

REAL ID ACT
OUTLINE OF EOIR-RELATED PROVISIONS

Section 101(a)(3)(B) Preventing Terrorists From Obtaining Relief From Removal, Conditions for Granting Asylum, Burden of Proof

- **Adds new INA § 208(b)(1)(B)(i)** which provides that 1) the burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A); and 2) to meet that burden, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

Conference Report Explanation. In requiring an asylum applicant to establish that at least one central reason for persecution was or will be one of the five factors for asylum relief, this subsection calls for an evaluation of whether the protected characteristic is central to the persecutor's motivation to act. This language allows for the possibility that a persecutor may have mixed motives. It does not require that the persecutor be motivated solely by the victim's possession of a protected characteristic. It does, however, require that the victim's protected characteristic be central to the persecutor's decision to act against the victim.

Congress further explains that there is currently no uniform standard for assessing motivation. This new statutory standard is in keeping with decisions of reviewing courts, including the Third Circuit, the Fifth Circuit, and the Seventh Circuit. However, the new statutory standard overrides the Ninth Circuit decisions in *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (holding that the petitioner was not merely extorted, but was persecuted, at least in part, on account of her political opinion because she articulated her political opposition to the NPA) and *Briones v. INS*, 175 F.3d 727 (9th Cir. 1999) (holding that the NPA "surely attributed" an adverse political point of view to the petitioner because he was an informer working for the government) and other cases which "have substantially undermined a proper analysis of mixed motive cases." Further, adopting this standard will address another anomaly in the law that has been created by Ninth Circuit case law that improperly favors asylum applicants who claim that they have been accused of engaging in terrorist, militant, or guerrilla activity. In such cases, the Ninth Circuit has recognized a presumption of persecution on account of political opinion in the absence of evidence of a "legitimate government prosecution" of a suspected militant. See *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985). The "central reason" standard will eliminate this presumption, and require aliens who allege persecution because they have been erroneously identified as terrorists to bear the same burden as all other asylum applicants.

- **Adds new INA § 208(b)(1)(B)(ii)** which states that the testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the IJ is satisfied 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 burden, the IJ may weigh the credible testimony along with other evidence of record. Where the IJ 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.

Conference Report Explanation. Codifies Matter of S-M-J, 21 I&N Dec. 722, which held that the testimony of an asylum applicant can be sufficient to sustain the asylum applicant's burden of proof without corroboration, where the adjudicator determines that such testimony is credible, persuasive, and refers to specific facts demonstrating refugee status. Although this provision makes it possible for an alien to prove eligibility for asylum without corroborating evidence, the inability to obtain corroborating evidence does not relieve the applicant from sustaining the burden of proof, that is, the alien must satisfy his burden through other evidence.

- **Adds new INA § 208(b)(1)(B)(iii)** which provides that considering the totality of circumstances, and all relevant facts, the IJ 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's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not made 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.

Conference Report Explanation. This amendment codifies factors identified in case law on which an adjudicator may make a credibility determination. This section reiterates the rule that an asylum adjudicator is entitled to consider credible testimony along with other evidence. The creation of a uniform standard for credibility is needed to address a conflict on this issue between the Ninth Circuit on one hand and other circuits and the BIA.

Congress further stated that although section 208(b)(1)(B)(iii) would allow an adjudicator to base an adverse credibility determination on any of the factors set forth therein, such a determination must be reasonable and take into consideration the individual circumstances of the specific witness and/or applicant. Finally, Congress stated that “[w]hile the trier of fact is not required to state expressly that the trier has considered each factor in assessing credibility, Congress expects that the trier of fact will describe those factors that form the basis of the trier's opinion. This is true even where the trier of fact bases a credibility determination in part or in whole on the demeanor of the applicant.”

- Effective date: These amendments shall take effect on the date of enactment and shall apply to applications for asylum filed on or after such

date. The Conference Report explains that these amendments would not apply by statute to asylum applications filed before the date of enactment, although such standards in existing case law would apply. The amendments apply to affirmative asylum applications filed with DHS on or after the date of enactment and later referred to the Immigration Judge.

Section 101(b) Exceptions to Eligibility for Asylum

- **Amends INA § 208(b)(2)(A)(v)** by replacing “inadmissible under” with “described in” and deleting “removable under.” Thus, an alien is now ineligible for asylum if he is described in INA 212(a)(3)(B)(i)(I), (a)(3)(B)(i)(II), (a)(3)(B)(i)(III), (a)(3)(B)(i)(IV) or 237(a)(4)(B) (related to terrorist activity).
- *Effective date:* Same as above. This amendment shall take effect on the date of enactment and shall apply to applications for asylum filed on or after such date.

