

# IMMIGRATION LAW

## IN THE NINTH CIRCUIT

### Selected Topics

#### February 2013 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 Summer 2012 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](mailto:jennifer_rich@ca9.uscourts.gov).

**JURISDICTION OVER IMMIGRATION PETITIONS  
AND STANDARDS OF REVIEW**

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“The exclusive means to challenge an order of removal is the petition for review process.” *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (holding that the district court lacked jurisdiction to review an Administrative Procedure Act claim that indirectly challenged an order of removal).

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On January 20, 2009, the Attorney General promulgated 8 C.F.R. § 1240.26(i), which specifies 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(c)(4), (e),(i); *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 525 (9th Cir. 2012) (en banc) (joining the Sixth Circuit in finding the regulation to be a valid exercise of delegated power). “[B]ecause the filing of a

petition now automatically terminates a petitioner’s grant of voluntary departure, [the court has] no authority to issue an equitable stay of a petitioner’s voluntary departure period.” *Garfias-Rodriguez*, 702 F.3d at 525. Note the BIA has held that the regulation does not apply retroactively, but rather applies only to voluntary departure granted on or after January 20, 2009. *See Matter of Velasco*, 25 I. & N. Dec. 143 (BIA 2009).

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The court lacks jurisdiction to review the denial of an application for cancellation of removal in the exercise of discretion. *See Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012). However, “jurisdiction stripping provisions [of 8 U.S.C. § 1252(a)(2)(B)(i) do not apply where, ... , the petitioner raises a question of law—[such as] whether the BIA acted within its regulatory authority.” *Id.*

The court has “jurisdiction over a constitutional challenge to a BIA decision denying cancellation of removal only if the constitutional claim is colorable, i.e., if it has some possible validity.” *Arteaga-De Alvarez v. Holder*, 704 F.3d 730, 736 (9th Cir. 2012) (internal quotation marks and citation omitted) (concluding that petitioner did not present a colorable due process claim where she alleged that the “BIA’s hardship determination in a cancellation of removal case [was] factually inconsistent with similar prior agency hardship determinations.”).

The court does have jurisdiction to review a legal challenge to the denial of cancellation of removal. *Arteaga-De Alvarez*, 704 F.3d at 737 (concluding that petitioner raised a colorable question of law subject to review where she alleged the BIA’s hardship determination was made on an erroneous legal standard).

*See also Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) (order) (concluding that denial of motion to reconsider was outside of court’s jurisdiction because the court could not reconsider the discretionary, fact-based determination that petitioners failed to demonstrate the requisite hardship and also that the court lacked jurisdiction over the motion to reopen to seek prosecutorial discretion based on the recent order of President Obama, citing 8 U.S.C. § 1252(g)).

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Because the court retains jurisdiction to determine its jurisdiction, the court has jurisdiction to determine whether an offense is an aggravated felony under the INA. *See Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1030-31 (9th Cir. 2012) (mandate pending) (“If we determine that Aguilar-Turcios’ Article 92 conviction is not an aggravated felony, then we have jurisdiction over the final order of removal and must grant his petition; if we determine, however, that it is an aggravated felony, we lose our jurisdiction and the agency has the final word on Aguilar-Turcios’ removal.”).

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*See also Pechenkov v. Holder*, 705 F.3d 444, 448-49 (9th Cir. 2012) (the court lacked jurisdiction to review particularly serious crime determination where the petitioner asked only for a “re-weighting of the factors involved in that discretionary determination,” but holding court had jurisdiction over constitutional claims and questions of law raised regarding petitioner’s application to adjust status and the revocation of asylee status).

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Where “the BIA has conducted a *de novo* review of the IJ’s decision, [the court reviews] only the decision of the BIA.” *Corpuz v. Holder*, 697 F.3d 807, 810-11 (9th Cir. 2012) (internal quotation marks and citation omitted).

