IMMIGRATION LAW

IN THE NINTH CIRCUIT

Selected Topics

January 2012 Supplement

The Immigration Outline and this Supplement are not intended to express the views or opinions of the Ninth Circuit, and may not be cited to or by the courts of this circuit.

Recently published decisions and updates to previously cited decisions are cited within this supplement, which should be used in conjunction with the July 2011 Immigration Outline.

These materials are provided as a resource to assist attorneys in analyzing petitions for review. The outline synthesizes procedural and substantive principles relating to immigration law in the Ninth Circuit and covers the following topics: Jurisdiction, Standards of Review, Relief from Removal (*e.g.* Asylum, Cancellation of Removal, Adjustment of Status), Motions to Reopen or Reconsider, Criminal Issues, Due Process, and Attorney Fees. **These research tools are only a starting point. You are encouraged to conduct independent research and verify that cited decisions are still good law.**

Corrections and comments may be e-mailed to Jennifer Rich at jennifer_rich@ca9.uscourts.gov.

JURISDICTION OVER IMMIGRATION PETITIONS AND STANDARDS OF REVIEW

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In *Li v. Holder*, 656 F.3d 898, 901-04 (9th Cir. 2011), this court determined it had jurisdiction to review the agency's denial of asylum relief, even though the BIA remanded to the IJ for completion of background checks that were required before alternative relief of withholding of removal could be granted.

The mandate has issued in *Ocampo v. Holder*, 629 F.3d 923, 927 (9th Cir. 2010).

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See also Myers v. Holder, 661 F.3d 1178, 1178-79 (9th Cir. 2011) (order) (staying mandate until BIA ruled on motion to reopen, and ordering that the mandate would be stayed pending disposition of the case if the BIA granted the motion to reopen, and in the alternative, the mandate would issue immediately if the BIA denied the motion to reopen).

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Exhaustion "'prevent[s] premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors.'" *Arsdi v. Holder*, 659 F.3d 925, 928 (9th Cir. 2011) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). A general challenge is insufficient, however, an alien need not use precise legal terminology to exhaust his claim, nor must he provide a well-developed argument to support the claim. *Arsdi*, 659 F.3d at 929. However, the issue must be put before the agency to meet the exhaustion requirements. *Id.* (concluding petitioner failed to meet even the minimum requirements for exhaustion).

"A *pro* se petitioner is not required to use the precise legal terminology … to make clear the basis of the challenge." *Ren v. Holder*, 648 F.3d 1079, 1084 (9th Cir. 2011) (concluding petitioner's *pro se* notice of appeal, while inartful, was sufficient to make clear the basis of his challenge, and thus satisfied the exhaustion requirement).

The policy concerns underlying exhaustion are satisfied where the BIA expressly adopts the IJ's decision which explicitly discusses an issue. *See Kwong v. Holder*, No. 04-72167, --- F.3d ---, 2011 WL 6061513, at *2 (9th Cir. Dec. 7, 2011) (mandate pending) (explaining that discussion of issues by IJ was sufficient to overcome exhaustion where BIA adopted IJ's reasoning and affirmed for reasons stated in IJ's decision).

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L. Denial of Registry *(new section)*

The court of appeals lacks jurisdiction to review the Attorney General's decision regarding an alien's denial of registry "to the extent the challenged decision was a legally permissible exercise of [the Attorney General's] discretion." *Gutierrez v. Holder*, 662 F.3d 1083, 1087 (9th Cir. 2011). *Cf. Beltran-Tirado v. INS*, 213 F.3d 1179, 1182-83 (9th Cir. 2000) (holding court had jurisdiction to review denial of registry based on omission of registry from statutory provision placed beyond the court's jurisdiction by the transitional rules of IIRIRA where the case concerned a legal question). However, the court does have jurisdiction to review the general finding of lack of good moral character as the reason for denying the application for registry, because "the good moral character decision is not committed to the discretion of the Attorney General." *Gutierrez*, 662 F.3d at 1089.