Section 101(c) Withholding of Removal

- **Adds new INA § 241(b)(3)(C)** which provides that in determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 208(b)(1)(B).

Conference Report Explanation. Codifies for withholding of removal applications the same standards for sustaining the applicable burden of proof and for assessing credibility that would be used for asylum adjudications under new INA §§ 208(b)(1)(B)(ii) and (iii).

- *Effective date:* Same as above. This amendment shall take effect on the date of enactment and shall apply to applications for withholding of removal filed on or after such date.

Section 101(d) Other Request for Relief from Removal

- **Adds new section INA § 240(c)(4)(A)** which states that an alien applying for relief or protection from removal has the burden of proof to establish that the alien-- (i) satisfies the applicable eligibility requirements; and (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.
- **Adds new section INA § 240(c)(4)(B)** which provides that 1) the applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form; 2) in evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's

burden of proof; 3) in determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record; and 4) where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

- **Adds new section INA § 240(c)(4)(C)** which provides that considering the totality of the circumstances, and all relevant factors, the immigration judge 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's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

Conference Report Explanation. These amendments apply the credibility and corroboration standards in section 101(a)(3) to other applications for relief and protection from removal. This provision also codifies the current requirement that an alien applying for relief or protection from removal bears the burden of satisfying the eligibility requirements for that relief or protection, and also that he or she merits that relief as a matter of discretion, if the relief is discretionary.

Additional Note. The language in new INA § 240(c)(4)(B) appears to require a specific credibility determination regarding the testimony of the applicant or other witness in support of any application for relief or protection from removal.

- **Effective date:** Same as above. This amendment shall take effect on the date of enactment and shall apply to applications for relief from removal filed on or after such date.

Section 101(e) Standard of Review for Orders of Removal

- **Adds new sentence at the end of INA § 242(b)(4)(D)** which states no court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

Conference Report Explanation. This amendment establishes a specific standard of review for reversal of determinations concerning the availability of corroborating evidence by an immigration judge considering an application for

asylum, withholding of removal, or other applications for relief or protection. This subsection would apply the prevailing deferential standard of review for factual determinations in subparagraph 242(b)(4)(B) of the INA to determinations about the availability of corroborating evidence, itself a factual determination.

- Effective date: This amendment shall take effect on the date of enactment and shall apply to all cases in which the final administrative removal order is or was issued before, on, or after such date.

Section 101(f) Clarification of Discretion

- **Amends INA § 242(a)(2)(B)** by inserting “and regardless of whether the judgment, decision, or action is made in removal proceedings,” after “other provision of law.”

Conference Report Explanation. This provision clarifies that the provision barring judicial review of denials of discretionary relief applies regardless of whether the discretionary judgment, decision, or action is made in removal proceedings.

- Effective date: This amendment shall take effect on the date of enactment and shall apply to all cases pending before any court on or after such date.

Section 101(g) Removal of Caps

- **Amends INA § 209(b)** by striking the provision that not more than 10,000 of the refugee admissions authorized under § 207(a) in any fiscal year may be made available to adjust to the status of an alien lawfully admitted for permanent residence.

- **Amends INA § 207(a)** by striking paragraph 5 which stated that for any fiscal year, not more than 1,000 refugees may be admitted under section 207 or granted asylum under section 208 pursuant to persecution for resistance to coercive population control methods.

Conference Report Explanation. The amendment to INA § 209 eliminates the cap for adjustment of status for asylees. The amendment to INA § 207 strikes the numerical limitation on asylum grants relating to persecution for resistance to coercive population control methods.

- Effective date: These amendments shall take effect on the date of enactment. Thus, any asylum application granted based on persecution for resistance to coercive population control methods on after the date of enactment (May 11, 2005) will be an outright grant, not a conditional grant. OPPM 99-1 is therefore superseded by statute and will be rescinded in a separate document. Instructions regarding individuals conditionally granted asylum based on coercive population control methods before the date of enactment will be provided at a later date.

Section 103 Inadmissibility Due to Terrorist and Terrorist Related Activities

• ***Amends so much of INA § 212(a)(3)(B)(i)*** as precedes the final sentence to read:

Note: This amendment did not change the entirety of § 212(a)(3)(B)(i). The substantive changes made by the amendment are noted in italicized language in brackets.

