# FUNDAMENTALS OF IMMIGRATION LAW

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TABLE OF CONTENTS

The "Entry Doctrine.". . . . . 13
History Lesson.. . . . . 13
Applicants for Admission. . . . . 13
Admission or Admitted. . . . . 14
Parole and Crewmen. . . . . 14
Lawful Permanent Residents. . . . . 14

Inspection and Credible Fear Review. . . . . 15
Inspection. . . . . 15
Withdrawal of Application for Admission. . . . . 16
Summary Removal.. . . . . 16
Stowaways. . . . . 16
Inspection of Other Aliens. . . . . 17
Removal of Aliens Inadmissible on Security and Related Grounds. . . . . 17

Bond and Custody under IIRIRA.. . . . . 18
Arriving Aliens. . . . . 18
Detention of Criminal Aliens.. . . . . 18
Transition Period Custody Rules. . . . . 24
Detention of Aliens Certified as Terrorists. . . . . 24
Mass Migrations and National Security Interests. . . . . 25
Aliens Subject to Expedited Removal. . . . . 26
All Other, i.e. Non-criminal, Non-terrorist, Aliens. . . . . 26
Procedure in Bond Proceedings. . . . . 29
Request for Additional or Subsequent Bond Redeterminations. . . . . 31
Appeals of Bond Decisions. . . . . 32

Grounds of Inadmissibility in Removal Proceedings.. . . . . 32
Health-related Grounds. . . . . 33
Crime Involving Moral Turpitude. . . . . 33
Controlled Substance Offenses. . . . . 38
Multiple Criminal Convictions. . . . . 38
Trafficking in Controlled Substances. . . . . 39
Prostitution. . . . . 40
Procurers & Importers of Prostitutes. . . . . 40
Commercialized Vice.. . . . . 41
Aliens Who Asserted Immunity from Prosecution. . . . . 41
Espionage or Sabotage. . . . . 42
Any Unlawful Activity.. . . . . 43
Overthrow the Government of the U.S.. . . . . 43
Terrorist Activities. . . . . 43

Effect on Foreign Policy. . . . . 47
Communist or Totalitarian Party Membership. . . . . 48
Nazi Persecution. . . . . 49
Genocide. . . . . 49
Public Charge.. . . . . 49
Labor Certification.. . . . . 50
Foreign Medical Graduates. . . . . 50
Uncertified Foreign Health-care Workers. . . . . 50
Illegal Entrants and Immigration Violators. . . . . 50
Not Admitted or Paroled. . . . . 50
Failure to Attend Hearing. . . . . 51
Misrepresentation.. . . . . 51
Fraud or Misrepresentation of a Material Fact.. . . . . 51
False Claim to USC.. . . . . 51
Stowaways. . . . . 52
Alien Smugglers.. . . . . 52
Violators of Section 274C. . . . . 52
Student Visa Abusers.. . . . . 53
Visa And/or Documentation Requirements Applicable to Immigrants.. . . . . 53
Visa And/or Documentary Requirements Applicable to Nonimmigrants. . . . . 53
Permanently Ineligible to Citizenship. . . . . 53
Draft Evaders. . . . . 54
Aliens Previously Removed or Unlawfully Present.. . . . . 54
Polygamists. . . . . 57
Guardian Required to Accompany Helpless Alien. . . . . 57
International Child Abduction. . . . . 57
Unlawful Voters.. . . . . 58
Former Citizens Who Renounced Citizenship to Avoid Taxation. . . . . 58

Grounds of Deportability in Removal Proceedings. . . . . 58
Inadmissible at Time of Entry or Adjustment of Status.. . . . . 58
Present in Violation of Law. . . . . 58
Violated Nonimmigrant Status. . . . . 58
Violators of Conditions of Entry. . . . . 58
Termination of Conditional Permanent Residence. . . . . 58
Alien Smuggling. . . . . 59
Special Rule in the Case of Family Reunification.. . . . . 59
Marriage Fraud.. . . . . 59
CIMT W/in 5 Years of Admission.. . . . . 60
Two CIMTs. . . . . 61
Convicted of an Aggravated Felony.. . . . . 64
Convicted of High Speed Flight.. . . . . 64
Failure to Register as a Sex Offender. . . . . 64
Controlled Substance Conviction. . . . . 64

Drug Abusers and Addicts. . . . . 68
Firearm Offenses. . . . . 68
Miscellaneous Crimes. . . . . 74
Crimes of Domestic Violence, Stalking, and Child Abuse. . . . . 74
Violators of Protection Orders. . . . . 75
Failure to Register. . . . . 76
Document Fraud.. . . . . 76
Falsely Claiming Citizenship. . . . . 76
National Security and Related Grounds.. . . . . 76
Terrorist Activities. . . . . 77
Effect on Foreign Policy. . . . . 77
Assisted in Nazi Persecution or Engaged in Genocide. . . . . 78
Public Charge.. . . . . 78
Unlawful Voters.. . . . . 78
Deportation of Certain Nonimmigrants Prohibited Without Approval. . . . . 78
Waiver under Section 237(c) for Special Immigrants... . . . . 78

Procedure in Removal Proceedings. . . . . 79
Notice to the Alien. . . . . 79
The Charging Document. . . . . 79
Written Notice Requirement. . . . . 79
Securing of Counsel. . . . . 80
Prompt Initiation of Removal. . . . . 81
Termination of Parole. . . . . 81
Service of the NTA. . . . . 82
Persons Confined. . . . . 82
Incompetents and Minors.. . . . . 82
Cancellation of the NTA and Motions to Dismiss and Remand. . . . . 84
Cancellation of the NTA. . . . . 84
Motion to Dismiss. . . . . 84
Motion for Remand. . . . . 85
Termination by IJ. . . . . 85
Hearing in Removal Proceedings.. . . . . 85
Charges. . . . . 86
Exclusive Procedures. . . . . 86
Authority of IJ. . . . . 86
Form of Proceeding. . . . . 86
Presence of Alien. . . . . 86
Alien's Rights in Proceeding. . . . . 86
Record. . . . . 87
Pleading by Respondent.. . . . . 87
Minors.. . . . . 87
Country of Removal.. . . . . 88
In General.. . . . . 88

Arriving Aliens.. . . . . 88
All Other Aliens.. . . . . 89
Foreign Contiguous Territory and Adjacent Islands.. . . . . 90
Decision. . . . . 91
Failure to Appear - In Absentia Hearings. . . . . 92
Recission of a Removal Order Rendered in Absentia. . . . . 98
Aliens in Contiguous Territory.. . . . . 99
Limitation on Discretionary Relief for Failure to Appear... . . . . 99
Stipulated Removal. . . . . 99
Methods of Removal Not Involving an IJ. . . . . 99
Expedited Removal of Aliens Convicted of Aggravated Felonies. . . . . 99
Expedited Removal of Other Aliens. . . . . 99
Reinstatement of Removal Orders Against Aliens Illegally Reentering. . . . . 100
Judicial Removal. . . . . 101

Relief from Removal. . . . . 101
Background and Security Investigations in Proceedings Before an IJ.. . . . . 101
Covered Forms of Relief. . . . . 101
Voluntary Departure.. . . . . 102
Pre-conclusion Voluntary Departure. . . . . 103
Voluntary Departure at the Conclusion of Proceedings.. . . . . 105
Additional Conditions. . . . . 107
Civil Penalty for Failure to Depart.. . . . . 107
Extension of Time to Depart. . . . . 108
Reinstatement of Voluntary Departure. . . . . 108
Withdrawal of Application for Admission. . . . . 108
Citizenship. . . . . 109
Cancellation of Removal for Certain Permanent Residents under Section 240A(a) and for Certain Nonpermanent Residents under Section 240A(b). . . . . 110
Aliens Ineligible for Relief. . . . . 110
Cancellation of Removal for Certain Permanent Residents, Section 240A(a). . 111
Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents under Section 240A(b). . . . . 112
Special Rule for Battered Spouse or Child. . . . . 117
Adjustment of Status of Alien Whose Removal is Cancelled. . . . . 118
Special Rules Relating to Continuous Residence or Physical Presence. . . . . 118
A Waiver under Former Section 212(c).. . . . . 123
Substantive Requirements. . . . . 126
Grounds of Inadmissibility and Deportability Which Cannot Be Waived under Former Section 212(c). . . . . 129
Exercise of Discretion. . . . . 132
Special Motions to Reopen for Former Section 212(c) Relief.. . . . . 137
Asylum.. . . . . 139
Authority to Apply for Asylum. . . . . 139

Exceptions. . . . . 139
Safe Third Country.. . . . . 139
Time Limit . . . . . 139
Conditions for Granting Asylum. . . . . 141
Exceptions. . . . . 145
Asylum Procedure. . . . . 148
Burden of Proof. . . . . 151
Past Persecution. . . . . 152
Discretion.. . . . . 156
Termination of Asylum. . . . . 157
Adjustment of Status by Refugees or Aliens Granted Asylum. . . . . 157
Aliens Admitted as Refugees.. . . . . 158
Aliens Granted Asylum. . . . . 158
Aliens Found to Be Inadmissible.. . . . . 159
Exercise of Discretion. . . . . 161
Withholding of Removal. . . . . 161
Exceptions. . . . . 162
Burden of Proof. . . . . 163
Past Persecution. . . . . 164
Case Law Common to Both Asylum and Withholding of Removal. . . . . 164
Reasonable Grounds for Regarding the Alien as a Danger
to the Security of the U.S.. . . . . 164
Particularly Serious Crimes. . . . . 165
Serious Nonpolitical Crime. . . . . 171
What Constitutes Persecution. . . . . 172
Definition.. . . . . 172
Criminal Prosecution. . . . . 172
Freedom of Speech.. . . . . 172
Harm Arising out of Civil Strife. . . . . 173
Travel Tax. . . . . 173
Kidnaping.. . . . . 173
Persecution by an Individual for Personal Reasons. . . . . 173
Nonphysical Forms of Harm. . . . . 174
Military Service. . . . . 174
Nongovernmental Persecution.. . . . . 174
Civil War and Guerrilla Activity. . . . . 175
Imputed Political Opinion. . . . . 178
Clan Membership/Family. . . . . 179
Participation in the Mariel Boatlift. . . . . 179
Coercive Family Planning or Population Control... . . . . 179
Political Situation in Sri Lanka. . . . . 184
Political Situation in India.. . . . . 185
Persecution on Account of Gender.. . . . . 186
Sexual Preference.. . . . . 189

Health Conditions. . . . . 189
Domestic Violence.. . . . . 190
Former Noncriminal Drug Informants. . . . . 191
Affluent Guatemalans. . . . . 191
Former Gang Members. . . . . 191
Evidence.. . . . . 193
Background and Corroborating Evidence. . . . . 194
Credibility. . . . . 196
Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. . . . . 198
Definition of "Torture.". . . . . 199
Eligibility in Spite of Frivolous Asylum Application. . . . . 201
Withholding of Removal under the Convention Against Torture. . . . . 201
Differences Between Withholding of Removal under Section 241(b)(3) of the Act and Withholding of Removal under Article 3 of the Convention Against Torture.. . . . . 201
Deferral of Removal under the Convention Against Torture.. . . . . 204
Notice Which IJ must Give to Respondent... . . . . 205
Establishing Eligibility.. . . . . 205
Termination of Deferral of Removal. . . . . 205
Termination at the Request of the Service.. . . . . 205
Termination at the Request of the Alien.. . . . . 207
Termination Pursuant to 8 C.F.R. § 1208.18(c).. . . . . 207
Adjustment of Status. . . . . 207
Introduction... . . . . 208
Jurisdiction.. . . . . 208
Substantive Requirements. . . . . 209
Favorable Exercise of Discretion.. . . . . 213
Aliens Who Are Ineligible to Adjust. . . . . 214
Section 245(i).. . . . . 221
Deportable LPRs May Adjust Status. . . . . 223
Miscellaneous Cases on Adjustment of Status.. . . . . 224
Waivers. . . . . 225
A Waiver for Inadmissible Refugees. . . . . 225
A Waiver of Passport, Immigrant Visa, or Other Entry Documents for Returning Residents. . . . . 226
Permission to Reapply after Deportation, Exclusion or Removal. . . . . 226
A Waiver for Nonimmigrants Coming to Provide Information about Criminal Activity. . . . . 227
A General Waiver for Nonimmigrants.. . . . . 228
A Waiver of Documents for Nonimmigrants.. . . . . 228
A Waiver of Alien Smuggling. . . . . 229
Waiver for Document Fraud. . . . . 230
A Waiver of the 2 Year Foreign Residence Requirement Imposed

on Exchange Nonimmigrants under Section 101(a)(15)(J). . . . . 231
A Waiver of Inadmissibility for Disease, Mental Illness, Etc... . . . . 232
A Waiver of Criminal Activity. . . . . 232
A Waiver of Inadmissibilty for Fraud or Misrepresentation. . . . . 241
A Waiver of Inadmissibility under Sections 212(a)(5)(A) [No Labor Certification] and 212(a)(7)(A)(I) [No Valid Entry Document]. . . . . 242
A Waiver of Inadmissibility as a Public Charge. . . . . 242
A Waiver of the Requirement to File Joint Petition for Removal of Conditions.243
A Waiver of Fraud in Removal Proceedings. . . . . 245
A Waiver of Passport and Visa for Certain Nonimmigrant Visitors Seeking Admission to Guam. . . . . 247
Nicaraguan Adjustment and Central American Relief Act (NACARA). . . . . 247
Adjustment of Status by Nationals of Nicaragua or Cuba. . . . . 248
Application in Lieu of MTR.. . . . . 249
Special Rule for Cancellation of Removal for Salvadorans, Guatemalans, and Aliens from Soviet Bloc Countries. . . . . 249
Motions to Reopen.. . . . . 252
Calculation of Physical Presence for Salvadorans, Guatemalans, and Aliens from Soviet Bloc Countries. . . . . 252

Advance Parole. . . . . 253

Defenses to Removability Available to Aliens Convicted of Crimes. . . . . 254
The Charge Requires a Conviction and the Conviction Does Not Support the Charge. 254
Crimes Involving Moral Turpitude. . . . . 254
The Conviction Is Not Final Due to an Appeal. . . . . 259
Pardons.. . . . . 263
The Criminal Proceeding Did Not Result in a “Conviction” Within the Meaning of the Immigration and Nationality Act. . . . . 266
Expungements of Criminal Convictions. . . . . 267
Reduction in Sentence. . . . . 270
Naturalized Citizen at Time of Conviction . . . . . 271
Judicial Recommendations Against Deportation (JRADs). . . . . 271
Juvenile Delinquency.. . . . . 271

Evidence.. . . . . 272
In General.. . . . . 272
Burden of Proof and Presumptions. . . . . 273
In Deportation Proceedings. . . . . 274
In Exclusion Proceedings.. . . . . 275
In Rescission Proceedings. . . . . 277
In Removal Proceedings. . . . . 277
Documents. . . . . 278
Certification.. . . . . 278

Domestic Documents.. . . . . 278
Foreign Documents.. . . . . 280
Translation. . . . . 282
Service... . . . . 282
Size and Format of Documents... . . . . 282
Presumption of Regularity of Government Documents.. . . . . 283
Similarity of Names.. . . . . 283
Cases Regarding Specific Documents.. . . . . 283
Form I-213, Record of Deportable/Inadmissible Alien.. . . . . 283
Sworn Statement by Respondent.. . . . . 284
Form I-130, Visa Petition.. . . . . 284
Police Reports.. . . . . 284
Admissions Made by Counsel... . . . . 285
Testimony.. . . . . 286
Calling the Alien to Testify... . . . . 286
Refusal by the Alien to Testify.. . . . . 286
On the Issue of Deportability.. . . . . 286
On the Issue of Relief.. . . . . 287
Hearsay.. . . . . 288
Evidence from an Application to Adjust an Alien's Status to That of a Lawful Temporary Resident under Section 210 of the Act. . . . . 289
The Exclusionary Rule.. . . . . 289
Evidence Obtained in Violation of the Due Process Clause of the 5th Amendment.. . . . 289
The Doctrine of Equitable Estoppel.. . . . . 291
The Doctrine of Collateral Estoppel or Res Judicata.. . . . . 291
In General.. . . . . 291
Decisions in Criminal Proceedings... . . . . 292
Decisions in Denaturalization Cases... . . . . 294
Decisions in Extradition Proceedings.. . . . . 295
Decisions in Prior Deportation Proceedings or Other Administrative Decisions... . . . . 296
Miscellaneous Cases.. . . . . 297
Classified Information. . . . . 298
Protective Orders.. . . . . 298
Constitutional Issues.. . . . . 302
Administrative Notice... . . . . 302
Items Which Are Not Evidence.. . . . . 304
An IJ's Duties Regarding Evidence.. . . . . 304

Aggravated Felonies. . . . . 305
Definition. . . . . 305
Murder, Rape, or Sexual Abuse of a Minor.. . . . . 305
Illicit Trafficking in Any Controlled Substance.. . . . . 307
Illicit Trafficking in Firearms or Destructive Devices.. . . . . 310

Any Offense Described in 18 U.S.C. § 1956 Relating to Laundering of Monetary Instruments. . . . . 311
Explosive Materials Offenses. . . . . 311
Firearms Offenses. . . . . 312
A Crime of Violence. . . . . 314
Theft, Burglary, and Receipt of Stolen Property. . . . . 323
Theft.. . . . . 323
Stolen Property.. . . . . 325
Burglary... . . . . 326
An Offense Described in 18 U.S.C. § 875, 876, 877, or 1202 Relating to the Demand for or Receipt of Ransom. . . . . 328
An Offense Described in 18 U.S.C. §§ 2251, 2251a, or 2252 (Relating to Child Pornography). . . . . 329
An Offense Described in 18 U.S.C. § 1962 (Relating to Racketeer Influenced Corrupt Organizations) or an Offense Described in 18 U.S.C. § 1084 (If it Is a Second or Subsequent Offense) or 18 U.S.C. § 1955 (Relating to Gambling Offenses) for Which a Sentence of One Year or More May Be Imposed. . . . . 329
Prostitution Business. . . . . 329
Transportation for the Purpose of Prostitution.. . . . . 329
Peonage, Slavery, and Involuntary Servitude. . . . . 330
National Defense Information. . . . . 330
Identity of Undercover Intelligence Agents. . . . . 330
An Offense That Involves Fraud or Deceit. . . . . 330
Tax Evasion. . . . . 332
Alien Smuggling. . . . . 332
An Offense Described in Section 275(a) [Entering or Attempting to Enter the U.S. Without Inspection or by Fraud] or 276 [Reentry after Exclusion, Deportation, or Removal] Committed by an Alien Who Was Previously Deported on the Basis of a Conviction Described in Another Subparagraph of Section 101(a)(43). . . . . 333
Document Fraud.. . . . . 333
Failure to Appear by a Defendant for Service of Sentence. . . . . 333
Commercial Bribery, Counterfeiting, Forgery, or Trafficking in Vehicles the Identification Numbers of Which Have Been Altered.. . . . . 333
An Offense Relating to Obstruction of Justice, Perjury or Subornation of Perjury, or Bribery of a Witness. . . . . 333
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. . . . . 334
An Attempt or Conspiracy. . . . . 334
Limitations by Date of Conviction, Etc.. . . . . 334
In Deportation Proceedings. . . . . 334
In Removal Proceedings. . . . . 335

Good Moral Character (GMC).. . . . . 335
Habitual Drunkard. . . . . 336
Miscellaneous (Including Polygamists). . . . . 336
Prostitutes and Commercialized Vice. . . . . 336
Persons Convicted of or Admitting a Crime Involving Moral Turpitude. . . . . 336
Persons Convicted of Two or More Offenses. . . . . 336
An Alien Who the Consular or Immigration Officer Knows or Has Reason to Believe Is or Has Been an Illicit Trafficker in Controlled Substances. . . . . 337
Alien Smugglers.. . . . . 337
Illegal Gambling Activities. . . . . 337
Convicted of 2 or More Gambling Offenses. . . . . 337
False Testimony. . . . . 337
Confined as a Result of Conviction to a Penal Institution for an Aggregate Period of 180 Days. . . . . 339
Convicted of an Aggravated Felony.. . . . . 339

Temporary Protected Status (TPS). . . . . 341
Designation by the Attorney General.. . . . . 341
Effective Period of Designation. . . . . 341
Jurisdiction to Consider Applications... . . . . 342
Before the DD. . . . . 342
Before an IJ.. . . . . 342
Aliens Eligible for TPS. . . . . 343
Withdrawal of TPS. . . . . 346
TPS as it Relates to Cancellation of Removal. . . . . 346
Benefits and Status During TPS. . . . . 347
Countries That Have Been Designated for TPS.. . . . . 347
Currently Designated Countries.. . . . . 347
Countries Which TPS Designation Has Expired. . . . . 349
Deferred Enforced Departure . . . . . 350

Motions to Reopen, Reconsider, and Remand under the IIRIRA. . . . . 350
Definitions... . . . . 350
Motion to Reconsider.. . . . . 352
Motions to Reopen in General.. . . . . 353
MTR to Apply for Asylum or Withholding of Removal.. . . . . 354
Motion to Reopen to Rescind a Removal Order Rendered in Absentia.. . . . . 355
Motions to Reopen Orders That Were Entered in Absentia in Exclusion Proceedings.. 357
A Motion to Reopen or Reconsider Based upon a Claim of Ineffective Assistance of Counsel. . . . . 357
MTR in Order to Apply for Adjustment of Status.. . . . . 362
MTR to Apply for Cancellation of Removal under Section 240A of the Act. . . . . 364
Where to File the Motion.. . . . . 365

In General.. . . . . 365
Motions to Reopen or Reconsider Decisions of the BIA.. . . . . 365
Motions to Reopen or Reconsider Decisions of IJs. . . . . 365
Sua Sponte Reopening or Reconsideration... . . . . 366

Appeals to the BIA from Decisions Made by an IJ. . . . . 366
Notice of the Right to Appeal. . . . . 366
Filing a Notice of Appeal.. . . . . 366
Time Limits for Appeal... . . . . 366
Appealing Parties. . . . . 367
Fee for Appeal... . . . . 367
Representation by Counsel.. . . . . 368
Proof of Service. . . . . 368
English Language or Certified Translation. . . . . 368
Proper Filing of Appeal. . . . . 368
Waiver of Appeal.. . . . . 368
Standard of Review on Appeal. . . . . 370
Interlocutory Appeals.. . . . . 370
Appeals from in Absentia Orders of Removal.. . . . . 370
Withdrawal of Appeal... . . . . 370
Certification.. . . . . 371
Remand from the BIA for Background and Security Checks. . . . . 372

I. The “entry doctrine.”

A. HISTORY LESSON.

1. Before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the decision as to whether an alien was subject to deportation proceedings or exclusion proceedings was based on whether or not the alien had made an "entry" into the U.S. An alien who had made an entry was entitled to a deportation hearing and the greater procedural safeguards it provided. An alien who had not made an entry was placed in exclusion proceedings. Former Section 101(a)(13) of the Act defined entry as "any coming of an alien into the U.S. from a foreign port or place." The BIA formulated a more precise definition of entry so as to better distinguish between exclusion and deportation in Matter of Pierre, 14 I&N Dec. 467 (BIA 1973), Matter of Phelisna, 18 I&N Dec. 272 (BIA 1982), and Matter of G-, 20 I&N Dec. 764 (BIA 1993). All of this came to be known as “the entry doctrine.”

2. An exception also arose for LPRs returning to the U.S. after a brief, casual, and innocent departure. The Supreme Court held that such a departure would not constitute an "entry" within the meaning of former Section 101(a)(13). Rosenberg v. Fleuti, 374 U.S. 449 (1963). This became known as the "Fleuti Doctrine."

3. These two doctrines caused a great deal of litigation over the issue of whether certain aliens were properly placed in exclusion proceedings. They were rather time consuming and, since they dealt with the issue of whether or not the alien was in the proper proceeding, delayed the addressing of the ultimate issues in the cases, i.e. the issues of excludability and eligibility for relief.

4. In the IIRIRA, Congress sought to simplify things by creating removal proceedings which are applicable to aliens admitted to the United States, alien applying for admission, and aliens present in the United States without being inspected and admitted. It also made the difference dependent simply on whether the alien had been admitted or not.

B. Applicants for admission. Section 235(a)(1) of the Act provides that “(A)n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this Act an applicant for admission.”

1. The term “arriving alien” means an alien who seeks admission to or transit through the United States, as provided in 8 C.F.R. § 1235, at a port of entry, or an alien who is interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. 8 § C.F.R. § 1001.1(q).

2. An arriving alien remains such even if paroled pursuant to Section 212(d)(5) of the Act. 8 C.F.R. § 1001.1(q).

3. An alien who leaves the U.S. to seek refugee status in Canada, and then returns to the U.S. after the application was denied in Canada, is deemed to be seeking admission to the U.S. Therefore, such an alien is deemed to be an arriving alien. Matter of R-D-, 24 I&N Dec. 221 (BIA 2007).

C. Admission or admitted. Section 101(a)(13)(A) of the Act, as amended by Section 301 of the IIRIRA, provides that the terms "admission" and "admitted" mean the lawful entry of an alien into the U.S. after inspection and authorization by an immigration officer.

1. In an unpublished decision, the BIA held that the questioning of a respondent by INS officers during an adjustment of status interview and the approval of the respondent’s adjustment of status constituted an inspection and admission under Section 101(a)(13)(A) of the Act.

2. The BIA later held that an alien who initially entered the U.S. without inspection but whose conviction for an aggravated felony was subsequent to her adjustment of status to that of a lawful permanent resident under Section 245A of the Act is deportable under Section 237(a)(2)(A)(iii) of the Act as an alien who was convicted of an aggravated felony “after admission.” Matter of Rosas, 22 I&N Dec. 616 (BIA 1999).

D. Parole and crewmen. An alien who is paroled under Section 212(d)(5) of the Act or permitted to land temporarily as a crewman shall not be considered to have been admitted. INA § 101(a)(13)(B).

E. Lawful permanent residents. Section 101(a)(13)(C) of the Act provides that an alien lawfully admitted for permanent residence shall not be regarded as seeking an admission into the U.S. unless the alien:

1. has abandoned or relinquished LPR status [INA § 101(a)(13)(C)(i)];

2. has been absent from the U.S. for a continuous period in excess of 180 days [INA § 101(a)(13)(C)(ii)];

3. has engaged in illegal activity after departing the U.S. [INA § 101(a)(13)(C)(iii)];

4. has departed from the U.S. while under legal process seeking removal of the alien from the U.S., including removal proceedings and extradition proceedings [INA § 101(a)(13)(C)(iv)];

5. has committed an offense identified in Section 212(a)(2) of the Act, unless since such offense the alien has been granted relief under Section 212(h) or 240A(a) [INA § 101(a)(13)(C)(v)];

6. is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the U.S. after inspection and authorization by an immigration officer [INA § 101(a)(13)(C)(vi)].

a. The BIA has held that the Fleuti doctrine, which required the admission of a LPR returning from a brief, casual, and innocent departure, did not survive the amendment of Section 101(a)(13) of the Act by IIRIRA. Matter of Collado, 21 I&N Dec. 1061 (BIA 1997). In that same decision, the Board held that a LPR described in Section 101(a)(13)(i)-(vi) of the Act is to be regarded as "seeking an admission into the U.S. for purposes of the immigration laws," without further inquiry into the nature and circumstances of a departure from and return to the U.S.

II. Inspection and credible fear review.

A. Inspection. All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the U.S. shall be inspected by immigration officers. INA § 235(a)(3).

1. Parolees and aliens formerly considered to have entered without inspection. Section 235(a)(1) of the Act provides that an alien present in the U.S. who has not been admitted or who arrives in the U.S. (whether or not at a designated port of arrival and including an alien who is brought to the U.S. after having been interdicted in international or U.S. waters) shall be deemed an applicant for admission.

2. Statements. An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the U.S., including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a U.S. citizen, and whether the

applicant is inadmissible. INA § 235(a)(5).

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

C. Summary removal. If an immigration officer determines that an alien (other than an alien described in Section 235(b)(f) of the Act, an alien who is a native or citizen of a country in the Western Hemisphere with whose government the U.S. does not have full diplomatic relations and who arrives by aircraft at a port of entry) who is arriving in the U.S. or has not been admitted or paroled into the U.S. and who has not affirmatively shown to the satisfaction of an immigration officer that the alien has been physically present in the U.S. continuously for the 2 year period immediately prior to the date of the determination of inadmissibility is inadmissible under Section 212(a)(6)(C) or 212(a)(7) of the Act, the officer shall order the alien removed from the U.S. without further hearing or review unless the alien indicates a fear of persecution or an intention to apply for asylum. Such an alien shall be referred for an interview by an asylum officer. If the officer determines that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum. INA § 235(b)(1)(B)(ii).

1. If the officer determines that the alien does not have a credible fear of persecution, the officer shall order the alien removed from the U.S. without further hearing or review. INA § 235(b)(1)(B)(iii)(I). The officer shall prepare a written record of a determination. Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary. INA § 235(b)(1)(B)(iii)(II). The AG shall provide by regulation and upon the alien's request for prompt review by an IJ of the determination that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the IJ either in person or by telephonic or video connection. Review shall be concluded, if possible, within 24 hours, but in no case later than 7 days after the date of determination. INA § 235(b)(1)(B)(iii)(III). Such alien shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed. INA § 235(b)(1)(B)(iii)(IV) of the Act.

D. Stowaways. An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer unless the alien indicates an intention to apply for asylum or a

fear of persecution. In that case, the officer shall refer the alien for an interview by an Asylum Officer under Section 235(B)(1)(B) of the Act. If the AG determines that the alien has a credible fear of persecution (defined at Section 235(b)(1)(B)(v) of the Act), the alien shall be detained for further consideration of the application for asylum. If it is determined that the alien does not have a credible fear of persecution, the officer shall order the alien removed from the U.S. without further hearing or review. Under Section 235(b)(1)(B)(iii)(III) of the Act, the determination that the alien does not have a credible fear of persecution may be reviewed, upon the alien's request, by an IJ within 7 days. Under Section 235(b)(1)(B)(iii)(IV) of the Act, an alien shall be detained pending a final determination of credible fear of persecution and, if found to have no such fear, until removed.

E. Inspection of other aliens. Except for an alien described above [inadmissible under Section 212(a)(6)(C) or 212(a)(7) of the Act], an alien who is a crewman, or an alien who is a stowaway, if the examining officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under Section 240 of the Act.

1. Aliens arriving from foreign contiguous territory. In the case of an alien arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S., the AG may return the alien to that territory pending a proceeding under Section 240 of the Act.

2. Challenge of decision. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an IJ for a proceeding under Section 240 of the Act. INA § 235(b)(3).

F. Removal of aliens inadmissible on security and related grounds. If an immigration officer or an IJ suspects that an arriving alien may be inadmissible under Section 212(a)(3)(A) [other than clause (ii)], (B), or (C), the officer or judge shall order the alien removed, report the order or removal to the AG, and not conduct any further inquiry or hearing until ordered by the AG. INA § 235(c)(1). Section 235(c)(3) of the Act provides that the alien or the alien's representative may submit a written statement and additional information for consideration by the AG.

1. If the AG is satisfied on the basis of confidential information that the alien is inadmissible under the portions of Section 212(a)(3) of the Act listed above and after consulting with appropriate security agencies concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, the AG may order the alien removed without

further inquiry or hearing by an IJ. If the AG does not order the alien removed, the AG shall specify the further inquiry or hearing that shall be conducted in the case.

III. Bond and custody under IIRIRA. Section 236(a) of the Act provides that on a warrant issued by the AG, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the U.S. In a custody redetermination under INA § 236(a), where an alien must establish to the satisfaction of the IJ that he or she does not present a danger to others, a threat to national security, or a flight risk, the IJ has wide discretion in deciding the factors that may be considered. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006).

A. Arriving aliens. An IJ has no authority to redetermine or set bond for an arriving alien. 8 C.F.R. § 1003.19(h)(2)(i)(B).

1. An alien who arrives in the U.S. pursuant to a grant of advance parole is an "arriving alien" as that term is defined in the regulations. According to the regulations, an IJ has no authority over the apprehension, custody, and detention of arriving aliens and is therefore without authority to consider the bond request of an alien returning pursuant to a grant of advance parole. Matter of Oseiwusu, 22 I&N Dec. 19 (BIA 1998).

B. Detention of criminal aliens. Section 236(c)(1) of the Act provides that the AG shall take into custody any alien who is inadmissible by reason of having committed any offense covered in Section 212(a)(2), is deportable by reason of having committed any offense covered in Section 237(a)(2)(A)(ii),(A)(iii),(B),(C), or (D), is deportable under Section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or is inadmissible under Section 212(a)(3)(B) or deportable under Section 237(a)(4)(B) when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

1. Constitutionality. The Supreme Court upheld the constitutionality of Section 236(c)(1) of the Act. Demore v. Kim, 538 U.S. 510 (2003).

2. The Ninth Circuit has held that authorization for detention under INA § 236(c) ends when the Board of Immigration Appeals affirms the removal order. "Thereafter, the Attorney General's detention authority rests with [the general discretionary authority to detain under INA § 236(a)] until the alien enters his 'removal period,' which occurs only after we have rejected his final petition for review or his time to seek such review expires." The Ninth Circuit further ruled that "the government may not detain a legal permanent resident . . . for a prolonged period without providing him a

neutral forum in which to contest the necessity of his continued detention." Casas-Castrillon v. DHS, 535 F.3d 942 (9th Cir. 2008).

3. "When released"

a. In a decision regarding the Transition Period Custody Rules which became effective on October 9, 1996, the BIA held that the words "when released from custody" did not describe a class of aliens, but rather was an instruction to the AG as to when the alien was to be taken into custody. Therefore, the rules applied irrespective of how or when the alien came into Service[1] custody. Matter of Noble, 21 I&N Dec. 672 (BIA 1997). However, the INS later reversed its position on this issue and, in a later decision, the BIA held that Section 236(c) of the Act does not apply to aliens whose most recent release from custody by an authority other than the Immigration and Naturalization Service occurred prior to the expiration of the Transition Period Custody Rules on October 8, 1998. Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999). Custody determinations of aliens in removal proceedings who are not subject to the provisions of Section 236(c) of the Act are governed by the general custody provisions at Section 236(a) of the Act. Id. However, by virtue of 8 C.F.R. § 1236.1(c)(8), a criminal alien in a custody determination under Section 236(a) of the Act must establish to the satisfaction of the Immigration Judge and the Board of Immigration Appeals that he or she does not present a danger to property or persons. Id.

b. A criminal alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention pursuant to Section 236(c) of the Act even if the alien is not immediately taken into custody by the Service when released from incarceration. Matter of Rojas, 23 I&N Dec. 117 (BIA 2001).

c. The BIA has also held that the use of the words "release" or "released" in Section 303 of the IIRIRA consistently appears to refer to a form of physical restraint. Therefore, the mandatory detention provisions of Section 236(c) of the Act do not apply to an alien who was convicted after the expiration of the Transition

[1] On March 1, 2003, the Immigration and Naturalization Service ceased to exist as an agency under the U.S. Department of Justice and became a part of the newly-formed Department of Homeland Security. In this outline, the Department of Homeland Security will continue to be referred to as the INS, the Service, or alternatively, the Government.

Period Custody Rules, but who was last released from the physical custody of state authorities prior to the expiration of those rules and who was not physically confined or restrained as a result of that conviction, i.e. sentenced to probation or given a suspended sentence. Matter of West, 22 I&N Dec. 1405 (BIA 2000).

d. In Matter of West, supra, the BIA stated that the word "released" can also refer to release from physical custody following arrest, not just a sentence.

e. The BIA held in Matter of Kotliar, 24 I&N Dec. 124 (BIA 2007), that an alien apprehended at home while on probation for criminal convictions is subject to the provisions of Section 236(c)(1), provided it can be ascertained that he was released from criminal custody after the expiration of the Transition Period Custody Rules.

f. The Board has ruled that the mandatory detention provision in INA § 236(c)(1) "does not support limiting the non-DHS custodial setting solely to criminal custody tied to the basis for detention under that section." INA § 236(c)(1) requires that DHS detain certain classes of aliens, including those charged with aggravated felonies, "when the alien is released" from non-DHS custody. Here, the respondent was charged as removable for an aggravated felony based on a 1990 conviction for indecent assault and battery under Massachusetts law. In 2005, the respondent was arrested under Massachusetts law for failure to register as a sex offender, a charge which was subsequently dismissed. The Board ruled that the respondent was subject to mandatory detention following his release from detention for the second offense, even though he was charged as removable for the first, rather than the second, offense. Matter of Saysana, 24 I&N Dec. 602 (BIA 2008).

4. Danger to property or persons.

a. In bond proceedings under the Transition Period Custody Rules, the standards set forth in Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994), apply to the determinations of whether the alien's release from custody during deportation proceedings will pose a danger to the safety of persons or of property and whether the alien is likely to appear for any scheduled proceeding. Matter of Melo, 21 I&N Dec. 883 (BIA 1997). In Matter of Drysdale, the BIA found that the statutory framework under former Section

242(a)(2)(B) of the Act involved a two-step analysis. If the alien cannot demonstrate that he is not a threat to the community, he should be detained in the custody of the Service. If the alien rebuts the presumption that he is a threat to the community, then the likelihood that he will abscond becomes relevant. This finding was based on the statutory language that the alien must show he is "likely" to appear for any scheduled hearing, rather than a showing that he "will appear." Unlike the standard for determining if there is a danger to the community, this language allowed for flexibility since the likelihood of appearance could vary from none to great. Therefore, if an alien overcomes the presumption that he is a threat to the community, the IJ should set a bond according to his assessment of the amount needed to motivate the respondent to appear in light of the considerations deemed relevant to bond determinations.

b. The phrase "is deportable" as used in the Transition Period Custody Rules does not require that an alien have been charged and found deportable on that deportation ground. Matter of Melo, 21 I&N Dec. 883 (BIA 1997). See also Matter of Kotliar, 24 I&N Dec. 124 (BIA 2007) (Holding that an alien need not be charged with the ground that provides the basis for mandatory detention to be considered “deportable” on that ground).

c. The Transition Period Custody Rules do not limit "danger to the safety of persons or of property" to the threat of direct physical violence. The risk of continued narcotics trafficking also constitutes a danger to the safety of persons. Matter of Melo, 21 I&N Dec. 883 (BIA 1997).

d. The Transition Period Custody Rules expired in 1998. However, the law regarding danger to the safety of persons or property appears to remain applicable.

5. Section 236(c)(2) provides that the AG may release an alien described above only if the AG decides pursuant to 18 U.S.C. § 3521 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the AG that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the

offense committed by the alien.

6. 8 C.F.R. § 1003.19(h)(2)(i) provides that upon the expiration of the Transition Period Custody Rules, an IJ may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

   a. Aliens in exclusion proceedings;

   b. Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to Section 212(d)(5) of the Act;

   c. Aliens described in Section 237(a)(4) of the Act;

   d. Aliens in removal proceedings subject to Section 236(c)(1) of the Act; and

   e. Aliens in deportation proceedings subject to Section 242(a)(2) of the Act as in effect prior to April 1, 1997.

7. However, 8 C.F.R. § 1003.19(h)(2)(ii) provides that "Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 235 or 236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs."

   a. For purposes of determining the custody conditions of a lawful permanent resident under Section 236 of the Act, and 8 C.F.R. § 1003.19(h)(2)(ii), a lawful permanent resident will not be considered "properly included" in a mandatory detention category when an Immigration Judge or the Board of Immigration Appeals finds, on the basis of the bond record as a whole, that it is substantially unlikely that the Immigration and Naturalization Service will prevail on a charge of removability specified in Section 236(c)(1) of the Act. Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).

      (1) In an unpublished decision, the BIA held that Matter of Joseph, 22 I&N Dec. 799 (BIA 1999) applies only to cases in which removability is not likely to be sustained. The Board stated that granting an alien's application for relief

from removal does not serve to take an alien out of the mandatory detention provisions when the Service has appealed the grant of relief.

b. Although a conviction document may provide the Service with sufficient reason to believe that an alien is removable under one of the mandatory detention grounds for purposes of charging the alien and making an initial custody determination, neither the IJ nor the BIA is bound by the Service's decisions in that regard when determining whether an alien is properly included within one of the regulatory provisions that would deprive the Immigration Judge and the Board of jurisdiction to redetermine the custody conditions imposed on the alien by the Service. Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).

c. When an IJ's removal decision precedes the determination, pursuant to 8 C.F.R. § 1003.19(h)(2)(ii), whether an alien is "properly included" in a mandatory detention category, the removal decision may properly form the basis for that determination. Matter of Joseph, 22 I&N Dec. 799 (BIA 1999). When an IJ bases a bond determination on evidence presented in the underlying merits case, it is the responsibility of the parties and the IJ to ensure that the bond record establishes the nature and substance of the specific factual information considered by the IJ in reaching the bond determination. Matter of Adeniji, 22 I&N Dec.1102 (BIA 1999).

d. In assessing whether an alien is "properly included" in a mandatory detention category during a bond hearing taking place early in the removal process, the IJ must necessarily look forward to what is likely to be shown during the hearing on the underlying removal case. Thus, for example, the failure of the Service to possess a certified copy of a conviction record shortly after taking an alien into custody would not necessarily be indicative of its ability to produce such a record at the merits hearing. Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).

8. 8 C.F.R. § 1003.19(h)(4) provides that a determination by a DD or other designated official regarding the exercise of authority under Section 303(b)(3)(B)(ii) of Pub. L. 104-208 concerning release of aliens who cannot be removed is final, and shall not be subject to redetermination by an IJ.

9. 8 C.F.R. § 1003.19(i)(1) provides that the BIA has the authority to stay the

custody order of an IJ when the Service appeals the custody decision and the Service is entitled to seek an emergency stay from the Board in connection with such an appeal at any time.

10. 8 C.F.R. § 1003.19(i)(2) provides that if an alien is subject to Section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by Section 440(c) of Pub. L. 104-132), Section 303(b)(3)(A) of Div. C. of Pub. L. 104-208, or Section 236(c)(1) of the Act (as designated on April 1, 1997), and the district director has denied the alien's request for release or has set a bond of $10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon the Service's filing of a Notice of Service Intent to Appeal Custody Redetermination (Form EOIR-43) with the Immigration Court on the day the order is issued, and shall remain in abeyance pending decision of the appeal by the Board of Immigration Appeals. The stay shall lapse upon failure of the Service to file a timely notice of appeal in accordance with § 8 C.F.R. 1003.38.

    a. Pursuant to 8 C.F.R. § 1003.19(i)(2), published as a final rule in 63 Fed. Reg. 27,441, 27,448-49 (1998), the INS's filing of a Form EOIR-43 (Notice of INS Intent to Appeal Custody Redetermination) provides an automatic stay of an IJ's order releasing an alien who is charged with removal under one of the mandatory detention grounds set forth in Section 236(c)(1) of the Act, even where the IJ has determined that the alien is not subject to Section 236(c)(1) and has terminated the removal proceedings on that charge. The IJ may not reject the Form EOIR-43. Matter of Joseph, 22 I&N Dec. 660 (BIA 1999).

    b. An automatic stay of an IJ's release order that has been invoked by the Service pursuant to 8 C.F.R. § 1003.19(i)(2) is extinguished by the Board's decision in the Service's bond appeal from that release order. Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).

C. Transition Period Custody Rules. The TPCR were a temporary "stop-gap" measure invoked after the IIRIRA's enactment to address the lack of detention space necessary to immediately implement the mandatory detention rule of Section 236(c)(1) of the Act. Under the TPCR, Immigration Judges had retained discretionary authority to release certain criminal aliens upon a demonstration that they did not present a danger to the community or a flight risk. That discretion ended with the TPCR's expiration on October 8, 1998.

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

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

2. Section 236A provides that the AG shall take into custody any alien who is certified under paragraph 3.

3. Paragraph 3 provides that the AG may certify an alien under this paragraph if the AG has reasonable grounds to believe that the alien described in

   a. Section 212(a)(3)(A)(i) - an alien seeking to enter the U.S. to engage in espionage or sabotage.

   b. Section 212(a)(3)(A)(iii) - an alien seeking to enter the U.S. to engage in any activity a purpose of which is the overthrow of the government of the U.S. by force, violence, or other unlawful means.

   c. Section 212(a)(3)(B) - an alien engaged in terrorist activity
   d. Section 237(a)(4)(A)(i) - engaged in espionage or sabotage.

   e. Section 237(a)(4)(A)(iii) - an alien engaged in any activity a purpose of which is the overthrow of the government of the U.S. by force, violence, or other unlawful means.

   f. Section 237(a)(4)(B) - an alien engaged in terrorist activity.

   g. Or is engaged in any other activity that endangers the national security of the U.S.

4. Section 236A(4) of the Act provides that the AG may delegate the authority provided under paragraph 3 only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

E. Mass migrations and national security interests.

1. In determining whether to release on bond undocumented aliens who arrive in the U.S. by sea seeking to evade inspection, it is appropriate to consider national security interests implicated by the encouragement of further unlawful mass migrations and the release of undocumented alien

migrants into the U.S. without adequate screening. Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003). The AG stated that it is reasonable to assume that the release on bond of mass migrants would come to the attention of others in their country and encourage future surges in illegal migration. Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests. Surges in illegal migration injure national security by diverting resources from counterterrorism and homeland security responsibilities.

2. Where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests. Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003).

3. Considering national security grounds applicable to a category of aliens in denying an unadmitted alien's request for release on bond does not violate any due process right to an individualized determination in bond proceedings under Section 236(a) of the Act. Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003).

4. NOTE: On November 13, 2002, the Commissioner designated for expedited removal under 8 C.F.R. § 1235.3(b)(1)(ii) all aliens (other than crewmen, stowaways, Cuban citizens or nationals, and aliens who arrive at U.S. ports-of-entry) who arrive in the U.S. on or after November 13, 2002 by sea who are not admitted or paroled and who have not been physically present in the U.S. for 2 years immediately prior to the determination of inadmissibility by an immigration officer. 8 C.F.R. § 1235.3(b)(2)(iii) provides that an alien whose inadmissibility is being considered under the expedited removal procedures of 8 C.F.R. § 1235.3(b)(1)(ii) or who has been ordered removed pursuant to that regulation shall be detained pending determination and removal, but may be allowed parole by the immigration authorities. Therefore, such an alien is not eligible for a bond redetermination by an IJ.

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

G. All other, i.e. non-criminal, non-terrorist, aliens.

1. Pending a decision on whether the alien is to be removed from the U.S.,

the AG may continue to detain the arrested alien, and may release the alien on a bond of at least $1,500 or conditional parole but may not provide the alien with work authorization unless the alien is a LPR or otherwise would be provided such authorization. INA § 236(a).

a. Note: An alien who is initially screened for expedited removal under Section 235(b)(1)(A) of the Act, as a member of a class of aliens designated pursuant to the authority in Section 235(b)(1)(A)(iii) of the Act, but who is subsequently placed in removal proceedings under Section 240 of the Act, following a positive credible fear determination, is eligible for a custody redetermination hearing before an IJ unless the alien is a member of any of the listed classes of alien who are specifically excluded from the custody jurisdiction of IJs pursuant to 8 C.F.R. § 1003.19(h)(2)(i). Matter of X-K-, 23 I&N Dec. 731 (BIA 2005).

2. The purpose of a bond in deportation proceedings is to insure that the respondent will appear for the deportation hearing. But neither Section 236(a) of the Act nor the applicable regulations confer on an alien the right to release on bond. Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003).

a. In determining a respondent's reliability as a bail risk and the amount of bond to be required, these factors may properly be considered:

(1) respondent's employment history and its stability;

(2) respondent's length of residence in the community;

(3) respondent's family ties in the U. S. and whether they are such that they may entitle the respondent to reside permanently in the U. S. at a future date;

(4) respondent's record of nonappearance at court proceedings;

(5) respondent's previous or pending criminal violations and the seriousness of the charges;

(6) the effect such criminal violations may have upon eligibility for relief from deportation;

(7) evidence of respondent's disrespect for the law;

(8) evidence which adversely reflects upon respondent's

character;

(9) respondent's previous immigration violations;

(10) respondent's manner of entry into the United States.

b. The Board of Immigration Appeals' decisions on bonds which discuss the above are:

(1) Matter of Patel, 15 I&N Dec. 666 (BIA 1976);

(2) Matter of San Martin, 15 I&N Dec. 167 (BIA 1974);

(3) Matter of Spiliopoulos, 16 I&N Dec. 561 (BIA 1978);

(4) Matter of Shaw, 17 I&N Dec. 177 (BIA 1979);

(5) Matter of Andrade, 19 I&N Dec. 488 (BIA 1987).

c. The following factors may not be considered in redetermining an alien's custody status:

(1) The potential difficulties that the INS may face in executing an order of deportation because of conditions in the alien's country. Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1991).

(2) In unpublished decisions, the BIA has held that a respondent's financial ability to post a bond is not a relevant consideration in bond proceedings.

(3) The determination of bond in a deportation case is independent of the bond proceedings in any criminal case in which the respondent has been involved and it is inappropriate for the IJ to speculate as to the possible rationale for a low bond set in a pending criminal case and to find that the low criminal bond weighs in favor of a larger bond in the deportation case. Matter of Shaw, 17 I&N Dec. 177 (BIA 1979).

(4) An alien's early release from prison and transition to a parole status do not necessarily reflect rehabilitation for one may receive an early release for other reasons. Therefore, such facts do not carry significant weight in determining whether the alien is a good bail risk for immigration

purposes. Matter of Andrade, 19 I&N Dec. 488 (BIA 1987).

(5) In unpublished decisions, the BIA has held that detention which precludes a respondent from complete access to counsel (either to retain counsel or to communicate with counsel already retained) is not a valid factor to be considered in a bond determination.

d. An alien subject to criminal proceedings for alleged terrorist activities in the country to which the INS seeks to deport him is appropriately ordered detained without bond as a poor bail risk. Matter of Khalifah, 21 I&N Dec. 107 (BIA 1995).

e. An IJ's jurisdiction includes the authority to increase the amount of bond initially set by the DD. Matter of Spiliopoulos, 16 I&N Dec. 561 (BIA 1978).

f. Even though a respondent has had a bond redetermination hearing before an IJ, if later there is a change of circumstances affecting his reliability as a bail risk, the DD has authority to increase the amount of bond. Matter of Sugay, 17 I&N Dec. 637 (BIA 1981). (Of course, the new bond amount is subject to redetermination by an IJ.)

H. Procedure in bond proceedings.

1. The initial decision on custody is made by the DD or his delegate; 8 C.F.R. § 1236.1(d)(1).

a. In order to make a proper custody determination, the INS must have custody of the respondent. A respondent who is in the custody of a State or agency other than the INS is not in the custody of the INS. Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990).

b. Even if INS has placed a detainer on a respondent held in the custody of another agency, the detainer does not entitle the respondent to have a bond set by the DD. Matter of Lehder, 15 I&N Dec. 159 (BIA 1975); Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990). A detainer is merely an administrative mechanism to insure that a person subject to confinement will not be released until the party requesting the detainer has an opportunity to act. Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990).

2. Former 8 C.F.R. § 3.18(b) [now 8 C.F.R. § 1003.19(b)] and former 8 C.F.R. § 242.2(d) [now 8 C.F.R. § 1236.1(d)(1)] provide authority for an IJ to redetermine custody status only upon application by the respondent or his representative. An IJ may not redetermine custody status on his own motion. Matter of P-C-M, 20 I&N Dec. 432 (BIA 1991).

3. Former 8 C.F.R. § 242.2(d) [now 8 C.F.R. § 1236.1(d)(1)] provides that an IJ only acquires jurisdiction over bond after the DD's initial determination of bond under 8 C.F.R. § 242.2(c)(2). Therefore, a respondent who is in the custody of a State or other agency other than INS is not subject to having a bond set by the DD under 8 C.F.R. § 242.2(c)(2) or reviewed by an IJ under 8 C.F.R. § 242.2(d). Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990).

   a. Even if a respondent is in the actual physical custody of the INS, it is arguable that an IJ does not acquire jurisdiction over bond until the DD makes the initial bond determination under the regulations. The BIA found it unnecessary to determine in Matter of Sanchez if an IJ may assume that a DD's inaction in setting bond is the equivalent of setting no bond. In such a situation, the respondent may be required to seek an order from a Federal Judge requiring the DD to set bond.

4. 8 C.F.R. § 1236.1(c)(5) provides that an IJ may not exercise bond redetermination authority with respect to:

   a. A criminal alien subject to Section 303(b)(3)(A)(ii) or (iii) of Div. C. of Pub. L. 104-208, if the alien has been sentenced, including in the aggregate, to at least 2 years imprisonment and the alien:

      (1) Is described in Section 237(a)(2)(D)(i) or (ii) of the Act [espionage and sabotage] or has been convicted of a crime described in Section 101(a)(43)(A), (C), (E)(i), (H), (I), (K)(iii) or (L) [select aggravated felonies];

      (2) Is described in Section 237(a)(2)(A)(iv) of the Act [high speed flight]; or

      (3) Has escaped or attempted to escape from the lawful custody of a local, State or Federal prison, agency or officer within the United States.

5. An IJ loses jurisdiction to redetermine bond when an order of removal

becomes administratively final. 8 C.F.R. § 1236.1(d).

6. Although aliens present in the U.S. without being admitted or paroled are charged under the grounds of inadmissibility listed in Section 212(a) of the Act, they are not arriving aliens and may have their bond redetermined by an IJ.

7. An IJ's jurisdiction includes the authority to increase the amount of bond initially set by the DD. Matter of Spiliopoulos, 16 I&N Dec. 561 (BIA 1978).

8. Even though a respondent has had a bond determination hearing before an IJ, if later there is a change of circumstances affecting his reliability as a bail risk, the DD has authority to increase the amount of bond. Matter of Sugay, 17 I&N Dec. 637 (BIA 1981). (Of course, the new bond amount is subject to redetermination by an IJ.)

9. The background investigations and security checks requirement at 8 C.F.R. § 1003.47(g) does not apply to proceedings seeking the redetermination of conditions of custody. However, in scheduling an initial custody redetermination hearing, the IJ shall, to the extent practicable consistent with expedited nature of such cases, take account of the brief initial period of time needed for the Department of Homeland Security to conduct the automated portions of its identity, law enforcement or security examinations or investigations with respect to aliens detained in connection with immigration proceedings. 8 C.F.R. § 1003.47(k).

I. Requests for additional or subsequent bond redeterminations.

1. The BIA has held that because the bond regulations do not specifically address motions to reopen, bond proceedings are not subject to the technical requirements of former 8 C.F.R. § 242.22 regarding motions to reopen. Bond proceedings are not really "closed" as long as a respondent is subject to a bond. Therefore, IJs may further consider requests to modify bonds by detained aliens without a formal motion to reopen. Such requests should be considered on the merits. However, if there are no changed circumstances shown, the IJ may decline to change the prior bond decision. Matter of Uluocha, 20 I&N Dec. 133 (BIA 1989). This decision implies that there is no limit to the number of times a detained respondent may request a bond redetermination hearing.

2. Following this decision, many detained respondents submitted multiple requests for bond redetermination hearings. This became burdensome and clogged IJs' dockets. In 1992, 8 C.F.R. § 3.19(e) [now 8 C.F.R. §

1003.19(e)] was amended to read as follows: "After an initial bond redetermination, a request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination."

3. An IJ maintains continuing jurisdiction to entertain requests by an alien for subsequent bond redeterminations even after the timely filing of an appeal with the BIA from a previous bond redetermination decision. Matter of Valles, 21 I&N Dec. 769 (BIA 1997). If, after a bond appeal has been filed by an alien, the IJ grants a request for a subsequent bond redetermination, the appeal is rendered moot and the BIA will promptly return the record to the Immigration Court. Id.

J. Appeals of bond decisions. 8 C.F.R. § 1236.1(d)(3) provides that an appeal to the BIA may be filed as follows:

1. Within 30 days by either the alien or the Service from a decision of an IJ.

2. Within 10 days by the alien from a decision of a DD once the IJ has lost jurisdiction, i.e. 7 days after posting bond or when an order of removal becomes administratively final.

a. The BIA has jurisdiction over an appeal from a DD's custody determination that was made after the entry of a final order of deportation or removal, regardless of whether the alien formally initiated the review or the DD made the review sua sponte. Matter of Saelee, 22 I&N Dec. 1258 (BIA 2000).

b. An alien subject to a final order of deportation based on a conviction for an aggravated felony, who is unable to be deported, may be eligible for release from detention after the expiration of the 90 day removal period provided in Section 241(a)(3) of the Act. INA § 241(a)(6). Matter of Saelee, 22 I&N Dec. 1258 (BIA 2000).

c. However, where an alien seeking review of a DD's post-final-order custody determination failed to demonstrate by clear and convincing evidence that the release would not pose a danger to the community pursuant to 8 C.F.R. § 241.4(a) (1999), the DD's decision to continue detention was sustained. Matter of Saelee, 22 I&N Dec. 1258 (BIA 2000).

IV. Grounds of inadmissibility in removal proceedings.

A. Health-related grounds - Section 212(a)(1). [For available waivers, see Section 212(g) of the Act].

1. Communicable disease. Section 212(a)(1)(A)(i) of the Act provides that any alien who is determined in accordance with regulations by the Secretary of Health and Human Services (HHS) to have a communicable disease of public health significance is inadmissible.

2. Vaccinations. Section 212(a)(1)(A)(ii) provides that any alien who seeks admission as an immigrant, or who seeks adjustment of status, who has failed to present documentation of having received vaccination against vaccine-preventable diseases, including those listed in the Section is inadmissible.

3. Mental disorder.

a. Section 212(a)(1)(A)(iii)(I) of the Act provides that any alien who is determined in accordance with regulations by the Secretary of HHS in consultation with the Attorney General (AG) to have a physical or mental disorder and a history of behavior associated with the disorder that has posed or may pose a threat to the property, safety, or welfare of the alien or others is inadmissible.

b. Section 212(a)(1)(A)(iii)(II) of the Act provides that any alien who is determined in accordance with regulations by the Secretary of Health and Human Services in consultation with the AG to have had in the past a physical or mental disorder and a history of behavior associated with the disorder which behavior has posed a threat to the property, safety, or welfare of the alien and which behavior is likely to recur or to lead to other harmful behavior is inadmissible.

4. Drug abusers. Section 212(a)(1)(A)(iv) provides that any alien determined in accordance with regulations by the Secretary of HHS to be a drug abuser or addict is inadmissible.

B. Crime involving moral turpitude. Section 212(a)(2)(A)(i)(I) provides that any alien convicted of, or who admits having committed, or admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime) is inadmissible. Moral turpitude refers generally to conduct that is inherently base, vile or depraved and contrary to the accepted rules of morality in general. Matter of Franklin, 20 I&N Dec. 867 (BIA 1994), aff'd 72 F.3d 571 (8th Cir.

1995). Moral turpitude does not depend on felony or misdemeanor distinction. Matter of Short, 20 I&N Dec. 136 (BIA 1989). Nor does the seriousness of a criminal offense or the severity of the sentence imposed determine whether a crime involves moral turpitude. Matter of Serna, 20 I&N Dec. 579 (BIA 1992).

1. HISTORY LESSON - Before 1990, excludability for a CIMT was covered in Section 212(a)(9) of the Act. In 1990, the Act was reorganized and that subject came under Section 212(a)(2)(A)(i)(I). In 1996, it stayed under that Section number. Many cases on this subject from before 1990 involve Section 212(a)(9) as the ground of inadmissibility.

2. The concept of admitting the commission of a CIMT or acts which constitute the essential elements of a CIMT (rather than actually being convicted of a CIMT).

   a. The concept of admitting the commission of a crime goes back to at least the Immigration Act of 1917. The BIA interpreted the phrase "admits the commission of" an offense to include, in addition to the admission of facts or specific acts, an admission of the legal conclusion that the alien had committed a specific criminal offense.

   b. In Matter of J-, 2 I&N Dec. 285 (BIA 1945), the BIA set forth the following rules to establish that an alien admits commission of a felony or other crime or misdemeanor involving moral turpitude:

      (1) It must be clear that the conduct in question constitutes a crime or misdemeanor under the law where it is alleged to have occurred.

      (2) The alien must be advised in a clear manner of the essential elements of the alleged crime or misdemeanor.

      (3) The alien must clearly admit conduct constituting the essential elements of the crime and that he committed the offense, i.e. he must admit the legal conclusion that he is guilty of the crime.

      (4) It must appear that the crime admitted actually involves moral turpitude, although it is not required that the alien himself concede the element of moral turpitude.

      (5) The admissions must be free and voluntary.

c. The Immigration and Nationality Act, which became effective in 1952, added to former Section 212(a)(9) a provision that an alien would also be excludable who admits committing acts which constitute the essential elements of a CIMT. The provisions of former Section 212(a)(9) were held to be applicable to offenses committed before as well as after the effective date of the Immigration and Nationality Act. Matter of R-R-, 6 I&N Dec. 55 (BIA 1953, 1954, AG 1955). The AG specifically stated that he did not decide whether the admission of the acts must take place before or after the effective date of the Act.

d. In light of the amendment, the requirement that the alien must admit the legal conclusion that he is in fact guilty of the specific crime was deleted in Matter of E-V-, 5 I&N Dec. 194 (BIA 1953). That decision specifically stated that the other requirements set forth in Matter of J- still prevail.

e. The BIA later held that to sustain a finding of inadmissibility under former Section 212(a)(9) as one who has admitted acts constituting the essential elements of a CIMT, the alien must have been furnished with a definition of such crime in understandable terms. Matter of G-M-, 7 I&N Dec. 40 (BIA 1955, AG 1956); Matter of K-, 7 I&N Dec. 594 (BIA 1957). In the second case cited, the BIA stated that the rule concerning the furnishing of an adequate definition is not a specific statutory requirement but has evolved for the purpose of insuring a fair hearing and to preclude a later claim of unwitting entrapment.

f. In determining whether an alien has admitted acts which constitute the essential elements of a CIMT, court decisions defining, explaining, or interpreting a statute may be considered in addition to the statute itself to determine if those acts constitute essential elements of the crime. Matter of W-, 5 I&N Dec. 578 (BIA 1953).

g. The "admission" does not have to be made in the course of the exclusion (now removal) hearing. It might be made in a sworn statement given to INS officers or in a proceeding held in a different tribunal. In cases involving a plea of guilty in a criminal proceeding, the INS sought to use the plea of guilty as an "admission" of either the commission of a CIMT or acts constituting the essential elements of a CIMT.

(1) The BIA has held that a plea of guilty in a criminal prosecution may be regarded as an "admission" within the

meaning of the immigration laws. Matter of K-, 9 I&N Dec. 143 (BIA 1959, AG 1961); Matter of P-, 4 I&N Dec. 373 (BIA 1951). However, where a plea of guilty results in something less than a conviction, the plea, without more, is not tantamount to an admission of commission of the crime for immigration purposes. Matter of Seda, 17 I&N Dec. 550 (BIA 1980) (treated under a first offender statute), overruled on other grounds by Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988), superseded by statute as stated in Matter of Devison-Charles, 22 I&N Dec. 1362 (BIA 2000); Matter of Winter, 12 I&N Dec. 638 (BIA 1967, 1968) (no sentence imposed and case placed "on file").

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

(3) Even in a case involving a foreign conviction (rather than an admission of commission of a CIMT or acts constituting the essential elements of a CIMT), the BIA has held that an adjudication of juvenile delinquency is not a conviction for a crime in the U.S. and one so convicted may not be excludable unless it is determined that the applicant was not dealt with as a juvenile by the foreign court. Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981); Matter of De La Nues, 18 I&N Dec. 140 (BIA 1981). Therefore, in determining inadmissibility as an alien who admits the commission of a CIMT or the commission of acts constituting the essential elements of a CIMT, the age of the applicant at the time he committed the acts should be considered.

h. In an exclusion proceeding where there was reason to believe, by the applicant's own admissions or otherwise, that there has been a conviction (not merely an admission of commission of a crime or admission of acts constituting the essential elements of a crime) and that the underlying crime involved moral turpitude, the burden was on the applicant for admission to establish that he was not inadmissible. Matter of Doural, 18 I&N Dec. 37 (BIA 1981), modified on other grounds, Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988); Matter of B-, 3 I&N Dec. 1 (BIA 1947). A finding of

excludability in such a case need not be supported by a record of conviction; Matter of Doural, supra. [A similar finding in a deportation (now removal) proceeding where the Service bears the burden to establish both the conviction and that it is for a CIMT might not be appropriate. See e.g., Matter of B-,3 I&N Dec. 1 (BIA 1947).]

3. Convicted of a crime involving moral turpitude. If the statute of conviction contains some offenses which involve moral turpitude and other which do not, the IJ examines select conviction documents to determine whether they unequivocally establish the respondent was convicted of a crime involving moral turpitude. Matter of Ajami, 22 I&N Dec. 949 (BIA 1999); Matter of Short, 20 I&N Dec. 136 (BIA 1989).

4. Purely political offense exception. In order for an offense to qualify for the "purely political offense" exception to the ground of inadmissibility under INA § 212(a)(2)(A)(i)(I), based on an alien's conviction for a CIMT, the offense must be completely or totally "political." Matter of O'Cealleagh, 23 I&N Dec. 976 (BIA 2006).

5. Exceptions to inadmissibility - Section 212(a)(2)(A)(ii)

   a. Section 212(a)(2)(A)(ii) of the Act provides that Section 212(a)(2)(A)(i)(I) shall not apply to an alien who committed only one crime if:

      (1) 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) more than 5 years before both the visa application and the application for admission [INA § 212(a)(2)(A)(ii)(I)];

      (2) or the maximum penalty possible for the crime did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to 6 months or more (regardless of the extent to which the sentence was ultimately executed) [INA § 212(a)(2)(A)(ii)(II)].

   b. An alien who has committed more than one petty offense is not ineligible for the "petty offense" exception if only one crime is a CIMT. Matter of Garcia-Hernandez, 23 I&N Dec. 590 (BIA 2003).

C. Controlled substance offenses. Section 212 (a)(2)(A)(i)(II) of the Act provides that any alien convicted of, or who admits committing acts which constitute the essential elements of, a violation of or a conspiracy to violate any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802) is inadmissible.

1. HISTORY LESSON - Before 1990, excludability for a drug offense was covered in part of Section 212(a)(23) of the Act. In 1990, the Act was reorganized and that subject came under Section 212(a)(2)(A)(i)(II). In 1996, it stayed under that Section number. Many cases on this subject from before 1990 involve former Section 212(a)(23) as the ground of inadmissibility.

2. The concept of admitting the commission of a violation or of admitting the commission of acts which constitute the essential elements of a violation was not contained in former Section 212(a)(23). It was added by the Immigration Act of 1990.

3. In an unpublished decision, the BIA held that an alien has admitted committing a violation and also has admitting committing acts which constitute the essential elements of a violation when he admits to possessing and using or possessing with intent to use marijuana within a particular jurisdiction and that he knew it was illegal in that jurisdiction. The Board found that the crime of possessing marijuana in the jurisdiction in question was not complicated, requiring only that a person knowingly possess marijuana for personal use, and found it evident from the record that the respondent understood the illegal nature of his acts and the essential elements of the crime of possession of marijuana. The Board found that the case clearly lacked the element of unfairness that concerned it in Matter of J-, 2 I&N Dec. 285 (BIA 1945) and Matter of G-M-, 7 I&N Dec. 40 (BIA 1955; A.G. 1956) which dealt with admission of the commission of a CIMT and found that the IJ had not violated the prevailing rule of fair play emphasized in those cases.

D. Multiple criminal convictions. Section 212(a)(2)(B) of the Act provides that any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were 5 years or more is inadmissible.

1. HISTORY LESSON - Before 1990, excludability for 2 or more offenses was covered in Section 212(a)(10) of the Act. In 1990, the Act was

reorganized and that subject came under Section 212(a)(2)(A)(i)(I). In 1996, it stayed under that Section number. Cases on this subject from before 1990 involve Section 212(a)(10) as the ground of inadmissibility.

2. Under former Section 212(a)(10) of the Act, a sentence was "actually imposed" if a criminal court suspended the execution of a sentence, but no sentence was "actually imposed" where the imposition of sentence was suspended. Matter of Esposito, 21 I&N Dec. 1 (BIA 1995). However, Section 101(a)(48)(B), which was added to the Act by the IIRIRA, now provides "Any reference to a term of imprisonment of a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that sentence in whole or in part." Thus, the relevant inquiry is the term to which the alien was sentenced by the trial court, regardless whether the imposition or execution of the sentence was suspended. Matter of S-S-, 21 I&N Dec. 900 (BIA 1997).

3. In interpreting former Section 212(a)(10), the BIA held that if an alien has been convicted of 2 counts of an offense and sentenced to serve 2 concurrent 3-year terms, the aggregate sentence is only 3 years. Matter of Fernandez, 14 I&N Dec. 24 (BIA 1972). Apparently the alien must be sentenced to consecutive terms in order for the terms to be combined in determining an aggregate sentence. This appears to still be good law because Fernandez was cited with approval in Matter of Aldabesheh, 22 I&N Dec. 983 (BIA 1999), which dealt with the "aggregate sentence" of an alien convicted of two or more aggravated felonies and sentenced to concurrent sentences of imprisonment. Because the aggregate sentence was less than 5 years, the respondent was eligible for withholding of removal.

E. Trafficking in controlled substances. Section 212(a)(2)(C) provides that any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any controlled substance or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in controlled substances is inadmissible.

1. HISTORY LESSON - Before 1990, excludability for being a drug trafficker was covered in part of Section 212(a)(23) of the Act. In 1990, the Act was reorganized and being a drug trafficker came under Section 212(a)(2)(C). In 1996, it stayed under that Section number. Many cases on this subject from before 1990 involve former Section 212(a)(23) as the ground of inadmissibility.

2. The statute does not require a conviction to establish inadmissibility under

this section.

3. In cases involving former Section 212(a)(23), the BIA held that a single act will constitute a "trafficker" and it is not necessary to show a pattern or continuous trade in drugs. Matter of Favela, 16 I&N Dec. 753 (BIA 1979); Matter of Rico, 16 I&N Dec. 181 (BIA 1977); Matter of P-, 5 I&N Dec. 190 (BIA 1953). However, Matter of Rico and Matter of Favela do imply that it is necessary to show an act of more than simple possession such as sale of drugs or possession of such a large quantity of drugs that it could not be intended for personal use.

4. An alien who knowingly and consciously acts as a conduit in the transfer of marijuana between a dealer and the customers of the dealer was excludable under former Section 212(a)(23) as an "illicit trafficker" in drugs, even though he derived no personal gain or profit from the transaction. Matter of R-H-, 7 I&N Dec. 675 (BIA 1958). (Alien was the owner of a poolroom who, on 3 occasions, held marijuana cigarettes for a dealer and distributed them to customers who either had already paid the dealer in advance or left payment with the alien for later collection by the dealer.)

5. Applicants who, at the time of arrival, were in possession of 6 marijuana cigarettes for personal use were not excludable under former Section 212(a)(23) of the Act because there had been no conviction for possession of marijuana and their possession of a small quantity for personal use did not constitute "trafficking." Matter of McDonald and Brewster, 15 I&N Dec. 203 (BIA 1975).

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

G. Procurers & importers of prostitutes. Section 212(a)(2)(D)(ii) of the Act provides that the following aliens are inadmissible:

1. Those who directly or indirectly procure or attempt to procure prostitutes or persons for the purpose of prostitution, or who receive, in whole or in part, the proceeds of prostitution.

   a. The Board has ruled that a conviction under California Penal Code § 647(b) does not render an alien inadmissible under INA § 212(a)(2)(D)(ii) for "procur[ing] . . . prostitutes or persons for the purpose of prostitution." The California statute punishes anyone

"[w]ho solicits or who agrees to engage in or who engages in any act of prostitution," and it states that "'prostitution' includes any lewd act between persons for money or other consideration." The Board ruled that "the term 'procure' [in INA § 212(a)(2)(D)(ii)] does not extend to an act of solicitation of a prostitute on one's own behalf." The Board further ruled that, even if INA § 212(a)(2)(D)(ii) encompasses soliciting a prostitute on one's own behalf, California Penal Code § 647(b) still falls outside that statute. For this holding, the Board cited to 22 C.F.R. § 40.24(b), which states that, for purposes of INA § 212(a)(2)(D)(ii), "'prostitution' means engaging in promiscuous sexual intercourse for hire. A finding that an alien has 'engaged' in prostitution must be based on elements of continuity and regularity." The Board explained that the California statute is broader than INA § 212(a)(2)(D)(ii) because: (1) it covers "lewd act[s]" rather than simply "sexual intercourse;" and (2) it does not require "a pattern of behavior or deliberate course of conduct." Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008).