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See also Romero-Mendoza v. Holder, 665 F.3d 1105, 1107 (9th Cir. 2011) ("To the extent that the BIA incorporates the IJ's decision as its own, we review the IJ's decision." (internal quotation marks and citation omitted)) (mandate pending); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111 (9th Cir. 2011) ("Where, as here, the BIA adopts the IJ's decision while adding some of its own reasoning, we review both decisions.") (mandate pending).

"In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency." *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011) (quotation marks and citation omitted).

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"Where, as here, the BIA adopts and affirms the IJ's order pursuant to *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994), and expresses no disagreement with the IJ's decision, [the court] review[s] the IJ's order as if it were the BIA's." *Kwong v. Holder*, No. 04-72167, --- F.3d ---, 2011 WL 6061513, at *2 (9th Cir. Dec. 7, 2011) (mandate pending); *see also Gutierrez v. Holder*, 662 F.3d 1083, 1086 (9th Cir. 2011). Where the BIA affirms citing *Burbano*, it is adopting the IJ's decision in its entirety. *See Lezama-Garcia v. Holder*, 666 F.3d 518, 524 (9th Cir. 2011).

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"Where … a BIA decision interpreting a statute is unpublished and issued by a single member of the BIA, it does not carry the force of law, and is accorded only *Skidmore v. Swift & Co.*, 323 U.S. 134, (1944) deference proportional to its thoroughness, reasoning, consistency, and ability to persuade." *Lezama-Garcia v. Holder*, 666 F.3d 518, 524-25 (9th Cir. 2011) (internal quotation marks and citation omitted). *See also Meza-Vallejos v. Holder*, No. 07-70638, --- F.3d ---, 2012 WL 164089, at *5 (9th Cir. Jan. 20, 2012) (as amended) (where the BIA has not opined on an issue in a precedential decision, its interpretation is entitled to *Skidmore*, not *Chevron*, deference); *Soriano-Vino v. Holder*, 653 F.3d 1096, 1099 (9th Cir. 2011) ("Where the BIA, in an unpublished decision, interprets an ambiguous immigration statute, we give *Skidmore* deference to the BIA's interpretation."). "Pursuant to *Skidmore*, a reviewing court may properly resort to an agency's interpretations and opinions for guidance, as they constitute a body of experience and informed judgment." *Garcia v. Holder*, 659 F.3d 1261, 1266-67 (9th Cir. 2011) (mandate pending) (internal quotation marks and citation omitted).

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See also Pagayon v. Holder, Nos. 07-74047, 07-75129, --- F.3d ---, 2011 WL 6091276, at *4 (9th Cir. Dec. 8, 2011) (per curiam) (reviewing IJ decision as final agency action where BIA summarily affirmed the IJ's decision).

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Romero-Mendoza v. Holder, 665 F.3d 1105, 1107 (9th Cir. 2011) (mandate pending) (questions of law reviewed de novo include not only pure issues of statutory interpretation, but also application of law to undisputed facts); *Carrillo de Palacios v. Holder*, 662 F.3d 1128, 1130 (9th Cir. 2011) (mandate pending) (reviewing adjustment of status issues de novo).

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Chevron deference is applied to the BIA's interpretations of ambiguous immigration statutes if the BIA's decision is a published decision. *See Lezama-Garcia v. Holder*, 666 F.3d 518, 524 (9th Cir. 2011). However, where the BIA decision interpreting the statute is unpublished and issued by a single member of the BIA it is accorded only *Skidmore* deference. *Id*. at 524-25. *See also Rosas-Castaneda v. Holder*, 655 F.3d 875, 882 (9th Cir. 2011) (reviewing unpublished decision of the BIA under *Skidmore* deference, entitling the interpretation to a respect proportional to its power to persuade). "In contrast, an agency's interpretation of its regulations is given 'substantial deference,' which differs slightly from the traditional '*Chevron* deference' given to agency interpretations of statutes." *Lezama-Garcia*, 666 F.3d at 525.

See also Garcia v. Holder, 659 F.3d 1261, 1266 (9th Cir. 2011) (mandate pending) ("An agency's statutory interpretation only 'qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" (citation omitted)).

