JURISDICTION OVER IMMIGRATION PETITIONS AND STANDARDS OF REVIEW

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I. OVERVIEW

Congress has amended the judicial review provisions of the Immigration and Nationality Act ("INA") several times since 1996.

Before 1996, judicial review of most administrative action under the INA was governed by 8 U.S.C. § 1105a, which gave exclusive jurisdiction for judicial review over final orders of deportation to the courts of appeals. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 476 (1999).

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104–208, 110 Stat. 3009, *as amended by* Pub. L. No. 104–302, 110 Stat. 3656 (Oct. 11, 1996) *and by* NACARA, Pub. L. No. 105–100, § 203(a)(2), 111 Stat. 2160 (1997), and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214. "IIRIRA … repealed the old judicial-review scheme set forth in § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252." *Reno*, 525 U.S. at 475. For example, IIRIRA placed significant limits on judicial review over certain discretionary determinations and petitions for review brought by individuals convicted of certain enumerated offenses. Cases that were pending when IIRIRA took effect on April 1, 1997, were to be governed by § 1105a, as modified by the IIRIRA transitional rules. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997), *superseded by statute as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010) (order).

In May 2005, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), which made several more significant changes to the judicial review provisions of the INA. Although the REAL ID Act did not repeal any of the existing statutory limits on the scope of judicial review implemented by IIRIRA, it eliminated statutory and non-statutory habeas jurisdiction over final orders of removal, deportation and exclusion, and made a petition for review filed with an appropriate court of appeals the sole and exclusive means for judicial review of such orders. Thus, the REAL ID Act restored the pre-IIRIRA scheme of limiting judicial review over final orders of removal and deportation to the courts of appeal, while maintaining IIRIRA's limits on review over certain discretionary determinations and cases involving enumerated offenses. *See* REAL ID Act § 106(a) (amending 8 U.S.C. § 1252). Simultaneously, the REAL ID Act

expanded the scope of direct judicial review of final orders of removal and deportation by providing explicitly for review of all constitutional claims and questions of law related to such final orders. *See* REAL ID Act § 106(a)(1)(A); 8 U.S.C. § 1252(a)(2)(D) (as amended).

The REAL ID Act made this new judicial review scheme applicable to both cases governed by the permanent rules and those governed by IIRIRA's transitional rules by providing that a petition for review filed under the transitional rules shall be treated as being filed under the permanent provisions of 8 U.S.C. § 1252. *See* REAL ID Act § 106(d) (uncodified); *Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005) (explaining that jurisdiction over transitional rules cases is now governed by 8 U.S.C. § 1252 rather than 8 U.S.C. § 1105a).

The REAL ID Act's amendments to the judicial review provisions of the INA and IIRIRA are effective as to all final administrative orders of removal, deportation, or exclusion issued before, on, or after May 11, 2005, the date of enactment, and thus govern all pending petitions for review. *See* REAL ID Act § 106(b) (uncodified).

II. APPLICABLE STATUTORY PROVISIONS

Petitions for review have been divided into three categories for purposes of judicial review:

A. Permanent Rules: The rules in 8 U.S.C. § 1252 apply to "removal" proceedings initiated on or after April 1, 1997. *See, e.g.*, *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1102 (9th Cir. 2004). Removal proceedings commence with the filing of a charging document, called a Notice to Appear, with the immigration court. See infra Commencement of Proceedings.

B. Old Rules: The judicial review provisions in 8 U.S.C. § 1105a, as amended by AEDPA, apply if the final order of deportation or exclusion was entered before October 31, 1996. *See Velarde v. INS*, 140 F.3d 1305, 1309 n.3 (9th Cir. 1998) (superseded by statute on other grounds) (holding that the old rules applied where the BIA decided case on September 30, 1996).

C. Transitional Rules: Where deportation proceedings were initiated before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See*

Kalaw v. INS, 133 F.3d 1147, 1150 (9th Cir. 1997). The transitional rules are not codified, and are located in Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996), *as amended by* Pub. L. No. 104–302, 110 Stat. 3656 (Oct. 11, 1996). Transitional rule cases were previously governed by 8 U.S.C. § 1105a, as modified by the "Transitional Changes in Judicial Review," found in IIRIRA § 309(c)(4). However, the REAL ID Act directs that jurisdiction in transitional rules cases is governed by 8 U.S.C. § 1252. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 106(d), 119 Stat. 231, 311 (2005); *Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005).

III. GENERAL JURISDICTIONAL PROVISIONS

A. Commencement of Proceedings

The relevant regulation, entitled "Jurisdiction and commencement of proceedings," dictates that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court." 8 C.F.R. § 1003.14(a). A charging document is "the written instrument which initiates a proceeding before an Immigration Judge," and one of the enumerated examples is a notice to appear. 8 C.F.R. § 1003.13.

Karingithi v. Whitaker, 913 F.3d 1158 (9th Cir. 2019). *See also Samayoa-Martinez v. Holder*, 558 F.3d 897, 901 (9th Cir. 2009) (stating that formal removal proceedings commence when the INS has filed a Notice to Appear ("NTA") in immigration court and concluding that the INS's obligation to notify the alien of his rights did not attach until he was arrested and placed in formal proceedings); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597–98 (9th Cir. 2002) (removal proceedings commence when the NTA is filed with the immigration court).

Information that the notice to appear must contain is specified in the regulation. *See Karingithi*, 913 F.3d 1158 (citing 8 C.F.R. § 1003.15(b), and recognizing that the time and date of removal proceedings are not specified in the regulation).

According to the regulation, a notice to appear must include specified information, such as "[t]he nature of the proceedings," "[t]he acts or conduct alleged to be in violation of law," and "[n]otice that the alien may be represented, at no cost to the government, by counsel or other representative." 8 C.F.R. § 1003.15(b). Importantly, the regulation

> does not require that the time and date of proceedings appear in the initial notice. *See id.* Rather, the regulation compels inclusion of such information "*where practicable*." 8 C.F.R. § 1003.18(b) (emphasis added). When "that information is not contained in the Notice to Appear," the regulation requires the IJ to "schedul[e] the initial removal hearing and provid[e] notice to the government and the alien of the time, place, and date of hearing." *Id.*

Karingithi, 913 F.3d 1158. The BIA recently interpreted the regulations in its precedential opinion *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 441 (BIA 2018). In *Bermudez-Cota*, the BIA explained that jurisdiction will vest in the immigration court, even if a notice to appear does not specify the time and place of the initial removal hearing, as long as a notice of hearing specifying that information is later sent to the alien. *Id*. at 447. The BIA stated that 8 C.F.R. § 1003.14(a) "does not specify what information must be contained in a 'charging document' at the time it is filed with an Immigration Court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest." *Bermudez-Cota*, 27 I. & N. Dec. at 445. The BIA further stressed that "8 C.F.R. § 1003.15(b) (2018), which lists the information that must be contained in a notice to appear, does not mandate that the time and date of the initial hearing must be included in that document." *Bermudez-Cota*, 27 I. & N. Dec. at 445.

Deferring to the BIA's decision in *Bermudez-Cota*, the court held in *Karingithi* that where the notice specified the location of the removal hearing and indicated that the date and time were "To Be Set," jurisdiction vested with the Immigration Court. Because the petitioner received hearing notices specifying the time and date of her removal proceedings the same day as the notice to appear, the court did not address whether jurisdiction would have vested if she had not received the information in a timely manner. *Karingithi*, 913 F.3d 1158.

Apart from a certificate showing service, there are no other jurisdictional requirements for jurisdiction to vest when a notice to appear is filed in immigration court. *See Kholi v. Gonzales*, 473 F.3d 1061, 1066–70 (9th Cir. 2007) (where name and title of issuing officer were not legible on NTA, alleged defect did not divest immigration court of jurisdiction); *see also Karingithi*, 913 F.3d 1158 (discussing requirements of notice, and concluding that where time and date of hearing were not including in notice to appear, jurisdiction nevertheless vested with the immigration court). For example, the failure of the notice to appear to fully specify the aggravated felony statutory subsections alleged to be violated does not deprive the immigration court of jurisdiction. *See Lazaro v. Mukasey*,

527 F.3d 977, 979–80 (9th Cir. 2008) (holding that the failure of the notice to appear to designate which subsection of the statute defining aggravated felony was applicable did not deprive immigration court of jurisdiction).

The relevant date is the filing of the charging document, not the service of the document on the applicant. *See Cortez-Felipe v. INS*, 245 F.3d 1054, 1056–57 (9th Cir. 2001) (proceedings did not commence until the INS filed the NTA even though the INS served petitioner with an OSC before April 1, 1997).

Merely presenting oneself to the immigration service does not commence proceedings. *See Lopez-Urenda v. Ashcroft*, 345 F.3d 788, 792–94 (9th Cir. 2003) (filing asylum application before the passage of IIRIRA did not commence proceedings or lead to a settled expectation of placement in deportation, rather than removal, proceedings); *see also Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1108 (9th Cir. 2003) (filing of an asylum application before IIRIRA's effective date did not lead to a settled expectation of placement in deportation, rather than removal, proceedings); *Jimenez-Angeles*, 291 F.3d at 600 (proceedings did not commence when applicant surrendered to INS).

B. Petition for Review Exclusive Means for Judicial Review over Final Orders of Deportation and Removal

"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). The REAL ID Act, Pub. L. No. 109-13, Div. B., 119 Stat. 231 (2005), eliminated district court habeas corpus jurisdiction over final orders of deportation or removal, and vested jurisdiction to review such orders exclusively in the courts of appeals. *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005); *see also Mamigonian v. Biggs*, 710 F.3d 936, 941 (9th Cir. 2013) ("Habeas relief for final orders of removal is only available through a petition to the court of appeals."); *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1085 (9th Cir. 2010) (concluding that district court lacked habeas jurisdiction to hear petitioner's challenge to the denial of his adjustment of status application), *overruled in part on other grounds by Garfias Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012). As amended by § 106(a) of the REAL ID Act, § 1252(a)(5) of the INA now provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas

> corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section.

In addition to eliminating habeas corpus jurisdiction over final administrative orders, the REAL ID Act directed that all such petitions pending in the district court upon enactment, *i.e.*, May 11, 2005, be transferred to the appropriate court of appeals and treated as if filed as a petition for review under INA § 242, 8 U.S.C. § 1252.

Although the REAL ID Act did not address how to treat appeals of the denial of habeas corpus relief already pending in the court of appeals upon enactment, such appeals will in most cases be treated as timely petitions for review. *See Morales-Izquierdo*, 600 F.3d at 1085–86; *Rafaelano v. Wilson*, 471 F.3d 1091, 1095–96 (9th Cir. 2006); *Almaghzar v. Gonzales*, 457 F.3d 915, 918 n.1 (9th Cir. 2006); *Martinez-Rosas*, 424 F.3d at 929; *see also Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 n.3 (9th Cir. 2005) ("[W]e make no comment on what should be done in the more unusual case where the pending habeas petition requires further factual development. In such a case, construing a pending habeas petition as a petition for review might bar this court from remanding the petition for further fact-finding.").

"[I]n cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court, and on appeal to this Court, pursuant to 28 U.S.C. § 2241." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006); *see also Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) (per curiam) ("The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction."); *Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) (order) (noting that the transfer provisions of the REAL ID Act do not apply where alien does not challenge a final order of removal) (as amended); *cf. Morales-Izquierdo*, 600 F.3d at 1082 (concluding that Reinstatement Order to which petitioner was subject qualified as an order of removal that could only be challenged in a petition for review, contrary to petitioner's contentions).

The elimination of habeas corpus review over final orders of removal and deportation does not violate the Suspension Clause. *See Puri v. Gonzales*, 464 F.3d 1038, 1042 (9th Cir. 2006); *see also Garcia de Rincon v. Dep't of Homeland*

Security, 539 F.3d 1133, 1141 (9th Cir. 2008) (jurisdictional limitations on review of habeas petition challenging reinstatement of expedited removal order did not violate the Suspension Clause).

C. Final Order of Deportation or Removal

1. Definition

"'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*, 640 F.3d 873, 877 (9th Cir. 2011) (quoting *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009)); *see also Nicusor-Remus v. Sessions*, 902 F.3d 895, 897 (9th Cir. 2018); *Viloria v. Lynch*, 808 F.3d 764, 767 (9th Cir. 2015) (concluding that court lacked jurisdiction to review BIA's decision where final order of removal had not been entered); *Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1299 (9th Cir. 2014) (jurisdiction to review final orders of removal under 8 U.S.C. § 1252); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012). "A removal order is an order by an administrative officer 'determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.'" *Nicusor-Remus*, 902 F.3d at 897 (quoting 8 U.S.C § 1101(a)(47)(A)); *see also Galindo-Romero*, 640 F.3d at 877. "[W]here there is no final order of removal, this court lacks jurisdiction even where a constitutional claim or question of law is raised." *Alcala v. Holder*, 563 F.3d 1009, 1016 (9th Cir. 2009).

The BIA is restricted to affirming orders of deportation or removal, and may not issue them in the first instance. *See Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 883–85 (9th Cir. 2003) (BIA acted beyond its authority when it vacated IJ's termination of removal proceedings and issued removal order in the first instance). However, where the BIA reverses an IJ's grant of relief that, by definition, follows an initial determination by the IJ that the alien is in fact removable, an order of deportation or removal has already been properly entered by the IJ. *See Lolong v. Gonzales*, 484 F.3d 1173, 1177 (9th Cir. 2007) (en banc) (overruling *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), and holding that this court has jurisdiction to review a BIA's order of removal following an initial determination of removability by the IJ); *see also Muradin v. Gonzales*, 494 F.3d 1208, 1209 (9th Cir. 2007) (concluding that the BIA's order of removal followed an initial determination of removability where the petitioner conceded removability and the IJ's grant of relief necessarily required the IJ to determine that the petitioner was removable). In such cases, the BIA does not enter an order of deportation *in the*

first instance when it orders the alien removed, but simply reinstates the order of removal that has already been entered by the IJ. *Lolong*, 484 F.3d at 1177.

An order of deportation "shall become final upon the earlier of – (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. § 1101(a)(47)(B); *see also Martinez v. Sessions*, 873 F.3d 655, 658 (9th Cir. 2017) (as amended) (holding that the BIA's dismissal of appeal of negative reasonable fear determination for lack of jurisdiction was final administrative order); *Go v. Holder*, 640 F.3d 1047, 1051–52 (9th Cir. 2011) (removal order did not become final and 30-day period for filing petition for review of that order did not run until the BIA rejected all claims, including the CAT claim it had previously remanded for further proceedings); *Ocampo v. Holder*, 629 F.3d 923, 928 (9th Cir. 2010) (removal order became final upon BIA's affirmance of order, rather than upon alien's overstay of voluntary departure period); *Noriega-Lopez*, 335 F.3d at 882–83; *Kalaw v. INS*, 133 F.3d 1147, 1150 n.4 (9th Cir. 1997) ("final order of deportation" includes BIA denial of a motion to reopen), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010) (order); *cf. Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1323–24 (9th Cir. 2006) (holding that res judicata does not bar INS from bringing additional charges where there is no final judgment and no separate action).

Jurisdiction over the petition for review ends if the BIA grants an applicant's motion to reopen because "there is no longer a final decision to review." *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (order) (dismissing, without prejudice, for lack of jurisdiction); *see also Keshishyan v. Holder*, 658 F.3d 888 (9th Cir. 2011) (order) (dismissing petition for lack of jurisdiction where the BIA reopened and terminated proceedings); *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 624 (9th Cir. 2010) (The court "lack[s] jurisdiction over a petition for review when the BIA reopens an alien's removal proceedings."); *Cordes v. Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008) (order) (vacating prior opinion and denying as moot pending petition for rehearing en banc where BIA had previously *sua sponte* reopened and remanded to IJ for further proceedings); *Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (order) (dismissing petition and advising parties to notify court when BIA reopens administrative proceedings while a petition for review is pending); *cf. Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 746 (9th Cir. 2008) (the BIA's grant of petitioner's motion to reconsider did not divest the court of appeals of jurisdiction over alien's petition for review where BIA affirmed its prior decision and BIA emphasized that it was granting motion for limited

purpose), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (en banc).

An order dismissing removal proceedings is not a final order of removal. *See Alcala*, 563 F.3d at 1013 (concluding court lacked jurisdiction where petitioner petitioned for review of proceedings that resulted in no order of removal whatsoever, and petitioner did not petition for review of a removal order, or an order denying a motion to reopen expedited proceedings that resulted in a removal order).

The court generally has "jurisdiction over petitions for review from negative reasonable fear determinations in the context of the reinstatement of an expedited removal order under 8 U.S.C. § 1252." *Ayala v. Sessions*, 855 F.3d 1012, 1015 (9th Cir. 2017). In *Ayala*, the court determined that the "final" order in the case was the BIA's dismissal of Ayala's appeal, in part because the IJ's decision had effectively (and misleadingly) instructed her to appeal to the BIA. *Id*. *See also Padilla-Ramirez v. Bible*, 882 F.3d 826, 834 (9th Cir. 2017) (as amended), *cert. denied*, 139 S. Ct. 411 (2018) (discussing *Ayala*). Likewise in *Martinez v. Sessions*, 873 F.3d 655, 660 (9th Cir. 2017), the court concluded that the BIA's dismissal of the petitioner's appeal of a negative reasonable fear determination for lack of jurisdiction was a final administrative order. *Id.*

This court has exercised jurisdiction over an administrate removal order issued under 8 U.S.C. § 1228(b). *See Gomez-Velazco v. Sessions*, 879 F.3d 989, 992 (9th Cir. 2018) (discussing administrative removal process under 8 U.S.C. § 1228(b), and exercising jurisdiction over constitutional right to counsel claim raised by petitioner).

The Department of Homeland Security's ("DHS") determination of a Visa Waiver Program entrant's removability under 8 C.F.R. § 217.4(b) is an order of removal. *See Nicusor-Remus*, 902 F.3d at 898. In *Nicusor-Remus*, the court explained that if the DHS's removal order had not been executed, the court would have jurisdiction; however, because the order was executed when Nicusor left the United States, there was no final order of removal over which the court had jurisdiction. *Id*. at 898–99.

An interim order of the BIA denying a stay of removal pending the disposition of petitioner's motion to reopen is not a final order of removal which this court may review. *See Shaboyan v. Holder*, 652 F.3d 988, 989–90 (9th Cir. 2011) (per curiam). However, the order may be subject to review as part of a petition for review stemming from the final order of removal. *See id.*

In *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014) (en banc), this court held that a BIA decision which denies some claims but remands other claims for relief to the IJ for further proceedings is not a final order of removal with regard to any claims, overruling *Li v. Holder*, 656 F.3d 898 (9th Cir. 2011) and *Annachamy v. Holder*, 733 F.3d 254 (9th Cir. 2013). *See Abdisalan*, 774 F.3d at 526 ("when the BIA issues a mixed decision, no aspect of the BIA's decision is 'final' for the purpose of judicial review"). However, *Abdisalan* did not "revisit [the] rule that the BIA's decision is a final order of removal when it remands for consideration of voluntary departure but denies all other forms of relief." *See id*. at 526 n.8. Prior to *Abdisalan*, in *Pinto v. Holder*, 648 F.3d 976, 980 (9th Cir. 2011), the court held that "the BIA's decision denying asylum, withholding of removal, and CAT protection but remanding to the IJ for voluntary departure proceedings is a final order of removal ... and, effectively, the only order that we can review." The court in *Abdisalan* did not overrule *Pinto*. *Abdisalan*, 774 F.3d at 526 n.8. Thus under *Pinto*, a BIA's order affirming the IJ's denial of asylum, withholding of removal, and CAT relief, and remanding solely for voluntary departure is a final order of removal. *See Singh v. Lynch*, 835 F.3d 880, 883 (9th Cir. 2016) (per curiam) (holding BIA's order remanding solely for voluntary departure was a final order of removal and the petition to review that order was untimely).

The court in *Anderson v. Holder*, 673 F.3d 1089, 1096 (9th Cir. 2012) held that "a removal order that has been executed against a U.S. citizen is 'a final order of removal' within the meaning of § 1252(a)" over which the court has jurisdiction. *Cf. Viloria v. Lynch*, 808 F.3d 764, 769–70 (9th Cir. 2015) (distinguishing the case from *Anderson* and concluding that court lacked jurisdiction to review citizenship claim).

"[A]n alien crew member's petition for asylum and other relief in 'asylum-only' proceedings is the 'functional equivalent' of a final order of removal … within the meaning of 8 U.S.C. § 1252(a)(1)." *Nian v. Holder*, 683 F.3d 1227, 1230 (9th Cir. 2012).

2. Scope of "Final Order" of Deportation or Removal

"[T]he term final orders in § 106(a) [8 U.S.C. § 1105a(a)] includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." *INS v. Chadha*, 462 U.S. 919, 938 (1983) (internal quotation marks omitted); *see also Padilla-Martinez v. Holder*, 770 F.3d 825, 830 (9th Cir. 2014) (holding that the court had jurisdiction to review the prior BIA decisions in the case because the final deportation order was

contingent upon them); *Montes v. Thornburgh*, 919 F.2d 531, 535 (9th Cir. 1990); *Mohammadi-Motlagh v. INS*, 727 F.2d 1450, 1452 (9th Cir. 1984).

Under the permanent rules, "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). This statutory provision "speaks to . . . the need to consolidate (or 'zip') *petitions for review* into one action in the court of appeals." *Flores-Miramontes v. INS*, 212 F.3d 1133, 1139 (9th Cir. 2000); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999) (describing § 1252(b)(9) as a "general jurisdictional limitation" which "channels judicial review" of immigration actions and decisions, and acts as a "'zipper' clause"); *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1082 (9th Cir. 2010) ("Under the zipper clause, any 'questions of law and fact' arising from an order of removal must be raised in a petition for review of that order. … It is known as the 'zipper' clause because it 'consolidates or 'zips' judicial review of immigration proceedings into one action in the court of appeals."), *overruled in part on other grounds by Garfias Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012); *Singh v. Gonzales*, 499 F.3d 969, 976 (9th Cir. 2007) (discussing "zipper clause"). "In the REAL ID Act, Congress amended the zipper clause explicitly to strip district courts of habeas corpus jurisdiction to hear challenges to final orders of removal, rendering courts of appeals with exclusive jurisdiction to hear challenges to removal orders." *Morales-Izquierdo*, 600 F.3d at 1082 n.6. *See also Martinez v. Napolitano*, 704 F.3d 620, 621–22 (9th Cir. 2012) ("holding that 8 U.S.C. § 1252(a)(5) prohibits Administrative Procedure Act claims that indirectly challenge a removal order").

D. Timeliness

1. Petitions for Review

"The petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1); *see also Martinez v. Sessions*, 873 F.3d 655, 658 (9th Cir. 2017) (as amended); *Singh v. Lynch*, 835 F.3d 880, 882 (9th Cir. 2016) (per curiam) (holding BIA's decision affirming denial of relief, but remanding to IJ for voluntary departure proceedings was final order of removal, and concluding court lacked jurisdiction to review petition filed more than 30 days after BIA's initial decision); *Abdisalan v. Holder*, 774 F.3d 517, 521 (9th Cir. 2014) (en banc) (discussing finality of removal order when BIA issues a mixed

decision); *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009) (where there was no appeal to the BIA, the petitioner had 30 days to petition the court for review after the IJ's decision became final); *Singh v. INS*, 315 F.3d 1186, 1188 (9th Cir. 2003); IIRIRA § 309(c)(4)(C) (transitional rules). "This provision applies to all final orders of exclusion or deportation entered after October 30, 1996." *Singh v. INS*, 315 F.3d at 1188. The time limit is "mandatory and jurisdictional" and "not subject to equitable tolling." *Stone v. INS*, 514 U.S. 386, 405 (1995); *see also Martinez*, 873 F.3d at 658; *Ayala v. Sessions*, 855 F.3d 1012, 1018 (9th Cir. 2017); *Abdisalan*, 774 F.3d at 521; *Anderson v. Holder*, 673 F.3d 1089, 1094 (9th Cir. 2012) (dismissing petition filed more than six years after statutory deadline); *Yepremyan v. Holder*, 614 F.3d 1042, 1043 (9th Cir. 2010) (per curiam) ("[A] petition for review must be filed no later than thirty days following the date of the final order of removal. This time limit is mandatory and jurisdictional and not subject to equitable tolling." (internal quotation marks and citation omitted)); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996).

The filing of a motion to reopen or reconsider does not toll the statutory time in which to appeal the underlying final order. *See Stone*, 514 U.S. at 405–06; *see also Martinez-Serrano*, 94 F.3d at 1258.

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. *See Yepremyan*, 614 F.3d at 1043; *Haroutunian v. INS*, 87 F.3d 374, 375 (9th Cir. 1996). The three-day grace period of Fed. R. App. P. 26(c) does not apply. *See Haroutunian*, 87 F.3d at 377. The time limit does not begin to run until the BIA mails its decision to the correct address. *See Martinez-Serrano*, 94 F.3d at 1258–59; *cf. Singh*, 315 F.3d at 1188–90 (time limit began to run when BIA mailed decision to the applicant's last known address where attorney never filed a notice of appearance).