2. Those who have within 10 years of the application for a visa, admission, or adjustment of status procured, attempted to procure, or to import prostitutes or persons for the purpose of prostitution.

3. Those who receive or have received within 10 years of the application for a visa, admission, or adjustment of status, in whole or in part, the proceeds of prostitution.

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

I. Aliens who asserted immunity from prosecution - Section 212(a)(2)(E). [For waiver available, see Section 212(h) of the Act.] Any alien is inadmissible who

1. has committed in the U.S. at any time a serious criminal offense as defined in Section 101(h) of the Act and

2. for whom immunity from criminal jurisdiction was exercised with respect to that offense,

3. who departed from the U.S. as a consequence of the offense and the exercise of immunity,

4. who has not subsequently submitted fully to the jurisdiction of the court in

the U.S. which has jurisdiction with respect to the offense.

5. The term "serious criminal offense", defined in Section 101(h) of the Act means:

   a. Any felony;

   b. Any crime of violence, as defined in 18 U.S.C. § 16;

      (1) 18 U.S.C. § 16 defines a "crime of violence" as:

         (a) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

         (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

   c. Any crime of reckless driving or driving while intoxicated or under the influence of prohibited substances if the crime involves personal injury to another.

J. Espionage or sabotage. Section 212(a)(3)(A)(i) of the Act provides that any alien is inadmissible who a consular officer or the AG knows, or has reasonable ground to believe, seeks to engage solely, principally or incidentally in:

1. any activity to violate any law of the U.S. relating to espionage or sabotage, or

2. to violate or evade any law prohibiting the export from the U.S. of goods, technology, or sensitive information.

3. Former Section 241(a)(4)(A)(i) of the Act, which provided for the deportability of any alien who after entry has engaged in "any activity to violate any law of the United States relating to espionage," does not require evidence that the alien was either engaged in an act of espionage or was convicted of violating a law relating to espionage. Matter of Luis, 22 I&N Dec. 747 (BIA 1999).

4. An alien who has knowledge of, or has received instruction in, the espionage or counter-espionage service or tactics of a foreign government in violation of 50 U.S.C. § 851 (1994), is deportable under former Section

241(a)(4)(A)(i) of the Act. Matter of Luis, 22 I&N Dec. 747 (BIA 1999).

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

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

M. Terrorist activities. The statutory language of INA § 212(a)(3)(B) does not allow a "totality of the circumstances" test to be employed in determining whether an organization is engaged in a terrorist activity, so factors such as an organization's purposes or goals and the nature of the regime that the organization opposes may not be considered. Matter of S-K-, 23 I&N Dec. 936 (BIA 2006). Section 212(a)(3)(B)(i) of the Act [amended by the REAL ID Act of 2005] provides that any alien is inadmissible who:

1. has engaged in a terrorist activity, (An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered to be engaged in a terrorist activity.) [INA § Section 212(a)(3)(B)(I)];

2. a consular officer or the AG or Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or likely to engage after entry in any terrorist activity [INA § 212(a)(3)(B)(II)];

3. has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity [INA § 212(a)(3)(B)(III)];

4. is a representative of a terrorist organization or a political, social or other group that endorses or espouses terrorist activity [INA § 212(a)(3)(B)(IV)];

5. is a member of a terrorist organization (unless the alien can demonstrated by clear and convincing evidence that he did not know and should not reasonably have known that the organization was a terrorist organization) [INA §§ 212(a)(3)(B)(V) & (VI)];

6. endorses or espouse a terrorist activity or persecutes others to endorse or espouse a terrorist activity or support a terrorist organization [INA §

212(a)(3)(B)(VII)];

7. has received military-type training (as defined in 18 USC § 2339D(c)(1)) from or on behalf of any organization that, at the time the training was received, was a terrorist organization [INA § 212(a)(3)(B)(VIII)]; or

8. is the spouse or child of an alien found inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years [INA § 212(a)(3)(B)(IX)].

9. The term "terrorist activity" is defined in Section 212(a)(3)(B)(iii) of the Act as any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the U.S., would be unlawful under the laws of the U.S. or any State) and which involves any of the following:

   a. The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle) [INA § 212(a)(3)(B)(iii)(I)];

   b. The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained [INA § 212(a)(3)(B)(iii)(II)];

   c. A violent attack upon an internationally protected person (as defined in 18 U.S.C. § 1116(b)(4)) or upon the liberty of such a person [INA § 212(a)(3)(B)(iii)(III)];

   d. An assassination [INA § 212(a)(3)(B)(iii)(IV)];

   e. The use of any (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property [INA § 212(a)(3)(B)(iii)(V)];

   f. A threat, attempt, or conspiracy to do any of the foregoing [INA § 212(a)(3)(B)(iii)(VI)].

10. The term "engage in terrorist activity" is defined in Section 212(a)(3)(B)(iv) of the Act and means, in an individual capacity or as a member of an organization

   a. to commit or to incite to commit, under circumstances indicating

an intention to cause death or serious bodily injury, a terrorist activity [INA § 212(a)(3)(B)(iv)(I)];

b. to prepare or plan a terrorist activity [INA § 212(a)(3)(B)(iv)(II)];

c. to gather information on potential targets for a terrorist activity [INA § 212(a)(3)(B)(iv)(III)];

d. to solicit funds or other things of value for a terrorist activity or a terrorist organization (unless the solicitor can demonstrate by clear and convincing evidence that he did not know and should not reasonable have known, that the organization was a terrorist organization) [INA § 212(a)(3)(B)(iv)(IV)];

e. to solicit any individual to engage in conduct otherwise described in this subsection, for membership in a terrorist organization (unless the solicitor can demonstrate by clear and convincing evidence that he did not know and should not reasonable have known, that the organization was a terrorist organization) [INA § 212(a)(3)(B)(iv)(V)];

f. to commit an act that the actor knows or reasonable should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identifications, weapons (including chemical, biological, or radiological weapons), explosives or training for the commission of a terrorist activity, to any individual who the actors knows or reasonably should know has committed or plans to commit a terrorist activity, or to a terrorist organization (unless the actor can demonstrate by clear and convincing evidence that he did not know and should not reasonable have known, that the organization was a terrorist organization) [INA § 212(a)(3)(B)(iv)(VI)]. Neither an alien's intent in making a donation to a terrorist organization nor the intended use of the donation by the recipient is considered in assessing whether the alien provided "material support" to a terrorist organization under INA § 212(a)(3)(B)(iv)VI). Matter of S-K-, 23 I&N Dec. 936 (BIA 2006).

(1) Effective February 20, 2007, the Secretary of Homeland Security made a determination pursuant to his discretionary authority under Section 212(d)(3)(B)(I) that Section 212(a)(3)(B)(iv)(VI) shall not apply with respect to material support provided to the Chin National Front/Chin National

Army of Burma by an alien who satisfactorily demonstrates that he or she: (a) is seeking a benefit or protection under the Act and has been determined to be otherwise eligible for the benefit or protection; (b) has undergone and passed relevant background and security checks; (c) has fully disclosed, in all relevant applications and interviews with U.S. Government representatives and agents, the nature and circumstances of each provision of such material support; and (d) poses no danger to the safety and security of the U.S. Subsequently, the Attorney General remanded Matter of S-K- to the BIA for consideration of the effect of the Secretary's determination. Matter of S-K-, 24 I&N Dec. 289 (A.G. 2007). The Board determined that the Secretary's determination made the respondent eligible for asylum, and granted relief. Matter of S-K-, 24 I&N Dec. 475 (BIA 2008). The Attorney General's remand does not affect the precedential nature of the BIA's conclusions in the first Matter of S-K-. Id.

(2) Also in 2007, the Secretary of the Department of Homeland Security exercised his authority to waive the material support inadmissibility bar for certain aliens if the material support was provided under duress to an undesignated terrorist organization and the totality of the circumstances justified the favorable exercise of discretion. Shortly after the first exercise of discretion, the Secretary authorized the U.S. Citizenship and Immigration Services (USCIS) to consider the duress exemption in cases involving material support for the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army of Colombia (ELN). In addition, section 691(b) of the Consolidated Appropriations Act (CAA) of 2008 named certain groups that were not to be considered terrorist organizations based on activities prior to the CAA's enactment on December 26, 2007. Subsequently, the Secretary exercised his authority to state that most of the terrorism-related inadmissibility grounds would not apply with respect to the 10 groups named in section 691(b) of the CAA, if certain conditions were met.

(3) On October 23, 2008, following interagency meetings, the Department of Homeland Security issued a Fact Sheet announcing its procedure for handling cases that may be considered for an exemption afforded by section

212(d)(3)(B), in which there is an administratively final order of removal. Previously, USCIS had been adjudicating the available exemptions for cases not in removal proceedings. Under the new procedures, certain cases involving aliens in removal proceedings can be referred to USCIS, if the respondent was found ineligible for relief or a benefit solely because of a terrorism bar for which the Secretary has exercised his exemption authority. If USCIS grants the exemption, the case can be reopened and relief granted.

11. The term "representative" is defined at Section 212(a)(3)(B)(v) of the Act as an officer, official, or spokesman of an organization and any person who directs, counsels, commands or induces an organization or its members to engage in terrorist activity.

12. The term "terrorist organization" is defined at Section 212(a)(3)(B)(vi) Of the Act as an organization

    a. designated under Section 219 of the Act;

    b. otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding the organization engages in terrorist activity [INA § 212(a)(3)(B)(vi)(II)];

    c. that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, terrorist activity [INA § 212(a)(3)(B)(vi)(III)].

N. Effect on foreign policy. Section 212(a)(3)(C)(i) of the Act provides that any alien whose entry or proposed activities in the U.S. the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the U.S. is inadmissible.

1. Exception for officials. Section 212(a)(3)(C)(ii) of the Act provides that an alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the U.S. solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the U.S.

2. Exception for other aliens. Section 212(a)(3)(C)(iii) of the Act provides that an alien, other than an official described above, shall not be excludable or subject to restrictions or conditions on entry into the U.S. because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the U.S., unless the Secretary of State personally determines that the alien's admission would compromise a compelling U.S. foreign policy interest.

O. Communist or totalitarian party membership. Section 212(a)(3)(D)(i) of the Act provides that any immigrant who is or has been a member of or affiliated with the Communist Party or any other totalitarian party, or subdivision or affiliate thereof, whether foreign or domestic is inadmissible.

1. Since Section 212(a)(3)(D)(i) applies only to immigrants, aliens seeking admission as nonimmigrants are not rendered inadmissible by party membership.

2. Exception for involuntary membership. Section 212(a)(3)(D)(ii) of the Act provides that Section 212(a)(3)(D)(i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the AG when applying for admission) that

   a. the membership or affiliation is or was involuntary, or

   b. is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

3. Exception for past membership. Section 212(a)(3)(D)(iii) of the Act provides that Section 212(a)(3)(D)(i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the AG when applying for admission) that the membership or affiliation terminated

   a. at least 2 years before the date of such application, or

   b. 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

c. the alien is not a threat to the security of the U.S.

4. Exception for certain close family members.

a. Although the statute refers to this as an "exception", it is actually a waiver since it involves the exercise of discretion.

5. Section 212(a)(3)(D)(iv) of the Act provides that the AG may, in the AG's discretion, waive the application of Section 212(a)(3)(D)(i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the U.S. or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the U.S.

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

Q. Genocide. Section 212(a)(3)(E)(ii) of the Act provides that any alien who has engaged in genocide is inadmissible.

R. Public Charge. Section 212(a)(4) of the Act provides that any alien who in the opinion of the consular officer at the time of application for a visa or the AG at the time of application for admission or adjustment of status, is likely to become a public charge is inadmissible.

1. Factors to be taken into account.

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

(1) age;

(2) health;

(3) family status;

(4) assets, resources, and financial status; and

(5) education and skills.

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

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

3. Section 212(a)(4)(D) provides that any alien who seeks admission or adjustment of status under a visa number issued under Section 203(b) by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible unless such relative has executed an affidavit of support described in Section 213A with respect to such alien.

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

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

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

V. Illegal entrants and immigration violators - Section 212(a)(6).

1. Not admitted or paroled. Section 212(a)(6)(A)(i) of the Act provides that an alien present in the U.S. without being admitted or paroled, or who arrives in the U.S. at any time or place other than as designated by the AG is inadmissible.

a. Exception for certain battered women and children. Section 212(a)(6)(A)(ii) of the Act provides that Section 212(a)(6)(A)(i)

shall not apply to an alien who demonstrates that:

(1) the alien qualifies for immigrant status under Sections 204(a)(1)(A)(iii),(A)(iv),(B)(ii), or (B)(iii) and

(2) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or

(3) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty and

(4) there was a substantial connection between the battery or cruelty and the alien's unlawful entry into the U.S.

2. Failure to attend hearing. Section 212(a)(6)(B) of the Act provides that any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the U.S. within 5 years of such alien's subsequent departure or removal is inadmissible.

3. Misrepresentation - Section 212(a)(6)(C).

a. Fraud or misrepresentation of a material fact. Section 212(a)(6)(C)(i) of the Act provides that any alien who seeks to procure, has sought to procure, or has procured a visa, other documentation, entry into the U.S., or other benefit under the Act by fraud or willfully misrepresenting a material fact is inadmissible.

(1) A waiver for this ground of inadmissibility is available under Section 212(i).

b. False claim to USC. Section 212(a)(6)(C)(ii) provides that any alien who falsely represents or has falsely represented himself or herself to be a citizen of the U.S. for any purpose or benefit under

the Act or any other Federal or State law is inadmissible.

4. Stowaways. Section 212(a)(6)(D) of the Act provides that any alien who is a stowaway is inadmissible. The term is defined at Section 101(a)(49) of the Act.

5. Alien smugglers. Section 212(a)(6)(E)(i) of the Act provides that any alien who at any time knowingly has encouraged, assisted, abetted, or aided, any other alien to enter or try to enter the U.S. in violation of law is inadmissible.

   a. Section 212(a)(6)(E)(i) shall not apply in the case of an alien who is an eligible immigrant as defined in Section 301(b)(1) of the Immigration Act of 1990, was physically present in the U.S. on May 5, 1988, and is seeking admission as an immediate relative or under Section 203(a)(2) (including under Section 112 of the Immigration Act of 1990) or benefits under Section 301(a) of the immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the U.S. in violation of law. INA § 212(a)(6)(E)(ii).

      (1) Section 301(b)(1) of the Immigration Act of 1990 defines the term "eligible immigrant" as a qualified immigrant who is the spouse or unmarried child of a legalized alien.

   b. A waiver of inadmissiblity may also be available under Section 212(d)(11). INA § 212(a)(6)(E)(iii).

6. Violators of Section 274C. Section 212(a)(6)(F) of the Act provides that any alien who is the subject of a final order for violation of Section 274C of the Act is inadmissible. Section 274C provides for a hearing before an ALJ, civil fines of between $250 and $2,000 for each document, and makes unlawful the following: to forge, attempt to use, possess, obtain, or falsely make any document for the purpose of satisfying a requirement of the Act; to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of the Act; to use or attempt to use or to provide or attempt to provide any document lawfully issued to a person other than the possessor for the purpose of satisfying a requirement of the Act; to accept or receive or to provide any document lawfully issued to a person other than the possessor for the purpose of complying with Section 274A(b).

a. A waiver may be available under Section 212(d)(12). INA § 212(a)(f)(ii).

7. Student visa abusers. Section 212(a)(6)(G) provides that an alien who obtains the status of a nonimmigrant under Section 101(a)(15)(F)(i) and who violates a term or condition of such status under Section 214(I) is inadmissible until the alien has been outside the U.S. for a continuous period of 5 years after the date of the violation.

W. Visa and/or documentation requirements applicable to immigrants. Section 212(a)(7)(A)(i) of the Act provides that any immigrant who, at the time of the application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act and a valid unexpired passport or other suitable travel document or document of identity and nationality if required by the regulations under Section 211(a), or whose visa has been issued without compliance with the provisions of Section 203 (the preferences by which immigrant visas are issued) is inadmissible.

1. A waiver may be available under Section 212(k). INA § 212(a)(7)(A)(ii).

X. Visa and/or documentary requirements applicable to nonimmigrants. Section 212(a)(7)(B)(i)(I) provides that any nonimmigrant who is not in possession of a passport valid for a minimum of 6 months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period is inadmissible.

1. Section 212(a)(7)(B)(i)(II) provides that any nonimmigrant not in possession of a valid nonimmigrant visa or a border crossing identification card is inadmissible.

2. Waivers available.

a. A waiver of both of the above is available under Section 212(d)(4) of the Act.

b. A waiver for certain nonimmigrant visitors to Guam is also available under Section 212(l) of the Act.

c. A general waiver is also available under the Visa Waiver Pilot Program discussed in Section 217 of the Act.

Y. Section 212(a)(8)(A) of the Act provides that any immigrant who is permanently ineligible to citizenship is inadmissible.

a. The term "ineligible to citizenship" is defined at Section 101(a)(19) of the Act and refers to persons who have requested exemption from military service on account of alienage.

b. The phrase "ineligible to citizenship" in Section 212(a)(8)(A) of the Act refers only to those aliens who are barred from naturalization by virtue of their evasion of military service. Therefore, an alien convicted of an aggravated felony is not thereby rendered inadmissible under Section 212(a)(8)(A) of the Act as an alien who is permanently "ineligible to citizenship." Matter of Kanga, 22 I&N Dec. 1206 (BIA 2000).

c. Note that Section 212(a)(8)(A) is applicable only to aliens seeking to enter the U.S. as an immigrant. It does not apply to nonimmigrants.

Z. Draft evaders. Section 212(a)(8)(B) provides that any person who has departed from or remained outside the U.S. to avoid or evade training or service in the armed forces in time of war or national emergency is inadmissible.

1. This section states that it is not applicable to aliens who were nonimmigrants when they departed the U.S. and who are seeking admission as nonimmigrants.

AA. Aliens previously removed or unlawfully present - Section 212(a)(9).

1. Section 212(a)(9)(A)(i) provides that any alien who has been ordered removed under Section 235(b)(1) or at the end of proceedings under Section 240 initiated upon the alien's arrival in the U.S. who again seeks admission within 5 years of the date of removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible unless the AG has consented to the alien's applying for readmission under Section 212(a)(9)(A)(iii).

2. Section 212(a)(9)(A)(ii) provides that any alien not described in Section 212(a)(9)(A)(i) who has been ordered removed under Section 240 or any other provision of law or departed the U.S. while an order of removal was outstanding is inadmissible.

a. Exception. Section 212(a)(9)(A)(iii) provides that Section 212(a)(9)(A) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place

outside the U.S. or attempt to be admitted from foreign contiguous territory, the AG has consented to the alien's reapplying for admission.

3. Section 212(a)(9)(B)(i)(I) provides that any alien (other than an alien lawfully admitted for permanent residence) who was unlawfully present in the U.S. for a period of more than 180 days but less than 1 year, voluntarily departed the U.S. (whether or not pursuant to Section 244(e)) prior to the commencement of proceedings under Section 235(b)(1) or 240, and again seeks admission within 3 years of the date of such departure or removal is inadmissible.

4. Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than a LPR) who has been unlawfully present in the U.S. for one year or more and who again seeks admission within 10 years of the date of such alien's departure or removal from the U.S. is inadmissible. To be rendered inadmissible for 10 years pursuant to this provision, an alien must depart the United States after having been unlawfully present in the United States for one year or longer. Matter of Rodarte, 23 I&N Dec. 905 (BIA 2006). Pursuant to IIRIRA, no period of an alien's presence in the United States prior to April 1, 1997, may be considered "unlawful presence" for the purposes of determining an alien's inadmissibility under section 212(a)(9)(B) of the Act.

   a. The Board has ruled that when an alien is unlawfully present for at least 1 year, then leaves the U.S. and, subsequently, seeks admission within 10 years after the departure, the alien is inadmissible under Section 212(a)(9)(B)(i)(II) even if the alien's departure was not made pursuant to an order of removal or grant of voluntary departure. Matter of Lemus-Losa, 24 I&N Dec. 373 (BIA 2007).

5. "Unlawful presence" defined. An alien is deemed to be unlawfully present in the U.S. if the alien is present in the U.S. after the expiration of the period of stay authorized by the AG or is present in the U.S. without being admitted or paroled; Section 212(a)(9)(B)(ii) of the Act.

   a. Note: Periods of unlawful presence have been interpreted to begin on or after April 1, 1997. Dep't of State Cable (no. 98-State-060539) (April 4, 1998), reprinted in 75 Interpreter Releases 543 (April 20, 1998).

   b. Exceptions.

(1) Minors. No period of time in which an alien is under 18 shall be taken into account. INA § 212(a)(9)(B)(iii)(I).

(2) Asylees. No period of time in which an alien has a bona fide application for asylum pending shall be taken into account unless during such period the alien was employed without authorization in the U.S. INA§212(a)(9)(B)(iii)(II).

(3) Family unity. No period of time in which the alien is a beneficiary of family unity protection pursuant to Section 301 of the Immigration Act of 1990 shall be taken into account. INA § 212(a)(9)(B)(iii)(III).

(4) Battered women and children. Section 212(a)(9)(B)(i) of the Act shall not apply to an alien who demonstrates that the alien qualifies for immigrant status under Section 204(a)(1)(A)(iii),(A)(iv),(B)(ii), or (B)(iii) and the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty and there was a substantial connection between the battery or cruelty and the alien's violation of the terms of the alien's nonimmigrant visa. INA § 212(a)(9)(B)(iii)(IV).

c. Tolling for good cause. If an alien has been lawfully admitted or paroled into the U.S., has filed, a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the AG, and has not been employed without authorization in the U.S. before or during the pendency of such application, the calculation of the period of time unlawfully present in the U.S. shall be tolled during the pendency of such application, but not to exceed 120 days. INA § 212(a)(9)(B)(iv).

d. Waiver under Section 212(a)(9)(B)(v). The AG has sole discretion to waive Section 212(a)(9)(B)(i) in the case of an immigrant who is the spouse or son or daughter of a U.S. citizen or of a LPR if it is

established to the satisfaction of the AG that the refusal of admission to such immigrant would result in extreme hardship to the citizen or LPR spouse or parent of such alien.

6. Section 212(a)(9)(C)(i) of the Act provides that any alien who (I) has been unlawfully present in the U.S. for an aggregate period of more than 1 year or (II) has been ordered removed under Section 235(b)(1), Section 240, or any other provision of the law, is inadmissible.

   a. Exception. Section 212(a)(9)(C)(i) of the Act shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the U.S. if, prior to the alien's reembarkation at a place outside the U.S. or attempt to be readmitted from a foreign contiguous territory, the AG has consented to the alien's reapplying for admission. INA § 212(a)(9)(C)(ii). However, an alien who reenters the United States without admission after having previously been removed is inadmissible under INA § 212(a)(9)(C)(i)(II), even if the alien obtained the Attorney General's permission to reapply for admission prior to reentering lawfully. Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006).

BB. Polygamists. Section 212(a)(10)(A) of the Act provides that any immigrant coming to the U.S. to practice polygamy is inadmissible.

1. Note that this Section is applicable only to aliens seeking to enter the U.S. as an immigrant. It does not apply to nonimmigrants.

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

DD. International child abduction. Section 212(a)(10)(C)(i) involves the custody of USC children and makes inadmissible aliens who, after a court order granting custody to a citizen of the U.S. of a child having a lawful claim to U.S. citizenship, detain or withhold custody outside the U.S. from the citizen granted custody.

1. This ground of inadmissibility exists only until the child is surrendered to the U.S. citizen.

2. Exception. Section 212(a)(10)(C)(ii) provides that Section 212(a)(10)(C)(i) does not apply to an alien whose country is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. INA § 212(a)(10)(C)(ii).

EE. Unlawful voters. Section 212(a)(10)(D) provides that any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

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

V. Grounds of deportability in removal proceedings.

A. Inadmissible at time of entry or adjustment of status. Section 237(a)(1)(A) provides that any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

1. A waiver is available under Section 237(a)(1)(H).

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

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

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

E. Termination of conditional permanent residence. Section 237(a)(1)(D)(i) provides that any alien with permanent residence on a conditional basis under Section 216 or Section 216A who has had such status terminated under such respective Section is deportable.

1. Exception. Section 237(a)(1)(D)(ii) provides that Section 237(a)(1)(D)(i)

shall not apply in the cases described in Section 216(a)(4) (relating to certain hardship waivers).

F. Alien smuggling. Section 237(a)(1)(E)(i) provides that any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the U.S. in violation of law is deportable.

1. Section 237(a)(1)(E)(i) does not require a conviction.

2. A conviction for transporting an illegal alien within the U.S. (Rather than smuggling across the border)was not a deportable offense under former Section 241(a)(13) of the Act. Matter of I-M-, 7 I&N Dec. 389 (BIA 1957).

3. Special rule in the case of family reunification. Section 237(a)(1)(E)(ii) provides that Section 237(a)(1)(E)(i) shall not apply in the case of an alien who is an eligible immigrant (as defined in Section 301(b)(1) of the Immigration Act of 1990), was physically present in the U.S. on May 5, 1988, and is seeking admission as an immediate relative or under Section 203(a)(2) (including under Section 112 of the Immigration Act of 1990) or benefits under Section 301(a) of the immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the U.S. in violation of law.

4. Waiver. Section 237(a)(1)(E)(iii) provides that the AG may, in the exercise of discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of Section 237(a)(1)(E)(i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the U.S. in violation of law.

G. Marriage fraud. Section 237(a)(1)(G)(i) provides that an alien shall be considered deportable as having procured a visa or other documentation by fraud (within the meaning of Section 212(a)(6)(i)) and to be in the U.S. in violation of this Act (within the meaning of Section 237(a)(1)(B)) if the alien obtains any admission into the U.S. with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the U.S., shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the AG that such marriage was not contracted for the purpose of

evading any provisions of the immigration laws.

1. Section 237(a)(1)(G)(ii) provides that an alien shall be considered deportable as having procured a visa or other documentation by fraud (within the meaning of Section 212(a)(6)(i)) and to be in the U.S. in violation of this Act (within the meaning of Section 237(a)(1)(B)) if it appears to the satisfaction of the AG that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the AG was made for the purpose of procuring the alien's admission as an immigrant.

H. CIMT w/in 5 years of admission. Section 237(a)(2)(A)(i) provides that any alien who is convicted of a crime involving moral turpitude committed within 5 years (or 10 years in the case of an alien provided LPR status under Section 245(j)) after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed is deportable.

1. HISTORY LESSON - Before 1988, deportability for conviction of a CIMT was covered in Section 241(a)(4) of the Act. In 1988, when the concept of an aggravated felony was introduced, deportability for being convicted of one was placed under Section 241(a)(4)(B). Conviction for a CIMT was redesignated as Section 241(a)(4)(A). In 1990, the Act was reorganized and conviction of a CIMT came under Section 241(a)(2)(A)(i). In 1996, it was again moved to Section 237(a)(2)(A)(i). Therefore, many cases from before 1996 involve these various sections of the Act as the ground of deportability.

2. Also, prior to 1996, an alien convicted of a CIMT was deportable only if he was sentenced to confinement or confined for one year or longer. The IIRIRA changed the statute to read "for which a sentence of one year or longer <u>may be</u> imposed."

3. Under earlier sections, an alien was deportable who <u>commited</u> a CIMT within 5 years of entry. The conviction for the crime could occur after the 5 year period. <u>Matter of A-</u>, 6 I&N Dec. 684 (BIA 1955). The present Section appears subject to the same interpretation.

4. Under earlier sections, the alien's first entry or any subsequent entry could be utilized as a basis for a deportation charge relating to the alien's conviction of a CIMT committed within 5 years of entry. <u>Matter of A-</u>, 6 I&N Dec. 684 (BIA 1955). Under current Section 237(a)(2)(A)(i), an alien is removable if the crime was committed within 5 years after admission made by the alien, whether it be the first or any subsequent admission. <u>Matter of Shanu</u>, 23 I&N Dec. 754 (BIA 2005), <u>vacated sub nom.</u> <u>Aremu v. DHS</u>, 450 F.3d 578 (4th Cir. 2006).

5. An immigration judge cannot go behind the records of the criminal court to determine the guilt or innocence of an alien. Matter of Khalik, 17 I&N Dec. 518 (BIA 1980); Matter of McNaughton, 16 I&N Dec. 569 (BIA 1978); Matter of Fortis, 14 I&N Dec. 576 (BIA 1974); Matter of Sirhan, 13 I&N Dec. 592 (BIA 1970).

I. Two CIMTs. Section 237(a)(2)(A)(ii) provides that any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

1. The concept of "a single scheme of criminal misconduct."

a. The normal inference to be drawn from different crimes committed at different times against different persons is that they were separate and distinct crimes and were not part of a common scheme or plan unless there is evidence to the contrary. Matter of S-, 9 I&N Dec. 613 (BIA 1962), rev'd by Sawkow v. INS, 314 F.2d 34 (3d Cir. 1963).

b. When an alien has performed an act which, in and of itself, constitutes a complete, individual and distinct crime, then he becomes deportable when he again commits such an act, provided he is convicted of both. The fact that one may follow the other closely, even immediately, in point of time is of no moment. Equally immaterial is the fact that they may be similar in character or that each distinct and separate crime is a part of an over-all plan of criminal misconduct. The "single scheme" exception in Section 241(a)(4)(A) of the Act relates to a situation where there are two separate and distinct crimes but morally the transaction constitutes only a single wrong. Matter of D-, 5 I&N Dec. 728 (BIA 1954).

c. Simply because an alien commits a crime and later repeats the offense, it does not follow that the offenses were part of a single scheme, even though the crimes were similar. If each criminal act was a complete and distinct offense for which the alien was convicted, repetition of the particular crime would generally not constitute a single scheme. Matter of J-, 6 I&N Dec. 382 (BIA 1954).

d. Criminal precedents in U.S. law make it clear that charges combined in one indictment or information under separate counts

constitute distinct crimes. Matter of J-, 6 I&N Dec. 382 (BIA 1954). Coupling in a single indictment or information is only a matter of convenience. Id.

e. A respondent's testimony regarding his crimes will not establish a single scheme of misconduct if the records of conviction show separate and distinct offenses; Matter of O'Gorman, 11 I&N Dec. 6 (BIA 1965).

f. In Matter of Adetiba, 20 I&N Dec. 506 (BIA 1992), the BIA adopted the analysis in Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976), cert. denied, 430 U.S. 985 (1977) which states that to be a "single scheme," the scheme must take place at one time, meaning there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done. The BIA also refused to conclude that Congress intended by the "single scheme" language to insulate from deportability individuals who formulate a plan at one time for criminal behavior involving multiple separate crimes, while making deportable those who commit only two such crimes without a plan and held that the statutory exception refers to acts, which although separate crimes in and of themselves, were performed in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct. Under this analysis, it is of no consequence that the alien's separate crimes (such as forgery or unauthorized use of a credit card) were committed pursuant to an elaborate plan and that the modus operandi was the same in each instance. The Board focused on the alien's actual receipt of money from a victim as accomplishing the criminal objective. With each act, the alien accomplished a specific criminal objective when he obtained things of value. After each act, the alien had the opportunity to disassociate himself from the enterprise and reflect on what he had done and the commission of additional acts to obtain things of value did not flow from and was not a natural consequence of the first act of criminal misconduct.

g. The statutory language of a "single scheme of criminal misconduct" was meant to distinguish cases where there are separate and distinct crimes, but they are performed in furtherance of a single criminal episode, such as where two crimes flow from and are the natural consequence of a single act of criminal misconduct. Matter of Adetiba, 20 I&N Dec. 506 (BIA 1992).

h. A single scheme of criminal misconduct would be present, if in the performance of one unified act of criminal misconduct several offenses are committed, such as breaking and entering followed by larceny or an attempt to escape after an assault. Matter of J-, 6 I&N Dec. 382 (BIA 1954).

2. No single scheme was found in the following cases:

a. Robbery involving separate persons at different times. Matter of A-, 5 I&N Dec. 470 (BIA 1953).

b. Obtaining money by false pretenses involving distinct offenses. Matter of D-, 5 I&N Dec. 728 (BIA 1954).

c. Two counts of income tax evasion with each count relating to a separate year. Matter of J-, 6 I&N Dec. 382 (BIA 1954).

d. Forgery and uttering of different checks at different times even though both checks were made payable to the same person. Matter of Z-, 6 I&N Dec. 167 (BIA 1954).

e. Passing forged checks on two different occasions within 10 days notwithstanding a general criminal intent to continue to defraud victims. Matter of B-, 8 I&N Dec. 236 (BIA 1958).

f. Using credit cards in the names of different people, with intent to defraud, and obtaining things of value with the cards, notwithstanding that the crimes were committed pursuant to an elaborate plan and the modus operandi was the same in each instance. Matter of Adetiba, 20 I&N Dec. 506 (BIA 1992).

3. Some Circuit Courts interpret the phrase "single scheme of criminal misconduct" differently than the BIA. The BIA stated that it will not follow a more expansive interpretation outside the respective circuits. Matter of Adetiba, 20 I&N Dec. 506 (BIA 1992).

a. Decisions of Circuit Courts on this point.

(1) The 1st Circuit agrees with the BIA. Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976), cert. denied 430 U.S. 985 (1977).

(2) The 2nd Circuit disagrees with the BIA. Nason v. INS, 394 F.2d 223 (2d Cir.), cert. denied, 393 U.S. 830 (1968).

(3) The 3rd Circuit disagrees with the BIA. Sawkow v. INS, 314 F.2d 34 (3d Cir. 1963).

(4) The 5th Circuit agrees with the BIA. Iredia v. INS, 981 F.2d 847 (5th Cir. 1993) cert denied 510 U.S. 872 (1993); Animashaun v. INS, 990 F.2d 234 (5th Cir. 1993), cert. denied, 510 U.S. 995 (1993).

(5) The 9th Circuit disagrees with the BIA. Gonzalez-Sandoval v. INS, 910 F.2d 614 (9th Cir. 1990).

(6) The 10th Circuit agrees with the BIA. Nguyen v. INS, 991 F.2d 621 (10th Cir. 1993).

J. Convicted of an aggravated felony. Section 237(a)(2)(A)(iii) provides that any alien who is convicted of an aggravated felony at any time after admission is deportable. Note: See discussion, infra, for a detailed discussion of aggravated felonies.

1. An alien who initially entered the U.S. without inspection but whose conviction for an aggravated felony was subsequent to her adjustment of status to that of a lawful permanent resident under Section 245A of the Act is deportable under Section 237(a)(2)(A)(iii) of the Act as an alien who was convicted of an aggravated felony "after admission." Matter of Rosas, 22 I&N Dec. 616 (BIA 1999).

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

1. Waiver. Section 237(a)(2)(A)(vi) provides that Section 237(a)(2)(A)(i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the U.S. or by the Governor of any of the several states.

L. Failure to register as a sex offender. Section 237(a)(2)(A)(v) provides that any alien who is convicted under section 2250 of title 18, United States Code, is deportable. (Pursuant to the Adam Walsh Child Protection and Safety Act of 2006).

M. Controlled substance conviction. Section 237(a)(2)(B)(i) provides that any alien who at any time after admission has been convicted of a violation of (or a

conspiracy or attempt to violate) any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

1. HISTORY LESSON - Before 1990, deportability for conviction of drug offenses was covered in Section 241(a)(11) of the Act. In 1990, the Act was reorganized and drug offenses came under Section 241(a)(2)(B)(i). In 1996, it was again moved to Section 237(a)(2)(B)(i). Therefore, many cases from before 1990 involve Section 241(a)(11) as the ground of deportability.

2. Former Section 241(a)(11) did not contain the word "attempt." However, the BIA has long held that an alien convicted of an attempt to commit a drug offense is deportable. Matter of G-, 6 I&N Dec. 353 (BIA 1954); Matter of Bronsztejn, 15 I&N Dec. 281 (BIA 1974).

3. The exception for a single offense of possession for one's own use of 30 grams or less of marijuana also was not included in former Section 241(a)(11). This exception does not apply to an alien convicted under a statute that has an element requiring that possession of the marijuana be in a prison or other correctional setting. Matter of Moncada, 24 I&N Dec. 62 (BIA 2007).

4. A sentence to confinement was not necessary for an alien to be deportable under former Section 241(a)(11). Matter of L-R-, 8 I&N Dec. 269 (BIA 1959), overruled in part by Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988), superseded by statute as recognized by Matter of Devison-Charles, 22 I&N Dec. 1362 (BIA 2000); see also Chabolla-Delgado v. INS, 384 F.2d 360 (9th Cir. 1967), cert. denied, 393 U.S. 865 (1968); Gutierrez v. INS, 323 F.2d 593 (9th Cir. 1963), cert. denied, 377 U.S. 910 (1964). No sentence is required under the present law. INA § 237(a)(2)(B)(i).

5. Even if the imposition (rather than the execution) of sentence was suspended, the alien was still deportable. Matter of Tucker, 15 I&N Dec. 337 (BIA 1975); Matter of Wong, 12 I&N Dec. 721 (BIA 1968); Matter of Gonzalez de Lara, 12 I&N Dec. 806 (BIA 1968); Matter of Johnson, 11 I&N Dec. 401 (BIA 1965).

6. Former Section 241(a)(ll) of the Act made deportable aliens convicted of selling a substance other than a narcotic pursuant to an agreement to sell narcotics. Matter of T-C-, 7 I&N Dec. 100 (BIA 1956). Section 237(a)(2)(B)(i) appears to be subject to the same interpretation.

7. Where the record of conviction is silent as to the controlled substance involved, an alien's conviction in a state court was not a ground of deportabilty under former Section 241(a)(11) because the conviction could have involved a substance defined as a narcotic under state law which was not a narcotic drug within the meaning of the immigration laws. Matter of Paulus, 11 I&N Dec. 274 (BIA 1965). The same appears true for Section 237(a)(2)(B)(i).

   a. In a case involving a CIMT rather than a drug offense, the BIA held that recourse could not be had to the remarks of the State's Attorney to the court at the time of sentencing in order to determine if the crime involved moral turpitude where the respondent was convicted under a broad, divisible statute which enumerated several acts, the commission of which may or may not involve moral turpitude, and the record of conviction merely referred to the Section of law involved. Matter of Cassisi, 10 I&N Dec. 136 (BIA 1963).

   b. The BIA later determined that the remarks of the defendant may be considered and held that the transcript from court proceedings which resulted in a conviction for possession of controlled substances at which the respondent, under questioning by the judge as part of the guilty plea, admitted possession of heroin, with knowledge that the substance was heroin, can be considered as part of the "record of conviction", and a finding of deportability under former Section 241(a)(11) can be based on it. Matter of Mena, 17 I&N Dec. 38 (BIA 1979).

8. Before the 1986 amendment to Section 241(a)(11) changed its applicability to a violation of "any law or regulation relating to a controlled substance," Section 241(a)(11) applied only to convictions "relating to the illicit possession of or traffic in narcotic drugs or marijuana." During that time, the BIA held that a conviction for misprision of a felony (failure to report the commission of a felony) did not subject an alien to deportation even though the felony was possession of marihuana with intent to distribute. The Board concluded that this offense did not relate to the "illicit possession of or traffic in narcotic drugs or marihuana." Matter of Velasco, 16 I&N Dec. 281 (BIA 1977).

9. A conviction for a violation of 21 U.S.C. § 843(b). The unlawful use of a communication facility to facilitate commission of the felony of conspiracy to import a quantity of cocaine, a felony under 21 U.S.C. § 963, was held to be a conviction of a crime relating to the illicit traffic in

narcotic drugs as described in former Section 212(a)(23) of the Act. Matter of Chang, 16 I&N Dec. 90 (BIA 1977).

10. Because of the 1986 amendment to Section 241(a)(11) by the Anti-Drug Abuse Act of 1986, an alien convicted of unlawful use (rather than possession or trafficking) of a controlled substance was held to be deportable. Matter of Hernandez-Ponce, 19 I&N Dec. 613 (BIA 1988). The wording of Section 237(a)(2)(B)(i) on this point is the same, so this should continue to be good law.

11. Since its 1986 amendment, former Section 241(a)(11) of the Act made deportable an alien convicted of use or being under the influence of a controlled substance. Matter of Esqueda, 20 I&N Dec. 850 (BIA 1994). The argument that the amendment was only to include "designer" drugs by eliminating the list of prohibited drugs and refer instead to the Controlled Substances Act was rejected. See also Matter of Hernandez-Ponce, 19 I&N Dec. 613 (BIA 1988).

12. The 9th Circuit recognized an incongruity in including in the statute an exception to deportability for a single offense of possession for one's own use of 30 grams or less of marijuana but omitting a similar exception for actual use of marijuana. Nevertheless, the court determined that the plain language of the phrase "any law... relating to a controlled substance" is unambiguous and that its ordinary meaning includes laws proscribing use or being under the influence of a controlled substance. Flores-Arellano v. INS, 5 F.3d 360 (9th Cir. 1993).

13. An alien convicted of aiding and abetting the sale of cocaine was deportable under former Section 241(a)(11). Londono-Gomez v. INS, 699 F.2d 475 (9th Cir. 1983). Section 237(a)(2)(B)(i) appears to be subject to the same interpretation.

14. An alien convicted of facilitation (providing another with the means or opportunity and aiding in commission of an offense) of the sale of cocaine was also deportable. Matter of Del Risco, 20 I&N Dec. 109 (BIA 1989). Section 237(a)(2)(B)(i) appears to be subject to the same interpretation.

15. A conviction for solicitation (an attempt to conspire) to commit a crime relating to a controlled substance rendered an alien deportable under former Section 241(a)(11). Matter of Beltran, 20 I&N Dec. 521 (BIA 1992). Section 237(a)(2)(B)(i) appears to be subject to the same interpretation.

16. A conviction for misprision of a felony (the felony being possession of

marijuana with intent to distribute) was held not to be a conviction of a law "relating to the illicit possession of or traffic in narcotic drugs or marijuana" and therefore did not render a respondent deportable under former Section 241(a)(11). Matter of Velasco, 16 I&N Dec. 281 (BIA 1977).

17. An alien convicted under 18 U.S.C. § 924(c) of unlawful carrying of a firearm during the commission of a felony was once held not to be deportable under former Section 241(a)(11) of the Act even though the underlying felony was possession of heroin because 18 U.S.C. § 924(c) was an offense separate and distinct from the underlying felony and not "a law relating to the illicit possession of a narcotic drug." Matter of Carrillo, 16 I&N Dec. 625 (BIA 1978). 18 U.S.C. § 924(c) was amended in 1986 to apply to use of a firearm during a drug trafficking crime or a crime of violence. The BIA later held that an alien convicted under 18 U.S.C. § 924(c)(1) for use of a firearm during a drug trafficking crime is deportable under former Section 241(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony. Matter of K-L-, 20 I&N Dec. 654 (BIA 1993). Since a drug related aggravated felony would also be an offense relating to controlled substances, an alien convicted of use of a firearm during a drug trafficking crime should also be deportable under Section 237(a)(2)(B)(i) of the Act.

18. The 9th Circuit has held that a conviction under the Travel Act (18 U.S.C. § 1952) for traveling in interstate commerce with the intention of distributing the proceeds derived from the unlawful distribution of drugs in violation of 18 U.S.C. 1952 (a)(1) is a conviction 'relating to a controlled substance." Johnson v. INS, 971 F.2d 340 (9th Cir. 1992). The BIA cited this case in an unpublished decision involving a conviction under 18 U.S.C. § 1952 (a)(3) for travel to carry on a business enterprise involving the importation of a controlled substance and found the respondent deportable.

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

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

1. HISTORY LESSON - Before 1990, deportability for conviction of firearm offenses was covered in Section 241(a)(14) of the Act. In 1990, the Act was reorganized and firearm offenses came under Section 241(a)(2)(C). In 1996, it was again moved to Section 237(a)(2)(C). Therefore, many cases from before 1996 involve former Section 241(a)(2)(C) as the ground of deportability.

2. Prior statutes and retroactivity. Former Section 241(a)(14) originally made deportable only aliens convicted of possessing or carrying any weapon which either shoots automatically or semiautomatically more than one shot by a single function of the trigger or a sawed-off shotgun. Section 7348 of the Anti-Drug Abuse Act of 1988 amended former Section 241(a)(14) to include convictions for possessing or carrying any "firearm or destructive device...or any revolver." However, these amendments were effective only against aliens convicted on or after the effective date of the Anti-Drug Abuse Act of 1988 [November 18, 1988]. Former Section 241(a)(2)(C) of the Act represented the enactment of a new statutory provision rather than a change of the numerical designation of former Section 241(a)(14) because it increased the number of weapons offenses that render an alien deportable. Former Section 241(a)(2)(C) of the Act completely superceded all former versions of that deportation ground and was not limited regarding the date when a conviction must take place. Therefore, aliens were deportable who were convicted before the enactment of Former Section 241(a)(2)(C) as well as after. Matter of Chow, 20 I&N Dec. 647 (BIA 1993), aff'd sub nom. Chow v. INS, 9 F.3d 1547 (5th Cir. 1993). Present Section 237(a)(2)(C) would also appear to also include aliens convicted before 1996.

3. Definition of "firearm" - 18 U.S.C. § 921(a)(3) defines a firearm as:

   a. any weapon which will or may be converted to expel a projectile by explosive action;

   b. the frame or receiver of any such weapon;

   c. any firearm muffler or silencer;

   d. any destructive device, but

   e. the definition does not include an antique firearm.

4. Definition of "destructive device" - 18 U.S.C. § 921(a)(4) defines a destructive device as:

a. any bomb, grenade, rocket (having a propellant charge of more than 4 ounces), missile (having an explosive or incendiary charge of more than 1/4 ounce), mine, or similar device which is explosive, incendiary, or contains poison gas;

b. any weapon (other than shotguns or shotgun shells for sporting use) which will or may be converted to expel a projectile by explosive or other propellant and which has a barrel with a bore of more than ½ inch in diameter;

c. any combination of parts from which a destructive device may be assembled.

5. A conviction for an attempted firearms offense would not support a charge of deportability under former Section 241(a)(2)(C) of the Act. Matter of Hou, 20 I&N Dec. 513 (BIA 1992), superseded by statute as recognized in Matter of St. John, 21 I&N Dec. 593 (BIA 1996). Apparently to legislatively overrule Matter of Hou, Section 203(b)(1) of the Immigration and Nationality Technical Corrections Act of 1994 amended former Section 241(a)(2)(C) to include both an attempt and a conspiracy. Section 203(c) provided that the amendment applies to convictions occurring before, on, or after the effective date.

6. After the enactment of Section 101(a)(48)(A) of the Act, an alien remains convicted for immigration notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative process. Matter of Roldan, 22 I&N Dec. 512 (BIA 1999) review granted, order vacated by Lujan-Armendariz v. I.N.S., 222 F.3d 728 (9th Cir. 2000); but see Matter of Salazar, 23 I&N Dec. 223 (BIA 2002) (recognizing an exception for controlled substances convictions arising in the Ninth Circuit pursuant to Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000)).

7. Sentence enhancement or element of the offense

a. The sentence enhancement provision of Section 12022(a) of the California Penal Code, which allows for the imposition of an additional and consecutive term of imprisonment upon a person convicted of a felony where any one of the principals was armed with a firearm, does not create a separate offense, but rather imposes additional punishment, and therefore does not constitute a conviction under California law. Therefore, an alien who was convicted of 5 counts of attempted murder in the second degree and whose sentence under one count was enhanced pursuant to

Section 12022(a) of the California Penal Code because a codefendant was armed with a firearm in the attempted commission of the felony has not been convicted of a firearm offense under California law and is not deportable under former Section 241(a)(2)(C) of the Act. Matter of Rodriguez-Cortes, 20 I&N Dec. 587 (BIA 1992). In a later unpublished decision, the BIA explained that under California law, the presence of a firearm is not an element of the substantive offense.

b. A conviction for assault in the third degree under Section 9A.36.031(1)(f) of the Revised Code of Washington is not a firearm offense where use of a firearm is not an element of the offense and a respondent so convicted is not deportable under former Section 241(a)(2)(C) of the Act. Matter of Perez-Contreras, 20 I&N Dec. 615 (BIA 1992). In this case, no element of the crime to which the respondent entered a plea of guilty related to the use of a weapon. Although the criminal information stated that the respondent used a pistol in the assault, he was not charged with use of a pistol; and did not plead guilty to such use.

c. A respondent convicted of assault with a firearm, in violation of California Penal Code Section 245(a)(2), has been convicted of a firearms violation and is deportable under former Section 241(a)(2)(C) of the Act. Matter of Montenegro, 20 I&N Dec. 603 (BIA 1992), superseded by statute on other grounds as recognized by Matter of Blake, 23 I&N Dec. 722 (BIA 2005). Although the case primarily involved eligibility for a waiver under former Section 212(c) of the Act and the BIA did not discuss at length the issue of deportability, it seems that the respondent was deportable under Section 241(a)(2)(C) because the use of a firearm was an element of the offense specifically stated in the statute. The BIA also rejected an argument that because the respondent's conviction for assault with a firearm could also render him excludable under Section 212(a)(2)(A)(i)(I) of the Act as an alien convicted of a CIMT, he should be allowed to apply for a waiver under Section 212(c).

d. An alien convicted under 18 U.S.C. § 924(c)(1) for use of a firearm during a drug trafficking crime is deportable under former Section 241(a)(2)(C) of the Act as an alien convicted of a firearm violation as well as under former Section 241(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony. Matter of K-L-, 20 I&N Dec. 654 (BIA 1993). In this case, the BIA distinguished its decision in Matter of Rodriguez-Cortes, 20 I&N Dec. 587 (BIA

1992) and held that 18 U.S.C.§ 924(c)(1) creates an offense separate from the underlying offenses and is not merely a sentence enhancement.

e. An alien convicted of the first degree felonies of armed burglary and robbery with a firearm under sections 810.02 and 812.13 of the Florida Statutes was convicted of firearm offenses and therefore deportable under former Section 241(a)(2)(C) of the Act because the use of a firearm was an essential element of the crimes, i.e. the use of a firearm elevated the crimes to first degree felonies and triggered a mandatory minimum sentence as distinguished from a statutory sentence enhancement. Matter of P-F-, 20 I&N Dec. 661 (BIA 1993).

f. Although Section 775.087 of the Florida Statutes is, on its face, a penalty enhancement provision designed to raise the penalty for conviction of a felony (actually the degree of the felony) where the felony is committed with the use of a firearm, under Florida caselaw, use of a firearm becomes an element of the substantive offense of first degree murder with a firearm where the elements of murder under Section 782.04 of the Florida Statutes and use of a firearm under Section 775.087 of the Florida Statutes are charged and proven. Therefore, a conviction for first degree murder in violation of sections 782.04 and 775.087 of the Florida Statutes constitutes a firearms offense under former Section 241(a)(2)(C) of the Act because the use of a firearm is deemed to be an element of the substantive offense. Matter of Lopez-Amaro, 20 I&N Dec. 668 (BIA 1993), aff'd Lopez-Amaro v. INS, 25 F.3d 986 (11th Cir. 1994).

8. In an unpublished decision, the BIA held that an alien convicted under Section 790.10 of the Florida Statutes of improper exhibition of a firearm is convicted of an offense involving the use of a firearm and, therefore, deportable under former Section 241(a)(2)(C) of the Act.

9. In an unpublished decision, the BIA held that a conviction for making false or fictitious statements in connection with acquiring firearms in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(B) is premised upon the making of false representations on the relevant applications or forms, rather than related to the actual possession of a firearm and found that an alien so convicted is not deportable under former Section 241(a)(2)(C) of the Act. In another case, an IJ found a respondent deportable as an alien convicted "under any law of purchasing . . . or of attempting or conspiring to purchase . . . any . . . firearm" and the BIA affirmed. Before a circuit

court, the alien argued that for his conduct to trigger former Section 241(a)(2)(C), the alien contends that he not only need have made false statements in connection with a firearms purchase, he must also have been the individual doing the buying. The court, in dismissing the appeal, held that nothing on the face of former Section 241(a)(2)(C), limits the statute to the actual purchaser of the firearm. Hall v. INS, 167 F.3d 852 (4th Cir. 1999).

10. The 1st Circuit has held that the offense of "control" of a firearm in violation of Rhode Island §11-47-7 constitutes constructive possession of a firearm. Aybar-Alejo v. INS, 230 F.3d 487 (1st Cir. 2000).

11. Evidence.

    a. Where the statute under which an alien was convicted encompasses offenses that constitute firearms violations and offenses that do not, the BIA looks to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted constitutes a firearms violation within the meaning of Section 241(a)(2)(C) of the Act. Matter of Teixeira, 21 I&N Dec. 316 (BIA 1996); Matter of Madrigal, 21 I&N Dec. 323 (BIA 1996); Matter of Pichardo, 21 I&N Dec. 330 (BIA 1996).

    b. A police report, standing alone, is not part of a "record of conviction," nor does it fit any of the regulatory descriptions found at 8 C.F.R. § 1003.41 for documents that are admissible as evidence in proving a criminal conviction, and it therefore should not be considered in determining whether the specific offense of which an alien was convicted constituted a firearms violations. Matter of Teixeira, 21 I&N Dec. 316 (BIA 1996). Although a police report concerning circumstances of arrest that is not part of a record of conviction is appropriately admitted into evidence for the purpose of considering an application for discretionary relief, it should not be considered for the purpose of determining deportability where the Act mandates a focus on a criminal conviction, rather than on conduct. Id.

    c. The transcript from the respondent's plea and sentence hearing, during which he admitted possession of a firearm, is part of the record of conviction and, consequently, was sufficient to establish that the respondent had been convicted of a firearms offense and was deportable under former Section 241(a)(2)(C) of the Act. Matter of Madrigal, 21 I&N Dec. 323 (BIA 1996).

d. Where the only criminal court document offered into the record to prove an alien's deportability under former Section 241(a)(2)(C) of the Act consists of a Certificate of Disposition which fails to identify the subdivision of the statute under which the alien was convicted or the weapon that he was convicted of possessing, deportability has not been established, even where the alien testifies that the weapon in his possession at the time of his arrest was a gun, since it is the crime that the alien was convicted of rather than a crime that he may have committed which determines whether he is deportable. Matter of Pichardo, 21 I&N Dec. 330 (BIA 1996).

P. Miscellaneous crimes. Section 237(a)(2)(D) provides that an alien is deportable who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate:

1. any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18, United States Code, for which a term of imprisonment of 5 or more years may be imposed;

2. any offense under 18 U.S.C. § 871 or 960;

3. a violation of any provision of the Military Selective Service Act (50 U.S.C. App 451 et seq. or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

4. a violation of Section 215 or 278 of the Immigration and Nationality Act.

Q. Crimes of domestic violence, stalking, and child abuse. Section 237(a)(2)(E)(i) provides that any alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.

1. Definition of "a crime of domestic violence." Section 237(a)(2)(E)(i) provides "For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in Section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who

is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government."

a. "Crime of Domestic Violence." The Ninth Circuit has held that to determine whether the victim of the crime is one described in Section 237(a)(2)(E)(i), the IJ must first look to the fact of the statute of conviction. Tokatly v. Ashcroft, 371 F.3d 613 (9th Cir. 2004). When it is not clear from the statute that the victim is a person described in Section 237(a)(2)(E)(i) of the Act, the IJ may look to selected conviction documents. Id. (applying Taylor v. U.S., 495 U.S. 575 (1990)). In removal proceedings arising within the jurisdiction of the Ninth Circuit, the offense of domestic battery in violation of sections 242 and 243(e)(1) of the California Penal Code does not presently qualify categorically as a "crime of violence" under 18 U.S.C. § 16 (2000), such that it may be considered a "crime of domestic violence" under section 237(a)(2)(E)(i) of the INA. Matter of Sanudo, 23 I&N Dec. 968 (BIA 2006).

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

R. Violators of protection orders. Section 237(a)(2)(E)(ii) provides that any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.

S. Failure to register.

1. Section 237(a)(3)(A) provides that an alien who has failed to comply with the provisions of Section 265 is deportable, unless the alien establishes to the satisfaction of the AG that such failure was reasonably excusable or was not willful.

   a. Section 265 requires certain aliens to notify the AG in writing of each change of address and new address within 10 days of a change of address.

2. Conviction for failure to register or falsification of documents. Section 237(a)(3)(B) provides that any alien is deportable who at any time has been convicted:

   a. under Section 266(c) of the Act or under Section 36(c) of the Alien Registration Act, 1940,

   b. of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611 et seq.), or

   c. of a violation of, or an attempt or a conspiracy to violate, 18 U.S.C. § 1546 (relating to fraud and misuse of visas, permits, and other entry documents).

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

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

U. Falsely claiming citizenship. Section 237(a)(D) provides that any alien who falsely represents, or has falsely represented, himself to be a citizen of the U.S. for any purpose or benefit under the Act (including Section 274A) or any Federal or State law is deportable.

V. National security and related grounds. Section 237(a)(4)(A) provides that any alien is deportable who has engaged, is engaged, or at any time after admission engages in:

1. any activity to violate any law of the U.S. relating to espionage or sabotage or to violate or evade any law prohibiting the export from the U.S. of goods, technology, or sensitive information,

2. any other criminal activity which endangers public safety or national security, or

3. any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the U.S. by force, violence, or other unlawful means.

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

X. Effect on foreign policy. Section 237(a)(4)(C)(i) of the Act provides that an alien whose presence or activities in the U.S. the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the U.S. is deportable.

1. In order to establish deportability under former Section 241(a)(4)(C)(i) of the Act, the INS has the burden of proving by clear, unequivocal, and convincing evidence that the Secretary of State has made a facially reasonable and bona fide determination that an alien's presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States. Matter of Ruiz-Massieu, 22 I&N Dec. 833 (BIA 1999). A letter from the Secretary of State conveying the Secretary's determination that an alien's presence in this country would have potentially serious adverse foreign policy consequences for the United States, and stating facially reasonable and bona fide reasons for that determination, is presumptive and sufficient evidence that the alien is deportable under former Section 241(a)(4)(C)(i) of the Act, and the Service is not required to present additional evidence of deportability. Id.

2. The Government is not required to permit an alien who is deemed to be deportable under former Section 241(a)(4)(C)(i) of the Act to depart the United States voluntarily prior to the initiation of deportation proceedings where the alien's presence is pursuant to his voluntary decision to enter or seek admission to this country. Matter of Ruiz-Massieu, 22 I&N Dec. 833 (BIA 1999), distinguishing Matter of Badalamenti, 19 I&N Dec. 623 (BIA 1988), Matter of Yam, 16 I&N Dec. 535 (BIA 1978), and Matter of C-C-, 3 I&N Dec. 221 (BIA 1948).

3. Extradition proceedings are separate and apart from any immigration proceeding and the Government's success or failure in obtaining an order of extradition has no effect on deportation proceedings. Matter of McMullen, 17 I&N Dec. 542, 548 (BIA 1980), rev'd on other grounds, 658 F.2d 1312 (9th Cir. 1981), on remand, Matter of McMullen, 19 I&N Dec. 90 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986), overruled in part on other grounds by Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005); Matter of Ruiz-Massieu, 22 I&N Dec. 833 (BIA 1999). The BIA pointed out that the standards of proof for the two proceedings are different. Also, the existence of criminal charges is not the only possible basis for a determination that the respondent's presence may have adverse foreign policy consequences.

4. Exceptions. Section 237(a)(4)(C)(ii) provides that the exceptions described in clauses (ii) and (iii) of Section 212(a)(3)(C) shall apply to deportability under Section 237(a)(4)(C)(i) in the same manner as they apply to inadmissibility under Section 212(a)(3)(C)(i).

Y. Assisted in Nazi persecution or engaged in genocide. Section 237(a)(4)(D) provides that any alien described in clause (i) or (ii) of Section 212(a)(3)(E) is deportable.

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

AA. Unlawful voters. Section 237(a)(6) provides that any alien who has voted in violation of any Federal, state, or local constitutional provision, statute, ordinance, or regulation is deportable.

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

CC. Waiver under Section 237(c) for special immigrants. Section 237(c) provides that the following grounds of deportability shall not apply to a special immigrant described in Section 101(a)(27)(J) [an immigrant declared dependent on a juvenile court] based upon circumstances that existed before the date the alien was provided such special immigrant status:

1. 237(a)(1)(A) - inadmissible at time of entry for grounds of inadmissibility other than:

   a. 212(a)(2) - criminal & related grounds, and

   b. 212(a)(3) - national security, terrorist activity, & related grounds.

2. 237(a)(1)(B) - in the U.S. in violation of law.

3. 237(a)(1)(C) - violated nonimmigrant status or condition of entry.

4. 237(a)(1)(D) - termination of conditional residence.

5. 237(a)(3)(A) - failure to report change of address.

VI. Procedure in removal proceedings.

A. Notice to the alien.

1. The charging document: Notice to Appear (NTA). Section 239(a)(1) provides that in removal proceedings under Section 240, written notice (referred to as a notice to appear) shall be given in person to the alien or, if personal service is not practicable, through service by mail to the alien or the alien's counsel of record and shall specify the following: 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; the charges against the alien and the statutory provisions alleged to have been violated; the right to be represented by counsel; the requirement that the alien must immediately provide the AG with a written record of any address and telephone number (if any) at which the alien may be contacted; the requirement that the alien must provide the AG immediately with a written record of any change of the alien's address or telephone number; the consequences under Section 240(b)(5) of failure to provide address and telephone information; the time and place at which the proceeding will be held; the consequences under Section 240(b)(5) of the failure, except under exceptional circumstances, to appear at such proceedings.

2. Section 239(a)(2)(A) provides that in the case of any change or postponement in the time and place of such proceedings, a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the new time or place of the proceedings and the consequences under Section 240(b)(5) of failing, except under exceptional

circumstance, to attend such proceedings.

a. Exception: Section 239(a)(2)(B) provides that in the case of an alien not in detention, a written notice shall not be required if the alien has failed to provide the address required.

3. Securing of counsel. Section 239(b)(1) provides that in order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under Section 240, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

a. Current lists of counsel. Section 239(b)(2) provides that the AG shall provide lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under Section 240.

b. Rule of construction. Section 239(b)(3) states that nothing in Section 239(b) may be construed to prevent the AG from proceeding against an alien pursuant to Section 240 if the 10 days has elapsed and the alien has failed to secure counsel.

c. All of the above would lead to the conclusion that the alien has only 10 days in which to acquire counsel. However 8 C.F.R. 1240.10(a)(1) provides that an IJ shall advise a respondent of the right to be represented and to determine if the alien desires representation. Apparently, if the alien desires representation, the hearing is to be continued to allow him to seek counsel. See Matter of Michel, 21 I&N Dec. 1101 (BIA 1998).

d. In Picca v. Mukasey, 512 F.3d 75 (2d Cir. 2008), the Second Circuit held that, under 8 C.F.R. § 1240.10(a), an IJ has an affirmative duty to notify the alien in proceedings that free legal services are available, and to ascertain that the alien has received a list of such services. No showing of prejudice is required for remand if an IJ fails to comply with 8 C.F.R. § 1240.10(a). In addition, the mailing of a list of free legal service providers to an alien does not satisfy 8 C.F.R. § 1240.10(a), as "it is the IJ who must advise immigrants of the availability of free legal services," and "appending a list of legal service organizations to a Notice to Appear cannot substitute for the requirement that the IJ ascertain that the respondent has received a list of such programs."

e. In Ram v. Mukasey, 529 F.3d 1238 (9th Cir. 2008), the Ninth

Circuit ruled that, for a waiver of counsel to be valid, "an IJ must generally: (1) inquire specifically as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response."

4. Prompt initiation of removal. Section 239(d)(1) provides that in the case of an alien who is convicted of an offense which makes the alien deportable, the AG shall begin any removal proceeding as expeditiously as possible after the date of the conviction. However, Section 239(d)(2) provides that Section 239(d)(1) shall not be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the U.S. or its agencies or officers or any other person.

5. Termination of parole. The BIA held that exclusion proceedings could not be instituted against a paroled alien who is entitled by regulation to written notice of the termination of parole until the alien receives such written notice. Matter of O, et al., 16 I&N Dec. 344 (BIA 1977). No definition of the term "parole" is contained in the Act, the regulations, or any judicial or administrative decision. Id. At the time this decision was made, it appears that the regulations provided for written notice to all paroled aliens. The current regulations provide for termination of parole as follows:

   a. Automatic termination under 8 C.F.R. § 212.5(e)(i) & (ii): parole is automatically terminated without written notice:

      (1) Upon the paroled alien's departure from the U.S., or

      (2) At the expiration of the time for which parole was authorized.

   b. Termination on notice under 8 C.F.R. § 212.5(e)(2): in all cases not covered above, parole must be terminated upon written notice to the alien:

      (1) Upon accomplishment of the purpose for which parole was authorized has been accomplished (apparently upon the happening of an event rather than upon the expiration of a period of time), or

      (2) When the DD or Chief Patrol Agent in charge of the area where the alien is located determines that neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the U.S.

(3) However, 8 C.F.R. § 212.5(e)(2)(i) provides that when a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified.

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

B. Service of the NTA. Section 239(a)(1) provides that in removal proceedings under Section 240, written notice (the NTA) shall be given in person to the alien or, if personal service is not practicable, through service by mail to the alien or the alien's counsel of record.

1. Persons confined. 8 C.F.R. § 103.5a(c)(2)(i) provides that if a person is confined in a penal or mental institution or hospital and is competent to understand the nature of the proceedings initiated against him, service shall be made both on him and the person in charge of the institution or hospital. If the confined person is not competent to understand, service shall be made only on the person in charge of the institution or hospital and such service will be deemed service on the confined person.

2. Incompetents and minors. 8 C.F.R. § 103.5a(c)(2)(ii) provides that in case of mental incompetency, whether or not confined in an institution, and in the case of a minor under 14 years of age, service shall be made upon the person with whom the incompetent or minor resides. Whenever possible, service shall also be made on the near relative, guardian, committee, or friend.

a. When a minor is detained by the Service, his residence is the particular setting in which he is detained because that setting is the alien's actual dwelling place. Therefore, service of an OSC was held to be properly made on the director of the facility in which the minor is detained. Matter of Amaya, 21 I&N Dec. 583 (BIA 1996).

b. A minor respondent, who could not be expected to attend immigration proceedings on her own, was properly notified of her hearing, through proper mailing of a Notice to Appear (Form I-862) to the last address provided by her parent, with whom she was residing. Matter of Gomez-Gomez, 23 I&N Dec. 522 (BIA 2002). Although the headnote states that the NTA was served by mail, the decision indicates it was personally served and the notice of the hearing was served by mail.

c. The regulations governing service of a NTA on a minor respondent do not explicitly require service on the parent or parents in all circumstances. If a minor respondent's parents are not present in the U.S., service on an uncle or other near relative accompanying the child may suffice. However, when it appears that the minor child will be residing with her parents in the U.S., the regulation requires service on the parents, whenever possible, in addition to service that may be made on an accompanying adult or more distant relative. Therefore, removal proceedings against a minor under 14 years of age were properly terminated because service of the NTA failed to meet the requirements of 8 C.F.R. § 103.5a(c)(2)(ii), as it was served only on a person identified as the respondent's uncle, and no effort was made to serve the notice on the respondent's parents, who apparently live in the U.S. Matter of Mejia-Andino, 23 I&N Dec. 533 (BIA 2002).

(1) Note: The Ninth Circuit has held that when the Government releases a minor alien into an adult's custody pursuant to its juvenile release and notice regulations, it must serve notice of the alien's rights and responsibilities upon that adult if the alien is under 18. Flores-Chavez v. Ashcroft, 362 F.3d 1150 (9th Cir. 2004).

3. Section 239(c) provides that service by mail of the NTA shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with Section 239(a)(1)(F).

4. The violation of former 8 C.F.R. § 242.1(c) which requires that the contents of an Order to Show Cause (OSC) be explained to an alien under certain circumstances when the OSC is served, does not necessarily result in prejudice to the alien. The explanation requirement of the regulation is not jurisdictional. As long as the statutory requirements regarding the OSC and notice of deportation proceedings are satisfied and the alien appears for the scheduled hearing, service of the OSC without explanation

of its contents by INS is sufficient to confer the IJ with jurisdiction over the alien. Where an alien raises the issue of violation of the explanation requirements of the regulation and the IJ finds that the alien was prejudiced by such violation, the IJ, where possible, can and should take corrective action short of termination of the proceedings. Matter of Hernandez, 21 I&N Dec. 224 (BIA 1996).

C. Cancellation of the NTA, motions to dismiss and remand, and termination by the IJ - 8 C.F.R. §§ 1239.2 & 239.2

1. Cancellation of the NTA.

a. 8 C.F.R. § 239.2(a) provides that any officer authorized by 8 C.F.R. § 239.1(a) to issue a NTA may cancel such notice prior to jurisdiction vesting with the IJ provided the officer is satisfied that:

(1) The respondent is a national of the U.S.;

(2) The respondent is not deportable or inadmissible under immigration laws;

(3) The respondent is deceased;

(4) The respondent is not in the U.S.;

(5) The NTA was issued for the respondent's failure to file a timely petition as required by Section 216(c) of the Act, but the failure to file was excused in accordance with Section 216(d)(2)(B) of the Act;

(6) The NTA was improvidently issued; or

(7) Circumstances of the case have changed after the NTA was issued to such an extent that continuation is no longer in the best interest of the government.

b. A decision by the INS to institute removal or other proceedings, or to cancel a NTA or other charging document before jurisdiction vests with the IJ, involves the exercise of prosecutorial discretion and is not a decision that the IJ or the BIA may review. Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998).

2. Motion to dismiss. 8 C.F.R. § 1239.2(c) provides that after commencement of proceedings under 8 C.F.R. § 1003.14, the Service may

move for dismissal of the matter on the grounds set forth above. Dismissal of the matter shall be without prejudice to the alien or the Service.

a. Once the charging document is filed with the Immigration Court and jurisdiction is vested in the IJ, the Service may move to dismiss the proceedings, but it may not simply cancel the charging document. Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998).

b. The IJ is not required to terminate proceedings upon the Service's invocation of prosecutorial discretion but rather must adjudicate the motion on the merits. Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998).

3. Motion for remand. 8 C.F.R. § 1239.2(d) provides that after commencement of the hearing, the Service may move for remand of the matter to district jurisdiction on the ground that the foreign relations of the U.S. are involved and require further consideration. Remand of the matter shall be without prejudice to the alien or the Service.

4. Termination by IJ. 8 C.F.R. § 1239.2(f) provides that an IJ may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.

a. The BIA held that: (1) because the BIA and the IJs lack jurisdiction to adjudicate applications for naturalization, removal proceedings may only be terminated pursuant to 8 C.F.R. § 1239.2(f) where DHS has presented an affirmative communication attesting to an alien's prima facie eligibility for naturalization; and (2) an adjudication by DHS on the merits of an alien's naturalization application while removal proceedings are pending is not an affirmative communication of the alien's prima facie eligibility for naturalization that would permit termination of proceedings under 8 C.F.R. § 1239.2(f). Matter of Acosta Hidalgo, 24 I&N Dec. 103 (BIA 2007).

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

1. Charges. Section 240(a)(2) provides that an alien placed in removal proceedings may be charged with any applicable ground of inadmissibility under Section 212(a) or any applicable ground of deportability under Section 237(a).

2. Exclusive procedures. Section 240(a)(3) provides that, unless otherwise specified in the Act, removal proceedings under Section 240 shall be the sole and exclusive procedure for determining whether an alien may be admitted to the U.S. or, if the alien has been so admitted, removed from the U.S. However, nothing in Section 240(a)(3) shall affect proceedings conducted pursuant to Section 238 (expedited removal).

3. Authority of IJ. Section 240(b)(1) provides that the IJ shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The IJ may issue subpoenas for the attendance of witnesses and presentation of evidence. The IJ shall have authority (under regulations prescribed by the AG) to sanction by civil money penalty any action (or inaction) in contempt of the IJ's proper exercise of authority.

   a. For information regarding subpoenas, see 8 C.F.R. § 1287.4.

   b. Regulations regarding contempt power have yet to be enacted.

