RELIEF FROM REMOVAL

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RELIEF FROM REMOVAL

ASYLUM, WITHHOLDING and the CONVENTION AGAINST TORTURE

I. THE CONTEXT

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

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

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987) (quoting 8 U.S.C. § 1101(a)(42)(A)); *see also* 8 C.F.R. § 1208.13; *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312-13 (9th Cir. 2012); *Zetino v. Holder*, 622 F.3d 1007, 1015 (9th Cir. 2010) (post-REAL ID Act); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010) (quoting 8 U.S.C. § 1101(a)(42)(A)). An applicant may apply for asylum if she is "physically present in the United States" or at the border. 8 U.S.C. § 1158(a)(1). Individuals seeking protection from outside the United States may apply for refugee status under 8 U.S.C. § 1157.

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

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

Deloso v. Ashcroft, 393 F.3d 858, 863-64 (9th Cir. 2005) (internal citations and quotation marks omitted); *see also Mendoza-Pablo*, 667 F.3d at 1313; *Hanna v. Keisler*, 506 F.3d 933, 937 (9th Cir. 2007).

In enacting the Refugee Act of 1980, "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *Cardoza-Fonseca*, 480 U.S. at 436-37. When interpreting the definition of "refugee," the courts are guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/IP/4/Eng./REV.2 (ed. 1992) (1979) ("UNHCR Handbook"). *Id.* at 438-39; *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (recognizing the UNHCR Handbook as "a useful interpretative aid" that is "not binding on the Attorney General, the BIA, or United States courts"); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) ("We view the UNHCR Handbook as persuasive authority in interpreting the scope of refugee status under domestic asylum law." (internal quotation marks and citation omitted)).

II. ASYLUM

A. Burden of Proof

An applicant bears the burden of establishing that he or she is eligible for asylum. 8 C.F.R. § 208.13(a); *see also Ali v. Holder*, 637 F.3d 1025, 1029 (9th Cir. 2011) (petitioner bears the burden of establishing his eligibility for asylum); *Halim v. Holder*, 590 F.3d 971, 975 (9th Cir. 2009); *Zhu v. Mukasey*, 537 F.3d 1034, 1038 (9th Cir. 2008) (alien bears burden of establishing eligibility for asylum); *Rendon v. Mukasey*, 520 F.3d 967, 973 (9th Cir. 2008) ("As an applicant for … asylum, [petitioner] bears the burden of proving that he is eligible for the

discretionary relief he is seeking."). Section 101(a)(3) of the REAL ID Act, Pub. L. 109-13, 119 Stat. 231, codified this standard. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (as amended and applicable to all applications filed on or after May 11, 2005).

"An applicant alleging past persecution has the burden of establishing that (1) his treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control." *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010); *see also Afriyie v. Holder*, 613 F.3d 924, 934 (9th Cir. 2010) (concluding record compelled conclusion that Ghanaian police were unable or unwilling to protect petitioner).

Although proof of the applicant's identity is an element of an asylum claim, *see Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003) (citing identity as a "key" element of asylum application), the applicant is not required to "to provide information so that the Attorney General and Secretary of State [can] carry out their statutory responsibilities" under 8 U.S.C. § 1158(d)(5)(A), *see Kalouma v. Gonzales*, 512 F.3d 1073, 1078-79 (9th Cir. 2008) (holding that § 1158(d)(5)(A), which mandates that the applicant's identity be checked against "all appropriate records or databases maintained by the Attorney General and by the Secretary of State" before asylum can be granted, "imposes duties on the Attorney General and the Secretary of State[] [but] [n]o new burden for the asylum seeker"). *See also Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1015 n.5 (9th Cir. 2008) (noting that in removal proceedings it is the burden of the government to show identity and alienage).

B. Defining Persecution

The term "persecution" is not defined by the Immigration and Nationality Act. "Our caselaw characterizes persecution as an extreme concept, marked by the infliction of suffering or harm … in a way regarded as offensive." *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (internal quotation marks omitted); *see also Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1313 (9th Cir. 2012); *Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009). Persecution covers a range of acts and harms, and "[t]he determination that actions rise to the level of persecution is very fact-dependent." *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000). Minor disadvantages or trivial inconveniences do not rise to the level of persecution. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

Cross-reference: Forms of Persecution.

1. Cumulative Effect of Harms

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

See also Ahmed v. Keisler, 504 F.3d 1183, 1194 (9th Cir. 2007) ("Where an asylum applicant suffers [physical harm] on more than one occasion, and … victimized at different times over a period of years, the cumulative effect of the harms is severe enough that no reasonable fact-finder could conclude that it did not rise to the level of persecution."); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005) ("The combination of sustained economic pressure, physical violence and threats against Petitioner and her close associates, and the restrictions on Petitioner's ability to practice her religion cumulatively amount to persecution."); *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1192-95 (9th Cir. 2005) (disposal of disabled newborn child in waste pile of human remains, confinement in a filthy state-run institution with little human contact, violence, and discrimination, including the denial of medical care and public education amounted cumulatively to persecution), *rev'd on other grounds*, 549 U.S. 57 (2006) (mem.); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120-21 (9th Cir. 2004) (death threats, violence against family, vandalism of residence, threat of mob violence, economic harm and emotional trauma suffered by ethnic-Afghan family in Germany); *Narayan v. Ashcroft*, 384 F.3d 1065, 1066-67 (9th Cir. 2004) (Indo-Fijian attacked and stabbed, denied medical treatment and police assistance, and home burglarized); *Faruk v. Ashcroft*, 378 F.3d 940, 942 (9th Cir. 2004) (mixed-race, mixed-religion Fijian couple beaten, attacked, verbally assaulted, assailed with rocks, repeatedly threatened, and denied marriage certificate); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, economic hardship, violence and discrimination against Israeli Arab and his family); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (harassment, wiretapping, staged car crashes, detention, and interrogation of anti-communist Romanian constituted persecution); *Popova v. INS*, 273 F.3d 1251, 1258-58 (9th Cir. 2001) (anti-communist Bulgarian was harassed, fired, interrogated, threatened, assaulted and arrested); *Surita v. INS*, 95 F.3d 814, 819-21 (9th Cir. 1996) (Indo-Fijian robbed multiple times, compelled to

quit job, and family home looted); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (Indo-Fijian family harassed, assaulted and threatened).

2. No Subjective Intent to Harm Required

A subjective intent to harm or punish an applicant is not required for a finding of persecution. *See Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997) (Russian government's attempt to "cure" lesbian applicant established persecution); *see also Mohammed v. Gonzales*, 400 F.3d 785, 796 n.15 (9th Cir. 2005). Moreover, harm can constitute persecution even if the persecutor had an "entirely rational and strategic purpose behind it." *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

3. Forms of Persecution

a. Physical Violence

Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution. *See Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) ("Physical harm has consistently been treated as persecution."); *see also Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009) (same); *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (same). The cultural practice of female genital mutilation also constitutes persecution. *See Abebe v. Gonzales*, 432 F.3d 1037, 1042 (9th Cir. 2005) (en banc); *Benyamin v. Holder*, 579 F.3d 970, 976 (9th Cir. 2009) ("It is well-settled in this circuit that female genital mutilation constitutes persecution sufficient to warrant asylum relief.").

An applicant's failure to "seek medical treatment for the [injury] suffered is hardly the touchstone of whether [the harm] amounted to persecution." *Lopez v. Ashcroft*, 366 F.3d 799, 803 (9th Cir. 2004) (applicant tied up by guerillas and left to die in burning building, coupled with subsequent death threats, amounted to past persecution despite failure to seek medical treatment). Moreover, the absence of serious bodily injury is not necessarily dispositive. *See, e.g.*, *Quan v. Gonzales*, 428 F.3d 883, 888-89 (9th Cir. 2005) ("Using an electrically-charged baton on a prisoner … may constitute persecution, even when there are no long-term effects and the prisoner does not seek medical attention."); *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004) (10-day detention, accompanied by daily beatings and hard labor constituted persecution).

(i) Physical Violence Sufficient to Constitute Persecution

See Benyamin v. Holder, 579 F.3d 970, 977 (9th Cir. 2009) (the female genital mutilation that petitioner's daughter suffered undoubtedly constituted past persecution); *Li v. Holder*, 559 F.3d 1096, 1107-08 (9th Cir. 2009) (petitioner was repeatedly hit by police officers in the face, kicked in the head and stomach, left bloodied and handcuffed exposed to freezing temperatures, and endured police-sanctioned beatings during fifteen days of confinement); *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (native of Bangladesh suffered beatings by police or army on three occasions, combined with detentions and threats); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007) (Ukrainian national experienced beatings and death threats rising to the level of persecution); *Guo v. Ashcroft*, 361 F.3d 1194, 1197, 1203 (9th Cir. 2004) (two arrests and repeated beatings constituted persecution); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1134 (9th Cir. 2004) (repeated physical abuse combined with detentions and threats); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1072 (9th Cir. 2004) (gang raped by Guatemalan soldiers); *Hoque v. Ashcroft*, 367 F.3d 1190, 1197-98 (9th Cir. 2004) (Bangladeshi kidnaped, beaten and stabbed); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (Ethiopian raped by soldiers); *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (Chinese applicant subjected to physically invasive and emotionally traumatic forced pregnancy examination); *Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (Guatemalan kidnaped and wounded by guerillas and husband and brother killed); *Agbuya v. INS*, 241 F.3d 1224, 1227-28 (9th Cir. 2001) (Filipino kidnaped by New People's Army, falsely imprisoned, hit, threatened with a gun); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (Indian Sikh arrested and tortured, including electric shocks), *superseded by statute on other grounds as stated by Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009); *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000) (Indo-Fijian assaulted in front of family, held captive for a week and beaten unconscious), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (per curiam) (politically active Nigerian arrested, tortured and scarred); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (ethnic Amhara Ethiopian beaten and raped at gunpoint); *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (Iranian beaten repeatedly and falsely accused of rape); *Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) (Indo-Fijian attacked repeatedly, robbed, and forced to leave home); *Maini v. INS*, 212 F.3d 1167, 1174 (9th Cir. 2000) (inter-faith Indian family subjected to physical attacks, death threats, and harassment at home, school

and work); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1161-62 (9th Cir. 1999) (repeated beatings and severe verbal harassment in the Guatemalan military); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (Indo-Fijian jailed, beaten, and subjected to sadistic and degrading treatment); *Lopez-Galarza v. INS*, 99 F.3d 954, 960 (9th Cir. 1996) (Nicaraguan raped by Sandinista soldiers, abused, deprived of food and subjected to forced labor).

(ii) Physical Violence Insufficient to Constitute Persecution

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

b. Torture

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

c. Threats

Threats of serious harm, particularly when combined with confrontation or other mistreatment, may constitute persecution. *See, e.g.*, *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120-21 (9th Cir. 2004) (death threats, violence against family, vandalism of residence, threat of mob violence, economic harm and emotional trauma suffered by ethnic Afghan family in Germany). "Threats on one's life, within a context of political and social turmoil or violence, have long been held sufficient to satisfy a petitioner's burden of showing an objective basis for fear of persecution." *Kaiser v. Ashcroft*, 390 F.3d 653, 658 (9th Cir. 2004). "What matters is whether the group making the threat has the will or the ability to carry it

out." *Id*. The fact that threats are unfulfilled is not necessarily dispositive. *See id*. at 658-59. *See also Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314 (9th Cir. 2012) (recognizing that being forced to flee home in face of immediate threat of violence or death may constitute persecution, as long as persecutor's actions are motivated by a protected ground). *But see Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats received by ethnic Albanian "constitute harassment rather than persecution").

(i) Cases Holding Threats Establish Persecution

Ahmed v. Keisler, 504 F.3d 1183, 1194 (9th Cir. 2007) (native of Bangladesh suffered beatings by police or army on three occasions, combined with detentions and threats); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007) (Ukrainian national experienced beatings and death threats rising to the level of persecution); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 745 (9th Cir. 2006) (Peruvian national who received anonymous death threats fifteen years ago demonstrated an at least one-in-ten chance of future persecution sufficient to establish a well-founded fear); *Ndom v. Ashcroft*, 384 F.3d 743, 751-52 (9th Cir. 2004) (Senegalese native subjected to severe death threats coupled with two lengthy detentions without formal charges), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Deloso v. Ashcroft*, 393 F.3d 858, 860-61 (9th Cir. 2005) (Filipino applicant attacked, threatened with death, followed, and store ransacked); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (threats, combined with anguish suffered as a result of torture and killing of fellow Burmese Christian preacher); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, violence and discrimination against Israeli Arab and family amounted to persecution); *Ruano v. Ashcroft*, 301 F.3d 1155, 1160-61 (9th Cir. 2002) (Guatemalan who faced multiple death threats at home and business, "closely confronted" and actively chased); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074-75, *as amended by* 290 F.3d 964 (9th Cir. 2002) (multiple death threats, harm to family, and murders of counterparts by Shining Path guerillas); *Chouchkov v. INS*, 220 F.3d 1077, 1083-84 (9th Cir. 2000) (Russian who suffered harassment, including threats, attacks on family, intimidation, and thefts); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (Indian applicant's politically active husband killed, and she and family threatened repeatedly); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) ("we have consistently held that death threats alone can constitute persecution;" Salvadoran threatened, shot at, family members killed, mother beaten); *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) ("[T]he determination that actions rise to the

level of persecution is very fact-dependent, … though threats of violence and death are enough."); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (multiple death threats faced by Colombian prosecutor); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (two death threats from Salvadoran guerillas, and cousins and their families killed); *Garrovillas v. INS*, 156 F.3d 1010, 1016-17 (9th Cir. 1998) (if credible, three death threat letters received by former Filipino military agent would appear to constitute past persecution); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1295-96 (9th Cir. 1997) (suggesting that threats to life and business based on opposition to Shining Path constituted past persecution), *as amended by* 133 F.3d 726 (9th Cir. 1998) (order); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (Indian Sikh threatened, home burglarized, and father beaten); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (Nicaraguan threatened with death by Sandinistas, house marked, ration card appropriated, and family harassed); *see also Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314-15 (9th Cir. 2012) (holding that infant was victim of persecution, as a result of the persecution of petitioner's mother who was forced to flee home in face of immediate threat of violence or death).

(ii) Cases Holding Threats Not Persecution

Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1171-72 (9th Cir. 2006) (vague and conclusory allegations regarding threats insufficient to establish a well-founded fear of persecution); *Ramadan v. Gonzales*, 479 F.3d 646, 658 (9th Cir. 2007) (per curiam) (threats of harm too speculative to meet much higher threshold for withholding of removal); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1153-54 (9th Cir. 2005) (two "serious" but anonymous threats coupled with harassment and de minimis property damage); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 n.6 (9th Cir. 2003) ("unspecified threats" received by Mexican national not "sufficiently menacing to constitute past persecution"); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats received by ethnic Albanian "constitute harassment rather than persecution"); *Lim v. INS*, 224 F.3d 929, 936-37 (9th Cir. 2000) (mail and telephone threats received by former Filipino intelligence officer); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (anonymous threat received by Salvadoran military musician).

d. Detention

Detention and confinement may constitute persecution. *See Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (native of Bangladesh suffered

"detentions, beatings, and threats" that were disproportionate to his political activities, and rose to the level of persecution); *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (Senegalese applicant threatened and detained twice under harsh conditions for a total of 25 days established persecution), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004) (imprisonment in over-crowded Congolese jail cell with harsh, unsanitary and life-threatening conditions established past persecution); *see also Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (suggesting that forced institutionalization of Russian lesbian could amount to persecution).

Cf. Khup v. Ashcroft, 376 F.3d 898, 903-04 (9th Cir. 2004) (evidence did not compel finding that one day of forced porterage suffered by Burmese Christian preacher amounted to persecution); *Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (Iraqi's five to six day detention not persecution), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order); *Khourassany v. INS*, 208 F.3d 1096, 1100-01 (9th Cir. 2000) (Palestinian Israeli's short detentions not persecution); *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (Iranian's brief detention not persecution); *Mendez-Efrain v. INS*, 813 F.2d 279, 283 (9th Cir. 1987) (Salvadoran's four-day detention not persecution); *see also Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007) (suggesting that potential detention for 72 hours upon removal to El Salvador under that country's "Mano Duro" laws on account of suspected gang affiliation would not amount to persecution); *Hanna v. Keisler*, 506 F.3d 933, 939 (9th Cir. 2007) (severity of past persecution in Iraq, where petitioner stated that he was detained for over one month and tortured, was not sufficient to qualify for humanitarian asylum based on past persecution).

e. Mental, Emotional, and Psychological Harm

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

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

f. Substantial Economic Deprivation

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

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

However, "mere economic disadvantage alone does not rise to the level of persecution." *Gormley v. Ashcroft*, 364 F.3d 1172, 1178 (9th Cir. 2004) (loss of employment pursuant to South Africa's affirmative action plan did not amount to persecution); *see also Castro-Martinez v. Holder*, 674 F.3d 1073, 1082 (9th Cir. 2011) ("Generalized economic disadvantage" does not rise to the level of persecution." (internal quotation marks and citation omitted)); *Zehatye v. Gonzales*, 453 F.3d 1182, 1186 (9th Cir. 2006) (Eritrean government's seizure of father's business, along with some degree of social ostracism, did not rise to the level of persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003) (employment discrimination faced by Ukrainian Christian did not rise to level of persecution); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (forced

closing of Palestinian Israeli's restaurant, when he continued to operate other businesses, did not constitute persecution); *Ubau-Marenco v. INS*, 67 F.3d 750, 755 (9th Cir. 1995) (confiscation of Nicaraguan family business by Sandinistas may not be enough to support finding of economic persecution), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1985) (denial of food discounts and special work permit by Sandinistas did not amount to persecution); *Raass v. INS*, 692 F.2d 596 (9th Cir. 1982) (asylum claim filed by Tonga Islanders required more than "generalized economic disadvantage").

g. Discrimination and Harassment

Persecution generally "does not include mere discrimination, as offensive as it may be." *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (brief detention and searches of Iranian women accused of violating dress and conduct rules did not constitute persecution); *see also Truong v. Holder*, 613 F.3d 938, 941 (9th Cir. 2010) (per curiam) (although IJ stated that petitioners suffered harassment rising to the level required for persecution, substantial evidence supported agency's determination that petitioners failed to show harassment suffered as Vietnamese citizens in Italy was at the hands of the government or another group that the government was unable to control); *Halim v. Holder*, 590 F.3d 971, 976 (9th Cir. 2009) (reported incidents of harassment did not constitute persecution, and were further undermined where record supported IJ's determination that petitioner exaggerated their impact); *Wakkary v. Holder*, 558 F.3d 1049, 1059-60 (9th Cir. 2009) (reviewing withholding of removal claim and concluding that petitioner's experiences where he was beaten by Indonesian youth, robbed of his sandals and pocket money, and accosted by a threatening mob were instances of discriminatory mistreatment); *Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005) (harassment on the way to weekly Catholic services in Bangladesh did not rise to the level of persecution); *Mansour v. Ashcroft*, 390 F.3d 667, 673 (9th Cir. 2004) (discrimination against Coptic Christians in Egypt did not constitute persecution); *Padash v. INS*, 358 F.3d 1161, 1166 (9th Cir. 2004) (discrimination by isolated individuals against Indian Muslims did not amount to past persecution); *Halaim v. INS*, 358 F.3d 1128, 1132 (9th Cir. 2004) (discrimination against Ukranian sisters on account of Pentecostal Christian religion did not compel a finding that they suffered past persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016-17 (9th Cir. 2003) (record did not compel finding that Ukrainian Pentecostal Christian who was "teased, bothered, discriminated against and harassed" suffered from past persecution); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1201-02 (9th Cir. 2000)

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

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

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

4. Age of the Victim

"Age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution." *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) (internal quotation marks and citation omitted). "[A] child's reaction to injuries to his family is different from an adult's.

The child is part of the family, the wound to the family is personal, the trauma apt to be lasting." *Id.* (joining the Second, Sixth, and Seventh Circuits in affirming legal rule that injuries to a family must be considered in an asylum case where events that form the basis of the past persecution claim were perceived when petitioner was a child). *See also Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312-15 (9th Cir. 2012) (recognizing that even an infant can be the victim of persecution even if he has no present recollection of the events).

C. Source or Agent of Persecution

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

Affirmative state action is not necessary to establish a well-founded fear of persecution if the government is unable or unwilling to control the agents of persecution. *Siong v. INS*, 376 F.3d 1030, 1039 (9th Cir. 2004). In cases of non-governmental persecution, "we consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors." *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004); *see also Truong v. Holder*, 613 F.3d 938, 941 (9th Cir. 2010) (per curiam) (substantial evidence supported agency's determination that petitioners failed to show harassment suffered as Vietnamese citizens in Italy was at the hands of the government or another group that the government was unable to control); *Afriyie v. Holder*, 613 F.3d 924, 934 (9th Cir. 2010) (9th Cir. 2010) (concluding that record compelled conclusion that Ghanaian police were unable or unwilling to protect petitioner); *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (failure to report non-governmental persecution due to belief that police would do nothing did not establish that government was unwilling or unable to control agent of persecution). Note that "reporting persecution to government authorities is not essential to demonstrating that the government is unable or unwilling to protect [the alien] from private actors." *Afriyie*, 613 F.3d at 931; *see also Castro-Martinez v. Holder*, 674 F.3d 1073, 1080-81 (9th Cir. 2011)

(explaining that reporting private persecution is not essential, but determining petitioner failed to adequately explain why reporting sexual abuse to authorities would have been futile).

"A government's inability or unwillingness to control violence by private parties can be established in other ways – for example, by demonstrating that a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection." *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010).

1. Harm Inflicted by Relatives

"There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it." *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) (mixed-race, mixed-religion couple in Fiji suffered persecution at the hand of family members and others); *see also Mohammed v. Gonzales*, 400 F.3d 785, 796 n.15 (9th Cir. 2005).

2. Reporting of Persecution Not Always Required

When the government is responsible for the persecution, there is no need to inquire whether applicant sought help from the police. *See Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (Israeli Arab persecuted by Israeli Marines); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) (Mexican homosexual man persecuted by police). Moreover, "an applicant who seeks to establish eligibility for [withholding] of removal under § 1231(b)(3) on the basis of past persecution at the hands of private parties the government is unwilling or unable to control need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006) (government officials and employees tacitly accepted abuse applicant suffered); *see also Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010) (explaining that where persecutor is not a state actor, the court will consider whether the incidents were reported to police, but also recognizing that the reporting of private persecution is not an essential element to establish that government is unwilling or unable to control attackers); *cf. Castro-Martinez v. Holder*, 674 F.3d 1073, 1080-81 (9th Cir. 2011) (explaining reporting private persecution is not essential, but determining petitioner failed to adequately explain why reporting sexual abuse to authorities would have been futile); *Castro-Perez v.*

Gonzales, 409 F.3d 1069, 1072 (9th Cir. 2005) (applicant failed to provide evidence sufficient to justify the failure to report alleged abuse).

3. Cases Discussing Source or Agent of Persecution

Rahimzadeh v. Holder, 613 F.3d 916, 923 (9th Cir. 2010) (substantial evidence supported determination that Dutch authorities were willing and able to control extremists that attacked the alien); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1056-58 (9th Cir. 2006) (applicant arrested by Mexican police, raped by family members and family friends, and abused by co-workers on account of his female sexual identity); *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (applicant raped by boyfriend in Honduras failed to show that the Honduran government was unwilling or unable to control rape); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120-21 (9th Cir. 2004) (ethnic Afghan family in Germany attacked by anti-foreigner mobs); *Deloso v. Ashcroft*, 393 F.3d 858, 861 (9th Cir. 2005) (attacks by a Filipino Communist party henchman); *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) ("Random, isolated criminal acts perpetrated by anonymous thieves do not establish persecution."); *Jahed v. INS*, 356 F.3d 991, 998-99 (9th Cir. 2004) (extortion by member of the Iranian Revolutionary Guard); *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1239-40 (9th Cir. 2001) (fear of violence from cousin in El Salvador not sufficient); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (rape by Ethiopian government official where government never prosecuted the perpetrator); *Mgoian v. INS*, 184 F.3d 1029, 1036-37 (9th Cir. 1999) (state action not required to establish persecution of Kurdish-Moslem family in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1042-43 (9th Cir. 1999) (Azerbaijani government did not protect ethnic Armenian); *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc) (non-state actors in the Philippines), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998) (ultra-nationalist anti-Semitic Ukranian group); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (Fijian government encouraged discrimination, harassment and violence against Indo-Fijians); *Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (persecution of Nicaraguan by a government-sponsored group); *Gomez-Saballos v. INS*, 79 F.3d 912, 916-17 (9th Cir. 1996) (fear of former Nicaraguan National Guard members); *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (denying petition because Egyptian Coptic Christian feared harms not "condoned by the state nor the prevailing social norm"); *Desir v. Ilchert*, 840 F.2d 723, 727–28 (9th Cir. 1988) (persecution by quasi-official Haitian security force); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434-35 (9th Cir. 1987) (persecution by Salvadoran army

sergeant), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc).

D. Past Persecution

An applicant may qualify as a refugee in two ways:

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

Deloso v. Ashcroft, 393 F.3d 858, 863-64 (9th Cir. 2005) (internal citations and quotation marks omitted); *see also Ratnam v. INS*, 154 F.3d 990, 994 (9th Cir. 1998) ("Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum."); 8 C.F.R. § 1208.13(b). "The regulations implementing the INA provide that past persecution must have occurred 'in the proposed country of removal.'" *Gonzalez-Medina v. Holder*, 641 F.3d 333, 337 (9th Cir. 2011) (quoting 8 C.F.R. § 1208.16(b)(1)(i)) (holding that BIA's construction of regulation mandating that past persecution occur in proposed country of removal was permissible and thus, that abuse petitioner suffered in the United States did not establish past persecution).

Once an applicant establishes past persecution, he is a refugee eligible for a grant of asylum, and the likelihood of future persecution is a relevant factor to consider in the exercise of discretion. *See Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996); *Kazlauskas v. INS*, 46 F.3d 902, 905 (9th Cir. 1995); *see also* 8 C.F.R. § 1208.13(b)(1)(i)(A). In assessing the likelihood of future persecution, the IJ shall consider whether the applicant could avoid persecution by relocating to another part of his or her country. 8 C.F.R. § 1208.13(b)(1)(i)(B); *see also Afriyie v. Holder*, 613 F.3d 924, 934 (9th Cir. 2010) (concluding that record compelled conclusion that Ghanaian police were unable or unwilling to protect petitioner and remanding for the BIA to consider whether petitioner could reasonably relocate).

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

"[P]roof of particularized persecution is not required to establish past persecution." *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004) (Serb petitioners suffered past persecution because their town was specifically targeted for bombing, invasion, occupation and ethnic cleansing by Croat military). In other words, "even in situations of widespread civil strife, it is irrelevant whether one person, twenty persons, or a thousand persons were targeted or placed at risk so long as there is a nexus to a protected ground." *Ndom v. Ashcroft*, 384 F.3d 743, 754 (9th Cir. 2004) (internal quotation marks and citation omitted), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *see also Ahmed v. Keisler*, 504 F.3d 1183, 1194-95 n.19 (9th Cir. 2007) (noting that even where there is generalized violence as a result of civil strife the relevant analysis is still whether the "persecutor was motivated by one of five statutory grounds").

1. Presumption of a Well-Founded Fear

"If past persecution is established, a rebuttable presumption of a well-founded fear arises, 8 C.F.R. § 208.13(b)(1), and the burden shifts to the government to demonstrate that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (internal quotation marks omitted); *see also Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312-13 (9th Cir. 2012); *Ali v. Holder*, 637 F.3d 1025, 1029 (9th Cir. 2011) (government failed to rebut presumption of well-founded fear of future persecution); *Kamalyan v. Holder*, 620 F.3d 1054, 1057 (9th Cir. 2010); *Ahmed v. Keisler*, 504 F.3d 1183, 1197 (9th Cir. 2007) ("[P]roof of past persecution gives rise to a presumption of a well-founded fear of future persecution and shifts the evidentiary burden to the government to rebut that presumption."); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 743 (9th Cir. 2006) (same); *Singh v. Ilchert*, 63 F.3d 1501, 1510 (9th Cir. 1995) ("[O]nce an applicant has demonstrated that he suffered past persecution, there is a presumption that he faces a similar threat on return."), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-

40 (9th Cir. 2009). The presumption "only applies to fear based on the original claim and not to fear of persecution from a new source." *Ali*, 637 F.3d at 1029-30.

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

2. Rebutting the Presumption of a Well-Founded Fear

a. Fundamental Change in Circumstances

Pursuant to 8 C.F.R. § 1208.13(b)(1)(i) & (ii), the government may rebut the presumption of a well-founded fear by showing "by a preponderance of the evidence" that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear." *See also Kamalyan v. Holder*, 620 F.3d 1054, 1057 (9th Cir. 2010) (to rebut presumption of a well-founded fear, government must show by a preponderance of the evidence that a fundamental change in country conditions has dispelled any well-founded fear); *Hanna v. Keisler*, 506 F.3d 933, 938 (9th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) ("[O]ur precedent compels the conclusion that genital mutilation, like forced sterilization, is a 'permanent and continuing' act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear."); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (government failed to meet burden); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161 (9th Cir. 2002) (1996 State Department report insufficient to established changed country conditions in Guatemala); *Gui v. INS*, 280 F.3d 1217, 1228 (9th Cir. 2002) (State Department report insufficient to establish changed country conditions in Romania). If the government does not rebut the presumption, the applicant is statutorily eligible for asylum. *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004).

b. Government's Burden

"When the petitioner establishes past persecution, the government bears the burden of establishing that changed country conditions have removed the

petitioner's presumptive well-founded fear of future persecution." *Mousa v. Mukasey*, 530 F.3d 1025, 1029 (9th Cir. 2008) (concluding government failed to meet burden where it submitted a single newspaper article that in no way suggested Chaldean Christians would be safe in Iraq); *see also Ali v. Holder*, 637 F.3d 1025, 1029 (9th Cir. 2011). In order to meet its burden under 8 C.F.R. § 208.13(b)(1), the government is "obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds for his well-founded fear of future persecution." *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001) (internal quotation marks omitted) (Bulgaria). "If past persecution is shown, the BIA cannot discount it merely on a say-so. Rather, our precedent establishes that in such a case the BIA must provide an individualized analysis of how changed conditions will affect the specific petitioner's situation." *Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004) (citation and internal quotation marks omitted) (Guatemala); *see also Kamalyan v. Holder*, 620 F.3d 1054, 1057-58 (9th Cir. 2010) (government failed to establish a fundamental change in country conditions by a preponderance of the evidence); *Mutuku v. Holder*, 600 F.3d 1210, 1213-14 (9th Cir. 2010) (reviewing denial of withholding of removal and concluding that factual findings regarding changed county conditions in Kenya were not supported by substantial evidence). "Information about general changes in the country is not sufficient." *Garrovillas v. INS*, 156 F.3d 1010, 1017 (9th Cir. 1998) (Philippines); *see also Smolniakova v. Gonzales*, 422 F.3d 1037, 1052 (9th Cir. 2005) (Russia).

If an applicant is entitled to a presumption of a well-founded fear of future persecution and the government made no arguments concerning changed country conditions before the IJ or BIA, the court will not remand to provide the government another opportunity to do so. *Ndom v. Ashcroft*, 384 F.3d 743, 756 (9th Cir. 2004), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *see also Quan v. Gonzales*, 428 F.3d 883, 889 (9th Cir. 2005).

(i) State Department Report

Where past persecution has been established, generalized information from a State Department report on country conditions is not sufficient to rebut the presumption of future persecution. *See Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002) (Guatemala). State department reports are generally "not amenable to an individualized analysis tailored to an asylum applicant's particular situation." *Kamalyan v. Holder*, 620 F.3d 1054, 1057 (9th Cir. 2010) (internal quotation marks omitted) (reiterating that a "State Department report on country

conditions, standing alone, is not sufficient to rebut the presumption of future persecution"; and remanding where country reports were expressly inconclusive regarding the significance or permanence of the improvements identified). "Instead, we have required an individualized analysis of how changed conditions will affect the specific petitioner's situation." *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1074 (9th Cir. 2004) (internal quotation marks omitted); *see also Ali v. Holder*, 637 F.3d 1025, 1030 (9th Cir. 2011); *Lopez v. Ashcroft*, 366 F.3d 799, 805-06 (9th Cir. 2004) (remanding for individualized analysis of changed country conditions); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 998-1000 (9th Cir. 2003) (individualized analysis of changed conditions in Guatemala rebutted presumption of well-founded fear based on political opinion); *Marcu v. INS*, 147 F.3d 1078, 1081-82 (9th Cir. 1998) (presumption of well-founded fear rebutted by individualized analysis of State Department letter and report regarding sweeping changes in Romania); *cf. Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008) (rejecting petitioner's contention that "generalized materials" found in State Department country report did not support conclusion that fear of persecution in Sierra Leone had been rebutted, and explaining that State country reports are appropriate and "perhaps the best resource on political situations").

(ii) Administrative Notice of Changed Country Conditions

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

If an IJ takes administrative notice of changed country conditions during the hearing, there is no violation of due process because the applicant has an opportunity to respond with rebuttal evidence. *See Kazlauskas v. INS*, 46 F.3d 902, 906 n.4 (9th Cir. 1995) (Lithuania); *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993) (Polish Solidarity supporters "had ample opportunity to argue before the

immigration judges and before the [BIA] that their fear of persecution remained well-founded"); *Kotasz v. INS*, 31 F.3d 847, 855 n.13 (9th Cir. 1994) (applicants given ample opportunity to discuss changes in Hungary).

This court has taken judicial notice of recent events occurring after the BIA's decision. *See Gafoor v. INS*, 231 F.3d 645, 655-56 (9th Cir. 2000) (taking judicial notice of recent events in Fiji and noting that the government would have an opportunity to challenge the significance of the evidence on remand), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009). However, this court may not determine the issue of changed country conditions in the first instance. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 999-1000 (9th Cir. 2003) (Guatemala).

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

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

See Kamalyan v. Holder, 620 F.3d 1054, 1057-58 (9th Cir. 2010) (court determined that government failed to establish a fundamental change in country conditions in Armenia by a preponderance of the evidence, and remanded for further proceedings); *Mousa v. Mukasey*, 530 F.3d 1025, 1029-30 (9th Cir. 2008) (Iraq); *Hanna v. Keisler*, 506 F.3d 933, 938 (9th Cir. 2007) (Iraq); *Ahmed v. Keisler*, 504 F.3d 1183, 1197-98 (9th Cir. 2007) (Bangladesh); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078-79 (9th Cir. 2004) (Israel); *Ruano v. Ashcroft*, 301 F.3d 1155, 1161-62 (9th Cir. 2002) (Guatemala); *Rios v. Ashcroft*, 287 F.3d 895, 901-02 (9th Cir. 2002) (Guatemala); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1076-77, *as amended by* 290 F.3d 964 (9th Cir. 2002) (Peru); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002) (Romania); *Popova v. INS*, 273 F.3d 1251, 1259-60 (9th Cir. 2001) (Bulgaria); *Lal v. INS*, 255 F.3d 998, 1010-11 (9th Cir. 2001) (Fiji), *as amended by* 268 F.3d 1148 (9th Cir. 2001); *Agbuya v. INS*, 241 F.3d 1224, 1230-31 (9th Cir. 2001) (past persecution by New People's Army in the Philippines); *Kataria v. INS*, 232 F.3d 1107, 1115-16 (9th Cir. 2000) (State Department report stating that arrests and killings had declined significantly in India not sufficient),

superseded by statute on other grounds as stated by Aden v. Holder, 589 F.3d 1040, 1044 (9th Cir. 2009); *Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000) (past persecution of religious minority in Iran); *Chand v. INS*, 222 F.3d 1066, 1078-79 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (Colombia); *Tarubac v. INS*, 182 F.3d 1114, 1119-20 (9th Cir. 1999) (State Department's mixed assessment of human rights conditions in the Philippines insufficient; *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (El Salvador); *Meza-Manay v. INS*, 139 F.3d 759, 765-66 (9th Cir. 1998) (Peru); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1239-40 (9th Cir. 1996) (Nicaragua); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (Fiji).

d. Internal Relocation

"[B]ecause a presumption of well-founded fear arises upon a showing of past persecution, the burden is on the INS to demonstrate by a preponderance of the evidence, once such a showing is made, that the applicant can reasonably relocate internally to an area of safety." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003); *see also Silaya v. Mukasey*, 524 F.3d 1066, 1073 (9th Cir. 2008); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1122-23 (9th Cir. 2004) (IJ erred by placing the burden of proof on ethnic Afghan to show "that the German government was unable or unwilling to control anti-foreigner violence 'on a countrywide basis'"); 8 C.F.R. § 1208.13(b)(1)(i)(B), (b)(1)(ii).

"The reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and family ties." *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214-15 (9th Cir. 2004) (citing 8 C.F.R. § 1208.13(b)(3); remanding for determination of whether internal relocation would be reasonable for elderly Serbian couple from Bosnia); *see also Afriyie v. Holder*, 613 F.3d 924, 935-36 (9th Cir. 2010) (remanding to the BIA to ensure that the proper burden of proof was applied and requisite regulatory factors considered in evaluating the relocation issue). This non-exhaustive list of factors "may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3). *See also Gonzalez-Medina v. Holder*, 641 F.3d 333, 338 (9th Cir. 2011) (statements that petitioner would never be able to escape husband in Mexico and that he would force her to be with him again were insufficient on

their own to meet her burden of proof); *Ahmed v. Keisler*, 504 F.3d 1183, 1197 (9th Cir. 2007) (concluding that government failed to meet burden where alien could not reasonably relocate to another part of Bangladesh, particularly because he was not required to suppress his political interests and activities); *Mashiri*, 383 F.3d at 1123 (relocation was not reasonable given evidence of anti-foreigner violence throughout Germany, financial and logistical barriers, and family ties in the U.S.); *Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002) (discussing reasonableness in light of threats in Peru); *Hasan v. Ashcroft*, 380 F.3d 1114, 1121-22 (9th Cir. 2004) (noting the different legal standards for evaluation of internal relocation in the context of asylum and Convention Against Torture relief).

Where the persecutor is the government, "[i]t has never been thought that there are safe places within a nation" for the applicant to return. *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995). "In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3)(ii).

Whether internal relocation is a factual or legal issue is unclear. *Brezilien v. Holder*, 569 F.3d 403, 414 (9th Cir. 2009) (remanding to the BIA for clarification as to whether internal relocation is a factual question subject to clear error review or a legal question subject to de novo review).

3. Humanitarian Asylum

The IJ or BIA may grant asylum to a victim of past persecution, even where the government has rebutted the applicant's fear of future persecution, "if the asylum seeker establishes (1) 'compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,' 8 C.F.R. § 1208.13(b)(1)(iii)(A), or (2) 'a reasonable possibility that he or she may suffer other serious harm upon removal to that country,' 8 C.F.R. § 1208.13(b)(1)(iii)(B)." *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004) (order); *see also Benyamin v. Holder*, 579 F.3d 970, 977 (9th Cir. 2009) (remanding to the BIA to consider in first instance whether humanitarian asylum should be granted where alien suffered female genital mutilation, which the court has recognized as a "particularly severe form of past persecution"); *Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (remanding for BIA to consider

whether alien was eligible for asylum pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(A)); *Silaya v. Mukasey*, 524 F.3d 1066, 1072 (9th Cir. 2008) (remanding for BIA to consider whether to grant humanitarian asylum); *Hanna v. Keisler*, 506 F.3d 933, 939 (9th Cir. 2007) (remanding for BIA to consider whether there existed a reasonable possibility that the petitioner may suffer other serious harm upon removal to Iraq, and thus could be eligible for humanitarian asylum).

a. Severe Past Persecution

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

"This avenue for asylum has been reserved for rare situations of 'atrocious' persecution, where the alien establishes that, regardless of any threat of future persecution, the circumstances surrounding the past persecution were so unusual and severe that he is unable to return to his home country." *Vongsakdy v. INS*, 171 F.3d 1203, 1205 (9th Cir. 1999) (Laos). Ongoing disability as a result of the persecution is not required. *Lal v. INS*, 255 F.3d 998, 1004 (9th Cir. 2001) (Indo-Fijian), *as amended by* 268 F.3d 1148 (9th Cir. 2001) (order).

(i) Compelling Cases of Past Persecution for Humanitarian Asylum

Lal v. INS, 255 F.3d 998, 1009-10 (9th Cir. 2001) (Indo-Fijian arrested, detained three times, beaten, tortured, urine forced into mouth, cut with knives, burned with cigarettes, forced to watch sexual assault of wife, forced to eat meat, house set ablaze twice, temple ransacked, and holy text burned), *amended by* 268 F.3d 1148 (9th Cir. 2001) (order); *Vongsakdy v. INS*, 171 F.3d 1203, 1206-07 (9th Cir. 1999) (Laotian applicant threatened, beaten and attacked, forced to perform hard manual labor and to attend "reeducation," fed once a day, denied adequate

water and medical care, and forced to watch the guards kill one of his friends); *Lopez-Galarza v. INS*, 99 F.3d 954, 960-63 (9th Cir. 1996) (Nicaraguan applicant imprisoned for 15 days, raped and physically abused repeatedly, confined in a jail cell for long periods without food, forced to clean bathrooms and floors of men's jail cells, mobs stoned and vandalized family home, and the authorities took away food ration card); *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988) (Haitian applicant arrested, assaulted, beaten some fifty times with wooden stick, and threatened with death by the Macoutes on several occasions); *see also Matter of Chen*, 20 I. & N. Dec. 16, 20-21 (BIA 1989) (Red Guards ransacked and destroyed applicant's home, imprisoned and dragged father through streets, and badly burned him in a bonfire of Bibles; as a child placed under house arrest, kept from school, interrogated, beaten, deprived of food, seriously injured by rocks, and exiled to the countryside for "re-education," abused, forced to criticize father, and denied medical care).

The court has remanded for consideration of humanitarian relief in: *Benyamin v. Holder*, 579 F.3d 970, 977 (9th Cir. 2009) (remanding to the BIA to consider in first instance whether humanitarian asylum should be granted where alien suffered female genital mutilation, which the court has recognized as a "particularly severe form of past persecution"); *Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (remanding for consideration of humanitarian relief where "BIA erred in failing to determine whether, assuming the truth of Sowe's testimony that he witnessed his parents' murder, the severing of his brother's hand, and his sister's kidnaping, he provided compelling reasons for his being unwilling or unable to return to Sierra Leone."); *Silaya v. Mukasey*, 524 F.3d 1066, 1072 (9th Cir. 2008) (native and citizen of the Philippines kidnaped, raped, and physically abused by members of the NPA); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (Ethiopian raped by two soldiers during one house search and family harassed and harmed repeatedly); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (Guatemalan gang raped by soldiers as part of an "orchestrated campaign" to punish entire village); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160-61 (9th Cir. 1996) (Nicaraguan severely beaten, threatened with death, imprisoned for working without a permit, witnessed sister being tortured and killed, and family denied food rations and work permit).

(ii) Insufficiently Severe Past Persecution for Humanitarian Asylum

Hanna v. Keisler, 506 F.3d 933, 939 (9th Cir. 2007) (Iraqi applicant detained for over one month and tortured; although past persecution not sufficient to qualify for humanitarian asylum, the court remanded for BIA to consider whether there existed a reasonable possibility that petitioner may suffer other serious harm upon removal); *Belishta v. Ashcroft*, 378 F.3d 1078, 1081, n.2 (9th Cir. 2004) (order) (economic and emotional persecution based on father's 10-year imprisonment in Albania); *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1240 (9th Cir. 2001) (per curiam) (Salvadoran applicant targeted by government sporadically between 1978 and 1980, and then not again until 1991, when forces searched home looking for FMLN sympathizers); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (ethnic Amhara Ethiopian detained for a month, interrogated, beaten for 45 minutes, and almost raped by guards, children detained temporarily and beaten, family harassed); *Kumar v. INS*, 204 F.3d 931, 934-35 (9th Cir. 2000) (Indo-Fijian applicant stripped and fondled in front of parents, punched and kicked, forced to renounce religion, and beaten unconscious; soldiers tied up and beat parents, detained father, and knocked mother unconscious; temple ransacked); *Marcu v. INS*, 147 F.3d 1078, 1082-83 (9th Cir. 1998) (Romanian taunted as a child, denounced as an "enemy of the people," detained, interrogated and beaten by police on multiple occasions, family's possessions confiscated, and mother imprisoned for refusing to renounce U.S. citizenship); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (Sandinista authorities made multiple death threats, marked applicant's house, took away ration card and means to buy inventory, and harassed and confiscated family property); *Kazlauskas v. INS*, 46 F.3d 902, 906-907 (9th Cir. 1995) (Lithuanian applicant ostracized, harassed by teachers and peers, and prevented from advancing to university; father imprisoned in Soviet labor camps); *Acewicz v. INS*, 984 F.2d 1056, 1062 (9th Cir. 1993) (Polish citizens suffered insufficiently severe past persecution).

b. Fear of Other Serious Harm

Victims of past persecution who no longer reasonably fear future persecution on account of a protected ground may be granted asylum if they can establish a reasonable possibility that they may suffer other serious harm upon removal to that country. *See Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004) (order) (remanding for consideration of humanitarian grant where former government agents terrorized Albanian family in an effort to take over their

residence); 8 C.F.R. § 1208.13(b)(1)(iii)(B); *see also Hanna v. Keisler*, 506 F.3d 933, 939 (9th Cir. 2007) (Iraqi applicant detained for over one month and tortured; although past persecution not sufficient to qualify for humanitarian asylum, the court remanded for BIA to consider whether there existed a reasonable possibility that petitioner may suffer other serious harm upon removal); *cf. Sowe v. Mukasey*, 538 F.3d 1281, 1287 (9th Cir. 2008) (petitioner failed to show "other serious harm" aside from claimed fear of persecution, which had been rebutted; but remanding for BIA to consider whether alien was eligible for asylum pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(A)).