The governing regulations explicitly state that the BIA shall not “engage in *de novo* review of findings of fact determined by an immigration judge.” 8 C.F.R. § 1003.1(d)(3)(i). Rather, “[f]acts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.” *Id.* The BIA may, however, “review questions of law, discretion, and judgment ... *de novo*.” *Id.* § 1003.1(d)(3)(ii). “Where the BIA engages in *de novo* review of an IJ’s factual findings instead of limiting its review to clear error, it has committed an error of law.” *Rodriguez*, 683 F.3d at 1170. Further, the BIA may “not engage in factfinding in the course of deciding appeals.” 8 C.F.R. § 1003.1(d)(3)(iv).

*Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012). “[T]he BIA cannot disregard the IJ’s findings and substitute its own view of the facts. Either it must find clear error, explaining why; or, if critical facts are missing, it may remand to the IJ.” *Id.* at 919.

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“Where the [Board] does not perform an independent review of the IJ’s decision and instead defers to the IJ’s exercise of his or her discretion, it is the IJ’s decision that we review.” *Rojas v. Holder*, 704 F.3d 792, 794 (9th Cir. 2012) (internal quotation marks and citation omitted; alteration in original).

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“Where ... the BIA conducts its own review of the evidence and law, our review is limited to the BIA’s decision, except to the extent that the IJ’s opinion is expressly adopted.” *Young v. Holder*, 697 F.3d 976, 981 (9th Cir. 2012) (en banc) (internal quotation marks and citation omitted).

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*See also Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1079-80 (9th Cir. 2013) (mandate pending) (“Beyond explaining that this court has jurisdiction to review the BIA’s denial of a motion to reopen and setting forth the new evidence provided to the BIA, Lopez-Vasquez’s brief [did] not raise any arguments directed to this issue” and thus any challenge to the denial of the motion to reopen was waived.).

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In *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1210-11 (9th Cir. 2013), the court declined to grant deference to the BIA decision, and instead reviewed the BIA’s determination de novo. *Id.* (holding that the BIA decision under review was

entitled to neither *Chevron* or *Skidmore* deference). Likewise in *Arteaga-De Alvarez v. Holder*, 704 F.3d 730, 740 (9th Cir. 2012), the court held that *Chevron* deference was unwarranted “because none of the published decisions cited by the BIA control[led] the case” and in “applying the *Skidmore* framework, the decision [was] not entitled to substantial weight” because it was “not thoroughly reasoned, and ... lack[ed] the power to persuade,” where the decision lacked any explanation. *Id.* at 740. (internal quotation marks and citation omitted).

This court has held that it “must treat an agency decision that is contrary to a ruling previously set forth by a court of appeals and ... prompts the court of appeals to defer to the agency, as [the court] would if the agency had changed its own rules.” *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012) (en banc) (explaining that to do otherwise would ignore the effect of *Chevron*, and further stating that to the extent precedent suggests to the contrary it is overruled, citing examples *Duran Gonzales v. Dep’t of Homeland Sec. (Duran Gonzales II)*, 659 F.3d 930, 939-41 (9th Cir. 2011); *Morales-Izquierdo v. Dep’t of Homeland Sec.*, 600 F.3d 1076, 1087-91 (9th Cir. 2010)).

The mandate has issued in *Nijjar v. Holder*, 689 F.3d 1077, 1083 (9th Cir. 2012) (Where Congress has directly spoken to the precise question at issue and the intent is clear, “that is the end of the matter” and *Chevron* deference does not apply.).

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Reviewing for abuse of discretion, the court concluded that “absent an adequate explanation as to how the Board’s ‘meaningful risk of harm’ rationale can be reconciled with the Board’s precedents and with the statutory language, [the court could not] say that the Board’s decision was the result of legally adequate decisionmaking.” *Alphonsus v. Holder*, 705 F.3d 1031, 1044-50 (9th Cir. 2013) (mandate pending) (granting the petition for review and remanding “for further consideration and explanation of the ‘particularly serious crime’ issue.”).

