

IMMIGRATION LAW

IN THE NINTH CIRCUIT

Selected Topics

January 2011 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 June 2010 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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“The carefully crafted congressional scheme governing review of decisions of the BIA limits this court’s jurisdiction to the review of final orders of removal.” *Galindo-Romero v. Holder*, 621 F.3d 924, 927 (9th Cir. 2010) (mandate pending) (quoting *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009)). The term “order of removal” refers to the administrative order “concluding that the alien is [removable] or ordering [removal].” *Galindo-Romero*, 621 F.3d at 927 (alterations in original) (quoting 8 U.S.C. § 1101(a)(47)(A)).

The court “lack[s] jurisdiction over a petition for review when the BIA reopens an alien’s removal proceedings.” *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 624 (9th Cir. 2010).

See also Ocampo v. Holder, 629 F.3d 923, 928 (9th Cir. 2010) (mandate pending) (a removal order granting voluntary departure becomes final upon the earlier of “(i) a BIA determination affirming the order or (ii) the expiration of the deadline to seek the BIA’s review of the order”, and not upon overstay of the voluntary departure period).

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“[A] petition for review must be filed no later than thirty days following the date of the final order of removal. ... The time limit is mandatory and jurisdictional and not subject to equitable tolling.” *Yepremyan v. Holder*, 614 F3d 1042, 1043 (9th Cir. 2010) (internal quotation marks and citation omitted).

“The time limit for filing a petition for review begins to run when the BIA mails its decision which is presumed to be the date indicated on the cover letter to the decision.” *Id.*

Fed. R. App. P. 26(a) governs appeals from administrative decisions. *See id.* at 1143-44 (concluding that the day after Thanksgiving is a legal holiday for purposes of calculating time under Fed. R. App. P. 26(a) and that the petition for review was timely); *Haroutunian v. INS*, 87 F.3d 374, 375 n.3 & 377 (9th Cir. 1996) (recognizing that Fed. R. App. P. 26(a) governs administrative proceedings, but concluding that the three-day grace period of Fed. R. App. P. 26(c) does not apply because time for filing the petition for review begins to run from the date of the final deportation order was issued, and not from the date of the “service of paper”).

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See also Mendoza v. Holder, 623 F.3d 1299, 1301-02 (9th Cir. 2010) (although 8 U.S.C. § 1252(a)(2)(C) generally precludes review of orders against aliens removable on the grounds enumerated in 8 U.S.C. §1182(a)(2), the court has jurisdiction to review constitutional claims and questions of law); *Tampubolon v. Holder*, 610 F.3d 1056, 1063 (9th Cir. 2010) (court lacks jurisdiction to review hardship determination, but retains jurisdiction to review due process challenges and other questions of law).

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See also Mejia-Hernandez v. Holder, No. 07-74277, --- F.3d ---, 2011 WL 240357, at *3-*4 (9th Cir. Jan. 27, 2011) (mandate pending) (discussing *Kucana v. Holder*, 130 S. Ct. 827 (2010)).

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See also Viridiana v. Holder, 630 F.3d 942 (9th Cir. 2011) (mandate pending) (exercising jurisdiction over whether extraordinary circumstances warranted equitable tolling of filing period for asylum application and concluding that fraudulent deceit by non-attorney immigration consultant amounted to an extraordinary circumstance for the delay in filing).

The mandate has issued in *Toj-Culpatan v. Holder*, 612 F.3d 1088, 1091-92 (9th Cir. 2010) (per curiam) (inability to speak English, being detained for two months, and the transfer of petitioner’s case from Arizona to California, did not constitute extraordinary circumstances to excuse the untimely filing of asylum application).

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The court is without jurisdiction to review a removal order against an alien removable for having committed an aggravated felony. *See Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010). However, 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. *Id.*

A. Judicial Review Framework Before Enactment of the REAL ID Act of 2005 A-39

See also Edu v. Holder, 624 F.3d 1137, 1141-42 (9th Cir. 2010) (the jurisdiction stripping provision of 8 U.S.C. § 1252(a)(2)(C) does not deprive the court of jurisdiction over denials of deferral of removal under the CAT, which are decisions on the merits).

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Kawashima v. Holder, 593 F.3d 979 (9th Cir. 2010), *withdrawn and superseded on denial of rehearing by Kawashima v. Holder*, 615 F.3d 1043, 1057 n.8 (9th Cir. 2010) (“Whether the BIA applied the appropriate regulation is decidedly a ‘question of law’ over which we retain jurisdiction.”), *petition for cert. filed*, 79 USLW 3286 (Nov. 1, 2010) (No. 10-577).

Delgado v. Mukasey, 563 F.3d 863, 866 (9th Cir. 2009), *rehearing en banc granted by Delgado v. Mukasey*, 621 F.3d 957 (9th Cir. 2010) (order). The three-judge panel opinion reported at 563 F.3d 863 shall not be cited as precedent. *See Delgado*, 621 F.3d at 957.