4. Form of proceeding. Section 240(b)(2)(A) provides that the proceeding may take place in person, where agreed upon by the parties in the absence of the alien, through video conference, or through telephone conference. However, Section 240(b)(2)(B) provides that an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

5. Presence of alien. Section 240(b)(3) provides that if it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the AG shall prescribe safeguards to protect the rights and privileges of the alien.

6. Alien's rights in proceeding. Section 240(b)(4) provides that in proceedings under Section 240, under regulations of the AG, the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings, the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such

national security information as the Government may proffer in opposition to the alien's admission to the U.S. or to an application by the alien for discretionary relief.

7. Record. Section 240(b)(4)(C) provides that a complete record shall be kept of all testimony and evidence produced at the hearing.

8. Pleading by respondent. 8 C.F.R. § 1240.10(c) provides that the IJ shall require the respondent to plead to the NTA by stating whether he admits or denies the factual allegations and his removability under the charges contained in the NTA.

   a. If the respondent admits the factual allegations and his removability under the charges and the IJ is satisfied that no issue of law or fact remain, the IJ may determine that removability as charged has been established by the admissions of the respondent. 8 C.F.R. § 1240.10(c).

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

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

      (2) The Immigration and Naturalization Service met its burden of establishing a minor respondent's deportability for entry without inspection by clear, unequivocal, and convincing

evidence, where (1) a Record of Deportable Alien (Form I-213) was submitted, documenting the respondent's identity and alienage; (2) the respondent, who failed without good cause to appear at his deportation hearing, made no challenge to the admissibility of the Form I-213; and (3) there were no grounds for a finding that the admission of the Form I-213 would be fundamentally unfair. Matter of Ponce-Hernandez, 22 I&N Dec. 784 (BIA 1999).

9. Country of removal.

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

(1) In an unpublished decision, the BIA held that under Section 243(a) no alien shall be permitted to make more than one designation and, if an alien exercises that right at a hearing and designates a country, he is not later entitled, through a motion to reopen, to designate another country especially in the absence of evidence that the designated country refused to accept the respondent or failed to furnish timely notice of acceptance.

b. Arriving aliens.

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

(2) Section 241(b)(1)(B) of the Act provides that if the alien boarded the vessel or aircraft in a foreign territory contiguous to the U.S., an island adjacent to the U.S., or an island adjacent to a foreign territory contiguous to the U.S., and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(3) Section 241(b)(1)(C) of the Act provides that if the government of the country designated in sections 241(b)(1)(A)or (B) is unwilling to accept the alien into its territory, removal shall be to the following countries, as directed by the AG:

(a) The country of which the alien is a citizen, subject, or national;

(b) The country in which the alien was born;

(c) The country in which the alien has a residence;

(d) A country with a government that will accept the alien if removal to each country above is impracticable, inadvisable, or impossible.

c. All other aliens.

(1) Section 241(b)(2)(A) of the Act provides that an alien who has been ordered removed may designate one country to which he wants to be removed and the AG shall remove the alien to the country designated.

(2) 8 C.F.R. § 1240.10(f) provides that the IJ shall notify the alien that if he is finally ordered removed, the country of removal will in the first instance be directed pursuant to Section 241(b) to the country designated by the alien, unless Section 241(b)(2)(C) applies, and shall afford him the opportunity then and there to make such designation.

(3) Section 241(b)(2)(B) of the Act provides that an alien may designate a foreign territory contiguous to the U.S., an adjacent island, or an island adjacent to a foreign territory contiguous to the U.S. only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(4) Section 241(b)(2)(E) permits the AG to remove an alien to any of the following countries:

(a) The country from which the alien was admitted to the United States;

(b) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States;

(c) A country in which the alien resided before the alien entered the country from which the alien entered the United States;

(d) The country in which the alien was born;

(e) The country that had sovereignty over the alien's birthplace when the alien was born;

(f) The country in which the alien's birthplace is located when the alien is ordered removed;

(g) If impracticable, inadvisable or impossible to remove the alien to these countries, another country whose government will accept the alien into that country.

(h) Note: The Supreme Court has held that Section 241(b)(2)(E) permits an alien to be removed to a country without advance consent of that country's government, except as provided in Section 241(b)(2)(E)(vii). Jama v. INS, 543 U.S. 335 (2005).

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

(1) Saint Pierre

(2) Miquelon

(3) Cuba

(4) the Dominican Republic

(5) Haiti

(6) Bermuda

(7) the Bahamas

(8) Barbados

(9) Jamaica

(10) the Windward & Leeward Islands

(11) Trinidad

(12) Martinique

(13) other British, French, & Netherlands territory in or bordering on the Caribbean Sea.

10. Decision. Section 240(c)(1)(A) provides that at the conclusion of the proceeding the IJ shall decide whether an alien is removable from the U.S. The IJ's determination shall be based only on the evidence produced at the hearing. Section 240(c)(1)(B) provides that if a medical officer or civil surgeon or board of medical officers has certified under Section 232(b) that an alien has a disease, illness, or addiction which would make the alien inadmissible under Section 212(a)(1), the IJ's decision shall be based solely upon such certification.

a. A summary decision pursuant to 8 C.F.R. § 1240.12(b) may properly be issued by an Immigration Judge in removal proceedings in lieu of an oral or written decision only when the respondent has expressly admitted to both the factual allegations and the charges of removability; and, either the respondent's ineligibility for any form of relief is clearly established on the pleadings; or, after appropriate advisement of and opportunity to apply for any form of relief for which it appears from the pleadings that he or she may be eligible, the respondent chooses not to apply for relief or applies only for, and is granted, the relief of voluntary departure. Matter of A-P-, 22 I&N Dec. 468 (BIA 1999).

b. A remand of the record for issuance of a full and separate decision apprising the parties of the legal basis of the Immigration Judge's decision is not required under Matter of A-P-, 22 I&N Dec. 468 (BIA 1999), where the respondent had notice of the factual and legal basis of the decision and had an adequate opportunity to contest them on appeal, the uncontested facts established at the hearing are dispositive of the issues raised on appeal, and the

hearing was fundamentally fair. Matter of Rodriguez-Carillo, 22 I&N Dec. 1031 (BIA 1999).

c. Section 240(c)(4) provides that if the IJ decides that the alien is removable and orders the alien to be removed, the IJ shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

d. The Board has held that, if an IJ includes an attachment to a decision, "particular care must be taken to insure that a complete record is preserved." In particular, (1) the attachment should include the respondent's name and A-number, and the decision date; (2) the attachment should be appended to the written memorandum summarizing the oral decision (which should reflect that there is an attachment); (3) the IJ should state on the record at the time of the oral decision that he or she will append an attachment to the decision; (4) a copy of the attachment should be provided to the parties; and (5) the parties should be given the opportunity to make any objections to the use of an attachment. Finally, the Board noted that "it is the [IJ's] responsibility to insure that the decision in the record is complete." Matter of Kelly, 24 I&N Dec. 446 (BIA 2008).

E. Failure to appear - in absentia hearings.

1. INTRODUCTION - The Due Process Clause protects aliens in removal proceedings and includes the right to a full and fair hearing. Notice of proceedings is an important component of any legal process. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. Matter of M-D-, 23 I&N Dec. 540 (BIA 2002) (quoting Landon v. Plasencia, 459 U.S. 21 (1982)).

a. Personal service clearly is adequate notice. Matter of M-D-, 23 I&N Dec. 540 (BIA 2002).

2. HISTORY LESSON - Prior to 1992, the Act provided only that "the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the

proceedings will be held." Former INA § 242(b)(1).

a. The Act was amended in 1990 by adding Section 242B, governing deportation proceedings. Effective as to any Order to Show Cause served after June 13, 1992, Section 242B stated that with regard to both an Order to Show Cause and a notice of the time and place of proceedings, "written notice shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any)." Therefore, at that time, certified mail was made the required method of notification if personal service was not practicable (and it remains so for deportation proceedings). See 8 C.F.R. 1003.13.

b. The BIA determined that under former Section 242B(a)(1) of the Act (effective on June 13, 1992), if personal service is not practicable, an OSC must be served by certified mail and the certified mail receipt must be signed by the respondent or a responsible person at the respondent's address. Matter of Grijalva, 21 I&N Dec. 27 (BIA 1995) (citing Matter of Huete, 20 I&N Dec. 250 (BIA 1991), for a similar requirement prior to the enactment of Section 242B(a)(1)). With regard to the notice of hearing under Section 242B(a)(2), Matter of Grijalva found no requirement that the certified mail return receipt be signed, so long as there was proof of attempted delivery. It also established a presumption that the Postal Service has, in fact, attempted to deliver certified mail, even in cases where the item is returned unclaimed. Thus, in deportation proceedings under Section 242B, attempted delivery by certified mail is sufficient to meet the notice requirements of the Act. Id. Furthermore, the presumption of effective service can only be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service if the respondent presents substantial and probative evidence demonstrating that there was improper delivery. Id.

3. PRESENT LAW - The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) changed the procedures with regard to notification of proceedings. In removal proceedings, the statute now provides that "written notice . . . shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)." Section 239(c) of the Act provides that service by mail under this Section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with Section 239(a)(1)(F) of the Act. No particular method of mailing is specified. Although the Act no longer requires that notice be

sent by certified mail, service by certified mail is not expressly disapproved. The applicable regulations at 8 C.F.R. 1003.13 state, in part: "*Service* means physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record."

a. Under Section 240(b)(5)(A) of the Act and 8 C.F.R. § 1003.26(c), an IJ is required to order an alien removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the alien is removable and that written notice of the time and place of proceedings and of the consequences of failure to appear were provided to the alien or to counsel of record. Written notice is considered sufficient if it was provided at the most recent address given by the alien.

b. In Perez v. Mukasey, 516 F.3d 770 (9th Cir. 2008), the Ninth Circuit held that an alien "who arrives late for his immigration hearing, but while the IJ is still in the courtroom, has not failed to appear for that hearing." The petitioner, who had been ordered removed in absentia, was scheduled for a 9:00 hearing but arrived at 11:00, at which time the IJ was "still on the bench."

c. In Matter of Munoz-Santos, 20 I&N Dec. 205 (BIA 1990), the BIA found that notice of the hearing was properly served by regular mail where the regulation did not require any particular form of service and notice was sent to the last known address provided by the unrepresented respondent. On the other hand, in Matter of Peugnet, 20 I&N Dec. 233 (BIA 1991), the Board held that a deportation hearing could not proceed in absentia where the Order to Show Cause was sent to the alien's address by regular mail, but the alien failed to appear for the hearing or to acknowledge that she received the OSC, which was not re-served by personal service, as required by 8 C.F.R. § 242.1(c) (1990). NOTE: The regulations no longer require personal service if the alien is served by regular mail and fails to appear.

(1) That decision also adopted, for purposes of deportation proceedings, a definition of personal service that was applicable to proceedings before Service officers under 8 C.F.R.103.5a(a)(2)(iv) (1990), which included certified

mail as a form of personal service. The Board stated that it has not adopted this definition for purposes of removal proceedings.

d. In removal proceedings, the Board held that an in absentia order may only be entered where the alien has received, or can be charged with receiving, a Notice to Appear informing him or her of the consequences of failing to provide a current address under Section 239(a)(1)(F) of the Act. Matter of G-Y-R-, 23 I&N Dec. 181 (BIA 2001). In that case the issue turned on whether the NTA, which was sent to the respondent by certified mail and returned unclaimed, constituted constructive notice where the address was obtained from an asylum application that was several years old. The Board concluded that it was improper to rely on an old address obtained in another proceeding, and that it was inappropriate to enter an in absentia order of removal where the record reflected that the alien did not receive, or could not be charged with receiving, the NTA.

e. In Matter of M-D-, 23 I&N Dec. 540 (BIA 2002), the BIA distinguished Matter of G-Y-R- as follows: "Unlike the present case, Matter of G-Y-R- involved a situation where there was a dispute over whether the notice had been mailed to the correct address. Matter of G-Y-R-, however, is instructive for making the point that the alien need not personally receive, read, and understand the NTA for the notice requirements to be satisfied. As we noted in Matter of G-Y-R-, 'An alien can, in certain circumstances, be properly charged with receiving notice, even though he or she did not personally see the mailed document. If, for example, the Notice to Appear reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper notice will have been effected.' The case before us is similar to Matter of G-Y-R- in that the respondent was served by certified mail at an address obtained from an asylum application. Importantly, however, there is no dispute here regarding the correct address. The respondent had provided the address only a few weeks before the hearing, and he admits that he was living at that address when the Notice to Appear was mailed. Unlike our decision in Matter of G-Y-R-, the issue in the present case is whether the respondent can be charged with receiving the Notice to Appear.

f. The statute only generally provides for the use of "service by

mail." Although the BIA interpreted the statute to allow service by regular mail, it did not read the regulation at 8 C.F.R. § 3.13 (now 8 C.F.R. § 1003.13) as conferring on an alien a right to require the use of regular mail instead of certified mail. The regulation provides for the use of regular mail as a convenience to the Service, not as a mandate to use regular mail instead of certified mail. The Service and the Immigration Courts routinely use certified mail instead of regular mail in many instances, although the degree of the use of certified mail varies from region to region. The BIA declined to hold that the use of certified mail in such instances is not allowed by the language of 8 C.F.R. § 3.13 (now 8 C.F.R. § 1003.13) when the Act does not specify one form of mailing over another. Matter of M-D-, 23 I&N Dec. 540 (BIA 2002).

g. As a general matter, the law recognizes a presumption that "[a] letter properly addressed, stamped and mailed is presumed to have been duly delivered to the addressee." Federal Deposit Ins. Corp. v. Schaffer, 731 F.2d 1134, 1137 n.6 (4th Cir. 1984) (quoting C. McCormick, McCormick's Handbook of the Law of Evidence § 343 (1972)). Moreover, the presumption is especially strong when the delivery is by certified mail, and clear and convincing evidence is required to overcome the presumption. Id. at 1137 n.6. Certified mail has always carried inherent reliability, and its use by other Federal Government agencies has been upheld. E.g., Patmon and Young Professional Corp. v. Commissioner, 55 F.3d 216 (6th Cir. 1995); Eschweiler v. United States, 946 F.2d 45 (7th Cir. 1991). Proof that the notice was sent by certified mail creates a rebuttable presumption of adequate notice, which an alien may overcome through evidence that the Post Office had not attempted delivery or had conducted delivery improperly. Fuentes-Argueta v. INS, 101 F.3d 867 (2d Cir. 1996); Arrieta v. INS, 117 F.3d 429, 431 (9th Cir. 1997) (holding that certified mail is sufficient even if no one signs for it.) It is not reasonable to allow the respondent to defeat service by neglecting or refusing to collect his mail. However, the Second, Third, Eighth, and Ninth Circuits have held that where a respondent actually initiates a proceeding to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing, a sworn affidavit from the respondent that neither she nor a responsible party residing at her address received the notice should ordinarily be sufficient to rebut the presumption of delivery and entitle the respondent to an evidentiary hearing to consider the veracity of her allegations. Lopes v. Mukasey, 517 F.3d 156 (2d Cir. 2008); Santana Gonzalez v. Att'y Gen., 506 F.3d 274 (3d Cir.

2007); Ghounem v. Ashcroft, 378 F.3d 740 (8th Cir. 2004); Salta v. INS, 314 F.3d 1076 (9th Cir. 2002). The Ninth Circuit went further in Sembiring v. Gonzales, 499 F.3d 981 (9th Cir. 2007), holding that "a sworn affidavit was not required to establish that [the petitioner] did not receive notice," given that "[t]he test for whether an alien has produced sufficient evidence to overcome the presumption of effective service by regular mail is practical and commonsensical rather than rigidly formulaic."

h. In Matter of M-R-A-, 24 I&N Dec. 665 (BIA 2008), the Board held that when an NTA or hearing notice is properly addressed and sent by regular mail according to normal office procedures, there is a presumption of delivery, but it is weaker than the presumption that applies to documents sent by certified mail. The Board stated that when an IJ adjudicates a motion to reopen to rescind an in absentia order of removal based on a claim that a notice sent by regular mail to the most recent address provided was not received, all relevant evidence submitted to overcome the weaker presumption of delivery must be considered. In the case at issue, the Board held that the respondent overcame the presumption of delivery of a hearing notice that was sent by regular mail where he submitted affidavits indicating that he did not receive the notice, had previously filed an asylum application and appeared for his first removal hearing, and exercised due diligence in promptly obtaining counsel and requesting reopening of the proceedings.

i. In Matter of C-R-C-, 24 I&N Dec. 677 (BIA 2008), the Board elaborated on the standard it announced in Matter of M-R-A-. In Matter of C-R-C-, the Board remanded from the denial of the respondent's motion to reopen to rescind an in absentia order in a case where the respondent failed to appear at an Immigration Court hearing after a Notice to Appear was sent by regular mail. In ruling that the respondent overcame the lower presumption of delivery of Matter of M-R-A-, the Board cited the following facts as relevant: (1) "the respondent submitted an affidavit alleging that he did not receive the Notice to Appear;" (2) the respondent had affirmatively applied for asylum with DHS, "thereby initiating a proceeding to obtain a benefit, which would give him an incentive to appear;" (3) the respondent had "complied with his Fingerprint Notification;" and (4) "the respondent immediately sought assistance from his current counsel after receiving the Immigration Judge's in absentia order of removal, and he promptly filed a motion to reopen."

4. Section 240(b)(5)(A) provides that any alien who, after written notice required under Section 239(a)(1) or (2) has been provided to the alien or alien's counsel of record, does not attend a proceeding under Section 240, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable. The written notice by the AG shall be considered sufficient if provided at the most recent address provided under Section 239(a)(1)(F). Section 240(b)(5)(B) provides that no written notice shall be required under Section 240(b)(5)(A) if the alien has failed to provide the address required under Section 239(a)(1)(F).

   a. When an alien fails to appear at removal proceedings for which notice of the hearing was served by mail, an in absentia order may only be entered where the alien has received, or can be charged with receiving, a Notice to Appear informing the alien of the statutory address obligations associated with removal proceedings and of the consequences of failing to provide a current address, pursuant to Section 239(a)(1)(F) of the Act. Matter of G-Y-R-, 23 I&N Dec. 181 (BIA 2001). Entry of an in absentia order of removal is inappropriate where the record reflects that the alien did not receive, or could not be charged with receiving, the Notice to Appear that was served by certified mail at an address obtained from documents filed with the Service several years earlier. Id.

   b. A minor respondent, who could not be expected to attend immigration proceedings on her own, was properly notified of her hearing, through proper mailing of a Notice to Appear (Form I-862) to the last address provided by her parent, with whom she was residing. Matter of Gomez-Gomez, 23 I&N Dec. 522 (BIA 2002). Although the headnote states that the NTA was served by mail, the decision indicates it was personally served and the notice of the hearing was served by mail. The BIA also stated, "we believe it is implicit in the statute and regulations dealing with notice that an adult relative who receives notice on behalf of a minor alien bears the responsibility to assure that the minor appears for the hearing, as required."

5. Recission of a removal order rendered in absentia.

   a. An in absentia order of removal may be rescinded only at any time upon a showing of lack of notice or that the alien was in Federal or State custody. A motion to reopen and rescind an in absentia order may be filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of

exceptional circumstances. INA § 240(b)(5)(C)(i). See discussion of motions to reopen, infra.

6. Aliens in contiguous territory. Section 240(b)(5)(E) provide that the notice and in absentia provisions of Section 240 shall apply to all aliens placed in proceedings under Section 240, including any alien who remains in a contiguous foreign territory pursuant to Section 235(b)(2)(C). This provision appears to change the conclusion reached in Matter of Sanchez, 21 I&N Dec. 444 (BIA 1996).

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

F. Stipulated removal. The AG shall provide by regulation for the entry by an IJ of an order of removal stipulated to by the alien (or the alien's representative) and the service; Section 240(d). A stipulated order shall constitute a conclusive determination of the alien's removability from the U.S. Id.

G. Methods of removal not involving an IJ.

1. Expedited removal of aliens convicted of aggravated felonies. Section 238(b) of the Act provides for the removal of aliens who are not LPRs and who have been convicted of aggravated felonies.

a. The procedure for such removal is set forth in 8 C.F.R. § 1238.1.

2. Expedited removal of other aliens. 8 C.F.R. 1235.3(b)(1) provides that the expedited removal procedure shall apply to the following classes of aliens:

a. Arriving aliens inadmissible under Section 212(a)(6)(C) and Section 212(a)(7) except for citizens of Cuba arriving at a U.S. port-of-entry by aircraft.

b. Subject to designation by the Commissioner, aliens arriving, attempting to enter, or who have entered the U.S. without being admitted or paroled by an immigration officer who have not established to the satisfaction of the immigration officer that they

have been physically present in the U.S. for 2 years immediately prior to the determination of inadmissibility.

(1) On November 13, 2002, the Commissioner designated all aliens who arrive in the U.S. on or after November 13, 2002 by sea who are not admitted or paroled and who have not been physically present in the U.S. for 2 years immediately prior to the determination of inadmissibility by an immigration officer. The Commissioner's designation does not apply to aliens who arrive at U.S. ports-of-entry, alien crewmen or stowaways, and Cuban citizens or nationals who arrive by sea.

3. Reinstatement of removal orders against aliens illegally reentering. Section 241(a)(5) of the Act provides that if the AG finds that an alien has reentered the U.S. illegally after having been removed or having departed voluntarily under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible for and may not apply for any relief under the Act, and the alien shall be removed under the prior order at any time after reentry.

a. The procedure for reinstatement of removal orders and the exception for withholding of removal are discussed in 8 C.F.R. § 1241.8.

b. IJs and the BIA lack jurisdiction to review a decision of the Service to reinstate a prior order of removal pursuant to Section 241(a)(5) of the Act. Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998).

c. The Supreme Court held that Section 241(a)(5) of the Act applies to aliens who reentered the United States before the effective date of IIRIRA and does not retroactively affect any right of, or impose any burden, on such aliens. Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

d. An IJ has no authority to reinstate a prior order of deportation or removal pursuant to Section 241(a)(5), and an alien subject to reinstatement of an order under Section 241(a)(5) has no right to a hearing before an IJ. Matter of W-C-B-, 24 I&N Dec. 118 (BIA 2007). The IJ may properly terminate proceedings as improvidently begun where the respondent is subject to reinstatement of a prior order. Id.

4. Judicial removal. Section 238(d)(1) of the Act provides that a U.S. District Judge shall have jurisdiction to enter a judicial order of removal at the time of sentencing an alien who is deportable, if such an order has been requested by the U.S. Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.

   a. The procedure for judicial removal is set forth in Section 238(d)(2) of the Act.

## VII. Relief from Removal

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

1. In no case shall an IJ grant an application for immigration relief that is subject to the conduct of identity, law enforcement, or security investigations or examinations until the Department of Homeland Security has reported to the IJ that the appropriate investigations or examinations have been completed and are current and the Department has reported any relevant information from the investigations or examinations to the IJ. 8 C.F.R. § 1003.47(g).

2. Covered forms of relief:

   a. Asylum under Section 208 of the Act;

   b. Adjustment of status to that of a lawful permanent resident under Section 209 or 245 of the Act, or any other provision of law;

   c. Waiver of inadmissibility or deportability under Section 209(c), 212, or 237 of the Act, or any other provision of law;

   d. Permanent resident status on a conditional basis or removal of the conditional bases of permanent resident status under Sections 216 or 216A of the Act, or any other provision of law;

   e. Cancellation of removal or suspension of deportation under Section 240A or former Section 244 of the Act, or any other provision of law;

   f. Relief from removal under former Section 212(c) of the Act;

   g. Withholding of removal under Section 241(b)(3) of the Act or under the United Nations Convention Against Torture;

h. Registry under Section 249 of the Act;

i. Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act, or cancellation of removal in light of Section 240A(e) of the Act.

3. Voluntary Departure is not subject to the background investigations and security checks requirement. However, the Department of Homeland Security may seek a continuance in order to complete pending investigations and the IJ may grant additional time in the exercise of discretion.

B. Voluntary departure - Section 240B.

1. Introduction. Voluntary departure is a relief from removal which may be granted by both the INS and by IJs. If granted, voluntary departure allows the respondent to depart the U.S. at his own expense and, if he departs within the time allowed, he is not considered to have been removed. An alien departing voluntarily may travel to any country of his choice. It is not necessary that he go to the country designated for removal.

2. Supreme Court decision. In Dada v. Mukasey, 128 S. Ct. 2307 (2008), the Supreme Court ruled that, when an alien is granted voluntary departure and then seeks to file a motion to reopen, "the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen." Here, two days before his voluntary departure period expired, the petitioner filed a motion to reopen (along with a motion to withdraw his request for voluntary departure), with the intention of applying for adjustment of status. The Board denied the motion to reopen, on the grounds that the petitioner had overstayed his voluntary departure period and thus was statutorily barred from adjustment of status. The Court rejected the government's argument that, in the Court's words, "by requesting and obtaining permission to voluntarily depart, the alien knowingly surrenders the opportunity to seek reopening." The Court also rejected the petitioner's argument that the voluntary departure period should be tolled while the motion to reopen is pending.

3. Motion to reopen or reconsider. Effective January 20, 2009, a grant of voluntary departure is automatically terminated upon the filing of a post-decision motion to reopen or reconsider with the Immigration Court or the Board within the voluntary departure period, or upon the filing of a petition for review in a federal court of appeals. 8 C.F.R. § 1240.26(b)(3)(iii), (c)(3)(iii), (e)(1), and (i). Although the alien no

longer has the benefit of voluntary departure with the filing of a post-decision motion to reopen or reconsider or a petition for review, the alien is also not subject to the penalties for failure to depart voluntarily under INA §240B(d). 8 C.F.R. §§ 1240.26(b)(3)(iii), (e)(1), and (i).

4. Pre-Conclusion Voluntary Departure - Section 240B(a).

a. In general. The AG may permit an alien voluntarily to depart the U.S. at the alien's own expense in lieu of being subject to proceedings under Section 240 or prior to the completion of such proceedings, if the alien is not deportable under Section 237(a)(2)(A)(iii) [convicted of an aggravated felony] or Section 237(a)(4)(B) [engaged in terrorist activities]. Section 240B(a)(1).

b. When to apply. 8 C.F.R. § 1240.26(b)(1)(i)(A) states that the request for voluntary departure must be made prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing.

(1) In Matter of Ocampo, 22 I&N Dec. 1301 (BIA 2000), the BIA stated in footnote 2: "We are cognizant that, although the respondent clearly indicated his interest in voluntary departure at his first appearance before the Immigration Judge, he did not actually request that relief until his hearing reconvened at a later date. We do not find this circumstance problematic, however, because the rescheduling was treated by the parties and the Immigration Judge as a continuation of the master calendar hearing."

c. Voluntary Departure Period. Permission to depart voluntarily under Section 240B(a)(1) shall not be valid for a period exceeding 120 days. INA § 240B(a)(2).

d. Bond. The AG may require an alien permitted to depart voluntarily under Section 240B(a)(1) to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the U.S. within the time specified. Section 240B(a)(3). However, a bond is not required. Matter of Ocampo, 22 I&N Dec. 1301 (BIA 2000).

e. Applicability to aliens arriving in the U.S. In the case of an alien who is arriving in the U.S. and with respect to whom proceedings under Section 240 are (or would otherwise be) initiated at the time of such alien's arrival, Section 240B(a)(1) regarding voluntary departure shall not apply; Section 240B(a)(4). However, this shall

not be construed as preventing such an alien from withdrawing the application for admission in accordance with Section 235(a)(4). Id.

f. Effective April 1, 1997, an alien may apply for voluntary departure either in lieu of being subject to removal proceedings or before the conclusion of the proceedings under Section 240B(a) of the Act, or at the conclusion of the proceedings under Section 240B(b) of the Act. An alien who applies for voluntary departure at the conclusion of removal proceedings pursuant to Section 240B(b) of the Act must demonstrate, inter alia, both good moral character for a period of 5 years preceding the application for relief and the financial means to depart the United States, but an alien who applies before the conclusion of the proceedings pursuant to Section 240B(a) is not subject to those requirements. Matter of Arguelles, 22 I&N Dec. 811 (BIA 1999).

g. Although an alien who applies for voluntary departure under either Section 240B(a) or 240B(b) of the Act must establish that a favorable exercise of discretion is warranted upon consideration of the factors set forth in Matter of Gamboa, 14 I&N Dec. 244 (BIA 1972), which governed applications for voluntary departure under the former Section 244(e) of the Act, the IJ has broader authority to grant voluntary departure in discretion before the conclusion of removal proceedings under Section 240B(a) than under Section 240B(b) or the former Section 244(e). Matter of Arguelles, 22 I&N Dec. 811 (BIA 1999). An alien who had been granted voluntary departure five times pursuant to former Section 244(e) of the Act and had returned each time without inspection was eligible to apply for voluntary departure in removal proceedings under Section 240B, because the restrictions on eligibility of Section 240B(c), relating to aliens who return after having previously been granted voluntary departure, only apply if relief was granted under Section 240B. Matter of Arguelles, 22 I&N Dec. 811 (BIA 1999).

h. Appeal. In order to qualify for voluntary departure under Section 240B(a), an alien must waive appeal of all issues. 8 C.F.R. § 1240.26(b)(1)(i)(D); see also Matter of Ocampo, 22 I&N Dec. 1301 (BIA 2000).

(1) It is necessary for IJs to advise respondents, on the record, that the right to appeal must be waived as a precondition to receiving voluntary departure under Section 240(B)(a). The only instance in which an IJ might safely forego such an

oral notification is when the record contains a written stipulation or comparable documentary evidence wherein the respondent, or the respondent's counsel, expressly waives appeal as part of establishing that all the regulatory requirements for this form of voluntary departure have been satisfied. Accordingly, the BIA holds that, without an oral notice regarding the waiver of the right to appeal or a written attestation reflecting the respondent's awareness of this requirement, an IJ lacks the authority to grant voluntary departure prior to the completion of proceedings under Section 240B(a) of the Act. Matter of Ocampo, 22 I&N Dec. 1301 (BIA 2000).

i. Additional advisals. Effective January 20, 2009, the Immigration Judge must advise the respondent that if he or she files a post-decision motion to reopen or reconsider during the voluntary departure period: (1) the grant of voluntary departure is terminated automatically; (2) the alternate order of removal takes effect immediately; and (3) the penalties for failure to depart voluntarily under INA § 240B(d) shall not apply. 8 C.F.R. § 1240.26(b)(3)(iii).

5. Voluntary Departure at the conclusion of proceedings - Section 240B(b).

a. Under Section 240B(b)(1), the AG may permit an alien voluntarily to depart the U.S. at the alien's own expense if, at the conclusion of a proceeding under Section 240, the IJ enters an order granting voluntary departure in lieu of removal and finds that:

(1) the alien has been physically present in the U.S. for a period of at least one year immediately preceding the date the notice to appear was served under Section 239(a) [INA § 240B(b)(1)(A)];

(2) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure [INA § 240B(b)(1)(B)];

(3) the alien is not deportable under Section 237(a)(2)(A)(iii) [convicted of an aggravated felony] or Section 237(a)(4) [security violations, terrorist activities, etc.] [INA § 240B(b)(1)(C)]; and

(4) the alien has established by clear and convincing evidence

that the alien has the means to depart the U.S. and intends to do so [INA § 240(b)(1)(D)].

b. Voluntary Departure Period. Permission to depart voluntarily under Section 240B(b) shall not be valid for a period exceeding 60 days. INA § 240B(b)(2).

c. Bond. An alien permitted to deport voluntarily under Section 240B(b)(1) shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, but in no case less than $500, to be surrendered upon proof that the alien has departed the U.S. within the time specified. INA § 240B(b)(3); 8 C.F.R. § 1240.26(c)(3). Effective January 20, 2009, if an alien does not post the bond within the time required, the alien is still obligated to depart within the period allowed and is not exempted from the consequences for failure to depart. 8 C.F.R. § 1240.26(c)(4). This overrules Matter of Diaz-Ruacho, 24 I&N Dec. 47 (BIA 2006). In addition, the failure to post bond may be considered as a negative discretionary factor with respect to any discretionary form of relief. If the alien waived appeal of the Immigration Judge's decision, the failure to timely post the voluntary departure bond means that the alternative order of removal takes effect immediately, except that an alien granted post-conclusion voluntary departure will not be deemed to have departed under an order of removal if the alien: (1) departs the U.S. no more than 25 days after the failure to post bond; (2) provides to DHS such evidence of departure as the ICE Field Office Director may require; and (3) provides evidence DHS deems sufficient that the alien remains outside the U.S. 8 C.F.R. § 1240.26(c)(4).

d. Opportunity to decline. Effective January 20, 2009, upon setting the bond and conditions of voluntary departure, the Immigration Judge must provide the alien the opportunity to accept the grant of voluntary departure or to decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. 8 C.F.R. § 1240.26(c)(3).

e. Aliens not eligible. The AG shall not permit an alien to depart voluntarily under Section 240B(b)(1) if the alien was previously permitted to so depart after having been found inadmissible under Section 212(a)(6)(A) [present in the U.S. without being admitted or paroled, or who arrived in the U.S. at any time or place other than as designated by the AG]. INA § 240B(c).

f. Advisals. Effective January 20, 2009, before granting post-conclusion voluntary departure, the Immigration Judge must advise the alien: (1) of any conditions the Immigration Judge set beyond those specifically enumerated by regulation; and (2) of the bond amount that will be set and the duty to post bond with the ICE Field Office Director within 5 business days of the order granting voluntary departure. Upon granting post-conclusion voluntary departure, the Immigration Judge must advise the alien: (1) of the requirement to provide to the Board, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond; (2) that the Board will not reinstate the voluntary departure period in its final order if the alien does not submit timely proof to the Board that the voluntary departure bond has been posted; and (3) that if the alien files a post-decision motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure is terminated automatically and the alternate order of removal takes effect immediately. 8 C.F.R. § 1240.26(c)(3)

6. Additional conditions. The AG may by regulation limit eligibility for voluntary departure under Section 240B for any class or classes of aliens and no court may review any such regulation. INA § 240B(e).

7. Civil penalty for failure to depart. If an alien is permitted to depart voluntarily under Section 240B and fails to depart the U.S. within the time specified, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and be ineligible for a period of 10 years for any further relief under sections 240B (voluntary departure), 240A (cancellation of removal), 245 (adjustment of status), 248 (change of nonimmigrant classification), and 249 (registry). The order permitting the alien to depart voluntarily shall inform the alien of these penalties. INA § 240B(d). Effective January 20, 2009, there is a rebuttable presumption of a civil penalty of $3,000 if the alien fails to depart within the voluntary departure period, but the Immigration Judge may set a higher or lower amount as permitted by INA § 240B(d)(A)(A). At the time of granting voluntary departure, the Immigration Judge shall advise the alien of the amount of the civil penalty. 8 C.F.R. § 1240.26(j).

a. The Board of Immigration Appeals lacks authority to apply an "exceptional circumstances" or other general equitable exception to the penalty provisions for failure to depart within the time period afforded for voluntary departure INA § 240B(d)(1). Matter of Zmijewska, 24 I&N Dec. 87 (BIA 2007). An alien has not voluntarily failed to depart the United States under section

240B(d)(1) of the Act when the alien, through no fault of his or her own, was unaware of the voluntary departure order or was physically unable to depart within the time granted. Id.

8. Extension of time to depart. Authority to extend the time within which to depart specified initially by an IJ or the BIA is within the sole jurisdiction of the DD. 8 C.F.R. § 1240.26(f).

9. Reinstatement of Voluntary Departure. An IJ or the BIA may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure if reopening was granted prior to the expiration of the original period of voluntary departure. 8 C.F.R. § 1240.26(h).

   a. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in Section 240B of the Act; 8 C.F.R. § 1240.26(h).

C. Withdrawal of application for admission.

1. HISTORY LESSON. - Until the passage of the IIRIRA, neither the statute nor the regulations directly provided for the withdrawal of an application for admission. The BIA held that an IJ, in his discretion, may permit an alien in exclusion proceedings to withdraw his application for admission. An alien could not withdraw his application as a matter of right. He had to satisfy the IJ that "justice would best be served" by permitting the withdrawal. Matter of Vargas-Molina, 13 I&N Dec. 651 (BIA 1971). In order to withdraw an application for admission, the alien had to demonstrate that he had the intent to depart the U.S., he had the means to depart immediately, and that justice would be ill served if an order of exclusion was entered. Matter of Gutierrez, 19 I&N Dec. 562 (BIA 1988). The BIA held that it was never contemplated that withdrawal of an application for admission would become a nonstatutory form of "relief" for which an applicant could apply after excludability was determined. Therefore, the BIA held that once an exclusion hearing has been conducted and the issue of excludability has been resolved, the applicant should only be allowed to withdraw his application for admission with the concurrence of the INS. Matter of Gutierrez, supra. By directing an applicant for admission to return to Mexico after being served with a form I-122, INS in effect consented to the alien's withdrawal of that application when the alien elected not to appear before an IJ to pursue his application for

admission; Matter of Sanchez, 21 I&N Dec. 444 (BIA 1996). If an IJ allowed an alien to withdraw his application for admission, the IJ could not set the time limit within which the alien was allowed to depart. To do so would infringe on the DD's parole power. The time and conditions of departure were up to the DD. Matter of Lepofsky, 14 I&N Dec. 718 (BIA 1974).

2. Withdrawal of application for admission under IIRIRA.

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

b. 8 C.F.R. § 1235.4 provides that the AG may, in the exercise of discretion, permit any alien applicant for admission to withdraw his application for admission in lieu of removal proceedings under Section 240 or expedited removal under Section 235(b)(1).

c. 8 C.F.R. § 1235.4 also provides that the alien's decision to withdraw the application for admission must be made voluntarily, but that shall not be construed to give an alien the right to withdraw the application for admission.

d. 8 C.F.R. § 1235.4 also provides that an alien permitted to withdraw an application for admission should normally remain in carrier or Service custody pending departure, unless the DD determines that parole of the alien is warranted.

e. 8 C.F.R. § 1235.4(b) also provides that permission to withdraw an application for admission should not normally be granted unless the alien intends and is able to depart the United States immediately.

D. Citizenship

1. Derivative Citizenship. The Board ruled that, to obtain derivative citizenship under former INA § 321(a), an alien must acquire LPR status "while he or she is under 18 years of age." Matter of Nwozuzu, 24 I&N Dec. 609 (BIA 2008).

a. A child who has satisfied the statutory conditions of former INA § 321(a), before the age of 18 years has acquired U.S. citizenship, regardless of whether the naturalized parent acquired legal custody of the child before or after the naturalization. Matter of Baires, 24 I&N Dec. 467 (BIA 2008).

2. Legitimation. Under Jamaican law, the sole means of legitimation of a child born out of wedlock is the marriage of the child's natural parents. If an individual's parents never marry, paternity is not established "by legitimation" pursuant to former INA § 321(a)(3). Matter of Hines, 24 I&N Dec. 544 (BIA 2008).

E. Cancellation of removal for certain permanent residents under Section 240A(a) and for certain nonpermanent residents under Section 240A(b).

1. Aliens ineligible for relief. Section 240A(c) provides that the provisions of sections 240A(a) and 240A(b)(1) shall not apply to any of the following aliens:

a. an alien who entered the U.S. as a crewman subsequent to June 30, 1964 [INA § 240A(c)(1)];

b. An alien who was admitted to the U.S. as a nonimmigrant exchange alien as defined in Section 101(a)(15)(J), or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of Section 212(e) [INA § 240A(c)(2)];

c. an alien who was admitted to the U.S. as a nonimmigrant exchange alien as defined in Section 101(a)(15)(J) or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training, is subject to the two-year foreign residence requirement of Section 212(e), and has not fulfilled that requirement or received a waiver thereof [INA § 240A(c)(3)];

d. An alien who is inadmissible under Section 212(a)(3) [espionage,

sabotage, etc., terrorist activities, adverse foreign policy consequences, immigrant membership in totalitarian party, participants in Nazi persecutions or genocide], or deportable under Section 237(a)(4) [national security violations, terrorist activities, adverse foreign policy consequences, assisted in Nazi persecution or engaged in genocide] [INA § 240A(c)(4)];

e. An alien who is described in Section 241(b)(3)(B)(i) [participated in the persecution of others] [INA § 240A(c)(5)];

f. An alien whose removal has previously been cancelled under Section 240A, whose deportation was suspended under (former) Section 244(a), or who has been granted relief under (former) Section 212(c) as such sections were in effect before the date of enactment of IIRIRA [INA § 240A(c)(6)].

2. Cancellation of Removal for Certain Permanent Residents, Section 240A(a). The AG may cancel removal in the case of an alien who is inadmissible or deportable from the U.S. if the alien: (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the U.S. continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.

a. The period of an alien's residence in the U.S. after admission as a nonimmigrant may be considered in calculating the 7 years of continuous residence required to establish eligibility for cancellation of removal. Matter of Blancas, 23 I&N Dec. 458 (BIA 2002).

b. An alien who acquired permanent resident status through fraud or misrepresentation has never been "lawfully admitted for permanent residence" and is therefore ineligible for cancellation of removal under Section 240A(a) of the Act. Matter of Koloamatangi, 23 I&N Dec. 548 (BIA 2003).

c. A parent's lawful permanent resident status cannot be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required for cancellation of removal. Matter of Escobar, 24 I&N Dec. 231 (BIA 2007).

d. A parent's period of residence in the United States cannot be imputed to a child for purposes of calculating the 7 years of continuous residence required to establish eligibility for cancellation of removal under INA § 240A(a)(2). Matter of Ramirez-Vargas, 24 I&N Dec. 599 (BIA 2008).

3. Cancellation of removal and adjustment of status for certain nonpermanent residents under Section 240A(b).

a. HISTORY LESSON - Prior to the IIRIRA, a comparable relief from deportation existed in the form of suspension of deportation. In order to qualify for this relief, an alien had to establish physical presence in the U.S. for 7 years (3 years if a battered spouse or child and 10 years if deportable under certain criminal grounds), good moral character for all of that period, and that deportation would result in extreme or exceptionally unusual hardship to the alien or to a qualifying relative (exceptionally unusual hardship if subject to the 10 year statutory period).

b. PRESENT LAW - Section 240A(b)(1). The AG may cancel removal in the case of an alien who is inadmissible or deportable from the U.S. if the alien:

(1) has been physically present in the U.S. for a continuous period of not less than 10 years immediately preceding the date of such application;

(2) has been a person of good moral character (GMC) during such period;

(3) has not been convicted of an offense under Section 212(a)(2) [CIMT; 2 or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more; illicit traffickers in controlled substances; prostitution and commercialized vice; aliens involved in serious criminal activity who have asserted immunity from prosecution], Section 237(a)(2) [CIMT w/in 5 years of entry for which a sentence of one year or longer may be imposed; 2 CIMTs not arising out of a single scheme of criminal misconduct; aggravated felony; high speed flight;

controlled substances; firearms or destructive devices; miscellaneous crimes; crimes of domestic, violence, stalking, and crimes against children; violators of protection orders]; or Section 237(a)(3) [failure to report change of address; failure to register or falsification of documents; document fraud; falsely claiming U.S. citizenship]; and

(a) The Board held that an alien whose conviction precedes the October 1, 1996 effective date of Section 237(a)(2)(E) has not been "convicted of an offense" under Section 237(a)(2)(E) and, therefore, is not barred by Section 240A(b)(1)(C) from establishing eligibility for cancellation of removal. Matter of Gonzalez-Silva, 24 I&N Dec. 218 (BIA 2007).

(4) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child, who is a citizen of the U.S. or an alien lawfully admitted for permanent residence.

(a) To establish "exceptional and extremely unusual hardship", an applicant for cancellation of removal under Section 240A(b) of the Act must demonstrate that his or her citizen or lawful permanent resident spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be "unconscionable." Matter of Monreal, 23 I&N Dec. 56 (BIA 2001).

(b) Although many of the factors that were considered in assessing "extreme hardship" for suspension of deportation should also be considered in evaluating "exceptional and extremely unusual hardship", an applicant for cancellation of removal must demonstrate hardship beyond that which has historically been required in suspension of deportation cases involving the "extreme hardship"

standard. Matter of Monreal, 23 I&N Dec. 56 (BIA 2001).

(c) In establishing eligibility for cancellation of removal, only hardship to qualifying relatives, not to the applicant himself or herself, may be considered, and hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to a qualifying relative. Matter of Monreal, 23 I&N Dec. 56 (BIA 2001).

(d) The BIA found it appropriate and useful to look to the factors considered in assessing "extreme hardship" for purposes of suspension of deportation as set forth in Matter of Anderson, 16 I&N Dec. 596 (BIA 1976), such as the age of a respondent, both at the time of coming to the U.S. and at the time of the application, family ties in the U.S. and abroad, length of residence in the U.S., the health of the respondent and qualifying family members, the political and economic conditions in the country of return, the possibility of other means of adjusting status in the U.S., the alien's involvement and position in his or her community, and his or her immigration history, but observed that some of the factors set forth in that case may relate only to the applicant for relief and those cannot be considered under the cancellation statute where only hardship to qualifying relatives, and not to the applicant, may be considered. Factors relating to the applicant can only be considered insofar as they may affect the hardship to a qualifying relative. For cancellation of removal, the BIA would consider the ages, health, and circumstances of qualifying lawful permanent resident and U.S. citizen relatives. The Board stated that an applicant who has elderly parents in the U.S. who are solely dependent upon him for support might have a strong case. Another strong applicant might have a qualifying child with very serious health issues or compelling special needs in school. The BIA said a lower standard of living or adverse country conditions in the county of return are factors to consider only insofar as they may affect a

qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship. The BIA also cited Matter of Kao and Lin, 23 I&N Dec. 45 (BIA 2001) and Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

(e) An unmarried mother of 2 U.S. citizen children (a 6 year old and an 11 year old) did not establish that her children would suffer exceptional and extremely unusual hardship upon her removal to Mexico in spite of the poor economic conditions and diminished educational opportunities in Mexico and the fact that the respondent is unmarried and has no family in Mexico to assist in her children's adjustment to life there. Matter of Andazola, 23 I&N Dec. 319 (BIA 2002). In that case, the BIA stated, "In assessing hardship, we should not consider the fact that the respondent's extended family is (in the U.S.) illegally, rather than in Mexico, as a factor that weighs in her favor." The BIA also noted that the respondent and her children may face some special difficulties in Mexico, because she is an unmarried mother and may encounter some discrimination as such.

(f) The BIA distinguished Matter of Monreal, 23 I&N Dec. 56 (BIA 2001) and Matter of Andazola, 23 I&N Dec. 319 (BIA 2002) and granted cancellation of removal in Matter of Recinas, 23 I&N Dec. 467 (BIA 2002). The factors considered in assessing the hardship to the respondent's United States citizen children included the heavy burden imposed on the respondent to provide the sole financial and familial support for her six children if she is deported to Mexico, the lack of any family in her native country, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country. The BIA stated that the hardship standard is not so restrictive that only a handful of applicants, such as

those who have a qualifying relative with a serious medical condition, will qualify for relief. However, the Board also stated, "We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met."

(g) In an unpublished, but indexed decision, the BIA stated: Neither the precedents of this Board nor any binding judicial rulings have articulated the precise distinction between "extreme hardship" and the "exceptional and extremely unusual hardship." It is clear, however, that the latter is considered to be a higher standard both by our precedents and by Congress in enacting IIRIRA. See Matter of Ching, supra; Matter of Pena-Diaz, 20 I&N Dec. 841 (BIA 1994); H. R. Conf. Rep. No. 104-828 at 213 ("Joint Explanatory statement") (stating that hardship standard has been "deliberately changed" to "exceptional and extremely unusual hardship" because the standard of "extreme hardship" has been weakened "by recent administrative decisions," and to emphasize "that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien's deportation"). The intent of Congress, as manifested in both the plain language of the statute and in this legislative history, was to establish a standard higher than that set forth in Board precedents such as Matter of Anderson, 16 I&N Dec. 596 (BIA 1978); Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996); Matter of Pilch, 21 I&N Dec. 627 (BIA 1996). In addition, Congress legislated that the showing of hardship must pertain to a qualifying relative of the alien who is either a United States citizen or lawful permanent resident; hardship to the alien himself is no longer a factor.

(h) In that same case, the BIA stated: We believe, however, that this change should be construed to alter the weight that is accorded various hardship factors, not to eliminate or alter the factors

themselves. Therefore, we find that the factors developed in the context of relief under the former Section 244(a) of the Act are appropriate factors to be used under Section 240A(b) of the Act. See Matter of Anderson,16 I&N Dec. 596 (BIA 1978) (the factors include the age and health of the alien and of his family; his family ties in the United States and abroad; his length of residence in the United States; the economic and political conditions in the country to which the alien is returnable; the financial status of the alien, including his business and occupation; the possibility of other means of adjustment of status; and his immigration history).

c. Special rule for battered spouse or child - Section 240A(b)(2). The AG may cancel removal in the case of an alien who is inadmissible or deportable from the U.S. if the alien demonstrates that:

(1) the alien has been battered or subjected to extreme cruelty in the U.S. by a spouse or parent who is a U.S. citizen or LPR (or is the parent of a child of a U.S. citizen or LPR and the child has been battered or subjected to extreme cruelty in the U.S. by such citizen or permanent resident parent);

(2) the alien has been physically present in the U.S. for a continuous period of not less than 3 years immediately preceding the date of such application;

(3) the alien has been a person of GMC during such period;

(4) the alien is not inadmissible under sections 212(a)(2) or (3), is not deportable under Section 237(a)(I)(G) involving marriage fraud, or sections 237(a)(2) through (4), and has not been convicted of an aggravated felony; and

(5) the removal would result in extreme hardship to the alien, the alien's child or (in the case of an alien who is a child) to the alien's parent.

(6) In acting on applications under this paragraph, the AG shall consider any credible evidence relevant to the application. INA § 240A(b)(2). The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the AG. Id.

d. Adjustment of status of aliens whose removal is canceled. Section 240A(b)(3) provides that the AG may adjust to the status of an alien lawfully admitted for permanent residence any alien who the AG determines meets the requirements of sections 240A(b)(1) and 240A(b)(2). The number of adjustments shall not exceed 4,000 for any fiscal year. The AG shall record the alien's lawful admission for permanent residence as of the date of the AG's cancellation of removal or determination.

4. Special rules relating to continuous residence or physical presence - Section 240A(d).

a. Termination of continuous period. Any period of continuous residence or continuous physical presence in the U.S. shall be deemed to end when the alien is served a notice to appear under Section 239(a) or when the alien has committed an offense referred to in Section 212(a)(2) that renders the alien inadmissible to the U.S. under Section 212(a)(2) or removable from the U.S. under Section 237(a)(2) or 237(a)(4), whichever is earliest. INA § 240A(d)(1).

(1) Termination by service of Notice to Appear.

(a) In a deportation case involving the respondent's eligibility for suspension of deportation, the BIA found that the continuous physical presence clock does not start anew after the service of an Order to Show Cause so as to allow an alien to accrue the time required to establish eligibility for suspension of deportation after the service of an Order to Show Cause. Matter of Mendoza-Sandino et al., 22 I&N Dec. 1236 (BIA 2000).

(2) Termination by commission of an offense.

(a) The period of continuous residence required for relief under Section 240A(a) commences when the alien has been admitted in any status, which includes admission as a temporary resident. Matter of Perez, 22 I&N Dec. 689 (BIA 1999).

(b) Continuous residence or physical presence for cancellation of removal purposes is deemed to end on the date that a qualifying offense has been committed. Matter of Perez, 22 I&N Dec. 689 (BIA 1999). An alien need not be charged and found inadmissible or removable on a ground specified in section 240(d)(1)(B) in order for the alleged criminal conduct to terminate the alien's continuous residence. Matter of Jurado, 24 I&N Dec. 29 (BIA 2006).

(c) An offense described in Section 240A(d)(1) is deemed to end continuous residence or physical presence for cancellation of removal purposes as of the date of its commission, even if the offense was committed prior to the enactment of the IIRIRA of 1996. Matter of Perez, 22 I&N Dec. 689 (BIA 1999), reaff'd Matter of Robles, 24 I&N Dec. 22 (BIA 2006).

(d) Pursuant to Section 240A(d)(1) of the Act, an offense must be one "referred to in Section 212(a)(2)" of the Act to terminate the period of continuous residence or continuous physical presence required for cancellation of removal; Matter of Campos-Torres, 22 I&N Dec. 1289 (BIA 2000). A firearms offense that renders an alien removable under Section 237(a)(2)(C) of the Act is not one "referred to in Section 212(a)(2)" and thus does not stop the further accrual of continuous residence or continuous physical presence for purposes of establishing eligibility for cancellation of removal. Id.

(e) An alien who has been convicted of a crime involving moral turpitude that falls within the "petty offense" exception in Section 212(a)(2)(A)(ii)(II) of the Act is not ineligible for cancellation of removal under Section 240A(b)(1)(C) of the Act because he "has not been convicted of an offense under Section 212(a)(2)" of the Act. Matter of Garcia-Hernandez, 23 I&N Dec. 590 (BIA 2003).

(f) An alien who has committed a crime involving moral turpitude that falls within the "petty offense" exception is not ineligible for cancellation of removal under Section 240A(b)(1)(B) of the Act, because commission of a petty offense does not bar the offender from establishing good moral character under Section 101(f)(3) of the Act. Matter of Garcia-Hernandez, 23 I&N Dec. 590 (BIA 2003).

(g) A respondent, who was convicted of two misdemeanor crimes involving moral turpitude is not precluded by the provisions of Section 240A(d)(1)(B) of the Act from establishing the requisite 7 years of continuous residence for cancellation of removal under Section 240A(a)(2), because his first crime, which qualifies as a "petty offense" under Section 212(a)(2)(A)(ii)(II) of the Act, did not render him inadmissible, and he had accrued the requisite 7 years of continuous residence before the second offense was committed.

b. A respondent, who was convicted of two misdemeanor crimes involving moral turpitude is not precluded by the provisions of Section 240A(d)(1)(B) of the Act from establishing the requisite 7 years of continuous residence for cancellation of removal under Section 240A(a)(2), because his first crime, which qualifies as a "petty offense" under Section 212(a)(2)(A)(ii)(II) of the Act, did not render him inadmissible, and he had accrued the requisite 7 years of continuous residence before the second offense was committed.

(1) This Section does not mean that any departure of 90 days or

less is forgiven and an alien's continuous physical presence is deemed to end at the time the alien is removed or compelled to depart the U.S. under threat of the institution of deportation or removal proceedings (voluntary departure granted by the Service under former Section 242(b) of the Act), even if the absence is for only one day. Matter of Romalez, 23 I&N Dec. 423 (BIA 2002).

(2) Where an alien departed the United States for a period less than that specified in Section 240A(d)(2) of the Act and unsuccessfully attempted reentry at a port of entry before actually reentering, physical presence continued to accrue for purposes of cancellation of removal under Section 240A(b)(1)(A) unless, during that attempted reentry, the alien was formally excluded or made subject to an order of expedited removal, was offered and accepted the opportunity to withdraw an application for admission, or was subjected to some other formal, documented process pursuant to which the alien was determined to be inadmissible to the United States. Matter of Avilez, 23 I&N Dec. 799 (BIA 2005).

c. Continuity not required because of honorable service in Armed Forces and presence upon entry into service. The requirements of continuous residence or continuous physical presence in the U.S. under sections 240A(a) and 240A(b) shall not apply to an alien who has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the U.S. and, if separated from such service, was separated under honorable conditions, and at the time of the alien's enlistment or induction was in the U.S. INA § 240A(d)(3).

5. Annual limitation. The AG may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under (former) Section 244(a) of a total of more than 4,000 aliens in any fiscal year. This applies regardless of when an alien applied for such cancellation and adjustment and whether such alien had previously applied for suspension under (former) Section 244(a). INA § 240A(e).

6. In addition to satisfying the statutory eligibility requirements, an applicant for cancellation of removal must establish that he or she merits such relief

as a matter of discretion. Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998). The general standards developed in Matter of Marin, 16 I&N Dec. 581 (BIA 1978), for the exercise of discretion under Section 212(c) of the Act, which was the predecessor provision to Section 240A(a), are applicable to the exercise of discretion under Section 240A(a). Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998).

a. However, an applicant for cancellation of removal under Section 240A(a) of the Act need not meet a threshold test requiring a showing of "unusual or outstanding equities" before a balancing of the favorable and adverse factors of record will be made to determine whether relief should be granted in the exercise of discretion. Matter of Sotelo, 23 I&N Dec. 201 (BIA 2001), clarifying Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998). The BIA stated that in any balancing test, various factors, whether positive or negative, are accorded more weight than others according to the specific facts of the individual case. More serious misconduct necessarily weighs more heavily against an exercise of discretion than does less serious misconduct. Therefore, an alien must present "additional offsetting favorable evidence" to counterbalance an adverse factor such as serious criminal activity. In Matter of C-V-T-, the Board questioned whether the requirement of presenting outstanding or unusual equities had any continuing viability in view of the expanded definition of the term "aggravated felony". It observed that in each of the precedent decisions where it required a showing of "unusual or outstanding equities," the alien would now be considered ineligible for relief because of a conviction for an aggravated felony, without any need to reach the issue of discretion. In Matter of Edwards, 20 I&N Dec. 191 (BIA 1990), the BIA clarified that its decision in Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988), did not require an alien to satisfy a threshold test of showing "unusual or outstanding equities" before it would apply a balancing test to consider whether a favorable exercise of discretion is warranted. The Board specifically stated that it found the reference to a threshold test in Matter of Buscemi to be "misleading, as it might be read to imply that a full examination of an alien's equities can somehow be pretermitted" and emphasized that a "complete review of the favorable factors" in the case is required. Consistent with the clarifying statements in Matter of Edwards, supra, the BIA reiterated that it will not apply a threshold test in cancellation of removal cases. Instead, the Board will weigh the favorable and adverse factors to determine whether, on balance, the "totality of the evidence before us" indicates that the "respondent has adequately demonstrated that he warrants a

favorable exercise of discretion and a grant of cancellation of removal under Section 240A(a) of the Act."

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

F. A waiver under former Section 212(c).

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

2. HISTORY LESSON

a. A provision similar to Section 212(c) dates back to 1917. The 7th proviso to Section 3 of the Immigration Act of 1917 (usually referred to as "The Seventh Proviso") allowed the Attorney General, in his discretion, to admit aliens returning after a temporary absence to an unrelinquished U.S. domicile of 7 consecutive years. In the Immigration and Nationality Act of 1952, Congress replaced the 7th Proviso with Section 212(c) and limited its availability to aliens lawfully admitted for permanent residence.

b. Section 212(c) was originally applied only as a waiver of excludability available to LPR's who sought to re-enter the U.S. after a temporary absence or to obtain an advance waiver in contemplation of a future absence. It was judicially expanded to also include those aliens who had not departed the U.S. Francis v. INS, 532 F.2d 268 (2nd Cir. 1976). The court found that the statute created 2 classes of aliens identical in every respect except

that one class had departed and returned to the U.S. and held that to limit the 212(c) waiver to those who departed and returned deprived those who had not departed of equal protection of the laws under the Fifth Amendment. The BIA accepted this interpretation in Matter of Silva, 16 I&N Dec. 26 (BIA 1976) and Section 212(c) has since been available as relief in deportation proceedings as well as in exclusion proceedings. However, in a 2009 en banc decision, the Ninth Circuit decided that Section 212(c) only provides relief from inadmissibility, not deportation. Abebe v. Mukasey, 554 F.3d 1203 (9th Cir. 2009).

c. Section 511(b) of the Immigration Act of 1990 (IMMACT 1990), effective on November 29, 1990, amended Section 212(c) to provide that its benefits were unavailable to an alien who had been convicted of one or more aggravated felonies and had served a term of imprisonment of at least five years for such felony or felonies.

d. Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), effective on April 24, 1996, replaced IMMACT 1990 to preclude Section 212(c) relief to all aliens who were deportable by reason of having committed any criminal offense covered in former Section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by former Section 241(a)(2)(A)(ii) for which both predicate offenses were covered by Section 241(a)(2)(A)(i) of the Act.

e. Then the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), repealed Section 212(c) and specifically eliminated it in all cases commencing on or after April 1, 1997. IIRIRA also reduced the potential sentence required for a conviction to be considered an aggravated felony from 5 years to 1 year.

(1) Section 309(c)(3) of IIRIRA permits aliens in deportation proceedings who would have been eligible for a waiver under former section 212(c) but for AEDPA Section 440(d) and who would be eligible for cancellation of removal under Section 240A(a), to seek termination of the deportation proceedings and initiation of removal proceedings.

f. These amendments set off a wave of litigation in the District and Circuit courts.

(1) The United States Court of Appeals for the Second Circuit in Henderson v. INS, 157 F.3d 106, 129-30 (2d Cir. 1998), cert. denied sub nom. Reno v. Navas, 526 U.S. 1004 (1999), concluded that the amendments made to Section 212(c) of the Act by Section 440(d) of the AEDPA do not apply retroactively to deportation proceedings pending on April 24, 1996. The Second Circuit specifically stated that the "traditional rules of statutory interpretation all point in one direction: §440(d) [of the AEDPA] should not apply retroactively." Id. at 130. Note: The Board previously held that the AEDPA Section 440(d) bar is inapplicable to aliens seeking relief in exclusion proceedings. Matter of Fuentes-Campos, 21 I&N Dec. 905 (BIA 1997).

(2) The Second Circuit later decided that the bars on applying for a 212(c) waiver enacted in Section 440(d) of the AEDPA and Section 304 of the IIRIRA do not apply to an alien who entered a plea of guilty or nolo contendere to an otherwise qualifying crime prior to the IIRIRA's enactment date. St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000). This decision was affirmed by the Supreme Court of the United States in INS v. St. Cyr, 533 U.S. 289 (2001). The Supreme Court held that 212(c) relief remains available for aliens whose convictions were obtained by plea agreements and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect.

3. Since former section 212(c) has been repealed, it exists only as resurrected by the Supreme Court in St. Cyr, supra, and its progeny. In October 2004, the 212(c) regulations were amended to conform with the St. Cyr decision. Note: the Circuit Courts of Appeals have various and differing interpretations regarding of the applicability of former section 212(c) relief.

4. Jurisdiction, 8 C.F.R. § 1212.3(a). An application by an eligible alien for the exercise of discretion under former Section 212(c) of the Act (as in

effect prior to April 1, 1997), if made in the course of proceedings under Section 240 of the Act, or under former section 235, 236 or 242, shall be submitted to the IJ by filing an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191).

5. Substantive requirements.

a. The alien must be a lawful permanent resident (LPR).

(1) Section 101(a)(20) of the Act defines the term "lawfully admitted for permanent residence" as the status of having been lawfully accorded the privilege of residing permanently in the U.S. as an immigrant in accordance with the immigration laws, such status not having changed.

(a) Therefore, an alien who has lost or abandoned his status as an LPR is not eligible to apply for a 212(c) waiver. But see, 8 C.F.R. § 1003.44 (special motions to reopen for former Section 212(c) relief) discussed, infra.

(b) For a discussion on the law on abandonment of LPR status, see the visa requirements applicable to immigrants [Section 212(a)(7)(A)(i)] under grounds of inadmissibility, supra.

(2) The BIA held that an alien who had resided in the U.S. for 8 years following admission as an LPR was not eligible for a 212(c) waiver because his original entry as an LPR was not "lawful" in that he had concealed the fact of a prior deportation when he applied for the immigrant visa. Matter of T-, 6 I&N Dec. 136 (BIA 1954; AG 1954). This case was not cited again for 42 years. However, the BIA cited it as good law in Matter of Garcia, 21 I&N Dec. 254 (BIA 1996).

(a) Since nunc pro tunc permission to reapply for admission is available only in the limited circumstances where a grant of such relief would

effect a complete disposition of the case (i.e. where the only ground of deportability or inadmissibility would be eliminated or where the alien would receive a grant of adjustment of status in conjunction with the grant of any appropriate waivers of inadmissibility), nunc pro tunc permission to reapply for admission is not available to an alien who returned to the U.S. with an immigrant visa after deportation but without obtaining advance permission to reapply and who is also deportable because of a drug-related conviction because he would remain deportable for the drug conviction even if permission to reapply for admission were granted. Matter of Garcia, 21 I&N Dec. 254 (BIA 1996). Therefore, such an alien is not eligible for 212(c) waiver because he is not independently eligible for the waiver as a result of his unlawful entry. Id.

(3) Commuters. An alien admitted to the U.S. as an LPR who later moved to Mexico to reside and who commuted daily from his home in Mexico to his employment in the U.S. was found to reside in Mexico and not the U.S., to have no domicile in the U.S. during the time he resided in Mexico, and therefore to be statutorily ineligible for relief under Section 212(c) of the Act. Matter of Carrasco, 16 I&N Dec. 195 (BIA 1977); Matter of Garcia-Quintero, 15 I&N Dec. 244 (BIA 1975). The lack of domicile in the U.S. was held to exist even though the alien commuter paid taxes in the U.S., had a California driver's license, and registered in the U.S. for Selective Service Matter of Sanchez, 17 I&N Dec. 218 (BIA 1980). In Matter of Garcia-Quintero, 15 I&N Dec. 244 (BIA 1975), the BIA conceded that the alien maintained his LPR status during the time he commuted to the U.S. to work, thus distinguishing the “commuter” situation from an alien who abandoned his status as an LPR. Therefore, it would seem that an alien commuter who moves back to the U.S. to reside would have a "lawful unrelinquished domicile of 7 consecutive years" after he resided in the U.S. for 7 years.

(4) When LPR status terminates.

(a) The BIA held that the LPR status of an alien terminates within the meaning of Section 101(a)(20) with the entry of a final administrative order of deportation. Matter of Lok, 18 I&N Dec. 101 (BIA 1981). An order becomes final when the time allotted for appeal expires, or when the BIA renders its decision on appeal or certification. Id. Since the LPR status of an alien continues until the entry of a final administrative order of deportation, an alien who enters the U.S. while in an excludable class before accruing 7 years as an LPR does not lose his lawful status and is eligible to apply for a 212(c) waiver if he attains 7 years before an administratively final order of deportation is entered. Matter of Duarte, 18 I&N Dec. 329 (BIA 1982). Once an order of deportation becomes administratively final, an alien may not thereafter establish eligibility as an LPR for relief under Section 212(c) (barring reversal on the merits of the finding of deportability by an appellate court or an administrative order reopening proceedings) nor may his domicile in the U.S. from then on be considered lawful for 212(c) purposes. Matter of Lok, supra.; Matter of Cerna, 20 I&N Dec. 399 (BIA 1991). A respondent who was denied a waiver under Section 212(c) and who is subject to an administratively final order of deportation cannot successfully move to reopen deportation proceedings to offer new evidence on his 212(c) eligibility because such a respondent is no longer an LPR. Matter of Cerna, supra. An entirely opposite decision was reached in Matter of Rodarte-Espinoza, 21 I&N Dec. 150 (BIA 1995). The decision did not say so explicitly, but it appears to be limited only to cases arising in the 9th Circuit.

b. The alien must have a lawful unrelinquished domicile in the U.S. for 7 consecutive years.

(1) The BIA held that the alien must have been an LPR for all of the 7 years and time spent in the U.S. in an immigration status other than LPR does not count toward the 7 years. Matter of Newton, 17 I&N Dec. 133 (BIA 1979); Matter of

Anwo, 16 I&N Dec. 293 (BIA 1977); Matter of Lok, 15 I&N Dec. 720 (BIA 1976), remanded, 548 F.2d 37 (2d Cir. 1977); Matter of S-, 5 I&N Dec. 116 (BIA 1953). In 1991, the AG effectively codified Matter of S-, supra by promulgating 8 C.F.R. § 212.3(f)(2) [now 8 C.F.R. § 1212.(3)(f)(2)] which provides that any application for a 212(c) waiver shall be denied if the alien has not maintained LPR status for at least 7 consecutive years immediately preceding the filing of the application. In a case involving whether or not time spent as a temporary resident should count toward the 7 years, the BIA held that it is bound by and will follow the regulation absent contrary circuit court precedent. Matter of Ponce de Leon, 21 I&N Dec. 154 (BIA 1996).

(2) The 7-year period begins on the effective date of LPR status. If an alien received a retroactive date of LPR status, ("roll-back" date), the 7-year period begins on the roll-back date, not on the later date when the adjustment of status was approved. Matter of Diaz-Chambrot, 19 I&N Dec. 674 (BIA 1988); Matter of Rivera-Rioseco, 19 I&N Dec. 833 (BIA 1988).

(3) A waiver of deportability under former Section 241(f) of the Act [now Section 237(a)(1)(H)] waives not only the alien's deportability but also the underlying fraud or misrepresentation and renders the alien a LPR from the time of his initial entry in that status. Therefore, the waiver recipient may use the time accrued since the initial granting of LPR status to establish the 7 years required for a 212(c) waiver. Matter of Sosa-Hernandez, 20 I&N Dec. 758 (BIA 1993).

6. Grounds of inadmissibility and deportability which cannot be waived under former Section 212(c).

a. Grounds of inadmissibility which cannot be waived by former Section 212(c) are as follows [8 C.F.R. § 1212.3(f)(3)]:

(1) 212(a)(3)(A) - aliens who are a threat to national security, etc.,

(2) 212(a)(3)(B) - aliens engaging in terrorist activities,

(3) 212(a)(3)(C) - aliens having an adverse effect on U.S. foreign policy,

(4) 212(a)(3)(E) - aliens participating in genocide or Nazi persecutions,

(5) 212(a)(10)(C) - aliens refusing to surrender custody of citizen children.

b. A former Section 212(c) waiver is unavailable to an alien who has been charged and found to be deportable or removable on the basis of a crime that is an aggravated felony. 8 C.F.R. §1212.3(f)(4).

(1) An alien who convictions for one or more aggravated felonies were entered pursuant to plea agreements made on or after November 29, 1990, but prior to April 24, 1996, is ineligible for former Section 212(c) relief only if he or she has served a term of imprisonment of five years or more for such aggravated felony or felonies [8 C.F.R. § 1212.3(f)(4)(i)];

(2) An alien is not ineligible for former Section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement made before November 29, 1990 [8 C.F.R. § 1212.3(f)(4)(ii)].

c. A 212(c) waiver is available in deportation proceedings only in cases in which the ground of deportation has a comparable ground of exclusion/inadmissiblity which may be waived by former Section 212(c). 8 C.F.R. § 1212.3(f)(5); Matter of Blake, 23 I&N Dec. 722 (BIA 2005); Matter of Brieva, 23 I&N Dec. 766 (BIA 2005); Matter of Meza, 20 I&N Dec. 257 (BIA 1991).

(1) In Matter of Blake, 23 I&N Dec. 722 (BIA 2005), the BIA held that the statutory counterpart test turns on "whether

Congress employed similar language to describe substantially equivalent categories of offenses." The First, Third, Fifth, Seventh, and Eighth Circuits have followed Matter of Blake in precedent decisions. See Gonzalez-Mesias v. Mukasey, 529 F.3d 62 (1st Cir. 2008); Zamora-Mallari v. Mukasey, 514 F.3d 679 (7th Cir. 2008); Caroleo v. Gonzales, 476 F.3d 158 (3d Cir. 2007); Vo v. Gonzales, 482 F.3d 363 (5th Cir. 2007); Brieva-Perez v. Gonzales, 482 F.3d 356 (5th Cir. 2007); Valere v. Gonzales, 473 F.3d 757 (7th Cir. 2007); Vue v. Gonzales, 496 F.3d 858 (8th Cir. 2007). (The Ninth Circuit followed Matter of Blake until the court's 2009 en banc decision in Abebe v. Gonazles, 554 F.3d 1203 (9th Cir. 2009), *supra*, in which it ruled that Section 212(c) does not provide relief from deportation.) However, in Blake v. Carbonne, 489 F.3d 88 (2d Cir. 2007), the Second Circuit declined to follow Matter of Blake, ruling that the statutory counterpart test should be based on whether the underlying offense would render an alien excludable as well as removable, rather than on a comparison of the language used in the INA to describe the two categories of offenses.

(2) In Matter of Hernandez-Casillas, 20 I&N Dec. 262 (BIA 1990; A.G. 1991), aff'd, 983 F.2d 231 (5th Cir. 1993), the BIA sought to make a 212(c) waiver available to any ground of deportability except those which have a comparable ground of excludability specifically exempted by Section 212(c). The Attorney General disapproved the BIA's decision and held that a 212(c) waiver is unavailable in deportation proceedings unless the alien is deportable under a ground of deportability for which there is a comparable ground of excludability.

