F.3d 876 (9th Cir. 2004) (failure to address explanation; conjecture); *Hoque v. Ashcroft*, 367 F.3d 1190 (9th Cir. 2004) (discrepancy in documents; minor omissions; and no evidence to support finding that wife's testimony was unresponsive); *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004) (many of the IJ's findings were based on speculation and conjecture); *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004) (reluctance to discuss rape and minor inconsistencies in testimony of applicant and witness); *Singh v. INS*, 362 F.3d 1164 (9th Cir. 2004) (perceived inconsistencies insufficient); *Chen v. Ashcroft*, 362 F.3d 611 (9th Cir. 2004) (no opportunity to explain perceived inconsistency); *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir. 2004) (no opportunity to explain); *Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003) (insufficient demeanor-based finding; speculation); *Wang v. Ashcroft*, 341 F.3d 1015 (9th Cir. 2003) (immaterial inconsistencies between two witnesses); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (IJ misstated the evidence; other perceived problems explained); *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002) (minor omission in doctor's note; trivial inconsistency regarding location of rally; no examples of unresponsiveness); *Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002) (inconsistencies between initial airport interview and testimony; speculation and conjecture); *Gui v. INS*, 280 F.3d 1217 (9th Cir. 2002) (mischaracterizations of testimony; speculation); *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) (boilerplate negative credibility finding); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (neither the IJ or the BIA addressed the applicant's explanation for the identified

discrepancy); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (per curiam) (implausibility finding based on impermissible grounds); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (conjecture; minor inconsistencies); *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (translation problems; confusion about dates that did not enhance applicant's claim); *Shah v. INS*, 220 F.3d 1062, 1067–71 (9th Cir. 2000) (no identification of evasiveness in the record; State Department conjecture; BIA's speculation); *Chanchavac v. INS*, 207 F.3d 584, 588 (9th Cir. 2000) (explainable inconsistencies and cultural assumptions); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (false passport and false declaration concerning Canadian citizenship; minor or non-existent discrepancies); *Osorio v. INS*, 99 F.3d 928, 931–32 (9th Cir. 1996) (no identification of specific inconsistencies); *Mosa v. Rogers*, 89 F.3d 601, 604–05 (9th Cir. 1996) (unsupported disbelief); *Ramos-Vasquez v. INS*, 57 F.3d 857, 861 (9th Cir. 1995) (circular reasoning); *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994) (remanding for credibility finding); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) ("failure to file an application form that was as complete as might be desired;" failure to present copy of threatening note); *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1147 (9th Cir. 1988) (minor inconsistency between testimony of two witnesses regarding date of death squad incident); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987) (discrepancy as to date father was killed); *Turcios v. INS*, 821 F.2d 1396, 1399–1401 (9th Cir. 1987) (purportedly evasive answers and false claim of Mexican nationality to INS officials); *Plateros-Cortez v. INS*, 804 F.2d 1127, 1131 (9th Cir. 1986) (uncertainty regarding dates; inconsistency regarding place of employer's death); *Martinez-Sanchez v. INS*, 794 F.2d 1396, 1400 (9th Cir. 1986) (trivial date error; inconsistency between testimony and application concerning number of children); *Damaize-Job v. INS*, 787 F.2d 1332, 1337–38 (9th Cir. 1986) (failure to marry mother of children; discrepancy between application and testimony on children's birth dates; failure to apply for asylum in any of the countries through which applicant traveled); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1375 n.9 (9th Cir. 1985) (out-of-wedlock child is impermissible factor); *Zavala-Bonilla v. INS*, 730 F.2d 562, 565–66 (9th Cir. 1984) (no evidence that submitted letters were false; inadequate discrepancies).

L. Cases Upholding Negative Credibility Findings

Li v. Ashcroft, 378 F.3d 959 (9th Cir. 2004) (omissions and discrepancies among three asylum applications, testimony, and airport interview statement); *Singh v. Ashcroft*, 367 F.3d 1139, 1143 (9th Cir. 2004) (major inconsistencies; inability to explain political party responsibilities); *Desta v. Ashcroft*, 365 F.3d 741, 745 (9th Cir. 2004) (fraudulent documents and material testimonial inconsistencies); *Wang v. INS*, 352 F.3d 1250 (9th Cir. 2003) (inconsistencies in testimonial and documentary evidence; evasiveness; new story); *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003) (discrepancies regarding identity, membership in a persecuted group, and date of entry); *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) (geographic discrepancies going to heart of the claim); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) ("last-minute, uncorroborated story" regarding dramatic attack and stabbing); *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001) (per curiam) (material differences in two asylum applications regarding the basis of applicant's fear); *Chebchoub v. INS*, 257 F.3d 1038 (9th Cir. 2001) (inconsistent statements about number of arrests; implausibility of other testimony); *Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) (contradictions between testimony and doctor's letter); *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999) (testimony waivered during cross examination; inconsistent testimony; sudden change in name to coincide with newspaper article); *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997) (major discrepancies in two asylum applications); *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997) (inconsistencies in testimony and failure to offer proof that applicant was a Jehovah's Witness); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256–57 (9th Cir. 1992) (discrepancies between testimony and application regarding number of arrests and lack of detail); *Ceballos-Castillo v. INS*, 904 F.2d 519 (9th Cir. 1990) (inconsistencies, including one regarding identity of alleged persecutors); *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985) (vague allegations regarding threats); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985) (negative credibility based on applicant's lies to get passport and under oath to INS officials; travel under an assumed name; conviction for illegally transporting aliens in the U.S.); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1263–64 (9th Cir. 1985) (substantial inconsistencies between application and testimony).

M. The REAL ID Act Codification of Credibility Standards

For all *applications* for asylum, withholding, or other relief from removal *made on or after May 11, 2005*, sections 101(a)(3), (c) and (d)(2) of the REAL ID Act created the following new standards governing the trier of fact's adverse credibility determination:

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base an adverse credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. §§ 1158(b)(1)(B)(iii) (asylum); 1231(b)(3)(C) (withholding of removal); 1229a(c)(4)(C) (other relief from removal).

VI. CORROBORATIVE EVIDENCE

A. Pre-REAL ID Act Standards

1. Credibility Testimony

"Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone." *Garrovillas v. INS*, 156 F.3d 1010, 1016–17 (9th Cir. 1998) (internal quotation marks omitted); *see also* 8 C.F.R. § 1208.13(a) ("The testimony

of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). Once an applicant's testimony is deemed credible, no further corroboration is required to establish the facts to which the applicant testified. *See Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004); *see also Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (per curiam) (holding that credible applicant was not required to produce evidence of organizational membership, political fliers or medical records).

Moreover, "when each of the IJ's or BIA's proffered reasons for an adverse credibility finding fails, we must accept a petitioner's testimony as credible[,]" and further corroboration is not required. *Kaur*, 379 F.3d at 890 (reversing the IJ's five-factor negative credibility finding and holding that corroboration was not required); *see also Abovian v. INS*, 219 F.3d 972, 978 (9th Cir. 2000) ("It is well settled in this circuit that independent corroborative evidence is not required from asylum applicants where their testimony is unrefuted."), *as amended by* 228 F.3d 1127 *and* 234 F.3d 492 (9th Cir. 2000).

2. Credibility Assumed

If the BIA assumes, without deciding, that the applicant is credible, further corroboration is not required. *See Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (BIA erred by requiring independent corroboration of the facts given express failure to determine credibility). Given the difficulty of proving specific threats by a persecutor, credible testimony regarding a threat is sufficient to show that a threat was made. *Id.* at 899–900 (citing, *inter alia*, *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.")). In addition, "other facts that serve as the basis for an asylum or withholding claim can be shown by credible testimony alone if corroborative evidence is 'unavailable.'" *Id.* at 900 ("conclud[ing] that this circuit assumes evidence corroborating testimony found to be credible is 'unavailable' if not presented"). "When an alien credibly testifies to certain facts, those facts are deemed true, and the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of the claim for relief." *Id.*

3. No Explicit Adverse Credibility Finding

Where the BIA raises questions about an applicant's claim, but does not make an explicit negative credibility finding, the factual contentions are deemed true, and no further corroboration of the facts is required. *See Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (rejecting BIA's finding that applicant did not meet his burden of proof because he failed to provide documentary evidence to corroborate his testimony).

4. Negative Credibility Finding

"[W]here the IJ has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review." *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000) (Sikh applicant should have presented his father at the hearing to corroborate his testimony, but remanding because applicant had no notice that negative credibility finding could be based on this failure); *see also id.* at 1090 ("[I]f the trier of fact either does not believe the applicant or does not know what to believe, the applicant's failure to corroborate his testimony can be fatal to his asylum application"); *Chebchoub v. INS*, 257 F.3d 1038, 1045 (9th Cir. 2001) (substantial evidence supported the BIA's determination that Moroccan applicant filed to satisfy his burden of proof based on a negative credibility finding and the failure to provide easily available corroborating evidence); *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997) (affirming negative credibility finding based on gaps and inconsistencies in testimony, and failure to provide documentary evidence proving membership in the Nicaraguan Jehovah's Witness Church).

a. Non-Duplicative Corroborative Evidence

"[W]here an applicant produces credible corroborating evidence to buttress an aspect of his own testimony, an IJ may not base an adverse credibility determination on the applicant's failure to produce additional evidence that would further support that particular claim." *Sidhu*, 220 F.3d at 1091; *see also Chen v. Ashcroft*, 362 F.3d 611, 620–21 (9th Cir. 2004)

(failure of brother to testify on applicant's behalf was not determinative because she produced other corroborating evidence regarding her child in China); *Gui v. INS*, 280 F.3d 1217, 1227 (9th Cir. 2002) ("Where, as here, a petitioner provides some corroborative evidence to strengthen his case, his failure to produce still more supporting evidence should not be held against him.").

b. Availability of Corroborative Evidence

Corroborative documentation may not be "easily available" where the applicant fled his or her country in haste, or where it would be dangerous to be caught with material evidence. *See Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (per curiam); *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000). "[I]t is inappropriate to base an adverse credibility determination on an applicant's inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States–such corroboration is almost never easily available." *Sidhu v. INS*, 220 F.3d 1085, 1091–92 (9th Cir. 2000); *see also Shire v. Ashcroft*, 388 F.3d 1288, 1298–99 (9th Cir. 2004) (medical records from and verification of stay in refugee camps in Kenya not easily available); *Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004) (affidavits or letters from friends and neighbors in India not easily available); *Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) (Chinese employment records not easily available because applicant was fired); *Guo v. Ashcroft*, 361 F.3d 1194, 1201 (9th Cir. 2004) (corroborative evidence of job termination not easily available because it was in China); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (affidavits from Sri Lanka not easily available); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (corroborating letters or statements from mother in Guatemala and friend in Mexico not required); *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981) (noting the difficulty in obtaining corroborative information of threats by members of an underground terrorist organization, who "obviously would not testify or otherwise make public their intentions"), *superseded on other grounds as stated in Ghebllawi v. INS*, 28 F.3d 83, 85 (9th Cir. 1994).

However, affidavits from close relatives in Western Europe and from individuals in the United States should be "easily available." *See Chebchoub v. INS*, 257 F.3d 1038, 1044–45 (9th Cir. 2001); *see also Sidhu*, 220 F.3d at 1091 (father living in nearby suburb was an "easily available" witness); *Mejia-Paiz v. INS*, 111 F.3d 720, 723–24 (9th Cir. 1997) ("Proving one's membership in a church does not pose the type of particularized evidentiary burden that would excuse corroboration.")

c. Opportunity to Explain

If corroborative evidence is required, the applicant must be given an opportunity to explain the failure to provide material corroboration. *See Sidhu v. INS*, 220 F.3d 1085, 1091 (9th Cir. 2000) (applicant was specifically asked to explain the lack of corroboration); *Chen v. Ashcroft*, 362 F.3d 611, 621 (9th Cir. 2004) (failure of brother to testify on applicant's behalf was not determinative because she presented a plausible explanation for his absence); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (Sri Lankan applicant was not given an opportunity to explain failure to produce corroborative evidence).

B. Post-REAL ID Act Standards

For *applications* for asylum, withholding of removal, and other relief from removal *filed on or after May 11, 2005*, sections 101(a)(3), (c), and (d)(2) of the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005), codified the BIA's and this court's practice of deeming an applicant's credible testimony sufficient to sustain his burden of proof without corroboration. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) (as amended) (emphasis added). However, the REAL ID Act created new standards governing when the trier of fact may require an applicant to submit corroborating evidence. Adopting the standard set forth in the BIA's decision, *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997), the new provisions permit the trier of fact to require an applicant to provide evidence to corroborate otherwise credible testimony, unless the applicant does not have the evidence and cannot reasonably obtain the evidence. 8 U.S.C. § 1158(b)(1)(B)(ii), 8 U.S.C. § 1231(b)(3)(C), and 8 U.S.C. § 1229a(c)(4)(B) (as amended).

Note that this standard differs from this court's existing standard that the trier of fact may not require corroborating evidence in the absence of an explicit adverse credibility determination. *See, e.g., Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (trier of fact may not require corroborating evidence absent an adverse credibility determination); *Ladha v. INS*, 215 F.3d 889, 901 (9th Cir. 2000) (explicitly disapproving corroboration requirement set forth in *Matter of S-M-J*).

The REAL ID Act also changed standard governing when a trier of fact may require corroborating evidence from where the evidence is "easily available" to where the evidence is "reasonably obtainable."

In addition, for all applications for asylum, withholding of removal, and other forms of relief from removal, in which a *final administrative order* issued *before, on or after May 11, 2005,* no court may reverse the trier of fact's determination regarding the availability of corroborating evidence unless the trier of fact would be compelled to conclude that such corroborating evidence is unavailable. 8 U.S.C. § 1252(b)(4) (as amended).

C. Judicially Noticeable Facts

The Court has reversed an adverse credibility determination based on the failure to corroborate judicially noticeable facts. *See Singh v. Ashcroft*, 393 F.3d 903, 907 (9th Cir. 2005) (taking judicial notice of existence and operations of Indian counter-terrorism agency, and reversing negative credibility finding based on petitioner's lack of corroborative evidence).

D. Forms of Evidence

Corroborative evidence may be in the form of documents, witness testimony, expert testimony, or physical evidence, such as scars. *See, e.g., Smolniakova v. Gonzales*, 422 F.3d 1037, 1047 (9th Cir. 2005) (newspaper article reporting an alleged incident of persecution); *Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (burn marks on arms; doctor's letter); *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (per curiam) (country conditions reports; witness testimony; and scars); *Hernandez-Montiel v.*

INS, 225 F.3d 1084 (9th Cir. 2000) (expert testimony); *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1199 (9th Cir. 2000) (expert testimony); *Akinmade v. INS*, 196 F.3d 951, 957 (9th Cir. 1999) (country conditions reports).

Although the trier of fact may deny an asylum application based on a finding that documentary evidence is not credible, such a finding must be supported by a legitimate articulable basis and specific cogent reasons, and cannot rest on mere speculation or conjecture, such as the IJ's bare subjective opinion as to the authenticity or probity of documents. *Lin v. Gonzales*, 434 F.3d 1158, 1162 (9th Cir. 2006); *see also Wang v. INS*, 352 F.3d 1250, 1253–54 (9th Cir. 2003); *Shah v. INS*, 220 F.3d 1062, 1067–71 (9th Cir. 2000). Rather, "the record must include some evidence undermining their reliability, such that a reviewing court can objectively verify whether the IJ has a legitimate basis to distrust the documents." *See Lin*, 434 F.3d at 1162 (internal quotation marks omitted). The court has noted that this evidence may in some circumstances be comprised of judicial expertise garnered by repetitive examination of particular documents and familiarity with foreign document practices, however, such expertise should be articulated on the record in order to permit meaningful review. *See id*. at 1163; *cf. Singh v. Gonzales*, 439 F.3d 1100 (9th Cir. 2006) (rejecting IJ's reliance on her recollection of the State Department Foreign Affairs Manual for India because it was not part of the record).

E. Hearsay Evidence

In general, hearsay evidence is admissible if it is probative and its admission is fundamentally fair. *See Gu v. Gonzales*, 454 F.3d 1014, (9th Cir. 2006) (mandate pending) (citing *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983)); *see also Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000); *In re Grijalva*, 19 I. & N. Dec. 713, 721–22 (BIA 1988). However, this court has held that the absence of an adverse credibility determination does not prevent the trier of fact from considering the relative probative value of hearsay and non-hearsay testimony, and according less weight to statements of out of court declarants when weighed against non-hearsay evidence. *Gu*, 454 F.3d at 1021 (explaining that the out of court statement of an anonymous friend was less persuasive or specific than that of a first hand account).

F. Country Conditions Evidence

Country conditions evidence generally provides the context for evaluating an applicant's credibility, rather than corroborating specifics of a claim. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1162 (9th Cir. 1999); *cf. Chebchoub v. INS*, 257 F.3d 1038, 1044 (9th Cir. 2001) (affirming BIA's use of country reports to "refute a generalized statement" regarding the practice of exile in Morocco).

This court has remanded a claim for reconsideration where the BIA relied on a flawed State Department report. *See Stoyanov v. INS*, 149 F.3d 1226 (9th Cir. 1998).

G. Certification of Records

Failure to obtain consular certification of foreign official records under 8 C.F.R. § 287.6(b) is not a basis to exclude corroborating documents. *See Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001) (per curiam). "Documents may be authenticated in immigration proceedings through any recognized procedure, such as those required by INS regulations or by the Federal Rules of Civil Procedure." *Id.* (internal quotation marks omitted); *see also Suntharalinkam v. Gonzales*, 458 F.3d 1034, 1049 (9th Cir. 2006) (mandate pending). Failure to supply affirmative authentication for documents, in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding. *See Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003); *Wang v. Ashcroft*, 341 F.3d 1015, 1021 (9th Cir. 2003) (failure to testify to the authenticity of medical records, or to present original documents, was insufficient to support negative credibility finding).

CANCELLATION OF REMOVAL, SUSPENSION OF DEPORTATION, FORMER SECTION 212(c) RELIEF

I. OVERVIEW

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") merged deportation and exclusion proceedings into a single new process called removal proceedings. *See Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). Individuals in removal proceedings may be able to avoid removal if they qualify for "cancellation of removal" relief under 8 U.S.C. § 1229b. Section 1229b provides for two forms of cancellation relief. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 n.2 (9th Cir. 2002). One form of cancellation is for applicants who are lawful permanent residents, *see* 8 U.S.C. § 1229b(a), and the other form is for nonpermanent residents, *see* 8 U.S.C. § 1229b(b). *See also Romero-Torres*, 327 F.3d at 888 n.1. IIRIRA repealed two analogous forms of relief: section 212(c) relief, 8 U.S.C. § 1182(c) (repealed 1996), and suspension of deportation, 8 U.S.C. § 1254 (repealed 1996). Some individuals, as discussed below, remain eligible for suspension of deportation and former section 212(c) relief.

A. Continued Eligibility for Pre-IIRIRA Relief Under the Transitional Rules

Where the former INS commenced deportation proceedings before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Under the transitional rules, an applicant "may apply for the pre-IIRIRA remedy of suspension of deportation if deportation proceedings against her were commenced before April 1, 1997." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002) (citing IIRIRA § 309(c)); *see also Martinez-Garcia v. Ashcroft*, 366 F.3d 732, 734 (9th Cir. 2004).

Cross-reference: Jurisdiction over Immigration Petitions, Commencement of Proceedings.

Despite the repeal of section 212(c), certain aliens remain eligible for relief. *See* 8 C.F.R. § 1003.44 (setting forth procedure for special motion to seek former section 212(c) relief) and 8 C.F.R. § 1212.3 (setting forth availability of former section 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes); *see also INS v. St. Cyr*, 533 U.S. 289, 325 (2001) (holding that the elimination of § 212(c) relief had an "obvious and severe retroactive effect" on those who entered into plea agreements with the expectation that they would be eligible for relief).

Cross-reference: Section 212(c) Relief.

II. JUDICIAL REVIEW

A. Limitations on Judicial Review of Discretionary Decisions

The IIRIRA permanent and transitional rules limited judicial review over certain discretionary determinations. *See* 8 U.S.C. § 1252(a)(2)(B) (permanent rule); IIRIRA § 309(c)(4)(E) (transitional rule). Notwithstanding any limitations on judicial review over discretionary determinations set forth in 8 U.S.C. § 1252(a)(2)(B), the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), explicitly provides for judicial review over constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) (as amended by § 106(a)(1)(A)(iii) of the REAL ID Act); *see also Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023 (9th Cir. Oct. 26, 2006) (en banc) (explaining that the REAL ID Act restored judicial review of constitutional questions and questions of law presented in petitions for review of final removal orders); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (holding that the court has jurisdiction to consider questions of statutory interpretation as they relate to discretionary denials of relief); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (holding that despite 8 U.S.C. § 1252(a)(2)(D) this court continues to lack jurisdiction to review discretionary hardship determinations).

Cross-reference: Jurisdiction Over Immigration Petitions, Limitations on Judicial Review of Discretionary Decisions.

B. Limitations on Judicial Review Based on Criminal Offenses

The IIRIRA permanent and transitional rules eliminated petition-for-review jurisdiction for individuals removable based on certain enumerated crimes. *See* 8 U.S.C. § 1252(a)(2)(C) (permanent rule); IIRIRA § 309(c)(4)(G) (transitional rule).

Effective May 11, 2005, however, the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) amended 8 U.S.C. § 1252 by adding a new provision, § 1252(a)(2)(D), as follows:

> Judicial Review of Certain Legal Claims -
> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Although the REAL ID Act did not repeal 8 U.S.C. § 1252(a)(2)(C), the Ninth Circuit has construed 8 U.S.C. § 1252(a)(2)(D) as "repeal[ing] all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) or (C) following the amendment of that section by the REAL ID Act." *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023 (9th Cir. Oct. 26, 2006) (en banc). In *Fernandez-Ruiz*, the court held that it is no longer barred by § 1252(a)(2)(C) from reviewing a petition on account of a petitioner's past convictions and, because in that case no other provision in § 1252 limited judicial review, the court concluded it had jurisdiction to consider the petition on the merits. *Id*.; *see also Parrilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005) (concluding that the court had jurisdiction to review the merits of the petition for review despite petitioner's aggravated felony conviction); *Lisbey v. Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005) (same).

Cross-reference: Jurisdiction Over Immigration Petitions, Limitations on Judicial Review Based on Criminal Offenses.

III. CANCELLATION OF REMOVAL, 8 U.S.C. § 1229b

Individuals placed in removal proceedings on or after April 1, 1997, may apply for a form of discretionary relief called cancellation of removal.

A. Cancellation for Lawful Permanent Residents, 8 U.S.C. § 1229b(a) (INA § 240A(a))

Cancellation of removal under 8 U.S.C. § 1229b(a) is similar to former section 212(c) relief, and provides a discretionary waiver of removal for certain lawful permanent residents.

1. Eligibility Requirements

In order for a lawful permanent resident to qualify for cancellation of removal under 8 U.S.C. § 1229b(a), she must show that she: "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) had not been convicted of any aggravated felony." *Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (internal quotation marks omitted).

Cancellation is available for permanent residents who are either inadmissible or deportable. *See* 8 U.S.C. § 1229b(a) (stating that "[t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States"). The statute does not require a showing of extreme hardship or family ties to a United States citizen or lawful permanent resident. *See id.*

There are some circumstances in which an applicant is deemed "admitted" for purposes of 8 U.S.C. § 1229b(a)(2), without having been inspected and authorized to enter the United States at the border. For example, acceptance into the Family Unity Program, *see* 8 U.S.C. § 1255a and 8 C.F.R. § 236, constitutes being "admitted in any status" for the purposes of 8 U.S.C. § 1229b(a)(2). *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1018-19 (9th Cir. 2006). Likewise, a legal permanent resident's parent's admission can be imputed to the parent's unemancipated minor

child, who resides with the parent, for the purposes of satisfying 8 U.S.C. § 1229b(a)(2). *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1029 (9th Cir. 2005).

2. Aggravated Felons

Aggravated felons are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3); *see also Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 909 (9th Cir. 2004). The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43).

Cross-reference: Criminal Issues in Immigration Law, Aggravated Felonies.

3. Termination of Continuous Residence

The applicant's period of continuous residence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant committed an offense referred to in section 1182(a)(2) (criminal grounds of inadmissibility) that renders him inadmissible, or removable under sections 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See* 8 U.S.C. § 1229b(d)(1).

a. Termination Based on Service of NTA

The date on which the notice to appear is served counts toward the period of continuous presence. *See Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (rejecting the government's contention that the period ends the day preceding the date on which the notice to appear is served). The precise times that the relevant events occurred are irrelevant. *Id.* at 992 ("hold[ing] that whether the ten-year physical presence requirement has been satisfied is a question that can be answered without recourse to 'fraction[s] of a day,' but only to dates").

b. Termination Based on Commission of Specified Offense

"[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest." 8 U.S.C. § 1229b(d)(1); *see also Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (remanding for determination of whether petitioner's burglary conviction constituted a crime involving moral turpitude, which would end his period of continuous residence for purposes of cancellation for lawful permanent residents).

The Ninth Circuit has not addressed whether the termination provision takes effect on the date the crime is committed, or on the date of conviction. The BIA has held that the time period ceases to accrue on the date the offense is committed, not the date of conviction. *See In re Perez*, 22 I. & N. Dec. 689, 693 (BIA 1999) (en banc); *cf. id.* at 701 (Guendelsberger, Member, dissenting) (stating that the natural reading of the statute "would terminate the period of continuous residence at the time a respondent is rendered inadmissible or removable," which in this case was the date of conviction). This court also has not addressed whether an offense that triggers removal, but not inadmissibility under 8 U.S.C. § 1182(a)(2), ends the accrual of time. *Cf. In re Campos-Torres*, 22 I. & N. Dec. 1289, 1292 (BIA 2000) (holding that "the plain language of section 240A(d)(1) also states that, as a prerequisite, an offense must be 'referred to in section 212(a)(2)' of the Act in order to stop accrual of time").

c. Military Service

An applicant who has served at least two years of active duty in the U.S. armed forces need not fulfill the continuous residence requirement. *See* 8 U.S.C. § 1229b(d)(3).

4. Exercise of Discretion

"Cancellation of removal . . . is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). The BIA has ruled that the factors relevant to determining whether a favorable exercise of discretion was warranted under former section 212(c) continue to be relevant in the cancellation context. *See Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).

B. Cancellation for Non-Permanent Residents, 8 U.S.C. § 1229b(b) (INA § 240A(b)(1))

1. Eligibility

Cancellation of Removal for non-permanent residents under 8 U.S.C. § 1229b(b) is similar to the pre-IIRIRA remedy of suspension of deportation. To qualify for relief under the more stringent cancellation standards, a deportable or inadmissible applicant must establish that he or she:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and (D) 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 United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1); *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 985 (9th Cir. 2004); *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004) (comparing "more lenient requirements for suspension" with the stricter cancellation provisions); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1003

n.3 (9th Cir. 2003); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003).

2. Ten Years of Continuous Physical Presence

"To qualify for the discretionary relief of cancellation of removal, an alien must, as a threshold matter, have been physically present in the United States for a continuous period of no less than ten years immediately preceding the date of the application." *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850 (9th Cir. 2004).

a. Standard of Review

The IJ's factual determination of continuous physical presence is reviewed for substantial evidence. *See Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850-51 (9th Cir. 2004).

b. Start Date for Calculating Physical Presence

The start date for determining an alien's ten years of physical presence is the date of arrival in the United States. *See Lagandaon v. Ashcroft*, 383 F.3d 983, 992 (9th Cir. 2004). The date of arrival is included as part of the relevant time period. *Id.*

c. Termination of Continuous Physical Presence

The applicant's period of continuous presence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant commits an offense referred to in section 1182(a)(2) (criminal grounds of inadmissibility) that renders him inadmissible, or removable under sections 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See* 8 U.S.C. § 1229b(d)(1).