E. Well-Founded Fear of Persecution

Even in the absence of past persecution, an applicant may be eligible for asylum based on a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b). A well-founded fear must be subjectively genuine and objectively reasonable. *See Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007); *Montecino v. INS*, 915 F.2d 518, 520-21 (9th Cir. 1990) (noting the importance of the applicant's subjective state of mind). An applicant can demonstrate a well-founded fear of persecution if: (A) she has a fear of persecution in her country; (B) there is a reasonable possibility of suffering such persecution; and (C) she is unable or unwilling to return to that country because of such fear. *See* 8 C.F.R. § 1208.13(b)(2)(i). A "'well-founded fear' … can only be given concrete meaning through a process of case-by-case adjudication." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

1. Past Persecution Not Required

A showing of past persecution is not required to qualify for asylum. *See Halim v. Holder*, 590 F.3d 971, 976 (9th Cir. 2009) ("In the absence of past persecution, an applicant may still be eligible for asylum based on a well-founded fear of future persecution."); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 (9th Cir. 2003); *Velarde v. INS*, 140 F.3d 1305, 1309 (9th Cir. 1998) ("Either past persecution or a well-founded fear of future persecution provides eligibility for a discretionary grant of asylum."), *superseded by statute on other grounds as stated in Falcon Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003). However, the past persecution of an applicant creates a rebuttable presumption that he will be persecuted in the future. *See* Past Persecution, above. Moreover, past harm not amounting to persecution is relevant to the reasonableness of an applicant's fear of future persecution. *See Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir.

2000) (harassment of ethnic Armenian in Russia, inability to get a job, and violence against friend did not rise to level of past persecution, but did support her well-founded fear); *see also Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (explaining that past threats, although insufficient under the circumstances to establish past persecution, are relevant to a well-founded fear of future persecution).

2. Subjective Prong

The subjective prong of the well-founded fear test is satisfied by an applicant's credible testimony that he or she genuinely fears harm. *See Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007) (native of Bangladesh and a Bihari); *Sael v. Ashcroft*, 386 F.3d 922, 924 (9th Cir. 2004) (Indonesian of Chinese descent); *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995) (Indian Sikh). "[F]ortitude in face of danger" does not denote an "absence of fear." *Singh v. Moschorak*, 53 F.3d at 1034; *see also Lolong v. Gonzales*, 484 F.3d 1173, 1178-79 (9th Cir. 2007) (en banc) (finding subjective fear where petitioner described fears and gave specific examples of violent incidents involving friends and family); *cf. Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1996) (finding no subjective fear where testimony of Nicaraguan who claimed to be a Jehovah's Witness was not credible); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1257-58 (9th Cir. 1992) (Nicaraguan who "failed to present 'candid, credible and sincere testimony' demonstrating a genuine fear of persecution, … failed to satisfy the subjective component of the well-founded fear standard").

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

3. Objective Prong

The objective prong of the well-founded fear analysis can be satisfied in two different ways: "One way to satisfy the objective component is to prove persecution in the past, giving rise to a rebuttable presumption that a well-founded fear of future persecution exists. The second way is to show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. The objective requirement can be met by either through the production of specific documentary

evidence or by credible and persuasive testimony." *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (internal citations and quotation marks omitted), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam); *see also Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007).

"A well-founded fear does not require certainty of persecution or even a probability of persecution." *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003). "[E]ven a ten percent chance of persecution may establish a well-founded fear." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001); *see also Halim v. Holder*, 590 F.3d 971, 977 (9th Cir. 2009) (concluding that record did not compel a finding of even a ten percent chance of persecution); *Ahmed*, 504 F.3d at 1191. This court has stated that objective circumstances "must be determined in the political, social and cultural milieu of the place where the petitioner lived." *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990).

A claim based solely on general civil strife or widespread random violence is not sufficient. *See, e.g.*, *Lolong v. Gonzales*, 484 F.3d 1173, 1179 (9th Cir. 2007) (en banc) ("a general, undifferentiated claim of [violence on Chinese or on Christians in Indonesia] does not render an alien eligible for asylum"); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Christian Armenians fearful of Azeris); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese-Filipino); *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986) (El Salvador). However, the existence of general civil unrest does not preclude asylum eligibility. *See Sinha v. Holder*, 564 F.3d 1015, 1022 (9th Cir. 2009) (explaining "the existence of civil unrest does not undercut an individual's claim of persecution based on incidents specific to him"); *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) ("[T]he fact that the individual resides in a country where the lives and freedom of a large number of persons has been threatened may make the threat *more* serious or credible." (internal quotation marks and alterations omitted)); *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) ("[T]he existence of civil strife does not … make a particular asylum claim less compelling."), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009).

Even when an applicant has not established past persecution, and the rebuttable presumption of future persecution does not arise, current country conditions may be relevant to whether the applicant has demonstrated an objectively reasonable fear of future persecution. *See Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002) ("When, as here, a petitioner has *not* established

past persecution, there is no presumption to overcome … [and] the IJ and the BIA are entitled to rely on all relevant evidence in the record, including a State Department report"). In determining whether an applicant's fear of future persecution is objectively reasonable in light of current country conditions, the agency must conduct an individualized analysis of how such conditions will affect the applicant's specific situation. *Marcos v. Gonzales*, 410 F.3d 1112, 1120-21 (9th Cir. 2005) (concluding applicant had a well-founded fear of future persecution).

4. Demonstrating a Well-Founded Fear

a. Targeted for Persecution

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

b. Family Ties

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

must be considered in an asylum case where the events that form the basis of the persecution claim were perceived when the petitioner was a child. *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007).

See also Zhang v. Ashcroft, 388 F.3d 713, 718 (9th Cir. 2004) (per curiam) (arrest and detention of family members who also practice Falun Gong among other factors compelled a finding that applicant is entitled to withholding of removal); *Njuguna v. Ashcroft*, 374 F.3d 765, 769 (9th Cir. 2004) (persecution of family in Kenya); *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999) (violence and harassment against entire Kurdish Muslim family in Armenia); *Gonzalez v. INS*, 82 F.3d 903, 909-10 (9th Cir. 1996) (Nicaraguan family suffered violence for supporting Somoza); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 515 (9th Cir. 1985) (Salvadoran applicant presented prima facie eligibility for asylum based on the persecution of her family), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009).

c. Pattern and Practice of Persecution

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

> (A) The applicant establishes that there is a pattern or practice in his or her country … of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

8 C.F.R. § 1208.13(b)(2)(iii); *see also Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) (evidence of a Croat pattern and practice of ethnically cleansing Bosnian Serbs); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *cf. Wakkary v. Holder*, 558 F.3d 1049, 1060-62 (9th Cir. 2009) (concluding record did not compel conclusion that there exists a pattern and practice of persecution against Chinese and Christians in Indonesia); *Lolong v. Gonzales*, 484 F.3d 1173, 1180-81 (9th Cir. 2007) (en banc) (no pattern or practice of persecution against ethnic Chinese Christian women in light of current conditions and where petitioner has not demonstrated that Indonesian government is unable or unwilling to control perpetrators). "[T]his 'group' of similarly situated persons is not necessarily the

same as the more limited 'social group' category mentioned in the asylum statute." *Mgoian*, 184 F.3d at 1036.

d. Membership in Disfavored Group

In the Ninth Circuit, a member of a "disfavored group" that is not subject to a pattern or practice of persecution may also demonstrate a well-founded fear. *See Kotasz v. INS*, 31 F.3d 847, 853-54 (9th Cir. 1994) (opponents of the Hungarian Communist Regime). *See also Tampubolon v. Holder*, 610 F.3d 1056, 1060 (9th Cir. 2010) (Christian Indonesians); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007) (Bihari in Bangladesh); *Sael v. Ashcroft*, 386 F.3d 922, 927 (9th Cir. 2004) (Indonesia's ethnic Chinese minority); *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (as amended) (stateless Palestinians born in Kuwait are members of a persecuted minority); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182-83 (9th Cir. 2003) (ethnic Albanians in Kosovo); *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996) (Indo-Fijians).

In determining whether an applicant had established a well-founded fear of persecution based on membership in a disfavored group, "this court will look to (1) the risk level of membership in the group (*i.e.*, the extent and the severity of persecution suffered by the group) and (2) the alien's individual risk level (*i.e.*, whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution)." *Mgoian v. INS*, 184 F.3d 1029, 1035 n.4 (9th Cir. 1999). "The relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be." *Id.*; *see also Sael*, 386 F.3d at 927 (stating that members of the significantly disfavored group comprising ethnic Chinese Indonesians need demonstrate a "comparatively low" level of particularized risk). Note that the "disfavored group analysis does not alter the *quantitative* standard of proof. Rather, it determines what sorts of evidence can be used to meet that standard, and quite generally, in what proportions." *Wakkary v. Holder*, 558 F.3d 1049, 1065 (9th Cir. 2009). *See also Halim v. Holder*, 590 F.3d 971, 979 (9th Cir. 2009) (concluding "that [alien] failed to make the minimal showing necessary to require that the agency reconsider its denial of relief … based on (1) the relative weakness of the claim of disfavored status, (2) the lack of evidence of government approval of the alleged discrimination, and (3) Halim's minimal showing of individual risk.").

Past experiences, including threats and violence, even if not sufficient to compel a finding of past persecution, are indicative of individualized risk of future harm. *See Sael*, 386 F.3d at 928-29; *Hoxha*, 319 F.3d at 1184.

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

The disfavored group analysis used in asylum claims is also applicable in the context of withholding of removal. *See Wakkary*, 558 F.3d at 1065; *see also Tampubolon*, 610 F.3d at 1060 (determining that Christian Indonesians were a disfavored group based on the record and remanding for BIA to analyze petitioners' withholding claim according to disfavored group analysis).

5. Countrywide Persecution

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

The inquiry into internal relocation or countrywide persecution is two-fold. "[W]e must first ask whether an applicant could relocate safely to another part of the applicant's country of origin." *Kaiser*, 390 F.3d at 660 (holding that Pakistani couple could not safely relocate where threats occurred even after petitioners moved to the opposite side of the country). "If the evidence indicates that the applicant could relocate safely, we next ask whether it would be reasonable to require the applicant to do so." *Id*. at 659. A previous successful internal

relocation may undermine the well-founded fear of future persecution. *See Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005).

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

"In cases in which the persecutor is a government or is government-sponsored, … it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3)(ii); *see also Fakhry v. Mukasey*, 524 F.3d 1057, 1065 (9th Cir. 2008) (petitioner gained benefit of presumption that threat of persecution existed nationwide and that relocation was unreasonable where petitioner testified that he feared persecution at the hands of the Senegalese government); *Ahmed v. Keisler*, 504 F.3d 1183, 1200 (9th Cir. 2007) (where it was more likely than not that petitioner would be persecuted by the police or the government upon return to Bangladesh, it was unreasonable to expect that petitioner could relocate within the country); *Melkonian*, 320 F.3d at 1069 (where the source of persecution is the government, a rebuttable presumption arises that the threat exists nationwide, and that internal relocation would be unreasonable); *Damaize-Job v. INS*, 787 F.2d 1332, 1336-37 (9th Cir. 1986) (no need for Miskito Indian from Nicaragua to demonstrate countrywide persecution if persecutor shows no intent to limit his persecution to one area, and applicant can be readily identified); *cf. Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) (no country-wide danger based on anonymous threat in hometown in El Salvador).

The regulations state that the reasonableness of internal relocation may be based on "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 1208.13(b)(3) (stating that this non-exhaustive list may, or may not, be relevant, depending on the case); *see also Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090 (9th Cir. 2005) (explaining that the regulation precludes relocation when a petitioner's age, limited job prospects, and lack of family or cultural connections to the proposed place of relocation militate against a finding that relocation would be reasonable); *Knezevic*, 367 F.3d 1215 (holding that Bosnian

Serb couple could safely relocate to Serb-held areas of Bosnia, and remanding for determination whether such relocation would be reasonable).

6. Continued Presence of Applicant

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

Cf. Lata v. INS, 204 F.3d 1241, 1245 (9th Cir. 2000) (Indo-Fijian's fear undermined by two-year stay in Fiji after incidents of harm); *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) (asylum denied where applicant remained over five years in Nicaragua after interrogation without further harm or contacts from authorities).

7. Continued Presence of Family

The continued presence of family members in the country of origin does not necessarily rebut an applicant's well-founded fear, unless there is evidence that the family was similarly situated or subject to similar risk. *See Zhao v. Mukasey*, 540 F.3d 1027, 1031 (9th Cir. 2008) (explaining that the well-being of others who have stayed behind in a country is only relevant when those others are similarly situated to the petitioners); *Kumar v. Gonzales*, 444 F.3d 1043, 1055 (9th Cir. 2006) (irrelevant that petitioner's parents were not harmed after petitioner left India, where they were not "similarly situated"); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (family in Burma not similarly situated because they "didn't do anything against the government"); *Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (where petitioner was singled out for persecution, the situation of remaining

relatives in Iran is "manifestly irrelevant"); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (evidence of the condition of the applicant's family is relevant only when the family is similarly situated to the applicant); *Rios v. Ashcroft*, 287 F.3d 895, 902 (9th Cir. 2002) (Guatemala); *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000) (Philippines). *See also Tamang v. Holder*, 598 F.3d 1083, 1094 (9th Cir. 2010) (analyzing withholding of removal claim and concluding that petitioner's fear of future persecution, which was based on threats received by his family, was not objectively reasonable where his family voluntarily returned to Nepal and continues to live there unharmed).

Cf. Li v. Ashcroft, 378 F.3d 959, 964 (9th Cir. 2004) (claim that applicant's family was so afraid of being arrested that it was forced to go deep into hiding was inconsistent with wife's travel to hometown without trouble); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) ("An applicant's claim of persecution upon return is weakened, even undercut, when similarly-situated family members continue to live in the country without incident, … or when the applicant has returned to the country without incident." (internal quotation marks and citation omitted)), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (Israel); *Aruta v. INS*, 80 F.3d 1389, 1395 (9th Cir. 1996) (sister remained in the Philippines without incident); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir.1988) (per curiam) (as amended) (family unmolested in El Salvador); *Mendez-Efrain v. INS*, 813 F.2d 279, 282 (9th Cir. 1987) (continued and unmolested presence of family in El Salvador undermined well-founded fear).

8. Possession of Passport or Travel Documents

Possession of a valid passport does not necessarily undermine the subjective or objective basis for an applicant's fear. *See Zhao v. Mukasey*, 540 F.3d 1027, 1031 (9th Cir. 2008) (petitioners' ability to acquire a passport and travel to Beijing for a visa interview despite travel restriction did not undermine claim of a well-founded fear of persecution); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1137 (9th Cir. 2004) ("A petitioner's ability to escape her persecutors does not undermine her claim of a well-founded fear of future persecution, even when she succeeds in obtaining government documents that permit her to depart."); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (possession and renewal of Burmese passport did not undermine petitioner's subjective fear of persecution); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (holding that ethnic Albanian from Kosovo who obtained passport had well-founded fear because "Serbian authorities actively

supported an Albanian exodus instead of opposing it"); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1200 (9th Cir. 2000) (minimizing significance of Russian passport issuance); *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987) (rejecting IJ's presumption that Salvadoran government would not persecute an individual that was allowed to leave the country); *Damaize-Job v. INS*, 787 F.2d 1332, 1336 (9th Cir. 1986) (obtaining passport through a friend did not undermine fear); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985).

Cf. Khourassany v. INS, 208 F.3d 1096, 1101 (9th Cir. 2000) (denying, in part, because Palestinian retained Israeli passport and was able to travel freely); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988) (per curiam) (as amended) (observing that ability to obtain passport is a relevant factor); *Espinoza-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985) (holding that acquisition of Nicaraguan passport without difficulty cut against applicant's asylum claim).

9. Safe Return to Country of Persecution

Return trips can be considered as one factor, among others, that rebut the presumption of a nationwide threat of persecution. *See Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (presumption of nationwide threat of persecution was rebutted when petitioner made three return trips, there had been two favorable changes in government, and fifteen years had passed between the past persecution and the asylum request); *see also Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008) (noting that "an alien's history of willingly returning to his or her home country militates against a finding of past persecution or a well-founded fear of future persecution"); *cf. Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9th Cir. 2005) (holding that petitioner's repeated return trips to Mexico to gather enough income to flee permanently did not rebut the presumption of a well-founded fear of persecution).

10. Cases Finding No Well-Founded Fear

Halim v. Holder, 590 F.3d 971, 977 (9th Cir. 2009) (concluding that record did not compel a finding of even a ten percent chance of persecution); *Lolong v. Gonzales*, 484 F.3d 1173, 1179-1181 (9th Cir. 2007) (en banc) (ethnic Chinese Christian petitioner did not establish an individualized risk or a pattern or practice of persecution in Indonesia); *Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir. 2005) (fear of persecution in Bangladesh undermined by prior successful internal relocation and current country conditions); *Nagoulko v. INS*, 333 F.3d 1012, 1018 (9th Cir. 2003) (possibility of future persecution in Ukraine too speculative);

Belayneh v. INS, 213 F.3d 488, 491 (9th Cir. 2000) (no well-founded fear of persecution in Ethiopia on account of imputed political opinion); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (Armenians from Nagorno-Karabakh region did not establish past persecution or a well-founded fear of future persecution by Azeris); *Acewicz v. INS*, 984 F.2d 1056, 1059-61 (9th Cir. 1993) (BIA properly took administrative notice of changed political conditions in Poland); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988) (per curiam) (as amended) (no well-founded fear of Salvadoran guerillas where, *inter alia*, potential persecutor was dead).

F. Nexus to the Five Statutorily Protected Grounds

For applications filed before May 11, 2005, the past or anticipated persecution must be "on account of" one or more of the five grounds enumerated in 8 U.S.C. § 1101(a)(42)(A): race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481-82 (1992); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010) (explaining a nexus is established when past persecution is on account of one or more of the protected grounds); *Silaya v. Mukasey*, 524 F.3d 1066, 1070 (9th Cir. 2008); *Sangha v. INS*, 103 F.3d 1482, 1486 (9th Cir. 1997). The applicant must provide some evidence, direct or circumstantial, that the persecutor was or would be motivated to persecute him because of his actual or imputed status or belief. *See Sangha*, 103 F.3d at 1486-87.

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

> [A] motive is a "central reason" if the persecutor would not have harmed the applicant if such motive did not exist. Likewise, a motive is a "central reason" if that motive, standing alone, would have led the persecutor to harm the applicant. … [P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant. Nevertheless, to demonstrate that a protected ground was "at least one central reason" for persecution, an applicant must prove that such ground was a cause of the persecutors' acts.

Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009); *see also Zetino v. Holder*, 622 F.3d 1007, 1015 (9th Cir. 2010) ("The REAL ID Act of 2005 places an additional burden on Zetino to demonstrate that one of the five protected grounds will be at least one central reason for his persecution."); *Sinha v. Holder*, 564 F.3d 1015, 1021 n.3 (9th Cir. 2009) (applying pre-REAL ID Act standard).

1. Proving a Nexus

The persecutor's motivation may be established by direct or circumstantial evidence. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

An applicant's uncontroverted credible testimony as to the persecutor's motivations may be sufficient to establish nexus. *See, e.g.*, *Antonyan v. Holder*, 642 F.3d 1250, 1254 (9th Cir. 2011) (accepting Antonyan's factual testimony as undisputed and concluding BIA erred in finding no nexus); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1026 (9th Cir. 2010) ("Baghdasaryan's testimony that he was harassed, threatened, arrested, and beaten by the government compels the conclusion that he was harmed, at least in part, due to his political opinion expressed through his opposition to government corruption."); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076-77 (9th Cir. 2004) (accepting applicant's testimony that the Guatemalan government persecuted entire village based on imputed political opinion); *Shoafera v. INS*, 228 F.3d 1070, 1074-75 (9th Cir. 2000) (Ethiopian applicant established through her credible testimony and witness testimony that the perpetrator was motivated to rape her based, in part, on her Amhara ethnicity); *Maini v. INS*, 212 F.3d 1167, 1175-76 (9th Cir. 2000) (evidence compelled a finding that Indian family was persecuted on account of inter-faith marriage based on credible witness testimony and statements by attackers).

a. Direct Evidence

Direct proof of motivation may consist of evidence concerning statements made by the persecutor to the victim, or by victim to persecutor. *See, e.g.*, *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (soldiers stated that rape was because of Kebede's family's position in prior Ethiopian regime); *Lopez v. Ashcroft*, 366 F.3d 799, 804 (9th Cir. 2004) (Guatemalan guerillas told applicant that he should not work for the wealthy); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 2000) (en banc) (applicant articulated her political opposition to the NPA), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Gonzalez-Neyra v. INS*, 122 F.3d 1293, 1295

(9th Cir. 1997) (applicant told Shining Path that he would not submit to extortion because of opposition), *amended by* 133 F.3d 726 (9th Cir. 1998) (order).

b. Circumstantial Evidence

Circumstantial proof of motivation may consist of severe or disproportionate punishment for violations of laws, or other evidence that the persecutor generally regards those who resist as political enemies. *See, e.g.*, *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (severe punishment for illegal departure). Circumstantial evidence of motive may also include, *inter alia*, the timing of the persecution and signs or emblems left at the site of persecution. *See Deloso v. Ashcroft*, 393 F.3d 858, 865-66 (9th Cir. 2005). Statements made by the persecutor may constitute circumstantial evidence of motive. *See Gafoor v. INS*, 231 F.3d 645, 651-52 (9th Cir. 2000) (holding that Fijian "soldiers' statements to Gafoor [to 'go back to India' were] unmistakable circumstantial evidence that they were motivated by his race and imputed political opinion"), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009).

"In some cases, the factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of political opinion, or one of the other protected grounds. Indeed, this court has held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue." *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) (internal citation omitted); *see also Li v. Holder*, 559 F.3d 1096, 1099 (9th Cir. 2009) (holding that "when a petitioner violates no Chinese law, but instead comes to the aid of refugees in defiance of China's unofficial policy of discouraging such aid, a BIA finding that the petitioner is a mere criminal subject to legitimate prosecution is not supported by substantial evidence."); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 744-45 (9th Cir. 2006) (anonymous threats began several weeks after applicant spoke out against Shining Path guerillas at a political rally). Moreover, "if there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person … there arises a presumption that the motive for harassment is political." *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (internal quotation marks omitted); *see also* Imputed Political Opinion, below.

The court has also considered the treatment of similarly-situated family members in determining whether the petitioner established the requisite nexus

between the treatment suffered and a protected ground. *See Sinha v. Holder*, 564 F.3d 1015, 1022 (9th Cir. 2009) (petitioner's similarly-situated wife who was harassed on account of her race bolstered petitioner's argument that the attacks directed at him during the same time period were similarly motivated by his race).

2. Mixed-Motive Cases

A persecutor may have multiple motives for inflicting harm on an applicant. With respect to applications filed before May 11, 2005, as long as the applicant produces evidence from which it is reasonable to believe that the persecutor's action was motivated, at least in part, by a protected ground, the applicant is eligible for asylum. *See Borja v. INS*, 175 F.3d 732, 736-37 (9th Cir. 1999) (en banc) (Filipino targeted for extortion plus political motives), *superseded by statute as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc), *superseded by statute as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009).

See e.g., *Antonyan v. Holder*, 642 F.3d 1250, 1256 (9th Cir. 2011) (mixed motives do not render the opposition any less political or the opponent any less deserving of asylum); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1026 (9th Cir. 2010) (explaining that mixed motives do not negate a legitimate nexus to political opinion, and that while some of the harm the alien experienced may have been due to personal reasons, the testimony compelled the conclusion that that he was harmed at least in part due to his political opinion); *Sinha v. Holder*, 564 F.3d 1015, 1021 (9th Cir. 2009) (petitioner was targeted at least in part on account of his race); *Zhu v. Mukasey*, 537 F.3d 1034, 1044-45 (9th Cir. 2008) (applicant who was raped by her factory manager was repeatedly sought by police at least in part on account of political opinion imputed to her as the result of her whistle-blowing); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130 (9th Cir. 2007) ("While some of the persecution suffered by [petitioner] may have been motivated by the personal greed of local officials, [petitioner's] testimony that he was harassed, threatened and assaulted for raising complaints about the extortion scheme adequately establishes that persecution was - at least in part - a response to his political opinion expressed through his whistleblowing."); *Nuru v. Gonzales*, 404 F.3d 1207, 1227-28 (9th Cir. 2005) (Eritrean army deserter had well-founded fear of future persecution on account of political opinion and as punishment for desertion); *Deloso v. Ashcroft*, 393 F.3d 858, 864-66 (9th Cir. 2005) (Filipino anti-communist targeted on account of political opinion and revenge); *Mihalev v. Ashcroft*, 388 F.3d 722, 727-30 (9th Cir. 2004) (Bulgarian gypsy established that police

persecuted her, in part, based on her Roma ethnicity); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1134 (9th Cir. 2004) ("That [petitioner's] supervisor might also have been motivated by personal dislike … does not undermine [petitioner's] claim of persecution.); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (gang rape by Guatemalan soldiers motivated in part by imputed political opinion); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (Bangladeshi targeted based on "political jealousy" and political opinion); *Jahed v. INS*, 356 F.3d 991, 999 (9th Cir. 2004) (Iranian National Guard's motive was "inextricably intertwined with petitioner's past political affiliation" even though he was motivated in part by his desire for money); *Gafoor v. INS*, 231 F.3d 645, 652-54 (9th Cir. 2000) (Indo-Fijian targeted for race, political opinion, and personal vendetta), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Shoafera v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000) (rape by Ethiopian government official motivated in part by ethnicity); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) ("revenge plus" motive of guerillas to harm former Filipino police officer who testified against the NPA); *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (at least one motive was the imputation of pro-guerilla political opinion to Salvadoran applicant); *Maini v. INS*, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000) (persecution of Indian family motivated by religious and economic grounds); *Tarubac v. INS*, 182 F.3d 1114, 1118-19 (9th Cir. 1999) (NPA persecution based on political opinion and economic motives); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) ("Torture in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation even if the torture served intelligence gathering purposes.").

For applications filed on or after May 11, 2005, § 101(a)(3) of the REAL ID Act provides that an applicant must establish that "race, religion, nationality, membership in a particular social group, or political opinion, was or will be *at least one central reason* for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added); *see also Sinha v. Holder*, 564 F.3d 1015, 1021 n.3 (9th Cir. 2009) (applying pre-REAL ID Act standard); *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009) ("[A] motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist. Likewise, a motive is a 'central reason' if that motive, standing alone, would have led the persecutor to harm the applicant. … [P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant. Nevertheless, to demonstrate that a protected ground was 'at least one central reason' for persecution, an applicant must prove that such ground was a cause of

the persecutors' acts."). The legislative history of the REAL ID Act suggests that the addition of this "central reason" standard is motivated, at least in part, by this court's mixed-motives caselaw. *See* Conference Committee Statement, 151 Cong. Rec. H2869 (daily ed. May 3, 2005) (suggesting that this court's decisions in *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995), *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988), and *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) violate Supreme Court precedent requiring asylum applicants to provide evidence of motivation and improperly shift the burden to the government to prove legitimate purpose, adverse credibility, or some other statutory bar to relief), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009).

3. Shared Identity Between Victim and Persecutor

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

4. Civil Unrest and Motive

Although widespread civil unrest does not, on its own, establish asylum eligibility, the existence of general civil strife does not preclude relief. *See Sinha v. Holder*, 564 F.3d 1015, 1022-23 (9th Cir. 2009) (explaining that IJ's suggestion "that the violence directed against one individual is somehow *less* 'on account of' his race because many other individuals of his ethnic group are *also* being targeted on account of their race" was illogical and had no support in case law); *Ahmed v. Keisler*, 504 F.3d 1183, 1194-95 n.9 (9th Cir. 2007) ("[E]ven though generalized violence as a result of civil strife does not necessarily qualify as persecution, neither does civil strife eliminate the possibility of persecution); *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) ("[T]he existence of civil strife does not alter our normal approach to determining refugee status or make a particular asylum claim less compelling."), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009). "The difficulty of determining motive in situations of general civil unrest should not … diminish the protections of asylum for persons who have been punished because of their actual

or imputed political views, as opposed to their criminal or violent conduct." *Arulampalam v. Ashcroft*, 353 F.3d 679, 685 n.4 (9th Cir. 2003) (internal quotation marks omitted). "In certain contexts, … the existence of civil strife supports a finding that claimed persecution was on account of a protected ground." *Ndom*, 384 F.3d at 753 (armed conflict between Senegalese forces and secessionist rebels).

See also Mengstu v. Holder, 560 F.3d 1055, 1058-59 (9th Cir. 2009) (holding that IJ's finding that no nexus to a protected ground existed was not supported by substantial evidence where Ethiopian government solely targeted Eritreans for deportation and denationalization); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004) (Guatemalan civil war); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211-12 (9th Cir. 2004) (distinguishing between displaced persons fleeing the ravages of war and refugees fleeing ethnic cleansing); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (widespread political violence in Bangladesh "says very little about" whether applicant could demonstrate a persecutory motive).

5. Resistance to Discriminatory Government Action

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

6. The Protected Grounds

a. Race

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

of ethnicity. *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211-12 (9th Cir. 2004) (distinguishing displaced persons).

(i) Cases Finding Racial or Ethnic Persecution

Mendoza-Pablo v. Holder, 667 F.3d 1308, 1312-15 (9th Cir. 2012) (concluding that petitioner established persecution where his mother when pregnant with him was persecuted on account of her ethnicity); *Sinha v. Holder*, 564 F.3d 1015, 1022-23 (9th Cir. 2009) (concluding that incidents petitioner described amounted to violence with a distinct racial slant, and were more than mere acts of random violence); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119-20 (9th Cir. 2004) (past persecution of ethnic Afghans in Germany); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (mixed-race, mixed-religion couple from Fiji suffered past persecution); *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004) (Serbian couple from Bosnia-Herzegovina established past persecution and a well-founded fear of future persecution on account of ethnicity because their town was targeted for bombing, invasion, occupation, and a "systematic campaign of ethnic cleansing by the Croats"); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (Armenian applicant was eligible for asylum because Abkhazian separatists specifically targeted him for conscription based on his ethnicity and religion); *Gafoor v. INS*, 231 F.3d 645, 651-52 (9th Cir. 2000) (Indo-Fijian persecuted on account of race and imputed political opinion), *superseded in part by statute as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Shoafera v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000) (rape motivated in part by Amhara ethnicity); *Chand v. INS*, 222 F.3d 1066, 1076 (9th Cir. 2000) (past persecution of ethnic Indian in Fiji); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197-98 (9th Cir. 2000) (well-founded fear of persecution on the basis of Armenian ethnicity); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem in Armenia); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (past persecution of Quiche Indian from Guatemala); *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996) (past persecution of Indo-Fijian).

(ii) Cases Finding No Racial or Ethnic Persecution

Parussimova v. Mukasey, 555 F.3d 734, 742 (9th Cir. 2009) (post-REAL ID Act case concluding that "utterance of an ethnic slur" during attack, standing alone, did not compel conclusion that ethnicity was a central motivating reason for attack); *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) (holding that random criminal acts in South Africa bore no nexus to race); *Pedro-Mateo v. INS*,

224 F.3d 1147, 1151 (9th Cir. 2000) (Kanjobal Indian from Guatemala failed to establish asylum eligibility on basis of race); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (Chinese Filipino failed to establish a well-founded fear on account of race or ethnicity).

b. Religion

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

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

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

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

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

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

(i) Cases Finding Religious Persecution

Kamalyan v. Holder, 620 F.3d 1054, 1057-58 (9th Cir. 2010) (petitioner, a Jehovah's Witness, and native of the U.S.S.R. and citizen of Armenia, demonstrated past persecution on account of religion); *Zhao v. Mukasey*, 540 F.3d

1027, 1029-31 (9th Cir. 2008) (petitioners demonstrated a well-founded fear of future persecution on account of their Falun Gong practice); *Hanna v. Keisler*, 506 F.3d 933 (9th Cir. 2007) (Chaldean Catholic, and native and citizen of Iraq, persecuted on account of religion); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (per curiam) (holding that petitioner established clear probability of persecution in China on account of his practice of Falun Gong); *Malty v. Ashcroft*, 381 F.3d 942, 948 (9th Cir. 2004) (BIA erred in denying motion to reopen because Egyptian Coptic Christian demonstrated prima facie eligibility for asylum); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (mixed-race, mixed-religion couple from Fiji suffered past persecution); *Khup v. Ashcroft*, 376 F.3d 898 (9th Cir. 2004) (Burmese Seventh Day Adventist minister); *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (Chinese Christian was persecuted on account of his religion when he was arrested, detained, physically abused, and forced to sign an affidavit renouncing his religion, after he participated in illegal religious activities and attempted to stop an officer from removing a cross from a tomb); *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 n.9 (9th Cir. 2004) (noting strong correlation between ethnicity and religion in the Middle East); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003) (Armenian applicant was eligible for asylum because Abkhazian separatists specifically targeted him for conscription based on his ethnicity and religion); *Popova v. INS*, 273 F.3d 1251, 1257-58 (9th Cir. 2001) (harassment and threats in Bulgaria based on applicant's religious surname and political opinion); *Lal v. INS*, 255 F.3d 998 (9th Cir. 2001) (Indo-Fijian faced religious and political persecution), *as amended by* 268 F.3d 1148 (9th Cir. 2001) (order); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (past persecution of Christian who attempted interfaith dating in Iran); *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (if credible, past persecution of Shia Muslims by Sunni Muslims in Pakistan), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam); *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) ("persecution aimed at stamping out an interfaith marriage is without question persecution on account of religion"); *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) (past persecution of Jewish citizen of the Ukraine); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (arrest of family member at church may provide basis for eligibility); *Hartooni v. INS*, 21 F.3d 336, 341-42 (9th Cir. 1994) (if credible, Christian Armenian in Iran eligible for asylum).

(ii) Cases Finding No Religious Persecution

Benyamin v. Holder, 579 F.3d 970 (9th Cir. 2009) (mixed-religion marriage); *Padash v. INS*, 358 F.3d 1161, 1166 (9th Cir. 2004) (Indian Muslim

was not eligible for asylum based on two incidents of religious-inspired violence at his father's restaurant); *Halaim v. INS*, 358 F.3d 1128, 1132 (9th Cir. 2004) (holding that discrimination against Ukranian sisters on account of Pentecostal Christian religion did not compel a finding that they suffered past persecution); *Nagoulko v. INS*, 333 F.3d 1012, 1016-17, 1018 (9th Cir. 2003) (past harassment of Christian in Ukraine not persecution; future fear too speculative); *Hakeem v. INS*, 273 F.3d 812, 817 (9th Cir. 2001) (Ahmadi in Pakistan not eligible for withholding), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007); *Tecun-Florian v. INS*, 207 F.3d 1107, 1110 (9th Cir. 2000) (past torture by Guatemalan guerillas had no nexus to applicant's religious beliefs); *Gonzalez v. INS*, 82 F.3d 903, 909 (9th Cir. 1996) (conscription of Nicaraguan Jehovah's Witness); *Abedini v. INS*, 971 F.2d 188, 191-92 (9th Cir. 1992) (prosecution of Iranian for distribution of Western videos); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (applicant's violation of restrictive dress and conduct rules did not establish persecution on account of religion or political opinion); *Ghaly v. INS*, 58 F.3d 1425 (9th Cir. 1995) (prejudice and discrimination against Egyptian Coptic Christian insufficient); *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (religious objection to service in the Salvadoran military insufficient to establish a nexus); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1991) (religious converts in Egypt).

c. Nationality

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

d. Membership in a Particular Social Group

A particular social group "implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986) (stating that a family is a "prototypical example" of a social group, but young working class urban males of military age are not). "[A] 'particular social group' is one united by a voluntary

association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it," *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (Mexican gay men with female sexual identities constitute a particular social group); *see also Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (BIA erred in rejecting "women in Guatemala" as a cognizable social group solely based on the broad nature of the group, without assessing 'innate characteristic' analysis); UNHCR's Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002). Large, internally diverse, demographic groups rarely constitute distinct social groups. *See Sanchez-Trujillo*, 801 F.2d at 1576-77 ("Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status.").

To determine whether a social group exists, the court considers certain factors, including "whether a group's shared characteristic gives members social visibility and whether the group can be defined with sufficient particularity to delimit its membership." *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007); *see also Donchev v. Mukasey*, 553 F.3d 1206, 1215-16 (9th Cir. 2009) (noticing that while the definition is instructive, it is not very helpful to deciding cases that concern something other than a tribe or clan); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744 (9th Cir. 2008).

The BIA has rejected this court's "voluntary associational relationship" test, explaining: "Under *Acosta*, we do not require a "voluntary associational relationship" among group members. Nor do we require an element of "cohesiveness" or homogeneity among group members." *Matter of C-A-*, 23 I. & N. Dec. 951, 956-57 (BIA 2006). The BIA focuses instead on the extent to which members of a society perceive those with the characteristics in question as members of a social group." *Id*. at 957.

The BIA's determination in a precedential decision that a group is or is not a "particular social group" is entitled to *Chevron* deference. *See Ramos-Lopez v. Holder*, 563 F.3d 855, 858-59 (9th Cir. 2009). However, note that *Skidmore* deference is owed where the BIA issues an unpublished decision by one member of the BIA. *See Soriano v. Holder*, 569 F.3d 1162, 1164 n.1 (9th Cir. 2009)

(affording Skidmore deference to BIA decision concluding that group comprised of government informants was not a valid social group for asylum purposes).

(i) Types of Social Groups

(A) Family and Clan

"[I]n some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes." *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002); *see also Lin v. Ashcroft*, 377 F.3d 1014, 1028-29 (9th Cir. 2004) (family membership may be a plausible basis for protected social group refugee status in the context of families who have violated China's coercive population control policy); *Sanchez-Trujillo v. INS*, 801 F.2d 1572, 1576-77 (9th Cir. 1986) (family is a "prototypical example" of a social group); *but see Estrada-Posados v. INS*, 924 F.2d 916, 191 (9th Cir. 1991) ("the concept of persecution of a social group [does not extend] to the persecution of a family"). Note that "[w]here the claimed group membership is the family, a family member's continuing safety [in the petitioner's hometown] is a … persuasive factor in considering a petitioner's well-founded fear." *Santos-Lemus v. Mukasey*, 542 F.3d 738, 743 (9th Cir. 2008).

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

(B) Gender-Related Claims

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

(1) Gender Defined Social Group

Gender may constitute membership in a social group in the case of female genital mutilation. *See Mohammed v. Gonzales*, 400 F.3d 785, 796-98 (9th Cir. 2005). Similarly, the gender-defined group of Mexican gay men with female sexual identities constitutes a particular social group. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000); *see also Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (rejecting BIA's analysis of its finding that "women in

Guatemala" could not constitute a cognizable social group; remanding for the BIA to consider properly in the first instance); *Fisher v. INS*, 79 F.3d 955, 965-66 (9th Cir. 1996) (en banc) (Canby, J., concurring) (although petitioner did not establish persecution on account of religion or political opinion based on her violation of restrictive dress and conduct rules, eligibility on account of membership in a particular social group was not argued, and thus not foreclosed). *See also In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (en banc) (granting asylum based on a gender-defined social group of "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by the tribe, and who oppose the practice").

(2) Gender-Specific Harm

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

Female genital mutilation ("FGM") constitutes persecution on account of membership in a social group. *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (social group comprised of young girls in the Benadiri clan or Somalian females). Moreover, FGM is a "permanent and continuing" act of persecution that cannot be rebutted. *Id.* at 801. *See also Edu v. Holder*, 624 F.3d 1137, 1147 & n.25 (9th Cir. 2010) (remanding for BIA to consider FGM claim as a separate, additional basis for CAT relief); *see also Abebe v. Gonzales*, 432 F.3d 1037, 1041-43 (9th Cir. 2005) (en banc) (remanding for consideration of whether U.S. citizen daughter's fear of FGM could be imputed to her parents); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (remanding CAT claim based on petitioner's past FGM in Nigeria, and fear that her daughter would suffer FGM if returned); *but see In re A-K-*, 24 I &N Dec. 275, 279 (BIA 2007) ("[T]here is no statutory basis for a grant

of derivative asylum status to a parent based on the grant of asylum to his child.") OR (concluding no eligibility for withholding of removal based on fear that U.S. citizen daughters

Rape and other forms of sexual or gender-based violence can constitute persecution on account of political opinion or other enumerated grounds. *See, e.g.*, *Silaya v. Mukasey*, 524 F.3d 1066, 1070-71 (9th Cir. 2008) (rape and physical abuse of petitioner by members of the New People's Army in Philippines amounted to persecution and was on account of imputed political opinion); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004) (Guatemalan woman gang raped by soldiers on account of a pro-guerilla political opinion imputed to her entire village); *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc) (forced pregnancy examination constituted persecution on account of political opposition to China's coercive family planning policy); *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004) (Ethiopian woman raped because of her family's association with the previous government); *Shoafera v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000) (Ethiopian woman beaten and raped at gunpoint on account of Amhara ethnicity); *Lopez-Galarza v. INS*, 99 F.3d 954, 959-60 (9th Cir. 1996) (Nicaraguan woman raped, abused, deprived of food, and subjected to forced labor on account of political opinion); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (Salvadoran woman's prolonged sexual abuse by Salvadoran military sergeant was persecution on account of political opinion), *overruled in part on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc).

(C) Sexual Orientation

Sexual orientation and sexual identity can be the basis for establishing a particular social group. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that all alien homosexuals are members of a "particular social group."). *See also Castro-Martinez v. Holder*, 674 F.3d 1073, 1080 (9th Cir. 2011) (recognizing that "[h]omosexual men in Mexico can constitute a social group for the purpose of an asylum claim[,]" but concluding that petitioner failed to establish eligibility for asylum); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088-89 (9th Cir. 2005) (Mexican homosexual man forced to perform nine sex acts on a police officer and threatened with death persecuted on account of sexual orientation); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094-95 (9th Cir. 2000) (Mexican gay men with female sexual identities constitute a particular social group); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (BIA 1990) (Cuban homosexual man established membership in a particular social group).

(D) Former Status or Occupation

An applicant's status based on her former occupations, associations, or shared experiences, may be the basis for social group claim. *See, e.g.*, *Cruz-Navarro v. INS*, 232 F.3d 1024, 1028-29 (9th Cir. 2000) (member of Peruvian National Police). "Persons who are persecuted because of their status as a former police or military officer, for example, may constitute a cognizable social group under the INA." *Id*. at 1029 (holding that current police or military are not a social group). *See also Ayala v. Holder*, 640 F.3d 1095, 1097 (9th Cir. 2011) (per curiam) (recognizing that a group of former officers may be a cognizable social group).

(ii) Cases Denying Social Group Claims

Delgado-Ortiz v. Holder, 600 F.3d 1148, 1151-52 (9th Cir. 2010) (concluding that returning Mexicans from the United States was too broad to qualify as a cognizable social group); *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010) (rejecting contention that former material witnesses for government constitute a particular social group); *Barrios v. Holder*, 581 F.3d 849, 854-55 (9th Cir. 2009) (rejecting petitioner's claim that he was a member of a particular social group as a young man in Guatemala who was targeted for gang recruitment but refused to join); *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009) (concluding "that a 'government informant' is not a member of a particular social group for purposes of asylum"); *Ramos-Lopez v. Holder*, 563 F.3d 855, 858-62 (9th Cir. 2009) (rejecting petitioner's claim that he was in a particular social group as a young Salvadoran man who was recruited by gangs and refused to join); *Donchev v. Mukasey*, 553 F.3d 1206, 1220 (9th Cir. 2009) (rejecting Bulgarian alien's claim that he was in a "particular social group" as a friend of the Roma people); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744-46 (9th Cir. 2008) (alien's proposed social group of young Salvadoran men who resist gang violence lacks both particularity and social visibility and thus is not a social group); *Toufighi v. Mukasey*, 538 F.3d 988, 997 (9th Cir. 2008) (explaining the court has never "recognized pro-Western as a social group protected against persecution"); *Arteaga v. Mukasey*, 511 F3d 940, 945-46 (9th Cir. 2007) (membership in violent criminal gang was not membership in a social group); *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (business owners in Colombia who rejected demands by narco-traffickers to participate in illegal activity was too broad a category to qualify as a particular social group); *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002) (evidence did not compel a finding that Guatemalan

applicant was persecuted on account of family membership); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1050-51 (9th Cir. 2000) (Kanjobal Indians comprising large percentage of population in a given area not a particular social group); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (persons of low economic status in China not a particular social group); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (former servicemen in Guatemalan military not a particular social group); *De Valle v. INS*, 901 F.2d 787, 792-93 (9th Cir. 1990) (family members of Salvadoran military deserter not a particular social group).