(a) Most Circuit courts have agreed that a 212(c) waiver is only available when the ground of deportability has a corresponding ground of exclusion. Campos v. INS, 961 F.2d 309 (1st Cir. 1992); Rodriguez v. INS, 9 F.3d 408 (5th Cir. 1993); Leal-Rodriguez v. INS, 990 F.2d 939 (7th Cir. 1993); Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988); Padron v. INS, 13 F.3d 1455 (11th Cir. 1994). Only the 2nd Circuit takes a contrary view: Bedoya-Valencia v. INS, 6 F.3d 891 (2d Cir. 1993).

(3) However, a waiver under Section 212(c) is not unavailable in deportation proceedings to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, "convicted of an aggravated felony." Matter of Meza, 20 I&N Dec. 257 (BIA 1991). The BIA held that the 1990 amendment to Section 212(c) which makes its waiver unavailable to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years implies that Congress intended that some aliens convicted of an aggravated felony are eligible for the waiver. The specific category of aggravated felony in the case was one involving trafficking in a controlled substance. Since such a conviction could also form the basis for excludability under Section 212(a)(23) [as an alien convicted of a violation of any law or regulation relating to a controlled substance], the Board held that the alien was not statutorily precluded from applying for a 212(c) waiver. The Board did not discuss the other categories of aggravated felonies to determine if LPRs deportable under any other category may qualify for a 212(c) waiver.

(4) In Matter of Blake, 23 I&N Dec. 722 (BIA 2005), the Board held that the aggravated felony ground of removal for sexual abuse of a minor has not statutory counterpart on the grounds of inadmissibility under Section 212(a)(2) of the Act. The Board has also held that the aggravated felony ground of removal for a crime of violence has no comparable ground of inadmissiblity. Matter of Brieva, 23 I&N Dec. 766 (BIA 2005).

d. A waiver under Section 212(c) of the Act may be sought in conjunction with an application for adjustment of status by an alien who is deportable for both drug and weapons offenses. Matter of Gabryelsky, 20 I&N Dec. 750 (BIA 1993).

7. The alien must merit a favorable exercise of discretion.

a. The Immigration Judge is required to balance the adverse factors of record evidencing an alien's undesirability as a permanent resident

against the favorable factors and social and humane considerations to determine if the granting of relief is in the best interest of the United States. Among the negative factors to be considered are the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (such as affidavits from family, friends, and responsible community representatives). Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Salmon, 16 I&N Dec. 734 (BIA 1978); Matter of Khalik, 17 I&N Dec. 518 (BIA 1980).

(1) A respondent's lack of remorse or refusal to accept responsibility for criminal acts may be considered as an adverse factor in the exercise of discretion. Matter of Khalik, 17 I&N Dec. 518 (BIA 1980).

(2) While community ties, property and business holdings, or special service to the community are to be considered in the alien's favor, the absence of those additional ties in themselves does not negate the weight to be accorded the alien's long residence in this country which was otherwise without a criminal record and during most of which the alien was employed. Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995).

(3) Evidence of general conditions in an alien's homeland may be weighed as a factor in evaluating an application under Section 212(c) of the Act but, since Congress has provided asylum and withholding of deportation under sections 208 and 243(h) of the Act as the appropriate avenues for

requesting relief from deportation on the basis of a fear of persecution, allegations and evidence regarding a well-founded fear or clear probability of persecution have no place in a Section 212(c) application or adjudication. Matter of D-, 20 I&N Dec. 915 (BIA 1994).

b. The equities that an applicant for Section 212(c) relief must bring forward to establish that favorable discretionary action is warranted will depend in each case on the nature and circumstances of the ground of exclusion sought waived and on the presence of any additional adverse factors. As the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. Such a showing at times may be required solely by virtue of the circumstances and nature of the exclusion ground sought waived. Matter of Marin, 16 I&N Dec. 581 (BIA 1978).

(1) In Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995), the BIA found the existence of 2 minor dependent US citizen children to be an outstanding equity.

(2) In the same case, the BIA found 20 years of LPR status which commenced at the age of 17 to be an unusual or outstanding equity.

c. In a case involving a criminal conviction, the gravity of the offense must be examined. Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988). The necessity of demonstrating unusual or outstanding equities may be required by the presence of a conviction of a single serious crime such as an offense involving controlled substances, or it may be required because of a succession of criminal acts which together establish a pattern of serious criminal misconduct. Id. The BIA does not look to what ground of deportability or inadmissibility a particular crime comes within, but rather to the nature of the underlying crime itself in determining the degree of equities that will be required to overcome the crime. Matter of Roberts, 20 I&N Dec. 294 (BIA 1991).

(1) In Matter of Roberts, 20 I&N Dec. 294 (BIA 1991), the INS argued that an applicant for a Section 212(c) waiver

who has been convicted of an aggravated felony should be required to show that he is fully rehabilitated and that deportation would result in exceptional and extremely unusual hardship to the respondent's USC or LPR spouse, parent, or child. The BIA rejected this argument and held that the balancing test set forth in Matter of Marin, Matter of Buscemi, and Matter of Edwards adequately allows for determining the appropriate strength of the equities necessary to overcome an alien's crimes in view of their nature and seriousness.

(2) Inquiry may be had into the circumstances surrounding the commission of a crime in order to determine whether a favorable exercise of discretion is warranted, but it is impermissible to go behind a record of conviction to reassess an alien's ultimate guilt or innocence. Matter of Roberts, 20 I&N Dec. 294 (BIA 1991); Matter of Edwards, 20 I&N Dec. 191 (BIA 1990).

(a) An IJ may consider evidence that the respondent engaged in criminal activity to support his drug habit. Matter of Edwards, 20 I&N Dec. 191 (BIA 1990).

(b) An IJ may not consider evidence on the issue of entrapment, for that issue directly relates to the question of the respondent's ultimate guilt or innocence. Matter of Roberts, 20 I&N Dec. 294 (BIA 1991).

(3) An alien who demonstrates unusual or outstanding equities when required merely satisfies the threshold test for having a favorable exercise of discretion considered in his case. Such a showing does not compel that discretion be exercised in his favor. Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988). In some cases, the seriousness of the crime may still not be overcome by the equities demonstrated, even though the equities are unusual or outstanding. Matter of Roberts, 20 I&N Dec. 294 (BIA 1991); Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988).

(a) In response to criticism by some Circuit Courts, the BIA stated that, in reviewing a discretionary determination of an IJ, it relies upon its own independent judgment in deciding the ultimate disposition of the case and that it has no de facto policy of denying a 212(c) waiver to all aliens convicted of a serious drug offense. However, a serious drug crime will be accorded due weight, as is consistent with the evolution of the immigration law in this area, and may ultimately be the determinative factor in a given case. Matter of Burbano, 20 I&N Dec. 872 (BIA 1994).

(4) Aliens who have been convicted of a crime should make a showing of rehabilitation before relief under Section 212(c) will be considered as a matter of discretion. Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988); Matter of Marin, 16 I&N Dec. 581 (BIA 1978).

(a) However, a clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion and the issue of rehabilitation should not be viewed as a "threshold test" to be met before other factors are considered in a 212(c) case involving a criminal conviction. Matter of Edwards, 20 I&N Dec. 191 (BIA 1990).

(b) A proper determination as to whether an alien has demonstrated outstanding or unusual equities in a 212(c) waiver application can only be made after a complete review of the favorable factors in his case, therefore 212(c) cases must be evaluated on a case-by-case basis, with rehabilitation as only. Matter of Edwards, 20 I&N Dec. 191 (BIA 1990).

(c) There is no irrebuttable presumption that a confined or recently convicted alien can never establish either that rehabilitation has occurred or that relief under Section 212(c) should otherwise be granted. Matter of Marin, 16 I&N Dec. 581 (BIA 1978). But the recency of a conviction and the fact of confinement

are matters relevant to the consideration of whether an alien has demonstrated rehabilitation and whether relief should be granted as a matter of discretion. Id. Confined aliens and those who have recently committed criminal acts have a more difficult task in demonstrating rehabilitation than aliens who have committed the same offenses in the more distant past. Matter of Silva-Rodriguez, 20 I&N Dec. 448 (BIA 1992; Matter of Marin, supra. Dependent upon the nature of the offense and the circumstances of confinement, it may well be that a confined respondent will not be able to demonstrate rehabilitation. Matter of Marin, supra. While the timing of the issuance of an OSC by the Service can have a significant effect on the circumstances relevant to the exercise of discretion, this fact alone does not mandate that proceedings should be delayed in order to afford an alien a better opportunity to prove rehabilitation. Matter of Silva-Rodriguez, supra; Matter of Marin, supra. Therefore, an IJ did not act with "good cause" under the regulations by granting a 1 year continuance so that the respondent would have more time to establish rehabilitation. Matter of Silva-Rodriguez, supra.

i) In Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995), the BIA found that an alien's acceptance of responsibility for her crime (both during the hearing and in a presentence investigation which resulted in a reduction of sentence) and her achievements while in prison (voluntarily pursuing GED studies for which she received a letter of commendation, pursuing other courses, having no prison infractions, and being involved in a church ministry) were favorable indicators of efforts at rehabilitation.

8. Special Motions to Reopen for Former Section 212(c) Relief - 8 C.F.R. § 1003.44.

a. This section applies to certain aliens who formerly were lawful permanent residents and who are subject to an administratively final order of deportation or removal and who are eligible to apply for relief under former Section 212(c) of the Act and 8 C.F.R. § 1212.3 with respect to convictions obtained by plea agreement reached prior to a verdict at trial prior to April 1, 1997.

b. These motions are adjudicated under the standards set forth at 8 C.F.R. § 1212.3.

c. General eligibility. The alien has the burden of establishing eligibility for relief, including the date on which the alien and the prosecution agreed on the plea of guilt or nolo contendere. The motion must establish that the alien:

(1) Was a lawful permanent resident and is now subject to a final order of deportation or removal;

(2) Agreed to plead guilty or nolo contendere to an offense rendering the alien deportable or removable, pursuant to a plea agreement made before April 1, 1997;

(3) Had seven consecutive years of lawful unrelinquished domicile in the United States prior to the date of the final administrative order of deportation or removal; and

(4) Is otherwise eligible to apply for former Section 212(c) relief under the standards that were in effect at the time the alien's plea was made.

d. Deadline to file motion. Such a motion must have been filed on or before April 26, 2005.

e. Limitations on eligibility. Aliens who have departed the United States and who are currently outside the United States, aliens issued a final order of deportation or removal who then illegally return to the United States or alien who have not been admitted or paroled are not eligible to file a special motion for former Section 212(c) relief.

G. Asylum: Section 208 and 8 C.F.R. § 1208.1 et seq.

1. Authority to apply for asylum - Section 208(a).

a. Any alien who is physically present in the U.S. or who arrives in the U.S. (whether or not at a designated port of arrival and including an alien who is brought to the U.S. after having been interdicted in international or U.S. waters), irrespective of such alien's status, may apply for asylum in accordance with Section 208 or, where applicable, Section 235(b). INA § 208(a)(1).

2. Exceptions - Section 208(a)(2).

a. Safe third country - Section 208(a)(2)(A). Authority to apply for asylum under Section 208(a)(1) shall not apply to an alien if the AG determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of the alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the AG finds that it is in the public interest for the alien to receive asylum to the U.S.

(1) Safe third country agreement with Canada. 8 C.F.R. § 208.30(e)(6).

b. Time limit - Section 208(a)(2)(B). Subject to the changed circumstances set forth in Section 208(a)(2)(D), authority to apply for asylum under Section 208(a)(1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States. 8 C.F.R. § 1208.4(a)(2)(ii) provides that the one year period shall be calculated from the date of the alien's last arrival in the U.S. or April 1, 1997, whichever is later. In Matter of F-P-R-, 24 I&N Dec. 681 (BIA 2008), the Board

ruled that, for purposes of determining whether an asylum application was filed within one year "from the date of the alien's last arrival in the United States," under 8 C.F.R. § 1208.4(a)(2)(ii), "the words 'last arrival' refer to an alien's most recent coming or crossing into the United States after having traveled from somewhere outside of the country." Here, the respondent had been in the US since 1989, but returned to Mexico on June 17, 2005. He attempted to come back to the US on July 20, 2005. The IJ refused to treat July 20, 2005, as the date of the respondent's "last arrival," stating that "applicants should not be able to reset the asylum clock by taking a short excursion abroad." In reversing the IJ's ruling, the Board disagreed with *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006), in which the Second Circuit stated that "the term 'last arrival in the United States' should not be read to include an alien's return to the United States after a brief trip abroad pursuant to a parole explicitly permitted by United States immigration authorities." In addition, the Board stated that "we need not here examine whether the regulation should be read to embody an implicit exception in a case where it is found that an alien's trip abroad was solely or principally *intended* to overcome the 1-year time bar." (Emphasis in original.)

(1) Changed circumstances Section 208(a)(2)(D). Notwithstanding sections 208(a)(2)(B) &(C), an application for asylum may be considered if the alien demonstrates to the satisfaction of the AG either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the 1 year time period. 8 C.F.R. § 1208.4(a)(4) provides that the term “changed circumstances” shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include: changes in conditions in the applicant's country of nationality or, if the person is stateless, country of last habitual residence or changes in objective circumstances relating to the applicant in the U.S., including changes in applicable U.S. law, that create a reasonable possibility that the applicant may qualify for asylum. 8 C.F.R. § 1208.4(a)(4)(ii) provides that the applicant shall apply for asylum within a reasonable period given those “changed circumstances.”

(2) 8 C.F.R. § 1208.4(a)(5) provides that the term

"extraordinary circumstances" shall refer to events or factors beyond the alien's control that caused the failure to meet the 1 year deadline. Such circumstances shall excuse the failure to file within 1 year so long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the AO or IJ that the circumstances were both beyond his control and that, but for those circumstances, he would have filed within the 1 year period. These circumstances may include: serious illness or mental or physical disability of significant duration, including any effects of persecution or violent harm suffered in the past, during the 1 year period after arrival; legal disability (e.g. unaccompanied minor or mental impairment) during the first year after arrival; ineffective assistance of counsel; the applicant maintained TPS until a reasonable period before the filing of the asylum application; the applicant submitted an asylum application prior to the expiration of the 1 year deadline, but the application was rejected by the service and was refiled within a reasonable period thereafter.

(a) An unaccompanied minor who was in the custody of the Service pending removal proceedings during the 1-year period following his arrival in the U.S. established extraordinary circumstances that excused his failure to file an asylum application within 1 year after the date of his arrival. Matter of Y-C-, 23 I&N Dec. 286 (BIA 2002).

(3) Previous asylum applications - Section 208(a)(2)(C). Subject to the changed circumstances set forth in 208(a)(2)(D), authority to apply for asylum under Section 208(a)(1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied. 8 C.F.R. § 1208.4(a)(3) provides that an asylum application has not been denied unless denied by an IJ or the BIA.

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

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

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

(a) Particular social group.

i) "Persecution on account of membership in a particular social group" refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic, i.e. a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified by Matter of Mogharrabi, 19 I&N Dec. 439

(BIA 1987).

ii) The existence of shared descriptive characteristics is not necessarily sufficient to qualify those possessing the common characteristics as members of a "particular social group" for the purposes of the refugee definition at Section 101(a)(42)(A) of the Act; rather, in construing the term in keeping with the other four statutory grounds, a number of factors are considered in deciding whether a grouping should be recognized as a basis for asylum, including how members of the grouping are perceived by the potential persecutor, by the asylum applicant, and by other members of the society. Matter of R-A-, 22 I&N Dec. 906 (BIA 1999), remanded, 23 I&N Dec. 964(AG 2005). An applicant making a "particular social group" claim must make a showing from which it is reasonable to conclude that the persecutor was motivated to harm the applicant, at least in part, by the asserted group membership. Id. The social visibility of the members of a claimed social group is an important consideration in determining whether a person qualifies as a refugee. Matter of C-A-, 23 I&N Dec. 951 (BIA 2006). See also Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007).

iii) The Ninth Circuit takes a more expansive view of what constitutes a particular social group, defining it as one united by a voluntary association, including a former association or 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 (9th Cir. 2000).

(b) Political opinion.

i) In order for an alien to show persecution on account of "political opinion," it is not sufficient to show that a persecutor's conduct furthers his goal in a political controversy; rather, the alien must show that it is his own, individual political opinion that a persecutor seeks to overcome by the infliction of harm or suffering. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

(c) Mixed motive cases. An applicant does not need to establish the exact motivation of a persecutor where different reasons for actions are possible. Matter of Fuentes, 19 I. & N. Dec. 658, 662 (BIA 1988). The applicant must present evidence which establishes that the persecutor's action was motivated, at least in part, by one of the protected grounds. Borja v. INS, 175 F.3d 732 (9th Cir. 1999).

i) REAL ID Act of 2005. The REAL ID Act arguably preserves the "mixed motive" cases as it requires that the applicant establish that one of the protected grounds was or will be at least one central reason for persecuting the applicant. INA § 208(b)(1)(B)(i) (as amended by the REAL ID Act of 2005 and applicable to only to applications for asylum made on or after May 11, 2005). In its first precedent decision on the subject, the BIA held that, in mixed motive asylum cases under the REAL ID Act, the applicant must prove that race, religion, nationality, membership in a social group, or political opinion was or will be at least one central reason for the claimed persecution. Matters of J-B-N- and S-M-, 24 I&N Dec. 208 (BIA 2007).

(2) Exceptions - Section 208(b)(2). Section 208(b)(1), relating to the AG's authority to grant asylum, shall not apply to an alien if the AG determines that:

(a) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

i) The participation or assistance of an alien in persecution need not be of his own volition to bar him from the relief of withholding of deportation or asylum. Fedorenko v. U.S., 449 U.S. 490 (1981).

ii) While membership in an organization, even one which engages in persecution, is not sufficient to bar an alien from withholding of deportation and asylum, if an alien's action or inaction furthers persecution in some way, he would be ineligible for relief. It is the objective effect of an alien's actions, not his motivation and intent, which controls in determining whether he "assisted" in persecution; Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985); Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988); Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984).

iii) In an unpublished, but indexed, decision, the BIA held, "To conclude that a person in a leadership position engaged in conduct that assisted in the persecution of others merely through the power of speech, we would require some volitional action on the part of the alien which resulted in the persecution of another as that term is defined in our law. This volitional action could be speech, or possibly silence in the right situation. Moreover, there must be a clear and

recognizable nexus between the action of the alien and the persecution suffered by the victim."

iv) A finding of persecution requires some degree of intent on the part of the persecutor to produce harm that the applicant fears in order that the persecutor may overcome a belief or characteristic of the applicant. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). Thus, engaging in military actions, attacking garrisons, burning of cars, and the destruction of other property by participants in a civil war is not persecution unless it can be established that there is some degree of intent to produce harm in order to overcome a belief or characteristic of the victim of these actions. Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988).

(b) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the U.S.;

i) An alien convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime. INA § 208(b)(2)(B)(i).

(c) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the U.S. prior to the arrival of the alien in the U.S.;

(d) there are reasonable grounds for regarding the alien as a danger to the security of the U.S.;

(e) the alien is described in Section 212(a)(3)(B)(i)(I),(II), (III) or (IV) or Section

237(a)(4)(B)(relating to terrorist activity), unless, in the case only of an alien inadmissible under Section 212(a)(3)(B)(i)(IV), the AG determines, in the AG's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the U.S. (see Matter of S-K-, 23 I&N Dec. 936 (BIA 2006)); or

(f) the alien was firmly resettled in another country prior to arriving in the U.S.

i) 8 C.F.R. § 1208.15 provides that an alien is considered to be firmly resettled if, prior to arrival in the U.S., he or she entered into another nation, with or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes that his entry into that nation was a necessary consequence of his flight from persecution, that he remained in the country only as long as was necessary to arrange onward travel, and that he did not establish significant ties in that nation; or that the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he was not in fact resettled. In making the determination, the Asylum Officer (AO) or IJ shall consider the conditions under which other residents of the country live, the type of housing made available to the refugee, whether permanent or temporary, 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 including a right of entry or reentry, education, public relief, or naturalization, ordinarily available to other residents in the country.

ii) The BIA held that North Koreans who have become citizens of South Korea can permissibly be precluded on firm resettlement grounds from asylum, despite the North Korean Human Rights Act of 2004, which provides that North Koreans cannot be barred from asylum on account of any legal right to citizenship in South Korea. Matters of K-R-Y- and K-C-S-, 24 I& Dec. 133 (BIA 2007).

(3) The AG may designate by regulation offenses that will be considered to be either a particularly serious crime or a serious nonpolitical crime. INA § 208(b)(2)(B)(ii).

(4) The AG may by regulation establish additional limitations and conditions under which an alien shall be ineligible for asylum under Section 208(b)(i).

4. Asylum procedure. The AG shall establish a procedure for the consideration of asylum applications filed under Section 208. INA § 208(d)(1).

a. At the time of filing an application for asylum, the AG shall advise the alien of the privilege of being represented by counsel and of the consequences of knowingly filing a frivolous application for asylum and provide the alien a list of persons who have indicated their availability to represent the aliens in asylum proceedings on a pro bono basis. INA § 208(d)(4).

b. If the AG determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under Section 208(d)(4)(A) of the consequences of knowingly filing a frivolous application for asylum, the alien shall be permanently ineligible for any benefits under the Act, effective as of the date of a final determination of such application. INA § 208(d)(6).

(1) 8 C.F.R. § 1208.20 provides that, for applications filed on or after April 1, 1997, an applicant is subject to the consequences set forth in Section 208(d)(6) only if a final

order by an IJ or the BIA specifically finds that the alien knowingly filed a frivolous asylum application.

(2) Definition of "frivolous." For purposes of 8 C.F.R. § 1208.20 and Section 208(d)(6) of the Act, an asylum application is frivolous if any material elements is deliberately fabricated. Such finding shall only be made if the IJ or BIA is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. 8 C.F.R. § 1208.20.

(3) A finding that an alien filed a frivolous asylum application does not preclude the alien from seeking withholding of removal. 8 C.F.R. § 1208.20.

(4) The BIA has held that, when making a finding of frivolousness, an IJ must: (1) address the question of frivolousness separately and make specific findings that the applicant deliberately fabricated material elements of the asylum claim; (2) give the applicant sufficient opportunity to account for discrepancies or implausible aspects of the claim; and (3) provide cogent and convincing reasons for determining that a preponderance of the evidence supports a frivolousness finding, taking into account any explanations by the applicant for discrepancies or implausible aspects of the claim. Matter of Y-L-, 24 I&N Dec. 151 (BIA 2007).

(5) In an unpublished decision, the BIA held that the provision involving the sufficient opportunity to account for any discrepancies or implausible aspects of the claim is meant to ensure that an asylum applicant has had the opportunity to explain any discrepancies or implausibilities before an IJ uses them as a basis for determining that a material element of the asylum application has been fabricated. It is not intended to allow an asylum applicant who has admittedly fabricated a material element of his claim to avoid a finding that he has filed a frivolous application by recanting his false statements after being presented with incontrovertible evidence of their falsity.

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

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

(1) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the AG and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the U.S., or ineligible to apply for or be granted asylum;

(2) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(3) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date the application is filed;

(4) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an IJ under Section 240, whichever is later; and

(5) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, the

application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(6) Section 208(d)(5)(B) states that the AG may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with the Act.

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

a. For applications made on or after May 11, 2005, the REAL ID Act of 2005 states that the testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met his or her burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonable obtain the evidence. INA § 208(b)(1)(B)(ii) (as amended by the REAL ID Act of 2005).

(1) The provisions regarding credibility determinations enacted in section 101(a)(3) of the REAL ID Act of 2005 (codified at INA § 208(b)(1)(B)(iii)) only apply to applications for asylum, withholding, and other relief from removal that were initially filed on or after May 11, 2005, whether with an asylum officer or an IJ. Matter of S-B-, 24 I&N Dec. 42 (BIA 2006). Where an alien filed his applications for relief prior to May 11, 2005, but renewed his applications in removal proceedings before an IJ subsequent to that date, the provisions of 208(b)(1)(B)(iii) are not applicable to credibility determinations made in adjudicating his applications. Id.

b. The Lautenberg Amendment sets forth a reduced burden of proof

for certain categories of aliens, including Evangelical Christians from the former Soviet republics, who are seeking refugee status. In Yakimchuck v. INS, (7th Cir., Aug. 6, 1999) (unpublished) (A73 219 477), the court agreed with the Immigration Judge and the Board that the respondent, in seeking asylum, cannot avail himself of the lower burden of proof established by the Lautenberg Amendment. However, the Board could properly consider the legislative history of the Amendment, which may suggest that Evangelical Christians are persecuted as a group in Ukraine. The case was remanded to allow the Immigration Judge and Board to determine if the Amendment is of probative value, and if so, whether the respondent has a well-founded fear of persecution.

6. Past persecution. 8 C.F.R. § 1208.13(b)(1) provides that an applicant shall be found to be a refugee on the basis of past persecution if he can establish that he has suffered persecution in the past in his country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion, and that he is unable or unwilling to return to or avail himself of the protection of that country owing to such persecution.

   a. The Board has held that, when evaluating an asylum application, the IJ must make a specific finding on whether the applicant has suffered past persecution based on a statutorily enumerated ground and then apply the regulatory framework at 8 C.F.R. § 1208.13(b)(1). If past persecution is established, then the burden shifts to the DHS to prove by a preponderance of the evidence that there are changed country conditions, or that the applicant could avoid future persecution by relocating, and that relocation is reasonable under the circumstances. Matter of D-I-M-, 24 I&N Dec. 448 (BIA 2008).

   b. 8 C.F.R. § 1208.13(b)(1)(i) provides that if it is determined that the applicant has established past persecution, he or she shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return.

      (1) Under 8 C.F.R. § 1208.13(b)(1)(i), where an asylum applicant has shown that he has been persecuted in the past

on account of a statutorily-protected ground, and the record reflects that country conditions have changed to such an extent that the asylum applicant no longer has a well-founded fear of persecution from his original persecutors, the applicant bears the burden of demonstrating that he has a well-founded fear of persecution from any new source. Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998).

c. 8 C.F.R. § 1208.13(b)(1)(iii) provides that an application for asylum shall be denied if the applicant establishes past persecution but it is also determined that he does not have a well-founded fear of future persecution, unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his country of nationality or last habitual residence arising out of the severity of the past persecution. If the applicant demonstrates such compelling reasons, he may be granted asylum unless such a grant is barred by 8 C.F.R. § 1208.13(c).

(1) An alien who has demonstrated past persecution is not separately required by 8 C.F.R. § 1208.13(b)(1)(ii) to demonstrate compelling reasons for being unwilling to return to his or her country of nationality or habitual residence in order to be granted asylum. Rather, he or she is considered to have established eligibility for asylum both on account of the past persecution which has been demonstrated and the well-founded fear of future persecution which is presumed. The need to demonstrate compelling reasons for being unwilling to return resulting from the severity of the past persecution suffered by the applicant only arises if the presumption of a well-founded fear of future persecution is successfully rebutted. Matter of H-, 21 I&N Dec. 337 (BIA 1996). To overcome the regulatory presumption, the record must reflect, by a preponderance of the evidence, that since the time the persecution occurred, conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return to that country. As a practical matter, it will be the Service's burden to rebut the presumption, whether by adducing additional evidence or resting upon evidence already in the record. Id.

(2) An asylum applicant who no longer has a well-founded fear of persecution due to changed country conditions may still be eligible for a discretionary grant of asylum under 8 C.F.R. § 1208.13(b)(1)(iii) only if he establishes, as a threshold matter, compelling reasons for being unwilling to return to his country of nationality or last habitual residence arising out of the severity of the past persecution. Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998); Matter of H-, 21 I&N Dec. 337 (BIA 1996). Central to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to the country where he or she was persecuted in the past. Matter of H-, supra. BIA caselaw also recognizes that general humanitarian reasons, independent of the circumstances that led to the applicant's refugee status, such as age, health, or family ties should also be considered in the exercise of discretion. Matter of Pula, 19 I&N Dec. 467 (BIA 1987), superseded by statute on other grounds as recognized by Andriasian v. INS, 180 F.3d 1033 (9th Cir. 1999). Although the totality of circumstances and actions of an alien in his or her flight from the country where persecution was suffered to the United States are to be considered, the danger of persecution should generally outweigh all but the most egregious of adverse factors. Matter of Pula, supra; Matter of H-, supra.

(a) In Matter of Chen, 20 I&N Dec. 16 (BIA 1989), the asylum applicant's suffering began when he was 8 years old and continued until his adulthood. He endured physical, psychological, and social harm. He was permanently physically and emotionally scarred. Therefore, he was granted asylum.

(b) In Matter of B-, 21 I&N Dec. 66 (BIA 1995), the BIA found that where the applicant had suffered 3 months detention in KHAD facilities, 10 months detention in prison, and 4 months involuntary military service, in addition to suffering sleep deprivation, beatings, electric shocks, and the routine use of physical torture and psychological abuse, the persecution was so severe that his asylum application should be granted notwithstanding the

change of circumstances in Afghanistan.

(c) In Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998), the BIA acknowledged the traumatic sequence of events that the applicant witnessed and experienced from his month-long detention and beatings and from the disappearance and likely death of his father. However, given the degree of harm suffered by the applicant, the length of time over which the harm was inflicted, and the lack of evidence of severe psychological trauma stemming from the harm, the Board concluded that the applicant had not shown compelling reasons arising out of the severity of the past persecution for being unable or unwilling to return to Afghanistan.

(d) It is appropriate to consider in the exercise of discretion whether an applicant, who is eligible for asylum based on a well-founded fear of persecution, has the ability and can reasonably be expected to relocate in his or her home country. Matter of R-, 20 I&N Dec. 621 (BIA 1992). Where the well-founded fear is of a nongovernmental authority, the question arises as to whether that authority has the ability to persecute the applicant throughout the home country and whether the applicant would have to pass through any unsafe part of the country. If the Service contends that an applicant would not face persecution throughout the entire country, the Service should clarify how it accomplishes the deportation of such individuals to a protected area. Matter of H-, 21 I&N Dec. 337, 249 n.7 (BIA 1996).

(e) In an unpublished, but indexed, decision the BIA agreed with the decision of an IJ who had found that the respondent, a member of a labor union at a government-owned company who was harassed and beaten by police, had suffered past persecution on the basis of his membership in a particular social group. The IJ noted that there was no evidence before him that conditions in Honduras had changed

so that the respondent might not suffer the same problems which precipitated his departure from Honduras. The IJ then indicated that the respondent's claim failed because he could not show a reasonable possibility that the persecution will occur again unless he involves himself with a union in a company which is antagonistic to unions. The IJ noted that the respondent specifically indicated in his testimony that he is not likely to renew unionizing activities. Therefore, the IJ concluded there was no reasonable possibility of persecution in the future, and so asylum was denied. The IJ concluded that the respondent did not qualify as a refugee under the Act and so did not consider the application in the exercise of discretion.

7. Discretion. Statutory and regulatory eligibility for asylum, whether based on past persecution or a well-founded fear of future persecution, does not necessarily compel a grant of asylum. An applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted. Matter of Pula, 19 I&N Dec. 467 (BIA 1987), superseded by statute on other grounds as recognized by Andriasian v. INS, 180 F.3d 1033 (9th Cir. 1999); Matter of Shirdel, 19 I&N Dec. 33 (BIA 1984). Factors which fall short of the grounds for mandatory denial may constitute discretionary considerations. In exercising discretion, the BIA has considered it appropriate to examine the totality of the circumstances and actions of an alien in his or her flight from the country where persecution is feared. Matter of Pula, supra.

a. Aliens who have committed violent or dangerous crimes will not be granted asylum, even if they are technically eligible for such relief, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of relief would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient. Matter of Jean, 23 I&N Dec. 373 (A.G. 2002).

b. When an IJ denies asylum solely in the exercise of discretion and then grants withholding of removal, 8 C.F.R. § 1208.16(e) requires

the IJ to reconsider the denial of asylum to take into account factors relevant to family unification. Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007).

8. Termination of asylum. Section 208(c)(2) provides that asylum granted under Section 208(b) does not convey a right to remain permanently in the U.S. and may be terminated if the AG determines that:

   a. The alien no longer meets the conditions described in Section 208(b)(1), i.e. being a refugee, owing to a fundamental change in circumstances;

   b. the alien meets a condition described in Section 208(b)(2), i.e. particularly serious crime, etc.;

   c. the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

   d. the alien has voluntarily availed himself of the protection of the alien's country of nationality or last habitual residence by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

   e. the alien has acquired a new nationality and enjoys the protection of the country of his new nationality.

   f. However, if the alien is eligible to adjust status under Section 209 of the Act, the IJ may adjust the respondent's status rather than terminating his asylee status. Matter of K-A-, 23 I&N Dec. 661 (BIA 2004).

9. Adjustment of status by refugees or aliens granted asylum.

a. Aliens admitted as refugees.

(1) Section 209(a)(1) of the Act provides that any alien who has been admitted to the U.S. under Section 207 of the Act (i.e. as a refugee) shall, at the end of a 1 year period, return or be returned to the custody of INS for inspection and examination for admission to the U.S. as an immigrant provided:

(a) The alien's admission has not been terminated by the AG [INA § 209(a)(1)(A)];

(b) The alien has been physically present in the U.S. for at least 1 year [INA § 209(a)(1)(B)];

(c) The alien has not acquired permanent resident status [INA § 209(a)(1)(C)].

(2) Any alien who is found upon inspection and examination by an immigration officer or an IJ to be admissible as an immigrant shall be regarded as a LPR as of the date of the alien's arrival in the U.S. notwithstanding any numerical limitation in the Act. INA § 209(a)(2).

(3) Aliens found inadmissible may apply for a waiver of inadmissibility under Section 209(c) of the Act discussed below.

b. Aliens granted asylum.

(1) Section 209(b) of the Act provides that not more than 10,000 refugee admissions under Section 207(a) per fiscal year may be made available by the AG to adjust to LPR status any asylee who:

(a) Applies for such adjustment,

(b) Has been physically present in the U.S. for at least one year after being granted asylum,

(c) Continues to be a refugee as defined in Section 101(a)(42)(A) of the Act or the spouse or child of such a refugee,

(d) Is not firmly resettled in any foreign country, and

(e) Is admissible as an immigrant.

i) Aliens found inadmissible may apply for a waiver of inadmissibility under Section 209(c) of the Act discussed below.

(2) If the application is granted, the AG shall establish a record of the alien's admission as a LPR as of the date 1 year before the approval of the application.

c. Aliens found to be inadmissible.

(1) Section 209(c) of the Act provides that in determining an alien's admissibility under both Section 209(a)(1) and Section 209(b), the following grounds of inadmissibility shall not apply:

(a) Section 212(a)(4) - an alien likely to become a public charge.

(b) Section 212(a)(5) - an alien not in possession of a labor certification.

(c) Section 212(a)(7)(A) - an immigrant not in possession of a valid unexpired immigrant visa or other entry document or not in possession of a valid unexpired passport or other travel document or

whose visa has been issued without compliance with Section 203 of the Act.

(2) Except for those provisions of Section 212(a) listed below, Section 209(c) allows the AG to waive any other provisions of Section 212(a) for the following reasons:

(a) For humanitarian reasons,

(b) To assure family unity, or

(c) When it is otherwise in the public interest.

(3) However, Section 209(c) provides that the following grounds of Section 212(a) may NOT be waived:

(a) 212(a)(2)(C) - an alien who the consular or immigration officer knows or has reason to believe is an illicit trafficker in controlled substances;

(b) 212(a)(3)(A) - an alien who a consular officer or the AG knows or has reasonable ground to believe seeks to enter the U.S. to violate any law of the U.S. relating to espionage or sabotage or to violate any law prohibiting the export of goods, technology, or sensitive information, or to engage in any activity to overthrow the Government of the U.S., or any other unlawful activity;

(c) 212(a)(3)(B) - an alien who has engaged or is likely to engage in terrorist activity;

(d) 212(a)(3)(C) - an alien whose entry or proposed activity in the U.S. would adversely affect foreign policy;

(e) 212(a)(3)(E) - an alien who participated in

persecution by the Nazi government of Germany or its allies.

d. Exercise of discretion. In evaluating the propriety of granting an otherwise inadmissible alien a discretionary waiver under Section 209(c) of the Act, any humanitarian, family unity preservation, or public interest considerations must be balanced against the seriousness of the criminal offense that rendered the alien inadmissible. Matter of Jean, 23 I&N Dec. 373 (A.G. 2002).

(1) Aliens who have committed violent or dangerous crimes will not be granted a discretionary waiver under Section 209(c) of the Act except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient. Matter of Jean, 23 I&N Dec. 373 (A.G. 2002).

(2) In an unpublished decision, the BIA held that an application for adjustment of status made by an asylee under Section 209 of the Act is to be filed with an IJ only if deportation or exclusion proceedings are pending against the alien at the time of such filing. 8 C.F.R. § 1209.2(c) does not require that once proceedings have been initiated, and asylum granted, any future application for adjustment must be filed with the IJ if those proceedings have long since been concluded or terminated. The Board held that the proper procedure where there are no proceedings pending at the time of application is to file the application with the DD having jurisdiction over the place of the alien's residence, as provided in 8 C.F.R. § 1209.2.

H. Withholding of removal - Section 241(b)(3).

1. Section 241(b)(3)(A) provides that the AG may not remove an alien to a country if the AG decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality,

membership in a particular social group, or political opinion.

a. The BIA held in Matter of I-S- & C-S-, that before an IJ can issue a decision granting withholding of removal, without a grant of asylum, he or she must first enter an explicit removal order. Matter of I-S & C-S-, 24 I&N Dec. 432 (BIA 2008).

2. Exceptions. Section 241(b)(3)(B) provides that Section 241(b)(3)(A) does not apply to an alien deportable under Section 237(a)(4)(D) [assisted in Nazi persecution or engaged in genocide] or if the AG decides that:

a. the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

b. the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the U.S.;

(1) An alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. INA § 241(b)(3)(B).

(2) This shall not preclude the AG from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. INA § 241(b)(3)(B).

(3) The Seventh Circuit ruled that, to qualify as a particularly serious crime under Section 241(b)(3)(B)(ii), an offense need not be an aggravated felony under Section 101(a)(43). Ali v. Achim, 468 F.3d 462 (7th Cir. 2006).

(4) The Third Circuit ruled that, to qualify as a particularly serious crime under Section 241(b)(3)(B)(ii), an offense must be an aggravated felony under Section 101(a)(43). Alaka v. Att'y Gen., 456 F.3d 88 (3d Cir. 2006).

(5) The BIA ruled that, to qualify as a particularly serious crime under Section 241(b)(3)(B)(ii), an offense need not be aggravated felony under Section 101(a)(43). This holding accords with Ali v. Achim, *supra* (7th Cir. 2006), but contradicts Alaka v. Att'y Gen., *supra* (3d Cir. 2006). The BIA further ruled that, if the elements of an offense "potentially bring it within the ambit of" a particularly serious crime, all reliable information may be considered in determining whether the offense is a particularly serious crime, including the conviction records, sentencing information, and other information outside the record of conviction. Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007).

c. there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the U.S. prior to the arrival of the alien in the U.S.; or

d. there are reasonable grounds for regarding the alien as a danger to the security of the U.S.

(1) An alien described in Section 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding the alien as a danger to the security of the U.S. INA § 241(b)(3)(B).

3. The burden of proof is on the applicant for withholding of removal to establish that his or her life or freedom would be threatened in the proposed country of removal on account of one of the five reasons set forth above. 8 C.F.R. § 1208.16(b). That regulation also provides that the testimony of the applicant, if credible, may be sufficient proof without corroboration.

a. For applications made on or after May 11, 2005, the REAL ID Act of 2005 provides that in determining whether an alien has demonstrated that the alien's life or freedom would be threatened on account of one of the five enumerated grounds, the trier of fact shall determine whether the alien has sustained his or her burden of proof and shall make credibility determinations in the manner

described in Section 208(b)(1)(B)(ii) and (iii) (as amended by the REAL ID Act of 2005). See discussion of burden of proof for asylum, supra.

4. The applicant's life or freedom shall be found to be threatened if it is more likely than not that he or she would be persecuted. 8 C.F.R. § 1208.16(b)(1).

5. Past persecution. If the applicant is determined to have suffered persecution in the past such that his or her life or freedom was threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that his or her life or freedom would be threatened on return to that country unless a preponderance of the evidence establishes that conditions in that country have changed to such an extent that it is no longer more likely than not that the applicant would be so persecuted. 8 C.F.R. § 1208.16(b)(1)(i). If the applicant's fear is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm. 8 C.F.R. § 1208.16(b)(1)(iii).

6. 8 C.F.R. § 1208.16(b)(2) provides that in evaluating whether the applicant has sustained the burden of proving that his or her life or freedom would be threatened in that country on account of race, religion, nationality, membership in a particular social group, or political opinion, the AO or IJ shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if the applicant establishes that there is a pattern or practice in the country of proposed removal of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion and the applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her freedom would be threatened upon return.

I. Case law common to both asylum and withholding of removal.

1. Reasonable grounds for regarding the alien as a danger to the security of the U.S.

a. The "reasonable ground to believe" standard is akin to the "probable cause" standard. A "reasonable belief" may be formed if the evidence "is sufficient to justify a reasonable person in the belief that the alien falls within the proscribed category." Matter of U-H-, 23 I&N Dec. 355 (BIA 2002).

b. The addition of Section 236A to the Act by Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 ("USA Patriot Act"), which provides for the certification of certain aliens as terrorists by the AG, does not change the standard employed to determine whether there is reasonable ground to believe that an alien is engaged in, or is likely to engage in, terrorist activity under Section 212(a)(3)(B)(i)(II) of the Act, or whether there is reasonable ground to believe that he or she is a danger to the security of the U.S. under Section 241(b)(3)(B)(iv) of the Act. The addition of Section 236A to the Act merely adds certification as another means to address detention of suspected terrorist aliens. It does not indicate that Congress wanted to change the standard of proof or make it easier for terrorists to apply for asylum or withholding of removal. Matter of U-H-, 23 I&N Dec. 355 (BIA 2002).

2. Particularly serious crimes.

a. HISTORY LESSON - The text of the current withholding of removal provision is based on the U.S.'s accession to the 1967 Protocol Relating to the Status of Refugees, applying Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees, adopted July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954) ("Convention"), to all refugees, without regard to geographic or other limitations contained in the Convention as to events occurring before 1951. Protocol, supra, Art. 1, para. 1; see also INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the . . . Protocol . . . ."). Article 33 of the Convention provides that "[n]o 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," but that this protection "may not, however, be claimed

by a refugee . . . who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. Convention, supra, Art. 33. The Board of Immigration Appeals originally addressed the question of what would be a "particularly serious crime" in Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified by Matter of C-, 20 I&N Dec. 529 (BIA 1992) and superseded by statute as recognized by Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996). In Matter of Frentescu, the Board held that "[i]n judging the seriousness of a crime, we look to 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." Id. at 247. The Board stated that crimes against persons are more likely to be categorized as particularly serious, but that there may be instances where crimes (or a crime) against property will be considered to be particularly serious. Id. Subsequently, in 1990, Congress stated categorically that all aggravated felonies constitute particularly serious crimes, rendering any alien convicted of an aggravated felony ineligible for withholding of deportation. See former INA § 243(h); see also Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996). Congress' declaration of this per se equation eliminated the basis for conducting an individual analysis of the underlying facts and circumstances of the crime in any case where the conviction was for an aggravated felony. See Matter of Frentescu, supra; see also Matter of U-M-, 20 I&N Dec. 327 (BIA 1991), aff'd, Urbina-Mauricio v. INS, 989 F.2d 1085 (9th Cir. 1993), modified by, Matter of C-, 20 I&N Dec. 529 (BIA 1992. On April 24, 1996, Congress enacted Section 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1269 ("AEDPA"), which expressly amended Section 243(h) of the Act to provide the AG discretionary authority to override the categorical bar that designated every aggravated felony a particularly serious crime, if the AG determined it necessary to do so in order to comply with our nonrefoulement obligation under the Protocol. Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996). Soon thereafter, on September 30, 1996, Congress enacted Section 305(a) of the IIRIRA, which again amended former Section 243(h) of the Act and recodified it as Section 241(b)(3) of the Act, effective on or after April 1, 1997. In construing the amendment of former Section 243(h) in the context of a deportation case, the Board had reasoned that Section 413(f) of the AEDPA was best read as introducing a narrow discretionary exemption from the

surviving exception, which precluded withholding of deportation under Section 243(h)(2)(B) of the Act. See Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996). The Board concluded that a presumption that the existing statutory bar was in compliance with the Protocol was necessary and appropriate because Congress did not revoke the categorical bar to withholding that had been imposed in 1990. At that time, taking guidance from the new standard set by Congress in Section 305(a) of the IIRIRA, applicable to proceedings initiated after April 1, 1997, the Board interpreted Section 413(f) of the AEDPA as creating a "rebuttable presumption" that an alien convicted of an aggravated felony for which a sentence of less than 5 years was imposed has been convicted of a particularly serious crime. Consequently, the Board held that in assessing eligibility for withholding of deportation, it must be ascertained "whether there is any unusual aspect of the alien's particular aggravated felony conviction that convincingly evidences that his or her crime cannot rationally be deemed 'particularly serious'" in light of United States treaty obligations under the Protocol. Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996); see also Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997). Congress' most recent revision of the "particularly serious crime" clause, in the IIRIRA, accomplished what Section 413(f) of the AEDPA had not: it eliminated the categorical exception to withholding of removal for every alien convicted of an aggravated felony. Conviction of an aggravated felony no longer renders every such conviction a "particularly serious crime" per se, and the basis on which the BIA previously established a rebuttable presumption in Matter of Q-T-M-T-, 21 I&N Dec. 639 (BIA 1996) no longer exists.

b. Asylum. Section 208 (b)(2)(A)(ii) of the Act provides that asylum is not available to an alien who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community. Section 208(b)(2)(B)(i) of the Act provides that an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

c. Withholding. Section 241(b)(3)(B)(ii) of the Act provides that the relief of withholding of removal is unavailable to an alien who, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States. Section 241(b)(3)(B) also provides that an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been

sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime. The statute goes on to state that the "previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime."

(1) Under Section 241(b)(3)(B) of the Act, a determination of whether an aggravated felony conviction constitutes a "particularly serious crime" per se is based on the length of sentence imposed, rather than on the category or type of aggravated felony conviction that resulted in the conviction. Matter of S-S-, 22 I&N Dec. 458 (BIA 1999), distinguishing Matter of Gonzalez, 19 I&N Dec. 692 (BIA 1988).

(2) Under Section 241(b)(3)(B) of the Act, there no longer exists a rebuttable presumption that an alien convicted of an aggravated felony for which a sentence of less than 5 years was imposed has been convicted of a "particularly serious crime" rendering the alien ineligible for withholding of deportation. Matter of S-S-, 22 I&N Dec. 458 (BIA 1999). Instead, the statutory language now in effect declares that an alien who has been convicted of an aggravated felony and is sentenced to at least 5 years imprisonment has been convicted of a particularly serious crime, but expressly affords the Attorney General discretion to exercise judgment as to whether the conviction is for a particularly serious crime when an alien has been sentenced to less than 5 years for the very same offense. In extending this authority to the Attorney General, Congress used permissive language, stating that its conclusion that an alien sentenced to at least 5 years had committed a particularly serious crime "shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." Congress neither imposed any presumption that an aggravated felony carrying a sentence of fewer than 5 years is a particularly serious crime, nor called for any blanket exercise of the Attorney General's authority to determine the applicability of Section 241(b)(3)(B)(ii) of the Act in such cases. See INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (addressing the proper construction of

Congress' use of different language in different sections of the same act); see also Matter of Fuentes-Campos, 21 I&N Dec. 905 (BIA 1997).

(3) Under Section 241(b)(3)(B)(ii) of the Act, a determination of whether an alien convicted of an aggravated felony and sentenced to less than 5 years imprisonment has been convicted of a "particularly serious crime," thus barring the alien from withholding of removal, requires an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction. Matter of S-S-, 22 I&N Dec. 458 (BIA 1999); Matter of L-S-, 22 I&N Dec. 645 (BIA 1999), both of which followed Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982).

(4) An alien who was convicted of first degree robbery of an occupied home while armed with a handgun and sentenced to 55 months imprisonment has been convicted of an aggravated felony under Section 101(a)(43)(F) of the Act, and, upon consideration of the nature of the conviction and the sentence imposed, as well as the underlying facts and circumstances of the conviction, has been convicted of a "particularly serious crime" rendering the alien ineligible for withholding of removal under Section 241(b)(3)(B)(ii) of the Act. Matter of S-S-, 22 I&N Dec. 458 (BIA 1999).

(5) An alien who was convicted of bringing an illegal alien into the U. S. in violation of Section 274(a)(2)(B)(iii) of the Act and sentenced to 3½ months imprisonment has, upon consideration of the nature of the conviction and the sentence imposed, as well as the underlying facts and circumstances of the conviction, not been convicted of a "particularly serious crime" and is eligible to apply for withholding of removal under Section 241(b)(3)(B)(ii) of the Act. Matter of L-S-, 22 I&N Dec. 645 (BIA 1999).

(6) The AG held that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute "particularly serious crimes" within the meaning of Section 241(b)(3)(B) of the Act and only under the most

extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible. Matter of Y-L-, A-G-, and R-S-R-, 23 I&N Dec. 270 (A.G. 2002), overruled in part on other grounds as stated in Rafiq v. Gonzales, 468 F.3d 165 (2d Cir. 2006).

(a) Those unusual circumstances would need to include, at a minimum:

i) a very small quantity of controlled substance;

ii) a very modest amount of money paid for the drugs in the offending transaction;

iii) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy;

iv) the absence of any violence or threat of violence implicit or otherwise, associated with the offense;

v) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and

vi) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

vii) Only if all of these criteria were demonstrated by an alien would it be appropriate to consider whether other, more unusual circumstances (e.g., the prospective distribution was solely for social purposes, rather than for profit) might justify departure from the default interpretation that drug

trafficking felonies are "particularly serious crimes." Finally, the AG stated, "I emphasize here that such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation."

3. Serious nonpolitical crime. A serious nonpolitical crime is one in which the common-law character of the crime outweighs the political aspect of the offense. INS v. Aguirre-Aguirre, 526 U.S. 415 (1999). To reach this determination, two specific inquiries must be asked: (1) whether there is a gross disproportion between means and ends, and (2) whether atrocious acts are involved. Id. Atrocious acts provide a clear indication that an alien's offense is a serious nonpolitical crime. However, the criminal element of an offense may outweigh its political aspect even if none of the acts are deemed atrocious. Crimes directed at an unprotected civilian population are "beyond the pale of a protectable political offense" in the context of eligibility for withholding of deportation. McMullen v. INS, 788 F.2d 591 (9th Cir. 1986), overruled on other grounds, Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005). However, acts of terrorism directed at military or official agencies of a state are distinguishable from random acts of violence intended "solely to bring about social chaos, with the eventual demise of the state intended only as an indirect result." Id.

a. Robbery is a serious nonpolitical crime. Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980).

b. Burglary and/or larceny is a serious nonpolitical crime; Matter of Ballester-Garcia. 17 I&N Dec. 592 (BIA 1980). The alien was not armed, but the crime involved a late night entry into a building, the alien stole a large sum of money, the crime was planned weeks in advance, and the alien received a 15 year sentence.

c. Serious non-political crimes under former Section 243(h)(2)(C) of the Act are not the equivalent of particularly serious crimes under former Section 243(h)(2)(B) of the Act. A serious non-political crime may be less serious than a particularly serious crime. See Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982).

d. A serious non-political crime may involve crimes against property as well as against persons; Matter of Ballester-Garcia, 17 I&N Dec. 592 (BIA 1980).

e. The BIA has also held that the seriousness of a crime for purposes of both former sections 243(h)(2)(B) and 243(h)(2)(C) does not vary from case to case dependent upon the degree of persecution to which the applicant may be subject. Matter of Rodriguez-Coto, 19 I&N Dec. 208 (BIA 1985).

f. It is not necessary to determine whether an applicant for withholding of deportation has been convicted of, or even has actually committed, a serious non-political crime. The statute provides that it is only necessary to find that there are serious reasons for considering that he has committed such a crime. Matter of Ballester-Garcia, 17 I&N Dec. 592 (BIA 1980).

4. What constitutes persecution?

a. Definition. The term "persecution" means harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

b. Criminal prosecution is not persecution unless it is politically motivated. Matter of Maccaud, 14 I&N Dec. 429 (BIA 1973).

(1) Where an asylum applicant violates currency laws which a government has a legitimate right to enforce, and he suffers harsh treatment as a result, the applicant must show that the government in question has punished him "on account of" his political opinion and not for violation of the currency laws. Matter of H-M-, 20 I&N Dec. 683 (BIA 1993).

c. The failure of a government to permit its citizens the same freedom of speech guaranteed in the U.S. does not constitute persecution. Matter of Surzycki, 13 I&N Dec. 261 (BIA 1969).

d. Generally harsh conditions shared by many others in a country and the harm arising out of civil strife do not amount to persecution within the meaning of the law. Matter of Sanchez and Escobar, 19 I&N Dec. 276 (BIA 1985); Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

e. A tax levied on all citizens of Peru who travel outside of that country is not persecution on account of race, religion, nationality, membership in a particular social group, or political opinion as contemplated by the Act. Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978).

f. Although kidnaping is a very serious offense, the seriousness of conduct is not dispositive in determining persecution, which does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997). While there may be a number of reasons for a kidnaping, an asylum applicant bears the burden of establishing that one motivation was to persecute him on account of an enumerated ground, and evidence that indicates that the perpetrators were motivated by the victim's wealth, in the absence of evidence to suggest other motivations, will not support a finding of persecution within the meaning of the Immigration and Nationality Act. Id.

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

(1) In unpublished decisions, the BIA has applied this rule of law to asylum applicants who fear retribution from government officials or private persons in the country of deportation about whom the applicant has provided information to U.S. or foreign law enforcement agencies. Although the applicant may be harmed by these persons, the BIA views these situations as arising from purely personal disputes, even if the applicant fears harm by

individuals of power and influence.

h. Nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution. Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007).

i. Military service.

(1) Governments have the right to require military service of their citizens and to enforce that right with reasonable penalties. It is not persecution for a country to require military service or to punish those who have deserted or who refuse to serve. Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Matter of Lee, 13 I&N Dec. 236 (BIA 1969); Matter of Liao, 11 I&N Dec. 113 (BIA 1965).

(2) Absent a showing that the government of a country enacted its conscription laws with the intent of persecuting members of a certain religion, or that the laws are carried out in a persecutory manner against persons with particular religious beliefs, an alien with religious objections to military service does not establish eligibility for asylum or withholding of deportation even though he may be prosecuted for a refusal to perform military service. Matter of Canas, 19 I&N Dec. 697 (BIA 1988), remanded 970 F.2d 599 (9th Cir. 1992).

j. Nongovernmental persecution.

(1) The BIA has recognized that there may be situations in which an alien could qualify for asylum and/or withholding of deportation even though persecution would not be by the government of a country to which the alien is returnable but rather by an organization or even an individual. In order to prevail with such a claim, however, there must be a showing that the government in power in that country is either unable or unwilling to protect the alien from the organization or individual. Matter of McMullen, 17 I&N Dec. 542, 548 (BIA 1980), rev'd on other grounds, 658

F.2d 1312 (9th Cir. 1981), on remand, Matter of McMullen, 19 I&N Dec. 90 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986), overruled in part on other grounds by Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005); Matter of Pierre, 15 I&N Dec. 461 (BIA 1975).

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

k. Civil war and guerrilla activity.

(1) The term "persecution" does not encompass the harm that arises out of civil or military strife. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

(2) The dangers faced by policemen as a result of that status alone because they are viewed as extensions of the government's military forces or because they are highly visible embodiments of the power of the state are not dangers faced on account of race, religion, nationality, membership in a particular social group, or political opinion. If it were held that a policeman or a guerrilla was a victim of "persecution" based solely on the fact of an attack by one against the other, then it would follow that the attacker had participated in an act of "persecution" that would bar him from relief under both sections 208 and 243(h). Such a broad interpretation of the concept of persecution on account of the 5 reasons in the Act would have the actual effect of greatly narrowing the group of persons eligible for asylum or withholding. Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988).

(3) Status as a former policeman is an immutable characteristic beyond the capacity of the applicant to change and mistreatment occurring because of such status could be found to be persecution on account of political opinion or membership in a particular social group. However,

although he does not bear the unreasonable burden of establishing the exact motivation of the persecutor where different reasons for actions are possible, he does have the burden of establishing facts on which a reasonable person would fear that the danger arises on account of his race, religion, nationality, membership in a particular social group, or political opinion. Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988).

(4) An alien who served as a soldier in the Guatemalan Army has not established a well-founded fear of persecution by the guerillas on account of one of the five grounds enumerated in Section 101(a)(42)(A) of the Act where he claims that his personal file from the army fell into the hands of the guerillas who sought to recruit him for his artillery expertise. Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997).

(5) An alien has failed to establish that he has a well-founded fear of country-wide persecution from the guerillas in Guatemala when he was able to live for more than one year in different areas within the country, including an area well known for its guerilla operations, without experiencing any problems from the guerillas. Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997).

(6) An alien's status as a young male subject to recruitment efforts from both sides in a civil war does not establish membership in a persecuted social group. Matter of Sanchez and Escobar, 19 I&N Dec. 276 (BIA 1985).

(7) It is not persecution for the government of a country to investigate and detain individuals suspected of aiding or of being members of a guerrilla organization. Matter of Maldonado-Cruz, 19 I&N Dec. 509 (BIA 1988), rev'd by Maldonado-Cruz v. INS, 885 F.2d 788 (9th Cir. 1989). A respondent has not established a well-founded fear of persecution by the Government of a country on account of political opinion due to his involvement with a guerrilla organization, where the Government of that country has the legitimate right to investigate the respondent regarding his

suspected activities on behalf of the guerrillas and to criminally prosecute and punish him under its laws for any activities found to be illegal, and there is no evidence that the respondent has received any threats from the Government on the grounds of political opinion, or otherwise. Matter of R-O-, 20 I&N Dec. 455 (BIA 1992).

(8) Forced recruitment or kidnaping of an individual by a guerrilla force does not constitute persecution if the guerrillas seek to make the person a member of their group rather than harm him because he possesses a characteristic they find offensive and wish to overcome. INS v. Elias-Zacarias, 502 U.S. 498 (1992).

(9) A guerrilla organization's attempt to coerce a person into joining does not necessarily constitute "persecution on account of political opinion." INS v. Elias-Zacarias, 502 U.S. 498 (1992); Matter of R-O-, 20 I&N Dec. 455 (BIA 1992). Even one who supports the political aims of a guerrilla movement might resist joining to perform military combat and thus become the object of such coercion. INS v. Elias-Zacarias, 502 U.S. 498 (1992). A victim of forced recruitment must show that he is being persecuted on account of his political opinion, and that his persecution is not solely the result of the guerrillas' aim in seeking to fill their ranks in order to carry out their war with the Government and pursue their political goal, their political motive being irrelevant. Matter of R-O-, 20 I&N Dec. 455 (BIA 1992).

(10) In order to satisfy the definition of a "refugee" in Section 101(a)(42) of the Act, the persecution must be on account of the victim's political opinion, not the persecutor's. Therefore, persecution on account of political opinion is not established by the fact that the coercing guerrillas had "political" motives." Matter of R-O-, 20 I&N Dec. 455 (BIA 1992).

(11) The threat of harm faced by a deserter from a guerrilla organization is a result of a military policy of the guerrilla group, inherent in the nature of the organization and a tool

of discipline. Therefore, the threat is neither an act of persecution nor evidence of persecution by the guerrilla organization on account of political opinion, or any other ground set forth in the Refugee Act of 1980. Matter of Maldonado-Cruz, 19 I&N Dec. 509 (BIA 1985), rev'd by Maldonado-Cruz v. INS, 885 F.2d 788 (9th Cir. 1989).

(12) It is a general rule that prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution. However, this rule does not apply to countries where a coup is the only means of effectuating political change. Matter of Izatula, 20 I&N Dec. 149 (BIA 1990).

l. Imputed political opinion.

(1) Although an applicant for asylum must demonstrate that harm has been or would be inflicted on account of one of the protected grounds specified in the "refugee" definition, persecution for "imputed" reasons can satisfy that definition. Matter of S-P-, 21 I&N Dec. 486 (BIA 1996).

(2) In mixed motive cases, an asylum applicant is not obligated to show conclusively why persecution occurred or may occur; however, in proving past persecution, the applicant must provide evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground. Matter of S-P-, 21 I&N Dec. 486 (BIA 1996).

(3) In situations involving general civil unrest, the motive for harm should be determined by considering the statements or actions of the perpetrators; abuse or punishment out of proportion to nonpolitical ends; treatment of others similarly situated; conformity to procedures for criminal prosecution or military law; the application of antiterrorism laws to suppress political opinion; and the subjection of political opponents to arbitrary arrest, detention, and abuse. Matter of S-P-, 21 I&N Dec. 486 (BIA 1996).

m. Clan membership/Family.

(1) Membership in a clan can constitute membership in a "particular social group." Matter of H-, 21 I&N Dec. 337 (BIA 1996). The Marehan subclan of Somalia, the members of which share ties of kinship and linguistic commonalities, is such a "particular social group." Id.

(2) While interclan violence may arise during the course of civil strife, such circumstances do not preclude the possibility that harm inflicted during the course of such strife may constitute persecution. Matter of H-, 21 I&N Dec. 337 (BIA 1996).

(3) Family may constitute a particular social group. Gebremichael v. INS, 10 F.3d 28 (1st Cir. 1993); Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993); Iliev v. INS, 127 F.3d 638 (7th Cir. 1997); Hamzehi v. INS, 64 F.3d 1240 (8th Cir. 1995); Thomas v. Gonzales, 409 F.3d 1177, (9th Cir. 2005), vacated on other grounds, 126 S.Ct. 1613 (2006).

n. Participation in the Mariel Boatlift, in and of itself, does not provide a basis for asylum or withholding of deportation. Matter of Barrerra, 19 I&N Dec. 837 (1988).

o. Coercive family planning or population control.

(1) HISTORY LESSON - In Matter of Chang, 20 I&N Dec. 38 (BIA 1989) superseded by statute, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, as recognized in Li v. Ashcroft, 312 F.3d 1094 (9th Cir. 2002), the BIA held that the "one couple, one child" policy of the Chinese government is not on its face persecutive and cannot support a claim of persecution even though it could result in involuntary sterilization because it is uniformly applied to the population as a whole. In order to overrule this decision, the AG enacted regulations which stated that aliens fleeing coercive family planning policies involving forced abortion or sterilization have a well-founded fear of persecution. The final asylum

regulations which became effective on October 1, 1990, inadvertently excluded this provision. Therefore, Matter of Chang was temporarily restored. On November 7, 1991, the INS General Counsel issued a memorandum to his subordinates instructing them that valid asylum requests based upon coercive family planning policies should not be opposed by INS trial attorneys. The memorandum was not binding on EOIR so INS trial attorneys were instructed to move to terminate any such cases in which an IJ denied asylum and invite the respondent to apply for asylum with INS. Then the BIA held that pending a decision by the AG on asylum and withholding claims premised on coercive family planning policies, it will continue to follow Matter of Chang as precedent in all proceedings involving the same issues. Matter of G-, 20 I&N Dec. 764 (BIA 1993). Finally, Section 601(a)(1) of the IIRIRA amended the definition of "refugee" at Section 101(a)(42) to bring about the present law on this subject.

(2) PRESENT LAW - Section 101(a)(42), as amended by Section 601(a) of IIRIRA, includes in the definition of "refugee" the following: "For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she 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."

(3) In Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996), the BIA held that since the amendment states that it applies not to asylum only, but to all "determinations under this Act," the amendment applies to determinations of eligibility for withholding of deportation as well as asylum.

(4) Section 601(b) of IIRIRA added Section 207(a)(5) to the Act. It reads: "For any fiscal year, not more than a total of

1,000 refugees may be admitted under this subsection or granted asylum under Section 208 pursuant to a determination under the third sentence of Section 101(a)(42) (relating to persecution for resistance to coercive population control methods). The BIA found that the INS, as the agency involved in all aspects of the asylum and overseas refugee system, is in the best position to monitor the usage of numbers under Section 207(a)(5) and to establish a reasonable interim system, in the absence of a regulation on the subject, for their allocation among the various potentially eligible individuals. Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996). Therefore, in such cases, asylum will be granted conditionally upon a determination by the INS that a number is available for such grant. Id. Withholding may be granted without condition. Id.

(5) The Attorney General has ruled that the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is not per se entitled to refugee status. A person who has not physically undergone a forced abortion or sterilization procedure may still qualify as a refugee based on a well-founded fear of persecution of being forced to undergo such a procedure, or on account of persecution or a well-founded fear of persecution for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, or on other grounds enumerated in the Immigration and Nationality Act. Matter of J-S-, 24 I&N Dec. 520 (A.G. 2008). The Attorney General's ruling reversed previous Board precedent, which held that an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion and qualifies as a refugee within the definition of Section 101(a)(42) of the Act. Matter of C-Y-Z-, 21 I&N Dec. 915 (BIA 1997), reversed on other grounds sub nom. Ke Zhen Zhao v. DOJ, 265 F.3d 83 (2d Cir. 2001). Such an alien must have been, in fact, opposed to the spouse's abortion or sterilization and legally married to the spouse at the time of sterilization. Matter of S-L-L-, 24 I&N Dec. 1 (BIA 2006). The regulatory presumption of a well-founded fear of future persecution may not be rebutted in the absence of changed country conditions, regardless of the fact that the sterilization of the alien's spouse negates the likelihood of sterilization to the alien. Matter of C-Y-Z,

supra.

(a) Prior to the Attorney General's decision, the Second Circuit, in Lin v. DOJ, 494 F.3d 296 (2d Cir. 2007), declined to follow Matter of C-Y-Z-. Rather, the court ruled that, when a woman undergoes a forced abortion or sterilization, her spouse (or other male partner) does not become a per se refugee on these grounds. Under Lin, for a spouse or other male partner of such an individual to be deemed a refugee on these grounds, he must demonstrate "other resistance" to the coercive population control program.

(6) Where an alien has established past persecution based on the forced sterilization of his spouse pursuant to a policy of coercive family planning, the fact that, owing to such sterilization, the alien and his spouse face no further threat of forced sterilization or abortion does not constitute a "fundamental change" in circumstances sufficient to meet the standards for a discretionary denial under 8 C.F.R. § 1208.13(b)(1)(i)(A), Matter of Y-T-L-, 23 I&N Dec. 601 (BIA 2003). Note, however, that, under the Attorney General's decision in Matter of J-S-, *supra*, an alien is no longer deemed to be a per se refugee based on his spouse's forced abortion or sterilization.

(7) Unmarried applicants claiming persecution related to a partner's coerced abortion or sterilization may qualify for asylum if they demonstrate that they have been persecuted for "other resistance to a coercive population control program" within the meaning of INA § 101(a)(42). Matter of S-L-L-, supra.

(8) An alien seeking to reopen removal proceedings based on a claim that the birth of a second child in the United States will result in the alien's forced sterilization in China cannot establish prima facie eligibility for relief where the evidence submitted with the motion and the relevant country conditions reports do not indicate that Chinese nationals returning to that country with foreign-born

children have been subjected to forced sterilization in the alien's home province. Matter of C-C-, 23 I&N Dec. 899 (BIA 2006) (distinguishing Guo v. Ashcroft, 386 F.3d 556 (3d Cir. 2004).

(9) An alien who has not previously been persecuted, but who has fathered or given birth to two or more children in China, qualifies as a refugee on this basis alone if he or she establishes that (1) the births violated family planning policies in the alien's locality, and (2) the current local family planning enforcement efforts would give rise to a well-founded fear of persecution because of the violation. Matter of J-H-S-, 24 I&N Dec. 196 (BIA 2007).

(10) In two cases involving Chinese citizens from Changle City, Fujian Province, both of whom had one child born in China and a second born in the U.S., the BIA rejected arguments that the respondents would be persecuted on account of their children born outside China. See Matter of J-W-S-, 24 I&N Dec. 185 (BIA 2007); Matter of S-Y-G-, 24 I&N Dec. 247 (BIA 2007).

(11) In a case involving an asylum application based on allegedly coercive abortions, the BIA held that: (1) an abortion is forced by threats of harm when a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution; and (2) nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution. Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007).

(12) In Matter of M-F-W- & L-G-, 24 I&N Dec. 633 (BIA 2008), the Board ruled as follows in a case where an IUD was forcibly inserted into the Chinese respondent and later removed, and a second IUD was subsequently inserted. First, the Board ruled that having an IUD inserted against one's will does not constitute being "forced to abort a pregnancy or to undergo involuntary sterilization" under

INA § 101(a)(42). Second, with regard to refugee status under INA § 101(a)(42) for having "been persecuted . . . for other resistance to a coercive population control program," the Board interpreted "other resistance" as including "both failures and refusals to comply with China's coercive population control practices, but not simple grudging compliance." The Board specified that qualifying resistance "would include resistance such as removing an IUD or failing to attend a mandatory gynecological appointment." Third, the Board held that "simply requiring a woman to use an IUD, and other more routine methods of China's implementation of its family planning policy, do not generally rise to the level of harm required to establish persecution." Rather, for the insertion of an IUD to constitute persecution, "the insertion . . . must involve aggravating circumstances." Fourth, the Board emphasized that, to qualify as a refugee under INA § 101(a)(42) due to the insertion of an IUD as persecution for "other resistance to a [CPC] program," the alien must show that the IUD was "inserted or reinserted *for* some resistance that the alien manifested." (Emphasis in original.) By contrast, if the IUD was reinserted "merely because reinsertion is a standard procedure in China," the "alien may be unable to meet her burden of establishing" refugee status.

p. Political situation in Sri Lanka.

(1) The Government of Sri Lanka does not persecute ethnic Sri Lankan Tamils on the basis of their ethnicity or "on account of" their championing of Tamil interests or political rights. Matter of T-, 20 I&N Dec. 571 (BIA 1992).

(2) Neither the relief of asylum or withholding of deportation provides for refuge "on account of" human rights abuses unconnected to the grounds enumerated in the Act. Matter of T-, 20 I&N Dec. 571 (BIA 1992).

(3) An ethnic Tamil alien from Sri Lanka who was forced to assist the Liberation Tigers of Tamil Eelam (LTTE), a separatist Tamil terrorist group, under threat of harm, did not establish that the LTTE was motivated to punish him

because of his political views or persecute him on account of any of the other grounds enumerated in the Act. Matter of T-, 20 I&N Dec. 571 (BIA 1992).

(4) In light of the historical context of the Sri Lankan civil war, an ethnic Tamil alien suspected of having ties to the terrorist group LTTE failed to demonstrate that the human rights abuses he suffered at the hands of the Sri Lankan security forces, Indian Peacekeeping Force, and allied Tamil organizations in reaction to LTTE terrorism amounted to persecution on account of any of the grounds enumerated in the Act. Matter of T-, 20 I&N Dec. 571 (BIA 1992).

q. Political situation in India.

(1) The fact that a Sikh from the state of Punjab in India was beaten and threatened by Sikh militants because he resisted their recruitment efforts did not establish persecution on account of political opinion or any of the other grounds enumerated in the Act. Matter of R-, 20 I&N Dec. 621 (BIA 1992). The BIA relied on INS v. Elias-Zacarias, 502 U.S. 498 (1992), for the proposition that persecution must be on account of the victim's political opinion, not the persecutor's.

(2) The mistreatment of a Sikh in Punjab by Indian police in the course of an investigation does not establish eligibility for asylum or withholding of deportation where the purpose of the mistreatment was to obtain information about Sikh militants who sought the violent overthrow of the Indian Government rather than to punish him because of his political opinion or merely because he was a Sikh. Matter of R-, 20 I&N Dec. 621 (BIA 1992).

(3) While a Sikh applicant for asylum may fear returning to the state of Punjab because of the mistreatment he experienced at the hands of the Indian police, he has not demonstrated country-wide persecution or mistreatment of Sikhs by the central government or other Indian groups, and therefore he has not established a well-founded fear of persecution in

India. Matter of R-, 20 I&N Dec. 621 (BIA 1992).