"In the absence of an appeal to the BIA, the IJ's removal order [will become final], thirty days after the IJ's decision." *Minasyan*, 553 F.3d at 1229.

A petition for review is "filed" when it is received by the court. *See Sheviakov v. INS*, 237 F.3d 1144, 1147–48 (9th Cir. 2001). For instance, where a petition is sent via express mail and received at the court's post office on the 30th day, the petition is timely even though it was not stamped by the Clerk's office until the following day. *See id.* at 1148.

Fed. R. App. P. 26(a) governs appeals from administrative decisions. *See Yepremyan*, 614 F.3d at 1043–44 (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*, 87 F.3d at 375 n.3 & 377 (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").

2. Habeas Appeals

A pending appeal of the district court's denial of habeas relief converted by this court into a petition for review will be deemed timely. *See, e.g.*, *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1085 (9th Cir. 2010), *overruled in part on other grounds by Garfias Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012); *Almaghzar v. Gonzales*, 457 F.3d 915, 917 (9th Cir. 2006); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005); *cf. Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006) (district court properly dismissed for lack of jurisdiction a habeas petition filed after the effective date of the REAL ID Act and attempting to challenge a final order of removal).

An appeal from the district court's denial of a 28 U.S.C. § 2241 habeas corpus petition must be filed within 60 days. Fed. R. App. P. 4(a)(1)(B).

E. Venue

"The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2); *see also* IIRIRA § 309(c)(4)(D); *Trejo-Mejia v. Holder*, 593 F.3d 913, 914–15 (9th Cir. 2010) (order) (transferring petition for review to Fifth Circuit). Before IIRIRA, an applicant could file a petition for review in the judicial circuit where she resided, or in "the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part." *See* 8 U.S.C. § 1105a(a)(2) (repealed 1996).

F. Stay Issues

1. No Automatic Stay of Removal Pending Review

"Service of the petition [for review] does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. § 1252(b)(3)(B); *see also* IIRIRA § 309(c)(4)(F). *Contra* 8 U.S.C.

§ 1105a(a)(3) (repealed 1996) (providing for automatic stay of deportation in most cases upon service of the petition for review). *See also Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (per curiam) (non-dispositive opinion) (clarifying standard for stays of removal in light of *Nken v. Holder*, 556 U.S. 418 (2009)). Under *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997) (order), "[t]he filing of a motion for stay or a request for a stay contained in a petition for review will stay a petitioner's deportation temporarily until the court rules on the stay motion." *See also Rivera v. Mukasey*, 508 F.3d 1271, 1277–78 (9th Cir. 2007); Ninth Circuit General Order 6.4(c) (setting forth procedures for stays of deportation or removal).

A stay is not a matter of right, but rather an exercise of judicial discretion. *See Nken*, 556 U.S. at 433. "[S]tays of removal are governed by 'the traditional test for stays,' rather than 8 U.S.C. § 1252(f)'s higher standard for enjoining an alien's removal … ." *Leiva-Perez*, 640 F.3d at 964 (quoting *Nken*, 556 U.S. at 433). Factors governing whether a stay should issue include: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 426 (noting that there is substantial overlap between the traditional factors that govern the issuance of a stay and the factors governing preliminary injunctions). Note that *Nken* raised the irreparable harm threshold. *See Leiva-Perez*, 640 F.3d at 965.

The stay of removal remains in place until this court issues its mandate. *See Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004). Note the court may stay the mandate in certain instances. *See 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).

2. Voluntary Departure Stays

The court lacks jurisdiction to review a discretionary denial of voluntary departure. 8 U.S.C. § 1229c(f) ("No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure . . . nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure."); *Kalilu v. Mukasey*, 548 F.3d 1215, 1217 n.1 (9th Cir. 2008) (per curiam) (stating the court lacked jurisdiction to review claim that BIA erred in denying his request for voluntary departure); *Gomez-Lopez v. Ashcroft*,

393 F.3d 882, 883–84 (9th Cir. 2005); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1255 (9th Cir. 2003); *Antonio-Cruz v. INS*, 147 F.3d 1129, 1130 (9th Cir. 1998); *cf. Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980–82 (9th Cir. 2006) (reviewing contention that BIA lacks authority in a streamlined summary affirmance to reduce the IJ's period of voluntary departure). The court retains jurisdiction to review questions of law regarding voluntary departure. *See Corro-Barragan v. Holder*, 718 F.3d 1174, 1177 (9th Cir. 2013) (confirming that "the Real ID Act . . . restores appellate jurisdiction over constitutional claims or questions of law in challenges to denials of voluntary departure under § 1229c" and reviewing de novo the interpretation of "physically present" under § 1229c(b)); *Gil v. Holder*, 651 F.3d 1000, 1006 (9th Cir. 2011) (where no legal question was raised, and IJ denied voluntary departure as a matter of discretion, the court lacked jurisdiction, pursuant to 8 U.S.C. § 1252(a)(2)(B)(i)), *overruled on other grounds by Moncrieffe v. Holder*, 569 U.S. 184 (2013).

The court previously held that it had equitable jurisdiction to grant a timely request for a stay of the voluntary departure period. *See El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003) (order), *abrogation recognized by Garfias-Rodriguez v. Holder*, 702 F.3d 504, 525 (9th Cir. 2012) (en banc). The same preliminary injunction standard for obtaining a stay of removal applied to a request for a stay of voluntary departure. *Id.*; *see also Rivera v. Mukasey*, 508 F.3d 1271, 1277–78 (9th Cir. 2007). As a procedural matter, the court temporarily stayed "the voluntary departure period pending determination of a motion for stay of voluntary departure, according to the same procedures … in place for motions for stay of removal." *El Himri*, 344 F.3d at 1263 n.1 (citing *De Leon v. INS*, 115 F.3d 643 (9th Cir. 1997) (order) and Ninth Circuit General Order 6.4(c)). However, *El Himri* was decided before 8 C.F.R. § 1240.26(i), which specifies that the filing of a petition for review shall terminate any grant of voluntary departure. *See Garfias-Rodriguez*, 702 F.3d at 525.

Under the transitional rules, the voluntary departure period does not begin to run until this court issues its mandate; a request to stay the voluntary departure period is not necessary. *See Elian v. Ashcroft*, 370 F.3d 897, 901 (9th Cir. 2004) (order) (denying as moot motion to stay voluntary departure period).

Under the permanent rules, the voluntary departure period begins to run when the BIA renders its decision. *See Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172–74 (9th Cir. 2003) (announcing that *Contreras-Aragon v. INS*, 852 F.2d 1088 (9th Cir. 1988) (en banc), which held that the voluntary departure period

was automatically stayed during the pendency of the petition for review, is no longer the law of the circuit after IIRIRA).

A motion for a stay of removal filed before expiration of the voluntary departure period is construed as including a timely motion to stay voluntary departure. *See Desta v. Ashcroft*, 365 F.3d 741, 749–50 (9th Cir. 2004) (denying as unnecessary subsequent untimely motion to stay voluntary departure period). Where the expiration of the voluntary departure period falls on a weekend or holiday it is deemed to fall on the next non-weekend and/or non-holiday day. *See Barroso v. Gonzales*, 429 F.3d 1195, 1204 (9th Cir. 2005); *Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 964–65 (9th Cir. 2004).

This court lacks jurisdiction to grant a voluntary departure stay where the request is filed after expiration of the voluntary departure period. *See Garcia v. Ashcroft*, 368 F.3d 1157, 1159–60 (9th Cir. 2004) (order) (declining to reach the question of whether petitioners properly relied on *Contreras-Aragon* because the issue was not yet ripe for consideration); *cf. Padilla-Padilla v. Gonzales*, 463 F.3d 972, 982 (9th Cir. 2006) (remanding for the Board to consider whether *Contreras-Aragon* applies where the voluntary departure period expired before this court decided *Zazueta-Carrillo*). Where the voluntary departure period expires on a weekend, and the petitioner files a timely petition for review and motion to stay removal on the next court day, the motion to stay voluntary departure is timely under Fed. R. App. P. 26(a). *See Salvador-Calleros*, 389 F.3d at 965. *See also Meza-Vallejos v. Holder*, 669 F.3d 920, 924–27 (9th Cir. 2012) (discussing voluntary departure and holding that where the last day of a voluntary departure period falls on a day on which the immigrant cannot file a motion for affirmative relief, that day does not count in the voluntary departure period if "the immigrant files on the first available day a motion that would either have tolled, automatically withdrawn, or otherwise affected his request for voluntary departure.").

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).

3. Stay of the Court's Mandate

This court may, upon denial of a petition for review, stay its mandate to allow the applicant to seek additional relief. *See, e.g.*, *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); *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004) (order) (staying mandate to permit BIA to reopen and consider in the first instance eligibility for asylum based on fear of "other serious harm upon removal"); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1143 (9th Cir. 2000) (staying mandate to permit filing of habeas corpus petition in district court); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (staying mandate to permit applicant to seek reopening under Convention Against Torture); *Ortiz v. INS*, 179 F.3d 1148, 1152 (9th Cir. 1999) (staying mandate to permit applicants to seek reopening for relief under the Nicaraguan Adjustment and Central American Relief Act ("NACARA")); *Ardon-Matute v. INS*, 157 F.3d 696, 697 (9th Cir. 1998) (staying proceedings pending BIA's adjudication of motion to reopen seeking NACARA relief); *Aguilar-Escobar v. INS*, 136 F.3d 1240, 1241 (9th Cir. 1998) (staying mandate to provide opportunity to reopen for NACARA relief); *Echeverria-Hernandez v. INS*, 946 F.2d 1481, 1482 (9th Cir. 1991) (en banc) (staying mandate pending resolution of administrative proceedings commenced pursuant to the *American Baptist Churches* settlement agreement); *Roque-Carranza v. INS*, 778 F.2d 1373, 1374 (9th Cir. 1985) (60-day stay to permit applicant to seek reopening to present ineffective assistance of counsel claim); *cf. Valderrama v. INS*, 260 F.3d 1083, 1086 (9th Cir. 2001) (per curiam) (declining to stay the mandate).

G. Exhaustion

This court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1); *see also* 8 U.S.C. § 1105a(c) (repealed 1996); *Brown v. Holder*, 763 F.3d 1141, 1153 (9th Cir. 2014) (denying challenge to removal order on the grounds the court lacked jurisdiction, but transferring the matter to the district court to makes findings of fact and draw conclusions of law as to his claim that he is entitled to United States citizenship). An applicant's failure to raise an issue to

the BIA generally constitutes a failure to exhaust, thus depriving this court of jurisdiction to consider the issue. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (no subject-matter jurisdiction over legal claims not presented in administrative proceedings below); *see also Garcia v. Lynch*, 786 F.3d 789, 792–93 (9th Cir. 2015); *Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014) (issue exhaustion is a jurisdictional requirement); *Sola v. Holder*, 720 F.3d 1134, 1135–36 (9th Cir. 2013) (declining to address a due process argument that was not raised below, which could have been addressed by the agency); *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (no jurisdiction to review legal claims not presented in the petitioner's administrative proceedings before the BIA); *Segura v. Holder*, 605 F.3d 1063, 1065–66 (9th Cir. 2010) (no jurisdiction to review challenge to IJ's authority to determine an alien's residency status, where not raised before BIA); *Brezilien v. Holder*, 569 F.3d 403, 412 (9th Cir. 2009) (no jurisdiction to review due process claim regarding waiver of right to counsel where petitioner failed to exhaust the claim).

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)); *see also Sola*, 2720 F.3d at 1135–36. A general challenge is insufficient. *See Alvarado*, 759 F.3d at 1228; *Arsdi*, 659 F.3d at 929. Although an alien need not use precise legal terminology to exhaust his claim, or provide a well-developed argument, the issue *must* be put before the agency to meet the exhaustion requirements. *Arsdi*, 659 F.3d at 929 (concluding petitioner failed to meet even the minimum requirements for exhaustion); *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004) ("A petitioner cannot satisfy the exhaustion requirement by making a general challenge to the IJ's decision, but, rather, must specify which issues form the basis of the appeal."). *See also Garcia*, 786 F.3d at 793 (exhaustion doctrine not employed in a formalistic manner); *Agyeman v. INS*, 296 F.3d 871, 877–78 (9th Cir. 2002) ("inartfully" raised due process claim and absence of "exact legalese"); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1183–84 (9th Cir. 2001) (en banc) (applicant that "never specifically invoked the phrase 'equitable tolling' in his briefs to the BIA … sufficiently raised the issue before the BIA to permit us to review the issue on appeal"); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030 n.8 (9th Cir. 2000) (addressing imputed political opinion argument even though issue was argued in "slightly different manner" below).

"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). Even if a pro se petitioner's brief is "inartful" it may be sufficient to put the BIA on notice of a claim. *See Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) (concluding pro se brief to BIA sufficiently raised ineffective assistance of counsel claim, even though the brief was inartful).

See, e.g., *Miller v. Sessions*, 889 F.3d 998, 1001 (9th Cir. 2018) (where petitioner put the BIA on notice of jurisdiction basis for motion, and BIA had an opportunity to pass on the issue, the issue was exhausted); *Rizo v. Lynch*, 810 F.3d 688, 693 (9th Cir. 2016) (failed to meaningfully challenge the IJ's denial of asylum before the BIA); *Garcia*, 786 F.3d at 793 (petitioner sufficiently exhausted the issue where argument was made in brief motion to reconsider and accompanying declaration, and reiterated before the IJ and in the notice of appeal); *Alvarado*, 759 F.3d at 1128 (even construing the pro se petitioner's claims liberally, he failed to raise even a general argument sufficient to exhaust the issue he was raising before the court); *Segura*, 605 F.3d at 1066 (broad statements in the notice of appeal and brief were insufficient to put the BIA on notice of petitioner's claim); *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 n.3 (9th Cir. 2010) (petitioner's mere citation to a case that discussed imputed political opinion on the last page of her brief to the BIA was insufficient to put the BIA on notice of the argument where she did not explicitly raise the issue in her asylum application, the written materials in support of her application, her notice of appeal to the BIA, or her appeal to the BIA), *overruled on other grounds by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc); *Rendon v. Mukasey*, 520 F.3d 967, 972 (9th Cir. 2008) (no jurisdiction over claim challenging certain conviction where brief submitted to BIA made no mention of conviction and rather made only a general challenge to IJ's decision concerning removability); *Tall v. Mukasey*, 517 F.3d 1115, 1120 (9th Cir. 2008) (although petitioner "raised his due process rights in his brief to the BIA," he failed to raise the particular procedural errors that he presented for the first time to the court of appeals, and thereby failed to exhaust his administrative remedies); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821 (9th Cir. 2004) (no jurisdiction to review withholding of removal claim not raised in brief to BIA); *Barron*, 358 F.3d at 676–78 (no jurisdiction where BIA appeal failed to mention newly-raised procedural due process challenge).

The exhaustion doctrine is not employed in a formalistic manner. *See Diaz-Jimenez v. Sessions*, 902 F.3d 955, 959 (9th Cir. 2018); *Garcia*, 786 F.3d at 793; *Figueroa v. Mukasey*, 543 F.3d 487, 492 (9th Cir. 2008). Rather, the court must look to "whether the issue was before the BIA such that it had the opportunity to

correct its error." *Figueroa*, 543 F.3d at 492; *see also Diaz-Jimenez*, 902 F.3d at 959 (to satisfy the exhaustion requirement, petitioner needs to "put the BIA on notice" in his appeal); *Arsdi*, 659 F.3d at 929.

> When a petitioner files no brief and relies entirely on the notice of appeal to make an immigration argument, as he may do before the BIA, *see* 8 C.F.R. § 1003.38(f), then the notice of appeal serves in lieu of a brief, and he will be deemed to have exhausted all issues raised therein. But when a petitioner does file a brief, the BIA is entitled to look to the brief for an explication of the issues that petitioner is presenting to have reviewed. Petitioner will therefore be deemed to have exhausted only those issues he raised and argued in his brief before the BIA.

Abebe v. Mukasey, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc) (per curiam), *overruling Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000). Note that **prior** to *Abebe*, this court had held that an "issue need not even be raised at all in the brief, if [] raised in the notice of appeal." *Figueroa*, 543 F.3d at 492; *Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006); *Ladha*, 215 F.3d at 903.

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*, 671 F.3d 872, 876 (9th Cir. 2011) (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). Where an issue was presented to the IJ, and the BIA affirms the IJ decision citing *Burbano*, the issue will be deemed exhausted. *See Mutuku v. Holder*, 600 F.3d 1210, 1213 (9th Cir. 2010); *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1232 (9th Cir. 2008) ("[W]hen the BIA cites *Burbano* … all issues presented before the IJ are deemed to have been presented to the BIA."); *see also Arsdi*, 659 F.3d at 929–30; *Cinapian v. Holder*, 567 F.3d 1067, 1073 (9th Cir. 2009) (where BIA adopted and affirmed IJ decision and cited *Burbano*, the court had jurisdiction to review asylum claim regardless of the clarity which aliens raised the timeliness issue before the BIA). Additionally, the court has found exhaustion where the IJ addressed an issue and petitioner raised it in his motion for reconsideration before the BIA, even though the BIA did not explicitly consider the argument in its denial. *See Singh v. Whitaker*, 914 F.3d 654 (9th Cir. 2019).

Where the BIA has addressed an issue, the issue has been exhausted. *See Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018) (court may review any issue

addressed on the merits by the BIA, regardless of whether petitioner raised it before the agency); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) (same); *Kin v. Holder*, 595 F.3d 1050, 1055 (9th Cir. 2010) (although petitioners failed to state they were appealing the issue of adverse credibility to the BIA, because the BIA reviewed the issue, the court could properly exercise jurisdiction); *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009); *Abebe v. Gonzales*, 432 F.3d 1037, 1040–41 (9th Cir. 2005) (en banc); *Socop-Gonzalez*, 272 F.3d at 1186; *Sagermark v. INS*, 767 F.2d 645, 648 (9th Cir. 1985).

The court does "not require an alien to exhaust administrative remedies on legal issues based on events that occur *after* briefing to the BIA has been completed." *Alcaraz v. INS*, 384 F.3d 1150, 1158 (9th Cir. 2004) (applicants exhausted administrative remedies regarding repapering argument because agency's repapering policies were issued after briefing before the BIA); *see also Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1279–80 (9th Cir. 2018) (explaining court retains jurisdiction over petitions where challenged agency action committed by Board after briefing was completed); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 977 (9th Cir. 2006) (concluding petitioner not required to exhaust claim that BIA acted improperly by reducing the voluntary departure period in a streamlined order, because reduction of voluntary departure period occurred after briefing before the BIA).

The BIA's use of the streamlined summary affirmance procedure does not eliminate the exhaustion requirement. *See Zara*, 383 F.3d at 931.

1. Exceptions to Exhaustion

a. Constitutional Challenges

"An exception to the exhaustion requirement has been carved for constitutional challenges to the Immigration and Naturalization Act and INS procedures," *Rashtabadi v. INS*, 23 F.3d 1562, 1567 (9th Cir. 1994), because "[t]he BIA does not have jurisdiction to determine the constitutionality of the statutes it administers," *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 977 (9th Cir. 2006). The BIA also lacks jurisdiction over, and an applicant thus need not exhaust, claims arising under international law. *See Padilla-Padilla*, 463 F.3d at 977.

See also Chettiar v. Holder, 665 F.3d 1375, 1379 n.2 (9th Cir. 2012) (noting that there is no administrative exhaustion requirement for constitutional due process challenges that involve more than mere procedural error that could be remedied by the agency, and concluding that the exception was inapplicable in the

present case); *Coyt v. Holder*, 593 F.3d 902, 905 (9th Cir. 2010) (considering challenge to validity of 8 C.F.R. § 1003.2(d) because exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation); *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1273–74 (9th Cir. 1996) ("[T]he exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation because of conflict with a statute."); *Bagues-Valles v. INS*, 779 F.2d 483, 484 (9th Cir. 1985) (considering two due process claims not raised before the BIA); *but see Lee v. Holder*, 599 F.3d 973, 976 (9th Cir. 2010) (per curiam) (stating that petitioner's apparent challenge to the validity of the regulations was not at issue, and that the court lacked jurisdiction because it was not exhausted).

"Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims." *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005) (per curiam); *see also Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1130 (9th Cir. 2007), *implied overruling on other grounds as recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1118 (9th Cir. 2013).

Nevertheless, "a petitioner cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process." *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987) ("'Due process' is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal." (quoting *Reid v. Engen*, 765 F.2d 1457, 1461 (9th Cir. 1985)). "The key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the BIA's ken." *Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995); *see also Sola v. Holder*, 720 F.3d 1134, 1135–36 (9th Cir. 2013) (per curiam) (no jurisdiction over due process claim that agency could have addressed); *Barron v. Ashcroft*, 358 F.3d 674, 676–78 (9th Cir. 2004) (requiring exhaustion of due process claims concerning the denial of opportunity to present case and deprivation of right to counsel); *Sanchez-Cruz v. INS*, 255 F.3d 775, 780 (9th Cir. 2001) (due process claim alleging IJ bias must be exhausted).

b. Futility and Remedies "Available … As of Right"

"[T]here are a number of exceptions to the general rule requiring exhaustion, covering situations such as where administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void."

Laing v. Ashcroft, 370 F.3d 994, 1000 (9th Cir. 2004) (internal quotation marks omitted).

However, an alien must exhaust "all administrative remedies *available* to the alien *as of right*." 8 U.S.C. § 1252(d)(1) (emphasis added). "Some issues may be so entirely foreclosed by prior BIA case law that no remedies are 'available … as of right' with regard to them before IJs and the BIA. The realm of such issues, however, cannot be broader than that encompassed by the futility exception to prudential exhaustion requirements." *Sun v. Ashcroft*, 370 F.3d 932, 942-43 (9th Cir. 2004) ("us[ing] the futility cases as a guide to the interpretation of the 'available … as of right' requirement"); *see also Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014) ("[I]f an issue is entirely foreclosed, such that the agency cannot give it unencumbered consideration, it is not available as of right and the statute does not require it to be exhausted, although prudential exhaustion requirements still apply." (internal quotation marks and citation omitted)); *El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 747 (9th Cir. 1991) (as amended) ("where the agency's position on the question at issue 'appears already set,' and it is 'very likely' what the result of recourse to administrative remedies would be, such recourse would be futile and is not required").

"[M]otions to reconsider, like motions to reopen, are not 'remedies available … as of right' within the meaning of 8 U.S.C. § 1252(d)(1)." *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) (rejecting the INS's contention that habeas petitioner was obliged to file a motion to reopen or reconsider before seeking review of the BIA's order of removal).

c. Nationality Claims

The exhaustion requirement of 8 U.S.C. § 1252(d)(1) does not apply to nationality claims brought under 8 U.S.C. § 1252(b)(5). *See Theagene v. Gonzales*, 411 F.3d 1107, 1111 (9th Cir. 2005); *see also Ayala-Villanueva v. Holder*, 572 F.3d 736, 738 (9th Cir. 2009) (non-dispositive opinion) (petition held in abeyance and matter transferred to District Court of Nevada pursuant to 8 U.S.C. § 1252(b)(5)(B)).

d. Events Occurring after Briefing before the Board

"We do not require an alien to exhaust administrative remedies on legal issues based on events that occur *after* briefing to the BIA has been completed." *Alcaraz v. INS*, 384 F.3d 1150, 1158 (9th Cir. 2004); *see also Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1279–80 (9th Cir. 2018) (explaining court retains

jurisdiction over petitions where challenged agency action committed by Board after briefing was completed); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 977–78 (9th Cir. 2006) (applicant need not have exhausted a challenge to the BIA's reduction of the IJ's voluntary departure period because it occurred after briefing).

e. Habeas Review

"On habeas review under § 2241, exhaustion is a prudential rather than jurisdictional requirement." *Singh v. Holder*, 638 F.3d 1196, 1203 n.3 (9th Cir. 2011). Accordingly, the court may exercise its discretion to reach an issue not raised before the BIA. *See id.*

H. Departure from the United States

1. Review of Removal Orders

For cases governed by the permanent rules, departure from the United States does not terminate jurisdiction. *See* 8 U.S.C. § 1252(a); *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 844 (9th Cir. 2006); *see also Rivera v. Mukasey*, 508 F.3d 1271, 1277 (9th Cir. 2007). However, there needs to be "some remaining 'collateral consequence' that may be redressed by success on the petition." *Del Cid Marroquin v. Lynch*, 823 F.3d 933, 935–36 (9th Cir. 2016) (per curiam) (quoting *Abdala v. INS*, 488 F.3d 1061, 1064 (9th Cir. 2007)) (explaining that although granting Del Cid Marroquin's petition will not guarantee his return to the United States, it will at least increase his chances of being allowed to do so. As such, the court could provide effective relief and his removal to El Salvador did not render the petition moot.). *See also Blandino–Medina v. Holder*, 712 F.3d 1338, 1342 (9th Cir. 2013) (holding that the petitioner's removal did not moot his petition because a favorable ruling would have made it possible—at least hypothetically—for him to obtain a waiver of the ban on reentry).