See also Daas v. Holder, 620 F.3d 1050, 1053 (9th Cir. 2010) (court retains jurisdiction to determine its jurisdiction, and thus has jurisdiction to determine whether an offense is an aggravated felony)

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The mandate has issued in *Zetino v. Holder*, 622 F.3d 1007, 1012 n.2 (9th Cir. 2010) (in light of *Kucana v. Holder*, 130 S. Ct. 827, 831 (2010) rejecting government’s contention that the court lacked jurisdiction over the discretionary decision to reject untimely brief).

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Arredondo v. Holder, 623 F.3d 1317, 1319 (9th Cir. 2010) (BIA has power to conduct a de novo review of the record, and when it does so, the court reviews the BIA decision); *Valadez-Munoz v. Holder*, 623 F.3d 1304, 1308 (9th Cir. 2010) (court reviews the BIA’s decision when the BIA conducts an independent review of the record).

See also Singh v. Holder, 591 F.3d 1190, 1198 (9th Cir. 2010) (where the BIA conducts a de novo review an error committed by the IJ will be rendered harmless by the BIA’s application of the correct legal standard).

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See also Viridiana v. Holder, 630 F.3d 942 (9th Cir. 2011) (mandate pending) (reviewing IJ’s decision directly where BIA adopted and affirmed the IJ’s decision pursuant to *Burbano*).

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The mandate has issued in *Zetino v. Holder*, 622 F.3d 1007, 1011 n.1 (9th Cir. 2010) (petitioner waived challenge to denial of CAT where he failed to raise the issue in his petition for review).

See also *Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (mandate pending) (petitioner waived withholding of removal and CAT claims where they were not raised in opening brief); *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (noting the court generally will not “take up arguments not raised in an alien’s opening brief”).

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“[T]he IJ’s jurisdiction on remand from the BIA is limited only when the BIA expressly retains jurisdiction and qualifies or limits the scope of the remand to a specific purpose.” *Fernandes v. Holder*, 619 F.3d 1069, 1074 (9th Cir. 2010). “An articulated purpose for the remand, without any express limit on scope, is not sufficient to limit the remand such that it forecloses consideration of other new claims or motions that the IJ deems appropriate or that are presented in accordance with relevant regulations.” *Id.* (concluding that new evidence that alien’s asylum

application was fraudulent was not outside jurisdiction of IJ to consider on remand from BIA).

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Tijani v. Holder, 598 F.3d 647, 654 (9th Cir. 2010), *withdrawn and superseded by Tijani v. Holder*, 628 F.3d 1071, 1079 (9th Cir. 2010) (“Deference is not due the agency in construing state law.”).

See, e.g., Covarrubias Teposte v. Holder, No. 08-72516, --- F.3d ----, 2011 WL 167037, at *2 (9th Cir. Jan 20, 2011) (reviewing de novo whether criminal conviction was a crime of violence); *Camacho-Cruz v. Holder*, 621 F.3d 941, 942 n.1 (9th Cir. 2010) (reviewing de novo legal determinations regarding alien’s eligibility for cancellation of removal, as well as determination that a conviction is a crime of violence); *Martinez-Medina v. Holder*, 616 F.3d 1011, 1014-15 (9th Cir. 2010) (mandate pending) (reviewing de novo denial of motion to suppress and claims of constitutional violations).

- a. *Chevron* Deference A-70

When the BIA interprets a provision of the INA, we first determine if there is any ambiguity in the statute using traditional tools of statutory interpretation. Only if we determine that a statute is ambiguous do we defer to the agency’s interpretation. We may not accept an interpretation clearly contrary to the plain meaning of a statute’s text.

Federiso v. Holder, 605 F.3d 695, 697 (9th Cir. 2010) (internal citations omitted).

Note that if the BIA is not charged with administering a statute, its interpretation of that statute gains no deference. *Covarrubias Teposte v. Holder*, No. 08-72516, --- F.3d ----, 2011 WL 167037, at *2 (9th Cir. Jan 20, 2011).

See also Rosas-Castaneda v. Holder, 630 F.3d 881 (9th Cir. 2011) (mandate pending) (reviewing unpublished decision of the BIA under *Skidmore* deference, entitling the interpretation to a respect proportional to its power to persuade); *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 625 (9th Cir. 2010) (explaining that where the BIA “issues or relies on a precedential determination to conclude that a particular crime is a CIMT, [the court accords] it *Chevron* deference; otherwise

[the court] defers to the BIA’s determination only to the extent that it has the power to persuade (*Skidmore* deference.)”; *Mendoza v. Holder*, 623 F.3d 1299, 1302 (9th Cir. 2010) (“[T]he court applies *Chevron* deference to the BIA’s precedential determination that the specified conduct constitutes a CIMT.”); *Vasquez v. Holder*, 602 F.3d 1003, 1012 n.8 (9th Cir. 2010) (where *Skidmore* deference was appropriate the court explained that BIA decision had “little inherent strength” and was entitled to minimal deference where BIA held petitioner ineligible for relief in a single sentence).