(4) Absent a threat of persecution on a country-wide basis in India and in light of the factual circumstances of his case, a Sikh applicant does not merit a grant of asylum in the exercise of discretion even if it were assumed that he suffered past persecution in Punjab. Matter of R-, 20 I&N Dec. 621 (BIA 1992).

r. Persecution on account of gender.

(1) Female Genital Mutilation (FGM)

(a) The practice of FGM, which results in permanent disfiguration and poses a risk of serious and potentially life-threatening complications, can be a basis for a claim of persecution. Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996). Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to FGM and who oppose the practice, are recognized as members of a "particular social group." Id.

(b) The Ninth Circuit held that the infliction of FGM gives rise to an unrebuttable well-founded fear of future persecution. The court reasoned that (1) forced sterilization gives rise to a well-founded fear of persecution; and (2) like forced sterilization, FGM is a "permanent and continuing" act. Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005).

(c) The BIA held that an alien may not establish eligibility for asylum or withholding of removal based solely on fear that his or her daughter will be forced to undergo female genital mutilation upon returning to the alien's home country. Matter of A-K-, 24 I&N Dec. 275 (BIA 2007).

(d) The BIA ruled that, because FGM is usually inflicted only once, a person who has undergone FGM generally cannot establish a well-founded fear of future persecution on this ground alone as the procedure itself constitutes a "fundamental change in circumstances" under 8 C.F.R. § 1208.13(b)(1)(i)(A). Matter of A-T-, 24 I&N Dec. 296 (BIA 2007). The BIA distinguished Matter of Y-T-L-, 23 I&N Dec. 601 (BIA 2003), which held that victims of forced sterilization have well-founded fears of future persecution. The BIA reasoned that, in contrast to forced sterilization, FGM is not specifically identified in INA § 101(a)(42) as a basis for refugee status. The BIA disagreed with Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005), which held that victims of FGM hold well-founded fears of future persecution.

(e) In Matter of A-T-, 24 I&N Dec. 617 (A.G. 2008), the Attorney General vacated the Board's decision in Matter of A-T-, 24 I&N Dec. 296 (BIA 2007). There, the Board denied the respondent's application for withholding of removal, in which she alleged that she had been subjected to female genital mutilation. In his decision, the Attorney General first stated that, because FGM is sometimes inflicted more than once on the same person, "there was no basis for the Board's legal conclusion that the past infliction of female genital mutilation by itself rebuts '[a]ny presumption of future [FGM] persecution.'" The Attorney General also stated that "the Board was wrong to focus on whether the future harm to life or freedom that [the] respondent feared would take the 'identical' form–namely, female genital mutilation–as the harm she had suffered in the past. . . . Here, the 'original claim' was not '[FGM] persecution,' as the Board put it . . . but rather persecution on account of membership in a particular (albeit not clearly defined) social group." This accords with the Second Circuit's decision in Bah v. Mukasey, 529 F.3d 99 (2d Cir. 2008), where the court stated that "the fact that an applicant has undergone female genital mutilation in the past cannot, in and of itself, be used to rebut

the presumption that her life or freedom will be threatened in the future."

(f) In a case involving a mother and daughter from Somalia who were subjected to FGM, the Board found that both respondents suffered past persecution on account of membership in a particular social group. Further, asylum on humanitarian grounds was merited, regardless of whether the respondents established well-founded fears of future persecution, because the respondents "suffered an atrocious form of persecution that results in continuing physical pain and discomfort." Matter of S-A-K and H-A-H-, 24 I&N Dec. 464 (BIA 2008).

(2) The 8th Circuit found that Iranian women do not qualify as a "particular social group" within the meaning of the Act merely by virtue of their gender and the harsh restrictions placed upon them in Iran. The Court deemed the classification as overbroad in that no fact finder could reasonably conclude that all Iranian women have a well-founded fear of persecution based solely on their gender. The Court noted that a group of women who refuse to conform to customs and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance may satisfy the definition. However, the Court found that the respondent failed to demonstrate that she was a member of such a group for although she had taken some affirmative steps to articulate her opposition to Iranian customs relating to women's rights, it could not conclude that for her, compliance with the gender-specific laws would be "so profoundly abhorrent that it could aptly be called persecution." Safaie v. INS, 25 F.3d 636 (8th Cir. 1994), superceded by statute on other grounds recognized by Rife v. Ashcroft, 374 F.3d 606, 614 (8th Cir. 2004).

(3) A woman with liberal Muslim beliefs who wore short skirts and makeup and refused to wear a veil, has suffered past persecution and has a well-founded fear of future persecution at the hands of her father who beat and physically punished her on account of her religious beliefs,

which differ from her father's orthodox Muslim views concerning the proper role of women in Moroccan society; Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000). The BIA held that the persecution was actually on account of the respondent's religion, not her gender.

s. Sexual preference.

(1) The BIA held that an applicant for admission who testified that he was registered as a homosexual with a government office in Cuba, that he was called in for examination by that office every 2 or 3 months for 13 years, and that he was required to leave Cuba in the Mariel Boatlift or face four years in prison, has established his membership in a particular social group in Cuba, has demonstrated that his freedom was threatened on account of his membership in that group, and is eligible for withholding of deportation. Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

(2) The Ninth Circuit has held that "all alien homosexuals are members of a 'particular social group.'" Karouni v. Gonzalez, 399 F.3d 1163, 1172 (9th Cir. 2005). The Third Circuit has impliedly recognized that homosexuals constitute a "particular social group." See Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003). The Eighth Circuit has assumed for purposes of an appeal, that "homosexuals are a particular social group." Molathwa v. Ashcroft, 390 F.3d 551, 554 (8th Cir. 2004) (citing Hernandez-Montiel, 225 F.3d 1084 (9th Cir. 2000).

t. Health Conditions

(1) HIV/AIDS. The INS recognized that "in certain circumstances . . . persons with HIV or AIDS may constitute a particular social group under refugee law." Memorandum from David A. Martin, INS Office of General Counsel (Feb. 16, 1996), reported in 73 Interpreter Releases 909, 909 (July 8, 1996). Shortly thereafter, the INS formally adopted the "position . . . that homosexuals do constitute a particular social group." Memorandum from David A. Martin, INS General Counsel, to All Regional and

District Counsel (Apr. 4, 1996).

(2) Parents of a disabled child. The Ninth Circuit has held that disabled children and their parents constituted a statutorily protected group, and a parent who provided care for a disabled child could seek asylum and withholding of removal on the basis of persecution the child had suffered on account of his disability. Tchoukhrova v. Gonzales, 404 F.3d 1181 (9th Cir. 2004). However, the Supreme Court vacated and remanded this decision in light of its decision in Gonzales v. Thomas, 126 S. Ct. 1613 (2006). Gonzales v. Tchoukhrova, 126 S. Ct. 57 (2006).

u. Domestic Violence.

(1) In Matter of R-A-, the Board held that an asylum applicant who claims persecution on the basis of a group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" must demonstrate, inter alia, that her persecutor husband targeted and harmed her because he perceived her to be a member of this particular social group. 22 I&N Dec. 906 (BIA 1999). The AG subsequently vacated the Board's decision and remanded the case for reconsideration following final publication of the proposed rule published at 65 Fed. Reg. 76588 (proposed Dec. 7, 2000). Matter of R-A-, 22 I&N Dec. 906 (BIA 1999; AG 2001). The proposed rule provides guidance in the assessment of claims made by applicants who have suffered or fear domestic violence. 65 Fed. Reg. 76588. The final rule has yet to be published and in January 2005, AG Ashcroft again remanded the case to the Board for reconsideration following publication of the final rule. Matter of R-A-, 23 I&N Dec. 694 (A.G. 2005).

(2) In Matter of R-A-, 24 I&N Dec. 629 (A.G. 2008), the Attorney General instructed the Board to "revisit the issues in *Matter of R-A-* and related cases and issue new decisions," despite the fact that the rule referenced above had yet to be published. In the 2008 decision, the Attorney General noted that the proposed rule (which "would have

amended the asylum regulations relating to the meaning of the terms 'persecution,' 'on account of,' and 'particular social group) has not been finalized, but that "both the Board and courts of appeals have issued numerous decisions relating to various aspects of asylum law under existing statutory and regulatory provisions." Further, some of these decisions "have addressed, for example, the terms 'persecution,' 'on account of,' and 'particular social group,' and thus may have relevance to the issues presented with respect to asylum claims based on domestic violence." The Attorney General also stated that, to the extent the Board will be addressing questions involving the "interpretation of ambiguous statutory language, the Board is free to exercise its own discretion and issue a precedent decision nationwide." For this, the Attorney General cited, in part, to *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), with the Attorney General stating that "the Supreme Court has made clear that administrative agencies are not bound by prior judicial interpretations of ambiguous statutory provisions."

v. Former noncriminal drug informants. The group "former noncriminal drug informants working against the Cali drug cartel" does not have the requisite social visibility to constitute a "particular social group." Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).

w. Affluent Guatemalans. In Matter of A-M-E- & J-G-U-, the BIA held that the respondents failed to establish that their status as affluent Guatemalans gave them sufficient social visibility to be perceived as a group by society or that the group was defined with adequate particularity to constitute a particular social group. 24 I&N Dec. 69 (BIA 2007).

(1) Matter of A-M-E- & J-G-U- was followed by the Second Circuit in Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007). In Ucelo-Gomez, the Second Circuit ruled that "affluent Guatemalans who suffer persecution fueled by class rivalry in an impoverished society" do not belong to a particular social group.

x. Former gang members.

(1) In the first precedent Board or circuit court decision directly addressing former gang membership as grounds for asylum, the Ninth Circuit ruled that tattooed former gang members do not belong to a particular social group. Arteaga v. Mukasey, 511 F3d. 940 (9th Cir. 2007).

(2) In Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008), the Board ruled that "persons resistant to gang membership" in Honduras are not members of a particular social group as this group "lacks the social visibility that would allow others to identify its members." The Board further ruled that "young persons [in Honduras] who are perceived to be affiliated with gangs" are not members of a particular social group. In this regard, the Board stated that "because we agree [with the Ninth Circuit's decision in *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007)] that membership in a criminal gang cannot constitute a particular social group, the respondent cannot establish particular social group status based on the incorrect perception by others that he is such a gang member." In addition, the Board ruled that "the respondent's refusal to join [a gang in Honduras], without more, does not constitute a 'political opinion,'" and that "no evidence, either direct or circumstantial, has been produced to show that gangs in Honduras would persecute the respondent because of any political opinion, real or imputed, that he holds."

(3) In Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008), the Board ruled that "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities, " are not members of a particular social group. In addition, the Board ruled that family members of such individuals are not members of a particular social group. The Board reasoned that these groups fail to satisfy the Board's standards for "particularity" and "social visibility." The Board further found "that the respondents failed to demonstrate that they were persecuted or have a well-founded fear of persecution based on actual or imputed political opinion." In this regard, the Board stated that "[t]he respondents did not establish what political opinion, if any, they held, and they have provided no evidence, direct or circumstantial, that the MS-13 gang in El Salvador imputed, or would impute to them, an anti-gang political opinion. Nor have they

established that the gang persecuted or would persecute them on the basis of such opinion. There is no indication that the MS-13 gang members who pursued the respondents had any motives other than increasing the size and influence of their gang."

(4) Citing to Matter of S-E-G-, the Ninth Circuit ruled that "young men in El Salvador resisting gang violence" are not members of a particular social group. Santos-Lemus v. Mukasey, 542 F.3d 738 (9th Cir. 2008).

5. Evidence.

a. 8 C.F.R. § 208.13(b)(2) states that an alien shall be found to have a well-founded fear of persecution if he establishes the following:

(1) He has a fear of persecution in his country of nationality or last habitual residence on account of one of the 5 reasons enumerated in the Act;

(2) There is a reasonable possibility of actually suffering such persecution if he were to return to that country;

(3) That he is unable or unwilling to return to or avail himself of the protection of that country because of such fear.

(4) The alien need not establish to the Asylum Officer or IJ that he would be singled out for persecution if:

(a) He establishes that there is a pattern or practice in his country of nationality or last habitual residence of groups of persons similarly situated to the applicant on account of one of the 5 reasons;

(b) The alien establishes his own inclusion in and identification with such group of persons such that his fear of persecution upon return is reasonable.

(5) The Asylum Officer or IJ shall give due consideration to evidence that the government of the country in which persecution is feared persecutes its nationals or residents if:

(a) They leave the country without authorization, or

(b) seek asylum in another country.

(6) Regarding withholding of deportation, 8 C.F.R. § 1208.16(b) provides the same as 8 C.F.R. § 1208.13(b)(2) does for asylum except that "the applicant's life or freedom" shall be found to be threatened if it is more likely than not that he would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion.

b. Background evidence (in the form of newspaper of magazine articles or reports prepared by government agencies) relating to general or specific conditions in the country of feared persecution is admissible in a hearing if it is relevant, material, and noncumulative, and an IJ's rejection of all background evidence, even on general conditions in the country, deprives the alien of a full and fair hearing and necessitates a remand by the BIA. Matter of Exame, 18 I&N Dec. 303 (BIA 1982).

c. Corroborating evidence is not required in all cases. An alien's own testimony, without corroborative evidence, may be sufficient proof if that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear of persecution. 8 C.F.R. § 1208.13(a); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). For applications affected by the REAL ID Act of 2005, where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. INA § 208(b)(1)(B)(ii).

d. When the basis of a persecution claim becomes less focused on specific events involving the alien personally and instead is more directed to broad allegations regarding general conditions in the

country of feared persecution, it may well be essential for the alien to present corroborative background evidence that establishes a plausible context for the persecution claim. Matter of Dass, 20 I&N Dec. 120 (BIA 1989).

(1) In such cases, background evidence should be presented if it is available or an acceptable explanation should be given for its absence. Id.

(2) Since the alien bears the evidentiary burden of proof and persuasion, applications will be denied for failure of proof where there are significant, meaningful evidentiary gaps. Id.

e. An alien must demonstrate that the threat of persecution exists throughout the country in which he alleges persecution, not merely in a particular area within the country. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985) overruled in part by Matter of Mogharrabi 19 I&N Dec. 439 (BIA 1987).

f. Even if an asylum claim is otherwise demonstrated, eligibility for asylum based on nongovernmental action may not be adequately established where the evidence of danger is directed to a very local area in the country of feared persecution. Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988).

g. If an alien claims that he received persecutive punishment at the hands of local officials, he must normally show that redress from higher officials was unavailable or that he had a well-founded fear that it would be unavailable. Matter of Chang, 20 I&N Dec. 38 (BIA 1989) superseded by statute, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, as recognized in Li v. Ashcroft, 312 F.3d 1094 (9th Cir. 2002) .

h. The reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure. Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998).

i. Where evidence from the U.S. Dept. of State indicates that country conditions have changed after an alien's departure from his native country and that the Peruvian government has reduced the Shining Path's ability to carry out persecutory acts and the alien fails to rebut such evidence, the alien failed to establish a well-founded fear of persecution. Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998).

j. Country profiles submitted by the Department of State's Bureau of Democracy, Human Rights and Labor are entitled to considerable deference. Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997).

k. Credibility.

(1) For applications made on or after May 11, 2005, the REAL ID Act of 2005 provides that considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness' account, the consistency between the applicant's or witness' 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. INA § 208(b)(1)(B)(iii).

(a) The BIA held that, for asylum cases governed by the REAL ID Act, a trier of fact may, after considering the totality of the circumstances, base a credibility finding on an asylum applicant's demeanor, the plausibility of his or her account, and

inconsistencies in statements, without regard to whether they go to the heart of the asylum claim. In this case, the BIA held that the IJ properly considered the totality of the circumstances in finding that the respondent lacked credibility based on his demeanor, his implausible testimony, the lack of corroborating evidence, and his inconsistent statements, some of which did not relate to the heart of the claim. Matter of J-Y-C-, 24 I&N Dec. 260 (BIA 2007).

(b) Circuit courts have split as to whether the REAL ID Act revived the doctrine of *falsus in uno, falsus in omnibus* (false in one thing, false in all things) with respect to the applicant's credibility. This doctrine permits a trier of fact to cite a witness's false statement relating to one subject to conclude that the witness testified falsely relating to another subject. In a footnote to a pre-REAL ID Act case, the First Circuit stated that the Act revived this doctrine. Castaneda-Castillo v. Gonzales, 488 F.3d 17 (1st Cir. 2007). However, in Kadia v. Gonzales, 501 F.3d 817 (7th Cir. 2007), the Seventh Circuit stated that it was "dubious" that the REAL ID Act did, in fact, revive the doctrine of *falsus in uno, falsus in omnibus*.

(c) Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. INA § 208(b)(1)(B)(ii).

(2) Presentation by an asylum applicant of an identification document that is found to be counterfeit by forensic experts not only discredits the applicant's claim as to the critical elements of identity and nationality, but, in the absence of an explanation or rebuttal, also indicates an overall lack of credibility regarding the entire claim. Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998), overruled in part as stated in Hanaj v. Gonzales, 446 F.3d 694 (7th Cir. 2006).

(3) Although the BIA has de novo review authority, the Board accords deference to an IJ's findings regarding credibility and credibility-related issues. The Board defers to an adverse credibility finding based on inconsistencies and omissions regarding facts central to an alien's asylum claim where a review of the record reveals that (1) the discrepancies and omissions described by the IJ are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions has not been supplied by the alien. Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998).

(4) An asylum applicant does not meet his burden of proof by general and meager testimony. Specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum. The weaker an applicant's testimony, the greater the need for corroborative evidence. Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998).

(5) An alien who did not provide any evidence to corroborate his purported identity, nationality, claim of persecution, or his former presence or his family's current presence at a refugee camp, where it was reasonable to expect such evidence, failed to meet his burden of proof to establish his asylum claim. Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998), vacated by Diallo v. INS, 232 F.3d 279 (2d Cir. 2000).

J. Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture.)

1. HISTORY LESSON - The Convention Against Torture has been in effect in the U.S. since November 20, 1994. However, there was no statutory provision to implement Article 3 of the Convention Against Torture in United States domestic law. Therefore, the BIA held that it lacked jurisdiction to adjudicate a claim for relief from deportation pursuant to Article 3 of the United Nations Convention against Torture and other

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

2. Definition of "torture."

a. 8 C.F.R. § 1208.18(a)(1) states, "Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

(1) An applicant for protection under Article 3 of the Convention against Torture must establish that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity; therefore, protection does not extend to persons who fear entities that a government is unable to control. Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000) overruled on other grounds by Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003).

b. 8 C.F.R. § 1208.18(a)(2) states, "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not

amount to torture."

c. 8 C.F.R. § 1208.18(a)(3)states, "Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture."

d. 8 C.F.R. § 1208.18(a)(4) provides that, in order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(1) The intentional infliction or threatened infliction of severe physical pain or suffering;

(2) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(3) The threat of imminent death; or

(4) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

e. 8 C.F.R. § 1208.18(a)(5) provides that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

f. 8 C.F.R. § 1208.18(a)(6) states, "In order to constitute torture an act must be directed against a person in the offender's custody or physical control."

g. 8 C.F.R. § 1208.18(a)(7) states that acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

h. 8 C.F.R. § 1208.18(a)(8) states, "Noncompliance with applicable legal procedural standards does not per se constitute torture."

3. Eligibility in spite of frivolous asylum application. Section 208(d)(6) of the Act provides that if the AG determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under Section 208(d)(4)(A) of the consequences of knowingly filing a frivolous application for asylum, the alien shall be permanently ineligible for any benefits under the Act, effective as of the date of a final determination of such application. However 8 C.F.R. § 1208.20 provides that a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

4. Withholding of removal under the Convention Against Torture.

a. Differences between withholding of removal under Section 241(b)(3) of the Act and withholding of removal under Article 3 of the Convention Against Torture.

(1) Several categories of individuals, including persons who assisted in Nazi persecution or engaged in genocide, persons who have persecuted others, persons who have been convicted of particularly serious crimes, persons who are believed to have committed serious non-political crimes before arriving in the United States, and persons who pose a danger to the security of the United States, are ineligible for withholding of removal under 241(b)(3)(B) of the Act. Article 3 of the Convention Against Torture does not exclude such persons from its scope.

(2) Section 241(b)(3) applies only to aliens whose life or freedom would be threatened on account of race, religion, nationality, or membership in a particular social group or

political opinion. Article 3 covers persons who fear torture that may not be motivated by one of those five grounds.

(3) The definition of torture does not encompass all types of harm that might qualify as a threat to life or freedom. Thus, the coverage of Article 3 is different from that of Section 241(b)(3): broader in some ways and narrower in others.

b. 8 C.F.R. § 1208.16(c)(2) provides that the burden of proof is on the applicant for withholding of removal under the Convention Against Torture to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. That regulation also provides that the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

c. 8 C.F.R. § 1208.16(c)(3) provides that in assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(1) Evidence of past torture inflicted upon the applicant;

(2) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(3) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(4) Other relevant information regarding conditions in the country of removal.

d. Specific decisions.

(1) The indefinite detention of criminal deportees by Haitian authorities does not constitute torture within the meaning of

8 C.F.R. § 1208.18(a) where there is no evidence that the authorities intentionally and deliberately detain deportees in order to inflict torture. Matter of J-E-, 23 I&N Dec. 291 (BIA 2002).

(2) Substandard prison conditions in Haiti do not constitute torture within the meaning of 8 C.F.R. 1208.18(a) where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture. Matter of J-E-, 23 I&N Dec. 291 (BIA 2002).

(3) Evidence of the occurrence in Haitian prisons of isolated instances of mistreatment that may rise to the level of torture as defined in the Convention Against Torture is insufficient to establish that it is more likely than not that a respondent will be tortured if returned to Haiti. Matter of J-E-, 23 I&N Dec. 291 (BIA 2002).

(4) An Iranian Christian of Armenian descent demonstrated that it is more likely than not he will be tortured if returned to Iran based on a combination of factors, including his religion, his ethnicity, the duration of his residence in the U.S., and his drug-related convictions in the U.S. Matter of G-A-, 23 I&N Dec. 366 (BIA 2002).

(5) In Matter of M-B-A-, 23 I&N Dec. 474 (BIA 2002), the BIA held that in an application for deferral of removal under Article 3 of the Convention Against Torture, it is not sufficient for a respondent simply to cite the existence of Decree No. 33 in Nigeria which provides that a Nigerian citizen who is convicted of a narcotic drug offense in a foreign country, or who is detected carrying a narcotic drug into a foreign country after a journey originating from Nigeria shall be liable for imprisonment for a term of five years. The BIA stated, "The respondent must provide some current evidence, or at least more meaningful historical evidence, regarding the manner of enforcement of the provisions of Decree No. 33 on individuals similarly situated to herself. The respondent's eligibility for deferral of removal rests upon a finding that it is more likely than not that she will be identified as a convicted drug trafficker

upon her return to Nigeria; that, as a result, she will be detained on arrival; that, when detained, she will be held in detention without access to bail or judicial oversight; that she will be detained for a significant period of time; and that, as a result of this detention, she will suffer mistreatment that rises to the level of torture at the hands of prison guards or authorities. Given the evidence of harsh and life-threatening prison conditions in Nigeria and the serious drug trafficking problems that Nigerian authorities are attempting to address, the respondent's fear of return to her home country is understandable. On the record before us, however, we find that the respondent's case is based on a chain of assumptions and a fear of what might happen, rather than evidence that meets her burden of demonstrating that it is more likely than not that she will be subjected to torture..."

e. 8 C.F.R. § 1208.16(c)(4) states that in considering an application for withholding of removal under the Convention Against Torture, the IJ shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the IJ determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3). If an alien entitled to such protection is subject to mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3), the alien's removal shall be deferred under 8 C.F.R. § 1208.17(a).

5. Deferral of removal under the Convention Against Torture.

a. 8 C.F.R. § 1208.17(a) provides that an alien who: (1) has been ordered removed; (2) has been found under 8 C.F.R. § 1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and (3) is subject to the provisions for mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

b. Notice which IJ must give to respondent. 8 C.F.R. § 1208.17(b) requires an IJ who orders an alien described in 8 C.F.R. § 1208.17(a) removed, to inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. The IJ shall inform the alien that deferral of removal:

(1) does not confer upon the alien any lawful or permanent immigration status in the United States;

(2) will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;

(3) is effective only until terminated; and

(4) is subject to review and termination if the IJ determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.

c. The IJ shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.

d. An alien's eligibility for deferral of removal under the Convention Against Torture cannot be established by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. Matter of J-F-F-, 23 I&N Dec. 912 (A.G. 2006).

6. Termination of deferral of removal.

a. Termination at the request of the Service.

(1) 8 C.F.R. § 1208.17(d)(1) provides that at any time while deferral of removal is in effect, the INS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under 8 C.F.R. § 1208.17(a) may file a motion with the Immigration Court having administrative control pursuant to 8 C.F.R. § 1003.11 to schedule a hearing to consider whether deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in 8 C.F.R. §§ 1003.2 and 1003.23.

(2) 8 C.F.R. § 1208.17(d)(2) provides that the Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of 8 C.F.R. § 1208.11.

(3) 8 C.F.R. § 1208.17(d)(3) provides that the IJ shall conduct a hearing and make a de novo determination, based on the record of proceeding and initial application in addition to any new evidence submitted by the Service or the alien, as to whether the alien is more likely than not to be tortured in the country to which removal has been deferred. This determination shall be made under the standards for eligibility set out in 8 C.F.R. § 1208.16(c). The burden is on the alien to establish that it is more likely than not that he or she would be tortured in the country to which removal

has been deferred.

(4) 8 C.F.R. § 1208.17(d)(4) provides that if the IJ determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the IJ determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the IJ's decision shall lie to the BIA.

b. Termination at the request of the alien.

(1) 8 C.F.R. § 1208.17(e)(1) provides that at any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court having administrative control pursuant to 8 C.F.R. § 1003.11 to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the IJ shall terminate the order of deferral and the alien may be removed.

(2) 8 C.F.R. § 1208.17(e)(2) allows an IJ, if necessary, to calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the IJ determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the IJ determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.

c. Termination pursuant to 8 C.F.R. § 1208.18(c), which provides that at any time while deferral of removal is in effect, the AG may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in 8 C.F.R. § 1208.18(c).

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

1. Introduction. Adjustment of status allows an alien who is not an immigrant (or deportable immigrant, if qualified) who is in the U.S. to adjust status to that of a lawful permanent resident (LPR) without leaving the U.S. to obtain an immigrant visa and re-entering the U.S. as an immigrant.

   a. If adjustment of status is denied by a DD or IJ, either for failure to establish statutory eligibility or as a matter of discretion, the denial simply means that the alien cannot seek consular processing abroad by applying for a visa at an American Consulate. The Consul will determine if the alien is eligible to receive a visa. If the alien receives a visa, he may then apply for admission to the U.S. At that time, if he is believed to be inadmissible under Section 212(a), his admissibility may be determined in removal proceedings.

2. Jurisdiction.

   a. In the case of an any alien who has been placed in deportation proceedings or removal hearings (other than an arriving alien), the IJ hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status. 8 C.F.R. § 1245.2(a)(1) (amended 71 Fed. Reg. 27585 (May 12, 2006)).

   b. Arriving Aliens.

      (1) HISTORY LESSON - There was a split of the Circuit Court of Appeals regarding the validity of 8 C.F.R. § 1245.1(c)(8) which precluded an arriving alien from adjusting status before an IJ. The First, Third, and Ninth Circuit, and Eleventh Circuits held that this regulation was invalid. Succar v. Ashcroft, 394 F.3d 8 (1st Cir. 2005); Zheng-Zheng v. Gonzales, 422 F.3d 98 (3d Cir. 2005); Bona v. Gonzales, 425 F.3d 663 (9th Cir. 2005); Scheerer v. U.S. Atty. Gen., 445 F.3d 1311 (11th Cir. 2006). The Fifth and Eighth Circuits concluded that 8 C.F.R. § 1245.1(c)(8) was valid. Momin v. Gonzales, 447 F.3d 447 (5th Cir. 2006), vacated and remanded, 462 F.3d 497 (5th Cir. 2006); Mouelle v. Gonzales, 416 F.3d 923 (8th Cir. 2005), vacated, 126 S.Ct. 2964 (2006).

      (2) PRESENT LAW - On May 12, 2006, the Attorney General amended the regulations by removing 8 C.F.R. §

1245.1(c)(8) to resolve the circuit conflict. 71 Fed. Reg. 27585 (May 12, 2006). Further, 8 C.F.R. § 1245.2(a)(1)(ii) was amended to read as follows: "Arriving aliens. In the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status . . . ." Id. The new regulation retains a narrow exception for an alien who leaves the United States while an adjustment application is pending with USCIS, and then returns under a grant of advance parole; an IJ would have jurisdiction to adjudicate the alien's renewed adjustment application if that application had been denied by USCIS. Id.

c. No appeal lies from a district director's denial of adjustment. However, the application may be renewed before the IJ if the alien (other than an arriving alien) is placed in proceedings. 8 C.F.R. § 1245.2(a)(5)(ii).

d. Cuban Refugee Adjustment Act. An IJ has jurisdiction to adjudicate an application for adjustment of status under the Cuban Refugee Adjustment Act of November 2, 1966 (Pub. L. No. 89-732, 80 Stat. 1161) when the respondent is charged as an arriving alien without a valid visa or entry document in removal proceedings. Matter of Artigas, 23 I&N Dec. 99 (BIA 2001).

e. If both parties agree, an IJ may use a form I-471 to remand an application for adjustment of status to the district director for his adjudication. However, an IJ is not permitted to remand a case without the district director's consent. Matter of Roussis, 18 I&N Dec. 256 (BIA 1982).

3. Substantive requirements. In order to qualify for adjustment of status, Section 245(a) of the Act states that a respondent must prove that he or she:

a. has been inspected and admitted (or paroled when the application is before the DD);

b. is admissible under Section 212(a) of the Act;

(1) A respondent who is inadmissible under Section 212(a) may apply for any available waiver of the ground of inadmissibility in conjunction with the application for

adjustment of status. 8 C.F.R. § 1245.1(f). Matter of Gabryelsky, 20 I&N Dec. 750 (BIA 1993).

(2) The "futility doctrine." The BIA has determined that the rule in Matter of V-, 1 I&N Dec. 293 (BIA 1942), which held that notwithstanding lack of a specific statutory ground of exclusion, an alien who upon entry would immediately become subject to deportation should be found excludable is not appropriate in the adjustment of status context and held that it is the Board's practice to interpret the requirement of admissibility in Section 245(a) with reference only to the inadmissibility grounds set forth in the Act. See Matter of Rainford, 20 I&N Dec. 598 (BIA 1992).

c. has an immigrant visa number is immediately available to him.

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

(a) Fraudulent marriages. Section 204(c) of the Act provides that no visa petition shall be approved if: (1) the alien has previously been accorded, or has sought to be accorded, immediate relative or preference status as the spouse of a USC or LPR by reason of a marriage determined by the AG to have been entered into for the purpose of evading the immigration laws or (2) the AG has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

(b) Section 204(c) of the Act does not preclude approval of a second marital visa petition filed by the petitioner on behalf of the same beneficiary. Matter of Isber,20 I&N Dec. 676 (BIA 1993).

(c) However, a petitioner who has previously withdrawn a visa petition and admitted that the marriage was not bona fide bears a heavy burden of explaining the prior withdrawal. Matter of

Laureano, 19 I&N Dec. 1 (BIA 1983). Where a visa petition has once been withdrawn under these circumstances, any subsequently filed visa petition must include an explanation of the prior withdrawal and evidence supporting the bona fides of the parties' relationship. Id.

(2) Children. Section 201(f)(1) of the Act, which allows the beneficiary of an immediate relative visa petition to retain his status as a "child" after he turns 21, applies to an individual whose visa petition was approved before the August 6, 2002, effective date of the Child Status Protection Act, but who filed an application for adjustment of status after that date. Matter of Avila, 24 I&N Dec. 78 (BIA 2007). Such a beneficiary would therefore remain an immediate relative. Id.

(3) Adopted children.

(a) An adopted child, as defined by Section 101(b)(1)(E) of the Act, may not confer immigration benefits upon a natural parent without regard to whether the adopted child has been accorded or could be accorded immigration benefits by virtue of his or her adopted status. Matter of Li, 20 I&N Dec. 700 (BIA 1993).

(b) An adopted child under the immigration laws may not confer immigration benefits upon his natural sibling because their common natural parent no longer has the status of parent of the adopted child for immigration purposes. Matter of Li, 20 I&N Dec. 700 (BIA 1993).

(c) If the provisions of Section 101(b)(1)(E) of the Act have been invoked to confer an immigration benefit by virtue of an adoptive relationship, the natural relationship will not therefore be recognized for immigration purposes even if it is established that the adoptive relationship has been legally terminated. Matter of Li, 21 I&N Dec. 13 (BIA 1995). A natural parent-child relationship may again be recognized for immigration purposes following the legal termination of an adoption that

meets the requirements of Section 101(b)(1)(E) if the petitioner can establish the following 4 criteria:

i) That no immigration benefit was obtained or conferred through the adoptive relationship;

ii) That a natural parent-child relationship meeting the requirements of Section 101(b) once existed;

iii) That the adoption has been legally terminated under applicable law; and

iv) That the natural relationship has been reestablished by law. Id.

(d) The Board has ruled that a child who was adopted while under the age of 18, and whose natural sibling was adopted by the same parents while under the age of 16, can qualify as a "child" under INA § 101(b)(1)(E) regardless of the order in which the two children were adopted. The Board rejected DHS's argument that, for an older sibling to qualify as a "child" under these circumstances, the older sibling's adoption must have preceded that of the younger child. Matter of Anifowoshe, 24 I&N Dec. 442 (BIA 2008).

d. It is improper for an IJ to enter a "conditional" grant of adjustment of status which is effective upon the happening of a future event, such as a visa petition being approved, or a visa number becoming available. Fulgencio v. INS, 573 F.2d 596 (9th Cir. 1978); Matter of Reyes, 17 I&N Dec. 239 (BIA 1980). However, in Matter of Reyes, the BIA implied that the presence of a condition does not void the IJ's order. The BIA considered the order to be final and stated that if the INS wished to attack the adjustment, it should institute rescission proceedings under Section 246 of the Act.

e. A respondent is also ineligible to adjust status if the approval of the visa petition has been revoked prior to the deportation hearing in spite of the language of Section 245(a)(3), "a visa immediately available at the time the application is filed." Kalezic v. INS, 647 F.2d 920 (9th Cir. 1981).

(1) Visa petitions may be revoked automatically (through withdrawal by the petitioner, death of the petitioner, divorce, etc.) or by the DD on notice to the petitioner. INA § 205; 8 C.F.R. § 1205.1 et seq.

(2) At the discretion of the DD, the petitioner's death may not automatically terminate the petition. 8 C.F.R. § 1205.1(a)(3)(i)(C). Neither IJ's nor the BIA have jurisdiction to review the DD's decision in such a case. Matter of Aurelio, 19 I&N Dec. 458 (BIA 1987).

(3) A DD's decision to revoke a visa petition on notice is appealable to the BIA. 8 C.F.R. § 1205.2(d). However, IJs do not appear to have authority to review the DD's decision.

f. Respondent must merit a favorable exercise of discretion.

(1) The grant of an application for adjustment of status is a matter of administrative grace and an applicant has the burden of showing that discretion should be exercised in his favor. Matter of Patel, 17 I&N Dec. 597 (BIA 1980); Matter of Marques, 16 I&N Dec. 314 (BIA 1977); Matter of Leung, 16 I&N Dec. 12 (BIA 1976); Matter of Arai, 13 I&N Dec. 494 (BIA 1970); Matter of Ortiz-Prieto, 11 I&N Dec. 317 (BIA 1965). Where adverse factors are present, it may be necessary for the applicant to offset those factors by a showing of unusual or even outstanding equities. Matter of Patel, supra; Matter of Arai, supra.

(2) In the absence of substantial equities, adjustment of status is denied, as a matter of discretion, to an alien who, in an effort to accelerate his immigration following marriage in his native country to a lawful permanent resident, entered the U.S. as a nonimmigrant visitor with the preconceived plan of joining his wife here and remaining permanently, thereby circumventing the normal immigrant visa issuing process by the U.S. consul abroad. Matter of Rubio-Vargas, 11 I&N Dec. 167 (BIA 1965).

(3) Adjustment of status is denied as a matter of discretion to a nonimmigrant visitor who, by his conflicting and evasive testimony, failed to establish that he did not intend to circumvent the normal immigrant visa issuing process by

the U.S. consul abroad. Matter of Diaz-Villamil, 10 I&N Dec. 494 (BIA 1964).

(4) An applicant for adjustment of status is not required by the statute or the regulations to establish GMC. Therefore, the provisions of Section 101(f) of the Act are not literally applicable to an applicant for adjustment. However, GMC is a factor which must be considered in determining whether a favorable exercise of discretion is warranted in a particular case. Matter of Francois, 10 I&N Dec. 168 (BIA 1963); Matter of Pires Da Silva, 10 I&N Dec. 191 (BIA 1963), modified by Matter of Krastman, 11 I&N Dec. 720 (BIA 1966). In order to merit a favorable exercise of discretion, GMC must exist for a reasonable period of time. Matter of Francois, supra; Matter of Pires Da Silva, supra. Therefore, an alien convicted fairly recently of a CIMT who is at liberty only upon the restraint exercised by the terms of his probation and who has been married only a short time does not merit a favorable exercise of discretion on an application for adjustment of status. Matter of Francois, supra.

(5) A respondent's application for adjustment was denied as a matter of discretion where he had worked without authorization during the 3 year period in which he was classified as a nonimmigrant student knowing that his employment was unlawful and on 3 separate occasions had made false statements about that employment in applications for benefits under the Act. Matter of Patel, 17 I&N Dec. 597 (BIA 1980).

(6) In applications for adjustment of status, the Act makes immediate relative status a special and weighty equity which should prevail in the absence of significant adverse factors. Matter of Ibrahim, 18 I&N Dec. 55 (BIA 1981); Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980).

4. Aliens who are ineligible to adjust.

a. Because Section 245(a) states that an alien must be inspected and admitted or paroled in order to adjust status, an alien who is present in the U.S. without being inspected and admitted (previously called an alien who entered without inspection) is ineligible to adjust. However, such an alien may adjust if he or she

is the beneficiary of a visa petition or labor certification filed in his or her behalf on or before April 30, 2001 and pays the amount set forth in Section 245(i) of the Act.

b. Adjustment of status is not available to an alien who entered the U.S. as a crewman. INA § 245(c)(1). However, such an alien may adjust if he or she is the beneficiary of a visa petition or labor certification filed in his or her behalf on or before April 30, 2001 and pays the amount set forth in Section 245(i) of the Act.

(1) The term "crewman" is defined in Section 101(a)(10) of the Act. As one of the nonimmigrant classes, it is discussed in Section 101(a)(15)(D). For purposes of suspension of deportation and adjustment of status, an alien may be considered a "crewman" even if he was not admitted to the U.S. as a D-1. The BIA decisions on this point are confusing and contradictory. A good history of this point and a discussion of each case addressing the issue may be found in Matter of Loo, 15 I&N Dec. 601 (BIA 1976).

(2) Perhaps in an effort to bring order out of the confusing decisions, the regulations state that an alien is ineligible to adjust status if, on arrival in the U.S., he was serving in any capacity on board a vessel or aircraft or was destined to join a vessel or aircraft in the U.S. to serve in any capacity thereon. 8 C.F.R. § 1245.1(b)(2).

c. Adjustment of status is not available to an alien who entered as a transit without a visa. INA § 245(c)(3); 8 C.F.R. § 1245.1(b)(1). However, such an alien may adjust if he or she is the beneficiary of a visa petition or labor certification filed in his or her behalf on or before April 30, 2001 and pays the amount set forth in Section 245(i) of the Act.

d. Adjustment of status is not available to an alien who continues in or accepts unauthorized employment (i.e. employed without the INS's permission) prior to filing the application for adjustment of status, except immediate relatives under Section 201(b) of the Act or special immigrants described in Section 101(a)(27)(H), (J), (K) or (I). INA § 245(c)(2). However, such an alien may adjust if he or she is the beneficiary of a visa petition or labor certification filed in his or her behalf on or before April 30, 2001 and pays the amount set forth in Section 245(i) of the Act. Also, the Departments of Commerce, Justice, and State, the Judiciary, and

Related Agencies Appropriations Act, 1998, H.R. 2267 (Public Law 105-119) amended Section 245(c) to provide that employment-based immigrants are allowed to apply for adjustment even if they failed to continuously maintain status, engaged in unauthorized employment, or otherwise violated the terms and conditions of their admission for an aggregate period which did not exceed 180 days.

(1) The provision regarding unauthorized employment was added to Section 245 by an amendment in 1976. Although Section 245(c)(2) does not state an effective date, the regulations provide that aliens (other than immediate relatives and the special immigrants exempted by the statute) who were employed without authorization on or after January 1, 1977 are ineligible for adjustment. 8 C.F.R. § 1245.1(b)(4).

(2) The term "employment" includes self-employment and is not limited to acting as an employee for another. Matter of Tong, 16 I&N Dec. 593 (BIA 1978).

(3) An alien's employment is unauthorized when it has not been approved by INS. Since a labor certification is approved by the Department of Labor, an approved labor certification does not operate to authorize employment. Matter of Raol, 16 I&N Dec. 466 (BIA 1978).

(4) A respondent who engages in fund-raising activities as part of missionary work for a church in which he is a minister is considered employed and not an unpaid volunteer if he receives his full support from the church. Matter of Hall, 18 I&N Dec. 203 (BIA 1982).

(5) A respondent who, without permission, engages in purely religious activities on behalf of a church and is compensated for these activities, is considered to be employed. Matter of Bennett, 19 I&N Dec. 21 (BIA 1984).

e. Adjustment of status is not available to an alien who was not in legal immigration status on the date of filing the adjustment application or who has failed to maintain a legal status since entry, except immediate relatives under Section 201(b) of the Act and special immigrants described in Section 101(a)(27)(H), (J), (K) or (I). INA § 245(c)(2). However, such an alien may adjust if he or

she is the beneficiary of a visa petition or labor certification filed in his or her behalf on or before April 30, 2001 and pays the amount set forth in Section 245(i) of the Act. Also, the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, H.R. 2267 (Public Law 105-119) amended Section 245(c) to provide that employment-based immigrants are allowed to apply for adjustment even if they failed to continuously maintain status, engaged in unauthorized employment, or otherwise violated the terms and conditions of their admission for an aggregate period which did not exceed 180 days.

(1) The requirement of maintaining a legal status was added to Section 245 by an amendment on November 6, 1986. The wording of the statute does not indicate an effective date, but the regulations provide that any alien who on or after November 6, 1986 is not in lawful immigration status on the date of filing an application for adjustment is ineligible to adjust (except immediate relatives and the special immigrants exempted by the statute). 8 C.F.R. § 1245.1(b)(5).

f. Adjustment of status is unavailable to an alien (other than an immediate relative defined in Section 201(b)) who was admitted as a nonimmigrant visitor without a visa under Section 212(l) or Section 217. INA § 245(c)(4). However, such an alien may adjust if he or she is the beneficiary of a visa petition or labor certification filed in his or her behalf on or before April 30, 2001 and pays the amount set forth in Section 245(i) of the Act.

g. Adjustment of status is unavailable to an alien admitted as a nonimmigrant under Section 101(a)(15)(S) of the Act [one who is to provide information about a criminal or terrorist organization]. INA § 245(c)(5). However, such an alien may adjust if he or she is the beneficiary of a visa petition or labor certification filed in his or her behalf on or before April 30, 2001 and pays the amount set forth in Section 245(i) of the Act. In addition to Section 245(i), such an alien should also be able to adjust under Section 245(j).

h. Adjustment of status is not available to an alien who is an alien lawfully admitted to the U.S. for permanent residence on a conditional basis under Sections 216 or 216A of the Act. INA § 245(d), (f).

(1) While the statutory language leaves open the question of whether the bar to adjustment of status extends to an alien whose status as a conditional permanent resident has been terminated, the BIA found that the INS's regulation at 8 C.F.R. § 245.1(b)(12) (1991) [now 8 C.F.R. § 1245.1(c)(5)] clearly applied the bar only to aliens currently holding conditional permanent resident status. Therefore, the BIA held that Section 245(d) of the Act does not prohibit an alien whose conditional permanent resident status has been terminated from adjusting status under Section 245(a). Matter of Stockwell, 20 I&N Dec. 309 (BIA 1991).

i. Adjustment of status is not available to an alien who entered the U.S. as a K-1 or a K-2, except if the K-1 marries the USC petitioner, the status of the K-1 and/or the K-2 may be adjusted to that of an alien lawfully admitted on a conditional basis under Section 216. INA § 245(d).

j. Adjustment of status is not available to an alien who seeks to receive an immigrant visa on the basis of a marriage entered into during the period in which administrative or judicial proceedings are pending regarding the alien's right to enter or remain in the U.S. INA § 245(e)(2).

(1) However, Section 245(e)(3) of the Act provides that an alien may apply for adjustment of status based on a marriage contracted during proceedings if he establishes by clear and convincing evidence the following:

(a) That the marriage was entered into in good faith;

(b) That the marriage was in accordance with the laws of the place where the marriage took place;

(c) That the marriage was not entered into for the purpose of procuring the alien's entry as an immigrant;

(d) That no fee (other than attorney's fees) was given for the filing of a visa petition.

(2) Section 245(e)(3) was added to the Act by the Immigration Act of 1990. Although the Immigration Act of 1990 was effective on November 29, 1990, Section 702(c) of that Act

provided that the addition of Section 245(c)(3) would apply to marriages entered into before, on, or after the effective date of the Immigration Act of 1990.

(3) 8 C.F.R. § 1245.1(c)(8)(i) provides that the period during which administrative proceedings are pending begins with

(a) the issuance of Form I-221, Order to Show Cause and Notice of Hearing prior to June 20, 1991;

(b) the filing of Form I-221, Order to Show Cause and Notice of Hearing, issued on or after June 20, 1991, with the Immigration Court;

i) An earlier regulation stated that the period began with the issuance of the charging document and made no distinction regarding the date it was issued. This appeared to be in conflict with 8 C.F.R. § 3.14(a) [now 8 C.F.R. § 1003.14(a)] which states that proceedings before an IJ commence when a charging document is filed with the Office of the Immigration Judge (OIJ) [now the Immigration Court]. The BIA addressed the conflict between former 8 C.F.R. § 3.14(a) and former 8 C.F.R. § 204.1(a)(2)(iii) which defines the period during which proceedings are pending for approval of a visa petition as commencing with the issuance of a charging document rather than its filing with the OIJ and held that, at least for purposes of Section 204(h) of the Act, the most recent regulation by the AG controls and a visa petition may not be approved after issuance of an OSC unless the facts required by Section 245(e)(3) are established. Matter of Fuentes, 20 I&N Dec. 227 (BIA 1991). Subsequent to the decision in Fuentes, the regulation was amended to provide that the period during which the alien is in deportation or exclusion proceedings commences with the filing with the IJ of an OSC issued on or after June 20, 1991. Therefore, the BIA found the Fuentes decision superceded by

the change in the regulation. Matter of Casillas, 22 I&N Dec. 154 (BIA 1998).

(c) the issuance of Form I-122, Notice to Applicant for Admission Detained for Hearing Before Immigration Judge, prior to April 1, 1997;

(d) the filing of a Form I-862, Notice to Appear, with the Immigration Court;

(e) the issuance and service of Form I-860, Notice and Order of Expedited Removal.

(4) 8 C.F.R. § 1245.1(c)(8)(ii) provides that the period in which the alien is in proceedings terminates:

(a) when the alien departs from the U.S. while an order of exclusion, deportation, or removal is outstanding or before the expiration of the voluntary departure time granted in connection with an alternate order of deportation or removal;

(b) when the alien is found not to be inadmissible or deportable from the U.S.;

(c) when the Form I-122, I-221, I-860, or I-862 is canceled;

(d) when proceedings are terminated by the IJ or BIA; or

(e) when a petition for review or an action for habeas corpus is granted by a Federal court on judicial review.

(f) Before these regulations were enacted, the BIA held that once deportation proceedings are instituted, they are considered to be pending until the respondent departs the U.S. Therefore, if an alien marries a USC after a final order of deportation or during a period of voluntary departure after the hearing, he is not eligible for adjustment of status. Matter of Enriquez, 19 I&N Dec. 554 (BIA 1988).

5. Section 245(i).

a. Section 506(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1995 added Section 245(i) to the Act. It was effective on October 1, 1994 through September 30, 1997 and provided that aliens who entered the U.S. without inspection or who are within the classes enumerated in Section 245(c) of the Act may apply for adjustment of status if they remit with their application a sum equaling five times the fee plus the regular fee. The IIRIRA raised the fee to $1,000. The fee was not required from a child under the age of 17 or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under Section 210, Section 245A, or Section 202 of the Immigration Reform and Control Act of 1986 who was the spouse or unmarried child as of May 5, 1988, who entered the U.S. before that date, resided in the U.S. on that date, is not a LPR, and applied for the benefits of Section 301(a) of the Immigration Act of 1990.

b. Therefore, the benefit of Section 245(i) was available to the following:

(1) aliens who entered the U.S. without inspection;

(2) alien crewmen;

(3) aliens employed without authorization;

(4) aliens in unlawful immigration status on the date the application is filed or who have failed to maintain a lawful status since entry;

(5) aliens admitted in transit without a visa;

(6) aliens admitted as nonimmigrant visitors without a visa;

(7) aliens admitted under Section 101(a)(15)(S).

c. Through inadvertence by Congress, there was another Section 245(i), which should have been designated as Section 245(j). It was added by Section 130003(c)(i) of the Violent Crime Control and Law Enforcement Act of 1994 and is effective with respect to aliens against whom deportation proceedings are initiated after September 13, 1994. Under that Section 245(i), a nonimmigrant

admitted under Section 101(a)(15)(5)(i) of the Act to provide information about a criminal or terrorist organization may adjust status to that of a LPR if the alien meets the criteria set forth in Section 245(i)(1) or (2). Notwithstanding the clerical error in the redundant designation of Section 245(i) of the Act, IJs had jurisdiction to entertain applications for relief based on both sections. Matter of Grinberg, 20 I&N Dec. 911 (BIA 1994). The IIRIRA corrected the designation of the second Section 245(i) to Section 245(j).

d. The remittance required by Section 245(i) is by definition a statutorily mandated "sum" and a requirement separate and apart from the fee required by the regulations. The "statutory sum" may not be waived by an IJ pursuant to 8 C.F.R. §§ 1003.24 and 1103.7. Matter of Fesale, 21 I&N Dec. 114 (BIA 1995).

e. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, H.R. 2267 (Public Law 105-119) amended Section 245(i) to provide that it applies only to aliens for whom a visa petition or labor certification was filed on or before January 14, 1998.

f. The Legal Immigration Family Equity (LIFE) Act amended Section 245(i) to extend the sunset date to April 30, 2001. Under the LIFE Act amendments, all aliens seeking to adjust status under Section 245(i) of the Act on the basis of a visa petition or application for labor certification filed after January 14, 1998 must have been physically present in the United States on December 21, 2000. INA § 245(i)(C). However, an alien who is the beneficiary of a visa petition filed on or before January 14, 1998 need not establish that he or she was physically present on December 21, 2000. See 8 C.F.R. § 1245.10(n)(1).

(1) 8 C.F.R. § 1245.10(i) states that "[t]he denial, withdrawal, or revocation of the approval of a qualifying immigrant visa petition, or application for labor certification, that was properly filed on or before April 30, 2001, and that was approvable when filed, will not preclude its grandfathered alien (including the grandfathered alien's family members) from seeking adjustment of status under section 245(i) of the Act on the basis of another approved visa petition, a diversity visa, or any other ground for adjustment of status under the Act, as appropriate." The BIA has ruled that an alien seeking to establish eligibility for adjustment of status

under Section 245(i) on the basis of a marriage-based visa petition must show that the marriage was bona fide at its inception in order to show that the visa petition was "approvable when filed" under 8 C.F.R. § 1245.10(i). Matters of Jara Riero and Jara Espinol, 24 I&N Dec. 267 (BIA 2007).

g. An alien whose application for adjustment pursuant to the Chinese Student Protection Act of 1992 was denied as a result of the alien's entry without inspection may not amend or renew the application in immigration proceedings in conjunction with section 245(i) of the INA. Matter of Wang, 23 I&N Dec. 924 (BIA 2006).

h. The BIA ruled that aliens who are inadmissible under Section 212(a)(9)(C)(i)(I) (aliens who have "been unlawfully present in the United States for an aggregate period of more than 1 year . . . and who enter[] or attempt[] to reenter the United States without being admitted") are ineligible for adjustment of status under Section 245(i). In doing so, the BIA ruled that the bar on adjustment of status for aliens who are inadmissible under Section 212(a)(9)(C)(i)(I) does not render meaningless the provision in Section 245(i)(1)(A) that an alien is eligible for adjustment of status even if he or she "entered the United States without inspection," as Section 212(a)(9)(C)(i)(I) only applies to a small subset (recidivist offenders) of aliens who enter without inspection. Matter of Briones, 24 I&N Dec. 355 (BIA 2007).

6. Deportable LPRs may adjust status. A lawful permanent resident who becomes deportable (usually due to a criminal conviction or for having been inadmissible at entry) is not precluded from establishing eligibility for adjustment of status by the fact that he already is an LPR. Tibke v. INS, 335 F.2d 42 (2d Cir. 1965); Matter of Krastman, 11 I&N Dec. 720 (BIA 1966).

a. Any respondent seeking to adjust status must be the beneficiary of an approved visa petition. See 8 C.F.R. § 1245.2(a)(2)(B). An LPR applying for adjustment of status probably has been the beneficiary of an approved visa petition in order to obtain status as an LPR. However, it is necessary for a new visa petition to be filed in his behalf and approved before he may adjust status for the original visa petition ceased to convey a priority date or visa classification once the respondent/beneficiary used it to obtain LPR status. See 8 C.F.R. § 1245.1(g)(2).

b. If the LPR respondent is deportable because he was inadmissible at the time of entry, he may have to apply for a waiver of the ground of inadmissibility which existed at entry.

c. If the LPR respondent is deportable because of a criminal conviction for a CIMT, he will have to qualify for a 212(h) waiver in order to be eligible for adjustment of status.

d. If the LPR respondent is deportable because of a criminal conviction for a drug offense, he may be ineligible to adjust status because there is no waiver available to an immigrant for a drug conviction other than simple possession of 30 grams or less of marijuana.

7. Miscellaneous cases on adjustment of status.

a. There is no authority to grant adjustment of status under Section 245 on a retroactive or nunc pro tunc basis. Matter of Hernandez - Puente, 20 I&N Dec. 335 (BIA 1991). Since an alien is assimilated to the position of an applicant for entry when applying for adjustment of status, he must be eligible, at the time his application is acted on, for the preference category relied on when the application was filed. Id. Although the Attorney General has discretion to admit applicants, he has no authority to act retroactively on an application. Id. Matter of Hernandez-Puente is limited to those aliens adjusted under Section 245 of the Act as the beneficiary of an approved visa petition. There are certain categories of applicants, such as refugees and those seeking adjustment as a Cuban/Haitian applicant, whose status as an LPR is acquired retroactively to a certain date fixed by the statute or the regulations. This is called a "roll-back" date.

b. An application for adjustment of status cannot be based on an approved visa petition that the applicant has already used to adjust his status to that of a lawful permanent resident. Matter of Villarreal-Zuniga, 23 I&N Dec. 886 (BIA 2006); 8 C.F.R. § 204.2(h)(2).

c. While a court order remains the preferred method of establishing the dissolution of a customary tribal marriage under Ghanaian law, affidavits executed by the heads of household, i.e., the fathers of the couple, that meet specified evidentiary requirements may be sufficient to establish a divorce for immigration purposes. Matter of Kodwo, 24 I&N Dec. 479 (BIA 2008).

L. Waivers. A respondent cannot "bootstrap" eligibility from one waiver to the another where he or she is not separately eligible for either. Matter of Roman, 19 I&N Dec. 855 (BIA 1988).

1. A waiver for inadmissible refugees. Section 207(c)(3) provides that certain grounds of inadmissibility are not applicable to aliens seeking admission to the U.S. as refugees and allows the AG to waive certain other grounds of inadmissibility.

a. Under Section 207(c)(3), the following grounds of inadmissibility are not applicable to aliens seeking admission as refugees:

(1) Section 212(a)(4) - aliens likely to become a public charge;

(2) Section 212(a)(5) - aliens not in possession of a labor certification;

(3) Section 212(a)(7)(A) - immigrants not in possession of a valid, unexpired immigrant visa or other entry document.

b. Section 207(c)(3) allows the AG to waive all other grounds of inadmissibility EXCEPT the following:

(1) Section 212(a)(2)(C) - aliens believed to be traffickers in controlled substances;

(2) Section 212(a)(3)(A) - aliens seeking to enter to perform activities which threaten the security of the U.S.;

(3) Section 212(a)(3)(B) - aliens engaged in terrorist activities;

(4) Section 212(a)(3)(C) - aliens inadmissible for their effect on the foreign policy of the U.S.;

(5) Section 212(a)(3)(E) - aliens who participated in persecution by the Nazis.

c. Under Section 207(c)(3), the grant of a waiver should be made:

(1) for humanitarian purposes,

(2) to assure family unity, or

(3) when it is otherwise in the public interest.

d. In unpublished decisions, the BIA has held that the favorable factors such as length of residence in the U.S., family ties in the U.S., rehabilitation from criminal activity, etc. should be weighed against the unfavorable factors of the alien's criminal history, immigration history, and other negative factors as is done in cases involving waivers under sections 212(c) and 212(h).

2. A waiver of passport, immigrant visa, or other entry documents for returning residents. Section 211(b) provides that, notwithstanding Section 212(a)(7)(A), returning resident immigrants, defined in Section 101(a)(27)(A), may be readmitted to the U.S. in the AG's discretion without being required to obtain a passport, immigrant visa, reentry permit, or other documentation.

a. Section 101(a)(27)(A) defines the term "special immigrant." Included in that definition at 101(a)(27)(A) is "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad."

b. This waiver is discussed at 8 C.F.R. § 1211.4.

c. Some of the cases discussing this waiver as well as the meaning of "temporary visit" are as follows:

(1) Matter of G-, 8 I&N Dec. 249 (BIA 1959);

(2) Matter of Salviejo, 13 I&N Dec. 557 (BIA 1970);

(3) Matter of Castro, 14 I&N Dec. 492 (BIA 1973), aff'd Castro-Guerrero v. INS, 515 F.2d 615 (5th Cir. 1975);

(4) Matter of Quijencio, 15 I&N Dec. 95 (BIA 1974);

(5) Matter of Martinez, 15 I&N Dec. 230 (BIA 1975);

(6) Matter of Kane, 15 I&N Dec. 258 (BIA 1975);

(7) Matter of Huang, 19 I&N Dec. 749 (BIA 1988);

(8) Matter of Abdoulin, 17 I&N Dec. 458 (BIA 1980).

3. Permission to reapply after deportation, exclusion or removal - 8 C.F.R.

§ 1212.2.

a. An Immigration Judge does not have authority to grant advance permission to reapply. Matter of Vrettakos, 14 I&N Dec. 593 (BIA 1974).

b. An Immigration Judge does have authority to grant nunc pro tunc permission to reapply, but only where the grant of the application will conclude the proceedings, i.e.:

(1) where the only ground of inadmissibility would be eliminated, or

(2) where the alien would receive a grant of adjustment of status in conjunction with any other waivers of inadmissibility.

c. The cases supporting these propositions are:

(1) Matter of Vrettakos, 14 I&N Dec. 593 (BIA 1973 & 1974);

(2) Matter of Ducret, 15 I&N Dec. 620 (BIA 1976);

(3) Matter of Martinez, 15 I&N Dec. 563 (BIA 1976);

(4) Matter of Ng, 17 I&N Dec. 63 (BIA 1979);

(5) Matter of Roman, 19 I&N Dec. 855 (BIA 1988).

4. A waiver for nonimmigrants coming to provide information about criminal activity. Section 212(d)(1) provides that the AG, in the exercise of discretion, may waive any ground of inadmissiblity (other than Section 212(a)(3)(E) [aliens involved in Nazi persecutions]) in the case of a nonimmigrant described in Section 101(a)(15)(S), if the AG considers it to be in the national interest to do so.

a. Section 212(d)(1) also provides that it does not prohibit the INS from instituting removal proceedings against an "S" nonimmigrant for conduct committed after the alien's admission or for conduct or a condition that was not disclosed to the AG.

b. This waiver is also discussed in the regulations at 8 C.F.R. 212.4(i).

5. A general waiver for nonimmigrants. Section 212(d)(3) provides that an inadmissible nonimmigrant may be issued a visa and/or admitted temporarily in the AG's discretion.

   a. Section 212(d)(3) has 2 parts. Part (A) is applicable to aliens applying for a nonimmigrant visa before a consular officer. Part (B) is applicable to aliens applying for admission.

   b. Under both parts, the following grounds of inadmissibility may not be waived:

      (1) 212(a)(3)(A)(i)(I) - espionage or sabotage;

      (2) 212(a)(3)(A)(ii) - any unlawful activity;

      (3) 212(a)(3)(A)(iii) - overthrow of U.S. government;

      (4) 212(a)(3)(C) - adverse effect on foreign policy;

      (5) 212(a)(3)(E) - Nazi persecutors.

   c. Under Matter of Hranka, 16 I&N Dec. 491 (BIA 1978), a decision on a 212(d)(3) waiver requires a weighing of at least 3 factors:

      (1) the risk of harm to society if the alien is admitted;

      (2) the seriousness of the alien's immigration or criminal violations, if any; and

      (3) the nature of the alien's reasons for wishing to enter the U.S.

   d. A waiver under Section 212(d)(3) could be granted in exclusion proceedings, but was unavailable nunc pro tunc in deportation proceedings because the regulations provided for the renewal of an application denied by the DD only in proceedings under Sections 235 and 236. Matter of Fueyo, 20 I&N Dec. 84 (BIA 1989).

   e. Section 212(d)(3) waivers are also discussed at 8 C.F.R. § 1212.4.

6. A waiver of documents for nonimmigrants. Section 212(d)(4) provides that either or both of the requirements of Section 212(a)(7)(B)(i), relating to a nonimmigrant's lack of passport and/or visa, may be waived by the AG and the Secretary of State acting jointly:

a. on the basis of unforeseen emergency in individual cases, or

b. on the basis of reciprocity with respect to nationals of foreign contiguous territory or adjacent islands, or

c. in the case of aliens proceeding in immediate and continuous transit through the U.S. under contracts authorized in Section 238(c).

d. An IJ has authority to grant a 212(d)(4) waiver. Matter of Kazemi, 19 I&N Dec. 49 (BIA 1984), overruling Matter of Ketema, 18 I&N Dec. 266 (BIA 1982).

7. A waiver of alien smuggling - Section 212(d)(11).

a. HISTORY LESSON - Former Section 212 (a) (31) of the Act, which dealt with the inadmissibility of alien smugglers, required that the smuggling had to be "for gain" in order to render an alien excludable. The Immigration Act of 1990 eliminated the element of gain. It also created a discretionary waiver under Section 212 (d)(11) of the Act for LPRs who attempted to smuggle their spouse, parent, son, or daughter. Section 307 (d) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 amended Section 212(d)(11) to make its provisions available to aliens seeking admission or adjustment of status as immediate relatives or immigrants under Section 203(a) of the Act (family-sponsored immigrants).

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

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

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

(b) who is otherwise admissible as a returning resident under Section 211(b) of the Act;

(c) who smuggled only an individual who at the time of

the smuggling was his spouse, parent, son, or daughter.

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

(2) The only other requirements are as follows:

(a) The alien must merit a favorable exercise of discretion, and

(b) The Attorney General's waiver must be for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

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

8. Waiver for document fraud - Section 212(d)(12).

a. HISTORY LESSON - Section 274C, which imposes civil penalties for document fraud, was added to the Act by Section 544(c) of the Immigration Act of 1990. When Section 212(a)(6)(F), which makes inadmissible any alien subject to a final order under Section 274C, was added, there was no waiver provided in the statute. In Matter of Lazarte, 21 I&N Dec. 214 (BIA 1996), the BIA held that there is no waiver for Section 212(a)(6)(F) and that a 212(i) fraud waiver is not applicable to waive that ground of inadmissibility. The IIRIRA added Section 212(d)(12) to the Act to provide a waiver.

b. Aliens who are eligible.

(1) An LPR who proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the U.S. as a returning resident under Section 211(b), or

(2) An alien seeking admission or adjustment of status under Section 201(b)(2)(A) [immediate relative] or Section 203(a) [family sponsored immigrants].

c. Substantive law.

(1) Section 212(d)(12) provides that the AG may waive a finding of inadmissibility under Section 212(a)(6)(F)(i) if:

(a) no previous civil money penalty was imposed against the alien under Section 274C and

(b) the offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual).

(2) The only other requirements are that:

(a) The alien must merit a favorable exercise of discretion, and

(b) The AG's waiver must be for humanitarian purposes or to assure family unity.

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

a. However, an Immigration Judge may decide whether an alien is subject to the foreign residence requirement of Section 212(e). Matter of Baterina, 16 I&N Dec. 127 (BIA 1977).

b. An alien who acquired J-1 status through fraud and who never participated in the exchange program is still subject to the foreign residence requirement. Matter of Park, 15 I&N Dec. 436 (BIA 1975).

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

a. Section 212(g)(1) allows the AG to waive inadmissibility under Section 212(a)(1)(A)(i) [alien determined to have a communicable disease of public health significance] in the case of an alien who is:

(1) the spouse of, the unmarried son or daughter of, the minor unmarried lawfully adopted child of, or who has a son or daughter who is a USC, an LPR, or an alien who has been issued an immigrant visa;

b. Section 212(g)(2) allows the AG to waive inadmissibility under Section 212(a)(1)(A)(ii) [alien not presenting documentation of vaccinations] in the case of any alien:

(1) who receives vaccination against the disease(s) for which the alien has failed to present documentation of previous vaccination, or

(2) for which a civil surgeon, medical officer, or panel physician (as defined in 42 C.F.R. § 34.2) certifies that such vaccination would not be medically appropriate, or

(3) under such circumstances as the AG provides by regulation, with respect to whom the requirement of such a vaccination would be contrary to the alien's religious beliefs or moral convictions.

c. Section 212(g)(3) allows the AG to waive inadmissibility under Section 212(a)(1)(A)(iii) [involving aliens determined to have a physical or mental disorder] in the case of any alien with such terms, conditions, and controls, including giving bond, as the AG (after consultation with the Secretary of Health & Human Services) may prescribe by regulation.

d. These waivers are also discussed in 8 C.F.R. § 1212.7(b).

11. A waiver of criminal activity - Section 212(h).

a. HISTORY LESSON - Before amendment by the Immigration Act of 1990, the waiver under Section 212(h) was available to immigrants who were the spouse, parent, son, or daughter of a USC or LPR who could establish that his exclusion (or deportation) would result in extreme hardship to the USC or LPR relative. The amendment did away with the extreme hardship requirement, but made the waiver available only to immigrants whose excludable activities occurred more than 15 years before application. This amendment was highly criticized, so in the Immigration Technical Corrections Act of 1991, Congress restored the waiver's availability upon a showing of extreme hardship as an alternative to the 15 year requirement.

(1) Before it was amended by the Immigration Act of 1990, Section 212(h) contained a requirement that the immigrant be "otherwise admissible," i.e. not excludable on any other ground than one which 212(h) may waive. This requirement was removed by amendment and has not been restored.

b. Section 212(h) provides that the Attorney General may waive the following grounds of inadmissibility:

(1) 212(a)(2)(A)(i)(I) - aliens convicted of or admitting the commission of a CIMT;

(2) 212(a)(2)(B) - aliens convicted of 2 or more offenses (other than purely political) with an aggregate sentence of 5 years;

(3) 212(a)(2)(D) - aliens involved in prostitution or commercialized vice;

(4) 212(a)(2)(E) - aliens involved in serious criminal activity who have asserted immunity from prosecution;

(5) 212(a)(2)(A)(i)(II) - aliens convicted of or admitting drug offenses as that Section relates to a single offense of simple possession of 30 grams or less of marijuana.

(a) The BIA ruled that this exception is not available where the alien was convicted under a statute containing, as an element, a requirement that the possession occur in a prison or other correctional

setting. Matter of Moncada, 24 I&N Dec. 424 (BIA 2007).

(b) In Matter of Martinez-Zapata, the BIA ruled that this exception is not available where the respondent's conviction was enhanced by virtue of the possession of marijuana occurring in a "drug-free zone," where the enhancement factor increased the maximum penalty for the underlying offense and had to be proved beyond a reasonable doubt to a jury. The BIA further ruled that any fact (including a fact contained in a sentence enhancement) that serves to increase the maximum penalty for a crime and that is required to be found by a jury beyond a reasonable doubt, if not admitted by the defendant, is to be treated as an element of the underlying offense, so that a conviction involving the application of such an enhancement is a conviction for the enhanced offense. Matter of Martinez-Zapata, 24 I&N Dec. 424 (BIA 2007).

c. Aliens who are ineligible.

(1) Section 212(h)(2) provides that no waiver shall be provided in the case of an alien who has been convicted of (or who has admitted acts that constitute) murder or criminal acts involving torture or an attempt or conspiracy to commit murder or a criminal act involving torture.

(2) Section 348 of IIRIRA amended Section 212(h)(2) to provide: "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States." This amendment was discussed by the BIA in Matter of Yeung, 21 I&N Dec. 610 (BIA 1996).

(a) An alien who has not previously been admitted to the U.S. as an alien lawfully admitted for permanent

residence is statutorily eligible for a 212(h) waiver despite his conviction for an aggravated felony. Matter of Michel, 21 I&N Dec. 1101 (BIA 1998).

(b) Section 348(b) of the IIRIRA provides that the amendments to Section 212(h) apply to aliens in exclusion or deportation proceedings as of September 30, 1996, unless a final order of deportation has been entered as of such date. This precluded the applicability of the new restrictions to an administratively final grant of a 212(h) waiver. However, an alien convicted of an aggravated felony who had a final administrative order of deportation as of September 30, 1996, would be subject to the restrictions on eligibility for a 212(h) waiver if his proceedings were thereafter reopened and the case returned to the status of a pending proceeding. Therefore, his motion to reopen deportation proceedings to apply for adjustment of status in conjunction with a 212(h) waiver was properly denied. Matter of Pineda, 21 I&N Dec. 1017 (BIA 1997).

(c) The lawfulness of the alien's status as a LPR is not relevant. Therefore, an alien who has previously been admitted as a LPR but later claims that such admission was not lawful because he concealed criminal activities from the INS cannot qualify for a 212(h) waiver if he has not resided continuously in the U.S. for 7 years or has been convicted of an aggravated felony. Matter of Ayala, 22 I&N Dec. 398 (BIA 1998).

(d) A returning LPR seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with a waiver under Section 212(h) of the Act. Matter of Abosi, 24 I&N Dec. 204 (BIA 2007).

(e) The Board has ruled that a respondent did not "lawfully reside" in the U.S., for purposes of eligibility for a waiver under INA § 212(h) of inadmissibility for certain criminal convictions, "during those periods in which he was an applicant

for asylum or for adjustment of status and lacked any other basis for claiming lawful residence." Matter of Rotimi, 24 I&N Dec. 567 (BIA 2008).

d. Substantive requirements. A Section 212(h) waiver is available to 2 classes of immigrants: those related to a USC or LPR and all other immigrants. Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992).

(1) Immigrants who are the spouse, parent, son, or daughter of a USC or LPR must establish the following:

(a) That the alien's exclusion would result in extreme hardship to the alien's USC or LPR spouse, parent, son, or daughter;

i) In interpreting the pre-amendment version of Section 212(h), the BIA held that the hardship to the alien himself may not be considered. Matter of Shaughnessy, 12 I&N Dec. 810 (BIA 1968).

ii) In the same case, the BIA held that the term "extreme hardship" encompasses both present and future hardship.

iii) By use of the term "extreme hardship," Congress intended a showing of more than the mere hardship caused by family separation. Matter of W-, 9 I&N Dec. 1 (BIA 1960).

iv) Only in cases of great actual or prospective injury to a qualifying party will a waiver be granted. Matter of Ngai, 19 I&N Dec. 245 (Comm. 1984).

v) In Osuchukwu v. INS, 744 F.2d 1136 (5th Cir. 1984), the 5th Circuit strongly implied that the "extreme hardship" to be demonstrated in a 212(h) case is the same as the "extreme hardship" required in suspension of deportation cases under former Section 244(a).