The court is "not required to give *Chevron* deference to the BIA's interpretation of citizenship laws." *Romero-Mendoza v. Holder*, 665 F.3d 1105,

1107 (9th Cir. 2011) (mandate pending). Additionally, the court does not give deference to the BIA when reviewing "whether a change to an immigration law is impermissibly retroactive." *Tyson v. Holder*, No. 08-70219, --- F.3d ---, 2012 WL 248001, at *2 (9th Cir. Jan. 27, 2012) (mandate pending) (quotation marks and citation omitted).

2. Substantial Evidence Review A-77

See also Oshodi v. Holder, No. 08-71478, --- F.3d ---, 2012 WL 232997, at *3 (9th Cir. Jan. 26, 2012) (mandate pending) ("Under the substantial evidence standard, administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.") (quotation marks and citation omitted)); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111 (9th Cir. 2011) (mandate pending) (same).

3. Abuse of Discretion Review A-78

"Where a grant or denial of asylum is based on the exercise of discretion, that decision is reviewed for abuse of discretion." *Li v. Holder*, 656 F.3d 898, 901 (9th Cir. 2011).

See also Kwong v. Holder, No. 04-72167, --- F.3d ---, 2011 WL 6061513, at *6 (9th Cir. Dec. 7, 2011) (mandate pending) (motion to remand); *Jiang v. Holder*, 658 F.3d 1118, 1120 (9th Cir. 2011) (denial of continuance); *Luna v. Holder*, 659 F.3d 753, 758 (9th Cir. 2011) (motion to reopen).

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See also Castro-Martinez v. Holder, 641 F.3d 1103, 1109 (9th Cir. 2011), *amended and superseded by Castro-Martinez v. Holder*, No. 08-70343, --- F.3d. ---, 2011 WL 6016162, at *8 (9th Cir. Dec. 5, 2011) ("Generalized economic disadvantage does not rise to the level of persecution." (internal quotation marks and citation omitted)).

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Pagayon v. Holder, 642 F.3d 1226, 1236 (9th Cir. 2011) (per curiam), *withdrawn and superseded on rehearing by Pagayon v. Holder*, Nos. 07-74047, 07-75129, --- F.3d ---, 2011 WL 6091276, at *6 (9th Cir. Dec. 8, 2011) (per curiam) ("A personal dispute is not, standing alone, tantamount to persecution based on an imputed political opinion.").

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6091276, at *6 (9th Cir. Dec. 8, 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).

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"[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).

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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).

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See Pagayon v. Holder, Nos. 07-74047, 07-75129, --- F.3d ---, 2011 WL 6091276, at *6 (9th Cir. Dec. 8, 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 furthermore petitioner failed to establish he would be targeted on account of a protected ground).

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"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) (mandate pending)).

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"[A]n alien may seek relief under the CAT, in at least these two forms: (1) withholding of removal under 8 C.F.R. § 1208.16(c) for aliens who are not barred from eligibility for asylum and withholding of removal 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." *Haile v. Holder*, 658 F.3d 1122, 1130 (9th Cir. 2011).

See also Cole v. Holder, 659 F.3d 762, 770-71 (9th Cir. 2011) (discussing general CAT principles).

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Issues of law regarding CAT claims are reviewed de novo, whereas the BIA's findings underlying the denial of CAT relief are reviewed for substantial evidence. *See Cole v. Holder*, 659 F.3d 762, 769-70 (9th Cir. 2011) (discussing general CAT principles); *see also Haile v. Holder*, 658 F.3d 1122, 1125 (9th Cir. 2011) (concluding the BIA's decision denying CAT deferral was not based on substantial evidence).

"[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*, 659 F.3d at 771-72. "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)).

"The standards for asylum and relief under the CAT 'are distinct and should not be conflated.'" *Oshodi v. Holder*, No. 08-71478, --- F.3d ---, 2012 WL 232997, at *6 (9th Cir. Jan. 26, 2012) (mandate pending) (quoting *Farah v. Ashcroft*, 348 F.3d 1153, 1157 (9th Cir. 2003)). In *Oshodi*, the court determined that where the BIA decision incorporated the IJ's findings, the decision "provided a sufficiently comprehensible explanation for denial of relief under the CAT, with its attendant higher burden of proof." 2012 WL 232997, at *6.