2. Substantial Evidence Review A-71

The mandate has issued in *Zetino v. Holder*, 622 F.3d 1007, 1012 (9th Cir. 2010) (“The petition for review may be granted only if the evidence presented was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed.” (internal quotation marks and citation omitted)).

See, e.g., Kamalyan v. Holder, 620 F.3d 1054, 1057-58 (9th Cir. 2010) (denial of asylum application not supported by substantial evidence where “any reasonable adjudicator” would agree that government failed to establish a fundamental change in country conditions).

3. Abuse of Discretion Review..... A-72

Reviewing the denial of a motion to reopen for abuse of discretion, the court will reverse if the agency’s decision is “arbitrary, irrational, or contrary to law.” *Yepremyan v. Holder*, 614 F.3d 1042, 1044 (9th Cir. 2010) (holding the BIA did not abuse its discretion in denying motion to reopen to adjust status on basis of marriage).

a. Failure to Provide Reasoned Explanation A-73

“Due process and this court’s precedent require a minimum degree of clarity in dispositive reasoning and in the treatment of a properly raised argument.” *She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010) (remanding case to the BIA for clarification where BIA’s reasoning behind decision was unclear).

Where the BIA fails to engage in a substantive analysis of its decision, the court is not able to conduct a meaningful review of the decision. *See Arredondo v. Holder*, 623 F.3d 1317, 1320 (9th Cir. 2010) (remanding to the BIA to clarify statutory grounds upon which it relied).

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See also Truong v. Holder, 613 F.3d 938, 941 (9th Cir. 2010) (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).

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The mandate has issued in *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)

“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).

See also Truong v. Holder, 613 F.3d 938, 941 (9th Cir. 2010) (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).

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See also Rahimzadeh v. Holder, 613 F.3d 916, 923 (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).

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See also 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).

D. Past Persecution.....B-16

The mandate has issued in *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).

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Where past persecution is established, there is a presumption that there is a well-founded fear of future persecution. *Kamalyan v. Holder*, 620 F.3d 1054, 1057 (9th Cir. 2010).

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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).

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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).

(i) State Department ReportB-20

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) (State Department report on country conditions standing alone is not sufficient to rebut presumption of future persecution; remanding where country reports were expressly inconclusive regarding the significance or permanence of the improvements identified).

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See Kamalyan v. Holder, 620 F.3d 1054 (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).

d. Internal Relocation.....B-22

The mandate has issued in *Afriyie v. Holder*, 613 F.3d 924, 935-36 (9th Cir. 2010) (9th Cir. 2010) (remanding to the BIA to ensure that the proper burden of proof was applied in evaluating the relocation issue).

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The mandate has issued in *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.”).

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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).

See also Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010) (determining BIA erred by dismissing petitioner’s appeal solely on the ground that “women in Guatemala” could not constitute a cognizable social group and remanding for the BIA to make the determination in the first instance).

(1) Gender Defined Social GroupB-51

See also Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010) (determining BIA erred by dismissing petitioner’s appeal solely on the ground that “women in Guatemala” could not constitute a cognizable social group and remanding for the BIA to make the determination in the first instance).

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Nai Yuan Jiang v. Holder, 611 F.3d 1086, 1094-95 (9th Cir. 2010) (concluding petitioner suffered persecution where 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).

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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).

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The mandate has issued in the following cases: *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 *Khunaverdians v. Mukasey*, 548 F.3d 760, 765 (9th Cir. 2008)).

Singh v. Holder, 602 F.3d 982 (9th Cir. 2010), *rehearing en banc ordered by Singh v. Holder*, 623 F.3d 633 (9th Cir. 2010) (order). The three-judge panel opinion reported at 602 F.3d 982 shall not be cited as precedent. *See Singh*, 623 F.3d at 633.

See also Viridiana v. Holder, 630 F.3d 942, 946 (9th Cir. 2011) (mandate pending) (exercising jurisdiction over whether extraordinary circumstances warranted equitable tolling of filing period for asylum application and concluding that fraudulent deceit by non-attorney immigration consultant amounted to an extraordinary circumstance for the delay in filing).

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See also Viridiana v. Holder, 630 F.3d 942, 946-51 (9th Cir. 2011) (mandate pending) (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 amounted to an extraordinary circumstance for the delay in filing).

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See also Edu v. Holder, 624 F.3d 1137, 1145 (9th Cir. 2010) (“[T]he BIA must consider all evidence in deciding whether it is more likely than not that the alien would face future torture” (citing 8 C.F.R. § 1208.16(c)(3))).

B. Definition of TortureB-101

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”).

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The burden of proving that the alien cannot avoid torture by relocating to a different part of his country is upon the alien. *Edu v. Holder*, 624 F.3d 1137, 1146-47 (9th Cir. 2010).

D. Country Conditions EvidenceB-103

E. Past TortureB-104

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)).

F. Internal RelocationB-105

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).

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.” *Id.* at 1147.