In *Chavez-Garcia v. Sessions*,871 F.3d 991 (9th Cir. 2017), the court held that petitioner's "departure from the United States, without more, [did] not provide clear and convincing evidence of a 'considered' and 'intelligent' waiver of the right to appeal. *Id.* at 997. The court explained that "[t]he IJ's failure to inform [petitioner] that his departure would constitute a waiver of his previously reserved right to appeal to the BIA render[ed petitioner's] purported waiver invalid." *Id.* at 997–98.

For cases governed by the transitional rules, former 8 U.S.C. § 1105a(c), the court generally lacks jurisdiction to review a deportation order once the applicant

departs from the United States. *See* 8 U.S.C. § 1105a(c) ("An order of deportation or of exclusion shall not be reviewed by any court if the alien … has departed from the United States after the issuance of the order."); *see also Stone v. INS*, 514 U.S. 386, 399 (1995) ("Once an alien has been deported, the courts lack jurisdiction to review the deportation order's validity."); *Kon v. Gonzales*, 400 F.3d 1225, 1226 (9th Cir. 2005) (per curiam); *Hajnal v. INS*, 980 F.2d 1247, 1247 (9th Cir. 1992) (per curiam). However, "[u]nder the *Mendez* exception, an alien outside the United States may petition for review of his deportation order when his departure was not 'legally executed.'" *Zepeda-Melendez v. INS*, 741 F.2d 285, 288, 290 (9th Cir. 1984) ("deportation of an alien without notice to his counsel is not a legally executed departure within the meaning of 8 U.S.C. § 1105a(c), and does not strip the court of jurisdiction to review the deportation order whether or not the alien was in custody at the time of deportation"); *see also Wiedersperg v. INS*, 896 F.2d 1179, 1181–82 (9th Cir. 1990) (deportation based on a vacated conviction was not legally executed).

Cases governed by the transitional rules face a potentially anomalous situation because the court loses jurisdiction once the petitioner departs, *see* 8 U.S.C. § 1105a(c), and the filing of a petition for review no longer results in an automatic stay of deportation, *see* IIRIRA § 309(c)(4)(F).

Note that the Ninth Circuit has not addressed the interplay between former 8 U.S.C. § 1105a(c), which eliminated jurisdiction in transitional rules cases once a petitioner departs the United States, and § 106(d) of the REAL ID Act, which directs that all petitions for review filed under the transitional rules shall be treated as if filed under the permanent rules of 8 U.S.C. § 1252.

2. Review of Motions to Reopen

"[T]he text of IIRIRA makes clear that the statutory right to file a motion to reopen and a motion to reconsider is *not* limited by whether the individual has departed the United States." *Toor v. Lynch*, 789 F.3d 1055, 1060 (9th Cir. 2015). In *Toor*, the court held that IIRIRA invalidated the regulatory departure bar set forth in 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1). Furthermore, the regulatory departure bar is invalid, irrespective of the manner in which the movant departed the United States (voluntarily or involuntarily). *See Toor*, 789 F.3d at 1064.

Where a petitioner has filed a motion to reopen, and then is involuntarily removed before the BIA has ruled on the motion, the BIA cannot deem the motion to reopen withdrawn. *See Coyt v. Holder*, 593 F.3d 902, 906–07 (9th Cir. 2010) (holding that 8 C.F.R. § 1003.2 was invalid as applied to a forcibly removed

petitioner). Additionally, physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen. *See Reyes-Torres v. Holder*, 645 F.3d 1073, 1076–77 (9th Cir. 2011). *See also Toor*, 789 F.3d at 1063 (explaining that in both *Coyt* and *Reyes-Torres*, the court held that IIRIRA invalidated the regulatory departure bar as applied to involuntary departures).

The court's decision in *Toor* is not inconsistent with its prior decisions in *Singh v. Gonzales*, 412 F.3d 1117, 1120 (9th Cir. 2005) (holding the regulatory departure bar did not apply to noncitizens who departed before removal proceedings commenced) and *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (concluding regulatory departure bard could not be applied where departure and motion to reopen followed conclusion of proceedings). *See Toor*, 789 F.3d at 1060 n.3.

I. Fugitive Disentitlement Doctrine

An applicant who fails to report for deportation or who fails to keep the courts apprised of his or her current address may have a petition for review dismissed under the fugitive disentitlement doctrine. "Although an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice. Like the fugitive in a criminal matter, the alien who is a fugitive from a deportation order should ordinarily be barred by his fugitive status from calling upon the resources of the court to determine his claims." *Zapon v. Dep't of Justice*, 53 F.3d 283, 285 (9th Cir. 1995) (quoting *Bar-Levy v. United States Dep't of Justice*, 990 F.2d 33, 35 (2d Cir. 1993) (citations omitted)); *see also Antonio-Martinez v. INS*, 317 F.3d 1089, 1091–93 (9th Cir. 2003) (applying the fugitive disentitlement doctrine where applicant had lost contact with his attorney and the agency and all efforts to contact him failed for over two years); *cf. Maldonado v. Lynch*, 786 F.3d 1155, 1161 (9th Cir. 2015) (en banc) (declining to apply the fugitive disentitlement doctrine because the petitioner did not flee); *Bhasin v. Gonzales*, 423 F.3d 977, 988–89 (9th Cir. 2005) (declining to uphold the BIA's reliance on the fugitive disentitlement doctrine in denying motion to reopen because applicant failed to receive critical agency documents pertaining to his order of removal).

The fugitive disentitlement doctrine is a "severe sanction that [the court does] not lightly impose." *Bhasin*, 423 F.3d at 987–88 (internal quotation marks omitted). "[T]he critical question the court must ask when deciding whether to

apply the fugitive disentitlement doctrine is whether the appellant is a fugitive at the time the appeal is pending." *Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009) (concluding that petitioner's failure to report for removal where her whereabouts were known did not make her a fugitive, and thus it would be inappropriate to apply the fugitive disentitlement doctrine). For disentitlement to be appropriate, there must be some connection between a defendant's fugitive status and the appellate process. *See id.*

"Two justifications frequently advanced in support of dismissal on a fugitive disentitlement theory are: (1) the pragmatic concern with ensuring that the court's judgment will be enforceable against the appellant; and (2) the equitable notion that a person who flouts the authority of the court waives his entitlement to have his appeal considered." *Id.* at 804.

J. Proper Respondent

The proper respondent in a petition for review is the Attorney General. 8 U.S.C. § 1252(b)(3)(A). This court has not addressed whether the proper respondent in an immigration habeas petition under 28 U.S.C. § 2241 is the Attorney General, the Secretary of the Department of Homeland Security, or the immediate custodian. *See Armentero v. INS*, 340 F.3d 1058, 1071–73 (9th Cir. 2003) (Secretary of the Department of Homeland Security and the Attorney General were the proper respondents), *withdrawn*, 382 F.3d 1153 (9th Cir. 2004) (order); *see also Rumsfeld v. Padilla*, 542 U.S. 426, 435 n.8 (2004) (declining to resolve whether the Attorney General is a proper respondent in an immigration habeas petition).

K. Reorganization of the Immigration and Naturalization Service

The INS was abolished on March 1, 2003 pursuant to the Homeland Security Act of 2002. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003). Immigration functions were transferred to the following agencies within the newly-created Department of Homeland Security ("DHS"):

1. U.S. Immigration and Customs Enforcement ("ICE"), responsible for alien removal and detention.

2. U.S. Citizenship and Immigration Services ("USCIS"), responsible for immigration services such as naturalization, asylum, refugee processing, and adjustment of status.

3. U.S. Customs and Border Protection ("CBP"), responsible for border patrol and processing people through ports of entry.

L. Reorganization of Administrative Regulations

The administrative regulations governing immigration proceedings have been recodified at 8 C.F.R. § 1003 *et seq.*, to reflect the transfer of INS functions to the DHS. *See* 68 Fed. Reg. 9824 (Feb. 28, 2003) (Add 1000 to the old regulation cite to find the current regulatory cite). The Executive Office for Immigration Review ("EOIR"), including the Board of Immigration Appeals and the Immigration Judges, remain under the Department of Justice. *Id.*

M. Exclusion Orders

Before IIRIRA, aliens who had not made an "entry" into the United States were placed in exclusion proceedings. *See Hose v. INS*, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). "Under pre-IIRIRA law, the appropriate avenue for judicial review of a final order of exclusion was for the alien to file a petition for a writ of habeas corpus in the district court." *Id.*; *see also* 8 U.S.C. § 1105a(b) (repealed) ("any alien against whom a final order of exclusion has been made … may obtain judicial review of such order by habeas corpus proceedings and not otherwise").

IIRIRA's permanent rules established a unified "removal" proceeding and eliminated the different jurisdictional tracks for deportation and exclusion proceedings. *See Hose*, 180 F.3d at 994 & n.1. IIRIRA's transitional rules redirected review of exclusion orders from the district courts to the courts of appeal. *See id.* (citing IIRIRA § 309(c)(4)(A)).

IV. LIMITATIONS ON JUDICIAL REVIEW OF DISCRETIONARY DECISIONS

The IIRIRA permanent rules, applicable to removal proceedings initiated on or after April 1, 1997, bar review of certain discretionary decisions. 8 U.S.C. § 1252(a)(2)(B) states:

> Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless whether the

> judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review–
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) amended the INA by adding 8 U.S.C. § 1252(a)(2)(D), which states:

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

Thus, notwithstanding any limitations on judicial review set forth in 8 U.S.C. § 1252(a)(2)(B), the court has jurisdiction to consider questions of law and constitutional questions raised in a petition for review challenging the agency's discretionary denial of relief. "In short, Congress repealed all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) …) following the amendment of that section by the REAL ID Act." *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc).

A. Definition of Discretionary Decision

The Immigration and Nationality Act does not define what constitutes a discretionary decision. *See Hernandez v. Ashcroft*, 345 F.3d 824, 833 (9th Cir. 2003). This court has held that "determinations that require application of law to factual determinations are nondiscretionary." *Id.* at 833–34 (internal quotation marks and alteration omitted). On the other hand, "an inquiry is discretionary

where it is a subjective question that depends on the value judgment of the person or entity examining the issue." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003) (internal quotation marks omitted) (holding that court lacks jurisdiction to review the BIA's exceptional and extremely unusual hardship determination). "A fact-intensive determination in which the equities must be weighed in reaching a conclusion is a prototypical example of a discretionary decision." *Torres-Valdivias v. Holder*, 786 F.3d 1147, 1153 (9th Cir. 2015) (as amended).

"When the BIA acts where it has no legal authority to do so, it does not make a discretionary decision, and such a determination is not protected from judicial review." *Hernandez*, 345 F.3d at 847 (internal citations omitted) (BIA's decision to deny adjustment based on non-viability of the marriage was contrary to law and therefore not discretionary); *see also Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003) ("Even if a statute gives the Attorney General discretion, … the courts retain jurisdiction to review whether a particular decision is *ultra vires* the statute in question.").

See also Idrees v. Whitaker, 910 F.3d 1103, 1105 (9th Cir. 2018) (explaining an administrative action is committed to agency discretion when the law is drawn so that a court would have no meaningful standard against which to review the agency's exercise of discretion, and holding that BIA's decision not to certify petitioner's ineffective assistance of counsel claim was committed to agency discretion and not subject to judicial review).

B. Enumerated Discretionary Decisions

1. Subsection (i) – Permanent Rules

Subsection (i) of § 1252(a)(2)(B) lists the following forms of discretionary relief:

8 U.S.C. § 1182(h)	Section 212(h), Criminal Inadmissibility Waiver
8 U.S.C. § 1182(i)	Section 212(i), Fraud or Misrepresentation Waiver
8 U.S.C. § 1229b	Cancellation of Removal
8 U.S.C. § 1229c	Voluntary Departure
8 U.S.C. § 1255	Adjustment of Status

2. Transitional Rules

Section 309(c)(4)(E) of IIRIRA contains a similar limitation on direct judicial review of discretionary decisions, stating that "there shall be no appeal of any discretionary decision under § 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act)."

Section 309(c)(4)(E) refers to the following forms of discretionary relief:

Section 212(c)	Discretionary Waiver for Long-Time Permanent Residents
Section 212(h)	Criminal Inadmissibility Waiver
Section 212(i)	Fraud or Misrepresentation Waiver
Section 244	Suspension of Deportation
Section 245	Adjustment of Status

Note that the REAL ID Act directs that a petition for review filed under IIRIRA's transitional rules shall be treated as though filed under the permanent provisions of 8 U.S.C. § 1252. *See* REAL ID Act § 106(d) (uncodified).

3. Cases Addressing Jurisdiction over Certain Enumerated Discretionary Decisions

a. Cancellation of Removal/Suspension of Deportation

The court lacks jurisdiction to review the denial of an application for cancellation of removal in the exercise of discretion. *See Szonyi v. Whitaker*, No. 15-73514, 2019 WL 573748, at *8 (9th Cir. Feb. 13, 2019) (The "court lacks jurisdiction to review the merits of a discretionary decision to deny cancellation of removal, but it does have jurisdiction to review whether the IJ considered relevant evidence in making this decision."); *Vilchez v. Holder*, 682 F.3d 1195, 1200–01 (9th Cir. 2012); *Bermudez v. Holder*, 586 F.3d 1167, 1169 (9th Cir. 2009) (per curiam), *implied overruling on other grounds recognized by Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015). The court also lacks jurisdiction to review the BIA's determination of eligibility for special rule cancellation of removal under NACARA § 203. *See Monroy v. Lynch*, 821 F.3d 1175, 1177 (9th Cir. 2016) (order) ("We lack jurisdiction to review the BIA's discretionary denial of special

rule cancellation of removal. … [A]s with non-NACARA cancellation of removal, § 1252(a)(2)(B)(i) bars us from reviewing the BIA's discretionary denial of NACARA cancellation of removal."); *Lanuza v. Holder*, 597 F.3d 970, 972 (9th Cir. 2010) (per curiam); *cf. Barrios v. Holder*, 581 F.3d 849, 857 (9th Cir. 2009) (reviewing BIA's ruling that petitioner failed to establish threshold requirement for relief under NACARA, concluding that it was a mixed question of law and fact).

The court lacks jurisdiction to review the agency's discretionary determination that an applicant failed to establish the requisite hardship for cancellation of removal or suspension of deportation. *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 (9th Cir. 2003) (permanent rules case); *Kalaw v. INS*, 133 F.3d 1147, 1152 (9th Cir. 1997) (transitional rules case), *superseded by statute on other grounds as stated in Trejo-Mejia v. Holder*, 593 F.3d 913, 915 (9th Cir. 2010) (order); *see also Mendez-Castro v. Mukasey*, 552 F.3d 975, 980–81 (9th Cir. 2009) (no jurisdiction to address claim that IJ's decision was factually inconsistent with prior agency hardship determinations); *Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008) (no jurisdiction to review denial of petitioner's application for cancellation of removal where agency determined petitioner failed to establish hardship, but otherwise exercising jurisdiction over petition for review of removal order). However, the court retains jurisdiction to review colorable constitutional claims or questions of law pertaining to the agency's discretionary hardship determination. 8 U.S.C. § 1252(a)(2)(D); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (court has jurisdiction to consider questions of statutory interpretation including whether the hardship standard is consistent with international law); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004–06 (9th Cir. 2003) (challenge to agency's interpretation of the hardship standard constitutes a colorable due process claim).

The court lacks jurisdiction to review an abuse of discretion argument merely recharacterized as a due process argument. *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1270–71 (9th Cir. 2001) (contention that the agency violated due process by misapplying the facts of the case to the applicable law did not state a colorable constitutional claim); *see also Martinez-Rosas*, 424 F.3d at 930 (addressing jurisdiction under the REAL ID Act and concluding that petitioner failed to raise a colorable due process claim).

The court also lacks jurisdiction to review the agency's discretionary good moral character determination. *See Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 854 (9th Cir. 2006). However, the court retains jurisdiction to review the agency's

determination that an applicant is statutorily precluded from establishing good moral character. *See Moran v. Ashcroft*, 395 F.3d 1089, 1091 (9th Cir. 2005) (explaining that court has jurisdiction to "to determine whether a petitioner's conduct falls within a per se exclusion category"), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (en banc).

The court retains jurisdiction to review the agency's determination as to whether a petitioner met the continuous physical requirement for cancellation of removal or suspension of deportation. *Kalaw*, 133 F.3d at 1150–51.

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*. *See also Szonyi*, 2019 WL 573748, at *8 (The "court lacks jurisdiction to review the merits of a discretionary decision to deny cancellation of removal, but it does have jurisdiction to review whether the IJ considered relevant evidence in making this decision.").

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 also has 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 order of President Obama, citing 8 U.S.C. § 1252(g)).

b. Adjustment of Status

The court lacks jurisdiction to review a discretionary denial of adjustment of status. *See Torres-Valdivias v. Lynch*, 786 F.3d 1147, 1151 (9th Cir. 2015) ("The BIA's ultimate discretionary decision to deny Torres-Valdivias adjustment of status under 8 U.S.C. § 1255(i) is … unreviewable."); *Hosseini v. Gonzales*, 471 F.3d 953, 956–57 (9th Cir. 2006) (where petitioner did not contend denial was unconstitutional or unlawful). The court lacks jurisdiction to review an abuse of discretion argument recast as a due process argument. *See Bazua-Cota v. Gonzales*, 466 F.3d 747, 748–49 (9th Cir. 2006) (per curiam) (order) (contention that the agency violated due process by failing to properly weigh the equities did not constitute a colorable constitutional claim). However, "when addressing adjustment-of-status issues contained in final orders of removal," the court has jurisdiction to review questions of law under 8 U.S.C. § 1252(a)(2)(D). *Torres-Valdivias*, 786 F.3d at 1151 ("Pursuant to 8 U.S.C. § 1252(a)(2)(D), however, this court retains jurisdiction over constitutional questions and questions of law."); *Carrillo de Palacios v. Holder*, 708 F.3d 1066, 1069 (9th Cir. 2013).

c. Voluntary Departure

"Voluntary departure is a discretionary form of relief that allows certain favored aliens – either before the conclusion of removal proceedings or after being found deportable – to leave the country willingly." *Dada v. Mukasey*, 554 U.S. 1, 8 (2008). The court lacks jurisdiction to review the agency's decision to grant or deny voluntary departure, as well as its discretionary decision to reduce a period of voluntary departure. 8 U.S.C. § 1229c(f); *Esquival-Garcia v. Holder*, 593 F.3d 1025, 1030 (9th Cir. 2010); *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1056 n.5 (9th Cir. 2006); *cf. Padilla-Padilla v. Gonzales*, 463 F.3d 972, 976 (9th Cir. 2006) (reviewing contention that BIA exceeded its authority by reducing in a streamlined summary affirmance the IJ's period of voluntary departure).

The court retains jurisdiction to review questions of law regarding voluntary departure. *See Corro-Barragan v. Holder*, 718 F.3d 1174, 1176 (9th Cir. 2013) (jurisdiction over petition that raised question of statutory interpretation regarding the meaning of "physically present" in § 1229c(b)); *Gil v. Holder*, 651 F.3d 1000 (9th Cir. 2011) (where no legal question was raised, and IJ denied voluntary departure as a matter of discretion, the court lacked jurisdiction, pursuant to 8 U.S.C. § 1252(a)(2)(B)(i)), *overruled on other grounds by Moncrieffe v. Holder*, 569 U.S. 184 (2013).

See also Meza-Vallejos v. Holder, 669 F.3d 920, 924 (9th Cir. 2012) (discussing voluntary departure generally).

C. Judicial Review Remains Over Non-Discretionary Determinations

The limitation on judicial review of discretionary decisions applies only to those decisions involving the exercise of discretion. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002) (concluding that § 1252(a)(2)(B)(i) "eliminates jurisdiction only over decisions by the BIA that involve the exercise of discretion"). Accordingly, the court retains jurisdiction over non-discretionary questions, such as whether the applicant satisfied the continuous physical presence requirement, and whether an adult daughter qualifies as a child. *See id.* at 1144–45 (court retained jurisdiction to review the purely legal question of whether the applicant's adult daughter qualified as a "child" for purposes of cancellation of removal).

See also Mancilla-Delafuente v. Lynch, 804 F.3d 1262, 1264 (9th Cir. 2015) ("Whether an offense is a CIMT is a purely legal question."); *Olivas-Motta v. Holder*, 746 F.3d 907, 908 (9th Cir. 2013) (whether a conviction is for a crime of moral turpitude is a question of law, which the court has jurisdiction to review); *Mendoza v. Holder*, 623 F.3d 1299, 1302 (9th Cir. 2010) (whether a crime involves moral turpitude is a question of law over which the court has jurisdiction, however, the court lacks jurisdiction to review the IJ's exercise of discretion in denying the 212(h) waiver); *Kohli v. Gonzales*, 473 F.3d 1061, 1065–70 (9th Cir. 2007) (exercising jurisdiction to review the legal question of the sufficiency of the NTA); *Freeman v. Gonzales*, 444 F.3d 1031, 1037 (9th Cir. 2006) (court retained jurisdiction to review purely legal claim of whether applicant qualified as a spouse for purposes of adjustment of status); *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (court retained jurisdiction over IJ's non-discretionary determination that cancellation applicant fell into one of the "per se exclusion categories" and lacked good moral character based on incarceration in county jail); *Hernandez v. Ashcroft*, 345 F.3d 824, 833–35 (9th Cir. 2003) (court retained jurisdiction over non-discretionary determination that VAWA applicant suffered "extreme cruelty"); *Murillo-Salmeron v. INS*, 327 F.3d 898, 901 (9th Cir. 2003) (court retained jurisdiction to review legal question of whether applicant's DUI conviction rendered him inadmissible, thus requiring a § 212(h) waiver of inadmissibility); *Molina-Estrada v. INS*, 293 F.3d 1089, 1093–94 (9th Cir. 2002) (court retained jurisdiction to review whether applicant's mother was a lawful permanent resident); *cf. Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) (abuse of discretion argument characterized as due process violation did not

confer jurisdiction); *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270–71 (9th Cir. 2001) (contention that BIA committed legal error by misapplying BIA precedent to her evidence of extreme hardship did not make the determination non-discretionary).

The court also retains "jurisdiction to review whether the BIA applied the correct discretionary waiver standard in the first instance." *Murillo-Salmeron*, 327 F.3d at 901 (holding that IIRIRA § 309(c)(4)(E) did not divest the court of jurisdiction where the BIA purported to affirm a discretionary decision that the IJ did not make) (internal quotation marks omitted); *see also Cervantes-Gonzales v. INS*, 244 F.3d 1001, 1005 (9th Cir. 2001) (court retained jurisdiction to review whether BIA applied the correct standard for determining eligibility for a § 212(i) waiver of inadmissibility).

D. Jurisdictional Bar Limited to Statutory Discretionary Eligibility Requirements

This court has "interpreted section 309(c)(4)(E) to pertain to the statutory eligibility requirements found in INA § 244(a)(1) and to the ultimate discretionary decision whether to grant the suspension based on the merits of the case." *Castillo-Perez v. INS*, 212 F.3d 518, 524 (9th Cir. 2000). An IJ's decision to deem an application for suspension to be abandoned, and the BIA's decision to dismiss a claim of ineffective assistance of counsel are not discretionary decisions under § 244 of the INA, and the court retains jurisdiction over these claims. *See id*. (remanding for application of the law as it existed at the time of applicant's original hearing).

E. Jurisdiction Over Constitutional Issues and Questions of Law

The court retains jurisdiction to consider both constitutional questions and questions of law raised in a petition for review of a discretionary decision. 8 U.S.C. § 1252(a)(2)(D); *see also Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *Rivera v. Lynch*, 816 F.3d 1064, 1070 (9th Cir. 2015) (although no jurisdiction to review a final order removing an alien on account of a conviction for a CIMT, the court had jurisdiction to review the agency's determination that the conviction was a CIMT); *Fuentes v. Lynch*, 788 F.3d 1177, 1180 (9th Cir. 2015) (per curiam) (jurisdiction to determine whether a particular offense constitutes an aggravated felony); *Olivas-Motta v. Holder*, 746 F.3d 907, 908 (9th Cir. 2013) (whether a conviction is for a crime of moral turpitude is a question of law, which the court has jurisdiction to review); *Vilchez v. Holder*, 682 F.3d 1195, 1198 (9th Cir. 2012)

(because due process requires IJ to consider relevant evidence, court has jurisdiction to review whether IJ considered evidence in deciding whether to grant cancellation of removal); *Latter-Singh v. Holder*, 668 F.3d 1156, 1159 (9th Cir. 2012) (considering whether a crime involved moral turpitude); *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); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 978–80 (9th Cir. 2006) (reviewing post-REAL ID Act due process and international law challenge to the ten-year physical presence requirement and applicability of the stop-time rule); *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004–06 (9th Cir. 2003) (BIA's interpretation of the exceptional and extremely unusual hardship standard did not violate due process); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1166–67 (9th Cir. 2004) (due process and equal protection challenges to voluntary departure regime); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003) (due process challenge to streamlining procedure); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (due process challenge based on IJ bias); *Munoz v. Ashcroft*, 339 F.3d 950, 954–57 (9th Cir. 2003) (due process, ineffective assistance of counsel, and equitable tolling contentions).