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## RELIEF FROM REMOVAL

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In *Henriquez-Rivas v. Holder*, No. 09-71571, --- F.3d ---, 2013 WL 518048 (9th Cir. Feb. 13, 2013) (en banc) (mandate pending), the court held that witnesses who testify against gang members may constitute a particular social group despite lack of social visibility, overruling *Soriano v. Holder*, 569 F.3d 1162 (9th Cir. 2009) and *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010). See *Henriquez-Rivas*, 2013 WL 518048, at \*5-\*11 (discussing membership in a particular social group and how to determine the existence of a social group, and stating that *Soriano* and *Velasco-Cervantes* were overruled to the extent that those cases made “considerations of diversity of lifestyle and origin the *sine qua non* of ‘particularity’ analysis.”). In *Henriquez-Rivas*, the BIA sustained the government’s appeal of an IJ’s grant of asylum to petitioner who claimed entitlement to relief based on membership in a particular social group, as a “person who testified in a criminal trial against members of a gang who killed her father.”

*Id.* at \*1, \*11. The court determined that the BIA erred in applying its own precedents in holding that “witnesses who testify against gang members may not constitute a particular social group due to lack of social visibility.” *Id.* (remanding for further proceedings where petitioner claimed she was a member of a particular social group as a witness who testified against gang members).

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Note that *Soriano v. Holder*, 569 F.3d 1162 (9th Cir. 2009) and *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010) were overruled by *Henriquez-Rivas v. Holder*, No. 09-71571, --- F.3d ---, 2013 WL 518048 (9th Cir. Feb. 13, 2013) (en banc) (mandate pending), which held that witnesses who testify against gang members may constitute a particular social group, despite lack of social visibility. See *Henriquez-Rivas*, at 2013 WL 518048, \*5-\*11 (discussing membership in a particular social group and how to determine the existence of a social group).

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*Soriano v. Holder*, 569 F.3d 1162 (9th Cir. 2009), *overruled on other grounds by Henriquez-Rivas v. Holder*, No. 09-71571, --- F.3d ---, 2013 WL 518048 (9th Cir. Feb. 13, 2013) (overruling *Soriano* to the extent it made “considerations of diversity of lifestyle and origin the *sine qua non* of ‘particularity’ analysis”).

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*Alphonsus v. Holder*, 705 F.3d 1031, 1049-50 (9th Cir. 2013) (9th Cir. Jan. 18, 2013) (mandate pending) (substantial evidence supported the BIA’s determination that petitioner failed to establish that he would more likely than not face torture if removed to Bangladesh).

*Soriano v. Holder*, 569 F.3d 1162, 1167 (9th Cir. 2009) (substantial evidence supported the denial of CAT relief where there no evidence showing a likelihood of torture upon return to the Philippines), *overruled on other grounds by Henriquez-Rivas v. Holder*, No. 09-71571, --- F.3d ---, 2013 WL 518048 (9th Cir. Feb. 13, 2013) (en banc) (mandate pending) (overruling *Soriano* to the extent it made “considerations of diversity of lifestyle and origin the *sine qua non* of ‘particularity’ analysis” when determining membership in a particular social group).

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This court has held that the “written warning on the asylum application adequately notifies the applicant of both the consequences of knowingly filing a frivolous application for asylum as well as the privilege of being represented by counsel, as required by 8 U.S.C. § 1158(d)(4)(A).” *Cheema v. Holder*, 693 F.3d 1045, 1049 (9th Cir. 2012). “The form states in clear, conspicuous, bold lettering on the signature page that ‘[a]pplicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act.’” *Id.* (concluding that the petitioner was notified of the consequences of filing a frivolous application where he signed below the bold warning on the application form).

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**CANCELLATION OF REMOVAL, SUSPENSION OF DEPORTATION, FORMER SECTION 212(c) RELIEF .....** B-150

“The REAL ID Act places the burden of demonstrating eligibility for cancellation of removal squarely on the noncitizen.” *See Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc) (citing 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d)).