(i) Termination Based on Service of NTA

An applicant's accrual of continuous physical presence ends when removal proceedings are commenced against them through the service of a legally sufficient notice to appear. *See Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005) (per curiam) (explaining that the service of a notice to appear that failed to specify the date or location of the immigration hearing did not end the accrual of physical presence).

The date on which the notice to appear is served counts toward the period of continuous presence. *Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (rejecting the government's contention that the period ends the day preceding the date on which the notice to appear is served). The precise times that the relevant events occurred are irrelevant. *Id.* at 992 ("hold[ing] that whether the ten-year physical presence requirement has been satisfied is a question that can be answered without recourse to 'fraction[s] of a day,' but only to dates").

(ii) Termination Based on Commission of Specified Offense

"[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest." 8 U.S.C. § 1229b(d)(1); *see also Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (remanding for determination of whether petitioner's burglary conviction constituted a crime involving moral turpitude, which would end his period of continuous residence for purposes of cancellation for lawful permanent residents).

The Ninth Circuit has not addressed whether the termination provision takes effect on the date the crime is committed, or on the date of conviction. The BIA has held that the time period ceases to accrue on the date the offense is committed, not the date of conviction. *See In re Perez*, 22 I. & N. Dec. 689, 693 (BIA 1999) (en banc); *cf. id.* at 701 (Guendelsberger, Member, dissenting) (stating that the natural reading of the statute "would terminate the period of continuous residence at the time a respondent is

rendered inadmissible or removable," which in this case was the date of conviction). This court also has not addressed whether an offense that triggers removal, but not inadmissibility under 8 U.S.C. § 1182(a)(2), ends the accrual of time. *Cf. In re Campos-Torres*, 22 I. & N. Dec. 1289, 1292 (BIA 2000) (holding that "the plain language of section 240A(d)(1) also states that, as a prerequisite, an offense must be 'referred to in section 212(a)(2)' of the Act in order to stop accrual of time").

d. Departure from the United States

An applicant has failed to maintain continuous physical presence if he "has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." 8 U.S.C. § 1229b(d)(2); *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 986 n.1 (9th Cir. 2004) (noting that a twenty-day absence did not interrupt petitioner's period of continuous physical presence). The 90/180 day rule replaced the previous "brief, casual and innocent" standard for determining when a departure breaks continuous physical presence. *See Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 939 (9th Cir. 2004).

The court has held that the 90/180 rule is not impermissibly retroactive when applied to petitioners who left the country for more than 90 days before IIRIRA's passage. *See id.* (transitional rules case); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 941 (9th Cir. 2005) (9th Cir. Aug. 26, 2005) (per curiam) (permanent rules case); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 742–43 (9th Cir. 2006) (mandate pending) (applying the 90/180 rule to a transitional rules case where the IJ applied the pre-IIRIRA brief, casual and innocent standard).

Departure from the United States under a grant of voluntary departure, including administrative voluntary departure, breaks an applicant's continuous physical presence. *See Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003) (per curiam); *see also In re Romalez-Alcaide*, 23 I. & N. Dec. 423 (BIA 2002) (en banc). However, "being turned away at the border by immigration officials does not have the same effect as an administrative voluntary departure and does not itself interrupt the accrual of an alien's continuous physical presence." *Tapia v. Gonzales*, 430 F.3d 997, 998 (9th

Cir. 2006); *see also In re Avilez-Nava*, 23 I. & N. Dec. 799, 807 (BIA 2005) (en banc) (concluding that a border turnaround does not interrupt accrual of physical presence). Moreover, the existence of a record of the border turnaround, including photographs or fingerprints, is insufficient to interrupt the accrual of continuous physical presence. *See Tapia*, 430 F.3d at 1003–04. In addition, in order for an administrative voluntary departure to constitute a break in continuous physical presence, its acceptance by an applicant must be knowing and voluntary. *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619–20 (9th Cir. 2006) (remanding to the agency for further consideration of whether petitioner received administrative voluntary departure, and if so, whether it was knowing and voluntary).

e. Proof

An applicant may establish the time element by credible direct testimony or written declarations. *See Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 849, 855 (9th Cir. 2004) (noting that "the regulations do not impose specific evidentiary requirements for cancellation of removal"); *Vera-Villegas v. INS*, 330 F.3d 1222, 1225 (9th Cir. 2003) (discussing suspension of deportation). Although contemporaneous documentation of presence "may be desirable," it is not required. *Vera-Villegas*, 330 F.3d at 1225; *cf. Chebchoub v. INS*, 257 F.3d 1038, 1042 (9th Cir. 2001) (holding that an IJ may require documentary evidence when he either not believe the applicant or does not know what to believe); *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000) (same).

Note that the REAL ID Act of 2005 codified new standards regarding when the trier of fact may require corroborating evidence and governing the availability of such evidence. These standards apply to applications for relief from removal filed on or after May 11, 2005. The REAL ID Act also codified the standard of review governing the trier of fact's determination regarding the availability of corroborating evidence. This standard of review applies to all final administrative decisions issued on or after May 11, 2005.

f. Military Service

An applicant who has served at least two years of active duty in the U.S. armed forces does not need to fulfill the continuous physical presence requirement. *See* 8 U.S.C. § 1229b(d)(3).

3. Good Moral Character

a. Jurisdiction

A moral character finding may be based on statutory or discretionary factors. *See Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (discussing suspension of deportation). The statutory "per se exclusion categories" are set forth in 8 U.S.C. § 1101(f)(1)–(8), and are discussed below. The court retains jurisdiction over statutory or "per se" moral character determinations. *See, e.g.*, *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (holding that court retained jurisdiction to review finding that alien could not establish good moral character for purposes of cancellation of removal under section 1101(f)(7)); *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (retaining jurisdiction over alien smuggling question). 8 U.S.C. § 1107(f)(8) also includes a catchall provision that permits an IJ in his discretion to find that an applicant lacks good moral character even when one of the per se categories does not apply. The court lacks jurisdiction to review moral character determinations based on discretionary factors. *See Kalaw*, 133 F.3d at 1151.

b. Standard of Review

"We review for substantial evidence a finding of statutory ineligibility for suspension of deportation based on a lack of good moral character." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001); *see also Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (discussing cancellation of removal); *but see United States v. Hovsepian*, 422 F.3d 882, 885 (9th Cir. 2005) (en banc) (holding that the clear error standard of review applies to a district court's good moral character determination in connection with naturalization proceedings). Purely legal questions, such as whether a county jail is a penal institution within the meaning of 8 U.S.C. § 1101(f)(7), are reviewed de novo. *See Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 885 (9th Cir. 2005).

c. Time Period Required

"In order to be eligible for cancellation of removal, [an applicant] must have 'been a person of good moral character' during the continuous 10-year period of physical presence required by the statute." *Moran v. Ashcroft*, 395 F.3d 1089, 1092 (9th Cir. 2005) (quoting 8 U.S.C. § 1229b(b)(1)(B)); *see also Limsico v. INS*, 951 F.2d 210, 213-14 (9th Cir. 1991) (declining to decide whether events occurring before the seven-year suspension period may be considered). For suspension cases, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc).

d. Per Se Exclusion Categories

(i) Habitual Drunkards

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . . a habitual drunkard." 8 U.S.C. § 1101(f)(1); *see also Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

(ii) Certain Aliens Described in 8 U.S.C. § 1182(a) (Inadmissible Aliens)

Section 1101(f)(3) provides that no person can be of good moral character if she is:

> described in paragraphs (2)(D), (6)(E), and (9)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period.

8 U.S.C. § 1101(f)(3); *see also Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816 (9th Cir. 2004) (holding that petitioner could not establish good moral character because she was described in 8 U.S.C. § 1182(a)(9)(A) as an "alien who has been ordered removed under section 1225(b)(1) of this title . . . and who again seeks admission within 5 years of the date of such removal.") (internal quotation marks omitted).

(A) Prostitution and Commercialized Vice

Section 1182(a)(2)(D) covers prostitution and commercialized vice.

(B) Alien Smugglers

Section 1182(a)(6)(E)(i) covers "[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law." *Moran v. Ashcroft*, 395 F.3d 1089, 1092 (9th Cir. 2005) (internal quotation marks omitted); *see also Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (holding that applicant who admitted that he paid a smuggler to bring his wife and child into the United States illegally in 1995 was statutorily ineligible for a good moral character finding for purposes of voluntary departure).

Section 1182(a)(6)(E)(ii) contains an exception to the smuggling provision in cases of family reunification, where an eligible immigrant, physically present in the United States on May 5, 1988, "encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law" before May 5, 1988. *See Moran*, 395 F.3d at 1093-94.

The statute also provides for a discretionary waiver of the alien-smuggling provision. *See* 8 U.S.C. § 1182(a)(6)(E)(iii) (referencing discretionary waiver provision in 8 U.S.C. § 1182(d)(11)). This waiver may be invoked for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1182(d)(11). The family member waiver provision does not apply to a spouse who was not a spouse

at the time of smuggling. *Moran*, 395 F.3d at 1094 (holding that alien who agreed to pay smugglers to help his son and future wife cross the border in 1993 was not eligible for cancellation of removal).

(C) Certain Aliens Previously Removed

Section 1182(a)(9)(A) covers "an alien who has been ordered removed under section 1225(b)(1) of this title . . . and who again seeks admission within 5 years of the date of such removal." *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816, 817 (9th Cir. 2004) (noting that before IIRIRA, this statutory section referred to aliens who were coming to the United States to practice polygamy) (internal quotation marks omitted).

(D) Crimes Involving Moral Turpitude

Section 1182(a)(2)(A) covers "a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." *See Beltran-Tirado v. INS*, 213 F.3d 1179, 1185 (9th Cir. 2000) (holding that petitioner's offenses of making false attestation on employment verification form and using a false Social Security number were not crimes of moral turpitude barring a finding of good moral character for purposes of registry); *cf. Hernandez-Robledo v. INS*, 777 F.2d 536, 542 (9th Cir. 1985) (holding that the BIA was within its discretion in finding that petitioner's conviction for malicious destruction of property was a crime involving moral turpitude, barring good moral character for purposes of suspension).

(E) Controlled Substance Violations

Section 1182(a)(2)(A) also covers violations of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 2)." 8 U.S.C. § 1182(a)(2)(A); *see also Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) (holding that application of the bar for purposes of voluntary departure did not violate due process). The mandatory bar to good moral character does not apply to a "single offense of simple possession of 30 grams or less of marihuana." 8 U.S.C. § 1101(f)(3).

(F) Multiple Criminal Offenses

Section 1182(a)(2)(B) covers "[a]ny 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 were 5 years or more." 8 U.S.C. § 1182(a)(2)(B); *see also Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1150-51 (9th Cir. 2002) (holding that petitioner with three convictions with aggregate sentences totaling over 10 years was ineligible for good moral character finding for purposes of registry).

(G) Controlled Substance Traffickers

Section 1182(a)(2)(C) covers "[a]ny alien who the consular officer or the Attorney General knows or has reason to believe . . . is or has been an illicit trafficker in any controlled substance or in any listed chemical." 8 U.S.C. § 1182(a)(2)(C). The Ninth Circuit has stated "that the plain language of the good moral character definition could be read to require a conviction for drug-trafficking in order to per se bar an alien from establishing good moral character." *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 827 (9th Cir. 2003) (discussing voluntary departure) (internal quotation marks omitted); *cf. Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000) (holding that conviction not required to establish inadmissibility as a drug trafficker); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1053 (9th Cir. 2005).

(iii) Gamblers

"[O]ne whose income is derived principally from illegal gambling activities," or "one who has been convicted of two or more gambling offenses committed during such period," shall not be regarded as a person of good moral character. 8 U.S.C. § 1101(f)(4) and (5); *see also Castiglia v. INS*, 108 F.3d 1101, 1103 (9th Cir. 1997).

(iv) False Testimony

An applicant who has given false testimony to obtain an immigration benefit is ineligible for relief which requires a showing of good moral character. *See* 8 U.S.C. § 1101(f)(6); *see also Abedini v. INS*, 971 F.2d 188, 193 (9th Cir. 1992) (discussing section in the context of voluntary departure). "For a witness's false testimony to preclude a finding of good moral character, the testimony must have been made orally and under oath, and the witness must have had a subjective intent to deceive for the purpose of obtaining immigration benefits." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001) (holding that false testimony to an asylum officer established lack of good moral character); *Bernal v. INS*, 154 F.3d 1020, 1023 (9th Cir. 1998) (holding that applicant's false statements made under oath during naturalization examination precluded finding of good moral character).

Whether or not a person has the subjective intent to deceive in order to obtain immigration facts is a question of fact reviewed for clear error. *United States v. Hovsepian*, 422 F.3d 883, 885, 887 (9th Cir. 2005) (en banc) (citing Fed. R. Civ. P. 52(a)). "When the court rests its findings on an assessment of credibility, we owe even greater deference to those findings [of fact]." *Id*.

(v) Confinement

A person cannot show good moral character if he "has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period." 8 U.S.C. § 1101(f)(7); *see also Rashtabadi v. INS*, 23 F.3d 1562, 1571-72 (9th Cir. 1994) (discussing good moral character in the context of voluntary departure). "[T]he plain meaning of the statute is that confinement in any facility-whether federal, state, or local-as a result of conviction, for the requisite period of time, falls within the meaning of § 1101(f)(7)." *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 886 (9th Cir. 2005) (holding that incarceration in a county jail falls within the meaning of the statutory exclusion). "The requirement that the confinement be as a result of

a conviction precludes counting any time a person may have spent in pretrial detention." *Id.*

(vi) Aggravated Felonies

An applicant is statutorily ineligible for a finding of good moral character if he was convicted of an aggravated felony for conduct occurring after November 29, 1990, the effective date of the statute. *See* 8 U.S.C. § 1101(f)(8); *United States v. Hovsepian*, 422 F.3d 883, 886 n.1 (9th Cir. 2005) (en banc) (explaining that 8 U.S.C. § 1101(f)(8) applies only to conduct that occurred after the statute's effective date). The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43). *See also Castiglia v. INS*, 108 F.3d 1101, 1104 (9th Cir. 1997) (holding that petitioner's second degree murder conviction precluded a good moral character finding for purposes of naturalization).

The court has not addressed the apparent tension between Section 509(b) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (providing that the aggravated felony bar to good moral character applies to convictions on or after November 29, 1990) and Section 321(b) of IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (amending aggravated felony definition to eliminate all previous effective dates).

Cross-Reference: Criminal Issues in Immigration Law, Aggravated Felonies.

(vii) Nazi Persecutors, Torturers, Violators of Religious Freedom

"[O]ne who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of

religious freedom)," shall not be regarded as having good moral character. 8 U.S.C. § 1101(f)(9).

(viii) False Claim of Citizenship and Voting

"In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes . . . in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien . . . is or was a citizen . . . the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it." 8 U.S.C. § 1101(f); *see also Hughes v. Ashcroft*, 255 F.3d 752, 759 (9th Cir. 2001); *cf. McDonald v. Gonzales*, 400 F.3d 684, 685, 689–90 (9th Cir. 2005) (holding that petitioner was not an unlawful voter for purposes of removal because she did not have the requisite mental state).

(ix) Adulterers

"In 1981, Congress amended § 1101(f) to exclude adulterers from the enumerated categories." *Torres-Guzman v. INS*, 804 F.2d 531, 533 n.1 (9th Cir. 1986).

4. Criminal Bars

An applicant is ineligible for nonpermanent resident cancellation of removal if he or she has been convicted of an offense under 8 U.S.C. § 1182(a)(2) (criminal grounds of inadmissibility), 8 U.S.C. § 1227(a)(2) (criminal grounds of deportability), or 8 U.S.C. § 1227(a)(3) (failure to register, document fraud, and false claims to citizenship). *See* 8 U.S.C. § 1229b(b)(1)(C); *see also Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 651-52 (9th Cir. 2004) (listing relevant offenses). Section 1229b(b)(1)(C) "should be read to cross-reference a list of offenses in three statutes," and "convicted of an offense under" means "convicted of an offense *described* under" each of the three sections. *Gonzalez-Gonzalez*, 390 F.3d at 652

(holding that inadmissible alien convicted of crime of domestic violence was ineligible for cancellation) (internal quotation marks omitted).

However, the court has held that IIRIRA's elimination of suspension of deportation to nonpermanent residents convicted of an aggravated felony has an impermissibly retroactive effect where the petitioner was eligible for a discretionary waiver of at the time of the plea. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853–84 (9th Cir. 2006) (applying *INS v. St. Cyr*, 533 U.S. 289 (2001)).

5. Exceptional and Extremely Unusual Hardship

Non-permanent resident applicants for cancellation of removal must establish "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D).

a. Jurisdiction

Pursuant to 8 U.S.C. § 1252(a)(2)(B)(i), the court lacks jurisdiction to review the agency's "exceptional and extremely unusual hardship" determination. *See Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 (9th Cir. 2003) (holding that the "'exceptional and extremely unusual hardship' determination is a subjective, discretionary judgment that has been carved out of our appellate jurisdiction"). Notwithstanding this jurisdictional bar, the court retains jurisdiction to consider constitutional questions, such as due process challenges, and questions of law. *See* 8 U.S.C. § 1252(a)(2)(D); *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023 (9th Cir. Oct. 26, 2006) (en banc). The court retains jurisdiction to review questions of statutory interpretation. *See Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (concluding that the court had jurisdiction to consider issues of statutory interpretation pertaining to agency's discretionary the hardship standard); *cf. Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (holding that the court lacked jurisdiction to consider petitioner's non-colorable contention that the agency deprived her of due process by

misapplying the applicable law to the facts of her case in evaluating exceptional and extremely unusual hardship).

b. Qualifying Relative

Under cancellation of removal, hardship to the applicant himself will no longer support a grant of relief. *See Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003) (comparing suspension of deportation, which allowed for hardship to the alien himself). The applicant must show the requisite degree of hardship to a "spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D); *see also Molina-Estrada v. INS*, 293 F.3d 1089, 1093-94 (9th Cir. 2002) (because petitioner provided no evidence that his mother was a lawful permanent resident, he was not eligible for cancellation).

An adult daughter twenty-one years of age or older does not qualify as a "child" for purposes of cancellation of removal. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144-45 (9th Cir. 2002).

6. Exercise of Discretion

"Cancellation of removal, like suspension of deportation before it, is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). The court lacks jurisdiction to review the ultimate discretionary determination to deny cancellation. *See id*. at 890; *cf. Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (where IJ's denial of cancellation was based solely on the physical presence prong, even though she referenced discretionary factors, the court had jurisdiction over petition). "Although we may not review the IJ's exercise of discretion, a due process violation is not an exercise of discretion." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003) (granting petition where IJ's biased remarks evinced the IJ's reliance on improper discretionary considerations); *cf. Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) ("[T]raditional abuse of discretion challenges recast as alleged due process

violations do not constitute colorable constitutional claims that would invoke our jurisdiction.").

7. Dependents

When an adult alien has been granted cancellation, minor alien dependents may be able to establish eligibility for cancellation once the parent adjusts to lawful permanent resident status. *See In re Recinas*, 23 I. & N. Dec. 467, 473 (BIA 2002) ("find[ing] it appropriate to remand [minor respondents'] records to the Immigration Judge for their cases to be held in abeyance pending a disposition regarding the adult respondent's [adjustment of] status"); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850 n.1 (9th Cir. 2004) (noting that if either petitioner is granted cancellation of removal, the minor son may be eligible for cancellation or other relief).

C. Ineligibility for Cancellation

8 U.S.C. § 1229b(c) lists specified aliens who are ineligible for cancellation of removal.

1. Certain Crewmen and Exchange Visitors

Crewmen who entered after June 30, 1964 are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(c)(1); *see also Guinto v. INS*, 774 F.2d 991, 992 (9th Cir. 1985) (per curiam) (discussing identical bar to suspension of deportation, and rejecting equal protection challenge).

Certain nonimmigrant exchange aliens, as described in 8 U.S.C. § 1101(a)(15)(J), are also ineligible for relief. *See* 8 U.S.C. § 1229b(c)(2) and (3).

2. Security Grounds

Persons inadmissible or deportable under security and terrorism grounds are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(c)(4) (referring to inadmissibility under 8 U.S.C. § 1182(a)(3) and deportability under 8 U.S.C. § 1227(a)(4)).

3. Persecutors

Individuals who have "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion" are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(c)(5) (referring to 8 U.S.C. § 1231(b)(3)(B)(i)).

4. Previous Grants of Relief

"An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996," is ineligible for cancellation. 8 U.S.C. § 1229b(c)(6); *Maldonado-Galindo v. Gonzales*, 456 F.3d 1064, 1067 (9th Cir. 2006) (holding that prior receipt of § 212(c) relief forecloses availability of § 240A cancellation of removal). This statutory scheme is not impermissibly retroactive. *Maldonado-Galindo*, 456 F.3d at 1069.p

D. Constitutional and Legal Challenges to the Availability of Cancellation of Removal or Suspension of Deportation

The BIA's interpretation of the heightened "exceptional and extremely unusual hardship" standard does not violate due process. *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1006 (9th Cir. 2003) ("The BIA has not exceeded its broad authority by defining 'exceptional and extremely unusual hardship' narrowly."); *see also Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 963 (9th Cir. 2004) (same).

An applicant cannot invoke the court's jurisdiction over constitutional claims by simply recasting traditional abuse of discretion challenge to the BIA's hardship determination. *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (holding that petitioners failed to raise a "colorable" due process claim).

The court has held that the importance of family unity and the

combined effect of the ten-year requirement for eligibility and the stop-time rule do not violate due process because Congress had a legitimate and facially bona fide reason for limiting the availability of relief. *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978–79 (9th Cir. 2006). Likewise, the court has held that these statutory limitations on the availability of cancellation of removal do not violate international law. *Id*. at 979–80; *see also Cabrera-Alvarez v. Gonzales*, *4*23 F.3d 1006, 1011–13 (9th Cir. 2005) (holding that exceptional and extremely unusual hardship standard does not violate international law as expressed in the UN Convention on the Rights of the Child).

E. Ten-Year Bars to Cancellation

1. Failure to Appear

Cancellation is unavailable for ten years if an applicant was ordered removed for failure to appear at a removal hearing, unless he or she can show exceptional circumstances for failing to appear. *See* 8 U.S.C. § 1229a(b)(7). The statute provides that the ten-year bar applies if the alien "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 under this paragraph of failing" to appear. *Id.*

The statute defines exceptional circumstances as "circumstances (such as serious illness of the alien or 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." 8 U.S.C. § 1229a(e)(1).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Time and Numerical Limitations, In Absentia Orders and Exceptional Circumstances.

2. Failure to Depart

Under 8 U.S.C. § 1229c(d), an applicant's failure to depart during the specified voluntary departure period will result in ineligibility for cancellation of removal for a period of ten years. *Id.*; *see also Elian v.*

Ashcroft, 370 F.3d 897, 900 (9th Cir. 2004) (order). "The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. § 1229c(d). "The plain language of 8 U.S.C. § 1229c(d) requires only that the order inform the alien of the penalties for failure to depart voluntarily[, and s]ervice of an order to the alien's attorney of record constitutes notice to the alien." *de Martinez v. Ashcroft*, 374 F.3d 759, 762 (9th Cir. 2004).

For permanent rules cases, the filing of a timely motion to reopen or reconsider automatically tolls the voluntary departure period, regardless of whether the motion is accompanied by a motion to stay the voluntary departure period. *Martinez Barroso v. Gonzales*, 429 F.3d 1195, 1204–05, 1207 (9th Cir. 2005); *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (rejecting the court's prior analysis in *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) and holding that petitioner's voluntary departure period is tolled while the BIA considers a timely-filed motion to reopen accompanied by a motion to stay removal); *cf. Medina-Morales v. Ashcroft*, 371 F.3d 520, 529-531 & n.9 (9th Cir. 2004) (holding, in permanent rules case, that where a petitioner bargains for voluntary departure in lieu of full adjudication under 8 U.S.C. § 1229c(a)(1), the BIA may weigh petitioner's voluntary departure agreement against the grant of a motion to reopen); *Shaar v. INS*, 141 F.3d 953, 959 (9th Cir. 1998) (holding, in pre-IIRIRA case, that BIA may deny motion to reopen to apply for suspension of deportation because petitioners failed to depart during the voluntary departure period).

If the petitioner files a motion to reopen after the expiration of the voluntary departure period, the BIA may deny the motion to reopen based on petitioner's failure to depart. *See de Martinez*, 374 F.3d at 763–64 (denying petition for review in permanent rules case where petitioner moved to reopen to apply for adjustment of status 30 days after the expiration of her voluntary departure period).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Failure to Voluntarily Depart.

F. Numerical Cap on Grants of Cancellation and Adjustment of Status

IIRIRA limits the number of people who may receive cancellation of removal and adjustment of status to 4,000 per fiscal year. *See* 8 U.S.C. § 1229b(e); 8 C.F.R. § 1240.21(c); *see also Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 967 n.6 (9th Cir. 2003); *Barahona-Gomez v. Reno*, 167 F.3d 1228 (1999), *as supplemented by*, 236 F.3d 1115 (9th Cir. 2001).

G. NACARA Special-Rule Cancellation

On November 19, 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), which established special rules to permit certain classes of aliens to apply for what is known as "special rule cancellation." "Special Rule Cancellation allows designated aliens to qualify for cancellation under the more lenient suspension of deportation standard that existed before the passage of [IIRIRA]." *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093 (9th Cir. 2005); *see also Munoz v. Ashcroft*, 339 F.3d 950, 955-56 (9th Cir. 2003); *Simeonov v. Ashcroft*, 371 F.3d 532, 536 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 887 (2005); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1162 (9th Cir. 2002); 8 C.F.R. §§ 1240.60-1240.70.

Special rule cancellation of removal is available for certain applicants from El Salvador, Guatemala, nationals 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. *See Ram v. INS*, 243 F.3d 510, 517 & n.9 (9th Cir. 2001).

NACARA section 203(c) allows an applicant one opportunity to file a motion to reopen his deportation or removal proceedings to obtain cancellation of removal. A motion to reopen will not be granted unless an applicant can demonstrate prima facie eligibility for relief under NACARA. *See Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003). "An alien can make such a showing if he or she has complied with section 203(a)'s filing deadlines, is a native of one countries listed in NACARA, has lived continuously in the United States for ten years, has not been convicted of any crimes, is a person of good moral character, and can demonstrate extreme hardship if forced to return to his or her native country." *Albillo-De*

Leon v. Gonzales, 410 F.3d 1090, 1093–94 (9th Cir. 2005); *see also* NACARA § 203(a), (b), and (c); 8 C.F.R. § 1003.43(b) (2004). "Such a showing need not be conclusive but need suggest only that it would be 'worthwhile' to reopen proceedings." *Id*. at 1094 (citing *Ordonez*, 345 F.3d at 785).

1. NACARA Does Not Violate Equal Protection

This court has held that limitations on the availability of NACARA special rule cancellation does not violate equal protection. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602-03 (9th Cir. 2002); *Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *see also Masnauskas v. Gonzales*, 432 F.3d 1067, 1071 n.5 (9th Cir. 2005) (concluding that NACARA § 202 and § 203's nationality-based classifications do not violate equal protection); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1164-65 (9th Cir. 2002) (holding that limitation on eligibility for relief based on whether an applicant filed an asylum application by the April 1, 1990 deadline did not violate equal protection or due process).