See also Ayala v. Holder, 640 F.3d 1095, 1098 (9th Cir. 2011) (per curiam) (even assuming proposed social group was cognizable, petitioner failed to show persecution was on account of membership in the group).

e. Political Opinion

"[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted 'on account of' a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted him (or that he faces the prospect of such persecution) *because of* his political opinion." *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (internal citation omitted); *see also Soriano v. Holder*, 569 F.3d 1162, 1165 (9th Cir. 2009) (concluding petitioner failed to establish persecution on account of political opinion where his "only act in opposition to organized crime was informing the police after his arrest about two individuals who had engaged in criminal activities"); *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007). In other words, that an applicant holds a political opinion "is not, by itself, enough to establish that any future persecution would be 'on account' of this opinion. He must establish that the political opinion would motivate his potential persecutors." *Njuguna v. Ashcroft*, 374 F.3d 765, 770 (9th Cir. 2004).

"[P]olitical opinion encompasses more than electoral politics or formal political ideology or action." *Ahmed*, 504 F.3d at 1192; *see, e.g.*, *Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (recognizing that an applicant's statements regarding the unfair distribution of food in Iraq resulted in the imputation of an anti-government political opinion), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (refusal to pay revolutionary tax to the NPA in the face of threats constitutes an expression of political belief), *superseded by statute on other grounds as stated by Parussimova*

v. Mukasey, 555 F.3d 734, 739-40 (9th Cir. 2009). "A political opinion can be an actual opinion held by the applicant, or an opinion imputed to him or her by the persecutor." *Ahmed*, 504 F.3d at 1192; *see also Sangha v. INS*, 103 F.3d 1482, 1488-89 (9th Cir. 1997); *see* Imputed Political Opinion, below.

(i) Organizational Membership

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

(ii) Refusal to Support Organization

An applicant may manifest a political opinion by his refusal to join or support an organization, or departing from the same. *See, e.g.*, *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (opposition to NPA), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (death threats and forced recruitment, where applicant did not agree with Salvadoran guerillas); *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997) (refusal to make payments to Shining Path guerilla movement), *amended by* 133 F.3d 726 (9th Cir. 1998) (order); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996) (refusal to support Sandinistas); *Gonzalez v. INS*, 82 F.3d 903, 906 (9th Cir. 1996) (same).

But see Barrios v. Holder, 581 F.3d 849, 854-55 (9th Cir. 2009) (rejecting petitioner's contention that he was persecuted on account of his political opinion based on his refusal to join a gang); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (petitioner's refusal to join gang did not prove persecution on account of a protected ground); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008) (alien's general aversion to gangs did not constitute a political opinion for asylum purposes).

(iii) Labor Union Membership and Activities

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

(iv) Opposition to Government Corruption

A whistleblower's exposure of government corruption "may constitute political activity sufficient to form the basis of persecution on account of political opinion." *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) (Filipino policeman and customs officer); *see also Baghdasaryan v. Holder*, 592 F.3d 1018, 1024 (9th Cir. 2010) ("Whistle-blowing against government corruption is an expression of political opinion."). "When the alleged corruption is inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily political." *Grava*, 205 F.3d at 1181. (distinguishing personal retaliation "completely untethered to a governmental system"); *see also Zhu v. Mukasey*, 537 F.3d 1034, 1044-45 (9th Cir. 2008) (applicant who was raped by her factory manager was repeatedly sought by police after writing a "letter to the town government [that] was more than a report of the rape: She condemned the appointment and protection - on the basis of family political connections - of people like the manager who raped her"); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007) (petitioner's "whistle-blowing was political because - in criticizing the local regime's failure to stop the extortion scheme - his acts were 'directed toward a governing institution' and not 'only against individuals whose corruption was aberrational.' (citation omitted)). "To qualify as a whistleblower, [petitioner] was not required to expose governmental corruption to the public at large. It was sufficient that [he] demonstrated that he suffered retaliation for acting against governmental corruption." *Fedunyak*, 477 F.3d at 1129; *see also Perez-Ramirez v. Holder*, 648 F.3d 953, 956 (9th Cir. 2011) ("Whistleblowing by a government employee against government officials engaged in corruption 'may constitute political activity sufficient to form the basis of persecution on account of political opinion' for the purposes of an asylum claim." (quoting *Grava*, 205 F.3d at 1177)); *Antonyan v. Holder*, 642 F.3d 1250, 1254 (9th Cir. 2011) (concluding

that petitioner's whistle-blowing constituted political opinion, as required for asylum); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1133-35 (9th Cir. 2004) (retaliation against Armenian applicant who protested government corruption demonstrated persecution on account of political opinion); *Hasan v. Ashcroft*, 380 F.3d 1114, 1121 (9th Cir. 2004) ("When a powerful political leader uses his political office as a means to siphon public money for personal use, and uses political connections throughout a wide swath of government agencies, both to facilitate and to protect his illicit operations, exposure of his corruption is inherently political."); *Njuguna v. Ashcroft*, 374 F.3d 765, 770-71 (9th Cir. 2004) (retaliation against Kenyan applicant who opposed government corruption by helping domestic servants escape was on account of political opinion); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245-46 (9th Cir. 1999) (death threats received after Colombian prosecutor investigated political corruption by opposition political party constituted persecution on account of political opinion); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (Haitian fisherman's refusal to accede to government extortion).

In *Perez-Ramirez*, this court held that where petitioner exposed the government corruption to his supervisor, and refused to accede to corrupt demands, his acts constituted political activity, qualifying him as a whistleblower of government corruption. 648 F.3d at 957-58.

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

(v) Neutrality

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

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

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

(vi) Other Expressions of Political Opinion

See Ahmed v. Keisler, 504 F.3d 1183, 1193 (9th Cir. 2007) (a native of Bangladesh and a Bihari who was a political organizer and who participated in a hunger strike and two political demonstrations); *Zhou v. Gonzales*, 437 F.3d 860, 867-69 (9th Cir. 2006) (petitioner demonstrated well-founded fear and clear probability of persecution on account of bringing illegal Falun Gong materials into China from abroad, which Chinese government viewed as political threat); *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (holding that applicant who was involved in translation and distribution of "The Satanic Verses" had a well-founded fear of persecution on account of political opinion); *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000) (Russian nuclear engineer's belief that his government should not sell nuclear technology to Iran); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (Salvadoran woman's resistance to rape and beating through flight constituted assertion of a political opinion opposing forced sexual subjugation), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc).

(vii) Imputed Political Opinion

"Imputed political opinion is still a valid basis for relief after *Elias-Zacarias*." *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992); *see also Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997). "An imputed political opinion arises when '[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views.'" *Baghdasaryan v. Holder*, 592 F.3d 1018, 1024 n.6, 1024-25 (9th Cir.

2010) (quoting *Canas-Segovia*, 970 F.2d at 602) (concluding that the record suggested a political opinion was imputed to alien, where "top law enforcement official indicated that [alien] was detained and beaten because he was 'defaming' and 'raising his head' against" government corruption). Under the imputed political opinion doctrine, the applicant's own opinions are irrelevant. *See Kumar v. Gonzales*, 444 F.3d 1043, 1054 (9th Cir. 2006) (Indian police persecuted applicant based on their false belief concerning his terrorist affiliation); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009). "[O]ur analysis focuses on how the persecutor perceived the applicant's actions and allegiances, and what motivated their abuse." *Agbuya v. INS*, 241 F.3d 1224, 1229 (9th Cir. 2001) (NPA perceived applicant to be an enemy of the laborers, the communist cause, and the NPA itself).

(A) Family Association

An imputed political opinion claim may arise from the applicant's associations with others, including family, organizational, governmental or personal affiliations, which cause assumptions to be made about him. *See Silaya v. Mukasey*, 524 F.3d 1066, 1070-71 (9th Cir. 2008) ("[E]vidence that the alleged persecutor acted because of a petitioner's family's political associations is sufficient to satisfy the motive requirement." (internal quotation marks and alteration omitted)). "Typically, where killings and other acts of violence are inflicted on members of the same family by government forces, the inference that they are connected and politically motivated is an appropriate one." *Navas v. INS*, 217 F.3d 646, 661 (9th Cir. 2000) (imputation of pro-guerilla political opinion by Salvadoran soldiers) (internal quotation marks omitted); *see also Lopez-Galarza v. INS*, 99 F.3d 954, 959-60 (9th Cir. 1996) (Sandinistas imputed a political opinion based on family's ties to former government); *cf. Sharma v. Holder*, 633 F.3d 865, 870-71 (9th Cir. 2011); *Sangha v. INS*, 103 F.3d 1482, 1489-90 (9th Cir. 1997) (Sikh failed to show that the militants imputed his father's Akali Dal political opinion to him).

(B) No Evidence of Legitimate Prosecutorial Purpose

"[I]f there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person … there arises a presumption that the motive for harassment is political." *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998)

(internal quotation marks omitted). Moreover, "extra-judicial punishment of suspected anti-government guerillas can constitute persecution on account of imputed political opinion." *Singh v. Ilchert*, 63 F.3d 1501, 1508-09 (9th Cir. 1995) (discussing difference between legitimate criminal prosecution and persecution), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (refusing to characterize death threats by Salvadoran security forces "as an example of legitimate criminal prosecution"), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) ("When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government's actions are politically motivated."), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009).

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

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

(C) Government Employees

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

(D) Other Cases Discussing Imputed Political Opinion

Pagayon v. Holder, 675 F.3d 1182, 1191 (9th Cir. 2011) (per curiam) ("A personal dispute is not, standing alone, tantamount to persecution based on an imputed political opinion."); *Zhu v. Mukasey*, 537 F.3d 1034, 1045 (9th Cir. 2008) (applicant who was raped by her factory manager and later wrote a letter to the town government complaining of corruption "established that the police repeatedly sought to arrest her on the basis of a political opinion imputed to her as the result of her whistle-blowing"); *Zhou v. Gonzales*, 437 F.3d 860, 869-70 (9th Cir. 2006) (importing and distributing material critical of Chinese government's treatment of Falun Gong practitioners could be imputed as anti-governmental political opinion); *Ndom v. Ashcroft*, 384 F.3d 743, 755-56 (9th Cir. 2004) (applicant was persecuted by Senegalese armed forces on account of imputed political opinion), *superseded in part by statute as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076-77 (9th Cir. 2004) (Guatemalan woman who was gang raped by soldiers was persecuted on account of a pro-guerilla political opinion imputed to her entire village); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (rape because of applicant's family's association with the previous Ethiopian government); *Rios v. Ashcroft*, 287 F.3d 895, 900-01 (9th Cir. 2002) (perceived to be political opponents of the Guatemalan guerillas); *Al-Harbi v. INS*, 242 F.3d 882, 890 (9th Cir. 2001) (imputed political opinion based on United States evacuation from Iraq); *Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (former Filipino intelligence officer feared retaliation for testifying against guerilla leaders); *Yazitchian v. INS*, 207 F.3d 1164, 1168 (9th Cir. 2000) (political opinion of prominent Dashnak imputed to Armenian couple); *Chanchavac v. INS*, 207 F.3d 584, 591 (9th Cir. 2000) (Guatemalan military accused applicant of being a guerilla when beating him); *Cordon-Garcia v. INS*, 204 F.3d 985, 991-92 (9th Cir. 2000) (Guatemalan guerilla abductor told applicant

that her teaching efforts undermined their recruitment efforts); *Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc) (Filipino military informant placed on NPA death list), *superseded in part by statute as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Ratnam v. INS*, 154 F.3d 990, 995-96 (9th Cir. 1998) (torture by Sri Lankan government on account of imputed political opinion); *Vera-Valera v. INS*, 147 F.3d 1036, 1039 (9th Cir. 1998) (president of street vendor's cooperative in Peru); *Velarde v. INS*, 140 F.3d 1305, 1312 (9th Cir. 1998) (bodyguard to former Peruvian President's family), *superseded in part on other grounds by Falcon Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003); *Meza-Manay v. INS*, 139 F.3d 759, 764 (9th Cir. 1998) (husband was member of Peruvian counter-insurgency unit); *Rodriguez-Roman v. INS*, 98 F.3d 416, 429-30 (9th Cir. 1996) (Cuban illegal departure statute imputes disloyalty); *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996) (Sandinista prison director); *Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995) (per curiam) (imputed beliefs of Sikh separatists); *Alonzo v. INS*, 915 F.2d 546, 549 (9th Cir. 1990) (refusal to join Guatemalan military); *Beltran-Zavala v. INS*, 912 F.2d 1027, 1029-30 (9th Cir. 1990) (based on friendship with Guatemalan guerilla supporter), *overruled in part on other grounds as recognized by Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) (imputed opinion based on employment by Salvadoran government); *Blanco-Lopez v. INS*, 858 F.2d 531, 533 (9th Cir. 1988) (false accusation that applicant was a Salvadoran guerilla), *superseded in part by statute as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) (Haitian's refusal to accede to extortion led to classification and treatment as a subversive); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (deliberate and cynical imputation of a political viewpoint by Salvadoran military official), *overruled in part on judicial notice grounds by Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

(viii) Opposition to Coercive Population Control Policies

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

The Immigration and Nationality Act now provides that:

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

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

(A) Forced Abortion

"The plain language of the statute provides that forced abortions are per se persecution and trigger asylum eligibility." *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was eligible for asylum and withholding). "[A]n asylum applicant seeking to prove he was subjected to a coercive family planning policy need not demonstrate that he was physically restrained during a 'forced' procedure. Rather, 'forced' is a much broader concept, which includes compelling, obliging, or constraining by mental, moral or circumstantial means, in addition to physical restraint." *Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004) (applicant suffered forced abortion where she was suspended from work for a month and required to attend birth control reeducation classes and was later forced into a van, driven to the hospital, and placed onto a surgical table for the abortion). 'Forced' does not require that the victim demonstrate resistance, that the victim have gone into hiding to avoid an abortion and that the abortion have been performed "pursuant to any official summons" or by "family planning officials," instead of by petitioner's employer. *Tang v. Gonzales*, 489 F.3d 987, 990-91 (9th Cir. 2007) (applicant suffered forced abortion where petitioner testified that he and his wife wanted to have a baby, that his wife was subject to a mandatory gynecological exam by her employer upon whom she

was economically dependent, that her employer's policy required her to have an abortion, that company representatives took her to a clinic to have the abortion performed and that the abortion was performed without anesthesia).

(B) Forced Sterilization

A person who has been forcibly sterilized, or his or her spouse, is automatically eligible for asylum. *See He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) (reversing BIA's negative credibility finding and holding that husband whose wife was forcibly sterilized after the birth of her second child, was entitled to asylum); *see also Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) ("Ge is automatically eligible for asylum if he can show that his wife was forced to undergo an abortion under China's one-child policy); *Zheng v. Ashcroft*, 397 F.3d 1139 (9th Cir. 2005) (same). However, in *Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1091-92 (9th Cir. 2010), the court held the BIA's most recent determination "that a spouse or unmarried partner of a victim of forced abortion is not presumptively eligible for refugee status" was entitled to deference.

The child of a parent forcibly sterilized is not automatically eligible for asylum. *Zhang v. Gonzales*, 408 F.3d 1239, 1244-46 (9th Cir. 2005) (upholding under *Chevron* deference the BIA's interpretation that 8 U.S.C. § 1101(a)(42)(B) does not apply to children of forcibly sterilized parents); *cf. Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (not deciding but suggesting that the children of forcibly sterilized parents might be automatically eligible for asylum). In *Zhang*, however, the court held that the child of forcibly sterilized parents may be able to establish persecution on account of her parents' resistance to China's population controls measures where she suffered hardships as a result of her father's forced sterilization, including economic deprivation, the limitation of her educational opportunities, and the trauma of witnessing her father's forcible removal from her home. *See Zhang*, 408 F.3d at 1249-50 (remanding for new asylum determination).

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

v. Ashcroft, 397 F.3d 1139, 1149 (9th Cir. 2005) (remanding the withholding of removal claim after determining that petitioner established a well-founded fear of persecution because the parties did not brief the issue).

(C) Other Resistance to a Coercive Population Control Policy

"In order to fit within the category of 'other resistance to a coercive population program,' an applicant must show that (1) the government was enforcing a coercive population program at the time of the pertinent events, and (2) the applicant resisted the program." *Lin v. Gonzales*, 472 F.3d 1131, 1134 (9th Cir. 2007) (beatings and threats of arrest for attempting to prevent birth control officials from confiscating and destroying family property constitute "other resistance" to a coercive population control program). An applicant's actions constitute resistance to a coercive population control program when the applicant physically or vocally resists birth control officials while the officials performed duties related to the birth control program. *Id*.

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

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

Likewise in *Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1094-95 (9th Cir. 2010), the court determined that the petitioner engaged in "other resistance" to China's coercive population control program, in light of his girlfriend's forced abortion, and his continued attempts to cohabit and marry in contravention of China's population control policy. *Id*. As a result of these actions, the petitioner suffered persecution. *Id*. at 1096-97.

(D) Family Members

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

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

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

See also Nai Yuan Jiang v. Holder, 611 F.3d 1086, 1092-95 (9th Cir. 2010) (giving deference to BIA's recent interpretation of asylum statute that determined a spouse or unmarried partner of a victim of forced abortion was not presumptively eligible for refugee status).

f. Prosecution

Ordinary prosecution for criminal activity is generally not persecution. *Lin v. Holder*, 610 F.3d 1093, 1097 (9th Cir. 2010) (per curiam); *Chanco v. INS*, 82 F.3d 298, 301 (9th Cir. 1996) (prosecution for involvement in military coup in the Philippines); *Mabugat v. INS*, 937 F.2d 426 (9th Cir. 1991) (prosecution for misappropriation of funds); *Fisher v. INS*, 79 F.3d 955, 961-62 (9th Cir. 1996) (en banc) (punishment for violation of Iranian dress and conduct rules); *Abedini v. INS*, 971 F.2d 188, 191-92 (9th Cir. 1992) (punishment for distribution of Western videos and films, use of false passport, and avoidance of conscription in Iran). "[W]here there is evidence of legitimate prosecutorial purpose, foreign authorities enjoy much latitude in vigorously enforcing their laws." *Singh v. Gonzales*, 439 F.3d 1100, 1112 (9th Cir. 2006); *see also Dinu v. Ashcroft*, 372 F.3d 1041, 1043-44 (9th Cir. 2004) (legitimate prosecutorial purpose existed for "heavy-handed" investigation of shootings during civil uprising).

"Understanding that persecution may appear in the guise of prosecution, [the court has] carved out exceptions to the general rule that applicants avoiding prosecution for violations of criminal law are ineligible for asylum. Chief among these exceptions to the general rule are disproportionately severe punishment and pretextual prosecution." *Li v. Holder*, 559 F.3d 1096, 1099 (9th Cir. 2009) (holding that "when a petitioner violates no Chinese law, but instead comes to the aid of refugees in defiance of China's unofficial policy of discouraging such aid, a BIA finding that the petitioner is a mere criminal subject to legitimate prosecution is not supported by substantial evidence.").

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

(i) Pretextual Prosecution

However, if the prosecution is motivated by a protected ground, and the punishment is sufficiently serious or disproportionate, the sanctions imposed could amount to persecution. *See Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (violation of Iranian law against public displays of affection can be basis for asylum claim); *see also Ahmed v. Keisler*, 504 F.3d 1183, 1195 (9th Cir. 2007). Additionally, "even if the government authorities' motivation for detaining and

mistreating [an applicant] was partially for reasons of security, persecution in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation, even if the persecution served intelligence gathering purposes." *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004) (past persecution by Senegalese armed forces) (internal quotation marks and alterations omitted), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *see also Li v. Holder*, 559 F.3d 1096, 1109 (9th Cir. 2009) (holding that "when a petitioner violates no Chinese law, but instead comes to the aid of refugees in defiance of China's unofficial policy of discouraging such aid, a BIA finding that the petitioner is a mere criminal subject to legitimate prosecution is not supported by substantial evidence."); *Navas v. INS*, 217 F.3d 646, 660 (9th Cir. 2000) ("If there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person … there arises a presumption that the motive for harassment is political." (internal quotation marks omitted)); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (extra-prosecutorial torture of Sri Lankan applicant, even if conducted for intelligence gathering purposes, constitutes persecution); *Rodriguez-Roman v. INS*, 98 F.3d 416, 427 (9th Cir. 1996) (severe punishment under Cuban illegal departure law); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (governmental harm without formal prosecutorial measures is persecution), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009).

(ii) Illegal Departure Laws

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

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

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

g. Military and Conscription Issues

(i) Conscription Generally Not Persecution

Forced military conscription, or punishment for evading compulsory military service is generally not persecution. *See, e.g.*, *Zehatye v. Gonzales*, 453 F.3d 1182, 1188 (9th Cir. 2006) (applicant presented no evidence of individualized threat, and weak, if any, evidence that she would be singled out for severe disproportionate punishment for refusing to serve in the Eritrean military due to her religious beliefs); *Padash v. INS*, 358 F.3d 1161, 1166-67 (9th Cir. 2004) (applicant presented no evidence that Iranian military sought to recruit or harm him on account of a statutory ground); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1150-51 (9th Cir. 2000) (attempts by military and guerillas to recruit Guatemalan not persecution absent evidence of discriminatory purpose); *Gonzalez v. INS*, 82 F.3d 903, 908 (9th Cir. 1996) (forced uniformed and armed national service did not amount to persecution of Nicaraguan Jehovah's Witness); *Ubau-Marenco v. INS*, 67 F.3d 750, 754 (9th Cir. 1995) (no evidence that petitioner was given active military duty in Cuba on account of his anti-communist views), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc); *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992) (punishment for avoiding military conscription in Iran not persecution); *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) (unmotivated Nicaraguan conscientious objector); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990) (conscription attempts by Guatemalan military not persecution absent indication that military knew of applicant's religious or political beliefs); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1005 (9th Cir. 1988) (per curiam) (as amended) (El Salvador); *Kaveh-Haghigy v. INS*, 783 F.2d 1321, 1323 (9th Cir. 1986) (per curiam) (conscription in Iran); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289-90 (9th Cir. 1984) (neutral Salvadoran male of military age did not establish well-founded fear of persecution).

(ii) Exceptions

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

(A) Disproportionately Severe Punishment

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

(B) Inhuman Conduct

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

(C) Moral or Religious Grounds

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

(iii) Participation in Coup

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

(iv) Military Informers

An informer for the military in a conflict that is "political at its core" would be perceived as a political opponent by the group informed upon. *Mejia v. Ashcroft*, 298 F.3d 873, 877 (9th Cir. 2002) ("[I]f an informer against the NPA appears on a NPA hit list, he has a well-founded fear of persecution based on imputed political opinion"); *see also Lim v. INS*, 224 F.3d 929, 934 (9th Cir. 2000) (NPA infiltrator); *Briones v. INS*, 175 F.3d 727, 728-29 (9th Cir. 1999) (en banc) (NPA infiltrator), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009).

(v) Military or Law Enforcement Membership

(A) Current Status

To the extent that an applicant fears that he will be targeted as a current member of the military, this danger does not constitute persecution on account of political opinion or membership in a social group. *See Cruz-Navarro v. INS*, 232 F.3d 1024, 1028-29 (9th Cir. 2000) (current member of Peruvian military); *Chanco v. INS*, 82 F.3d 298, 302-03 (9th Cir. 1996) (current member of Philippines' military); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) ("Military enlistment in Central America does not create automatic asylum eligibility."); *cf. Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) (Granting petition where Filipino whistle-blowing law enforcement officer feared political retribution by government, not mere criminals or guerilla forces).

(B) Former Status

However, an applicant's status based on his former service could be the basis for a claim based on social group or imputed political opinion. *See Velarde v. INS*, 140 F.3d 1305, 1311 (9th Cir. 1998) (former bodyguard to daughters of

former Peruvian president), *superseded by statute on other grounds as stated in Falcon Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (ex-soldier eligible for asylum because guerilla persecutors identified him politically with the Salvadoran government); *cf. Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (prior military service in Guatemala not a basis for asylum).

(vi) Non-Governmental Conscription

A guerilla group's attempt to conscript an asylum seeker does not necessarily constitute persecution on account of political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478, 481-82 (1992); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003). In order to establish asylum eligibility, the applicant must show that the guerillas will persecute him because of his political opinion, or other protected ground, rather than merely because he refused to fight with them. *Melkonian*, 320 F.3d at 1068 (holding that applicant was eligible for asylum because the Separatists specifically targeted him for conscription based on his Armenian ethnicity and religion); *see also Pedro-Mateo v. INS*, 224 F.3d 1147, 1150-51 (9th Cir. 2000) (indigenous Guatemalan not eligible for failure to show that forced recruitment was on account of statutory ground); *Tecun-Florian v. INS*, 207 F.3d 1107, 1109 (9th Cir. 2000) (Guatemalan not eligible when guerillas tortured him because he refused to join them); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 509 (9th Cir. 1999) (Guatemalan not eligible for failure to show that guerillas beat and threatened him on account of imputed political opinion rather than for refusal to join them); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (granting petition where substantial evidence did not support BIA's determination that Salvadoran guerillas' threats were merely recruitment attempts); *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989) (petition for review granted, pre *Elias-Zacarias*).

h. Cases Concluding No Nexus to a Protected Ground

Pagayon v. Holder, 675 F.3d 1182, 1191 (9th Cir. 2011) (per curiam) (even if petitioner could show a well-founded fear of reprisals by the National Police upon return to the Philippines, he could not show that reprisals would be based on an imputed political opinion); *Lin v. Holder*, 610 F.3d 1093, 1097 (9th Cir. 2010) (per curiam) ("Ordinary prosecution for criminal activity is not persecution 'on account' of a protected ground."); *Zetino v. Holder*, 622 F.3d 1007, 1015-16 (9th Cir. 2010) (where bandits had attempted to steal petitioner's grandfather's farm

and murdered his family members in El Salvador, petitioner failed to prove a nexus where there was no evidence that family was targeted on account of protected ground and petitioner testified motivation for acts of violence was the value of his grandfather's land); *Dinu v. Ashcroft*, 372 F.3d 1041, 1044-45 (9th Cir. 2004) (petitioner failed to meet his burden of proof that the authorities imputed a pro-Ceauşescu political opinion to him, or that the purported criminal investigation had no bona fide objective); *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) (random criminal acts bore no nexus to race); *Molina-Estrada v. INS*, 293 F.3d 1089, 1094-95 (9th Cir. 2002) (no evidence to compel finding that Guatemalan guerillas attacked petitioner's family on account of actual or imputed political opinion); *Ochave v. INS*, 254 F.3d 859, 865-66 (9th Cir. 2001) (no nexus between rape by NPA guerillas and any protected ground); *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (rape and murder of aunt by government politician in El Salvador was personal dispute); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000) (no evidence to show that guerillas imputed contrary political opinion to Peruvian police officer); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (kidnaping by Guatemalan government soldiers and guerillas not on account of political opinion, race or social group); *Kozulin v. INS*, 218 F.3d 1112, 1115-17 (9th Cir. 2000) (failed to prove attack was motivated by anti-Communist views); *Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000) (no imputed political opinion based on views of former husband); *Rivera-Moreno v. INS*, 213 F.3d 481, 486 (9th Cir. 2000) (no nexus between bombing of home and refusal to join guerillas); *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (random violence during civil strife in Armenia); *Bolshakov v. INS*, 133 F.3d 1279, 1281 (9th Cir. 1998) (criminal extortion and robbery by Russian thugs); *Sangha v. INS*, 103 F.3d 1482, 1488-91 (9th Cir. 1997) (Sikh applicant failed to provide direct or circumstantial evidence that the militants sought to recruit him on account of an actual or imputed political opinion); *Li v. INS*, 92 F.3d 985, 987-88 (9th Cir. 1996) (fear of punishment from unpaid smugglers); *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (en banc) (violation of restrictive dress and conduct rules did not establish persecution on account of religion or political opinion); *De Valle v. INS*, 901 F.2d 787, 791 (9th Cir. 1990) (rejecting claim of "doubly imputed" political opinion based on husband's desertion from Salvadoran army); *Florez-de Solis v. INS*, 796 F.2d 330, 335 (9th Cir. 1986) (violent collection of private debt or random crime during civil strife in El Salvador); *Zayas-Marini v. INS*, 785 F.2d 801, 806 (9th Cir. 1986) (death threats based on personal hostility); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984) (danger based on family's

ownership of strategically located house or non-commitment to either faction in El Salvador not on account of protected ground).

G. Exercise of Discretion

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

The Attorney General's ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion. *See Andriasian v. INS*, 180 F.3d 1033, 1040 (9th Cir. 1999); *Kalubi*, 364 F.3d at 1137 ("By statute, 'the Attorney General's discretionary judgment whether to grant [asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion.'" (quoting 8 U.S.C. § 1252(b)(4)(D)). An IJ abuses his discretion when he conflates his discretionary determination of whether an applicant is entitled to asylum with his non-discretionary determination concerning eligibility for asylum. *See Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004).

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

In exercising its discretion, the BIA must consider both favorable and unfavorable factors, including the severity of the past persecution suffered. *See Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995) (discussing likelihood of future persecution, severity of past persecution, alcohol rehabilitation, circumstances surrounding departure and entry into U.S., and criminal record in U.S.); *see also Gulla v. Gonzales*, 498 F.3d 911, 917-919 (9th Cir. 2007) (IJ

abused his discretion by giving little weight to the fear of persecution, by ignoring strong family ties to the US, by relying on the use of fraudulent documents to reach the US and by relying on the alleged circumvention of asylum and immigration procedures), *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (IJ abused his discretion in failing to balance favorable factors against factors identified as negative); *Andriasian v. INS*, 180 F.3d 1033, 1043-47 (9th Cir. 1999) (discussing petitioner's temporary stay in a third country); *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996) (discussing likelihood of future persecution and humanitarian considerations).

"There is no definitive list of factors that the BIA must consider or may not consider. Each asylum application is different, and factors that are probative in one context may not be in others. However, all relevant favorable and adverse factors must be considered and weighed." *Kalubi*, 364 F.3d at 1139, 1140 & n.6 (holding that the relevant factors in Kalubi's case were: membership in a terrorist organization, forum shopping, the likelihood of future persecution, separation from a spouse, and the applicant's health). "[T]he likelihood of future persecution is a particularly important factor to consider." *Id.* at 1141 (internal quotation marks omitted); *Gulla*, 498 F.3d 911; *Rodriguez-Matamoros*, 86 F.3d at 161.

Uncontested evidence that an applicant committed immigration fraud is sufficient to support the discretionary denial of asylum. *Hosseini v. Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006). In contrast, an applicant's entry into the United States using false documentation is worth little if any weight in balancing positive and negative factors. *Mamouzian*, 390 F.3d at 1138; *Gulla*, 498 F.3d at 917 (petitioner's use of false documents in fleeing country of origin is not a proper reason for denying asylum).

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

H. Remanding Under *INS v. Ventura*

In *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam), the Supreme Court held that where the BIA has not yet considered an issue, the proper course is to remand to allow the BIA to consider the issue in the first instance. *See also Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam); *Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011) (where BIA erred in concluding petitioner failed to establish nexus, the court remanded for BIA to consider in the

first instance whether government met its burden to rebut presumption of well-founded fear of future persecution); *Pannu v. Holder*, 639 F.3d 1225, 1226 (9th Cir. 2011) (remanding to BIA where law impacting case had changed considerably since the BIA's decision); *Zhu v. Mukasey*, 537 F.3d 1034, 1045 (9th Cir. 2008) (remanding for BIA to consider whether petitioner fulfilled burden of establishing well-founded fear of persecution); *Tekle v. Mukasey*, 533 F.3d 1044, 1056 (9th Cir. 2008) (where "the IJ has made an adverse credibility finding and has also concluded in the alternative that the petitioner is ineligible for asylum and other relief, and the BIA has affirmed on the basis of the IJ's adverse credibility finding, but has specifically declined to reach the issue of eligibility for asylum and other relief, we ordinarily must remand under *Ventura*"); *Silaya v. Mukasey*, 524 F.3d 1066, 1072 (9th Cir. 2008) (remanding for BIA to consider in the first instance whether to grant humanitarian asylum); *Fakhry v. Mukasey*, 524 F.3d 1057, 1065 (9th Cir. 2008) (remanding for agency to apply presumption of persecution and to determine if the government rebutted this presumption); *Huang v. Mukasey*, 520 F.3d 1006, 1008 (9th Cir. 2008) (remanding for the BIA to address in the first instances the IJ's finding that the petitioners failed to prove past or a well-founded fear of future persecution) (per curiam); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (reversing BIA's no-nexus finding and remanding for determination of changed circumstances); *Singh v. Ashcroft*, 362 F.3d 1164, 1172 (9th Cir. 2004) (reversing negative credibility finding and remanding for determination of eligibility); *Guo v. Ashcroft*, 361 F.3d 1194, 1204 (9th Cir. 2004) (reversing negative credibility finding and remanding for a determination of changed country conditions).

However, where the agency has already passed on the relevant issue, this court has remanded in some cases, but not in others. For example, in *Khup v. Ashcroft*, 376 F.3d 898, 904-05 (9th Cir. 2004), and *Baballah v. Ashcroft*, 367 F.3d 1067, 1078-78 (9th Cir. 2004), this court declined to remand because the IJ had already considered the applicants' eligibility for asylum and withholding. *See also Latu v. Mukasey*, 547 F.3d 1070, 1075-76 (9th Cir. 2008) (granting petition and declining government's request to remand under *Ventura* so BIA could consider modified categorical approach, where BIA already considered whether offense was a crime involving moral turpitude and all evidence had been presented to BIA). In contrast, in *Lopez v. Ashcroft*, 366 F.3d 799, 806 (9th Cir. 2004), this court held that the applicant had established past persecution, and determined that a remand for a redetermination of changed country conditions was "more consistent with the spirit and reasoning of *Ventura*." *See also Jahed v. INS*, 356 F.3d 991, 1001 (9th Cir. 2004) (remanding withholding claim).

The ordinary remand rule is unnecessary where the applicant is automatically eligible for asylum. *See He v. Ashcroft*, 328 F.3d 593, 603-04 (9th Cir. 2003) (holding that applicant was statutorily eligible for asylum based on the forced sterilization of his spouse); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (reversing negative credibility finding and holding that applicant who had two forced abortions and an IUD inserted was statutorily eligible for asylum and withholding); *cf. Chen v. Ashcroft*, 362 F.3d 611, 621-23 (9th Cir. 2004) (reversing negative credibility finding and remanding to allow BIA to determine whether the involuntary insertion of an IUD and the imposition of a large fine for an unauthorized pregnancy constituted past persecution, and whether she had a well-founded fear of future persecution); *Lin v. Gonzales*, 472 F.3d 1131, 1136 (9th Cir. 2007) (finding that petitioner resisted a coercive population control program and remanding to allow BIA to determine whether petitioner suffered past persecution or has a well-founded fear of future persecution in connection with resistance).

Remand is inappropriate where the court would be compelled to hold that petitioner has established eligibility for asylum and withholding of removal. *See Fedunyak v. Gonzales*, 477 F.3d 1126, 1130-31 (9th Cir. 2007) (where IJ concluded that petitioner qualified for relief under the Convention Against Torture and risk of torture derived in part from petitioner's political resistance to the government's extortion schemes, petitioner "easily met the lesser burden of establishing a well-founded fear of persecution" and demonstrated the existence of a clear probability of future persecution).

Remand may not be warranted where the government waives an argument by failing to raise it or fails to submit evidence on an issue before the agency. *See, e.g.*, *Mashiri v. Ashcroft*, 383 F.3d 1112, 1123 n.7 (9th Cir. 2004) (remand unnecessary where government failed to rebut substantial evidence that internal relocation was neither safe nor feasible); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 n.11 (9th Cir. 2004); *Ndom v. Ashcroft*, 384 F.3d 743, 756 (9th Cir. 2004) (INS failed to put forth argument or evidence of changed country conditions), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1135 (9th Cir. 2004) (same).

Note the court generally does "not remand a case to the BIA to apply the modified categorical approach 'where only legal questions remain and these questions do not invoke the Board's expertise; all relevant evidence regarding the conviction had been presented to the BIA in earlier proceedings; and the BIA had

already once determined that the offense fell within the generic definition of the crime, even if only at the categorical stage.'" *Flores-Lopez v. Holder*, 685 F.3d 857, 865 (9th Cir. 2012) (quoting *Fregozo v. Holder*, 576 F.3d 1030, 1036 (9th Cir. 2009)).

I. Derivative Asylees

"A spouse or child … of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien." *Ma v. Ashcroft*, 361 F.3d 553, 561 n.10 (9th Cir. 2004) (quoting 8 U.S.C. § 1158(b)(3)); *see also* 8 C.F.R. § 1208.21. An individual who is eligible for asylum in her own right cannot benefit from the derivative status set forth in § 1158(b)(3). *Ma*, 361 F.3d at 560-61. Although minor children may obtain asylum derivatively through their parents, there is no comparable provision permitting parents to obtain relief derivatively through their minor children. *See* 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 207.7(b)(6) (stating that parents, siblings, grandparents, grandchildren and other relatives of a refugee are ineligible for accompanying or follow-to-join benefits); *but see Abebe v. Gonzales*, 432 F.3d 1037, 1043 (9th Cir. 2005) (en banc) (remanding for BIA to consider in the first instance whether parents of a U.S. citizen child likely to face persecution in their native country may qualify derivatively for asylum).

J. Bars to Asylum

1. One-Year Bar

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her application for asylum was filed within one year after arrival in the United States. *See Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001), *superseded by statute as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007); *see also* 8 U.S.C. § 1158(a)(2)(B), "The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later." 8 C.F.R. § 1208.4(a)(2)(ii). The first day of the one-year period for filing an asylum application is the day after the alien arrived in the United States. *See Minasyan v. Mukasey*, 553 F.3d 1224, 1227 (9th Cir. 2009). "Where … the government alleges an alien's arrival date in the Notice to Appear, and the alien admits the government's allegation before the IJ, the allegations are considered judicial admissions rendering the arrival date undisputed." *Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009); *see also*

Hakopian v. Mukasey, 551 F.3d 843, 847 (9th Cir. 2008) (holding government's allegation of arrival date in Notice to Appear, and alien's subsequent admission of the allegation, constituted judicial admission of the date as the date of entry, and thus the IJ erred in determining the application was time-barred); *cf. Cortez-Pineda v. Holder*, 610 F.3d 1118, 1122 (9th Cir. 2010) (in regard to special rule cancellation under NACARA explaining that *Hakopian* made clear that "that an entry date alleged in a Notice to Appear might not bind the IJ if the Notice to Appear is amended or if, … , the entry date is subsequently contested" and concluding that government should not be held to have made a binding judicial admission about petitioner's entry date because the government "vigorously disputed" it); *Lin v. Holder*, 610 F.3d 1093, 1096 (9th Cir. 2010) (per curiam) ("[F]acts are undisputed, even if the exact departure and arrival dates are unclear, if 'any view of the historical facts necessarily establishes that [the alien] filed his asylum application within one year of arrival." (quoting *Khunaverdiants v. Mukasey*, 548 F.3d 760, 765 (9th Cir. 2008)).

Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. *Hakeem*, 273 F.3d at 815; *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002). However, § 106 of REAL ID Act restored jurisdiction over constitutional claims and questions of law. *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *see also Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011) (en banc) (one-year bar determination not reviewable absent a legal or constitutional question); *Tamang v. Holder*, 598 F.3d 1083, 1088 (9th Cir. 2010). "[Q]uestions of law, as it is used in section 106, extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (per curiam) (holding that court had jurisdiction over whether "changed circumstances" excepted the application from the deadline because the issue was a question of the application of a statutory standard to undisputed facts). "[F]acts are undisputed, even if the exact departure and arrival dates are unclear, if 'any view of the historical facts necessarily establishes that [the alien] filed his asylum application within one year of arrival." *Lin v. Holder*, 610 F.3d 1093, 1096 (9th Cir. 2010) (per curiam) (quoting *Khunaverdiants v. Mukasey*, 548 F.3d 760, 765 (9th Cir. 2008). The court "may review the agency's application of the changed or extraordinary circumstances exception to undisputed facts." *Singh v. Holder*, 656 F.3d 1047, 1051 (9th Cir. 2011).

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

Cross-reference: Jurisdiction Over Immigration Petitions.

a. Exceptions to the Deadline

"[T]he Government may still consider a late application if the applicant establishes (1) changed circumstances that materially affect the applicant's eligibility for asylum or (2) extraordinary circumstances directly related to the delay in filing an application." *Singh v. Holder*, 656 F.3d 1047, 1052 (9th Cir. 2011). "[T]he applicant need only provide evidence '[t]o the satisfaction of … the immigration judge … that he or she qualifies for an exception to the 1-year deadline[.]'" *Id*. at 1052-53 (quoting 8 C.F.R. § 1208.4(a)(2)(i)(B)) (concluding IJ erred by holding petitioner to "clear and convincing" standard). If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. *See* 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4) & (5). The court held in *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (per curiam), a case where the facts were undisputed, that it had jurisdiction over the "changed circumstances" question because it was a mixed question of fact and law. *See also Chen v. Mukasey*, 524 F.3d 1028, 1031 (9th Cir. 2008) ("Under the Real ID Act, this court may review the BIA's interpretation of the 'changed circumstances' exception to the asylum statute." (citation omitted)); *see also Taslimi v. Holder*, 590 F.3d 981, 984-85 (9th Cir. 2010) (exercising jurisdiction over whether petitioner filed her asylum application within a "reasonable period" given the changed circumstances presented by her religious conversion, and concluding that asylum application was filed within reasonable time). Similarly, the court has jurisdiction over the "extraordinary circumstances" question where facts are undisputed. *See, e.g., Toj-Culpatan v. Holder*, 612 F.3d 1088, 1090 (9th Cir. 2010) (per curiam). For example, the court has held that a "claim to 'extraordinary circumstances' arising from a legal status maintained until a 'reasonable period' before the filing of an asylum application" presented a question of law that may be reviewed where the underlying facts were undisputed. *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008) (holding that 364-day delay after alien's nonimmigrant status expired was not a "reasonable period" in the absence of any explanation); *see also Viridiana v. Holder*, 646 F.3d 1230, 1234, 1238 (9th Cir. 2011) (exercising jurisdiction to determine whether extraordinary circumstances warranted equitable tolling of filing period for asylum application and concluding that fraudulent deceit

by non-attorney immigration consultant can amount to an extraordinary circumstance for the delay in filing); *Vahora v. Holder*, 641 F.3d 1038, 1042 (9th Cir. 2011) (religious riots that began after petitioner left India, and its subsequent impact on his family constituted changed circumstances to excuse late filing of asylum application); *Toj-Culpatan*, 612 F.3d at 1091 (rejecting petitioner's contention that his case fit within 8 C.F.R. § 1208.4(a)(5)(v), which provides extraordinary circumstances may include a case where the application was filed and returned to the applicant, where petitioner failed to refile within a reasonable time); *Tamang v. Holder*, 598 F.3d 1083, 1090-91 (9th Cir. 2010) (no extraordinary circumstances, but even if there were, application not filed in reasonable time); *Wakkary v. Holder*, 558 F.3d 1049, 1058-59 (9th Cir. 2009) (considering question of whether the petitioner's delay in filing his asylum application was "reasonable under the circumstances" within the meaning of 8 C.F.R. § 208.4(a)(5) and remanding); *Dhital v. Mukasey*, 532 F.3d 1044, 1049-50 (9th Cir. 2008) (per curiam) (holding that BIA properly concluded alien lost nonimmigrant status when he failed to enroll in a semester of college classes, and that alien then failed to file application within a "reasonable period" when he waited 22 months without further explanation for delay). *Contrast Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) (pre-REAL ID and pre-*Ramadan* case, declining to exercise jurisdiction over extraordinary circumstances question citing 8 U.S.C. § 1158(a)(3)).

To determine whether the reasons for petitioner's delay in filing an asylum application is reasonable, the court considers the reasons given to justify the delay, as well as the length of the delay in filing. *See Wakkary*, 558 F.3d at 1058-59 (concluding that reasons for the delay were reasonable and remanding for agency to consider whether delay of just over six months constituted a "reasonable period" as required by the regulations); *see also Taslimi*, 590 F.3d at 987-88 (exercising jurisdiction over whether petitioner filed her asylum application within a "reasonable period" given the changed circumstances presented by her religious conversion, and concluding that asylum application was filed within reasonable time).