(b) That the alien merits a favorable exercise of discretion;

i) In interpreting the pre-amendment version of Section 212(h), the BIA held that when an alien has been convicted of serious crimes, there should be a reasonable showing of rehabilitation before there can be a finding that his admission would not be contrary to the national welfare, safety, or security of the U.S. Matter of Shaughnessy, 12 I&N Dec. 810 (BIA 1968). Neither the "welfare, safety, or security" requirement or the "rehabilitation" requirement of amended Section 212(h) is applicable to an immigrant seeking the waiver on the basis of his relationship to a USC or LPR. A discussion of the BIA's view on the subject since amendment is set forth below.

ii) Establishing extreme hardship and eligibility for Section 212(h)(1)(B) relief does not create any entitlement to that relief. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. Matter of Mendez, 21 I&N Dec. 296 (BIA 1996). In assessing whether an applicant has met his burden that he merits a favorable exercise of discretion, the IJ must balance the adverse factors of record evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the grant of relief in the exercise of discretion is in the best interest of this country. Id. The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature,

recency, seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Id. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (such as affidavits from family, friends, and responsible community representatives). Id. The equities that an applicant for Section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse factors. As the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence.

iii) The underlying significance of the adverse and favorable factors is also to be taken into account.

a) If the alien has relatives in the U.S., the quality of their relationship must be considered in determining the weight to be awarded this equity.

b) The equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of

deportation proceedings, with knowledge that the alien might be deported.

c) If the alien has a history of employment, it is important to consider the type of employment and its length and stability.

d) When looking at the length of the alien's presence in the U.S., the nature of his presence during this period must be evaluated. For example, a period of residency marked by a term of imprisonment diminishes the significance of the period of residency.

iv) While the IJ may not go behind the record of conviction to determine the guilt or innocence of the alien, it is proper to look to probative evidence outside the record of conviction in inquiring as to the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted. Matter of Mendez, 21 I&N Dec. 296, 303 n.1 (BIA 1996). Taking responsibility and showing remorse for one's criminal behavior does constitute some evidence of rehabilitation, although an alien who claims innocence and does not express remorse is not precluded from ever presenting persuasive evidence of rehabilitation by other means. Id. While the lack of persuasive evidence of rehabilitation may not in itself be an adverse factor, the absence of this equity in the alien's favor may ultimately be determinative in a given case concerning the exercise of discretion under Section 212(h)(1)(B) of the Act, particularly where an alien has engaged in serious misconduct and there are questions whether the alien will revert to criminal behavior. Id.

Conversely, evidence of rehabilitation in some cases may constitute the factor that raises the significance of the alien's equities in total so as to be sufficient to counterbalance the adverse factors in the case and warrant a favorable exercise of discretion. Id.

v) As of December 19, 2002, 8 C.F.R. § 212.7 [now 8 C.F.R. § 1212.7(d)] was added which provides as follows: "The Attorney General, in general, will not favorably exercise discretion under Section 212(h)(2) of the Act to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under Section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional or extremely unusual hardship. Moreover, depending on the gravity of the alien's criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under Section 212(h)(2) of the Act."

(2) Immigrants not having the requisite relationship to a USC or LPR must establish the following:

(a) That the alien is inadmissible only under sections 212(a)(2)(D)(i) or (ii) [all grounds involving prostitution, except coming to the U.S. to engage in any other commercialized vice as described in Section 212(a)(2)(D)(iii)] or that the activities for which the alien is inadmissible occurred more than 15 years before the date of application;

(b) The alien must also establish that his admission to the U.S. would not be contrary to the national welfare, safety, or security of the U.S.;

(c) The alien must also establish that he has been rehabilitated;

(d) The alien must also establish that he merits a favorable exercise of discretion;

i) An application for discretionary relief, including a waiver under Section 212(h), may be denied in the exercise of discretion without express rulings on the question of statutory eligibility. INS v. Bagamasbad, 429 U.S. 24 (1976).

12. A waiver of inadmissibilty for fraud or misrepresentation. Section 212(i) of the Act allows the AG to waive Section 212(a)(6)(C)(i) relating to fraud or misrepresentation of a material fact in procuring a visa, admission into the U.S., or other benefit under the Act.

a. Under Section 212(i)(1), the waiver is available to an immigrant who is the spouse, son, or daughter of a USC or LPR if it is established that the refusal of admission to the U.S. of the immigrant would result in extreme hardship to the USC or LPR spouse or parent. Section 212(i)(1) also requires that the immigrant merit a favorable exercise of discretion.

b. Section 212(i) waivers are discussed in 8 C.F.R. § 1212.7.

c. Section 212(i) of the Act is not available to waive inadmissibility under Section 212(a)(6)(F) of the Act which makes inadmissible aliens subject to a final order under Section 274C of the Act involving document fraud. Matter of Lazarte, 21 I&N Dec. 214 (BIA 1996).

d. The provisions of Section 212(i) of the Act which require that an alien establish extreme hardship to his or her United States citizen or permanent resident alien spouse or parent in order to qualify for a waiver of inadmissibility, are applicable to pending cases. Matter of Cervantes, 22 I&N Dec. 560 (BIA 1999), following Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997).

e. The factors to be used in determining whether an alien has established extreme hardship pursuant to Section 212(i) of the Act include, but are not limited to, the following: the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to the unavailability of suitable medical care in the country to which the qualifying relative would relocate. Matter of Cervantes, 22 I&N Dec. 560 (BIA 1999).

f. The underlying fraud or misrepresentation for which an alien seeks a waiver of inadmissibility under Section 212(i) of the Act may be considered as an adverse factor in adjudicating the waiver application in the exercise of discretion. Matter of Cervantes, 22 I&N Dec. 560 (BIA 1999).

13. A waiver of inadmissibility under sections 212(a)(5)(A) [no labor certification] and 212(a)(7)(A)(i) [no valid entry document]. Section 212(k) provides that any alien inadmissible under Section 212(a)(5)(A) [no labor certification] or Section 212(a)(7)(A)(i) [immigrant not in possession of valid immigrant visa] who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the AG's discretion if the AG is satisfied that "exclusion was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission."

a. This waiver is also discussed at 8 C.F.R. § 1212.10.

b. The only case in recent years dealing with 212(k) waivers is Matter of Aurelio, 19 I&N Dec. 458 (BIA 1987).

14. A waiver of inadmissibility as a public charge - Section 213.

a. IJs have jurisdiction to grant a waiver of inadmissibility under Section 213 of the Act and are required to advise an alien found to be inadmissible as a public charge under Section 212(a)(4)(B) of the Act of his or her right to apply for a waiver. Matter of Ulloa,

22 I&N Dec. 725 (BIA 1999).

b. Section 213 provides that an alien inadmissible under Section 212(a)(4) [likely to become a public charge] may be admitted if:

(1) bond is posted;

(2) is otherwise admissible; and

(3) if alien merits a favorable exercise of discretion.

15. A waiver of the requirement to file joint petition for removal of conditions - Section 216(c)(4).

a. Introduction and in general.

(1) The Act provides 2 means by which the conditional basis of a conditional permanent resident's (CPR) status may be removed: (1) the alien and the citizen spouse may file a joint petition to remove the conditional basis of the alien's permanent resident status under Section 216(c)(1) of the Act, or (2) the alien may file an application for a waiver of the requirement to file a joint petition under Section 216(c)(4). Matter of Mendes, 20 I&N Dec. 833 (BIA 1994); Matter of Anderson, 20 I&N Dec. 888 (BIA 1994); Matter of Balsillie, 20 I&N Dec. 486 (BIA 1992).

(2) The 1986 amendment which created CPR status contained the word "or" between the extreme hardship ground for waiver and the good faith ground which follows it. A 1990 amendment removed the word "or," but added a third ground for waiver available to battered spouses or children. The third ground is preceded by the word "or." These changes were for the purposes of syntax only and not to combine the first 2 grounds for a waiver. There are 3 separate waivers which a CPR may file. Matter of Balsillie, 20 I&N Dec. 486 (BIA 1992).

(a) A CPR who seeks to remove the conditional basis of that status by means of a waiver under Section 216(c)(4) of the Act should apply for any applicable waiver provided under that section. Matter of Anderson, 20 I&N Dec. 888 (BIA 1994).

(b) An alien whose application for a specific waiver under Section 216(c)(4) of the Act has been denied by the INS may not seek consideration of an alternative waiver under that Section in deportation proceedings before an IJ. Id.

(c) Where an alien becomes eligible for an additional waiver under Section 216(c)(4) of the Act due to changed circumstances, the deportation proceedings may be continued in order to give the alien a reasonable opportunity to submit an application to the Service. Id.

(d) Inasmuch as the BIA only has authority to review a waiver application after the INS and the IJ have considered it, an alien may not apply for a waiver under Section 216(c)(4) on appeal. Id.

(e) In order to preserve an application for relief under Section 216(c)(4) of the Act, an alien must request during deportation proceedings before an IJ a review of the Service's denial of such application. Matter of Gawaran, 20 I&N Dec. 938 (BIA 1995).

(f) Only circumstances occurring during the period the alien was admitted for conditional residence will be considered. Matter of Singh, 24 I&N Dec. 331 (BIA 2007). There is no conflict between Section 216(c)(4) and the implementing regulation at 8 C.F.R. § 1216.5(e)(1) where both provide the same start date for the circumstances to be considered and only the statute provides an end date. Id.

b. The extreme hardship waiver. In order to qualify for this waiver, the CPR must establish that extreme hardship would result if he or she is deported. Neither the statute nor the regulations specify to whom the extreme hardship must result.

(1) The regulations emphasize that hardship results from any deportation and that the waiver should be granted only in those cases in which the hardship is extreme. 8 C.F.R. § 1216.5(e)(1).

(a) In determining extreme hardship, only

circumstances occurring after the alien acquired CPR status may be considered. INA § 216(c)(4); 8 C.F.R. § 1216.5(e)(1).

c. The "good faith" waiver. In order to qualify for this waiver, the alien must establish that he/she entered into the qualifying marriage in good faith, but the qualifying marriage was terminated (other than by death of a spouse) and the alien was not at fault in failing to meet the petition and interview requirements.

(1) The 1986 amendment which created CPR status contained the requirement that the qualifying marriage had to be terminated "by the alien spouse for good cause." This led to some inequitable situations in which aliens who had entered into the qualifying marriage in good faith and were not at fault in failing to meet the requirements of petition and interview were ineligible for a waiver because their spouse had been the plaintiff in the divorce. A 1990 amendment to the Act removed the requirement that the marriage be terminated by the alien spouse. The amendment removing this requirement is applicable to marriages entered into before, on, or after the effective date of the amendment (Nov. 29, 1990). Therefore, the amendment is considered to be retroactive.

d. The battered spouse or child waiver. In order to qualify for this waiver, it must be shown that the alien entered into the qualifying marriage in good faith, was battered by or the subject of extreme cruelty by his or her spouse or parent, and was not at fault in failing to meet the petition and interview requirements. INA § 216(c)(4)(C).

(1) The battered spouse or child ground for waiver was added by a 1990 amendment applicable to marriages entered into before, on, or after the effective date of the amendment (Nov. 29, 1990). Therefore, the amendment is considered to be retroactive.

16. A waiver of fraud in removal proceedings. Section 237(a)(1)(H) provides that an alien subject to removal as inadmissible at the time of application for admission under Section 212(a)(6)(C)(i) because of either willful or innocent fraud or misrepresentation of a material fact in obtaining a visa, entry, or other benefit may be granted a waiver of the fraud or misrepresentation and any ground of inadmissibility at time of application

for admission which resulted from the fraud or misrepresentation.

a. In order to qualify for the waiver, the respondent must demonstrate the following:

(1) The respondent must be the spouse, parent, son or daughter of a USC or LPR;

(a) The Board has ruled that, for an alien to qualify for a waiver of inadmissibility under INA § 237(a)(1)(H)(i), the alien's qualifying relative must be living. The Board rejected the respondent's argument that he qualified for a waiver of inadmissibility under INA § 237(a)(1)(H)(i) based on his deceased U.S.-citizen mother. Matter of Federiso, 24 I&N Dec. 661 (BIA 2008).

(2) The respondent must have been in possession of an immigrant visa at the time of entry;

(3) The respondent must have been otherwise admissible at the time of entry except for sections 212(a)(5)(A) [no labor certification] and 212(a)(7)(A) [no valid, unexpired immigrant visa] which were a direct result of the fraud or misrepresentation;

(4) The respondent must merit a favorable exercise of discretion.

b. Section 237(a)(1)(H) provides that "a waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive deportation based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation."

(1) INA § 237(a)(1)(H) authorizes a waiver of removability under INA § 237(a)(1)(A) based on charges of inadmissibility at the time of admission under INA § 212(a)(7)(A)(i)(I), for lack of a valid immigrant visa or entry document, as well as under INA § 212(a)(6)(C)(i) for fraud or willful misrepresentation of a material fact, where there was a misrepresentation made at the time of admission, whether innocent or not. Matter of Fu, 23 I&N

Dec. 985 (BIA 2006).

c. Section 237(a)(1)(H) states that its waiver is unavailable to any alien described in Section 241(a)(4)(D) [Nazi persecutors].

d. Former Section 241(f)(1) of the Act was held to be unavailable to waive an alien's deportability under former Section 241(a)(9)(B) of the Act (an alien with LPR status on a conditional basis whose status on a conditional basis whose status is terminated) because termination of the alien's conditional permanent resident status constitutes a basis for deportability which is separate and distinct from the charge that the alien is "excludable at the time of entry" within the meaning of former Section 241(f)(1). Matter of Gawaran, 20 I&N Dec. 938 (BIA 1995). Section 237(a)(1)(H) appears subject to the same interpretation.

e. Former Section 241(f) was held to waive grounds of excludability existing only at the time of an alien's entry to the U.S. and was unavailable to waive frauds committed while adjusting status because an adjustment was not an "entry." Matter of Connelly, 19 I&N Dec. 156 (BIA 1984).

f. Former Section 241(f) was held to be available only in deportation proceedings and not in rescission proceedings. Matter of Pereira, 19 I&N Dec. 169 (BIA 1984).

g. In making the discretionary determination on a waiver of deportability pursuant to former Section 241(a)(1)(H) of the Act, an IJ should consider the alien's initial fraud or misrepresentation in the overall assessment of positive and negative factors. Matter of Tijam, 22 I&N Dec. 408 (BIA 1998). In that decision, the BIA specifically declined to follow the policy set forth by the Commissioner of the Immigration and Naturalization Service in Matter of Alonzo, 17 I&N Dec. 292 (Comm. 1979), that the underlying fraud or misrepresentation for which the alien seeks a waiver should be disregarded.

17. A waiver of passport and visa for certain nonimmigrant visitors seeking admission to Guam - Section 212(l).

a. This waiver is discussed in the regulations at 8 C.F.R. § 1212.1(e).

M. Nicaraguan Adjustment and Central American Relief Act (NACARA).

1. Adjustment of status by nationals of Nicaragua or Cuba. Section 202 of NACARA provides that the status of an alien shall be adjusted to that of a LPR if the alien:

   a. Is a national of Nicaragua or Cuba who has been physically present in the U.S. for a continuous period , beginning not later than December 1, 1995 and ending not earlier than the date the application for adjustment is filed. NACARA § 202(a)(b)(1).

      (1) Section 202(b)(2) of NACARA provides that, for purposes of establishing that the period of continuous physical presence commenced not later than December 1, 1995, an alien shall demonstrate that prior to December 1, 1995, he:

         (a) applied to the AG for asylum;

         (b) was issued an OSC under former Section 242 or 242B of the Act (as in effect prior to April 1, 1997);

         (c) was placed in exclusion proceedings under former Section 236 of the Act (as in effect prior to April 1, 1997);

         (d) applied for adjustment of status under Section 245 of the Act;

         (e) performed service, or engaged in a trade or business, within the U.S. which is evidenced by records maintained by the Commissioner of Social Security;

         (f) applied for any other benefit under the Act by means of an application establishing the alien's presence in the U.S. prior to December 1, 1995; or

         (g) shall make such other demonstration of physical presence as the AG may provide for by regulation.

   b. Applies for NACARA adjustment before April 1, 2000;

   c. Is otherwise eligible to receive an immigrant visa and is otherwise admissible to the U. S. for permanent residence;

(1) The following grounds of inadmissibility shall not apply:

(a) Section 212(a)(4) - public charge;

(b) Section 212(a)(5) - labor certification;

(c) Section 212(a)(6)(A) - present without admission or parole;

(d) Section 212(a)(7)(A) - not in possession of a valid entry document.

d. Application in lieu of MTR. Section 202(a)(2) of NACARA provides that an alien present in the U.S. who has been ordered excluded, deported, removed, or ordered to depart voluntarily from the U.S. under any provision of the Act may, notwithstanding such order, apply for adjustment of status under Section 202(a)(1) of NACARA. Such an alien may not be required, as a condition of submitting or granting such application, to file a separate motion to reopen, reconsider, or vacate such order. If the AG grants the application, the AG shall cancel the order. If the AG renders a final administrative decision to deny the application, the order shall be effective and enforceable to the same extent as if the application had not been made.

(1) Section 202(g) of NACARA provides that when an alien's status is adjusted to that of an LPR, the Secretary of State is not required to reduce the number of immigrant visas available to be issued.

2. Special rule for cancellation of removal for Salvadorans, Guatemalans, and aliens from Soviet bloc countries. Section 203(b) of NACARA amended Section 309 of IIRIRA to add Section 309(b) which provides that, subject to the provisions of the Act in effect after IIRIRA, other than sections 240A(b)(1), 240A(d)(1), and 240A(e) [but including Section 242(a)(2)(B)], the AG may cancel removal and adjust to the status of an LPR an alien who is inadmissible or deportable from the U.S. who:

a. Applies for such relief;

b. Is described in Section 203(a)(5)(C)(i) of NACARA;

(1) Has not been convicted of an aggravated felony;

(2) Was not apprehended after December 19, 1990; and

(3) Is a Salvadoran national who first entered the U.S. on or before September 19, 1990 and who registered for benefits pursuant to the settlement agreement in American Baptist Churches, et al v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) on or before October 31, 1991 or applied for TPS on or before October 31, 1991; or

(a) For guidance on what constitutes evidence of registration for benefits under the ABC settlement agreement, see Chaly-Garcia v. U.S., 508 F.3d 1201 (9th Cir. 2007). USCIS implemented a new nationwide policy in light of this decision.

(4) Is a Guatemalan national who first entered the U. S. on or before October 1, 1990, and who registered for benefits pursuant to the settlement agreement in American Baptist Churches, et al v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) on or before October 31, 1991; or

(a) For guidance on what constitutes evidence of registration for benefits under the ABC settlement agreement, see Chaly-Garcia v. U.S., 508 F.3d 1201 (9th Cir. 2007). USCIS implemented a new nationwide policy in light of this decision.

(5) Is a Guatemalan or Salvadoran national who filed an application for asylum with the INS on or before April 1, 1990; or

(6) Is the spouse or child (as defined in Section 101(b)(1) of the Act) of an individual described in this clause at the time the individual is granted suspension or cancellation; or

(7) Is the unmarried son or daughter of an alien parent described in this subclause at the time suspension or cancellation is granted the parent - if the unmarried son or daughter is 21 years of age or older at the time the decision is rendered, the son or daughter must have entered the U.S. on or before October 1, 1990; or

(8) Is an alien who entered the U.S. on or before December 31, 1990 and who filed an application for asylum on or before that date, and who was, at the time of filing the application, a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.

c. The alien is not inadmissible or deportable under Section 212(a)(2) or (3), or Section 237(a) (2), (3), or (4);

d. Is not an alien described in Section 241(b)(3)(B)(i) of the Act;

e. Has been physically present in the U.S. for a continuous period of not less than 7 years immediately preceding the date of application;

(1) The BIA held that, as an application for special rule cancellation of removal is deemed to be a "continuing" application, an applicant can continue to accrue physical presence until a final administrative decision is issued. Matter of Garcia, 24 I&N Dec. 179 (BIA 2007).

f. Has been a person of GMC during such period, and

g. Establishes that removal would result in extreme hardship to the alien or the alien's spouse, parent, or child who is a USC or LPR, or

h. If the alien is inadmissible or deportable under Section 212(a)(2), 237(a)(2) [other than 237(a)(2)(A)(iii)], or 237(a)(3), and

i. Is not an alien described in Section 241(b)(3)(B)(i) or Section 101(a)(43) [an alien convicted of an aggravated felony], and

j. Has been physically present in the U.S. for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for removal, and

k. Establishes that removal would result in exceptional and extremely unusual hardship to the alien or the alien's spouse, parent, or child

who is a USC or LPR.

3. Section 309(f)(2) of IIRIRA was amended to provide that Section 240A(d)(2) of the Act shall apply for purposes of calculating any period of continuous physical presence, except that "reference to subsection (b)(1) in such Section shall be considered to be a reference to paragraph (1) of this section."

4. Motions to reopen. Section 203(g) of NACARA provides that, notwithstanding any limitation imposed by law on motions to reopen removal or deportation proceedings (except limitations premised on an alien's conviction of an aggravated felony), any alien who has become eligible for cancellation of removal or suspension of deportation as a result of the amendments made by Section 203 of NACARA may file one motion to reopen removal or deportation proceedings to apply for cancellation of removal or suspension of deportation. It also provides that the AG shall designate a specific time period in which all such motions to reopen are required to be filed. The period shall begin not later than 60 days after the date of enactment of NACARA and shall extend for a period not to exceed 240 days.

5. Calculation of physical presence for Salvadorans, Guatemalans, and aliens from Soviet bloc countries. Section 203(a)(5)(C)(i) of NACARA provides that, for purposes of calculating the period of continuous physical presence under former Section 244(a) of the Act (suspension of deportation) and Section 240A of the Act (cancellation of removal for non-LPRs), subparagraph (A) and sections 240A(d)(1) and (2) [relating to termination of and breaks in residence or physical presence] shall not apply in the case of an alien, regardless of whether in exclusion or deportation proceedings, who:

   a. Has not been convicted of an aggravated felony;

   b. Was not apprehended after December 19, 1990; and

      (1) Is a Salvadoran national who first entered the U.S. on or before September 19, 1990 and who registered for benefits pursuant to the settlement agreement in American Baptist Churches, et al v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) on or before October 31, 1991 or applied for TPS on or before October 31, 1991; or

         (a) For guidance on what constitutes evidence of

registration for benefits under the ABC settlement agreement, see Chaly-Garcia v. U.S., 508 F.3d 1201 (9th Cir. 2007). USCIS implemented a new nationwide policy in light of this decision.

(2) Is a Guatemalan national who first entered the U. S. on or before October 1, 1990, and who registered for benefits pursuant to the settlement agreement in American Baptist Churches, et al v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) on or before October 31, 1991; or

(a) For guidance on what constitutes evidence of registration for benefits under the ABC settlement agreement, see Chaly-Garcia v. U.S., 508 F.3d 1201 (9th Cir. 2007). USCIS implemented a new nationwide policy in light of this decision.

(3) Is a Guatemalan or Salvadoran national who filed an application for asylum with the INS on or before April 1, 1990; or

(4) Is the spouse or child (as defined in Section 101(b)(1) of the Act) of an individual described in this clause at the time the individual is granted suspension or cancellation; or

(5) Is the unmarried son or daughter of an alien parent described in this subclause at the time suspension or cancellation is granted the parent - if the unmarried son or daughter is 21 years of age or older at the time the decision is rendered, the son or daughter must have entered the U.S. on or before October 1, 1990; or

(6) Is an alien who entered the U.S. on or before December 31, 1990 and who filed an application for asylum on or before that date, and who was, at the time of filing the application, a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.

VIII. Advance parole.

A. Introduction. Advance parole is a mechanism by which a DD can, as a humanitarian measure, advise an alien who is in the U.S., but who knows or fears that he will be inadmissible if he leaves and tries to return, that he can leave with the assurance that he will be paroled back into the U.S. upon return, under prescribed conditions, if he cannot establish that he is admissible at that time; Matter of G-A-C-, 22 I&N Dec. 83 (BIA 1998). In that same decision, the BIA pointed out that the term "advance parole" is something of a misnomer. An alien in the U.S. may request an advance authorization of parole and, if the request is approved, the alien is not at that point paroled. Rather, the alien is advised in advance of a departure that, if he meets certain requirements, he will be paroled into the U.S. when he returns.

IX. Defenses to removability available to aliens convicted of crimes.

A. INTRODUCTION - The term "defense" is used to describe facts or law put forward to show that a respondent is not removable. The term is used to distinguish it from "relief" in which the alien is subject to removal but seeks a remedy which will prevent removal, and from "waiver,"" in which the alien is removable but seeks to have the ground of removal overlooked or waived.

B. The charge requires a conviction and the conviction does not support the charge.

1. Crimes involving moral turpitude (CIMT). "Moral turpitude" does not have a clear definition. Individual decisions of the Board of Immigration Appeals (BIA) and the courts must be reviewed before reaching a conclusion.

a. Some of the more esoteric definitions mentioned by the BIA are: "anything done contrary to justice, honesty, principle, or good morals," "an act of baseness, vileness, or depravity in the private social duties which man owes to his fellow man or to society," "a crime involves moral turpitude when its nature is such that it manifests upon the part of its perpetrator personal depravity or baseness." Matter of Awaijane, 14 I&N Dec. 117 (BIA 1972); Matter of Sloan, 12 I&N Dec. 840 (BIA 1966; A.G. 1968); Matter of E-, 2 I&N Dec. 134 (BIA 1944).

b. Perhaps the most practical definition is from a Dec. 5, 1922 opinion of the Solicitor of the Department of Labor. It is quoted by the BIA in Matter of E-, 2 I&N Dec. 134 (BIA 1944), "A crime involving moral turpitude may be either a felony or a misdemeanor, existing at common law or created by statute, and is an act or omission which is malum in se and not merely malum

prohibitum; which is actuated by malice or committed with knowledge and intention and not done innocently or without inadvertence or reflection; which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons; but which is not the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, of mistaken principles, unaccompanied by a vicious motive or corrupt mind."

c. The BIA has adopted the requirement of intent and holds that a test in determining what crimes involve moral turpitude is whether the act is accompanied by a "vicious motive" or "corrupt mind." A crime must by its very nature and at its minimum , as defined by statute, involve an evil intent before a finding of moral turpitude would be justified. Malicious and mischievous intention, or what is equivalent to such intention, is the broad boundary between right and wrong and between crimes involving moral turpitude and those which do not. Matter of Awaijane, 14 I&N Dec. 117 (BIA 1972); Matter of P-, 3 I&N Dec. 56 (BIA 1948); Matter of E-, 2 I&N Dec. 134 (BIA 1944).

(1) The BIA has held that an "evil intent" (actually its equivalent) may be found in a statute based on "recklessness" rather than specific criminal intent, such as manslaughter defined as recklessly causing the death of another. The BIA held that recklessness is evidenced when a person is "aware of and consciously disregards a substantial and unjustifiable risk" and the risk "constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Matter of Franklin, 20 I&N Dec. 867 (BIA 1994); Matter of Wojtkow, 18 I&N Dec. 111 (BIA 1981).

(2) Statutory rape has been found to involve moral turpitude even though it is a strict liability offense. Castle v. INS, 541 F.2d 1064 (4th Cir. 1976); Marciano v. INS, 450 F.2d 1022 (8th Cir. 1971); Matter of Dingena, 11 I&N Dec. 723 (BIA 1966).

d. The BIA has also suggested, on occasion, that part of the test for the existence of moral turpitude in connection with the violation of

a law requires the doing of an act which is malum in se rather than malum prohibitum. Matter of A-, 5 I&N Dec. 52 (BIA 1953); Matter of E-, 2 I&N Dec. 134 (BIA 1944) .

e. General considerations.

(1) Moral turpitude does not depend on felony or misdemeanor distinction. Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929); Matter of Short, 20 I&N Dec. 136 (BIA 1989).

(2) Neither the seriousness of a criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. Matter of Serna, 20 I&N Dec. 579 (BIA 1992).

(3) Conduct must be deemed criminal under U. S. law. Matter of McNaughton, 16 I&N Dec. 569 (BIA 1978), aff'd McNaughton v. INS, 612 F.2d 457 (9th Cir. 1980).

(4) Moral turpitude is judged by U.S. standards. Id.

(5) The Board of Immigration Appeals and the Immigration Judge are bound by the record of conviction and may not retry the criminal case. Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962).

(6) If an offense involves moral turpitude, then an attempt to commit that crime involves moral turpitude. U.S. ex rel. Meyer v. Day, 54 F. 2d 336 (2nd Cir. 1931); Matter of Awaijane, 14 I&N Dec. 117 (BIA 1972).

(7) If an offense involves moral turpitude, then a conspiracy to commit that offense also involves moral turpitude. Matter of E, 9 I&N Dec. 421 (BIA 1961).

(8) If a crime involves moral turpitude, then a conviction for aiding in the commission of that crime or otherwise acting as an accessory before the fact also involves moral turpitude. Matter of Short, 20 I&N Dec. 136 (BIA 1989); Matter of F-, 6 I&N Dec. 783 (BIA 1955).

(9) An assault with intent to commit a felony is not per se a CIMT without regard to whether the underlying felony

involves moral turpitude. There must be a finding that the felony intended as a result of the assault involves moral turpitude. Matter of Short, 20 I&N Dec. 136 (BIA 1989).

f. Specific offenses:

(1) Money laundering under New York Penal Law § 470.10(1) is a CIMT. Matter of Tejwani, 24 I&N Dec. 97 (BIA 2007).

(2) Trafficking in counterfeit goods or services in violation of 18 U.S.C. § 2320 is a CIMT. Matter of Kochlani, 24 I&N Dec. 128 (BIA 2007).

(3) Willful failure to register as a sex offender by an individual who has previously been apprised of the obligation to register, in violation of section 290(g)(1) of the California Penal Code, is a CIMT. Matter of Tobar-Lobo, 24 I&N Dec. 143 (BIA 2007). However, in Plasencia-Ayala v. Mukasey, 516 F.3d 738 (9th Cir. 2008), the Ninth Circuit ruled that the Nevada offense of failing to register as a sex offender, under Nev. Rev. Stat. 179D.550, is not a CIMT.

(4) Third degree assault under New York Penal Law § 102.00(1) is a CIMT. A person is guilty of this offense when, "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third party." Matter of Solon, 24 I&N Dec. 239 (BIA 2007).

(5) Assault and battery against a family or household member under Virginia Code § 18.2-57.2 is not categorically a CIMT. A person is guilty of this offense if he or she "commits an assault and battery against a family or household member." Matter of Sejas, 24 I&N Dec. 236 (BIA 2007).

g. Determination of moral turpitude. In Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008), the Attorney General ruled that, in determining whether an alien's offense constitutes a CIMT, "adjudicators should: (1) look first to the statute of conviction under the categorical inquiry . . . ; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the

judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question."

(1) The previous standard for determining whether an offense was a CIMT was as follows:

(a) In determining whether a crime involves moral turpitude, it is the nature of the offense itself which determines moral turpitude. Matter of Esfandiary, 16 I&N Dec. 659 (BIA 1979).

(b) The statute under which the conviction occurred controls. If it defines a crime in which turpitude necessarily inheres, then the conviction is for a CIMT. United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939); United States ex rel. Mylius v. Uhl, 210 F. 860 (2d Cir. 1914).

(c) Only where the statute under which the respondent was convicted includes some offenses which involve moral turpitude and some which do not involve moral turpitude is the record of conviction consulted to determine for which offense the respondent was convicted. The record of conviction consists of the indictment, plea, verdict, and sentence. Matter of Esfandiary, 16 I&N Dec. 659 (BIA 1979); Matter of Ghunaim, 15 I&N Dec. 269 (BIA 1975), modified on other grounds by Matter of Franklin, 20 I. & N. Dec. 867 (BIA 1994); Matter of Lopez, 13 I&N Dec. 725 (BIA 1971), modified on other grounds by Matter of Franklin, 20 I&N Dec. 867 (BIA 1994); Matter of S-, 2 I&N Dec. 353 (BIA 1945).

(d) When the record of conviction does not establish under which section of a divisible statute the respondent was convicted, the offense is assumed to be the minimum defined by the statute and moral turpitude cannot be found. Matter of N-, 8 I&N Dec. 466 (BIA 1959).

(e) Where an indictment or information charged a particular offense but the respondent entered a plea of guilty to a lesser offense, the allegations in the indictment which pertain only to the greater offense are disregarded and the remaining allegations to which the plea has been taken are considered to determine whether there has been a conviction of a CIMT. Matter of Beato, 10 I&N Dec. 730 (BIA 1964); Matter of W-, 4 I&N Dec. 241 (BIA 1951); Matter of M-, 2 I&N Dec. 525 (BIA 1946).

2. The conviction is not final due to an appeal.

a. A conviction pending direct appeal is not final. Pino v. Landon, 349 U. S. 901 (1955) (per curiam); Kabongo v. INS, 837 F.2d 753 (6th Cir. 1988); Will v. INS, 447 F.2d 529 (7th Cir. 1971); Morales-Alvarado v. INS, 655 F.2d 172 (9th Cir. 1981).

b. This means an appeal as of right and not where there is discretion to accept or reject the appeal or where the alien is making a collateral attack on the conviction. Morales-Alvarado v. INS, 655 F.2d 172 (9th Cir. 1981); Matter of Polanco, 20 I&N Dec. 894 (BIA 1994). The possibility or pendency of post-conviction motions or other forms of collateral attack, not constituting direct appeals, do not serve to negate the finality of a conviction or the charge of deportability for immigration purposes, unless and until the conviction is overturned pursuant to such motions. Marino v. INS, 537 F.2d 686 (2nd Cir. 1981); Okabe v. INS, 671 F.2d 863 (5th Cir. 1982); Aquilera-Enriquez v. INS, 516 F. 2d 565 (6th Cir. 1975); Morales-Alvarado v. INS, 655 F.2d 172, (9th Cir. 1981); Matter of Polanco, 20 I&N Dec. 894 (BIA 1994).

c. An alien who has waived or exhausted the right to a direct appeal of a conviction is subject to deportation, and the potential for discretionary review on direct appeal will not prevent the conviction from being considered final for immigration purposes. Matter of Polanco, 20 I&N Dec. 894 (BIA 1994). In that case, the respondent had failed to appeal the conviction within the time allowed but, under the New Jersey Rules of Court, he had submitted a late appeal which the court treated as an application for leave to file a nunc pro tunc appeal. The court could then consider whether to allow the appeal but there were no time constraints for

the decision to be made. Nor was there a limit to the period during which a defendant could request permission to take a nunc pro tunc appeal. The BIA held that to find a conviction not final because the respondent had the right at any time to apply for a late appeal could delay deportation proceedings indefinitely.

d. Following the rationale of Morales-Alvarado v. INS, 655 F.2d 172 (9th Cir. 1981), the BIA held that an alien who failed to file a timely appeal from a conviction in New Jersey has a final conviction for immigration purposes, despite the potential for seeking a nunc pro tunc appeal because, under New Jersey law, the decision to allow a nunc pro tunc appeal is discretionary and not routinely granted. Matter of Polanco, 20 I&N Dec. 894 (BIA 1994). The BIA noted that the New Jersey Rules of Court contain no time constraints to limit the period during which a defendant may request permission to take a nunc pro tunc appeal and stated that to hold that a conviction in New Jersey is not final simply because an alien has a right to apply for a late appeal would postpone indefinitely his deportation proceedings, a result that Congress did not intend.

e. In an unpublished decision by the BIA, the respondent had filed an appeal of a conviction but the appeal was dismissed for lack of jurisdiction since the appeal was untimely filed. The respondent later filed a motion with the sentencing U.S. District Court under 28 U.S.C. § 2255. The District Court granted the motion and ordered the respondent's right to appeal reinstated. The respondent filed an appeal which was still pending at the time of the deportation hearing. The BIA held that the conviction was on direct appeal.

f. The BIA has held that while a conviction on direct appeal may not support a finding of deportability, it may still be considered in the exercise of discretion. Matter of Gonzalez, 16 I&N Dec. 134 (BIA 1977); Matter of Turcotte, 12 I&N Dec. 206 (BIA 1967).

(1) An alien's extensive criminal history, which included an expunged felony conviction for assaulting a police officer, may be considered in deciding whether voluntary departure is merited as a matter of discretion. Villanueva-Franco v. INS, 802 F.2d 327 (9th Cir. 1986).

(2) An alien's arrest on a drug charge may be considered as a

discretionary factor in a 212(c) application, even though the arrest never resulted in a conviction because the charges were dismissed following the alien's completion of a pre-trial diversion program. Paredes-Urrestarazu v. INS, 36 F.3d 801 (9th Cir. 1994).

(3) Criminal charges which were placed "on file" by a state court under a procedure peculiar to Massachusetts law and which therefore did not constitute convictions may still be considered as "some evidence weighing against discretionary relief," particularly where the alien had pleaded guilty to one charge and was found guilty to one charge and was found guilty by a jury on another. White v. INS, 17 F.3d 475 (1st Cir. 1994).

(4) In determining whether a favorable exercise of discretion is warranted on an alien's application for a waiver under Section 212(i) of the Act, the BIA could consider not only his foreign in absentia convictions for criminal association, forgery, and possession of firearms, but also murder charges pending against him and the extradition proceedings spawned by those charges. Esposito v. INS, 936 F.2d 911 (7th Cir. 1991).

(5) In determining whether or not voluntary departure is merited as a matter of discretion, felony arson charges pending against the respondent may be considered. Parcham v. INS, 769 F.2d 1001 (4th Cir. 1985). The court stated that although the alien was acquitted of the charges during the pendency of the circuit court appeal, this fact did not alter its decision and stated that evidence of an alien's conduct, without a conviction, may be considered in denying the discretionary relief of voluntary departure and the AG is entitled to consider the facts as they exist at the time he acts and does not have to wait for the disposition of pending criminal charges.

(6) Where an alien's conduct results in his having had contact with the criminal justice proceedings, the nature of those contacts and the stage to which those proceedings have progressed should be taken into account and weighed accordingly. Hence, the probative value of and corresponding weight, if any, assigned to evidence of

criminality will vary according to the facts and circumstances of each case and the nature and strength of the evidence presented. Matter of Thomas, 21 I&N Dec. 20 (BIA 1995).

(7) Where an alien has been convicted following a jury trial of several crimes but the convictions are not final due to an appeal, the fact that he has been so convicted constitutes significant evidence that he has committed the crimes and the conduct underlying those convictions is a significant adverse factor to be weighed in deciding whether he merits VD as a matter of discretion. Matter of Thomas, 21 I&N Dec. 20 (BIA 1995).

(8) Where an alien has been imprisoned only as a result of non-final convictions, his conduct while in prison is independent of that which resulted in his convictions and any disciplinary infractions he may have committed while in prison may be considered as adverse factors in the exercise of discretion. Matter of Thomas, 21 I&N Dec. 20 (BIA 1995).

(9) Evidence of an alien's arrest bears upon whether he might have engaged in the underlying conduct and is probative of relevant discretionary factors. Paredes-Urrestarazu v. INS, 36 F.3d 801 (9th Cir. 1994).

(10) An alien's in absentia convictions may at the very least constitute probable cause to believe he is guilty of the crimes in question. Esposito v. INS, 936 F.2d 911 (7th Cir. 1991).

(11) Pending murder charges against an alien are indicative of probable cause that he committed the murders and that "reasonable minds suspect that he is guilty of the crimes charged." Id.

(12) Police reports implicating a respondent in criminal activity but which never resulted in prosecution due to a lack of sufficient evidence are not probative. Sierra-Reyes v. INS, 585 F.2d 762 (5th Cir. 1978).

(13) A non-final conviction resulting from an alien's own guilty

plea or a conviction following a trial by jury is entitled to substantial weight in the exercise of discretion. Matter of Thomas, 21 I&N Dec. 20 (BIA 1995).

(14) The admission into evidence of police reports concerning the circumstances of an alien's arrest is especially appropriate in cases involving discretionary relief, where all relevant factors regarding an alien's arrest and conviction should be considered. Matter of Grijalva, 19 I&N Dec. 713 (BIA 1988).

(15) In Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995), the BIA held that it is "hesitant" to give substantial weight to an arrest report absent a conviction or corroborating evidence of the allegations contained therein. The alien conceded that the arrest took place but admitted to no wrongdoing. Considering that prosecution was declined and there was no corroboration, from the alien or otherwise, the Board gave the arrest report little weight in the exercise of discretion.

3. Pardons.

a. Pardons of crimes involving moral turpitude.

(1) HISTORY LESSON - Former Section 241(b) which provided that an alien who has received a pardon is not deportable under former Section 241(a)(4) was repealed by the Immigration Act of 1990. Former Section 241(e) was redesignated as Section 241(b). However, the Immigration Act of 1990 also enacted Section 241(a)(2)(A)(iv) which provided that the provisions of Section 241(a)(2)(A)(i) [relating to aliens convicted of a CIMT] shall not apply in the case of an alien who, after the conviction, has been granted a full and unconditional pardon by the President of the U.S. or by the Governor of any state.

(2) As added by IIRIRA, Section 237(a)(2)(A)(v) of the Act now provides that clauses (i), (ii), (iii), and (iv) [of Section 237(a)(2)(A)] shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the U.S. or by the

Governor of any state. The clauses listed are as follows:

(a) 237(a)(2)(A)(i) - CIMT w/in 5 years of admission;

(b) 237(a)(2)(A)(ii) - 2 CIMTs not arising out of a single scheme;

(c) 237(a)(2)(A)(iii) - aggravated felony;

(d) 237(a)(2)(A)(iv) - high speed flight.

(3) A presidential or gubernatorial pardon waives only the grounds of removal specifically set forth in Section 237(a)(2)(A)(v) of the Act, and no implicit waivers may be read into the statute. Therefore, a respondent's pardon of a conviction for sexual battery of a minor did not waive his removability as an alien convicted of a crime of domestic violence or child abuse under Section 237(a)(2)(E)(i) of the Act, because that Section is not specifically included in Section 237(a)(2)(A)(v). Matter of Suh, 23 I&N Dec. 626 (BIA 2003).

(4) Only an executive pardon will prevent deportation; a legislative pardon is no bar to deportability. Matter of R-, 6 I&N Dec. 444 (BIA 1954); Matter of R-, 5 I&N Dec. 612 (BIA 1954).

(5) However, if a state has a constitutional provision which allows pardon authority to be exercised by a board or by a commission, such a pardon is considered an executive pardon. Matter of Tajer, 15 I&N Dec. 125 (BIA 1974), Matter of D-, 7 I&N Dec. 476 (BIA 1957).

(6) An executive pardon must be unconditional in order to prevent deportation. It may not be dependent upon a condition precedent or a condition subsequent. Matter of C-, 5 I&N Dec. 630 (BIA 1954).

(7) A foreign pardon (or amnesty, expungement, or extinction) is not effective to prevent deportation. Matter of G-, 5 I&N Dec. 129 (BIA 1953); Matter of F-y G-, 4 I&N Dec. 717 (BIA 1952).

(8) The availability of a pardon under state or federal law, or the existence or nonexistence of a qualifying pardoning authority, is not determinative of whether an offense constitutes a crime for immigration purposes. Matter of Nolan, 19 I&N Dec. 539 (BIA 1988).

b. Pardons of drug offenses.

(1) The provisions of former Section 241(b) regarding pardons were applicable only to aliens deportable under former Section 241(a)(4)(A) and the statute specifically provided that the provisions regarding pardons were not applicable in the case of an alien deportable under former Section 241(a)(11) for a drug conviction.

(2) Former Section 241(b) was repealed by the Immigration Act of 1990 and former Section 241(e) was redesignated as Section 241(b).

(3) Former Section 241(a)(2)(B) and present Section 237(a)(2)(B) dealing with the deportability of aliens convicted of drug offenses do not provide an exception for aliens who receive a pardon. Therefore, an alien convicted of an offense relating to controlled substances is deportable even if he is granted a pardon.

c. Pardons of aggravated felonies.

(1) The amendments contained in the Immigration Act of 1990 brought about a confusing situation regarding pardons granted to aliens convicted of an aggravated felony.

(2) Section 505 of the Immigration Act of 1990 amended Section 241(b) to provide that its provisions which prevented the deportation of an alien receiving a pardon would not apply to aliens convicted of an aggravated felony. This amendment took effect on November 29, 1990 and applied to convictions entered before, on, or after that date.

(3) Section 602(b) of the Immigration Act of 1990 repealed Section 241(b) and redesignated former Section 241(e) as 241(b). This amendment was not applicable to deportation

proceedings for which notice was provided before March 1, 1991.

(4) Section 602(a) of the Immigration Act of 1990 amended Section 241(a) to include Section 241(a)(2)(A)(iv) which provided that clauses (i) [aliens convicted of a CIMT committed within 5 years of entry and sentenced to a year or longer], (ii) [aliens convicted of 2 or more CIMTs], and (iii) [aliens convicted of an aggravated felony] of Section 241(a)(2)(A) shall not apply to aliens who have been granted a full and unconditional pardon by the President of the U.S. or by the Governor of any state. This amendment was not applicable to deportation proceedings for which notice was provided before March 1, 1991.

(5) The only way to make sense of these amendments would be to view the situation as follows:

(a) Aliens convicted of an aggravated felony who received notice of their deportation hearing before March 1, 1991 and were therefore deportable under former Section 241(a)(4)(B) are deportable even if they are granted a pardon.

(b) Aliens convicted of an aggravated felony who received notice of their deportation hearing on or after March 1, 1991 and are deportable under current Section 237(a)(2)(A)(iii) are not deportable if they have received a full and unconditional pardon from the President of the U.S. or the Governor of any state.

4. The criminal proceeding did not result in a "conviction" within the meaning of the Immigration and Nationality Act.

a. Section 322 of the IIRIRA added Section 101(a)(48)(A) to the Act. It reads as follows: "The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by the court, or if adjudication of guilt has been withheld, where

(1) 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

(2) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."

b. The Board has noted that Section 322(c) of IIRIRA, which added Section 101(a)(48)(A) to the Act, specifically states that its amendments "shall apply to convictions and sentences entered before, on, or after the date of enactment of this Act." Therefore the date when a conviction took place is of no consequence. Matter of Punu, 22 I&N Dec. 224 (BIA 1998).

c. The Board has held that the imposition of costs and surcharges in the criminal sentencing context constitutes a form of "punishment" or "penalty" for purposes of establishing that an alien has suffered a "conviction" within the meaning of INA § 101(a)(48)(A). Matter of Cabrera, 24 I&N Dec. 459 (BIA 2008).

d. The Board has ruled that a judgement of guilt entered by a general court-martial of the U.S. Armed Forces qualifies as a "conviction" within the meaning of INA § 101(a)(48)(A). Matter of Rivera-Valencia, 24 I&N Dec. 484 (BIA 2008).

5. Expungements of criminal convictions.

a. Prior to the enactment of Section 101(a)(48)(A) of the Act, a conviction which was expunged would not support an order of deportation. See e.g., Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988), superseded by INA § 101(a)(48)(A). However, an expungement of a conviction for a controlled substances offense would not eliminate the conviction for immigration purposes because the manner in which a state deals with a person after his conviction is not controlling in a deportation proceeding. Rehman v. INS, 544 F.2d 71 (2d Cir. 1976), superseded by statute as in Mugalli v. Ashcroft, 258 F.3d 52 (2d Cir. 2001); Yanez-Popp v. INS, 998 F.2d 231 (4th Cir. 1993); Gonzalez de Lara v. INS, 439 F.2d 1316 (5th Cir. 1971); Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975); Will v. INS, 447 F.2d 529 (7th Cir. 1971); de la Cruz-Martinez v. INS, 404 F.2d 1198 (9th Cir. 1968). The expungement of drug offenses was later found to eliminate a conviction for immigration purposes when expungement was pursuant to the provisions of the Federal Youth Corrections (which has since been repealed) or the first offender provisions of the Controlled Substances Act, 21 U.S.C. § 844(b)(1). Matter of

Werk, 16 I&N Dec. 234 (BIA 1977); Matter of Zingis, 14 I&N Dec. 621 (BIA 1974). In Matter of Manrique, the Board expanded the elimination of controlled substances convictions for immigration purposes to include expungements under a state rehabilitative statute if the alien would have been eligible for federal first offender treatment if he had been prosecuted under federal law. 21 I&N Dec. 58 (BIA 1995).

b. With the passage of the IIRIRA, Congress provided a statutory definition for the term, adding Section 101(a)(48)(A) of the Act which states:

(1) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where

(a) 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

(b) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(2) Section 322(c) of the IIRIRA states that the definition applies "to convictions and sentences entered before, on, or after the date of the enactment" of the Act.

c. In light of this definition, the BIA held that no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute and once an alien is subject to a "conviction" as that term is defined at Section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure; Matter of Roldan, 22 I&N Dec. 512 (BIA 1999). Therefore, an alien, who has had his guilty plea to the offense of possession of a controlled substance vacated and his case dismissed upon termination of his probation pursuant to Section 19-2604(1) of the Idaho Code, is considered to have a conviction for immigration

purposes. Id.

d. The BIA also stated, "Our decision is limited to those circumstances where an alien has been the beneficiary of a state rehabilitative statute which purports to erase the record of guilt. It does not address the situation where the alien has had his or her conviction vacated by a state court on direct appeal, wherein the court determines that vacation of the conviction is warranted on the merits, or on grounds relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings. We also do not reach the issue of the effect of noncollateral challenges to a conviction on these grounds that are pending in state court while an alien is in deportation proceedings."

e. The Ninth Circuit disagreed with the BIA and found that the definition of "conviction" set forth in IIRIRA did not repeal the Federal First Offender Act. Further, the new definition does not change the rule that persons whose offenses would qualify for treatment under that Act, but who are convicted and have their convictions expunged under state laws, may not be removed based on those offenses. The court thereby specifically rejected the Board's decision in Matter of Roldan, 22 I&N Dec. 512 (BIA 1999), insofar as that decision held that treatment under the Federal First Offenders Act or state counterparts will not be given effect for immigration purposes. Lujan-Armendariz v INS, 222 F.3d 728 (9th Cir. 2000). The Ninth Circuit adopted the test set forth in Matter of Manrique, 21 I&N Dec. 58 (BIA 1995), finding that an alien will not be removable if he or she establishes that: (1) the alien has not previously been convicted of violating any federal or state law relating to controlled substances; (2) the alien has pled to or been found guilty of the offense of simple possession of a controlled substance; (3) the alien has not previously been accorded first offender treatment under any law; and (4) the court entered an order pursuant to a state rehabilitative statute under which the alien's criminal proceedings have been deferred pending successful completion of probation.

(1) The BIA later held that Matter of Roldan, supra, will not be applied in cases arising within the jurisdiction of the 9th Circuit, but everywhere else an alien whose adjudication of guilt was deferred following a plea of guilty to possession of a controlled substance is considered to have been convicted of the offense. Matter of Salazar, 23 I&N Dec.

223 (BIA 2002).

(2) Lujan-Armendariz, is limited to controlled substances violations. See Matter of Marroquin-Garcia, 23 I&N Dec. 705 (A.G. 2005).

f. In all other cases, if a court vacates an alien's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes. Matter of Pickering, 23 I&N Dec. 621 (BIA 2003), rev'd on other grounds, 454 F.3d 525 (6th Cir. 2006), amended and superceded, 465 F.3d 263 (6th Cir. 2006).

(1) In Renteria-Gonzales v. INS, F.3d 804, (5th Cir. 2003), the Fifth Circuit held that a conviction vacated on *any* grounds remains a conviction under Section 101(a)(48)(A). This holding contradicts the BIA's ruling in Matter of Pickering. However, as practical matter, the Matter of Pickering standard may still apply in the Fifth Circuit. Specifically, the government has announced (in its response to a petition for en banc review in a case involving a vacated criminal conviction) that, in Fifth Circuit cases involving vacated convictions, it will seek to remand to the BIA for a ruling under Matter of Pickering. See Gaona-Romero v. Gonzales, 497 F.3d 694 (5th Cir. 2007)

g. An alien seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. Matter of Chavez, 24 I&N Dec. 272 (BIA 2007).

h. A conviction vacated pursuant to section 2943.031 of the Ohio Revised Code for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes. Matter of Adamiak, 23 I&N Dec. 878 (BIA 2006).

6. Reduction in sentence. A trial court's decision to modify or reduce an alien's criminal sentence nunc pro tunc is entitled to full faith and credit by the IJ and the BIA. Such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for effecting the modification or reduction. Matter of

Cota-Vargas, 23 I&N Dec. 849 (BIA 2005), clarifying Matter of Song, 23 I&N Dec. 173 (BIA 2001) and distinguishing Matter of Pickering, 23 I&N Dec. 621 (BIA 2003).

7. Naturalized citizen at time of conviction. The Board has held that a denaturalized citizen who committed crimes while a lawful permanent resident and concealed them during the naturalization process is removable on the basis of the crimes, even though the alien was a naturalized citizen at the time of conviction. Matter of Gonzalez-Munro, 24 I&N Dec. 472 (BIA 2008).

C. Judicial Recommendations Against Deportation (JRADS)

1. An amendment to the Act, made by the Immigration Act of 1990 and effective on November 29, 1990, eliminated Section 241(b)(2). Although the amendment took effect on November 29, 1990, it applied to convictions entered before, on, or after that date. There is no procedure for a recommendation against deportation in the deportation provisions created by the Immigration Act of 1990. Therefore, it would seem that recommendations against deportation are no longer available to aliens in deportation proceedings and that any recommendations previously made would have no effect.

a. The INS took the position that recommendations against deportation granted before November 29, 1990 were still valid as a defense to deportability. The Commissioner amended 8 C.F.R. § 242.16(c) [now found at 8 C. F. R. §§ 1240.10(c) and 1240.48(c)] as of November 29, 1990 to provide the following:

(1) No recommendation against deportation is effective against a charge of deportability under Section 241(a)(11) of the Act.

(2) No recommendation against deportation granted on or after November 29, 1990, is effective.

(3) The respondent shall provide a court-certified copy of a recommendation against deportation to the IJ when the recommendation will be the basis of denying any charge made by the Service.

D. Juvenile delinquency. An act of juvenile delinquency is not a crime in the United States. Therefore, an adjudication of delinquency is not a crime within the

meaning of the immigration laws. Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981); Matter of C-M-, 5 I&N Dec. 327 (BIA 1953).

1. A juvenile delinquency proceeding results in the adjudication of a status rather than conviction for a crime. An adjudication of youthful offender status pursuant to Article 720 of the New York Criminal Procedure Law, which corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1994 & Supp. II 1996), does not constitute a judgment of conviction for a crime within the meaning of Section 101(a)(48)(A) of the Act. Matter of Devison, 22 I&N Dec. 1362 (BIA 2000).

2. Once a youthful offender determination has been made, that decision cannot be changed as a consequence of the offender's subsequent behavior. Therefore, the resentencing of a youthful offender in New York following a violation of probation does not convert the youthful offender adjudication into a judgment of conviction. Matter of Devison, 22 I&N Dec. 1362 (BIA 2000).

3. Foreign convictions of juveniles. In order for a foreign conviction to serve as a basis for a finding of inadmissibility, the conviction must be for conduct which is deemed criminal by U.S. standards. Matter of McNaughton, 16 I&N Dec. 569 (BIA 1978), aff'd McNaughton v. INS, 612 F.2d 457 (9th Cir. 1980).

   a. Conduct underlying a foreign conviction which constitutes an act of juvenile delinquency under U.S. standards (no matter how the case was treated by a foreign court) is not a crime for purposes of the Act. Matter of De La Nues, 18 I&N Dec. 140 (BIA 1981).

   b. In order to determine whether a foreign conviction is to be treated as an adjudication of delinquency, the BIA relies on the Federal Juvenile Delinquency Act (FJDC), 18 U.S.C. § 5031 et seq.. Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981); Matter of De La Nues, 18 I&N Dec. 140 (BIA 1981).

X. Evidence.

A. In general.

1. Immigration proceedings are not bound by the strict rules of evidence. Dallo v. INS, 765 F.2d 581 (6th Cir. 1981); Longoria-Castaneda v. INS, 548 F.2d 233 (8th Cir. 1977); Baliza v. INS, 709 F.2d 1231 (9th Cir.

1983); Matter of DeVera, 16 I&N Dec. 266 (BIA 1977).

2. The general rule with respect to evidence in immigration proceedings favors admissibility as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law. Tashnizi v. INS, 585 F.2d 781 (5th Cir. 1978); Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983); ; Trias-Hernandez v. INS, 528 F.2d 366 (9th Cir. 1975); Marlowe v. INS, 457 F.2d 1314 (9th Cir. 1972); Matter of Toro, 17 I&N Dec. 340 (BIA 1980); Matter of Lam, 14 I&N Dec. 168 (BIA 1972).

3. 8 C.F.R. § 1240.7(a) provides that an IJ "may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."

   a. However, 8 C.F.R. § 1003.19(d) provides that consideration by an IJ of an application or request regarding custody or bond shall be separate and apart from, and shall form no part of, any deportation hearing or proceeding. Therefore, it would seem that an IJ is precluded from considering any evidence from a bond hearing in the course of a hearing on deportability or relief from deportation unless, of course, the evidence is reintroduced and received in the deportation hearing.

   b. The opposite is not true, however. 8 C.F.R. § 1003.19(d) provides that the determination of the IJ as to custody status or bond may be based upon any information available to the IJ (such as information from the deportation hearing) or that is presented during the bond hearing by the respondent or the Service. When an IJ bases a bond determination on evidence presented in the underlying merits case, it is the responsibility of the parties and the IJ to ensure that the bond record establishes the nature and substance of the specific factual information considered by the IJ in reaching the bond determination. Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999).

4. Since the rules of evidence are not applicable and admissibility is favored, the pertinent question regarding most evidence in immigration proceedings is not whether or not it is admissible, but what weight the fact finder should accord it in adjudicating the issues on which the evidence has been submitted.

B. Burden of proof and presumptions.

1. In deportation proceedings.

a. The INS bears the burden to establish deportability. Deportability must be established by evidence which is clear, convincing and unequivocal. Woodby v. INS, 385 U.S. 276 (1966).

(1) An exception to the "clear, convincing and unequivocal" standard exists in deportation proceedings in which the alien is charged with deportability pursuant to Section 241(a)(9)(B) [now Section 237(a)(1)(D)(i)] as an alien whose status as a conditional permanent resident has been terminated under Section 216(b) of the Act. Section 216(b)(2) of the Act states that the INS bears the burden of demonstrating "by a preponderance of the evidence" that a condition described in Section 216(b)(1)(A) is met. Matter of Lemhammad, 20 I&N Dec. 316 (BIA 1991).

b. However, the burden is on the respondent to show the time, place, and manner of entry. INA § 291. If this burden of proof is not sustained, the respondent is presumed to be in the U. S. in violation of law. Id. In presenting his proof, the respondent is entitled to the production of his visa or other entry document, if any, and of any other documents and records pertaining to his entry which are in the custody of the INS and not considered confidential by the AG. Id.

(1) This burden and presumption is applicable to any charge of deportability which brings into question the time, place, and manner of entry. Matter of Benitez, 19 I&N Dec. 173 (BIA 1984).

(a) The 9th Circuit disagrees and holds that the presumption of Section 291 applies only in cases involving illegal entry. Iran v. INS, 656 F.2d 469 (9th Cir. 1981).

(2) Therefore, in a case in which the charge involves time, place, and manner of entry, the INS's burden is often reduced to establishing alienage.

(a) In deportation proceedings there is no presumption of citizenship similar to the presumption of

innocence which exists in criminal cases. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

(b) A person born abroad is presumed to be an alien until he or she shows otherwise. United States ex rel. Rongetti v. Neelly, 207 F.2d 281 (7th Cir. 1953); Corona-Palomera v. INS, 661 F.2d 814 (9th Cir.1981); Matter of Ponco, 15 I&N Dec. 120 (BIA 1974); Matter of Tijerina-Villarreal, 13 I&N Dec. 327 (BIA 1969); Matter of A-M-, 7 I&N Dec. 332 (BIA 1956).

(3) Although Section 291 of the Act places the burden of proof on the respondent to establish the time, place, and manner of entry, it cannot serve as a basis on which to predicate a charge of deportability, i.e. the respondent may not be charged under Section 291 as an alien who has failed to establish the time, place, and manner of entry. A charge of deportability must be under one of the provisions of Section 241 of the Act. Matter of Li, 12 I&N Dec. 293 (BIA 1967).

c. In applications for relief from deportation, the burden of proof is on the respondent.

2. In exclusion proceedings.

a. The burden of proof in exclusion proceedings is on the applicant to show that he is not subject to exclusion under any provision of the Act. INA § 291.

(1) Except when the applicant has a "colorable" claim to status as a returning resident. In that case the burden of proof to establish excludabity is on the INS. Matter of Kane, 15 I&N Dec. 258 (BIA 1975).

(a) The INS burden in such a case is to show by "clear, unequivocal, and convincing evidence" that the applicant should be deprived of LPR status. Matter of Huang, 19 I&N Dec. 749 (BIA 1988).

(b) An alien "commuter" is not returning to an actual unrelinquished permanent residence in the U.S.,

therefore he is not entitled to a hearing at which the INS bears the burden of proof. Matter of Moore, 13 I&N Dec. 711 (BIA 1971).

(c) If the LPR contends that exclusion proceedings are not proper under the Fleuti doctrine, he bears the burden to prove that he comes within the Fleuti exception to the entry definition. Molina v. Sewell, 983 F.2d 676 (5th Cir. 1993).

(2) In exclusion proceedings where the applicant has no "colorable claim" to LPR status and alleges that exclusion proceedings are improper because he made an entry and should therefore be in deportation proceedings, the burden is on the applicant to show that he has effected an entry. Matter of Z-, 20 I&N Dec. 707 (BIA 1993); Matter of Matelot, 18 I&N Dec. 334 (BIA 1982); Matter of Phelisna, 18 I&N Dec. 272 (BIA 1982). In a case where there is no clear evidence of the facts determinative of the entry issue, the case ultimately must be resolved on where the burden of proof lies. Matter of G-, 20 I&N Dec. 764 (BIA 1993).

b. Under Section 214(b) of the Act, every alien is presumed to be an immigrant. The burden of proof is on the alien to establish nonimmigrant status under Section 101(a)(15) of the Act.

c. In cases in which the applicant bears the burden of proof, the burden of proof never shifts and is always on the applicant. Matter of Rivero-Diaz, 12 I&N Dec. 475 (BIA 1967); Matter of M-, 3 I&N Dec. 777 (BIA 1949). Where the evidence is of equal probative weight, the party having the burden of proof cannot prevail. Id.

(1) An applicant for admission to the U.S. as a citizen of the U.S. has the burden of proving citizenship. Tillinghast v. Flynn ex rel. Chin King, 38 F.2d 5 (1st Cir. 1930), cert. denied 281 U.S. 768 (1930); Mah Ying Og v. Wixon, 124 F.2d 1015 (9th Cir. 1942); Lum Mon Sing v. United States, 124 F.2d 21 (9th Cir. 1941); Matter of G-R-, 3 I&N Dec. 141 (BIA 1948).

(2) Once the applicant establishes that he was once a citizen and the INS asserts that he lost that status, then the INS

bears the burden of proving expatriation. Id.

(3) The standard of proof to establish expatriation is less than the "clear, unequivocal, and convincing" evidence test as applied in denaturalization cases but more than a mere preponderance of evidence. The proof must be strict and exact. Id.

3. In rescission proceedings.

a. In rescission proceedings the burden of proof is on the INS.

b. The burden is "clear, convincing, and unequivocal evidence." Waziri v. INS, 392 F.2d 55 (9th Cir.1968); Matter of Vilanova-Gonzalez, 13 I&N Dec. 399 (BIA 1969) .

c. This is the same burden as the INS bears in deportation proceedings.

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

a. If the alien is an applicant for admission, the alien has the burden of establishing that he is clearly and beyond doubt entitled to be admitted and is not inadmissible under Section 212 or by clear and convincing evidence, that he is lawfully present in the U.S. pursuant to a prior admission. INA § 240(c)(2). In meeting the burden that he is lawfully present in the U.S., the alien shall have access to the alien's visa or other entry document, if any and any other records and documents, not considered by the AG to be confidential, pertaining to the alien's admission or presence in the U.S. Id.

b. The Government has the burden of proof to show that an applicant with a "colorable" claim to status as a returning resident should be deprived of LPR status. Katebi v. Ashcroft, 396 F.3d 463 (1st Cir. 2005); Singh v. Reno, 113 F.3d 1512 (9th Cir. 1997).

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

a. In the case of an alien who has been admitted to the U.S., the Service has the burden of establishing by clear and convincing evidence that the alien is deportable. No decision on deportability

shall be valid unless it is based upon reasonable, substantial, and probative evidence. INA § 240(c)(3).

b. However, it is the alien's burden of proof to establish by clear and convincing evidence that he is lawfully in the United States pursuant to a prior admission. INA § 240(c)(2)(B).

C. Documents.

1. Certification.

a. Domestic documents.

(1) 8 C.F.R. § 1287.6(a) provides that an official record, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy.

(2) Proof of criminal convictions. Section 240(c)(3)(B) of the Act and 8 C.F.R. § 1003.41(a) provide that in any proceeding under the Act, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(a) An official record of judgment and conviction;

(b) An official record of plea, verdict, and sentence;

(c) A docket entry from court records that indicates the existence of the conviction;

(d) Official minutes of a court proceeding or a transcript of a court hearing that indicates the existence of the conviction;

(e) An abstract of a record of conviction prepared by the court in which the conviction was entered or by a State official associated with the State's repository of criminal justice records which indicates the charge or Section of law violated, the disposition of the case, the existence and date of conviction, and the sentence;

(f) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction;

(g) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(3) 8 C.F.R. § 1003.41(b) provides that any document or record listed in 8 C.F.R. § 1003.41(a) may be submitted if:

(a) it complies with the provisions of 8 C.F.R. § 1287.6(a), i.e. attested by the custodian of the document or his authorized deputy, or

(b) it is attested by an immigration officer to be a true and correct copy of the original.

(4) Section 240(c)(3)(C) and 8 C.F.R. § 1003.41(c) provide that any record of conviction or abstract submitted by electronic means to the Service from a state or court shall be admissible as evidence to prove a criminal conviction if:

(a) it is certified by a state official associated with the state's repository of criminal justice records as an official record from its repository or by a court official from the court in which conviction was entered as an official record from its repository (Section 240(c)(3)(C) and 8 C.F.R. § 1003.41(c)(1) provide that the certification may be by means of a computer-generated signature and statement of authenticity) and

(b) it is certified in writing by a Service official as having been received electronically from the state's record repository or the court's record repository.

(5) 8 C.F.R. § 1003.41(d) provides that any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof.

b. Foreign documents.

(1) Documents from Canada. 8 C.F.R. § 1287.6(d) provides that an official record or entry therein issued by a Canadian government entity within the geographical boundaries of Canada, when admissible for any purpose, shall be evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy.

(2) Documents from countries signatory to the Convention Abolishing the Requirement of Legislation for Foreign Public Document.

(a) 8 C.F.R. § 1287.6(c) provides that a public document or entry therein, when admissible for any purpose, may be evidenced by an official publication or by a copy properly certified under the Convention.

(b) No certification is needed from an officer in the Foreign Service of public documents. 8 C.F.R. § 1287.6(c)(2). But to be properly certified, the copy must be accompanied by a certificate in the form dictated by the Convention. This certificate must be signed by a foreign officer so authorized by the signatory country and it must certify (1) the authenticity of the signature of the person signing the document, (2) the capacity in which that person acted, and (3) where appropriate, the identity of the seal or stamp the document bears.

(c) 8 C.F.R.§ 1287.6(c)(3) provides that in accordance with the Convention, the following documents are deemed to be public documents:

i) documents emanating from an authority or an official connected with the courts or tribunals of the state, including those emanating from a public prosecutor, a clerk of a court, or a process server;

ii) administrative documents;

iii) notarial acts;

iv) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures.

(d) 8 C.F.R. § 1287.6(c)(4) provides that in accordance with the Convention, the following documents are deemed not to be public documents and are subject to the more stringent requirements of 8 C.F.R. § 1287.6(b):

i) documents executed by diplomatic or consular agents;

ii) administrative documents dealing directly with commercial or customs operations.

(3) Documents from countries not signatory to the Convention.

(a) 8 C.F.R. § 1287.6(b) provides that an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized; 8 C.F.R. § 1287.6(b)(1). This attested copy, with the additional foreign certificates if any, must be certified by an officer in the Foreign Service of the U.S., stationed in the country where the record is kept. 8 C.F.R. § 1287.6(b)(2). The Foreign Service officer must certify the genuineness of the signature and the official position either of either:

i) the attesting officer, or

ii) any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or

is in a chain of certificates of genuineness of signature and official position relating to the attestation. (8 C.F.R. § 1287.6(a)(1) provides that the copy attested by an authorized foreign officer may, but need not, be certified in turn by any authorized foreign officer both as to the genuineness of the signature of the attesting officer and as to his/her official position. The signature and official position of this certifying officer may then likewise be certified by any other foreign officer so authorized, thereby creating a chain of certificates. In that situation, the officer of the Foreign Service of the U.S. may certify any signature in the chain.)

2. Translation. 8 C.F.R. § 1003.33 provides that any foreign language document offered by a party in a proceeding shall be accompanied by an English language translation and a certification signed by the translator that must be printed legibly or typed. Such certification must include a statement that the translator is competent to translate the document and that the translation is true and accurate to the best of the translator's abilities.

3. Service. 8 C.F.R. § 1003.32(a) provides that, except in absentia hearings, a copy of all documents (including proposed exhibits or applications) filed with or presented to the IJ shall be simultaneously served by the presenting party on the opposing party or parties.

   a. Service of copies shall be in person or by first class mail to the most recent address contained in the ROP. 8 C.F.R. § 1003.32(a).

   b. Any documents or applications not containing a certificate certifying service on the opposing party on a date certain will not be considered by the IJ unless service is made on the record during a hearing. 8 C.F.R. § 1003.32(a).

4. Size and format of documents.

   a. Unless otherwise permitted by the IJ, all written material presented to IJs must be on 8 ½" x 11" size paper. 8 C.F.R. § 1003.32(b).

b. An IJ may require that exhibits or other written material presented be indexed and paginated and that a table of contents be provided. 8 C.F.R. § 1003.32(b).

5. Presumption of regularity of Government documents. The BIA held that government documents are entitled to a presumption of regularity. Matter of P-N-, 8 I&N Dec. 456 (BIA 1959).

6. Similarity of names. When documentary evidence bears a name identical to that of the respondent, an IJ may reasonably infer that such evidence relates to the respondent in the absence of evidence that it does not relate to him. U.S. v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Leyva, 16 I&N Dec. 118 (BIA 1977); Matter of Li, 15 I&N Dec. 514 (BIA 1975); Matter of Cheung, 13 I&N Dec. 794 (BIA 1972).

7. Cases regarding specific documents.

a. Form I-213, Record of Deportable/Inadmissible Alien.

(1) Absent proof that a form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability. Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988); Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).

(2) In fact, the document would be admissible even under the Federal Rules of Evidence as an exception to the hearsay rule as a public record or report. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).

(3) A form I-213 is admissible and ordinarily sufficient "for a prima facie case of deportability," whereupon the "burden shifts to the alien to prove that he is here legally" under Section 291 of the Act. Bustos-Torres v. INS, 898 F.2d 1053, 1057 (5th Cir. 1990); see also Espinoza v. INS, 45 F.3d 308 (9th Cir. 1995); Matter of Benitez, 19 I&N Dec. 173 (BIA 1984).