2. NACARA Deadlines

NACARA section 203(a) identifies the threshold requirements for NACARA eligiblity. In order to qualify for relief, an applicant must have filed an asylum application by April 1, 1990 and must have applied for certain benefits by December 31, 1991. *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1097 (9th Cir. 2005). Section 203(a)'s deadlines are statutory cutoff dates, and are not subject to equitable tolling. *See Munoz v. Ashcroft*, 339 F.3d 950, 956-57 (9th Cir. 2003) ("Statutes of repose are not subject to equitable tolling.").

Although section 203(c) does not identify by date the deadline for filing a motion to reopen deportation or removal proceedings to seek special rule cancellation, the Attorney General set the deadline at September 11, 1998. *See* NACARA § 203(c); 8 C.F.R. § 1003.43(e)(1); *Albillo-De Leon*, 410 F.3d at 1094. An application for special rule cancellation of removal, to accompany the motion to reopen, must have been submitted no later than November 18, 1999. 8 C.F.R. § 1003.43(e)(2). NACARA section 203(c), which applies only to those aliens who have already complied with section

203(a)'s filing deadlines, is a statute of limitations subject to equitable tolling. *See Albillo-De Leon*, 410 F.3d at 1097–98; *compare Munoz*, 339 F.3d at 956-57 (holding that section 203(a)'s deadlines are not subject to equitable tolling).

The numerical cap on the number of adjustments arising from cancellation and suspension in 8 U.S.C. § 1229b(e) does not apply to NACARA special rule cancellation. *See* 8 U.S.C. § 1229b(e)(3)(A).

3. Judicial review

The Ninth Circuit has not addressed the judicial review provision in section 309(c)(5)(C)(ii) of IIRIRA, as amended by section 203 of NACARA, which provides that "[a] determination by the Attorney General as to whether an alien satisfies the requirements of this clause (i) is final and shall not be subject to review by any court."

H. Abused Spouse or Child Provision

A battered spouse, battered child, or the parent of a battered child, may apply for a special form of cancellation of removal. *See* 8 U.S.C. § 1229b(b)(2); *see also Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058–59 (9th Cir. 2005) (holding that the IJ violated due process in refusing to hear relevant expert testimony regarding domestic violence). An applicant for special rule cancellation must show:

> (1) that she had been 'battered or subjected to extreme cruelty' by a spouse who is or was a United States citizen or lawful permanent resident;
> (2) that she had lived continuously in the United States for the three years preceding her application;
> (3) that she was a person of 'good moral character' during that period;
> (4) that she is not inadmissible or deportable under various other specific immigration laws relating to criminal activity, including 8 U.S.C. § 1182(a)(2); and
> (5) that her removal 'would result in extreme hardship' to

herself, her children, or her parents.

Lopez-Umanzor, 405 F.3d at 1053; *see also Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003) (discussing similar suspension of deportation provision).

Cross-reference: Suspension of Deportation, Abused Spouse or Child Provision.

IV. SUSPENSION OF DEPORTATION, 8 U.S.C. § 1254 (repealed) (INA § 244)

A. Eligibility Requirements

Under the pre-IIRIRA rules, an applicant "would be eligible for suspension if (1) the applicant had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of the application for suspension of deportation; (2) the applicant was a person of good moral character; and (3) deportation would result in extreme hardship to the alien or to an immediate family member who was a United States citizen or a lawful permanent resident." *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc) (citing 8 U.S.C. § 1254(a)(1) (repealed)); *Alcaraz v. INS*, 384 F.3d 1150, 1153 (9th Cir. 2004).

Ten years of continuous physical presence was required for applicants deportable for serious crimes who could show exceptional and extremely unusual hardship. *See Leon-Hernandez v. INS*, 926 F.2d 902, 905 (9th Cir. 1991) (citing 8 U.S.C. § 1254(a)(2)); *Pondoc Hernaez v. INS*, 244 F.3d 752, 755 (9th Cir. 2001).

1. Continuous Physical Presence

Applicants for suspension must show that they have "been physically present in the United States for a continuous period of not less than seven years." 8 U.S.C. § 1254(a) (repealed 1996); *see also Ramirez-Alejandre*, 320 F.3d at 862 (en banc). "[T]he relevant seven year period is the period

immediately preceding service of the OSC that prompts the application for suspension." *Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 941 (9th Cir. 2004) (rejecting petitioners' contention that they met the seven year requirement before departing to Mexico for five months).

a. Jurisdiction

The court retains jurisdiction over the determination of whether an applicant has satisfied the seven-year continuous physical presence requirement. *See Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997).

b. Standard of Review

"We review for substantial evidence the BIA's decision that an applicant has failed to establish seven years of continuous physical presence in the United States." *Vera-Villegas v. INS*, 330 F.3d 1222, 1230 (9th Cir. 2003).

c. Proof

An applicant may establish the time element by credible direct testimony or written declarations. *See Vera-Villegas v. INS*, 330 F.3d 1222, 1225 (9th Cir. 2003). Although contemporaneous documentation of presence "may be desirable," it is not required. *Id*.

d. Departures: 90/180 Day Rule

Under the transitional rules, an alien fails to maintain continuous physical presence if he is absent for more than 90 days, or 180 days in the aggregate. *See Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 939 & n.2 (9th Cir. 2004); *see also Canales-Vargas v. Gonzales*, 441 F.3d 739, 742 (9th Cir. 2006) (mandate pending). The Ninth Circuit has held that the 90/180 rule as applied to transitional rules cases is not impermissibly retroactive. *See Mendiola-Sanchez*, 381 F.3d at 940–41.

Cross-reference: Cancellation for Non-Permanent Residents, Departure from the United States.

e. Brief, Casual, and Innocent Departures

Under pre-IIRIRA law, the statute allowed for "brief, casual and innocent" absences from the United States. 8 U.S.C. § 1254(b)(2) (repealed 1996); *see also Castrejon-Garcia v. INS*, 60 F.3d 1359, 1363 (9th Cir. 1995) (eight-day trip to Mexico seeking a visa was brief, casual and innocent); *Kamheangpatiyooth v. INS*, 597 F.2d 1253, 1258 (9th Cir. 1979) (holding that 30-day trip to Thailand to visit ailing mother did not necessarily break applicant's continuous physical presence); *cf. Hernandez-Luis v. INS*, 869 F.2d 496, 498-99 (9th Cir. 1989) (holding voluntary departure under threat of coerced deportation was not a brief, casual and innocent departure).

f. IIRIRA Stop-Time Rule

Under the IIRIRA "stop-time" rule, "any period of . . . continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear or an order to show cause why he or she should not be deported." *Arrozal v. INS*, 159 F.3d 429, 434 (9th Cir. 1998) (internal quotation marks omitted); *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (holding in cancellation case that the date the notice to appear is served counts toward the period of continuous presence). "The stop-clock provision applies to all deportation and removal proceedings, whether they are governed by the transitional rules or the permanent rules." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002).

The stop-time rule applies to suspension of deportation cases heard on or after April 1, 1997. *See Astrero v. INS*, 104 F.3d 264, 266 (9th Cir. 1996) (holding that IIRIRA's stop-time rule could not be applied before its effective date of April 1, 1997); *see also Otarola v. INS*, 270 F.3d 1272, 1273 (9th Cir. 2001) (granting petition where INS maintained meritless appeal in order to avail itself of stop-time rule); *Ram v. INS*, 243 F.3d 510, 517, 518 (9th Cir. 2001) (holding that the application of the new stop-time rule did not offend due process, and rejecting claim that 7 years can start anew after service of the OSC); *Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1211 (9th Cir. 2001), *corrected by* 250 F.3d 1271 (9th Cir. 2001) (order), (reversing premature application of the stop-time rule).

g. Pre-IIRIRA Rule on Physical Presence

Before IIRIRA, an applicant "in deportation proceedings continued to accrue time towards satisfying the seven-year residency requirement for suspension of deportation during the pendency of the proceedings." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002); *see also Alcaraz v. INS*, 384 F.3d 1150, 1153 (9th Cir. 2004). However, an applicant could not establish the seven-year requirement by pursuing baseless appeals. *See INS v. Rios-Pineda*, 471 U.S. 444, 449-50 (1985); *cf. Sida v. INS*, 783 F.2d 947, 950 (9th Cir. 1986) (distinguishing *Rios-Pineda*).

h. NACARA Exception to the Stop-Time Rule

The Nicaraguan Adjustment and Central American Relief Act ("NACARA") exempts certain applicants from El Salvador, Guatemala, and nationals of the former 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, from the stop-time provision. *See Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *see also Simeonov v. Ashcroft*, 371 F.3d 532, 537 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 887 (2005); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002). For covered individuals, time accrued after issuance of a charging document may count towards the continuous physical presence requirement.

Cross-reference: Cancellation of Removal, NACARA Special-Rule Cancellation.

i. *Barahona-Gomez v. Ashcroft* Exception to the Stop-Time Rule

The stop-time rule also does not apply to class members covered by the December 2002 settlement of *Barahona-Gomez v. Ashcroft*, No. C97-0895 CW (N.D. Cal). This class action challenged the Executive Office for Immigration Review's ("EOIR") directive to halt the granting of suspension applications during the period between February 13, and April 1, 1997, the effective date of IIRIRA, based on the annual cap on suspension grants.

As a result of the EOIR directive, some applicants who would have had their suspension of deportation claims heard under pre-IIRIRA law during this period were rendered ineligible by the stop time rule when their cases were heard after April 1, 1997.

Eligible *Barahona-Gomez* class members may reapply for suspension of deportation under the law as it existed prior to the effective date of IIRIRA. For background on the case, *see Barahona-Gomez v. Ashcroft*, 167 F.3d 1228 (9th Cir. 1999), *supplemented by* 236 F.3d 1115 (9th Cir. 2001); *see also* 68 Fed. Reg. 13727 (Mar. 20, 2003) (Advisory Statement); http://www.usdoj.gov/eoir/omp/barahona/barahona.htm (reproducing settlement agreement). The settlement contains two provisions that define who is entitled to relief, a definition of the class and a definition of eligible class members, both of which must be met to be eligible for relief. *Sotelo v. Gonzales*, 430 F.3d 968, 971 (9th Cir. 2005).

The *Barahona-Gomez* settlement class is defined as:

> "all persons who have had (or would have had) suspension of deportation hearings conducted before April 1, 1997, within the jurisdiction of the Ninth Circuit Court of Appeals, and who were served an Order to Show Case within seven years after entering the United States, where:
> (a) the immigration judge reserved or withheld granting suspension of deportation on the basis of the . . . directive from Defendant Chief Immigration Judge . . .; or
> (b) the suspension of deportation hearing was concluded prior to April 1,1 997, the INS has appealed or will appeal, at any time, on a basis that includes the applicability of [IIRIRA], and the case was affected by the . . . directive[s] . . .; or
> (c) the Board of Immigration Appeals . . . has or had jurisdiction but withheld granting suspension of deportation (or reopening or remanding a case for consideration of an application for suspension of deportation) before April 1, 1997 on the basis of the . . . directive from Defendant Board Chairman . . . .

Sotelo, 430 F.3d at 971 (citing *Barahona-Gomez v. Reno*, 243 F. Supp.2d 1029, 1030–31 (N.D. Cal. 2002)) (emphasis omitted).

Thus, in order to qualify as a member of the class, an individual must have had a suspension of deportation hearing *before* April 1, 1997 (or would have had a hearing but for the directives) or *before* April 1, 1997 the Board withheld granting of suspension of deportation (or a motion to reopen or remand for consideration of an application for suspension of deporation) *because of* a challenged directive. *Fajardo Sotelo*, 430 F.3d at 971–72.

j. Repapering

For individuals who became ineligible for suspension of deportation based on the retroactive stop-time rule, a "safety-net provision" called "repapering" was included in section 309(c)(3) of IIRIRA. *See Alcaraz v. INS*, 384 F.3d 1150, 1152 (9th Cir. 2004). This section "permits the Attorney General to allow aliens who would have been eligible for suspension of deportation but for the new stop-time rule to be placed in removal proceedings where they may apply for cancellation of removal under 8 U.S.C. § 1229b, INA § 240A(b)." *Id*. at 1154 (remanding for determination of whether petitioners were eligible for repapering based on internal agency policy and practice) (emphasis omitted).

2. Good Moral Character

a. Jurisdiction

A moral character finding may be based on statutory or discretionary factors. *See Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (discussing suspension of deportation). The court retains jurisdiction over statutory or "per se" moral character determinations. *See, e.g.*, *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (holding that court retained jurisdiction to review finding that alien could not establish good moral character for purposes of cancellation of removal under section 1101(f)(7)); *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (holding that court retains

jurisdiction over alien smuggling question in cancellation of removal case). However, the court lacks jurisdiction to review moral character determinations based on discretionary factors. *See Kalaw*, 133 F.3d at 1151.

b. Time Period Required

The applicant must show that he or she has been of good moral character for the entire statutory period. *See Limsico v. INS*, 951 F.2d 210, 213-14 (9th Cir. 1991) (declining to decide whether events occurring before the seven-year period may be considered). Moreover, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc).

Cross-reference: Cancellation for Non-Permanent Residents, Good Moral Character.

3. Extreme Hardship Requirement

a. Jurisdiction

Determination of extreme hardship "is clearly a discretionary act." *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997). The court is "no longer empowered to conduct an 'abuse of discretion' review of the agency's purely discretionary determinations as to whether 'extreme hardship' exists." *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001); *cf. Reyes-Melendez v. INS*, 342 F.3d 1001, 1006-07 (9th Cir. 2003) (holding that due process required remand where IJ's moral bias against petitioner precluded full consideration of the relevant hardship factors).

Cross-reference: Jurisdiction Over Immigration Petitions, Limitations on Judicial Review of Discretionary Decisions.

b. Qualifying Individual

Under the more lenient suspension standards, applicants could meet

the extreme hardship requirement by showing hardship to himself or to his United States or lawful permanent resident spouse, parent or child. *See* 8 U.S.C. § 1254(a)(1) (repealed 1996); *see also Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003).

c. Extreme Hardship Factors

The administrative regulations describe extreme hardship as "a degree of hardship beyond that typically associated with deportation." 8 C.F.R. § 1240.58(b). The regulation sets forth the following non-exclusive list of factors relevant to the hardship inquiry:

> (1) The age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation;
> (2) The age, number, and immigration status of the alien's children and their ability to speak the native language and to adjust to life in the country of return;
> (3) The health condition of the alien or the alien's children, spouse, or parents and the availability of any required medical treatment in the country to which the alien would be returned;
> (4) The alien's ability to obtain employment in the country to which the alien would be returned;
> (5) The length of residence in the United States;
> (6) The existence of other family members who are or will be legally residing in the United States;
> (7) The financial impact of the alien's departure;
> (8) The impact of a disruption of educational opportunities;
> (9) The psychological impact of the alien's deportation;
> (10) The current political and economic conditions in the country to which the alien would be returned;
> (11) Family and other ties to the country to which the alien would be returned;
> (12) Contributions to and ties to a community in the United States, including the degree of integration into society;

> (13) Immigration history, including authorized residence in the United States; and
> (14) The availability of other means of adjusting to permanent resident status.

Id.

Although the court no longer has jurisdiction to review the IJ's hardship determination, numerous cases have discussed the relevant factors. *See, e.g.*, *Chete Juarez v. Ashcroft*, 376 F.3d 944, 948–49 (9th Cir. 2004) (listing "broad range" of relevant circumstances in the hardship inquiry); *Arrozal v. INS*, 159 F.3d 429, 433-34 (9th Cir. 1998) (discussing, inter alia, medical problems and political conditions); *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (per curiam) (considering family separation); *Ordonez v. INS*, 137 F.3d 1120, 1123-24 (9th Cir. 1998) (discussing persecution); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1318-19 (9th Cir. 1997) (considering community assistance and acculturation); *Tukhowinich v. INS*, 64 F.3d 460, 463 (9th Cir. 1995) (considering non-economic hardship flowing from economic detriment); *Biggs v. INS*, 55 F.3d 1398, 1401-02 (9th Cir. 1995) (considering medical information); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423-24 (9th Cir. 1987) (considering family separation); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) (per curiam) (considering hardship to applicant based on separation from non-qualifying relatives).

"Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case[, and a]djudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances." 8 C.F.R. § 1240.58(a); *see also Watkins v. INS*, 63 F.3d 844, 850 (9th Cir. 1995) (holding, pre-IIRIRA, that the BIA abuses its discretion when it does not consider all factors and their cumulative effect).

d. Current Evidence of Hardship

The BIA must decide eligibility for suspension "based, not on the facts that existed as of the time of the hearing before the IJ, but on the facts

as they existed when the BIA issued its decision." *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 860, 875 (9th Cir. 2003) (en banc) (holding that the BIA's refusal to allow applicant to supplement the record with additional materials was a denial of due process); *see also Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1212 (9th Cir.), *corrected by* 250 F.3d 1271 (9th Cir. 2001).

4. Ultimate Discretionary Determination

"Even if all three of these statutory criteria are met, the ultimate grant of suspension is wholly discretionary." *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997). "Thus, if the Attorney General decides that an alien's application for suspension of deportation should not be granted as a matter of discretion in addition to any other grounds asserted, the BIA's denial of the alien's application would be unreviewable under the transitional rules." *Id*.; *see also Sanchez-Cruz v. INS*, 255 F.3d 775, 778–79 (9th Cir. 2001); *cf. Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (where IJ's denial of cancellation was based solely on the physical presence prong, even though she referenced discretionary factors, the court had jurisdiction over petition). "Although we may not review the IJ's exercise of discretion, a due process violation is not an exercise of discretion." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003) (granting petition where IJ's biased remarks evinced the IJ's reliance on improper discretionary considerations).

B. Abused Spouses and Children Provision

A battered spouse, battered child, or the parent of a battered child, may apply for a special form of suspension added to the INA by the Violence Against Women Act of 1994 ("VAWA"). *See Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003) (discussing 8 U.S.C. § 1254(a)(3)(1996)). Under this provision, the Attorney General may suspend the deportation of an alien who:

> 1) has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application;
> 2) has been battered or subjected to extreme cruelty in the

United States by a spouse or parent who is a United States citizen or lawful permanent resident;
3) proves that during all of such time in the United States the alien was and is a person of good moral character;
4) and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

Id.; *see also* 8 C.F.R. § 1240.58(c). The court retains jurisdiction to review the BIA's determination regarding whether an applicant was subjected to extreme cruelty. *See Hernandez*, 345 F.3d at 835 (holding that batterer's behavior during the "contrite" phase of the domestic violence cycle may constitute extreme cruelty).

Cross-reference: Cancellation of Removal, Abused Spouse or Child Provision.

C. Ineligibility for Suspension

1. Certain Crewmen and Exchange Visitors

Persons who entered as crewmen after June 30, 1964 are statutorily ineligible for suspension. *See* 8 U.S.C. § 1254(f)(1); *see also Guinto v. INS*, 774 F.2d 991, 992 (9th Cir. 1985) (per curiam) (rejecting equal protection challenge). Certain nonimmigrant exchange aliens are also ineligible for relief. *See* 8 U.S.C. § 1254(f)(2) and (3).

2. Participants in Nazi Persecutions or Genocide

The statute excludes aliens described in 8 U.S.C. § 1251(a)(4)(D) from eligibility for suspension of deportation. *See* 8 U.S.C. § 1254(a). Section 1251(a)(4)(D) incorporates the definitions of Nazi persecutors and those who engaged in genocide found in 8 U.S.C. § 1182(a)(3)(E)(i) & (ii).

3. Aliens in Exclusion Proceedings

Aliens in exclusion proceedings are ineligible for suspension of

deportation. *See Simeonov v. Ashcroft*, 371 F.3d 532, 537 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 887 (2005).

D. Five-Year Bars to Suspension

1. Failure to Appear

An individual is not eligible for suspension of deportation for a period of five years if, after proper notice, she failed to appear at a deportation or asylum hearing, or failed to appear for deportation. *See* 8 U.S.C. § 1252b(e) (repealed 1996). The five-year ban also applies to voluntary departure and adjustment of status. *Id.* at § 1252(b)(e)(5). The government must provide proper notice in order for the bar to relief to be effective. *See Lahmidi v. INS*, 149 F.3d 1011, 1015–16 (9th Cir. 1998) (reviewing denial of motion to reopen in absentia deportation proceeding).

The pre-IIRIRA version of the statute provided an exception to the five-year bar for "exceptional circumstances." *See* 8 U.S.C. § 1252b(e). Exceptional circumstances are defined as "circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. § 1252b(f)(2).

2. Failure to Depart

An individual is not eligible for suspension of deportation for a period of five years if she remained in the United States after the expiration of a grant of voluntary departure. *See* 8 U.S.C. § 1252b(e)(2)(A) (repealed 1996); *see also Shaar v. INS*, 141 F.3d 953, 959 (9th Cir. 1998) (holding under transitional rules that BIA may deny motion to reopen to apply for suspension of deportation because petitioners failed to depart during the voluntary departure period); *cf. Martinez Barroso v. Gonzales*, 429 F.3d 1195, 1204–05, 1207 (9th Cir. 2005) (holding that timely filed motion to reopen automatically tolls the voluntary departure period in permanent rules cases); *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (holding in cancellation case that when an applicant files a timely motion to reopen

within the voluntary departure period, along with a request for a stay of removal or voluntary departure, the voluntary departure period is tolled while the BIA is considering the motion to reopen).

The five-year ban will not apply unless "the Attorney General has provided written notice to the alien in English and Spanish and oral notice either in the alien's native language or in another language the alien understands of the consequences . . . of the alien's remaining in the United States after the scheduled date of departure, other than because of exceptional circumstances." 8 U.S.C. § 1252b(e)(2)(B). The IJ's oral warning of the consequences of failing to depart must explicitly identify the types of discretionary relief that would be barred. *See Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (reviewing, under the transitional rules, the denial of petitioner's motion to reopen suspension proceedings); *cf. de Martinez v. Ashcroft*, 374 F.3d 759, 762 (9th Cir. 2004) (suggesting in permanent rules cancellation case that the new ten-year statutory bar for failing to voluntarily depart no longer explicitly requires oral notice of the consequences for failing to depart).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Time and Numerical Limitations, In Absentia Orders and Exceptional Circumstances.

E. Retroactive Elimination of Suspension of Deportation

Applying the Supreme Court's retroactivity analysis in *INS v. St. Cyr*, 533 U.S. 289, 316–21 (2001), this court has held that IIRIRA's elimination of suspension of deportation relief for non-permanent residents convicted of certain enumerated offensea is impermissibly retroactive. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853–54 (9th Cir. 2006) (holding that IIRIRA's elimination of suspension of deportation could not be applied retroactively to deprive a non-permanent resident of discretionary relief from removal where he was eligible for such relief at the time of his guilty plea).

V. SECTION 212(c) RELIEF, 8 U.S.C. § 1182(c) (repealed), Waiver

of Excludability or Deportability

A. Overview

Former INA section 212(c), 8 U.S.C. § 1182(c), allowed certain long-time permanent residents to obtain a discretionary waiver for certain grounds of excludability and deportability. *See INS v. St. Cyr*, 533 U.S. 289, 294-95 (2001) (providing history of former section 212(c) relief).

Section 212(c) provided that "[a]liens 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) [classes of excludable aliens]." 8 U.S.C. § 1182(c) (repealed 1996); *St. Cyr*, 533 U.S. at 295. If former section 212(c) relief was granted, the deportation proceedings would be terminated, and the alien would remain a lawful permanent resident. *See United States v. Ortega-Ascanio*, 376 F.3d 879, 882 (9th Cir. 2004).

Although the literal language of former section 212(c) applies only to exclusion proceedings, the statute applies to aliens in deportation proceedings as well. *See St. Cyr*, 533 U.S. at 295-96 & n.5 (discussing the "great practical importance" of extending former § 212(c) relief to permanent resident aliens in deportation proceedings, and noting the large percentage of applications that have been granted); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1122 (9th Cir. 2002); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995).

Effective April 1, 1997, IIRIRA repealed section 212(c), and created a new and more limited remedy called "cancellation of removal for certain permanent residents." However, certain individuals, as discussed below, remain eligible to apply for a section 212(c) waiver. *See* 8 C.F.R. § 1212.3 (final rule establishing procedures to implement *St. Cyr*).

Cross-reference: Cancellation for Lawful Permanent Residents.

B. Eligibility Requirements

1. Seven Years

To be eligible for discretionary relief from deportation under former section 212(c), an applicant must have accrued seven years of lawful permanent residence status. *See Ortega de Robles v. INS*, 58 F.3d 1355, 1360-61 (9th Cir. 1995) (holding that applicant could include time spent as a lawful temporary resident under the amnesty program). An applicant could continue to accrue legal residency time for the purpose of relief while pursuing an administrative appeal. *See Foroughi v. INS*, 60 F.3d 570, 572 (9th Cir. 1995); *Lepe-Guitron v. INS*, 16 F.3d 1021, 1026 (9th Cir. 1994) (holding that a parent's lawful unrelinquished domicile is imputed to his or her minor children).

2. Balance of Equities

The IJ or BIA must balance the favorable and unfavorable factors when determining whether an applicant is entitled to former section 212(c) relief. *See, e.g.*, *Georgiu v. INS*, 90 F.3d 374, 376-77 (9th Cir. 1996) (per curiam) (reversing BIA where it failed to address positive equities). Under the IIRIRA transitional rules, the court lacks jurisdiction to review the discretionary balancing of the relevant factors. *See Palma-Rojas v. INS*, 244 F.3d 1191, 1192 (9th Cir. 2001) (per curiam). However, numerous cases have discussed the equities and adverse factors that should be balanced. *See, e.g., United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (discussing positive equities and holding that defendant had a plausible claim for former § 212(c) relief); *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1056-57 (9th Cir. 2003) (holding that defendant did not establish prejudice given the significant adverse factors in his case); *Pablo v. INS*, 72 F.3d 110, 113-14 (9th Cir. 1995) (holding, under abuse of discretion standard, that BIA considered all of the relevant factors); *Yepes-Prado v. INS*, 10 F.3d 1363, 1366 (9th Cir. 1993) (listing factors).

Former section 212(c) does not require a showing of good moral character or extreme hardship. *See* 8 U.S.C. § 1182(c); *see also Castillo-Felix v. INS*, 601 F.2d 459, 466 (9th Cir. 1979) (comparing the stricter

qualitative requirements for suspension of deportation), *limited on other grounds by Ortega de Robles v. INS*, 58 F.3d 1355, 1358-59 (9th Cir. 1995).

C. Comparable Ground of Exclusion

Because former section 212(c) explicitly applies to the grounds of excludability, in order to be eligible for a waiver, an applicant in deportation proceedings must show that his ground of deportation has an analogous exclusion ground. *See Komarenko v. INS*, 35 F.3d 432, 434-35 (9th Cir. 1994) (stating that the waiver was not available for deportation based on a firearms offense because there was no comparable exclusion ground); *see also* 8 C.F.R. § 1212.3(f)(5) ("An application for relief under former section 212(c) of the Act shall be denied if: . . .[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.").

D. Comparable Ground of Inadmissibility

This court is currently considering whether a petitioner is ineligible for § 212(c) relief unless there is a ground of inadmissibility that is comparable to a ground of removability relating to a conviction for an aggravated felony. *See* 8 C.F.R. § 1212.3(f)(5); *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005) (holding that a petitioner is ineligible for § 212(c) relief where there is no ground of inadmissibility that is comparable to the ground of removability); *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005).