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"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) (mandate pending). Furthermore, "an application for CAT relief need not show that he will be tortured 'on account of' any particular ground." *Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011).

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"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." *Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011) (quotation marks and citations omitted).

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Lopez-Cardona v. Holder, 662 F.3d 1110, 1113-14 (9th Cir. 2011) (mandate pending) (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).

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and an opportunity to either produce the evidence or explain why it is unavailable before ruling that the applicant has failed in his obligation to provide corroborative evidence and therefore failed to meet his burden of proof.'" *Oshodi*, 2012 WL 232997, at *4 n.4 (quoting *Ren*, 648 F.3d at 1090). However, *Oshodi* states that the language in *Ren* is dicta because the issue was not before the *Ren* panel.

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See also Habibi v. Holder, No. 06-72111, --- F.3d ---, 2011 WL 6091274, at *5 (9th Cir. Dec. 8, 2011) (as amended) ("Congress does not violate equal protection by denying LPRs the opportunity to apply for a § 212(h) waiver").

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Meza-Vallejos v. Holder, No. 07-70638, --- F.3d ---, 2012 WL 164089, at *4 (9th Cir. Jan. 20, 2012) (as amended) ("'A motion to reopen is a traditional procedural mechanism in immigration law with a basic purpose that has remained constant – to give aliens a means to provide new information relevant to their cases to the immigration authorities.'" (quoting *Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005)).

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Meza-Vallejos v. Holder, No. 07-70638, --- F.3d ---, 2012 WL 164089, at *4-6 (9th Cir. Jan. 20, 2012) (as amended) (where voluntary departure period expired on weekend, and motion to reopen was filed on following Monday, court determined that motion was timely filed).

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The mandate has issued in *Ocampo v. Holder*, 629 F.3d 923, 925 (9th Cir. 2010).

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Santiago-Rodriguez v. Holder, 657 F.3d 820, 835-36 (9th Cir. 2011) (petitioner was prejudiced by counsel's ineffective assistance where counsel admitted to factual allegations without any factual basis for doing so).

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The mandate has issued in *Ocampo v. Holder*, 629 F.3d 923, 925 (9th Cir. 2010).

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Perez-Mejia v. Holder, 641 F.3d 1143, 1148-49 (9th Cir. 2011), *amended and superseded by Perez-Mejia v. Holder*, 663 F.3d 403, 409-10 (9th Cir. 2011) (Admissions by an alien to facts alleged in the notice to appear, and concessions concerning matters of law, made in the 8 C.F.R. § 1240.10(c) "pleading stage" of removal proceedings were sufficient to establish removability.).

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Pagayon v. Holder, 642 F.3d 1226, 1236 (9th Cir. 2011) (per curiam), *withdrawn and superseded on rehearing by Pagayon v. Holder*, Nos. 07-74047, 07-75129, --- F.3d ---, 2011 WL 6091276, at *4 n.1 (9th Cir. Dec. 8, 2011) (per curiam) ("The modified categorical approach applies when the simple fact of conviction of a state-law crime does not automatically establish removability under federal law.").

See also United States v. Aguila-Montes de Oca, 655 F.3d 915, 924 (9th Cir. 2011) (en banc) (per curiam) ("The purpose of the modified categorical approach is to determine whether the trier of fact was actually required to find all the elements of the generic offense before enhancing the defendant's sentence based on a state conviction."); *Rosas-Castaneda v. Holder*, 655 F.3d 875, 886 (9th Cir. 2011) (concluding record of conviction was inconclusive as to whether Arizona drug conviction as an aggravated felony).

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Pagayon v. Holder, 642 F.3d 1226, 1236 (9th Cir. 2011) (per curiam), *withdrawn and superseded on rehearing by Pagayon v. Holder*, Nos. 07-74047, 07-75129, --- F.3d ---, 2011 WL 6091276 (9th Cir. Dec. 8, 2011) (per curiam).