The court also has jurisdiction to review a claim that an IJ failed to address the argument that an asylum application was untimely due to extraordinary circumstances. *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (remanding).

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

2. Previous Denial Bar

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

3. Safe Third Country Bar

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

The United States and Canada entered into a bilateral agreement, effective December 29, 2004, which recognizes that both countries "offer generous systems of refugee protection" and provides, subject to exceptions, that aliens arriving in the United States from Canada at a land border port-of-entry shall be returned to Canada to seek protection under Canadian immigration law. *See* "The Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries," U.S.-Can., Dec. 5, 2002, *available at* http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp. The Agreement indicates that an alien may apply for asylum, withholding of removal or protection under the Convention Against Torture in one or the other, but not both, countries. *See also* 8 C.F.R. § 208.30(e)(6) (implementing regulation); 69 FR 69480 (Nov. 29, 2004) (rules implementing United States-Canada agreement).

4. Firm Resettlement Bar

As of October 1, 1990, an applicant may not be granted asylum if he or she "was firmly resettled in another country prior to arriving in the United States." *See* 8 U.S.C. § 1158(b)(2)(A)(vi); *see also She v. Holder*, 629 F.3d 958, 962 (9th Cir. 2010). Prior to October 1, 1990, firm resettlement was merely one of the factors to be considered in evaluating an asylum claim as a matter of discretion. *See Maharaj v. Gonzales*, 450 F.3d 961, 968-69 (9th Cir. 2006) (en banc) (recounting the history of the firm resettlement doctrine). A finding of firm resettlement is a factual determination reviewed for substantial evidence. *Id*. at 967; *see also Mengstu v. Holder*, 560 F.3d 1055, 1059 (9th Cir. 2009).

The definition of firm resettlement is currently found at 8 C.F.R. § 1208.15. "Subject to two exceptions, an alien has firmly resettled if, prior to arrival in the United States, he or she entered another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 819 (9th Cir. 2004) (internal quotation marks omitted); *see also Mengstu*, 560 F.3d at 1059. An applicant who received an offer of permanent resettlement will not be firmly resettled if he can establish:

> (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or
>
> (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of

> entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

8 C.F.R. § 1208.15.

The government bears the initial burden of showing by direct or indirect evidence an offer of permanent resident status, citizenship, or some other type of permanent resettlement. *Maharaj*, 450 F.3d at 972; *see also Mengstu*, 560 F.3d at 1059. Whether relying on direct or circumstantial evidence, the focus of the firm resettlement inquiry remains on *an offer* of permanent resettlement. *Maharaj*, 450 F.3d at 972 The fact that a country offers a process for applying for some type of refugee or asylum status is not the same as offering the status itself. *Maharaj*, 450 F.3d at 977. However, an applicant may have an offer if he or she is entitled to permanent resettlement and all that remains in the process is for the applicant to complete some ministerial act. *Id*. Thus, the firm resettlement bar may apply if the applicant chooses to walk away instead of completing the process and accepting the third country's offer of permanent resettlement. *Id*. The fact that an applicant no longer has travel authorization does not preclude a finding of permanent resettlement when the applicant has permitted his documentation to lapse. *Id.* at 969 (citing *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998) and *Yang v. INS*, 79 F.3d 932 (9th Cir. 1996)).

Once the government presents evidence of an offer of some type of permanent resettlement, the burden shifts to the applicant to show that the nature of his stay and ties was too tenuous, or the conditions of his residence too restricted, for him to be firmly resettled. *Maharaj*, 450 F.3d at 976-77; *see also She*, 629 F.3d at 962 ("If the government establishes firm resettlement, the burden shifts to the alien to show, by a preponderance of the evidence, that the nature of his stay and ties was too tenuous for her to be firmly resettled." (internal quotation marks and citation omitted)).

For further discussion of the firm resettlement doctrine, *see Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir. 1998) (discussing the former firm resettlement regulation, 8 C.F.R. § 208.14(c) (1997)). *See also Mengstu*, 560 F.3d at 1060 (concluding IJ's finding as to firm resettlement was not supported by substantial evidence); *Camposeco-Montejo*, 384 F.3d 814, 820-21(9th Cir. 2004) (Guatemalan was not firmly resettled in Mexico because he did not receive an offer of permanent resettlement, was restricted to the municipality in which his refugee camp was located, was not allowed to attend Mexican schools, and was threatened

with repatriation); *Andriasian v. INS*, 180 F.3d 1033, 1043-47 (9th Cir. 1999) (ethnic Armenian from Azerbaijan was not firmly resettled because he was harassed and threatened in Armenia, and accused of being loyal to the Azerbaijanis); *Yang v. INS*, 79 F.3d 932, 934-39 (9th Cir. 1996) (discussing 1990 firm resettlement regulation).

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

5. Persecution of Others Bar

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

Determining whether an applicant assisted in the persecution of others "requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability." *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 (9th Cir. 2006). "Whether [petitioner's] assistance was material is measured by examining the degree of relation his acts had to the persecution itself: How instrumental to the persecutory end were those acts? Did the acts further the persecution, or were they tangential to it?" *Id.* at 928 (serving as a military interpreter during interrogation and torture of suspected Peruvian Shining Path members constituted persecution of others due to integral role in persecution); *see also Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) (IJ failed to conduct a particularized evaluation to determine Bosnian applicant's individual

accountability for persecution). "This standard does not require actual trigger-pulling … but mere acquiescence or membership in an organization, is insufficient to satisfy the persecutor exception." *Miranda Alvarado*, 449 F.3d at 927 (internal citations omitted); *see also Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004) (recognizing that merely being a member of an organization that persecutes others is insufficient for persecutor of others bar to apply).

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

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

The Supreme Court recently held in *Negusie v. Holder*, 555 U.S. 511 (2009) that the BIA failed to exercise its authority to interpret the statute, and misapplied *Fedorenko* as mandating that whether an alien is compelled to assist in persecution is immaterial for prosecutor-bar purposes. The Court remanded explaining that the BIA must interpret the statute in the first instance to determine whether the statute permits such an interpretation based on a different course of reasoning. *Negusie*, 555 U.S. at 521-22.

6. Particularly Serious Crime Bar

An applicant in removal proceedings is barred from relief if, "having been convicted by a final judgment of a particularly serious crime, [he] constitutes a danger to the community in the United States." *See* 8 U.S.C. § 1158(b)(2)(A)(ii); *see also Kankamalage v. INS*, 335 F.3d 858, 864 (9th Cir. 2003) (noting that this statutory provision applies only to immigration proceedings commenced on or

after April 1, 1997). A person convicted of a particularly serious crime is considered per se to be a danger to the community. *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987) (upholding BIA's decision not to balance the seriousness of the offense [drug possession and trafficking] against the degree of persecution feared in El Salvador); *see also Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994) (noting that the bar "is based on the reasonable determination that persons convicted of particularly serious crimes pose a danger to the community"), *abrogated on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam).

A person convicted of an aggravated felony "shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i); *see also Rendon v. Mukasey*, 520 F.3d 967, 976 (9th Cir. 2008).

If an applicant pled guilty to the crime before October 1, 1990, the particularly serious crime bar cannot be applied to categorically deny relief. *See Kankamalage*, 335 F.3d at 864. Instead, the conviction may be considered in the exercise of discretion. *Id.*

"'[A]ll reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.'" *Anaya-Ortiz v. Holder*, 594 F.3d 673, 677-78 (9th Cir. 2010) (quoting omitted) (quoting *Matter of N-A-M-*, 245 I. & N. Dec. 336, 342 (BIA 2007) and concluding that BIA's interpretation of the evidence that may be considered in a particularly serious crime determination was reasonable). An alien's own testimony qualifies as the sort of "reliable information" that may be considered. *See Anaya-Ortiz*, 594 F.3d at 678-79 (concluding that BIA's reliance on alien's own testimony was proper, and that BIA applied correct legal standard in determining alien's drunk driving conviction constituted a particularly serious crime).

The "'Attorney General may designate by regulation offenses that will be considered to be a [particularly serious] crime … .'" *See Delgado v. Holder*, 648 F.3d 1095, 1102 (9th Cir 2011) (en banc) (quoting 8 U.S.C. § 1158(b)(2)(B)(ii)). The Attorney General may also determine by adjudication that a crime is particularly serious without first classifying it by regulation. *See Delgado*, 648 F.3d at 1098.

Note that while the court has jurisdiction to review the "particularly serious crime" bar issue in the context of asylum, *see id.* at 872, the court lacks jurisdiction to review the merits of the BIA's determination that a conviction is a particularly serious crime for purposes of withholding of removal, *see id.* at 870-71.

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

7. Serious Non-Political Crime Bar

An applicant is barred from relief if there are serious reasons for believing that he or she committed a serious, non-political crime outside the United States prior to arrival. 8 U.S.C. § 1158(b)(2)(A)(iii); *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1986) ("serious reasons for believing" means probable cause), *overruled in part on other grounds by Barapind v. Enomoto*, 400 F.3d 744, 751 n.7 (9th Cir. 2005) (en banc). The IJ is not required to balance the seriousness of the offense against the degree of persecution feared. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999). The court interprets "serious reasons to believe as being tantamount to probable cause." *Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011) (internal quotation marks and citation omitted)).

8. Security Bar

An applicant is ineligible for asylum if there are reasonable grounds for regarding the alien as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv); *Malkandi v. Holder*, 576 F.3d 906, 914-917 (9th Cir. 2009) (concluding substantial evidence supported the adverse national security finding that the alien, an Iraqi Kurd, was a danger to national security, and therefore ineligible for asylum and withholding of removal).

9. Terrorist Bar

An applicant is ineligible for asylum if he is inadmissible or removable for reasons relating to terrorist activity, unless in the case of an applicant inadmissible as a representative of a terrorist organization or group that espouses or endorses terrorist activity, the Attorney General determines in his discretion that there are not reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(v). *See also Annachamy v. Holder*, 686 F.3d 729, 732-33 (9th Cir. 2012) (mandate pending); *Khan v. Holder*, 584 F.3d 773, 777-78, 785 (9th Cir. 2009) (concluding that IJ's decision that alien belonged

to a "terrorist organization," rendering him ineligible for asylum and withholding of removal, was supported by substantial evidence).

In *Cheema v. Ashcroft*, this court analyzed a prior version of the statute, INA § 208 (repealed 1996), which permitted a discretionary waiver of the terrorist asylum bar to any applicant excludable or deportable for reasons relating to terrorist activity, if the Attorney General determined that there were not reasonable grounds for regarding an applicant as a danger to the security of the United States. *See* 383 F.3d 848 (9th Cir. 2004). The court explained that the "statute imposes a two-prong analysis: (1) whether an alien engaged in a terrorist activity, and (2) whether there are not reasonable grounds to believe that the alien is a danger to the security of the United States." *Id*. at 855-56. Given this two-prong inquiry, the court held that the BIA erred by focusing solely on terrorist activity in concluding that Cheema was a danger to the security of the United States. *Id.* at 857-58; *cf. Bellout v. Ashcroft*, 363 F.3d 975, 978-79 (9th Cir. 2004) (applying a newer version of the statute that does not include the two-prong test and concluding that the applicant was barred from withholding due to his terrorist activities), *superseded by statute on other grounds as stated in Khan v. Holder*, 584 F.3d 773, 779-80 (9th Cir. 2009).

Note that as to all removal proceedings instituted before, on, or after the effective date of May 11, 2005, the REAL ID Act expanded the definitions of terrorist organizations and terrorist related activities. *See* Pub. L. No. 109-13, §§ 103-105, 119 Stat. 231 (2005), 8 U.S.C. §§ 1182(a)(3)(B), 1227(a)(4)(B*)*. *See e.g., Khan*, 584 F.3d at 778-79 (IJ issued a supplemental decision to account for changes made to the INA by the REAL ID Act). Also note that "the amendments to § 1182, which expanded the definitions of terrorist organizations and terrorist-related activities, were given retroactive effect" and thus apply to cases where the application for asylum was filed before the enactment of the REAL ID Act. *See Haile v. Holder*, 658 F.3d 1122, 1126 n.3 (9th Cir. 2011).

In *Annachamy*, the court addressed the "material support bar" found in 8 U.S.C. § 1182(a)(3)(B)(iv)(IV) and held there was not "political offense exception to the material support bar. 686 F.3d at 733-34. Additionally, the court determined there is no "duress" exception to the "material support bar." *See id*. at 734-38.

III. WITHHOLDING OF REMOVAL OR DEPORTATION

An application for asylum under 8 U.S.C. § 1158 is generally considered an application for withholding of removal under 8 U.S.C. § 1231(b)(3), (INA § 241(b)(3)), as well. *See* 8 C.F.R. § 1208.3(b); *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006); *Ghadessi v. INS*, 797 F.2d 804, 804 n.1 (9th Cir. 1986). Where deportation or exclusion proceedings were commenced before April 1, 1997, withholding of deportation is available under former 8 U.S.C. § 1253(h) (INA § 243(h)). Withholding codifies the international norm of "nonrefoulement" or non-return to a country where an applicant would face persecution. *See Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1998) (en banc), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("The basic withholding provision … parallels Article 33 [of the Refugee Convention], which provides that no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [a protected ground].") (internal quotation marks and alteration omitted).

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

A. Eligibility for Withholding

1. Higher Burden of Proof

"To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that he would be subject to persecution on one of the specified grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation marks omitted); *see also INS v. Stevic*, 467 U.S. 407, 430 (1984); *Tamang v. Holder*, 598 F.3d 1083, 1091 (9th Cir. 2010); *Hanna v. Keisler*, 506 F.3d 933, 940 (9th Cir. 2007); *Zehatye v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006); 8 C.F.R. § 1208.16(b)(2). "This clear probability standard for withholding of removal is more stringent than the well-founded fear standard governing asylum." *Al-Harbi*, 242 F.3d at 888-89 (internal quotation marks and citation omitted); *see*

also Viridiana v. Holder, 646 F.3d 1230, 1239 (9th Cir. 2011); *Tamang*, 598 F.3d at 1091; *Zehatye*, 453 F.3d at 1190; *Sowe v. Mukasey*, 538 F.3d 1281, 1288 (9th Cir. 2008) ("When the government rebuts an applicant's well-founded fear of future persecution, it defeats the applicant's asylum claim, *and* his or her claim for withholding of removal."); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130-31 (9th Cir. 2007). The standard has "no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that [the alien] will be subject to persecution upon deportation." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987); *Zehatye*, 453 F.3d at 1190.

An applicant who fails to satisfy the lower standard of proof for asylum necessarily fails to satisfy the more stringent standard for withholding of removal. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003); *see also Zehatye*, 453 F.3d at 1190. However, if asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Huang v. INS*, 436 F.3d 89, 95 (9th Cir. 2006); *Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994).

2. Mandatory Relief

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

3. Nature of Relief

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

4. Past Persecution

Past persecution generates a presumption of eligibility for withholding of removal. *See Mutuku v. Holder*, 600 F.3d 1210, 1213 (9th Cir. 2010); *Tamang v. Holder*, 598 F.3d 1083, 1091 (9th Cir. 2010); *Mousa v. Mukasey*, 530 F.3d 1025,

1030 (9th Cir. 2008) ("[A] petitioner can generate a presumption of eligibility for withholding of removal by showing past persecution."); *Hanna v. Keisler*, 506 F.3d 933, 940 (9th Cir. 2007); *Ahmed v. Keisler*, 504 F.3d 1183, 1199 (9th Cir. 2007); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130-31 (9th Cir. 2007); *Baballah v. Ashcroft*, 367 F.3d 1067, 1079 (9th Cir. 2004); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000), *superseded by statute on other grounds as stated by Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1164 (9th Cir. 1999); *Korablina v. INS*, 158 F.3d 1038, 1046 (9th Cir. 1998); *see also* 8 C.F.R. § 1208.16(b)(1)(i) (if past persecution, "it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim"). The presumption may be rebutted if the government establishes "by a preponderance of the evidence" that: (A) that there has been a fundamental change in circumstances; or (B) the applicant could reasonably relocate internally to avoid a future threat to life or freedom. 8 C.F.R. § 1208.16(b)(1)(i), (ii); *see also Mutuku*, 600 F.3d at 1213; *Tamang*, 598 F.3d at 1091; *Mousa*, 530 F.3d at 1030; *Hanna*, 506 F.3d at 940.

5. Future Persecution

The INA's regulations provide "two routes" by which an alien can establish the objective risk of future persecution – he may show that he will be singled out individually or that there is a systematic pattern or practice of persecution against the group to which he belongs in his home country. *See Wakkary v. Holder*, 558 F.3d 1049, 1060 (9th Cir. 2009); *see also* 8 C.F.R. §§ 1208.13(b)(2)(iii), 208.16(b)(2)(i)(ii). The disfavored group analysis used in asylum claims is also applicable in the context of withholding of removal. *See Wakkary*, 558 F.3d at 1065.

6. No Time Limit

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

7. Firm Resettlement Not a Bar

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

8. Entitled to Withholding

Taslimi v. Holder, 590 F.3d 981, 983 (9th Cir. 2010) (IJ concluded that petitioner was eligible for withholding of removal because petitioner showed it was more likely than not that her life or freedom would be threatened in Iran on account of her religion); *Ahmed v. Keisler*, 504 F.3d 1183, 1200 (9th Cir. 2007) (concluding that substantial evidence failed to support finding that petitioner, a native of Bangladesh and a Bihari, was not entitled to withholding of removal); *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130-31 (9th Cir. 2007) (harassment, death threats and beatings in retaliation for exposing government corruption entitles petitioner to withholding of removal); *Tang v. Gonzales*, 489 F.3d 987, 992 (9th Cir. 2007) (holding that victims of forced abortion are entitled to withholding of removal); *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004) (past persecution by Senegalese armed forces), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *El Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004) (as amended) (stateless Palestinians in Kuwait subjected to severe economic discrimination); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (applicant's family persecuted and applicant threatened by government for Falun Gong practice); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (arrest, torture and killing of fellow preachers, military pursuit and documented history of human rights abuses in Burma); *Njuguna v. Ashcroft*, 374 F.3d 765, 772 (9th Cir. 2004) (applicant threatened and family members in Kenya attacked and imprisoned); *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (applicant harassed and forced to have two abortions and an IUD inserted); *Baballah v. Ashcroft*, 367 F.3d 1067, 1079 (9th Cir. 2004) (applicant and family suffered severe harassment, threats, violence and discrimination); *Ruano v. Ashcroft*, 301 F.3d 1155, 1162 (9th Cir. 2002) (applicant received multiple death threats at home and business, was "closely confronted" and actively chased); *Cardenas v. INS*, 294 F.3d 1062, 1068 (9th Cir. 2002) (direct threats by Shining Path guerillas); *Rios v. Ashcroft*, 287 F.3d 895, 902-03 (9th Cir. 2002) (kidnaped and wounded by guerillas, husband and brother killed); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074-75 (9th Cir. 2002) (death threats combined with harm to family and murders of his counterparts), *as amended by* 290 F.3d 964 (9th Cir. 2002) (order); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. 2001) (harassed, fired, interrogated, threatened, assaulted and arrested); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on evacuation from Iraq by United States); *Agbuya v. INS*, 241 F.3d 1224, 1231 (9th Cir. 2001) (kidnaped, falsely imprisoned, hit, threatened with a gun by NPA); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000) (past torture by Indian authorities), *superseded by statute on*

other grounds as stated by Aden v. Holder, 589 F.3d 1040, 1044 (9th Cir. 2009); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (per curiam) (arrested, tortured, and scarred); *Tagaga v. INS*, 228 F.3d 1030, 1035 (9th Cir. 2000) (past sentence and would face treason trial if returned); *Bandari v. INS*, 227 F.3d 1160, 1169 (9th Cir. 2000) (past persecution of religious minority who engaged in prohibited interfaith co-mingling); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (rape and assault by Mexican police); *Zahedi v. INS*, 222 F.3d 1157, 1168 (9th Cir. 2000) (summoned for interrogation based on effort to translate and distribute banned book in Iran); *Shah v. INS*, 220 F.3d 1062, 1072 (9th Cir. 2000) (husband killed, applicant and family threatened in India); *Maini v. INS*, 212 F.3d 1167, 1177-78 (9th Cir. 2000) (physical attacks, death threats, and harassment at home, school and work in India); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1246 (9th Cir. 1999) (multiple death threats by opposition political party in Colombia); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (pattern and practice of persecution of Kurdish Moslem intelligentsia in Armenia); *Andriasian v. INS*, 180 F.3d 1033, 1043 (9th Cir. 1999) (ethnic Armenian from Azerbaijan); *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (applicant beaten harassed and threatened with death by military); *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (death threats from Philippine guerillas), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2009); *Leiva-Montalvo v. INS*, 173 F.3d 749, 752 (9th Cir. 1999) (death threats from Salvadoran Recontra guerillas); *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998) (torture by Sri Lankan authorities); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1297 (9th Cir. 1997) (harassment by Peruvian Shining Path guerillas), *as amended on denial of rehearing*, 133 F.3d 726 (9th Cir. 1998) (order); *Korablina v. INS*, 158 F.3d 1038, 1045-46 (9th Cir. 1998) (past discrimination, harassment and violence); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1240 (9th Cir. 1996) (harassment by Sandinista government in Nicaragua); *Montoya-Ulloa v. INS*, 79 F.3d 930, 932 (9th Cir. 1996) (harassed, threatened, beaten, placed on "black list" by Nicaraguan authorities); *Gomez-Saballos v. INS*, 79 F.3d 912, 918 (9th Cir. 1996) (death threats by Sandinistas); *Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994) (applicant threatened and close colleagues persecuted); *Mendoza Perez v. INS*, 902 F.2d 760, 763-64 (9th Cir. 1990).

9. Not Entitled to Withholding

Pagayon v. Holder, 675 F.3d 1182, 1190-91 (9th Cir. 2011) (per curiam) (not entitled to withholding of removal where record failed to compel conclusion that notwithstanding petitioner's relocation within the Philippines 15 years prior,

he would face reprisals from the National Police should he be returned now, where his sister continued to live in the Philippines unmolested, and petitioner failed to establish he would be targeted on account of a protected ground); *Tamang v. Holder*, 598 F.3d 1083, 1094-95 (9th Cir. 2010) (no past persecution in Nepal where petitioner did not suffer threats of violence against him personally, and even if he had established past persecution changed country conditions mitigated any fear of persecution there); *Sowe v. Mukasey*, 538 F.3d 1281, 1288 (9th Cir. 2008) (not entitled to withholding of removal where government rebutted alien's well-founded fear of future persecution by showing changed country conditions in Sierra Leone); *Fakhry v. Mukasey*, 524 F.3d 1057, 1065-66 (9th Cir. 2008) (Senegalese applicant not eligible for withholding); *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (petitioner's membership in a violent gang was not membership in a social group for purposes of withholding); *Kohli v. Gonzales*, 473 F.3d 1061, 1071 (9th Cir. 2007) (brief detention without mistreatment, occasion in which police told petitioner to go home and stop rallying and police call to petitioner's grandmother that it was in petitioner's best interest to stop participating with activists is insufficient); *Faruk v. Ashcroft*, 378 F.3d 940, 944 (9th Cir. 2004) (evidence of harassment and attacks on interracial and interreligious couple in Fiji not strong enough); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 (9th Cir. 2003) (no compelling evidence that persecution of non-political Albanians in Kosovo is so widespread that applicant faced a clear probability of persecution); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (given changes in Romania since departure); *Hakeem v. INS*, 273 F.3d 812, 817 (9th Cir. 2001) (remaining family unharmed, and applicant made two trips to Pakistan), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007); *Lim v. INS*, 224 F.3d 929, 938 (9th Cir. 2000) (given post-threat harmless period and family safety); *Barraza Rivera v. INS*, 913 F.2d 1443, 1454 (9th Cir. 1990) (insufficient evidence to show that he would be forced to participate in assassinations); *Arteaga v. INS*, 836 F.2d 1227, 1231 n.6 (9th Cir. 1988) (one-time threat of conscription sufficient for asylum, but not for withholding), *abrogated on other grounds by I.N.S. v. Elias-Zacarias*,502 U.S. 478 (1992); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1373 (9th Cir. 1985) (no specific threat, and government unaware of applicant's protest activities).

10. No Derivative Withholding of Removal

Unlike asylum, withholding of removal relief is not derivative. *Compare* 8 U.S.C. § 1158(b)(3) (permitting derivative asylum for spouses and children as defined in 8 U.S.C. § 1101(b)(1)(A), (B), (C), (D), or (E)), *and* 8 C.F.R. § 1208.21,

with 8 U.S.C. § 1231(b)(3) (failing to provide derivative withholding of removal); *see also Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005).

B. Bars to Withholding

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

1. Nazis

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

2. Persecution-of-Others Bar

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

3. Particularly Serious Crime Bar

"Although conviction for an 'aggravated felony' makes an alien removable and statutorily ineligible for asylum under 8 U.S.C. § 1158(b)(2)(A)(ii), it is not automatically a bar to relief in the form of withholding of removal. The aggravated felony conviction prevents an alien from being eligible for withholding only if the crime constitutes a 'particularly serious crime.' 8 C.F.R. § 1208.16(d)(2)." *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111-12 (9th Cir. 2011). Withholding is not available if the applicant, "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); *Arbid v. Holder*, 674 F.3d 1138, 1140 (9th Cir. 2012); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 675 (9th Cir. 2010); *Singh v. Ashcroft*, 351 F.3d 435, 438-39 (9th Cir. 2003). This bar is more narrowly defined than the bar in the asylum context because not all aggravated felonies are considered to be particularly serious. For cases filed on or after April 1, 1997, an aggravated felony conviction is considered to be a particularly serious crime if the applicant has been sentenced to an aggregate term of imprisonment of at least five years. 8 U.S.C. § 1231(b)(3)(B). "[A]n aggravated felony containing a drug trafficking element is presumed to be a particularly serious crime which would make [a petitioner]

ineligible for withholding of removal." *Rendon v. Mukasey*, 520 F.3d 967, 976 (9th Cir. 2008).

In light of *Kucana v. Holder*, 130 S. Ct. 827 (2010), the court overruled its earlier holding in *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001), and held that it has jurisdiction to review the BIA's determination that an alien has been convicted of a "particularly serious crime" and therefore ineligible for withholding of removal. *See Delgado v. Holder*, 648 F.3d 1095, 1099-1100 (9th Cir. 2011) (en banc) (remanding for the BIA to clarify its reasons for concluding Delgado was convicted of a particularly serious crime and thus barred from asylum and withholding of removal). "[T]he BIA's determination that an alien was convicted of a particularly serious crime is a discretionary decision, and [reviewed] under an abuse-of-discretion standard." *Arbid*, 674 F.3d at 1141-43.

The court may "determine whether the BIA applied the correct legal standard in making its determination. … [and therefore has] jurisdiction to review whether the BIA and IJ failed to consider the appropriate factors, …, or relied on improper evidence, … , in making the "particularly serious crime" determination. *Anaya-Ortiz*, 594 F.3d at 676 (internal quotation marks and citation omitted).

"'[A]ll reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.'" *Id*. at 676 (quoting *Matter of N-A-M-*, 245 I. & N. Dec. 336, 342 (BIA 2007) and concluding that BIA's interpretation of the evidence that may be considered in a particularly serious crime determination was reasonable). An alien's own testimony qualifies as the sort of "reliable information" that may be considered. *See Anaya-Ortiz*, 594 F.3d at 678-79 (concluding that BIA's reliance on alien's own testimony was proper, and that BIA applied correct legal standard in determining alien's drunk driving conviction constituted a particularly serious crime).

The Attorney General may determine by adjudication that a crime is particularly serious even though it is not classified as an aggravated felony. *See Delgado*, 648 F.3d at 1098 (concluding that the BIA was entitled to determine, by adjudication, in the absence of regulation, that petitioner's DUI convictions were particularly serious crimes that barred him from eligibility for withholding of removal under 8 U.S.C. § 1231(B)(3)(b) and CAT withholding under 8 C.F.R. § 1208.16(d)(2)).

Cross-reference: Criminal Issues in Immigration Law.

4. Serious Non-Political Crime Bar

Withholding is not available if "there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before" arrival. 8 U.S.C. § 1231(b)(3)(B)(iii); *see also Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011) (the court interprets "serious reasons to believe as being tantamount to probable cause." (internal quotation marks and citation omitted)); *McMullen v. INS*, 788 F.2d 591, 598-99 (9th Cir. 1986) (holding that applicant was ineligible for withholding because he facilitated or assisted Provisional Irish Republican Army terrorists to commit serious non-political crimes), *overruled on other grounds by Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005). The BIA is not required to balance the applicant's criminal acts against the risk of persecution. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999); *see also Kenyeres v. Ashcroft*, 538 U.S. 1301, 1306 (2003) (holding that petitioner was not eligible for a stay of removal pending review because substantial evidence supported the IJ's determination that petitioner committed serious financial crimes in Hungary).

5. Security and Terrorist Bar

An applicant is ineligible for withholding of removal if the Attorney General decides that there are reasonable grounds for regarding the applicant as a danger to the security of the United States. 8 U.S.C. § 1231(b)(3)(B); *Malkandi v. Holder*, 576 F.3d 906, 914-17 (9th Cir. 2009) (concluding substantial evidence supported the adverse national security finding that the alien, an Iraqi Kurd, was a danger to national security). An applicant who is deportable for engaging in terrorist activity "shall be considered to be an alien for whom there are reasonable grounds for regarding as a danger to the security of the United States." 8 U.S.C. § 1231(b)(3)(B)(iv). *See also Annachamy v. Holder*, 686 F.3d 729, 732-33 (9th Cir. 2012) (mandate pending); *Khan v. Holder*, 584 F.3d 773, 785 (9th Cir. 2009) (concluding that IJ's decision that alien belonged to a "terrorist organization," rendering him ineligible for asylum and withholding of removal, was supported by substantial evidence).

Interpreting the prior version of the terrorist bar to withholding in *Cheema v. Ashcroft*, this court held it impermissible to find an applicant a danger to the security of the United States solely because he engaged in terrorist activity. 383 F.3d 848, 857 (9th Cir. 2004). The court explained that in order for an applicant to be barred by this section, there must be a finding supported by substantial evidence

that links the terrorist activity with one of the criteria relating to this country's national security. *Id*. at 857; *see also Hosseini v. Gonzales*, 471 F.3d 953, 958 (9th Cir. 2006) (remanding for further consideration of security bar in light of *Cheema*); *cf. Bellout v. Ashcroft*, 363 F.3d 975, 978-79 (9th Cir. 2004) (applying a newer version of the statute that does not include the two-prong test and concluding that the applicant was barred from withholding due to his terrorist activities), *superseded by statute on other grounds as stated in Khan v. Holder*, 584 F.3d 773, 779-80 (9th Cir. 2009).

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

IV. CONVENTION AGAINST TORTURE ("CAT")

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

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

motion demonstrated prima facie eligibility for relief. *See* 8 C.F.R. §§ 1208.18(b)(2)(i) and (ii).

There are two forms of protection under the Convention Against Torture: (1) withholding of removal under 8 C.F.R. § 1208.16(c) for aliens who are not barred from eligibility under FARRA for having been convicted of a "particularly serious crime" or of an aggravated felony for which the term of imprisonment is at least five years, and (2) deferral of removal under 8 C.F.R. § 1208.17(a) for aliens entitled to protection but subject to mandatory denial of withholding. *See Hosseini v. Gonzales*, 471 F.3d 953, 958-59 (9th Cir. 2006); *see also Haile v. Holder*, 658 F.3d 1122, 1130 (9th Cir. 2011); *Cole v. Holder*, 659 F.3d 762, 770-71 (9th Cir. 2011) (discussing general CAT principles); *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083 (9th Cir. 2008); *Huang v. Ashcroft*, 390 F.3d 1118, 1121 (9th Cir. 2005).

A. Standard of Review

This court reviews for substantial evidence the factual findings underlying the BIA's determination that an applicant is not eligible for protection under the Convention Against Torture. *See Silaya v. Mukasey*, 524 F.3d 1066, 1070 (9th Cir. 2008); *Morales v. Gonzales*, 478 F.3d 972, 983 (9th Cir. 2007); *see also Shrestha v. Holder*, 590 F.3d 1034, 1048 (9th Cir. 2010); *Sinha v. Holder*, 564 F.3d 1015, 1025 (9th Cir. 2009); *Zheng v. Holder*, 644 F.3d 829, 835 (9th Cir. 2011) ("In order for this court to reverse the BIA with respect to a finding of fact, the evidence must compel a different conclusion from the one reached by the BIA. ").

The BIA's interpretation of purely legal questions is reviewed de novo. *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003).

"The regulations implementing CAT explicitly require the IJ to consider 'all evidence relevant to the possibility of future torture.'" *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 n.6 (9th Cir. 2010) (quoting 8 C.F.R. § 208.16(c)(3); *see also Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010).

"[W]here there is any indication that the BIA did not consider all of the evidence before it, a catchall phrase does not suffice, and the decision cannot stand. Such indications include misstating the record and failing to mention highly probative or potentially dispositive evidence." *Cole v. Holder*, 659 F.3d 762, 771-72 (9th Cir. 2011). "That is not to say that the BIA must discuss each piece of evidence submitted. When nothing in the record or the BIA's decision indicates a

failure to consider all the evidence, a 'general statement that [the agency] considered all the evidence before [it]' may be sufficient." *Id*. at 771 (quoting *Almaghzar v. Gonzales*, 457 F.3d 915, 922 (9th Cir. 2006)).

Cross-reference: Standards of Review.

B. Definition of Torture

"Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(1) (2000)); *see also Edu v. Holder*, 624 F.3d 1137, 1144 (9th Cir. 2010) (explaining that the CAT defines torture as the "intentional infliction of severe pain or suffering by (as relevant here) public officials … ."); *Sinha v. Holder*, 564 F.3d 1015, 1026 (9th Cir. 2009); *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) (explaining that "petitioner must show that severe pain or suffering was specifically intended – that is, that the actor intend[ed] the actual consequences of his conduct …"). "'Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.'" *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(2)), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order).

"The United States included a reservation when it ratified the Convention, narrowing the definition of torture with respect to 'mental pain or suffering.' The reservation states that 'mental pain or suffering refers to the prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt

profoundly the sense or personality." *Nuru v. Gonzales*, 404 F.3d 1207, 1217 n.5 (9th Cir. 2005).

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

C. Burden of Proof

In order to be eligible for withholding of removal under the Convention Against Torture, the applicant has the burden of establishing that if removed to the proposed country of removal "he is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, *but* defeats the object and purpose of CAT." *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005) (citing *Wang v. Ashcroft*, 320 F.3d 130, 134 (2d Cir. 2003)) (emphasis in original); *see also Zheng v. Holder*, 644 F.3d 829, 835 (9th Cir. 2011) ("To receive relief under CAT, Petitioner has the burden of showing that he "is more likely than not to be tortured in the country of removal.""); *Go v. Holder*, 640 F.3d 1047, 1054 (9th Cir. 2011) (petitioner failed to sustain burden of proof); *Edu v. Holder*, 624 F.3d 1137, 1146-47 (9th Cir. 2010) (petitioner carried burden of proof; granting petition and ordering CAT relief); *Wakkary v. Holder*, 558 F.3d 1049, 1067-68 (9th Cir. 2009); 8 C.F.R. § 1208.16(c)(2). This standard requires that an applicant demonstrate "only a chance greater than fifty percent that he will be tortured" if removed. *Hamoui v. Ashcroft*, 389 F.3d 821, 827 (9th Cir. 2004); *see also Wakkary*, 558 F.3d at 1068.

A "petitioner carries this burden whenever he or she presents evidence establishing 'substantial grounds for believing that he [or she] would be in danger of being subjected to torture' in the country of removal." *Kamalthas v. INS*, 251

F.3d 1279, 1284 (9th Cir. 2001). The "failure to establish eligibility for asylum does not necessarily doom an application for relief under the United Nations Convention Against Torture." Instead, "the standards for the two bases of relief are distinct and should not be conflated." *Farah v. Ashcroft*, 348 F.3d 1153, 1156-57 (9th Cir. 2003). *See also Kamalthas*, 251 F.3d at 1282-83 (remanding for reconsideration of a CAT claim where the BIA relied unduly on its prior adverse credibility determination and failed to consider relevant county conditions in the record); *Taha v. Ashcroft*, 389 F.3d 800, 802 (9th Cir. 2004) (per curiam) (remanding for consideration of CAT claim that the BIA denied on same adverse credibility grounds cited for denial of asylum); *but see Farah*, 348 F.3d at 1157 (affirming denial of asylum and CAT claim based on adverse credibility determination where applicant pointed to no additional evidence relevant to the CAT claim).

When assessing the possibility of relocation, if the petitioner has shown past persecution" the government bears the burden to show by a preponderance of the evidence that the petitioner can move elsewhere within the country." *v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011) (citing *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003) (vacating BIA's CAT determination and remanding for the agency to determine whether the government met its burden).

"[T]he CAT regulations cast a wide evidentiary net, providing that 'all evidence relevant to the possibility of future torture shall be considered, including, but not limited to … evidence of gross, flagrant or mass violations of human rights within the country of removal … .'" *Wakkary*, 558 F.3d at 1068 (quoting 8 C.F.R. § 1208.16(c)(3)); *see also Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011) (noting all relevant evidence must be considered). "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(2)).

"An adverse credibility determination is not necessarily a death knell to CAT protection." *Shrestha v. Holder*, 590 F.3d 1034, 1048 (9th Cir. 2010). "But when the petitioner's 'testimony [is] found not credible, to reverse the BIA's decision [denying CAT protection,] we would have to find that the reports alone compelled the conclusion that [the petitioner] is more likely than not to be tortured." *Id.* at 1048-49 (citation omitted).

D. Country Conditions Evidence

"[C]ountry conditions alone can play a decisive role in granting relief under the Convention." *Kamalthas v. INS*, 251 F.3d 1279, 1280, 1283 (9th Cir. 2001) (holding that a negative credibility finding in asylum claim does not preclude relief under the Convention, especially where documented country conditions information corroborated the "widespread practice of torture against Tamil males"); *see also Mutuku v. Holder*, 600 F.3d 1210, 1214 (9th Cir. 2010) (concluding that given the country conditions, record did not compel finding that petitioner would likely be tortured upon return to Kenya). "[A]ll evidence relevant to the possibility of future torture shall be considered, including, but not limited to … [e]vidence of gross, flagrant or mass violations of human rights within the country of removal; and [o]ther relevant information regarding conditions in the country of removal." *Id*. at 1282 (quoting 8 C.F.R. § 208.16(c)(3) (emphasis deleted)). The agency's failure to consider evidence of country conditions in denying CAT relief constitutes reversible error. *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010).

See also Go v. Holder, 640 F.3d 1047, 1054 (9th Cir. 2011) (country reports and testimony insufficient to compel conclusion that petitioner would be tortured); *Muradin v. Gonzales*, 494 F.3d 1208, 1211 (9th Cir. 2007) (petitioner eligible for CAT relief given past abuse and beatings and State Department report stating that torture of conscripts, prisoners, and deserters by Armenian security personnel is likely); *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005) (relying on country report showing that the Eritrean government routinely prosecutes military deserters and subjects at least some of them to torture); *Abassi v. INS*, 305 F.3d 1028, 1029 (9th Cir. 2002) (holding that the BIA must consider the most recent State Department country conditions report where a pro se applicant refers to the report in his moving papers); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that the BIA was required to consider relevant information in the State Department report on Iraq), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order); *Khup v. Ashcroft*, 376 F.3d 898, 906-07 (9th Cir. 2004) (Seventh Day Adventist petitioner eligible for CAT relief given past persecution, and country conditions reports indicating that the Burmese government regularly tortures detainees); *cf. Sowe v. Mukasey*, 538 F.3d 1281, 1288-89 (9th Cir. 2008) (petitioner not eligible for CAT where conditions in Sierra Leone had changed).

E. Past Torture

Evidence of past torture is relevant to a determination of eligibility for CAT relief. *Mohammed v. Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005) (quoting 8 C.F.R. § 1208.16(c)(3) (2000)); *see also Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) ("[T]he existence of past torture is ordinarily the principal factor on which [the court relies]." (internal citation and quotation marks omitted)); *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001). However, unlike asylum, past torture does not provide a separate basis for eligibility. Nevertheless, evidence of past torture that causes "permanent and continuing harm" alone may be enough to establish automatic entitlement to CAT relief. *See Mohammed*, 400 F.3d at 802 (comparing *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) for the proposition that continuing persecution may establish entitlement to withholding of removal). "[I]f an individual has been tortured and has escaped to another country, it is likely that he will be tortured again if returned to the site of his prior suffering, unless circumstances or conditions have changed significantly, not just in general, but with respect to the particular individual." *Nuru v. Gonzales*, 404 F.3d 1207, 1217-18 (9th Cir. 2005) (noting that "individualized analysis" of how changed conditions will affect the specific applicant's situation is required).

F. Internal Relocation

"Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured" is relevant to the possibility of future torture. *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.16(c)(3) (2000)); *see also Edu v. Holder*, 624 F.3d 1137, 1146-47 (9th Cir. 2010) (concluding the record showed there was danger to political activists throughout Nigeria); *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008) (concluding that petitioner failed to establish that internal relocation was impossible within Mexico, and determining that substantial evidence supported the IJ's decision to deny deferral of removal under the CAT); *Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006) (applicant would presumably be safe in another area of India where police are not under the mistaken impression that he is a separatist); *Singh v. Ashcroft*, 351 F.3d 435, 443 (9th Cir. 2003) (applicant could settle in a part of India where he is not likely to be tortured and was not personally threatened); *Hasan v. Ashcroft*, 380 F.3d 1114, 1122 (9th Cir. 2004) (noting differing standards for evaluating possibility of internal relocation for asylum and CAT claims).

It is rarely safe to remove a potential torture victim on the assumption that torture will be avoided simply by relocating to another area of the country. *Perez-Ramirez v. Holder*, 648 F.3d 953, 958 (9th Cir. 2011); *see also Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005). Where past persecution is shown, "the government bears the burden to show by a preponderance of the evidence that the petitioner can move elsewhere within the country. *Perez-Ramirez*, 648 F.3d at 958. Additionally, where a well-founded fear of persecution by the government has been established, a rebuttable presumption arises that the threat exists nationwide and that internal relocation is unreasonable. *Id*. (granting petition and remanding where BIA improperly placed burden on petitioner to show that he could not relocated within Mexico and failed to apply presumption of nationwide threat).

In *Edu v. Holder*, the court concluded the BIA erred in determining that the petitioner could avoid torture by giving up her political activity upon return to Nigeria. The court granted her petition and ordered relief so that petitioner would not be forced to choose between her "conscience and torture." 624 F.3d at 1147.

G. Differences Between CAT Protection and Asylum and Withholding

"[T]he Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured 'on account of' a protected ground; it is narrower, however, because the petitioner must show that it is 'more likely than not' that he or she will be tortured, and not simply persecuted upon removal to a given country." *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001); *see also Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011); *Muradin v. Gonzales*, 494 F.3d 1208 (9th Cir. 2007); *Nuru v. Gonzales*, 404 F.3d 1207, 1224 (9th Cir. 2005); *Khup v. Ashcroft*, 376 F.3d 898, 906-07 (9th Cir. 2004). "Unlike asylum and withholding, there are no mandatory bars to an applicant seeking deferral of removal under CAT." *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1113-14 (9th Cir. 2011). *See also Annachamy v. Holder*, 686 F.3d 729, 732 (9th Cir. 2012) (mandate pending) ("An alien who has engaged in terrorist activities is ineligible for asylum, withholding of removal and withholding under CAT, but remains eligible for deferral of removal under CAT.").

H. Agent or Source of Torture

To qualify for relief under the Convention, the torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Zheng v. Ashcroft*, 332 F.3d 1186, 1188 (9th Cir. 2003) (quoting 8 C.F.R. § 208.18(a)(1) (2002)) (emphasis and internal quotation marks omitted); *see also Silaya v. Mukasey*, 524 F.3d 1066, 1073 (9th Cir. 2008) (denying petition for relief under CAT because petitioner failed to demonstrate it was more likely than not that she would be tortured "at the instigation of, or with the acquiescence of the Philippine government"). "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1059 (9th Cir. 2006) (citing 8 C.F.R. § 208.18(a)(1)). "Acquiescence" by government officials does not require actual knowledge or willful acceptance, rather awareness and willful blindness by governmental officials is sufficient. *Zheng*, 332 F.3d at 1197 (remanding CAT claim of Chinese applicant who feared being killed by the smugglers who brought him to the United States); *see also Oyeniran v. Holder*, 672 F.3d 800, 803 (9th Cir. 2012); *Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011) ("Acquiescence by government officials requires only that they were aware of the torture but remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it." (quotation marks and citations omitted)); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010) (granting petition for review and remanding to BIA to reconsider application for deferral of removal where agency construed "government acquiescence" too narrowly); *Morales v. Gonzales*, 478 F.3d 972, 983-84 (9th Cir. 2007) (remanding CAT claim because IJ afforded no weight to instances of violence and rape not reported to authorities by petitioner because of willful blindness and/or outright acceptance by Mexican police officers). Nor does the standard require that public officials sanction the alleged conduct. *Ornelas-Chavez*, 458 F.3d at 1059 (holding that "sanctioned" is too strict a standard). "It is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it." *Id*. at 1060.