(4) The Immigration and Naturalization Service met its burden, in an in absentia removal proceeding, of

establishing a minor respondent's removability by clear, unequivocal, and convincing evidence, where (1) a Record of Deportable/Inadmissible Alien (Form I-213) was submitted, documenting the respondent's identity and alienage; (2) the respondent, who failed without good cause to appear at her removal hearing, made no challenge to the admissibility of the Form I-213; (3) there were no grounds for a finding that the admission of the Form I-213 would be fundamentally unfair; and (4) no independent evidence in the record supported the Immigration Judge's conclusion that the respondent may not have been the child of the adult who claimed to be the respondent's parent and who furnished the information regarding her foreign citizenship; Matter of Gomez-Gomez, 23 I&N Dec. 522 (BIA 2002); see also Matter of Ponce-Hernandez, 22 I&N Dec. 784 (BIA 1999).

b. Sworn statement by respondent. Where an alien in deportation proceedings admits his name and then stands mute, his sworn statement may be relied upon as evidence of deportability and need not be identified by the officer to whom the statement was made although it represented the sole evidence of deportability other than the inference to be drawn from the alien's silence. Matter of P-, 7 I&N Dec. 133 (BIA 1956); Matter of V-, 7 I&N Dec. 308 (BIA 1956).

c. Form I-130, visa petition. A form I-130 and accompanying documents (birth certificate, marriage certificate, etc.) are admissible, even without identification of the I-130 by its maker, if there is an identity of name with the name of the respondent. Matter of Gonzalez, 16 I&N Dec. 44 (BIA 1976).

d. Police reports. Inasmuch as all relevant factors regarding an alien's arrest and conviction should be considered in cases involving discretionary relief, police reports concerning circumstances of arrest are appropriately admitted into evidence. Matter of Grijalva, 19 I&N Dec. 713 (BIA 1988); Matter of Thomas, 21 I&N Dec. 20 (BIA 1995). Since the question posed in an application for discretionary relief is whether a favorable exercise of discretion is warranted, a police report may be helpful in answering that question because it bears on the issue of the alien's conduct where he was arrested and this in turn is germane to whether he merits discretionary relief. Matter of Teixeira, 21

I&N Dec. 316 (BIA 1996). However, a police report should not be considered for the purpose of determining deportability where the statute mandates a focus on a criminal conviction, rather than on conduct. Id.

e. Admissions made by counsel. Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission. Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986). Thus, when an admission (of deportability) is made as a tactical decision by an attorney in a deportation proceeding, the admission is binding on his alien client and may be relied upon as evidence of deportability. Id. There is a strong presumption that an attorney's decision to concede an alien's deportability in a motion for change of venue was a reasonable tactical decision, and, absent a showing of egregious circumstances, such a concession is binding upon the alien as an admission. Id. It is immaterial whether an alien actually authorized his attorney to concede deportability in a motion to change venue, for so long as the motion was prepared and filed by an attorney on behalf of his alien client, it is prima facie regarded as authorized by the alien and is admissible as evidence. Id. An allegation that an attorney was authorized to represent an alien only to the extent necessary to secure a reduction in the amount of bond does not render inadmissible the attorney's concession of deportability in a pleading filed in regard to another matter (a motion for change of venue filed in the deportation hearing) for there is no "limited" appearance of counsel in immigration proceedings. Id.

(1) In an unpublished decision, the BIA held that the Service is held to the same standards as the respondent and is also bound by the admissions of counsel. Thus, if counsel for the Service states at a master calendar hearing that the Service is not opposed to a grant of voluntary departure, the Service cannot oppose that relief and argue that the respondent has failed to appear and establish his eligibility if the respondent is absent from a later hearing on another application for relief and his counsel withdraws the application and asks only for voluntary departure. The BIA also noted that the Service had presented no evidence of the respondent's ineligibility for voluntary departure to support its change in position concerning the relief.

D. Testimony.

1. Calling the alien to testify.

a. The INS may call the respondent as a witness to establish deportability. Requiring the respondent to testify does not violate due process, absent a claim of self-incrimination. Matter of Laqui, 13 I&N Dec. 232 (BIA 1969), aff'd Laqui v. INS, 422 F.2d 807 (7th Cir. 1970).

b. A valid claim to privilege against compulsory self-incrimination under the 5th amendment may be raised only as to questions that present a real and substantial danger of self-incrimination. Marchetti v. U.S., 390 U.S. 39 (1968). Therefore, an IJ does not err in compelling non-incriminating testimony. Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975); Wall v. INS, 722 F.2d 1442 (9th Cir. 1984); Matter of Santos, 19 I&N Dec. 105, 109 n.2 (BIA 1984) (no crime is implicated when a nonimmigrant overstays his allotted time of admission).

c. Neither the IJ nor the Trial Attorney is in a position to offer immunity from criminal prosecution. This is an action which can only be authorized by the AG or certain officials designated by him. Matter of Carrillo, 17 I&N Dec. 30 (BIA 1979); Matter of King and Yang, 16 I&N Dec. 502 (BIA 1978); Matter of Exantus and Pierre, 16 I&N Dec. 382 (BIA 1977).

2. Refusal by the alien to testify.

a. On the issue of deportability.

(1) Refusal to testify without legal justification in deportation proceedings concerning the questions of alienage, time, place, and manner of entry is reliable, substantial, and probative evidence supporting a finding of deportability. Matter of Pang, 11 I&N Dec. 489 (BIA 1966), aff'd Ah Chiu Pang v. INS, 368 F.2d 637 (3d Cir. 1966); Matter of R-S-, 7 I&N Dec. 271 (BIA 1956, AG 1956).

(2) It is also proper to draw an unfavorable inference from refusal to answer pertinent questions where such refusal is based upon a permissible claim of privilege as well as

where privilege is not a factor. Matter of O-, 6 I&N Dec. 246 (BIA 1954). The prohibition against the drawing of an unfavorable inference from a claim of privilege arises in criminal proceedings, not civil proceedings. Id. The logical conclusion to be drawn from the silence of one who claims his answers may subject him to possible prosecution or punishment is that the testimony withheld would be adverse to the interests of the person claiming privilege. Id. Even if the refusal to testify is based on the 5th Amendment privilege against self-incrimination, the refusal forms the basis of an inference and such inference is evidence. U.S. v. Alderete-Deras, 743 F.2d 645 (9th Cir. 1984); Matter of M-, 8 I&N Dec. 535 (BIA 1960); Matter of P-, 7 I&N Dec. 133 (BIA 1956); Matter of V-, 7 I&N Dec. 308 (BIA 1956).

(3) Although it is proper to draw an unfavorable inference from a respondent's refusal to answer pertinent questions, the inference may only be drawn after a prima facie case of deportability has been established. Matter of J-, 8 I&N Dec. 568 (BIA 1960); Matter of O-, 6 I&N Dec. 246 (BIA 1954). In deportation proceedings, the respondent's silence alone, in the absence of any other evidence of record, is insufficient to constitute prima facie evidence of the respondent's alienage and is therefore also insufficient to establish the respondent's deportability. Matter of Guevara, 20 I&N Dec. 238 (BIA 1991). Also, the record should show that the respondent was requested to give testimony, that there was a refusal to testify, and the ground of refusal. Matter of J-, supra.

b. On the issue of relief.

(1) In the case of an alien who refused to answer the questions of a congressional committee on the grounds that the answers might incriminate him, the BIA held that it might well be inferred that what would be revealed by the answers to such questions would not add to the alien's desirability as a resident. Therefore, he was found not to be a desirable resident of the U.S. and his application for suspension of deportation was denied as a matter of discretion. Matter of M-, 5 I&N Dec. 261 (BIA 1953).

(2) An applicant for the exercise of discretion has the duty of making a full disclosure of all pertinent information. If, under a claim of privilege against self-incrimination pursuant to the 5th amendment, an applicant refuses to testify concerning prior false claims to U.S. citizenship, denial of his application is justified on the ground that he has failed to meet the burden of proving his fitness for relief. Matter of Y-, 7 I&N Dec. 697 (BIA 1958).

(3) A respondent's refusal to answer questions pertaining to his application for voluntary departure prevented a full examination of his statutory (or discretionary, depending on the questions) eligibility for the relief sought and such relief is properly denied. Matter of Li, 15 I&N Dec. 514 (BIA 1975). Since the grant of voluntary departure is a matter of discretion and administrative grace, a respondent's refusal to answer questions directed to him bearing on his application for voluntary departure is a factor which an IJ may consider in the exercise of discretion. Matter of Mariani, 11 I&N Dec. 210 (BIA 1965). The same applies to an application for registry under Section 249 of the Act. Matter of DeLucia, 11 I&N Dec. 565 (BIA 1966).

(4) An alien seeking a favorable exercise of discretion cannot limit the inquiry to the favorable aspects of the case and reserve the right to be silent on the unfavorable aspects. Matter of DeLucia, 11 I&N Dec. 565 (BIA 1966); Matter of Y-, 7 I&N Dec. 697 (BIA 1958).

(5) A respondent has every right to assert his 5th amendment privilege against self-incrimination. However, as an applicant for adjustment of status, he also is required to provide information relevant to the exercise of discretion. In refusing to disclose such information, the respondent prevents an IJ from reaching a conclusion as to the respondent's entitlement to Section 245 relief. Therefore, the respondent has failed to sustain the burden of establishing that he is entitled to the privilege of adjustment of status and his application is properly denied. Matter of Marques, 16 I&N Dec. 314 (BIA 1977).

E. Hearsay.

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

2. Hearsay evidence may be admitted and relied upon in administrative hearings. Therefore, the finder of fact in an administrative adjudication may consider relevant and material hearsay. Richardson v. Perales, 402 U.S. 389 (1971).

3. Hearsay evidence is not only admissible, but may be relied on, even if contradicted by direct evidence. Richardson v. Perales, 402 U.S. 389 (1971); Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980).

F. Evidence from an application to adjust an alien's status to that of a lawful temporary resident under Section 210 of the Act.

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

G. The exclusionary rule for evidence obtained in violation of the Fourth Amendment prohibition against unlawful search and seizure.

1. Deportation proceedings are civil, not criminal. Therefore, the Fourth Amendment exclusionary rule is not applicable to deportation proceedings. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). The Supreme Court left open the question of whether egregious violations of the Fourth Amendment might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.

2. The Ninth Circuit has determined that such egregious violations warrant the application of the exclusionary rule in deportation proceedings. Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994).

H. Evidence obtained in violation of the due process clause of the 5th Amendment.

1. The BIA has held that evidence obtained by coercion or other activity which violates the due process clause of the 5th Amendment may be

excluded. Matter of Toro, 17 I&N Dec. 340 (BIA 1980).

2. However, a mere demand for a suppression hearing is not enough to cause one to be held. In a claim that evidence was obtained in violation of due process, the burden is on the respondent to establish a prima facie case of illegality before the INS will be called upon to assume the burden of justifying the manner in which it obtained its evidence. Matter of Burgos, 15 I&N Dec. 278 (BIA 1975); Matter of Wong, 13 I&N Dec. 820 (BIA 1971); Matter of Tang, 13 I&N Dec. 691 (BIA 1971).

3. To establish a prima facie case, statements alleging illegality must be specific and detailed, not general, conclusory, or based on conjecture. They must be based on personal knowledge, not merely the allegations of counsel. Matter of Wong, 13 I&N Dec. 820 (BIA 1971).

4. In addition to establishing a prima facie case, a motion to suppress evidence must enumerate the articles to be suppressed. Matter of Wong, 13 I&N Dec. 820 (BIA 1971).

5. Where a party wishes to challenge the admissibility of a document allegedly obtained in violation of the due process clause of the 5th Amendment, the offering of an affidavit which describes how the document or the information therein was obtained is not sufficient to sustain the burden of establishing a prima facie case. If an affidavit is offered which, if accepted as true, would not form a basis for excluding the evidence, the contested document may be admitted into the record. If the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported by testimony. Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988).

6. Even where certain evidence may have been acquired in violation of due process, the identity of the alien is not suppressible. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Matter of Ramirez-Sanchez 17 I&N Dec. 503, 504 n.1 (BIA 1980); Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). Therefore, a respondent is not justified in refusing to identify himself at a deportation hearing.

   a. In an unpublished decision, the BIA noted that neither the respondent nor his counsel objected at the outset of each of his hearings when the IJ identified the respondent by name and indicated that he was present each time. While counsel motioned the IJ to allow the respondent to refuse to identify himself, the

Board held that such a motion does not effectively amount to a denial by the respondent of his true identity. The Board concluded that either the respondent's silence or lack of objection to the IJ's identifying the respondent by name are sufficient inferences that the respondent was correctly identified as the alien in the deportation proceedings.

I. The doctrine of equitable estoppel.

1. Equitable estoppel is a judicially devised doctrine which precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or defense, regardless of its substantive validity. Matter of Hernandez-Puente, 20 I&N Dec. 335 (BIA 1991).

2. The Supreme Court has recognized the possibility that the doctrine of equitable estoppel might be applied against the Government in a case where it is established that its agents engaged in "affirmative misconduct." INS v. Hibi, 414 U.S. 5 (1973); Montana v. Kennedy, 366 U.S. 308 (1961). However, the Supreme Court has not yet decided whether even "affirmative misconduct" is sufficient to estop the Government from enforcing the immigration laws. INS v. Miranda, 459 U.S. 14 (1982).

3. Some federal courts have found "affirmative misconduct" and applied estoppel against the Government. Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976); Fano v. O'Neill, 806 F.2d 1262 (5th Cir. 1987).

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

J. The doctrine of collateral estoppel or res judicata.

1. In general.

a. The doctrine of collateral estoppel precludes parties to a judgment on the merits in a prior suit from relitigating in a subsequent suit

issues that were actually litigated and necessary to the outcome of the prior suit. Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984).

b. The doctrine of collateral estoppel generally applies to the Government as well as to private litigants. Id.

c. The doctrine of collateral estoppel may be applied to preclude reconsideration of an issue of law, as well as fact, so long as the issue arises in both the prior and subsequent suits from virtually identical facts and there has been no change in the in the controlling law. Id.

d. The doctrine of collateral estoppel applies in deportation proceedings when there has been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect, the parties had a full and fair opportunity to litigate the issues resolved by and necessary to the outcome of the prior judgment, and the use of collateral estoppel is not unfair. Id.

e. The language in Section 240(a)(3) of the Act, which provides that a removal proceeding shall be "the sole and exclusive procedure for determining the whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States," does not preclude the use of collateral estoppel in a deportation proceeding. Rather, this language was intended to exempt deportation proceedings from the provisions of any other law, most particularly the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, repealed by Pub. L. No. 89-554, 80 Stat. 378 (1966). Id.

f. Under the doctrine of collateral estoppel, a prior judgment conclusively establishes the "ultimate facts" of a subsequent deportation proceeding, i.e. those facts upon which an alien's deportability and eligibility for relief from deportation are to be determined, and precludes reconsideration of issues of law resolved by the prior judgment, so long as the issues in the prior suit and the deportation proceeding arise from virtually identical facts and there has been no change in the controlling law. Id.

2. Decisions in criminal proceedings.

a. The adverse judgment of a court in a criminal proceeding is binding in a deportation proceeding in which the respondent was

the defendant in the criminal case and in which the issue is one which was also an issue in the criminal case. Matter of Z-, 5 I&N Dec. 708 (BIA 1954).

b. Where a respondent has been convicted in a criminal proceeding of a conspiracy to violate 8 U.S.C. § 1325 (entry without inspection or by willfully false or misleading representation or the willful concealment of a material fact) but the indictment does not contain an allegation that the respondent procured a visa by fraud, his conviction will not, under the doctrine of collateral estoppel, establish his deportability as an alien who procured a visa by fraud. Matter of Marinho, 10 I&N Dec. 214 (BIA 1962, 1963).

c. An alien attempting to enter the U.S. by presenting a false Alien Registration Card who was paroled for prosecution and thereafter convicted in a criminal proceeding of a violation of Section 275 of the Act (8 U.S.C. § 1325 - illegal entry) is not properly placed in exclusion proceeding. Although the applicant was paroled into the U.S., he was prosecuted and convicted of illegal entry. Therefore, an exclusion proceeding will be terminated because, under the doctrine of collateral estoppel, the Service is prevented from denying that the applicant made an entry. Matter of Barragan-Garibay, 15 I&N Dec. 77 (BIA 1974).

d. The definition of the term "entry" in Section 101(a)(13) of the Act applies to both the criminal provisions of Section 275 of the Act and the deportation provisions of (former) Section 241(a)(2). The definition of "entry" in Section 101(a)(13) was interpreted in Rosenberg v. Fleuti, 374 U.S. 449 (1963). Since the respondent was convicted in a criminal proceeding of illegal entry, that decision is dispositive of any possible Fleuti issue, and the respondent is collaterally estopped from relitigating the issue of illegal entry in a subsequent deportation proceeding. Matter of Rina, 15 I&N Dec. 346 (BIA 1975).

e. The doctrine of collateral estoppel prevents respondent, who was convicted of entry without inspection under Section 275 of the Act (8 U.S.C. 1325), from relitigating the illegal entry in subsequent deportation proceedings. Matter of Rina, 15 I&N Dec. 453 (BIA 1975).

f. Where a respondent has been acquitted on a criminal charge, one of the essential elements of which was alienage, the doctrine of

collateral estoppel does not preclude litigation of the question of his alienage in a subsequent deportation proceeding because of the difference in the burden of proof applicable to criminal proceedings and to deportation proceedings. Matter of Perez-Valle, 17 I&N Dec. 581 (BIA 1980).

g. An applicant in exclusion proceedings is estopped from contending that he was brought to the U.S. against his will where, in criminal proceedings for attempted smuggling of heroin into the U.S., the court considered the same contention and found that the applicant came to the U.S. voluntarily. An applicant in possession of a visa for entry into the U.S., destined to the U.S., voluntarily arriving in the U.S., and submitting his luggage for inspection by Customs officials, must be considered an applicant for admission. Matter of Grandi, 13 I&N Dec. 798 (BIA 1971).

h. Ordinarily a court decision may be res judicata or operate as a collateral estoppel in a subsequent administrative proceeding, but when a respondent presented a fraudulent offer of employment with his application for an immigrant visa and was later convicted in a criminal proceeding of a conspiracy to violate 18 U.S.C. § 1001 (making false statements or using false writings), the doctrine of collateral estoppel does not estop the respondent from denying that he was excludable at entry under former Section 212(a)(19) of the Act [procured visa by fraud or willfully misrepresenting a material fact] or former Section 212(a)(20) of the Act [immigrant not in possession of a valid immigrant visa] because of the issue of materiality. In the deportation proceeding, the test of materiality is whether the matter concealed concerned a ground of inadmissibility or a probable inadmissibility. See Matter of S- and B-C-, 9 I&N Dec. 436 (BIA 1960; A.G.1961). In the criminal case (in those jurisdictions where materiality is required), the test of materiality is merely whether the false statement could affect or influence the exercise of a Governmental function. An offer of employment is not legally required as an absolute condition for the issuance of an immigrant visa. The purpose of such a document is merely to assist the Counsel in his determination of whether to issue the visa. Therefore, the respondent's misrepresentation was not material and he is not deportable for being excludable at entry. Matter of Martinez-Lopez, 10 I&N Dec. 409 (BIA 1962; A.G. 1964).

3. Decisions in denaturalization cases.

a. Under the doctrine of collateral estoppel, a prior denaturalization judgment conclusively establishes the "ultimate facts" of a subsequent deportation proceeding, i.e. those facts upon which an alien's deportability and eligibility for relief from deportation are to be determined, and precludes reconsideration of issues of law resolved by the prior judgment, so long as the issues in the prior suit and the deportation proceeding arise from virtually identical facts and there has been no change in the controlling law. Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984).

b. Where one of the principal issues in a denaturalization suit was whether the respondent had been a member of the Communist Party from 1930 to 1936 and this issue was litigated and was essential to the court's determination which resulted in a judgment revoking citizenship, by the doctrine of collateral estoppel the finding by the court in the denaturalization suit was conclusive in the subsequent deportation proceeding involving a charge based upon a like period of membership in the Communist Party. Matter of C-, 8 I&N Dec. 577 (BIA 1960).

c. Under the doctrine of collateral estoppel, a finding by a denaturalization court which was essential to its judgment that the respondent was a member of the Communist Party from 1937 to 1945 is conclusive in a subsequent deportation proceeding. Matter of T-, 9 I&N Dec. 127 (BIA 1960).

4. Decisions in extradition proceedings.

a. Decisions resulting from extradition proceedings are not entitled to res judicata effect in later proceedings. The parties to an extradition proceeding are not the same as in a deportation proceeding since the real party at interest in extradition proceedings is the foreign country seeking the respondents extradition, not the U.S. Also, the res judicata bar goes into effect only where a valid, final judgment has been rendered on the merits. It is well established that decisions and orders regarding extraditability embody no judgment on the guilt or innocence of the accused, but serve only to insure that his culpability will be determined in another forum. While the function of a deportation proceeding also is not to decide an alien's guilt or innocence of a crime, those cases holding that extradition decisions do not bind judicial bodies in later criminal proceedings are as applicable to

subsequent deportation proceedings. The issues involved in a deportation hearing differ from those involved in an extradition case, and resolution of even a common issue in one proceeding is not binding in the other. Therefore, a magistrate's decision in extradition proceedings that the crimes committed by the respondent in a foreign country were political crimes which bar his extradition does not bind the BIA. Matter of McMullen, 17 I&N Dec. 542, 548 (BIA 1980), rev'd on other grounds, 658 F.2d 1312 (9th Cir. 1981), on remand, Matter of McMullen, 19 I&N Dec. 90 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986), overruled in part on other grounds by Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005).

5. Decisions in prior deportation proceedings or other administrative decisions.

a. Based on the decision of the Supreme Court in Pearson v. Williams, 202 U.S. 281 (1906) and other federal courts which held that the doctrine of res judicata has no application in administrative proceedings, the BIA held that the doctrine is not applicable to deportation proceedings. Matter of M-, 8 I&N Dec. 535 (BIA 1960); Matter of K-, 3 I&N Dec. 575 (BIA 1949).

b. The Supreme Court stated that when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the doctrine of res judicata may apply. U.S. v. Utah Constr. & Min. Co., 384 U.S. 394 (1982) (citing Pearson v. Williams, supra as an example of where a court used language that was too broad in stating that res judicata principles do not apply to administrative proceedings), superseded by statute on other grounds as recognized by Essex Electro Engineers, Inc. v. U.S., 702 F.2d 998 (Fed. Cir. 1983); see also Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (requiring a full and fair opportunity to litigate the claim or issue).

c. In Medina v. INS, 993 F.2d 499 (5th Cir. 1993), the 5th Circuit specifically held that res judicata may be applied to decisions in deportation proceedings provided (1) the case in which the valid, final judgment was rendered involved the same parties and issues and (2) there was an opportunity to reach the merits on those issues. See also U.S. Shanbaum, 10 F.3d 305 (5th Cir. 1994). The 9th Circuit has also given res judicata effect to an IJ's

decision. Ramon-Sepulveda v. INS, 824 F.2d 749 (9th Cir. 1987).

d. Based on the cases cited above, the BIA has applied the doctrine in several unpublished decisions and held that if an IJ terminates deportation proceedings because alienage or deportability is not established, the INS is barred from instituting a subsequent deportation proceeding in which the factual allegations and the charge of deportability are the same as in the earlier case.

6. Miscellaneous cases.

a. The fact that a respondent was inspected and erroneously admitted to the U.S. by a Service officer does not operate to estop the Service from instituting a deportation proceeding against the respondent if it is later discovered that he was excludable at the time of his admission. Matter of Khan, 14 I&N Dec. 397 (BIA 1973), aff'd sub nom. Santiago v. INS, 526 F.2d 488 (9th Cir. 1975); Matter of Polanco, 14 I&N Dec. 483 (BIA 1973).

b. A respondent admitted for permanent residence in possession of an immigrant visa issued to him as the spouse of a U.S. citizen upon the basis of a visa petition approved by the Service subsequent to the commencement but prior to the conclusion of deportation proceedings instituted against his wife which resulted in a determination, ultimately sustained by the U.S. Court of Appeals, that she was not in fact a citizen of the U.S. is not immune to deportation proceedings. Notwithstanding the visa petition approval may have been an erroneous act, there was no "affirmative misconduct" and the Service is not estopped in subsequent deportation proceedings against respondent from showing that his wife was not a citizen. The fact that a formal decision was made on the visa petition does not, by itself, give substantial weight to respondent's estoppel argument. The approval of the petition was by no means a final determination of the citizenship claim of the respondent's wife. Matter of Morales, 15 I&N Dec. 411 (BIA 1975). This decision was based on a lack of equitable estoppel rather than on the doctrine of collateral estoppel. Under the doctrine of collateral estoppel, the respondent was not a party to the previous visa petition proceeding. As to the deportation proceeding brought against his wife, the doctrine of collateral estoppel might not apply because the burden of proof may be different in visa petition proceedings than in deportation

proceedings.

c. Since applicants are not entitled to immediate relative status on the basis of claimed adoption in the Yemen Arab Republic (which does not recognize the practice of adoption), the Service is not estopped from excluding them under former Section 212(a)(20) of the Act as immigrants not in possession of valid immigrant visas notwithstanding the erroneous approval of visa petitions according them immediate relative status. Not only is the Service empowered to make a redetermination of an applicant's admissibility upon arrival at a port of entry with an immigrant visa, it is under an absolute duty to do so under sections 204(e) and 235(b) of the Act. Matter of Mozeb, 15 I&N Dec. 430 (BIA 1975).

K. Classified information.

1. 8 C.F.R. § 1240.33(c)(4) provides that counsel for the Service may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the IJ or the BIA has determined that such information is relevant to the hearing. (Although 8 C.F.R. § 1240.33 deals specifically with applications for asylum, the rules cited below appear applicable anytime classified material is presented.)

a. 8 C.F.R. § 1240.33(c)(4) also provides that the applicant shall be informed when the IJ receives such classified information.

b. 8 C.F.R. § 1240.33(c)(4) also states that the agency that provides the classified information to the IJ may provide an unclassified summary of the information for release to the applicant whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence.

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

L. Protective orders.

1. 8 C.F.R. § 1003.46(a) provides that in any immigration or bond

proceeding, an IJ may issue a protective order barring disclosure of information upon a showing by the Department of Homeland Security of a substantial likelihood that specific information submitted under seal or to be submitted under seal will, if disclosed, harm the national security as defined in Section 219(c)(2) of the Act or law enforcement interests of the U.S.

a. Section 219(c)(2) of the Act defines the term "national security" as the national defense, foreign relations, or economic interests of the United States.

2. 8 C.F.R. § 1003.46(b) provides that the Department of Homeland Security may at any time after filing a NTA or other charging document with the IJ, file a motion for an order to protect specific information it intends to submit or is submitting under seal.

a. The motion shall describe, to the extent practical, the information that the Department of Homeland Security seeks to protect from disclosure.

b. The motion shall specify the relief requested in the protective order.

c. The motion shall be served upon the respondent.

d. The respondent may file a response to the motion within 10 days after the motion is served.

e. 8 C.F.R. § 1003.46(c) provides that, in the Department of Homeland Security's discretion, DHS may file the specific information as a sealed annex to the motion, which shall not be served upon the respondent. If DHS files a sealed annex, or the Immigration Judge, in his or her discretion, instructs that the information be filed as a sealed annex in order to determine whether to grant or deny the motion, the Immigration Judge shall consider the information only for the purpose of determining whether to grant or deny the motion.

3. 8 C.F.R. § 1003.46(d) provides that the IJ shall give appropriate deference to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit in determining whether the disclosure of information will harm the national security or law enforcement interests of the U.S.

4. Denied motions. 8 C.F.R. § 1003.46(e) provides that if the motion is denied, any sealed annex shall be returned to the Department of Homeland Security, and the IJ shall give no weight to such information. DHS may immediately appeal denial of the motion to the BIA, which shall have jurisdiction to hear the appeal, by filing a Notice of Appeal and the sealed annex with the Board. The IJ shall hold any further proceedings in abeyance pending resolution of the appeal by the BIA.

5. Granted motions. 8 C.F.R. § 1003.46(f) provides that if the motion is granted, the IJ shall issue an appropriate protective order.

6. 8 C.F.R. § 1003.46(f)(1) provides that the IJ shall ensure that the protective order encompasses such witnesses as the respondent demonstrates are reasonably necessary to the presentation of his case. If necessary, the IJ may impose the requirements of the protective order on any witness before the IJ to whom such information may be disclosed.

7. The protective order may require that the respondent, and his or her attorney or accredited representative, if any, to do any of the following:

    a. Not divulge any of the information submitted under the protective order, or any information derived therefrom, to any person or entity, other than authorized personnel of EOIR, the Department of Homeland Security, or such other persons approved by DHS or the IJ;

    b. When transmitting any information under a protective order, or any information derived therefrom, to EOIR or the Department of Homeland Security, include a cover sheet identifying the contents of the submission as containing information subject to a protective order under 8 C.F.R. § 1003.46;

    c. Store any information under a protective order, or any information derived therefrom, in a reasonably secure manner, and return all copies of such information to the Department of Homeland Security upon completion of proceedings, including judicial review; and

    d. Such other requirements as the IJ finds necessary to protect the information from disclosure.

8. Upon issuance of a protective order, the Department of Homeland

Security shall serve the respondent with the protective order and the sealed information. Once a protective order is issued, it shall remain in effect until vacated by the IJ. 8 C.F.R. § 1003.46(f)(3).

9. 8 C.F.R. § 1003.46(f)(4) provides that further review of the protective order before the BIA shall only be had pursuant to review of an order of the IJ resolving all issues of removability and any applications for relief pending in the matter pursuant to 8 C.F.R. § 3.1(b). It also provides that, notwithstanding any other provision the regulation, the IJ shall retain jurisdiction to modify or vacate a protective order upon motion of the Department of Homeland Security or the respondent. An IJ may not grant a motion by the respondent to modify or vacate a protective order until either: DHS files a response to such motion or 10 days after service of such motion on DHS.

10. Admissibility as evidence. 8 C.F.R. § 1003.46(g) provides that the issuance of a protective order shall not prejudice the respondent's right to challenge the admissibility of the information subject to a protective order. The IJ may not find the information inadmissible solely because it is subject to a protective order.

11. 8 C.F.R. § 1003.46(h) provides that any submission to the IJ including any briefs referring to information subject to a protective order shall be filed under seal. Any information submitted subject to a protective order shall remain under seal as part of the administrative record.

12. Failure to comply with protective order. 8 C.F.R. § 1003.46(i) provides that if the Department of Homeland Security establishes that a respondent, or the respondent's attorney or accredited representative, has disclosed information subject to a protective order, the IJ shall deny all forms of discretionary relief, except bond, unless the respondent fully cooperates with DHS or other law enforcement agencies in any investigation relating to the noncompliance with the protective order and disclosure of the information; and establishes by clear and convincing evidence either that extraordinary and extremely unusual circumstances exist or that failure to comply with the protective order was beyond the control of the respondent and his or her attorney or accredited representative. Failure to comply with a protective order may also result in the suspension of an attorney's or an accredited representative's privilege of appearing before EOIR or before DHS.

13. The consequence of breaching a protective order is discussed in Matter of R-S-H-, 23 I&N Dec. 629 (BIA 2003). That case holds that the presence

of federal employees, including court personnel or Department of Justice attorneys, at a closed hearing in which a protective order is discussed does not violate the protective order regulations.

M. Constitutional issues. Neither the BIA nor an IJ may rule on the constitutionality of the statutes they administer or the regulations properly promulgated under the provisions of the Immigration and Nationality Act. Matter of Patel, 19 I&N Dec. 774 (BIA 1988); Matter of Valdovinos, 18 I&N Dec. 343 (BIA 1982); Matter of Bogart, 15 I&N Dec. 552 (BIA 1975, 1976; A.G. 1976); Matter of Chery and Hasan, 15 I&N Dec. 380 (BIA 1975); Matter of Santana, 13 I&N Dec. 362 (BIA1969); Matter of L-, 4 I&N Dec. 556 (BIA 1951).

N. Administrative notice.

1. Although immigration proceedings are not bound by the strict rules of evidence or by the Federal Rules of Evidence, reference is made herein to the Federal Rules of Evidence for the purposes of definition and background.

   a. Rule 201 (b) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

   b. Rule 201(c) provides that judicial notice is discretionary and a court may take judicial notice, whether requested or not. Rule 201(d) discusses when it is mandatory and provides that a court shall take judicial notice if requested by a party and supplied with the necessary information.

   c. Rule 201(e) discusses the opportunity to be heard and states that a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. It goes on to state that in the absence of prior notification, the request may be made after judicial notice has been taken.

2. The BIA has held that it is well established that administrative agencies and the courts may take judicial (or administrative) notice of commonly known facts. Matter of O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998); Matter of H-M-, 20 I&N Dec. 683 (BIA 1993); Matter of R-R-, 20 I&N Dec. 547 (BIA 1992) (citing Ohio Bell Telephone Co. v. Public Utilities

Commission, 301 U.S. 292 (1937)).

3. The issue of administrative notice arises most often in the asylum context and the BIA has held that it may take administrative notice of changes in foreign governments. Matter of R-R-, 20 I&N Dec. 547 (BIA 1992).

4. There is a circuit split regarding the extent to which an alien must be afforded an opportunity to respond when the BIA takes administrative notice of facts.

   a. The Ninth Circuit has held that it is improper for the BIA to take administrative notice of "controversial or individualized facts, such as whether a particular group remains in power after an election, and whether the election has vitiated any previously well-founded fear of persecution," unless the alien is given "an opportunity to rebut the extra-record facts or show cause why administrative notice should not be taken of those facts." Getachew v. INS, 25 F.3d 841, 846 (9th Cir. 1994); *see also* Circu v. Gonzales, 450 F.3d 990 (9th Cir. 2006); Gomez-Vigil v. INS, 990 F.2d 1111 (9th Cir. 1993); Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992).

   b. Similarly, the Tenth Circuit has held that "where the BIA noticed facts and made disputable inferences based on those facts which not only contradicted the findings of the immigration judge but were dispositive of Petitioners' appeal, we hold that due process requires the BIA to give Petitioners advance notice and an opportunity to be heard." de la Llana-Castellon v. INS, 16 F.3d 1093, 1099 (10th Cir. 1994).

   c. The Second Circuit recently published two decisions that were in accord with the Ninth and Tenth Circuits. In reversing the BIA's denial (based solely on administratively-noticed facts) of a motion to reopen, the Second Circuit held that the BIA "exceeded its discretion in failing to provide [the alien] with an opportunity to rebut the significance of those facts before issuing its decision." Chhetry v. DOJ, 490 F.3d 196, 201 (2d Cir. 2007). Similarly, in reversing the BIA's denial (based solely on administratively noticed facts) of an asylum application, the Second Court stated that "the BIA erred by failing to give [the alien] advance notice of its intention to consider this extra-record fact. . . . [and] the opportunity to rebut this fact's significance before issuing its decision." Burger v. Gonzales, 498 F.3d 131 (2d Cir. 2007).

d. The Seventh Circuit has disagreed with the above circuits, with that court stating that "the motion to reopen procedure allows asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts which is sufficient to satisfy" due process requirements. Kaczmarczyk v. INS, 933 F.2d 588, 597 (7th Cir. 1991). Similarly, the Fifth Circuit has held that "[t]he motion to reopen provides [aliens who have applied for asylum] with an opportunity to be heard regarding facts officially noticed and to present contrary evidence." Rivera-Cruz v. INS, 948 F.2d 962, 968 (5th Cir. 1991). Finally, the D.C. Circuit has ruled that, where the BIA took official notice of a change in government while an asylum application was before the BIA on appeal, "[t]he availability of a petition to reopen secures [the alien's] due process right to a meaningful hearing." Gutierrez-Rogue v. INS, 954 F.2d 769, 773 (DC Cir. 1992).

O. Items which are not evidence.

1. The arguments of counsel and statements made in a brief or on a Notice of Appeal are not evidence and therefore not entitled to any evidentiary weight. INS v. Phinpathya, 464 U.S. 183 (1984), superseded by statute on other grounds as recognized by INS v. Hector, 479 U.S. 85 (1986); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of M/V "Runaway", 18 I&N Dec. 127 (BIA 1981).

2. In an unpublished decision, the BIA held that a copy of an unpublished BIA decision presented to an IJ for the purpose of supporting the INS argument that certain published Board precedents should be applied to a respondent's case, does not constitute "evidence" so that the alien has a right to examine it or object to it under 8 C.F.R. § 1240.10(a)(4).

3. Evidence first submitted on appeal and not offered at the trial level is not considered by the BIA. Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988); Matter or Arias, 19 I&N Dec. 568 (BIA 1988); Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Estime, 19 I&N Dec. 450 (BIA 1987).

P. An IJ's duties regarding evidence.

1. Under regulations effective September 25, 2002, the BIA has limited fact-finding ability on appeal. This heightens the need for IJs to include in their decisions clear and complete findings of fact that are supported by

the record and are in compliance with controlling law. Matter of S-H-, 23 I&N Dec. 462 (BIA 2002).

XI. Aggravated felonies.

A. HISTORY LESSON - The concept of an "aggravated felony" was first created and added to the Immigration and Nationality Act by the Anti-Drug Abuse Act of 1988 which became effective on November 18, 1988. Section 501 of the Immigration Act of 1990 (effective November 29, 1990) amended the definition and added 2 new crimes (money laundering and crime of violence) to it. A few corrections were made by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (enacted December 12, 1991). Section 222(a) of the Immigration and Technical Corrections Act of 1994 again amended the definition and added many new crimes to it. It was again amended by Section 321(a)(3) of the IIRIRA in 1996.

B. Definition.

1. The term "aggravated felony" is defined in Section 101(a)(43) of the Act as the following crimes committed within the U. S. or a foreign country. It applies to violations of both state and federal law. The original definition provided that if the offense is a violation of foreign law, the offense must have been committed after the effective date of the Immigration Act of 1990 (November 29, 1990) and the term of imprisonment must have been completed within the previous 15 years. The definition now provides that it includes an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

a. Murder, rape, or sexual abuse of a minor - Section 101(a)(43)(A).

(1) A victim of sexual abuse who is under the age of 18 is a "minor" for purposes of determining whether an alien has been convicted of sexual abuse of a minor within the meaning of Section 101(a)(43)(A) of the Act. Matter of V-F-D-, 23 I&N Dec. 859 (BIA 2006).

(2) The offense of indecency with a child by exposure pursuant to Section 21.11(a)(2) of the Texas Penal Code Annotated constitutes sexual abuse of a minor and is therefore an aggravated felony within the meaning of Section 101(a)(43)(A) of the Immigration and Nationality Act. Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991

(BIA 1999).

(3) In seeking to define the term "sexual abuse of a minor", the BIA referred to the Black's Law Dictionary definition of the term stating that it is commonly defined as "[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance." The Board also used the definition of the term found in 18 U.S.C. § 3509(a) which defines "sexual abuse" as "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." 18 U.S.C. § 3509(a)(8). Sexually explicit conduct includes lascivious exhibition of the genitals or pubic area of a person or animal. 18 U.S.C. § 3509(a)(9)(D); Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA 1999).

(4) The BIA also stated "Abuse is defined in relevant part as physical or mental maltreatment." This definition suggests that the common usage of the term includes a broad range of maltreatment of a sexual nature, and it does not indicate that contact with the minor is a limiting factor. Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA 1999).

(5) A conviction under California Penal Code Section 288(a) qualifies as a conviction for "sexual abuse of a minor" and is an aggravated felony. U.S. v. Baron-Medina, 187 F.3d 1144 (9th Cir. 1999). In reaching that conclusion, the court stated, "We look solely to the statutory definition of the crime, not to the name given to the offense or to the underlying circumstances of the predicate conviction."

(6) The BIA originally held that a conviction for "murder, rape, or sexual abuse of a minor" must be for a felony offense in order for the crime to be considered an aggravated felony under Section 101(a)(43)(A) of the Act. Matter of Crammond, 23 I&N Dec. 9 (BIA 2001). It later vacated that decision because the alien had departed the U.S. during the pendency of the appeal. Matter of Crammond, 23 I&N Dec. 179 (BIA 2001). The Board

now holds that a misdemeanor offense of sexual abuse of a minor constitutes an aggravated felony under Section 101(a)(43)(A) of the Act. Matter of Small, 23 I&N Dec. 448 (BIA 2002). The BIA stated that the change in its position was based on decisions of Circuit Courts in United States v. Gonzales-Vela, 276 F.3d 763 (6th Cir. 2001); Guerrero-Perez v. INS, 242 F.3d 727 (7th Cir. 2001), rehearing denied, Guerrero-Perez v. INS, 256 F.3d 546 (7th Cir. 2001); United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002); United States v. Marin-Navarette, 244 F.3d 1284 (11th Cir.), cert. denied, 534 U.S. 941 (2001).

(a) Under federal law, an offense is defined as a felony if it is one for which the maximum term of imprisonment authorized is, at a minimum, "more than 1 year." An offense is classified as a misdemeanor if the maximum authorized term of imprisonment is "one year or less," and the minimum authorized term of imprisonment is 5 days.

b. Illicit trafficking in any controlled substance (as defined in Section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in 18 U.S.C. § 924(c)(2) - Section 101(a)(43)(B).

(1) The term "drug trafficking crime" referenced in the aggravated felony definition is defined in Section 924(c) of title 18, United States Code as "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.) (CSA), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.)." Matter of Yanez, 23 I&N Dec. 390 (BIA 2002).

(2) The Controlled Substances Act defines the term "felony" at 21 U.S.C. § 802(13) as "any Federal or State offense classified by applicable Federal or State law as a felony." This definition also applies to the Controlled Substances Import and Export Act and the Maritime Drug Law Enforcement Act. See 21 U.S.C. § 951(b); 46 U.S.C. App. § 1903(i); Matter of Yanez, 23 I&N Dec. 390 (BIA 2002).

(3) Absent contrary controlling precedent, a state law misdemeanor offense of conspiracy to distribute marijuana qualifies as an aggravated felony under INA § 101(a)(43)(B) where its elements correspond to the elements of the Federal felony offense of conspiracy to distribute an indeterminate quantity of marijuana. Matter of Aruna, 24 I&N Dec. 452 (BIA 2008).

(4) Conduct treated as a felony under state law but as a misdemeanor by the CSA.

(a) HISTORY LESSON - Circuits were split on the issue of whether a non-trafficking state drug felony constituted a "felony punishable under the Controlled Substances Act," and thus, an aggravated felony. The 1st, 4th, 5th, 8th, 10th and 11th Circuits all concluded that a state law felony that is a misdemeanor under the CSA does constitute an aggravated felony for immigration purposes. U.S. v. Wilson, 316 F.3d 506 (4th Cir. 2003); U.S. v. Simon, 168 F.3d 1271 (11th Cir. 1999); U.S. v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997); U.S. v. Briones-Mata, 116 F.3d 308 (8th Cir. 1997); U.S. v. Cabrera-Sosa, 81 F.3d 998 (10th Cir. 1996); U.S. v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir. 1996). The 2nd, 3rd, 6th, 7th, and 9th Circuits held that such a state law felony would *not* constitute an aggravated felony. Gonzales-Gomez v. Achim, 441 F.3d 532 (7th Cir. 2006); U.S. v. Palacios-Suarez, 418 F.3d 692 (6th Cir. 2005); Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004); Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002); Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996). The BIA, recognizing the circuit split, held that the determination whether a state drug offense constitutes a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) (2000), such that it may be considered an "aggravated felony" under Section 101(a)(43)(B) of the Act shall be made by reference to decisional authority from the federal circuit courts of appeals, and not by reference to any separate legal standard adopted by the Board. Matter of Yanez, 23 I&N Dec. 390

(BIA 2002) (overruling Matter of K-V-D-, 22 I&N Dec. 1163 (BIA 1999)).

(b) PRESENT LAW - In Lopez v. Gonzales, the Supreme Court held that a state offense constitutes a "felony punishable under the Controlled Substances Act" only if it proscribes conduct punishable as a felony under that federal law. 549 U.S. 47 (2006). That case involved an alien who had been convicted in South Dakota of aiding and abetting another person's possession of cocaine (the equivalent of possession in South Dakota), a felony South Dakota. Id. The Eighth Circuit upheld the BIA's decision affirming the IJ's decision finding that the alien had been convicted of an aggravated felony under the INA. Id. The Supreme Court reversed the Eighth Circuit, reasoning that mere possession could not be considered "trafficking" in the commonsense meaning of the word. Id.

(5) Recidivism

(a) The BIA has held that, where an alien is convicted of a simple drug possession offense under state law, this conviction is only deemed to be an aggravated felony as a recidivist drug trafficking offense if, during the criminal proceedings, the alien either admitted his or her status as a recidivist drug offender or this status was determined by a judge or jury. Matter of Carachuri-Rosendo, 24 I&N Dec. 382 (BIA 2007).

(b) Citing to Matter of Carachuri-Rosendo, 24 I&N Dec. 382 (BIA 2007), the BIA ruled that the respondent's 2003 conviction for marijuana possession under Florida law was not an aggravated felony as a recidivist drug trafficking offense. The Board's ruling was based on the fact that, in the 2003 criminal proceedings, neither did the respondent admit that he was previously convicted of a first drug offense nor was this determined by a judge or jury. Matter of Thomas,

24 I&N Dec. 416 (BIA 2007).

(6) In accordance with authoritative precedent of the United States Court of Appeals for the Second Circuit in United States v. Pornes-Garcia, 171 F.3d 142 (2d Cir. 1999), and United States v. Polanco, 29 F.3d 35 (2d Cir. 1994), an individual who has been convicted twice of misdemeanor possession of marijuana in violation of New York State law has not been convicted of an aggravated felony under Section 101(a)(43)(B) of the Act. Matter of Elgendi, 23 I&N Dec. 515 (BIA 2002). Note that Matter of Elgendi analyzed whether the state offenses in question were felonies under state law, as opposed to federal law. This method of analysis is no longer valid under Lopez v. Gonzales, 549 U.S. 47 (2006), which held that, for a state offense to constitute an aggravated felony as a "drug trafficking crime," the offense must be a felony under federal law, as opposed to state law.

(7) An alien convicted under 18 U.S.C. § 924(c)(1) for use of a firearm during a drug trafficking crime is deportable under Section 241(a)(2)(A)(iii) of the Act [now Section 237(a)(2)(A)(iii)] as an alien convicted of an aggravated felony as well as under Section 241(a)(2)(C) of the Act as an alien convicted of a firearm violation. Matter of K-L-, 20 I&N Dec. 654 (BIA 1993).

c. Illicit trafficking in firearms or destructive devices defined in 18 U.S.C. § 921 or in explosive materials as defined in 18 U.S.C. § 841(c) - Section 101(a)(43)(C).

(1) 18 U.S.C. § 921 defines "firearms" as:

(a) any weapon which will or may be converted to expel a projectile by explosive action;

(b) the frame or receiver of any such weapon;

(c) any firearm muffler or silencer;

(d) any destructive device, but does not include antique firearms.

(2) 18 U.S.C. § 921 defines "destructive device" as:

(a) any bomb, grenade, rocket, missile, mine, or similar device which is explosive, incendiary, or contains poison gas;

(b) any weapon (other than shotgun shells for sporting use) which will or may be converted to expel a projectile by explosive or other propellant <u>and</u> which has a barrel with a bore of more than ½ inch in diameter;

(c) any combination of parts from which a destructive device may be assembled.

(3) 18 U.S.C. § 841(c) defines "explosive materials" as explosives, blasting agents, and detonators.

d. Any offense described in 18 U.S.C. § 1956 relating to laundering of monetary instruments or an offense described in 18 U.S.C. § 1957 relating to engaging in monetary transactions in property derived from specific unlawful activity if the amount of the funds exceeded $10,000 - Section 101(a)(43)(D).

e. An offense described in 18 U.S.C. § 842(h) or (i) or 18 U.S.C. § 844(d), (e), (f), (g), (h), or (i) relating to explosive materials offenses - Section 101(a)(43)(E)(i).

(1) 18 U.S.C. § 842(h) provides that it is unlawful for any person to receive, conceal, transport, ship, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such materials were stolen.

(2) 18 U.S.C. § 842(i) provides that it is unlawful for any explosive to be shipped in or received from interstate or foreign commerce by any person who:

(a) is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term not exceeding one year;

(b) is a fugitive from justice;

(c) is an unlawful user of or addicted to any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802);

(d) has been adjudicated as a mental defective or who has been committed to a mental institution.

(3) 18 U.S.C. § 844(d) makes it unlawful to transport or receive in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or to unlawfully damage any property.

(4) 18 U.S.C. § 844(e) makes it unlawful to use the mail, telephone, etc. to make a bomb scare.

(5) 18 U.S.C. § 844(f) makes it unlawful to damage federal property by fire or explosive.

(6) 18 U.S.C. § 844(g) makes it unlawful to possess an explosive in an airport or federal building.

(7) 18 U.S.C. § 844(i) makes it unlawful to damage by fire or explosive any property used in or affecting interstate or foreign commerce.

f. An offense described in 18 U.S.C. §§ 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 18 U.S.C. § 924(b) or (h) relating to firearms offenses - Section 101(a)(43)(E)(ii).

(1) 8 U.S.C. § 922(g)(1) - (5) provides that it is unlawful for any firearm or ammunition to be shipped in or received from interstate or foreign commerce by any person who:

(a) has been convicted in any court of, a crime punishable by imprisonment for a term not exceeding one year;

(b) is a fugitive from justice;

(c) is an unlawful user of or addicted to any controlled substance as defined in Section 102 of the

Controlled Substances Act (21 U.S.C. § 802);

(d) has been adjudicated as a mental defective or who has been committed to a mental institution;

(e) is an alien illegally or unlawfully in the U.S.;

(f) 18 U.S.C. § 922(g) also has a part (6) and a part (7), but convictions for these offenses are not aggravated felonies.

(2) An offense defined by state or foreign law may be classified as an aggravated felony as an offense "described in" a federal statute enumerated in Section 101(a)(43) of the Act even if lacks the jurisdictional element of "affecting interstate or foreign commerce." Matter of Vasquez-Muniz 23 I&N Dec. 207 (BIA 2002). Therefore, possession of a firearm by a felon in violation of Section 12021(a)(1) of the California Penal Code (and perhaps any other similar state crime) is an aggravated felony under Section 101(a)(43)(E)(ii) of the Act because it is an offense "described in" 18 U.S.C. § 922(g)(1). Matter of Vasquez-Muniz 23 I&N Dec. 207 (BIA 2002).

(3) 18 U.S.C. § 922(j) makes it unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition which is moving in interstate or foreign commerce knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(4) 18 U.S.C. § 922(n) makes it unlawful for any person under indictment for a crime punishable by imprisonment for a term exceeding one year to ship in or receive from interstate or foreign commerce any firearm or ammunition.

(5) 18 U.S.C. § 922(o) makes it unlawful to transfer or possess a machine gun.

(6) 18 U.S.C. § 922(p) makes it unlawful to manufacture, import, sell, ship, deliver, possess, transfer, or receive a firearm not as detectable by a metal detector as the

Security Exemplar.

(7) 18 U.S.C. § 922(r) makes it unlawful to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under 18 U.S.C. § 925(d)(3).

(8) 18 U.S.C. § 924(b) makes it unlawful to ship in or receive from interstate or foreign commerce a firearm or any ammunition with intent to commit an offense therewith.

(9) 18 U.S.C. § 924(h) makes it unlawful to transfer a firearm knowing that it will be used to commit a crime of violence or drug trafficking crime.

g. An offense described in Section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses) - Section 101(a)(43)(E)(iii).

h. A crime of violence (as defined in 18 U.S.C. § 16, not including a purely political offense), for which the term of imprisonment is at least one year - Section 101(a)(43)(F).

(1) 18 U.S.C. § 16 defines a "crime of violence" as:

(a) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(2) Not necessarily a felony. Section 101(a)(43)(F) of the Act refers specifically to the federal definition of a "crime of violence" in 18 U.S.C. § 16, which requires that any crime falling within Section 16(b) be a felony but contains no such requirement for offenses falling within Section 16(a). It further provides a specific minimum sentence of "at least one year" for the offense. Thus, this section has been found to include crimes that are not "felonies" within the federal definition of that term.

(a) The Second Circuit found that, for sentence enhancement purposes, that a misdemeanor offense for which the alien had been sentenced to a 1-year suspended sentence was an aggravated felony. U.S. v. Pacheco, 225 F.3d 148 (2d Cir. 2000).

(b) The Fourth Circuit found that the plain language of Section 101(a)(43)(F) contains no requirement that the offense have been a felony, and concluded that an alien's misdemeanor conviction for sexual battery was for a crime of violence and an aggravated felony. Wireko v. Reno, 211 F.3d 833 (4th Cir. 2000).

(c) The fact that an offense of assault was classified as a misdemeanor under state law did not preclude it from qualifying as an aggravated felony for purposes of the enhanced penalty provisions for the offense of illegal reentry. U.S. v. Urias-Escobar, 281 F.3d 165 (5th Cir. 2002).

(3) Mens rea. The Supreme Court held that a "crime of violence" requires a higher mens rea than merely accidental or negligent conduct. Leocal v. Ashcroft, 543 U.S. 1 (2004).

(a) In addition, the Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits have held that reckless crimes cannot be crimes of violence under 18 U.S.C. § 16(b). Jimenez-Gonzalez v. Mukasey, 548 F.3d 557 (7th Cir. 2008); United States v. Zuniga-Soto, 527 F.3d 1110 (10th Cir. 2008); United States v. Portela, 469 F.3d 496 (6th Cir. 2006); Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006) (en banc); Garcia v. Gonzales, 455 F.3d 465 (4th Cir. 2006); Oyebanji v. Gonazles, 418 F.3d 260 (3d Cir. 2005).

(b) Relying on U.S. v. Springfield, 829 F.2d 860 (9th Cir. 1987), the BIA held that the legislative history of 18 U.S.C. § 16 indicates that Congress did not limit the term "crime of violence" to crimes of

specific intent. Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994).

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

(a) For purposes of determining whether an offense is a crime of violence as defined in 18 U.S.C. § 16(b), it is necessary to examine the criminal conduct required for conviction, rather than the consequence of the crime, to find if the offense, by its nature, involves "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Id. To find that a criminal offense is a crime of violence under 18 U.S.C. § 16(b), a causal link between the potential for harm and the "substantial risk" of "physical force" being used must be present. Id.

(b) Analysis under 18 U.S.C. § 16(b) requires first that the offense be a felony and, if it is, that the nature of the crime as elucidated by the generic elements of the offense is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs. While this generic or categorical approach to 18 U.S.C. § 16(b) might occasionally include consideration of the charging papers or jury instructions in order to identify the "offense," it does not extend to consideration of the underlying facts of the conviction. Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994).

(5) Indeterminate sentences. Under Massachusetts law, an indeterminate sentence is considered to be a sentence for the maximum term imposed. Therefore, an alien convicted of a crime of violence and sentenced to prison for a minimum of 4 ½ years to a maximum of 7 years is convicted of an aggravated felony. Matter of D-, 20 I&N Dec. 827 (BIA 1994).

(6) Manslaughter

(a) Involuntary Manslaughter - A respondent's conviction for involuntary manslaughter under Illinois Rev. Stat. ch. 38. para. 9-3(a), for which he was sentenced to 10 years in prison, is a "crime of violence" and, therefore, an aggravated felony. Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994). The Fourth Circuit has held that involuntary manslaughter under Virginia law is not a crime of violence because it requires only a mens rea of recklessness. Bejarano-Urrutia v. Gonzales, 413 F.3d 444 (4th Cir. 2005).

(b) 2nd Degree Manslaughter - Second-degree manslaughter under New York law, which required only that the perpetrator recklessly cause the death of another, was not a crime of violence under 18 U.S.C. § 16(b). Jobson v. Ashcroft, 326 F.3d 367 (2d Cir. 2003). Focusing on the verb "use" in 18 U.S.C. § 16(b), the court stated that the statute contemplates only the risk of an intentional use of force.

(c) 1st Degree Manslaughter - Because first-degree manslaughter requires proof of intent to cause serious physical injury or death, it differs significantly from the reckless conduct required for second-degree manslaughter, which the Jobson court found "encompasse[d] many situations", the offense of manslaughter in the first degree in violation of Section 125.20 of the New York Penal Law is a crime of violence under 18 U.S.C. § 16(b) and is therefore an aggravated felony under Section 101(a)(43)(F) of the Act. Matter of Vargas, 23

I&N Dec. 651 (BIA 2004).

(d) Vehicular Manslaughter - In Oyebanji v. Gonzales, 418 F.3d 260 (3rd Cir. 2005), the parties agreed that vehicular manslaughter under New Jersey law is not a crime of violence under 18 U.S.C. § 16(a). The court held that the reasoning in Leocal, supra, suggests that the offense is not a crime of violence under 18 U.S.C. § 16(b) as the offense requires recklessness. The Ninth Circuit held in Lara-Cazares v. Gonzales, 408 F.3d 1217 (9th Cir. 2005), that pursuant to the reasoning in Leocal, a conviction under § 191.5(a) of the California Penal Code for gross vehicular manslaughter while intoxicated is not a crime of violence, because the mens rea is gross negligence and the intentional use of a vehicle to cause injury is not an element of the offense.

(7) Arson - An alien who was convicted of arson in the first degree under the law of Alaska and sentenced to 7 years imprisonment with 3 years suspended was convicted of a "crime of violence" within the meaning of Section 101(a)(43)(F) of the Act, and therefore is deportable under Section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony. Matter of Palacios, 22 I&N Dec. 434 (BIA 1998). In its analysis, the Board stated, "We find that the respondent's act of arson in the first degree, by its very nature, requires a substantial risk of physical force against another person or property. (Citations omitted). First, we note that the intentional starting of a fire or causing an explosion ordinarily would lead to the substantial risk of damaging property of another. Not only is there a risk to items belonging to others that are on or in the property, i.e., such as items left in a store, there always exists the risk that the fire will spread beyond the original intended property. Secondly, since there is a risk that the fire or explosion will encroach upon another structure and that structure may be occupied, arson involves a substantial risk to another person. Moreover, there is a real risk that the people responding to the fire, i.e., public employees who respond to emergencies, will be injured while extinguishing the fire or investigating the fire scene.

Accordingly, we find that the respondent's conviction for arson in the first degree under Alaska law is a "crime of violence" within the meaning of the 18 U.S.C. § 16, and correspondingly, an aggravated felony under Section 101(a)(43)(F) of the Act."

(8) Assault - The offense of third-degree assault in violation of Section 53a-61(a)(1) of the Connecticut General Statutes, which involves the intentional infliction of physical injury upon another, is a crime of violence under 18 U.S.C. 16(a). Matter of Martin, 23 I&N Dec. 491 (BIA 2002).

(9) Drunk Driving

(a) HISTORY LESSON - The BIA originally held that the use of physical force is not an element of drunk driving, but driving under the influence vastly increases the probability that the driver will injure someone in an accident. Therefore, drunk driving, by its nature, presents a serious risk of physical injury and therefore qualifies as a crime of violence. Various circuit courts disagreed with these decisions, finding that there must be a substantial likelihood that the perpetrator will intentionally employ physical force against another's person or property in the course of committing the offense. U.S. v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); U.S. v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001).

(b) PRESENT LAW - In Leocal v. Ashcroft, 543 U.S. 1 (2004), the Supreme Court held that the alien's DUI offense was not a crime of violence under 18 U.S.C. § 16(a) as the statute's key phrase, the use of physical force against the person or property of another, suggested a higher degree of intent than negligent or merely accidental conduct. The DUI conviction was not a crime of violence under 18 U.S.C. § 16(b) for similar reasons: it required a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense. The ordinary meaning of the term "crime of violence,"

combined with 18 U.S.C. § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggested a category of violent, active crimes that did not include DUI offenses. Thus, 18 U.S.C. § 16 could not be read to include the alien's conviction for DUI causing serious bodily injury under Florida law.

i) Leocal left open the question of whether an offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence. Leocal v. Ashcroft, 543 U.S. 1, 13 (2004).

(10) Intoxication Assault - The 5th Circuit found that intentional use of force was not an element of the crime of Texas intoxication assault and this offense did not qualify as a "crime of violence" for sentence enhancement purposes. United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004).

(11) Criminally Negligent Child Abuse - An alien convicted of criminally negligent child abuse under sections 18-6-401(1) and (7) of the Colorado Revised Statutes, whose negligence in leaving his stepson alone in a bathtub resulted in the child's death, was not convicted of a crime of violence under 18 U.S.C. § 16(b) because there was not "substantial risk that physical force" would be used in the commission of the crime. Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999).

(12) Sexual Abuse of a Child - When an adult attempts to sexually touch a child under the age of consent, there is always a substantial risk that physical force will be used to ensure the child's compliance and crimes of sexual abuse of a child or child molestation are crimes of violence. See U.S. v. Bauer, 990 F.2d 373 (8th Cir. 1993); U.S. v. Rodriguez, 979 F.2d 138 (8th Cir. 1992); U.S. v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993). The BIA has held that statutory rape is a crime of violence for the same reason. Matter of B-, 21 I&N Dec. 287 (BIA 1996).

(a) The Ninth Circuit held that felony unlawful sexual intercourse with person under 18 did not qualify as a "crime of violence," because it does not "'by its nature, involve [] a substantial risk that [violent] physical force against the person or property of another may be used in the course of committing the offense.'" Valencia v. Gonzales, 439 F.3d 1046 (9th Cir. 2006), replacing 431 F.3d 673 (9th Cir. 2005).

(13) Burglary

(a) Burglary of a Habitation - In an appeal of a sentence in a criminal case, the 5th Circuit held that burglary of a habitation (Texas Penal Code Section 30.02) is per se a crime of violence under 18 U.S.C. § 16(b). U.S. v. Guadardo, 40 F.3d 102 (5th Cir. 1994).

(b) Burglary of a Vehicle or Nonresidential Structure - The burglary of a nonresidential building or the burglary of a vehicle under the Texas Penal Code often involves the application of destructive physical force to the property of another. Therefore, both offenses are crimes of violence under 18 U.S.C. § 16(b). U.S. v. Rodriguez-Guzman, 56 F.3d 18 (5th Cir. 1995); overruling recognized by U.S. v. Turner, 305 F.3d 349 (5th Cir. 2002) (describing new analysis of "crime of violence" established in U.S. v. Charles, 301 F.3d 309 (5th Cir. 2002). The Seventh Circuit has held that burglary of an automobile under Illinois law is not a crime of violence under 18 U.S.C. § 16(b). Solorzano-Patlan v. INS, 207 F.3d 869 (7th Cir. 2000). The Ninth Circuit has held that vehicular burglary under California law is not a crime of violence under 18 U.S.C. § 16(b) because it can be accomplished without physical force. Sareang Ye v. INS, 214 F.3d 1128 (9th Cir. 2000).

(14) Trespass - A trespass conviction under Colorado law, under which a "person commits the crime of first degree criminal trespass if he knowingly and unlawfully enters or

remains in a dwelling or if he enters any motor vehicle with intent to steal anything of value" is a crime of violence because entering or remaining in the dwelling of another creates a substantial risk that physical force will be used against the residents in the dwelling. Even when the perpetrator has illegally entered a nonresidential building, there is a substantial risk of physical force being used against the property of another. U.S. v. Delgado-Enriquez, 188 F.3d 592 (5th Cir. 1999).

(15) Unauthorized Use of a Vehicle - The Fifth Circuit stated, "the unauthorized use of a vehicle likewise carries a substantial risk that the vehicle might be broken into, 'stripped,' or vandalized, or that it might become involved in an accident" and concluded that the unauthorized use of a motor vehicle constitutes a "crime of violence" under 18 U.S.C. § 16(b). United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir. 1999); Matter of Brieva-Perez, 23 I&N Dec. 766 (BIA 2005).

(16) Carrying a Firearm - Although unlawfully carrying a firearm on premises which have been licensed to sell alcoholic beverages is a felony under Texas Penal Code Section 46.02, the Fifth Circuit found that it is not a crime of violence. U. S. v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2001).

(17) Stalking - A stalking offense for harassing conduct in violation of Section 646.9(b) of the California Penal Code, which proscribes stalking when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the stalking behavior, is a crime of violence under 18 U.S.C. § 16(b) and, if a sentence of a year or longer is imposed, is an aggravated felony under Section 101(a)(43)(F) of the Act. Matter of Malta, 23 I&N Dec. 656 (BIA 2004). The BIA noted that the statute in question prohibited "following or harassing another person," found that it was divisible, and therefore looked to the record of conviction to determine that the respondent conviction was for conduct involving harassing, rather than following. It found that a substantial risk of the use of force exists when a person makes a credible threat that places another in fear for his or her

safety through a course of action that "seriously alarms, annoys, torments, or terrorizes the person." While it is possible to violate the stalking statute without the use of force, such as through the use of a computer, a telephone, or mail, the BIA observed that when a "course of conduct" that is both serious and continuing in nature is coupled with a "credible threat" to another's "safety," there is a substantial risk that physical force may be used, at least recklessly, over the duration of the commission of the crime. The Board added, "the fact that the respondent violated the California stalking statute despite the existence of a court order prohibiting the behavior demonstrates a level of determination that further increases the severity of the interaction and the risk of the use of physical force. Moreover, when a person engages in stalking, there is a substantial risk that the individual being stalked will take exception and, as a result, cause the perpetrator to use force in self-defense or to further effectuate the harassment.

i. Theft, burglary, and receipt of stolen property - Section 101(a)(43)(G): A theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment imposed is at least one year.

(1) Section 101(a)(43)(G) defines as aggravated felonies theft or burglary offenses for which the sentence is "at least 1 year" without further qualification. Therefore, it seems to include crimes that are not "felonies" within the federal definition of that term.

(a) The Third Circuit found, for sentence enhancement purposes, that a misdemeanor theft conviction for which the term of imprisonment is 1 year is an aggravated felony. U.S. v. Graham, 169 F.3d 787 (3d Cir. 1999).

(2) Theft.

(a) Although "theft" is a "popular name" for larceny, the term "theft" is generally considered in federal law "to be broader than 'common law larceny.'" Under the common law, "larceny" requires the

intent to permanently deprive the owner of possession or use of his property. Congress' use of the term "theft" is therefore broader than the common-law definition of that term. Specifically, a "theft offense" under Section 101(a)(43)(G) of the Act does not require as a statutory element the specific intent to permanently deprive an owner of his property, an element that was present in the common-law definition of larceny. Rather, a taking of property constitutes a "theft" whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000). Not all takings of property, however, will meet this standard because some takings entail a de minimis deprivation of ownership interests. Id.

(b) A conviction for unlawful driving and taking of a vehicle in violation of Section 10851 of the California Vehicle Code, which makes guilty a person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, is a "theft offense" under Section 101(a)(43)(G) of the Act. Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000).

(c) A conviction for welfare fraud in violation of Section 40-6-15 of the General Laws of Rhode Island is not a theft offense. Matter of Garcia-Madruga, 24 I&N Dec. 436, 441 (BIA 2008). The Board narrowed the definition of "theft," finding that it requires a taking of property without consent whereas fraud involves fraudulently obtained consent. Id.

(d) Aiding and abetting theft. The Supreme Court held that a theft offense under INA § 101(a)(43)(G) includes the crime of "aiding and abetting" a theft offense. Gonzales v. Duenas-Alvarez, 549 U.S.

183 (2007). In this case, the Court vacated a Ninth Circuit case, Penuliar v. Ashcroft, 395 F.3d 1037 (2005), in which the Ninth Circuit concluded that a conviction for unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a) is not categorically a theft offense under INA § 101(a)(43)(G) because the California provision, which includes accomplice liability, is broader than the generic definition of "theft offense." The Supreme Court observed that all states and the federal government have "expressly abrogated the distinction" among principals and aiders and abettors. Id. at 820.

(3) Stolen property.

(a) In Matter of Bahta, 22 I&N Dec. 1381 (BIA 2000), the BIA found that the "receiving stolen property" parenthetical in Section 101(a)(43)(G) of the Act was intended to clarify that the term "theft" was not being used in its limited, traditional sense to require proof that the offender was involved in the actual taking of the property at issue. First, the Board noted that the modern view of theft generally treats as equivalent those who knowingly receive and those who knowingly possess stolen property. The commentaries to the Model Penal Code explain that whether the term used is receiving, possessing, buying, or concealing, "[i]t seems clear that the essential idea behind these and other terms is acquisition of control, whether in the sense of physical dominion or of legal power to dispose." Model Penal Code § 223.6, cmt. 2, at 235. Accordingly, the Model Penal Code definition of "receiving" is "broad" and includes "the retention of possession [of stolen property]." Id. Moreover, under the Model Penal Code, one "is guilty of theft if he 'receives, retains, or disposes of movable property of another' with the requisite culpability." Id. cmt. 1, at 234. Second, the Board observed that nearly all of the federal "receipt" of stolen property provisions reflect an application of this well-understood meaning of

"receiving" stolen property and include "possession" offenses within their scope. Finally, the Board stated that the focus is not just on the parenthetical in Section 101(a)(43)(G) of the Act, but also on whether an offense is a "theft" offense within this provision. To read the parenthetical in a restricted manner would be to assume that Congress intended to apply a technical distinction within the "theft" definition set forth in Section 101(a)(43)(G) that is inconsistent both with the modern view of "theft" offenses and with the consolidation and definition of theft and related offenses in Chapters 31 and 113 of Title 18 of the United States Code. The Board concluded that the reference to "receipt of stolen property" in Section 101(a)(43)(G) of the Act was intended in a generic sense to include the category of offenses involving knowing receipt, possession, or retention of property from its rightful owner. Therefore, a conviction for attempted possession of stolen property, in violation of Sections 193.330 and 205.275 of the Nevada Revised Statutes, is a conviction for an attempted "theft offense (including receipt of stolen property)," and therefore an aggravated felony, within the meaning of sections 101(a)(43)(G) and (U) of the Act (provided, of course, that a sentence of a year or more was imposed).

(4) Burglary.

(a) The offense of burglary of a vehicle in violation of Section 30.04(a) of the Texas Penal Code Annotated is not a "burglary offense" within the definition of an aggravated felony in Section 101(a)(43)(G) of the Act. Matter of Perez, 22 I&N Dec. 1325 (BIA 2000).

(b) In this decision, the BIA stated that in the absence of a definition of the term "burglary offense" in the Act, or some other clear expression of congressional intent, the logical starting point is the definition of a burglary set forth by the United

States Supreme Court in Taylor v. United States, 495 U.S. 575 (1990), which states that for purposes of sentence enhancement under 18 U.S.C. § 924(e), the term "burglary" as used in 18 U.S.C. § 924(e)(2)(B)(ii) means an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime. In Taylor, the Supreme Court specifically excluded from the definition of generic burglary statutes which include breaking and entering places other than buildings, such as booths, tents, vehicles, boats, vessels, and railroad cars. In its decision, the Taylor court noted that Congress must have thought that certain property crimes, like burglary, so often presented a risk of injury to persons or were so often committed by career criminals that they should be included in the enhancement statute even though they do not necessarily involve the use or threat of force against a person. It also noted that Congress presumably realized that "run-of-the-mill" burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force presented a sufficiently "serious potential risk" to count toward enhancement. All of this involves a determination that burglary must somehow pose a substantial risk that physical force will be used against a person before it can be considered in enhancing a sentence. The court concluded that burglaries of places other than buildings posed much less risk that physical force will be used against a person and therefore excluded them from the generic definition of burglary.

(c) COMMENT - In the immigration context, no nexus between a burglary and its risk that physical force will be used against a person appears necessary. One of the categories of aggravated felonies, included in the definition at Section 101(a)(43)(F), is any crime of violence (as defined in 18 U.S.C. 16, not including a purely political offense), for which the term of imprisonment is at least one year. The mere fact that the crime of burglary is placed in a different Section of the

aggravated felony definition, part (G), and is included there with theft and receipt of stolen property seems to indicate that in the immigration context Congress views burglary as a crime against property rather than against the person and the fact that property may be taken from or damaged in or some other crime committed in a watercraft, aircraft, railroad car, or vehicle should not prevent the offense from being a burglary. The BIA did not consider this analysis.

(d) The BIA concluded Matter of Perez, 22 I&N Dec. 1325 (BIA 2000), by saying, "The question of the precise scope of the term "burglary offense" under Section 101(a)(43)(G) has been neither adequately developed nor fully argued in this appeal. Here, we simply hold that burglary of a vehicle under this particular Texas statute is not a burglary offense under Section 101(a)(43)(G)."

j. An offense described in 18 U.S.C. § 875, 876, 877, or 1202 relating to the demand for or receipt of ransom - Section 101(a)(43)(H).

(1) 18 U.S.C. § 875(a) makes it a crime to transmit a ransom demand in interstate or foreign commerce.