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The court “typically may not review the BIA’s finding that a case does not warrant a discretionary grant of cancellation of removal, [however,] such jurisdiction stripping provisions do not apply where, ... , the petitioner raises a question of law—[such as] whether the BIA acted within its regulatory authority.” *Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012) (citing 8 § 1252(a)(2)(B)(i)).

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“In exercising discretion, the IJ must consider the record as a whole, and balance the adverse factors evidencing the alien’s undesirability as a permanent resident with the social and humane considerations presented [on] his (or her) behalf to determine whether the granting of ... relief appears in the best interest of this country.” *Ridore v. Holder*, 696 F.3d 907, 920 (9th Cir. 2012) (internal quotation marks and citation omitted; alteration in original).

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Alien’s admission was sufficient to show she knowingly participated in and aided the attempted entry of an illegal alien. *Sanchez v. Holder*, 704 F.3d 1107, 1110 (9th Cir. 2012) (per curiam) (mandate pending) (“Her admitted actions were more than mere reluctant acquiescence in the plan of another, but were instead affirmative acts in violation of § 1182(a)(6)(E)(i).”).

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The court in *Arteaga-De Alvarez v. Holder*, 704 F.3d 730, 737-42 (9th Cir. 2012) held that it had jurisdiction over petitioner’s claim that the BIA committed an error of law in “relying on a categorical rule that the availability of alternative relief necessarily undercuts a cancellation of removal claim of hardship to the applicant’s qualifying relative.”

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“INA § 212(h) provides the Attorney General discretion to waive the inadmissibility of certain aliens if the alien establishes that inadmissibility would cause hardship to a family member who is a United States citizen or lawful resident.” *Sanchez-Avalos v. Holder*, 693 F.3d 1011, 1014 (9th Cir. 2012).

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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 Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1078-79 (9th Cir. 2013) (mandate pending) (concluding alien not eligible for adjustment of status where nothing in the state court record demonstrated that the court changed his underlying conviction to one that did not render him inadmissible under § 1182).

*See also Garfias-Rodriguez v. Holder*, 702 F.3d 504, 514 (9th Cir. 2012) (en banc) (“aliens who are inadmissible under § 212(a)(9)(C)(i)(I) are not eligible for adjustment of status under § 245(i)”); *Carrillo de Palacios v. Holder*, No. 09-72059, --- F.3d ---, 2013 WL 310387, at \*5-7 (9th Cir. Jan. 28, 2013) (mandate pending) (concluding that petitioner who was inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(II), and who did not qualify for the § 1182(a)(9)(C)(ii) exception to inadmissibility, was ineligible for adjustment of status).

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**MOTIONS TO REOPEN OR RECONSIDER  
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Like an improperly captioned motion asserting an ineffective assistance of counsel claim, an appeal to the BIA asserting such a claim is effectively a motion to reopen. *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (mandate pending) (where petitioner improperly used an appeal to BIA as vehicle to allege ineffective assistance of counsel, the appeal was effectively a motion to reopen).

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The court will find prejudice “when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings.” *Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013) (mandate pending) (quoting *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir.1999)).

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The court in *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-32 (9th Cir. 2013) (mandate pending) held that the BIA abused its discretion by requiring the alien to provide correspondence from the state Bar indicating receipt of a complaint where the alien provided a copy of the complaint with the motion, along with a declaration from the lawyer “admitting responsibility and absolving the client of any culpability for the delay.”

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*Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-34 (9th Cir. 2013) (mandate pending) (concluding petitioner suffered prejudice where the record was undisputed his lawyer failed to file his application for cancellation of removal, and remanding to the BIA to allow petitioner to file his application for relief).

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## **CRIMINAL ISSUES IN IMMIGRATION LAW**

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To determine if an offense is a categorical crime of violence, the court inquires whether the conduct encompassed by the elements of the offense presents a substantial risk that physical force might be used against another in committing the offense. *Barragan-Lopez v. Holder*, 705 F.3d 1112, 1115-17 (9th Cir. 2013) (mandate pending) (conviction for false imprisonment under Cal. Penal Code § 210.5 was categorically a crime of violence, making the alien removable as an aggravated felon).