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

An applicant also need not demonstrate that she would face torture while under public officials' prospective custody or physical control. *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004) ("petitioner may qualify for withholding of removal by showing that he or she would likely suffer torture while under *private parties*' exclusive custody or physical control"); *see also Ornelas-Chavez*, 458 F.3d at 1059 (same in the case of a Mexican male with female sexual identity); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787 (9th Cir. 2004) (same in the case of a Salvadoran homosexual male with a female sexual identity).

I. Mandatory Relief

"If an alien meets his burden of proof regarding future torture, withholding of removal [under CAT] is mandatory under the implementing regulations, just as it is in the case of a well-founded fear of persecution." *Nuru v. Gonzales*, 404 F.3d 1207, 1216 (9th Cir. 2005) (citing INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), and 8 C.F.R. §§ 1208.16-1208.18). However, there is one qualification to the mandatory nature of withholding under the CAT. "If the alien has committed a 'particularly serious crime' or an aggravated felony for which the term of imprisonment is at least five years, only deferral of removal, not withholding of removal, is authorized." *Nuru*, 404 F.3d at 1216 n.4 (citing 8 C.F.R. §§ 1208.16(d), 1208.17).

Although an applicant will be denied withholding of removal under CAT if the Attorney General has reasonable grounds to believe that the alien is a danger to the security of the United States, *see* 8 U.S.C. § 1231(b)(3)(B)(iv) and 8 C.F.R. § 1208.16(d)(2), he may still be eligible for deferral of removal under CAT, *see* 8 C.F.R. § 1208.17(a); *see also Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (discussing Algerian terrorist's eligibility for deferral of removal), *superseded by statute on other grounds as stated in Khan v. Holder*, 584 F.3d 773, 779-80 (9th Cir. 2009); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (holding, in the case of a Bosnian Serb, that even a persecutor may be eligible for deferral of removal).

J. Nature of Relief

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

K. Derivative Torture Claims

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

L. Exhaustion

This court will not address a CAT claim unless it was first raised before the BIA. *See Ortiz v. INS*, 179 F.3d 1148, 1152-53 (9th Cir. 1999) (granting a stay of the mandate to allow the applicants to move the BIA to reopen to apply for CAT protection). The proper procedure is for the applicant to file a motion to reopen with the BIA to apply for protection. *See Khourassany v. INS*, 208 F.3d 1096, 1100-01 (9th Cir. 2000) (denying applicant's motion to remand his case; staying the mandate to allow applicant to file motion to reopen with the BIA).

Cross-reference: Jurisdiction Over Immigration Petitions.

M. Habeas Jurisdiction

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

N. Cases Granting CAT Protection

Annachamy v. Holder, 686 F.3d 729, 732 (9th Cir. 2012) (mandate pending) (BIA granted deferral of removal, but denied asylum and withholding of removal); *Haile v. Holder*, 658 F.3d 1122, 1130-33 (9th Cir. 2011) (petitioner was eligible for deferral of removal having established that it was more likely than not she would be tortured upon return to Eritrea); *Edu v. Holder*, 624 F.3d 1137, 1147 (9th Cir. 2010) (entitled to deferral of removal under CAT where petitioner was tortured in Nigeria for engaging in political activity, and there were substantial grounds that she would be tortured again if she was returned to Nigeria); *Muradin v. Gonzales*, 494 F.3d 1208, 1211 (9th Cir. 2007) (petitioner eligible for CAT relief given past abuse and beatings and State Department report stating that torture of

conscripts, prisoners, and deserters by Armenian security personnel is likely); *Hosseini v. Gonzales*, 471 F.3d 953, 959-61 (9th Cir. 2006) (applicant entitled to deferral of removal because it was more likely than not that Iranian government would torture him based on his involvement with an Iranian terrorist organization); *Nuru v. Gonzales*, 404 F.3d 1207, 1223 (9th Cir. 2005) (Eritrean soldier who was bound, whipped, beaten and placed in the broiling sun for nearly one month after voicing political opposition to war between Eritrea and Sudan entitled to CAT relief); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (repeated beatings and cigarette burns of Iraqi Sunni Muslim constitute torture), *amended by* 355 F.3d 1140 (9th Cir. 2004) (order); *Khup v. Ashcroft*, 376 F.3d 898, 906-07 (9th Cir. 2004) (Seventh Day Adventist entitled to CAT protection given past persecution and country conditions reports indicating that the Burmese government regularly tortures detainees).

O. Cases Finding No Eligibility for CAT Protection

Latter-Singh v. Holder, 668 F.3d 1156, 1164 (9th Cir. 2012) (conditions in India had changed such that Singh may safely return); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1113-14 (9th Cir. 2011) (although gang members had beat petitioner and his cousin, petitioner failed to prove it was more likely than not he would be tortured upon return to El Salvador); *Zheng v. Holder*, 644 F.3d 829, 835-36 (9th Cir. 2011) (claims of possible torture remained speculative); *Abufayad v. Holder*, 632 F.3d 623, 632-33 (9th Cir. 2011); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010) (generalized evidence of violence and crime in Mexico not particular to petitioners was insufficient to establish CAT eligibility); *Shrestha v. Holder*, 590 F.3d 1034, 1048-49 (9th Cir. 2010) (denial of CAT protection supported by substantial evidence where testimony was not credible, and background material provided was insufficient to compel conclusion that alien was entitled to relief); *Soriano v. Holder*, 569 F.3d 1162, 1167 (9th Cir. 2009) (no evidence showing likelihood of torture by gang members or demonstrating petitioner would be subject to torture by or with consent of government official if petitioner was returned to the Philippines); *Sinha v. Holder*, 564 F.3d 1015, 1026 (9th Cir. 2009) (denying CAT claim, although remanding to BIA for further proceedings concerning asylum and withholding of removal); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747-48 (9th Cir. 2008) (failed to show more likely than not would be tortured upon return to El Salvador where fear was speculative, torture feared would be committed by private individuals, and alien's mother remained safely in hometown); *Sowe v. Mukasey*, 538 F.3d 1281, 1288-89 (9th Cir. 2008) (evidence of changed country conditions in Sierra Leone defeated CAT

claim); *Dhital v. Mukasey*, 532 F.3d 1044, 1051-52 (9th Cir. 2008) (per curiam) (state department reports failed to demonstrate applicant faced "any particular threat of torture beyond that of which all citizens of Nepal are at risk"); *Silaya v. Mukasey*, 524 F.3d 1066, 1073 (9th Cir. 2008) (denying petition for relief under CAT because petitioner failed to demonstrate it was more likely than not that she would be tortured "at the instigation of, or with the acquiescence of the Philippine government"); *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) (conditions of mental health system in Mexico did not warrant relief under the CAT); *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1084 (9th Cir. 2008) (concluding that petitioner failed to establish that internal relocation was impossible within Mexico, and determining that substantial evidence supported the IJ's decision to deny deferral of removal under the CAT); *Arteaga v. Mukasey*, 511 F.3d 940, 948-49 (9th Cir. 2007) (substantial evidence supported determination that petitioner failed to show that he would be tortured at the hands of the El Salvadorean government, even though he showed a possibility of mistreatment); *Ahmed v. Keisler*, 504 F.3d 1183, 1201 (9th Cir. 2007) (evidence did not demonstrate it was more likely than not petitioner would be tortured if returned to Bangladesh, despite fact that evidence compelled finding he would be persecuted if returned); *Almaghzar v. Gonzales*, 457 F.3d 915, 822-23 (9th Cir. 2006) (evidence of possible future torture was insufficient to overcome prior adverse credibility determination); *Singh v. Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006) (evidence did not compel finding of likelihood of torture where applicant failed to demonstrate that he could not live safely elsewhere in India); *Hasan v. Ashcroft*, 380 F.3d 1114, 1122-23 (9th Cir. 2004) (journalist from Bangladesh failed to show future harm rising to level of torture, or inability to avoid harm by relocating); *El Himri v. Ashcroft*, 378 F.3d 932, 938 (9th Cir. 2004) (as amended) (stateless Palestinians in Kuwait, where "most of the physical violence perpetrated by the government against Palestinians ended when constitutional government returned"); *Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (member of State-Department-designated terrorist organization failed to show that Algerian government was aware of or interested in him), *superseded by statute on other grounds as stated in Khan v. Holder*, 584 F.3d 773, 779-80 (9th Cir. 2009); *Singh v. Ashcroft*, 351 F.3d 435, 443 (9th Cir. 2003) (fear of members of mother's family who are police officers); *Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003) (Somali applicant's claim "based on the same statements … that the BIA determined to be not credible"); *Gui v. INS*, 280 F.3d 1217, 1230 (9th Cir. 2002) (harassment, wiretapping, staged car crashes, detention and interrogation of Romanian anti-Communist did not amount to torture).

V. CREDIBILITY DETERMINATIONS

Note that the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) codified several new standards governing credibility determinations and judicial review of such determinations. These standards apply to all *applications filed* on or after May 11, 2005. REAL ID Act § 101(h)(2). *See, e.g., Ren v. Holder*, 648 F.3d 1079, 1084-85 (9th Cir. 2011); *Shrestha v. Holder*, 590 F.3d 1034, 1039-45 (9th Cir. 2010) (post-REAL ID Act application in which court discusses REAL ID Act standards governing credibility determination and the measure of deference owed to agency credibility determinations); *Malkandi v. Holder*, 576 F.3d 906, 914-917 (9th Cir. 2009).

A. Standard of Review

Adverse credibility findings are reviewed under the substantial evidence standard. *Rizk v. Holder*, 629 F.3d 1083, 1087 (9th Cir. 2011) (adverse credibility determinations are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary); *Kin v. Holder*, 595 F.3d 1050, 1054 (9th Cir. 2010); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091 (9th Cir. 2009); *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) ("This court reviews factual determinations, including credibility determinations, for substantial evidence."); *Rivera v. Mukasey*, 508 F.3d 1271, 1274 (9th Cir. 2007); *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002). *See also Shrestha v. Holder*, 590 F.3d 1034, 1039 (9th Cir. 2010) (reviewing adverse credibility determination for substantial evidence in post-REAL ID Act application); *Malkandi v. Holder*, 576 F.3d 906, 914-917 (9th Cir. 2009) (same).

Deference is given to the IJ's credibility determination, because the IJ is in the best position to assess the trustworthiness of the applicant's testimony. *See Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003); *Canjura-Flores v. INS*, 784 F.2d 885, 888 (9th Cir. 1985). Credibility findings will be upheld unless evidence compels a contrary result. *See Don v. Gonzales*, 476 F.3d 738, 741 (9th Cir. 2007). Moreover, false statements or inconsistencies "must be viewed in light of all the evidence presented in the case." *Kaur v. Gonzales*, 418 F.3d 1061, 1066 (9th Cir. 2005).

"While the substantial evidence standard demands deference to the IJ, we do not accept blindly an IJ's conclusion that a petitioner is not credible. Rather, we examine the record to see whether substantial evidence supports that conclusion

and determine whether the reasoning employed by the IJ is fatally flawed." *Gui*, 280 F.3d at 1225 (internal quotation marks omitted).

An IJ must articulate a legitimate basis to question the applicant's credibility, and must offer specific and cogent reasons for any stated disbelief. *Id.*; *see also Rivera*, 508 F.3d at 1275. "Any such reason must be substantial and bear a legitimate nexus to the finding." *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (per curiam) (internal quotation marks omitted); *see also Chawla v. Holder*, 599 F.3d 998. 1001 (9th Cir. 2010); *Kin*, 595 F.3d at 1053. "Generalized statements that do not identify specific examples of evasiveness or contradiction in the petitioner's testimony" are insufficient. *Garrovillas v. INS*, 156 F.3d 1010, 1013 (9th Cir. 1998). However, "[t]he obligation to provide a specific, cogent reason for a negative credibility finding does not require the recitation of unique or particular words." *de Leon-Barrios v. INS*, 116 F.3d 391, 394 (9th Cir. 1997) (concluding that the IJ made a specific and cogent negative credibility finding).

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

As long as one of the identified grounds underlying a negative credibility finding is supported by substantial evidence and goes to the heart of the claims of persecution, the court is bound to accept the negative credibility finding. *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (pre-REAL ID Act; affirming negative credibility finding even though some of the factors were factually unsupported or irrelevant); *see also Wang v. INS*, 352 F.3d 1250, 1259 (9th Cir. 2003) ("whether we have rejected some of the IJ's grounds for an adverse credibility finding is irrelevant"). Note that under the REAL ID Act, inconsistencies no longer need to go to the heart of the claim; however, when an inconsistency does go to the heart of the claim, it is of great weight. *See Shrestha v. Holder*, 590 F.3d 1034, 1046-47 (9th Cir. 2010) (applying REAL ID Act).

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

Where an adverse credibility determination is based on a clearly erroneous factual finding, it will not be upheld. *See Mutuku v. Holder*, 600 F.3d 1210, 1213 (9th Cir. 2010).

B. Opportunity to Explain

"[T]he BIA must provide a petitioner with a reasonable opportunity to offer an explanation of any perceived inconsistencies that form the basis of a denial of asylum." *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) (superseded by statute); *see also Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011); *Joseph v. Holder*, 600 F.3d 1235, 1244-45 (9th Cir. 2010) (adverse credibility determination not supported by substantial evidence where BIA failed to offer petitioner opportunity to explain why he did not provide the last name of an alleged persecutor); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091-92 (9th Cir. 2009) (adverse credibility determination not supported by substantial evidence where agency failed to offer petitioner opportunity to explain inconsistency upon which the adverse determination was partially based, and also failed to address explanation that was given for other inconsistencies upon which the agency relied); *Quan v. Gonzales*, 428 F.3d 883, 886 (9th Cir. 2005) (explaining that an applicant must be given an opportunity to clarify unclear testimony); *Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004) (reversing negative credibility finding because, *inter alia*, applicant was denied a reasonable opportunity to explain a perceived inconsistency); *Guo v. Ashcroft*, 361 F.3d 1194, 1200 (9th Cir. 2004) (reversing negative credibility finding because, *inter alia*, applicant was not afforded an opportunity to explain ambiguous witness testimony); *Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003) ("[T]he BIA did not identify and respond to Ordonez's explanations. Either Ordonez was given no chance to contest the issue or the BIA did not address his arguments. Either way, Ordonez's rights were violated.").

The IJ must also consider and address the applicant's explanation for the identified discrepancy. *See Rizk*, 629 F.3d at 1088 (explaining the IJ must also provide a specific and cogent reason for rejecting the petitioner's explanation if it is "reasonable and plausible."); *Soto-Olarte*, 555 F.3d at 1091 ("[IJ's] lack of consideration given to [petitioner's] proffered explanation was error and prevent[ed] the underlying inconsistency from serving as substantial evidence."); *Tekle v. Mukasey*, 533 F.3d 1044, 1055 (9th Cir. 2008) (rejecting adverse credibility finding where alien was not provided an opportunity to explain certain inconsistencies, and where the IJ failed to address explanations alien gave for other inconsistencies); *Singh v. Gonzales*, 439 F.3d 1100, 1105-06 (9th Cir. 2006); *Kaur*

v. Ashcroft, 379 F.3d 876, 887 (9th Cir. 2004) (superseded by statute) ("An adverse credibility finding is improper when an IJ fails to address a petitioner's explanation for a discrepancy or inconsistency."); *Guo*, 361 F.3d at 1200 (reversing negative credibility finding because, *inter alia*, the IJ did not address Guo's reasonable and plausible explanation for a perceived inconsistency); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (substantial evidence lacking where applicant provided an explanation for a discrepancy, but neither the BIA nor the IJ addressed it), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007); *cf. Rivera v. Mukasey*, 508 F.3d 1271, 1275 (9th Cir. 2007) (upholding negative credibility finding where IJ petitioner tried to explain inconsistencies, but IJ ultimately found the explanations insufficient); *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004) (affirming negative credibility finding and noting that the IJ addressed Li's explanation for an inconsistency).

Note that the IJ does not have "to engage in multiple iterations of the opportunity to explain. Once the IJ has provided a specific, cogent reason for disbelieving the alien's rationalization, the IJ need not offer the alien another opportunity to address the IJ's concerns … ." *Rizk*, 629 F.3d at 1088.

"When an IJ provides a specific reason for an adverse credibility finding, her judgment merits deference as long as (1) the reasoning employed by the IJ is [not] fatally flawed, and (2) the reason is 'substantial and bear[s] a legitimate nexus to the finding." *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (internal quotation marks and citations omitted).

The opportunity to explain may be provided through cross-examination by the government. *Rizk*, 629 F.3d at 1088.

C. Credibility Factors

1. Demeanor

Credibility determinations that are based on an applicant's demeanor are given "special deference." *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999) (deferring to the IJ's observation that the applicant "began to literally jump around in his seat and to squirm rather uncomfortably while testifying" on cross-examination). However, boilerplate demeanor findings are not appropriate. *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1048, 1051-52 (9th Cir. 2002) ("Cookie cutter credibility findings are the antithesis of the individualized determination required in asylum cases."). Moreover, an IJ's demeanor-based negative

credibility finding must specifically and cogently refer to the non-credible aspects of the applicant's demeanor. *See Arulampalam v. Ashcroft*, 353 F.3d 679, 686 (9th Cir. 2003); *see also Kin v. Holder*, 595 F.3d 1050, 1055 (9th Cir. 2010) (concluding demeanor finding was insufficient where IJ failed to provide specific examples of how petitioner's demeanor supported the adverse credibility determination). An applicant's demeanor has been described as "including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication." *Arulampalam*, 353 F.3d at 686. (internal quotation marks omitted).

2. Responsiveness

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

"The REAL ID Act expressly permits the agency to base a credibility determination on the 'responsiveness of the applicant or witness.'" *Shrestha v. Holder*, 590 F.3d 1034, 1045 (9th Cir. 2010) (quoting 8 U.S.C. § 1158(b)(1)(B)(iii)).

3. Specificity and Detail

The level of specificity in an applicant's testimony is an appropriate consideration. *See Singh-Kaur v. INS*, 183 F.3d 1147, 1153 (9th Cir. 1999) (approving IJ's finding that an applicant's testimony was suspicious given its lack of specificity); *cf. Zheng v. Ashcroft*, 397 F.3d 1139, 1147 (9th Cir. 2005) (testimony was fairly detailed, and IJ did not identify examples of how Zheng's testimony lacked detail); *Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004) (superseded by statute) ("[A] general response to questioning, followed by a more specific, consistent response to further questioning is not a cogent reason for supporting a negative credibility finding."); *Akinmade v. INS*, 196 F.3d 951, 957 (9th Cir. 1999) (finding testimony to be sufficiently detailed and specific,

"especially when Akinmade was not given notice that he should provide such information, nor asked at the hearing to do so").

4. Inconsistencies

a. Minor Inconsistencies

"Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding." *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003); *see also Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (recognizing "minor inconsistencies that reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding" (internal quotation marks and citation omitted)); *Li v. Holder*, 629 F.3d 1154, 1158 (9th Cir. 2011) ("A minor inconsistency or incidental misstatement that does not go to the heart of an applicant's claim does not support an adverse credibility determination."); *Chawla v. Holder*, 599 F.3d 998, 1006 (9th Cir. 2010) (minor inconsistency did not support adverse credibility determination); *Li v. Holder*, 559 F.3d 1096, 1103-07 (9th Cir. 2009) (adverse credibility determination "riddled" with speculation and based on minor inconsistencies that did not go to heart of claim not supported by substantial evidence); *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000) ("Any alleged inconsistencies in dates that reveal nothing about a petitioner's credibility cannot form the basis of an adverse credibility finding."). Note that under the REAL ID Act, inconsistencies no longer need to go to the heart of the claim; however, when an inconsistency does go to the heart of the claim, it is of great weight. *See Shrestha v. Holder*, 590 F.3d 1034, 1046-47 (9th Cir. 2010) (applying REAL ID Act).

Although "minor inconsistencies regarding non-material and trivial details … cannot form the exclusive basis for an adverse credibility determination, … minor inconsistencies going to the heart of a petitioner's claim may, when considered collectively, deprive the claim of the requisite ring of truth, thereby supplying substantial evidence that will sustain the IJ's adverse credibility determination."). *See Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011) (internal quotation marks and citation omitted).

The concern underlying decisions which address minor inconsistencies is to avoid premising such a finding on an applicant's failure to remember non-material details. *See Singh v. Holder*, 643 F.3d 1178, 1180 (9th Cir. 2011).

"[I]nconsistencies of less than substantial importance for which a plausible explanation is offered" also cannot serve as the sole basis for an negative credibility finding. *Garrovillas v. INS*, 156 F.3d 1010, 1014 (9th Cir. 1998); *see also Guo v. Ashcroft*, 361 F.3d 1194, 1201 (9th Cir. 2004) (failure to remember company name claimed on his B-1 visa application did not go to the heart of his claim involving persecution on account of his Christian beliefs).

Discrepancies that cannot be viewed as attempts to enhance claims of persecution generally have no bearing on credibility. *Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004); *Wang v. Ashcroft*, 341 F.3d 1015, 1021 (9th Cir. 2003); *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000); *cf. Kaur v. Gonzales*, 418 F.3d 1061, 1065 (9th Cir. 2005) ("Our court has never articulated a *per se* rule that whenever inconsistencies technically weaken an asylum claim they can never serve as the basis of an adverse credibility finding."); *see also Don v. Gonzales*, 476 F.3d 738, 742 (9th Cir. 2007) (inconsistency that does not enhance a claim of persecution is relevant to credibility determination when accompanied by other indications of dishonesty such as a pattern of clear and pervasive inconsistency or contradiction).

b. Substantial Inconsistencies

Substantial inconsistencies, however, damage a claim and support a negative credibility finding. *See, e.g.*, *Kin v. Holder*, 595 F.3d 1050, 1056-57 (9th Cir. 2010) (substantial evidence supported adverse credibility determination where petitioners omitted from asylum application a political demonstration and petitioners' participation in it, and there were inconsistencies between testimony of different witnesses); *Husyev v. Mukasey*, 528 F.3d 1172, 1182-83 (9th Cir. 2008) (concluding that omission of political activism went to the heart of the claims and was not a "mere detail"); *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) ("geographic discrepancies which went to the heart" of applicant's claim). "An adverse credibility ruling will be upheld so long as identified inconsistencies go to the heart of the asylum claim." *Li v. Ashcroft*, 378 F.3d 959, 962 (9th Cir. 2004) (three prior asylum applications contained key omissions and discrepancies) (internal quotation marks and alteration omitted); *see also Kohli v. Gonzales*, 473 F.3d 1061, 1071 (9th Cir. 2007) (discrepancies between petitioner's testimony, declaration and letter of membership substantially support adverse credibility finding); *Goel v. Gonzales*, 490 F.3d 735, 739 (9th Cir. 2007) (inconsistencies between testimony and documentary evidence support an adverse credibility finding where inconsistencies go to the heart of the claim); *Don v. Gonzales*, 476

F.3d 738, 741-43 (9th Cir. 2007) (inconsistencies and lack of details regarding the event that spurred the persecutors to threaten petitioner go to the heart of the claim and are not trivial); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) (failure to include in either of two asylum applications or principal testimony the incident that precipitated flight from Guatemala); *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001) (inconsistencies relating to "the events leading up to his departure and the number of times he was arrested"), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *de Leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997) (inconsistency relating to the basis for the alleged fear).

Additionally, "[m]aterial alterations in the applicant's account of persecution are sufficient to support an adverse credibility finding." *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011).

Inconsistencies should not be viewed in isolation, but rather should be considered in light of all the evidence presented. *See Kaur v. Gonzales*, 418 F.3d 1061, 1067 (9th Cir. 2005) (repeated and significant inconsistencies deprived claim of the requisite "ring of truth"). *See also Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011) (explaining "even minor inconsistencies going to the heart of a petitioner's claim may, when considered collectively, deprive the claim of the requisite ring of truth, thereby supplying substantial evidence that will sustain the IJ's adverse credibility determination." (internal quotation marks and citation omitted)).

Note that under the REAL ID Act, although inconsistencies no longer need to go to the heart of the claim, when it does go to the heart of the claim, it is of great weight. *See Shrestha v. Holder*, 590 F.3d 1034, 1046-47 (9th Cir. 2010) (applying REAL ID Act). Additionally, although inconsistencies need not go to heart of the claim, the "IJ cannot selectively examine evidence in determining credibility, but rather must present a reasoned analysis of the evidence as a whole and cite specific instances in the record that form the basis of the adverse credibility finding." *Tamang v. Holder*, 598 F.3d 1083, 1093-94 (9th Cir. 2010) (applying REAL ID Act and upholding adverse credibility determination where IJ provided specific and cogent reasons for ruling); *see also Ren v. Holder*, 648 F.3d 1079, 1084-85 (9th Cir. 2011).

c. Mistranslation/Miscommunication

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

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

Cf. Singh v. Ashcroft, 367 F.3d 1139, 1143 (9th Cir. 2004) (IJ's specific and cogent negative credibility finding was proper despite suggestion that hearing transcription was problematic because applicant did not contest any particular portion of the transcript or request remand for clarification).

5. Omissions

"[T]he mere omission of details is insufficient to uphold an adverse credibility finding." *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000); *see also Mousa v. Mukasey*, 530 F.3d 1025, 1029 (9th Cir. 2008) (alien's failure to explain consequences of a leg infection did not support adverse credibility finding where alien testified about the infection "only in passing" and was "never asked to discuss the seriousness of the infection or how she had recovered from it"). For

example, an omission of one detail included in an applicant's oral testimony does not make a supporting document inconsistent or incompatible. *See Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (doctor's letter failed to mention all of the applicant's injuries). "Omissions are not given much significance because applicants usually do not speak English and are not represented by counsel." *Kin v. Holder*, 595 F.3d 1050, 1056 (9th Cir. 2010) (concluding omissions from asylum application of a political demonstration and petitioners' participation in it were significant where the information was crucial to establishing persecution claim). Where an applicant gives one account of persecution but then revises the story "so as to lessen the degree of persecution he experienced, rather than to increase it, the discrepancy generally does not support an adverse credibility finding." *Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) (internal quotation marks omitted); *see also Garrovillas v. INS*, 156 F.3d 1010, 1013-14 (9th Cir. 1998) ("there was no reason for Garrovillas to disavow the earlier statement other than a desire to correct an error of which he had not been aware").

However, "[m]aterial alterations in the applicant's account of persecution are sufficient to support an adverse credibility finding." *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (citation omitted) (adverse credibility finding supported where omissions from original application "went to core of [the petitioner's] fear of political persecution").

6. Incomplete Asylum Application

"It is well settled that an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application." *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996); *see also Singh v. INS*, 292 F.3d 1017, 1021 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant's initial statements at the airport); *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) ("[A] concern that the affidavit is not as complete as might be desired cannot, without more, properly serve as a basis for a finding of lack of credibility.") (internal quotation marks omitted); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) (failure to mention two collateral incidents involving relatives on application not sufficient for adverse credibility determination). *Cf. Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (adverse credibility determination supported where incidents of mistreatment and arrest were stated in post-interview supplemental declaration, but omitted from original application).

Moreover, "asylum forms filled out by people who are unable to retain counsel should be read charitably, especially when it comes to the absence of a comprehensive and thorough account of all past instances of persecution." *Smolniakova v. Gonzales*, 422 F.3d 1037, 1045 (9th Cir. 2005) (internal quotation marks omitted).

7. Sexual Abuse or Assault

An applicant's failure to relate details about sexual assault or abuse at the first opportunity "cannot reasonably be characterized as an inconsistency." *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052-53 (9th Cir. 2002). "That a woman who has suffered sexual abuse at the hands of male officials does not spontaneously reveal the details of that abuse to a male interviewer does not constitute an inconsistency from which it could reasonably be inferred that she is lying." *Id.* at 1053; *see also Mousa v. Mukasey*, 530 F.3d 1025, 1027-29 (9th Cir. 2008) (failure to disclose sexual assault earlier in proceedings was credibly explained as a result of cultural norms); *Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) ("A victim of sexual assault does not irredeemably compromise his or her credibility by failing to report the assault at the first opportunity.").

8. Airport Interviews

The court has "rejected adverse credibility findings that relied on differences between statements a petitioner made during removal proceedings and those made during less formal, routinely unrecorded proceedings." *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (rejecting adverse credibility finding that relied on difference between bond hearing testimony and removal hearing testimony, noting similarities to asylum interviews and airport interviews). This court "hesitate[s] to view statements given during airport interviews as valuable impeachment sources because of the conditions under which they are taken and because a newly-arriving alien cannot be expected to divulge every detail of the persecution he or she sustained." *Li v. Ashcroft*, 378 F.3d 959, 962-63 (9th Cir. 2004) (sworn airport interview statement was a reliable impeachment source supported adverse credibility determination); *see also Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (omission at the airport of specific details of torture that were revealed later did not support negative credibility finding); *Singh v. INS*, 292 F.3d 1017, 1021-24 (9th Cir. 2002) (adverse credibility determination cannot be based on trial testimony that is more detailed than the applicant's initial statements at the airport). *Cf. Liu v. Holder*, 640 F.3d 918, 925-26 (9th Cir. 2011) (adverse

credibility finding supported in part by petitioner's failure to mention Falun Gong, the central element of her claim, in airport interview).

9. Asylum Interview/Assessment to Refer

"Certain features of an asylum interview make it a potentially unreliable point of comparison to a petitioner's testimony for purposes of a credibility determination." *See Singh v. Gonzales*, 403 F.3d 1081, 1087-88 (9th Cir. 2005) (discussing the nature of an asylum interview and concluding that discrepancies between Assessment To Refer and applicant's testimony did not support an adverse credibility determination); *see also Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (rejecting adverse credibility finding that relied on difference between bond hearing testimony and removal hearing testimony, noting similarities to asylum interviews and airport interviews). For example, the informal conference conducted by an asylum officer is quasi-prosecutorial in nature. *See Singh*, 403 F.3d at 1087-88. (citing *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th Cir. 2001), for a description of the asylum interview). In addition, although the regulations provide that an asylum officer "shall have the authority to administer oaths," there is no requirement "that the officer *must* take evidence under oath." *See Singh*, 403 F.3d at 1087-88 (citing 8 C.F.R. § 208.9(c)). Moreover, in the event that an applicant is unable to proceed with the interview in English, the applicant must provide at his or her own expense a competent translator. *See id*.

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

10. Bond Hearing

The court has "rejected adverse credibility findings that relied on differences between statements a petitioner made during removal proceedings and those made during less formal, routinely unrecorded proceedings." *Joseph v. Holder*, 600 F.3d

1235, 1243 (9th Cir. 2010). Bond hearings are like airport interviews and asylum interviews in that they are far less formal than removal hearings. *Id*. at 1243. "Because the bond hearing lacks procedural safeguards to ensure reliability, including the requirement of an oath and a transcript of the proceedings, testimony given in bond hearings, as stated under 8 C.F.R. § 1003.19(d), shall be 'separate and apart from, and shall form no part of, any deportation or removal hearing or proceedings.'" *Id*. at 1244. As such, 8 C.F.R. § 1003.19(d) precludes an IJ from considering evidence from a bond hearing when determining a petitioner's credibility at a removal hearing. *Id.* at 1242-44.

11. State Department and other Government Reports

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

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

It is permissible, however, for the agency to place supplemental reliance on a State Department report to discredit general portions of an applicant's testimony. *See Chebchoub v. INS*, 257 F.3d 1038, 1043-44 (9th Cir. 2001) (affirming negative credibility finding based in part on country conditions evidence that Morocco did not practice enforced exile of dissidents), *superseded by statute on other grounds*

as stated in Shrestha v. Holder, 590 F.3d 1034, 1046 (9th Cir. 2010). In *Chebchoub*, the court also noted that the State Department report was not used to discredit specific testimony regarding the petitioner's individual experiences. *Chebchoub*, 257 F.3d at 1044.

See also Singh v. Gonzales, 439 F.3d 1100, 1110-11 (9th Cir. 2006) (IJ erred in relying on generalized country report to find specific testimony about experiences implausible); *Zheng v. Ashcroft*, 397 F.3d 1139, 1143-44 (9th Cir. 2005) (rejecting the IJ's reliance on a country report in finding it unbelievable that applicants were forced to abort a child conceived outside of marriage); *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004) (alleged discrepancy based on country report statement that early marriage fines and regular IUD insertions were common, had no bearing on applicant's credibility); *Ge v. Ashcroft*, 367 F.3d 1121, 1126 (9th Cir. 2004) (to the extent that the IJ relied on blanket statements in the State Department report regarding detention conditions in China, the IJ's finding was not sufficiently individualized); *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) ("Mere failure to authenticate documents, at least in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding," despite State Department's observations regarding high incidence of document fabrication in China.).

12. Speculation and Conjecture

"Speculation and conjecture cannot form the basis of an adverse credibility finding, which must instead be based on substantial evidence." *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000); *see also Joseph v. Holder*, 600 F.3d 1235, 1245 (9th Cir. 2010).

See Joseph, 600 F.3d at 1245-46 (agency improperly speculated that Joseph would have a sophisticated understanding of Haiti's political situation, and also engaged in speculation when they assumed that Joseph's failure to leave Haiti sooner undermined his credibility); *Chawla v. Holder*, 599 F.3d 998, 1007 (9th Cir. 2010) (agency's conclusion that media or police reports existed was based on impermissible speculation and conjecture); *Li v. Holder*, 559 F.3d 1096, 1103-07 (9th Cir. 2009) (adverse credibility determination "riddled" with speculation and based on minor inconsistencies that did not go to heart of claim not supported by substantial evidence); *Mousa v. Mukasey*, 530 F.3d 1025, 1027 (9th Cir. 2008) (IJ's inability to reconcile alien's ability to resist pressure to join Ba'ath political party in Iraq, despite that party's reputation for ruthless tactics, was improper

speculation); *Kumar v. Gonzales*, 444 F.3d 1043, 1050-53 (9th Cir. 2006) (speculation concerning appropriate appearance of foreign official documents, investigative practices of Indian police, and whether applicant should know the whereabouts of his brother with whom he fled India); *Singh v. Gonzales*, 439 F.3d 1100, 1108 (9th Cir. 2006) (speculation about the types of questions Indian police would ask during a beating); *Zhou v. Gonzales*, 437 F.3d 860, 865 (9th Cir. 2006) (implausibility that applicant would risk privileged position in society to smuggle illegal material into China for a friend); *Lin v. Gonzales*, 434 F.3d 1158, 1162-67 (9th Cir. 2006) (speculation concerning appropriate appearance of foreign official documents); *Quan v. Gonzales*, 428 F.3d 883, 887-88 (9th Cir. 2005) (speculation regarding police capabilities based on country's geographical size and unsupported assumption that banks in China would be closed on Sundays); *Jibril v. Gonzales*, 423 F.3d 1129, 1135-36 (9th Cir. 2005) (speculation concerning whether petitioner could have survived gunshot wound overnight and received necessary operation); *Shire v. Ashcroft*, 388 F.3d 1288, 1296-97 (9th Cir. 2004) (speculation concerning believability that applicant could enter the U.S. using false documents and not remember the names of the cities through which he traveled by bus from New York to San Diego); *Kaur v. Ashcroft*, 379 F.3d 876, 887-88 (9th Cir. 2004) (superseded by statute) ("personal conjecture about the manner in which Indian passport officials carry out their duties" and how an applicant would describe an event); *Ge v. Ashcroft*, 367 F.3d 1121, 1125 (9th Cir. 2004) (personal conjecture about what the Chinese authorities would or would not do); *Guo v. Ashcroft*, 361 F.3d 1194, 1201-02 (9th Cir. 2004) (speculation as to why applicant did not apply for asylum immediately upon entry); *Arulampalam v. Ashcroft*, 353 F.3d 679, 687-88 (9th Cir. 2003) (IJ's hypotheses regarding abilities of Sri Lankan soldiers and police, and official registration requirements); *Wang v. INS*, 352 F.3d 1250, 1255-56 (9th Cir. 2003) (speculation regarding China's use of force against demonstrators and enforcement of one-child policy); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) (IJ's hypothesis as to what motivated the applicant's departure from Sri Lanka); *Singh v. INS*, 292 F.3d 1017, 1024 (9th Cir. 2002) (assumption regarding Indian police motives); *Gui v. INS*, 280 F.3d 1217, 1226-27 (9th Cir. 2002) (IJ's opinion about appropriate way to silence a dissident and implications of Romanian government's failure to kill applicant); *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000) (per curiam) (rejecting BIA's unsupported assumptions regarding the plausibility of applicant's political activities in Nigeria); *Bandari v. INS*, 227 F.3d 1160, 1167-68 (9th Cir. 2000) ("IJ's subjective view of what a persecuted person would include in his asylum application," personal belief that applicant should have bled when he was flogged,

and speculation about a foreign government's educational policies); *Chouchkov v. INS*, 220 F.3d 1077, 1083 (9th Cir. 2000) (personal conjecture about expected efficiency and competence of government officials); *Shah*, 220 F.3d at 1071 (State Department conjecture about the effect of electoral victory on existing political persecution and BIA's conjecture about appropriate quantity and appearance of letters); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) ("personal conjecture about what guerillas likely would and would not do" not sufficient).

13. Implausible Testimony

Skepticism as to the plausibility of testimony may in certain circumstances be a proper basis for finding that the testimony is inherently unbelievable if the IJ's logical inferences are supported by substantial evidence. *See Singh v. Gonzales*, 439 F.3d 1100, 1100 (9th Cir. 2006) (ultimately concluding that the IJ's inferences were not supported by substantial evidence); *see also Don v. Gonzales*, 476 F.3d 738, 743 (9th Cir. 2007) (substantial evidence supported the IJ's finding that petitioner's account of feared persecution by the police was implausible where petitioner had relatives in the police department, had reported threats to police and had repeated interactions with police); *cf. Chawla v. Holder*, 599 F.3d 998, 1008 (9th Cir. 2010) (IJ's skepticism as to the plausibility of testimony was based on mischaracterization of testimony and thus failed to support the adverse credibility determination); *see also Liu v. Holder*, 640 F.3d 918, 926 (9th Cir. 2011) (the IJ permissibly found the "improbable nature" of petitioner's story undermined petitioner's credibility); *Jibril v. Gonzales*, 423 F.3d 1129, 1135 (9th Cir. 2005) ("testimony that is implausible in light of the background evidence can support an adverse credibility finding") (internal citation and quotation omitted).

14. Counterfeit and Unauthenticated Documents

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

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

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

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

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

15. Misrepresentations

"Untrue statements by themselves are not reason for refusal of refugee status." *Turcios v. INS*, 821 F.2d 1396, 1400-01 (9th Cir. 1987) (Salvadoran applicant's false claim to INS officials that he was Mexican did not undermine his credibility). For example, "the fact that an asylum seeker has lied to immigration officers or used false passports to enter this or another country, without more, is not a proper basis for finding her not credible." *Kaur v. Ashcroft*, 379 F.3d 876, 889 (9th Cir. 2004) (superseded by statute). These statements must be examined in light of all of the circumstances of the case. *Turcios*, 821 F.2d at 1400-01; *see also Marcos v. Gonzales*, 410 F.3d 1112, 1116 (9th Cir. 2005) (misrepresentation on

visa application); *Guo v. Ashcroft*, 361 F.3d 1194, 1202 (9th Cir. 2004) (false statements made to extend B-1 visa); *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) (distinguishing between "false statements made to establish the critical elements of the asylum claim from false statements made to evade INS officials").

"While the special circumstances of needing to lie one's way out of a persecuting country and perhaps use fraudulent documents to get out of that country. . . may weaken or vitiate the adverse inference … lies and fraudulent documents when they are no longer necessary for the immediate escape from persecution do support an adverse inference. *Singh v. Holder*, 638 F.3d 1264, 1272 (9th Cir. 2011) ("We have not held, and could not reasonably hold, that an asylum applicant's past lies may never support an adverse credibility determination.); *see also Singh v. Holder*, 643 F.3d 1178, 1180-81 (9th Cir. 2011) ("[Lying to immigration authorities] always counts as substantial evidence supporting an adverse credibility finding, unless the lie falls within the narrow *Akinmade* exception."). False statements regarding alleged persecution may support a negative credibility finding. *See Al-Harbi v. INS*, 242 F.3d 882, 889-90 (9th Cir. 2001) (affirming negative credibility finding based on Iraqi dissident's "propensity to change his story regarding incidents of past persecution"); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1393 (9th Cir. 1985) (negative credibility based on Salvadoran applicant's lies to get passport and under oath to INS officials, travel under an assumed name, and conviction of illegally transporting aliens into the U.S).

16. Classified Information

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

17. Failure to Seek Asylum Elsewhere

The failure to seek asylum in the first country in which an applicant arrives does not necessarily undermine a credible fear of persecution. *See Singh v. Gonzales*, 439 F.3d 1100, 1107 (9th Cir. 2006); *Ding v. Ashcroft*, 387 F.3d 1131, 1140 (9th Cir. 2004) (citing *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986)). However, an applicant's voluntary return to her home country may be considered in rendering an adverse credibility determination. *See Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008) (distinguishing *Ding*, and concluding that alien's admission that she voluntarily returned to Indonesia twice

following previous trips to the United States "inherently undermine[d] her testimony that she experienced past suffering or that she feared returning home.").

18. Cumulative Effect of Adverse Credibility Grounds

"[R]epeated and significant inconsistencies" may deprive a claim of the "requisite ring of truth." *Kaur v. Gonzales*, 418 F.3d 1061, 1067 (9th Cir. 2005); *see also Don v. Gonzales*, 476 F.3d 738, 742 (9th Cir. 2007) (an adverse credibility determination may be supported by substantial evidence where there are inconsistencies that weaken a claim for asylum coupled with other indications of dishonesty); *Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) ("the inconsistencies are the sum total of [the applicant's] testimony"). Furthermore, "just as repeated and significant inconsistencies can deprive an alien's claim of the requisite ring of truth, so too can an inconsistency accompanied by other indications of dishonesty – such as a pattern of clear and pervasive inconsistency or contradiction." *Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011) (internal quotation marks and citation omitted).

19. Voluntary Return to Country

An adverse credibility finding can be based in part on the alien's voluntary return to his or her home country. *See Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008) (holding that adverse credibility finding based in part on alien's admission that she willingly returned to her home country was supported by substantial evidence where alien's voluntary return to Indonesia following trips to the United States undermined testimony that she suffered past persecution and feared returning).

D. Presumption of Credibility

Where the BIA does not make an adverse credibility finding, this court accepts the applicant's factual contentions as true. *See Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011) (where neither the BIA nor the IJ make an adverse credibility finding, the court of appeals must assume that the petitioner's factual contentions are true); *She v. Holder*, 629 F.3d 958, 964 (9th Cir. 2010) (explaining a petitioner's testimony is presumed credible absent an explicit adverse credibility finding); *Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005) ("When the BIA's decision is silent on the issue of credibility, despite an IJ's explicit adverse credibility finding, we may presume that the BIA found the petitioner to be credible."); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004) ("Testimony

must be accepted as true in the absence of an explicit adverse credibility finding."); *Navas v. INS*, 217 F.3d 646, 652 n.3 (9th Cir. 2000) (same).

Note the court has declined to extend the presumption of credibility to situations where an applicant is seeking admission to the United States outside of the asylum context. *Abufayad v. Holder*, 632 F.3d 623, 631 (9th Cir. 2011) (no general requirement that testimony of an applicant seeking admission to the US outside of the asylum context be regarded as true).

E. Implied Credibility Findings

1. Immigration Judges

"[I]t is clearly our rule that when the IJ makes implicit credibility observations in passing, … this does not constitute a credibility finding." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137-38 (9th Cir. 2004) (internal quotation marks and alteration omitted); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 658-59 (9th Cir. 2003) (same); *see also Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2160 (2011) (mem.) ("Precedent holds that an adverse credibility finding does not require the recitation of a particular formula, yet the finding must be 'explicit.'"); *Huang v. Mukasey*, 520 F.3d 1006, 1007-08 (9th Cir. 2008) (per curiam) (concluding that although IJ found numerous inconsistencies in testimony, the IJ failed to make a credibility finding); *Mansour v. Ashcroft*, 390 F.3d 667, 672 (9th Cir. 2004); *Shoafera v. INS*, 228 F.3d 1070, 1075 n.3 (9th Cir. 2000); *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) ("In the absence of an explicit adverse credibility finding, we must assume that [the applicant's] factual contentions are true."), *superseded by statute on other grounds as stated by Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1383 (9th Cir. 1990) ("The mere statement that an applicant is 'not entirely credible' is not enough."); *Singh v. Gonzales*, 491 F.3d 1019, 1024-25 (9th Cir. 2007) (superseded by statute on other grounds) (a negative inference is insufficient to support an adverse credibility determination without an explicit adverse credibility finding). *Cf. Toufighi v. Mukasey*, 538 F.3d 988, 994-95 (9th Cir. 2008) (concluding that through the IJ's qualifying remarks, the IJ made an express adverse credibility determination as to petitioner's claim that he converted to Christianity).