"[J]urisdiction over 'questions of law' as defined in REAL ID Act includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact." *Ramadan v. Gonzales*, 479 F.3d 646, 648, 650 (9th Cir. 2007) (per curiam) (holding that court had jurisdiction to review IJ's determination that petitioner failed to show changed circumstances to excuse the untimely filing of her asylum application).

F. Authorized and Specified Discretionary Decisions–Subsection (ii)

Under subsection (ii) of 8 U.S.C. § 1252(a)(2)(B),

> no court shall have jurisdiction to review … any other decision or action of the Attorney General the authority for which is specified under [8 U.S.C. §§ 1151–1378] to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title [relating to asylum].

Spencer Enters., Inc. v. United States, 345 F.3d 683, 688–92 (9th Cir. 2003) (alterations in original) (quoting 8 U.S.C. § 1252(a)(2)(B)(ii), and holding that

section did not preclude jurisdiction over a challenge to the denial of an immigrant investor visa pursuant to 8 U.S.C. § 1153(b)(5)).

The *Spencer* court held that § 1252(a)(2)(B)(ii) does not bar review over all discretionary decisions, rather it applies only where the Attorney General's discretionary authority is "specified" in the statute in question. *See Spencer*, 345 F.3d at 689. More specifically, for subsection (ii) to apply, "the language of the statute in question must provide the discretionary authority." *Id*. *Cf*. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1246–47 (9th Cir. 2008) (per curiam) (court retains jurisdiction to review IJ's discretionary denial of a continuance because "[a]n immigration judge's authority to continue a case is not 'specified under' the subchapter to be in the discretion of the Attorney General" (quoting *Alsamhouri v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007)).

Moreover, the "authority" to act must be in the discretion of the Attorney General, meaning that "the right or power to act is entirely within his or her judgment or conscience." *Spencer*, 345 F.3d at 690. In order to bar review, the statute must give the Attorney General "pure discretion, rather than discretion guided by legal standards." *Id*. *But see Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (stating the court has "jurisdiction to review whether the BIA and IJ failed to consider the appropriate factors, … , or relied on improper evidence, … , in making the "particularly serious crime" determination." (citations omitted)); *Morales v. Gonzales*, 478 F.3d 972, 980 (9th Cir. 2007) (court retained jurisdiction to review IJ's denial of withholding of removal based upon IJ's finding that petitioner's crime was a "particularly serious crime" because appeal raised legal question regarding what an IJ could consider in making the determination), *abrogated on other grounds as stated by Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010).

"In general terms, if a legal standard from an appropriate source governs the determination in question, that determination is reviewable for a clarification of that legal standard." *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004). More specifically, "if the statutory provision granting the Attorney General power to make a given decision also sets out specific standards governing that decision, the decision is not in the discretion of the Attorney General." *Id*. at 892 (internal quotation marks omitted). Although the court may not look to agency practice as a source for the relevant legal standards, the court may use judicial precedent in order to interpret the relevant statutory standards. *See id*. at 893.

See also Zadvydas v. Davis, 533 U.S. 678, 688 (2001) (court retained jurisdiction to consider legal question regarding extent of Attorney General's authority under post-removal-period detention statute); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011) (discussing *Kucana v. Holder*, 558 U.S. 233 (2010)); *Singh v. Holder*, 591 F.3d 1190, 1193–94 (9th Cir. 2010) (Section 242(a)(2)(B)(ii) "precludes judicial review of a decision made under a particular statute only when the language of the statute in question ... provide[s] the discretionary authority for the Attorney General's action (internal quotation marks and citation omitted)); *Sandoval-Luna*, 526 F.3d at 1246–47 (§ 1252(a)(2)(B)(ii) does not bar jurisdiction to review IJ's discretionary denial of a continuance); *Nath v. Gonzales*, 467 F.3d 1185, 1188 (9th Cir. 2006) (§ 1252(a)(2)(B)(ii) does not bar jurisdiction over denial of motion to reopen) (citing *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004)); *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1142–43 (9th Cir. 2005) (court retained jurisdiction to consider statutory waiver under 8 U.S.C. § 1186a(c)(4) to remove conditional basis of permanent resident status because determination not purely discretionary); *Unuakhaulu v. Gonzales*, 416 F.3d 931, 935 (9th Cir. 2005) (as amended) (stating that § 1252(a)(2)(B)(ii) would preclude judicial review over agency's discretionary determination that offense qualifies as "particularly serious"); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157–59 (9th Cir. 2005) (stating that court would have jurisdiction to review IJ's statutory denial of § 237(a)(1)(H) waiver of removal but not discretionary denial of waiver); *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 889–95 (9th Cir. 2004) (Attorney General's decision to revoke visa under 8 U.S.C. § 1155 not barred by subsection (ii) as specified discretionary decision); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528–29 (9th Cir. 2004) (court retained jurisdiction over denial of motion to reopen to adjust status); *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 819 (9th Cir. 2004) (§ 1252(a)(2)(B)(ii) barred review of applicant's claim that IJ should have permitted her to withdraw application for admission under 8 U.S.C. § 1225(a)(4) because decision committed by statute to discretion of Attorney General); *Nakamoto v. Ashcroft*, 363 F.3d 874, 878 (9th Cir. 2004) (court retained jurisdiction over IJ's marriage fraud determination under 8 U.S.C. § 1227(a)(1)(G)(ii) because "the determination of whether a petitioner committed marriage fraud is not a decision the authority for which is specified under the INA to be entirely discretionary"); *Hernandez v. Ashcroft*, 345 F.3d 824, 833–35 (9th Cir. 2003) (determination of whether applicant suffered "extreme cruelty" a reviewable legal and factual determination).

The REAL ID Act clarified that § 1252(a)(2)(B)(ii) applies regardless of whether the "judgment, decision, or action is made in removal proceedings."

8 U.S.C. § 1252(a)(2)(B) (as amended by the REAL ID Act). *See generally ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004) (assuming, but not deciding, applicability of subsection (ii) to a visa revocation decision under 8 U.S.C. § 1155); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 692 (9th Cir. 2003) (noting circuit split over whether subsection (ii) applies outside the context of removal proceedings).

1. Particularly Serious Crime Determinations

Note that § 1252(a)(2)(B)(ii) does not bar review of the agency's particularly serious crime determinations. *See Kucana v. Holder*, 558 U.S. 233 (2010) (Section 1252 (a)(2)(B)(ii) precludes judicial review only to Attorney General determinations made discretionary by statute, not to determinations declared discretionary by the Attorney General himself through regulation); *Delgado v. Holder*, 648 F.3d 1095, 1099–1100 (9th Cir. 2011) (en banc) (holding the court had jurisdiction to review the BIA's particularly serious crime determination); *Arbid v. Holder*, 700 F.3d 379, 383 (9th Cir. 2012) (per curiam) ("[D]etermining whether a crime is particularly serious is an inherently discretionary decision, and we will review such decisions for abuse of discretion."). While the court cannot reweigh the evidence to determine if the crime was particularly serious, it does have jurisdiction to determine whether the agency applied the correct legal standard. *See Gomez-Sanchez v. Sessions*, 892 F.3d 985, 990 (9th Cir. 2018); *Blandino-Medina v. Holder*, 712 F.3d 1338, 1343 (9th Cir. 2013); *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-weighing of the factors involved in that discretionary determination"). As such, the court has jurisdiction to review "whether the BIA and IJ failed to consider the appropriate factors, … , or relied on improper evidence, … , in making the 'particularly serious crime' determination." *Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (citations omitted).

The BIA's determination that an alien was convicted of a particularly serious crime is a discretionary decision, reviewed for abuse of discretion. *See Alphonsus v. Holder*, 705 F.3d 1031, 1043 (9th Cir. 2013), *abrogated on other grounds by Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018).

Cross-reference: Criminal Issues in Immigration Law, Categories of Criminal Offenses, Particularly Serious Crimes.

G. Asylum Relief

Although asylum is a discretionary form of relief, 8 U.S.C. § 1252(a)(2)(B)(ii) explicitly exempts asylum determinations from the jurisdictional bar over discretionary decisions. *Morales v. Gonzales*, 478 F.3d 972, 979 (9th Cir. 2007) (jurisdiction to review denial of petitioner's asylum application because decisions whether to grant asylum are exempt from § 1252(a)(2)(B)(ii)'s jurisdiction-stripping mandate), *abrogated on other grounds as stated by Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010); *Hosseini v. Gonzales*, 471 F.3d 953, 956 (9th Cir. 2006) (jurisdiction to review the BIA's discretionary denial of asylum application).

1. Eligibility Restrictions Generally Not Subject to Review

Several restrictions on eligibility for asylum, however, are generally not subject to judicial review:

a. One-Year Bar

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her asylum application was filed within one year after arrival in the United States. 8 U.S.C. § 1158(a)(2)(B); *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001), *superseded by statute as stated in Ramadan v. Gonzalez*, 479 F.3d 646 (9th Cir. 2007). The first day of the one-year period for filing an asylum application is the day after the alien arrived in the United States. *See Minasyan v. Mukasey*, 553 F.3d 1224, 1227 (9th Cir. 2009).

Pursuant to 8 U.S.C. § 1158(a)(3), the court lacks jurisdiction to review the agency's determination that an asylum application is not timely. *See Hakeem*, 273 F.3d at 815; *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002). However, § 106 of REAL ID Act restored jurisdiction over constitutional claims and questions of law. *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *see also Sumolang v. Holder*, 723 F.3d 1080, 1082 (9th Cir. 2013) (court lacked jurisdiction to review extraordinary circumstances exception where agency's ruling rested on resolution of disputed facts, but had jurisdiction to review changed circumstances determination that turned on undisputed facts); *Gasparyan v. Holder*, 707 F.3d 1130, 1134 (9th Cir. 2013) (holding that the court lacked jurisdiction to review extraordinary circumstances determination where it was based on disputed facts, but finding jurisdiction to review question of law whether BIA applied proper legal standard in making the determination); *Singh v. Holder*, 649 F.3d 1161 (9th Cir.

2011) (en banc) (one-year bar determination not reviewable absent a legal or constitutional question). "[Q]uestions of law, as it is used in section 106, extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (per curiam) (exercising jurisdiction over "changed circumstances" question because it was a question of the application of a statutory standard to undisputed facts); *see also Singh v. Holder*, 656 F.3d 1047, 1051 (9th Cir. 2011) (the court has jurisdiction to review the agency's application of the changed or extraordinary circumstances exception to undisputed facts); *Chen v. Mukasey*, 524 F.3d 1028, 1031 (9th Cir. 2008) ("Under the Real ID Act … this court may review the BIA's interpretation of the 'changed circumstances' exception to the asylum statute.").

If the applicant can show a material change in circumstances or that extraordinary circumstances caused the delay in filing, the limitations period will be tolled. *See* 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(4) & (5); *see also Sumolang v. Holder*, 723 F.3d 1080, 1082 (9th Cir. 2013); *Viridiana v. Holder*, 646 F.3d 1230, 1234, 38 (9th Cir. 2011) (exercising jurisdiction over whether extraordinary circumstances warranted equitable tolling of filing period for asylum application and concluding that immigration consultant fraud may constitute an extraordinary circumstance for the purpose of excusing an untimely asylum application); *Vahora v. Holder*, 641 F.3d 1038, 1047 (9th Cir. 2011) (religious rioting that began after petitioner left India, the subsequent disappearance of petitioner's brothers, and the destruction of his home constituted changed circumstances to excuse late filing of asylum application); *Taslimi v. Holder*, 590 F.3d 981, 987–88 (9th Cir. 2010) (application was filed within a reasonable time of change in circumstances based on conversion to Christianity, where application was filed just under seven months after she converted). The court held in *Ramadan*, 479 F.3d at 650, a case where the facts were undisputed, that it had jurisdiction over the "changed circumstances" question because it was a mixed question of fact and law. The court has similarly exercised jurisdiction over the "extraordinary circumstances" issue in cases where the facts were undisputed. *See Mutuku v. Holder*, 600 F.3d 1210, 1212 (9th Cir. 2010) (petitioner's hope that conditions would improve in Kenya did not constitute an extraordinary circumstance); *Toj-Culpatan v. Holder*, 612 F.3d 1088, 1090–92 (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); *Dhital v. Mukasey*, 532 F.3d 1044, 1049–50 (9th Cir. 2008) (per curiam) (holding

that BIA properly concluded alien lost nonimmigrant status when he failed to enroll in a semester of college classes and that alien then failed to file application within a "reasonable period" when he waited 22 months without further explanation for delay); *Husyev v. Mukasey*, 528 F.3d 1172, 1178–81 (9th Cir. 2008) (holding that 364-day delay after alien's nonimmigrant status expired was not a "reasonable period" in the absence of any explanation); *see also Tamang v. Holder*, 598 F.3d 1083, 1089 (9th Cir. 2010) (discussing which underlying facts cannot be disputed for purposes of the determination of whether a question is a mixed one of law and fact in an ineffective assistance of counsel case). *Contrast Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002) (pre-REAL ID Act, declining to exercise jurisdiction over extraordinary circumstances question citing 8 U.S.C. § 1158(a)(3)). In *Al Ramahi v. Holder*, 725 F.3d 1133, 1137–38 & n.2 (9th Cir. 2013), the court noted that the Ninth Circuit is alone in allowing for review the BIA's application of the changed or extraordinary circumstances exception, but that in the absence of intervening higher authority the court is bound by *Ramadan.*

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

b. Previous-Denial Bar

An applicant who previously applied for and was denied asylum is barred from receiving a grant of asylum. *See* 8 U.S.C. § 1158(a)(2)(C). The court generally lacks jurisdiction to review this determination. 8 U.S.C. §1158(a)(3).

c. Safe Third Country Bar

An applicant has no right to apply for asylum if he or she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality …) in which the alien's life or freedom would not be threatened on account of" the statutory grounds. 8 U.S.C. § 1158(a)(2)(A); *see, e.g.*, 8 C.F.R. § 208.30(e)(6) (implementing bilateral agreement between Canada and the United States). The court generally lacks jurisdiction to review the IJ's determination under this section. 8 U.S.C. § 1158(a)(3).

d. Terrorist Activity Bar

The court generally lacks jurisdiction to review the Attorney General's determination that an applicant is ineligible for asylum based on terrorist activity under 8 U.S.C. § 1158(b)(2)(A)(v). 8 U.S.C. § 1158(b)(2)(D); *Bellout v. Ashcroft*, 363 F.3d 975, 977 (9th Cir. 2004), *superseded by statute as stated in Khan v. Holder*, 584 F.3d 773, 777 (9th Cir. 2009). Section 1158(b)(2)(A)(v) eliminates eligibility for asylum if:

> the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or removable under section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.

However, the court has "jurisdiction to determine the scope and meaning of the statutory terrorism bar, including the definition of 'terrorist organization' and 'terrorist activity,' as these present purely legal questions." *Khan v. Holder*, 584 F.3d 773, 780 (9th Cir. 2009) (also concluding that the court had "jurisdiction to determine whether the [Jammu Kashmir Liberation Front met] this standard" because it was a mixed question of law and fact.).

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

2. Standard of Review

Under the permanent rules, the Attorney General's discretionary judgment whether to grant asylum relief "shall be conclusive unless manifestly contrary to the law and an abuse of discretion." 8 U.S.C. § 1252(b)(4)(D). "Thus, when refugee status has been established, we review the Attorney General's grant or denial of asylum for abuse of discretion." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004).

V. LIMITATIONS ON JUDICIAL REVIEW BASED ON CRIMINAL OFFENSES

Generally, the Courts of Appeals have jurisdiction to review final removal orders of the BIA. 8 U.S.C. § 1252(a). However, Congress has restricted judicial review where an alien is removable based on a conviction for certain crimes. 8 U.S.C. § 1252(a)(2)(C). *See also Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) (stating the court lacks "jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a crime involving moral turpitude" (internal quotation marks omitted)); *Guerrero-Silva v. Holder*, 599 F.3d 1090, 1093 (9th Cir. 2010) (petitioner's removability stripped the court of jurisdiction under 8 U.S.C. § 1252(a)(2)(C)). For example, 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. *See id*; *see also Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1299 (9th Cir. 2014) (court lacks jurisdiction to review final order of removal against alien convicted of aggravated felony, but retains jurisdiction to review whether conviction qualifies as an aggravated felony under federal law); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) ("Although [the court lacks] 'jurisdiction to review any final order of removal against an alien who is removable by reason of having committed' an aggravated felony (among other offenses), 8 U.S.C. § 1252(a)(2)(C), [the court] retains jurisdiction over 'constitutional claims or questions of law,' 8 U.S.C. § 1252(d), which includes the question whether a state crime of conviction is an aggravated felony."); *Kwong v. Holder*, 671 F.3d 872, 876 (9th Cir. 2011) (recognizing that IIRIRA stripped federal courts of jurisdiction to review any final order of removal where an alien is removable for having committed an aggravated felony, but further explaining that because the REAL ID Act restored jurisdiction over questions of law, there was jurisdiction to determine whether an offense is an aggravated felony for purposes of removal).

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

Before enactment of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), this court had limited jurisdiction over final administrative orders against petitioners found removable, deportable or excludable based on enumerated criminal offenses.

Section 440(a) of AEDPA, enacted on April 24, 1996, amended 8 U.S.C. § 1105a(a)(10) by repealing judicial review over final orders of deportation against most criminal aliens. As amended, § 1105a(a)(10) provided that "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court." AEDPA, Pub. L. No. 104–132, § 440(a) (as amended by IIRIRA § 306(d)). This court held that § 440(a) is constitutional, and that it applies retroactively to pending cases. *See Duldulao v. INS*, 90 F.3d 396, 399–400 (9th Cir. 1996).

"Section 1105a(a)(10) and many other provisions of the Immigration Act were superseded by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 … ." *Elramly v. INS*, 131 F.3d 1284, 1285 n.1 (9th Cir. 1997) (per curiam) (as amended on denial of rehearing). Section 321 of IIRIRA amended the aggravated felony definition in 8 U.S.C. §§ 1101(a)(43)(F) and 1101(a)(43)(S) by increasing the number of crimes qualifying as aggravated felonies. The aggravated felony amendments apply to "actions taken" on or after the September 30, 1996 enactment of IIRIRA. *See Valderrama-Fonseca v. INS*, 116 F.3d 853, 856–57 (9th Cir. 1997) ("actions taken" refers to administrative orders and decisions issued against an applicant, and may include steps taken by the applicant, but do not include acts of the courts); *cf. Park v. INS*, 252 F.3d 1018, 1025 (9th Cir. 2001) (aggravated felony amendments applied to actions taken on or after enactment of IIRIRA), *overruled on other grounds by Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc).

IIRIRA's transitional rules, applicable to cases in which deportation proceedings were initiated before April 1, 1997, and the final agency order was entered on or after October 31, 1996, limited petition-for-review jurisdiction for individuals found deportable based on enumerated offenses.

IIRIRA § 309(c)(4)(G) provides:

> [T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for

which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

The listed criminal offenses are:

Section 212(a)(2):	the criminal grounds of inadmissibility
Section 241(a)(2)(A)(i) & (ii):	two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, for which both crimes carry possible sentences of one year or longer
Section 241(a)(2)(A)(iii):	conviction of an aggravated felony at any time after admission
Section 241(a)(2)(B):	controlled substance convictions and drug abuse
Section 241(a)(2)(C):	certain firearm offenses
Section 241(a)(2)(D):	miscellaneous crimes

Likewise, IIRIRA's permanent rules, applicable to removal proceedings initiated on or after April 1, 1997, limited petition for review jurisdiction for individuals found removable based on enumerated offenses.

8 U.S.C. § 1252(a)(2)(C) provides:

> Notwithstanding any other provision of law … no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

The listed criminal offenses are:

8 U.S.C. § 1182(a)(2):	the criminal grounds of inadmissibility
8 U.S.C. § 1227(a)(2)(A)(i) & (ii):	two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, for which both crimes carry possible sentences of one year or longer
8 U.S.C. § 1227(a)(2)(A)(iii):	conviction of an aggravated felony at any time after admission
8 U.S.C. § 1227(a)(2)(B):	controlled substance convictions and drug abuse
8 U.S.C. § 1227(a)(2)(C):	certain firearm offenses
8 U.S.C. § 1227(a)(2)(D):	miscellaneous crimes

For § 1252(a)(2)(C)'s jurisdiction-stripping provision to apply, its language requires that the agency determine that a petitioner is actually removable on a basis specified in that section. *See Alvarez-Santos v. INS*, 332 F.3d 1245, 1249–53 (9th Cir. 2003). *See also Bolanos v. Holder*, 734 F.3d 875, 876 (9th Cir. 2013) ("Under 8 U.S.C. § 1252(a)(2)(C), we lack jurisdiction to consider a challenge to the removal order that rests on a firearm conviction. But we retain jurisdiction to decide our own jurisdiction and to resolve questions of law."); *Malilia v. Holder*, 632 F.3d 598, 601–02 (9th Cir. 2011) ("When a petitioner's conviction is a deportable firearms offense under 8 U.S.C. § 1227(a)(2)(C), this court does not have jurisdiction to consider challenges to removal orders based on that conviction."); *Eneh v. Holder*, 601 F.3d 943, 946 (9th Cir. 2010) (explaining that for the jurisdiction stripping provision in § 1252(a)(2)(C) to apply, removal must be expressly premised upon a criminal conviction); *Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008) ("Because Blanco was not ordered removed as a criminal alien under § 1182(a)(2), the jurisdictional bar of § 1252(a)(2)(C) does not apply."); *Kelava v. Gonzales*, 434 F.3d 1120, 1122–23 (9th Cir. 2006) (8 U.S.C. § 1252(a)(2)(C) did not preclude judicial review where BIA failed to address IJ's findings on aggravated felony charge and instead based decision solely on terrorist activity charge); *Unuakhaulu v. Gonzales*, 416 F.3d 931, 936–37 (9th Cir. 2005) (as amended) (exercising jurisdiction because while agency found applicant

removable based on aggravated felony conviction, removal was not ordered on that basis and alternate grounds of removal were charged).

Under the IIRIRA provisions, if the court determined that the petitioner was ordered removed or ineligible for relief from removal based on a conviction for an enumerated crime, it lacked direct judicial review over the petition for review. *Cf. Unuakhaulu*, 416 F.3d at 937; *Alvarez-Santos*, 332 F.3d at 1253. However, the court retained jurisdiction to determine its own jurisdiction, *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000), and to decide "three threshold issues: whether the petitioner was [1] an alien, [2] removable, and [3] removable because of a conviction for a qualifying crime," *see Zavaleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotation marks, alteration, and emphasis omitted).

Where direct judicial review was unavailable over a final order of deportation or removal, a petitioner could file a petition for writ of habeas corpus in district court under 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (AEDPA and IIRIRA did not repeal habeas corpus jurisdiction to challenge the legal validity of a final order of deportation or removal); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 964 (9th Cir. 2004) (same), *overruled on other grounds by Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497 (9th Cir. 2007) (en banc).

B. The Current Judicial Review Scheme under the REAL ID Act of 2005

1. Expanded Jurisdiction on Direct Review

In May 2005, Congress amended the INA to expand the scope of direct judicial review over petitions for review brought by individuals removable based on enumerated crimes, and to limit the availability of habeas corpus relief over challenges to final orders of removal, deportation, or exclusion. Congress explicitly made the REAL ID Act's judicial review amendments retroactive and directed that they shall apply to all cases in which the final administrative order was issued before, on, or after May 11, 2005, the date of enactment of the Act. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005).

The REAL ID Act added the following new judicial review provision to 8 U.S.C. § 1252:

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

8 U.S.C. § 1252(a)(2)(D); REAL ID Act, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (2005). Pursuant to this new provision, the court now has jurisdiction to review constitutional claims and questions of law presented in all petitions for review, including those brought by individuals found removable based on certain enumerated crimes. *See Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *as adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006) (en banc); *see also, e.g.*, *Delgado v. Holder*, 648 F.3d 1095, 1099–1100 (9th Cir. 2011) (en banc) (the court has jurisdiction to review the agency's particularly serious crime determination); *Garcia-Jimenez v. Gonzales*, 488 F.3d 1082, 1085 (9th Cir. 2007); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1194 (9th Cir. 2006); *Perez-Enriquez v. Gonzales*, 463 F.3d 1007, 1009–10 (9th Cir. 2006) (en banc); *Lisbey v. Gonzales*, 420 F.3d 930, 932 (9th Cir. 2005); *Parrilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005).

See also Gomez-Sanchez v. Sessions, 892 F.3d 985, 996 (9th Cir. 2018) (reviewing whether BIA applied the proper legal standard, concluding BIA's underlying rationale for its decision was unreasonable, and remanding for BIA to consider all reliable, relevant information, when making its particularly serious crime determination); *Konou v. Holder*, 750 F.3d 1120 (9th Cir. 2014) (BIA did not abuse discretion in determining petitioner's assault and battery convictions were particularly serious crimes); *Blandino-Medina v. Holder*, 712 F.3d 1338, 1343 (9th Cir. 2013) (explaining that while the court cannot reweigh the evidence to determine if the crime was particularly serious, it does have jurisdiction to determine whether the agency applied the correct legal standard); *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-weighing of the factors involved in that discretionary determination"); *Arbid v. Holder*, 700 F.3d 379, 382 (9th Cir. 2012) (per curiam) (as amended) (jurisdiction to review BIA's determination that alien was convicted of a particularly serious crime); *Rivera-Peraza v. Holder*, 684 F.3d 906, 909 (9th Cir. 2012) (court had jurisdiction to review whether BIA used erroneous legal standard in its analysis of petitioner's application for waiver of inadmissibility); *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); *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010) (court has jurisdiction to determine whether a particular offense constitutes an offense governed by the jurisdiction-stripping provisions); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (stating the court has "jurisdiction to review whether the BIA and IJ failed to consider the appropriate factors, … , or relied on improper evidence, …, in making the 'particularly serious crime' determination." (citations omitted)).