(i) IN GENERAL- Any alien who--(I) has engaged in a terrorist activity; (II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv)); (III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity; (IV) is a representative (as defined in clause (v)) of--
(aa) a terrorist organization (as defined in clause vi)) [the provision "foreign" has been deleted]; or (bb) a political, social, or other group that endorses or espouses terrorist activity [a "public endorsement" and Secretary of State determination are no longer needed];
(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi); (VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization [clarifies the alien's burden]; (VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization [deleted "the position of prominence" requirement and the requirement of a determination by the Secretary of State]; (VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)) [new provision]; or (IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

• ***Amends INA § 212(a)(3)(B)(iv)*** to read:

Note: This amendment did not change the entirety of § 212(a)(3)(B)(iv). The substantive changes made by the amendment are noted in italicized language in brackets.

(iv) ENGAGE IN TERRORIST ACTIVITY DEFINED- As used in this Act, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization-- (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (II) to prepare or plan a terrorist activity; (III) to gather information on potential targets for terrorist activity; (IV) to solicit funds or other things of value for--
(aa) a terrorist activity; (bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization

was a terrorist organization [clarifies the alien's burden of proof and deletes the provision that the solicitation would further the organization's terrorist activity];

(V) to solicit any individual--

(aa) to engage in conduct otherwise described in this subsection; (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or (cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization [clarifies the alien's burden of proof and deletes the provision that the solicitation would further the organization's terrorist activity]; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity; (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; (cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or (dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization [clarifies the alien's burden of proof and deletes the provision that the solicitation would further the organization's terrorist activity].

• **Amends INA § 212(a)(3)(B)(vi)** to read:

Note: This amendment did not change the entirety of § 212(a)(3)(B)(vi). The substantive changes made by the amendment are noted in italicized language in brackets.

(vi) **TERRORIST ORGANIZATION DEFINED**- As used in this section, the term "terrorist organization" means an organization-- (I) designated under section 219; (II) 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 that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv) [deletes "or that the organization provides material support to further terrorist activity"]; or (III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

• **Effective Date:** The amendments made by this section shall take effect on the date of the enactment of this division, and these amendments, and INA § 212(a)(3)(B), as amended by this section, shall apply to--(1) removal proceedings instituted before, on, or after the date of the enactment; and (2) acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after such date.

Section 105 Removal of Terrorists

- **Amends INA § 237(a)(4)(B)** to read:

(B) **TERRORIST ACTIVITIES**- Any alien who is described in subparagraph (B) or (F) of section 212(a)(3) is deportable.

- **Effective date:** This amendment shall take effect on the date of the enactment, and INA § 237(a)(4)(B), as amended by such paragraph, shall apply to--(A) removal proceedings instituted before, on, or after the date of the enactment of this division; and (B) acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after such date.

Section 106 Judicial Review of Orders of Removal

- Because the judicial review provisions do not directly affect proceedings before immigration judges, the text of the statutory amendments is not copied here. Rather, a summary of these amendments, as explained in the Conference Report, is provided below.

Conference Report Explanation. Section 106 addresses a number of judicial review anomalies improperly favoring criminal aliens that were created by court decisions interpreting changes to the INA in 1996. In IIRIRA, Congress reestablished that only courts of appeals--and not district courts--could review a final removal order. These provisions were intended to preclude all district court review of any issue raised in a removal proceeding. Further, Congress established that criminal aliens could not obtain any judicial review. Despite Congress's efforts to limit judicial review in 1996, the Supreme Court expanded it just five years later. In *INS v. St. Cyr*, the Supreme Court held that criminal aliens are actually entitled to more review than they had before the 1996 amendments, and more review than non-criminal aliens. *INS v. St. Cyr*, 533 U.S. 289 (2001). Specifically, the Court held that criminal aliens could seek habeas review of their removal orders under 28 U.S.C. Sec. 2241.

Section 106 amends INA § 242 to address the anomalies created by *St. Cyr* and its progeny by establishing that judicial review over removal orders takes place only in the courts of appeal. Under the amendments in section 106, all aliens will get review in the same forum--the courts of appeals. In addition, by channeling review to the courts of appeals, section 106 will eliminate the problems of bifurcated and piecemeal litigation. Finally, section 106 would not preclude habeas review over challenges to detention that are independent of challenges to removal orders. Instead, the bill would eliminate habeas review only over challenges to removal orders.

- **Effective date:** The amendments made to INA § 242 shall take effect upon the date of enactment and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of enactment.