2. Board of Immigration Appeals

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

Note that "the BIA may not simply treat inconsistencies between the IJ's findings and [the petitioner's] testimony to be tantamount to an explicit adverse credibility finding." *She v. Holder*, 629 F.3d 958, 964 (9th Cir. 2010).

F. Sua Sponte Credibility Determinations and Notice

The BIA may not make an adverse credibility determination in the first instance unless the applicant is afforded certain due process protections. *See Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003) (holding that due process was violated where the IJ made a credibility observation but failed to make an express credibility determination and noting that under 8 C.F.R. § 1003.1(d)(3)(i) "the BIA would have no choice but to remand to the IJ for an initial credibility determination, as the BIA is now limited to reviewing the IJ's factual findings, including credibility determinations, for clear error.").

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

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

Where an applicant had no notice that an adverse credibility determination could be based on his failure to call a witness to corroborate his testimony, due

process requires a remand for a new hearing. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000) (pre-REAL ID Act).

G. Discretionary Decisions

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

H. Remedy

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

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

Where the IJ makes an additional finding on the merits of the case, and this court reverses a negative credibility finding, a remand for "further consideration and investigation in light of the ruling that the petitioner is credible" is not required with respect to the issues addressed by the IJ. *See Guo v. Ashcroft*, 361 F.3d 1194, 1204 (9th Cir. 2004).

When this court determines that substantial evidence does not support a negative credibility finding, it may deem the applicant credible, *see, e.g.*, *Arulampalam v. Ashcroft*, 353 F.3d 679, 689 (9th Cir. 2003), or it may remand for a renewed credibility determination, *see, e.g.*, *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998); *Hartooni v. INS*, 21 F.3d 336, 343 (9th Cir. 1994) (remanding for credibility finding because the court could not "say that 'no doubts have been raised' about" applicant's credibility). *See also Soto-Olarte v. Holder*, 555 F.3d 1089, 1095 (9th Cir. 2009) (explaining that "both the option of deeming a petitioner credible and the option of remanding on an open record remain viable in an appropriate case.").

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

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

J. Cases Reversing Negative Credibility Findings

Li v. Holder, 629 F.3d 1154, 1158-60 (9th Cir. 2011) (adverse credibility finding not supported by substantial evidence where inconsistencies were minor and record did not support the conclusion that petitioner was evasive); *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (adverse credibility determination not supported by substantial evidence where the IJ based the finding in part on inconsistencies between petitioner's bond hearing testimony according to the IJ's

notes and his testimony during his removal); *Chawla v. Holder*, 599 F.3d 998, 1001 (9th Cir. 2010) (adverse credibility determination not supported by substantial evidence where "[n]one of the reasons articulated by the IJ or BIA, considered either separately or in combination, provide[d] a legitimate basis to question Chawla's credibility"); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091-93 (9th Cir. 2009) (adverse credibility determination not supported by substantial evidence where neither the IJ nor the BIA addressed plausible explanation of inconsistency relied upon, and the petitioner was not given an opportunity to explain other inconsistencies that formed basis of determination); *Li v. Holder*, 559 F.3d 1096, 1103-07 (9th Cir. 2009) (adverse credibility determination "riddled" with speculation and based on minor inconsistencies that did not go to heart of claim not supported by substantial evidence); *Zhu v. Mukasey*, 537 F.3d 1034, 1038-43 (9th Cir. 2008) (IJ speculated, failed to address explanations, improperly relied on a statement given in airport interview that was not inconsistent with subsequent testimony, failed to provide an opportunity to explain a perceived inconsistency, and relied on minor inconsistencies that did not go to heart of claim); *Tekle v. Mukasey*, 533 F.3d 1044, 1052-55 (9th Cir. 2008) (IJ mischaracterized evidence, characterized evidence out of context, failed to provide applicant opportunity to explain some perceived inconsistencies, and failed to address applicant's explanations of other perceived inconsistencies); *Mousa v. Mukasey*, 530 F.3d 1025, 1027-29 (9th Cir. 2008) (speculation regarding petitioner's ability to resist pressure to join Ba'ath political party in Iraq despite the party's reputation for ruthless tactics; failure to disclose sexual assault earlier in proceedings was credibly explained as a result of cultural norms; minor omission regarding consequences of leg infection); *Morgan v. Mukasey*, 529 F.3d 1202, 1206-10 (9th Cir. 2008) (agency relied on discrepancies that did not exist or were inconsequential, and speculation); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1046 (9th Cir. 2007) (misstatements were not material, and IJ incorrectly "supposed" that applicant's failure to find his parents was an "impossibility"); *Kumar v. Gonzales*, 444 F.3d 1043 (9th Cir. 2006) (veiled concerns about terrorist ties clouded adverse credibility determination and minor discrepancies that would not support determination individually could not support determination cumulatively); *Singh v. Gonzales*, 439 F.3d 1100 (9th Cir. 2006) (speculation; improper reliance on country report; irregular translation; discrepancies that do not go to the heart of the claim); *Lin v. Gonzales*, 434 F.3d 1158 (9th Cir. 2006) (impermissible speculation regarding authenticity of several official documents); *Jibril v. Gonzales*, 423 F.3d 1129 (9th Cir. 2005) (inconsistencies on trivial matters not going to heart of claim; speculation and conjecture; unsupported demeanor

finding); *Smolniakova v. Gonzales*, 422 F.3d 1037 (9th Cir. 2005) (adverse credibility determination based on misconstruction of the record; insufficient evidence; improper speculation and conjecture); *Zheng v. Ashcroft*, 397 F.3d 1139 (9th Cir. 2005) (State Department reports on China not inconsistent with applicant testimony); *Kaur v. Ashcroft*, 379 F.3d 876 (9th Cir. 2004) (superseded by statute) (failure to address explanation; conjecture); *Hoque v. Ashcroft*, 367 F.3d 1190 (9th Cir. 2004) (discrepancy in documents; minor omissions; and no evidence to support finding that wife's testimony was unresponsive); *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004) (many of the IJ's findings were based on speculation and conjecture); *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004) (reluctance to discuss rape and minor inconsistencies in testimony of applicant and witness); *Singh v. INS*, 362 F.3d 1164 (9th Cir. 2004) (perceived inconsistencies insufficient); *Chen v. Ashcroft*, 362 F.3d 611 (9th Cir. 2004) (no opportunity to explain perceived inconsistency); *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir. 2004) (no opportunity to explain); *Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003) (insufficient demeanor-based finding; speculation); *Wang v. Ashcroft*, 341 F.3d 1015 (9th Cir. 2003) (immaterial inconsistencies between two witnesses); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (IJ misstated the evidence; other perceived problems explained); *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002) (minor omission in doctor's note; trivial inconsistency regarding location of rally; no examples of unresponsiveness); *Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002) (inconsistencies between initial airport interview and testimony; speculation and conjecture); *Gui v. INS*, 280 F.3d 1217 (9th Cir. 2002) (mischaracterizations of testimony; speculation); *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) (boilerplate negative credibility finding); *Hakeem v. INS*, 273 F.3d 812, 816 (9th Cir. 2001) (neither the IJ or the BIA addressed the applicant's explanation for the identified discrepancy), *superseded by statute on other grounds as stated in Ramadan v. Gonzalez*, 479 F.3d 646, 650 (9th Cir. 2007); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (per curiam) (implausibility finding based on impermissible grounds); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (conjecture; minor inconsistencies); *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (translation problems; confusion about dates that did not enhance applicant's claim); *Shah v. INS*, 220 F.3d 1062, 1067-71 (9th Cir. 2000) (no identification of evasiveness in the record; State Department conjecture; BIA's speculation); *Chanchavac v. INS*, 207 F.3d 584, 588 (9th Cir. 2000) (explainable inconsistencies and cultural assumptions); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (false passport and false declaration concerning Canadian citizenship; minor or non-existent discrepancies); *Osorio v. INS*, 99 F.3d 928, 931-32 (9th Cir. 1996) (no

identification of specific inconsistencies); *Ramos-Vasquez v. INS*, 57 F.3d 857, 861 (9th Cir. 1995) (circular reasoning); *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994) (remanding for credibility finding); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990) ("failure to file an application form that was as complete as might be desired;" failure to present copy of threatening note); *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1147 (9th Cir. 1988) (minor inconsistency between testimony of two witnesses regarding date of death squad incident), *superseded by statute as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987) (discrepancy as to date father was killed); *Turcios v. INS*, 821 F.2d 1396, 1399-1401 (9th Cir. 1987) (purportedly evasive answers and false claim of Mexican nationality to INS officials); *Plateros-Cortez v. INS*, 804 F.2d 1127, 1131 (9th Cir. 1986) (uncertainty regarding dates; inconsistency regarding place of employer's death); *Martinez-Sanchez v. INS*, 794 F.2d 1396, 1400 (9th Cir. 1986) (trivial date error; inconsistency between testimony and application concerning number of children); *Damaize-Job v. INS*, 787 F.2d 1332, 1337-38 (9th Cir. 1986) (failure to marry mother of children; discrepancy between application and testimony on children's birth dates; failure to apply for asylum in any of the countries through which applicant traveled); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1375 n.9 (9th Cir. 1985) (out-of-wedlock child is impermissible factor); *Zavala-Bonilla v. INS*, 730 F.2d 562, 565-66 (9th Cir. 1984) (no evidence that submitted letters were false; inadequate discrepancies).

K. Cases Upholding Negative Credibility Findings

Singh v. Holder, 643 F.3d 1178, 1180-81 (9th Cir. 2011) (admission that petitioner repeatedly lied to immigration judge sufficient to support adverse credibility finding); *Singh v. Holder*, 638 F.3d 1264, 1272 (9th Cir. 2011) (lies and fraudulent documents supported adverse credibility when they were no longer necessary for the immediate escape from persecution); *Liu v. Holder*, 640 F.3d 918 (9th Cir. 2011) (adverse credibility finding supported in part by petitioner's failure to mention Falun Gong, the central element of her claim, in airport interview); *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (adverse credibility finding supported based on omission of incidents of mistreatment and arrest from original asylum application). *Rizk v. Holder*, 629 F.3d 1083, 1091 (9th Cir. 2011) (adverse credibility finding upheld where inconsistencies between police report and testimony went to the heart of the claim and petitioner failed to offer a reasonable); *Fernandes v. Holder*, 619 F.3d 1069, 1075 (9th Cir. 2010) (misrepresentations in testimony and evidence of filing of fraudulent application); *Cortez-Pineda v.*

Holder, 610 F.3d 1118, 1123-24 (9th Cir. 2010) (disputed entry date and inconsistencies between asylum application and hearing testimony as to when threats were received); *Martinez v. Holder*, 557 F.3d 1059, 1065 (9th Cir. 2009) (repeated and persistent lies under oath with respect to his asylum application); *Dhital v. Mukasey*, 532 F.3d 1044, 1050-51 (9th Cir. 2008) (per curiam) (filing of fraudulent first asylum application; repetition of fraudulent claim in asylum interview and initial hearing before IJ; inconsistency between explanation that false identity was used on first application in order to hide from persecutors, while simultaneously using true name to renew Nepalese passport and apply for credit cards); *Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008) (alien's admission that she voluntarily returned to Indonesia twice following previous trips to the United States "inherently undermines her testimony that she experienced past suffering or that she feared returning home"); *Goel v. Gonzales*, 490 F.3d 735 (9th Cir. 2007) (per curiam) (petitioner's testimony was at odds with his own documentary evidence); *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004) (omissions and discrepancies among three asylum applications, testimony, and airport interview statement); *Singh v. Ashcroft*, 367 F.3d 1139, 1143 (9th Cir. 2004) (major inconsistencies; inability to explain political party responsibilities); *Desta v. Ashcroft*, 365 F.3d 741, 745 (9th Cir. 2004) (fraudulent documents and material testimonial inconsistencies); *Wang v. INS*, 352 F.3d 1250 (9th Cir. 2003) (inconsistencies in testimonial and documentary evidence; evasiveness; new story); *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003) (discrepancies regarding identity, membership in a persecuted group, and date of entry); *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) (geographic discrepancies going to heart of the claim); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003) ("last-minute, uncorroborated story" regarding dramatic attack and stabbing); *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001) (per curiam) (material differences in two asylum applications regarding the basis of applicant's fear); *Chebchoub v. INS*, 257 F.3d 1038 (9th Cir. 2001) (inconsistent statements about number of arrests; implausibility of other testimony), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) (contradictions between testimony and doctor's letter); *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999) (testimony waivered during cross examination; inconsistent testimony; sudden change in name to coincide with newspaper article); *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997) (major discrepancies in two asylum applications); *Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1997) (inconsistencies in testimony and failure to offer proof that applicant was a Jehovah's Witness); *Berroteran-Melendez v. INS*,

955 F.2d 1251, 1256-57 (9th Cir. 1992) (discrepancies between testimony and application regarding number of arrests and lack of detail); *Ceballos-Castillo v. INS*, 904 F.2d 519 (9th Cir. 1990) (inconsistencies, including one regarding identity of alleged persecutors); *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985) (vague allegations regarding threats); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985) (negative credibility based on applicant's lies to get passport and under oath to INS officials; travel under an assumed name; conviction for illegally transporting aliens in the U.S.); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1263-64 (9th Cir. 1985) (substantial inconsistencies between application and testimony).

L. The REAL ID Act Codification of Credibility Standards

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

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

8 U.S.C. §§ 1158(b)(1)(B)(iii) (asylum); 1231(b)(3)(C) (withholding of removal); 1229a(c)(4)(C) (other relief from removal). *See also Ren v. Holder*, 648 F.3d 1079, 1084 (9th Cir. 2011) ("REAL ID Act established new standards for adverse credibility determinations in proceedings on applications for asylum, withholding

of removal, and CAT relief that, …, were submitted on or after May 11, 2005"); *Shrestha v. Holder*, 590 F.3d 1034, 1039 (9th Cir. 2010) (the REAL ID Act's "new standards governing adverse credibility determinations" applies to applications for asylum, withholding of removal, and CAT relief made on or after May 11, 2005).

M. Frivolous Applications

A finding of frivolousness does not flow automatically from an adverse credibility determination. *Liu v. Holder*, 640 F.3d 918, 925 (9th Cir. 2011); *Khadka v. Holder*, 618 F.3d 996, 1002 (9th Cir. 2010) (internal quotation marks and citation omitted) (holding adverse credibility determination based solely on finding that petitioner created a false document to support his asylum application was insufficient to support a *sua sponte* finding that petitioner filed a frivolous application.).

For asylum applications filed on or after April 1, 1997, the frivolous asylum application bar, 8 U.S.C. § 1158(d)(6), renders an applicant permanently ineligible for immigration benefits if his or her asylum application is found to be knowingly frivolous. *See Kalilu v. Mukasey*, 548 F.3d 1215, 1217 (9th Cir. 2008) (per curiam) ("A determination that an applicant filed a frivolous asylum application renders the applicant permanently ineligible for immigration relief."). An application is frivolous "if any of its material elements is deliberately fabricated." 8 C.F.R. § 1208.20; *see also Fernandes v. Holder*, 619 F.3d 1069, 1076 (9th Cir. 2010) ("'An asylum application is frivolous if any of its material elements is deliberately fabricated.'" (quoting 8 C.F.R. § 1208.20)). Note that "[f]abrication of material evidence does not necessarily constitute fabrication of a material element." *Khadka*, 618 F.3d at 1004.

The bar will not apply absent four procedural safeguards:

> In order to sustain a finding of frivolousness, (1) 'an asylum applicant must have notice of the consequences of filing a frivolous application;' (2) 'the IJ or Board must make specific findings that the applicant knowingly filed a frivolous application;' (3) 'those findings must be supported by a preponderance of the evidence;' and (4) 'the applicant must be given sufficient opportunity to account for any discrepancies or implausibilities in his application.'

Fernandes, 619 F.3d at 1076 (quoting *Ahir v. Mukasey*, 527 F.3d 912, 917 (9th Cir. 2008) (adopting procedural requirements outlined in *Matter of Y-L*,

24 I. & N. Dec. 151, 155-60 (BIA 2007)); *see also Liu v. Holder*, 640 F.3d 918, 928-29 (9th Cir. 2011) (concluding that alien was not given sufficient notice and opportunity to explain grounds which the IJ invoked for finding the asylum application to be frivolous); *Khadka*, 618 F.3d at 1002; *Farah v. Ashcroft*, 348 F.3d 1153, 1158 (9th Cir. 2003) (reversing frivolous asylum application determination because applicant was not given adequate opportunity to explain discrepancies).

"Whether the IJ complied with the BIA's four procedural requirements for frivolousness finding is a question of law we review de novo." *Liu*, 640 F.3d at 928.

In *Fernandes v. Holder*, the court affirmed the BIA's determination that the petitioner filed a frivolous application, where the agency gave "cogent and convincing reasons for [the] specific finding that [the petitioner's] application was fraudulent." 619 F.3d at 1076.

Challenges to frivolous findings must be exhausted. *See Almaghzar v. Gonzales*, 457 F.3d 915, 920-21 (9th Cir. 2006) (declining to consider claim that application was filed before the frivolous application bar took effect).

"[W]ithdrawal of an asylum application does not obviate the need for an IJ to determine whether a false application should be deemed frivolous." *Chen v. Mukasey*, 527 F.3d 935, 943 (9th Cir. 2008) (stating that the phrase "final determination on such application" in § 1158(d)(6) "refers not to a determination on the merits of the application, but to a final determination as to whether the application is frivolous," but remanding "to allow the agency itself to speak on this issue").

VI. CORROBORATIVE EVIDENCE

A. Pre-REAL ID Act Standards

1. Credible Testimony

"Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone." *Garrovillas v. INS*, 156 F.3d 1010, 1016-17 (9th Cir. 1998) (internal quotation marks omitted); *see also* 8 C.F.R. § 1208.13(a) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). Once an applicant's

testimony is deemed credible, no further corroboration is required to establish the facts to which the applicant testified. *See Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004) (superseded by statute); *see also Li v. Holder*, 629 F.3d 1154, 1160 (9th Cir. 2011) (explaining that in a "pre-REAL ID Act case, absent other substantial evidence of adverse credibility, the production of corroborating evidence cannot be required. When credibility is the only issue on appeal, and once each of the IJ's reasons for finding adverse credibility is shown to be defective, this court accepts a petitioner's testimony as credible." (internal citations omitted)); *Joseph v. Holder*, 600 F.3d 1235, 1246 (9th Cir. 2010) (where substantial evidence did not support adverse credibility finding, no corroborative evidence was required); *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2160 (2011) (mem.) (explaining that where the IJ fails to make an explicit credibility finding, he cannot require corroborating evidence); *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (per curiam) (holding that credible applicant was not required to produce evidence of organizational membership, political fliers or medical records).

Moreover, "when each of the IJ's or BIA's proffered reasons for an adverse credibility finding fails, we must accept a petitioner's testimony as credible[,]" and further corroboration is not required. *Kaur*, 379 F.3d at 890 (reversing the IJ's five-factor negative credibility finding and holding that corroboration was not required); *see also Lin v. Holder*, 610 F.3d 1093, 1096-97 (9th Cir. 2010) (per curiam) (where petitioner established by clear and convincing evidence that his asylum application was timely filed, there was no need for corroboration); *Abovian v. INS*, 219 F.3d 972, 978 (9th Cir. 2000) ("It is well settled in this circuit that independent corroborative evidence is not required from asylum applicants where their testimony is unrefuted."), *as amended by* 228 F.3d 1127 *and* 234 F.3d 492 (9th Cir. 2000).

2. Credibility Assumed

If the BIA assumes, without deciding, that the applicant is credible, further corroboration is not required. *See Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (BIA erred by requiring independent corroboration of the facts given express failure to determine credibility), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam); *see also Singh v. Gonzales*, 491 F.3d 1019, 1025-26 (9th Cir. 2007) (superseded by statute) (without making an explicit adverse credibility determination, IJ erred by requiring corroboration of the facts based on a negative inference). Given the difficulty of

proving specific threats by a persecutor, credible testimony regarding a threat is sufficient to show that a threat was made. *Ladha*, 215 F.3d at 899-900 (citing, *inter alia*, *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.")), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam). In addition, "other facts that serve as the basis for an asylum or withholding claim can be shown by credible testimony alone if corroborative evidence is 'unavailable.'" *Id.* at 900 ("conclud[ing] that this circuit assumes evidence corroborating testimony found to be credible is 'unavailable' if not presented"). "When an alien credibly testifies to certain facts, those facts are deemed true, and the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of the claim for relief." *Id.*

3. No Explicit Adverse Credibility Finding

Where the BIA raises questions about an applicant's claim, but does not make an explicit negative credibility finding, the factual contentions are deemed true, and no further corroboration of the facts is required. *See Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (rejecting BIA's finding that applicant did not meet his burden of proof because he failed to provide documentary evidence to corroborate his testimony), *superseded by statute as stated by Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009). A negative inference, without an explicit adverse credibility finding, is insufficient to sustain an adverse credibility finding; without an explicit adverse credibility finding, the agency must treat petitioner's testimony as true and analyze the merits of the claim. *See Singh v. Gonzales*, 491 F.3d 1019, 1024-25 (9th Cir. 2007) (superseded by statute) (holding that while IJ was entitled to draw a negative inference from petitioner's refusal to allow access to his Canadian immigration file, IJ could not deny asylum on the basis of the negative inference alone); *see also Kaur v. Holder*, 561 F.3d 957, 962-63 (9th Cir. 2009) (concluding that the IJ's passing statement that "there are certain instances where this Court does not find the Applicants' testimony to be credible" was insufficient to constitute an adverse credibility finding.").

4. Negative Credibility Finding

"[W]here the IJ has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse

credibility finding will withstand appellate review." *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000) (pre-REAL ID Act) (Sikh applicant should have presented his father at the hearing to corroborate his testimony, but remanding because applicant had no notice that negative credibility finding could be based on this failure); *see also Singh v. Holder*, 638 F.3d 1264, 1272-73 (9th Cir. 2011) (adverse credibility finding upheld where there was fraud in the asylum application, past perjury, and absence of reasonably available corroboration); *Chawla v. Holder*, 599 F.3d 998, 1005 (9th Cir. 2010) (rejecting IJ's adverse credibility based petitioner's failure to provide corroboration, where evidence IJ demanded was not easily available); *Sidhu*, 220 F.3d at 1090 ("[I]f the trier of fact either does not believe the applicant or does not know what to believe, the applicant's failure to corroborate his testimony can be fatal to his asylum application"); *Chebchoub v. INS*, 257 F.3d 1038, 1045 (9th Cir. 2001) (substantial evidence supported the BIA's determination that Moroccan applicant failed to satisfy his burden of proof based on a negative credibility finding and the failure to provide easily available corroborating evidence), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1997) (affirming negative credibility finding based on gaps and inconsistencies in testimony, and failure to provide documentary evidence proving membership in the Nicaraguan Jehovah's Witness Church).

Note that while the IJ or BIA can require corroborating evidence, case law does not require such evidence to be "strong" or "conclusive." *Chawla*, 599 F.3d at 1008.

a. Non-Duplicative Corroborative Evidence

"[W]here an applicant produces credible corroborating evidence to buttress an aspect of his own testimony, an IJ may not base an adverse credibility determination on the applicant's failure to produce additional evidence that would further support that particular claim." *Sidhu v. INS*, 220 F.3d 1085, 1091 (9th Cir. 2000) (pre-REAL ID Act); *see also Chen v. Ashcroft*, 362 F.3d 611, 620-21 (9th Cir. 2004) (failure of brother to testify on applicant's behalf was not determinative because she produced other corroborating evidence regarding her child in China); *Gui v. INS*, 280 F.3d 1217, 1227 (9th Cir. 2002) ("Where, as here, a petitioner provides some corroborative evidence to strengthen his case, his failure to produce still more supporting evidence should not be held against him.").

b. Availability of Corroborative Evidence

Corroborative documentation may not be "easily available" where the applicant fled his or her country in haste, or where it would be dangerous to be caught with material evidence. *See Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (per curiam); *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000). "[I]t is inappropriate to base an adverse credibility determination on an applicant's inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States – such corroboration is almost never easily available." *Sidhu v. INS*, 220 F.3d 1085, 1091-92 (9th Cir. 2000) (pre-REAL ID Act); *see also Chawla v. Holder*, 599 F.3d 998, 1005 (9th Cir. 2010) (failure to provide charge sheet as corroborating evidence did not support adverse credibility determination where the charge sheet was not easily available); *Shire v. Ashcroft*, 388 F.3d 1288, 1298-99 (9th Cir. 2004) (medical records from and verification of stay in refugee camps in Kenya not easily available); *Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004) (superseded by statute) (affidavits or letters from friends and neighbors in India not easily available); *Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) (Chinese employment records not easily available because applicant was fired); *Guo v. Ashcroft*, 361 F.3d 1194, 1201 (9th Cir. 2004) (corroborative evidence of job termination not easily available because it was in China); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (affidavits from Sri Lanka not easily available); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (corroborating letters or statements from mother in Guatemala and friend in Mexico not required).

However, affidavits from close relatives in Western Europe and from individuals in the United States should be "easily available." *See Chebchoub v. INS*, 257 F.3d 1038, 1044-45 (9th Cir. 2001), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *see also Sidhu*, 220 F.3d at 1091 (father living in nearby suburb was an "easily available" witness); *Mejia-Paiz v. INS*, 111 F.3d 720, 723-24 (9th Cir. 1997) ("Proving one's membership in a church does not pose the type of particularized evidentiary burden that would excuse corroboration.").

c. Opportunity to Explain

If corroborative evidence is required, the applicant must be given an opportunity to explain the failure to provide material corroboration. *See Sidhu v. INS*, 220 F.3d 1085, 1091 (9th Cir. 2000) (pre-REAL ID Act) (applicant was specifically asked to explain the lack of corroboration); *Chen v. Ashcroft*, 362 F.3d

611, 621 (9th Cir. 2004) (failure of brother to testify on applicant's behalf was not determinative because she presented a plausible explanation for his absence); *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003) (Sri Lankan applicant was not given an opportunity to explain failure to produce corroborative evidence).

B. Post-REAL ID Act Standards

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

> There are three prerequisites before uncorroborated testimony may be considered sufficient: (1) the applicant's testimony is credible; (2) the applicant's testimony is persuasive; and (3) the applicant's testimony refers to facts sufficient to demonstrate refugee status. Credible testimony is not by itself enough. Otherwise the other two requirements would be mere surplus-age.

Aden v. Holder, 589 F.3d 1040, 1044 (9th Cir. 2009). *See also Owino v. Holder*, 575 F.3d 956 (9th Cir. 2009) (per curiam) (remanding for the IJ to determine whether petitioner was required to corroborate his claim).

Note that this standard differs from this court's pre-REAL ID Act standard that the trier of fact may not require corroborating evidence in the absence of an explicit adverse credibility determination. *See, e.g.*, *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (trier of fact may not require corroborating evidence absent an adverse credibility determination), *superseded by statute as stated by Aden v. Holder*, 589 F.3d 1040, 1044 (9th Cir. 2009); *Ladha v. INS*, 215 F.3d 889, 901 (9th Cir. 2000) (explicitly disapproving corroboration requirement set forth in *Matter of*

S-M-J), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam).

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

In addition, for all applications for asylum, withholding of removal, and other forms of relief from removal, in which a *final administrative order* issued *before, on or after May 11, 2005*, no court may reverse the trier of fact's determination regarding the availability of corroborating evidence unless the trier of fact would be compelled to conclude that such corroborating evidence is unavailable. 8 U.S.C. § 1252(b)(4) (as amended). *See also Shrestha v. Holder*, 590 F.3d 1034, 1047 (9th Cir. 2010) (quoting 8 U.S.C. § 1252(b)(4)) ("Under the REAL ID Act, [the court] may not reverse the IJ's and BIA's conclusion that [the petitioner] should have been able to obtain a supportive affidavit … to corroborate his claims … unless 'a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.'").

The corroboration requirement of § 1158(b)(1)(B)(ii) should not be read into § 1158(a)(2)(B), which requires asylum applications to be timely filed. *See Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011) (en banc).

C. Judicially Noticeable Facts

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

D. Forms of Evidence

Corroborative evidence may be in the form of documents, witness testimony, expert testimony, or physical evidence, such as scars. *See, e.g.*, *Smolniakova v. Gonzales*, 422 F.3d 1037, 1047 (9th Cir. 2005) (newspaper article reporting an alleged incident of persecution); *Singh v. Ashcroft*, 301 F.3d 1109, 1112 (9th Cir. 2002) (burn marks on arms; doctor's letter); *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (per curiam) (country conditions reports; witness testimony; and scars); *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1199 (9th Cir.

2000) (expert testimony); *Akinmade v. INS*, 196 F.3d 951, 957 (9th Cir. 1999) (country conditions reports).

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

E. Hearsay Evidence

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

Cross-reference: Due Process in Immigration Proceedings, Right to Confront and Cross-Examine Witnesses.

F. Country Conditions Evidence

Country conditions evidence generally provides the context for evaluating an applicant's credibility, rather than corroborating specifics of a claim. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1162 (9th Cir. 1999); *cf. Chebchoub v. INS*, 257 F.3d 1038, 1044 (9th Cir. 2001) (affirming BIA's use of country reports to "refute a generalized statement" regarding the practice of exile in Morocco), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010).

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

G. Certification of Records

Failure to obtain consular certification of foreign official records under 8 C.F.R. § 287.6(b) is not a basis to exclude corroborating documents. *See Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001) (per curiam); *see also Jiang v. Holder*, 658 F.3d 1118, 1120 (9th Cir. 2011) (explaining that the procedure in 8 C.F.R. § 287.6 is not the exclusive method for authenticating documents). "Documents may be authenticated in immigration proceedings through any recognized procedure, such as those required by INS regulations or by the Federal Rules of Civil Procedure." *Khan*, 237 F.3d at 1144 (internal quotation marks omitted). Failure to supply affirmative authentication for documents, in the absence of evidence undermining their reliability, does not constitute a sufficient foundation for an adverse credibility finding. *See Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003); *Wang v. Ashcroft*, 341 F.3d 1015, 1021 (9th Cir. 2003) (failure to testify to the authenticity of medical records, or to present original documents, was insufficient to support negative credibility finding).

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

I. OVERVIEW

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") merged deportation and exclusion proceedings into a single new process called removal proceedings. *See Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). Individuals in removal proceedings may be able to avoid

removal if they qualify for "cancellation of removal" relief under 8 U.S.C. § 1229b. Section 1229b provides for two forms of cancellation relief. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 n.2 (9th Cir. 2002). One form of cancellation is for applicants who are lawful permanent residents, *see* 8 U.S.C. § 1229b(a), and the other form is for nonpermanent residents, *see* 8 U.S.C. § 1229b(b). *See also Romero-Torres*, 327 F.3d at 888 n.1. IIRIRA repealed two analogous forms of relief: § 212(c) relief, 8 U.S.C. § 1182(c) (repealed 1996), and suspension of deportation, 8 U.S.C. § 1254 (repealed 1996). Some individuals, as discussed below, remain eligible for suspension of deportation and former § 212(c) relief. *See also Gallegos-Vasquez v. Holder*, 636 F.3d 1181 (9th Cir. 2011) (discussing 212(c) relief).

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

Where the former INS commenced deportation proceedings before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010). Under the transitional rules, an applicant "may apply for the pre-IIRIRA remedy of suspension of deportation if deportation proceedings against her were commenced before April 1, 1997." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002) (citing IIRIRA § 309(c)); *see also Martinez-Garcia v. Ashcroft*, 366 F.3d 732, 734 (9th Cir. 2004).

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

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

Cross-reference: Section 212(c) Relief.

II. JUDICIAL REVIEW

A. Limitations on Judicial Review of Discretionary Decisions

The IIRIRA permanent and transitional rules limited judicial review over certain discretionary determinations. *See* 8 U.S.C. § 1252(a)(2)(B) (permanent rule); IIRIRA § 309(c)(4)(E) (transitional rule). Notwithstanding any limitations on judicial review over discretionary determinations set forth in 8 U.S.C. § 1252(a)(2)(B), the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), explicitly provides for judicial review over constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) (as amended by § 106(a)(1)(A)(iii) of the REAL ID Act); *see also Vilchez v. Holder*, 682 F.3d 1195, 1201 (9th Cir. 2012) (exercising jurisdiction over due process issue, but holding no jurisdiction to review discretionary decision to deny cancellation of removal); *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc) (explaining that the REAL ID Act restored judicial review of constitutional questions and questions of law presented in petitions for review of final removal orders); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th. Cir. 2007) (per curiam) (holding that questions of law "extend[] to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law"); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (holding that the court has jurisdiction to consider questions of statutory interpretation as they relate to discretionary denials of relief); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (holding that despite 8 U.S.C. § 1252(a)(2)(D) this court continues to lack jurisdiction to review discretionary hardship determinations).

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

B. Limitations on Judicial Review Based on Criminal Offenses

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

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

Judicial Review of Certain Legal Claims –

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

Although the REAL ID Act did not repeal 8 U.S.C. § 1252(a)(2)(C), the Ninth Circuit has construed 8 U.S.C. § 1252(a)(2)(D) as "repeal[ing] all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) or (C) following the amendment of that section by the REAL ID Act." *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc). In *Fernandez-Ruiz*, the court held that it is no longer barred by § 1252(a)(2)(C) from reviewing a petition on account of a petitioner's past convictions and, because in that case no other provision in § 1252 limited judicial review, the court concluded it had jurisdiction to consider the petition on the merits. *Id.*; *see also Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (per curiam) (holding that questions of law "extend[] to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law"); *Garcia-Jimenez v. Gonzales*, 488 F.3d 1082, 1085 (9th Cir. 2007) (stating that court has jurisdiction to review question of law despite petitioner's crime of moral turpitude and controlled substance violation); *Parrilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005) (concluding that the court had jurisdiction to review the merits of the petition for review despite petitioner's aggravated felony conviction); *Lisbey v. Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005) (same).

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

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

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

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

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

1. Eligibility Requirements

In order for a lawful permanent resident to qualify for cancellation of removal under 8 U.S.C. § 1229b(a), she must show that she: "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) had not been convicted of any aggravated felony." *Toro-Romero v. Ashcroft*, 382 F.3d 930, 937 (9th Cir. 2004) (internal quotation marks omitted). *See also Rosas-Castaneda v. Holder*, 655 F.3d 875, 883 (9th Cir. 2011) (stating eligibility requirements for lawful permanent residents). If an alien was at one time a lawful permanent resident for five years, but then lost that status, he is no longer eligible for cancellation of removal. *See Padilla-Romero v. Holder*, 611 F.3d 1011, 1013 (9th Cir. 2010) (per curiam).

The Supreme Court in *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012) overruled this court's decisions in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005) and *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009), holding that each alien must satisfy his or her own the statutory requirements for continuous physical presence, without imputing a parent's LPR status or years of continuous residence. *See also Sawyers v. Holder*, 684 F.3d 911, 912 (9th Cir. 2012) (per curiam) (recognizing that *Cuevas-Gaspar* and *Mercado-Zazueta* are no longer valid precedent); *Saucedo-Arevalo v. Holder*, 636 F.3d 532, 533-34 (9th Cir. 2011) (per curiam) (holding mother's physical presence in the United States could not be imputed to Petitioner who entered the country nine years later).

Cancellation is available for permanent residents who are either inadmissible or deportable. *See* 8 U.S.C. § 1229b(a) (stating that "[t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the

United States"); *see also Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1055 (9th Cir. 2010). The statute does not require a showing of extreme hardship or family ties to a United States citizen or lawful permanent resident. *See* 8 U.S.C. § 1229b(a).

There are some circumstances in which an applicant is deemed "admitted" for purposes of 8 U.S.C. § 1229b(a)(2), without having been inspected and authorized to enter the United States at the border. For example, acceptance into the Family Unity Program, *see* 8 U.S.C. § 1255a and 8 C.F.R. § 236, constitutes being "admitted in any status" for the purposes of 8 U.S.C. § 1229b(a)(2). *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1018-19 (9th Cir. 2006); *cf. Vasquez de Alcantar v. Holder*, 645 F.3d 1097 (9th Cir. 2011) (alien was never admitted for purposes of showing continuous physical presence); *Guevara v. Holder*, 649 F.3d 1086 (9th Cir. 2011) (employment authorization was not equivalent to participation in Family United Program and does not confer admission status on an undocumented alien for purposes of calculating continuous residence under § 1229b(a)(2)). Additionally, parole as a special immigrant juvenile qualifies as "admission in any status" for purposes of establishing seven years of continuous physical presence for cancellation of removal. *Garcia v. Holder*, 659 F.3d 1261, 1272 (9th Cir. 2011).

2. Termination of Continuous Residence

The applicant's period of continuous residence ends upon the earlier of the following: (1) when the applicant is served with a notice to appear; or (2) when the applicant committed an offense referred to in § 1182(a)(2) (criminal grounds of inadmissibility) that renders him inadmissible, or removable under §§ 1227(a)(2) (criminal grounds of deportability), or 1227(a)(4) (security grounds of deportability). *See* 8 U.S.C. § 1229b(d)(1). *See also Sawyers v. Holder*, 684 F.3d 911 (9th Cir. 2012) (per curiam) (prior state drug conviction terminated alien's continuous residence).

a. Termination Based on Service of NTA

The date on which the notice to appear is served counts toward the period of continuous presence. *See Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (rejecting the government's contention that the period ends the day preceding the date on which the notice to appear is served). The precise times that the relevant events occurred are irrelevant. *Id.* at 992 ("hold[ing] that whether the ten-year physical presence requirement has been satisfied is a question that can be

answered without recourse to 'fraction[s] of a day,' but only to dates"). The retroactive application of this provision is permissible. *See Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002) (non-permanent resident case).

See also Hernandez-Mancilla v. Holder, 633 F.3d 1182, 1184-85 (9th Cir. 2011) (where NTA was served prior to accrual of 10 years continuous presences, the court concluded that equitable tolling was not available where petitioners relied on advice of agency that informed them they would be eligible for relief, when in fact they were over one month short of satisfying the continuous physical presence requirement).

b. Termination Based on Commission of Specified Offense

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

The retroactive application of this provision is permissible, *see Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1331 (9th Cir. 2006), but not if the conviction occurred before enactment of IIRIRA and the alien was eligible for former § 212(c) relief at the time IIRIRA became effective, *see Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1202-03 (9th Cir. 2006).

The Ninth Circuit has not addressed in a published decision whether the termination provision takes effect on the date the crime is committed, or on the date of conviction. The BIA has held that the time period ceases to accrue on the date the offense is committed, not the date of conviction. *See In re Perez*, 22 I. & N. Dec. 689, 693 (BIA 1999) (en banc); *cf. id.* at 701 (Guendelsberger, Member, dissenting) (stating that the natural reading of the statute "would terminate the period of continuous residence at the time a respondent is rendered inadmissible or removable," which in this case was the date of conviction); *see also Valencia-Alvarez*, 469 F.3d at 1325-26. This court also has not addressed whether an

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

c. Military Service

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

3. Aggravated Felons

Aggravated felons are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3); *see also Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 n.2 (9th Cir. 2010) ("Conviction of an aggravated felony renders an alien removable and ineligible for cancellation of removal."); *Becker v. Gonzales*, 473 F.3d 1000, 1003-04 (9th Cir. 2007) (for alien convicted in 1978 of aggravated felony and found removable for 2004 controlled substance conviction, holding that alien is ineligible for cancellation of removal because even if alien could obtain former § 212(c) waiver for 1978 conviction that would not make 1978 conviction disappear for immigration purposes but would merely waive the finding of deportability); *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1084 (9th Cir. 2007) (holding that stalking is not a crime of violence and therefore not an aggravated felony, thus alien is not ineligible for cancellation on aggravated felony ground); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 909 (9th Cir. 2004). The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43).

"Conviction of an aggravated felony constitutes a mandatory ground for denial of relief. Where an alien's conviction indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." *Rosas-Castaneda v. Holder*, 655 F.3d 875, 883 (9th Cir. 2011) (internal citations and quotation marks omitted). *See also Habibi v. Holder*, 673 F.3d 1082, 1085 (9th Cir. 2011) ("an LPR convicted of an 'aggravated felony' is ineligible for cancellation of removal").

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

4. Exercise of Discretion

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

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

1. Eligibility Requirements

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

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

8 U.S.C. § 1229b(b)(1); *see also Camacho-Cruz v. Holder*, 621 F.3d 941, 942 (9th Cir. 2010) (stating eligibility requirements for non-permanent residents); *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1231 (9th Cir. 2008); *Lagandaon v. Ashcroft*, 383 F.3d 983, 985 (9th Cir. 2004); *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004) (comparing "more lenient requirements for suspension" with the stricter

cancellation provisions); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1003 n.3 (9th Cir. 2003); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003).

2. Ten Years of Continuous Physical Presence

"To qualify for the discretionary relief of cancellation of removal, an alien must, as a threshold matter, have been physically present in the United States for a continuous period of no less than ten years immediately preceding the date of the application." *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850 (9th Cir. 2004); *see also* 8 U.S.C. § 1229b(b)(1)(A); *Zarate v. Holder*, 671 F.3d 1132, 1134-35 (9th Cir. 2012); *Gutierrez v. Mukasey*, 521 F.3d 1114, 1116 (9th Cir. 2008). This ten-year requirement violates neither due process nor international law. *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979-80 (9th Cir. 2006).

a. Standard of Review

The IJ's factual determination of continuous physical presence is reviewed for substantial evidence. *See Zarate v. Holder*, 671 F.3d 1132, 1134 (9th Cir. 2012); *Gutierrez v. Mukasey*, 521 F.3d 1114, 1116 (9th Cir. 2008); *Landin-Zavala v. Gonzales*, 488 F.3d 1150, 1151 (9th Cir. 2007); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850-51 (9th Cir. 2004).

b. Start Date for Calculating Physical Presence

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

c. Termination of Continuous Physical Presence

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

(i) Termination Based on Service of NTA

An applicant's accrual of continuous physical presence ends when removal proceedings are commenced through the service of a legally sufficient notice to appear. *See Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005) (per curiam) (explaining that the service of a notice to appear that failed to specify the date or location of the immigration hearing did not end the accrual of physical presence). The stop-time rule violates neither due process nor international law, *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979-80 (9th Cir. 2006), and its retroactive application is permissible, *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002).

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

(ii) Termination Based on Commission of Specified Offense

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

The retroactive application of this provision is permissible, *see Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1331 (9th Cir. 2006), unless the conviction occurred before enactment of IIRIRA and the alien was eligible for former § 212(c) relief at the time IIRIRA became effective, *see Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1202-03 (9th Cir. 2006).

The Ninth Circuit has not addressed in a published decision whether the termination provision takes effect on the date the crime is committed, or on the date of conviction. The BIA has held that the time period ceases to accrue on the date the offense is committed, not the date of conviction. *See In re Perez*, 22 I. & N. Dec. 689, 693 (BIA 1999) (en banc); *cf. id.* at 701 (Guendelsberger, Member, dissenting) (stating that the natural reading of the statute "would terminate the period of continuous residence at the time a respondent is rendered inadmissible or removable," which in this case was the date of conviction); *see also Valencia-Alvarez*, 469 F.3d at 1325-26. This court also has not addressed whether an offense that triggers removal, but not inadmissibility under 8 U.S.C. § 1182(a)(2), ends the accrual of time. *Cf. In re Campos-Torres*, 22 I. & N. Dec. 1289, 1292 (BIA 2000) (holding that "the plain language of section 240A(d)(1) also states that, as a prerequisite, an offense must be 'referred to in section 212(a)(2)' of the Act in order to stop accrual of time").

d. Departure from the United States

An applicant has failed to maintain continuous physical presence if he "has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." 8 U.S.C. § 1229b(d)(2); *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 986 n.1 (9th Cir. 2004) (noting that a twenty-day absence did not interrupt petitioner's period of continuous physical presence). *See also Valadez-Munoz v. Holder*, 623 F.3d 1304, 1310-12 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 106 (2011) (mem.) (recognizing that not every departure from the United States will interrupt the period of continuous physical presence, but determining that alien's continuous physical presence was interrupted when upon returning to the United States petitioner was offered an option to see an IJ for an expedited hearing or withdraw application for admission and return abroad). The 90/180 day rule replaced the previous "brief, casual and innocent" standard for determining when a departure breaks continuous physical presence. *See Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 939 (9th Cir. 2004).

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

Deportation under a formal exclusion order breaks an applicant's continuous physical presence, *Landin-Zavala v. Gonzales*, 488 F.3d 1150, 1153 (9th Cir. 2007), as does an expedited removal order, *Juarez-Ramos v. Gonzales*, 485 F.3d 509, 511 (9th Cir. 2007). *See also Zarate v. Holder*, 671 F.3d 1132, 1135 (9th Cir. 2012).