"[T]he jurisdictional bar set forth in § 1252(a)(2)(C) is subject to two exceptions. The first exception permits [] review of questions of law or constitutional claims. The second exception permits [] review when the IJ denies relief on the merits of the claim rather than in reliance on the conviction, *i.e.*, when the IJ concludes that the petitioner failed to establish the requisite grounds for relief." *Perez-Palafox v. Holder*, 744 F.3d 1138, 1144 (9th Cir. 2014) (internal quotation marks and citations omitted) (reviewing legal question whether the BIA engaged in impermissible fact finding). *See also Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) ("Although [the court lacks] 'jurisdiction to review any final order of removal against an alien who is removable by reason of having committed' an aggravated felony (among other offenses), 8 U.S.C. § 1252(a)(2)(C), [the court] retains jurisdiction over 'constitutional claims or questions of law,' 8 U.S.C. § 1252(d), which includes the question whether a state crime of conviction is an aggravated felony."); *Alphonsus v. Holder*, 705 F.3d 1031, 1036–37 (9th Cir. 2013) (regardless of whether 8 U.S.C. § 1252(a)(2)(C)'s bar to review for criminal aliens applied to petitioner's case, an issue the court did not decide, the court had jurisdiction where the petitioner's challenges were premised on constitutional and legal considerations and were not fact-based), *abrogated on other grounds by Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018); *Planes v. Holder*, 652 F.3d 991, 997–98 (9th Cir. 2011) (where BIA made no legal error regarding criminal grounds for removability, court lacked jurisdiction to review final order of removal under 8 U.S.C. § 1252(a)(2)(C)).

"[J]urisdiction over 'questions of law' as defined in the Real ID Act includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact." *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (per curiam); *see also Chen v. Mukasey*, 524 F.3d 1028, 1031 (9th Cir. 2008); *Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007) (applying *Ramadan* to conclude that in assessing equitable tolling, "the due diligence question necessarily falls within *Ramadan*'s

ambit as a mixed question of law and fact, requiring merely that we apply the legal standard for equitable tolling to established facts").

With respect to asylum, withholding of removal, and CAT claims of a petitioner who was convicted of an offense covered by § 1252(a)(2)(C), the court has jurisdiction to review the denial of an asylum application and to review the denial of withholding of removal and CAT relief to the extent that a petitioner raises questions of law, including mixed questions of law and fact, or constitutional claims. *See Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) (explaining the court has jurisdiction to review the denial of CAT relief when a petitioner raises questions of law, including mixed questions of law and fact, or constitutional claims); *Bolanos v. Holder*, 734 F.3d 875, 876 (9th Cir. 2013) ("Under 8 U.S.C. § 1252(a)(2)(C), we lack jurisdiction to consider a challenge to the removal order that rests on a firearm conviction. But we retain jurisdiction to decide our own jurisdiction and to resolve questions of law."); *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-weighing 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). Moreover, as to "factual issues, when an IJ does not rely on an alien's conviction in denying CAT relief and instead denies relief on the merits, none of the jurisdiction-stripping provisions … apply to divest this court of jurisdiction." *Pechenkov*, 705 F.3d at 978 (internal quotation marks and citation omitted); *see also Haile v. Holder*, 658 F.3d 1122, 1130–31 (9th Cir. 2011); *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083 (9th Cir. 2008) ("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 always decisions on the merits." (emphasis added)), *overruled on other grounds by Maldonado v. Lynch*, 786 F.3d 1155, 1162–64 (9th Cir. 2015) (en banc); *Villegas v. Mukasey*, 523 F.3d 984, 987–88 (9th Cir. 2008); *Arteaga v. Mukasey*, 511 F.3d 940, 942 n.1 (9th Cir. 2007).

Thus, whereas the court previously had jurisdiction to evaluate only whether a criminal conviction was a qualifying offense for the purpose of IIRIRA's jurisdictional bars, the court now has jurisdiction to review the petition for review on the merits, assuming no other provision in the INA limits judicial review. *See Fernandez-Ruiz*, 410 F.3d at 586–87, *as adopted by* 466 F.3d at 1124; *see also, e.g.*, *Garcia-Jimenez*, 488 F.3d at 1085 (stating that court has jurisdiction over questions of law despite petitioner's crime involving moral turpitude and

controlled substance offense); *Lisbey*, 420 F.3d at 932 (concluding that petitioner was convicted of an aggravated felony and denying the petition on the merits); *Parrilla*, 414 F.3d at 1040 (same).

2. Applicability to Former Transitional Rules Cases

In addition to restoring direct judicial review and eliminating habeas jurisdiction over final orders of removal in cases involving enumerated criminal offenses, § 106(d) of the REAL ID Act directs that a petition for review filed in a transitional rules case "shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252) [IIRIRA's permanent rules]." REAL ID Act, Pub. L. No. 109-13, § 106(d), 119 Stat. 231, 311 (2005); *see also Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005) (explaining that jurisdiction over transitional rules cases is now governed by 8 U.S.C. § 1252 rather than 8 U.S.C. § 1105(a)). Accordingly, the restoration of direct judicial review over cases involving enumerated offenses applies to both transitional rules and permanent rules cases.

3. Contraction of Habeas Jurisdiction

In addition to expanding the scope of judicial review for aliens convicted of certain enumerated crimes, the REAL ID Act also "makes the circuit courts the 'sole' judicial body able to review challenges to final orders of deportation, exclusion, or removal." *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005); *see also* 8 U.S.C. § 1252(a)(5); *Mamigonian v. Biggs*, 710 F.3d 936, 941 (9th Cir. 2013) ("the REAL ID Act precludes aliens . . . from seeking habeas relief over final orders of removal in district courts."); *Momeni v. Chertoff*, 521 F.3d 1094, 1095–96 (9th Cir. 2008) (district court lacked habeas jurisdiction over petition filed after effective date of REAL ID Act). "To accomplish this streamlined judicial review, the Act eliminated habeas jurisdiction, including jurisdiction under 28 U.S.C. § 2241, over final orders of deportation, exclusion, or removal." *Alvarez-Barajas*, 418 F.3d at 1052.

The REAL ID Act required the district courts to transfer to the appropriate court of appeals all habeas petitions challenging final orders of removal, deportation or exclusion that were pending before the district court on the effective date of the REAL ID Act (May 11, 2005). *See* REAL ID Act, Pub. L. No. 109-13, § 106(b), 119 Stat. 231, 310–11 (2005); *see also Alvarez-Barajas*, 418 F.3d at 1052. Although the REAL ID Act did not address appeals of the denial of habeas relief already pending in the court of appeals on the effective date of the Act, this court has held that such petitions shall be treated as timely filed petitions for

review. *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005); *Alvarez-Barajas*, 418 F.3d at 1052–53; *see also Singh v. Gonzales*, 491 F.3d 1090, 1095 (9th Cir. 2007) (holding that "a habeas petition is 'pending' in the district court within the meaning of [REAL ID Act]'s transfer provision when the notice of appeal was not filed at the time [REAL ID Act] was enacted, but was filed within the sixty day limitations period for filing a timely appeal of a habeas petition under Federal Rules of Appellate Procedure 4(a)(1)(B)"); *cf. Singh v. Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) (holding that aliens who lacked opportunity to file petitions for review prior to the enactment of the REAL ID Act had a grace period of 30 days from the Act's effective date in which to seek review).

Exceptions for continuing habeas jurisdiction survive, however, for claims like challenges to indefinite detention: "[I]n cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court, and on appeal to this Court, pursuant to 28 U.S.C. § 2241." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006). *See also Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) ("The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction.").

VI. EXCLUSIVE JURISDICTION PROVISION – 8 U.S.C. § 1252(g)

Section 242(g) of IIRIRA, 8 U.S.C. § 1252(g), provides:

> Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law … no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

"Section 1252(g) is not subject to IIRIRA's transitional rules; it applies without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under the Act." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (citing IIRIRA § 306(c)(1)) (internal quotation marks omitted).

In *Reno v. American-Arab Anti-Discrimination Comm.*, the Supreme Court construed Section 1252(g) narrowly, holding that "[t]he provision applies only to three discrete actions that the Attorney General may take: her decision or action to

commence proceedings, *adjudicate* cases, or *execute* removal orders." 525 U.S. 471, 482 (1999) (internal quotation marks omitted); *see also Shin v. Mukasey*, 547 F.3d 1019, 1023 (9th Cir. 2008) (no jurisdiction to review Attorney General's decision to commence proceedings). The Court held that it lacked jurisdiction over the aliens' selective enforcement claims because these claims fell squarely within the prohibition on review of the Attorney's General's decision to "commence proceedings." *Reno*, 525 U.S. at 486–87.

See also Regents of the Univ. of California v. United States Dep't of Homeland Sec., 908 F.3d 476, 503 (9th Cir. 2018) (holding that § 1252(g) does not deprive courts of jurisdiction to review order rescinding the Deferred Action for Childhood Arrivals program); *Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) (order) (concluding that the court lacked "jurisdiction to review petitioners' contention that the agency abused its discretion in denying the motion to reopen to seek prosecutorial discretion based on the recent order of President Obama," citing 8 U.S.C. § 1252(g)); *Shin*, 547 F.3d at 1023–24 (§ 1252(g) did not bar jurisdiction over petitioner's equitable estoppel claim that arose from actions taken by a government employee prior to any decision to commence proceedings against petitioner); *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (§ 1252(g) did not bar jurisdiction over repapering claim); *Wong v. United States*, 373 F.3d 952, 965 (9th Cir. 2004) (§ 1252(g) did not bar review of actions occurring *prior* to decision to commence proceedings or execute removal order); *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) (§ 1252(g) barred review over claim that agency should have commenced deportation proceedings immediately upon becoming aware of applicant's illegal presence but did not bar review of retroactivity challenge to application of IIRIRA's permanent rules); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120–21 (9th Cir. 2001) (§ 1252(g) barred review of discretionary, quasi-prosecutorial decisions by asylum officers and INS district directors to adjudicate cases or refer them to IJs for hearing but did not bar review of challenge to agency decision to halt consideration of suspension of deportation applications indefinitely); *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc) (§ 1252(g) did not deprive district court of jurisdiction to enter preliminary injunction); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 (9th Cir. 2000) (§ 1252(g) did not deprive district court of habeas jurisdiction); *Barapind v. Reno*, 225 F.3d 1100, 1109–10 (9th Cir. 2000) (§ 1252(g) did not affect the availability and scope of habeas review); *Sulit v. Schiltgen*, 213 F.3d 449, 453 (9th Cir. 2000) (§ 1252(g) did not bar review of due process claim that green cards were seized improperly without a hearing); *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999) (§ 1252(g) did not strip

district court of habeas jurisdiction); *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) (§ 1252(g) did not prohibit district court from enjoining deportation of aliens who raised general collateral challenges to unconstitutional agency practices).

VII. JURISDICTION OVER CERTAIN MOTIONS

A. Jurisdiction Over Motions to Reopen

The denial of a motion to reopen is a final administrative decision generally subject to judicial review in the court of appeals. *See Mata v. Lynch*, 135 S. Ct. 2150, 2154 (2015) ("[C]ircuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding."); *Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) ("We … 'have jurisdiction when an alien appeals from the [BIA]'s denial of a motion to reopen a removal proceeding.'" (quoting *Mata*, 135 S. Ct. at 2154)); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016) (reviewing denial of motion to reopen for adjustment of status); *Hernandez v. Holder*, 738 F.3d 1099 (9th Cir. 2013) (reviewing BIA's dismissal of a motion to reopen for lack of jurisdiction and granting the petition for review); *Meza-Vallejos v. Holder*, 669 F.3d 920, 923 (9th Cir. 2012) (court has jurisdiction to review denial of motion to reopen pursuant to 8 U.S.C. § 1252(a)); *Sarmadi v. INS*, 121 F.3d 1319, 1322 (9th Cir. 1997) ("other recent changes to the INA did not alter our traditional understanding that the denial of a motion to reconsider or to reopen generally does fall within our jurisdiction over final orders of deportation"); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (permanent rules); *see also* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order."); *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (discussing long history of federal-court review of administrative decisions denying motions to reopen removal proceedings). "Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision." *Mata*, 135 S. Ct. at 2154–55.

Jurisdiction over motions to reopen may be limited where the underlying request for relief is discretionary. "Section 1252(a)(2)(B)(i) permits the exercise of jurisdiction in cases in which the BIA rules that a motion to reopen fails to satisfy procedural standards such as the evidentiary requirements specified in 8 C.F.R.

§ 1003.2(c)(1), but bars jurisdiction where the question presented is essentially the same discretionary issue originally decided." *Fernandez v. Gonzales*, 439 F.3d 592, 600 (9th Cir. 2006) (footnote omitted). Thus, "[i]f … the BIA determines that a motion to reopen proceedings in which there has already been an unreviewable discretionary determination concerning a statutory prerequisite to relief does not make out a prima facie case for that relief, § 1252(a)(2)(B)(i) precludes our visiting the merits, just as it would if the BIA had affirmed the IJ on direct appeal." *Id*. at 601.

However, "[w]here the relief sought is formally the same as was previously denied but the evidence submitted with a motion to reopen is directed at a different basis for providing the same relief, the circumstances can take the matter out of the realm of § 1252(a)(2)(B)(i)." *Id*. For example, the court would have jurisdiction to review the denial of a motion to reopen seeking consideration of non-cumulative evidence, such as a newly-discovered life threatening medical condition afflicting a qualifying relative. *Id*.

In *Garcia v. Holder*, 621 F.3d 906, 911 (9th Cir. 2010), the court reaffirmed the rule in *Fernandez v. Gonzales*, 439 F.3d 592 (9th Cir. 2006): "[T]his court has jurisdiction to review BIA decisions on motions to reopen that present evidence that is 'so distinct from that considered previously as to make the motion to reopen a request for new relief, rather than for reconsideration of a prior denial.'" *Garcia*, 621 F.3d at 911 (quoting *Fernandez*, 439 F.3d at 603) (concluding that with the exception of one doctor's report, the evidence that petitioners submitted or sought to submit with their motion to reopen was non-cumulative and "different in kind").

The court also has jurisdiction to review motions to reopen seeking consideration of new requests for discretionary forms of relief. *See de Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004) (as amended) (court retained jurisdiction to review denial of motion to reopen to apply for adjustment of status); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 527 (9th Cir. 2004) (§ 1252(a)(2)(B)(i) did not preclude review of denial of motion to reopen to re-apply for adjustment of status where agency had not previously ruled on discretionary adjustment application); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1169–70 (9th Cir. 2003) (§ 1252(a)(2)(B)(i) did not bar review of denial of motion to reopen to apply for adjustment of status); *Arrozal v. INS*, 159 F.3d 429, 431–32 (9th Cir. 1998) (§ 309(c)(4)(E) of transitional rules did not bar review of denial of motion to reopen to apply in the first instance for suspension of deportation).

Likewise, the court has jurisdiction to review the denial of motions to reopen in which an independent claim of ineffective assistance of counsel is at issue. *Fernandez*, 439 F.3d at 602. This is true even where evaluations of ineffectiveness and prejudice require an indirect weighing of discretionary factors. *See id*.; *see also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002).

> In sum, [the court has] jurisdiction over motions to reopen regarding cases in which: (1) the agency has not made a prior discretionary determination concerning the relief sought; (2) the agency's denial of a motion to reopen applies a procedural statute, regulation, or rule, as opposed to determining that the movant did not establish a prima facie case for relief that merits reopening a prior decision denying relief on an unreviewable discretionary ground; (3) the evidence submitted addresses a hardship ground so distinct from that considered previously as to make the motion to reopen a request for new relief, rather than for reconsideration of a prior denial; and (4) an independent claim such as ineffective assistance of counsel is at issue. Section 1252(a)(2)(B)(i) bars jurisdiction, however, to review the denial of a motion to reopen that pertains only to the merits basis for a previously-made discretionary determination under one of the enumerated provisions, 8 U.S.C. §§ 1182(h), 1182(i), 1229b, 1229c, and 1255.

Fernandez, 439 F.3d at 602–03.

The court also has jurisdiction to review the BIA's determination that an "alien has failed to provide a sufficient justification for an untimely motion" to reopen because it presents a mixed question of fact and law. *See Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009).

The court lacks jurisdiction to review the BIA's decision not to invoke its *sua sponte* authority to reopen proceedings under 8 C.F.R. § 1003.2(a). *See Menendez v. Whitaker*, 908 F.3d 467, 471 (9th Cir. 2018); *Go v. Holder*, 744 F.3d 604, 609–10 (9th Cir. 2014) (the court lacks "jurisdiction to review the Board's decision not to invoke its *sua sponte* authority to reopen proceedings); *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009); *Toufighi v. Mukasey*, 538 F.3d 988, 993 n.8 (9th Cir. 2008); *Ekimian v. INS*, 303 F.3d 1153, 1159–60 (9th Cir. 2002). However, the court does have limited jurisdiction to review the BIA's denial of a motion to reopen *sua sponte* for the limited purpose of determining whether the BIA based its decision on legal or constitutional error. *Bonilla v. Lynch*, 840 F.3d

575, 581 (9th Cir. 2016) (reviewing denial of motion to reopen for adjustment of status); *see also Mata*, 135 S. Ct. at 2155 (holding that the court of appeals had jurisdiction over appeal, notwithstanding that BIA's denial was based on timeliness reasons and that BIA determined not to exercise its *sua sponte* authority to reopen). "If, upon exercise of its jurisdiction, this court concludes that the Board relied on an incorrect legal premise, it should remand to the BIA so it may exercise its authority against the correct 'legal background. … Once it does so, this court will have no jurisdiction to review the *sua sponte* decision, as *Ekimian* instructs." *Bonilla*, 840 F.3d at 588 (internal quotation marks and citations omitted).

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Jurisdiction.

B. Motions for Continuance

The court retains jurisdiction to review an IJ's discretionary denial of a continuance. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1246–47 (9th Cir. 2008) (per curiam); *see also Garcia v. Lynch*, 798 F.3d 876, 881 (9th Cir. 2015) ("[W]e conclude that the§ 1252(a)(2)(C) bar does not apply to the denial of a procedural motion that rests on a ground independent of the conviction that triggers the bar."); *Malilia v. Holder*, 632 F.3d 598, 604 (9th Cir. 2011) (court retains jurisdiction to review challenge that IJ's denial of "request for a continuance was based on an error of law"). Under 8 C.F.R. § 1003.29, an IJ may grant a continuance for good cause shown. *See Martinez-Cedillo v. Sessions*, 896 F.3d 979, 994–95 (9th Cir. 2018); *Garcia*, 798 F.3d at 881; *Peng v. Holder*, 673 F.3d 1248, 1253 (9th Cir. 2012). The court reviews for abuse of discretion the IJ's denial of a continuance. *See Martinez-Cedillo*, 896 F.3d at 995 (holding there was no abuse of discretion); *Taggar v. Holder*, 736 F.3d 886, 889 (9th Cir. 2013) (stating that the "legal standard for reviewing whether an IJ should have granted a motion for continuance" is abuse of discretion); *Peng*, 673 F.3d at 1253; *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) (denial of continuance was an abuse of discretion and resulted in denial of full and fair hearing); *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009). "The BIA abuses its discretion when it fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief." *Peng*, 673 F.3d at 1253 (internal quotation marks and citation omitted). Furthermore, when the BIA denies a continuance on legal grounds, the court will find an abuse of discretion if the BIA acted arbitrarily, irrationally, or contrary to law. *See id*. at 1253–54.

"When evaluating an IJ's denial of a motion for continuance [the court] consider[s] a number of factors – including, for example, (1) the importance of the evidence, (2) the unreasonableness of the immigrant's conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted." *Cui v. Mukasey*, 538 F.3d 1289, 1292 (9th Cir. 2008); *see also Garcia*, 798 F.3d at 881 (no abuse of discretion); *Peng*, 673 F.3d at 1253. The question of whether the denial of a continuance constitutes an abuse of discretion must be resolved on a case-by-case basis. *See Cui*, 538 F.3d at 1292 (concluding IJ abused his discretion by denying petitioner's motion for a continuance so petitioner could resubmit her fingerprints); *see also Jiang v. Holder*, 658 F.3d 1118, 1120 (9th Cir. 2011) (discussing four factors to weigh when determining whether denial of continuance was abuse of discretion); *Ahmed*, 569 F.3d at 1012 (holding IJ abused its discretion in denying continuance). An IJ's failure to state a reasoned basis for the decision not to grant a continuance may constitute an abuse of discretion. *See Ahmed*, 569 F.3d at 1014 (absent an explanation from the IJ, the court had no choice but to conclude denial of the continuance was arbitrary and unreasonable).

VIII. JURISDICTION OVER OTHER PROCEEDINGS

> Under the Immigration and Nationality Act, the Department of Homeland Security (DHS) can seek to remove non-citizens from the United States through several different means. The most formal process involves a hearing in immigration court before an immigration judge, at which the individual to be removed can contest the charges against him and request various forms of relief from removal. *See* 8 U.S.C. § 1229a. Today, however, most non-citizens are ordered removed through streamlined proceedings—expedited removal, administrative removal, and reinstatement of removal—that do not involve a hearing before an immigration judge. *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. Cal. L. Rev. 181, 183–84 (2017); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 Colum. J. Race & L. 1, 2–3 (2014). The proceedings are summary in nature and conducted by front-line immigration enforcement officers employed by DHS.

Gomez-Velazco v. Sessions, 879 F.3d 989, 990–91 (9th Cir. 2018) (explaining administrative removal process under 8 U.S.C. § 1228(b), and exercising jurisdiction over constitutional right to counsel claim raised by petitioner).

A. Expedited Removal Proceedings

Under 8 U.S.C. § 1225(b)(1), the government may order the expedited removal of certain inadmissible aliens at the port of entry. *See Padilla v. Ashcroft*, 334 F.3d 921, 922–23 (9th Cir. 2003) (describing expedited removal procedure); *see also* 8 C.F.R. § 235.3(b). Under the expedited removal process, "the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum … or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018) (discussing expedited removal process).

Except for limited habeas proceedings, "no court shall have jurisdiction to review … any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited] order of removal pursuant to section 1225(b)(1) of this title." 8 U.S.C. § 1252(a)(2)(A)–(a)(2)(A)(i). Habeas proceedings in the expedited removal context are limited to determinations of:

> (A) whether the petitioner is an alien,
>
> (B) whether the petitioner was ordered removed under such section, and
>
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee … or has been granted asylum … .

8 U.S.C. § 1252(e)(2).

In *Ayala v. Sessions*, 855 F.3d 1012, 1018 (9th Cir. 2017), the court concluded it had "jurisdiction over petitions for review of reasonable fear determinations made in connection with the reinstatement of expedited removal orders." *Id. See also Martinez v. Sessions*, 873 F.3d 655, 658 (9th Cir. 2017).

See also Pena v. Lynch, 815 F.3d 452, 455 (9th Cir. 2015) (court lacked jurisdiction to consider petition for review of expedited removal order where no claim listed in the statutory exceptions was raised); *Smith v. United States Customs & Border Protection*, 741 F.3d 1016, 1020–22 (9th Cir. 2014) (where petitioner failed to establish any of the three permissible bases for habeas review of an expedited removal order, court lacked jurisdiction to consider a collateral challenge

to the expedited removal order); *Galindo-Romero v. Holder*, 640 F.3d 873, 875 n.1 (9th Cir. 2011) (noting that 8 U.S.C. § 1252(e) permits review of expedited removal orders only in a habeas corpus petition, and even then review is limited to three distinct inquiries, none of which the petitioner raised); *Garcia de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133, 1139 (9th Cir. 2008) (concluding that court lacked jurisdiction to review reinstated expedited removal order, where alien's challenge to the reinstated removal order was not a habeas petition and did not contest the expedited removal order on any of the enumerated permissible grounds in 8 U.S.C. § 1252(e)).

B. Legalization Denials

The Immigration Reform and Control Act of 1986 ("IRCA") established a legalization or "amnesty" program for two groups of aliens: (1) those who entered the United States illegally before January 1, 1982, *see* 8 U.S.C. § 1255a, INA § 245A; and (2) Special Agricultural Workers ("SAWs"), *see* 8 U.S.C. § 1160, INA § 210.