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“[T]he IJ must give the petitioner the opportunity to provide an explanation of an apparent inconsistency.” *Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011)

(mandate pending). The IJ must also provide a specific and cogent reason for rejecting the petitioner’s explanation if it is “reasonable and plausible.” *Id.* However, 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” *Id.*

The opportunity to explain may be provided through cross-examination by the government. *Id.*

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Tijani v. Holder, 598 F.3d 647, 655 (9th Cir. 2010), *withdrawn and superseded on denial of rehearing by Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (“Precedent holds that an adverse credibility finding does not require the recitation of a particular formula, yet the finding must be ‘explicit.’”).

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“[T]he 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).

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“An asylum application is frivolous if any of its material elements is deliberately fabricated.” *Fernandes v. Holder*, 619 F.3d 1069, 1076 (9th Cir. 2010) (quoting 8 C.F.R. § 1208.20). Note that “[f]abrication of material evidence does not necessarily constitute fabrication of a material element.” *Khadka v. Holder*, 618 F.3d 996, 1004 (9th Cir. 2010).

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)); see also *Khadka*, 618 F.3d at 1002.

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.

A finding of frivolousness does not flow automatically from an adverse credibility determination. *Khadka*, 618 F.3d at 1002 (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.).

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	The mandate has issued in <i>Cortez-Pineda v. Holder</i> , 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).	
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	The mandate has issued in the following cases: <i>Tijani v. Holder</i> , 598 F.3d 647, 655 (9th Cir. 2010), <i>withdrawn and superseded on denial of rehearing by Tijani v. Holder</i> , 628 F.3d 1071, 1080 (9th Cir. 2010) (explaining that where the IJ fails to make an explicit credibility finding, he cannot require corroborating	

evidence); *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).

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See also Rosas-Castaneda v. Holder, 630 F.3d 881, 885 (9th Cir. 2011) (mandate pending) (stating eligibility requirements for lawful permanent residents).

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**MOTIONS TO REOPEN OR RECONSIDER
IMMIGRATION PROCEEDINGS**

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See also Garcia v. Holder, 621 F.3d 906, 910-11 (9th Cir. 2010) (discussing *Fernandez* and concluding that the court had jurisdiction to review the BIA’s denial of the motion to reopen to the extent it presented new and distinct hardship evidence).

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See also Saavedra-Figueroa v. Holder, 625 F.3d 621, 624 (9th Cir. 2010) (explaining the court “lack[s] jurisdiction over a petition for review when the BIA reopens an alien’s removal proceedings[,]” and concluding that although the BIA granted a motion for reconsideration, because the BIA affirmed its earlier decision, there remained a final order of removal which the court had jurisdiction to review).

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	The mandate has issued in <i>Hernandez-Velasquez v. Holder</i> , 611 F.3d 1073, 1078-79 (9th Cir. 2010) (granting petition because BIA failed to weigh the evidence petitioner submitted in support of her claim that she mailed a Change of Address form to the BIA and evidence that petitioner did not receive notice of BIA’s decision).	
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“8 U.S.C. § 1229a(c)(7)(C)(i) requires that a motion to reopen be filed within 90 days of a final order of removal. 8 U.S.C. § 1101(a)(47)(B) mandates that an order of removal becomes final upon the earlier of (i) a BIA determination affirming the order or (ii) the expiration of the deadline to seek the BIA’s review of the order.” *Ocampo v. Holder*, 629 F.3d 923, 928 (9th Cir. 2010) (mandate pending).

A removal order granting voluntary departure becomes final for purposes of a motion to reopen upon the BIA’s affirmance of the order, not upon the alien’s overstay of the voluntary departure period. *Ocampo*, 629 F.3d at 925-928.

The mandate has issued in the following cases: *Vega v. Holder*, 611 F.3d 1168, 1170-71 (9th Cir. 2010) (BIA reasonably interpreted 8 U.S.C. § 1229a(c)(7)(C)(i) as requiring the motion to reopen to have been filed within 90 days of the merits decision, rather than from a denial of the motion to reconsider), *petition for cert. filed* (Dec. 13, 2010) (No. 10-8010); *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1078-79 (9th Cir. 2010) (granting petition because BIA failed to weigh the evidence petitioner submitted in support of her claim that she mailed a Change of Address form to the BIA and evidence that petitioner did not receive notice of BIA’s decision).

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“[D]eciding whether exceptional circumstances are present requires a consideration of all facts in a specific case, including but not limited to the probability of the petitioner obtaining relief.” *Vukmirovic v. Holder*, 621 F.3d 1043, 1047-48 (9th Cir. 2010) (mandate pending) (whether exceptional circumstances exist depend on the particularized facts of each case; the court has “never pointed to a single circumstance as either qualifying or disqualifying a situation from consideration as exceptional.”).

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(ii) Cases Finding Exceptional CircumstancesC-20

See also Vukmirovic v. Holder, 621 F.3d 1043, 1049-50 (9th Cir. 2010) (mandate pending) (concluding exceptional circumstances existed where neither petitioner nor his attorney received notice of the hearing due to an “ironic series of events”).