See also Kwong v. Holder, No. 04-72167, --- F.3d ---, 2011 WL 6061513, *4-5 (9th Cir. Dec. 7, 2011) (mandate pending) (discussing the sufficiency of abstract of judgment to establish conviction); *Rosas-Castaneda v. Holder*, 655 F.3d 875, 886 (9th Cir. 2011) ("The list of judicially noticeable documents that this court may consider in applying the modified categorical approach is limited to the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (internal quotation marks and citation omitted)).

Perez-Mejia v. Holder, 641 F.3d 1143, 1148-49 (9th Cir. 2011), *amended and superseded by Perez-Mejia v. Holder*, 663 F.3d 403, 410 (9th Cir. 2011).

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Although the immigration statute contains no definition of CMT, this court has explained that a CMT involves "base, vile, and depraved conduct that shocks the conscience and is contrary to the societal duties we owe each other." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1069 (9th Cir. 2007) (en banc) (holding that accessory after the fact offense was not a CMT), *overruled on other grounds by United States v. Aguila-Montes de Oca*, 655 F.3d 915, 940 (9th Cir. 2011) (en banc) (per curiam).

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Pagayon v. Holder, 642 F.3d 1226, 1236 (9th Cir. 2011) (per curiam), *withdrawn and superseded on rehearing by Pagayon v. Holder*, Nos. 07-74047, 07-75129, --- F.3d ---, 2011 WL 6091276, at *5 (9th Cir. Dec. 8, 2011) (per curiam) (state conviction for possessing methamphetamine constituted a controlled substance offense rendering alien removable, where petitioner made a pleading-stage admission to the conviction).

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A. Aggravated Felony D-34

See also Habibi v. Holder, No. 06-72111, --- F.3d ---, 2011 WL 6091274, at *2 (9th Cir. Dec. 8, 2011) (as amended) ("Under 8 U.S.C. § 1229b(a)(3), an LPR convicted of an 'aggravated felony' is ineligible for cancellation of removal. 'Aggravated felony' is defined by 8 U.S.C. § 1101(a)(43)(F) as including a 'crime of violence ... for which the term of imprisonment [is] at least one year.'").

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See also Kwong v. Holder, No. 04-72167, --- F.3d ---, 2011 WL 6061513, at *3-4 (9th Cir. Dec. 7, 2011) (mandate pending) (prior California conviction for first-degree burglary constituted crime of violence, and thus petitioner was not eligible for withholding of removal).

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See Kwong v. Holder, No. 04-72167, --- F.3d ---, 2011 WL 6061513, at *3-4 (9th Cir. Dec. 7, 2011) (mandate pending) (prior California conviction for first-degree burglary constituted crime of violence, and thus petitioner was not eligible for withholding of removal); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111-12 (9th Cir. 2011) (mandate pending) (holding that conviction for residential burglary under Cal. Penal Code § 459 constitutes a crime of violence because it is a felony that involves a substantial risk that physical force against the person or property of

another may be used in committing the offense), *cf. United States v. Aguila-Montes de Oca*, 655 F.3d 915, 946-47 (9th Cir. 2011) (en banc) (per curiam) (holding only that a conviction under Cal. Penal Code § 459 does not categorically constitute a conviction for generic burglary).

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See Habibi v. Holder, No. 06-72111, --- F.3d ---, 2011 WL 6091274, at *2 (9th Cir. Dec. 8, 2011) (as amended).

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DUE PROCESS IN IMMIGRATION PROCEEDINGS

I. DUE PROCESS E-1

A. Generally E-1

"A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings. … A court will grant a petition on due process grounds only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (citations and quotation marks omitted).

B. Prejudice Requirement E-3

"An alien bears the burden of proving the alleged violation prejudiced his or her interests." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (citations and quotation marks omitted).

See also Pagayon v. Holder, 642 F.3d 1226, 1236 (9th Cir. 2011) (per curiam), *withdrawn and superseded on rehearing by Pagayon v. Holder*, Nos. 07-74047, 07-75129, --- F.3d ---, 2011 WL 6091276, at *7 (9th Cir. Dec. 8, 2011) (per curiam) (concluding that Pagayon failed to show prejudice where IJ accepted Pagayon's version of the facts, and thus corroborating evidence was not necessary).