Judicial review of a § 1255a legalization denial is available only during review of a final order of deportation or removal. *See Pedroza-Padilla v. Gonzales*, 486 F.3d 1362, 1364 n.1 (9th Cir. 2007) (jurisdiction to review denial of a § 1255a legalization application in conjunction with judicial review of an order of deportation); *Guzman-Andrade v. Gonzales*, 407 F.3d 1073, 1075 (9th Cir. 2005) (holding that court continues to have jurisdiction to review denial of a § 1255a legalization application when reviewing final removal order of an individual who would have been placed in deportation proceedings prior to passage of IIRIRA); *Noriega-Sandoval v. INS*, 911 F.2d 258, 261 (9th Cir. 1990) (per curiam) (court lacked jurisdiction to review Legalization Appeals Unit's ("LAU") denial of application for adjustment to temporary resident status under IRCA because challenge did not arise in context of review of order of deportation). "Thus, until the INS initiates deportation proceedings against an alien who unsuccessfully applies for legalization, that alien has no access to substantive judicial review of the LAU's denial." *Proyecto San Pablo v. INS*, 189 F.3d 1130, 1134 (9th Cir. 1999); *see also* 8 U.S.C. § 1255a(f)(4)(A) ("There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title (as in effect before October 1, 1996)."). The courts lack jurisdiction to review § 1255a legalization denials in exclusion proceedings. *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1278 (9th Cir. 1996) ("the plain meaning of the statute precludes review of a legalization application in an exclusion proceeding").

For SAW denials, judicial review is available during review of a final order of deportation or exclusion. *See* 8 U.S.C. § 1160(e)(3)(A) ("There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title (as in effect before October 1, 1996)."); *see also Espinoza-Gutierrez*, 94 F.3d at 1278 (noting that for SAW applicants, "Congress did provide for judicial review of LAU denials in exclusion proceedings"). The SAW judicial review provision applies to judicial review of a final order of removal under 8 U.S.C. § 1252(a)(1). *See Perez-Martin v. Ashcroft*, 394 F.3d 752, 757–58 (9th Cir. 2005). The BIA lacks jurisdiction to review the denial of SAW status. *See id.* at 758. However, the court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review questions of law. *See Perez-Enriquez v. Gonzales*, 463 F.3d 1007, 1009–10 (9th Cir. 2007) (en banc) (reviewing question of whether petitioner's admissibility was determined not only as of the date of his admission to lawful temporary status under § 1160(a)(1), but also as of the date of his adjustment to lawful permanent resident status under § 1160(a)(2)).

C. Registry

The transitional rules do not bar review of the denial of an application for registry under 8 U.S.C. § 1259. *See Beltran-Tirado v. INS*, 213 F.3d 1179, 1182–83 (9th Cir. 2000).

D. In Absentia Removal Orders

Any petition for review from an in absentia order of removal "shall … be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable." 8 U.S.C. § 1229a(b)(5)(D); *see also Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1003 (9th Cir. 2014) ("Our review includes the "validity of the notice provided to the alien" and "the reasons for the alien's absence" from the hearing."); *Hamazaspyan v. Holder*, 590 F.3d 744, 747 (9th Cir. 2009) ("This court's review of a removal order entered *in absentia* is limited to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's absence from the proceeding, and (iii) whether or not the alien is removable."); *Al Mutarreb v. Holder*, 561 F.3d 1023, 1026 (9th Cir. 2009); *Lo v. Ashcroft*, 341 F.3d 934, 936 (9th Cir. 2003). These limitations do not apply if the applicant claims to be a national of the United States. *See* 8 U.S.C. § 1229a(b)(5)(D) (excluding cases described in 8 U.S.C. § 1252(b)(5)).

See also Miller v. Sessions, 889 F.3d 998, 1003 (9th Cir. 2018) (concluding that 8 U.S.C. § 1231(a)(5), which allows DHS to reinstate a prior removal order

without a hearing before an IJ, did not preclude petitioner from filing a motion under 8 U.S.C. § 1229a(b)(5)(C)(ii), which allows for a motion to reopen to be "filed at any time" to rescind a removal order entered *in absentia* if the individual can show she never received notice of the hearing).

E. Reinstated Removal Proceedings

"[W]hen an alien subject to removal leaves the country, the removal order is deemed to be executed. If the alien reenters the country illegally, the order may not be executed against him unless it has been reinstated by an authorized official." *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009) (internal quotation marks omitted). "Reinstatement of a prior order of removal is not automatic." *Id.*

8 U.S.C. § 1231(a)(5) provides:

> Reinstatement of removal orders against aliens illegally reentering
>
> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Id. (enacted in 1996, replacing the former reinstatement provision at 8 U.S.C. § 1252(f) (repealed 1996)); *see also Miller v. Sessions*, 889 F.3d 998, 1002–03 (9th Cir. 2018) ("An individual placed in reinstatement proceedings under § 1231(a)(5) cannot as a general rule challenge the validity of the prior removal order in the reinstatement proceeding itself."); *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1079–80 (9th Cir. 2010) (The reinstatement of a prior removal order bars an alien from applying for "any relief" from removal for which he or she might previously have been eligible."), *overruled in part on other grounds by Garfias Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012).

"Aliens subject to reinstated orders of removal are placed in reasonable fear screening proceedings, if they express fear of persecution or torture in their country of removal." *Bartolome v. Sessions*, 904 F.3d 803, 807 (9th Cir. 2018). "[W]here an alien pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order does not become final until the reasonable fear of persecution and withholding of removal

proceedings are complete." *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012). *See also Bartolome*, 904 F.3d at 811 ("We have jurisdiction to review '[a]n IJ's negative determination regarding the alien's reasonable fear' under 8 C.F.R. § 208.31(g)(1).'" (citation omitted)); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 833 (9th Cir. 2016) (as amended) ("An IJ's negative determination regarding the alien's reasonable fear makes the reinstatement order final, *see* 8 C.F.R. § 208.31(g)(1), and thus subject to review under 8 U.S.C. § 1252).

Where an individual is placed in reinstatement proceedings under § 1231(a)(5), the individual retains "the right, conferred by § 1229a(b)(5)(C)(ii), to seek rescission of a removal order entered *in absentia*, based on lack of notice, by filing a motion to reopen 'at any time.'" *Miller*, 889 F.3d at 1002–03.

"The Immigration and Nationality Act (INA) substantially limits this court's review of a prior order of removal that has been reinstated by the government. 8 U.S.C. § 1231(a)(5). However, [the court] retains jurisdiction to review the reinstatement order itself under 8 U.S.C. § 1252(a)(1)." *Morales de Soto v. Lynch*, 824 F.3d 822, 825 (9th Cir. 2016) (as amended); *see also Andrade-Garcia*, 828 F.3d at 833 ("Although '[r]einstatement orders are not literally orders of removal,' we have jurisdiction … under 8 U.S.C. § 1252(a)(1) … to review constitutional claims or questions of law that are 'raised in the context of reinstated removal orders.'"); *Villa-Anguiano v. Holder*, 727 F.3d 873, 875 (9th Cir. 2013); *Castro-Cortez v. INS*, 239 F.3d 1037, 1043–44 (9th Cir. 2001) (holding that new reinstatement provision does not apply to aliens who reentered the United States before April 1, 1997), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). "[R]eview of the reinstatement itself is limited to confirming the agency's compliance with the reinstatement regulations." *Garcia de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133, 1137 (9th Cir. 2008) (concluding that court lacked jurisdiction to review reinstated *expedited* removal order, where alien's challenge to the reinstated removal order was not a habeas petition and did not contest the expedited removal order on any of the enumerated permissible grounds in 8 U.S.C. § 1252(e)); *see also Villa-Anguiano*, 727 F.3d at 877–78 ("review of a reinstatement order is limited to assessing ICE's determination of the factual predicates for reinstatement: '(1) [that] petitioner is an alien, (2) who was subject to a prior removal order, and (3) who illegally reentered the United States.'" (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495–96 (9th Cir. 2007) (en banc)); *Galindo-Romero v. Holder*, 640 F.3d 873, 881 (9th Cir. 2011) (concluding no jurisdiction to review termination of formal removal proceedings because there was no order of removal, and stating that there would be

no final order of removal until the prior expedited removal order was reinstated or new formal removal proceedings were initiated).

This court has addressed the revised reinstatement provisions in the following cases: *Bartolome v. Sessions*, 904 F.3d 803, 807–09 (9th Cir. 2018) (explaining reasonable fear screening proceedings that occur when non-citizens subject to reinstated orders of removal express fear of persecution or torture in their country of removal); *Miller v. Sessions*, 889 F.3d 998, 1002–03 (9th Cir. 2018) (discussing interplay of 8 U.S.C. § 1231(a)(5) and § 1229a(b)(5)(C)(ii)); *Ayala v. Sessions*, 855 F.3d 1012, 1018 (9th Cir. 2017) (holding the court had "jurisdiction over petitions for review of reasonable fear determinations made in connection with the reinstatement of expedited removal orders."); *Martinez v. Sessions*, 873 F.3d 655, 658 (9th Cir. 2017); *Morales de Soto v. Lynch*, 824 F.3d 822 (9th Cir. 2016) (as amended) (denying petition for review where there was nothing in the facts of the case justifying remand to ICE for it to reconsider its decision to reinstate prior removal order); *Andrade-Garcia v. Lynch*, 828 F.3d 829 (9th Cir 2016) (as amended) (the court reviews reinstated removal orders under the standard applicable to final orders of removal); *Ortega v. Holder*, 747 F.3d 1133 (9th Cir. 2014) (holding that the IIRIRA provision that eliminated nearly all forms of relief from reinstatement was not impermissibly retroactive as applied to alien who failed to take any action before the Act's effective date); *Montoya v. Holder*, 744 F.3d 614 (9th Cir. 2014) (holding that the reinstatement provision in IIRIRA was not impermissibly retroactive as applied to the alien's Form I-130 which was filed prior to the Act's effective date); *Villa-Anguiano*, 727 F.3d at 882 (granting petition for review where ICE improperly reinstated removal order after the district court found underlying removal proceedings violated the petitioner's due process rights); *Tamayo-Tamayo v. Holder*, 725 F.3d 950, 952 (9th Cir. 2013) (discussing reinstatement); *Ixcot v. Holder*, 646 F.3d 1202, 1203 (9th Cir. 2011) (post-IIRIRA reinstatement provision was impermissibly retroactive when applied to an alien who applied for relief prior to IIRIRA's effective date); *Morales-Izquierdo*, 600 F.3d at 1082 ("The Reinstatement Order to which Morales is subject qualifies as an order of removal that can only be challenged in a petition for review filed directly with our court."); *Alcala*, 563 F.3d at 1013 (dismissing petition for lack of jurisdiction where BIA's order dismissing removal proceedings so that government could reinstate a prior, expedited removal order, was not a final order of removal); *Martinez-Merino v. Mukasey*, 525 F.3d 801, 803–05 (9th Cir. 2008) (petitioner failed to demonstrate prejudice resulting from reinstatement or a "gross miscarriage of justice"); *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007) (per curiam) (8 C.F.R. § 1003.2(d) does not preclude jurisdiction over

motions to reopen filed by petitioners who had been lawfully removed after the completion of immigration proceedings); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495–96 (9th Cir. 2007) (en banc) (reinstatement procedures in 8 C.F.R. § 241.8 constitute a valid interpretation of the INA and do not offend due process); *Lin v. Gonzales*, 473 F.3d 979, 982–83 (9th Cir. 2007) (agency erred in finding that original deportation order was automatically reinstated upon petitioner's illegal reentry where the agency did not comply with 8 C.F.R. § 241.8(a) and (b)); *Padilla v. Ashcroft*, 334 F.3d 921, 924 (9th Cir. 2003) (declining to decide whether reinstated expedited removal order violates due process because alien could not show prejudice); *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173–74 (9th Cir. 2001) (reinstatement of prior removal order did not violate due process because alien already had one full and fair hearing); *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1128–29 (9th Cir. 2001) (INS may reinstate order of deportation pertaining to alien granted voluntary departure in lieu of deportation).

F. Discretionary Waivers

1. Three and Ten-Year Unlawful Presence Bars

"No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver" of the three and ten-year unlawful presence bars set forth in 8 U.S.C. § 1182(a)(9)(B)(i). 8 U.S.C. § 1182(a)(9)(B)(v) ("The Attorney General has sole discretion to waive [the bars] in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established … that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.").

2. Document Fraud Waiver

"No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver" of the document fraud ground of inadmissibility in 8 U.S.C. § 1182(a)(6)(F)(i). 8 U.S.C. § 1182(d)(12).

3. Criminal Inadmissibility Waivers

"No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a [Section 212(h)] waiver … ." 8 U.S.C. § 1182(h); s*ee also Mendoza v. Holder*, 623 F.3d 1299, 1302 (9th Cir. 2010) (court lacks jurisdiction to review IJ's exercise of discretion in denying 212(h) waiver).

4. Fraud Waivers

"No court shall have jurisdiction to review a decision or action of the Attorney General regarding a [Section 212(i)] waiver." 8 U.S.C. § 1182(i)(2); *see also Corona-Mendez v. Holder*, 593 F.3d 1143, 1146 (9th Cir. 2010) ("No court has jurisdiction to review any judgment granting relief under 212(i), or other provisions for which decision is committed to the discretion of the Attorney General or the Secretary of Homeland Security, unless review of the petition involves constitutional claims or questions of law.").

G. Inadmissibility on Medical Grounds

An individual may not appeal an IJ's removal decision that is based solely on a medical certification that he or she is inadmissible under the health-related grounds in 8 U.S.C. § 1182(a)(1). *See* 8 U.S.C. § 1252(a)(3) ("No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.").

H. Administrative Closure

"Administrative closure is a procedure by which an IJ or the BIA temporarily removes a case from the active calendar or docket as a matter of administrative convenience and docket management." *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 889 (9th Cir. 2018).

In *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 893 (9th Cir. 2018), the court held that it has jurisdiction to review administrative closure decisions. Prior to *Gonzalez-Caraveo*, the court had held it lacked jurisdiction to review such decisions, because there was no meaningful standard against which the agency decision could be judged. *See Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1117–20 (9th Cir. 2009) (concluding that court lacked jurisdiction to review for abuse of discretion the BIA's decision denying an alien's request to administratively close her immigration case where there was no statutory or regulatory basis for administrative closures and there was no meaningful standard against which to judge the BIA's decision). After *Diaz-Covarrubias* was decided, the BIA decided *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012), which provided a non-exhaustive list of six factors to be considered when determining whether administrative closure was appropriate. *See Avetisyan*, 25 I. & N. at 696 (holding that an IJ or the BIA has the authority to administratively close a case even if a party opposes, if it is otherwise appropriate). Because *Avetisyan* provided a sufficiently meaningful standard to evaluate the IJ or BIA's administrative

closure decision, the court held in *Gonzalez-Caraveo* that it had jurisdiction to review such decision. 882 F.3d at 893.

Subsequent to *Gonzalez-Caraveo*, the Attorney General overruled *Avetisyan*, holding "immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action." *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 271& 292 (AG 2018). The Attorney General explained in reviewing administrative closure decisions, federal courts had assumed that IJs and the BIA had authority to administratively close a case, rather than analyzing the regulations in detail. As such, no federal court decisions conflicted with, nor diminished the Attorney General's authority to interpret the regulations. *See id.* at 285–86 (specifically noting the Ninth Circuit's decision in *Gonzalez-Caraveo*). The Attorney General explained that the existing regulations did not offer a "persuasive basis for inferring" authority to administratively close cases and "conclude[d] that immigration judges and the Board lack the general authority to administratively close cases[,]" rather, they may only administratively close a case where a regulation or judicially approved settlement authorizes such action. *Id*. at 292 (noting at the time of the decision, only "[a] small proportion of … cases have been closed pursuant to regulations expressly authorizing administrative closure in particular cases or pursuant to court-approved settlements." (citing 8 C.F.R. §§ 1214.2(a), 1214.3, 1245.13(d)(3)(i), 1245.15(p)(4)(i), 1245.21(c), 1240.62(b), 1240.70(f)–(h); *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002); *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991)).

I. BIA Rejection of Untimely Brief

The court has jurisdiction to review the BIA's decision to reject an untimely brief. *See Zetino v. Holder*, 622 F.3d 1007, 1012 n.2 (9th Cir. 2010) (in light of *Kucana v. Holder*, 558 U.S. 233, 237 (2010) the court rejected the government's contention that the court lacked jurisdiction over the discretionary decision to reject untimely brief). The court may also consider a due process challenge to the rejection of an untimely brief. *See id*. (concluding that petitioner was not deprived of due process by BIA's decision not to accept his untimely brief).

J. Denial of Registry

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). 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 "nothing in sections 1252 or 1259 specifies that the good moral character decision is committed to the discretion of the Attorney General." *Gutierrez*, 662 F.3d at 1089.

K. Appeal by Certification

"Section 1003.1(c) of Title 8 of the Code of Federal Regulations grants the BIA authority to accept a procedurally improper appeal by certification" *Idrees v. Whitaker*, 910 F.3d 1103, 1105 (9th Cir. 2018). The "decision of whether to certify a claim under 8 C.F.R. § 1003.1(c) is committed to agency discretion." *Id*. at 1106 (joining the conclusions of the Second, Eighth, and Tenth Circuits). As such, the court of appeals lacks jurisdiction to review the agency's decision not to certify a claim. *See id*. (dismissing appeal of failure to certify ineffective assistance of counsel claim).

L. Administrative Removal

DHS is authorized under 8 U.S.C. § 1228(b) "to order a limited class of non-citizens removed from the country without affording them a hearing before an immigration judge." *Gomez-Velazco v. Sessions*, 879 F.3d 989, 991 (9th Cir. 2018).

> To invoke § 1228(b), DHS must establish that the individual to be removed: (1) is not a citizen of the United States; (2) has not been lawfully admitted for permanent residence; and (3) has been convicted of an aggravated felony. 8 U.S.C. § 1228(b)(1), (2); 8 C.F.R. § 238.1(b)(1). Proceedings under § 1228(b) are summary in nature because if DHS establishes those three predicates, the individual is conclusively presumed removable and categorically ineligible for most forms of discretionary relief from removal.

Gomez-Velazco, 879 F.3d at 991 (explaining administrative removal proceedings). Adminisrative removal proceedings commence with service of a "Notice of Intent to Issue a Final Administrative Removal Order", after wich the non-citizen has ten days to file a response. *Id.* If no response is filed, or the non-citizen concedes

removability as charged, a DHS official will issue a "Final Administrative Removal Order." *Id.* "To allow an opportunity for judicial review, the order may not be executed for 14 days unless [the non-citizen] waive[s] that waiting period in writing." *Id.* at 992. If a removal order is issued and the non-citizen fears persecution or torture in the country of removal, the case must be referred to an asylum officer for a reasonable fear interview. *Id.*

In *Gomez-Velazco*, the court exercised jurisdiction over a constitutional right to counsel claim raised by petitioner, who was subject to an administrative removal order. *Id.* at 992–96 (holding that although petitioner may have been improperly denied the right to counsel during his initial interaction with DHS officers, he did not show that the denial of that right caused him any prejudice, and thus the due process claim failed; the court assumed the right to counsel was violated, and did not decide that question).

IX. SCOPE AND STANDARD OF REVIEW

A. Scope of Review

"In reviewing the decision of the BIA, [the court] consider[s] 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). *See also Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 784 (9th Cir. 2018); *Solorio-Ruiz v. Sessions*, 881 F.3d 733, 738 (9th Cir. 2018) ("In reviewing a petition, we 'consider only the grounds relied upon by the BIA.' *Singh v. Holder*, 649 F.3d 1161, 1164 n.6 (9th Cir. 2011) (en banc) (internal quotation marks omitted)."). "When the BIA's decision 'cannot be sustained upon its reasoning, [the court] must remand to allow the agency to decide any issues remaining in the case.'" *Solorio-Ruiz*, 881 F.3d at 738 (quoting *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam)); *see also Myers v. Sessions*, 904 F.3d 1101, 1113 (9th Cir. 2018); *Alvarez-Cerriteno*, 899 F.3d at 784 (granting petition and remanding).

1. Where BIA Conducts De Novo Review

Where the BIA conducts its own review of the evidence and law rather than adopting the IJ's decision the court's "review is limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted." *Hosseini v. Gonzales*, 471 F.3d 953, 957 (9th Cir. 2006) (internal quotation marks omitted); *see also Szonyi v. Whitaker*, No. 15-73514, 2019 WL 573748, at *9 (9th Cir. Feb. 13, 2019); *Villavicencio v. Sessions*, 904 F.3d 658, 663 (9th Cir. 2018) (as amended); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059 (9th Cir. 2017) (en

banc); *Maldonado v. Lynch*, 786 F.3d 1155, 1160 (9th Cir. 2015) (en banc); *Zumel v. Lynch*, 803 F.3d 463, 471 (9th Cir. 2015); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1305 (9th Cir. 2015); *Bolanos v. Holder*, 734 F.3d 875, 876 (9th Cir. 2013); *Cordoba v. Holder*, 726 F.3d 1106, 1113–14 (9th Cir. 2013); *Corpuz v. Holder*, 697 F.3d 807, 810–11 (9th Cir. 2012); *Perez-Mejia v. Holder*, 663 F.3d 403, 409 (9th Cir. 2011); *Valadez-Munoz v. Holder*, 623 F.3d 1304, 1307–08 (9th Cir. 2010) (court reviews the BIA's decision when the BIA conducts an independent review of the record); *Aden v. Holder*, 589 F.3d 1040, 1043 (9th Cir. 2009) (reviewing only BIA's decision where BIA wrote its own decision and did not adopt that of IJ); *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) ("If the BIA issues a written opinion, it is that opinion which is under review."); *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 832 (9th Cir. 2008). Where the BIA conducts a de novo review, "[a]ny error committed by the IJ will be rendered harmless by the Board's application of the correct legal standard." *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995); *see also Singh v. Holder*, 591 F.3d 1190, 1198 (9th Cir. 2010) (where the BIA conducts a de novo review any error committed by the IJ will be rendered harmless by the BIA's application of the correct legal standard); *Brezilien v. Holder*, 569 F.3d 403 (9th Cir. 2009).

Note that under 8 C.F.R. § 1003.1(d)(i)(iv) "(1) the Board will not engage in de novo review of findings of fact determined by the immigration judge; and (2) except for the taking of administrative notice of commonly known facts, the Board will not engage in factfinding in the course of deciding appeals." *Brezilien*, 569 F.3d at 413 n.3; *Ridore v. Holder*, 696 F.3d 907, 911 (9th Cir. 2012). "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.'" *Ridore*, 696 F.3d at 911 (quoting 8 C.F.R. § 1003.1(d)(3)(i)). "[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." *Ridore*, 696 F.3d at 919. "If the IJ has left certain factual disputes unresolved and the BIA believes that it cannot decide the case unless they are resolved, it cannot make its own factual findings but instead must remand to the IJ for further factual findings." *Zumel v. Lynch*, 803 F.3d 463, 475 (9th Cir. 2015) (internal quotation marks and citation omitted). "In contrast to these substantive limitations on factfinding, '[t]he Board may review questions of law, discretion, and judgment on all other issues in appeals from decisions of immigration judges de novo.'" *Brezilien*, 569 F.3d at 413 n.3 (quoting 8 C.F.R. § 1003.1(d)(3)(ii)); *see also Perez-Palafox v. Holder*, 744 F.3d 1138, 1145 (9th Cir. 2014) ("Although the BIA may not engage in *de*

novo factfinding and may only review the IJ's findings under the clearly erroneous standard, the BIA may review 'legal questions, discretion, and judgment . . . de novo.'" (quoting 8 C.F.R. § 1003.1(d)(3)(ii))).

"Where the BIA fails to follow its own regulations and makes factual findings, it commits an error of law, which we have jurisdiction to correct." *Rodriguez v. Holder*, 683 F.3d 1164, 1172–73 (9th Cir. 2012) (remanding where BIA committed legal error by making its own factual determination and engaging in de novo review of the IJ's factual findings); *see also Vitug v. Holder*, 723 F.3d 1056, 1063–64 (9th Cir. 2013) (BIA failed to apply the clear error standard of review, and also abused its discretion by ignoring the factual findings of the IJ); *Ridore*, 696 F.3d at 911.

2. Where BIA Conducts Abuse of Discretion Review

"If … the BIA reviews the IJ's decision for an abuse of discretion, we review the IJ's decision." *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997); *see also Rojas v. Holder*, 704 F.3d 792, 794 (9th Cir. 2012) ("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." (internal quotation marks and citation omitted; alteration in original)); *Yepes-Prado v. INS*, 10 F.3d 1363, 1366–67 (9th Cir. 1993).

3. Where BIA Incorporates IJ's Decision

"Where … the BIA has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's." *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002); *see also Szonyi v. Whitaker*, No. 15-73514, 2019 WL 573748, at *9 (9th Cir. Feb. 13, 2019) ("We may look to the IJ's decision when the BIA incorporates parts of the IJ's reasoning as its own." (internal quotation marks and citation omitted)); *Parada v. Sessions*, 902 F.3d 901, 909 (9th Cir. 2018); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293 (9th Cir. 2018) ("Where, as here, the BIA agrees with the IJ's reasoning, we review both decisions."); *Medina-Lara v. Holder*, 771 F.3d 1106, 1111 (9th Cir. 2014) ("Where, as here, the Board incorporates the IJ's decision into its own without citing *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994), this court will review the IJ's decision to the extent incorporated."); *Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014) (reviewing both the BIA and IJ decision where the BIA adopted the IJ's decision and added some of its own analysis); *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.");

Sinha v. Holder, 564 F.3d 1015, 1019–20 (9th Cir. 2009) (reviewing the IJ's decision as that of the BIA where the BIA adopted and affirmed the IJ's decision without adding any commentary of its own); *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) (reviewing IJ decision where BIA decision drew examples from it).