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(A) OSCs

(B) Hearing Notices

Where the hearing notice is sent by certified mail and there is proof of attempted delivery and notification, a strong presumption of effective service arises. *See Mejia-Hernandez v. Holder*, No. 07-74277, --- F.3d ---, 2011 WL 240357, at *2 (9th Cir. Jan. 27, 2011) (mandate pending). “This strong presumption of effective notice by certified mail contrasts with a weaker presumption that results from regular mail service.” *Id.* at *3 (holding that petitioner failed to overcome presumption of effective notice).

(iii) Removal ProceedingsC-26

See also Mejia-Hernandez v. Holder, No. 07-74277, --- F.3d ---, 2011 WL 240357, at *3 (9th Cir. Jan. 27, 2011) (mandate pending) (“Th[e] strong presumption of effective notice by certified mail contrasts with a weaker presumption that results from regular mail service.”).

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The mandate has issued in *Almaraz v. Holder*, 608 F.3d 638, 640-41 (9th Cir. 2010) (holding it was not an abuse of discretion to deny motion to reopen as

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The court lacks jurisdiction to review the BIA’s decision to overturn sua sponte motion by IJ to reopen deportation proceedings. *Mejia-Hernandez v. Holder*, NO. 07-74277, --- F.3d ---, 2011 WL 240357, at *3-*4 (9th Cir. Jan. 27, 2011) (mandate pending).

VI.	EQUITABLE TOLLING.....	C-30
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“Equitable tolling is applied in situations where, despite all due diligence, the party requesting equitable tolling is unable to obtain vital information bearing on the existence of the claim.” *Mejia-Hernandez v. Holder*, No. 07-74277, --- F.3d ---, 2011 WL 240357, at *5 (9th Cir. Jan. 27, 2011) (mandate pending) (internal quotation marks and citation omitted).

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“When the issue is fraudulent representation, the limitations period is tolled until the petitioner definitively learns of counsel’s fraud.” *Mejia-Hernandez v. Holder*, No. 07-74277, --- F.3d ---, 2011 WL 240357, at *5 (9th Cir. Jan. 27, 2011) (mandate pending) (internal quotation marks and citation omitted).

C.	Due Diligence.....	C-32
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See also Mejia-Hernandez v. Holder, No. 07-74277, --- F.3d ---, 2011 WL 240357, at *5-*7 (9th Cir. Jan. 27, 2011) (mandate pending) (discussing diligence, and concluding that petitioner was entitled to equitable tolling of deadline to apply for relief under NACARA).

VII.	INEFFECTIVE ASSISTANCE OF COUNSEL.....	C-32
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See Singh v. Napolitano, 619 F.3d 1101, 1105 (9th Cir. 2010) (per curiam) (mandate pending) (concluding that petitioner failed to exhaust his administrative remedies by failing to first file a motion to reopen with the BIA based on IAC that occurred after the BIA decision, prior to bringing his habeas petition in district court).

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- A. Motions to Reopen to Apply for Suspension of Deportation.....C-41
- B. Motions to Reopen to Apply for Asylum and WithholdingC-42

The mandate has issued in *Almaraz v. Holder*, 608 F.3d 638, 640-41 (9th Cir. 2010) (petition denied).

- C. Motions to Reopen to Apply for Relief Under the Convention Against TortureC-43
- D. Motions to Reopen to Apply for Adjustment of StatusC-44

“Generally, a motion to reopen for adjustment of status will not be granted on the basis of a marriage entered into during deportation proceedings unless the petitioner qualifies for the bona fide marriage exception.” *Yepremyan v. Holder*, 614 F3d 1042, 1044 (9th Cir. 2010) (citing 8 U.S.C. 1255(e)) (denying petition where BIA acted within its discretion in denying motion to reopen where petitioner failed to prove her marriage to be bona fide by clear and convincing evidence).

See also Ocampo v. Holder, 629 F.3d 923, 928 (9th Cir. 2010) (mandate pending) (motion to reopen to apply for adjustment of status denied as untimely).

E. Motions to Reopen to Apply for Other ReliefC-44

Mejia-Hernandez v. Holder, No. 07-74277, --- F.3d ---, 2011 WL 240357, at *5-*6 (9th Cir. Jan. 27, 2011) (mandate pending) (time period for filing motion to reopen for NACARA relief equitably tolled due to fraudulent representation, and case remanded to BIA); *Kawashima v. Holder*, 593 F.3d 979, 988-89 (9th Cir. 2010), *withdrawn and superseded on denial of rehearing by Kawashima v. Holder*, 615 F.3d 1043, 1058 (9th Cir. 2010) (concluding BIA properly denied motion to reopen as untimely where petitioner failed to properly identify his motion as a special motion to seek § 212(c) relief), *petition for cert. filed*, 79 USLW 3286 (Nov. 1, 2010) (No. 10-577).