“In order to hold that the statute of conviction is overbroad, [the court] must determine that there is a ‘realistic probability’ of its application to conduct that falls beyond the scope of the generic federal offense.” *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1212 (9th Cir. 2013).

“[T]he categorical and modified categorical approaches look only to the prior *conviction*, not to the facts outside the record of conviction.” *Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1031 (9th Cir. 2012) (mandate pending) (“[T]he categorical approach requires that federal courts look[ ] to the statute defining the crime of conviction, rather than to the specific facts underlying the crime.” (internal quotation marks and citation omitted)).

*See also Young v. Holder*, 697 F.3d 976, 982-83 (9th Cir. 2012) (en banc) (discussing categorical approach).

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There are two limitations on the application of the modified categorical approach: 1) the court may only rely on facts contained in a limited universe of judicial documents, such as the indictment or information and jury instructions, or if a guilty plea is at issue, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea; and 2) the court may only take into account the facts on which the defendant’s convictions necessarily rested. *Sanchez-Avalos v. Holder*, 693 F.3d 1011, 1015 (9th Cir. 2012).

The modified categorical approach requires the court “to determine whether a jury was actually required to find all the elements of the generic federal crime.” *Young v. Holder*, 697 F.3d 976, 983 (9th Cir. 2012) (en banc) (internal quotation marks and citation omitted). “[U]nder the modified categorical approach[, the court] may review only the charging instrument, transcript of the plea colloquy, plea agreement, and comparable judicial record of this information.” *Id.* “[W]hen the record of conviction consists only of a charging document that includes several

theories of the crime, at least one of which would *not* qualify as a predicate conviction, then the record is inconclusive under the modified categorical approach.” *Id.* at 988.

Note that “there is no authority ... that permits the combining of two offenses to determine whether one or the other is an aggravated felony.” *Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1037 (9th Cir. 2012) (mandate pending) (internal quotation marks and citation omitted).

*See also* *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1207 (9th Cir. 2013) (remanding to BIA so the agency could apply the modified categorical approach in the first instance); *Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1035 (9th Cir. 2012) (mandate pending) (explaining, “The judicially noticeable documents that we may examine in applying the modified categorical approach [in this case] consist of (1) the Charge Sheet; (2) the Memorandum of Pretrial Agreement; (3) the Stipulation of Fact, which was incorporated into the Memorandum of Pretrial Agreement and accepted by the MJ at the plea proceeding; and (4) the transcript of the plea colloquy between the MJ and Aguilar-Turcios” and holding that the petitioner’s “Article 92 conviction [did] not necessarily rest on facts satisfying the elements of either § 2252(a)(2) or (a)(4),” and thus was not an aggravated felony).

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“[W]here, ... , the abstract of judgment or minute order specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment, [the court] can consider the facts alleged in that count.” *Cabantac v. Holder*, 693 F.3d 825, 827-28 (9th Cir. 2012) (per curiam) (mandate pending) (holding that the record was clear that the petitioner pleaded guilty to possession of methamphetamine, a controlled substance, that supported the order of removal).

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“Crimes of moral turpitude generally involve some ‘evil intent.’” *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213 (9th Cir. 2013).

“Simple kidnapping under CPC § 207(a) does not require an intent to injure, actual injury, or a special class of victims.” *Id.* at 1213. “Thus, simple kidnapping under CPC § 207(a) does not categorically have anything in common with the type of crime [the court has] normally held to involve moral turpitude. It can be committed without any intention of harming anyone, it need not result in actual harm, and it does not necessarily involve a protected class of victim.” *Id.* at 1207, 1214 (explaining that the court has held that “non-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim” and holding that simple kidnapping under Cal. Penal Code § 207(a) is not categorically a crime of moral turpitude).

- B. Controlled Substances Offenses.....D-34
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*See also Cabantac v. Holder*, 693 F.3d 825, 828 (9th Cir. 2012) (per curiam) (mandate pending) (conviction under Cal. Health & Safety Code § 11377(a) for possession of methamphetamine was a controlled substance offense supporting the order of removal).