(Cal. 12/4/06): *Abebe v. Gonzales*, 05-76201; *Maaref v. Gonzales*, 05-77191; *Dang v. Gonzales*, 04-74235/05-74752; *Sosa v. Gonzales*, 05-77250; *Ledezma-Sandoval v. Gonzales*, 05-77082.

E. Ineligibility for Relief

Former section 212(c) relief is not available to persons based on certain national security, terrorist, or foreign policy grounds, or if the applicant participated in genocide or child abduction. *See* 8 U.S.C.

§ 1182(c) (referring to sections 1182(a)(3) and 1182(a)(9)(C)). The court has held that there is no impermissibly retroactive effect in applying IIRIRA's elimination of section 212(c) relief to individuals who engaged in the requisite terrorist activity prior to IIRIRA's enactment. *Kelava v. Gonzales*, 434 F.3d 1120,1124–26 (9th Cir. 2006).

F. Statutory Changes to Former Section 212(c) Relief

1. IMMACT 90

The Immigration Act of 1990 ("IMMACT 90") amended Section 212(c) to eliminate relief for aggravated felons who had served a term of imprisonment of at least five years. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001); *Toia v. Fasano*, 334 F.3d 917, 919 (9th Cir. 2003). "Section 212(c) was further revised in 1991 to clarify that the bar applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years." *Toia*, 334 F.3d at 919 n.1. Accordingly, under IMMACT 90, an applicant convicted of an aggravated felony could qualify for former section 212(c) relief, unless he had served a prison term of at least five years. *See id*.

a. No Retroactive Application

The *Toia* court also held that the IMMACT 90 five-year bar may not be applied retroactively to convictions before November 29, 1990. *Id.* at 918-19; *see also Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1152 (9th Cir. 2002) (remanding for a determination of whether application of five-year bar was impermissibly retroactive); 8 C.F.R. § 1212.3(f)(4)(ii) ("An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990.").

2. AEDPA

Section 440(d) of the Antiterrorism and Effective Death Penalty Act

of 1996 ("AEDPA") severely restricted former section 212(c) relief to bar waivers for applicants convicted of most crimes, including those who had aggravated felonies (regardless of the length of their sentences), or those with convictions for controlled substances offenses, drug addiction or abuse, firearms offenses, two crimes of moral turpitude, or miscellaneous crimes relating to national security. *See INS v. St. Cyr*, 533 U.S. 289, 297 & n.7 (2001); *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003); *Magana-Pizano v. INS*, 200 F.3d 603, 606 & n.2 (9th Cir. 1999).

An aggravated felony not listed in the notice to appear can serve as a bar to former 212(c) relief. *See United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1055-56 (9th Cir. 2003).

a. Continued Eligibility for Relief

Under final administrative regulations promulgated after the Supreme Court's ruling in *INS v. St. Cyr*, aliens in deportation proceedings before April 24, 1996 may apply for former section 212(c) relief without regard to section 440(d) of AEDPA. *See* 8 C.F.R. § 1212.3(g).

AEDPA § 440(d) also does not apply "if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made before April 24, 1996." *Id.* at 1212.3(h)(1).

If the alien entered a plea agreement between April 24, 1996 and April 1, 1997, he may apply for former section 212(c) relief, as amended by § 440(d) of AEDPA. *Id.* at 1212.3(h)(2).

3. IIRIRA

Section 304(b) of IIRIRA eliminated section 212(c) relief entirely, and replaced it with a new form of relief called cancellation of removal. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001); *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002). Individuals who entered into plea agreements on or after April 1, 1997 are not eligible for former section 212(c) relief. *See* 8 C.F.R. § 1212.3(h)(3).

Cross-reference: Cancellation of Removal.

a. Continued Eligibility for Relief

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that a retrospective application of the bar to former section 212(c) relief would have an impermissible retroactive effect on certain lawful permanent residents. *Id.* at 325 (holding that the elimination of § 212(c) relief had an "obvious and severe retroactive effect" on those who entered into plea agreements with the expectation that they would be eligible for relief). More specifically, "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321 (internal quotation marks omitted). Accordingly, applicants who were convicted pursuant to plea agreements before AEDPA and IIRIRA, and who were eligible for former section 212(c) relief at the time of their guilty pleas, remain eligible to apply for relief. *Id.* at 326; *see also* 8 C.F.R. § 1003.44 (setting forth procedure for special motion to seek former section 212(c) relief) and 8 C.F.R. § 1212.3(h) (setting forth continued availability of former section 212(c) relief); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 n.1 (9th Cir. 2002) (stating that repeal of § 212(c) relief did not apply to alien falling under the transitional rules); *cf. Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005) (AEDPA's expanded definition of aggravated felony could be applied retroactively to eliminate section 212(c) relief even though petitioner's offense did not qualify as an aggravated felony at the time he pled guilty because at that time the law had already changed to make all aliens convicted of aggravated felonies ineligible for section 212(c) relief).

b. Inapplicability to Convictions After Trial

Individuals who were convicted after trial are not eligible for former section 212(c) relief. *See Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (holding that because the applicant elected a jury trial, the AEDPA restrictions on former section 212(c) relief did not have an impermissibly retroactive effect; and finding no equal protection violation);

Kelava v. Gonzales, 434 F.3d 1120, 1125 (9th Cir. 2006) (stating that the Supreme Court in *Clark v. Martinez*, 543 U.S. 371 (2005) did not effectively overrule *Armendariz-Montoya*); *see also* 8 C.F.R. § 1212.3(h) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial."); *United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (finding no impermissible retroactive effect where applicant was convicted after a jury trial).

c. Inapplicability to Terrorist Activity

The elimination of section 212(c) relief has no impermissibly retroactive effect where a petitioner engaged in the requisite terrorist activity prior to IIRIRA's enactment and his removability depended on that activity, rather than his conviction. *See Kelava v. Gonzales*, 434 F.3d 1120, 1124–26 (9th Cir. 2006).

G. Expanded Definition of Aggravated Felony

Section 321 of IIRIRA also expanded the list of crimes defined as "aggravated felonies." *See, e.g., United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002) (noting that "IIRIRA expanded the definition of 'aggravated felony' by [inter alia] reducing the prison sentence required to trigger 'aggravated felony' status for burglary from five years to one year."); *see also INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); 8 U.S.C. § 1101(a)(43) (providing definition of aggravated felony); 8 C.F.R. § 1212.3(f)(4) (discussing applicability of aggravated felony exclusion).

Cross-reference: Criminal Issues in Immigration Law, Aggravated Felonies.

H. Retroactive Elimination of § 212(c) Relief

In *United States v. Leon-Paz*, 340 F.3d 1003, 1007 (9th Cir. 2003), this court held that a defendant who pled guilty to burglary in October 1995, before the effective date of AEDPA, was entitled to be considered for former section 212(c) relief because at the time of his plea, he did not have notice

that section 212(c) relief would not be available in the event his conviction was reclassified as an aggravated felony.

In *United States v. Velasco-Medina*, 305 F.3d 839, 850 (9th Cir. 2002), this court held that the elimination of former section 212(c) relief was not impermissibly retroactive where defendant's June 1996 guilty plea for burglary did not make him deportable under the law in effect at the time of the plea, and he had notice that AEDPA had already eliminated relief for aggravated felons. *See also Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053–54 (9th Cir. 2005); *Cordes v. Gonzales*, 421 F.3d 889, 894-95 (9th Cir. 2005) (petitioner could not have had settled expectations as to the continued availability of 212(c) relief at the time she entered her guilty plea for (then) deportable offenses because the passage of section 440(d) of AEDPA predated her conviction) (mandate pending).

In *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1199 (9th Cir. 2002), the court held that the INS policy of allowing excludable aliens, but not deportable aliens, to apply for former section 212(c) relief violated equal protection. *Id.* (affirming a grant of habeas relief to a lawful permanent resident aggravated felon who was precluded from applying for former section 212(c) relief during the time when the BIA allowed excludable aggravated felons to apply for such relief).

In *Cordes*, 421 F.3d at 895–96, the court held that the retroactive application of section 321 of IIRIRA is rationally related to a legitimate government purpose and therefore does not violate due process. However, the court further held in *Cordes* that retroactive application of section 321 of IIRIRA violates equal protection because the current judicially defined limits of the availability of section 212(c) relief post-IIRIRA, as applied by the Bureau of Immigration and Customs Enforcement, create an irrational result that affords discretionary relief from removal to legal permanent residents who have committed worse crimes than similarly situated permanent residents like petitioner. *See Cordes*, 421 F.3d at 896–99 (9th Cir. 2005); *cf. Alvarez-Barajas v. Gonzales*, 418 F.3d at 1054 (denying petition for review challenging the retroactive application of IIRIRA's expanded aggravated felony definition).

VI. Section 212(h) Relief, 8 U.S.C. § 1182(h), Waiver of Inadmissibility

Section 212(h) allows the Attorney General, in his discretion, to waive inadmissibility of an applicant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien. 8 U.S.C. § 1182(h)(1)(B); *see also Yepez-Razo v. Gonzales*, 445 F.3d 1216, 1218 n.3 (9th Cir. 2006) (describing the section 212(h) waiver).

Congress amended section 212(h) in 1996 to indicate that an alien previously admitted for lawful permanent residence is ineligible for a section 212(h) waiver if 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. The period during which an applicant is a Family Unity Program beneficiary counts toward the "lawfully residing continuously" requirement for § 212(h) relief. *Yepez-Razo v. Gonzales*, 445 F.3d at 1219.

This court has held that Congress did not violate equal protection by providing a waiver of inadmissibility to aggravated felons who were not permanent residents while denying the same waiver to aggravated felons who were permanent residents. *Taniguchi v. Schultz*, 303 F.3d 950, 958 (9th Cir. 2002); *see also* 8 U.S.C. § 1182(h) (precluding a waiver of inadmissibility to aggravated felon lawful permanent residents only). The court explained that a rational basis exists for denying a discretionary waiver to aggravated felons who were permanent residents because they enjoyed greater privileges in the United States than aggravated felons who were not permanent residents and posed a potentially higher risk of recidivism than illegal aliens who did not have the benefits that come with permanent resident status." *Taniguchi*, 303 F.3d at 958.

IIRIRA and AEDPA also amended the statute to preclude a section 212(h) waiver to non-permanent resident aliens convicted of aggravated

felonies and who are subject to expedited removal proceedings. *See* 8 U.S.C. § 1228(b) (stating that aliens subject to expedited removal proceedings are ineligible for any discretionary relief from removal). This court has held that the elimination of section 212(h) relief for such aliens is not impermissibly retroactive because there is no indication as a matter of practice that aliens have chosen to forgo their constitutional right to a jury trial in reliance on maintaining their eligibility for such relief. *United States v. Gonzales*, 429 F.3d 1252, 1257 (9th Cir. 2005).

MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

IIRIRA transformed motions to reopen from a regulatory to a statutory form of relief. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005). For individuals in removal proceedings, motions to reopen and to reconsider are governed by 8 U.S.C. § 1229a(c)(6) and (7) (formerly codified at 8 U.S.C. § 1229a(c)(5) and (6)). For deportation cases pending before the April 1, 1997 effective date of IIRIRA, motions to reopen or to reconsider are governed by 8 C.F.R. §§ 1003.2 and 1003.23(b) (formerly codified at 8 C.F.R. §§ 3.2 and 3.23).

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND TO RECONSIDER

A. Motion to Reopen

A motion to reopen is based on factual grounds, and seeks a fresh determination based on newly discovered facts or a change in the applicant's circumstances since the time of the hearing. *See* 8 U.S.C. § 1229a(c)(7)(B) (removal proceedings); 8 C.F.R. § 1003.2(c); *Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1180 (9th Cir. 2001) (en banc); *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005) (providing history of motions to reopen).

A petitioner's assertion of new legal arguments does not constitute new "facts" warranting reopening. *Membreno v. Gonzales*, 425 F.3d 1227, 1229–30 (9th Cir. 2005) (en banc).

A petitioner may also move to reopen for the purpose of submitting a new application for relief, provided such motion is accompanied by the appropriate application for relief and all supporting documentation, and the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. *See* 8 C.F.R. § 1003.2(c)(1). However, a motion to reopen for the purpose of affording the applicant an opportunity to apply for any form of discretionary relief shall not be granted if it appears that the applicant's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore

was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. *Id*.

Motions to reopen are also the appropriate avenue to raise ineffective assistance of counsel claims. *See Iturribarria*, 321 F.3d at 897.

B. Motion to Reconsider

A motion to reconsider is based on legal grounds, and seeks a new determination based on alleged errors of fact or law. *See* 8 U.S.C. § 1229a(c)(6) (removal proceedings); 8 C.F.R. § 1003.2(b)(1); *see also Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004). The motion to reconsider must be accompanied by a statement of reasons and supported by pertinent authority. *See* 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. § 1003.2(b)(1); *see also Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003).

C. Motion to Remand

A motion to reopen or reconsider filed while an immigration judge's deportation or removal decision is before the BIA on direct appeal will be treated as a motion to remand the proceedings to the immigration judge. *See Rodriguez v. INS*, 841 F.2d 865, 867 (9th Cir. 1987); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097 (9th Cir. 2005); 8 C.F.R. § 1003.2(b)(1) and (c)(4). "The formal requirements of the motion to reopen and those of the motion to remand are for all practical purposes the same." *Rodriguez*, 841 F.2d at 867; *cf. Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (per curiam) (motion to remand filed after petitioner's deportation order had become final was properly treated as a motion to reopen); *see also Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004) (holding that the BIA must address and rule on substantive remand motions); *Movsisian*, 395 F.3d at 1097 (holding that the BIA must articulate its reasons for denying a motion to remand).

D. Improperly Styled Motions

Where a petitioner improperly titles a motion to reopen or to

reconsider, the BIA should construe the motion based on its underlying purpose. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) (noting that the BIA properly construed "motion to reconsider" based on ineffective assistance of counsel as a motion to reopen, and that petitioner's subsequent "motion to reopen" should have been construed as a motion to reconsider the BIA's previous decision).

II. JURISDICTION

The denial of a motion to reopen is a final administrative decision generally subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321–22 (9th Cir. 1997) (concluding "that other recent changes to the INA did not alter our traditional understanding that the denial of a motion to reconsider or to reopen generally does fall within our jurisdiction over final orders of deportation"); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (permanent rules); *see also* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order").

Jurisdiction over motions to reopen may be limited where the underlying request for relief is discretionary. "Section 1252(a)(2)(B)(i) permits the exercise of jurisdiction in cases in which the BIA rules that a motion to reopen fails to satisfy procedural standards, such as the evidentiary requirements specified in 8 C.F.R. § 1003.2(c)(1), but bars jurisdiction where the question presented is essentially the same discretionary issue originally decided." *Fernandez v. Gonzales*, 439 F.3d 592, 600 (9th Cir. 2006). Thus, "[i]f . . . the BIA determines that a motion to reopen proceedings in which there has already been an unreviewable discretionary determination concerning a statutory prerequisite to relief does not make out a prima facie case for that relief, § 1252(a)(2)(B)(i) precludes our visiting the merits, just as it would if the BIA had affirmed the IJ on direct appeal." *Id*. at 601.

However, "[w]here the relief sought is formally the same as was previously denied but the evidence submitted with a motion to reopen is directed at a different basis for providing the same relief, the circumstances can take the matter out of the realm of § 1252(a)(2)(B)(i)." *Id*. For example,

the court would have jurisdiction to review the denial of a motion to reopen seeking consideration of non-cumulative evidence, such as a newly-discovered life-threatening medical condition afflicting a qualifying relative. *Id*. at 601–02.

The court also has jurisdiction to review motions to reopen seeking consideration of new requests for discretionary forms of relief. *See de Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004) (holding that court retained jurisdiction to review denial of motion to reopen to apply for adjustment of status); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 527 (9th Cir. 2004) (holding that § 1252(a)(2)(B)(i) did not preclude review of the denial of a motion to reopen to re-apply for adjustment of status where the agency had not previously made a discretionary decision on the adjustment application); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1169–70 (9th Cir. 2003) (holding that § 1252(a)(2)(B)(i) did not bar review of the denial of a motion to reopen to apply for adjustment of status); *Arrozal v. INS*, 159 F.3d 429, 431–32 (9th Cir. 1998) (holding that § 309(c)(4)(E) of the transitional rules did not bar review of the denial of petitioner's motion to reopen to apply for suspension of deportation).

Likewise, the court has jurisdiction to review the denial of motions to reopen in which an independent claim of ineffective assistance of counsel is at issue. *Fernandez*, 439 F.3d at 602. This is true even where the ineffectiveness and prejudice evaluations require an indirect weighing of discretionary factors. *See id*.; *see also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002) (holding that court retained jurisdiction to review denial of motion to reopen arguing ineffective assistance of counsel in a suspension of deportation case).

The court lacks jurisdiction to review the BIA's decision not to invoke its sua sponte authority to reopen proceedings under 8 C.F.R. § 1003.2(a). *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

Cross-Reference: Jurisdiction over Immigration Petitions, Jurisdiction over Motions to Reopen

A. Finality of the Underlying Order

The filing of a motion to reopen does not disturb the finality of the underlying deportation or removal order. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995). However, if the BIA grants a motion to reopen, "there is no longer a final decision to review," and the petition should be dismissed for lack of jurisdiction. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (order); *see also Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (order) (advising parties to notify the court when the BIA grants a motion to reopen while a petition for review is pending).

This court may review the denial of a motion to reopen even if a motion to reconsider is pending before the BIA. *Singh v. INS*, 213 F.3d 1050, 1052 n.2 (9th Cir. 2000).

B. Filing Motion to Reopen or Reconsider Not a Jurisdictional Prerequisite to Filing a Petition for Review

The filing of a motion to reopen or reconsider with the BIA is not a jurisdictional prerequisite to filing a petition for review with the court of appeals. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1023–24 (9th Cir. 1992); *see also Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) (motions to reopen and reconsider are not remedies available as of right and not required for exhaustion).

C. No Tolling of the Time Period to File Petition for Review

The time period for filing a petition for review with the court of appeals is not tolled by the filing of a motion to reopen. *See Stone v. INS*, 514 U.S. 386, 405–06 (1995); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996).

D. No Automatic Stay of Deportation or Removal

The filing of a motion to reopen or reconsider does not automatically result in a stay of deportation or removal. *See* 8 C.F.R. § 1003.2(f); *Baria v. Reno*, 180 F.3d 1111, 1113 (9th Cir. 1999).

1. Exception for In Absentia Removal or Deportation

The filing of a motion to reopen an in absentia order of deportation or removal stays deportation. *See* 8 C.F.R. § 1003.2(f).

E. Consolidation

Judicial review of a motion to reopen or reconsider must be consolidated with the review of the final order of removal. *See* 8 U.S.C. § 1252(b)(6).

F. Departure from the United States

Departure from the United States generally ends the right to make a motion to reopen or reconsider. *See* 8 C.F.R. §§ 1003.2(d) (BIA) and 1003.23(b)(1) (IJ); *cf. Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005) (holding that § 1003.2(d) applies only to persons who depart the U.S. after removal proceedings have already commenced against them). However, a motion to reopen may be made on the basis that the departure was not legally executed. *See Wiedersperg v. INS*, 896 F.2d 1179, 1181–82 (9th Cir. 1990) (holding that petitioner was entitled to reopen his deportation proceedings where his state conviction, which was the sole ground of deportation, was vacated); *Estrada-Rosales v. INS*, 645 F.2d 819, 820–21 (9th Cir. 1981); *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977). The court's holdings in *Wiedersperg* and *Estrada-Rosales* are not limited to cases in which a vacated state court conviction was the sole ground of deportability; rather, reopening is permitted where the conviction was a "key part" of the deportation or removal proceeding. *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006).

Cross-reference: Jurisdiction over Immigration Petitions in the Ninth Circuit, Departure from the United States, Review of Motions to Reopen.

III. STANDARD OF REVIEW

A. Generally

The court reviews denials of motions to reopen, remand or reconsider

for abuse of discretion. *See Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004) (reopen and reconsider), *amended by* 404 F.3d 1105 (9th Cir. 2005); *Castillo-Perez v. Gonzales*, 212 F.3d 518, 523 (9th Cir. 2000) (remand). The abuse of discretion standard applies regardless of the underlying relief requested. *See INS v. Doherty*, 502 U.S. 314, 323 (1992). "[M]otions to reopen are disfavored in deportation proceedings." *INS v. Abudu*, 485 U.S. 94, 107, 110 (1988) (noting, among other things, "the tenor of the Attorney General's regulations, which plainly disfavor motions to reopen"). However, this court will reverse the denial of a motion to reopen if it is "arbitrary, irrational, or contrary to law." *Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir. 2002) (internal quotation marks omitted).

The BIA's determination of purely legal questions is reviewed de novo. *See Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000); *see also Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005). Factual findings are reviewed for substantial evidence. *See Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996).

Cross-reference: Jurisdiction over Immigration Petitions, Standards of Review; Ninth Circuit Standards of Review Outline.

B. Full Consideration of All Factors

The BIA must show proper consideration of all factors, both favorable and unfavorable. *See Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (holding that the BIA abused its discretion in denying motion to reopen based solely on failure to post voluntary departure bond without consideration of favorable factors); *Bhasin v. Gonzales*, 423 F.3d 977, 986–87 (9th Cir. 2005) (holding that the BIA abused its discretion by improperly discrediting petitioner's affidavit as "self-serving" and failing to properly consider the factors relevant to eligibility for relief); *Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) (holding that BIA abused its discretion by denying motion to reopen in an incomplete and nonsensical opinion, and in failing to consider all attached evidence); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of BIA's unexplained failure to address petitioner's ineffective assistance of counsel claim); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097–99 (9th Cir. 2005) (remanding where BIA failed to articulate its reasons for denying motion to

reopen); *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (remanding where BIA did not consider any of the factors weighing in petitioner's favor); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (remanding motion to reopen where BIA did not engage in substantive analysis or articulate any reasons for its decision); *Arrozal v. INS*, 159 F.3d 429, 433 (9th Cir. 1998); *Watkins v. INS*, 63 F.3d 844, 848 (9th Cir. 1995).

1. Later-Acquired Equities

It is unclear whether equities acquired after a final order of deportation or removal must be given less weight than those acquired before the applicant was found to be deportable. *Compare Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995) ("The government rightly points out that equities flowing from [petitioner's] marriage should be given little weight because it took place . . . three months after the BIA's summary dismissal/final deportation order.") *with Vasquez v. INS*, 767 F.2d 598, 602 (9th Cir. 1985) (affirming denial of motion to reopen because petitioner's intra-proceedings marriage did not outweigh his violations of immigration law), *with Israel v. INS*, 785 F.2d 738, 741 (9th Cir. 1986) (concluding that the BIA's denial of a motion to reopen to adjust status based on a "last-minute marriage" was arbitrary); *see also Malhi v. INS*, 336 F.3d 989, 994 (9th Cir. 2003) (discussing regulatory presumption of fraud for intra-proceedings marriages and requirements of bona fide marriage exemption).

C. Explanation of Reasons

"We have long held that the BIA abuses its discretion when it fails to provide a reasoned explanation for its actions." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (granting petition where BIA summarily denied motion to reopen and remand without explanation). "[W]here the BIA entertains a motion to reopen in the first instance, and then fails to provide specific and cogent reasons for its decision, we are left without a reasoned decision to review." *Id.* (rejecting government's contention that BIA's summary denial of a motion to reopen and remand was consistent with its streamlining procedures).

See also Franco-Rosendo v. Gonzales, 454 F.3d 965, 967–68 (9th Cir. 2006); *Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) ("[T]he

BIA must issue a decision that fully explains the reasons for denying a motion to reopen."); *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004) (holding that "the BIA must address and rule upon remand motions, giving specific, cogent reasons for a grant or denial"); *Arrozal v. INS*, 159 F.3d 429, 433 (9th Cir. 1998) ("[T]he BIA must indicate how it weighed [the favorable and unfavorable] factors and indicate with specificity that it heard and considered petitioner's claims.").

D. Irrelevant Factors

The BIA may not rely on irrelevant factors. *See, e.g.*, *Virk v. INS*, 295 F.3d 1055, 1060–61 (9th Cir. 2002) (holding that BIA improperly considered the impact of an unrelated section of the INA and petitioner's wife's pre-naturalization misconduct); *Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986) (holding that BIA improperly relied on misconduct of petitioner's father).

E. Credibility Determinations

The BIA should not make credibility determinations on motions to reopen. *See Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986) ("As motions to reopen are decided without a factual hearing, the Board is unable to make credibility determinations at this stage of the proceedings."). Facts presented in supporting affidavits must be accepted as true unless inherently unbelievable. *See Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *see also Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003) ("The BIA violates an alien's due process rights when it makes a sua sponte adverse credibility determination without giving the alien an opportunity to explain alleged inconsistencies."); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 897 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003) (holding that where BIA cites no evidence to support a finding that petitioner's version of the facts is incredible, and none is apparent from the court's review of the record, petitioner's allegations will be credited).

IV. REQUIREMENTS FOR A MOTION TO REOPEN

A. Supporting Documentation

A motion to reopen must be supported by affidavits, the new evidentiary material sought to be introduced, and, if necessary, a completed application for relief. *See* 8 U.S.C. § 1229a(c)(7)(B) (removal proceedings); 8 C.F.R. § 1003.2(c)(1) (pre-IIRIRA proceedings); *see also INS v. Wang*, 450 U.S. 139, 143 (1981) (per curiam) (upholding BIA's denial of motion to reopen to apply for suspension of deportation because "the allegations of hardship were in the main conclusory and unsupported by affidavit"); *Patel v. INS*, 741 F.2d 1134, 1137 (9th Cir. 1984) ("[I]n the context of a motion to reopen, the BIA is not required to consider allegations unsupported by affidavits or other evidentiary material."). "Although the statute and regulation refer to 'affidavits,' we have treated affidavits and declarations interchangeably for purposes of motions to reopen." *Malty v. Ashcroft*, 381 F.3d 942, 947 n.2 (9th Cir. 2004).

1. Exception

The petitioner's failure to submit supporting documentation does not bar reopening where the government either joins in the motion to reopen, or does not affirmatively oppose it. *See Konstantinova v. INS*, 195 F.3d 528, 530–31 (9th Cir. 1999) (noting that BIA retains the ability to waive procedural errors); *Guzman v. INS*, 318 F.3d 911, 914 n.3 (9th Cir. 2003) (per curiam); *see also Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 873 (9th Cir. 2003) (en banc) (assuming that where BIA does not express concerns about form, relevancy or admissibility of new evidence, "that any purported failure to comply with procedural requirements was not the stated reason for the BIA's" decision).

The supporting documentation need not be submitted concurrently with the motion so long as it is submitted within the 90-day time limitation on motions to reopen. *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 998–99 (9th Cir. 2006) (holding that BIA abused its discretion and violated due process in dismissing motion before expiration of the limitation period based on petitioner's failure to file supporting brief).

B. Previously Unavailable Evidence

The moving party must show that the previously unavailable material evidence could not have been discovered or presented at the former hearing.