CRIMINAL ISSUES IN IMMIGRATION LAW

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Delgado v. Holder, 563 F.3d 863, 868-69 (9th Cir. 2009) (considering question of law whether the applicable statutes permit the agency to determine petitioner’s offenses to be “particularly serious” by individual adjudication), *rehearing en banc granted by* 621 F.3d 957 (9th Cir. 2010) (order). The three-judge panel opinion reported at 563 F.3d 863 shall not be cited as precedent. *See Delgado*, 621 F.3d at 957.

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II. CRIMINAL CONVICTIONS AS GROUNDS FOR INADMISSIBILITY AND REMOVABILITY D-6

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 B. Differing Burdens of Proof D-6

 The mandate has issued in *Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) (“The government bears the burden of proving by ‘clear, unequivocal, and convincing evidence that the facts alleged as grounds for [removability] are true.’” (quoting *Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989)).

 “An alien seeking to prove his eligibility for cancellation of removal carries his burden of establishing by a preponderance of the evidence that he has not been convicted of an aggravated felony when he submits an inconclusive record of conviction.” *Young v. Holder*, No. 07-70949, --- F.3d ---, 2011 WL 257898, at *3 (9th Cir. Jan. 28, 2011) (mandate pending); *see also Rosas-Castaneda v. Holder*, 630 F.3d 881, 889 (9th Cir. 2011) (mandate pending) (stating, “Where a record of conviction proves inconclusive, an alien carries his burden of proving by a preponderance of the evidence that she has not been convicted of an aggravated felony.”).

 C. Admissions D-7

D. What Constitutes a Conviction?..... D-8

See also Rangel-Zuazo v. Holder, No. 07-72316, --- F.3d ---, 2011 WL 285214, at *1 (9th Cir. Jan. 31, 2011) (per curiam) (mandate pending) (discussing the term “conviction” and reiterating that “where a juvenile offender is charged and convicted as an adult under state law, the offender has a ‘conviction’ for purposes of the INA”).

1. Final, Reversed and Vacated Convictions D-8
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 - b. Exception for Simple Drug Possession Offenses D-10

Nunez-Reyes v. Holder, 602 F.3d 1102, 1104-05 (9th Cir. 2010) (per curiam) (expunged California convictions for being under the influence could not be treated as conviction for immigration purposes), *rehearing en banc granted by Nunez-Reyes v. Holder*, No. 05-74350, --- F.3d ---, 2010 WL 3816719 (9th Cir. Sep. 24, 2010) (order). The three-judge panel opinion reported at 602 F.3d 1102 shall not be cited as precedent. *See Nunez-Reyes*, 2010 WL 3816719, at *1.

In *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010), the Supreme Court held that “second or subsequent simple possession offenses are not aggravated felonies under § 1101(a)(43), when, ... , the state conviction is not based on the fact of a prior conviction.”

- E. Definition of Sentence D-11
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The mandate has issued in *Carlos-Blaza v. Holder*, 611 F.3d 583, 587 (9th Cir. 2010) (reviewing de novo whether a particular conviction qualified as an aggravated felony).

See also Covarrubias Teposte v. Holder, No. 08-72516, --- F.3d ----, 2011 WL 167037, at *2 (9th Cir. Jan 20, 2011) (reviewing “de novo whether a criminal conviction is a crime of violence and therefore an aggravated felony rendering an alien removable”).

B. Categorical Approach.....	D-15
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Tijani v. Holder, 598 F.3d 647, 650 (9th Cir. 2010), *withdrawn and superseded on denial of rehearing by Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010).

See also Young v. Holder, No. 07-70949, --- F.3d ---, 2011 WL 257898, at *4 (9th Cir. Jan. 28, 2011) (mandate pending) (“[A] conviction under Cal. Health & Safety Code § 11352(a) is not categorically an illicit trafficking crime.”); *Covarrubias Teposte v. Holder*, No. 08-72516, --- F.3d ----, 2011 WL 167037, at *2 (9th Cir. Jan 20, 2011) (determining that California conviction for shooting at an inhabited dwelling or vehicle was not categorically a crime of violence); *Mendoza v. Holder*, 623 F.3d 1299, 1302-03 (9th Cir. 2010) (applying categorical approach and determining that conviction for robbery under California law was categorically a crime of moral turpitude).

C. Modified Categorical Approach.....	D-17
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“When applying a modified categorical analysis to a removal proceeding, we may not consider the administrative record, including the alien’s own admissions before the IJ, but must confine our review to the record of conviction.” *Young v. Holder*, No. 07-70949, --- F.3d ---, 2011 WL 257898, at *4 (9th Cir. Jan. 28, 2011) (mandate pending).

See also Rosas-Castaneda v. Holder, 630 F.3d 881, 888-89 (9th Cir. 2011) (mandate pending) (concluding record of conviction was inconclusive as to whether Arizona drug conviction as an aggravated felony).

The mandate has issued in *Carlos-Blaza v. Holder*, 611 F.3d 583, 590 (9th Cir. 2010) (concluding that under the modified categorical approach a conviction

for misapplication of funds under 18 U.S.C. § 656 necessarily involves fraud or deceit and therefore is an aggravated felony).