- 2. Inadmissibility Grounds – 8 U.S.C. § 1182(a)(2)(A)(i)(II) & 8 U.S.C. § 1182(a)(2)(C) .....D-36

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*See Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012) (conviction of alien on charge of sexual battery under California law did not qualify as sexual abuse of minor and thus did not qualify as aggravated felony that prevented alien from being eligible for waiver of inadmissibility).

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- 6. Crimes of Violence (“COV”) – 8 U.S.C. § 1101(a)(43)(F) .D-42

Crimes of violence under 18 U.S.C. § 16(b) are “offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense.” *Barragan-Lopez v. Holder*, 705 F.3d 1112, 1115 (9th Cir. 2013) (mandate pending) (internal quotation marks and citation omitted).

*See also Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1126-27 (9th Cir. 2012) (per curiam) (considering whether petitioner’s conviction for attempted kidnapping is a crime of violence making him removable as an aggravated felon and discussing 18 U.S.C. § 16).

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“Whether [Cal. Penal Code] § 207(a) involves a substantial risk that physical force ... may be used and thus qualifies as a crime of violence, is not as straightforward as that under § 16(a).” *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127-33 (9th Cir. 2012) (per curiam) (“[N]umerous courts have held that kidnapping generally presents a risk of substantial force. Congress, the Sentencing Commission, and forty jurisdictions have concluded, consistent with historical practice, that kidnapping is a violent crime. Based on all the available evidence, the government sufficiently met its burden of showing that an ordinary kidnapping under § 207(a) is a crime of violence because it results in a substantial risk of force.”).

- c. Specific Crimes Considered.....D-45

Examples of cases finding an offense to be a COV include: *Barragan-Lopez v. Holder*, 705 F.3d 1112, 1115-17 (9th Cir. 2013) (mandate pending) (conviction for false imprisonment under Cal. Penal Code § 210.5 was categorically a crime of violence, making the alien removable as an aggravated felon); *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1133 (9th Cir. 2012) (per curiam) (ordinary kidnapping under Cal. Penal Code § 207(a) constitutes a “crime of violence”); *cf. Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213 (9th Cir. 2013) (holding that Cal. Penal Code § 207(a) is not categorically a crime involving moral turpitude, and explaining that not every categorical crime of violence is also categorically a crime involving moral turpitude).

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## DUE PROCESS IN IMMIGRATION PROCEEDINGS

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|    | “To show prejudice, [a petitioner] must present plausible scenarios in which the outcome of the proceedings would have been different if a more elaborate process were provided.” <i>Tamayo-Tamayo v. Holder</i> , No. 08-74005, --- F.3d ---, 2013 WL 718455, at *3 (9th Cir. Feb. 28, 2013) (mandate pending) (quoting <i>Morales-Izquierdo v. Gonzales</i> , 486 F.3d 484, 496 (9th Cir. 2007) (en banc)) (discussing prejudice and concluding that petitioner failed to establish prejudice where he failed to show outcome would have been different where no relief was available to him). |      |
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|    | “Presenting an argument to the BIA requires reasoning sufficient to put the BIA on notice that it was called on to decide the issue. A general challenge to the IJ’s decision is insufficient; the alien must specify particular issues on appeal to the BIA.” <i>Young v. Holder</i> , 697 F.3d 976, 982 (9th Cir. 2012) (en banc) (citation omitted).  |      |
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“The Federal Rules of Evidence, ... , do not apply in immigration hearings. Rather, the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.” *Sanchez v. Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012) (per curiam) (mandate pending) (citation and quotation marks omitted) (determining that the IJ did not abuse his discretion by admitting Form I-213).

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This court has held that the written advisement that “applicants may be represented by counsel” on the I-589 asylum application form is sufficient to advise the applicant of the privilege of being represented by counsel, as required by 8 U.S.C. § 1158(d)(4)(A). *Cheema v. Holder*, 693 F.3d 1045, 1049-50 (9th Cir. 2012).