See INS v. Doherty, 502 U.S. 314, 324 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding based on lack of new material evidence); *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (explaining that the statute and 8 C.F.R. § 1003.2(c)(1) require that the evidence must not have been available to be presented at the former hearing before the IJ); *Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen because "new" information was available and capable of discovery prior to deportation hearing); *Bolshakov v. INS*, 133 F.3d 1279, 1282 (9th Cir. 1998) (finding no evidence of new circumstances to support asylum application); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (holding that BIA erred in affirming the IJ's decision granting the government's motion to reopen based on a foreign birth certificate that could have been discovered and presented at prior hearing).

C. Explanation for Failure to Apply for Discretionary Relief

If the motion to reopen is made for the purpose of obtaining discretionary relief, the moving party must establish that he or she was denied the opportunity to apply for such relief, or that such relief was not available at the time of the original hearing. *See INS v. Doherty*, 502 U.S. 314, 327 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding because the applicant did "not reasonably explain[] his failure to pursue his asylum claim at the first hearing"); *INS v. Abudu*, 485 U.S. 94, 111 (1988) (affirming BIA's denial of motion to reopen to apply for asylum where applicant failed to explain why the asylum application was not submitted earlier); *Lainez-Ortiz v. INS*, 96 F.3d 393, 396 (9th Cir. 1996).

D. Prima Facie Eligibility for Relief

The applicant must also show prima facie eligibility for the underlying substantive relief requested. *See INS v. Wang*, 450 U.S. 139, 145 (1981) (per curiam); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 869 (9th Cir. 2003) (concluding that request to reinstate asylum application is analogous to motion to reopen); *Dielmann v. INS*, 34 F.3d 851, 853 (9th Cir. 1994); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *Aviles-Torres v. INS*, 790 F.2d 1433, 1435–36 (9th Cir. 1986).

A *prima facie* case is established where the evidence reveals a reasonable likelihood the statutory requirements for relief have been satisfied. *See Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003); *see also Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985).

E. Discretionary Denial

Where ultimate relief is discretionary, such as asylum, the BIA may leap over the threshold concerns, and determine that the moving party would not be entitled to the discretionary grant of relief. *See, e.g.*, *INS v. Abudu*, 485 U.S. 94, 105–06 (1988); *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997); *Vasquez v. INS*, 767 F.2d 598, 600 (9th Cir. 1985); *see also* 8 C.F.R. § 1003.2(a) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.")

However, "the BIA must consider and weigh the favorable and unfavorable factors in determining whether to deny a motion to reopen proceedings on discretionary grounds." *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (remanding where BIA did not consider any of the factors weighing in petitioner's favor); *see also Franco-Rosendo v. Gonzales*, 454 F.3d 965, 968 (9th Cir. 2006); *Arrozal v. INS*, 159 F.3d 429, 433–34 (9th Cir. 1998).

F. Failure to Depart Voluntarily

For permanent rules cases, the filing of a timely motion to reopen or reconsider automatically tolls the voluntary departure period, regardless of whether the motion is accompanied by a motion to stay the voluntary departure period. *Barroso v. Gonzales*, 429 F.3d 1195, 1204–05, 1207 (9th Cir. 2005); *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (rejecting the court's prior analysis in *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998), and holding that petitioner's voluntary departure period is tolled while the BIA considers a timely-filed motion to reopen accompanied by a motion to stay removal); *cf. Medina-Morales v. Ashcroft*, 371 F.3d 520, 529–531 & n.9 (9th Cir. 2004) (holding, in permanent rules case, that where a petitioner bargains for voluntary departure in lieu of full adjudication under 8 U.S.C. § 1229c(a)(1), the BIA may weigh petitioner's voluntary

departure agreement against the grant of a motion to reopen).

If the petitioner files a motion to reopen after the expiration of the voluntary departure period, the BIA may deny the motion to reopen based on petitioner's failure to depart. *See de Martinez v. Ashcroft*, 374 F.3d 759, 763–64 (9th Cir. 2004) (denying petition for review in permanent rules case where petitioner moved to reopen to apply for adjustment of status 30 days after the expiration of her voluntary departure period); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1174 (9th Cir. 2003). The disparate treatment of aliens permitted to depart voluntarily and those not eligible for voluntary departure with respect to the amount of time in which they may file a motion to reopen does not violate equal protection. *Granados-Oseguera v. Gonzales*, 464 F.3d 993, 994 (9th Cir. 2006) (applying *de Martinez*).

Under the transitional rules, the BIA may deny a motion to reopen to apply for relief where the petitioners failed to depart during the voluntary departure period. *See Shaar v. INS*, 141 F.3d 953, 959 (9th Cir. 1998); *cf. Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (holding in transitional rules case that BIA erred in denying motion to reopen to apply for suspension of deportation where IJ failed to give adequate oral warning under the former statute of the consequences of failing to depart voluntarily).

The BIA may not deny reopening as a matter of discretion based solely on the failure to post a voluntary departure bond or to depart voluntarily without also considering the favorable factors in support of reopening. *See Franco-Rosendo v. Gonzales*, 454 F.3d 965, 968 (9th Cir. 2006) (remanding for consideration of positive factors in favor of reopening where BIA denied reopening based solely on petitioner's failure to post a voluntary departure bond and/or depart voluntarily).

Cross-reference: Cancellation of Removal, Ten-Year Bars to Cancellation, Failure to Depart.

G. Appeal of Deportation Order

"The BIA cannot deny a motion to reopen merely because an alien appeals a deportation order." *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531 n.10 (9th Cir. 2004) (citing *Watkins v. INS*, 63 F.3d 844, 851 (9th Cir.

1995)).

H. Fugitive Disentitlement Doctrine

Individuals who disregard the order of deportation against them by refusing to report on their appointed date of departure may have their motion to reopen denied as a matter of discretion. *Antonio-Martinez v. INS*, 317 F.3d 1089, 1091 (9th Cir. 2003) (applying the fugitive disentitlement doctrine where petitioner had lost contact with his attorney and the agency and all efforts to contact him failed for over two years); *cf. Bhasin v. Gonzales*, 423 F.3d 977, 988–89 (9th Cir. 2005) (declining to uphold BIA's reliance on fugitive disentitlement doctrine in denying petitioner's motion to reopen because petitioner failed to receive critical agency documents).

V. TIME AND NUMERICAL LIMITATIONS

A. Generally

1. Time Limitations

Generally, a motion to reopen must be filed within ninety days after a final administrative order of removal is rendered. *See* 8 U.S.C. § 1229a(c)(7)(C)(i) (removal proceedings); 8 C.F.R. § 1003.2(c)(2) (pre-IIRIRA proceedings); *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005) (discussing first imposition of time limitation on motions to reopen in 1990).

A motion to reconsider must be filed within thirty days after the date of entry of the final administrative decision. *See* 8 U.S.C. § 1229a(c)(6)(B) (removal proceedings); 8 C.F.R. § 1003.2(b)(2) (pre-IIRIRA proceedings).

The limitation period begins to run when the agency sends its decision to the correct address. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1258–59

(9th Cir. 1996).

2. Numerical Limitations

A party may make one motion to reopen and one motion to reconsider. *See* 8 U.S.C. § 1229a(c)(7)(A) and (c)(6)(A) (removal proceedings); 8 C.F.R. § 1003.2(b)(2) and (c)(2). The single-motion limitation on motions to reopen does not apply to motions to reopen and rescind in absentia orders of deportation. *See Fajardo v. INS*, 300 F.3d 1018, 1020 (9th Cir. 2002) (noting for in absentia cases that the limitation applies only to removal cases under IIRIRA's permanent rules).

B. Exceptions to the Ninety-Day/One-Motion Rule

1. In Absentia Orders

a. Exceptional Circumstances

If an applicant who is ordered deported or removed in absentia can show that she failed to appear for the hearing due to "exceptional circumstances," the applicant has 180 days to file a motion to reopen to rescind the in absentia order. *See* 8 U.S.C. § 1229a(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(1); *see also Lo v. Ashcroft*, 341 F.3d 934, 936 (9th Cir. 2003).

"The term 'exceptional circumstances' refers to exceptional circumstances (such as serious illness of the alien or 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." 8 U.S.C. § 1229a(e)(1); *see also Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004). "This court must look to the particularized facts presented in each case in determining whether the petitioner has established exceptional circumstances." *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) (internal quotation marks omitted); *see also* 8 U.S.C. § 1252b(f)(2) (pre-IIRIRA provision, repealed 1996).

(i) Evidentiary Requirements

The BIA may not impose new proof requirements without notice. *See*

Singh v. INS, 213 F.3d 1050, 1053–54 (9th Cir. 2000) (holding that BIA violated due process where it newly required an applicant to produce an affidavit from his employer or doctor, and to contact the immigration court); *cf. Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891 (9th Cir. 2002) (holding that petitioner had notice of BIA's evidentiary requirements).

(ii) Cases Finding Exceptional Circumstances

Chete Juarez v. Ashcroft, 376 F.3d 944, 948 (9th Cir. 2004) (holding that petitioner established exceptional circumstances because she appeared at all scheduled hearings but the last, of which she had no actual notice; she had prevailed on appeal before the BIA; and she had no reason to delay or evade the hearing); *Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004) (stating that ineffective assistance of counsel qualifies as an exceptional circumstance, but denying relief because petitioner failed to comply with the procedural prerequisites of *Matter of Lozada*); *Lo v. Ashcroft*, 341 F.3d 934, 939 (9th Cir. 2003) (holding that ineffective assistance of counsel constituted an exceptional circumstance); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 894–95, 898 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003) (counsel's wife's advice to leave and reenter the United States the day before the hearing, in order to prove that petitioner's visa was valid, constituted IAC and exceptional circumstances); *Fajardo v. INS*, 300 F.3d 1018, 1022 n.8 (9th Cir. 2002) (suggesting to BIA on remand that "it [would be] difficult to imagine" how the paralegal's failure to inform the petitioner "of her need to appear at her deportation hearing would not constitute an exceptional circumstance"); *Singh v. INS*, 295 F.3d 1037, 1039–40 (9th Cir. 2002) (holding that petitioner established exceptional circumstances where he arrived late to his hearing based on a misunderstanding, and had "no possible reason to try to delay the hearing" because he was eligible for adjustment of status); *Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999) (concluding that where applicant was 20 minutes late, and the IJ was still on the bench, an in absentia order was too "harsh and unrealistic"); *see also Romani v. INS*, 146 F.3d 737, 739 (9th Cir. 1998) (holding that where applicants were in the courthouse but did not enter the courtroom due to incorrect advice by lawyer's assistant, they did not fail to appear for their hearing, and reopening was warranted).

(iii) Cases Finding No Exceptional

Circumstances

Valencia-Fragoso v. INS, 321 F.3d 1204, 1205 (9th Cir. 2003) (per curiam) (holding that applicant who was 4 1/2 hours late due to a misunderstanding of the time of the hearing, and made no showing that she arrived while the IJ was still hearing cases, did not establish exceptional circumstances, especially where only possible relief was discretionary grant of voluntary departure); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891–92 (9th Cir. 2002) (severe asthma attack not exceptional); *Singh-Bhathal v. INS*, 170 F.3d 943, 946–47 (9th Cir. 1999) (holding that erroneous advice of immigration consultant not to appear at hearing did not constitute exceptional circumstances); *Shaar v. INS*, 141 F.3d 953, 958 (9th Cir. 1998) (holding under the old statute that the mere filing of a motion to reopen did not constitute exceptional circumstances excusing petitioners' failure to depart voluntarily by the deadline); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding that petitioner's failure personally to receive the notice of hearing, which was mailed to his last known address, where receipt was acknowledged, was not an exceptional circumstance); *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996) (traffic congestion and parking difficulties not exceptional); *see also Hernandez-Vivas v. INS*, 23 F.3d 1557, 1559–60 (9th Cir. 1994) (holding under the previous standard of reasonable cause that the mere filing of a motion for a change of venue did not excuse the failure to appear).

b. Improper Notice of Hearing

A motion to reopen to rescind an in absentia order of removal may be filed at any time if the applicant demonstrates improper notice of the hearing. *See* 8 U.S.C. § 1229a(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2). "Neither the statute nor the BIA's interpretation of the statute–or any court of appeals opinion–limits this 'any time' language by prescribing a cut-off period after an alien learns of the deportation order." *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam) (interpreting pre-IIRIRA notice provision in 8 U.S.C. § 1252b(c)(3)(B) (repealed 1996)).

Due process requires notice of an immigration hearing that is reasonably calculated to reach the interested parties. *See Khan v. Ashcroft*,

374 F.3d 825, 828 (9th Cir. 2004); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997). If petitioners do not receive actual or constructive notice of deportation proceedings, "it would be a violation of their rights under the Fifth Amendment of the Constitution to deport them in absentia." *Andia*, 359 F.3d at 1185.

A petitioner "does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." *Farhoud*, 122 F.3d at 796 (holding that notice was sufficient where mailed to applicant's last address, where receipt was acknowledged); *see also Dobrota v. INS*, 311 F.3d 1206, 1211 (9th Cir. 2002). "Actual notice is, however, sufficient to meet due process requirements." *Khan*, 374 F.3d at 828 (holding that a second notice in English was sufficient to advise petitioner of the pendency of the action when petitioner had appeared in response to an earlier notice in English).

(i) Proper Notice Requirements

(A) Presumption of Proper Notice

The INS will benefit from a presumption of effective delivery if the notice of hearing was properly addressed; had sufficient postage; and was properly deposited in the mails. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003). However, "[a] notice which fails to include a proper zip code is not properly addressed." *Id.* "Notice mailed to an address different from the one [the applicant] provided could not have conceivably been reasonably calculated to reach him." *Singh v. INS*, 362 F.3d 1164, 1169 (9th Cir. 2004).

The applicant is responsible for informing the immigration agency of his current address. *See* 8 U.S.C. § 1305(a); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *cf. Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005) (explaining that § 1305(a) applies only so long as the applicant is within the United States and where he or she receives written notice of the address notification requirement); *Lahmidi v. INS*, 149 F.3d 1011, 1017 (9th Cir. 1998) (holding, under the pre-1996 statutory provision, that applicant who was not informed of the change-of-address requirement established reasonable cause for failure to appear at the hearing); *Urbina-Osejo v. INS*,

124 F.3d 1314, 1317 (9th Cir. 1997) (remanded for further findings).

Where an applicant seeks to reopen proceedings on the basis of nondelivery or improper delivery of the notice, the IJ and BIA must consider the evidence submitted by the applicant. *See Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (per curiam).

(B) Pre-IIRIRA Proceedings

Before passage of IIRIRA, service of Orders to Show Cause and written notice of deportation hearings was governed by INA § 242B, 8 U.S.C. §§ 1252b(a)(1) and (a)(2) (repealed 1996).

Service of the Order to Show Cause was required to be given in person to the respondent or, if personal service was not practicable, by certified mail to the respondent or his counsel of record, with the requirement that the certified mail receipt be signed by the respondent or a responsible person at the respondent's address. *Matter of Grijalva*, 21 I. & N. Dec. 27, 32 (BIA 1995) (en banc). The pre-IIRIRA notice provision required that the Order to Show Cause be written in English and Spanish. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 (9th Cir. 2004); 8 U.S.C. § 1252b(a) (repealed 1996).

Unlike service of the Order to Show Cause, written notice of the time and place of the deportation hearing sent by certified mail to the respondent at the last address provided to the agency can be sufficient to establish proper service by "clear, unequivocal, and convincing" evidence, regardless of whether there is proof of actual service or receipt of the notice by respondent. *See* 8 U.S.C. § 1252b(c)(1) (repealed) (stating that written notice shall be considered sufficient if provided at the most recent address provided by respondent); *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) (per curiam); *see also Matter of Grijalva*, 21 I. & N. Dec. at 33–34.

Adopting the BIA's standard in *Matter of Grijalva*, this court has held that written notice of a deportation hearing sent by certified mail through the United States Postal Service with proof of attempted delivery creates a "strong presumption of effective service." *Arrieta*, 117 F.3d at 431; *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003); *see also*

Matter of Grijalva, 21 I. & N. Dec. at 37. However, this presumption of service may be overcome if the applicant presents "substantial and probative evidence," such as documentary evidence from the Postal Service, or personal or third-party affidavits, that her mailing address has remained unchanged, that neither she nor a responsible party working or residing at the address refused service, and that there was nondelivery or improper delivery by the Postal Service. *Arrieta*, 117 F.3d at 431. This court has not addressed whether the presumption of delivery is rebutted where the INS lacks the certified return receipt. *Busquets-Ivars*, 333 F.3d at 1009 (expressing "no opinion whether the record, lacking the return receipt, deprives the INS of the presumption that notice was effective"); *cf. Singh v. Gonzales*, 412 F.3d 1117, 1119 n.1 (9th Cir. 2005) (noting that the government did not submit into evidence the certified mail return receipt).

(C) Removal Proceedings

Proper notice procedures for removal proceedings are set forth in 8 U.S.C. § 1229(a)(1) and (2). The statute provides that "written notice (in this section 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 to the alien's counsel of record, if any)." *Id.*; *see also Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004). "In addition, the notice must include seven specified elements, including, *inter alia*, the nature of the proceedings, the conduct that is alleged to be in violation of the law, and the date and time of the proceedings." *Khan*, 374 F.3d at 828. Neither the statute nor the regulations require notices to be provided in any language other than English. *See id.* (distinguishing translation requirement for expedited removal proceedings); *see also Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 n.4 (9th Cir. 2004) (discussing Congressional intent to vest discretion for translation in the agency).

"[D]elivery by regular mail does not raise the same 'strong presumption' as certified mail, and less should be required to rebut such a presumption." *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (holding, under the new statutory provision in 8 U.S.C. § 1229(a)(1), which does not require service by certified mail, that the BIA erred by applying the strong presumption of delivery accorded to certified mail under the former statutory provision). An applicant's sworn affidavit 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 applicant] to an evidentiary hearing." *Id*. (noting that the applicant initiated the proceedings to obtain a benefit, appeared at an earlier hearing, and had no motive to avoid the hearing).

(D) Notice to Counsel Sufficient

Notice to counsel is sufficient to establish notice to the applicant. *See Garcia v. INS*, 222 F.3d 1208, 1209 (9th Cir. 2000) (per curiam) (rejecting claim of inadequate notice where the government personally served written notice of the hearing on petitioner's counsel; noting that petitioner did not raise an ineffective assistance of counsel claim). Where the government fails to send notice to counsel of record, notice is insufficient. *See Dobrota v. INS*, 311 F.3d 1206 (9th Cir. 2002).

(E) Notice to Juvenile Insufficient

If a juvenile under 18 years old is released from INS custody to a responsible adult, proper written notice must be served on the juvenile and on the adult who took custody of him. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004).

(F) Notice to Applicant No Longer Residing in the United States

A notice to appear mailed to an applicant's former address after he has already departed the United States may not be sufficient to establish proper notice. *See Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005) (holding that BIA abused its discretion in denying a motion to reopen where applicant submitted evidence demonstrating that the agency mailed notice to his former address after he had departed the United States).

2. Asylum and Withholding Claims

A motion to reopen to apply or reapply for asylum or withholding of removal based on changed country conditions that could not have been discovered or presented at the prior hearing, may be filed at any time. *See* 8

U.S.C. § 1229a(c)(7)(C)(ii) (removal proceedings); 8 C.F.R. § 1003.2(c)(3)(ii) (pre-IIRIRA proceedings); *see also Malty v. Ashcroft*, 381 F.3d 942, 945–46 (9th Cir. 2004) (holding that BIA abused its discretion in denying as untimely and numerically barred a motion to reopen based on changed circumstances in Egypt); *Azanor v. Ashcroft*, 364 F.3d 1013, 1021–22 (9th Cir. 2004).

"A petitioner's evidence regarding changed circumstances will almost always relate to his initial claim; nothing in the statute or regulations requires otherwise. The critical question is not whether the allegations bear some connection to a prior application, but rather whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution." *Malty*, 381 F.3d at 945.

The exception for changed country conditions does not apply to changes in United States asylum law. *See Azanor*, 364 F.3d at 1022 (rejecting claim that recognition of female genital mutilation as a ground for asylum constituted changed country conditions within the meaning of former 8 C.F.R. § 3.2(c)(3)(ii)).

3. Jointly-Filed Motions

An exception to the number and time restrictions exists if the motion to reopen is agreed upon by all parties and jointly filed. *See* 8 C.F.R. § 1003.2(c)(3)(iii); *Bolshakov v. INS*, 133 F.3d 1279, 1281–82 (9th Cir. 1998) (rejecting government's contention that the "exception in section 3.2(c)(3)(iii) is an administrative remedy that must be exhausted before an alien can petition the Court of Appeals").

4. Government Motions Based on Fraud

The government may, at any time, bring a motion based on fraud in the original proceeding or a crime that would support termination of asylum. *See* 8 C.F.R. § 1003.2(c)(3)(iv).

5. Movant in Custody

A motion to reopen to rescind an in absentia order of removal may be filed at any time if the applicant demonstrates that he failed to appear at the hearing because he was in state or federal custody. *See* 8 C.F.R. § 1003.2(c)(3) (referring to 8 C.F.R. §§ 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2)).

6. Sua Sponte Reopening by the BIA

The BIA may at any time reopen proceedings sua sponte. *See* 8 C.F.R. § 1003.2(a). However, this court lacks jurisdiction to review a claim that the BIA should have exercised its sua sponte power to reopen deportation proceedings. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002).

VI. EQUITABLE TOLLING

The ninety-day/one-motion limitations are not jurisdictional, and are amenable to equitable tolling. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1188 (9th Cir. 2001) (en banc). Equitable tolling is available "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).

A. Circumstances Beyond the Applicant's Control

In *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc), the court held that equitable tolling is available "in situations where, despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim," *id.* at 1193 (internal quotation marks omitted) (applying equitable tolling where INS officer repeatedly provided erroneous information to the applicant). "The inability to obtain vital information bearing on the existence of a claim need not be caused by the wrongful conduct of a third party. Rather, the party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control." *Id.*

See also Mendez-Alcaraz v. Gonzales, 464 F.3d 842, 845 (9th Cir. 2006) (holding that the IJ's erroneous statement that petitioner's conviction

qualified as an aggravated felony and petitioner's unawareness of subsequent caselaw to the contrary did not warrant equitable tolling). *Compare United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006) (reasoning in a collateral attack on an underlying removal order that IJ's erroneous, but qualified, advice about whether conviction constituted an aggravated felony invalidated prior deportation order).

B. Fraudulent or Erroneous Attorney Conduct

This court recognizes equitable tolling in cases involving ineffective assistance by an attorney or representative, coupled with fraudulent, or erroneous conduct. *See, e.g.*, *Iturribarria v. INS*, 321 F.3d 889, 897–98 (9th Cir. 2003). "Where the ineffective performance was that of an actual attorney and the attorney engaged in fraudulent activity causing an essential action in her client's case to be undertaken ineffectively, out of time, or not at all, equitable tolling is available." *Id.* at 898; *see also Ray v. Gonzales*, 439 F.3d 582, 588 n.5 (9th Cir. 2006); *Singh v. Ashcroft*, 367 F.3d 1182, 1185–86 (9th Cir. 2004); *Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002); *Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999); *cf. Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (stating that "[i]neffective assistance of counsel amounting to a due process violation permits untimely reopening").

"It is well established in this circuit that ineffective assistance of counsel, where a nonattorney engaged in fraudulent activity causes an essential action in his or her client's case to be undertaken ineffectively, may equitably toll the statute of limitations." *Fajardo*, 300 F.3d at 1020; *see also Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093 (9th Cir. 2005) (holding that fraudulent conduct by a non-attorney warranted equitable tolling of the deadline to file a motion to reopen under NACARA); *Rodriguez-Lariz*, 282 F.3d at 1224; *Socop-Gonzalez v. INS*, 272 F.3d 1179, 1187–88, 1193–96 (9th Cir. 2001).

C. Due Diligence

The filing deadline may be tolled until the petitioner, exercising due

diligence, discovers the fraud, deception, or error. In cases involving ineffective assistance, this court has found that the limitation period may be tolled until the petitioner meets with new counsel to discuss his file, thereby becoming aware of the harm resulting from the misconduct of his prior representatives. *See Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003). *See also Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099–1100 (9th Cir. 2005) (holding that petitioner acted with due diligence in making a FOIA request for court case file after discovering former counsel's deception); *Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002).

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Presented Through a Motion to Reopen

"Where the facts surrounding allegedly ineffective representation by counsel were unavailable to the petitioner at an earlier stage of the administrative process, motions before the BIA based on claims of ineffective assistance of counsel are properly deemed motions to reopen." *Iturribarria v. INS*, 321 F.3d 889, 891 (9th Cir. 2003) (holding that "the BIA misapplied its own regulations when it classified [petitioner's] motion alleging ineffective assistance of counsel as a motion to reconsider rather than a motion to reopen"); *see also Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005); *Siong v. INS*, 376 F.3d 1030, 1036 (9th Cir. 2004); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004).

B. Failure to Exhaust IAC Claim

The court has jurisdiction to consider an ineffective assistance of counsel claim raised for the first time in a petition for review "[i]n the limited situation where an alien is represented by the same allegedly incompetent counsel throughout agency proceedings including through the filing of his motion to reopen proceedings before the BIA and therefore cannot administratively exhaust a claim for ineffective assistance of counsel." *Granados-Oseguera v. Gonzales*, 464 F.3d 993, 994 (9th Cir. 2006).

C. Standard of Review

The court reviews findings of fact regarding counsel's performance for substantial evidence. *Lin v. Ashcroft*, 377 F.3d 1014, 1024 (9th Cir. 2004).

C. Requirements for Due Process Violation

1. Constitutional Basis

Although individuals in immigration proceedings do not enjoy the Sixth Amendment's guarantee of an attorney's assistance at government expense, they do have the right to obtain counsel of their own choice. *Ray v. Gonzales*, 439 F.3d 582, 586–87 (9th Cir. 2006). "[T]he extent to which aliens are entitled to effective assistance of counsel during [immigration] proceedings is governed by the Fifth Amendment due process right to a fair hearing." *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), *amended by* 404 F.3d 1105 (9th Cir. 2005) (emphasis omitted). The Sixth Amendment "reasonableness" standard for ineffective assistance of counsel in criminal proceedings "does not attach to civil immigration matters." *Id.* at 974.

"Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (internal quotation marks omitted); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 857–58 (9th Cir. 2004) (per curiam).

2. Counsel's Competence

To prevail on an ineffective assistance of counsel claim, the petitioner must make two showings. First, petitioner must demonstrate that counsel failed to perform with sufficient competence. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). "We do not require that [petitioner's] representation be brilliant, but it cannot serve to make [the] immigration hearing so fundamentally unfair that [petitioner] was prevented from reasonably presenting his case." *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th

Cir. 2004) (internal quotation marks omitted) (holding that counsel's failure to: investigate and present the factual and legal basis of Lin's asylum claim; attend the hearing in person; advocate on his behalf at the hearing; and file brief on appeal, constituted ineffective assistance of counsel).

Cross-reference: Cases Finding Ineffective Assistance, below.

3. Prejudice

Second, petitioner must generally show that she was prejudiced by her counsel's performance. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). A showing of prejudice can be made if counsel's performance "was so inadequate that it may have affected the outcome of the proceedings." *Iturribarria v. INS*, 321 F.3d 889, 899–90 (9th Cir. 2003) (internal quotation marks omitted); *see also Maravilla Maravilla*, 381 F.3d at 858; *cf. Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004), *amended by* 404 F.3d 1105 (9th Cir. 2005) (stating that alien must show "substantial prejudice, which is essentially a demonstration that the alleged violation affected the outcome of the proceedings") (internal quotation marks omitted).