Similarly, departure from the United States under a grant of voluntary departure, including administrative voluntary departure, breaks an applicant's continuous physical presence. *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003) (per curiam); *see also Matter of Romalez-Alcaide*, 23 I. & N. Dec. 423 (BIA 2002) (en banc). However, "being turned away at the border by immigration officials does not have the same effect as an administrative voluntary departure and does not itself interrupt the accrual of an alien's continuous physical presence." *Tapia v. Gonzales*, 430 F.3d 997, 998 (9th Cir. 2006); *see also Matter of Avilez-Nava*, 23 I. & N. Dec. 799, 807 (BIA 2005) (en banc) (concluding that a border turnaround does not interrupt accrual of physical presence). Moreover, the existence of a record of the border turnaround, including photographs or fingerprints, is insufficient to interrupt the accrual of continuous physical presence. *See Tapia*, 430 F.3d at 1003-04; *see also Zarate*, 671 F.3d at 1135. In addition, in order for an administrative voluntary departure to constitute a break in continuous physical presence, its acceptance by an applicant must be knowing and voluntary. *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619-20 (9th Cir. 2006) (remanding to the agency for further consideration of whether applicant received voluntary departure, and if so, whether it was knowing and voluntary); *cf. Gutierrez v. Mukasey*, 521 F.3d 1114, 1117-18 (9th Cir. 2008) (holding that alien's testimony regarding acceptance of voluntary departure and rejection of opportunity to go before an IJ "constitutes substantial evidence of a knowing and voluntary consent to administrative voluntary departure in lieu of removal proceedings).

e. Proof

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

does not believe the asylum applicant or does not know what to believe), *superseded by statute on other grounds as stated in Shrestha v. Holder*, 590 F.3d 1034, 1046 (9th Cir. 2010); *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000) (pre-REAL ID Act) (same).

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

f. Military Service

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

3. Good Moral Character

a. Jurisdiction

A moral character finding may be based on statutory or discretionary factors. *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (discussing suspension of deportation), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010). The statutory "per se exclusion categories" are set forth in 8 U.S.C. § 1101(f)(1)-(8), and are discussed below. The court retains jurisdiction over statutory or "per se" moral character determinations. *See, e.g.*, *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (holding that court retained jurisdiction to review finding that alien could not establish good moral character for purposes of cancellation of removal under § 1101(f)(7)); *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (retaining jurisdiction over alien smuggling question), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc). 8 U.S.C. § 1101(f) also includes a catchall provision that permits an IJ discretion to find that an applicant lacks good moral character even when one of the per se categories does not apply. The court lacks jurisdiction to review moral character determinations based on discretionary factors. *Kalaw*, 133 F.3d at 1151.

b. Standard of Review

"We review for substantial evidence a finding of statutory ineligibility for suspension of deportation based on a lack of good moral character." *Ramos v. INS*, 246 F.3d 1264, 1266 (9th Cir. 2001); *see also Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (discussing cancellation of removal), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc); *but see United States v. Hovsepian*, 422 F.3d 883, 885 (9th Cir. 2005) (en banc) (holding that the clear error standard of review applies to a district court's good moral character determination in connection with naturalization proceedings). Purely legal questions, such as whether a county jail is a penal institution within the meaning of 8 U.S.C. § 1101(f)(7), are reviewed de novo. *See Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 885 (9th Cir. 2005).

c. Time Period Required

"In order to be eligible for cancellation of removal, [an applicant] must have 'been a person of good moral character' during the continuous 10-year period of physical presence required by the statute." *Moran v. Ashcroft*, 395 F.3d 1089, 1092 (9th Cir. 2005) (quoting 8 U.S.C. § 1229b(b)(1)(B)), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc); *see also Limsico v. INS*, 951 F.2d 210, 213-14 (9th Cir. 1991) (declining to decide whether events occurring before the seven-year suspension period may be considered). "[T]he relevant ten year period for the moral character determination is calculated backwards from the date on which the cancellation of removal application is finally resolved by the IJ or the BIA." *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1162 (9th Cir. 2009) (finding that IJ erred in finding that alien failed to establish good moral character during required ten-year period, where convictions occurred more than ten years before the date of the IJ's decision to pretermit alien's application). For suspension cases, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc).

d. Per Se Exclusion Categories

(i) Habitual Drunkards

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was … a habitual drunkard." 8 U.S.C. § 1101(f)(1); *see also*

Kalaw v. INS, 133 F.3d 1147, 1151 (9th Cir. 1997), *superseded by statute as stated in Trejo-Mejia v. Holder*, 593 F.3d 913 (9th Cir. 2010).

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

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

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

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

Cross-reference: Criminal Issues in Immigration Law, Exception for Simple Drug Possession Offenses.

(A) Prostitution and Commercialized Vice

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

(B) Alien Smugglers

Section 1182(a)(6)(E)(i) covers "[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law." 8 U.S.C. § 1182(a)(6)(E)(i); *see also Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (holding that applicant who admitted that he paid a smuggler to bring his wife and child into the United States illegally in 1995 was statutorily ineligible for a good moral character finding for purposes of voluntary departure). "The plain meaning of [section 1182(a)(6)(E)(i)] requires an *affirmative act* of help, assistance, or

encouragement." *Altamirano v. Gonzales*, 427 F.3d 586, 592 (9th Cir. 2005) (holding that alien's mere presence in a vehicle with knowledge that an undocumented alien was hiding in the trunk did not constitute alien smuggling under § 1182(a)(6)(E)(i)) (emphasis added); *see also Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011) (explaining that the Government must prove by clear and convincing evidence that the petitioner provided an affirmative act of assistance to help his wife and brother make an unlawful entry into the United States); *Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204, 1209 (9th Cir. 2008) (alien's reluctant acquiescence to her father's requests to use her son's birth certificate was not an "affirmative act" of assistance). Alien smuggling continues until the initial transporter ceases to transport the alien, and abetting alien smuggling includes collecting money to pay a transporter. *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748-49 (9th Cir. 2007) (suspension of deportation case).

Section 1182(a)(6)(E)(ii) contains an exception to the smuggling provision in cases of family reunification, where an eligible immigrant, physically present in the United States on May 5, 1988, "encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law" before May 5, 1988. 8 U.S.C. § 1182(a)(6)(E)(ii). The statute also provides for a discretionary waiver of the alien-smuggling provision. *See* 8 U.S.C. § 1182(a)(6)(E)(iii) (referencing discretionary waiver provision in 8 U.S.C. § 1182(d)(11)). This waiver may be invoked for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1182(d)(11). However, this court has held that the alien smuggling *inadmissibility* waiver contained in § 1182(d)(11) does not authorize waiver of the alien smuggling bar to establishing good moral character for purposes of cancellation of removal. *See Sanchez v. Holder*, 560 F.3d 1028, 1032 (9th Cir. 2009) (en banc) (holding that inadmissibility waiver contained in § 1182(d)(11) did not apply to applicant for cancellation of removal who arranged to have his wife smuggled into the United States, and thus that he was statutorily unable to demonstrate good moral character).

(C) Certain Aliens Previously Removed

Section 1182(a)(9)(A) covers "an alien who has been ordered removed under section 1225(b)(1) of this title … and who again seeks admission within 5 years of the date of such removal." *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816-17 (9th Cir. 2004) (noting that before IIRIRA, this statutory section referred to

aliens who were coming to the United States to practice polygamy) (internal quotation marks omitted).

(D) Crimes Involving Moral Turpitude

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

(E) Controlled Substance Violations

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

(F) Multiple Criminal Offenses

Section 1182(a)(2)(B) covers "[a]ny alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more." 8 U.S.C. § 1182(a)(2)(B); *see also Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1150-51 (9th Cir. 2002) (holding that petitioner with three convictions with aggregate sentences totaling over 10 years was ineligible for good moral character finding for purposes of registry).

(G) Controlled Substance Traffickers

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

(iii) Gamblers

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

(iv) False Testimony

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

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

(v) Confinement

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

"[P]re-trial detention that is later credited as time served as part of the sentence imposed counts as confinement as a result of a conviction within the meaning of [section] 1107(f)(7)." *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1232 (9th Cir. 2008).

(vi) Aggravated Felonies

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

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

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

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

"[O]ne who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom)," shall not be regarded as having good moral character. 8 U.S.C. § 1101(f)(9).

(viii) False Claim of Citizenship and Voting

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

(ix) Adulterers

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

4. Criminal Bars

An applicant is ineligible for nonpermanent resident cancellation of removal if he or she has been convicted of an offense under 8 U.S.C. § 1182(a)(2) (criminal grounds of inadmissibility), 8 U.S.C. § 1227(a)(2) (criminal grounds of deportability), or 8 U.S.C. § 1227(a)(3) (failure to register, document fraud, and false claims to citizenship). *See* 8 U.S.C. § 1229b(b)(1)(C); *see also Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 651-52 (9th Cir. 2004) (listing relevant

offenses); *see, e.g.*, *Nunez v. Holder*, 594 F.3d 1124, 1128 (9th Cir. 2010) (noting that two convictions for crimes of moral turpitude render an alien ineligible for cancellation, but granting petition for review and concluding that indecent exposure under California law was not categorically a crime of moral turpitude*)*; *Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1056-57 (9th Cir. 2010) (conviction for corporal injury to a spouse under Cal. Penal Code § 273.5 is an offense described in § 1227(a)(2)); *Bermudez v. Holder*, 586 F.3d 1167, 1168-69 (9th Cir. 2009) (per curiam) (conviction for offense of prohibited acts related to drug paraphernalia under Hawaii law qualified for as violation of law relating to a controlled substance under 8 U.S.C. § 1227(a)(2)). Section 1229b(b)(1)(C) "should be read to cross-reference a list of offenses in three statutes," and "convicted of an offense under" means "convicted of an offense *described* under" each of the three sections. *Gonzalez-Gonzalez*, 390 F.3d at 652 (holding that inadmissible alien convicted of crime of domestic violence was ineligible for cancellation) (internal quotation marks omitted); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391-94 (9th Cir. 2006) (holding that under modified categorical approach a conviction for simple battery was not a crime of domestic violence and alien was therefore not ineligible for cancellation on that ground). Section 1229(b)(1)(C) "does not place any temporal limitation on when the crime was committed." *Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (explaining that "a person can be of good moral character for ten years before his application for cancellation of removal under 8 U.S.C. § 1229b(b)(1)(B), yet have committed a crime involving moral turpitude more than ten years earlier, and therefore be ineligible for cancellation of removal" under § 1229b(b)(1)(C)).

However, IIRIRA's elimination of suspension of deportation for nonpermanent residents convicted of an aggravated felony has an impermissibly retroactive effect where the petitioner was eligible for a discretionary waiver of deportation at the time of the plea. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853-54 (9th Cir. 2006) (applying *INS v. St. Cyr*, 533 U.S. 289 (2001)); *cf. Becker v. Gonzales*, 473 F.3d 1000, 1003-04 (9th Cir. 2007) (discussing retroactivity in context of aggravated felony bar to lawful permanent resident cancellation of removal).

5. Exceptional and Extremely Unusual Hardship

Non-permanent resident applicants for cancellation of removal must establish "that removal would result in exceptional and extremely unusual hardship

to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D).

a. Jurisdiction

Pursuant to 8 U.S.C. § 1252(a)(2)(B)(i), the court lacks jurisdiction to review the agency's "exceptional and extremely unusual hardship" determination. *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 (9th Cir. 2003) (holding that the "'exceptional and extremely unusual hardship' determination is a subjective, discretionary judgment that has been carved out of our appellate jurisdiction"); *see also Mendez-Castro v. Mukasey*, 552 F.3d 975, 980-81 (9th Cir. 2009) (no jurisdiction to address claim that IJ's decision was factually inconsistent with prior agency hardship determinations). Under current precedent, this jurisdictional bar applies even though hardship determinations necessarily affect "family unity." *See de Mercado v. Mukasey*, 566 F.3d 810, 816 (9th Cir. 2009) (stating that the panel lacked the authority to reconsider the jurisdictional bar over discretionary hardship determinations, without deciding "whether 'family unity' is a constitutionally protected right or whether it is impacted by" an alien's removal). Notwithstanding this jurisdictional bar, the court retains jurisdiction to consider constitutional questions, such as due process challenges, and questions of law. *See* 8 U.S.C. § 1252(a)(2)(D); *see also Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008) (no jurisdiction to review the BIA's discretionary denial of application for cancellation of removal based on finding that petitioner failed to show hardship, but reviewing due process challenge based on exclusionary rule); *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc). The court also retains jurisdiction to review questions of statutory interpretation. *See Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (concluding that the court had jurisdiction to consider issues of statutory interpretation pertaining to the agency's discretionary hardship determination); *cf. Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (holding that the court lacked jurisdiction to consider petitioner's non-colorable contention that the agency deprived her of due process by misapplying the applicable law to the facts of her case in evaluating exceptional and extremely unusual hardship). The court also has jurisdiction to review "whether the IJ considered [certain] evidence in deciding whether to grant cancellation of removal." *Vilchez v. Holder*, 682 F.3d 1195, 1198 (9th Cir. 2012).

b. Qualifying Relative

Under cancellation of removal, hardship to the applicant will no longer support a grant of relief. *See Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003) (comparing suspension of deportation, which allowed for hardship to the applicant). The applicant must show the requisite degree of hardship to a "spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D); *see also Molina-Estrada v. INS*, 293 F.3d 1089, 1093-94 (9th Cir. 2002) (because petitioner provided no evidence that his mother was a lawful permanent resident, he was not eligible for cancellation). This court has held that the qualifying relative requirement does not violate the Free Exercise Clause of the First Amendment or place a substantial burden on religious exercise under the Religious Freedom Restoration Act. *See Fernandez v. Mukasey*, 520 F.3d 965, 966-67 (9th Cir. 2008) (per curiam) (concluding that devout Catholics who opposed in vitro fertilization failed to demonstrate that their lack of a qualifying relative was due to their religious beliefs because they could adopt a child, and that the connection between having a child and showing requisite hardship to obtain cancellation was too attenuated).

An adult daughter twenty-one years of age or older does not qualify as a "child" for purposes of cancellation of removal. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144-45 (9th Cir. 2002). A grandchild does not qualify as a "child" for purposes of cancellation, even when the grandparent has legal custody and guardianship. *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1178 (9th Cir. 2007) (holding that the statute precluded a functional approach to defining a "child").

6. Exercise of Discretion

"Cancellation of removal, like suspension of deportation before it, is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003). The court lacks jurisdiction to review the ultimate discretionary determination to deny cancellation. *See id*. at 890; *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011) (dismissing petition challenging discretionary denial of cancellation of removal where petitioner failed to raise a colorable legal or constitutional challenge to BIA's discretionary decision), *petition for rehearing en banc denied*, 686 F.3d 1033 (9th Cir. 2012)

(order); *cf. Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (where IJ's denial of cancellation was based solely on the physical presence prong, even though she referenced discretionary factors, the court had jurisdiction over petition). "Although we may not review the IJ's exercise of discretion, a due process violation is not an exercise of discretion." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003) (granting petition where IJ's biased remarks evinced the IJ's reliance on improper discretionary considerations); *cf. Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) ("[T]raditional abuse of discretion challenges recast as alleged due process violations do not constitute colorable constitutional claims that would invoke our jurisdiction.").

7. Dependents

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

C. Ineligibility for Cancellation

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

1. Certain Crewmen and Exchange Visitors

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

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

2. Security Grounds

Persons inadmissible or deportable under security and terrorism grounds are ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(c)(4) (referring to inadmissibility under 8 U.S.C. § 1182(a)(3) and deportability under 8 U.S.C. § 1227(a)(4)). *See also Abufayad v. Holder*, 632 F.3d 623 (9th Cir. 2011) (denying petition for review of BIA's decision finding petitioner removable for being likely to engage in terrorist activity, and further concluding ineligible for CAT relief).

3. Persecutors

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

4. Previous Grants of Relief

"An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996," is ineligible for cancellation. 8 U.S.C. § 1229b(c)(6); *Garcia-Jimenez v. Gonzales*, 488 F.3d 1082, 1086 (9th Cir. 2007) (holding that an alien who has received § 212(c) relief at any time, even in the same proceeding, cannot also receive cancellation); *Maldonado-Galindo v. Gonzales*, 456 F.3d 1064, 1067, 1069 (9th Cir. 2006) (holding that prior receipt of § 212(c) relief forecloses availability of cancellation, and that this statutory scheme is not impermissibly retroactive).

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

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

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

The importance of family unity and the combined effect of the ten-year requirement for eligibility and the stop-time rule do not violate due process because Congress had a legitimate and facially bona fide reason for limiting the availability of relief. *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978-79 (9th Cir. 2006). Likewise, these statutory limitations on the availability of cancellation of removal do not violate international law. *Id*. at 979-80; *see also Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1011-13 (9th Cir. 2005) (holding that exceptional and extremely unusual hardship standard does not violate international law as expressed in the U.N. Convention on the Rights of the Child).

E. Ten-Year Bars to Cancellation

1. Failure to Appear

Cancellation is unavailable for ten years if an applicant was ordered removed for failure to appear at a removal hearing, unless he or she can show exceptional circumstances for failing to appear. *See* 8 U.S.C. § 1229a(b)(7). The statute provides that the ten-year bar applies if the alien "was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing" to appear. *Id.*

The statute defines exceptional circumstances as "circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. § 1229a(e)(1).

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

2. Failure to Depart

Under 8 U.S.C. § 1229c(d), an applicant's failure to depart during the specified voluntary departure period will result in ineligibility for cancellation of removal for a period of ten years. *Id.*; *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015-16 (9th Cir. 2008) (per curiam) (where motion to reopen is filed after period for voluntary departure period has elapsed, the BIA is compelled to deny the motion pursuant to 8 U.S.C. § 1229c(d)(1)); *see also Elian v. Ashcroft*, 370 F.3d 897, 900 (9th Cir. 2004) (order). "The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. § 1229c(d). "The plain language of 8 U.S.C. § 1229c(d) requires only that the order inform the alien of the penalties for failure to depart voluntarily[, and s]ervice of an order to the alien's attorney of record constitutes notice to the alien." *de Martinez v. Ashcroft*, 374 F.3d 759, 762 (9th Cir. 2004).

The Supreme Court determined in *Dada v. Mukasey* that there is no statutory authority to automatically toll the voluntary departure period while a petitioner's motion to reopen is pending. 554 U.S. 1, 19-20 (2008) (holding that, in order to safeguard the right to pursue a motion to reopen, voluntary departure recipients should be permitted an opportunity to unilaterally withdraw a motion for voluntary departure, provided the request is made prior to the departure period expiring). Prior to *Dada*, this court had held that in permanent rules cases, the filing of a timely motion to reopen or reconsider automatically tolled the voluntary departure period, regardless of whether the motion was accompanied by a motion to stay the voluntary departure period. *See, e.g., Barroso v. Gonzales*, 429 F.3d 1195, 1204-05, 1207 (9th Cir. 2005); *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (rejecting the court's prior analysis in *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) and holding that petitioner's voluntary departure period is tolled while the BIA considers a timely-filed motion to reopen accompanied by a motion to stay removal), *abrogated by Dada v. Ashcroft*, 554 U.S. 1, 19-21 (2008); *cf. Medina-Morales v. Ashcroft*, 371 F.3d 520, 529-531 & n.9 (9th Cir. 2004) (holding, in permanent rules case, that where a petitioner bargains for voluntary departure in lieu of full adjudication under 8 U.S.C. § 1229c(a)(1), the BIA may weigh petitioner's voluntary departure agreement against the grant of a motion to reopen); *Shaar v. INS*, 141 F.3d 953, 959 (9th Cir. 1998) (holding, in pre-IIRIRA case, that BIA may deny motion to reopen to apply for suspension of deportation because petitioners failed to depart during the voluntary departure period).

Note that where voluntary departure was granted on or after January 20, 2009, the filing of a motion to reopen or reconsider, or the filing of a petition for review before the court of appeals will terminate voluntary departure. *See* 8 C.F.R. 1240.26(i); *Matter of Velasco*, 25 I. & N. Dec. 143 (BIA 2009).

If the applicant files a motion to reopen after the expiration of the voluntary departure period, the BIA may deny the motion to reopen based on applicant's failure to depart. *See Granados-Oseguera*, 546 F.3d at 1015-16; *de Martinez*, 374 F.3d at 763-64 (denying petition for review in permanent rules case where petitioner moved to reopen to apply for adjustment of status 30 days after the expiration of her voluntary departure period).

Note that when the BIA streamlines, it is required to affirm the entirety of the IJ's decision, including the length of the voluntary departure period. *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 981 (9th Cir. 2006).

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

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

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

G. NACARA Special Rule Cancellation

On November 19, 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), which established special rules to permit certain classes of aliens to apply for what is known as "special rule cancellation." "Special Rule Cancellation allows designated aliens to qualify for cancellation under the more lenient suspension of deportation standard that existed before the passage of [IIRIRA]." *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093 (9th Cir. 2005); *see also Lezama-Garcia v. Holder*, 666 F.3d 518, 528-30 (9th Cir. 2011) (discussing NACARA § 202 providing for adjustment of status for certain Nicaraguan and Cuban nationals); *Barrios v. Holder*, 581 F.3d 849, 857 (9th Cir. 2009); *Munoz v. Ashcroft*, 339 F.3d 950, 955-56 (9th Cir. 2003);

Simeonov v. Ashcroft, 371 F.3d 532, 536 (9th Cir. 2004); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1162 (9th Cir. 2002); 8 C.F.R. §§ 1240.60-1240.70.

Special rule cancellation of removal is available for certain applicants from El Salvador, Guatemala, nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia. *See Ram v. INS*, 243 F.3d 510, 517 & n.9 (9th Cir. 2001). Note that NACARA § 202 makes separate provision for adjustment of status for certain Nicaraguan and Cuban nationals.

NACARA § 203(c) allows an applicant one opportunity to file a motion to reopen his deportation or removal proceedings to obtain cancellation of removal. A motion to reopen will not be granted unless an applicant can demonstrate prima facie eligibility for relief under NACARA. *See Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003). "An alien can make such a showing if he or she has complied with section 203(a)'s filing deadlines, is a native of one of the countries listed in NACARA, has lived continuously in the United States for at least ten years, has not been convicted of any crimes, is a person of good moral character, and can demonstrate extreme hardship if forced to return to his or her native country." *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1093 (9th Cir. 2005); *see also* NACARA § 203(a), (b), and (c); 8 C.F.R. § 1003.43(b). "Such a showing need not be conclusive but need suggest only that it would be 'worthwhile' to reopen proceedings." *Albillo-De Leon*, 410 F.3d at 1094 (citing *Ordonez*, 345 F.3d at 785).

A minor who qualifies for NACARA relief as a derivative under 8 C.F.R. § 1240.61(a)(4) is required to satisfy the seven-year physical presence requirement in 8 C.F.R. § 1240.66(b)(2). *See Barrios v. Holder*, 581 F.3d 858-59 (9th Cir. 2009). This court has held that a parent's physical presence in the United Sates cannot be imputed to his minor child for purposes of NACARA relief. *See id.* at 859.

"IIRIRA expressly precludes federal courts from reviewing the agency's factual determination that an immigrant is ineligible for … special rule cancellation of removal under NACARA § 203." *Ixcot v. Holder*, 646 F.3d 1202, 1213-14 (9th Cir. 2011) (citing *Lanuza v. Holder*, 597 F.3d 970, 971 (9th Cir.2010) (per curiam) ("Section 309(c)(5)(C)(ii) [of IIRIRA] provides that '[a] determination by the Attorney General as to whether an alien satisfies the requirements of clause (i) is

final and shall not be subject to review by any court.' Therefore, we lack jurisdiction to determine [petitioner's] statutory eligibility for NACARA § 203 relief." (citation omitted)).

1. NACARA Does Not Violate Equal Protection

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

2. NACARA Deadlines

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

Although § 203(c) does not identify by date the deadline for filing a motion to reopen deportation or removal proceedings to seek special rule cancellation, the Attorney General set the deadline at September 11, 1998. *See* NACARA § 203(c); 8 C.F.R. § 1003.43(e)(1); *Albillo-De Leon*, 410 F.3d at 1094. An application for special rule cancellation of removal, to accompany the motion to reopen, must have been submitted no later than November 18, 1999. 8 C.F.R. § 1003.43(e)(2). NACARA § 203(c), which applies only to those aliens who have already complied with § 203(a)'s filing deadlines, is a statute of limitations subject to equitable tolling. *See Albillo-De Leon*, 410 F.3d at 1097-98; *compare Munoz*, 339 F.3d at 956-57 (holding that § 203(a)'s deadlines are not subject to equitable tolling).

The numerical cap on the number of adjustments arising from cancellation and suspension in 8 U.S.C. § 1229b(e) does not apply to NACARA special rule cancellation. *See* 8 U.S.C. § 1229b(e)(3)(A).

3. Judicial Review

Section 309(c)(5)(C)(ii) of IIRIRA, as amended by § 203 of NACARA, provides that "[a] determination by the Attorney General as to whether an alien satisfies the requirements of this clause (i) is final and shall not be subject to review by any court." *See also Lanuza v. Holder*, 597 F.3d 970, 971 (9th Cir. 2010) (per curiam) (dismissing petition for review because court lacked jurisdiction to determine petitioner's statutory eligibility for NACARA § 203 relief). However, pursuant to § 106 of the REAL ID Act, the court retains jurisdiction over constitutional claims and questions of law. *See Barrios v. Holder*, 581 F.3d 849, 857 (9th Cir. 2009) (reviewing whether BIA properly applied law where IJ accepted petitioner's testimony as true, and none of the facts pertaining to petitioner's NACARA application were in dispute).

H. Abused Spouse or Child Provision

A battered spouse, battered child, or the parent of a battered child, may apply for a special form of cancellation of removal. *See* 8 U.S.C. § 1229b(b)(2) (enacting provisions of the Violence Against Women Act of 1994); *see also Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058-59 (9th Cir. 2005) (holding that the IJ violated due process in refusing to hear relevant expert testimony regarding domestic violence). An applicant for special rule cancellation must show:

> (1) that she had been 'battered or subjected to extreme cruelty' by a spouse who is or was a United States citizen or lawful permanent resident;
> (2) that she had lived continuously in the United States for the three years preceding her application;
> (3) that she was a person of 'good moral character' during that period;
> (4) that she is not inadmissible or deportable under various other specific immigration laws relating to criminal activity, including 8 U.S.C. § 1182(a)(2); and
> (5) that her removal 'would result in extreme hardship' to herself, her children, or her parents.

Lopez-Umanzor, 405 F.3d at 1053; *see also Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003) (discussing similar suspension of deportation provision).

Cross-reference: Suspension of Deportation, Abused Spouse or Child Provision.

IV. SUSPENSION OF DEPORTATION, 8 U.S.C. § 1254 (repealed) (INA § 244)

A. Eligibility Requirements

Under the pre-IIRIRA rules:

> [A]n [applicant] would be eligible for suspension if (1) the applicant had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of the application for suspension of deportation; (2) the applicant was a person of good moral character; and (3) deportation would result in extreme hardship to the alien or to an immediate family member who was a United States citizen or a lawful permanent resident.

Ramirez-Alejandre v. Ashcroft, 320 F.3d 858, 862 (9th Cir. 2003) (en banc) (citing 8 U.S.C. § 1254(a)(1) (repealed)); *Alcaraz v. INS*, 384 F.3d 1150, 1153 (9th Cir. 2004).

Ten years of continuous physical presence was required for applicants deportable for serious crimes who could show exceptional and extremely unusual hardship. *See Leon-Hernandez v. INS*, 926 F.2d 902, 905 (9th Cir. 1991) (citing 8 U.S.C. § 1254(a)(2)); *see also Pondoc Hernaez v. INS*, 244 F.3d 752, 755 (9th Cir. 2001).

1. Continuous Physical Presence

Applicants for suspension must show that they have "been physically present in the United States for a continuous period of not less than seven years." 8 U.S.C. § 1254(a)(1) (repealed 1996); *see also Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc). "[T]he relevant seven year period is the period immediately preceding service of the OSC that prompts the application for suspension." *Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 941 (9th Cir. 2004) (rejecting petitioners' contention that they met the seven-year requirement before departing to Mexico for five months).

a. Jurisdiction

The court retains jurisdiction over the determination of whether an applicant has satisfied the seven-year continuous physical presence requirement. *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997), *superseded by statute as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010).

b. Standard of Review

"[The court] review[s] for substantial evidence the BIA's decision that an applicant has failed to establish seven years of continuous physical presence in the United States." *Vera-Villegas v. INS*, 330 F.3d 1222, 1230 (9th Cir. 2003).

c. Proof

An applicant may establish the time element by credible direct testimony or written declarations. *See Vera-Villegas v. INS*, 330 F.3d 1222, 1225 (9th Cir. 2003). Although contemporaneous documentation of presence "may be desirable," it is not required. *Id*.

d. Departures: 90/180 Day Rule

Under the transitional rules, an alien fails to maintain continuous physical presence if he is absent for more than 90 days, or 180 days in the aggregate. 8 U.S.C. § 1229b(d)(2); *Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 939 & n.2 (9th Cir. 2004); *see also Canales-Vargas v. Gonzales*, 441 F.3d 739, 742 (9th Cir. 2006). The 90/180 rule as applied to transitional rules cases is not impermissibly retroactive. *See Mendiola-Sanchez*, 381 F.3d at 940-41.

Cross-reference: Cancellation for Non-Permanent Residents, Departure from the United States.

e. Brief, Casual, and Innocent Departures

Under pre-IIRIRA law, the statute allowed for "brief, casual and innocent" absences from the United States. 8 U.S.C. § 1254(b)(2) (repealed 1996); *see also Camins v. Gonzales*, 500 F.3d 872, 877-78, 885 (9th Cir. 2007) (legal permanent resident's three-week trip to Philippines to visit ailing parent was brief, casual and innocent under *Fleuti* doctrine); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1363 (9th Cir. 1995) (eight-day trip to Mexico seeking a visa was brief, casual and innocent and did not interrupt continuous physical presence); *cf. Hernandez-Luis v. INS*, 869

F.2d 496, 498-99 (9th Cir. 1989) (holding voluntary departure under threat of coerced deportation was not a brief, casual and innocent departure).

f. Deportation

Deportation from the United States interrupts continuous physical presence. *Pedroza-Padilla v. Gonzales*, 486 F.3d 1362, 1365 (9th Cir. 2007).

Cross-reference: Cancellation for Non-Permanent Residents, Departure from the United States.

g. IIRIRA Stop-Time Rule

Under the IIRIRA "stop-time" rule, "any period of … continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear or an order to show cause why he or she should not be deported." *Arrozal v. INS*, 159 F.3d 429, 434 (9th Cir. 1998) (internal quotation marks and citation omitted); *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004) (holding in cancellation case that the date the notice to appear is served counts toward the period of continuous presence). "The stop-clock provision applies to all deportation and removal proceedings, whether they are governed by the transitional rules or the permanent rules … ." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002) (citations omitted).

The stop-time rule applies to suspension of deportation cases heard on or after April 1, 1997. *See Astrero v. INS*, 104 F.3d 264, 266 (9th Cir. 1996) (holding that IIRIRA's stop-time rule could not be applied before its effective date of April 1, 1997); *see also Otarola v. INS*, 270 F.3d 1272, 1273 (9th Cir. 2001) (granting petition where INS maintained meritless appeal in order to avail itself of stop-time rule); *Ram v. INS*, 243 F.3d 510, 517, 518 (9th Cir. 2001) (holding that the application of the new stop-time rule did not offend due process, and rejecting claim that 7 years can start anew after service of the OSC); *Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1211 (9th Cir. 2001), *corrected by* 250 F.3d 1271 (9th Cir. 2001) (order), (reversing premature application of the stop-time rule).

The stop-time rule violates neither due process nor international law, *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979-80 (9th Cir. 2006), and its retroactive application is permissible, *Jimenez-Angeles*, 291 F.3d at 602. *See also Pedroza-Padilla v. Gonzales*, 486 F.3d 1362, 1364 (9th Cir. 2007) (retroactivity).

h. Pre-IIRIRA Rule on Physical Presence

Before IIRIRA, an applicant "in deportation proceedings continued to accrue time towards satisfying the seven-year residency requirement for suspension of deportation during the pendency of the proceedings." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002); *see also Alcaraz v. INS*, 384 F.3d 1150, 1153 (9th Cir. 2004). However, an applicant could not establish the seven-year requirement by pursuing baseless appeals. *See INS v. Rios-Pineda*, 471 U.S. 444, 449-50 (1985); *cf. Sida v. INS*, 783 F.2d 947, 950 (9th Cir. 1986) (distinguishing *Rios-Pineda*).

i. NACARA Exception to the Stop-Time Rule

The Nicaraguan Adjustment and Central American Relief Act ("NACARA") exempts certain applicants from El Salvador, Guatemala, and nationals of the former Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia, from the stop-time provision. *See Ram v. INS*, 243 F.3d 510, 517 (9th Cir. 2001); *see also Simeonov v. Ashcroft*, 371 F.3d 532, 537 (9th Cir. 2004); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598 (9th Cir. 2002). For covered individuals, time accrued after issuance of a charging document may count towards the continuous physical presence requirement.

Cross-reference: Cancellation of Removal, NACARA Special-Rule Cancellation.

j. *Barahona-Gomez v. Ashcroft* Exception to the Stop-Time Rule

The stop-time rule also does not apply to class members covered by the December 2002 settlement of *Barahona-Gomez v. Ashcroft*, No. C97-0895 CW (N.D. Cal). This class action challenged the Executive Office for Immigration Review's ("EOIR") directive to halt the granting of suspension applications during the period between February 13, and April 1, 1997, the effective date of IIRIRA, based on the annual cap on suspension grants.

As a result of the EOIR directive, some applicants who would have had their suspension of deportation claims heard under pre-IIRIRA law during this period

were rendered ineligible by the stop-time rule when their cases were heard after April 1, 1997.

Eligible *Barahona-Gomez* class members may reapply for suspension of deportation under the law as it existed prior to the effective date of IIRIRA. For background on the case, *see Barahona-Gomez v. Ashcroft*, 167 F.3d 1228 (9th Cir. 1999), *supplemented by* 236 F.3d 1115 (9th Cir. 2001); *see also* 68 Fed. Reg. 13727 (Mar. 20, 2003) (Advisory Statement); http://www.usdoj.gov/eoir/omp/barahona/barahona.htm (reproducing settlement agreement). "The settlement contains two provisions that define who is entitled to relief" – "Definition of the Class" and a "Definition of 'Eligible class members,'" both of which must be met to be eligible for relief. *Sotelo v. Gonzales*, 430 F.3d 968, 971 (9th Cir. 2005). "Eligibility under *Barahona-Gomez* is a question of law reviewed *de novo*." *Navarro v. Mukasey*, 518 F.3d 729, 733 (9th Cir. 2008).

The *Barahona-Gomez* settlement class is defined as:

> "all persons who have had (or would have had) suspension of deportation hearings conducted before April 1, 1997, within the jurisdiction of the Ninth Circuit Court of Appeals, and who were served an Order to Show Case within seven years after entering the United States, where:
>
> (a) the immigration judge reserved or withheld granting suspension of deportation on the basis of the … directive from Defendant Chief Immigration Judge …; or
>
> (b) the suspension of deportation hearing was concluded prior to April 1,1 997, the INS has appealed or will appeal, at any time, on a basis that includes the applicability of [IIRIRA], and the case was affected by the … directive[s] …; or
>
> (c) the Board of Immigration Appeals … has or had jurisdiction but withheld granting suspension of deportation (or reopening or remanding a case for consideration of an application for suspension of deportation) before April 1, 1997 on the basis of the … directive from Defendant Board Chairman … .

Sotelo, 430 F.3d at 971 (citing *Barahona-Gomez v. Reno*, 243 F. Supp. 2d 1029, 1030-31 (N.D. Cal. 2002)) (emphasis omitted).

Thus, in order to qualify as a member of the class, an individual must have had a suspension of deportation hearing *before* April 1, 1997 (or would have had a hearing but for the directives) or *before* April 1, 1997 the Board withheld granting of suspension of deportation (or a motion to reopen or remand for consideration of an application for suspension of deportation) *because of* a challenged directive. *Sotelo*, 430 F.3d at 971-72; *see also Navarro*, 518 F.3d at 735-36 (concluding that petitioners qualified as class members where IJ undertook the act of scheduling a merits hearing prior to April 1, 1997).

k. Repapering

For individuals who became ineligible for suspension of deportation based on the retroactive stop-time rule, a "safety-net provision" called "repapering" was included in § 309(c)(3) of IIRIRA. *Alcaraz v. INS*, 384 F.3d 1150, 1152-53 (9th Cir. 2004). This section "permits the Attorney General to allow aliens who would have been eligible for suspension of deportation but for the new stop-time rule to be placed in removal proceedings where they may apply for cancellation of removal under 8 U.S.C. § 1229b, INA § 240A(b)." *Id*. at 1154 (remanding for determination of whether petitioners were eligible for repapering based on internal agency policy and practice) (emphasis omitted).

2. Good Moral Character

a. Jurisdiction

A moral character finding may be based on statutory or discretionary factors. *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (discussing suspension of deportation), *superseded by statute as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010).

The court retains jurisdiction over statutory or "per se" moral character determinations. *See, e.g.*, *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (holding that court retained jurisdiction to review finding that alien could not establish good moral character for purposes of cancellation of removal under § 1101(f)(7)); *Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (holding that court retains jurisdiction over alien smuggling question in cancellation of removal case), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc).

The court lacks jurisdiction to review moral character determinations based on discretionary factors. *Kalaw*, 133 F.3d at 1151. However, notwithstanding limitations on judicial review over discretionary determinations, the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), provided for judicial review over constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) (as amended by § 106(a)(1)(A)(iii) of the REAL ID Act); *see also Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc) (explaining that the REAL ID Act restored judicial review of constitutional questions and questions of law presented in petitions for review of final removal orders); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th. Cir. 2007) (per curiam) (holding that questions of law "extend[] to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law").

b. Time Period Required

The applicant must show that he or she has been of good moral character for the entire statutory period. *See Limsico v. INS*, 951 F.2d 210, 213-14 (9th Cir. 1991) (declining to decide whether events occurring before the seven-year period may be considered). Moreover, the BIA must make the moral character determination based on the facts as they existed at the time of the BIA decision. *See Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 862 (9th Cir. 2003) (en banc).

c. Per Se Exclusion Categories

The statutory or per se exclusion categories are set forth at 8 U.S.C. § 1101(f), and include inadmissible aliens defined in § 1182. Section 1182(a)(6)(E)(i) covers any alien "who have at any time 'knowingly … encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.'" *Sanchez v. Holder*, 560 F.3d 1028, 1031 (9th Cir. 2009) (quoting 8 U.S.C. § 1182(A)(6)(E)(i). Alien smuggling continues across the border until the initial transporter ceases to transport the alien, and abetting alien smuggling includes collecting money to pay a transporter. *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748-49 (9th Cir. 2007).

Cross-reference: Cancellation for Non-Permanent Residents, Good Moral Character.

3. Extreme Hardship Requirement

a. Jurisdiction

Determination of extreme hardship "is clearly a discretionary act." *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997), *superseded by statute as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010). The court is "no longer empowered to conduct an 'abuse of discretion' review of the agency's purely discretionary determinations as to whether 'extreme hardship' exists." *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001); *cf. Reyes-Melendez v. INS*, 342 F.3d 1001, 1006-07 (9th Cir. 2003) (holding that due process required remand where IJ's moral bias against petitioner precluded full consideration of the relevant hardship factors). However, notwithstanding limitations on judicial review over discretionary determinations, the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), provided for judicial review over constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) (as amended by § 106(a)(1)(A)(iii) of the REAL ID Act); *see also Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc) (explaining that the REAL ID Act restored judicial review of constitutional questions and questions of law presented in petitions for review of final removal orders); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th. Cir. 2007) (per curiam) (holding that questions of law "extend[] to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law").

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

b. Qualifying Individual

Under the more lenient suspension standards, applicants could meet the extreme hardship requirement by showing hardship to himself or to his United States or lawful permanent resident spouse, parent or child. *See* 8 U.S.C. § 1254(a)(1) (repealed 1996); *see also Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003).

c. Extreme Hardship Factors

The administrative regulations describe extreme hardship as "a degree of hardship beyond that typically associated with deportation." 8 C.F.R.

§ 1240.58(b). The regulation sets forth the following non-exclusive list of factors relevant to the hardship inquiry:

> (1) The age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation;
> (2) The age, number, and immigration status of the alien's children and their ability to speak the native language and to adjust to life in the country of return;
> (3) The health condition of the alien or the alien's children, spouse, or parents and the availability of any required medical treatment in the country to which the alien would be returned;
> (4) The alien's ability to obtain employment in the country to which the alien would be returned;
> (5) The length of residence in the United States;
> (6) The existence of other family members who are or will be legally residing in the United States;
> (7) The financial impact of the alien's departure;
> (8) The impact of a disruption of educational opportunities;
> (9) The psychological impact of the alien's deportation;
> (10) The current political and economic conditions in the country to which the alien would be returned;
> (11) Family and other ties to the country to which the alien would be returned;
> (12) Contributions to and ties to a community in the United States, including the degree of integration into society;
> (13) Immigration history, including authorized residence in the United States; and
> (14) The availability of other means of adjusting to permanent resident status.

Id.

Although the court no longer has jurisdiction to review the IJ's hardship determination, numerous cases have discussed the relevant factors. *See, e.g.*, *Chete Juarez v. Ashcroft*, 376 F.3d 944, 948-49 (9th Cir. 2004) (listing "broad range" of relevant circumstances in the hardship inquiry); *Arrozal v. INS*, 159 F.3d 429, 433-34 (9th Cir. 1998) (discussing, inter alia, medical problems and political conditions); *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (per curiam) (considering family separation); *Ordonez v. INS*, 137 F.3d 1120, 1123-24

(9th Cir. 1998) (discussing persecution); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1318-19 (9th Cir. 1997) (considering community assistance and acculturation); *Tukhowinich v. INS*, 64 F.3d 460, 463 (9th Cir. 1995) (considering non-economic hardship flowing from economic detriment); *Biggs v. INS*, 55 F.3d 1398, 1401-02 (9th Cir. 1995) (considering medical information); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423-24 (9th Cir. 1987) (considering family separation); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) (per curiam) (considering hardship to applicant based on separation from non-qualifying relatives).

"Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case. … Adjudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances." 8 C.F.R. § 1240.58(a); *see also Watkins v. INS*, 63 F.3d 844, 850 (9th Cir. 1995) (holding, pre-IIRIRA, that the BIA abuses its discretion when it does not consider all factors and their cumulative effect).

d. Current Evidence of Hardship

The BIA must decide eligibility for suspension "based, not on the facts that existed as of the time of the hearing before the IJ, but on the facts as they existed when the BIA issued its decision." *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 860 (9th Cir. 2003) (en banc) (holding that the BIA's refusal to allow applicant to supplement the record with additional materials was a denial of due process); *see also Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1212 (9th Cir.), *corrected by* 250 F.3d 1271 (9th Cir. 2001).

4. Ultimate Discretionary Determination

"Even if all three of these statutory criteria are met, the ultimate grant of suspension is wholly discretionary." *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010). "Thus, if the Attorney General decides that an alien's application for suspension of deportation should not be granted as a matter of discretion in addition to any other grounds asserted, the BIA's denial of the alien's application would be unreviewable under the transitional rules." *Kalaw*, 133 F.3d at 1152; *see also Sanchez-Cruz v. INS*, 255 F.3d 775, 778-79 (9th Cir. 2001); *cf. Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (where IJ's denial of cancellation was based solely on the physical presence prong, even though she referenced discretionary factors, the court had jurisdiction over petition). "Although we may not review the IJ's exercise of discretion, a due

process violation is not an exercise of discretion." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1008 (9th Cir. 2003) (granting petition where IJ's biased remarks evinced the IJ's reliance on improper discretionary considerations).

B. Abused Spouses and Children Provision

A battered spouse, battered child, or the parent of a battered child, may apply for a special form of suspension added to the INA by the Violence Against Women Act of 1994 ("VAWA"). *See Hernandez v. Ashcroft*, 345 F.3d 824, 832 (9th Cir. 2003) (discussing 8 U.S.C. § 1254(a)(3) (1996)). Under this provision, the Attorney General may suspend the deportation of an alien who:

> 1) has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application;
> 2) has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident;
> 3) proves that during all of such time in the United States the alien was and is a person of good moral character;
> 4) and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

Id.; *see also* 8 C.F.R. § 1240.58(c). The court retains jurisdiction to review the BIA's determination regarding whether an applicant was subjected to extreme cruelty. *See Hernandez*, 345 F.3d at 828 (holding that batterer's behavior during the "contrite" phase of the domestic violence cycle may constitute extreme cruelty).