4. *Burbano* Adoption and Affirmance

Where the BIA cites *Matter of Burbano*, 20 I. & N. Dec. 872 (BIA 1994) in its decision and does not express disagreement with any part of the IJ's decision, the BIA adopts the IJ's decision in its entirety. *See Kwong v. Holder*, 671 F.3d 872, 876 (9th Cir. 2011); *Abebe v. Gonzales*, 432 F.3d 1037, 1040 (9th Cir. 2005) (en banc); *see also Tista v. Holder*, 722 F.3d 1122, 1125 (9th Cir. 2013); *Gutierrez v. Holder*, 662 F.3d 1083, 1086 (9th Cir. 2011); *Viridiana v. Holder*, 646 F.3d 1230, 1233 (9th Cir. 2011) (reviewing IJ's decision directly where BIA adopted and affirmed the IJ's decision pursuant to *Burbano*); *Tamang v. Holder*, 598 F.3d 1083, 1088 (9th Cir. 2010) (where BIA adopted and affirmed IJ decision citing *Burbano*, the court looked through the BIA's decision and treated the IJ's decision as the final agency decision); *Samayoa-Martinez v. Holder*, 558 F.3d 897, 899 (9th Cir. 2009) (explaining that where BIA cited *Burbano* and expressed no disagreement with the IJ's decision the court reviews the IJ's decision as if it were a decision of the BIA).

Unlike a streamlined summary affirmance (discussed below), which signifies only that the result the IJ reached was correct and any errors were harmless or nonmaterial, a *Burbano* affirmance signifies that the BIA has conducted an independent review of the record and has determined that its conclusions are the same as those articulated by the IJ. *See Abebe*, 432 F.3d at 1040; *see also Lezama-Garcia v. Holder*, 666 F.3d 518, 524 (9th Cir. 2011) (noting that where the BIA affirms citing *Burbano*, it is adopting the IJ's decision in its entirety); *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229, 1232 (9th Cir. 2008) (explaining that "when the BIA cites *Burbano* in its decision, all issues presented before the IJ are deemed to have been presented to the BIA."). If the BIA intends to constrict the scope of its opinion to apply to only certain grounds upon which the IJ's decision rested, the BIA can and should specifically state that it is so limiting its opinion. *See Abebe*, 432 F.3d at 1040 (citing *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005), *vacated on other grounds*, 549 U.S. 801 (2006)). *See also Mutuku v. Holder*, 600 F.3d 1210, 1212 (9th Cir. 2010) (where the BIA adopted and affirmed IJ decision in its entirety and cited *Burbano* with respect to denial of withholding of removal and CAT relief the court reviewed the IJ's

decision, however, with regard to denial of asylum, review was restricted to BIA decision where the BIA did not adopt that portion of the IJ's decision).

Where the BIA cites *Burbano* and also provides its own review of the evidence and the law, the court reviews both the IJ and the BIA's decision. *See Ali v. Holder*, 637 F.3d 1025, 1028–29 (9th Cir. 2011); *Joseph v. Holder*, 600 F.3d 1235, 1239–40 (9th Cir. 2010) (reviewing both decisions where the BIA cited *Matter of Burbano*, emphasized that it found the IJ's adverse credibility finding supported by the record, explained why it agreed with the IJ's adverse credibility finding, and then addressed petitioner's contentions that adverse credibility finding was based improperly based on testimony from the bond hearing.").

5. Where BIA's Standard of Review is Unclear

Where it is unclear whether the BIA conducted a de novo review, the court may also "look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion." *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197 (9th Cir. 2000) (reviewing both opinions even though the BIA's "phrasing seems in part to suggest that it did conduct an independent review of the record," because "the lack of analysis that the BIA opinion devoted to the issue at hand – its simple statement of a conclusion – also suggests that the BIA gave significant weight to the IJ's findings"); *see also Ming Dai v. Sessions*, 884 F.3d 858, 866 (9th Cir. 2018) (declining to "resolve the precise scope of review in [case were it was unclear], because none of the reasons advanced by the IJ, including the one omitted by the BIA, provide[d] a sufficient basis for the BIA's decision"); *Benyamin v. Holder*, 579 F.3d 970, 974 (9th Cir. 2009) ("Where the standard of review the BIA employed is unclear, we may look to both the BIA's decision and the IJ's oral decision as a guide to what lay behind the BIA's conclusion." (internal quotation marks and citation omitted)); *Morgan v. Mukasey*, 529 F.3d 1202, 1206 (9th Cir. 2008) (reviewing IJ decision where there was an ambiguity in the BIA's decision, which drew illustrative examples from the IJ's decision); *Ahmed v. Keisler*, 504 F.3d 1183, 1190–91 (9th Cir. 2007) (reviewing IJ's decision as a guide to the BIA's conclusion given the ambiguity as to whether BIA conducted a de novo review); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006) (reviewing IJ decision denying CAT relief as a guide to BIA's conclusion where the BIA's decision lacked analysis and did not expressly state it conducted de novo review of the IJ's decision).

6. Single Board Member Review

Although appeals of the IJ's denial of relief were previously heard by three-member BIA panels, an appeal may now be reviewed by a single member of the BIA pursuant to 8 C.F.R. § 1003.1(e)(5). A single BIA member is charged with the task of deciding an appeal and issuing a brief order, unless the member determines that an opinion is necessary and therefore designates the case for decision by a three-member panel under 8 C.F.R. § 1003.1(e)(6). *See Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012–13 (9th Cir. 2006) (comparing BIA single-member and three-panel member review), *abrogated on other grounds as recognized by Medina-Nunez v. Lynch*, 788 F.3d 1103 (9th Cir. 2015) (per curiam). A case must be decided by a three-member panel if it presents "[t]he need to establish a precedent construing the meaning of laws, regulations, or procedures." 8 C.F.R. § 1003.1(e)(6)(ii).

The BIA's unpublished one-member decisions are not entitled to *Chevron* deference. *Garcia-Quintero*, 455 F.3d at 1011–14. Rather, "[w]here … 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 Martinez-Cedillo v. Sessions*, 896 F.3d 979, 993 (9th Cir. 2018) (*Skidmore* deference applies to a nonprecedential holding of the BIA); *Coquico v. Lynch*, 789 F.3d 1049, 1051 (9th Cir. 2015) (the court reviews "the BIA's unpublished interpretation of immigration law, including the definition of a CIMT, with *Skidmore* deference."); *de Rodriguez v. Holder*, 724 F.3d 1147, 1150 (9th Cir. 2013); *Rohit v. Holder*, 670 F.3d 1085, 1088 (9th Cir. 2012); *Meza-Vallejos v. Holder*, 669 F.3d 920, 926 (9th Cir. 2012) (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) (internal quotation marks and citation omitted); *see also Choin v. Mukasey*, 537 F.3d 1116, 1120 (9th Cir. 2008) ("When the BIA advances its interpretation of an ambiguous statute in an unpublished decision" it is not entitled to *Chevron* deference; rather, Skidmore deference applies.").

7. Streamlined Cases

One member of the BIA may summarily affirm or "streamline" an IJ's decision, without opinion, under 8 C.F.R. § 1003.1(e)(4) (formerly codified at 8 C.F.R. § 3.1(e)(4)). If the BIA member determines that the decision should be affirmed without opinion, the BIA shall issue an order stating, "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination." 8 C.F.R. § 1003.1(e)(4)(ii). Moreover, "[a]n order affirming without opinion … shall not include further explanation or reasoning." *Id.* This court has held that a streamlined decision that included a footnote disavowing the IJ's adverse credibility determination, although in violation of the regulation, was nothing more than harmless surplusage and caused no prejudice. *See Kumar v. Gonzales*, 439 F.3d 520, 523–24 (9th Cir. 2006). However, this court has also explained that when the BIA issues a streamlined decision, it is required to affirm the entirety of the IJ's decision. *See Padilla-Padilla v. Gonzales*, 463 F.3d 972, 980–81 (9th Cir. 2006) (BIA's reduction of voluntary departure period in streamlined decision constituted an abuse of discretion).

"The practical effect of streamlining is that, unless the BIA opts for three-judge review, the IJ's decision becomes the BIA's decision and we evaluate the IJ's decision as we would that of the Board." *Lanza v. Ashcroft*, 389 F.3d 917, 925 (9th Cir. 2004) (internal quotation marks omitted); *see also Alvarado v. Holder*, 759 F.3d 1121, 1126 (9th Cir. 2014); *Pagayon v. Holder*, 675 F.3d 1182, 1188 (9th Cir. 2011) (per curiam) (reviewing IJ decision as final agency action where BIA summarily affirmed the IJ's decision); *Perez v. Mukasey*, 516 F.3d 770, 773 (9th Cir. 2008). Even though the IJ's decision becomes the final agency determination, "summary affirmance does not necessarily mean that the BIA has adopted or approved of the IJ's reasoning, only that the BIA approves the result reached." *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821 (9th Cir. 2004). "[W]hen the BIA invokes its summary affirmance procedures, it pays for the opacity of its decision by taking on the risk of reversal in declining to articulate a different or alternate basis for the decision should the reasoning proffered by the IJ prove faulty." *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 786 (9th Cir. 2004) (internal quotation marks and alterations omitted); *see also Perez*, 516 F.3d at 773.

"Where . . . the BIA summarily affirms an IJ's decision and does not expressly conduct a de novo review [the court] may look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion." *Bassene v. Holder*, 737 F.3d

530, 536 (9th Cir. 2013) (as amended) (internal quotation marks and citation omitted).

The BIA's summary affirmance procedure does not violate due process. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848 (9th Cir. 2003) (cancellation of removal); *see also Tijani v. Holder*, 628 F.3d 1071, 1074 n.1 (9th Cir. 2010); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078–79 (9th Cir. 2004) (same in asylum context); *see also Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1323 (9th Cir. 2006) (rejecting challenge to BIA's streamlining because streamlining does not violate due process, and petitioner failed to show that court could not adequately determine BIA's reasons for denying relief, or that BIA abused its own regulations in streamlining).

Note that the BIA errs when it summarily affirms the IJ's decision where the "petitioner argues on appeal to the BIA that the IJ proceedings were procedurally infirm … ." *Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007) (remanding where BIA erred in applying summary affirmance procedure when petitioner challenged procedural irregularity of IJ proceedings). This is because the BIA is the "*only* administrative agency capable of independently addressing [a claim based on a purported procedural defect of the proceedings before the IJ]." *Id.*

a. Jurisdiction Over Regulatory or "As-Applied" Challenges to Streamlining

Where the decision on review is a discretionary hardship determination, the court lacks jurisdiction over a challenge that the BIA's decision to streamline a case violated the regulations. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 852–54 (9th Cir. 2003); *see also Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 962 (9th Cir. 2004).

The court retains jurisdiction over regulatory challenges to streamlining in other contexts. *See, e.g.*, *de Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047, 1052 (9th Cir. 2008) (explaining the court has "jurisdiction to determine whether the BIA complied with its own regulations in deciding to streamline"); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821–22 (9th Cir. 2004); *Chen v. Ashcroft*, 378 F.3d 1081, 1086–88 (9th Cir. 2004) (retaining jurisdiction over regulatory challenge to streamlining and concluding that BIA erred in summarily affirming IJ's denial of application for adjustment of status under Chinese Student Protection Act because legal issue presented not squarely controlled by existing BIA or federal court precedent); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th

Cir. 2004) (holding that regulatory challenge to streamlining in asylum case is not beyond judicial review, but declining to reach the question because the court granted the petition); *Falcon Carriche*, 350 F.3d at 852–53 (rejecting the government's contention that the BIA's decision to streamline a case is inherently discretionary, and therefore never subject to review).

However, where the court reaches the merits of the agency decision, it is "unnecessary and duplicative" to review the BIA's decision to streamline. *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154–55 (9th Cir. 2005); *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (review of the BIA's decision to streamline decision would be "superfluous" under rationale set forth in *Falcon Carriche*).

b. Streamlining and Multiple Grounds

Where the BIA's summary affirmance without opinion leaves the court unable to discern whether it affirmed the IJ on a reviewable ground or an unreviewable ground, the court will remand the case to the BIA for clarification of the grounds for its decision. *See Lanza v. Ashcroft*, 389 F.3d 917, 924 (9th Cir. 2004) (remanding asylum case where it was unclear whether the BIA's affirmance without opinion was based on a reviewable ground – the merits of the asylum claim – or an unreviewable ground – untimeliness); *Diaz-Ramos v. Gonzales*, 404 F.3d 1118, 1118 (9th Cir. 2005) (per curiam order) (granting government's motion to remand for clarification of grounds for summary affirmance without opinion of denial of cancellation of removal); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157–59 (9th Cir. 2005) (remanding streamlined appeal for determination of whether BIA affirmed IJ's denial of waiver of removal on statutory or discretionary grounds); *see also Falcon Carriche v. Ashcroft*, 350 F.3d 845, 855 n.10 (9th Cir. 2003) (noting, but not reaching, the "potentially anomalous situation … where both discretionary and non-discretionary issues are presented to the BIA and the BIA's streamlining procedure prevents us from discerning the reasons for the BIA's decision").

However, where the court must necessarily decide the merits of the reviewable ground in the course of deciding the other claims for relief, "jurisprudential considerations that weighed in favor of remand to the BIA in *Lanza* do not apply." *Kasnecovic v. Gonzales*, 400 F.3d 812, 815 (9th Cir. 2005) (IJ denied asylum based on the non-reviewable one-year bar and reviewable adverse credibility grounds and this court affirmed the adverse credibility determination in reviewing the denial of withholding of removal and CAT relief).

c. Novel Legal Issues

The BIA errs in streamlining an appeal in the presence of novel legal questions not squarely controlled by existing BIA or federal court precedent, factual and legal questions that are not insubstantial, a complex factual scenario, and applicability to numerous other aliens. *See Chen v. Ashcroft*, 378 F.3d 1081, 1086–87 (9th Cir. 2004) (remanding to the BIA for consideration of a novel and substantial legal issue in the first instance).

d. Streamlining and Motions to Reopen

"[W]here the BIA entertains a motion to reopen in the first instance, and then fails to provide specific and cogent reasons for its decision, we are left without a reasoned decision to review." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005). Accordingly, the BIA abuses its discretion when it summarily denies a motion to reopen without explanation. *See id.* (rejecting government's contention that BIA's summary denial of a motion was consistent with BIA's streamlining procedures).

8. Review Limited to BIA's Reasoning

"[T]his court cannot affirm the BIA on a ground upon which it did not rely." *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000); *see also Ming Dai v. Sessions*, 884 F.3d 858, 866 (9th Cir. 2018) (court cannot deny a petition on a ground upon which the BIA did not base its decision); *Singh v. Holder*, 649 F.3d 1161, 1164 n.6 (9th Cir. 2011) (en banc) *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) (explaining the court cannot deny a petition for review on a ground that the BIA itself did not base its decision); *Pascua v. Holder*, 641 F.3d 316, 318 (9th Cir. 2011); *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010) (noting review is limited to the actual grounds relied upon by the BIA); *Doissaint v. Mukasey*, 538 F.3d 1167, 1170 (9th Cir. 2008) (stating the court cannot affirm on a ground upon which the BIA did not rely). In other words, "we must decide whether to grant or deny the petition for review based on the Board's reasoning rather than our own independent analysis of the record." *Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004); *see also Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam) ("In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency. If we conclude that the BIA's decision cannot be sustained upon its reasoning, we must remand to allow the agency to decide any issues remaining in the case.").

"When the BIA's decision 'cannot be sustained upon its reasoning, [the court] must remand to allow the agency to decide any issues remaining in the case.'" *Solorio-Ruiz v. Sessions*, 881 F.3d 733, 738 (9th Cir. 2018) (quoting *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam)).

9. Review Generally Limited to Administrative Record

This court's review is generally limited to the information in the administrative record. *See Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (court is "statutorily prevented from taking judicial notice of the Country Report" that petitioner did not submit to the BIA). "We may review out-of-record evidence only where (1) the Board considers the evidence; or (2) the Board abuses its discretion by failing to consider such evidence upon the motion of an applicant." *Id.* at 964; *see also Altawil v. INS*, 179 F.3d 791, 792 (9th Cir. 1999) (order) (denying motion to reconsider order striking supplemental excerpts of record).

10. Judicial and Administrative Notice

This court is not precluded from taking judicial notice of an agency's own records. *See Lising v. INS*, 124 F.3d 996, 998–99 (9th Cir. 1997) (taking judicial notice of application for naturalization); *see also Dent v. Holder*, 627 F.3d 365, 371 (9th Cir. 2010) (taking "notice of the existence of Dent's adoptive mother's and his own applications for naturalization, because they are official agency records from Dent's A-file."). This court may take judicial notice of "dramatic foreign developments" that occur after the BIA's determination. *See Gafoor v. INS*, 231 F.3d 645, 655–57 (9th Cir. 2000) (taking judicial notice of Fijian coup which occurred after the BIA's decision), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009). This court may also take judicial notice under Federal Rule of Evidence 201 of adjudicative facts not subject to reasonable dispute. *Singh v. Ashcroft*, 393 F.3d 903, 905–07 (9th Cir. 2004) (taking judicial notice of existence and operations of Indian counter-terrorism agency and reversing negative credibility finding based on insufficient corroborative evidence).

When the agency takes administrative notice of events occurring after the merits hearing, it must provide notice to the parties, and in some cases, an opportunity to respond. *See Circu v. Gonzales*, 450 F.3d 990, 994–95 (9th Cir. 2006) (en banc) (IJ violated due process by taking judicial notice of a new country report without providing notice and an opportunity to respond). Notice of intent to take administrative notice is all that is required if extra-record facts and questions

are "legislative, indisputable, and general." *See Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992). However, "more controversial or individualized facts require *both* notice to the alien that administrative notice will be taken *and* an opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts." *Circu*, 450 F.3d at 993 (emphasis in original, but internal quotation marks and alternation omitted). An example of an indisputable fact is a political party's victory in an election, whereas a controversial fact would be "whether the election has vitiated any previously well-founded fear of persecution." *Id*. at 994 (internal quotation marks omitted).

11. No Additional Evidence

Under 8 U.S.C. § 1252(a)(1), "the court may not order the taking of additional evidence under section 2347(c) of Title 28." *See also Altawil v. INS*, 179 F.3d 791, 792–93 (9th Cir. 1999) (order) (denying motion for leave to adduce additional evidence); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003).

12. Waiver

"Issues raised in a brief that are not supported by argument are deemed abandoned." *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (challenge to denial of motion to reopen, referred to in statement of the case but not discussed in body of the opening brief, was waived); *see also Corro-Barragan v. Holder*, 718 F.3d 1174, 1177 n.5 (9th Cir. 2013) (failure to contest issue in opening brief resulted in waiver); *Cui v. Holder*, 712 F.3d 1332, 1338 n.3 (9th Cir. 2013) (waived any objection to withholding of removal or CAT relief by failing to address either issue in brief); *Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1079–80 (9th Cir. 2013) (waived challenge to denial of motion to reopen by failing to address it in brief); *Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (petitioner waived withholding of removal and CAT claims where they were not raised in opening brief); *Husyev v. Mukasey*, 528 F.3d 1172, 1183 (9th Cir. 2008) (because petitioner failed to advance argument in support of CAT claim, the issue was waived); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) (declining to reach issue raised for the first time in the reply brief).

Cf. Mamouzian v. Ashcroft, 390 F.3d 1129, 1136 (9th Cir. 2004) (holding that applicant did not waive challenge to future persecution finding, and refusing to "pars[e] her brief's language in a hyper technical manner"); *Ndom v. Ashcroft*, 384 F.3d 743, 750–51 (9th Cir. 2004) (rejecting government's contention that applicant waived asylum and withholding of removal claims by failing to articulate proper

standard of review or argue past persecution), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009); *Guo v. Ashcroft*, 361 F.3d 1194, 1199 (9th Cir. 2004) (rejecting government's contention that asylum applicant waived challenge to negative credibility finding because issue sufficiently argued in opening brief); *Mejia v. Ashcroft*, 298 F.3d 873, 876 (9th Cir. 2002) ("failure to recite the proper standard of review does not constitute waiver of a properly raised merits issue").

a. Exceptions to Waiver

(i) No Prejudice to Opposing Party

The court has discretion to review an issue not raised in a petitioner's briefs "if the failure to raise the issue properly did not prejudice the defense of the opposing party." *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (internal quotation marks omitted) (reviewing repapering issue raised first in Fed. R. App. P. 28(j) letter and discussed at oral argument and in post-argument supplemental briefs); *see also Ndom v. Ashcroft*, 384 F.3d 743, 751 (9th Cir. 2004) (noting lack of prejudice because government briefed issue), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009); *Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004) (reviewing appropriateness of summary dismissal because issue briefed by government).

(ii) Manifest Injustice

The court may also "review an issue not raised in a petitioner's opening brief if a failure to do so would result in manifest injustice." *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (internal quotation marks omitted) (failure to review applicant's repapering issue would result in manifest injustice).

13. Agency Bound by Scope of 9th Circuit's Remand

The BIA is bound by the scope of this court's remand in situations where the scope of the remand is clear. *See Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1173 (9th Cir. 2006) (BIA did not err in refusing to entertain issue beyond scope of this court's remand).

a. Scope of BIA's Remand

"[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);

see also Bermudez-Ariza v. Sessions, 893 F.3d 685, 688 (9th Cir. 2018) ("[T]he BIA only retains jurisdiction when remanding to an IJ if its remand order expressly retains jurisdiction and qualifies or limits the scope of remand to a specific purpose."); *Padilla-Martinez v. Holder*, 770 F.3d 825, 831 (9th Cir. 2014) (discussing BIA *sua sponte* remanding case back to IJ on open record). "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." *Fernandes*, 619 F.3d at 1074 (concluding that new evidence that alien's asylum application was fraudulent was not outside jurisdiction of IJ to consider on remand from BIA); *see also Bermudez-Ariza*, 893 F.3d at 688–89 (explaining that while it was likely the BIA limited the scope of remand to the specific purpose of reconsidering CAT claim, the BIA did not mention jurisdiction, nor expressly retain it, and thus, IJ had jurisdiction to reconsider its earlier decisions).

14. Where Agency Ignores a Procedural Defect

"When the BIA has ignored a procedural defect and elected to consider an issue on its substantive merits, [this court] cannot then decline to consider the issue based upon this procedural defect." *Abebe v. Gonzales*, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc).

The BIA cannot cure the legal error of ignoring a claim in a petitioner's direct appeal by subsequently considering the claim in a motion to reopen. *See Doissaint v. Mukasey*, 538 F.3d 1167, 1170–71 (9th Cir. 2008) (concluding the BIA erred by determining that alien's properly raised and briefed CAT claim was abandoned on appeal, and that BIA failed to cure the error by subsequently considering the claim in a motion to reopen).

15. Collateral Estoppel

"[T]he doctrine of collateral estoppel (or issue preclusion) applies to an administrative agency's determination of certain issues of law or fact involving the same alien in removal proceedings." *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012).

> Collateral estoppel applies to a question, issue, or fact when four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the

prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits.

Id. In *Oyeniran*, the court determined the BIA erred because it "failed to recognize that collateral estoppel applies to findings made in the initial determination *and* that new evidence and changed circumstances now permit it to reconsider the substantive question of whether the alien with deferral status is more likely than not to be tortured in the future if returned home." *Id*. at 807–08.

B. Standards of Review

The proper standard of review in immigration proceedings depends on the nature of the decision being reviewed. *See Virdiana v. Holder*, 646 F.3d 1230, 1233 (9th Cir. 2011); *Manzo-Fontes v. INS*, 53 F.3d 280, 282 (9th Cir. 1995) (discussing standards); *see also* 8 U.S.C. § 1252(b)(4) *and* Ninth Circuit Standards of Review Outline.