The court will "consider the underlying merits of the case to come to a tentative conclusion as to whether [petitioner's] claim, if properly presented, would be viable." *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004). To show prejudice, the alien "only needs to show that he has *plausible* grounds for relief." *Id.* (internal quotation marks omitted).

"[W]here an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely." *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000). In cases involving such error, the proceedings are subject to a "presumption of prejudice, and we will find that a petitioner has been denied due process if he can demonstrate plausible grounds for relief." *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (applying a presumption of prejudice where petitioner's counsel failed to file an appeal and concluding that the government failed to rebut that presumption where petitioner's asylum application provided plausible grounds for relief); *see also Sing v. INS*, 376 F.3d 1030, 1037 (9th Cir.

2004).

a. Exception for In Absentia Orders

Where a claim of ineffective assistance of counsel is the basis for moving to reopen and rescind an in absentia removal order, a showing of prejudice is not required. *See Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003); *see also Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003) (granting petition without discussing prejudice).

D. The *Lozada* Requirements

A motion to reopen based on ineffective assistance of counsel must generally meet the three procedural requirements set forth by the BIA in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). The petitioner must "1) submit an affidavit explaining his agreement with former counsel regarding his legal representation, 2) present evidence that prior counsel has been informed of the allegations against her and given an opportunity to respond, 3) either show that a complaint against prior counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed." *Iturribarria v. INS*, 321 F.3d 889, 890 (9th Cir. 2003); *see also Monjaraz-Munoz v. INS*, 327 F.3d 892, 896 n.1 (9th Cir.), *amended by* 339 F.3d 1012 (2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226–27 (9th Cir. 2002). The court "presume[s], as a general rule, that the Board does not abuse its discretion when it obligates petitioners to satisfy *Lozada*'s literal requirements." *Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004).

1. Exceptions

This court has explained that the *Lozada* requirements are not sacrosanct, and the court has not hesitated to address an ineffective assistance of counsel claim even when petitioner fails to comply strictly with *Lozada*. *See Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (identifying cases holding that the failure to comply with *Lozada* was not dispositive). For example, the failure to comply with the *Lozada* requirements is not fatal where the alleged ineffective assistance is plain on the face of the administrative record. *See Castillo-Perez v. INS*, 212 F.3d 518, 525–26 (9th

Cir. 2000). "In addition, we have concluded that 'arbitrary application' of the *Lozada* command is not warranted if petitioner shows 'diligent efforts' to comply were unsuccessful due to factors beyond petitioner's control." *Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004).

See also Granados-Oseguera v. Gonzales, 464 F.3d 993, 998 (9th Cir. 2006) (excusing failure to comply with *Lozada* because ineffective assistance and prejudice were clear in the record); *Lo v. Ashcroft*, 341 F.3d 934, 937–38 (9th Cir. 2003) (noting court's flexibility in applying the *Lozada* requirements, and holding that failure to comply with third *Lozada* factor did not defeat ineffective assistance of counsel claim given no suggestion of collusion between petitioners and counsel); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 825–26 (9th Cir. 2003) (failure to file bar complaint not fatal); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (substantial compliance sufficient); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124–25 (9th Cir. 2000) (holding that the BIA may not impose the *Lozada* requirements arbitrarily); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir.), *amended by* 213 F.3d 1221 (9th Cir. 2000); *Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000).

E. Cases Discussing Ineffective Assistance of Counsel

1. Cases Finding Ineffective Assistance

Granados-Oseguera v. Gonzales, 464 F.3d 993, 998 (9th Cir. 2006) (failure to file a timely petition for review, failure to seek a stay of voluntary departure after family member fell ill, and failure to file motion to reopen withing voluntary departure period); *Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (failure to file timely appeal to the BIA, and failure to meet procedural requirements of two motions to reopen); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (counsel's performance was ineffective and caused prejudice where she failed to present evidence of petitioner's past female genital mutilation); *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (failure to file motion to reopen to pursue claim under the Convention Against Torture constituted constitutionally deficient performance); *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (counsel's failure to: investigate and present the factual and legal basis of Lin's asylum claim; attend the hearing

in person; advocate on his behalf at the hearing; and file brief on appeal, constituted ineffective assistance of counsel); *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004) ("Failing to file a timely notice of appeal is obvious ineffective assistance of counsel."); *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (counsel's failure to file brief to BIA established ineffective assistance and caused prejudice); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (failure to file brief on appeal to BIA constituted ineffective assistance, but petitioner could not show prejudice); *Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir.) (advisements to return to Mexico in order to prove validity of visa, where petitioner missed his hearing due to border detention upon attempted return, constituted ineffective assistance and exceptional circumstances warranting reopening), *amended by* 339 F.3d 1012 (2003); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) (counsel was ineffective, but petitioner could not show prejudice); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (non-attorney provided ineffective assistance by failing to file a timely application for relief while assuring petitioners he was diligently handling their case); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000) (untimely petition for review presented valid ineffective assistance claim); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (finding a "clear and obvious case of ineffective assistance of counsel" where counsel "failed, without any reason, to timely file [an] application" for relief even though petitioner was prima facie eligible); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir.), *amended by* 213 F.3d 1221 (9th Cir. 2000) (IJ denied applicant her right to counsel when he allowed an attorney whom she had never met and who had no understanding of her case to represent her); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (fraudulent legal representation by notary posing as an attorney established a meritorious ineffective assistance claim).

2. Cases Rejecting Ineffective Assistance of Counsel Claims

Padilla-Padilla v. Gonzales, 463 F.3d 972, 975-76 (9th Cir. 2006) (counsel's erroneous advice regarding the retroactivity of the stop-time rule did not result in the deprivation of due process); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004), *amended by* 404 F.3d 1105 (9th Cir. 2005) (counsel's "unfortunate immigration-law advice" was not ineffective assistance because it did not "pertain to the actual substance of the hearing"

or "call the hearing's fairness into question"); *Azanor v. Ashcroft*, 364 F.3d 1013, 1023 (9th Cir. 2004) (rejecting claim because petitioner failed to comply with *Lozada* and counsel's actions did not cause prejudice because petitioner failed to inform counsel of critical facts); *Reyes v. Ashcroft*, 358 F.3d 592, 597–98 (9th Cir. 2004) (rejecting claim because petitioner failed to comply substantially with *Lozada*); *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (rejecting claim based on single statement of counsel during proceedings); *Lata v. INS*, 204 F.3d 1241 (9th Cir. 2000) (petitioner failed to show prejudice); *Ortiz v. INS*, 179 F.3d 1148 (9th Cir. 1999) (petitioner failed to show prejudice); *Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986) (finding no ineffective assistance by accredited representative); *Ramirez-Durazo v. INS*, 794 F.2d 491, 500–01 (9th Cir. 1986) (no ineffective assistance or prejudice); *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986) (attorney's decision to forego contesting deportability was a tactical decision that did not rise to the level of ineffective assistance).

VIII. CASES ADDRESSING MOTIONS TO REOPEN FOR SPECIFIC RELIEF

A. Motions to Reopen to Apply for Suspension of Deportation

INS v. Rios-Pineda, 471 U.S. 444 (1985) (petition denied); *INS v. Wang*, 450 U.S. 139 (1981) (per curiam) (petition denied).

Chete Juarez v. Ashcroft, 376 F.3d 944 (9th Cir. 2004) (petition granted); *Ordonez v. INS*, 345 F.3d 777 (9th Cir. 2003) (petition granted); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) (petition denied); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen to apply for suspension because "new" information regarding date of entry was available and capable of discovery prior to deportation hearing); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (reversed and remanded); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998) (reversed and remanded); *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) (petition denied); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (petition remanded); *Sequeira-Solano v. INS*, 104 F.3d 278 (9th Cir. 1997) (petition denied); *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995) (reversed and remanded); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991) (petition denied); *Gonzalez Batoon v. INS*, 791 F.2d 681 (9th Cir. 1986) (en banc)

(discretionary denial of reopening was arbitrary); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Saldana v. INS*, 762 F.2d 824 (9th Cir. 1985), *amended by* 785 F.2d 650 (9th Cir. 1986) (reversed and remanded); *Duran v. INS*, 756 F.2d 1338 (9th Cir. 1985) (reversed and remanded).

Cross-reference: Cancellation of Removal, Suspension of Deportation, and Section 212(c) Relief.

B. Motions to Reopen to Apply for Asylum and Withholding

INS v. Doherty, 502 U.S. 314 (1992) (Attorney General did not abuse his discretion by denying the motion to reopen); *INS v. Abudu*, 485 U.S. 94 (1988) (BIA did not abuse its discretion by denying the motion to reopen).

Bhasin v. Gonzales, 423 F.3d 977, 989 (9th Cir. 2005) (petition granted); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (petition granted); *Malty v. Ashcroft*, 381 F.3d 942 (9th Cir. 2004) (petition granted); *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (petition granted); *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004) (petition granted); *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (petition granted); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (denying petition as to asylum and withholding, granting as to CAT relief); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (petition granted); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (granting petition for review of BIA's denial of motion to reconsider based on due process violation); *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002) (petition granted); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (petition denied); *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (petition denied); *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996) (petition denied); *Romero-Morales v. INS*, 25 F.3d 125 (9th Cir. 1994) (petition granted); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984) (petition denied); *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987) (reversed and remanded); *Ghadessi v. INS*, 797 F.2d 804 (9th Cir. 1986) (petition granted); *Sakhavat v. INS*, 796 F.2d 1201 (9th Cir. 1986) (reversed and remanded); *Aviles-Torres v. INS*, 790 F.2d 1433 (9th Cir. 1986) (reversed and remanded); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986) (petition denied); *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985) (reversed and remanded); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985) (remanding on asylum claim); *Sangabi v. INS*, 763 F.2d

374 (9th Cir. 1985) (petition denied); *Samimi v. INS*, 714 F.2d 992 (9th Cir. 1983) (remanded).

Cross-reference: Asylum, Withholding and the Convention Against Torture.

C. Motions to Reopen to Apply for Relief Under the Convention Against Torture

"Denial of a motion to reopen to present a claim under the Convention qualifies as a final order of removal" over which this court has jurisdiction. *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (petition granted).

See also Huang v. Ashcroft, 390 F.3d 1118 (9th Cir. 2004), *as amended* (9th Cir. Jan. 31, 2005) (motions to reopen to apply for withholding or deferral of removal under CAT are both subject to the time limitations set forth in 8 C.F.R. § 208.18(b)(2)); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (granting petition as to CAT relief and remanding for evaluation under correct legal standard); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (IJ abused his discretion in failing to address motion to reopen to apply for CAT relief); *Abassi v. INS*, 305 F.3d 1028 (9th Cir. 2002) (petition granted in part); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001) (vacated and remanded); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (motion to remand denied); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (motion to reopen to apply for Convention relief denied).

Cross-reference: Asylum, Withholding and the Convention Against Torture.

D. Motions to Reopen to Apply for Adjustment of Status

Medina-Morales v. Ashcroft, 371 F.3d 520 (9th Cir. 2004) (petition granted, holding that BIA erred in considering the strength of the stepparent-stepchild relationship); *de Martinez v. Ashcroft*, 374 F.3d 759 (9th Cir. 2004) (petition denied): *Manjiyani v. Ashcroft*, 343 F.3d 1018 (9th Cir.

2003) (order) (petition remanded); *Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003) (affirming BIA's denial of motion to remand to apply for adjustment of status based on marriage that occurred during deportation proceedings); *Zazueta-Carrillo v. INS*, 322 F.3d 1166 (9th Cir. 2003) (remanding BIA's denial of motion to reopen to apply for adjustment of status based on petitioner's failure to depart voluntarily); *Castillo Ison v. INS*, 308 F.3d 1036 (9th Cir. 2002) (per curiam) (adjustment of status and immigrant visa; petition granted); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002) (court lacks jurisdiction to review BIA's refusal sua sponte to reopen proceedings to allow applicant to apply for adjustment of status); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (reversing and remanding denial of motion to remand to adjust status); *Eide-Kahayon v. INS*, 86 F.3d 147 (9th Cir. 1996) (per curiam) (petition denied); *Caruncho v. INS*, 68 F.3d 356 (9th Cir. 1995) (petition denied); *Dielmann v. INS*, 34 F.3d 851 (9th Cir. 1994) (petition denied); *Ng v. INS*, 804 F.2d 534 (9th Cir. 1986) (reversed and remanded); *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986) (petition granted); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Ahwazi v. INS*, 751 F.2d 1120 (9th Cir. 1985) (petitions denied).

E. Motions to Reopen to Apply for Other Relief

Albillo-De Leon v. Gonzales, 410 F.3d 1090 (9th Cir. 2005) (NACARA section 203(c) special rule cancellation; petition granted); *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002) (holding that petitioner failed to exhaust equitable tolling argument); *Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (Section 241(f) waiver; petition granted); *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (court lacks jurisdiction to review denial of aggravated felon's motion to reopen to apply for former § 212(c) relief); *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996) (motion to reopen to request a humanitarian waiver; petition denied); *Alquisalas v. INS*, 61 F.3d 722 (9th Cir. 1995) (waiver of deportation; remanded); *Foroughi v. INS*, 60 F.3d 570 (9th Cir. 1995) (former § 212(c) relief; petition granted); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (former § 212(c) relief; petition granted); *Torres-Hernandez v. INS*, 812 F.2d 1262 (9th Cir. 1987) (former § 212(c) relief; petition denied); *Platero-Reymundo v. INS*, 807 F.2d 865 (9th Cir. 1987) (voluntary departure; petition denied); *Desting-Estime v. INS*, 804

F.2d 1439 (9th Cir. 1986) (to redesignate country of deportation; petition denied); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986) (reinstatement of voluntary departure; finding no abuse of discretion); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Avila-Murrieta v. INS*, 762 F.2d 733 (9th Cir. 1985) (former § 212(c) relief; petition denied).

CRIMINAL ISSUES IN IMMIGRATION LAW

I. OVERVIEW

The Immigration and Nationality Act ("INA") includes serious consequences for non-citizens convicted of various crimes. Conviction of a crime defined as an aggravated felony, and certain convictions for crimes involving moral turpitude, for example, trigger deportation or removal proceedings, and preclude eligibility for many forms of discretionary relief. In addition, certain convictions for crimes of domestic violence trigger deportation or removal proceedings. Some other criminal convictions render an individual inadmissible and thus ineligible to adjust status. Although the 1996 amendments to the INA eliminated direct judicial review of final orders of deportation and removal based on enumerated criminal offenses, the REAL ID Act of 2005 restored direct judicial review of constitutional challenges and legal questions raised by petitioners found removable, deportable, or excludable based on those enumerated offenses. *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023, at * 2 (9th Cir. Oct. 26, 2006) (en banc).

"The [Notice to Appear] served on an alien in removal proceedings must contain the nature of the proceedings against the alien, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, and the charges against the alien and the statutory provisions alleged to have been violated." *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (internal quotation marks omitted) (citing 8 U.S.C. § 1229(a)(1) and 8 C.F.R. §§ 1003.15(b) & (c)). However, the court has held that "due process does not require inclusion of charges in the [Notice to Appear] that are not grounds for removal but are grounds for denial of relief from removal." *Id.*

II. JUDICIAL REVIEW

A. Judicial Review Scheme Before Enactment of the REAL ID Act of 2005

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which limited petition-for-review jurisdiction for individuals removable based on enumerated crimes. *See* 8 U.S.C. § 1252(a)(2)(C) (permanent rules); IIRIRA section 309(c)(4)(G) (transitional rules).

Under these former provisions, if the court determined that the petitioner was removable or ineligible for relief from removal based on a conviction for an enumerated crime, it lacked direct judicial review over the petition for review. *See Unuakhaulu v. Gonzales*, 416 F.3d 931, 937 (9th Cir. 2005); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1253 (9th Cir. 2003). However, the court retained jurisdiction to determine its own jurisdiction, *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000), and to decide three threshold issues: whether the petitioner was [1] an alien, [2] removable, and [3] removable because of a conviction for a qualifying crime, *see Zavaleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotation marks, alteration, and emphasis omitted). Moreover, where direct judicial review was unavailable over a final order of deportation or removal, a petitioner could file a petition for writ of habeas corpus in district court under 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (AEDPA and IIRIRA did not repeal habeas corpus jurisdiction to challenge the legal validity of a final order of deportation or removal); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 964 (9th Cir. 2004) (same).

B. The Current Judicial Review Scheme under the REAL ID Act of 2005

In May 2005, Congress once again amended the INA to expand the scope of direct judicial review over petitions for review brought by individuals removable based on enumerated crimes, and to limit the availability of habeas corpus relief over challenges to final orders of removal or deportation.

First, the REAL ID Act added the following new judicial review provision to 8 U.S.C. § 1252:

> Judicial Review of Certain Legal Claims -
> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(a)(2)(D); REAL ID Act, Pub. L. No. 109-13, § 106(b), 119 Stat. 231, 310 (2005). Pursuant to this new provision, the court now has jurisdiction to review constitutional claims and questions of law presented in petitions for review brought by individuals found removable based on certain enumerated crimes. *See Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023, at *2 (9th Cir. Oct. 26, 2006) (en banc); *see also Lisbey v. Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005); *Parrilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005). Moreover, this court has interpreted this provision as "repeal[ing] all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) or (C)) following the amendment of that section by the REAL ID Act." *Fernandez-Ruiz*, 410 F.3d at 587.

Thus, whereas the court previously had jurisdiction to evaluate only whether a criminal conviction was a qualifying offense for the purpose of IIRIRA's jurisdictional bars, the court now has jurisdiction to review the petition for review on the merits, assuming no other provision in the INA limits judicial review. *See id.* at 586–87; *Lisbey*, 420 F.3d at 932 (concluding that petitioner was convicted of an aggravated felony and denying the petition on the merits); *Parrilla*, 414 F.3d at 1040 (same).

In addition to expanding the scope of judicial review for aliens convicted of certain enumerated crimes, the REAL ID Act also "makes the circuit courts the 'sole' judicial body able to review challenges to final orders of deportation, exclusion, or removal." *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005); 8 U.S.C. § 1252(a)(5). "To

accomplish this streamlined judicial review, the Act eliminated habeas jurisdiction, including jurisdiction under 28 U.S.C. § 2241, over final orders of deportation, exclusion, or removal." *Id.*

Congress explicitly made the REAL ID Act's judicial review amendments retroactive and directed that they shall apply to all cases in which the final administrative order was issued before, on, or after May 11, 2005, the date of enactment of the Act. REAL ID Act, § 106(b); *Alvarez-Barajas*, 418 F.3d at 1052.

The REAL ID Act also required the district courts to transfer to the appropriate court of appeals all habeas petitions challenging final orders of removal, deportation or exclusion that were pending before the district court on the effective date of the REAL ID Act (May 11, 2005). *See* REAL ID Act, Pub. L. No. 109-13, § 106(b), 119 Stat. 231, 310–11 (2005); *see also Alvarez-Barajas*, 418 F.3d at 1052. Although the REAL ID Act did not address appeals of the denial of habeas relief already pending in the court of appeals on the effective date of the Act, this court has held that such petitions shall be treated as timely filed petitions for review. *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005); *Alvarez-Barajas*, 418 F.3d at 1053; *Cordes v. Gonzales*, 421 F.3d 889, 892 (9th Cir. 2005) (mandate pending).

Cross-reference: Jurisdiction over Immigration Petitions, Limitations on Judicial Review Based on Criminal Offenses.

III. DEFINITION OF CONVICTION

IIRIRA provided the first statutory definition of "conviction" in the INA. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1289 (9th Cir. 2004). A conviction is defined as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where–(i) 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 (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. § 1101(a)(48)(A); *see also Murillo-Espinoza v. INS*, 261 F.3d 771, 773–74 (9th Cir. 2001); *Lujan-*

Armendariz v. INS, 222 F.3d 728, 741–42 (9th Cir. 2000).

A. Finality

"A criminal conviction may not be considered by an IJ until it is final." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (pre-IIRIRA). A conviction is final for immigration purposes "[o]nce an alien has been convicted by a court of competent jurisdiction and exhausted the direct appeals to which he is entitled." *Id*. (internal quotation marks omitted). "A conviction subject to collateral attack or other modification is still final." *Id.* (rejecting petitioner's claim that his conviction was not final because he had a pending petition for writ of error coram nobis).

B. Juvenile Proceedings

The BIA has held that juvenile delinquency and youthful offender adjudications do not constitute convictions under the INA. *See Matter of Devison*, 22 I. & N. Dec. 1362, 1369 (BIA 2000) (en banc) (IIRIRA's definition of conviction definition in IIRIRA did not "require a departure from our nearly 6 decades of precedent decisions holding that juvenile adjudications are not convictions for purposes of federal immigration law").

C. Post-Conviction Relief

1. Reversed and Vacated Convictions

A conviction overturned on the merits may not be used as the basis for removability. *See Nath v. Gonzales*, No. 05-16557, 2006 WL 3110424, at *2 (9th Cir. Nov. 3, 2006) ("[A] conviction vacated because of a procedural or substantive defect is not considered a conviction for immigration purposes and cannot serve as the basis for removability.") (internal quotation marks and citation omitted); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107–08 (9th Cir. 2006) (remanding for consideration of whether conviction was vacated on the merits or because of immigration consequences); *Lujan-Armendariz v. INS*, 222 F.3d 728, 746–47 & n.30 (9th Cir. 2000) (noting "the INS's recognition that a reversed conviction is of no force" under the INA); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (alien was entitled

to reopen proceedings where state conviction was vacated).

The government has the burden to prove whether a state court reversed or vacated a prior conviction for reasons other than the merits. *Nath*, 2006 WL 3110424, at *2; *Cardoso-Tlaseca*, 460 F.3d at 1107 n.3 ("[F]or the government to carry its burden in establishing that a conviction remains valid for immigration purposes, the government must prove with clear, unequivocal and convincing evidence that the Petitioner's conviction was quashed *solely* for rehabilitative reasons or reasons related to his immigration status, i.e. to avoid adverse immigration consequences.") (internal quotation marks and citation omitted).

2. Expunged Convictions

a. Expungement Generally Does Not Eliminate Immigration Consequences of Conviction

Following codification of the statutory definition of conviction in 8 U.S.C. § 1101(a)(48)(A), this court has deferred to the BIA's interpretation of the statute as "preclud[ing] the recognition of subsequent state rehabilitative expungements of convictions." *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony). "For immigration purposes, [therefore,] a person continues to stand convicted of an offense notwithstanding a later expungement under a state's rehabilitative law." *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expungement of a misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); *see also Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

b. Exception for Simple Drug Possession Offenses

The government may not remove aliens with expunged convictions for simple drug possession that satisfy the requirements of the Federal First Offender Act ("FFOA"), 18 U.S.C. § 3607. *See Lujan-Armendariz v. INS*, 222 F.3d 728, 749–50 (9th Cir. 2000) ("[T]he new definition of 'conviction'

for immigration purposes does not repeal either the [FFOA] or the rule that no alien may be deported based on an offense that could have been tried under the Act, but is instead prosecuted under state law, where the findings are expunged pursuant to a state rehabilitative statute."). Expungement of lesser offenses that have no federal analogue, such as possession of drug paraphernalia, also may qualify for federal first offender treatment. *See Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000) (remanding for determination of whether applicant qualified for federal first offender treatment); *see also Dillingham v. INS*, 267 F.3d 996, 1006–07 (9th Cir. 2001) (reversing, on equal protection grounds, BIA's refusal to recognize foreign expungement of simple possession that would have qualified for federal first offender treatment in the United States); *Garberding v. INS*, 30 F.3d 1187, 1190 (9th Cir. 1994) (holding that the BIA's refusal to recognize state expungement for first-time marijuana possession violated applicant's right to equal protection).

If an applicant's state court conviction does not fall within the scope of the FFOA, he or she is not entitled to favorable immigration treatment just because his or her conviction is subject to a state rehabilitation statute. *Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994); *see also Aguilez-Arellano v. Gonzales*, 446 F.3d 980 (9th Cir. 2006) (record demonstrated that petitioner's conviction was a second drug offense conviction that would not have qualified for FFOA treatment).

The federal first offender exception does not apply to convicted aliens who are eligible for, but have not yet received, expungement of the conviction. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1291 (9th Cir. 2004) (removal order based on conviction that had not yet been expunged did not violate equal protection).

3. Writ of Audita Querela

A state court vacatur of a drug conviction pursuant to a writ of *audita querela* does not eliminate the immigration consequences of that conviction. *Beltran-Leon v. INS*, 134 F.3d 1379, 1380–81 (9th Cir. 1998) (noting that petitioner did not identify a "new defense or legal defect in his conviction," and he "requested that the conviction be set aside solely in order to prevent deportation and the subsequent hardship to himself and his family"); *Doe v.*

INS, 120 F.3d 200, 204 (9th Cir. 1997) ("a writ of *audita querela*, if it survives at all, is available only if a defendant has a legal defense or discharge to the underlying judgment").

4. All Writs Act

Courts have no authority to grant equitable relief under the All Writs Act to shield defendants from deportation. *See Doe v. INS*, 120 F.3d 200, 205 (9th Cir. 1997); *see also United States v. Bravo-Diaz*, 312 F.3d 995, 998 (9th Cir. 2002).

5. Full and Unconditional Pardons

An alien "granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States," is not deportable for crimes involving moral turpitude, multiple criminal convictions, aggravated felonies, and high speed flight. 8 U.S.C. § 1227(a)(2)(A)(v).

IV. DEFINITION OF SENTENCE

Under the INA, "[a]ny reference to a term of imprisonment or 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." 8 U.S.C. § 1101(a)(48)(B).

A. One-Year Sentences

A sentence "for which the term of imprisonment [is] at least one year" means the actual sentence imposed by the court. *Alberto-Gonzalez v. INS*, 215 F.3d 906, 910 (9th Cir. 2000) (rejecting government's contention that the relevant term of imprisonment is the potential sentence that the judge could have imposed); *see also United States v. Pimentel-Flores*, 339 F.3d 959, 962 (9th Cir. 2003).

The phrase "at least one year" refers to a sentence of 365 days or more. *Matsuk v. INS*, 247 F.3d 999, 1001–02 (9th Cir. 2001) (rejecting

petitioner's contention that the phrase "should be read to mean a 'natural or lunar' year, which is composed of 365 days and some hours"); *Bayudan v. Ashcroft*, 298 F.3d 799, 800 (9th Cir. 2002) (order) (setting aside previous order dismissing petition for lack of jurisdiction because 364-day sentence for manslaughter was not a crime of violence constituting an aggravated felony); *see also United States v. Gonzalez-Tamariz*, 310 F.3d 1168, 1171 (9th Cir. 2002).

B. Recidivist Enhancements Not Included

In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), this court held that separate recidivist sentencing enhancements may not be taken into account when determining the maximum possible sentence for an offense. *Id*. at 1209–11. The defendant in *Corona-Sanchez* received a two-year sentence for his conviction for petty theft with a prior. This court held that the conviction was not an aggravated felony under federal sentencing law because the maximum possible sentence for petty theft in California, without the recidivist enhancement, was six months. *Id*.; *see also Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (California drug offense, without recidivist enhancement, would not be punishable by more than one year of imprisonment under federal law); *Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) (California conviction of petty theft with a prior was not a crime for which a sentence of one year or longer could be imposed); *United States v. Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003) (second Arizona drug conviction did not constitute an aggravated felony for sentencing purposes after eliminating recidivism enhancement); *United States v. Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002) (disregarding federal penalties for repeat offenders in drug possession case).