“[A]n alien who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney.” *Montes-Lopez v. Holder*, 694 F.3d 1085, 1093-94 (9th Cir. 2012). In *Montes-Lopez*, the court held that petitioner’s right to counsel was violated where the IJ required the petitioner to proceed with the hearing, although his retained attorney was suspended from practice. *Id.* at 1089 (noting there was no basis to conclude that the petitioner had been aware of his attorney’s suspension for very long or was derelict in responding to it).

*See also Gonzaga-Ortega v. Holder*, 694 F.3d 1069, 1073-76 (9th Cir. 2012) (mandate pending) (holding that the petitioner, a lawful permanent resident, did not have a right to counsel at secondary inspection when entering the country under 8 C.F.R. § 292.5(b) where he fell within the express exception to the regulation as an applicant for admission who had not become the focus of a criminal investigation).

17. Ineffective Assistance of Counsel .....E-19

This court has held the BIA abused its discretion by requiring an alien to provide correspondence from the Bar indicating receipt of complaint in order to comply with *Lozada* where the alien provided a copy of the complaint, along with a declaration from the attorney admitting responsibility and absolving his client of any culpability. *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-34 (9th Cir. 2013) (mandate pending) (holding the alien was prejudiced by his attorney’s failure to file an application for cancellation of removal).

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 30. Confessions .....(new section)

“Expulsion cannot turn upon utterances cudgled from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.” *Gonzaga-Ortega v. Holder*, 694 F.3d 1069, 1076 (9th Cir. 2012) (mandate pending) (quoting *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960)). To prevail on a due process claim that a confession was coerced, the petitioner must demonstrate error and substantial prejudice to prevail on a due process claim. *Gonzaga-Ortega*, 694 F.3d at 1076 (the court rejected the petitioner’s contention that his admission was coerced where he stated his statements were voluntary, he was treated fine, and held for only a brief period).

F. Due Process Challenges to Certain Procedures and Statutory Provisions .....E-26

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In *Ruiz-Diaz v. United States*, 703 F.3d 483 (9th Cir. 2012), a class of alien religious workers, as beneficiaries of five-year special immigrant religious worker visas, challenged the regulation governing the process for religious workers to apply for adjustment of status. The court explained that plaintiffs could not claim “that their due process rights [were] violated unless they ha[d] some ‘legitimate claim of entitlement’ to have the petitions approved before their visas expire.” *Id.* at 487. The court rejected the due process claim, explaining that even if the regulation “ma[de] it more difficult for plaintiffs to obtain adjustment of status, it d[id] not violate due process as there is no legitimate statutory or constitutional claim of entitlement to concurrent filings.” *Ruiz-Diaz*, 703 F.3d at 487-88.

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“Under the regulation, 8 C.F.R. § 245.2(a)(2)(i)(B), [religious workers] are among the categories of applicants for lawful permanent resident ... status who cannot file their visa applications concurrently with the petitions of their sponsoring employers. The employees must wait for the Citizenship and

Immigration Service ... to approve their employers’ petitions before they can file applications.” *Ruiz-Diaz v. United States*, 703 F.3d 483, 485 (9th Cir. 2012). This court has held that 8 C.F.R. § 245.2(a)(2)(i)(B) does not violate equal protection. In *Ruiz-Diaz*, the court concluded that the regulation had a “rational basis” where the government demonstrated “that there have been concerns about fraud in the religious worker visa program, and as a result, the government has encountered difficulties in determining which applicants are bona fide religious workers.” 703 F.3d at 486-87.

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

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

In *Ruiz-Diaz v. United States*, 703 F.3d 483 (9th Cir. 2012), the court held that a regulation governing the process by which religious workers can apply for adjustment of status pursuant to 8 U.S.C. § 1255 did not impose a substantial burden on plaintiff’s religious exercise; therefore, the regulation did not violate the RFRA. *Id.* at 486.

D. Fifth Amendment Right Against Self-Incrimination ..... E-33

**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](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:

2012: \$184.32

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