1. De Novo Review

Questions of law are reviewed de novo. *See, e.g.*, *Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1275–76 (9th Cir. 2018) (reviewing de novo constitutional claims and questions of law, including whether a new agency interpretation may be applied retroactively and whether preclusion is available); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293 (9th Cir. 2018) (reviewing de novo BIA's determination of purely legal questions, including the BIA's interpretation of the INA); *Solorio-Ruiz v. Sessions*, 881 F.3d 733, 735 (9th Cir. 2018) (reviewing de novo whether a particular conviction under state law counts as a removable offense); *Villavicencio v. Sessions*, 904 F.3d 658, 663 (9th Cir. 2018) (as amended) (reviewing whether a particular conviction qualifies as an aggravated felony); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc); *Ortega v. Holder*, 747 F.3d 1133, 1134 (9th Cir. 2014) (reviewing de novo the retroactive applicability of a statute); *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014) (reviewing de novo due process claim); *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1050 (9th Cir. 2014) (reviewing de novo legal question of whether the petitioner was statutorily eligible to apply for a § 212(h) waiver); *Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014); *Hernandez v. Holder*, 738 F.3d 1099 (9th Cir. 2013) (reviewing de novo the BIA's own determination of its jurisdiction); *Barragan-Lopez v. Holder*, 705 F.3d 1112 (9th Cir. 2013) (whether Cal. Penal Code § 210.5 constitutes an aggravated felony); *Latter-Singh v. Holder*, 668 F.3d 1156, 1159 (9th Cir. 2012) (reviewing de novo moral turpitude question); *Anderson v. Holder*, 673 F.3d 1089, 1096 (9th Cir. 2012) (question of citizenship

reviewed de novo); *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312 (9th Cir. 2012); *Martinez-Medina v. Holder*, 673 F.3d 1029, 1033 (9th Cir. 2011) (reviewing de novo denial of motion to suppress and claims of constitutional violations); *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); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1108 (9th Cir. 2010) ("We review de novo claims of equal protection and due process violations in removal proceedings."); *Aguilar Gonzales v. Mukasey*, 534 F.3d 1204, 1208 (9th Cir. 2008) (whether petitioner assisted in alien smuggling); *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 804 n.1 (9th Cir. 2007) (whether IJ violated statutory right to counsel); *Kankamalage v. INS*, 335 F.3d 858, 861–62 (9th Cir. 2003) (whether regulation had retroactive effect); *Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (district court's decision whether to grant or deny a petition for writ of habeas corpus); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1145 (9th Cir. 2002) (legal determination of whether applicant's daughter was a qualifying "child").

"The BIA's interpretation of immigration laws is entitled to deference[, but the court is] not obligated to accept an interpretation clearly contrary to the plain and sensible meaning of the statute." *Kankamalage*, 335 F.3d at 861 (citation omitted); *see also Xiao Lu Ma v. Sessions*, 907 F.3d 1191, 1196 (9th Cir. 2018) (the BIA's interpretation of an immigration statute is entitled to deference where it is based on a permissible construction of the statute); *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1114–15 (9th Cir. 2018) (reviewing de novo BIA's interpretation of statute of conviction, subject to appropriate deference); *Poblete Mendoza v. Holder*, 606 F.3d 1137, 1140 (9th Cir. 2010). Additionally, the court "will not defer to BIA decisions that conflict with circuit precedent." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003); *see also Benyamin v. Holder*, 579 F.3d 970, 974 (9th Cir. 2009) (same). Moreover, the court will not defer to the BIA's interpretation of statutes that it does not administer. *See Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) (explaining the court does "not defer to the BIA's interpretation of state or federal criminal statutes, because the BIA does not administer such statutes or have any special expertise regarding their meaning."). "Deference is not due the agency in construing state law." *Tijani v. Holder*, 628 F.3d 1071, 1079 (9th Cir. 2010).

Mixed questions of law and fact are also reviewed de novo. *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014); *Cordoba v. Holder*, 726 F.3d 1106, 1113 (9th Cir. 2013) (reviewing de novo both purely legal questions and mixed

questions of law and fact requiring the court to exercise judgment about legal principles).

a. *Chevron* Deference

The principles of *Chevron* deference apply to the proper deference owed to an agency's interpretation of a statute. *See Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–44 (1984); *INS v. Aguirre–Aguirre*, 526 U.S. 415, 424–25 (1999)); *Go v. Holder*, 744 F.3d 604 (9th Cir. 2014) (Wallace, J. concurring) (making distinction between deference owed to the agency's interpretation of statutes compared to that owed to the agency's interpretation of a regulation). "Indeed, 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations." *Scialabba*, 573 U.S. at 56–57. "*Chevron* deference is appropriate when 'it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and ... the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018) (citation omitted).

> At step one of the familiar *Chevron* analysis, we ask whether, "applying the normal tools of statutory construction," the statute is ambiguous, …; we consider this question de novo, … . "If the intent of Congress is clear, that is the end of the matter... ." … But if the statute is ambiguous, we move to step two of the *Chevron* inquiry and consider whether the agency's interpretation permissibly construes the statute.

Sung Kil Jang v. Lynch, 812 F.3d 1187, 1190 (9th Cir. 2015) (citations omitted); *see also Campos-Hernandez*, 889 F.3d at 568. "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); *see also United States v. Garcia-Santana*, 774 F.3d 528, 543–43 (9th Cir. 2014) (BIA's conclusion was due no deference); *Lezama-Garcia v. Holder*, 666 F.3d 518, 524 (9th Cir. 2011).

"An agency's interpretation that conflicts with earlier binding authority of this court is entitled to deference unless the court's earlier interpretation 'follows

from the unambiguous terms of the statute and thus leaves no room for agency discretion.'" *Campos-Hernandez*, 889 F.3d at 568 (citation omitted).

"The BIA's construction of ambiguous statutory terms in precedential decisions is entitled to deference under *Chevron* […]." *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014); *see also Martinez-Cedillo v. Sessions*, 896 F.3d 979, 987–89 (9th Cir. 2018) (holding that the BIA's interpretation of § 1227(a)(2)(E)(i) is reasonable and entitled to deference); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 815 (9th Cir. 2016) ("We apply the *Chevron* framework where, as here, there is 'binding agency precedent on-point' in the form of a published BIA opinion."). However, "[a]n agency that misapplies its own precedent is not entitled to *Chevron* deference, which is reserved for those decisions that are precedential or are appropriately 'based on' a previously issued precedential decision." *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1118 (9th Cir. 2018) (citing *Saldivar v. Sessions*, 877 F.3d 812, 815 n.3 (9th Cir. 2017)).

No deference is owed if the court determines the statute is unambiguous. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) ("[T]he Court need not resort to *Chevron* deference [where] Congress has supplied a clear and unambiguous answer to the interpretive question at hand."); *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1050 (9th Cir. 2014) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation." (internal quotation marks and citation omitted)).

Where the BIA decision interpreting the statute is unpublished and issued by a single member of the BIA it is accorded only *Skidmore* deference. *See Lezama-Garcia*, 666 F.3d at 524–25 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). *See also Martinez-Cedillo v. Sessions*, 896 F.3d 979, 993 (9th Cir. 2018) (*Skidmore* deference applies to a nonprecedential holding of the BIA); *Coquico v. Lynch*, 789 F.3d 1049, 1051 (9th Cir. 2015) (the court reviews "the BIA's unpublished interpretation of immigration law, including the definition of a CIMT, with *Skidmore* deference."); *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), *overruled on other grounds by Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), *abrogated in part on other grounds by Moncrieffe v. Holder*, 569 U.S. 184 (2013). "Under *Skidmore*, the measure of deference afforded to the agency varies depending upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Coquico*, 789

F.3d at 1051–52 (internal quotation marks and citations omitted). *See also Martinez-Cedillo*, 896 F.3d at 993; *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1303 (9th Cir. 2017) ("The extent of that deference in any particular case depends upon the persuasiveness of the agency's reasoning.").

"[W]here, … , the BIA erroneously applies its published precedent in an unpublished decision, that decision is entitled only to *Skidmore* deference." *Barrera-Lima*, 901 F.3d at 1118.

"[A]n 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.

Note that if the BIA is not charged with administering a statute, its interpretation of that statute gains no deference. *See Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1052 (9th Cir. 2011). The court is "not required to give *Chevron* deference to the agency's interpretation of citizenship laws." *Minasyan v. Gonzales*, 401 F.3d 1069, 1074 (9th Cir. 2005); *see also Acevedo v. Lynch*, 798 F.3d 1167, 1169 (9th Cir. 2015) (court is not required to give *Chevron* deference to the agency's interpretation of citizenship laws). The court also does "not defer to an agency's interpretations of state law or provisions of the federal criminal code." *Sandoval v. Sessions*, 866 F.3d 986, 988 (9th Cir. 2017). 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*, 670 F.3d 1015, 1017 (9th Cir. 2012) (quotation marks and citation omitted).

"The BIA's conclusion that a particular crime does or does not involve moral turpitude is subject to different standards of review depending on whether the BIA issues or relies on a published decision in coming to its conclusion. If it does either, we accord *Chevron* deference. If it does neither, we defer to its conclusion to the extent that it has the 'power to persuade.'" *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (internal citations omitted); *see also Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1266 (9th Cir. 2013).

"There are, … , 'rare instances' where [the court] withholds deference from precedential BIA decisions, including where the BIA has 'failed to provide an explanation for its action.'" *Rivera v. Lynch*, 816 F.3d 1064, 1071 (9th Cir. 2016); *see also Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron*[.]"). 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). In *Rivera*, the court held that because the BIA did not support its conclusion with any statutory interpretation or reasoning, no deference was owed under either *Chevron* or *Skidmore*. 816 F.3d at 1071.

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)).

"When an agency does not reach an issue for which it is owed *Chevron* deference, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Sandoval v. Sessions*, 866 F.3d 986, 993 (9th Cir. 2017) (quoting *INS v. Ventura*, 537 U.S. 12, 16 (2002)). However, where the issue is not a matter that warrants *Chevron* deference, there is no reason to remand for the BIA to decide the issue in the first instance. *See Sandoval*, 866 F.3d at 993–94 (declining to remand for the BIA to decide the issue of divisibility in the first instance).

See also Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) (*Chevron* deference not applicable where the statute, when read in context, unambiguously foreclosed the Board's interpretation); *Xiao Lu Ma v. Sessions*, 907 F.3d 1191, 1196 (9th Cir. 2018) (concluding that *Skidmore* deference was not warranted where the Board decision offered no explanation and failed to cite any supporting authority; the court stated, "Cursory conclusions are neither persuasive nor entitled to deference."); *Vasquez-Valle v. Sessions*, 899 F.3d 834, 838 (9th Cir. 2018) ("Because the BIA decision here was unpublished and was not controlled by any published BIA decision, we apply *Skidmore* rather than *Chevron*."); *Gomez-*

Sanchez v. Sessions, 892 F.3d 985, 995 (9th Cir. 2018) (Board's interpretation of INA did not warrant deference under *Chevron*); *Nguyen v. Holder*, 763 F.3d 1022, 1027–28 (9th Cir. 2014) (in the absence of a precedential BIA decision on point the court deferred to the BIA to the extent its decision had the power to persuade); *Lawrence v. Holder*, 717 F.3d 1036, 1038 (9th Cir. 2013); *Rohit v. Holder*, 670 F.3d 1085, 1088 (9th Cir. 2012) (applying Skidmore deference where the BIA had not yet determined whether the conduct at issue involved moral turpitude in a precedential decision); *Latter-Singh v. Holder*, 668 F.3d 1156, 1160 (9th Cir. 2012) (applying Skidmore deference); *Garcia v. Holder*, 659 F.3d 1261, 1266 (9th Cir. 2011) ("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)); Vasquez de *Alcantar v. Holder*, 645 F.3d 1097, 1099 (9th Cir. 2011) (explaining that Chevron deference applies "to the Attorney General's interpretations of ambiguous immigration statutes, if the agency's decision is a published decision," but that the court "need not defer to the BIA if the statute is unambiguous."); *Guevara v. Holder*, 649 F.3d 1086 (9th Cir. 2011) (court applied limited Skidmore framework in reviewing BIA decision); *Malilia v. Holder*, 632 F.3d 598, 602 (9th Cir. 2011) ("[F]ederal courts owe no deference to the BIA's interpretation of a criminal statute."); *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

The IJ's or BIA's factual findings are reviewed for substantial evidence. *See, e.g.*, *Villavicencio v. Sessions*, 904 F.3d 658, 663–64 (9th Cir. 2018) (as amended); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1305 (9th Cir. 2015) (reviewing denial of CAT relief for substantial evidence); *Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014); *Urooj v. Holder*, 734 F.3d 1075, 1077 (9th Cir. 2013) (reviewing

factual finding in decision to terminate a grant of asylum for substantial evidence); *Bassene v. Holder*, 737 F.3d 530, 536 (9th Cir. 2013) (reviewing adverse credibility finding for substantial evidence); *Hamazaspyan v. Holder*, 590 F.3d 744, 747 (9th Cir. 2009) ("Factual findings are reviewed for substantial evidence." (internal quotation marks and citation omitted)); *Zhao v. Mukasey*, 540 F.3d 1027, 1030 (9th Cir. 2008) (concluding substantial evidence did not support IJ's rejection of the aliens' claim of well-founded fear of persecution); *Aguilar Gonzales v. Mukasey*, 534 F.3d 1204, 1208 (9th Cir. 2008) (reviewing factual finding relating to alien smuggling for substantial evidence); *Mohammed v. Gonzales*, 400 F.3d 785, 791 (9th Cir. 2005) (ineffective assistance of counsel). "A finding by the IJ is not supported by substantial evidence when any reasonable adjudicator would be compelled to conclude to the contrary based on the evidence in the record." *Bringas-Rodriguez*, 850 F.3d at 1059 (internal quotation marks and citation omitted). *See also Villavicencio*, 904 F.3d at 664 ("The BIA's factual findings are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."); *Sanjaa v. Sessions*, 863 F.3d 1161, 1164 (9th Cir. 2017) ("To reverse the BIA, we must determine that the evidence not only *supports* [a contrary] conclusion, but *compels* it—and also compels the further conclusion' that the petitioner meets the requisite standard for obtaining relief." (alterations in original) (quotation marks and citations omitted)).

While the substantial evidence standard is deferential, 'deference does not mean blindness.'" *Parada v. Sessions*, 902 F.3d 901, 908–09 (9th Cir. 2018) (quoting *Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014) (quoting *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc))).

For instance, the BIA's determination that an applicant is not eligible for asylum "can be reversed only if the evidence presented by [the applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992) (noting that "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it"); *see also 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)); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1026 (9th Cir. 2010) (holding BIA's conclusion that petitioner was ineligible for asylum was not supported by substantial evidence); *Khourassany v. INS*, 208 F.3d 1096, 1100 (9th Cir. 2000) ("Under our venerable standards of review of BIA decisions, we may grant the petition for review only if the evidence presented … is such that a

reasonable fact-finder would be compelled to conclude that the requisite fear of persecution existed."). *But see Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir. 1995) (reviewing de novo the BIA's determination that petitioner's harm was not on account of political opinion because the question involved "the application of established legal principles to undisputed facts"), *superseded by statute on other grounds as stated by Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009).

The permanent rules define the substantial evidence standard by stating that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *see also Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014); *Garcia-Milian v. Holder*, 755 F.3d 1026, 1031 (9th Cir. 2014); *Lawrence v. Holder*, 717 F.3d 1036, 1038 (9th Cir. 2013); *Zarate v. Holder*, 671 F.3d 1132, 1134 (9th Cir. 2012) (reviewing for substantial evidence whether alien established continuous physical presence); *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); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1102 (9th Cir. 2004) (quoting 8 U.S.C. § 1252(b)(4)(B)). The previous jurisdictional statute provided that "findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." 8 U.S.C. § 1105a(a)(4) (repealed 1996).

3. Abuse of Discretion Review

"The BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to the law, and when it fails to provide a reasoned explanation for its actions." *Tadevosyan v. Holder*, 743 F.3d 1250, 1252–53 (9th Cir. 2014) (internal citations and quotation marks omitted) (holding the BIA abused its discretion in denying motion to reopen); *see also Go v. Holder*, 744 F.3d 604, 609 (9th Cir. 2014) (reviewing denial of motion to reopen for abuse of discretion, explaining that the BIA's decision may only be reversed if "arbitrary, irrational, or contrary to law"); *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000); *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014) (reviewing denial of a continuance); *Ali v. Holder*, 637 F.3d 1025, 1032 (9th Cir. 2011) (BIA abused discretion by denying motion to reopen); *Yepremyan v. Holder*, 614 F.3d 1042, 1044–45 (9th Cir. 2010) (per curiam) (holding the BIA did not abuse its discretion in denying motion to reopen to adjust status on basis of marriage); *Cerezo v. Mukasey*, 512 F.3d 1163, 1166 (9th Cir. 2008) ("The BIA abuses its discretion when it makes an error of law."). "The BIA abuses its discretion when it fails to comply with its own regulations."

Iturribarria v. INS, 321 F.3d 889, 895 (9th Cir. 2003). Review is limited to whether the agency relied on the appropriate factors and proper evidence to reach its conclusion. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015) (reviewing BIA's conclusion that an offense constituted a particularly serious crime).

This court reviews the following for abuse of discretion:

- BIA's denial of a motion to reopen, reconsider, or remand. *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (motion to reopen and reconsider); *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002) (no abuse of discretion in denying motion to reopen to seek CAT relief); *see also Tadevosyan v. Holder*, 743 F.3d 1250, 1251 (9th Cir. 2014) (concluding the BIA abused its discretion in denying the motion to reopen because it improperly relied on DHS's opposition to the motion, instead of addressing the merits); *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012) (BIA abused discretion by denying motion to reopen); *Kwong v. Holder*, 671 F.3d 872, 880 (9th Cir. 2011) (no abuse to deny motion to remand); *Luna v. Holder*, 659 F.3d 753, 758 (9th Cir. 2011) (motion to reopen; no abuse of discretion); *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010) (motion to reopen/reissue); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (same standard for denial of motion to remand).

- IJ's decision to deem an application waived for failing to adhere to deadlines imposed under 8 C.F.R. § 1003.31. *Taggar v. Holder*, 736 F.3d 886, 889 (9th Cir. 2013) (concluding that neither the IJ nor the BIA abused their discretion in holding that Taggar waived her application for relief and protection).

- Agency's discretionary decision to deny asylum relief. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004); *see also* 8 U.S.C. § 1252(b)(4)(D) ("the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion").

- Denial of a motion for a continuance. *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014) (explaining that motion to admit additional evidence past the deadline was equivalent to a motion to continue, and concluding IJ abused its discretion in denying the motion); *Peng v. Holder*, 673 F.3d 1248, 1253 (9th Cir. 2012) (denial of continuance was abuse of discretion); *Jiang v.*

Holder, 658 F.3d 1118, 1120 (9th Cir. 2011) (denial of continuance was abuse of discretion); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109–10 (9th Cir. 2010) (IJ denied full and fair hearing by limiting testimony and denying request for continuance); *Cui v. Mukasey*, 538 F.3d 1289, 1290 (9th Cir. 2008) (holding that IJ abused discretion by denying a motion for a continuance so the petitioner could resubmit her fingerprints to the court).

- An agency's determination that a crime is particularly serious rendering petitioner ineligible for withholding of removal. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077–78 (9th Cir. 2015) (BIA properly found that petitioner's prior felony conviction was a particularly serious crime); *Arbid v. Holder*, 700 F.3d 379, 383–85 (9th Cir. 2012) (per curiam) (as amended) (no abuse of discretion).

- Whether the BIA clearly departs from its own standards. *Salgado v. Sessions*, 889 F.3d 982, 987 (9th Cir. 2018); *Mejia v. Sessions*, 868 F.3d 1118, 1121 (9th Cir. 2017) (holding that the BIA abused its discretion by failing to explain why it allowed the IJ to disregard rigorous procedural requirements set forth in *In re M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011), which explained that if an applicant shows an indicia of incompetency, the IJ has an independent duty to determine whether the applicant is competent). See also *Calderon-Rodriguez v. Sessions*, 878 F.3d 1179 (9th Cir. 2018) (the BIA abused its discretion by affirming the IJ's departure from the standards set forth in *In re M-A-M-*, 25 I. & N. Dec. at 480–81).

a. Failure to Provide Reasoned Explanation

"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) (superseded on other grounds by statute) (remanding case to the BIA for clarification where BIA's reasoning behind decision was unclear); *see also Tadevosyan v. Holder*, 743 F.3d 1250, 1258 (9th Cir. 2014). The court has "long held that the BIA abuses its discretion when it fails to provide a reasoned explanation for its actions." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (BIA abused its discretion by denying motion to remand without any explanation). 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). For example, in *Alphonsus v. Holder*, 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." 705 F.3d 1031, 1044–50 (9th Cir. 2013) (granting the petition for review and remanding "for further consideration and explanation of the 'particularly serious crime' issue."), *abrogated on other grounds by Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018).

See also Mejia v. Sessions, 868 F.3d 1118, 1121 (9th Cir. 2017) (holding that the BIA abused its discretion by failing to explain why it allowed the IJ to disregard rigorous procedural requirements set forth in *In re M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011), which explained that if an applicant shows an indicia of incompetency, the IJ has an independent duty to determine whether the applicant is competent); *Pirir-Boc v. Holder*, 750 F.3d 1077, 1086 (9th Cir. 2014) ("In order for the court to exercise our limited authority, there must be a reasoned explanation by the BIA of the basis for its decision.") (internal quotation marks and citation omitted); *Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (remanding for explanation of the BIA's reasoning); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA's unexplained failure to address applicant's ineffective assistance of counsel claim); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1141 (9th Cir. 2004) (explaining that conclusory statements are insufficient and BIA must provide an explanation showing that it "heard, considered, and decided" the issue (internal quotation marks omitted)); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (remanding motion to reopen to apply for suspension of deportation where BIA did not engage in substantive analysis or articulate any reasons for its decision); *Arrozal v. INS*, 159 F.3d 429, 432 (9th Cir. 1998) ("The BIA abuses its discretion when it fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief" (internal quotation marks and emphasis omitted)); *but cf. Almaghzar v. Gonzales*, 457 F.3d 915, 921–22 (9th Cir. 2006) (IJ's generalized statement that he considered all the evidence was sufficient).

b. Failure to Consider Arguments or Evidence

"IJs and the BIA are not free to ignore arguments raised by [a party]." *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (IJ erred by failing to consider extraordinary circumstances proffered to excuse untimely asylum application); *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1086 (9th Cir. 2014) (BIA must provide a reasoned explanation as the basis for its decision; while not required to discuss every piece of evidence, where there is an indication that BIA

failed to consider all of the evidence before it, a catchall phrase will not suffice and the decision cannot stand); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010) ("The failure of the IJ and BIA to consider evidence of country conditions constitutes reversible error."); *Brezilien v. Holder*, 569 F.3d 403, 412 (9th Cir. 2009) (remanding where BIA failed to address petitioner's claim that agency erred by failing to apply presumption of a well-founded fear of persecution); *Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007) (explaining that BIA is not free to ignore arguments raised by petitioner and concluding that "by summarily affirming the IJ's decision, the BIA ignored – and denied review of – [petitioner's]" procedural due process claim).

"Immigration judges, although given significant discretion, cannot reach their decisions capriciously and must indicate how they weighed factors involved and how they arrived at their conclusion." *Sagaydak*, 405 F.3d at 1040 (internal quotation marks and alteration omitted). *See also Singh v. Gonzales*, 494 F.3d 1170, 1173 (9th Cir. 2007) (remanding where the BIA failed to consider and address affidavits submitted by petitioner and his attorney); *Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (BIA abused its discretion by failing to identify and evaluate favorable factors in support of motion to reopen); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA's unexplained failure to address ineffective assistance of counsel claim); *Chen v. Ashcroft*, 362 F.3d 611, 620 (9th Cir. 2004) (IJ erred by failing to consider explanation for witness's failure to testify at hearing). *But see Almaghzar v. Gonzales*, 457 F.3d 915, 921–22 (9th Cir. 2006) (explaining that individualized consideration does not require an IJ to discuss every piece of evidence, and accepting the IJ's general statement that he considered all the evidence before him); *Fernandez v. Gonzales*, 439 F.3d 592, 603–04 (9th Cir. 2006) (noting that any concerns about the court's ability to review inadequately reasoned or cursory decisions do not apply where the court has already determined it lacks jurisdiction to review the agency's decision on the merits).

"[W]here there is any indication that the BIA did not consider all of the evidence before it, a catchall phrase does not suffice, and the decision cannot stand. Such indications include misstating the record and failing to mention highly probative or potentially dispositive evidence." *Cole v. Holder*, 659 F.3d 762, 771–72 (9th Cir. 2011); *see also Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018) (holding the agency failed to consider all relevant evidence and improperly construed the government acquiescence standard, and remanding for further consideration of CAT claim); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) (holding there was no indication agency did not consider all the

evidence when assessing CAT claim). "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." *Cole*, 659 F.3d at 771 (quoting *Almaghzar v. Gonzales*, 457 F.3d 915, 922 (9th Cir. 2006)); *see also Gonzalez-Caraveo*, 882 F.3d at 894–95 ("A general statement that the BIA considered all the evidence can suffice where nothing in the record indicates a failure to consider all the evidence).

When the BIA commits legal error by ignoring a claim in a petitioner's direct appeal, it cannot cure that error by subsequently considering the claim in a motion to reopen. *See Doissaint v. Mukasey*, 538 F.3d 1167, 1171 (9th Cir. 2008) (concluding the BIA erred by determining that alien's properly raised and briefed CAT claim was abandoned on appeal, and that the error was not cured by subsequent consideration of the claim in a motion to reopen).

C. Boilerplate Decisions

"[W]e do not allow the Board to rely on 'boilerplate' opinions 'which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.'" *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995) (quoting *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991)). The BIA's decision "must contain a statement of its reasons for denying the petitioner relief adequate for us to conduct our review." *Ghaly*, 58 F.3d at 1430. *See also Shrestha v. Holder*, 590 F.3d 1034, 1042 (9th Cir. 2010) (in post-REAL ID Act case, noting that court will reverse adverse credibility determinations based on boilerplate demeanor findings).