C. Misdemeanors

In the sentencing context, this court has held that an offense designated by the state as a misdemeanor may qualify as an aggravated felony if it otherwise meets the federal definition of an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). *See, e.g., United States v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005); *United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002); *see also Afridi v. Gonzales*,

442 F.3d 1212, 1217 n.2 (9th Cir. 2006) (rejecting the contention that a misdemeanor conviction may not qualify as an aggravated felony).

This court has also held that a crime that constitutes a misdemeanor under federal law may nonetheless be considered an aggravated felony if it qualifies as a felony under state law. *United States v. Arellano-Torres*, 303 F.3d 1173, 1178–80 (9th Cir. 2002); *see also United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339-40 (9th Cir. 2000), *overruled in part by United States v. Corona-Sanchez*, 291 F.3d 1201, 1210 (9th Cir. 2002) (en banc).

Note that the Supreme Court recently granted review in order to resolve an inter-circuit conflict as to whether a crime that constitutes a misdemeanor under federal law may nonetheless be considered an aggravated felony if it qualifies as a felony under state law. *See Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1651 (U.S. Apr. 3, 2006) (No. 05-547) and *Toledo-Flores v. United States*, 149 Fed. Appx. 241 (5th Cir. 2005), *cert. granted*, 126 S. Ct. 1652 (U.S. Apr. 3, 2006) (No. 05-7664).

D. Wobblers

An "offense [that] can result in a range of punishments . . . is referred to as a 'wobbler' statute, providing for either a misdemeanor or a felony conviction." *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). For wobbler offenses, "it is clear that a state court's designation of a criminal offense [as a misdemeanor or a felony] is binding on the BIA for purposes of determining whether there has been a conviction under the INA." *Id.* at 846 ("[A] state court expungement of a conviction is qualitatively different from a state court order to classify an offense or modify a sentence"). In *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999), this court addressed a petitioner's undesignated probationary sentence that was later designated as a misdemeanor, and held that it was not akin to an indeterminate sentence, which would have allowed the BIA to consider the maximum sentence possible for the offense. *Id.* at 1215–16. Rather, the BIA was bound by the court's subsequent designation of the offense as a misdemeanor. *Id.* at 1216; *see also Ferreira v. Ashcroft*, 382 F.3d 1045, 1051 (9th Cir. 2004) (California drug possession wobbler offense converted

from a felony into a misdemeanor once state court sentenced defendant to county jail term).

E. Probation Violations

This court has held in the sentencing context that a two-year term of imprisonment that was imposed after revocation of probation was a "term of imprisonment of at least one year." *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (defendant in unlawful reentry case was convicted of a prior aggravated felony even though he was initially sentenced only to probation).

V. ANALYZING SPECIFIC CRIMES

A. Standard of Review

This court reviews de novo whether a state or federal conviction is an offense with immigration consequences. *Parrilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005) (post-REAL ID Act); *see also Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (reviewing de novo whether federal conviction was a deportable offense).

B. Categorical Approach

In order to determine whether a conviction constitutes a predicate offense for immigration purposes, the court will apply the two-step "categorical" approach set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990). *See Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004); *see also Parrilla v. Gonzales*, 414 F.3d 1038, 1042 (9th Cir. 2005) (post-REAL ID Act case applying the same approach). The court will first "make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the state statute] is broader than, and so does not categorically fall within, this generic definition." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003). For example, "an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term." *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir 2002)

(internal quotation marks omitted); *see also Martinez-Perez v. Ashcroft*, 417 F.3d 1022, 1026 (9th Cir. 2005); *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (stating that the categorical approach is based only on the elements of the statute, and the court will not "look to the particular facts underlying the conviction").

C. Modified Categorical Approach

If the statute at issue is divisible into several crimes or sub-sections, or if it is broader than the generic definition of the crime, the conviction will not necessarily qualify as an aggravated felony or other predicate immigration offense. *See Carty v. Ashcroft*, 395 F.3d 1081, 1084 (9th Cir. 2005). To determine whether the specific offense of conviction has immigration consequences, the court will proceed to a modified categorical analysis. *See id.*; *Parrilla v. Gonzales*, 414 F.3d 1038, 1042 (9th Cir. 2005) (post-REAL ID Act case applying the same approach). Under this approach, the court will "consider whether documentation or other judicially noticeable facts in the record indicate that [the applicant] was convicted of the elements of the generically defined crime." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003). "The idea of the modified categorical approach is to determine if the record unequivocally establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc).

The court will "look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction," but will not "look beyond the record of conviction itself to the particular facts underlying the conviction." *Tokatly*, 371 F.3d at 620; *see also Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (stating that the court will "conduct a limited examination of documents in the record to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially over-inclusive").

1. Record of Conviction

Under the modified categorical approach, the court may look to "charging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment . . ." to document the elements of conviction." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003); *see also Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076 (9th Cir. 2003) (order); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc).

"Charging papers alone are never sufficient" but "may be considered in combination with a signed plea agreement." *Corona-Sanchez*, 291 F.3d at 1211 (internal citation omitted); *see also Penuliar v. Ashcroft*, 435 F.3d 961, 968–69 (9th Cir. 2006) (as amended) (holding that charging documents and abstract of judgment were insufficient to establish that petitioner's conviction for unlawful driving or taking of vehicle was a "crime of violence") (mandate pending); *Martinez-Perez v. Ashcroft*, 417 F.3d 1022, 1028–29 (9th Cir. 2005) (information charging second-degree robbery, minute order memorializing a probation violation hearing, and abstract of judgment showing guilty plea to grand theft, where the record did not contain any plea agreement or transcript of the plea proceeding, were insufficient to determine whether petitioner pled guilty to generic theft offense); *Li v. Ashcroft*, 389 F.3d 892, 898 (9th Cir. 2004) (charging document and judgment of conviction were insufficient to show that jury had actually found fraud resulting in loss of more than $10,000); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003).

In the criminal sentencing context, the court may not "look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for," a relevant offense. *Shepard v. United States*, 544 U.S. 13, 15 (2005) (holding "that a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"); *see also United States v. Almazan-Becerra*, 456 F.3d 949, 954-55 (9th Cir. 2006) (remanding, in part, for a determination of whether in light of *Shepard* a police report stipulated to form the basis of a guilty plea could be used to support a sentencing

enhancement); *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004) (holding, in the sentencing context, that a California abstract of judgment was not sufficient to establish unequivocally that defendant was convicted of the sale and transportation of methamphetamine); *cf. United States v. Velasco-Medina*, 305 F.3d 839, 852 (9th Cir. 2002) (abstract of judgment, when coupled with the Information, furnished sufficient proof that Velasco-Medina was convicted of all the elements of generic burglary for sentencing purposes).

However, "[a]lthough police reports and complaint applications, standing alone, may not be used to enhance a sentence following a criminal conviction, . . . the contents of these documents may be considered if specifically incorporated into the guilty plea or admitted by a defendant." *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005) (Certification for Determination of Probable Cause, incorporated by reference into guilty plea, demonstrated that conviction met the definition of sexual abuse of a minor) (internal citation omitted); *see also United States v. Espinoza-Cano*, 456 F.3d 1126 (9th Cir. 2006) (mandate pending) (police report incorporated by reference into the charging document and stipulated to form the factual basis of a guilty plea could be considered in determining whether prior conviction qualified as an aggravated felony); *United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005) (defendant's assent to the statement of facts in a motion under Cal. Penal Code § 995 to set aside the indictment or information was a proper basis for a sentencing court to engage in a modified categorical analysis); *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098–1100 (9th Cir. 2004) (restitution order referenced in plea agreement was properly examined under the modified categorical approach).

2. Probation or Presentence Reports

In *Corona-Sanchez*, this court held that the defendant's presentence report ("PSR"), which recited the facts of the crime as alleged in the charging papers, was not sufficient to establish that the defendant pled guilty to the elements of the generic definition of a crime. *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc); *see also Abreu-Reyes v. INS*, 350 F.3d 966, 967 (9th Cir. 2003) (order) (IJ may not use PSR to determine whether petitioner was an aggravated felon); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153–54 (9th Cir. 2003) (BIA erred in

relying solely on the PSR to demonstrate the elements of a drug trafficking conviction); *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076–77 (9th Cir. 2003) (order); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003).

3. Extra-Record Evidence

Under the categorical and modified categorical approaches, evidence outside the record of conviction may not be considered to determine whether a conviction is a predicate immigration offense. *See Tokatly v. Ashcroft*, 371 F.3d 613, 624 (9th Cir. 2004) (IJ erred by relying on testimonial evidence to determine that petitioner was convicted of a crime of domestic violence); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393 (9th Cir. 2006) (inferences and admissions in the administrative record could not be used to determine whether petitioner was convicted of a crime of domestic violence); *see also United States v. Taylor*, 495 U.S. 575, 601 (1990) (noting the "practical difficulties and potential unfairness of a factual approach," rather than a categorical approach, to a defendant's prior offenses).

D. Applicability of Criminal Cases in the Immigration Context

In some cases, the court has found criminal sentencing cases controlling in the immigration context. For example, this court has held that for purposes of determining whether a crime constituted the aggravated felony of sexual abuse of a minor, a prior precedent in a criminal case was controlling. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066–67 (9th Cir. 2003) (citing *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999)). *See also Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003) (applying generic definition of "theft offense" adopted in *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc)); *Nevarez-Martinez v. INS*, 326 F.3d 1053, 1055 (9th Cir. 2003) (same); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (applying generic definition of "theft offense" adopted in *United States v. Corona-Sanchez* and citing criminal cases for description of the categorical approach); *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002) (citing criminal cases for description of the categorical approach); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (per curiam) (applying construction of "crime of violence" from sentencing case); *Castro-Baez v. Reno*, 217 F.3d 1057, 1058–59 (9th Cir. 2000) (applying definition of rape adopted in a criminal case); *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) (applying the uniform definition of "burglary" in the Career Criminals Amendment Act, and citing criminal cases for description of the categorical approach).

However, in the context of determining whether a conviction qualifies as a crime of violence, the court has explained that sentencing cases are not controlling because the Federal Sentencing Guidelines definition of a crime of violence differs from that in the immigration statutes. *Compare Valencia v. Gonzales*, 439 F.3d 1046, 1053 (9th Cir. 2006) (statutory rape is not a crime of violence under the immigration statute), *with United States v. Asberry*, 394 F.3d 712, 717–18 (9th Cir. 2005) (holding that statutory rape is a crime of violence under U.S.S.G. § 4B1.2). *See also Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006) (holding that the modified categorical approach applies to prior crimes of domestic violence and distinguishing *United States v. Belless*, 338 F.3d 1063, 1065–67 (9th Cir. 2003), which held otherwise in a different context); *cf. Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (discussing rule of lenity and stating that the statutory definition of crime of violence must be interpreted "consistently,

whether we encounter its application in a criminal or noncriminal context").

Likewise, in *Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004), the court held that the determination of whether a drug trafficking crime is an aggravated felony for immigration purposes should not be based on case law in the criminal sentencing context. In *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004), this court recognized "the strong interest in national uniformity in the administration of immigration laws." *Id.* at 912 (holding, contrary to *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000), that a state drug offense is not an aggravated felony for immigration purposes unless it would be punishable under federal drug laws as a felony, or contains a trafficking element).

Cross-reference: Aggravated Felonies, Offenses Defined as Aggravated Felonies, Illicit Trafficking in Controlled Substances, or State Drug Offenses.

VI. AGGRAVATED FELONIES

Several dozen offenses are categorized as aggravated felonies under 8 U.S.C. § 1101(a)(43). An applicant is deportable or removable if convicted of an aggravated felony at any time after admission. *See Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134 (9th Cir. 2001) ("admission" includes adjustment of status). Aggravated felons are also disqualified from many forms of relief including asylum, voluntary departure, and cancellation of removal. *See United States v. Corona-Sanchez*, 291 F.3d 1201, 1210 n.8 (9th Cir. 2002) (en banc); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1049 (9th Cir. 2004). Moreover, convictions for aggravated felonies trigger mandatory detention during removal proceedings, *see Demore v. Kim*, 538 U.S. 510, 517–18 (2003), and a conviction for illegal reentry under 8 U.S.C. § 1326 will carry a significantly higher federal prison term if the defendant was previously convicted of an aggravated felony, *see* 8 U.S.C. § 1326(b)(2).

A. Increasingly Broad Definition

The aggravated felony provisions in the INA were introduced by the Anti-Drug Abuse Act of 1988. The "narrow list of serious crimes" included murder, drug trafficking, arms trafficking, and any attempt or conspiracy to

commit such acts. *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 915–16 (9th Cir. 2004); *see also Leocal v. Ashcroft*, 543 U.S. 1, 4 n.1 (2004).

The Immigration Act of 1990 added more aggravated felonies, including "illicit trafficking" in a controlled substance, money laundering, and crimes of violence for which the term of imprisonment imposed was at least five years. *See United States v. Andrino-Carillo*, 63 F.3d 922, 925 (9th Cir. 1995).

New aggravated felonies were added by the Violent Crime Control and Law Enforcement Act of 1994, the Immigration and Nationality Technical Corrections Act of 1994, and section 440(e) of the Antiterrorism and Effective Death Penalty Act of 1996.

1. IIRIRA Amendments

Section 321 of IIRIRA added new offenses to the definition of aggravated felony and dramatically broadened the definition's reach by expanding the terms of many offenses already denominated aggravated felonies. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1044–45 & n.3 (9th Cir. 2004); *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002) (noting that "IIRIRA expanded the definition of 'aggravated felony' by [inter alia] reducing the prison sentence required to trigger 'aggravated felony' status for burglary from five years to one year"); *see also* 8 U.S.C. § 1101(a)(43) (definition of aggravated felony).

2. Retroactive Application

The expanded definition of aggravated felony applies to all "actions taken" by the Attorney General on or after September 30, 1996, regardless of the date of conviction. *See* IIRIRA § 321(b) and (c); *Aragon-Ayon v. INS*, 206 F.3d 847, 852 (9th Cir. 2000) (citing *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997)). This court has upheld the retroactive application of IIRIRA's expanded definition of aggravated felony. *See id.* at 853 ("Congress intended the 1996 amendments to make the aggravated felony definition apply retroactively to all defined offenses whenever committed, and to make aliens so convicted eligible for deportation notwithstanding the

passage of time between the crime and the removal order."); *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 852 (9th Cir. 2006) ("[I]t is settled law that the effective-date provision of the *definitional* statute, IIRIRA § 321, which defines certain crimes as aggravated felonies, applies *regardless* of the date of the commission of the crime.") (emphasis in original); *Cordes v. Gonzales*, 421 F.3d 889, 894–95 (9th Cir. 2005) (mandate pending); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1054 (9th Cir. 2005); *Park v. INS*, 252 F.3d 1018, 1025 (9th Cir. 2001) (amended definition of aggravated felony applied to pre-IIRIRA conviction for involuntary manslaughter), *overruled on other grounds by Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005).

3. AEDPA and Former Section 212(c) Relief

Former INA section 212(c), 8 U.S.C. § 1182(c), permitted certain long-time permanent residents to obtain a discretionary waiver for some grounds of excludability and deportability. Before section 321 of IIRIRA expanded the definition of aggravated felony, section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") severely restricted former INA section 212(c) relief by barring waivers of deportability or excludability for applicants convicted of most crimes, including those convicted of aggravated felonies. Thus, IIRIRA's expanded aggravated felony definition coupled with AEDPA's expansion of the ineligibility grounds for former INA section 212(c) relief had the effect of eliminating section 212(c) relief for many applicants.

In *Alvarez-Barajas v. Gonzales*, this court held that IIRIRA's expanded definition of aggravated felony did not have an impermissibly retroactive effect where it ultimately barred Alvarez-Barajas from obtaining former section 212(c) relief. *See* 418 F.3d 1050, 1054 (9th Cir. 2005) (explaining that petitioner did not have settled expectations concerning the availability of section 212(c) relief although at the time he pled guilty his offense did not qualify as an aggravated felony, and therefore was not a deportable offense, because at the time of the guilty plea the law had already changed to make all aliens convicted of aggravated felonies ineligible for section 212(c) relief); *see also Cordes v. Gonzales*, 421 F.3d 889, 894–95 (9th Cir. 2005) (mandate pending); *United States v. Velasco-Medina*, 305 F.3d 839, 849–50 (9th Cir. 2002). On situations in which the elimination of

former section 212(c) relief would have an impermissibly retroactive effect, *see generally INS v. St. Cyr*, 533 U.S. 289 (2001) (elimination of discretionary section 212(c) relief had an impermissibly retroactive effect on certain aliens who were deportable but eligible for section 212(c) relief when they entered their guilty pleas); *see also United States v. Leon-Paz*, 340 F.3d 1003, 1007 (9th Cir. 2003) (defendant who pled guilty to burglary in October 1995, before the effective date of AEDPA, was entitled to be considered for former section 212(c) relief because at the time of his plea he did not have notice that section 212(c) relief would not be available in the event his conviction was reclassified as an aggravated felony).

Cross-reference: Cancellation of Removal, Suspension of Deportation, and Former 212(c) Relief, Section 212(c) Relief, Application of Retroactivity Analysis.

a. Due Process

This court has held that the retroactive application of the expanded aggravated felony definition in section 321 of IIRIRA does not violate due process because it is rationally related to a legitimate government purpose of protecting society from the commission of aggravated felonies and deporting aliens who commit or have committed those acts. *See Cordes v. Gonzales*, 421 F.3d 889, 894–95 (9th Cir. 2005) (mandate pending).

b. Equal Protection

This court has held that the retroactive application of the expanded aggravated felony definition of section 321 of IIRIRA violates equal protection in light of the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). *Cordes v. Gonzales*, 421 F.3d 889, 894–95 (9th Cir. 2005) (mandate pending). The court explained: "The disparate treatment of Cordes and those permanent residents who are entitled to section 212(c) relief under *St. Cyr* lacks a rational basis. Because Cordes does not fit within the *St. Cyr* exception, the law treats her differently than those permanent resident aliens who formed settled expectations as to the availability of section 212(c) relief because they committed severe, deportable offenses. Had Cordes committed a more severe crime – one that would have rendered her deportable – she would have been eligible for such relief and been able to preserve the relief

even though her crime was later reclassified as an aggravated felony. Put differently, those permanent residents who committed more serious crimes than Cordes obtain the section 212(c) bulwark only because they had the ironic fortune of facing the prospect of deportation at the time they entered their guilty pleas." *Id*.

B. Offenses Defined as Aggravated Felonies

1. Murder, Rape or Sexual Abuse of a Minor

The offenses of murder, rape and sexual abuse of a minor constitute aggravated felonies. *See* 8 U.S.C. § 1101(a)(43)(A).

a. Rape

The court has explained that the ordinary, contemporary, and common meaning for the term "rape" contains at least the following elements: "that the defendant engage in sexual activity with another person and that the sexual activity is (1) unlawful and (2) without consent." *Rivas-Gomez v. Gonzales*, 441 F.3d 1072, 1074 (9th Cir. 2006) (mandate pending). The contemporary definition of rape does not include a forcible compulsion element. *Id*. (citing *United States v. Yanez-Saucedo*, 295 F.3d 991, 996 (9th Cir. 2002) (third-degree rape under Washington law meets the definition of rape even though it does not necessarily include an element of physical force)). "In ordinary usage, rape is understood to include the act of engaging in non-consensual sexual intercourse with a person whose ability to resist has been substantially impaired by drugs or other intoxicants." *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000). By analogy, the court has held that statutory rape meets the aggravated felony definition of rape. *See Rivas-Gomez*, 441 F.3d at 1075 (sexual intercourse with another person under 16 years of age under Oregon Revised Statutes 163.355 qualifies as an aggravated felony because a person of that age cannot consent as a matter of law).

b. Sexual Abuse of a Minor

See Afridi v. Gonzales, 442 F.3d 1212 (9th Cir. 2006) (California conviction under Cal. Penal Code § 261.5(c) for unlawful sexual intercourse with a minor more than three years younger meets the definition of sexual abuse of a minor); *Parrilla v. Gonzales*, 414 F.3d 1038, 1043–44 (9th Cir. 2005) (conviction for communicating with a minor for immoral purposes under Wash. Rev. Code § 9.68A.090 did not categorically qualify as sexual abuse of a minor, but under the modified categorical approach, the information and the Certification for Determination of Probable Cause incorporated by reference into the guilty plea demonstrated that applicant was convicted of sexual abuse of a minor); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 (9th Cir. 2003) (Nevada conviction for lewdness with a child under 14 constitutes sexual abuse of a minor); *see also United States v. Baza-Martinez*, 464 F.3d 1010, 1012 (9th Cir. 2006) (North Carolina conviction for taking indecent liberties with a child is not categorically sexual abuse of a minor because statute prohibits conduct that is not necessarily physically or psychologically harmful) (mandate pending); *United States v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005) (Nevada conviction for statutory sexual seduction constituted sexual abuse of a minor for enhancement purposes); *United States v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004) (misdemeanor California conviction for annoying or molesting child under age 18 does not categorically constitute sexual abuse of minor for immigration purposes); *United States v. Marin-Navarette*, 244 F.3d 1284 (9th Cir. 2001) (Washington conviction for third-degree attempted child molestation was an aggravated felony for sentencing purposes); *United States v. Mendoza-Iribe*, 198 F.3d 742 (9th Cir. 1999) (per curiam) (California conviction for penetrating genital or anal openings of child under 14 with foreign object constituted sexual abuse of a minor for sentencing enhancement purposes); *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999) (California conviction for lewd conduct with a child under 14 constituted sexual abuse of a minor for sentencing enhancement purposes).

2. Illicit Trafficking in a Controlled Substance

"The definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(B) does not include all controlled substance convictions covered by 8 U.S.C.

§ 1227(a)(2)(B), but only includes 'illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 942(c) of Title 18).'" *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1065 n.1 (9th Cir. 2006) (citing 8 U.S.C. § 1101(a)(43)(B)); *see also Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003).

"Section 802(6) of Title 21 defines 'controlled substance' as a 'drug or other substance, or immediate precursor,' included in schedules attached to the subchapter." *Olivera-Garcia v. INS*, 328 F.3d 1083, 1085 (9th Cir. 2003).

Section 924(c)(2) of Title 18 defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), 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.)."

a. State Drug Offenses

To determine whether a state drug offense is an aggravated felony for immigration purposes "the first question is whether [petitioner's] conviction . . . would be punishable as a felony under the [Controlled Substances Act]." *Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004). If the analogous federal offense would not be punishable by more than one year of imprisonment under federal law, the crime is not a felony for immigration purposes. *Id.* (California conviction for possession of methamphetamine was not an aggravated felony). A state controlled substance conviction may also constitute an aggravated felony if it contains a trafficking element. *Id.; see also Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004) (Arizona felony conviction for possession of methamphetamine was not an aggravated felony); *cf. United States v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000) (holding for sentencing purposes that a state felony offense could be an aggravated felony, even if it would only be punishable as a misdemeanor under federal law).

Note that the Supreme Court is currently considering whether the term "any felony" as used in section 924(c)'s definition of a drug trafficking

crime includes offenses designated as felonies under state law, but which would not meet the federal definition of a felony drug offense. *See Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1651 (U.S. Apr. 3, 2006) (No. 05-547) and *Toledo-Flores v. United States*, 149 Fed. Appx. 241 (5th Cir. 2005), *cert. granted*, 126 S. Ct. 1652 (U.S. Apr. 3, 2006) (No. 05-7664).

See also Salviejo-Fernandez v. Gonzales, 455 F.3d 1063, 1067–68 (9th Cir. 2006) (California conviction under Health & Safety Code § 11366 for opening or maintaining any place for the purpose of unlawfully selling, giving away, or using any specified controlled substance constitutes an aggravated felony).

b. Expungement of First Possession Convictions

Expunged first convictions for simple drug possession will generally not count as convictions for immigration purposes. *See Lujan-Armendariz v. INS*, 222 F.3d 728, 749–50 (9th Cir. 2000) ("[T]he new definition of 'conviction' for immigration purposes does not repeal either the Federal First Offender Act [FFOA] or the rule that no alien may be deported based on an offense that could have been tried under the Act, but is instead prosecuted under state law, where the findings are expunged pursuant to a state rehabilitative statute"); *see also Aguilez-Arellano v. Gonzales*, 446 F.3d 980 (9th Cir. 2006) (second drug conviction would not have qualified for FFOA treatment); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1175 (9th Cir. 2002) (expungement did not eliminate immigration consequences where conviction was not within scope of FFOA).

Cross-reference: Post-Conviction Relief, Expunged Convictions, Exception for Minor Drug Offenses.

c. Solicitation

A generic solicitation offense is not an aggravated felony. *See Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (Arizona conviction for solicitation to possess marijuana for sale is not an aggravated felony or violation of a law relating to a controlled substance); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (Arizona conviction for solicitation to

possess cocaine is not a violation of a law relating to a controlled substance and is therefore not a deportable offense). A solicitation offense relating to a controlled substance is not an aggravated felony. *See United States v. Rivera-Sanchez*, 247 F.3d 905, 908–09 (9th Cir. 2001) (en banc) (California conviction for transporting marijuana was not an aggravated felony on its face for sentencing purposes because the statute punishes solicitation).

d. Accessory after the Fact

A conviction for being an accessory after the fact to the manufacture of methamphetamine is an aggravated felony. *See Olivera-Garcia v. INS*, 328 F.3d 1083 (9th Cir. 2003) (leaving open the question of whether a conviction solely under the federal accessory after the fact statute would be a violation of a law relating to a controlled substance).

e. Convictions and Admissions Relating to a Controlled Substance

Aliens may be deportable for drug offenses that are not aggravated felonies. *See* 8 U.S.C. § 1227(a)(2)(B)(i). This ground of deportability covers "[a]ny 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 United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana."

For example, *see Lara-Chacon v. Ashcroft*, 345 F.3d 1148 (9th Cir. 2003) (amended opinion) (Arizona money laundering offense is not a crime relating to a controlled substance); *Cruz-Aguilera v. INS*, 245 F.3d 1070 (9th Cir. 2001) (order) (California conviction for possession of methamphetamine is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i)); *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (holding that Arizona conviction for possession of drug paraphernalia was a conviction relating to a controlled substance); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (Arizona conviction for solicitation to possess marijuana for sale is not an aggravated felony or violation of a law relating to a controlled substance); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (Arizona conviction for solicitation to possess cocaine is not a

violation of a law relating to a controlled substance, and is therefore not a deportable offense); *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (conviction for being under the influence of amphetamines is a deportable offense); *Johnson v. INS*, 971 F.2d 340 (9th Cir. 1992) (conviction for violation of the Travel Act, 18 U.S.C. § 1952, was a violation of a law relating to a controlled substance).

Even absent a conviction, a noncitizen can be found inadmissible to the United States if he or she admits all of the elements of a controlled substance offense. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II); *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) (applicant was inadmissible because he admitted prior use of marijuana in the Philippines, which constituted the essential elements of a violation of a foreign state's law relating to a controlled substance).

(i) Exception for 30 Grams or Less of Marijuana

See Medina v. Ashcroft, 393 F.3d 1063, 1065 (9th Cir. 2005) (Nevada conviction of attempting to be under the influence of THC-carboxylic acid, a controlled substance, was not a removable offense because it came within the statutory exception for possession of 30 grams or less of marijuana).

3. Illicit Trafficking in Firearms

An aggravated felony includes "illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title)." 8 U.S.C. § 1101(a)(43)(C).

4. Money Laundering

An aggravated felony includes "an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000." 8 U.S.C. § 1101(a)(43)(D). In order for a conviction for money laundering to constitute an aggravated felony under this section, the amount

of funds laundered must be over $10,000. *See Chowdhury v. INS*, 249 F.3d 970, 975 (9th Cir. 2001) (conviction for money laundering was not an aggravated felony because amount of funds laundered was less than $10,000).