1. Charging Documents, Abstracts of Judgment, and Minute Orders D-18

See also Young v. Holder, No. 07-70949, --- F.3d ---, 2011 WL 257898, at *4 (9th Cir. Jan. 28, 2011) (mandate pending) (“Where the prior conviction was based on a guilty plea, our inquiry is generally limited to examining the statutory definition, 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)); *Rosas-Castaneda v. Holder*, 630 F.3d 881, 888 (9th Cir. 2011) (mandate pending) (“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)).

The mandate has issued in *Yong v. Holder*, 600 F.3d 1028, 1035 (9th Cir. 2010) (where IJ relied solely on alien’s judicial admissions and an unidentified “conviction” document to determine that conviction was a controlled substance offense under the INA, the court held the government failed to meet its burden because the judicially noticeable documents in the record were inconclusive).

2. Police Reports and Stipulations D-21
3. Probation or Presentence Reports D-22
4. Extra-Record Evidence D-22

The mandate has issued in *Yong v. Holder*, 600 F.3d 1028, 1036 (9th Cir. 2010) (IJ’s reliance on extra-record evidence including alien’s admissions, coupled with the government attorney’s assessment that was based on a “rap sheet” that the IJ never looked at, was insufficient to conclude that the alien “had been convicted of possession for sale of a controlled substance that would constitute an aggravated felony under the INA.”).

5. Remand D-23

The mandate has issued in *Yong v. Holder*, 600 F.3d 1028, 1036 (9th Cir. 2010) (granting petition for review and reversing the order of removal).

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b. Multiple Offenses at Any Time	D-24
2. Inadmissibility Pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I).	D-25
3. Definition of Crime Involving Moral Turpitude	D-26

“Crimes involving fraud are considered to be crimes involving moral turpitude.” *Tijani v. Holder*, 628 F.3d 1071, 1076-1079 (9th Cir. 2010) (internal quotation marks and citation omitted) (conviction for using false statements to obtain credit cards in violation of California law were inherently fraudulent).

“[T]he federal generic definition of a CIMT is a crime involving fraud or conduct that (1) is vile, base, or depraved and (2) violates accepted moral standards.” *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010). “Non-fraudulent CIMTs ‘almost always involve an intent to harm someone.’” *Id.* (quoting *Nunez v. Holder*, 594 F.3d 1124, 1131 & n. 4 (9th Cir. 2010)).

Misdemeanor false imprisonment under Cal. Penal Code § 236 is not categorically a crime involving moral turpitude because it does not require the defendant to have had the intent to harm necessary for the crime to be “base, vile, or depraved.” *Saavedra-Figueroa*, 625 F.3d at 626.

A robbery conviction under Cal. Penal Code § 211 is a crime involving moral turpitude for the purposes of INA § 212(a)(2)(A)(i)(I). *Mendoza v. Holder*, 623 F.3d 1299, 1303 (9th Cir. 2010).

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“[S]ection 1227(a)(2)(B)(i) exempts from removability solely those aliens who have (1) committed only one controlled substance offense, where (2) that offense is possession for personal use of less than 30 grams of marijuana.” *Rodriguez v. Holder*, 619 F.3d 1077, 1079 (9th Cir. 2010) (per curiam) (discussing “personal use exception” of § 1227(a)(2)(B)(i) and holding that it does not apply to aliens who have more than one drug conviction).

The mandate has issued in *Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) (explaining that a conviction under Cal. Health & Safety Code § 11379 does not necessarily entail a “controlled substance offense” under 8 U.S.C. § 1227 (a)(2)(B)(i)).

- 2. Inadmissibility Grounds – 8 U.S.C. § 1182(a)(2)(A)(i)(II) & 8 U.S.C. § 1182(a)(2)(C) D-31

V. CATEGORIES OF CRIMINAL OFFENSES THAT ARE GROUNDS OF REMOVABILITY ONLY D-31

- A. Aggravated Felony D-31

See also Daas v. Holder, 620 F.3d 1050, 1053 (9th Cir. 2010) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.” (quoting 8 U.S.C. § 1227(a)(2)(A)).

- 1. Murder, Rape or Sexual Abuse of a Minor – 8 U.S.C. § 1101(a)(43)(A) D-33
 - a. Rape D-33
 - b. Sexual Abuse of a Minor D-33
- 2. Illicit Trafficking in a Controlled Substance – 8 U.S.C. § 1101(a)(43)(B) D-35

See also Daas v. Holder, 620 F.3d 1050, 1053-54 (9th Cir. 2010) (conviction for distributing ephedrine and pseudoephedrine with reasonable cause to believe they would be used to manufacture methamphetamine qualified as a “drug trafficking crime” and thus was an aggravated felony).