Cross-reference: Cancellation of Removal, Abused Spouse or Child Provision.

C. Ineligibility for Suspension

1. Certain Crewmen and Exchange Visitors

Persons who entered as crewmen after June 30, 1964 are statutorily ineligible for suspension. *See* 8 U.S.C. § 1254(f)(1) (repealed 1996); *see also Guinto v. INS*, 774 F.2d 991, 992 (9th Cir. 1985) (per curiam) (rejecting equal

protection challenge). Certain nonimmigrant exchange aliens are also ineligible for relief. *See* 8 U.S.C. § 1254(f)(2) and (3).

2. Participants in Nazi Persecutions or Genocide

The statute excludes aliens described in 8 U.S.C. § 1251(a)(4)(D) from eligibility for suspension of deportation. *See* 8 U.S.C. § 1254(a) (repealed 1996). Section 1251(a)(4)(D) incorporates the definitions of Nazi persecutors and those who engaged in genocide found in 8 U.S.C. § 1182(a)(3)(E)(i) & (ii).

3. Aliens in Exclusion Proceedings

Aliens in exclusion proceedings are ineligible for suspension of deportation. *See Simeonov v. Ashcroft*, 371 F.3d 532, 537 (9th Cir. 2004).

D. Five-Year Bars to Suspension

1. Failure to Appear

An individual is not eligible for suspension of deportation for a period of five years if, after proper notice, she failed to appear at a deportation or asylum hearing, or failed to appear for deportation. *See* 8 U.S.C. § 1252b(e) (repealed 1996). The five-year ban also applies to voluntary departure and adjustment of status. *Id.* at § 1252(b)(e)(5). The government must provide proper notice in order for the bar to relief to be effective. *See Lahmidi v. INS*, 149 F.3d 1011, 1015-16 (9th Cir. 1998) (reviewing denial of motion to reopen in absentia deportation proceeding).

The pre-IIRIRA version of the statute provided an exception to the five-year bar for "exceptional circumstances." *See* 8 U.S.C. § 1252b(e). Exceptional circumstances are defined as "circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. § 1252b(f)(2).

2. Failure to Depart

An individual is not eligible for suspension of deportation for a period of five years if she remained in the United States after the expiration of a grant of voluntary departure. *See* 8 U.S.C. § 1252b(e)(2)(A) (repealed 1996); *cf. Barroso v. Gonzales*, 429 F.3d 1195, 1204-05, 1207 (9th Cir. 2005) (holding that timely-filed motion to reopen automatically tolled the voluntary departure period in permanent

rules case); *but see Dada v. Mukasey*, 554 U.S. 1, 19-21 (2008) (concluding that there is no statutory authority for automatically tolling the voluntary departure period during the pendency of a motion to reopen).

The five-year ban will not apply unless "the Attorney General has provided written notice to the alien in English and Spanish and oral notice either in the alien's native language or in another language the alien understands of the consequences … of the alien's remaining in the United States after the scheduled date of departure, other than because of exceptional circumstances." 8 U.S.C. § 1252b(e)(2)(B). The IJ's oral warning of the consequences of failing to depart must explicitly identify the types of discretionary relief that would be barred. *See Ordonez v. INS*, 345 F.3d 777, 783-84 (9th Cir. 2003) (reviewing, under the transitional rules, the denial of petitioner's motion to reopen suspension proceedings); *cf. de Martinez v. Ashcroft*, 374 F.3d 759, 762 (9th Cir. 2004) (suggesting in permanent rules cancellation case that the new ten-year statutory bar for failing to voluntarily depart no longer explicitly requires oral notice of the consequences for failing to depart).

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

E. Retroactive Elimination of Suspension of Deportation

Applying the Supreme Court's retroactivity analysis in *INS v. St. Cyr*, 533 U.S. 289, 316-21 (2001), this court has held that IIRIRA's elimination of suspension of deportation relief for non-permanent residents convicted of certain enumerated offenses is impermissibly retroactive. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853-54 (9th Cir. 2006) (holding that IIRIRA's elimination of suspension of deportation could not be applied retroactively to deprive a non-permanent resident of discretionary relief from removal where he was eligible for such relief at the time of his guilty plea); *see also Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 931, 941 (9th Cir. 2007) (suspension of deportation application by a permanent resident).

V. SECTION 212(c) RELIEF, 8 U.S.C. § 1182(c) (repealed), Waiver of Excludability or Deportability

A. Overview

Former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), allowed certain long-time permanent residents to obtain a discretionary waiver for certain grounds of excludability and deportability. *See INS v. St. Cyr*, 533 U.S. 289, 294-95 (2001) (providing history of former § 212(c) relief).

Former § 212(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision of subsection (a) [classes of excludable aliens]." 8 U.S.C. § 1182(c) (repealed 1996); *St. Cyr*, 533 U.S. at 295; *Segura v. Holder*, 605 F.3d 1063, 1066-67 (9th Cir. 2010) (ineligible for 212(c) relief because alien was never "lawfully admitted for permanent residence" notwithstanding immigration officials mistake in granting alien permanent resident status). If former § 212(c) relief was granted, the deportation proceedings would be terminated, and the alien would remain a lawful permanent resident. *See United States v. Ortega-Ascanio*, 376 F.3d 879, 882 (9th Cir. 2004).

Although the literal language of former § 212(c) applies only to exclusion proceedings, the statute applies to aliens in deportation proceedings as well. *See St. Cyr*, 533 U.S. at 295-96 & n.5 (discussing the "great practical importance" of extending former § 212(c) relief to permanent resident aliens in deportation proceedings, and noting the large percentage of applications that have been granted); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1122 (9th Cir. 2002); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995).

Effective April 1, 1997, IIRIRA repealed § 212(c), and created a more limited remedy called "cancellation of removal for certain permanent residents." However, certain individuals, as discussed below, remain eligible to apply for a former § 212(c) waiver. *See* 8 C.F.R. § 1212.3 (final rule establishing procedures to implement *St. Cyr*); *see also Zheng v. Holder*, 644 F.3d 829, 833 (9th Cir. 2011) ("Although Congress repealed § 212(c) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Supreme Court ruled in *St. Cyr* that permanent residents who pled guilty to crimes prior to the repeal could still apply for § 212(c) relief if they would have been eligible at the time of their plea."); *see*

also Tyson v. Holder, 670 F.3d 1015, 1017-22 (9th Cir. 2012) (discussing the repeal of § 212(c) relief, as well as the determination that the repeal does not apply retroactively to aliens who pled guilty to aggravated felonies in reliance on the possibility of such relief).

Cross-reference: Cancellation for Lawful Permanent Residents.

B. Eligibility Requirements

1. Seven Years

To be eligible for discretionary relief from deportation under former § 212(c), an applicant must have accrued seven years of lawful permanent residence status. *See Ortega de Robles v. INS*, 58 F.3d 1355, 1360-61 (9th Cir. 1995) (holding that applicant could include time spent as a lawful temporary resident under the amnesty program). An applicant could continue to accrue legal residency time for the purpose of relief while pursuing an administrative appeal. *See Foroughi v. INS*, 60 F.3d 570, 572 (9th Cir. 1995).

2. Balance of Equities

The IJ or BIA must balance the favorable and unfavorable factors when determining whether an applicant is entitled to former § 212(c) relief. *See, e.g.*, *Zheng v. Holder*, 644 F.3d 829, 833 (9th Cir. 2011) ("[T]he BIA abuses its discretion when it fails to consider all favorable and unfavorable factors bearing on a petitioner's application for § 212(c) relief."); *Georgiu v. INS*, 90 F.3d 374, 376-77 (9th Cir. 1996) (per curiam) (reversing BIA where it failed to address positive equities). Numerous cases have discussed the equities and adverse factors that should be balanced. *See, e.g.*, *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 923-24 (9th Cir. 2007); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (discussing positive equities and holding that defendant had a plausible claim for former § 212(c) relief); *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1056-57 (9th Cir. 2003) (holding that defendant did not establish prejudice given the significant adverse factors in his case); *Pablo v. INS*, 72 F.3d 110, 113-14 (9th Cir. 1995) (holding, under abuse of discretion standard, that BIA considered all of the relevant factors); *Yepes-Prado v. INS*, 10 F.3d 1363, 1366 (9th Cir. 1993) (listing factors).

However, the court lacks jurisdiction to review the discretionary balancing of the relevant factors. *See Vargas-Hernandez*, 497 F.3d at 923 (permanent rules,

stating, "Discretionary decisions, including whether or not to grant § 212(c) relief, are not reviewable." (citing 8 U.S.C. § 1252(A)(2)(b)(II)); *Palma-Rojas v. INS*, 244 F.3d 1191, 1192 (9th Cir. 2001) (per curiam) (transitional rules). Nevertheless, under the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), the court retains review over constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(D) (as amended by § 106(a)(1)(A)(iii) of the REAL ID Act); *see also Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th. Cir. 2007) (per curiam) (holding that questions of law "extend[] to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law").

Note that former § 212(c) does not require a showing of good moral character or hardship. *See* 8 U.S.C. § 1182(c) (repealed 1996); *see also Castillo-Felix v. INS*, 601 F.2d 459, 466 (9th Cir. 1979) (comparing the stricter qualitative requirements for suspension of deportation), *limited on other grounds by Ortega de Robles v. INS*, 58 F.3d 1355, 1358-59 (9th Cir. 1995).

C. Deportation: Comparable Ground of Exclusion

This court previously held that because former § 212(c) explicitly applied to the grounds of excludability, in order to be eligible for a waiver, an applicant in deportation proceedings must show that his/her ground of deportation had an analogous exclusion ground. *See Komarenko v. INS*, 35 F.3d 432, 434-35 (9th Cir. 1994) (stating that the waiver was not available for deportation based on a firearms offense because there was no comparable exclusion ground), *abrogated by Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam); *see also* 8 C.F.R. § 1212.3(f)(5) (An application for relief under former § 212(c) of the Act shall be denied if "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act."). However, the Supreme Court held in *Judulang v. Gonzales*, 132 S. Ct. 476 (2012) that the BIA's comparable-ground approach was arbitrary and capricious.

D. Removal: Comparable Ground of Inadmissibility

This court previously held that in order to be eligible for a waiver under former § 212(c), an applicant in removal proceedings must show that there is a ground of inadmissibility that is comparable to a ground of removability relating to a conviction for an aggravated felony. *See* 8 C.F.R. § 1212.3(f)(5); *Matter of*

Brieva-Perez, 23 I. & N. Dec. 766, 771 (BIA 2005). However, the Supreme Court held in *Judulang v. Gonzales*, 132 S. Ct. 476 (2012) that the BIA's comparable-ground approach was arbitrary and capricious.

E. Ineligibility for Relief

Former § 212(c) relief is not available to persons based on certain national security, terrorist, or foreign policy grounds, or if the applicant participated in genocide or child abduction. *See* 8 U.S.C. § 1182(c) (repealed 1996) (referring to §§ 1182(a)(3) and 1182(a)(9)(C)). There is no impermissibly retroactive effect in applying IIRIRA's elimination of § 212(c) relief to individuals who engaged in the requisite terrorist activity prior to IIRIRA's enactment. *Kelava v. Gonzales*, 434 F.3d 1120, 1124-26 (9th Cir. 2006).

F. Statutory Changes to Former Section 212(c) Relief

1. IMMACT 90

The Immigration Act of 1990 ("IMMACT 90") amended § 212(c) to eliminate relief for aggravated felons who had served a term of imprisonment of at least five years. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001); *Toia v. Fasano*, 334 F.3d 917, 919 (9th Cir. 2003). "Section 212(c) was further revised in 1991 to clarify that the bar applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years." *Toia*, 334 F.3d at 919 n.1. The five year period includes time served for sentencing enhancements, and time served for convictions obtained before the IMMACT 90 and 1991 amendments may be added to time served for convictions obtained after IMMACT 90 and the 1991 amendments. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1128, 1134 (9th Cir. 2007). Accordingly, an applicant convicted of an aggravated felony after IMMACT 90 and the 1991 amendments cannot qualify for former § 212(c) relief if the aggregate time served both before and after IMMACT 90 and the 1991 amendments is five or more years. *See Toia*, 334 F.3d at 919 n.1; *Saravia-Paguada*, 488 F.3d at 1134-35.

a. Continued Eligibility for Relief

The IMMACT 90 five-year bar may not be applied retroactively to convictions before November 29, 1990. *Toia v. Fasano*, 334 F.3d 917, 918-19 (9th Cir. 2003); *see also Angulo-Dominguez v. Ashcroft*, 290 F.3d 1147, 1152 (9th Cir. 2002) (remanding for a determination of whether application of five-year bar was

impermissibly retroactive); 8 C.F.R. § 1212.3(f)(4)(ii) ("An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990.").

However, the calculation of time served may include time served as a result of a conviction prior to IMMACT 90 and the 1991 amendments, when added to time served as a result of a post-IMMACT 90 conviction. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1134-35 (9th Cir. 2007).

2. AEDPA

Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") severely restricted former § 212(c) relief to bar waivers for applicants convicted of most crimes, including those who had aggravated felonies (regardless of the length of their sentences), or those with convictions for controlled substances offenses, drug addiction or abuse, firearms offenses, two crimes of moral turpitude, or miscellaneous crimes relating to national security. *See INS v. St. Cyr*, 533 U.S. 289, 297 & n.7 (2001); *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003); *Magana-Pizano v. INS*, 200 F.3d 603, 606 & n.2 (9th Cir. 1999).

An aggravated felony not listed in the notice to appear can serve as a bar to former 212(c) relief. *See United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1055-56 (9th Cir. 2003).

a. Continued Eligibility for Relief

Under final administrative regulations promulgated after the Supreme Court's ruling in *INS v. St. Cyr*, aliens in deportation proceedings before April 24, 1996 may apply for former § 212(c) relief without regard to § 440(d) of AEDPA. *See* 8 C.F.R. § 1212.3(g).

AEDPA § 440(d) also does not apply "if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made before April 24, 1996." *Id.* at 1212.3(h)(1).

If the alien entered a plea agreement between April 24, 1996 and April 1, 1997, he may apply for former § 212(c) relief, as amended by § 440(d) of AEDPA. *Id.* at 1212.3(h)(2).

However, AEDPA's expanded definition of aggravated felony can be applied retroactively to eliminate § 212(c) relief even though an alien's offense did not qualify as an aggravated felony at the time he pled guilty, because the law had already changed to make all aliens convicted of an aggravated felony ineligible for § 212(c) relief. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1054 (9th Cir. 2005).

3. IIRIRA

Section 304(b) of IIRIRA eliminated § 212(c) relief entirely, and replaced it with a new form of relief called cancellation of removal. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001); *United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002). Individuals who entered into plea agreements on or after April 1, 1997 are not eligible for former § 212(c) relief. *See* 8 C.F.R. § 1212.3(h)(3).

IIRIRA also expanded the list of crimes defined as aggravated felonies. *See, e.g.*, *Velasco-Medina*, 305 F.3d at 843 (noting that "IIRIRA expanded the definition of 'aggravated felony' by [inter alia] reducing the prison sentence required to trigger 'aggravated felony' status for burglary from five years to one year." (citation omitted)); *see also St. Cyr*, 533 U.S. at 296 n.4; 8 U.S.C. § 1101(a)(43) (providing definition of aggravated felony); 8 C.F.R. § 1212.3(f)(4) (discussing applicability of aggravated felony exclusion).

IIRIRA also removed the court's jurisdiction to review discretionary determinations, including whether to grant or deny former § 212(c) relief. *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 923 (9th Cir. 2007) (permanent rules case); *Palma-Rojas v. INS*, 244 F.3d 1191, 1192 (9th Cir. 2001) (per curiam) (transitional rules case).

Cross-reference: Cancellation of Removal.

a. Retroactive Elimination of § 212(c) Relief

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that a retrospective application of the bar to former § 212(c) relief would have an impermissible retroactive effect on certain lawful permanent residents. *Id.* at 325 (holding that the elimination of § 212(c) relief had an "obvious and severe retroactive effect" on those who entered into plea agreements with the expectation that they would be eligible for relief). More specifically, "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with

the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321 (internal quotation marks and citation omitted). *See also Peng v. Holder*, 673 F.3d 1248, 1256-57 (9th Cir. 2012) (holding that applying § 304(b) retroactively to petitioner's case would result in impermissible retroactive effect) ; *Tyson v. Holder*, 670 F.3d 1015, 1017-22 (9th Cir. 2012) (holding that BIA erred in concluding that *St. Cyr* is restricted to plea bargains, and further that the stipulated facts trial in the instant case was similar to a guilty plea in "all important respects" such that the repeal of 212(c) relief could not be applied retroactively); *Luna v. Holder*, 659 F.3d 753, 755-56 (9th Cir. 2011) (discussing § 212(c) relief).

b. Continued Eligibility for Relief

While IIRIRA eliminated § 212(c) relief, certain permanent residents may still seek a waiver under former § 212(c). Former § 212(c) relief applies in deportation proceedings that commenced before the April 1, 1997 effective date of IIRIRA even if the proceedings include deportation charges based on post-IIRIRA offenses. *Pascua v. Holder*, 641 F.3d 316, 317 (9th Cir. 2011).

(i) Plea Agreements Prior to AEDPA and IIRIRA

Applicants who were convicted pursuant to plea agreements before AEDPA and IIRIRA, and who were eligible for former § 212(c) relief at the time of their guilty pleas, remain eligible to apply for former § 212(c) relief. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001); *see also* 8 C.F.R. § 1003.44 (setting forth procedure for special motion to seek former § 212(c) relief) and 8 C.F.R. § 1212.3(h) (setting forth continued availability of former § 212(c) relief); *Zheng v. Holder*, 644 F.3d 829, 833 (9th Cir. 2011) ("Although Congress repealed § 212(c) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Supreme Court ruled in *St. Cyr* that permanent residents who pled guilty to crimes prior to the repeal could still apply for § 212(c) relief if they would have been eligible at the time of their plea."); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 n.1 (9th Cir. 2002) (stating that repeal of § 212(c) relief did not apply to alien falling under the transitional rules). *See also Peng v. Holder*, 673 F.3d 1248, 1256-57 (9th Cir. 2012) (concluding that " prior to the enactment of IIRIRA on September 30, 1996, an alien, who proceeded to trial on a crime involving moral turpitude (having not been convicted of one prior crime involving moral turpitude), remains eligible to apply for a § 212(c) waiver").

An applicant who pled guilty to burglary in October 1995, before the effective date of AEDPA, was entitled to be considered for former § 212(c) relief because at the time of his plea, he did not have notice that § 212(c) relief would not be available in the event his conviction was reclassified as an aggravated felony. *United States v. Leon-Paz*, 340 F.3d 1003, 1007 (9th Cir. 2003); *cf. Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1054 (9th Cir. 2005) (AEDPA's expanded definition of aggravated felony could be applied retroactively to eliminate § 212(c) relief even though the alien's offense did not qualify as an aggravated felony at the time he pled guilty because the law had already changed to make all aliens convicted of aggravated felonies ineligible for § 212(c) relief).

(ii) Reasonable Reliance on Pre-IIRIRA Application for Relief

In *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 942 (9th Cir. 2007), this court held that a permanent resident applying for naturalization is in a similar position to "an alien engaged in plea bargaining, acutely aware of the immigration consequences of her action." (internal quotation and citation omitted). Thus, an applicant who applied for relief pre-IIRIRA that demonstrates reasonable reliance on pre-IIRIRA law, and plausibly shows that she would have acted differently had she known about the elimination of § 212(c) relief, remains eligible for former § 212(c) relief. *Id*. at 941-44.

(iii) Similarly Situated Aliens Treated Differently

Allowing excludable aliens, but not deportable aliens, to apply for former § 212(c) relief violates equal protection. *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1199 (9th Cir. 2002) (affirming a grant of habeas relief to a permanent resident aggravated felon who was precluded from applying for former § 212(c) relief during the time when the BIA allowed excludable aggravated felons to apply for such relief).

But see Alvarez-Barajas v. Gonzales, 418 F.3d 1050, 1054 (9th Cir. 2005) (denying petition for review challenging the retroactive application of IIRIRA's expanded aggravated felony definition); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (holding that retroactive application of AEDPA restrictions on former § 212(c) relief did not violate equal protection).

c. Ineligibility for Relief

Section 304(b) of IIRIRA eliminated § 212(c) relief for all permanent residents other than those who remain eligible because of an impermissibly retroactive application of the statute. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001). Ineligible applicants include the following:

(i) Plea Agreements after IIRIRA

Individuals who entered into plea agreements on or after April 1, 1997 are not eligible for former § 212(c) relief. 8 C.F.R. § 1212.3(h)(3).

(ii) Plea Agreements after AEDPA

In *United States v. Velasco-Medina*, 305 F.3d 839, 850 (9th Cir. 2002), the court held that the elimination of former § 212(c) relief was not impermissibly retroactive where defendant's June 1996 guilty plea for burglary did not make him deportable under the law in effect at the time of the plea, and he had notice that AEDPA had already eliminated relief for aggravated felons. *See also Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053-54 (9th Cir. 2005).

(iii) Convictions After Trial

"[P]rior to the enactment of IIRIRA on September 30, 1996, an alien, who proceeded to trial on a crime involving moral turpitude (having not been convicted of one prior crime involving moral turpitude), remains eligible to apply for a § 212(c) waiver" where they can plausibly argue they relied on the availability of relief. *Peng v. Holder*, 673 F.3d 1248, 1256-57 (9th Cir. 2012); *see also Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 941 (9th Cir. 2007) (petitioner convicted at trial nevertheless eligible for former § 212(c) relief because of her reasonable reliance on pre-IIRIRA application for relief); *cf. Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (holding that for an applicant who elected a jury trial prior to AEDPA, the AEDPA restrictions on former § 212(c) relief did not have an impermissibly retroactive effect because he could not plausibly claim that he would have acted any differently if he had known about the elimination of § 212(c) relief). In *Peng*, this court rejected the BIA's interpretation that *Armedariz-Montoya* created a "bright-line rule barring aliens who proceeded to trial from § 212(c) relief." *Peng*, 673 F.3d at 1256. *But see* 8 C.F.R. § 1212.3(h) ("Aliens are not eligible to apply for § 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial.");

Kelava v. Gonzales, 434 F.3d 1120, 1125-26 (9th Cir. 2006) (stating that the Supreme Court in *Clark v. Martinez*, 543 U.S. 371 (2005) did not effectively overrule *Armendariz-Montoya*); *United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (finding no impermissible retroactive effect where applicant was convicted after a jury trial).

(iv) Pre-IIRIRA Criminal Conduct

The availability of former § 212(c) relief at the time the crime was committed is not a basis for continued eligibility for relief under that section. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1131-34 (9th Cir. 2007).

(v) Terrorist Activity

The elimination of § 212(c) relief has no impermissibly retroactive effect where a petitioner engaged in the requisite terrorist activity prior to IIRIRA's enactment and his removability depended on that activity, rather than his conviction. *See Kelava v. Gonzales*, 434 F.3d 1120, 1124-26 (9th Cir. 2006).

G. Expanded Definition of Aggravated Felony

IMMACT 90, the 1991 amendments, AEDPA, and IIRIRA progressively expanded the scope of the aggravated felony bar to waiver.

IMMACT 90 amended § 212(c) to eliminate relief for aggravated felons who had served a term of imprisonment of at least five years, and the section was further amended in 1991 "to clarify that the bar applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years." *Toia v. Fasano*, 334 F.3d 917, 919 n.1 (9th Cir. 2003); *see also Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1128, 1134-35 (9th Cir. 2007); 8 C.F.R. § 1212.3(f)(4)(ii).

Section 440(d) of AEDPA barred waivers for applicants convicted of most crimes, including aggravated felons regardless of the length of their sentences, and those with convictions for controlled substance offenses, drug addiction or abuse, firearms offenses, two crimes involving moral turpitude, or miscellaneous crimes relating to national security. *See INS v. St. Cyr*, 533 U.S. 289, 297 & n.7 (2001); *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003); *Magana-Pizano v. INS*, 200 F.3d 603, 606 & n.2 (9th Cir. 1999).

Section 321 of IIRIRA also expanded the list of crimes defined as "aggravated felonies." *See United States v. Velasco-Medina*, 305 F.3d 839, 843 (9th Cir. 2002) (noting that "IIRIRA expanded the definition of 'aggravated felony' by [inter alia] reducing the prison sentence required to trigger 'aggravated felony' status for burglary from five years to one year." (citation omitted)); *see also* 8 U.S.C. § 1101(a)(43) (providing definition of aggravated felony); *INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); 8 C.F.R. § 1212.3(f)(4) (discussing applicability of aggravated felony exclusion).

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

H. Burden of Proof

In *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391 (9th Cir. 2006), the court held that the government has the burden of production under the modified categorical approach to demonstrate an eligibility bar to cancellation of removal. In *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1129-30 (9th Cir. 2007), the court held that an alien seeking to prove eligibility for cancellation of removal bears the burden of establishing that he has not been convicted of an aggravated felony, but may meet this burden by pointing to inconclusive conviction records. Where the alien points to an inconclusive record of conviction, the "government has the burden of going forward to prove" the disqualifying offense. *See Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 (9th Cir. 2010). "Where an alien's conviction 'indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.'" *Rosas-Castaneda v. Holder*, 655 F.3d 875, 883 (9th Cir. 2011).

VI. SECTION 212(H) RELIEF, 8 U.S.C. § 1182(H), WAIVER OF INADMISSIBILITY

Section 212(h) allows the Attorney General, in his discretion, to waive inadmissibility of an applicant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien. 8 U.S.C. § 1182(h)(1)(B); *see also Sum v. Holder*, 602 F.3d 1092, 1094-95 (9th Cir. 2010); *Yepez-Razo v. Gonzales*, 445 F.3d 1216, 1218 n.3 (9th Cir. 2006) (describing the § 212(h)

waiver). The court has jurisdiction to review whether the BIA used an erroneous legal standard when analyzing an application for waiver of inadmissibility. *Rivera-Peraza v. Holder*, 684 F.3d 906, 909 (9th Cir. 2012). Note that "the hardship standard of 8 C.F.R. § 1212.7(d) applies to those who have committed 'violent or dangerous crimes' and who seek a waiver of inadmissibility under 8 U.S.C. § 1182(h)(1). [Section] 1212.7(d) directs the agency to consider hardship to the alien and to his or her relatives." *Rivera-Peraza*, 684 F.3d at 910-11.

Congress amended § 212(h) in 1996 to indicate that an alien previously admitted for lawful permanent residence is ineligible for a § 212(h) waiver if the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. The period during which an applicant is a Family Unity Program beneficiary counts toward the "lawfully residing continuously" requirement for § 212(h) relief. *Yepez-Razo*, 445 F.3d at 1219.

Congress did not violate equal protection by providing a waiver of inadmissibility to aggravated felons who were not permanent residents while denying the same waiver to aggravated felons who were permanent residents. *Taniguchi v. Schultz*, 303 F.3d 950, 958 (9th Cir. 2002); *see also* 8 U.S.C. § 1182(h) (precluding a waiver of inadmissibility to aggravated felon lawful permanent residents only); *see also Peng v. Holder*, 673 F.3d 1248, 1258-59 (9th Cir. 2012) (holding that a rational basis exists for applying the seven-year continuous physical presence requirement to LPRs and not to LPRs for of 212(h)); *Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) ("Congress does not violate equal protection by denying LPRs the opportunity to apply for a § 212(h) waiver"); *Sum*, 602 F.3d at 1094-95. A rational basis exists for denying a discretionary waiver to aggravated felons who were permanent residents because they enjoyed greater privileges in the United States than aggravated felons who were not permanent residents and posed a potentially higher risk of recidivism than illegal aliens who did not have the benefits that come with permanent resident status. *See Taniguchi*, 303 F.3d at 958.

IIRIRA and AEDPA also amended the statute to preclude a § 212(h) waiver to non-permanent resident aliens convicted of aggravated felonies and who are subject to expedited removal proceedings. *See* 8 U.S.C. § 1228(b) (stating that aliens subject to expedited removal proceedings are ineligible for any discretionary relief from removal). The elimination of § 212(h) relief for such aliens is not impermissibly retroactive because there is no indication as a matter of practice that

aliens have chosen to forgo their constitutional right to a jury trial in reliance on maintaining their eligibility for such relief. *See United States v. Gonzales*, 429 F.3d 1252, 1257 (9th Cir. 2005).

VII. INNOCENT, CASUAL, AND BRIEF DEPARTURES UNDER *FLEUTI* DOCTRINE

Under pre-IIRIRA law, a legal permanent resident who made an "innocent, casual, and brief" trip out of the United States did not intend a departure and therefore when he returned he was not an alien seeking entry who could be charged as excludable (now inadmissible). *Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963); *see also* 8 U.S.C. § 1101(a)(13) (repealed 1996).

Section 301(a)(13) of IIRIRA abrogated the *Fleuti* doctrine so that legal permanent residents convicted of certain crimes cannot leave the United States even for brief, innocent and casual trips without facing charges of inadmissibility. *Camins v. Gonzales*, 500 F.3d 872, 877-80 (9th Cir. 2007). This abrogation may not, however, be applied retroactively to those who pled guilty prior to the enactment of IIRIRA. *Id*. at 884-85 (holding that *Fleuti* exception for an innocent, casual and brief departures applies to legal permanent resident who pled guilty in January 1996 to sexual battery and who departed in 2001 for three weeks to see ailing mother in Philippines). *See also Vartelas v. Holder*, 132 S. Ct. 1479, 1483-85 (2012).

ADJUSTMENT OF STATUS

I. OVERVIEW

One form of relief from removal is adjustment of status. Adjustment of status is the process through which an alien may achieve permanent residence while in the United States. Historically, an alien applied for permanent residence at the United States consulate office located in his home country (consular processing). The alien would remain abroad until the application was approved, entering the United States for the first time as a permanent resident. As more aliens came to the United States on temporary visas in the 1950s, Congress created the adjustment of status process to facilitate the permanent residence application for aliens already in the United States.

Once removal proceedings have commenced, an alien must file his adjustment of status application in immigration court, and may no longer file the

application with the United States Citizenship and Immigration Service ("USCIS," formerly "BCIS and "INS"). *See* 8 C.F.R. §§ 245.2(a), 1245.2(a)(1)(i). The USCIS, however, has exclusive jurisdiction to adjudicate the visa petition portion of the application. *See id*. "Accordingly, if an alien in removal proceedings may be eligible for adjustment of status but does not yet have an approved visa petition, he may request a continuance of removal proceedings while the USCIS adjudicates the visa petition." *Avagyan v. Holder*, 646 F.3d 672, 675 n.3 (9th Cir. 2011). "Typically, the IJ will continue removal proceedings until USCIS adjudicates the visa petition." *Id*. If the immigration judge denies the continuance, the alien may still be eligible to move to reopen the case for adjustment of status processing once the visa petition is approved.

If an alien is ineligible for adjustment of status in removal proceedings, he may still be able to file for permanent residence at the United States consulate in his home country. Adjustment of status is frequently preferred to consular processing for several reasons. First, certain grounds of inadmissibility only apply if an alien departs the United States. For example, the unlawful presence provisions of 8 U.S.C. § 1182(a)(9)(B) & (C) only apply to an alien who departs the United States, and later re-enters. Accordingly, an alien who would be subject to 8 U.S.C. § 1182(a)(9) if he filed for consular processing may be able to circumvent the provision by staying in the U.S. and filing an adjustment of status application. Likewise, aliens who can file for adjustment of status prior to the entry of a removal order may avoid the ground of inadmissibility contained in 8 U.S.C. § 1182(a)(9)(A) (generally rendering aliens previously removed inadmissible for a period of five years). Finally, many aliens prefer to adjust status in the United States for convenience.

A. Eligibility for Permanent Residence

1. Visa Petition

In order to be eligible for an immigrant visa, an alien must file a visa petition pursuant to 8 U.S.C. § 1154.[1] The visa petition is the alien's petition to prove that he may be classified in one of the family or employment categories listed in 8 U.S.C. § 1153. The approval of a visa petition does not confer on the alien any

[1] Other aliens may be eligible for immigrant visas through provisions creating special forms of relief such as asylum, withholding of removal, and cancellation of removal.

legal status or right to remain in the United States, nor does it mean that the alien will be granted adjustment of status. A visa petition is merely the USCIS's determination that the alien fits into one of the visa categories listed in 8 U.S.C. § 1153.

The beneficiaries of all immigrant visa categories, except for immediate relatives, may bring their spouses and children with them to the United States. These spouses and children do not have to file a separate visa petition, but they must file separate adjustment of status or consular processing applications.

There are five categories of ***family-based*** visa petitions:

Immediate Relatives, 8 U.S.C. § 1151(b)(2)(A)(i): Spouses, children, and parents of U.S. citizens. An alien is not considered a "child" unless the alien is unmarried and less than 21 years old, *see* 8 U.S.C. § 1101(b)(1). In addition, a U.S. citizen is not allowed to petition for his parent until he is at least 21 years old. *See* 8 U.S.C. § 1151(b)(2)(A)(i). **Immediate relatives are not subject to the priority date system. Immediate relatives may not include their own spouses and children on their applications.**

First Preference, 8 U.S.C. § 1153(a)(1): Unmarried Sons and Daughters of U.S. Citizens.

Second Preference A, 8 U.S.C. § 1153(a)(2)(A): Spouses and Children (<21) of Permanent Residents.

Second Preference B, 8 U.S.C. § 1153(a)(2)(B): Unmarried Sons and Daughters (>21) of Permanent Residents.

Third Preference, 8 U.S.C. § 1153(a)(3): Married Sons and Daughters of U.S. Citizens.

Fourth Preference, 8 U.S.C. § 1153(a)(4): Brothers and Sisters of U.S. Citizens.

There are five categories of ***employment-based*** visa petitions:

First Preference, 8 U.S.C. § 1153(b)(1): Priority Workers.

Second Preference, 8 U.S.C. § 1153(b)(2): Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability.

Third Preference, 8 U.S.C. § 1153(b)(3): Skilled Workers, Professionals, and Other Workers.

Fourth Preference, 8 U.S.C. § 1153(b)(4): Certain Special Immigrants.

Fifth Preference, 8 U.S.C. § 1153(b)(5): Employment Creation.

Note on labor certifications: the majority of aliens wishing to be classified in the second and third employment preferences must file and receive an approved labor certification from the Department of Labor before filing for a visa petition. *See* 8 U.S.C. § 1153(b)(3)(C). A labor certification is not a visa petition; it is simply certification from the Department of Labor that willing and qualified United States workers are not available for a particular job. *See* 8 U.S.C. § 1182(a)(5)(A). Because a labor certification is not a visa petition, a filed and/or approved labor certification alone does not enable an alien to apply for adjustment of status. *See* 8 U.S.C. § 1255(a).

2. Priority Date

The United States will grant a total of 366,000 visas annually. The demand for visas outpaces this annual allotment. As a result, a priority date system has been established in order to allocate these limited visas among visa applicants. **Note**: immediate relatives are not subject to the priority date system, but rather are provided as many visas as necessary each year. When an alien files a visa petition, he is given a priority date (the same date that the visa petition was received by the USCIS.) The alien must monitor whether his priority date is "current," *i.e.* whether there is a visa immediately available for him to use to immigrate to the U.S. Failure to apply for an immigrant visa within one year following notification of the availability of a visa may be grounds for revocation of an approved visa petition. *See Park v. Gonzales*, 450 F. Supp. 2d 1153 (D. Or. 2006), *adopted by Park v. Mukasey*, 514 F.3d 1384 (9th Cir. 2008) (order).

The 366,000 visas are divided amongst the countries of the world, and then subdivided amongst the various employment-based and family-based immigration categories. Certain visa categories, especially for aliens from large countries, have become oversubscribed and have waiting lists of up to 20 years. An alien with an approved visa petition must continually check the monthly visa bulletin, found on the State Department's website at http://travel.state.gov/visa, to determine whether his priority date is current and, therefore, whether he may file an adjustment of status application.

8 U.S.C. § 1255(a) allows an alien to file an adjustment of status application if the alien is eligible to receive an immigrant visa and the immigrant visa is immediately available (*e.g.* the priority date is current). Although most aliens demonstrate eligibility to receive an immigrant visa through the approval of a visa petition, aliens who can demonstrate visa eligibility and an immediately available visa do not need to have an approved visa petition to file for adjustment of status. The rule allowing aliens to apply for adjustment of status in the absence of an approved visa petition has been extended to the motion to reopen context. *See Malhi v. INS*, 336 F.3d 989, 994-95 (9th Cir. 2003); *Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253, 256 (BIA 2002) (en banc).

Because immediate relatives are not subject to the priority date system, they are always eligible to apply for adjustment of status without an approved visa petition.

3. Admissibility

An alien applying for an immigrant visa also must demonstrate admissibility pursuant to 8 U.S.C. § 1182. An alien has the burden of establishing clearly and beyond doubt that he is entitled to be admitted and is not inadmissible under 8 U.S.C. § 1182. *See Valadez-Munoz v. Holder*, 623 F.3d 1304, 1308 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 106 (2011) (mem.) (applicant was inadmissible for having made a false claim of citizenship). This provision renders aliens inadmissible for many reasons including various crimes, prior immigration violations, indications that the alien will become a public charge, and certain communicable diseases. *See, e.g.*, *Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1030 (9th Cir. 2010) (where petitioner pleaded guilty to possession of a narcotic controlled substance under California law, sufficient evidence supported the denial of adjustment of status); *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1063 (9th Cir. 2008) (applicant was inadmissible for purposes of adjustment on account of having made a false claim to citizenship under 8 U.S.C. § 1182(a)(6)(C)(ii)). Some aliens found inadmissible under provisions of 8 U.S.C. § 1182 may be eligible to apply for the various waivers listed throughout 8 U.S.C. § 1182, most of which require the alien to show hardship to a United States citizen relative.

The grounds of inadmissibility are different from the grounds of removability listed in 8 U.S.C. § 1227. Therefore, even if an IJ has already determined that the alien is removable pursuant to 8 U.S.C. § 1227, the IJ could still determine that the alien is admissible pursuant to 8 U.S.C. § 1182 and the alien

could be granted lawful permanent residence. For instance, a crime of domestic violence is a ground of removability, but not a ground of inadmissibility. Therefore, if an alien is found to be removable for having committed a crime of domestic violence, the IJ must undertake a separate analysis to determine whether the same crime bars the alien's adjustment of status application pursuant to the criminal grounds of inadmissibility listed in 8 U.S.C. § 1182.

B. ELIGIBILITY FOR ADJUSTMENT OF STATUS PROCESS

Beyond the visa petition, priority date, and admissibility requirements, an alien must prove that he is eligible to *file* an adjustment of status application in accordance with the provisions of 8 U.S.C. § 1255. Aliens eligible for permanent residence through consular processing are not necessarily eligible for the adjustment of status process. The primary requirements for filing an adjustment of status application are lawful entry to the United States and current lawful status in the United States. *See* 8 U.S.C. § 1255(a), (c).

8 U.S.C. § 1255(a) states that an alien who has been "inspected and admitted or paroled" may be able to apply for adjustment of status, thus barring those who entered without inspection from applying for standard adjustment of status. 8 U.S.C. § 1255(c) bars adjustment of status for any alien who has engaged in unlawful employment, has unlawful immigration status at the time of filing, or who has failed to maintain lawful immigration status (other than through technical reasons or through no fault of his own). Exceptions to the requirements are listed below in Section B.1.

A separate bar to adjustment of status frequently encountered is found in 8 U.S.C. § 1229c(d). This provision states that an alien is ineligible for adjustment of status if he overstays the granted voluntary departure period. For cases subject to pre-Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") law, an alien who overstayed a grant of voluntary departure was barred from adjustment of status even if the alien filed a motion to reopen before the voluntary departure period expired. *See Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) (applying former 8 U.S.C. § 1252b(e)(2)(A) to pre-IIRIRA deportation proceedings). This court held that in post-IIRIRA cases in which a motion to reopen is filed within the voluntary departure period, the voluntary departure period is tolled during the period the BIA is considering the motion. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005), *abrogated by Dada v. Mukasey*, 554 U.S. 1, 19-20 (2008); *Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005). However, the Supreme

Court held in *Dada v. Mukasey*, 554 U.S. 1, 19-20 (2008) that there is no statutory authority for automatically tolling the voluntary departure period during the pendency of a motion to reopen.

Note that where voluntary departure was granted on or after January 20, 2009, the filing of a motion to reopen or reconsider, or the filing of a petition for review before the court of appeals will terminate voluntary departure. *See* 8 C.F.R. 1240.26(i); *Matter of Velasco*, 25 I. & N. Dec. 143 (BIA 2009).

1. Exceptions to Lawful Entry and Lawful Status Requirements

a. Exception for Immediate Relatives

Aliens coming to the U.S. as immediate relatives pursuant to 8 U.S.C. § 1151(b)(2)(A)(i) (spouses, children and parents of U.S. citizens), are exempt from portions of 8 U.S.C. § 1255. *See* 8 U.S.C. § 1255(c)(2). Immediate relatives must prove lawful entry to the United States, but may adjust their status even if they have not maintained lawful status throughout their stay.

b. Aliens Eligible For 8 U.S.C. § 1255(i) ("245(i)")

Legislation first passed in 1986 exempted certain aliens from the lawful status and lawful entry requirements. *See* 8 U.S.C. § 1255(i). Aliens who could not meet the lawful entry and status requirements could pay a $1,000 penalty to file their adjustment of status applications. 8 U.S.C. § 1255(i) has since expired, although certain aliens are grandfathered and may still use the provision. *See also Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 n.1 (9th Cir. 2010) (noting that § 1255(i) benefits are available only to those aliens who have been grandfathered into the provision); *Landin-Molina v. Holder*, 580 F.3d 913, 915 (9th Cir. 2009) ("Adjustment of status is generally available only to aliens who were inspected and admitted or paroled into the United States, *see* INA § 245(a), 8 U.S.C. § 1255(a); however, under § 1255(i), certain aliens who entered this country without inspection may apply for adjustment of status.").

To establish eligibility for 245(i) grandfathering, an alien must have had a labor certification or visa petition filed before April 30, 2001 (the expiration of the most recent 8 U.S.C. § 1255(i) provision). The visa petition filed before April 30, 2001 must have either been approved, or have been "approvable when filed." Therefore, even an alien who hopes to adjust his status based on a visa petition

filed after April 30, 2001 may be eligible for 245(i) if he had an "approvable when filed" visa petition filed before April 30, 2001. To establish that a visa petition was "approvable when filed," an alien must show that the petition was filed properly, was meritorious in fact, was not fraudulent, and that, at the time of filing, the beneficiary had the appropriate familial or employment relationship to support the filing. *See* "INS Questions and Answers", 6 Bender's Immig. Bull. 405 (2001).

"[A] principal alien who is grandfathered into § 1255(i) may impart grandfathered status to a spouse, again provided that the spouse is eligible to receive a visa under § 1153(d)." *Landin-Molina*, 580 F.3d at 918. However, to be entitled to grandfathered status, the derivative spouse must be "accompanying or following to join" the principal grandfathered alien. *Id*.

The deadline for filing for adjustment of status under INA § 245(i) is in nature a statute of repose, and not subject to equitable tolling. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1049-50 (9th Cir. 2008). *See also Blanco v. Holder*, 572 F.3d 780, 785 (9th Cir. 2009) (holding that application for adjustment of status under § 245(i) was not untimely, even though lawyer's accompanying check for the filing fee was inadvertently unsigned).

c. Unlawful Employment Exception

Certain employment-based applicants for adjustment of status may be exempted from the lawful status requirements of 8 U.S.C. § 1255. Under 8 U.S.C. § 1255(k), religious workers and beneficiaries of first, second, and third preference employment visa petitions may adjust status despite a violation of status, provided that the violation of status does not exceed 180 days in the aggregate.

2. Discretion

Ultimately, the grant or denial of an adjustment of status application is a matter of discretion. *See* 8 U.S.C. § 1255(a); *Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1029 (9th Cir. 2010); *Thomaidis v. INS*, 431 F.2d 711, 712 (9th Cir. 1970) (per curiam).

C. Adjustment of Status Application Pending

Regardless of his prior status, an alien with a pending adjustment of status application will be eligible to apply for work authorization, 8 C.F.R.

§ 274a.12(c)(9) and, where appropriate, travel authorization, 8 C.F.R. § 245.2(a)(4).

D. Adjustment of Status Application Approved

When an adjustment of status application is approved, the alien receives lawful permanent residence (a green card). In certain adjustment of status cases based on marriage to a United States citizen, the lawful permanent residence is conditional and the alien must take further action to remove the conditions at a later date. *See* 8 U.S.C. § 1186a(a); *see, e.g.*, *Chettiar v. Holder*, 665 F.3d 1375, 1376 (9th Cir. 2012) (alien granted conditional permanent resident status based on marriage to American citizen, authorizing him to stay in the United States and "seek removal of the conditions placed on his residency by submitting a petition to the CIS during the 90-day period immediately preceding the expiration of his two-year conditional residence period").