5. Explosives, Firearms and Arson

An aggravated felony includes: an offense described in –

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or
(iii) section 5861 of Title 26 (relating to firearms offenses).

8 U.S.C. § 1101(a)(43)(E); *see also United States v. Mendoza-Reyes*, 331 F.3d 1119 (9th Cir. 2003) (Washington conviction for first-degree unlawful possession of a firearm is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii) for sentencing purposes); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E) for sentencing purposes); *United States v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000) (Washington conviction for possession of firearm by non-citizen was not an aggravated felony for sentencing purposes).

6. Crimes of Violence

The definition of aggravated felony includes "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F); *see also Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

"Section 16 of Title 18, in turn, provides that 'crime of violence' means: (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." *Ye*, 214 F.3d at 1133 (quoting 18 U.S.C. § 16); *see also Leocal v. Ashcroft*, 543 U.S. 1, 6–7 (2004). "We have squarely held that the force necessary to constitute a crime of violence must actually be violent in nature." *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (internal quotation marks and alteration omitted) (Oregon conviction for harassment was not a crime of violence). In determining whether a crime is a crime of violence under § 16, it may be relevant to look at whether the state defines the crime as a "violent felony." *See Ruiz-Morales v. Ashcroft*, 361 F.3d 1219, 1222 (9th Cir. 2004); *cf. Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005) (the fact that California does not list sexual battery as a "violent" crime is not dispositive).

The "language [of the statute] requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal*, 543 U.S. at 7. Moreover, the statute "is concerned with the least extreme cases of an offense that nonetheless satisfy the offense's necessary elements." *Singh*, 386 F.3d at 1234.

a. Negligent and Reckless Conduct Insufficient

"The critical aspect of § 16(a) is that a crime of violence is one involving the use . . . of physical force against the person or property of another." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (emphasis and internal quotation marks omitted) (explaining that a mens rea of mere negligence or less cannot be shoehorned into the federal definition of a crime of violence). "[U]se requires active employment," and "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* (internal quotation marks omitted). "In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 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), suggests a category of violent, active crimes." *Id.* at 11; *see also Penuliar v. Ashcroft*, 435 F.3d 961, 967–68 (9th Cir. 2006) (as amended); *Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221 (9th Cir. 2005) (explaining that gross negligence "does not

constitute the kind of *active* employment of force against another that *Leocal* requires for a crime of violence.").

Likewise, "the reckless use of force is 'accidental' and crimes of recklessness cannot be crimes of violence." *Fernandez-Ruiz v. Gonzales*, No. 03-74533, 2006 WL 3026023, at *7 (9th Cir. Oct. 26, 2006) (en banc). The court has explained: "To the extent recklessness differs from criminal negligence, the difference between them is that criminal negligence requires only a failure to perceive a risk, as compared to the recklessness requirement of an awareness and conscious disregard of the risk. But this subjective awareness of possible injury is not the same as the *intentional* use of physical force against the person of another. Neither gross negligence in failing to perceive, nor conscious disregard of a substantial and unjustifiable risk of injury implies that physical force is instrumental to carrying out the crime, such as the plain meaning of the word 'use' denotes." *Id.* (internal quotation marks and citations omitted).

b. Felony Driving Under the Influence

State DUI offenses which either do not have a *mens rea* component, or require only a showing of negligence in the operation of a vehicle, do not qualify as crimes of violence. *See Leocal v. Ashcroft*, 543 U.S. 1, 8–10 (2004) (Florida conviction for felony DUI causing injury); *Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221–22 (9th Cir. 2005) (California conviction for gross vehicular manslaughter while intoxicated) (overruling *Park v. INS*, 252 F.3d 1018, 1023–25 (9th Cir. 2001) and its progeny to the extent inconsistent with *Leocal*)); *see also Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (per curiam) (California felony conviction of DUI with multiple prior convictions); *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001) (California conviction of DUI with injury to another not a crime of violence for sentencing purposes).

c. Assault and Battery

Matsuk v. INS, 247 F.3d 999 (9th Cir. 2001) (petitioner's convictions for assaulting his wife and children were crimes of violence within the definition of 18 U.S.C. § 16(a)); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000) ("It is undisputed that assault with a deadly weapon is included in the

amended definition of 'aggravated felony' in INA § 101(a)(43)(F)"); *see also United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002) (Nevada gross misdemeanor conviction for battery causing substantial bodily harm was an aggravated felony for sentencing purposes); *cf. Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (Oregon harassment offense, which can be accomplished by mere "ephemeral touching," is not a deportable crime of violence).

d. Possession of Firearms

In the criminal context, being a felon in possession of a firearm is not a crime of violence. *See, e.g., United States v. Garcia-Cruz*, 40 F.3d 986 (9th Cir. 1994); *United States v. Sakahian*, 965 F.2d 740 (9th Cir. 1992); *United States v. Canon*, 993 F.2d 1439, 1441 (9th Cir. 1993); *cf. United States v. Hayes*, 7 F.3d 144 (9th Cir. 1993) (possession of unregistered sawed-off shotgun is crime of violence for purposes of career offender status). However, being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E), the specific firearms provision of the aggravated felony definition. *See United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony).

e. Other Cases Interpreting Crimes of Violence

Valencia v. Gonzales, 439 F.3d 1046 (9th Cir. 2006) (California statutory rape conviction is not a crime of violence); *Penuliar v. Ashcroft*, 435 F.3d 961, 967–68 (9th Cir. 2006) (as amended) (California conviction for evading an officer is not a crime of violence because intent can be satisfied by proof of prior negligent traffic violations) (mandate pending);*Ye v. INS*, 214 F.3d 1128, 1133–34 (9th Cir. 2000) (California conviction for entry into a locked vehicle is not a crime of violence).

Lisbey v. Gonzales, 420 F.3d 930, 932 (9th Cir. 2005) (California conviction for sexual battery under Cal. Penal Code § 243.4(a) is a crime of violence because it involves a substantial risk that physical force against the person or property of another may be used in committing the offense); *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 941 (9th Cir. 2004) (California conviction for exhibiting deadly weapon with intent to evade arrest is a crime of

violence); *Ruiz-Morales v. Ashcroft*, 361 F.3d 1219 (9th Cir. 2004) (California conviction of mayhem is a crime of violence); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) (California conviction for making terrorist threats is a crime of violence); *United States v. Springfield*, 829 F.2d 860, 863 (9th Cir. 1987) (federal involuntary manslaughter).

Cross-reference: Domestic Violence Crimes.

7. Theft or Burglary

The definition of aggravated felony includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G); *see also Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), this court adopted the following generic definition of theft offense: "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id*. at 1205 (California conviction for petty theft with a prior did not facially constitute an aggravated felony because the statute was over-inclusive and the maximum possible sentence was less than one year).

The critical aspect of the generic definition of theft is "the criminal intent to deprive the owner." *Nevarez-Martinez v. INS*, 326 F.3d 1053, 1055 (9th Cir. 2003). Aiding and abetting theft does not constitute theft for purposes of the aggravated felony definition. *See Corona-Sanchez*, 291 F.3d at 1207–08 (noting that "[u]nder California law, aiding and abetting liability is quite broad, extending even to promotion and instigation"); *see also Penuliar v. Ashcroft*, 435 F.3d 961, 969–71 (9th Cir. 2006) (as amended) (California conviction for vehicle theft does not categorically qualify as theft offense where record of conviction does not preclude the possibility that the conviction was for aiding and abetting); *Martinez-Perez v. Ashcroft*, 417 F.3d 1022, 1028–29 (9th Cir. 2005) (grand theft under Cal. Penal Code § 487(c) is not categorically a theft offense because it criminalizes conduct by a principal and by an aider and abettor).

Note that the Supreme Court recently granted review in ***Gonzales v.***

***Duenas-Alvarez*, No. 04-74471, 2006 WL 1009222 (9th Cir. April 18, 2006) (unpublished memorandum disposition), *cert. granted*, ---- S. Ct. ----, 2006 WL 1733804 (U.S. Sept. 26, 2006) (No. 05-1629), to determine whether an aiding and abetting conviction qualifies as a theft offense.**

A burglary offense is "the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Ye*, 214 F.3d at 1132.

See also United States v. Espinoza-Cano, 456 F.3d 1126, 1131 (9th Cir. 2006) (mandate pending) (California conviction for grand theft under Cal. Penal Code § 487(a) is not categorically an aggravated felony); *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003) (Arizona conviction for theft of a means of transportation is not categorically an aggravated felony); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883 (9th Cir. 2003) (Arizona conviction for possession of a stolen vehicle is not categorically an aggravated felony); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (federal conviction for possession of stolen mail qualifies as an aggravated felony); *United States v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002) (Arizona conviction for unlawful use of means of transportation is not a theft offense for sentencing enhancement purposes); *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) (California conviction for petty theft with a prior is not categorically an aggravated felony because the statute was over-inclusive and the maximum possible sentence was less than one year); *Alberto-Gonzalez v. INS*, 215 F.3d 906, 910 (9th Cir. 2000) (California burglary conviction with 79-day sentence was not an aggravated felony); *Ye*, 214 F.3d at 1132–34 (California conviction for vehicle burglary does not meet the aggravated felony definition of a burglary or a crime of violence).

8. Ransom Offenses

The definition of aggravated felony includes "an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)." 8 U.S.C. § 1101(a)(43)(H).

9. Child Pornography Offenses

The definition of aggravated felony includes "an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)." 8 U.S.C. § 1101(a)(43)(I).

10. RICO Offenses

The definition of aggravated felony includes "an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed." 8 U.S.C. § 1101(a)(43)(J).

11. Prostitution and Slavery Offenses

The definition of aggravated felony includes: an offense that–

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;
(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or
(iii) is described in any of sections 1581–1585 or 1588–1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons).

8 U.S.C. § 1101(a)(43)(K).

12. National Defense Offenses

The definition of aggravated felony includes: an offense described in–

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;
(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents).

8 U.S.C. § 1101(a)(43)(L).

13. Fraud or Deceit Offenses

The definition of aggravated felony includes: an offense that–

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

8 U.S.C. § 1101(a)(43)(M).

See Unuakhaulu v. Ashcroft, 416 F.3d 931, 933 n.2 (9th Cir. 2005) (noting that petitioner did not dispute that conviction for conspiracy to traffic in counterfeit credit cards was an aggravated felony); *Ferreira v. Ashcroft*, 390 F.3d 1091 (9th Cir. 2004) (California welfare fraud conviction was an aggravated felony under the modified categorical approach); *Li v. Ashcroft*, 389 F.3d 892 (9th Cir. 2004) (fraud-related federal offenses were not aggravated felonies because statutes did not require proof of monetary loss, and record of conviction did not demonstrate unequivocally that the jury found the amount of loss to be greater than $10,000); *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (conviction for one count of bank fraud was not an aggravated felony where the loss to the victim, as noted in the plea agreement, was under $10,000, even though restitution order was higher).

14. Alien Smuggling

The definition of aggravated felony includes "an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (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 individual) to violate a provision of this chapter." 8 U.S.C.

§ 1101(a)(43)(N).

Harboring illegal aliens constitutes an aggravated felony under this section. *See Castro-Espinosa v. Ashcroft*, 257 F.3d 1130 (9th Cir. 2001); *see also United States v. Galindo-Gallego*, 244 F.3d 728 (9th Cir.), *amended by* 255 F.3d 1154 (9th Cir. 2001) (conviction for transporting illegal aliens already in United States was aggravated felony for sentencing enhancement purposes). Alien smuggling "requires an affirmative act of help, assistance, or encouragement. *Altamirano v. Gonzales*, 427 F.3d 586, 592–93 (9th Cir. 2005) (presence in a vehicle with knowledge that an alien is in the trunk is insufficient to constitute alien smuggling).

15. Illegal Reentry after Deportation for Aggravated Felony

The definition of aggravated felony includes "an offense described in section 1325(a) [Improper entry by alien] or 1326 [Reentry of removed aliens] of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph." 8 U.S.C. § 1101(a)(43)(O).

16. Passport Forgery

The definition of aggravated felony includes "an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) 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 individual) to violate a provision of this chapter." 8 U.S.C. § 1101(a)(43)(P).

17. Failure to Appear for Service of Sentence

The definition of 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 5 years or more." 8 U.S.C. § 1101(a)(43)(Q).

18. Commercial Bribery and Counterfeiting

The definition of 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." 8 U.S.C. § 1101(a)(43)(R). A federal conviction for possession of counterfeit obligations is an aggravated felony under this section. *See Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000).

The court has adopted a generic core definition of forgery that requires intent to defraud and includes a mental state requirement of knowledge of the fictitious nature of the instrument. *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006) (California conviction for forgery of a check, in violation of Cal. Penal Code § 476(a), categorically qualifies as an aggravated felony because it requires knowledge of the fictitious nature of the instrument).

19. Obstruction of Justice

The definition of 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." 8 U.S.C. § 1101(a)(43)(S).

20. Failure to Appear before a Court

The definition of 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 2 years' imprisonment or more may be imposed." 8 U.S.C. § 1101(a)(43)(T).

21. Attempt or Conspiracy to Commit an Aggravated Felony

The definition of aggravated felony includes "an attempt or conspiracy to commit an offense described in this paragraph. 8 U.S.C. § 1101(a)(43)(U); *see also Li v. Ashcroft*, 389 F.3d 892, 896 n.8 (9th Cir. 2004).

VII. CRIMES INVOLVING MORAL TURPITUDE

Conviction of a crime involving moral turpitude is a ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(i). Specifically, an alien "convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and . . . for which a sentence of one year or longer may be imposed, is deportable." 8 U.S.C. § 1227(a)(2)(A)(i). Before 1996, the statute required a sentence or actual confinement for one year. *See Perez v. INS*, 116 F.3d 405, 408 (9th Cir. 1997).

The "date of admission" for purposes of calculating the five years for the moral turpitude ground is the date of the alien's lawful entry to the United States upon inspection and authorization by an immigration officer. *See Shivaraman v. Ashcroft*, 360 F.3d 1142, 1148–49 (9th Cir. 2004). The alien's subsequent adjustment to lawful permanent resident status will not trigger the five-year provision if he or she continued to maintain lawful presence in the United States after an initial lawful entry. *Id.* at 1149 (applicant was not removable because his crime of moral turpitude was not committed within five years of his initial lawful admission); *cf. Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134–35 (9th Cir. 2001) (applicant's adjustment of status could constitute an "admission" for purposes of deportability based on a conviction of an aggravated felony where he initially entered the United States without inspection).

Multiple convictions for moral turpitude offenses may also subject an individual to removability. *See* 8 U.S.C. § 1227(a)(2)(A)(ii). "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." *Id.*

Additionally, "any alien convicted of, or who admits having committed, or who 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." 8 U.S.C. § 1182(a)(2)(A)(i)(I); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003).

A. Definition of Crime Involving Moral Turpitude

"The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." *Jordan v. De George*, 341 U.S. 223, 232 (1951) (holding that crime of conspiracy to defraud United States of taxes was a crime of moral turpitude). Additionally, "certain crimes necessarily involving rather grave acts of baseness or depravity may qualify as crimes of moral turpitude even though they have no element of fraud." *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995) (internal quotation marks omitted). For example, "spousal abuse, child abuse, first-degree incest, and having carnal knowledge of a 15 year old female, all involve moral turpitude." *Id*.

Where an act is only statutorily prohibited, rather than inherently wrong, the act will generally not involve moral turpitude. *See Beltran-Tirado v. INS*, 213 F.3d 1179, 1184 (9th Cir. 2000) (noting difference between *malum prohibitum*, an act only statutorily prohibited, and *malum in se*, an act inherently wrong).

1. Fraud Cases

Notash v. Gonzales, 427 F.3d 693 (9th Cir. 2005) (concluding that a conviction for attempted entry of goods by means of a false statement was not a crime involving moral turpitude where the record did not disclose whether petitioner was convicted under a section of the federal statute requiring a false or fraudulent statement that could indicate an intent to defraud); *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (convictions for making a false attestation on an employment verification form and using a false Social Security number do not constitute crimes involving moral turpitude); *Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994) (California conviction for grand theft is a crime involving moral turpitude); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993) (structuring transaction to avoid currency reporting requirement was not crime involving moral turpitude because there

was no intent to defraud); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (per curiam) (conspiracy to affect the market price of stock by deceit with intent to defraud is a crime involving moral turpitude); *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir. 1978) (dealing in counterfeit obligations is a crime involving moral turpitude); *see also United States v. Esparza-Ponce*, 193 F.3d 1133, 1136–37 (9th Cir. 1999) (stating in illegal reentry case that petty theft constitutes a crime involving moral turpitude).

2. Base or Depraved Acts

Galeana-Mendoza v. Gonzales, 465 F.3d 1054 (9th Cir. 2006) (California conviction for domestic battery under Cal. Penal Code § 243(e) is not categorically a crime involving moral turpitude because it lacks an injury requirement and includes no inherent element evidencing grave acts of baseness or depravity); *Zavaleta-Gallegos v. INS*, 261 F.3d 951 (9th Cir. 2001) (conviction for stalking is a crime involving moral turpitude); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) ("Incest . . . involves an act of baseness or depravity contrary to accepted moral standards, and we hold that it too is a 'crime involving moral turpitude.'"); *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993) (willful infliction of injury to a spouse is a crime involving moral turpitude); *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) (willful infliction of injury to a child is a crime involving moral turpitude).

3. Firearms Offenses

Carr v. INS, 86 F.3d 949, 951 (9th Cir. 1996) (California conviction for assault with firearm not a crime involving moral turpitude); *but see Gonzales v. Barber*, 207 F.2d 398, 400 (9th Cir. 1953), *aff'd*, 347 U.S. 637 (1954) (California conviction for assault with deadly weapon is crime involving moral turpitude).

4. Theft and Burglary Offenses

Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1017–20 (9th Cir. 2005) (burglary convictions under Wash. Rev. Code §§ 9A.52.025(1) and 9A.08.020(3) do not categorically meet the definition of crime involving moral turpitude, but do meet the definition under the modified categorical

approach because petitioner admitted to entering a residence with the intent to steal property); *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136–37 (9th Cir. 1999) (stating in criminal context that petty theft constitutes a crime of moral turptitude); *Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994) (grand theft is a crime involving moral turpitude).

5. Other Cases Discussing Crimes Involving Moral Turpitude

Murillo-Salmeron v. INS, 327 F.3d 898 (9th Cir. 2003) (simple DUI convictions are not crimes involving moral turpitude); *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003) (Arizona conviction for aggravated driving under the influence is not a crime involving moral turpitude); *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 n.4 (9th Cir. 1995) (crime of malicious mischief was not crime involving moral turpitude); *see also United States v. Chu Kong Yin*, 935 F.2d 990 (9th Cir. 1991) (crimes of gambling and criminal intimidation did not necessarily involve moral turpitude).

This court is currently considering en banc whether an accessory after the fact conviction under Cal. Penal Code § 32, which requires a knowing affirmative act to conceal a felony with the specific intent to hinder or avoid prosecution of the perpetrator, constitutes a crime of moral turpitude. *See Navarro-Lopez v. Gonzales*, 04-70345 (Cal. 12/13/06).

B. Single Scheme of Criminal Misconduct

For purposes of deportability under 8 U.S.C. § 1227(a)(2)(A)(ii), based on two convictions involving moral turpitude, the government must prove that the crimes were not part of a single scheme of criminal misconduct. *See Ye v. INS*, 214 F.3d 1128, 1134 n.5 (9th Cir. 2000) (rejecting argument that the court lacked jurisdiction, because the INS did not show that the two counts of vehicle burglary arose out of different criminal schemes); *Leon-Hernandez v. INS*, 926 F.2d 902 (9th Cir. 1991) (conviction for two counts of oral copulation, one month apart, not part of a single scheme); *Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990) (two robberies at same bank arose out of a single scheme).

C. Petty Offense and Youthful Offender Exceptions

A non-citizen with one crime involving moral turpitude is not inadmissible if he or she meets the petty offense exception. *See* 8 U.S.C. § 1182(a)(2)(A)(ii). A crime involving moral turpitude will meet the petty offense exception if "the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months." *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999) (internal quotation marks omitted); *see also Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003).

The youthful offender exception will apply if "the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States." 8 U.S.C. § 1182(a)(2)(A)(ii)(I).

VIII. DOMESTIC VIOLENCE CRIMES

In 1996, IIRIRA added a ground of deportation for a state or federal convictions for a crime of domestic violence. *See* 8 U.S.C. § 1227(a)(2)(E). There is no such ground of inadmissibility. *See Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 650 (9th Cir. 2004).

The statute covers "[a]ny alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i); *see also Tokatly v. Ashcroft*, 371 F.3d 613, 619 (9th Cir. 2004). The act also covers violators of protective orders. *See* 8 U.S.C. § 1227(a)(2)(E)(ii).

A "crime of domestic violence" means:

> any crime of violence (as defined in section 16 of Title 18) 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.

8 U.S.C. § 1227(a)(2)(E)(i).

A crime of violence means: "(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." 8 U.S.C. § 16; *Singh v. Ashcroft*, 386 F.3d 1228, 1231 n.2 (9th Cir. 2004).

Cross-reference: Aggravated Felonies, Crimes of Violence.

A. The Categorical Approach

"In order to determine that [a petitioner] was convicted of a 'crime of domestic violence' under section 237(a)(2)(E)(i), we would have to conclude that his crime was not only one of 'violence,' but also that the violence was 'domestic' within the meaning of that section." *Tokatly v. Ashcroft*, 371 F.3d 613, 619 (9th Cir. 2004); *see also Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393–94 (9th Cir. 2006) (California conviction for battery under Penal Code § 242 is not categorically a crime of domestic violence because it encompasses both domestic violence and violence against strangers).

The categorical and modified categorical methods for determining whether a conviction is a predicate offense for immigration purposes apply to both elements of a crime of domestic violence. *Tokatly*, 371 F.3d at 624 (rejecting the government's contention that the IJ should be able to go outside of the record to determine whether the petitioner had a domestic relationship with the victim). The court has "unequivocally endorsed application of the

modified categorical approach for ascertaining whether a prior conviction constituted a crime of *domestic* violence." *Cisneros-Perez*, 465 F.3d at 392. However, the adjudicating authority may not go beyond the record of conviction to determine whether a conviction is "domestic" within the meaning of the statute. *Id.* at 393 (inferences and admissions in the administrative record could not be used to determine whether a conviction was for domestic violence); *see also Tokatly*, 371 F.3d at 624 (IJ erred in relying on testimonial evidence outside the record of conviction to determine that petitioner's conviction constituted a crime of domestic violence).

B. Domestic Violence

Ortega-Mendez v. Gonzales, 450 F.3d 1010, 1014–15 (9th Cir. 2006) (California battery conviction under Penal Code § 242 is not categorically a crime of violence and thus not a crime of domestic violence); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393–94 (9th Cir. 2006) (California battery conviction under Penal Code § 242 is not categorically a crime of domestic violence because it encompasses violence against strangers); *Tokalty v. Ashcroft*, 371 F.3d 613, 623 (9th Cir. 2004) (Oregon convictions for burglary and attempted kidnaping are not crimes of domestic violence under categorical and modified categorical approaches); *Singh v. Ashcroft*, 386 F.3d 1228, 1230 (9th Cir. 2004) (Oregon's harassment law, "which outlaws intentionally harassing or annoying another person by subjecting that person to offensive physical contact," was not a crime of violence and thus not a crime of domestic violence).

C. Child Abuse

Velazquez-Herrera v. Gonzales, No. 04-72417, 2006 WL 2979646 (9th Cir. Oct. 19, 2006) (per curiam) (remanding for the BIA to consider in the first instance statutory interpretation of the term "child abuse" in 8 U.S.C. § 1227(a)(2)(E)(i)).

IX. Particularly Serious Crimes

An applicant is ineligible for asylum and withholding of removal if the Attorney General determines that "having been convicted by a final judgment of a particularly serious crime, [he or she] is a danger to the community." 8 U.S.C. §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii). For purposes of asylum, an alien convicted of an aggravated felony "shall be considered to be convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). For withholding of removal, "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. [However,] the Attorney General [is not precluded] from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B)(iv).

Although the term "particularly serious crime" is not statutorily defined, this court has applied the standard set forth by the BIA in *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982) (superseded in part by statute). The determination of whether an offense is particularly serious requires a "case-by-case analysis, using '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.'" *Afridi v. Gonzales*, 442 F.3d 1212, 1219–21 (9th Cir. 2006) (internal quotation marks omitted) (remanding for consideration of the facts and circumstances surrounding petitioner's crime to determine whether it qualifies as particularly serious so as to make him ineligible for withholding of removal); *see also Mahini v. INS*, 779 F.2d 1419 (9th Cir. 1986). The court has explained that "when determining whether a particularly serious crime has been committed, it is the conviction that is in issue, not other acts that might render the alien dangerous to the community." *Afridi*, 442 F.3d at 1220 (quoting *Beltran-Zavala v. INS*, 912 F.2d 1027, 1031 (9th Cir. 1990) (superseded in part by statute)).

X. Selected Criminal Grounds for Inadmissibility

While the government has the burden of establishing by clear and convincing evidence that an individual admitted to the United States is deportable, an individual who is an applicant for admission bears the burden

of establishing that he or she is "clearly and beyond doubt entitled to be admitted and is not inadmissible . . .; or by clear and convincing evidence that he or she is lawfully present in the United States pursuant to a prior admission." 8 U.S.C. § 1229a(c)(2); *Altamirano v. Gonzales*, 427 F.3d 586, 590 (9th Cir. 2005). An individual paroled into the United States is considered an "applicant for admission." 8 U.S.C. § 1101(a)(13)(A) (stating that parole status "shall not be regarded as an admission of the alien); *Altamirano*, 427 F.3d at 590–91 (IJ erred by misplacing the government's burden to prove that a parolee was inadmissible).

Admissibility for Special Agricultural Workers is determined as of the date of admission for lawful temporary residence. *Perez-Enriquez v. Gonzales*, 463 F.3d 1007, 1011–14 (9th Cir. 2006) (en banc).

A. Prostitution Offenses

Section 212(a)(2)(D)(i) of the INA, 8 U.S.C. § 1182(a)(2)(D)(i), renders inadmissible any alien who "is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status. Although the INA does not define the term "prostitution," the court has accorded deference to the State Department's definition of prostitution as "engaging in promiscuous sexual intercourse for hire." 22 C.F.R. § 40.24(b); *Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th Cir. 2006). The court has explained, quoting this regulation, that engaging in prostitution "must be based on elements of *continuity* and *regularity*, indicating a *pattern* of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts." *Kepilino*, 454 F.3d at 1061–62 (prostitution conviction under Hawaii Revised Statute § 712-1200 did not categorically meet the definition of prostitution because the statute is overly broad and criminalizes isolated acts that do not necessarily involve sexual intercourse).

B. Alien Smuggling

Any alien who at any time knowingly has encouraged, induced,

assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible. 8 U.S.C. § 1182(a)(6)(E)(i).

Mere presence in a vehicle at the port of entry with knowledge that an undocumented immigrant is hiding in the trunk does not constitute alien smuggling. *See Altamirano v. Gonzales*, 427 F.3d 586, 596 (9th Cir. 2005). The court has explained that the plain meaning of the alien smuggling provision "requires an affirmative act of help, assistance, or encouragement." *Id*. at 592.