- 3. Illicit Trafficking in Firearms – 8 U.S.C. § 1101(a)(43)(C) D-36
- 4. Money Laundering – 8 U.S.C. § 1101(a)(43)(D) D-36
- 5. Explosives, Firearms and Arson – 8 U.S.C. § 1101(a)(43)(E) D-36

6.	Crimes of Violence (“COV”) – 8 U.S.C. § 1101(a)(43)(F).....	D-37
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See also Camacho-Cruz v. Holder, 621 F.3d 941, 942 (9th Cir. 2010) (“To determine whether a state law conviction is categorically a crime of violence, we compare the elements of the state law crime to the elements of a crime of violence, as defined in 18 U.S.C. § 16.” (citation omitted)).

a.	Negligent and Reckless Conduct Insufficient	D-38
b.	Force Against Another.....	D-39

“Section 16(a) does not require an actual application of force or an injury to the victim. Rather, the threatened use of force is sufficient for a crime to constitute a crime of violence.” *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010) (explaining that whether the defendant actually intends to harm the victim or whether any harm results is irrelevant).

c.	Specific Crimes Considered	D-39
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Covarrubias Teposte v. Holder, No. 08-72516, --- F.3d ----, 2011 WL 167037, at *6 (9th Cir. Jan 20, 2011) (California conviction for shooting at an inhabited dwelling or vehicle was not categorically a crime of violence); *Cortez-Guillen v. Holder*, 623 F.3d 933, 935-36 (9th Cir. 2010) (Alaska conviction for coercion not categorically a crime of violence); *Camacho-Cruz v. Holder*, 621 F.3d 941, 942-43 (9th Cir. 2010) (holding that conviction for assault with use of a deadly weapon under Nev. Rev. Stat. § 200.471 was a crime of violence).

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DUE PROCESS IN IMMIGRATION PROCEEDINGS

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See also Dent v. Holder, 627 F.3d 365, 374 (9th Cir. 2010) (mandate pending) (concluding prejudice was plain where government failed to provide petitioner with documents contained in his Alien File, where documents in alien file could have established he was in fact a naturalized United States citizen).

Cf. United States v. Ramos, 623 F.3d 672, 684 (9th Cir. 2010) (although court concluded that DHS violated Ramos’s right to due process, he suffered no prejudice where he was not eligible for the relief sought).

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See also Dent v. Holder, 627 F.3d 365, 374 (9th Cir. 2010) (mandate pending) (concluding petitioner was denied the opportunity to fully and fairly litigate his removal and claim of defensive citizenship where government failed to provide petitioner with documents contained in his Alien File that could have established he was in fact a naturalized United States citizen).

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See also United States v. Ramos, 623 F.3d 672, 680 (9th Cir. 2010) (due process violated where petitioner did not receive a competent Spanish language translation of this right to appeal, but ultimately concluding that he failed to establish prejudice where he was not eligible for relief).

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The mandate has issued in *Zetino v. Holder*, 622 F.3d 1007, 1014-15 (9th Cir. 2010) (concluding no due process violation where petitioner was advised of right to counsel).

See also United States v. Ramos, 623 F.3d 672, 682-83 (9th Cir. 2010) (concluding “that Ramos’s waiver of counsel was invalid and a violation of his due process right to counsel”).

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The mandate has issued in *Zetino v. Holder*, 622 F.3d 1007, 1013-14 (9th Cir. 2010) (no due process violation where BIA refused to accept untimely brief where it was petitioner’s own fault that the brief was untimely and notice of appeal contained coherent argument).

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The mandate has issued in *Zetino v. Holder*, 622 F.3d 1007, 1014-15 (9th Cir. 2010) (rejecting petitioner’s contention that IJ violated due process by failing to develop a factually complete record or advise him of right to counsel, where IJ clearly did both).

See also Dent v. Holder, 627 F.3d 365, 373-74 (9th Cir. 2010) (mandate pending) (“When the alien appears pro se, it is the IJ’s duty to fully develop the record. Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.” (internal citations and quotation marks omitted)).

26. Reasoned Explanation (*new section*)

“Due process and this court’s precedent require a minimum degree of clarity in dispositive reasoning and in the treatment of a properly raised argument.” *She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010). In *She*, although the BIA surmised that the IJ made a finding of firm resettlement, the IJ actually did not. As such, the court could not “confidently infer the reasoning behind the IJ’s conclusion” of firm resettlement and remanded the case to the BIA for clarification. *Id.* at 963-64.

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7. 8 U.S.C. § 1101(a)(48)(A) (*new section*)

Where a juvenile offender is charged and convicted as an adult under state law, the offender has a “conviction” for purposes of 8 U.S.C. § 1101(a)(48)(A). *See Rangel-Zuazo v. Holder*, No. 07-72316, --- F.3d ---, 2011 WL 285214, at *1 (9th Cir. Jan. 31, 2011) (per curiam) (mandate pending). It does not violate equal protection “to treat differently offenders who have reached eighteen years of age before conviction or adjudication from those who have not reached eighteen years of age before conviction or adjudication.” *Id.* at *2.

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**ATTORNEY FEES AND RECOVERABLE EXPENSES UNDER THE
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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:

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