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See also Oshodi v. Holder, No. 08-71478, --- F.3d ---, 2012 WL 232997, at *5 (9th Cir. Jan. 26, 2012) (mandate pending) (IJ did not prevent Oshodi from testifying, even though IJ interrupted petitioner at the outset); *Pagayon v. Holder*, 642 F.3d 1226, 1236 (9th Cir. 2011) (per curiam), *withdrawn and superseded on rehearing by Pagayon v. Holder*, Nos. 07-74047, 07-75129, --- F.3d ---, 2011 WL 6091276, at *7 (9th Cir. Dec. 8, 2011) (per curiam) (no due process violation where IJ refused to allow telephonic testimony from family and declined to allow petitioner time to submit a letter recapitulating his oral testimony, because petitioner failed to establish prejudice); *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (no violation of due process rights by excluding telephonic testimony of three witnesses because there were other witnesses present and prepared to testify as to the same character evidence); *Haile v. Holder*, 658 F.3d 1122, 1128 (9th Cir. 2011) ("The sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." (quotation marks and citation omitted)).

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See also Kwong v. Holder, No. 04-72167, --- F.3d ---, 2011 WL 6061513, at *6 (9th Cir. Dec. 7, 2011) (mandate pending) (counsel's performance was not constitutionally deficient where counsel interrogated petitioner and presented sufficient evidence in support of petitioner's claim for withholding of removal to permit the IJ to make a reasoned decision on the merits of that claim); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835-36 (9th Cir. 2011) (petitioner was prejudiced by counsel's ineffective assistance where counsel admitted to factual allegations without any factual basis for doing so).

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20. Consideration of Evidence by Agency E-23

Oshodi v. Holder, No. 08-71478, --- F.3d ---, 2012 WL 232997, at *5 (9th Cir. Jan. 26, 2012) (mandate pending) ("An alien attempting to establish that the [BIA] violated his right to due process by failing to consider relevant evidence must overcome the presumption that it did review the evidence." (internal quotation marks, alteration, and citation omitted)).

21. Notice of Evidentiary Requirements.....E-23

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The mandate has issued in *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011).

28. Notice of Deadline (*new section)*

Notice of the deadline to file a special motion to reopen to apply for 212(c) relief was presumptively in compliance with due process where law was enacted by Congress and regulation that established procedures for filing motions to reopen. *See Luna v. Holder*, 659 F.3d 753, 759 (9th Cir. 2011).

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See Habibi v. Holder, No. 06-72111, --- F.3d ---, 2011 WL 6091274, at *5 (9th Cir. Dec. 8, 2011) (as amended) ("Congress does not violate equal protection by denying LPRs the opportunity to apply for a § 212(h) waiver.").

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8. One-Year Filing Deadline.....E-31

9. 8 U.S.C. § 1229b.....E-32

10. Application of law within circuit where there is a circuit split *(new section)*

Note that "the mere existence of a circuit split on an issue of statutory interpretation" violates neither due process, nor equal protection. *Habibi v. Holder*, No. 06-72111, --- F.3d ---, 2011 WL 6091274, at *5 (9th Cir. Dec. 8, 2011) (as amended) (rejecting contention that the differing application of the law in different circuits violates equal protection).

B. Suspension Clause.....E-32

C. Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act E-33

D. Fifth Amendment Right Against Self-Incrimination *(new section)*

"In a deportation hearing there is no prohibition against drawing an adverse inference when a petitioner invokes his Fifth Amendment right against self-incrimination." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011).

ATTORNEY FEES AND RECOVERABLE EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT ("EAJA")

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The court annually posts a Notice regarding the statutory maximum rates under EAJA. The most recent notice is available at:

- http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039

The Notice currently states:

> Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (d)(2)(A), *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005), and Ninth Circuit Rule 39-1.6, the applicable statutory maximum hourly rates under EAJA, adjusted for increases in the cost of living, are as follows:
>
> For work performed in:
>
> 2011: $180.59
>
> 2010: $175.06
>
> 2009: $172.24
>
> 2008: $172.85
>
> 2007: $166.46
>
> 2006: $161.85
>
> 2005: $156.79

2004: $151.65

2003: $147.72

2002: $144.43

2001: $142.18