(a) 18 U.S.C. § 875(b) & (c) makes it a crime to transmit in interstate or foreign commerce a threat to kidnap or to injure another. Since these offenses do not relate to a demand for ransom, they do not appear to be aggravated felonies. However, by reference to the other portions of the definition, it appears that the words "relating to the demand for or receipt of ransom" in Section 101(a)(43)(H) are illustrative only and a violation of 18 U.S.C. § 875(b) or (c) would be an aggravated felony.

(2) 18 U.S.C. § 876 makes it a crime to mail a ransom demand.

(3) 18 U.S.C. § 877 makes it a crime to mail a ransom demand from a foreign country.

(4) 18 U.S.C. § 1202 makes it a crime to knowingly receive, possess, or dispose of money which at any time has been delivered as ransom in connection with a violation of 18 U.S.C. 1201 (kidnaping).

k. An offense described in 18 U.S.C. §§ 2251, 2251A, or 2252 (relating to child pornography) - Section 101(a)(43)(I).

(1) 18 U.S.C. § 2251 makes it unlawful to make or advertise child pornography.

(2) 18 U.S.C. § 2251A makes it unlawful to buy or sell children for child pornography.

(3) 18 U.S.C. § 2252 makes it unlawful to send child pornography or receive same in interstate or foreign commerce.

l. An offense described in 18 U.S.C. § 1962 (relating to racketeer influenced corrupt organizations) or an offense described in 18 U.S.C. § 1084 (if it is a second or subsequent offense) or 18 U.S.C. § 1955 (relating to gambling offenses) for which a sentence of one year or more may be imposed - Section 101(a)(43)(J).

(1) 18 U.S.C. § 1963 provides that a violation of 18 U.S.C. § 1962 may be punished by not more than 20 years (in some circumstances, life imprisonment). Therefore, it would appear that one year or more may be imposed for any violation of 18 U.S.C. § 1962. Perhaps the reference to a minimum potential sentence is for the violation of a state statute that is the equivalent of 18 U.S.C. § 1962.

m. An offense that relates to the owning, controlling, managing, or supervising of a prostitution business - Section 101(a)(43)(K)(i).

n. An offense described in 18 U.S.C. § 2421, 2422, or 2433 (relating to transportation for the purpose of prostitution) if committed for commercial advantage - Section 101(a)(43)(K)(ii).

(1) The categorical approach to determining whether an offense qualifies as a removable offense does not apply to

a determination of whether a violation of 18 U.S.C. § 2422(a) was committed for "commercial advantage" and, therefore, constitutes an aggravated felony under Section 101(a)(43)(K)(ii), where "commercial advantage" is not an element of the offense and the evidence relating to that issue is not ordinarily likely to be found in the record of conviction. Matter of Gertsenshteyn, 24 I&N Dec. 111 (BIA 2007).

o. An offense described in 18 U.S.C. §§ 1581, 1582, 1583, 1584, 1584, or 1588 relating to peonage, slavery, and involuntary servitude - Section 101(a)(43)(K)(iii).

p. An offense described in 18 U.S.C. § 793 relating to gathering or transmitting national defense information, 18 U.S.C. § 798 relating to disclosure of classified information, 18 U.S.C. 2153 relating to sabotage, or 18 U.S.C. §§ 2381 or 2382 relating to treason - Section 101(a)(43)(L)(i).

q. An offense described in Section 601 of the National Security Act of 1947 (50 U.S.C. § 421) relating to protecting the identity of undercover intelligence agents - Section 101(a)(43)(L)(ii).

r. An offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000 - Section 101(a)(43)(M)(i).

(1) An alien who was convicted of submitting a false claim with intent to defraud arising from an unsuccessful scheme to obtain $15,000 from an insurance company was convicted of an "attempt" to commit a fraud in which the loss to the victim exceeded $10,000 within the meaning of Section 101(a)(43)(U) of the Immigration and Nationality Act and therefore is deportable under Section 241(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony. Matter of Onyido, 22 I&N Dec. 552 (BIA 1999). The Board stated, "We disagree with the respondent's contention that Section 101(a)(43)(U) of the Act requires that the victim suffer an actual loss which exceeds $10,000. By its very nature, an attempt involves an unsuccessful effort to commit a crime... Here, the offense for which the respondent was convicted involved an attempt to obtain $15,000 from the insurance company through fraud and deceit. The respondent's actions

support a conviction for attempted fraud which is a lesser included offense within a conviction for fraud under Indiana law. The fact that the respondent failed to obtain the money is of no consequence under Section 101(a)(43)(U) of the Act, which prescribes deportability as an aggravated felon for aliens convicted of an attempt or conspiracy to commit an offense described in Section 101(a)(43) of the Act." Because of its decision regarding Section 101(a)(43)(U), the BIA did not discuss the IJ's additional finding that the respondent was also deportable as an aggravated felon under Section 101(a)(43)(M)(i), as an alien convicted of a fraud or deceit in which the loss to the victim exceeds $10,000.

(2) Embezzling more than $10,000 from the United States was an aggravated felony within the meaning of the exception from waiver of inadmissiblity since the federal government did not qualify as a "victim" within the definition of an aggravated felony. Balogun v. U.S. Attorney General, 425 F.3d 1356 (11th Cir. 2005).

(3) Theft by deception must satisfy the elements of both Sections 101(a)(43)(G) and 101(a)(43)(M)(i) to constitute an aggravated felony. Nugent v. Ashcroft, 367 F.3d 162 (3d Cir. 2004).

(4) Restitution. The Third Circuit has held that the amount of restitution is not controlling to determine the amount of loss, but may be used to determine the amount of loss if the conviction record is unclear. Munroe v. Ashcroft, 353 F.3d 225 (3d Cir. 2003).

(5) In an unpublished decision, the BIA found erroneous an IJ's finding that no actual loss to a victim occurred because the respondent paid restitution. The Board stated, "Merely because the respondent was forced to reimburse the monies he illegally obtained does not negate the fact that his fraudulent acts resulted in actual loss to the victims of his crime. To find otherwise would cause an absurd result."

(6) In a case involving an aggravated felony under INA § 101(a)(43)(M)(i) as an "offense that involves fraud or

deceit in which the loss to the victim or victims exceeds $10,000," the BIA held that: (1) the $10,000 loss threshold does not have to be an element of the offense; and (2), therefore, IJs are not confined to using the categorical or modified categorical approaches in determining loss to the victim but, rather, may consider any admissible evidence. Matter of Babaisakov, 24 I&N Dec. 306 (BIA 2007).

(a) However, the Ninth Circuit has ruled that, to constitute an aggravated felony under Section 101(a)(43)(M)(i), the offense must include as, an element, loss to the victim of more than $10,000. Kawashima v. Mukasey, 530 F.3d 1111 (9th Cir. 2008).

(7) The BIA ruled that conspiracy offenses can permissibly be aggravated felonies under INA §§ 101(a)(43)(M)(i) and (U) where the substantive crime that was the object of the conspiracy was an offense that involved "fraud or deceit" and where the potential loss to the victim or victims exceeded $10,000. Matter of S-I-K-, 24 I&N Dec. 324 (BIA 2007).

s. An offense that is described in Section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $200,000; Section 101(a)(43)(M)(ii).

t. An offense described in 18 U.S.C. § 274(a)(1)(A) or (a)(2) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other person) to violate a provision of this Act - Section 101(a)(43)(N).

(1) A conviction for transporting an illegal alien in violation of Section 274(a)(1)(A)(ii) of the Act is an aggravated felony, as defined in Section 101(a)(43)(N) of the Act, and, therefore, it supports a finding of deportability under Section 237(a)(2)(A)(iii) of the Act. The parenthetical expression "relating to alien smuggling" does not limit deportable offenses to those involving smuggling. Matter of Ruiz-Romero, 22 I&N Dec. 486 (BIA 1999).

(2) An alien convicted of an offense described in Section 275(a) of the Act (illegal entry)is not convicted of an aggravated felony as that term is defined in Section 101(a)(43)(N) of the Act, which specifically refers to those offenses relating to alien smuggling described in sections 274(a)(1)(A) and (2) of the Act. Matter of Alvarado-Alvino, 22 I&N Dec. 718 (BIA 1999). A violation of Section 275(a) may be an aggravated felony under the circumstances described in Section 101(a)(43)(O). Id.

u. An offense described in Section 275(a) [entering or attempting to enter the U.S. without inspection or by fraud] or 276 [reentry after exclusion, deportation, or removal] committed by an alien who was previously deported on the basis of a conviction described in another subparagraph of Section 101(a)(43) - Section 101(a)(43)(O).

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

w. 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 - Section 101(a)(43)(Q).

x. 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 - Section 101(a)(43)(R).

y. 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 - Section 101(a)(43)(S).

(1) A respondent's conviction pursuant to 18 U.S.C. § 3

(accessory after the fact) and sentence to at least one year establishes his deportability as an alien convicted of an aggravated felony because the offense of accessory after the fact falls within the definition of an obstruction of justice crime under Section 101(a)(43)(S) of the Act. Matter of Batista-Hernandez, 21 I&N Dec. 955 (BIA 1997).

(2) A conviction for misprision of a felony under 18 U.S.C. § 4 does not constitute a conviction for an aggravated felony under Section 101(a)(43)(S) of the Act as an offense relating to obstruction of justice because the crime does not require as an element either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice. Matter of Espinoza, 22 I&N Dec. 889 (BIA 1999).

(3) A conviction for perjury in violation of the California Penal Code constitutes a conviction for an aggravated felony under Section 101(a)(43)(S) of the Act. Matter of Martinez-Recinos, 23 I&N Dec. 175 (BIA 2001).

z. 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 - Section 101(a)(43)(T).

aa. An attempt or conspiracy to commit any such act described above - Section 101(a)(43)(U).

C. Limitations by date of conviction, etc.

1. In deportation proceedings.

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

Immigration Act of 1990 amended and redesignated the deportation grounds then found at Section 241 of the Act. Section 602(c) of the 1990 Act provided that its provisions "shall apply to all aliens described in subsection (a) thereof notwithstanding that (1) any such alien entered the United States before the date of enactment of this Act, or (2) the facts, by reason of which an alien is described in such subsection, occurred before the date of the enactment of this Act." The BIA held that this provision eliminated the temporal limitation of Section 7344(a) of the ADAA and an alien convicted of an aggravated felony is subject to deportation regardless of the date of conviction when the alien is placed in deportation proceedings on or after March 1, 1991, and the crime falls within the aggravated felony definition. Matter of Lettman, 22 I&N Dec. 365 (BIA 1998).

2. In removal proceedings.

a. Section 101(a)(43) of the Act provides as follows: "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." This was placed in the definition by Section 321(b) of IIRIRA which was entitled "Effective date of definition."

b. Section 321(c) of IIRIRA, entitled"effective date," provided as follows: "The amendments made by this Section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred." It also stated that the amendments shall apply under Section 276(b) of the Act only to violations of Section 276(a) occurring on or after such date.

c. In an unpublished, but indexed, decision, the BIA held that, pursuant to IIRIRA, the amendments to the aggravated felony definition in Section 101(a)(43) of the Act apply retroactively. Various Circuit Courts have agreed and held that the aggravated felony definition applies retroactively. E.g., Sousa v. INS, 226 F.3d 28 (1st Cir. 2000); Flores-Leon v. INS, 272 F.3d 433 (7th Cir. 2001); Aragon-Ayon v. INS, 206 F.3d 847 (9th Cir. 2000).

XII. Good moral character (GMC) - Section 101(f) of the Act.

A. A showing of good moral character is required for several forms of relief,

including voluntary departure, suspension of deportation, and registry.

B. A finding of GMC for a given period is not barred merely because of several arrests during that period which resulted in subsequent release without conviction. Matter of V-I-, 3 I&N Dec. 571 (BIA 1949).

C. A conviction which forms a basis for a finding that an alien lacks GMC need not be the basis upon which the alien is found deportable. Matter of Correa-Garces, 20 I&N Dec. 451 (BIA 1992).

D. Section 101(f) (as amended by Section 822 of the Violence Against Women and Department of Justice Reauthorization Act of 2005) provides that no person shall be found to be a person of good moral character who, during the period for which GMC is required, was:

1. A habitual drunkard [INA § 101(f)(1)];

2. Whether inadmissible or not, persons described in the following paragraphs of Section 212(a):

a. 212(a)(10)(A) - miscellaneous (including polygamists);

b. 212(a)(2)(D) - prostitutes and commercialized vice;

c. 212(a)(2)(A) - persons convicted of or admitting a crime involving moral turpitude and persons convicted of any law or regulation relating to a controlled substance.

(1) The phrase "whether inadmissible or not" which appears in the first part of Section 101(f)(3) does not prevent the application of the "petty offense" exception at current Section 212(a)(2)(A)(ii)(II) of the Act. Matter of M-, 7 I&N Dec. l47 (BIA l956).

(2) Persons convicted of a single offense of simple possession of 30 grams or less of marijuana are not precluded from establishing good moral character. INA § 101(f)(3).

d. 212(a)(2)(B) - persons convicted of two or more offenses;

(1) Other than purely political offenses;

(2) Regardless of whether the conviction was in a single trial

or whether the offenses arose from a single scheme of misconduct;

(3) Regardless of whether the offenses involved moral turpitude;

(4) BUT, the aggregate sentences to confinement actually imposed must have been 5 years or more.

e. 212(a)(2)(C) - an alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in controlled substances or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in controlled substances.

f. 212(6)(E) - alien smugglers.

3. A person whose income is derived principally from illegal gambling activities [INA § 101(f)(4)];

4. A person who has been convicted of 2 or more gambling offenses committed during the statutory period [INA § 101(f)(5)];

5. A person who has given false testimony for the purpose of obtaining any benefit under the Act [INA § 101(f)(6)];

a. In order to constitute false testimony under Section 101(f)(6) of the Act, the testimony must be under oath. Matter of G-, 6 I&N Dec. 208 (BIA l954).

b. False statements in a written application, whether or not under oath, do not constitute false "testimony." The word "testimony" refers solely to oral utterances of witnesses under oath. Matter of L-D-E, 8 I&N Dec. 399 (BIA l959).

c. False information given under oath in a question-and-answer statement before an INS officer made in connection with a written application is "testimony." Matter of Ngan, 10 I&N Dec. 725 (BIA l964); Matter of G-L-T-, 8 I&N Dec. 403 (BIA l959).

d. In order to come within the prohibition of Section 101(f)(6), it is not necessary that false testimony be given in order to obtain a benefit under the Act for oneself. False testimony given in

connection with a visa petition filed in another's behalf will preclude a showing of GMC. The benefit sought by the petitioner is to have the beneficiary join him in the U.S. Matter of Ngan, 10 I&N Dec. 725 (BIA l964); Matter of W-J-W-, 7 I&N Dec. 706 (BIA l958).

e. It is not a requirement of the statute that a benefit be obtained, only that the false testimony be given for the purpose of obtaining a benefit. Matter of L-D-E-, 8 I&N Dec. 399 (BIA l959).

f. If an alien in an immigration proceeding testifies falsely under oath as to a material fact but voluntarily and without prior exposure of his false testimony comes forward and corrects his testimony, he has not committed perjury and an exclusion charge based on the commission of perjury is not sustained. Matter of R-R-, 3 I&N Dec. 823 (BIA l949). Following the reasoning of this case, the BIA has held that an alien is not barred from establishing GMC if he has made a voluntary and timely retraction of attempted false testimony. Matter of M-, 9 I&N Dec. 118 (BIA l960). The recantation must be voluntary and made without delay in order for the false statement and its withdrawal to be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn. Matter of Namio, l4 I&N Dec. 4l2 (BIA l973).

g. The Ninth Circuit has held that such oral statements must be made "to a court or tribunal" in order to constitute false testimony. Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), rev'd on other grounds, 464 U.S. 183 (1984).

h. The 9th Circuit has not defined what constitutes "a court or tribunal." However, the Ninth Circuit has held that false statements made under oath during a naturalization examination constitute false testimony within the meaning of Section 101(f)(6) of the Act. Bernal v. INS, 154 F.3d 1020 (9th Cir. 1998).

i. False oral statements under oath to an asylum officer can constitute false testimony as defined by the Ninth Circuit in Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), rev'd on other grounds, 464 U.S. 183 (1984); Matter of R-S-J-, 22 I&N Dec. 863 (BIA 1999).

j. In a denaturalization case, the Supreme Court has held that there

is no requirement that false testimony under Section 101(f)(6) must have been material (as opposed to visa fraud or misrepresentations under former Section 212(a)(19) [now Section 212(a)(6)(C)(i)] which must be material). Kungys v. U.S., 485 U.S. 759 (1988).

6. A person who, during the period, was confined as a result of conviction to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense was committed during the period [INA § 101(f)(7)];

   a. Section 101(f)(7) of the Act is concerned with "persons" not "aliens." Therefore an individual who falls within the terms of Section 101(f)(7) of the Act is precluded from establishing GMC regardless of whether he was a citizen or an alien during the period of confinement to the penal institution. Matter of B-, 7 I&N Dec. 405 (BIA 1957).

   b. An alien whose conviction resulted only in a sentence to a period of probation with no incarceration is not, as a matter of law, precluded from a showing of GMC by Section 101(f)(7). Matter of Gantus-Bobadilla, 13 I&N Dec. 777 (BIA 1971), overruled on other grounds by Matter of Franklin, 20 I&N Dec. 867 (BIA 1994).

   c. Section 101(f)(7) of the Act makes no exception for a prison term resulting from violation of probation rather than from an original sentence to incarceration and an alien so confined for an aggregate period of 180 days or more within the statutory period is barred from establishing GMC. Matter of Piroglu, 17 I&N Dec. 578 (BIA 1980).

   d. Since pre-sentence confinement is credited in determining the date of release from custody (under Section 2900.5 of the California Penal Code), such pre-sentence confinement is counted in determining whether a respondent has been confined as a result of conviction for an aggregate period of 180 days. Matter of Valdovinos, 18 I&N Dec. 343 (BIA 1982).

7. A person who has been convicted of an aggravated felony at any time (even outside the statutory period) [INA § 101(f)(8)];

   a. Prior to an amendment to the Act, effective on November 29,

1990, Section 101(f)(8) made a showing of GMC unavailable to anyone convicted of the crime of murder, even if the conviction took place outside the statutory period.

b. The amendment to include aggravated felonies applies to convictions occurring on or after November 29, 1990.

c. Following the amendment, it was doubtful whether persons convicted of murder before November 29, 1990 were able to demonstrate GMC. As part of the Miscellaneous Technical Immigration and Naturalization Amendments in 1991, Congress again amended Section 101(f)(8) to provide that a person convicted of murder cannot demonstrate GMC regardless of the date of the conviction.

d. The BIA has acknowledged these amendments and holds that an alien convicted of murder, regardless of the date of the conviction, is forever precluded from establishing GMC under Section 101(f)(8) of the Act. Matter of Reyes, 20 I&N Dec. 789 (BIA 1994). An alien convicted of an aggravated felony other than murder is forever barred from establishing GMC under Section 101 (f)(8) of the Act if the aggravated felony conviction occurred on or after November 29, 1990. Id.

(1) The BIA previously held that a conviction for attempted murder was not a permanent bar to a showing of GMC and only barred a showing of GMC under Section 101(f)(3) if the offense was committed within the statutory period for relief. Matter of Awaijane, 14 I&N Dec. 117 (BIA 1972). The alien's sentence was commuted to less than 180 days, so Section 101(f)(7) was not an issue.

(2) Since the definition of "aggravated felony" includes the offense of murder and any attempt to commit an enumerated offense, an alien convicted of attempted murder after November 29, 1990 should be permanently barred from demonstrating GMC as an alien convicted of an aggravated felony.

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

"a false statement or claim of citizenship" if "the alien reasonably believed at the time of such statement . . . that he or she was a citizen."

1. The Board has ruled that a person "who has made a false claim of United States citizenship may be considered a person who is not of good moral character. [INA § 101(f)] does not, however, mandate such an outcome." The Board rejected the analysis that, because an unknowing false claim to U.S. citizenship cannot be grounds to find a lack of good moral character, a *knowing* false claim to U.S. citizenship mandates a finding of no good moral character. Matter of Guadarrama, 24 I&N Dec. 625 (BIA 2008).

XIII. Temporary protected status (TPS) - Section 244.

A. Designation by the Attorney General (AG). The AG may designate any foreign state or any part of such foreign state under Section 244(b) of the Act if:

1. The AG finds that there is an ongoing armed conflict within the state which would pose a threat to nationals of that state required to return there [INA § 244(b)(1)(A)];

2. The AG finds that there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected [INA § 244(b)(1)(B)(i)];

3. The AG finds that the foreign state is temporarily unable to adequately handle the return of its nationals [INA § 244(b)(1)(B)(ii)];

4. The AG finds that the foreign state has officially requested designation [INA § 244(b)(1)(B)(iii)];

5. The AG finds that there exist extraordinary temporary conditions in the foreign state that prevent nationals of that state from returning in safety, unless the AG finds that permitting such aliens to remain temporarily in the U.S. is contrary to the national interest of the U.S. [INA § 244(b)(1)(C)].

B. Effective period of designation

1. The designation of a foreign state shall take effect upon the date of publication of the designation by the AG in the Federal Register or such later date as the AG may specify. INA § 244(b)(2)(A).

2. The initial period of designation shall be not less than 6 months and not more than 18 months. INA § 244(b)(2)(B).

3. At least 60 days before the end of the initial period or any extended period of designation, the AG shall review the conditions in the foreign state. INA § 244(b)(3)(a).

4. If the AG determines that a foreign state no longer meets the conditions for designation, he shall terminate the designation by publishing notice in the Federal Register. The termination shall not be effective earlier than 60 days after the date the notice is published or the end of the last extension, whichever is longer. INA § 244(b)(3)(B).

5. If the AG determines that the foreign state continues to meet the conditions for designation, the period of designation is extended for an additional period of 6 months (or 18 months in the AG's discretion). INA § 244(b)(3)(C).

C. Jurisdiction to consider applications.

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

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

b. The BIA held in Matter of Barrientos, 24 I&N Dec. 100 (BIA 2007) that Section 244(b)(5)(B) permits an alien to seek de novo review of eligibility for TPS in removal proceedings, even if an appeal was previously filed and denied by the Administrative Appeals Unit.

2. Before an IJ.

a. 8 C.F.R. § 1244.7(d) provides that if the alien has a pending case before an IJ or the BIA at the time a state is designated, the alien shall be given written notice concerning TPS. The alien shall have an opportunity to submit an application to the DD during the registration period unless the basis of the charging document, if established, would render the alien ineligible for TPS. In that case, eligibility for TPS shall be decided by EOIR during the proceedings.

b. 8 C.F.R. § 1244.11 provides that if a charging document is served on an alien with a notice of denial or withdrawal of TPS, the alien may renew the application for TPS in deportation or exclusion proceedings. (The regulation does not mention removal proceedings, probably due to oversight.)

c. 8 C.F.R. § 1244.11 also states that its provisions do not extend the benefits of TPS beyond the termination of a foreign state's designation.

d. 8 C.F.R. § 1244.11 also provides that the decision of the IJ as to eligibility for TPS may be appealed to the BIA.

D. Aliens eligible for TPS

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

a. The alien has been continuously physically present in the U.S. since the effective date of the most recent designation of that state. INA § 244(c)(1)(A)(i).

(1) Absences are allowed if they are brief, casual, and innocent. INA § 244(c)(4)(A).

b. The alien has continuously resided in the U.S. since such date as the AG may designate. INA § 244(c)(1)(A)(ii).

(1) Absences are allowed if they are brief, casual, and innocent or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien. INA § 244(c)(4)(B).

c. The alien is admissible as an immigrant. INA § 244(c)(1)(A)(iii).

(1) Section 244(c)(2)(A)(i) provides that the following paragraphs of Section 212(a) shall not apply in determining an alien's admissibility:

(a) Section 212(a)(5) which makes inadmissible aliens with no labor certification;

(b) Section 212(a)(7)(A) which makes inadmissible immigrants not in possession of a valid, unexpired immigrant visa or other entry document.

(2) Section 244(c)(2)(A)(ii) authorizes the AG to waive any other provision of Section 212(a) [except those listed below] in individual cases for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

(3) Section 244(c)(2)(A)(iii) provides that the following paragraphs of Section 212(a) May NOT be waived:

(a) 212(a)(2)(A) and 212(a)(2)(B) relating to criminals;

(b) 212(a)(2)(C) relating to drug offenses, EXCEPT a single offense of simple possession of 30 grams or less of marijuana [Section 212(a)(2)(C) actually relates to illicit trafficking in controlled substances];

(c) 212(a)(3)(A) relating to national security and sabotage, etc.;

(d) 212(a)(3)(B) relating to aliens engaged in terrorist activities;

(e) 212(a)(3)(C) relating to aliens whose entry or proposed activity in the U.S. may have adverse foreign policy consequences;

(f) 212(a)(3)(E) relating to those aliens who participated in Nazi persecution or genocide.

(4) Under Section 244(c)(2)(B) of the Act, an alien is also not

eligible for TPS if:

(a) The alien has been convicted of any felony or 2 or more misdemeanors committed in the U.S., or

(b) The alien is described in Section 208(b)(2)(A) which lists the following:

i) 208(b)(2)(A)(i) - the alien participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

ii) 208(b)(2)(A)(ii) - the alien, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the U.S.;

iii) 208(b)(2)(A)(iii) - there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the U.S. prior to arrival in the U.S.;

iv) 208(b)(2)(A)(iv) - there are reasonable grounds for regarding the alien as a danger to the security of the U.S.;

v) 208(b)(2)(A)(v) - the alien is inadmissible under Section 212(a)(3)(B)(i)(I) [has engaged in a terrorist activity], Section 212(a)(3)(B)(i)(II) [AG knows or has reason to believe alien is engaged in or likely to engage in terrorist activity], Section 212(a)(3)(B)(i)(III) [has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity], or Section 212(a)(3)(B)(i)(IV) [is a representative of a foreign terrorist organization] unless, in the case only of a representative, the AG determines, as a matter of discretion, that there are not reasonable grounds for regarding the alien as a danger to the

security of the U.S.;

vi) 208(b)(2)(A)(vi) - the alien was firmly resettled in another country prior to arriving in the U.S.

d. To the extent and in a manner which the AG establishes, the alien registers for TPS during a registration period of not less than 180 days.

E. Withdrawal of TPS - Section 244(c)(3) of the Act.

1. The AG shall withdraw TPS granted to an alien if:

a. The AG finds that the alien was not in fact eligible for TPS; or

b. Except for brief, casual, and innocent absences or absences with the prior consent of the AG under Section 244(f)(3), the alien has not remained continuously physically present in the U.S. from the date he was first granted TPS; or

c. The alien fails, without good cause, to register with the AG annually at the end of each 12 month period after the granting of TPS.

2. 8 C.F.R. § 1244.18 provides that a charging document may be issued against an alien granted TPS on grounds of deportability or excludability which would have rendered the alien statutorily ineligible for TPS under 8 C.F.R. §§ 1244.3(c) and 1244.4, unless the Service had expressly granted a waiver of those grounds. The charging document shall constitute notice to the alien that his or her status in the U.S. is subject to withdrawal and a final order of deportation or exclusion shall constitute a withdrawal of TPS status.

F. Section 244(c)(5) of the Act provides that the existence of the statute authorizing TPS does not authorize an alien to apply for admission to, or to be admitted to, the U.S. in order to apply for TPS.

G. TPS as it relates to cancellation of removal under Section 240A(a) - Section 244(e) of the Act makes the following provisions:

1. The period of TPS shall not be counted as physical presence in the U.S. for purposes of cancellation of removal under Section 240A(a) of the Act

unless the AG determines that extreme hardship exists.

a. The reference to Section 240A(a) appears to be an error since that Section requires continuous residence and LPR status, not continuous physical presence. Congress must have meant to refer to cancellation of removal and adjustment of status under Section 240A(b).

2. The period of TPS shall not cause a break in the continuity of residence for purposes of suspension of deportation under Section 244(a) of the Act. The period of time before TPS may be added to the period of time after TPS to determine the period of physical presence.

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

1. During TPS, the alien shall not be considered to be permanently residing in the U.S. under color of law. INA § 244(f)(1).

2. During TPS, the alien may be deemed ineligible for public assistance by a State. INA § 244(f)(2).

3. During TPS, the alien may travel abroad with the prior consent of the AG. INA § 244(f)(3).

4. For purposes of adjustment of status under Section 245 of the Act or change of status under Section 248 of the Act, an alien in TPS shall be considered as being in, and maintaining, lawful status as a nonimmigrant. INA § 244(f)(4).

I. Countries that have been designated for TPS.

1. Currently Designated Countries.

a. **Burundi** was designated from November 4, 1997 to November 3, 1998. It was extended to November 3, 1999. It was again extended to November 2, 2000. The notice also redesignates Burundi under the TPS program, thereby expanding TPS eligibility to include nationals of Burundi (and aliens having no nationality who last habitually resided in Burundi) who have been "continuously present in the United States" and who have "continuously resided in the United States" since November 9, 1999. It has been extended additional times. On October 29, 2007, DHS determined that TPS status for Burundi would

terminate effective May 2, 2009.

b. **El Salvador** was designated from March 9, 2001 until September 9, 2002. On July 11, 2002, it was extended until September 9, 2003. It was extended again through September 9, 2006. Effective September 9, 2006, it was extended to September 9, 2007. Effective September 10, 2007, TPS status was again extended to March 9, 2009. El Salvador is currently designated through September 9, 2010.

c. On January 5, 1999, the AG designated **Honduras** for TPS for a period of 18 months. Under the terms of the designation, applicants could apply for TPS during the registration period lasting from January 5, 1999, through July 5, 1999. In AG order No. 2239-99 the registration period was extended until August 20, 1999. The AG's order specified that it did not extend the period of designation. On May 29, 2007 DHS announced that TPS status for Honduras would be further extended to January 5, 2009. The next extension was November 3, 2004 when it was extended to July 5, 2006. Honduras is currently designated through July 5, 2010.

d. On January 5, 1999, the AG designated **Nicaragua** for TPS for a period of 18 months. Under the terms of the designation, applicants could apply for TPS during the registration period lasting from January 5, 1999, through July 5, 1999. In AG order No. 2239-99 the registration period was extended until August 20, 1999. The AG's order specified that it did not extend the period of designation. On May 29, 2007, DHS announced that TPS status for Nicaragua would be further extended to January 5, 2009. Nicaragua is currently designated through July 5, 2010.

e. TPS was granted to nationals of **Somalia** on September 16, 1991. It was to expire on September 17, 1992 but was extended to September 17, 1993. On September 20, 1993, it was extended to September 17, 1994. Eligibility for an extension of TPS is limited to those Somalis who already obtained TPS. A new form I-821 was required to be filed before October 12, 1993. TPS was extended several times. On July 29, 2005, it was extended to September 17, 2006. Effective September 17, 2006, it was extended to March 17, 2008. Somalia is currently designated through September 17, 2009.

f. **Sudan** was designated from November 4, 1997 to November 3,

1998. It was extended to November 3, 1999. It was again extended and redesignated to November 2, 2000. The next extension was on March 8, 2007, when TPS status was extended to November 2, 2008. Sudan is currently designated through May 2, 2010.

2. Countries for which TPS designation has expired

a. Angola was designated from March 29, 2000, until March 29, 2001. It was extended again. The last was on February 1, 2002, which extended it to March 29, 2003. It expired on March 29, 2003.

b. TPS was granted to nationals of (and aliens having no nationality who last habitually resided in) Bosnia-Herzegovina who have been continuously physically present and have continuously resided in the U.S. since August 10, 1992. The registration period began on August 10, 1992, and ended on August 10, 1993. TPS was due to expire on August 10, 1993, but on July 29, 1993, it was extended to August 10, 1994. Those previously granted TPS were required to re-register by filing a new application between July 29, 1993, and August 30, 1993. It was extended several times, but terminated on February 10, 2001.

c. Guinea-Bissau was designated from March 11, 1999, until March 10, 2000. The Attorney General later determined that conditions in Guinea-Bissau no longer support a TPS designation. However, because this determination was not made 60 days before the termination date, TPS was automatically extended by statute to September 10, 2000. It expired on that date.

d. The province of Kosovo in the Republic of Serbia in the state of the Federal Republic of Yugoslavia (Serbia-Montenegro) was designated from June 9, 1998, until June 8, 1999. It was extended and also redesignated a few times, but expired on December 8, 2000.

e. TPS was granted to nationals of Kuwait on March 27, 1991. The period of TPS expired on March 27, 1992.

f. TPS was granted to nationals of Lebanon on March 27, 1991. It was to expire on March 27, 1992, but was extended to March 28, 1993. Non-national habitual residents were granted from March

28, 1992, to September 28, 1992, to apply for TPS. TPS for Lebanon was terminated on April 9, 1993.

g. Montserrat was designated in 1998. It was extended until August 27, 2000. Eligible nationals of Montserrat (or aliens having no nationality who last habitually resided in Montserrat) could re-register for TPS and an extension of employment authorization. Re-registration was limited to persons who registered for the initial period of TPS, which ended on August 27, 1998, or who registered after that date under the late initial registration provision. Persons who are eligible for late initial registration may register for TPS during this extension. It was extended several times, the last was on July 6, 2004, when it was extended to February 27, 2005. It expired on that date.

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

i. Sierra Leone was designated from November 4, 1997 to November 3, 1998. It was extended several times. It terminated on May 3, 2004.

3. Deferred Enforced Departure

a. TPS was granted to nationals of Liberia on March 27, 1991. It expired in 1999, but the President directed the Attorney General to defer enforced departure. The most recent such order is valid through March 31, 2009, for Liberians (and aliens without nationality who last habitually resided in Liberia) who had TPS as of September 30, 2007.

XIV. Motions to reopen, reconsider, and remand under the IIRIRA.

A. Definitions.

1. A motion to reopen (MTR) seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing. Matter of Cerna, 20 I&N Dec. 399 (BIA 1991). In an unpublished decision, the BIA stated "A motion to reopen seeks fresh consideration in light of new facts,

or a change in circumstances since the decision... ." Facts upon which a MTR is based will either have been undiscoverable at the time of the initial application or hearing, or have occurred since initial application or hearing.

a. In Matter of M-S-, 22 I&N Dec. 349 (BIA 1998), the BIA distinguished between motions to reopen in order to rescind an order of deportation following an in absentia hearing and motions to reopen in order to apply for a form of relief that was unavailable at the time of the hearing. In that decision, the Board stated:

(1) Rescission means to annul ab initio. Thus, by the plain meaning of the words in Section 242B(c)(3) of the Act [now Section 240(b)(5)(C)], to "rescind" an in absentia deportation order is to annul from the beginning all of the determinations reached in the in absentia hearing. The only reasons that will support such rescission are exceptional circumstances which prevented the alien from appearing, the alien's incarceration which prevented his or her appearance, or lack of notice of the hearing. Once an in absentia order is rescinded, the alien is then given a new opportunity to litigate the issues previously resolved against him or her at the in absentia hearing. In other words, the deportation proceedings go back to the start, the Service must proceed to prove deportability under the allegations in the original Order to Show Cause, and the alien must establish any eligibility for relief. Matter of Grijalva, 21 I&N Dec. 472 (BIA 1996). The alien is returned to the same status he or she had prior to the in absentia hearing, namely, an alien charged with deportability and subject to the already-initiated deportation proceedings.

(2) In contrast, proceedings may be "reopened" when a new question has arisen that requires a hearing. 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3); Matter of Ku, 15 I&N Dec. 712 (BIA 1976). An order reopening proceedings is an interlocutory order allowing for such a hearing and does not dispose of the merits of the application for relief from deportation. Matter of Pena-Diaz, 20 I&N Dec. 841 (BIA 1994); Matter of Ku, 15 I&N Dec. 712 (BIA 1976). If, after reopening, the requested relief is denied, the respondent remains subject to the original finding of deportability and the respondent is ordered deported from

the United States. When proceedings are reopened for a purpose other than rescission of an in absentia order, what transpired at previously conducted proceedings is not necessarily abrogated.

2. A motion to reconsider is a request that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. Matter of Cerna, 20 I&N Dec. 399 (BIA 1991).

3. A motion to remand is a request to the BIA to return an active Record of Proceeding (ROP) to the IJ for receipt of additional evidence. It is distinguished from a MTR because a motion to remand is made to the BIA while it is still considering an appeal from an IJ's decision rather than after the Board has made its decision. Since the BIA's function is to review a record rather than create a record, it cannot receive evidence and, if the motion is granted, it must return the ROP to the IJ for receipt of the evidence at a hearing.

   a. The term "motion to remand" is also used at the trial level to describe a request to an IJ to remand a case to the jurisdiction of the District Director (DD) so that the DD can consider a remedy over which he has exclusive jurisdiction, such as reinstatement of student status, or concurrent jurisdiction with the IJ, such as adjustment of status.

B. Motion to reconsider. The alien may file one motion to reconsider a decision that the alien is removable from the U.S. INA § 240(c)(5)(A). The motion must be filed within 30 days of the date of entry of a final administrative order of removal. INA § 240(c)(5)(B). The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(5)(C).

1. Under 8 C.F.R. § 1003.2(b), "[a] motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

2. A motion to reconsider which is based on a legal argument that could have been raised earlier in the proceedings will not be granted. Matter of

Medrano, 20 I&N Dec. 216 (BIA 1990). This case involved a motion to reconsider made by INS to the BIA. Before the initial decision, the BIA specifically solicited the views of the INS on a particular issue. The INS stated a position that the IJ's decision was correct. After the BIA rendered its decision, the INS sought reconsideration and argued that the IJ's decision was incorrect. The BIA denied the motion because the INS did not provide an adequate explanation for its failure to raise its arguments at the earlier stage of the proceedings.

C. Motions to reopen in general.

1. An alien may file one motion to reopen proceedings under Section 240. INA § 240(c)(6)(A). The motion to reopen shall state the new facts that will be proven if the motion is granted, and shall be supported by affidavits or other evidentiary material. INA § 240(c)(6)(B).

2. Under 8 C.F.R. § 1003.2(d), "[a] motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

   a. In William v. Gonzales, 499 F.3d 329 (4th Cir. 2007), the Fourth Circuit invalidated 8 C.F.R. § 1003.2(b) as it pertains to motions to reopen, ruling that motions to reopen may be filed from outside, as well as inside, the U.S. The court reasoned that 8 C.F.R. § 1003.2(b) conflicts with Section 240(c)(7)(A), which states that "[a]n alien may file one motion to reopen proceedings," as the statute does not specify any restriction on motions to reopen filed outside the U.S.

   b. In Matter of Armendarez-Mendez, 24 I&N Dec. 646 (BIA 2008), the Board ruled that, under 8 C.F.R. § 1003.2(d), the Board does not have the authority to reopen proceedings, either by motion or sua sponte, after the alien has left the U.S. The Board disagreed with *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), and *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007), in which the Ninth Circuit, citing the regulation's present-tense phrasing ("is the subject of . . . removal proceedings"), ruled that 8 C.F.R. § 1003.2(d) does not bar aliens from filing motions to reopen from

outside the U.S. after the proceedings are complete. The Board stated that, under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), it would not follow *Lin* or *Reynoso-Cisneros*, including within the Ninth Circuit. In addition, the Board disagreed with *Williams v. Gonzales*, 499 F.3d 329 (4th Cir. 2007), in which the Fourth Circuit invalidated 8 C.F.R. § 1003.2(d) due to what it viewed as an inconsistency between the regulation and the INA. The Board stated it would follow *Williams* in the Fourth Circuit, but not in the other circuits.

3. Time in which to file. Except for a MTR to rescind an order of removal rendered in absentia or to apply for asylum and withholding of deportation, the MTR shall be filed within 90 days of the date of entry of a final administrative order of removal. INA § 240(c)(6)(C)(i). The filing of a motion to reopen an in absentia order entered pursuant to Section 240(b)(5) is subject to the deadline specified in Section 240(b)(5)(C). INA § 240(c)(6)(C)(iii).

   a. A judicial ruling cannot be considered the final administrative decision, and the filing of a court action seeking judicial review does not extend the time for filing a motion to reopen administrative proceedings. Matter of Susma, 22 I&N Dec. 947 (BIA 1999). A motion to reopen a decision of the BIA following judicial review is untimely if it is filed more than 90 days after the date of the Board's decision, even if the motion is filed within 90 days of the order of the court. Id.

   b. Where an alien has filed an untimely motion to reopen alleging that the INS failed to prove the alien's removability, the burden of proof no longer lies with the Service to establish removability, but shifts to the alien to demonstrate that an exceptional situation exists that warrants reopening by the BIA on its own motion. Matter of Beckford, 22 I&N Dec. 1216 (BIA 2000). Where an alien seeking to reopen removal proceedings failed to demonstrate a substantial likelihood that the result in his case would be changed if the proceedings were reopened, by showing that he was not, in fact, removable, he failed to present an exceptional situation to warrant a grant of his untimely motion. Id.

D. MTR to apply for asylum or withholding of removal. There is no time limit on the filing of a MTR if the basis of the motion is to apply for relief under sections 208 or 241(b)(3) and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such

evidence is material and was not available and would not have been discovered or presented at the previous proceeding. INA § 240(c)(7)(C)(ii).

1. The BIA held that Section 240(c)(7)(C)(ii) (and 8 C.F.R. § 1003.2(c)(3)(ii)), bars an alien who is subject to a final order of removal from filing an untimely motion to reopen removal proceedings to apply for asylum under Section 208(a)(2)(D), if the motion is based on changed personal circumstances (as opposed to changed country conditions). Matter of C-W-L-, 24 I&N Dec. 346 (BIA 2007).

E. Motion to reopen to rescind a removal order rendered in absentia.

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

a. upon a MTR filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances [INA § 240(b)(5)(C)(i)];

(1) The term "exceptional circumstances" is defined at Section 240(e)(1) and refers to exceptional circumstances (such as serious illness or death of the spouse, child or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Cases discussing "exceptional circumstances"

(a) An alien (in deportation proceedings) failed to establish that a serious headache he suffered on the day of his hearing amounted to exceptional circumstances to excuse his failure to appear where he gave no explanation for neglecting to contact the Immigration Court on the day of the hearing and did not support his claim with medical records or other evidence, such as affidavits by persons with knowledge regarding the extent and seriousness of the alien's headache and the remedies he used to treat it. Matter of J-P-, 22 I&N Dec. 33 (BIA 1998).

(b) An alien (in deportation proceedings) who claimed that his failure to appear at his hearing resulted from an "illegible hearing date" on the OSC and notice of hearing failed to establish by sufficient evidence that he received inadequate notice under former

Section 242B(c)(3)(B) of the Act or that his absence was the result of exceptional circumstances under former Section 242B(c)(3)(A) of the Act. Matter of S-M-, 22 I&N Dec. 49 (BIA 1998).

(c) An alien (in deportation proceedings) failed to establish that a foot injury he suffered on the day before his hearing amounted to exceptional circumstances to excuse his failure to appear where he gave no explanation for neglecting to contact the Immigration Court on the day of the hearing and did not support his claim with medical records or other evidence, such as an affidavit from his employer. Matter of B-A-S-, 22 I&N Dec. 57 (BIA 1998).

i) An alien seeking to reopen in absentia proceedings based on her unsuccessful communications with her attorney did not establish exceptional circumstances under former Section 242B(c)(3)(A) of the Act where she failed to satisfy all the requirements for an ineffective assistance of counsel claim set out in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). A claim of ineffective assistance of counsel does not constitute an exception to the 180 day statutory limit for the filing of a MTR to rescind an in absentia order of deportation under former Section 242B(c)(3)(A) of the Act. Matter of A-A-, 22 I&N Dec. 140 (BIA 1998); Matter of Lei, 22 I&N Dec. 113 (BIA 1998).

b. or upon a MTR filed at any time if the alien demonstrates that the alien did not receive notice in accordance with Section 239(a)(1) or (2) or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien [INA § 240(b)(5)(C)(ii)].

2. The filing of the MTR to rescind an in absentia order of removal shall stay the removal of the alien pending disposition of the motion by the IJ. INA § 240(b)(5)(C). The BIA has held that the automatic stay of deportation associated with the filing of a MTR after an in absentia hearing under

former Section 242B(C)(3) continued during the pendency of an appeal from the denial of the MTR. Matter of Rivera, 21 I&N Dec. 232 (BIA 1996). Section 240(b)(5)(C) appears subject to the same interpretation.

F. Motions to reopen orders that were entered in absentia in exclusion proceedings. The regulation that provides exceptions to filing deadlines for motions seeking to reopen orders that were entered in absentia in deportation or exclusion proceedings is found at 8 C.F.R. § 1003.23(b)(4)(iii). Although the subheading at 8 C.F.R. § 1003.23(b)(4)(iii) signals that this regulation provides a time exception for motions to reopen both deportation and exclusion proceedings conducted in absentia, the regulation itself provides a time exception only for motions to reopen deportation proceedings conducted in absentia. The regulation is silent as to what specific time exception applies to motions to reopen exclusion proceedings conducted in absentia. The regulation provides only a standard for reopening, stating that "[a] motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear." 8 C.F.R. § 1003.23(b)(4)(iii)(B). Therefore, the BIA held that he regulatory language at 8 C.F.R. § 1003.23(b)(4)(iii)(B) contains no time or numerical limitations on aliens who wish to file a motion to reopen exclusion proceedings conducted in absentia. Matter of N-B-, 22 I&N Dec. 590 (BIA 1999). In that decision, the BIA pointed out in a footnote: "We emphasize that our decision in the instant case "fills in" the regulatory "gap" that exists in the current regulation. Nothing prevents the Department of Justice from revising the current regulation to fill the regulatory gap in a manner that would create specific restrictions on motions to reopen exclusion proceedings conducted in absentia."

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

1. A motion to reopen or reconsider based upon a claim of ineffective assistance of counsel should comply with the following criteria:

a. The motion should be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

b. Counsel whose integrity or competence is being impugned should be informed of the allegations leveled against him and be given an opportunity to respond;

c. The motion should reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. Matter of Lozada, 19 I&N Dec. 637 (BIA 1988).

(1) The Ninth Circuit has held that the Lozada requirements need not be rigidly enforced where their purpose is fully served by other means. Castillo-Perez v. INS, 212 F.3d 518 (9th Cir. 2000).

2. Equitable tolling for motions based on ineffective assistance of counsel.

a. Equitable tolling. Some of the circuits permit the filing deadlines or numerical limitations for motions to reopen to be tolled upon a showing of ineffective assistance of counsel. Often, a showing of "due diligence" by the alien is required.

(1) First Circuit: Whether time limits may be tolled remains an open question under Chen v. Gonzales, 415 F.3d 151 (1st Cir. 2005). *See also* Guerrero-Santana v. Gonzales, 499 F.3d 90 (1st Cir. 2007); Boakai v. Gonzales, 447 F.3d 1, 3 (1st Cir. 2006); Jobe v. INS, 238 F.3d 96, 100 (1st Cir. 2001) (en banc). However, the court has held that tolling is unavailable where a party fails to exercise due diligence. In Nascimento v. Mukasey, 549 F.3d 12 (1st Cir. 2008), the court found no due diligence where the alien was ordered deported on October 11, 2001, but waited until November 20, 2002, to file a motion to reopen with the Immigration Judge. The Immigration Judge denied the motion and, in February 2004, the Board of Immigration Appeals affirmed. The petitioner waited until March 2007 to file the subsequent motion to reopen that was the subject of the court's decision.

(2) Second Circuit: Time limits may be tolled. Iavorski v. INS, 232 F.3d 124, 129-133 (2d Cir. 2000). In Iavorski, the court cited lack of due diligence by the alien in affirming the denial of the motion to reopen. In Cekic v. INS, 435 F.3d 167 (2d Cir. 2006), the Second Circuit again affirmed the denial of the motion to reopen for lack of due diligence. In Ceckic, the alien petitioners should have become aware in 2000 that their counsel provided ineffective assistance. However, they waited until 2002 to file a motion to reopen.

In Wang v. BIA, 508 F.3d 710 (2d Cir. 2007), the Second Circuit articulated a two-step inquiry for equitably tolling deadlines for motions to reopen for ineffective assistance of counsel. First, the court evaluates when the ineffective assistance should have been discovered by a reasonable person. Second, the court asks whether the alien showed due diligence in the period between discovering the ineffective assistance and filing the motion to reopen. The court emphasized that there is no per se time period within which the motion must be filed. In Wang, the court found no due diligence where the alien discovered the ineffective assistance in October 2005 and complied with the Matter of Lozada requirements for reopening in January 2006, but waited until June 2006 to file the motion to reopen.

(3) Third Circuit: Time limits may be tolled where fraud is shown. Borges v. Gonzales, 402 F.3d 398, 406-407 (3d Cir. 2005). In Borges, the Court also found that the alien acted with requisite due diligence to resolve his immigration status over the course of five years. In contrast, the court found the alien in Mahmood v. Gonzales, 427 F.3d 248 (3rd Cir. 2005) did not demonstrate due diligence. He allowed his case to lapse twice over one year intervals, without taking steps to inquire about the status of his case.

(4) Fourth Circuit: No published cases.

(5) Fifth Circuit: No published cases.

(6) Sixth Circuit: Time limits may be tolled. Harchenko v. INS, 379 F.3d 405, 409-10 (6th Cir. 2004). The court found in Tapia-Martinez v. Gonzalez, 482 F.3d 417 (6th Cir. 2007), that waiting fifteen months after discovery of counsel's deficient performance to raise an ineffective assistance claim, does not satisfy the due diligence requirement. In a case not relating to ineffective assistance of counsel, the court ruled the petitioner did not establish due diligence where (1) on July 5, 2005, the Board dismissed the petitioner's appeal from the denial of her asylum application; and (2) on November 22, 2006, the petitioner filed a motion to reopen based on a marriage to a U.S. citizen, and argued that the deadline should be

equitably tolled. Barry v. Mukasey, 524 F.3d 721 (6th Cir. 2007).

(7) Seventh Circuit: Tolling of numerical limits permitted. Joshi v. Ashcroft, 389 F.3d 732, 735 (7th Cir. 2004). Tolling of time limits for motions to reopen in in absentia proceedings. Pervaiz v. Gonzales, 405 F.3d 488, 490 (7th Cir. 2005). Due diligence is required. Patel v. Gonzalez, 442 F.3d 1011 (7th Cir. 2006). In Patel, the court found that filing a motion to reopen, two years after actual knowledge of a deportation order did not constitute due diligence. In Gaberov v. Muksey, 516 F.3d 590 (7th Cir. 2008), the court found that due diligence existed in a case where, after trying for several years to ascertain the status of his case, the petitioner filed a motion to reopen several months after receiving a "bag and baggage" letter from the Department of Homeland Security. In Yuan Gao v. Mukasey, 519 F.3d 376 (7th Cir. 2008), the court ruled that equitable tolling does not restart the motion to reopen clock. Rather, a petitioner who learns the facts necessary to file a motion to reopen within the deadline must do so by the deadline.

(8) Eighth Circuit: Equitable tolling of time limits permitted sparingly, when extraordinary circumstances beyond the alien's control prevented timely filing. Hernandez-Moran v. Gonzales, 408 F.3d 496 (8th Cir. 2005). Due diligence is required. Habchy v. Gonzalez, 471 F.3d 858, (8th Cir. 2006). In Habchy, the court held that waiting four months to file a second motion to reopen absent any explanation for delay, does not constitute due diligence.

(9) Ninth Circuit: Time and numerical limits may be equitably tolled "during periods when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud or error." Iturribarria v. INS, 321 F.3d 889, 897 (9th Cir. 2003). In Singh v. Gonzales, 491 F.3d 1090 (2d Cir. 2007), the Ninth Circuit found that due diligence did not exist when the alien waited six months after becoming suspicious that his prior counsel acted ineffectively before consulting another attorney regarding reopening his case on ineffective assistance grounds. In Ghahremani v. Gonzales, 498 F.3d 993 (9th Cir. 2007),

however, the Ninth Circuit found that the alien acted with due diligence in filing a motion to reopen. The Ghahremani court cited the alien's "unbroken efforts to retain competent counsel" in the period before he learned that a previous attorney acted ineffectively. In addition, the Ninth Circuit has tolled numerical limits where a nonlawyer engages in ineffective assistance. Fajardo v. INS, 300 F.3d 1018 (9th Cir. 2002).

(10) Tenth Circuit: Equitable tolling is permitted, and due diligence required. Riley v. INS, 310 F.3d 1253, 1258 (10th Cir. 2002).

(11) Eleventh Circuit: Time limitations can be equitably tolled where the alien has filed a defective pleading during the statutory period or where the alien has been induced or tricked by misconduct into allowing the filing deadline to pass. Abdi v. U.S. Atty. Gen. 430 F.3d 1145 (11th Cir. 2005). Time limitations may not be tolled for motions to reopen in absentia deportation orders, on account of ineffective assistance of counsel. Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999).

3. A motion to reopen or reconsider based upon a claim of ineffective assistance of counsel was replaced by the Attorney General with a claim based on deficient performance of counsel. Matter of Compean, 24 I&N Dec. 710 (A.G. 2009).

a. To prevail on a deficient performance of counsel claim, the alien bears the burden of establishing three elements.

(1) The alien must show that his lawyer's errors were "egregious."

(2) In cases where the alien files an untimely motion to reopen, the alien must demonstrate that he exercised due diligence in discovering and seeking to cure counsel's alleged deficient performance. If the alien demonstrates due diligence, the judge may toll the filing period in the exercise of discretion.

(3) The alien must establish prejudice arising from the lawyer's errors by showing that, but for the deficient performance, it

is more likely than not that the alien would have been entitled to the ultimate relief sought.

b. The alien must also comply with certain documentary requirements. In addition to a detailed affidavit setting forth the facts that form the basis of the deficient performance of counsel claim, the alien must also submit:

(1) A copy of the agreement, if any, the alien had with the lawyer whose performance the alien alleges was deficient.

(2) A copy of a letter to the alien's former lawyer setting forth the lawyer's deficient performance *and* a copy of the lawyer's response, if any.

(3) A completed and signed complaint addressed to the appropriate State bar or other disciplinary authorities. There is no requirement that the complaint actually be filed.

(4) If the alien's claim is that his former lawyer failed to submit something to the immigration judge, the alien must attach the allegedly omitted item to the motion.

(5) If the alien is represented by counsel in seeking reopening, the motion shall contain the following signed statement of the new attorney: "Having reviewed the record, I express a belief, based on a reasoned and studied professional judgment, that the performance of my client's former counsel fell below minimal standards of professional competence."

H. MTR in order to apply for adjustment of status.

1. The BIA originally held that an IJ was not required to continue a deportation case pending the adjudication of a visa petition filed in the respondent's behalf. Matter of Kotte, 16 I&N Dec. 449 (BIA 1978).

2. Following a change in the regulations, the BIA held that a MTR in order to apply for adjustment of status should be granted by an IJ even if the visa petition which forms the basis for the adjustment is filed simultaneously with the application for adjustment of status provided a prima facie approvable visa petition and adjustment application have been submitted;

Matter of Garcia, 16 I&N Dec. 653 (BIA 1978). The BIA added, however, that an IJ may still deny a MTR if the visa petition is frivolous or if the adjustment application would be denied on statutory or discretionary grounds even if the visa petition were approved.

3. The BIA modified its decision in Matter of Garcia in cases involving applications for adjustment of status based on marriages entered into during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the U.S. After the Garcia decision, Congress amended sections 204(g) and 245(e) of the Act (in 1986 and again in 1990) to preclude an alien from adjusting status based on a marriage that was entered into after the commencement of deportation proceedings and to bar the approval of a visa petition to accord immediate relative or preference status based upon such a marriage until the beneficiary of the petition has resided outside the U.S. for a 2-year period following the marriage, unless the alien establishes "by clear and convincing evidence to the satisfaction of the Attorney General that the marriage was entered into in good faith and... was not entered into for the purpose of procuring the alien's entry as an immigrant." Matter of Garcia created a presumption that, for the purposes of a MTR, the relationship claimed in a visa petition supporting the application for adjustment of status was presumed to be bona fide unless clear ineligibility was apparent in the record. The BIA stated that the amendments to sections 204(g) and 245(e) created a rebuttable presumption that marriages contracted after the institution of deportation proceedings are fraudulent. The decision on whether that presumption is overcome is up to the DD with whom the visa petition is filed for DDs have exclusive jurisdiction over visa petitions. The BIA concluded that an IJ's inquiry to determine whether the presumption is overcome would be a substantial and unwarranted intrusion into the DD's authority over the adjudication of visa petitions and held that all MTRs for consideration of adjustment of status based on unadjudicated visa petitions within the ambit of sections 204(g) and 245(e) should be denied. Matter of Arthur, 20 I&N Dec. 475 (BIA 1992). In Matter of H-A-, 22 I&N Dec. 728 (BIA 1999), the BIA found that Matter of Arthur was not inconsistent with the motions to reopen regulations at 8 C.F.R. §§ 3.2(c)(2) and 3.23(b)(4)(i) (effective July 1, 1996) [now 8 C.F.R. §§ 1003.2(c) and 1003.23(b)(4)(i)] which allowed only one MTR which must be filed within 90 days of the decision.

4. Finding that its policy in Matter of Arthur coupled with the regulation limiting respondents to one MTR filed within 90 days of a final administrative decision and the Service's inability to adjudicate visa petitions within that time deprived a small class of respondents of the

opportunity to have applications for adjustment of status adjudicated by an IJ, the BIA withdrew from Matter of Arthur. Based on a revision of the Service's policy on joining untimely MTRs for adjustment of status and its no longer requiring "extraordinary and compelling circumstances" in order to join in such a motion, the BIA held in Matter of Velarde, 23 I&N Dec. 253 (BIA 2002), that a properly filed MTR may be granted, in the exercise of discretion, to provide an alien an opportunity to pursue an application for adjustment of status where the following factors are present:

a. The motion is timely filed;

b. The motion is not numerically barred by the regulations;

c. The motion is not barred by Matter of Shaar, 21 I&N Dec. 541 (BIA 1996) [where the respondent lost eligibility for relief by overstaying a period of voluntary departure] or on any other procedural grounds;

d. The motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide; and

e. The Service either does not oppose the motion or bases its opposition solely on Matter of Arthur, 20 I&N Dec. 475 (BIA 1992).

(1) The Second, Ninth, and Sixth Circuits have held that MTRs should not be denied solely because DHS opposed the motion. Ahmed v. Mukasey, 548 F.3d 768 (9th Cir. 2008); Melnitsenko v. Mukasey, 517 F.3d 42 (2d Cir. 2008); Sarr v. Gonzales, 485 F.3d 354 (6th Cir. 2007). However, the Third Circuit has found that, under Matter of Verlarde, DHS opposition is an appropriate reason for denying a MTR. Bhiski v. Ashcroft, 373 F.3d 363 (3d Cir. 2004).

I. MTR to apply for cancellation of removal under Section 240A of the Act. A motion to reopen for consideration or further consideration of an application for cancellation of removal under Section 240A(a) or Section 240A(b) of the Act may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief, under Section 240A(d)(1), prior to the service of the notice to appear, or prior to the commission of an offense referred to in Section 212(a)(2) of the Act that renders the alien inadmissible or removable under Section 237(a)(2) of the Act.

1. The provision in 8 C.F.R. § 1003.23(b)(3) (2005) that an applicant for cancellation of removal under section 240A(b) (2000), must demonstrate statutory eligibility for that relief prior to the service of a notice to appear applies only to the continuous physical presence requirement and has no bearing on the issues of qualifying relatives, hardship, or good moral character. Matter of Bautista-Gomez, 23 I&N Dec. 893 (BIA 2006).

J. Where to file the motion.

1. In general.

a. The general rule is that the MTR or reconsider is filed with the maker of the last decision in the case.

b. When the BIA dismisses an appeal solely for lack of jurisdiction, without adjudication on the merits, the appeal is deemed nugatory, and the IJ retains jurisdiction over any subsequent motion to reopen or reconsider. Matter of Mladineo, 14 I&N Dec. 591 (BIA 1974).

c. However, where the BIA dismisses an appeal as untimely, without adjudication on the merits, the Board retains jurisdiction over a motion to reconsider its dismissal of the untimely appeal to the extent that the motion challenges the finding of untimeliness or requests consideration of the reasons for untimeliness. Matter of Lopez, 22 I&N Dec. 16 (BIA 1998).

2. Motions to reopen or reconsider decisions of the BIA.

a. 8 C.F.R. § 1003.2(g)(2)(i) provides that a MTR or motion to reconsider a decision of the BIA pertaining to proceedings before an IJ shall be filed directly with the BIA.

b. 8 C.F.R. § 1003.2(g)(2)(ii) provides that a MTR or motion to reconsider a decision of the BIA pertaining to a matter initially adjudicated by an INS officer shall be filed with the officer of the INS having administrative control over the record of proceeding.

3. Motions to reopen or reconsider decisions of IJs.

a. 8 C.F.R. § 1003.23(b)(ii) provides that MTRs or reconsider a decision of an IJ must be filed with the Immigration Court having administrative control over the ROP.

K. Sua sponte reopening or reconsideration.

1. Although Sections 240(c)(5) and (6) of the Act place time limits on motions to reopen or reconsider, 8 C.F.R. § 1003.23(b) provides that an IJ may reopen or reconsider a decision on his or her own motion at any time..

2. The BIA has this same authority under 8 C.F.R. § 1003.2(a). However, in a decision rendered before IIRIRA when motions to reconsider were governed only by the regulations, the BIA held that its power to reopen or reconsider cases sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship. Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

3. Where an alien has filed an untimely motion to reopen alleging that the INS failed to prove the alien's removability, the burden of proof no longer lies with the Service to establish removability, but shifts to the alien to demonstrate that an exceptional situation exists that warrants reopening by the BIA on its own motion. Matter of Beckford, 22 I&N Dec. 1216 (BIA 2000). Where an alien seeking to reopen removal proceedings failed to demonstrate a substantial likelihood that the result in his case would be changed if the proceedings were reopened, by showing that he was not, in fact, removable, he failed to present an exceptional situation to warrant a grant of his untimely motion. Id.

4. In order for a change in the law to qualify as an exceptional situation that merits the exercise of discretion by the Board of Immigration Appeals to reopen or reconsider a case sua sponte, the change must be fundamental in nature and not merely an incremental development in the state of the law (such as a BIA or court decision). Matter of G-D-, 22 I&N Dec. 1132 (BIA 1999).

XV. Appeals to the BIA from decisions made by an IJ.

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

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

C. Time limits for appeal.

1. The Notice of Appeal must be filed directly with the BIA within 30 calendar days after the stating of an IJ's oral decision or the mailing of an IJ's written decision. 8 C.F.R. § 1003.38(b). If the final date for filing falls on a Saturday, Sunday or on a legal holiday, the appeal time is extended to the next business day. Id.

   a. The 30-day period set forth in 8 C.F.R. § 1003.38(b) for filing an appeal to the BIA is mandatory and jurisdictional, and it begins to run upon the issuance of a final disposition in a case. Matter of Jean, 23 I&N Dec. 373 (A.G. 2002).

   b. Neither the INA nor the regulations grant the BIA authority to extend the thirty-day time limit for filing an appeal to the BIA. Matter of Liadov, 23 I&N Dec. 990 (BIA 2006).

   c. The BIA's authority under 8 C.F.R. § 1003.1(c) to certify cases to itself in its discretion is limited to exceptional circumstances and is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing the regulations might result in hardship. Matter of Jean, 23 I&N Dec. 373 (A.G. 2002). A short delay by an overnight service is not a rare or extraordinary event that would warrant consideration of an untimely appeal on certification. Matter of Liadov, supra.

2. The date of filing of the Notice of Appeal is the date the Notice is received by the BIA. 8 C.F.R. § 1003.38(c).

3. There is no authority in the regulations to extend the time for filing an appeal. Matter of Correa-Garces, 20 I&N Dec. 451 (BIA 1992); Matter of G-Z-, 5 I&N Dec. 295 (BIA 1953). Nor is there authority for an Immigration Judge to reopen a case on his own motion for the sole purpose of permitting a late appeal to be taken. Matter of D-, 5 I&N Dec. 520 (BIA 1953).

D. The appealing parties are only those who are covered by the decision and are named in the Notice of Appeal. 8 C.F.R. § 1003.3(a)(1).

E. Fee for appeal.

1. The Notice of Appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of 8 C.F.R. § 1003.8. 8 C.F.R. § 1003.3(a)(1).

2. Waiver of fees.

a. The BIA may, in its discretion, authorize the prosecution of any appeal or motion over which it has jurisdiction without payment of the required fee. 8 C.F.R. § 1003.8(c).

b. In any case in which an alien or other party affected is unable to pay the fee fixed for an appeal or motion, he or she shall file with the Notice of Appeal or motion, an Appeal Fee Waiver Request (Form EOIR-26A). 8 C.F.R. § 1003.8(c).

c. If the request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed. 8 C.F.R. § 1003.8(c).

F. Representation by counsel.

1. If the respondent is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR-27) must be filed with the Notice of Appeal. 8 C.F.R. § 1003.3(a)(1).

G. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. 8 C.F.R. § 1003.3(a)(1).

H. An appeal and all attachments must be in English or accompanied by a certified translation. 8 C.F.R. § 1003.3(a)(1).

I. An appeal is not properly filed unless it is received at the BIA, along with all required documents, fees or fee waiver requests, and proof of service, within the time allowed for filing. 8 C.F.R. § 1003.3(a)(1).

J. A notice of appeal may not be filed by any party who has waived appeal pursuant to 8 C.F.R. § 1003.39. 8 C.F.R. § 1003.3(a)(1).

1. 8 C.F.R. § 1003.39 provides that, except when certified to the BIA, the decision of an IJ becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever comes first.

a. Prior to the amendment of an earlier version of this regulation, effective April 6, 1992, the BIA would usually accept a timely filed appeal even if the alien had waived appeal at hearing. Because of the addition to the regulation of the words "whichever occurs first",

the BIA held that the decision of an IJ becomes final immediately upon the waiver of an alien's right to appeal and that the BIA is without jurisdiction to adjudicate an appeal in such a case. Matter of Shih, 20 I&N Dec. 697 (BIA 1993).

b. Later, the BIA held that a party wishing to challenge the validity of an appeal waiver may file either a motion to reconsider with the IJ or an appeal directly with the BIA. Matter of Patino, 23 I&N Dec. 74 (BIA 2001).

c. However, the BIA has held that an unrepresented alien who accepts an IJ's decision as "final" does not effectively waive the right to appeal where the IJ failed to make clear that such acceptance constitutes an irrevocable waiver of appeal rights; therefore, the BIA has jurisdiction to consider the alien's appeal. Matter of Rodriguez-Diaz, 22 I&N Dec. 1320 (BIA 2000).

(1) In footnote #2 of the case, the BIA suggested the following colloquy: "You have the right to appeal my decision. You do not have to decide today if you want to appeal, but you should decide soon. You can also give up your right to appeal by waiving it. If you want to appeal my decision, or if you want to think about appeal and decide later, you must reserve appeal now. If you reserve appeal, you will have 30 days from today to file your appeal with the Board of Immigration Appeals. Your notice of appeal must actually arrive at and be received by the Board within 30 days. Your appeal right will be lost if the notice of appeal arrives late. If you do not want to appeal my decision, you may waive appeal. If you waive appeal, my decision becomes final, and your case is completely finished. You cannot change your mind later and try to file an appeal. Do you understand? Do you want to reserve appeal or waive appeal?"

d. The BIA also held that if an alien wishes to raise the issue regarding whether his waiver of appeal was knowingly and intelligently made, he should file a motion to reopen with the IJ. Matter of Shih, 20 I&N Dec. 697 (BIA 1993).

2. Departure from the U.S. of a person who is the subject of deportation (sic) proceedings, prior to the taking of an appeal from a decision in his or her case shall constitute a waiver of his or her right to appeal. 8 C.F.R. §

1003.3(e).

K. Standard of review on appeal.

1. The Board has held that, under 8 C.F.R. § 1003.1(d)(3), it should defer to the factual findings of an IJ, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. In determining whether established facts are sufficient to meet a legal standard, such as "well-founded fear," the Board has the authority to weigh the evidence in a manner different from that accorded by the IJ, or to conclude that the foundation for the IJ's legal conclusions was insufficient or otherwise not supported by the evidence of record. Matter of A-S-B-, 24 I&N Dec. 493 (BIA 2008).

2. The Board reviews de novo an IJ's prediction or finding regarding the likelihood that an alien will be tortured, because it relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met and is therefore a mixed question of law and fact, or a question of judgment. Matter of V-K-, 24 I&N Dec. 500 (BIA 2008).

L. Interlocutory appeals.

1. As a general rule, the BIA does not entertain appeals from interlocutory decisions of an Immigration Judge, such as decisions on change of venue, admissibility of evidence, etc. Matter of Victorino, 18 I&N Dec. 259 (BIA 1982); Matter of Ruiz-Campuzano, 17 I&N Dec. 108 (BIA 1979).

2. Only where a significant issue is raised which affects the administration of the immigration laws will the BIA accept an interlocutory appeal. Matter of Victorino, supra; Matter of Alphonse, 18 I&N Dec. 178 (BIA 1981); Matter of Wadas, 17 I&N Dec. 346 (BIA 1980).

M. Appeals from in absentia orders of removal.

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

N. Withdrawal of appeal.

1. In any case in which an appeal has been taken, the party taking the appeal may file a written withdrawal thereof with the office at which the Notice of Appeal was filed. 8 C.F.R. § 1003.4. (This may appear to be left over from the time that Notices of Appeal were filed with the Immigration Court rather than directly with the BIA. However, it still applies to appeals from decisions by the INS because those Notices of Appeal are filed with the INS and then forwarded with the record to the BIA.)

    a. If the record in the case has not been forwarded to the BIA on appeal (as is the case in appeals from INS decisions), the decision in the case shall be final as if no appeal had been taken. 8 C.F.R. § 1003.4.

    b. If the record has been forwarded to the BIA, the withdrawal shall also be forwarded there and, if no decision on the case has been made by the BIA, the decision in the case shall be final as if no appeal had been taken. 8 C.F.R. § 1003.4.

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

3. Departure from the U.S. by a person who is the subject of deportation or removal proceedings (other than an arriving alien defined in 8 C.F.R. § 1001.1(q)), subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal and the decision in the case shall be final as if no appeal had been taken. 8 C.F.R. § 1003.4.

    a. The exception of arriving aliens seems to be for the purpose of codifying the BIA decision that departure from the U.S. by an applicant for admission in exclusion proceedings after the taking of an appeal from an IJ's order denying admission does not constitute withdrawal of the appeal. Matter of Keyte, 20 I&N Dec. 158 (BIA 1990).

4. A respondent's departure from the United States is not a constructive withdrawal under 8 C.F.R. § 1003.4 of an appeal by the Department of Homeland Security. Matter of Luis, 22 I&N Dec. 747 (BIA 1999). It also does not render DHS's appeal moot. Id.

O. Certification.

1. 8 C.F.R. § 1003.1(c) provides that an IJ may also certify a case to the BIA.

2. 8 C.F.R. § 1003.7 provides that when a case is certified to the BIA, the alien or other party affected shall be given notice of certification.

3. It also provides that an IJ may certify a case only after an initial decision has been made and before an appeal has been taken.

4. It also provides that if it is known at the time the decision is rendered that the case will be certified, the notice of certification shall be included in the decision and no further notice of certification shall be required.

5. In an unpublished, but indexed, decision, the BIA held that when a decision denying asylum is appealed but remanded for the respondent to apply for relief under NACARA and the respondent fails to appear for the remanded hearing, the IJ should "return" the case to the Board, but not "certify" it to them.

P. Remand from BIA for background and security checks.

1. When the BIA has remanded the record for completion of background and security checks and new information that may affect the alien's eligibility for relief is revealed, the IJ has discretion to determine whether to conduct an additional hearing to consider the new evidence before entering an order granting or denying relief. Matter of Alcantara-Perez, 23 I&N Dec. 882 (BIA 2006). When a proceeding is remanded for background and security checks, but no new information is presented as a result of those checks, the IJ should enter an order granting relief. Id.

2. When the BIA remands a case to the IJ for the appropriate background checks, the IJ reacquires jurisdiction over the proceedings and may consider additional evidence regarding new or previously considered relief if the evidence meets the requirements for reopening the proceedings. Matter of M-D, 24 I&N Dec. 138 (BIA 2007). When a case is on remand for completion of background checks, the IJ is required to enter a final order granting or denying the requested relief. Id.